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The Constitutionality of the City of
Portland's Residential Sign Statute

Kelly S. Forbes

CST 403: Communication Law

Dr. Mulcrone

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Introduction

One of the most important rights guaranteed to Americans is in the First Amendment of the United States Constitution. That amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This amendment is not only one of the most important rights, but one that is constantly being interpreted and defined in courtrooms across the country. Since the First Amendment was adopted as part of the Bill of Rights in 1791 court decisions have helped to develop its meaning.¹ An issue of free speech came about in Portland, Oregon, recently when one man displayed his feelings about a new aerial tram that passed directly over his house.

In 2006 the City of Portland completed an aerial tram that connected the South Waterfront to the Oregon Health and Science University. The tram consists of two cars that can carry a maximum of 79 people per car. The cars depart about every five minutes during peak operating hours. The tram was built by the city to help connect the South Waterfront to the Marquam Hill, to help spur economic development due to OHSU's recent expansions and to promote urban renewal.

While many people were excited about the new tram, many others were against it. One group of people that fiercely opposed the tram was the homeowners that lived directly under its path. Many of these homeowners were concerned that the tram would lower their property values and would also be an invasion of their privacy. The

¹ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 34

homeowners were concerned about the hundreds of people each day that would now be able to see into their previously private backyards. Due to these concerns, one homeowner decided to stand up and voice his opinion.

Justin Auld owned a home that was directly under the path of the new aerial tram. He was upset that his backyard, which had previously been private, could now be seen by any person riding the tram. Portland city officials had previously told Auld and his neighbors that this was not going to happen. After Auld discovered that people could in fact see into his backyard he decided to hang a sign on the roof of his house that expressed his feelings for the tram. In large, black letters on a white background the sign read: "FUCK THE TRAM."²

When people riding the tram saw the sign many thought it was funny, while others thought that it was tasteless. Portland city officials soon became involved and they told Auld that he was going to have to take the sign down. By April 27, 2007, the sign was taken down from the roof and hung on a nearby fence; the word fuck was folded underneath the sign so that it was hidden from view and only "THE TRAM" was legible. The city was successful in prohibiting Auld from expressing his feelings about the tram.

The Oregon Constitution even more broadly and clearly protects the rights of its citizens to free speech than the U.S. Constitution. Article one, section eight of the Oregon Constitution states,

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

² Brian Barker and the KATU Web Staff, "Man Explains Why He Made F-bomb Tram Sign," KATU Channel Two News, 26 April 2007. Accessed on 27 February 2009. www.katu.com

This constitutional right makes it impossible for any law to restrict speech solely based upon the vulgarity of words used.

According to the preferred position balancing theory, the right to free expression guaranteed by the First Amendment and article one, section eight of the Oregon Constitution, is held at a higher status than all other societal concerns. In this case the government is trying to censor ideas that Auld has about the tram. This theory presumes that any action the government takes that limits freedom of expression to protect other interests is unconstitutional. “This presumption forces the government to bear the burden of proof in any legal action challenging censorship.”³ According to this theory the City of Portland must prove that their censorship of Auld’s sign is justified so that they are not violating the First Amendment and Article one, section eight of the Oregon Constitution..

Another legal theory of the First Amendment that relates to this case is the Meiklejohnian theory. This theory states that “expression that relates to the self-governing process must be protected absolutely by the First Amendment.”⁴ What this means is that political speech gets absolute protection. Ever since the tram was proposed it was a very contentious topic, not only among the area where Auld’s home is but throughout the greater Portland area. The tram was a political topic of debate, and under the Meiklejohnian theory, speech related to it should be given the fullest protection.

The government is also restricted in the ways that it can enforce prior censorship on communication, such as laws that regulate signs and billboards. These are called time,

³ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 44.

⁴ *Ibid.*, 45.

place and manner restrictions.⁵ The criteria that have been set is that rules must be content neutral, rules can not constitute a complete ban on a kind of communication, the rule must be justified by a substantial state interest, and the rule must be narrowly tailored.⁶

This study will examine the First Amendment of the United States Constitution, the freedom of speech rights provided in the Oregon Constitution, the Portland city sign statutes and time, place and manner restrictions. It will explore whether or not the City of Portland sign statutes violate constitutionally provided rights to free speech and expression. The purpose of this study is to weigh the city's legitimate concerns to regulate signs in residential neighborhoods and its citizens from profanity versus Justin Auld's right to express his ideas freely.

The sign that Auld placed on his roof was on his private property and expressed his attitudes toward the tram that glided past his house. This paper will argue that when the City of Portland told Auld to take the sign down from his roof, it infringed on his constitutional right to freedom of speech as guaranteed by both the First Amendment and the Oregon Constitution.

Facts of the Case

Justin Auld was told by tram officials that the new aerial tram was not going to invade on his privacy. When the tram was finally built, he discovered that anyone riding on the tram would be able to see directly into his backyard. That was when Auld decided to do something about it.

Auld had a large sign professionally made that said in large black letters on a

⁵ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 106.

⁶ *Ibid.*, 108.

white background “FUCK THE TRAM.” On April 23, 2007, Auld hung the sign on the roof of his house. The sign was clearly visible from the aerial tram, but it was not visible from the street. Due to the pitch of the roof, the sign could not be seen by other people in houses on the hill above Auld’s house.

On April 27, 2007, Auld was told in a letter written from Portland city officials that his sign violated a city code that prohibited signs on single residential houses. That city ordinance is located in title 32 of the Portland city code and charter. The specific subsection the city cited that Auld was in violation of is in subsection 32.32.010. That subsection states that houses, duplexes and attached houses are only allowed one sign per property and that sign can only have a maximum sign face area of one square foot. Signs are also not allowed to be placed higher than ten feet.⁷ Auld was informed that if he did not take the sign down by May 14, 2007, he was going to be fined \$50 per day.⁸

On the day Auld received the letter from the City of Portland he decided to take the sign off his roof. Auld then placed the sign on a nearby fence. Auld was then told by city officials that due to the same code as previously stated that he was not allowed to keep the sign anywhere on his property where it could be visible to the public.

Because of all the media coverage, Auld decided to take the sign down without fighting the city to keep it up. The sign had been shown on various television news stations, including KATU, and local newspapers such as *The Oregonian*. “I had made my point,” Auld said. Auld was happy that because of all the media coverage on local television news stations many more people than he had expected were able to see the sign

⁷ See Appendix I: 32.32.010 Standards in the Residential Zones and Open Space Zone.

⁸ Benjamin Brink. “No Fan of the Tram.” *The Oregonian*, 28 April 2007.

and how he felt about his loss of privacy.

Case Law Analysis

Time, Place and Manner Restrictions

In a series of decisions the United States Supreme Court has said that the government can exercise prior restraint on certain types of communication based on the time, place or manner of the communication if there is a substantial state interest. To be able to do this the rules the government puts into place must meet a set of four criteria so that no First Amendment rights are violated.

The first criterion states that, “the rule must be neutral as to content, or what the courts call content neutral, both on its face and in the manner in which it is applied.”⁹ This means that it does not matter what is said or printed, but the rule must apply equally to all communications. An example of a law that was found by the courts to be a violation of this criterion was when a town passed an ordinance that prohibited property owners from placing political signs on their property, unless it was within 30 days before an election. This law was not content neutral because it only regulated political speech and not other types of signs.¹⁰ If an ordinance does not meet this criterion then it could be subject to the strict scrutiny standard of judicial review that requires the government to prove not just a substantial state interest, but a compelling state interest.

The second criterion states that rules must not constitute a complete ban on a kind of communication. An example of this criterion being violated can be found in several

⁹ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 106.

¹⁰ *Whitton v. Gladstone*, 354 F. 3d 1400 (1995).

court rulings. In one case a city statute banned exit polling that was being conducted by the local newspaper. This statute was struck down because the statute would constitute a complete ban on a specific type of communication. Reporters trying to find out information of voter turnout would not be able to get the same information elsewhere.¹¹ For a ban to not violate the First Amendment there must be other ways of accomplishing the same communication.

The third criterion states that there must be a substantial state interest to justify the restraint on speech. For example, there have been attempts by cities to ban the distribution of pamphlets because they can create a litter problem. The courts decided that this is not considered a legitimate concern because the litter can be dealt with by other means, such as enforcing anti-litter laws.¹² On the other hand, a ban on the use of loudspeakers after 10 p.m. could be justified because people are trying to sleep at that hour of the night, which is a substantial state interest. The city, state or federal law that applies to restraint on speech must have a legitimate reason to justify that the restraint is necessary.¹³

The fourth criterion that must be met is that, “the law must be narrowly tailored so that it furthers the state interest that justifies it, but does not restrain more expression than is actually required to further this interest.”¹⁴ In one case that dealt with this criterion, a city passed an ordinance that banned the distribution of free, printed material in yards, driveways and porches in an attempt to stop a particular newspaper from cluttering up

¹¹ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 107.

¹² *Schneider v. New Jersey*, 308 U.S. 147 (1939); and *Miller v. Laramie*, 880 P. 2d 594 (1994).

¹³ *Daily Herald v. Munro*, 838 F. 2d 380 (1988).

¹⁴ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 108-09.

gutters and streets. Instead of just preventing the problematic paper, the ordinance also prevented any free material from being distributed in the same manner. For this reason the law was not narrowly tailored because as it restrained more expression than was actually required to further the state's interest. The city could have instead required people to pick up their papers or fined the paper for any unclaimed papers.¹⁵

A law that deals with prior restraint due to time, place and manner needs to be able to meet all of these criteria so that it does not violate the First Amendment. Depending upon where the speech in question is taking place determines the manner in which the court may apply the four criterions.¹⁶

Oregon State Constitution

“Over the past 50 years, the U.S. Supreme Court has given the states broad latitude to set their own laws regarding free speech.”¹⁷ Because of this the laws that govern the freedom of expression vary considerably from state to state. Article one, section eight of the Oregon Constitution states that:

*No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.*¹⁸

With these words the framers of the Oregon Constitution gave their citizens even more free speech rights than those provided by the U.S. Constitution. Oregon's guarantee of

¹⁵ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 109.

¹⁶ *Ibid.*, 110.

¹⁷ ACLU of Oregon. “A Closer Look at Free Speech.” Accessed on 16 March 2009. http://www.aclu-or.org/site/PageServer?pagename=Iss_free

¹⁸ Oregon State Legislature. “Constitution of Oregon.” Accessed on 6 March 2009. <http://www.leg.state.or.us/orcons/orcons.html>

free speech is actually considered one of the broadest in the country. It is also considered to be one of the strongest constitutional guarantees of free speech.¹⁹

Because Oregon's constitutional guarantee of free speech is so broad, there are many ongoing controversies arising from it.

Past Cases: Signs

In 1994 the U.S. Supreme Court was faced with a case that is strikingly similar to that of *Auld*'s; that case involved Margaret Gilleo. Gilleo, who owned a single-family home in Ladue, Missouri, put a 24 by 36-inch sign on her front lawn that said, "Say No to War in the Persian Gulf, Call Congress Now." Soon after Gilleo put up the sign, it disappeared. She then put up another sign, but that one also disappeared. Gilleo reported the incidents to the police but was informed by them that signs of that nature were prohibited inside of city limits.²⁰

Gilleo decided to take action, and the District Court issued a preliminary injunction against the city ordinance that prohibited her from displaying her sign. After the injunction Gilleo placed an 8.5 by 11-inch sign in her window that read, "For Peace in the Persian Gulf." The City of Laude responded by repealing the old city ordinance, which the court had placed an injunction on, and enacted a new, revised city ordinance. This ordinance prohibited all residential signs, allowing for only 10 exemptions such as residential identification signs and "for sale" signs. Gilleo then amended her complaint to challenge the new ordinance.²¹ This is a violation of one of the guidelines for time, place

¹⁹ ACLU of Oregon. "A Closer Look at Free Speech." Accessed on 16 March 2009. http://www.aclu-or.org/site/PageServer?pagename=Iss_free

²⁰ *City of Laude v. Gilleo*, 512 U.S. 43 (1994).

²¹ *Ibid.*

and manner restrictions because these exemptions make the ordinance not content neutral.

The U.S. Supreme Court ruled in favor of Gilleo by ruling that the city ordinance violated her First Amendment guarantee to freedom of expression. Justice John Paul Stevens delivered the opinion of the court.

Stevens wrote, “Ladue has almost completely foreclosed a venerable means of communication that is both unique and important.”²² Signs that express a view or react to a local controversial issue reflect and animate changes in the life of the community. Residential signs have long been an important medium for expression.

The City of Laude argued that the ordinance was a regulation of time, place and manner because residents were still capable of using other mediums to express their ideas. The court addressed this concern by stating that residential signs are often a cheap and convenient form of communication, especially for people who have limited mobility or modest means. Other forms of communication such as printing leaflets or taking out advertising space in a newspaper may be far too costly for many people to do. Activities such as handing out the leaflets and holding protests or speeches may also be unreasonable for people who have disabilities preventing them from doing so. Also, residential signs are meant to reach a certain audience that might not be able to be reached as effectively by any other means.²³

The government does have the right to impose regulations on signs in residential

²² City of Laude v. Gilleo, 512 U.S. 43 (1994).

²³ Ibid.

²⁴ Ibid.

neighborhoods if they have legitimate concerns, but the city's ordinance prohibiting all signs violated the First Amendment. With more "temperate measures," the City of Laude could satisfy their regulatory needs without violating their citizens' right to free speech.²⁴

Past Cases- Expletives

The U.S. Supreme Court has also dealt with issues arising from offensive messages, or for lack of a better term, swearwords. In 1971 a 19-year-old named Paul Cohen wore a jacket that expressed his ideas about the Vietnam War. The jacket was emblazoned with the words "Fuck the Draft. Stop the War." He was charged under a California statute, convicted, and sentenced to 30 days in jail. The statute prohibited, "maliciously and willfully disturb[ing] the peace and quiet of any neighborhood or person [by] offensive conduct."²⁵ The court found that although the phrase on the jacket is provocative, it is not directed at any one person. There was also no evidence that "people in substantial numbers would be provoked into some kind of physical action by the words on his jacket."²⁶ There was no evidence that anyone who saw the jacket, or was likely to see it, could have reasonably regarded the words as an insult because the message was not directed at any one person.²⁷

The court also made a distinction between the use of vulgar language and obscenity, which the government has been given more power to regulate. For a state to use its "power to prohibit obscene expression, such expression must be, in some

²⁵ Cohen v. California, 403 U. S. 15 (1971).

²⁶ Ibid.

²⁷ Ibid.

significant way, erotic.”²⁸

The State of California made the argument that the state had a legitimate concern to act because the “distasteful” remark was thrust unwillingly upon its viewers. This argument was not held by the court because there was no intrusion of privacy. The government’s ability to stop dialogue solely in the interest of protection other from hearing is “dependent upon showing that substantial privacy interests are being invaded in an essentially intolerable manner.”²⁹

Discussion

The type of speech that Auld displayed on his roof was political speech. Even if people did not like the expletive he used, there is no doubt that the topic he was referring to was a highly contentious issue for the people living in his area and around the Portland metropolitan area. The Meikeljohnian theory of the First amendment states that political speech should get absolute protection, while all other types of speech must be balanced with other societal concerns.³⁰ What makes this statute unconstitutional is that it does not meet the criteria set forth for time, place and manner restrictions.

The Portland city statute that regulates signs in residential areas does meet the first criterion in that the law is content neutral. The statute does not have any language that provides a guideline for what types of language is or is not allowed. There is also no sign ordinance that states that expletives are or are not permitted. In fact, the statute prohibits all signs that have a face area larger than one square foot. The statute also

²⁸ Cohen v. California, 403 U. S. 15 (1971).

²⁹ Ibid.

³⁰ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 45.

prohibits signs that are placed higher than ten feet off the ground.³¹

The statute is also an almost complete ban on residential signs. For many properties in Portland, a sign that is smaller than one square foot would not be able to be legible from the street. In *Laude v. Gilleo* Justice Stevens wrote in his opinion that signs are a valuable means of communication for many people. For many, signs are cheap, easy to use and for people with disabilities or financial restraints, can be the only way to effectively communicate their ideas. “[R]esidential signs have long been an important and distinct medium of expression.”³² This statute almost completely bans this entire type of communication, which makes it a violation of this time, place and manner criterion.

This statute also does not meet the third and fourth criteria of time, place and manner restriction, that the law must justify a substantial state interest and the law must be narrowly tailored as to not restrain more expression than is required to further its interest.³³ The City of Portland’s interest in protect unlimited proliferation of residential signs which might create “visual clutter” is not enough of a substantial state interest to prohibit such an important means of communication. The Supreme Court has ruled that in situations like this there are more temperate measures a city can use to satisfy their interest in regulation visual clutter.³⁴

Conclusion

As the Portland statute which regulates residential signs stands today, all signs on houses, duplexes and attached houses cannot have a face area larger than one square foot.

³¹ See Appendix I: 32.32.010 Standards in the Residential Zones and Open Space Zone.

³² *City of Laude v. Gilleo*, 512 U.S. 43 (1994).

³³ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 109.

³⁴ *City of Laude v. Gilleo*, 512 U.S. 43 (1994).

This means that people would not be able to have “Happy Birthday” banners, “It’s a Boy” signs or even house identification number signs larger than one square foot.

By taking away our right to have signs with a face area larger than one square foot, statute 32.32.010 also prohibits one of the most common forms of political speech. Under this law it is technically illegal to fly the standard size United States flag on private property. In our democratic form of society political speech is one of the greatest rights we are all guaranteed. “The guarantee of freedom of speech and freedom of the press were added to the Constitution in large measure to protect political debate in the nation from government interference.”³⁵

Another freedom this statute infringes upon is the right to support candidates for public office. Many Americans choose to do this by placing signs in their windows and on their lawns during a candidate’s campaign, but city statute 32.32.010 prohibits these signs if they have a face area larger than one square foot. Because this statute is prohibiting political speech, it is certainly unconstitutional. “[P]olitical speech is at the top of the First Amendment hierarchy of expression.”³⁶ This means that political speech is given the highest priority for protection under the First Amendment.

Even if the City of Portland was trying to protect its citizens from vulgar language with this statute there are no substantial privacy interest that Auld is invading upon, which is the only reason the government can use to stop dialogue solely in the interest of protecting others from hearing it.³⁷ In fact it is Auld’s privacy that the city invaded upon.

The statute that the City of Portland cited in Auld’s case does not meet three of

³⁵ Don R. Pember, Clay Calvert. *Mass Media Law*. (New York: McGraw-Hill, 2008), 609.

³⁶ *Ibid.*, 541.

³⁷ *Cohen v. California*, 403 U. S. 15 (1971).

the criterions for time, place and manner restrictions which makes the statute unconstitutional under both the United States Constitution and the Oregon Constitution.

Appendix I

(The following is a copy of code 32.32.010 as listed on the Online Code and Charter from the Portland City Auditors Office.)

32.32.010 Standards in the Residential Zones and Open Space Zone.

A. General standards. The standards for permanent signs in the RF through RH zones and for the IR and OS zones are stated in Table 1. The sign standards for the RX zone are stated in Table 2. All signs must conform to the regulations of Section 32.32.030.

Use Category/Structure Type[2]	Number of Signs	Max. Sign Face Area	Types of Signs Allowed	Maximum Sign Height	Additional Signs Allowed [3]
Household Living/ Houses, Duplexes, Attached Houses.	1 per site	1 sq. ft.	Fascia, Painted Wall Freestanding	Top of wall, or 10 ft. whichever is less. 6 ft.	lawn signs, directional signs
Household Living/ Townhouse, Multi-dwelling Group Living, Day Care, Nonresidential category uses not listed below.	1 per building	10 sq. ft.	Fascia, Awning, Painted Wall Freestanding	Top of wall 10 ft.	lawn signs, directional signs
Subdivisions, PUDs, Houseboat Moorages, Mobile Home Parks, Agricultural Uses. [4]	1 per entrance	32 sq. ft.	Monument	10 ft.	lawn signs, directional signs
Parks and Open Areas [5]	1 per street frontage	10 sq. ft.	Monument	10 ft	lawn signs, directional signs
Colleges, Community Service, Medical Centers, Religious Institutions, Schools, Commercial Outdoor Recreation, Major Event Entertainment, and nonconforming uses in Commercial and Industrial use categories.	The sign standards of the CN zones apply. See Section 32.32.020.				

Notes:
 [1] Temporary signs are regulated by 32.32.030 K, Temporary Signs.
 [2] See 32.30.030, Uses, Use Categories, and Structure Types.
 [3] These signs are allowed in addition to other signs when they meet the standards of 32.32.030 H.-J.
 [4] These signs are allowed in addition to those for individual buildings.
 [5] Signs in, or adjacent to and facing, a sports fields associated with Parks and Open Areas are subject to the standards of the CN zone. See 32.32.020.

B. Sign features. Signs in the RF through RH zones and in the IR and OS zones, except for those subject to the CN zone sign standards, are subject to the standards of this subsection. Illuminated signs placed in windows are subject to these sign regulations. Extensions into the right-of-way are prohibited. Changing image sign features are prohibited and only indirect lighting is allowed.

