LITTER OR LITERATURE: DOES THE FIRST AMENDMENT PROTECT LITTERING OF NEIGHBORHOODS?

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The distribution of literature to the public by leaflet or pamphlet is a firmly entrenched tradition in the United States. Our country owes its very origin to pamphleteers such as Thomas Paine, whose writings helped engender a spirit of rebellion amongst the American colonists. One can surmise that when these distributors posted and distributed these revolutionary pamphlets, they attempted to do so without being caught by the British. The rabble-rousing colonists believed, as do many of their modern-day counterparts, that no other method of communication could better guarantee the greatest impact with the least cost.

More than 200 years later, pamphlet distributors still roam the streets of our cities and towns. Many solicit votes for their candidates or sympathy for their causes. Others, however, merely hawk commercial products and services.

As did their predecessors throughout history, contemporary pamphleteers seek the widest audience possible. Some still hand pamphlets to people on sidewalks or in cars. Some put free pamphlets in “newspaper boxes” on the street. Other pamphlet distributors seek to contact people at their residences. Some of these walk through neighborhoods and deliver papers door-to-door to the occupants, leaving their materials on doorsteps or door handles when the occupants are not home. Still others throw their pamphlets into yards and driveways.

Pamphlets can be as simple as a single piece of paper or as voluminous as a small newspaper placed in a plastic bag. Each method of distribution engenders its own particular problems.

The purpose of this Article is to examine the legal implications of pamphlet distribution, particularly distribution on residential property. Are these pamphlets litter or literature? Or, might they be called “litter-ature”--a combination of both?

The first part of this Article sets forth some of the problems associated with the distribution of pamphlets, especially on residential property. The second part examines the First Amendment speech implications of distributing literature to property instead of to people, and explores the rationale of court decisions that discuss legislative attempts to restrict distribution of pamphlets. Finally, the last part of the Article discusses the Florida Litter Law and other possible solutions to unwanted distribution of literature, as well as...
some of the legal and political risks of those solutions.

I. SOCIETAL PROBLEMS CAUSED BY DISTRIBUTION

OF PAMPHLETS
Governments have probably been concerned about the problems caused by the distribution of pamphlets for as long as pamphlets have been distributed. Of course, earlier concerns were often based on the tendency of the pamphlet to incite a riot or rebellion. But for at least 100 years, local governments have enacted ordinances that were directed at problems unrelated to the content of the message. [FN1] The most common problem was littering.

Everyone is familiar with the street or sidewalk scene in which leaflets or pamphlets are handed to passersby, who then promptly throw the papers on the ground. One early governmental response consisted of banning the distribution of literature to eliminate subsequent littering. [FN2] The courts first declared this solution invalid before 1889. [FN3] Nearly a half century later, in Schneider v. New Jersey, [FN4] the United States Supreme Court followed suit. [FN5]

In 1937, the year before the Supreme Court's decision in Schneider, the Court declared invalid an ordinance that required a license to distribute pamphlets, leaflets, or handbills. [FN6] Five years later, in Jamison v. Texas, [FN7] the Supreme Court ruled that the government could not ban distribution of leaflets and pamphlets, even when they were being sold, if the pamphlets were being distributed *840 for a religious purpose. [FN8] The Jamison Court distinguished the Valentine v. Chrestensen [FN9] decision from the previous year, in which the Court held that the government could lawfully prohibit the distribution of advertising materials in the form of handbills or pamphlets on city streets. [FN10] While these cases established First Amendment protection for the distribution of pamphlets and handbills on sidewalks and other such public property, the Court was simultaneously addressing the issue of distribution on private property. In Martin v. Struthers, [FN11] the Court ruled that First Amendment protection extended to the door-to-door distribution of literature to occupants of private premises. [FN12]

The decisions noted above broadly protected the rights of persons to hand out pamphlets to those they encounter. Pamphlet distributors have gone further, however. Political campaigns, commercial advertisers, and other distributors send people door-to-door to leave papers on doorsteps, vestibules, doorknobs, and elsewhere, without speaking to or obtaining the permission of the occupants. Because postal service regulations prohibit unmailed material from being placed into mailboxes, [FN13] materials left at the “doorstep” are not well-contained and can often create clutter or blow away. Other businesses take different approaches. They pay delivery persons to drive along streets and throw papers into the yards and driveways of each home. These papers are not requested by the residents, and in many cases, they are not wanted. They are regularly left in yards to rot or be picked up in rainstorms and swept into sewer systems, where they can slow or stop drainage, causing street or other flooding. The most common complaint, however, is that the papers are aesthetically damaging to the neighborhood. This damage cannot always be blamed solely on the distributors. *841 The throwing of the paper can be merely a seed that finds fertile ground, for instance, when the occupants fail to pick up the papers for days or weeks at a time. Sometimes that failure is due to the premises...
being left unoccupied for a period of time.
And so the question arises: what, if anything, can governments do to constitutionally regulate these methods of distributing papers?

II. IS “LITTER-ATURE” PROTECTED BY THE FIRST AMENDMENT?

Can the government prohibit the littering of private residences without violating the Constitution? At first blush, the answer appears to be a simple “yes.” For example, the government undoubtedly can prosecute and punish the person who throws an old milk carton or other type of garbage onto someone else's front yard. An anti-litter law prohibiting the throwing or leaving of papers or other trash on peoples’ yards, doors, or doorsteps without prior permission would not cause any constitutional consternation as applied to papers, magazines, or books that are old and torn. The constitutional problem arises when the litter is an unsolicited, neatly wrapped, unread newspaper or a campaign pamphlet. Then the litterer argues that the “litter-ature” is protected by the First Amendment and therefore cannot be treated as litter. More precisely, the argument is that throwing papers into peoples' yards and leaving pamphlets on doorknobs is not in fact littering, but is rather the distribution of literature, and is protected by the First Amendment. [FN14] The question then becomes how to distinguish between the throwing of litter and the distribution of literature.

A. Constitutional Regulation of First Amendment Rights

The government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech, provided that the restrictions are justified “without reference to the content of the regulated speech.” [FN15] In order to be reasonable, the time, place, or manner regulations must (1) be content-neutral, (2) be narrowly tailored to serve a substantial governmental interest, and (3) “leave open ample alternative channels for communication of the information.” [FN16]
For the sake of this analysis, let us assume a hypothetical anti-littering law which reads as follows:
Dumping Litter Prohibited. Unless otherwise authorized by law or permit, it is unlawful for any person to dump litter in any manner or amount in or on any private property unless
(a) prior consent of the owner has been given; and
(b) such litter will not cause a public nuisance or be in violation of any other state or local law, rule, or regulation.
Assume further that the statutory definition of litter includes paper and plastic.

1. The First Prong: Content Neutrality

An anti-littering law clearly satisfies the content-neutrality prong of the time, place, or manner test. The Supreme Court has held that even when no evidence exists that the government has acted with animus toward the specific idea expressed in a publication, an ordinance is still content-based if it restricts the distribution of “commercial handbills” but not “newspapers.” [FN17] An anti-littering law, however, could not distinguish
between commercial and non-commercial speech, nor between religious, political, or other types of speech. Since all littering is equally circumscribed, any anti-littering law meets the requirement of content-neutrality.

2. The Second Prong: Narrowly Tailored, Substantial Governmental Interest

The second prong of the time, place, or manner test focuses on the governmental interests that are used to justify regulation of speech. In the case of the anti-littering law, several interests are implicated. One such possibility is that the prevention of litter is, in itself, a governmental interest. Other possibilities include the government interests in aesthetics, crime prevention, maintenance of public works, and prevention of trespassing. These latter four interests support the interest in preventing litter, but also stand as independent interests themselves.

a. Substantial Governmental Interest

The second prong of the time, place, or manner test requires that the statute be “narrowly tailored” to serve a “substantial governmental interest.” The first question to be answered is whether the anti-littering law protects a governmental interest that rises to the level of being substantial.

The first and most obvious governmental interest to be asserted is the protection of neighborhoods from litter. The most obvious public purpose of prohibiting littering is the alleviation or elimination of its side effects. While it is certain that the prevention of litter is a legitimate governmental interest, courts have disagreed whether it rises to the level of a substantial interest. The courts have cited Schneider v. New Jersey, each urging a separate position. [FN18]

The Supreme Court stated in Schneider that “the 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.” [FN20] It added, however, that “(t)his constitutional protection does not deprive a city of all power to prevent street littering.” [FN21] In dicta, the Court stated that a permissible exercise of police power includes “punishment of those who actually throw papers on the streets.” [FN22]

In City Council of Los Angeles v. Taxpayers for Vincent, [FN23] the Supreme Court wrote that “(t)he Court (in Schneider) explained that cities could adequately protect the aesthetic interest in avoiding litter without abridging protected expression merely by penalizing those who actually litter.” [FN24] The statements in Schneider and Taxpayers for Vincent strongly support the proposition that the prevention of litter is a substantial governmental interest. In addition, the Eleventh Circuit has expressly held that the prevention of litter is a substantial governmental interest. [FN25] The Fourth Circuit has agreed, stating that it thought that “the government has a substantial interest in the maintenance of cleanliness and beauty of the nation’s capital and its governmental environs and that it may adopt reasonable regulations designed to prevent unnecessary littering.” [FN26] At least one court has specifically disagreed, holding that the “(p)revention of litter .. . has never been considered a particularly weighty objective.” [FN27] This decision is an aberration, however, and the better conclusion is that the
prevention of litter is, in itself, a substantial governmental interest. The prevention of litter is closely related to other substantial governmental interests. Litter prevention is related to aesthetics, and numerous cases hold that a substantial governmental interest exists in protecting the aesthetics of a community. In Gold Coast Publications, Inc. v. Corrigan, the Eleventh Circuit stated “(t)he Supreme Court has recognized aesthetics and safety as significant government interests legitimately furthered through ordinances regulating First Amendment expression in various contexts.” The Ninth Circuit has also recognized that “(c)ities have a substantial interest in protecting the aesthetic appearance of their communities by ‘avoiding visual clutter.’” In City of Cincinnati v. Discovery Network, Inc., the plaintiffs challenging Cincinnati’s prohibitions on commercial newsboxes did not even “question the substantiality of the city’s interest in . . . esthetics.” In Taxpayers for Vincent, the Supreme Court held that the City’s interest in aesthetics was sufficiently substantial to justify a prohibition on posting signs on public property. And finally, the Supreme Court “has recognized, in a number of settings, that states and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.” A number of other courts have followed these cases. With regard to regulation of billboards, the Ninth Circuit wrote that “(i)t is obvious that . . . the goals of the ordinance—esthetics and safety—represent substantial governmental interests.” The Fourth Circuit upheld aesthetics as a “substantial government goal” in reviewing an ordinance restricting signs on residential property. The Ninth Circuit also upheld aesthetics as “substantial governmental interest” in upholding an ordinance regulating antennae within neighborhoods. In upholding an ordinance restricting billboards, the Tenth Circuit held that the governmental interest in aesthetic values was “clearly ‘substantial.”’ The Sixth Circuit has recognized the legitimacy of aesthetics in reviewing a regulation of service stations. In upholding a regulation of newsboxes, the Seventh Circuit said simply that “(c)ities may curtail visual clutter, for aesthetic and safety reasons.” A federal district court, in upholding a regulation of print colors on buildings, held that “(i)t is well settled that aesthetic interests . . . are significant governmental interests.” The case law demonstrates that a court will likely hold that “aesthetic beauty” is an “important government interest.” This judgment should be particularly true with regard to protecting aesthetic values of neighborhoods. The prevention of litter is directly linked to promoting neighborhood aesthetics and eliminating blight. A court should find that preservation of neighborhood aesthetics is a substantial governmental interest sufficient to support a time, place, or manner restriction. The governmental interest in preventing litter can also be viewed in relation to another governmental interest—the prevention of trespassing on private property. The prevention of litter eliminates one form of trespass. The Restatement (Second) of Torts states that “(o)ne is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so.” The Restatement further explains that a trespass is committed by throwing an object onto the land of another: Causing entry of a thing. The actor, without himself entering the land may invade
another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land . . . even though no harm is done to the land or to the possessor's enjoyment of it. [FN46]

Indisputably, throwing litter on another's property without consent is a trespass, even when the “litter” is literature. One might argue that a newspaper or book is not an object that could be used to commit a trespass. The logic of that argument appears tenuous at best. If a book cannot be used to commit trespass, is it also exempt from the possibility of being used to commit the tort of battery? Rather than making the assumption that the First Amendment will not permit literature to be classified as an object that can be used to commit a trespass, the better approach is to recognize that literature can be used to commit a trespass and then analyze in a particular controversy whether it is constitutional to apply the common law tort of trespass to the literature.

This position is consistent with other First Amendment decisions.*846 As held by the Ninth Circuit, “(c)itizens are not entitled to exercise their First Amendment rights whenever and wherever they wish.” [FN47] In particular, the Supreme Court has upheld against a First Amendment challenge the validity of a state statute prohibiting trespass as applied to demonstrating on jailhouse grounds. [FN48] The D.C. Circuit has stated that speakers “have no general First Amendment right to trespass on private property,” [FN49] and the Supreme Court has implicitly held the same. [FN50] Protection against trespass has been a key element in upholding injunctions against abortion protestors attempting to exercise their right to free expression at clinics. [FN51]

Clearly then, one can commit a trespass by throwing litter that is also literature. Is the governmental interest in preventing trespass a substantial governmental interest? Another line of cases supports the proposition that the government has a substantial interest in preventing trespass of private property. [FN52] The New Jersey Supreme Court held in Horizon Health Center v. Felicissimo, [FN53] that prevention of trespass serves a significant governmental interest by protecting private property. [FN54] In addition, one district court's ruling on the validity of a litter ordinance specifically relied on private premises protection as a rationale for upholding a ban on the littering of private residences with literature. [FN55] As private property rights are a fundamental aspect of American constitutional government, it is difficult to conceive of any rationale that would describe the government interest in protecting those rights as anything less than substantial.

In summary, while at least one court has held that the prevention of litter is not a substantial governmental interest, that decision failed to consider litter prevention in terms of the now unchallengeable government interest in aesthetics, or in terms of the governmental interest in protecting private property against trespass. A court should conclude, therefore, that the anti-litter law satisfies the “substantial governmental interest” requirement of the time, place, or manner test.

b. Narrowly Tailored

Part two of the second prong of the time, place, or manner test requires that the ordinance be “narrowly tailored” to “serve” a substantial governmental interest. In Woodbury Daily
Times Co. v. Township of Monroe, [FN56] the court invalidated an ordinance that allowed door-to-door distribution only if the materials were left in designated areas. [FN57] The court reasoned that the ordinance did not “effectively serve” the goal of limiting litter because “materials may blow off a porch or entranceway, or out of an overstuffed delivery box.” [FN58] Similarly, the court in Distribution Systems of America, Inc. v. Village of Old Westbury [FN59] stated that an ordinance was not narrowly tailored to prevent litter because “(s)olicited materials can blow off a porch or mail box (sic) and create litter as well.” [FN60]

Such analyses exemplify courts exceeding their proper role. In reviewing whether or not an ordinance is “narrowly tailored” or “serves” a particular interest, courts are not to apply a “least restrictive alternative test,” nor are they to substitute their opinion of what is “effective” for the opinion of the legislature. The Supreme Court has rejected the use of a least restrictive alternative test for analysis of time, place, or manner regulations, stating as follows:

Lest any confusion of the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” [FN61]

Indeed, in Ward v. Rock Against Racism, [FN62] the Supreme Court chided the Second Circuit Court of Appeals for not deferring to “the city's reasonable determination” about how to best serve its interests. [FN63] In explaining the requirement of narrow tailoring, the Court held that the courts should defer to the legislative determination about how to best serve the governmental interest, unless the government “regulate(s) expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” [FN64] In other words, the essence of “narrow tailoring” is that the regulation “focus() on the source of the evils the (government) seeks to eliminate . . . and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.” [FN65]

The Ward Court noted that the court of appeals had “hypothesized” [FN66] as to the availability of “alternative regulatory methods,” and that such hypothesizing simply “reflect(s) nothing more than a disagreement with the (government)” about how best to serve the government’s interest. [FN67] The Court held that “(t)he validity of (time, place, or manner) regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.” [FN68] Instead, the reviewing court should consider whether the government's interest would be less well-served without the regulation.

The requirement of narrow tailoring enunciated in Ward is satisfied by the anti-litter law for two reasons. First, the goal of litter control clearly would be less effectively achieved in the absence of the litter law. Second, by specifically prohibiting all non-solicited materials from being thrown or left on residential property, the state is addressing only those acts that affect each of the governmental interests of preventing trespass and litter, and promoting aesthetics. Since an anti-litter law directly attacks these problems, it is not substantially broader than necessary. Indeed, the anti-litter law complies with the essence
of “narrow-tailoring” noted above. It is directed only against that method of distributing speech that directly causes the harm sought to be eliminated. Finally, as stated in Albertini, the degree to which the statute is less effective than an alternative regulation in controlling litter is an irrelevant consideration in a court challenge. \[\text{[FN70]}\] The Woodbury and Distribution Systems decisions support the proposition that the narrowly-tailored requirement is violated by a statute that allows distribution of solicited papers, but prohibits the distribution of unsolicited papers. These cases, however, err in two respects. First, they misconstrue the narrowly-tailored requirement, failing to recognize that if the legislative body could have found that the governmental interest would be accomplished more effectively because of the legislation, the requirement is satisfied. In Commonwealth v. Sterlace, \[\text{[FN71]}\] the court used the following rationale to distinguish between solicited and unsolicited materials: *850 When it is known that these materials are desired, there is ample reason to believe that homeowners in the area will both collect these materials before they can become either litter or eyesores and assume the responsibility, as they do with newspapers and other home door-step deliveries, to suspend delivery or to arrange for these materials to be picked up in their absence. \[\text{[FN72]}\] This rationale is all that is needed to justify the differential treatment of solicited and unsolicited materials under the narrowly-tailored requirement.

The second way in which the Woodbury and Distribution Systems cases err is that they do not consider the complete package of governmental interests, which further support a distinction between solicited and unsolicited materials. In terms of the interest in protecting private property by preventing trespass, solicited papers do not constitute a trespass, while unsolicited papers clearly do. In terms of the aesthetic nuisance, sign cases have recognized that the government can distinguish between one aesthetic nuisance and another. \[\text{[FN73]}\] Therefore, despite the rulings in Woodbury and Distribution Systems, courts should consider anti-litter laws narrowly-tailored to serve a substantial governmental interest.

3. The Third Prong: Adequate Alternative Channels

The third prong of the time, place, or manner test is that the statute must leave open ample alternative channels for communication of information. This prong is the most puzzling and difficult to apply. The anti-littering law prohibits distribution of materials on private property without owner consent. Many alternatives remain open to would-be distributors. For instance, they may phone ahead or knock on doors to obtain consent. Alternatively, they may place free papers in newsracks on public property, or in businesses or other private locations with permission, or they may distribute them through sidewalk or door-to-door handbilling.

One could make a strong argument, however, that none of the alternative avenues are economically feasible and, consequently, do not meet the constitutional test. In Linmark Associates, Inc. v. \[*851\] Township of Willingboro, \[\text{[FN74]}\] the Supreme Court invalidated a prohibition on posting “For Sale” signs because alternatives involved more cost and less autonomy, and were less effective. \[\text{[FN75]}\] At least two appellate court decisions have used the Linmark rationale to invalidate regulations of door-to-door solicitation. In Project 80's, Inc. v. City of Pocatello, \[\text{[FN76]}\] the court held that while a complete ban on
door-to-door solicitation may have invalidated only one type of communication, the ban eliminated what “may be the most effective way to disseminate information.” [FN77]

Consequently, no reasonable alternative existed.

The Third Circuit agreed with the Project 80's holding in New Jersey Citizen Action v. Edison Township, [FN78] in which it invalidated a ban on door-to-door solicitation before 9:00 p.m. [FN79] The court stated that the trial court had “found that the possible alternatives to door-to-door canvassing, such as direct mail, phone, or shopping mall canvassing, were either ‘much more expensive’ . . . or significantly less effective” than door-to-door solicitation. [FN80] Quoting a portion of the trial court's order, the Third Circuit noted that the increased costs were prohibitive:

The preponderance of the evidence on the record . . . indicates that these plaintiffs do not have meaningful alternatives to evening canvassing. The uncontradicted testimony is to the effect that plaintiffs could not survive economically if the restrictions at issue remain in place. The economic viability of these grass roots organizations is sufficiently tenuous that the use of more expensive means of reaching the public such as direct mail would be prohibitive to their continued operations. Plaintiffs could not survive economically if canvassing was limited to hours of low home occupancy. Further, in some respects there are no alternatives to door-to-door canvassing. [FN81]

Therefore, the Third Circuit concluded that the lack of financially *852 feasible alternatives meant that the ban did not meet the Linmark test. [FN82]

Project 80's and New Jersey Citizen support the proposition that alternative avenues must be financially feasible. On the other hand, they can also be cited for the proposition that “door-to-door distribution may be the most effective way to disseminate information.” [FN83] If true, an anti-litter law does not eliminate all available alternatives, but in fact permits what may be the most effective alternative.

Contradistinguishing the decisions discussed above are the cases holding that the lack of financially feasible alternatives does not equate to a lack of available alternatives. For example, the Supreme Court in Taxpayers for Vincent upheld a ban on all signs, including political signs on the right-of-way. [FN84] In so doing, the Court reasoned as follows:

The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, . . . there is no reason to believe that these same advantages cannot be obtained through other means. [FN85]

Citing Linmark, the dissent suggested that adequate alternative avenues do not exist unless they are reasonably similar in cost:

The average cost of communicating by handbill is . . . likely to be far higher than the average cost of communicating by poster. For that reason, signs posted on public property are doubtless “essential to the poorly financed causes of little people” . . . and their prohibition constitutes a total ban on an important medium of communication. . . . Because the City has completely banned the use of this particular medium of communication, and because, given the circumstances, there are no equivalent alternative media *853 that provide an adequate substitute, the Court must examine with particular care the justifications that the City proffers for its ban. [FN86]

The majority's rejection of the dissent's position on cost, however, indicates that
alternative channels are not inadequate simply because they are more expensive or less effective. Moreover, the language of the majority opinion could support the constitutionality of the anti-litter law, in that the statute does not affect any individual’s right to speak and to lawfully distribute literature in the same location where that person is otherwise prohibited from littering with literature. [FN87]

Adequate alternatives have also been found to exist where amplifiers on subway platforms were banned, even though this ban eliminated substantial access to listeners. [FN88] The Carew-Reid v. Metropolitan Transportation Authority court noted that “(t)he First Amendment . . . does not guarantee appellees access to every or even the best channels or locations for their expression.” [FN89] Similarly, the California Fourth District Court of Appeal, in Savage v. Trammel Crow Co., [FN90] noted that: (T)he adequacy of alternative channels is not measured by the fondest hopes of those who wish to disseminate ideas . . . . Rather, where, as here, an advocate is given a realistic opportunity to reach his intended audience, the alternative channels of communication are adequate. [FN91]

As with the policy in Savage, which prohibited leafleting of cars in a shopping center parking lot, the anti-littering law still provides the would-be litterer with a realistic opportunity to reach the intended audience. [FN92]

*854 In other areas of regulation, the courts have rejected financial feasibility as a consideration in determining whether alternative avenues are available. [FN93] As stated by the Supreme Court, “(t)he inquiry for First Amendment purposes is not concerned with economic impact.” [FN94] In the context of adult entertainment in particular, courts have reiterated the irrelevance of the economic consequences of government action. [FN95] Courts have rejected the argument that an ordinance violates the First Amendment if it requires relocation that would put a plaintiff out of business. [FN96] The courts have also held that the economic impact of a restriction on operating hours is irrelevant for First Amendment purposes. [FN97] Likewise, the cost of developing land is irrelevant. [FN98] Furthermore, an ordinance causing the economic impact by requiring additional employees does not violate the First Amendment; [FN99] nor does an ordinance requiring open booths for viewing sexually explicit material, even if that requirement reduces profitability. [FN100] Finally, courts have specifically held that alternative sites are available for First Amendment purposes even where the sites are economically infeasible. [FN101]

*855 Cases outside of the adult entertainment context have also held that profitability is not a consideration in First Amendment analysis. In Warner Cable Communications v. City of Niceville, [FN102] the Eleventh Circuit, quoting the district court, stated that “the first amendment does not guarantee that someone will listen to . . . speech, nor pay to listen.” [FN103] In another case, a court held that an ordinance regulating cable television businesses resulted, at most, “in an infringement upon plaintiff’s profits, not its First Amendment rights.” [FN104]

As is evident, the cases analyzing the alternative avenues requirement conflict with one another. A number of cases support the proposition that the economic feasibility of alternative avenues is important. [FN105] Others reject economic feasibility and support the proposition that the alternative merely needs to be legally available. [FN106] Given that prohibitions on trespass and littering are traditional forms of regulation, and that “drive-by” littering with advertising newspapers or other materials is a very recent
product of automobile technology, the better answer is that traditional alternatives remain available and are reasonable and adequate.

III. LEGISLATIVE ALTERNATIVES AND POLITICAL CONSIDERATIONS

As set forth above, the hypothetical anti-littering law, as applied to literature left on residential property, complies with the *856 time, place, or manner test. The law would prohibit all papers thrown onto yards or left on doorsteps or doorknobs, unless the owner's consent is obtained, and no public nuisance is created. Such a law is content-neutral. In no way is content considered. The ban would serve a number of substantial governmental interests, including the prohibiting of littering, protecting aesthetics of neighborhoods, and preventing trespass of property. The ban is narrowly-tailored. Indeed, it is directed solely at those activities that specifically transgress each of the governmental interests. Finally, the ban leaves open alternative avenues of communication, including, among other things, door-to-door solicitations and subscription services. While this is not necessarily the result that will be reached by a court, it is the better result.

Legislative Alternative for Local Governments

The discussion above demonstrates that governments can ban littering as applied to literature thrown on private property, but the question remains how local governments should approach this problem. A number of approaches are available. In the State of Florida, one approach is to not enact local legislation, and instead rely solely on the Florida Litter Law. [FN107] The Florida Litter Law is, in fact, identical in relevant part to the hypothetical anti-littering law discussed throughout this Article. That law is valid as applied to literature under the analysis discussed above.

The main drawback to relying on the Florida Litter Law is politics. The law is not regularly used to punish distribution of literature and it is quite possible the state attorney would not want to do so. In addition, by enacting its own ordinance, especially with discussion of the hours of distribution of literature, the local government will have shown the political willpower to attack the littering problem.

Our political system encourages local officials to reject a complete*857 ban. Elected officials are also politicians, and politicians want to find cheap methods of distributing campaign literature. They may not want to cut off door-to-door distribution of literature. Indeed, many will want to send door-to-door volunteers who will leave literature when residents are not home. These politicians may want to ameliorate the burdens of a complete ban on unsolicited materials by allowing them under some circumstances. For instance, the regulation could allow delivery of materials into what might be called a “secondary mailbox.” Similarly, materials might be legally distributed by hanging them on the doorknob or sliding them under the door or doormat. One obvious effect of these exceptions is to increase the number of reasonable alternative avenues for expression. These exceptions allow the distributor to go door-to-door and leave materials at every house, whether or not anyone is home.

A concurring opinion from the Supreme Court supports exceptions such as those described above. In United States Postal Service v. Council of Greenburg Civic Ass'ns,
the Court reversed a lower federal court decision which held that adequate alternative channels of communication did not exist under federal law which prohibited the use of mailboxes by any entity other than the Postal Service. While the majority held that it was unnecessary to determine whether sufficient alternative avenues existed, Justice Brennan did make that determination in his concurrence. Justice Brennan found adequate alternatives existed because “(a)ppellees may, for example, place their circulars under doors or attach them to doorknobs.” Justice Brennan's concurrence and the majority's rejection of the trial court's decision provide strong support for the proposition that an exception allowing the placement of literature on or under doorknobs or doormats leaves open adequate alternative avenues. As stated above, even a complete ban on unsolicited materials leaves alternative avenues. Exceptions to a complete ban allow still more alternative avenues.

Allowing exceptions to a complete ban on unsolicited literature does have one drawback. One might argue that when an exception exists, the government is no longer preventing all the trespasses or all aesthetic blight, and that therefore the regulation is not narrowly-tailored to serve the governmental interest. The response to such an argument depends on the exception at issue. For instance, with regard to the secondary mailbox exception, the simple answer is that delivery into a secondary mailbox is not a trespass and therefore does not implicate that governmental interest. With regard to the placement of literature on doorknobs or under doormats, one may counter this argument by noting that the government need not prohibit all activities which infringe on the government's interest, but instead may enact partial solutions.

In Gold Coast Publications, Inc. v. Corrigan, the City of Coral Gables enacted extensive restrictions on the appearance of newsracks, based in part on the governmental interest in aesthetics. The City did not enact similar regulations for awnings or trash cans. The Eleventh Circuit upheld the constitutionality of the ordinance, reasoning as follows:

(The Plaintiff) argues that the color and lettering restrictions are invalid because they do not apply to other fixtures in the business district, such as awnings and trash receptacles. The Supreme Court has allowed cities to enact partial solutions to further their aesthetic interests, . . . (“Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance”) . . ., and has explicitly rejected a requirement that such solutions be part of a “comprehensive plan” to improve aesthetics . . . Following those cases, this circuit has also permitted partial solutions addressing aesthetic concerns in the commercial speech context. . . . Furthermore, other courts have upheld newsrack ordinances in the absence of an overall scheme of regulation . . . . Coral Gables chose to require that all newsracks be painted beige and brown consistent with its Mediterranean theme, but the City was not obligated to dictate the colors of trash receptacles or awnings to ensure that the newsrack regulation would survive constitutional attack. For these reasons, we reject the district court's conclusion that the color and size of lettering provisions are not narrowly tailored to serve the City's aesthetic goals.

The doorknob/doormat exception aims to inhibit the possibility that unsolicited literature will change location by wind or other such force. As such, it attacks those aesthetically harmful private trespasses which are likely to injure not only the immediate property, but also neighboring yards or even the entire neighborhood. Thus, even with the
exceptions, the ordinance does not fail the narrowly-tailored test.

IV. CONCLUSION

A government regulation may validly prohibit unsolicited materials from being left on private property, even when the regulation grants exceptions. The regulation will be invalidated only if a court finds that throwing literature on private property is such a uniquely effective or efficient way to communicate that the communication cannot be adequately accomplished by any alternative avenues. The better result is to recognize that because door-to-door solicitation, handbilling and other traditional methods of communication remain, “litter-ature” should not be exempt from trespass and littering laws.

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[FN3]. See Armstrong, 41 N.W. at 277 (declaring that bans on the distribution of literature had been held invalid in other cases).

[FN4]. 308 U.S. 147 (1939).

[FN5]. See id. at 162-65.


[FN7]. 318 U.S. 413 (1943).

[FN8]. See id. at 415-17.

[FN9]. 316 U.S. 52 (1942).

[FN10]. See id. at 54-55. The Valentine decision is of questionable validity in light of the Supreme Court’s recent decisions in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424-28 (1993) and 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1514-15 (1996), wherein the Court held that commercial speech has nearly as much protection under the First Amendment as non-commercial speech, and that the government must have a good reason to treat commercial speech differently than non-commercial speech.

[FN12] See id. at 143-49.


[FN17] See Discovery Network, 507 U.S. at 429; see also Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-30 (1987) (holding that sales tax exemptions are content-based when they include newspapers and religious, professional, trade, or sports journals, but not general interest magazines).


[FN19] Compare Miller v. City of Laramie, 880 P.2d 594, 600-01 (Wyo. 1994) (Golden, J., dissenting) (arguing the ordinance designed to prevent litter “is serving a significant governmental interest”), with Woodbury Daily Times Co. v. Township of Monroe, 610 F. Supp. 916, 918 (D.N.J. 1985) (observing that “(p)revention of litter . . . has never been considered a particularly weighty objective”).

[FN20] 308 U.S. at 162 (emphasis added).

[FN21] Id.

[FN22] Id.


[FN24] Id. 808-09.


[FN45]. Restatement (Second) of Torts S 158 (1965).

[FN46]. Id. at cmt. 1; see also 74 Am. Jur. 2d Trespass S 55 (1991); 87 C.J.S. Trespass S 13 (1954).

[FN47]. Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 269 (9th Cir. 1995).


[FN50]. See Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) (holding that since privately owned and operated shopping center had not been dedicated to public use, respondents were not entitled to exercise First Amendment rights unrelated to the center's operations within the center).


[FN53]. Id.

[FN54]. See id. at 1270. While the court in Horizon Health referred to the governmental interest as “significant,” it actually employed the time, place, or manner test, and it appears to have used that term to mean substantial. See id.

[FN55]. See Buxbom v. City of Riverside, 29 F. Supp. 3, 7 (S.D. Cal. 1939). While the Buxbom court did not engage in a time, place, or manner analysis, and therefore did not specifically state that the protection of private property or the prevention of trespass is a “substantial” governmental interest, the opinion leaves little doubt that such was the court's view. Id.


[FN57]. See id. at 919.

[FN58]. Id.

A few courts have invalidated, on overbreadth grounds, statutes or ordinances requiring prior consent before leaving literature on others' property. See Van Nuys Pub'l g Co. v. City of Thousand Oaks, 97 Cal. Rptr. 777 (Cal. 1971) (hereinafter Van Nuys II); Toms River Pub'l g Co. v. Borough of Manasquan, 316 A.2d 719 (N.J. Super. Ct. Ch. Div. 1974). In Van Nuys II, the ordinance did not define “litter,” but instead declared the distribution of handbills, circulars, dodgers, newspapers, papers, booklets, posters, and any other printed matter or advertising literature of any kind, without a property owner's consent, to be a punishable public nuisance. See Van Nuys II, 97 Cal. Rptr. at 778-79. The court ruled that the ordinance “exhibits the familiar unconstitutional vice of ‘overbreadth,’ proscribing constitutionally protected activity along with ‘littering.’” Id. at 778.

The Van Nuys II court's analysis is faulty in that it does not employ the time, place, or manner test. In sum, the essence of the court's reasoning is that because free speech rights are restricted by the ordinance intended to curtail litter, the ordinance is not narrowly tailored and is automatically unconstitutional. See id. at 784. Such an approach not only misapprehends the narrowly tailored requirement, but also fails to undertake a full time, place, or manner analysis. See infra notes 70-73 and accompanying text.


Id.

Id. at 800; see also id. at 798-802.

Id. at 799 (footnote omitted).

Id. at 799 n.7.

Id. at 800.

491 U.S. at 800.

Id. at 800.

Id. (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

See id.

Albertini, 472 U.S. at 689.


Id. at 1069.


[FN75]. See id. at 96-97; see also City of Ladue v. Gilleo, 512 U.S. 43, 57 & n.16 (1994) (noting residential signs are a cost-effective communication form that “may have no practical substitute”).

[FN76]. 942 F.2d 635 (9th Cir. 1991).

[FN77]. Id. at 639.

[FN78]. 797 F.2d 1250 (3d Cir. 1986).

[FN79]. See id. at 1259.

[FN80]. Id. (quoting the district court's finding (citation omitted)).

[FN81]. Id.

[FN82]. See id. at 1262.

[FN83]. Project 80's, 942 F.2d at 639; see also New Jersey Citizen, 797 F.2d at 1262.

[FN84]. See 466 U.S. at 816-17.

[FN85]. Id. at 812 (footnote and citation omitted).

[FN86]. Id. at 820-21 (Brennan, J., dissenting) (citations omitted).

[FN87]. See United States Postal Serv. v. Council of Greenburg Civic Ass'n's, 453 U.S. 114, 135 (1981) (Brennan, J., concurring) (noting that with regard to the federal prohibition on the deposit of unstamped mailable matter in a letter box, available alternatives are door-to-door delivery and placing literature on doorknobs and under door mats).


[FN89]. Id. at 919 (emphasis added).


[FN91]. Id. at 308 (citation omitted).

[FN92]. See also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986)
(clarifying that “(W)e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.”); Clark v. Community for Creative Non-Violence, 468 U.S. 293, 295 (1984) (articulating that a regulation prohibiting protesters who sleep in parks to demonstrate the plight of the homeless, leaves open ample alternatives of “symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil”).

[FN93] See Spokane Arcade, Inc. v. City of Spokane, 75 F.3d 663, 664 (9th Cir. 1996) (noting the district court’s holding that a “relevant inquiry (under the First Amendment) turn(s) on whether the plaintiffs were free to engage in their protected speech and not on whether the regulation at issue resulted in decreased profits”); see also Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123, 132 n.10 (3d Cir. 1993) (finding that the “First Amendment does not guarantee anyone a profit”); International Food & Beverage Sys. v. City of Ft. Lauderdale, 794 F.2d 1520, 1526 (11th Cir. 1986); Movie & Video World v. Board of County Comm’rs, 723 F. Supp. 695, 700 (S.D. Fla. 1989).


[FN95] See, e.g., Holmberg v. City of Ramsey, 12 F.3d 140, 144 (8th Cir. 1993); Specialty Malls v. City of Tampa, 916 F. Supp. 1222, 1231 n.8 (M.D. Fla. 1996).

[FN96] See Holmberg, 12 F.3d at 144; see also Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858, 864 (8th Cir. 1994).

[FN97] See Mitchell, 10 F.3d at 132 n.10.


[FN99] See Spokane Arcade, 75 F.3d at 665.

[FN100] See Doe v. City of Minneapolis, 898 F.2d 612, 620 (8th Cir. 1990).

[FN101] See Specialty Malls, 916 F. Supp. at 1231 n.8; T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500, 1504-05 (M.D. Fla. 1992); see also D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 147 (4th Cir. 1991) (commenting that available land need not be “commercially desirable”).

[FN102] 911 F.2d 634 (11th Cir. 1990).

[FN103] Id. at 638 (quoting from the district court’s unpublished opinion).

[FN104] Storer Cable Communications v. City of Montgomery, 806 F. Supp. 1518, 1562
(M.D. Ala. 1992) (quoting National Mkt. Reports, Inc. v. Brown, 443 F. Supp. 1301, 1304 (S.D. W. Va. 1978)). In a twist on the economic consideration, the Supreme Court held in Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2461-63, 2469-70 (1994), that Congress has a governmental interest in protecting the economic viability of broadcast television stations. For the plurality, the result in Turner Broadcasting System turned on the question of sufficiency of the proof as to whether the regulation supported the interest asserted. See id. at 2472. The plurality did not question the importance of the government's interest in protecting financial feasibility. See id.

At least in the circumstances presented in Turner Broadcasting System, the government can be concerned about the question of financial feasibility. The question in the anti-littering context is whether the courts can or must be concerned with the financial feasibility of one avenue of speech when determining its availability.

[FN105]. See supra notes 74-82 and accompanying text.

[FN106]. See supra notes 83-84, 92-103 and accompanying text.

[FN107]. Fla. Stat. S 403.413 (1995). In relevant part, the Florida Litter Law reads as follows:
(4) Dumping litter prohibited--Unless otherwise authorized by law or permit, it is unlawful for any person to dump litter in any manner or amount:
(c) In or on any private property, unless prior consent of the owner has been given and unless such litter will not cause a public nuisance or be in violation of any other state or local law, rule, or regulation.
Id. S 403.413(4)(c).


[FN109]. See id. at 119-20, 134 (The appeal was from the United States District Court for the Southern District of New York).

[FN110]. See id. at 132.

[FN111]. See id. at 135-36 (Brennan, J., concurring).

[FN112]. Id. at 135; see Holmberg v. City of Ramsey, 12 F.3d 140, 144 (8th Cir. 1993); Specialty Malls v. City of Tampa, 916 F. Supp. 1222, 1231 n.8 (M.D. Fla. 1996).

[FN113]. See, e.g., Holmberg, 12 F.3d at 144; Specialty Malls, 916 F. Supp. at 1231 n.8.

[FN114]. 42 F.3d 1336 (11th Cir. 1994).

[FN115]. See id. at 1340-44.

[FN116]. See id. at 1342.
[FN117]. Id. at 1347 (emphasis added, citations omitted).

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