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# Election Signs and Time Limits

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Signs exist for the sole purpose of communicating messages. Hence, any regulation of signs is inevitably a regulation of speech protected by the First Amendment. The message, however, is only one aspect of a sign. A sign's other constituent element is the structure upon which the message is displayed. Many communities have wished to regulate those structures in the interests of aesthetics, or safety, or some combination of the two. The regulations have attempted to limit the location, the size, the number, or other features of the structures upon which the messages may be displayed. Because these regulations inevitably affect the communications that are intended to be displayed on the structures, they raise constitutional issues of free speech.[1]

These issues become particularly difficult when the signs being regulated convey political messages. Relatively small, disposable signs are a traditional way of communicating political messages. They may be the least expensive way political speakers have of reaching large audiences. They therefore hold enormous appeal to those candidates for political office who are relatively unknown and lack so-called "name recognition."[2] Most importantly, political messages dealing with ballot issues are at the apex of the hierarchy of speech values protected by the First Amendment.[3]

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1. *See generally* DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW §§ 7.01-7.12 (1999) [hereafter FEDERAL LAND USE LAW].

2. *See, e.g.*, Rappa v. New Castle County, 18 F.3d 1043, 1076 (3d Cir. 1994); John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981). The effectiveness of signs as a means of achieving name recognition was the subject of disputed expert testimony in *Rappa*.

3. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (The constitutional

On the other hand, because these signs are cheap they proliferate like weeds during election cycles. Few of them are items of beauty. This absence of visual appeal combined with their numbers make them real eyesores in otherwise attractive residential communities. Moreover, they are flimsy in construction, easily damaged or destroyed by rain, snow, wind or vandals. They are frequently blown or thrown into the street, creating driver safety and trash disposal problems. They therefore are a prime target of those who wish to eliminate visual clutter from their community's environment in the interests of beauty, and perhaps also of safety.

This article tries to cast light into a small corner of this problem. It deals with a question the United States Supreme Court has never answered directly, namely, whether a community may impose time limits on the periods during which signs carrying messages about election issues may be displayed.[4] The article begins with a brief survey of relevant Supreme Court decisions before coming to grips with that question.

Two aspects of this discussion require emphasis. The first is that the subject is "election" (or "campaign") signs, not "political" signs. The former are doubtless a subcategory of the latter. Yet, "political" signs include a great many messages, such as "Save the Whales," for example, that are not tied to a specific date or time period. Hence, imposing time limits on such signs would be difficult to justify in terms of regulating their structures. Second, billboards and other permanent structures are excluded from consideration. Imposing time limits on whatever election messages such structures might display contributes nothing to either aesthetics or safety. Political messages are no more or less objectionable on billboards than are any other constitutionally protected communications.[5]

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protection afforded political speech has its "fullest and most urgent application precisely to the conduct of campaigns for political office.").

4. For other efforts, see Stephanie L. Bunting, *Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in City of Ladue v. Gilleo*, 20 HARV. ENVTL. L. REV. 473 (1996); Daniel N. McPherson, *Municipal Regulation of Political Signs: Balancing First Amendment Rights Against Aesthetic Concerns*, 45 DRAKE L. REV. 767 (1997); Thomas Stephen Neuberger & Daniel T. Smith, *The First Amendment Implications of State Regulation of Candidate Political Speech Through Election Signs*, 14 ST. L.U. PUB. L. REV. 571 (1995).

5. *See, e.g.*, Orazio v. Town of North Hempstead, 426 F. Supp. 1144 (E.D.N.Y. 1977).

## I. SUPREME COURT DECISIONS

### *A. Background*

Fundamental First Amendment doctrine provides the background against which to view relevant Supreme Court decisions. That doctrine divides regulations of speech into two classes. The first class consists of laws that regulate speech because of its content, such as bans on obscenity and perjury. Traditional doctrine refers to this class as "content based" regulations. Except for a few narrowly defined subcategories, content based regulations must pass strict scrutiny analysis to survive a constitutional challenge. That is, they must be necessary to further compelling governmental interests and must be the least restrictive alternative available to further those interests.

The second class consists of regulations that purport to be unconcerned about message content but nevertheless have the effect of limiting speech. The first Supreme Court decision on measures of this type approved an ordinance that imposed restrictions on parades.[6] The Court observed that governments might have legitimate interests in limiting the times or the places at which, or the manner in which, speech is delivered.[7] The Court referred to such limitations as "time, place and manner" restrictions, a term by which they are still known.[8] Regulations of this kind are held to a standard less rigorous than strict scrutiny. To be constitutional, they need only (a) be content neutral, (b) further significant or substantial (but not compelling) governmental interests, and (c) leave open adequate alternative channels of communication. The requirement that they be "no greater than necessary" to protect the governmental interests was added later.[9] The Court has made plain that the "no greater than necessary" requirement under this standard is significantly less stringent than the

6. *See* Cox v. New Hampshire, 312 U.S. 569 (1941).

7. *Id*. at 575-76.

8. *Id.*

9. Support for the statements about constitutional standards in the last two paragraphs can be found in LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d ed. 1988); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.1 (1997); and RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT §§ 3.01-3.04 (Student ed. 1994).

"least restrictive alternative" requirement of strict scrutiny.[10]

A word needs to be said about the concept of content neutrality. Early cases addressing this issue involved blatant discrimination against unpopular views. For example, Jehovah's Witnesses were denied the use of a public park that other religious groups were routinely granted permission to use.[11] Cases such as these were the genesis of the Court's often repeated statement that discrimination based on content is virtually per se unconstitutional. That formulation is problematic because of the word "content." It clearly includes "viewpoints." That is, discrimination against an unpopular viewpoint is certainly discrimination based on content. The reasons governments should be denied the power to discriminate against viewpoints are virtually self-evident. They all center on the danger of giving government the power to censor speech. Content, however, also includes "subject matter."[12] Why governments should absolutely and totally be denied the power to discriminate on the basis of subject matter is not clear. For example, suppose the city in the Jehovah's Witnesses case prohibited the use of its public park for religious purposes. That would constitute subject matter rather than viewpoint discrimination. There would be no danger of government censorship. The denial still might be unconstitutional, but the reasons offered for finding it so obviously would have to be (or should have to be, at any rate) different from those that were given to strike down the viewpoint discrimination.

Currently, the Supreme Court continues to articulate the standard as one of content neutrality. Sometimes it will accept viewpoint neutrality as fulfilling the requirement,[13] however, and sometimes it

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10. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989) ("[R]estrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.' . . . Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech . . . need not be the least-restrictive or least-intrusive means. . .").

11. *See* Niemotko v. Maryland, 340 U.S. 268 (1951).

12. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

13. *See, e.g.*, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981). Heffron upheld a statute that required everyone who wished to do a number of things at the state fair, including solicit money, to do so from booths that were rented on a first come, first served, basis. *Id.* at 643-44. Because the restricted speech—soliciting money—was

will not.[14] And sometimes it insists that the standard requires *both* content *and* viewpoint neutrality.[15]

### *B. The Cases*

*Metromedia, Inc. v. City of San Diego* was the first Supreme Court decision to apply free speech principles to sign regulations.[16] *San Diego's* ordinance generally banned "outdoor advertising display signs." The ordinance exempted two categories of signs. The first category consisted of on-site signs that identified the premises or the items produced or sold there. The second category consisted of twelve specifically described displays. A splintered Court held the ordinance unconstitutional.[17] The nine justices divided into three groups with five opinions: a plurality of four, a concurrence of two, and three dissents. The gist of the concurring opinion was that the ordinance effectively banned all billboards and that such a total ban ought to be invalid.[18] The plurality overturned the ordinance for completely different reasons. They focused on the two categories of exemptions. The category that exempted on-site signs was unconstitutional because it limited the content of such signs to commercial messages.[19] Political messages, for example, could not be displayed. It was impermissible to prefer commercial to traditional speech in this manner (the "commercial speech preference" rationale).[20] The other category exempted twelve specifically defined displays. Seven of them were defined by content, including governmental signs (street identifiers, traffic controls, and the like) and temporary political signs. The plurality refused to deal with these

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identified by content, the statute clearly was content based. But since it was applicable to everyone, it was viewpoint neutral. The Court described it as content neutral. *Id*. at 648-49.

14. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), discussed *infra* notes 16-24 and accompanying text.

15. *See* Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n, 447 U.S. 530, 536-37 (1980).

16. *Metromedia*, 453 U.S. at 490. For a more detailed description and analysis, see FEDERAL LAND USE LAW, *supra* note 1, at § 7.02.

17. *Id*. at 521.

18. *Id*. at 521-40.

19. *Id*. at 513.

20. For criticism of this aspect of *Metromedia*, see FEDERAL LAND USE LAW, *supra* note 1, at § 7.02[3][b][i].

content subcategories individually. Instead, they lumped them together and declared this entire category of exemptions invalid because of content discrimination (the "discrimination" rationale).[21] The dissents criticized this part of the plurality opinion harshly. First, they argued, the ordinance was viewpoint albeit not content neutral, and viewpoint neutrality ought to be enough. Second, some of the exemptions, like that for political signs, enhanced free speech values rather than detracted from them.

Two difficulties stand in the way of accepting *Metromedia*'s content discrimination rationale at face value, difficulties that remain unresolved to this day. One of the twelve specifically defined exemptions was of For Sale signs. The Supreme Court had held it unconstitutional to ban For Sale signs.[22] San Diego merely incorporated the Court's mandate into its ordinance's provisions. Another exemption was for temporary political signs. San Diego's original ordinance did not contain this provision. It was added only after a local federal court had invalidated another city's ordinance for being too restrictive of political signs.[23] The upshot is that an ordinance that does not contain the exemptions is invalid because it fails to protect speech in accordance with judicial decisions; but an ordinance that does contain them is invalid because of content discrimination. Surely the Court did not intend to place municipalities in this impossible Catch-22!

The second difficulty has to do with the exemption for governmental signs. Whether it is possible to draft a definition of "sign" that does not include street identifiers, traffic controls, etc., without running afoul of the prohibition against content discrimination is debatable.[24] It is indisputable, however, that drafting such a definition would be extraordinarily difficult. *Metromedia*

21. 453 U.S. at 515-17.

22. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 91-98 (1977).

23. *See* Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976). Moreover, on the same day it decided *Metromedia*, the Court summarily affirmed *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981). That case struck down Maine's anti-billboard statute partly on the ground that it did *not* contain an exemption for political signs.

24. For a heroic effort to create definitions that satisfy judicial requirements, see DANIEL R. MANDELKER & WILLIAM R. EWALD, STREET GRAPHICS AND THE LAW 83-130 (rev. ed. 1988).

offers no explanation why free speech values require this onerous task to be undertaken. It goes without saying, of course, that these kinds of governmental signs are absolutely indispensable to all municipalities. Given the apparent absence of any First Amendment interests that need protection, it seems unlikely the Court meant to suggest that municipalities must forgo sign regulation entirely if they choose to install such essential signs.

*Members of the City Council of Los Angeles v. Taxpayers for Vincent* was decided three years later.[25] At issue was a Los Angeles ordinance that prohibited attaching signs to many types of government property, including lamp posts. A candidate for public office, whose signs had been torn down by the city, challenged the ordinance. The Court upheld the ordinance by a vote of six to three. Justice Stephens, who dissented in *Metromedia*, wrote the majority opinion. He emphasized that the ordinance was viewpoint neutral, the same argument he had urged unsuccessfully in his *Metromedia* dissent. The ordinance, therefore, was entitled to be evaluated under standards for time, place, and manner regulations. Two issues were involved. The first was whether the city's interests in aesthetics were sufficient to justify this impairment of speech. The Court held that they were. Accumulations of signs on public property were a significant evil that could be prohibited. The weight of this interest was not reduced by the city's failure to outlaw signs on private property. Private owners were thereby empowered to communicate by temporary signs, which enhanced speech. Moreover, the concerns of such owners for the beauty of their own property would tend to reduce undesirable visual clutter. The second issue was whether the ordinance's restrictions were no greater than necessary to protect the city's interests. Again, the Court gave an affirmative answer. The ordinance "did no more than eliminate the exact source of the evil it sought to remedy."[26]

Two reasons support the argument that *Vincent* implicitly overruled the content discrimination rationale of *Metromedia*. The first is *Vincent*'s repeated emphasis on the need for viewpoint rather

25. Members of the City Council of Los Angeles v. Taxpayers, 466 U.S. 789 (1984).
26. *Id.* at 808.

than content neutrality.[27] The second is that the Los Angeles ordinance in *Vincent* contained a host of specific exemptions that were similar or identical to those that had proved fatal to the San Diego ordinance in *Metromedia*.[28] The *Vincent* Court simply ignored them.

Before returning to the subject of sign regulation, the Court rendered a decision that has major significance to this discussion. The zoning ordinance challenged in *City of Renton v. Playtime Theatres, Inc.* prohibited theaters that showed sexually explicit films from locating within one thousand feet of any residential zone, school, church, or park.[29] Since the ordinance's classification was based on the type of movies that were offered, the challengers claimed content discrimination. The ordinance, however, was upheld by a vote of seven to two. The Court began its analysis by observing that the usual rule required content neutrality. The Court went on to hold, however, that content neutrality is to be determined by looking at a regulation's purposes, not solely at its terms. If its purposes are unrelated to the suppression of speech and if it is viewpoint neutral, then it is entitled to be treated as a content neutral time, place, and manner regulation. The purpose of this viewpoint neutral ordinance was to preserve the quality of urban life by confining the adverse secondary effects of constitutionally protected adult businesses to certain locales. Hence, it was entitled to be treated as content neutral despite its terms.

*Renton* left two questions unanswered. First, how does one determine whether the purpose of a content based regulation is to control the secondary effects of speech rather than to suppress it? Second, was the *Renton* doctrine limited to regulations of adult businesses or was it applicable to other regulations of speech as well? *Boos v. Barry* addressed both of these questions but resolved only the first.[30] The federal statute under review prohibited, within five hundred feet of a foreign embassy, the display of any sign that tended to bring that nation "into public odium." The government argued that

27. *See* FEDERAL LAND USE LAW, *supra* note 1, at § 7.02[3][b][ii].

28. *Id.*

29. City of Renton v. Playtime Theatres, 475 U.S. 41 (1986). For a more detailed description and analysis, see *id.* § 8.02.

30. Boos v. Barry, 485 U.S. 312 (1988).

the law should be treated as content neutral because its purpose was to prevent the secondary effect of subjecting foreign diplomats to speech that offends their dignity, an objective this nation had an obligation to achieve under international law. The Court rejected the argument by a vote of five to three. "Regulations that focus on the direct impact of the speech on its audience," as here, are regulations of speech itself, not its secondary effects.[31] A secondary effect under *Renton* is one "that happens to be associated with that type of speech," such as the deterioration of neighborhoods, but is not the direct result of the speech itself.[32] "If the ordinance [in *Renton*] . . . was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate."[33] Only the five justices in the majority addressed the issue of confining *Renton* to restrictions on adult businesses and they divided three to two. Justice O'Connor, who wrote the majority opinion, joined by Justices Stevens and Scalia, appeared willing to use the *Renton* analysis to determine content neutrality in all cases, including those involving political speech, as was the subject here. Justices Brennan and Marshall objected to that. The three dissenters argued that international law made the government's interest in this case compelling and that the statute thus survived strict scrutiny review. Hence, they did not reach the content neutrality issue.

That split in approach reappeared in *Burson v. Freeman*.[34] The ordinance at issue prohibited the display of political campaign signs within one hundred feet of a polling place. Since only political messages were banned, the ordinance was clearly content-based; however, a splintered Court upheld it five to three. The five justices in the majority divided into three groups, so there was no controlling rationale. The plurality opinion for three of the five justices held that the ordinance survived strict scrutiny because it served the compelling governmental interest of protecting voters from fraud and intimidation. That justification seems fanciful at best, as the dissent

31. *Id.* at 321.
32. *Id.*
33. *Id.*
34. 504 U.S. 191 (1992).

claimed, in view of the Court's rejection of that same defense in *Boos v. Barry*, where it made considerably more sense. Concurring, Justice Scalia voted to sustain the measure as a permissible viewpoint neutral regulation of the time, place, and manner of holding elections, an eminently more plausible rationale.

*City of Cincinnati v. Discovery Network, Inc.*,[35] brought to the Court an ordinance regulating the presence of newsracks on public sidewalks. The city claimed the measure furthered its interests in safety (reducing obstacles that pedestrians might trip over) and in aesthetics (newsracks being eyesores). Newsracks dispensing regular newspapers, numbering about fifteen hundred, were permitted; those dispensing publications consisting entirely of advertisements, numbering sixty two, were not. The city justified this content discrimination on the grounds that the ordinance was viewpoint neutral and that commercial speech was entitled to less protection than traditional speech. The Court rejected that justification and struck down the ordinance. The distinction between publications devoted entirely to commercial speech and those that included traditional messages bore no relationship whatsoever to the interests the city claimed to be protecting and thus failed the "no greater than necessary" prong of the time, place, and manner standard. All newsracks, irrespective of the content of the publications they offered, contributed equally to the unsightliness of the environment and to the danger of tripping pedestrians. Furthermore, it was doubtful that removing sixty two of more than fifteen hundred newsracks contributed meaningfully to the city's beauty.

The Court's most recent decision on sign controls is *City of Ladue v. Gilleo*.[36] A St. Louis suburb prohibited homeowners from displaying any signs except residential identification, safety hazard, and For Sale signs. Businesses, churches, schools, and a few other organizations, were allowed to display signs forbidden to homeowners. Ladue defended its ordinance primarily as a matter of aesthetics, of preventing the uncontrolled proliferation of signs. A unanimous Court declared the ordinance unconstitutional. The Court accepted the city's argument that since the ordinance was aimed at

35. 507 U.S. 410 (1993).
36. 512 U.S. 43 (1994).

controlling the secondary effects of signs rather than at suppressing speech, it was entitled to be treated as a content neutral time, place, and manner regulation. That acceptance at least implies the Court's agreement that the *Renton* doctrine is applicable outside the area of adult business regulation, the issue *Boos v. Barry* left unresolved.

The Court gave two sets of reasons for striking down the ordinance. One set was mentioned just briefly, almost as an aside. Even if it were treated as a time, place, and manner regulation, the Court said, the ordinance's exemptions "diminish the credibility" of the city's aesthetics claim, and made it doubtful that the ordinance actually furthered a significant governmental interest.[37] The Court thereby perpetuated the muddle that *Metromedia* created by refusing to acknowledge or discuss the fact that federal court decisions mandated some of the exemptions that condemned San Diego's measure as content discriminatory, such as the For Sale sign exemption.[38]

Most of the Court's opinion was devoted to the second set of reasons, an analysis of the "alternative channels of communication" prong of the time, place, and manner standard. Residential signs are a particularly important medium of communication for a number of reasons, the Court argued. A message displayed at a home has more impact than it would have if displayed elsewhere, in part because it identifies the speaker. Signs in front yards target neighbors, an audience that is difficult to reach by other means. Residential signs are cheap. They are also convenient. Even wealthy homeowners, who might otherwise not participate publicly in a political debate, might post one or more. They are especially important during political campaigns. Finally, the opinion noted that many prior decisions had emphasized that the home is a place that deserves special protections. Hence, Ladue's ordinance failed even the more relaxed standard of scrutiny by not leaving open adequate alternative channels of communication.

The Court concluded by saying that its decision "by no means leaves the City powerless to address the ills that may be associated with residential signs . . . [M]ore temperate measures could . . .

37. *Id*. at 52-53.
38. *See supra* notes 22-23 and accompanying text.

satisfy" its needs without harm to free speech interests.[39] That statement at least leaves open the possibility that reasonable time limits would be viewed as "more temperate," legitimate, restrictions.

## II. ELECTION SIGNS AND TIME LIMITS

### *A. Identifying the Signs*

The reason election signs are chosen as the subject of time limit restrictions is that they pertain to events with definite dates. Their importance, therefore, is bounded by time. Given the position of speech about elections at the very apex of the hierarchy of values protected by the First Amendment, however, it might be thought that any measure that selects political speech for disfavored treatment is ipso facto unconstitutional.[40] That would be wrong. The Supreme Court has on at least three occasions permitted just that.[41] One of those occasions was *Burson v. Freeman*, discussed earlier. *Lehman v. City of Shaker Heights*[42] approved a city's refusal to sell advertising space on its buses for any political advertising on behalf of candidates or public issues. Commercial ads were accepted; political ads were not. *Greer v. Spock*[43] upheld a regulation restricting political speeches and the distribution of political literature on military bases. These cases are, of course, distinguishable. For one thing, the latter two involved governments acting as proprietors of property rather than as regulators of society. The important point, however, is that singling out political speech is not per se unconstitutional.

Nevertheless, the teachings of *Metromedia* and *Discovery Network* must not be ignored. The reasons for wishing to impose time limits on election signs are equally applicable to signs pertaining to other time bound events, such as garage (or tag) sales, homes for sale, lost pets, neighborhood gatherings, and the like. The commercial

39. 512 U.S. at 58.

40. For an extensive analysis of this subject, see Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

41. It can be argued that the Court's recent approval of campaign contribution limits is a fourth example. *See* Nixon v. Shrink Missouri Government PAC, 120 S. Ct. 897 (2000).

42. 418 U.S. 298 (1974).

43. 424 U.S. 828 (1976).

speech preference rationale of *Metromedia* has provided the authority for invalidating many ordinances that failed to impose time limits on signs advertising commercial events.[44] The *Discovery Network* rationale has provided similar authority for overturning ordinances that failed to include signs with other traditional messages, including political signs that did not pertain to election issues.[45]

A few courts have rejected the claim that *Gilleo* sanctions the application of the *Renton* content neutral doctrine, have characterized measures that impose time limits on election signs as content discriminatory subject to strict scrutiny, and have struck them down on that basis.[46] If these courts are correct, and I doubt that they are,[47] this outcome cannot be avoided. So long as political signs are included within the definition of the time bound signs subject to restriction, whether in terms or in effect, these courts will hold the measure to be content discriminatory. The resulting application of strict scrutiny is a certain death sentence for time limit measures under federal constitutional law. Aesthetic considerations (with apologies to ardent environmentalists) will never, ever, be held to be compelling governmental interests. Safety considerations might be—in the abstract. It is impossible, however, to conceive of a danger that could be created by temporary political signs that would rise to that level. One court justified the application of strict scrutiny by resort to its state's constitution, recognizing that Supreme Court decisions did

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44. *See* Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995); Dimas v. City of Warren, 939 F. Supp. 554 (E.D. Mich. 1996); McCormack v. Township of Clinton, 872 F. Supp. 1320 (D.N.J. 1994); Warms v. Springfield Township, No. 94-6610, 1994 WL 613660 (E.D. Pa. 1994), No. 94-6610, 1995 WL 318791 (E.D. Pa. 1995); Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 467 S.E.2d 875 (Ga. 1996); Collier v. City of Tacoma, 854 P.2d 1046 (Wash. 1993) (en banc); Fisher v. City of Charleston, 425 S.E.2d 194 (W. Va. 1992); Richard Spence, Union City Board of Zoning Appeals v. Justice Outdoor Displays, *467 S.E.2d 875 (Ga. 1996)*, 26 STETSON L. REV. 1073, 1073-74 (1997).

45. *See* Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994); Dimas v. City of Warren, 939 F. Supp. 554 (E.D. Mich. 1996); McCormack v. Township of Clinton, 872 F. Supp. 1320 (D.N.J. 1994); City of Lakewood v. Colfax Unlimited Assn., Inc., 634 P.2d 52 (Col. 1981) (en banc); Van v. Travel Information Council, 628 P.2d 1217 (Ore. App. 1981).

46. See Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995); City of Euclid v. Mabel, 484 N.E.2d 249 (Ohio App. 1984), *cert. denied*, 474 U.S. 826 (1985); City of Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52 (1982).

47. *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1411, for the compelling dissent of Judge Fagg.

not require it.[48] That court left open the possibility, however, that longer limits and more vigorous efforts to improve the aesthetics of the environment might lead to a different result.[49]

### *B. Defining the Places*

Election sign restrictions may intrude upon the constitutional rights of two quite distinct groups of people, the candidates (or those interested in ballot propositions) and the property owners.[50] Which group is affected depends, most of the time but not always,[51] on the locations where the signs must be found to be subject to the challenged regulation. Since the locations being regulated in *Vincent* were entirely public property, the ordinance that the Court upheld affected only candidates. It is important to emphasize, however, that the *Vincent* Court held the property at issue, such as lamp posts, to be a non-public forum.[52] The Court has held that governments need not abide by time, place, and manner standards in non-public fora. Therefore, it would be a mistake to believe that *Vincent* allows municipalities virtually free rein when they are regulating signs on public property. Most of the public property on which election signs are placed is in the public forum. In the public forum, municipalities are limited in the restrictions they may impose by time, place, and manner standards.

The quintessential public fora are streets and parks. A "street" includes the entire right of way, not just the paved areas. Accordingly, an ordinance that imposed unreasonable restrictions on signs in areas "adjacent to highways"—in the public right of way—was overturned.[53] In residential areas the public right of way almost

48. *See* Collier v. City of Tacoma, 854 P.2d 1046 (Wash. 1993) (en banc).

49. *Id*. at 1057.

50. *See* Arlington County Republican Comm. v. Arlington County, 983 F.2d 587 (4th Cir. 1993).

51. The regulation in *Van v. Travel Information Council*, 628 P.2d 1217 (Ore. App. 1981), was overturned in part because it permitted only candidates and their committees, but not private citizens, to display election signs.

52. For a description and analysis of public forum doctrine, *see* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.47 (5th ed. 1995); FEDERAL LAND USE LAW, *supra* note 1, § 6.03.

53. *See* Van v. Travel Information Council, 628 P.2d 1217 (Ore. App. 1981). *See also* Arlington County Republican Comm. v. Arlington County, 983 F.2d 587 (4th Cir. 1993)

always includes an area next to the street that homeowners tend to think of incorrectly as their property. The ordinance in *Collier v. City of Tacoma*[54] permitted election signs in parking strips only with the permission of the owner of the property abutting the strip. Assuming, as I do, that the parking strips were in the street right of way, the question arises whether requiring candidates to procure permission from the abutting owners as a condition of allowing them to use the public forum would pass muster if challenged by a candidate. In this situation, the free speech interests of the candidates and of the property owners may conflict rather than coincide.

Private property can be divided into residential and non-residential categories. Whether they must be treated alike for purposes of election sign regulation is uncertain.[55] Non-residential property may be divided between commercial/industrial and farm/undeveloped. The catalog of reasons as to why election signs are so important when placed on front lawns that the Court offered in *Gilleo*[56] have little, if any, pertinence to signs in areas zoned commercial or industrial, although they may be relevant to regulations of farmland and open spaces. However, in the commercial speech preference rationale of *Metromedia*, the Court was particularly emphatic in stressing that it was impermissible to restrict businesses to commercial messages, that they must be allowed to display signs with political messages.[57] Apparently, then, the issue would be whether a reason can be found that justifies imposing time limits on election signs in non-residential areas that are different from those imposed on the same signs in residential areas.

One final problem is worth mentioning. Residential zones usually contain both occupied and unoccupied lots. *Gilleo* obviously controls the regulation of election signs on occupied lots. But *Gilleo*'s rationale is only marginally persuasive, if that, when applied to

(concerning a restriction on the numbers of signs rather than on time).

54. 854 P.2d 1046 (Wash. 1993)(en banc).

55. *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977), restricted campaign signs in non-residential areas, but the restriction was of wall signs, not the temporary signs under discussion.

56. *See supra* text accompanying notes 37-39.

57. *Metromedia*, 453 U.S. at 520-21.

vacant lots. Here the issue of whose rights are being impinged comes to the fore. Are candidates constitutionally entitled to put their signs on vacant lots so long as the owner does not object? Or are the municipality's interests in aesthetics sufficient to allow it to ban all signs on vacant lots that are not placed there by the owners?

### *C. Defining the Time Limit*

In the process of declaring election sign regulations unconstitutional for other reasons, many courts have stated in dictum that reasonable time limits would be allowed.[58] The catch, of course, is defining "reasonable." The regulation may limit how long before the election the sign may be displayed, or how long after the election it may be retained, or both.[59] The easier part is defining the period subsequent to the event because the message on the sign then has no utility. It has no utility, that is, when the covered event is the final election scheduled to resolve the subject. If the election is one of a sequence—if, for example, the covered event is a primary election leading up to a general election—the sign's utility is not ended. A number of ordinances have specifically allowed the signs of the winners of the primary election to remain on display throughout the period between the primary and the general election.[60] That detail aside, the only other consideration is giving the sign's owner a fair chance to remove it. Any plausibly reasonable period, such as one week, ought to be satisfactory. Two cases have approved limits of ten days following elections.[61]

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58. *See* Verrilli v. City of Concord, 548 F.2d 262, 265 (9th Cir. 1977); Baldwin v. Redwood City, 540 F.2d 1360, 1370 (9th Cir. 1976), *cert. denied sub nom.*, Leipzig v. Baldwin, 431 U.S. 913 (1977); McCormack v. Township of Clinton, 872 F. Supp. 1320, 1326 (D.N.J. 1994); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52, 63 (Colo. 1981) (en banc); Town of Huntington v. Estate of Schwartz, 313 N.Y.S.2d 918 (Dist. Ct. 1970); Fisher v. City of Charleston, 425 S.E.2d 194, 201 (W. Va. 1992).

59. Recall that the regulation will also have to cover other time bound events in order to satisfy *Discovery Network*. *See supra* note 35 and accompanying text. Because of that requirement, care must be taken in formulating the allowable time periods. It may be necessary to cover the different kinds of signs in different sections of the regulation.

60. *See, e.g.*, Curry v. Prince George's County, 33 F. Supp. 2d 447 (D. Md. 1999); Dimas v. City of Warren, 939 F. Supp. 554 (E.D. Mich. 1996); Collier v. City of Tacoma, 854 P.2d 1046 (Wash. 1993) (en banc).

61. *See* Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508

Defining the starting point, the date before which signs may not be displayed, is a much more problematic venture. Any such limit must be viewed with skepticism because it will have been formulated by incumbents, who are less likely than their potential opponents to need to establish name recognition. Obviously, the group whose interests are primarily at stake here are the candidates. Homeowners may also have an interest, but it cannot be as substantial as that of the candidates. Three cases have struck down sixty day limits as inadequate.[62] Another invalidated a forty-five day period, but mainly because the court read *Gilleo* as virtually outlawing restrictions that apply to homeowners.[63] Twenty years ago, in a decision the Supreme Court summarily affirmed, a federal court of appeals declared in dictum that a three week limit was inadequate.[64]

Nevertheless, common sense dictates that some outer limit should be permissible. Whether there should be one limit or many is debatable. Two cases have upheld general restrictions on the total time temporary signs may be displayed that made no specific reference to election dates.[65] Perhaps the limit should vary depending on the office or ballot issue (for example, statewide or local). That would complicate the task of drafting the regulation. I have no idea what impartial sources a court might consult in determining whether any given limit would adequately protect the rights of individuals while at the same time giving municipalities some discretion in protecting environmental concerns. Absent a controlling decision from the Supreme Court, each case will establish its own starting point, depending on the expert testimony and other evidence offered in that case.

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U.S. 830 (1993); Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972).

62. City of Antioch v. Candidates' Outdoor Graphic Service, 557 F. Supp. 52, 61 (N.D. Cal. 1982); Van v. Travel Information Council, 628 P.2d 1217, 1227 (Ore. Ct. App. 1981); Collier v. City of Tacoma, 854 P.2d 1046, 1058 (Wash. 1993) (en banc).

63. Curry v. Prince George's County, 33 F. Supp. 2d 447, 455 (D. Md. 1999).

64. *See* John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 545 U.S. 916 (1981).

65. *See* City of Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. Ct. 1992) (allowing ninety days total for all temporary signs); Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994) (during apparently undefined "election season").

## III. CONCLUSION

Properly interpreted, Supreme Court decisions permit local governments to impose reasonable time restrictions on election signs. The restrictions must also cover signs bearing other time bound messages, commercial and traditional. Subject to that qualification the validity of such measures ought to be tested only under the less rigorous scrutiny applicable to other content neutral time, place, and manner regulations. Whether signs on non-residential property may be treated differently from those on residential property is unclear, but doing so raises difficult constitutional questions. Establishing a period after an election during which signs must be removed appears to be relatively risk free. Establishing a period before an election during which signs cannot be displayed presents great constitutional difficulties. Fixing a uniform period may not be possible.