McGeorge Law Review

Volume 42 | Issue 2 Article 7

1-1-2010

Vehicle Leafleting: Suggestion for Municipalities Seeking to Defend Vehicular Leafleting Bans against First Amendment Challenges

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TABLE OF CONTENTS

I. INTRODUCTION 448
A. *The History of Leafleting in America* 448
B. *Changing American Attitudes Towards Litter* 449
C. *Overview of this Comment* 450

II. THE CONSTITUTIONALITY OF LEAFLETING GENERALLY 451

III. THE EXISTING CIRCUIT SPLIT ON THE CONSTITUTIONALITY OF ANTI-LEAFLETING ON CAR WINDSHIELD ORDINANCES 452
A. *The Sixth Circuit* 452
B. *The Seventh, Eighth, and Ninth Circuits* 454
1. Horina v. Granite City 454
2. Krantz v. Fort Smith 456
3. Klein v. San Clemente 457

IV. THE "NARROWLY-TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST" STANDARD 459
A. *Narrowly-Tailored* 459
B. *Substantial Government Interest* 460

V. OPTIONS FOR CITIES THAT WISH TO DEFEND THEIR ANTI-LEAFLETING ORDINANCES 460
A. *Empirical Evidence that Leafleting Contributes to a Municipality's Litter Problem* 461
B. *The Anti-Leafleting Ordinance is Part of a Comprehensive Plan to Prevent Litter* 462

VI. ADEQUATE ALTERNATIVE CHANNELS FOR COMMUNICATING 465

VII. CONCLUSION 466

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I. INTRODUCTION

A. The History of Leafleting in America

The distribution of leaflets, commonly known as handbills or pamphlets, has a long history in the United States.[1] Uninvited dissemination of ideas through personal solicitation at private homes has been utilized even longer.[2] Dissemination of information before and during the American Revolution, particularly through leafleting, played a major role in solidifying popular support for breaking with the British Empire.[3] Some of the most important documents in early American history, including *The Federalist Papers* and Thomas Paine's *Common Sense*, were originally published as pamphlets under pseudonyms.[4] The writing of leaflets and pamphlets during colonial America was an important profession, and as they were "inexpensive to print . . . , cheap to buy, easy to read, and, more significant, easy to write," they became "the dominant vehicle of propaganda and debate."[5]

The Supreme Court has declared that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."[6] The influence of leaflets in the formation of early America—including influencing the formation of the United States Constitution, a move towards a secular government, and launching the careers of founding fathers such as Thomas Jefferson and Benjamin Franklin—shows that the Court's finding was not merely hyperbole.[7] Due to the rise of newspapers, magazines, books, and most recently, the Internet, we no longer live in the "age of the pamphlet." However, leafleting, both anonymous and in-person, continues to play a prominent role in contemporary America.[8]

Although modern-day leaflets do not and probably will not have the same historical impact of early American leaflets, they nonetheless maintain an important function. People use leaflets today for a variety of purposes, including advertising local businesses, soliciting votes for political candidates, spreading religious ideas, sharing information about upcoming concerts and other events, and informing local citizens what the local deli offers on its take-out menu (not to

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1. Stephen Durden & David Ray, *Litter or Literature: Does the First Amendment Protect Littering of Neighborhoods?*, 26 STETSON L. REV. 837, 838 (1997).

2. Martin v. City of Struthers, 319 U.S. 141, 141 (1943) ("For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants . . . .").

3. *See* Durden & Ray, *supra* note 1, at 837 ("Our country owes its very origin to pamphleteers such as Thomas Paine, whose writings helped engender a spirit of rebellion amongst the American colonists.").

4. Talley v. California, 362 U.S. 60, 65 (1960); Durden & Ray, *supra* note 1, at 837.

5. LITERARY HISTORY OF THE UNITED STATES: HISTORY 131 (Robert E. Spiller et al. eds., 4th ed. 1974).

6. *Talley*, 362 U.S. at 64.

7. *See generally* LITERARY HISTORY OF THE UNITED STATES, *supra* note 5, at 131-45 (examining how leaflets were used in early America).

8. SPILLER ET AL., *supra* note 5, at 145; *see also* Durden & Ray, *supra* note 1, at 837 ("More than 200 years later, pamphlet distributors still roam the streets of our cities and towns.").

mention the all important buy-one-get-one-free coupon).[9] While leaflets have served, and continue to serve, an important function in our society, people often do not want them. What happens to these unwanted leaflets? "Most often [leaflets] are thrown onto the sidewalk, street[,] or gutter because there is no trash can nearby,"[10] which contributes to a municipality's litter problem.

B. Changing American Attitudes Towards Litter

Generally speaking, the term "litter" is a fairly recent concept.[11] In 1892, naturalist John Muir created the Sierra Club to help preserve nature's natural beauty[12] and in the early twentieth century, President Theodore Roosevelt set aside more federal land for protection than any other administration before him.[13] Despite these early efforts at conservation, up until the middle of the twentieth century, Americans continued to litter "with little regard . . . [for] its effects on the environment."[14]

Beginning in the 1960s, American attitudes towards the preservation of the environment began to change.[15] During the Johnson administration, Lady Bird Johnson encouraged the cleanup of litter as part of her "Beautify America" campaign.[16] In 1969, the Cuyahoga River fire had more impact on the American attitude towards pollution than any prior conservation efforts.[17] The fact a major American river was so polluted that it caught fire brought environmental issues into the national spotlight.[18] The Nixon administration responded to public concern about the environment by creating the Environmental Protection Agency, and Congress subsequently passed other environmental reforms, including the Clean Air Act and the Clean Water Act to fight pollution.[19] While

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9. Durden & Ray, *supra* note 1, at 837, 839.

10. Letter from Martin J. Golden, Senator, N.Y. State Senate, to Richard Platkin, Counsel to the Governor of N.Y. (July 21, 2003) (on file with the *McGeorge Law Review*).

11. STEVE SPACEK, THE AMERICAN STATE LITTER SCORECARD: A SOCIOPOLITICAL INQUIRY INTO LITTERING AND THE RESPONSE ROLE OF 50 AMERICAN STATES 3 (Mar. 9, 2008), *available at* http://ftp.dot.state.mn.us/adopt/files/AmericanStateLitterScorecard.pdf (on file with the *McGeorge Law Review*) ("The American Public Works Association standardized the term *litter* in the 1950's [sic] to include 'garbage . . . refuse . . . and rubbish . . . ,' known later as a form of solid waste.").

12. TIMOTHY EGAN, THE BIG BURN: TEDDY ROOSEVELT & THE FIRE THAT SAVED AMERICA 31 (2009).

13. ERIN C. TRESNER, FACTORS AFFECTING STATES' RANKING ON THE 2007 FORBES LIST OF AMERICA'S GREENEST STATES 7 (2009), *available at* http://ecommons.txstate.edu/cgi/viewcontent.cgi?article=1295&context=arp (on file with the *McGeorge Law Review*) ("Between 1903 and 1909, Roosevelt created a total of fifty-one wildlife refuges and five additional national parks.").

14. SPACEK, *supra* note 11, at 3.

15. *See* TRESNER, *supra* note 13, at 9 (noting that the publication of Rachel Carson's *Silent Spring*, "which explored the effects of exposure to the pesticide DDT . . . on humans, animals, and the environment," led to an independent commission to investigate her claims and "may have forever changed the way Americans view their environment").

16. *Id.* at 11.

17. Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L. J. 89, 90-91 (2002).

18. *Id.* at 91.

19. TRESNER, *supra* note 13, at 13.

these government reforms battled pollution on a national level, the anti-littering campaign took a more grassroots approach.

Keep America Beautiful (KAB) was founded in New York City in 1953 with the goal of promoting "national cleanliness."[20] KAB began running a series of Public Service Announcements to remedy the country's littering problem during the 1960s and 1970s, which culminated in one of the most successful and recognizable campaigns in history—the "Crying Indian" commercial.[21] Subsequent research funded by KAB discovered the seven primary sources of litter and helped awaken the public consciousness to the plague of litter.[22] Thanks to KAB, volunteers collected approximately sixty-five million pounds of litter in 2009.[23]

C. *Overview of this Comment*

Part II of this Comment begins by reviewing important Supreme Court decisions dealing with the right to leaflet, noting that in general, leafleting is protected speech under the First Amendment. In Part III, this Comment explores the circuit split with respect to leafleting, noting the reasoning behind each court's decision, and concludes that the basis for the split is whether the ordinances are narrowly tailored to serve a substantial governmental interest. Next, Part IV of this Comment examines Supreme Court decisions on the "narrowly tailored for a substantial governmental interest" prong in order to determine whether municipalities may constitutionally defend existing ordinances. Part V proposes ways that municipalities may defend their ordinances in court based on circuit distinctions and cases analyzing the "narrowly-tailored" concept. Part VI examines the adequate alternative channel of communication prong. Finally, this Comment concludes that there are no guaranteed ways to defend an anti-leafleting ordinance in court, but by adopting certain strategies, a municipality may have more success than their counterparts in the Seventh, Eighth, and Ninth Circuits.

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20. KAB: A Beautiful History, http://www.kab.org/site/PageServer?pagename=kab_history (last visited Feb. 15, 2010) (on file with the *McGeorge Law Review*).

21. *Id.* In the "Crying Indian" commercial, a Native American cries when a motorist throws a bag of trash at his feet because he feels "a deep, abiding respect for the natural beauty that was once this country." To watch the commercial, see http://www.youtube.com/watch?v=_R-FZsysQNw (last visited Mar. 7, 2010).

22. KAB: A Beautiful History, *supra* note 20. The seven primary sources of litter are: (1) pedestrians, (2) motorists, (3) households, (4) commercial businesses, (5) construction sites, (6) uncovered vehicles, and (7) loading/unloading operations. Seven Sources of Litter, http://tristatehomepage.com/search-fulltext?&nxd_id=4018 (last visited Feb. 15, 2010) (on file with the *McGeorge Law Review*).

23. Keep America Beautiful 2010 Fact Sheet, http://www.kab.org/site/DocServer/Fact_Sheet_2010.pdf?docID=4821 (last visited Feb. 15, 2010) (on file with the *McGeorge Law Review*).

II. THE CONSTITUTIONALITY OF LEAFLETING GENERALLY

The Supreme Court has long recognized that the distribution of leaflets is protected by the First Amendment's free speech prong[24]—that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[25] In *Schneider v. New Jersey*, the Court, deciding upon the constitutionality of various ordinances that prohibited the distribution of leaflets to prevent litter, held that "a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, [but] may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion."[26] The Court was "of opinion 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."[27] Later Court decisions extended leafleting protections. In *Lovell v. City of Griffin,* the Court denied the constitutionality of ordinances that required a license to distribute leaflets.[28] In *Jamison v. Texas*, the Court held that municipalities cannot "prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek . . . to promote the raising of funds for religious purposes."[29] And in *Martin v. City of Struthers*, the Court held that the First Amendment allows the distribution of leaflets to the homes of private citizens.[30]

Although the Court has recognized a broad right to distribute leaflets, that right is not absolute.[31] For example, in one case, the Court upheld a federal statute[32] prohibiting the placement of unstamped mail into residential or personal

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24. Schneider v. New Jersey, 308 U.S. 147, 162 (1939)

25. U.S. CONST. amend. I.

26. *Schneider*, 308 U.S at 160.

27. *Id.* at 162.

28. 303 U.S. 444, 452 (1938) ("Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.").

29. 318 U.S. 413, 417 (1943).

30. *See generally* 319 U.S. 141, 142 (1943) (declaring unconstitutional an ordinance that prohibited those distributing leaflets from "summon[ing] the inmate or inmates of any residence to the door for the purposes of receiving such handbills"); *see also* Durden & Ray, *supra* note 1, at 839-40 (noting a brief history of what the authors describe as "litter-ature").

31. *See* Durden & Ray, *supra* note 1, at 837 (listing the variety of forms of leafleting, including leaving unrequested leaflets by placing them on private door handles, porches, or merely throwing them into the front yards of private residences).

32. 18 U.S.C. § 1725 (2009).

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any latter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined under this title.

Id.

mailboxes, noting that the statute did not infringe upon First Amendment rights.[33] Today, when determining the validity of restrictions on speech—such as the anti-leafleting ordinances—the Court uses a three-part test to determine the restrictions' constitutionality. A government may reasonably restrict the distribution of leaflets if: (1) they are neutral as to the content of the restricted speech, (2) are "narrowly tailored to serve a significant governmental interest," and (3) "they leave open ample alternative channels for communication of the information."[34]

III. THE EXISTING CIRCUIT SPLIT ON THE CONSTITUTIONALITY OF ANTI-LEAFLETING ON CAR WINDSHIELD ORDINANCES

Whether a municipality may constitutionally restrict the leafleting of car windshields is currently undecided due to a circuit split; however, that has not stopped cities, including Portland, Las Vegas, and Atlanta, from enacting these ordinances.[35] New York has even enacted a state-wide ban on the practice.[36]

A. *The Sixth Circuit*

The Sixth Circuit is the only circuit that has upheld a city's ban on the leafleting of vehicles on public streets.[37] In 1952, the city council of Catlettsburg, Kentucky, passed Catlettsburg City Ordinance § 113.05, entitled *Placing Posters on Vehicles*.[38] The ordinance states that:

> It shall be unlawful for any person to place or deposit or in any manner affix or cause to be placed or deposited or affixed to any automobile or other vehicle or other automotive vehicle, any handbill, sign, poster, advertisement, or notice of any kind whatsoever, unless he be the owner thereof, or without first having secured in writing the consent of the owner thereof.[39]

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33. *See* U.S. Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (upholding the constitutionality of 18 U.S.C. § 1725).

34. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Many Supreme Court cases explain the "time, place, and manner" test. *Ward* is used in this Comment because I believe it is a good analysis of the test and because the Durden & Ray article uses the *Ward* case, which was helpful in my research. *See generally* Durden & Ray, *supra* note 1 (using *Ward* as the main case to explain the "time, place, and manner" test).

35. PORTLAND, OR., CITY CODE § 16.70.510 (1992); LAS VEGAS, NEV., MUN. CODE § 6.42.145 (1988); ATLANTA, GA., CODE OF ORDINANCES § 6-2 (2005).

36. N.Y. VEH. & TRAF. LAW § 375(b) (McKinney 2009).

37. *See* Jobe v. City of Catlettsburg, 409 F.3d 261 (6th Cir. 2005) (upholding the Kentucky city's local ordinance that banned the leafleting of vehicles).

38. *Id.* at 262-63.

39. CATLETTSBURG, KY., CODE § 113.05 (1952).

In 2002, Leonard Jobe, head of the American Legion Post in Catlettsburg, began placing leaflets for the American Legion under the windshield wipers of cars parked on public property.[40] The City of Catlettsburg (City), in response to Jobe's leafleting, enforced the ordinance and fined him five hundred dollars.[41] According to the mayor of Catlettsburg, Jobe was the first person the City had enforced the ordinance against. While the mayor explained the city had a "littering problem" and the ordinance was one of the means used to address it,[42] the mayor also admitted "the ban on leaflets under car windshield wipers 'really did not enhance' the City's anti-littering efforts."[43] Jobe subsequently filed suit against the City, arguing the ordinance violated his First Amendment right to free speech.[44] The district court upheld the City's ordinance and Jobe appealed to the Sixth Circuit.[45] The Sixth Circuit affirmed the district court's ruling, holding that Jobe's First Amendment rights were not violated because Catlettsburg's anti-littering ordinance:

> Represents a content-neutral restriction on the time, place and manner of speech, because the law narrowly regulates the problems at hand . . . , because the law leaves open ample alternative avenues for distributing leaflets in an inexpensive manner . . . and because the law has much in common with a ban on placing signs on utility poles.[46]

When discussing the content-neutrality portion of the test, both Jobe and the City agreed the ordinance did not "draw distinctions based on the topic of speech at issue or the point of view of the speaker," nor did the ordinance have anything "to do with content of the literature being distributed . . . ."[47] Next, the Sixth Circuit found the ordinance served two significant governmental interests: (1) the prevention of litter and "visual blight," and (2) the interests of private citizens "in

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40. *Jobe*, 409 F.3d at 263.

41. *Id.*

42. *Id.*

43. Petition for Writ of Certiorari for Plaintiff-Appellant, Jobe v. City of Catlettsburg, at 4, 126 S. Ct. 389 (Aug. 4, 2005) (No. 05-188), *available at* 2005 WL 1902124.

44. *Jobe*, 409 F.3d at 263.

45. *Id.*

46. *Id.* In the context of the First Amendment, content-neutral speech restrictions are those restrictions that do not favor one viewpoint expressed in speech over another. Content-based speech restrictions, on the other hand, are restrictions that draw distinctions between the viewpoints expressed and the speaker, and are almost always unconstitutional unless they fall under a recognized First Amendment exception, such as "fighting words," incitement, or obscenity. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (examining the "fighting words" doctrine); Brandenburg v. Ohio, 395 U.S. 444 (1969) (examining restrictions on speech that is likely to incite people to imminent illegal action); Miller v. California, 413 U.S. 15 (1973) (laying out a three-part test to determine whether speech is "obscene" and can be regulated). Content-neutral restrictions are viewed under the time, place, and manner test, and will be held constitutional if they "are justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

47. *Jobe*, 409 F.3d at 268.

having their private property left alone by those who do not have permission to use it."[48] Finally, the court held that the ordinance was narrowly designed to prevent the litter that resulted from the placement of leaflets on vehicles.[49]

In the court's analysis of the city's legitimate interest, it relied heavily on *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,[50] a Supreme Court case that upheld a ban on the attachment of signs and posters to city owned utility poles.[51] The Sixth Circuit reasoned that "[i]f a city may ban signs from utility poles due to the visual blight caused by them, it follows that a city may ban the placement of leaflets and signs on privately owned cars."[52] The Catlettsburg ordinance prevented not only the litter placed on the cars themselves, but also the subsequent litter that would fall from the cars' windshields to the city's streets.[53] Finally, the court held that the ban on placing leaflets on car windshields left open numerous avenues for distributing information, including approaching pedestrians and handing them leaflets, waiting on the street or at a parking lot and asking those approaching their vehicles if they wanted to accept the leaflet, going from door-to-door to offer their literature to citizens, or mailing the leaflets to residents.[54] The Catlettsburg City Code even expressly allowed for the distribution of leaflets "at private residences if they are 'placed on a porch or securely fastened to prevent them from being blown or scattered about.'"[55]

Ultimately, the Sixth Circuit found that placing leaflets on car windshields was much more like littering—just like putting leaflets on someone's front lawn or anyplace "not otherwise designed by intent or usage to receive and hold literature distributed by others"—rather than simply distributing information to the willing public.[56]

B. The Seventh, Eighth, and Ninth Circuits

1. Horina v. Granite City

Donald Horina, a retired school teacher and born-again Christian from St. Charles, Missouri, uses leaflets to tell others about his religious beliefs and "their need to be born again."[57] As part of his leafleting, Horina would frequently drive across the Mississippi River to Granite City, Illinois, to distribute pro-life

48. *Id.*
49. *Id.* at 269.
50. 466 U.S. 789 (1984).
51. *Jobe*, 409 F.3d at 269-70.
52. *Id.*
53. *Id.* at 270.
54. *Id.*
55. *Id.* (quoting language from Catlettsburg City Code § 113.03).
56. *Id.* at 273-74.
57. Horina v. Granite City, 538 F.3d 624, 627 (7th Cir. 2009).

literature on car windshields parked near an abortion clinic.[58] A security guard at the clinic twice asked Horina to stop leafleting his vehicle, but Horina continued to do so.[59] The security guard then contacted local police, and Horina was cited for violating Granite City Municipal Code section 5.78.020, which stated that "[n]o person shall deposit or throw any handbill in or upon any vehicle. It is not unlawful for a person to handout or distribute a handbill to any occupant of a vehicle who is willing to accept it."[60] Approximately two years later, Horina filed suit against the City alleging the ordinance violated his First Amendment right to free speech as it was an "unreasonable restriction[] on the time, place, and manner in which he could place handbills on automobile windshields . . . ."[61] The district court ruled in favor of Horina, enjoining the City from enforcing its leafleting ban while also noting the City failed to show any evidence the ordinance resulted in any reduction of litter in the City.[62] On appeal, the Seventh Circuit affirmed, holding the ordinance unconstitutional.[63]

The City failed to meet its burden of showing that the ban served a substantial government interest because it did not demonstrate that the ordinance actually resulted in a decrease in litter.[64] But even if it had, according to the Seventh Circuit, the ordinance was neither narrowly tailored nor did it leave open sufficient alternative opportunities for Horina to spread his message. The court found that the ban was not narrowly tailored because the City had other ordinances that dealt exclusively with litter and could fight its litter problem without the broad ban on leafleting.[65] The court cited *Schneider v. New Jersey*,[66] and suggested that a more obvious method of reducing litter was by punishing "'those who actually throw papers on the streets.'"[67] Additionally, the Seventh Circuit held that the alternate forms of communication put forth by the City—distributing leaflets from person-to-person by waiting at parked cars, walking door-to-door, or by mail—were not feasible due to the increased time and cost a leafleter would incur in disseminating his or her information.[68]

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58. *Id.*

59. *Id.*

60. GRANITE CITY, ILL., MUN. CODE § 5.78.020 (2005); *Horina*, 538 F.3d at 627.

61. *Horina*, 538 F.3d at 628.

62. *Id.* at 629.

63. *See id.* at 636 ("As such, the Ordinance cannot survive constitutional scrutiny.").

64. Granite City relied on a "common sense" argument that leafleting causes litter and also pointed to the fact that other municipalities had passed similar laws as proof that the ordinances led to a decrease in littering. *Id.* at 633-34.

65. *Id.* at 635.

66. 308 U.S. 147 (1939).

67. *Horina*, 538 F.3d at 635 (quoting Schneider v. New Jersey, 308 U.S. 147, 162-63 (1939)).

68. *Id.* at 636.

2. Krantz v. Fort Smith

The Twentieth Century Holiness Tabernacle Church believes it is its duty "to 'preach the gospel to every living person on earth.'"[69] In order to spread its religious message, the Arkansas Church placed leaflets under the windshield wipers of unoccupied vehicles in nearby cities and towns.[70] While distributing their leaflets throughout Arkansan towns[71], the Church's members were allegedly arrested and threatened with other punishment for violating the local ordinances banning the distribution of leaflets on parked cars.[72] The ordinance for the City of Van Buren, almost identical in wording to the other cities' ordinances at issue,[73] stated:

> It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill or other hand-distributed advertisement upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, [or] alley within the City of Van Buren, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute . . . any handbill to any occupant of the vehicle that is willing to accept it.[74]

The Plaintiffs filed suit alleging that the Cities' ordinances were unconstitutional as overly-broad restrictions on the right to distribute religious material.[75] The district court, while noting that the ordinances may "have some impact on expressive conduct," ruled in favor of the Cities, holding that the anti-leafleting ordinances satisfied the time, place, and manner restrictions on public speech.[76]

On appeal by the Church, the Eighth Circuit reversed.[77] The court found the Cities' statutes to be unconstitutional because "the ordinances [were] not narrowly tailored to serve a significant governmental interest."[78] Here, the court reasoned the ordinances suppressed more speech than was reasonably necessary to serve the Cities' interest of preventing litter on the streets.[79] The Cities did not, or were unable to, present evidence establishing the indiscriminate placement of

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69. Krantz v. City of Fort Smith, 160 F.3d 1214, 1215-16 (8th Cir. 1998).

70. *Id.* at 1216.

71. The four defendants in the case were the cities of Fort Smith, Van Buren, Alma, and Dyer. *Id.* at 1215.

72. *Id.*

73. *Id.* at 1216 n.3.

74. VAN BUREN, ARK., ORDINANCES No. 5-1983; *Krantz*, 160 F.3d at 1216.

75. *Krantz*, 160 F.3d at 1215.

76. *Id.* at 1216.

77. *Id.* at 1222.

78. *Id.* at 1219.

79. *Id.* at 1221. The court also made the assertion that most of those who are unwilling to receive the leaflet would not throw it on the ground. *Id.*

leaflets on parked cars contributed to litter in the Cities.[80] Another factor that weighed in the Eighth Circuit's decision was there was a much less restrictive way to prevent the placement of unwanted leaflets on cars—vehicle owners could place a "no solicitation" sign on their dashboards while parked.[81] The court noted that even had the Cities been able to present evidence showing a "cause-and-effect relationship," the ordinances could still be unconstitutional. Further, it explained that "a governmental restriction does not have to be the least restrictive or least intrusive means of regulation," but that it must not "curtail substantially more speech than is necessary to accomplish its purpose, which is precisely what the ordinances do."[82]

3. Klein v. San Clemente

The Ninth Circuit is the most recent court to look at the constitutionality of leafleting on parked cars.[83] In June of 2007, Steve Klein and several like-minded people distributed leaflets in San Clemente, California, espousing their views on immigration policy.[84] The group started handing their leaflets to passing pedestrians, but they soon began placing their materials underneath the windshield wipers on parked cars.[85] Not long after, members of the San Clemente Sheriff's Department approached the leafleters and informed them they were in violation of San Clemente Municipal Code § 8.40.130,[86] which stated:

> No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle. Provided, however, that it shall not be unlawful in any public place for a person to hand out or distribute, without charge to the receiver thereof, a non-commercial advertisement to any occupant of a vehicle who is willing to accept it.[87]

When the police told the group that they would face fines for violating the ordinance if they continued to leaflet the vehicles, the group stopped.[88] Klein sued the City, claiming the anti-litter ordinance violated his First Amendment right to free speech.[89] The district court found the City's ordinance to be a legitimate

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80. *See id.* at 1221-22 ("[D]efendants have not established a factual basis for concluding that a cause-and-effect relationship actually exists . . . that impacts the health, safety, or aesthetic well-being of the defendant cities.").

81. *Id.* at 1220.

82. *Id.* at 1222.

83. *See* Klein v. San Clemente, 2009 WL 3152381 (9th Cir. 2009) (noting that the decision was filed on October 2, 2009).

84. *Id.* at *1.

85. *Id.*

86. *Id.*

87. SAN CLEMENTE, CA., MUN. CODE § 8.40.130.

88. *Klein*, WL 3152381, at *1.

89. *Id.*

restriction on speech as it was narrowly tailored to serve the City's significant interest in reducing litter in the City, and it denied Klein's request for an injunction.[90] On appeal, the Ninth Circuit reversed, holding the City's interests were not "proven sufficiently weighty to justify the restrictions placed on Klein's right to express his political views."[91]

Noting that a marginal reduction in the amount of litter would not constitute a significant government interest when restricting First Amendment rights, the Ninth Circuit held the City must prove "not only that vehicle leafleting can create litter, but that it creates an abundance of litter significantly beyond the amount the City already manages to clean up."[92] Klein testified that the act of securing the leaflets underneath windshield wipers generally prevented litter, but in any case, no more than one or two leaflets out of every hundred distributed would fall to the ground and contribute to the City's litter problem.[93] The City did not present any empirical evidence that leafleting substantially contributed to its litter problem but argued that the language of the ordinance itself noted a significant interest and goal. The court, however, rejected this argument, finding that "[t]he title of an ordinance is not evidence of an actual problem."[94] The court also found no merit in the City's argument that the ordinance prevented the unauthorized use of private property.[95]

As the question of whether these types of municipal ordinances are constitutional remains unanswered by the Supreme Court, the question remains: how can a city craft an ordinance similar to the ones above when the weight of the circuit authority leads to the conclusion that these statutes, in their respective factual scenarios, are unconstitutional?[96] The circuits are split over whether the ordinances are narrowly tailored to serve a significant government interest.[97]

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90. *Id.*

91. *Id.* at *2.

92. *Id.* at *4.

93. *Id.*

94. *See id.* ("Noticeably absent from the City's argument, however, is any claim that the type of leafleting engaged in by Klein significantly increases the amount of litter in San Clemente.").

95. *Id.* at *5.

96. *Compare Klein*, WL 3152381 (finding the ordinance unconstitutional), *and* Horina v. Granite City, 538 F.3d 624 (7th Cir. 2008) (finding the ordinance unconstitutional), *and* Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998) (finding the ordinance unconstitutional), *with* Jobe v. City of Catlettsburg, 409 F.3d 261 (finding the ordinance constitutional).

97. *Compare Klein*, WL 3152381 (finding the ordinance not narrowly tailored), *and Horina*, 538 F.3d 624 (finding the ordinance not narrowly tailored), *and Krantz*, 160 F.3d 1214 (finding the ordinance not narrowly tailored), *with Jobe*, 409 F.3d 261 (finding the ordinance narrowly tailored).

IV. THE "NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST" STANDARD

A. Narrowly Tailored

In *Ward v. Rock Against Racism*,[98] the Supreme Court gave a detailed explanation of the "time, place, and manner" test used by courts reviewing First Amendment free speech issues. The Court upheld a New York statute that set guidelines for sound amplification at concerts, finding that the ordinance was content neutral, narrowly tailored to serve a substantial governmental interest, and that it provided sufficient alternatives channels of communication.[99] In discussing whether the ordinance was narrowly tailored, the Court rejected the Court of Appeals' analysis that the ordinance was unconstitutional because there were less restrictive means available for the City to control the noise problem.[100] The Court stated that the "less-restrictive-alternative analysis" was never part of the "time, place, and manner" test, and noted that previous precedent "clearly hold[s] that restrictions . . . are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'"[101] In reaffirming this proposition, the Court held that the requirement that a restriction be narrowly tailored "is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[102]

The Court also noted, however, that any restrictions imposed must not "burden substantially more speech than . . . necessary" to achieve the goals of the restriction.[103] "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[104] An ordinance that is not "substantially broader than necessary" to effect the purpose of the restriction should not be declared unconstitutional because a court finds "less-restrictive" means for effecting that purpose.[105] Additionally, a court should give deference to a municipality's decision to impose restrictions that serve an appropriate interest.[106] Nonetheless, a court must consider whether the governmental interest would not be as well-served if there was no regulation or restriction at all.[107]

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98. 491 U.S. 781 (1989).

99. *Id.* at 803. Not unlike leafleting, the Court noted that "[m]usic is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and the emotions, and have censored musical compositions to serve the needs of the state." *Id.* at 790.

100. *Id.* at 797.

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

102. *Id.* at 799 (quoting *Albertini*, 472 U.S. at 689).

103. *Id.*

104. Frisby v. Schultz, 487 U.S. 474, 485 (1988).

105. *Ward*, 487 U.S. at 800.

106. *See id.* (quoting *Albertini*, 472 U.S. at 689) ("'The validity of [time, place, or manner] regulations [do] not turn on a judge's agreement with the most appropriate method for promoting significant government

B. Substantial Government Interest

The Supreme Court has never expressly stated whether preventing litter and visual blight is a significant governmental interest, but dicta from cases generally implies that it is.[108] Both the Fourth[109] and Eleventh[110] Circuits have held that preventing litter is a substantial government interest, and despite isolated state courts holding otherwise, commentators generally agree.[111] Similarly, numerous courts have concluded that maintaining the aesthetical beauty of a town or city is a substantial governmental interest.[112] Thus, littering, its aesthetic effect on a community, and the safety problems it may pose, are all substantial governmental interests to be served by an anti-littering ordinance. In sum, there is disagreement among circuits over whether these anti-littering ordinances are narrowly tailored.[113] This Comment proposes ways for a municipality to defend its ordinances, or alternatively, to draft ordinances that meet the narrowly tailored requirement.

V. OPTIONS FOR CITIES THAT WISH TO DEFEND THEIR ANTI-LEAFLETING ORDINANCES

Even though a majority of circuit courts have determined that ordinances banning the distribution of leaflets on car windshields for the purpose of preventing litter are unconstitutional because they are not narrowly tailored,[114] several options exist for municipalities to either defend their existing ordinances or draft them in a more "narrowly tailored" fashion. These options include presenting empirical data showing that leafleting has contributed to a city's

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interests' or the degree to which those interest should be promoted.").

107. Durden & Ray, *supra* note 1, at 849.

108. *See id.* at 842 (noting that the dicta in *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984) and *Schneider v. New Jersey*, 308 U.S. 147 (1939) indicates that "the prevention of litter is a substantial governmental interest").

109. United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

110. Sciarrino v. City of Key West, 83 F.3d 364 (11th Cir. 1996).

111. Durden & Ray, *supra* note 1, at 843.

112. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805 ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); *see also* Curto v. City of Harper Woods, 954 F.2d 1237, 1243 (6th Cir. 1992) (finding that addressing the aesthetic and safety concerns of a community constitutes a legitimate interest); Chicago Observer, Inc. v. City of Chicago, 929 F.2d 325, 328 (7th Cir. 1991) ("Cities may curtail visual clutter, for aesthetic and safety reasons."); One World Family Now v. City and County of Honolulu, 76 F.3d 1009, 1013 (9th Cir. 1996) ("Cities have a substantial interest in protecting the aesthetic appearance of their communities by 'avoiding visual clutter.'").

113. *See supra* Part III (discussing the circuit split).

114. *Compare* Jobe v. City of Catlettsburg, 409 F.3d 261 (6th Cir. 2005) (holding that the ordinance was a reasonable time, place, and manner restriction on speech), *with* Klein v. City of San Clemente, WL 3152381, at *9 (9th Cir. 2009) ("The record does not support the district court's conclusion that the City's anti-litter ordinance was narrowly tailored . . . ."), *and* Horina v. Granite City, 538 F.3d 624, 634 (7th Cir. 2008) ("[T]he Ordinance is not narrowly tailored."), *and* Krantz v. City of Fort Smith, 160 F.3d 1214, 1219 (8th Cir. 1998) ("[W]e hold as a matter of law that the ordinances are not narrowly tailored to serve a significant governmental interest.").

littering problem[115] and demonstrating that the leafleting ban is part of a comprehensive plan to combat litter.[116]

A. Empirical Evidence that Leafleting Contributes to a Municipality's Litter Problem

Probably the most important strategy in defending a municipality's anti-leafleting ordinance is presenting concrete evidence that leafleting is contributing to increased litter throughout the community. In the three circuits that declined to uphold the validity of the challenged ordinances, the municipalities failed to offer evidence showing that leafleting of car windshields actually led to increased litter in the cities.[117] For example, in *Klein*, the only party to submit evidence on the amount of litter caused by the leafleting, was Klein—and he was the one distributing the leaflets.[118] To make a strong argument that its ordinance is narrowly tailored, a city should thus provide some evidence to prove that the restricted activity contributes to a problem the city seeks to remedy.[119] To paraphrase the Eight Circuit in *Horina*, the common sense notion that prohibiting people from leaving leaflets on cars will lead to a reduction in litter is not enough.[120]

This "nexus,"[121] however, is not an incredibly hard showing to make.[122] A city does not "need to produce panoply of 'empirical studies, testimony, police records, [or] reported injuries' . . . [as] less evidence might be sufficient . . . depending on the scope and context of the restriction."[123] At the same time, the Ninth Circuit has made it clear that a municipality must prove that the leafleting leads to more than a "marginal" amount of litter.[124] Therefore, a city must offer evidence that more than one or two of every hundred leaflets distributed ends up littering the city.[125]

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115. *See infra* Part V.A and accompanying text.

116. *See infra* Part V.B and accompanying text.

117. *Klein*, WL 3152381 at *4; *Horina*, 538 F.3d at 634; *Krantz*, 160 F.3d at 1221-22.

118. *Klein*, WL 3152381 at *4 (remarking that Klein admitted that if he failed to properly secure the leaflets underneath the cars' windshields, no more than one or two leaflets out of every hundred would blow away).

119. *See id.* at *3 ("[M]erely invoking interests . . . is insufficient.").

120. *Horina*, 538 F.3d at 633.

121. *Klein*, WL 3152381 at *3.

122. *See Horina*, 538 F.3d at 633 (noting that a city does not need detailed studies for empirical support).

123. *Id.* The proposition put forth by counsel for the City of Catlettsburg—that there is no litter problem because Jobe was the only person who violated the ordinance during its over fifty year existence—seems conclusory and I doubt it would make a compelling argument in court. Brief in Opposition at *1, Jobe v. City of Catlettsburg, 2005 WL 2083984 (2005) (No. 05-188).

124. *Klein*, WL 3152381 at *4.

125. *Id.* (finding that Klein's admissions did not "significantly increase the amount of litter in San Clemente").

A city does not need to prove, however, that the leaflet litter constitutes a problem in and of itself—a city could also support its argument by presenting evidence of the effects of that litter. For example, a city may inspect its sewers in order to determine whether leaflets have entered into the system. A city that can prove leaflet litter has entered a sewer system may forcefully argue that not only does the ordinance prevent visual blight, but it also protects the safety of its citizens.[126] New York City,[127] which in many places still uses original plumbing from the mid-nineteenth century, has seen its wastewater treatment plants become backed up by chicken heads, pickles, and lumber, among other things. These blockages can lead to devastating pollution of the City's water supply.[128] While pickles and chicken heads may not be much of a threat to the modern city or town, leaflets, when raining, can "turn to mulch[,] often clogging street drains and causing flooding."[129] Presenting this type of evidence before a court would also make it easier to convince the courts that do not view prevention of litter as a particularly substantial governmental interest that there is indeed a substantial governmental interest in preventing leaflets from becoming litter.

B. The Anti-Leafleting Ordinance is Part of a Comprehensive Plan to Prevent Litter

Another way to defend an anti-leafleting ordinance, most likely in conjunction with empirical evidence, is to show a city enacted the ordinance as part of a comprehensive plan to prevent litter. Acting alone, an ordinance banning the leafleting of car windshields to prevent litter, while created with good intentions, may be seen as an "unsupported conjecture."[130] In *Metromedia, Inc. v. City of San Diego*,[131] a plurality of the Supreme Court held that San Diego's ordinance banning billboards but allowing certain types of on-site advertising and other special types of billboards was unconstitutional.[132] While banning most billboards, the ordinance allowed for billboards that were erected for governmental purposes, religious symbols, for-sale signs, political campaigns, and on-site advertising, among other exceptions.[133] San Diego defended its ordinance on the grounds that it served two substantial governmental interests—

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126. *See* Charles Duhigg, *As Sewers Fill, Waste Poisons Waterways*, N.Y. TIMES, Nov. 23, 2009, at A1 (reporting that although the Clean Water Act of 1972 provided money for cities to upgrade their sewage systems to deal with increasing waste, many cities' systems remained "overwhelmed").

127. New York is the only state to have a state-wide law banning the leafleting of vehicle windshields. N.Y. VEH. & TRAF. LAW § 375(b) (McKinney 2009).

128. Duhigg, *supra* note 126, at A1 (noting that over twenty million people become sick every year from contact with untreated water).

129. Letter from Martin J. Golden, *supra* note 10.

130. Horina v. Granite City, 538 F.3d 624, 633 (7th Cir. 2008) (noting that an unsupported conjecture is "*verboten* in the First Amendment context").

131. 453 U.S. 490 (1981).

132. *Id.* at 521.

133. *Id.* at 496.

the aesthetic beauty of the city and a reduction in the hazard of distraction faced by both pedestrians and drivers.[134] However, the Court found the City's argument unpersuasive because the exceptions contained in the ordinance allowed for some unaesthetic and distracting signs while prohibiting others.[135] Unlike the anti-leafleting ordinances at issue in the current circuit split,[136] the plurality in *Metromedia, Inc.* did not view the case as a total ban on billboard advertising.[137] Justice Brennan's concurring opinion, however, did consider the ordinance to be a total ban and concluded that "before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment."[138] Nevertheless, subsequent decisions have made clear that although a comprehensive plan shows that a municipality is serious about combating litter, such a plan is not necessary.[139] But assuming that courts will be more willing to uphold ordinances when a city's ultimate goal is tied to a comprehensive plan, what can a city do to show they have one?

First, cities drafting their anti-leafleting ordinances should not permit exceptions to the leafleting of car windshields except where absolutely necessary—for example, ticketing illegally parked cars. A municipality would be wise to avoid language like that contained in the New York state ordinance, which states that "[t]he use or placing of posters or stickers on windshields or rear windows of motor vehicles *other than authorized by the commissioner*, is hereby prohibited."[140] Because New York allows leafleting of car windshields when express approval of the traffic commissioner is given, it has a weaker argument that the ordinance's design is the actual prevention of litter, as a Court could find this exception to be similar to those exceptions in *Metromedia, Inc.*[141]

Second, a municipality should be prepared to demonstrate that a leafleting ban is not the only step it is taking to reduce litter.

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134. *Id.* at 493.

135. *Id.* at 513.

136. *See supra* Part III and accompanying text (discussing the current circuit split).

137. *Id.* at 521-22.

138. *Metromedia*, 453 U.S. at 531 (plurality) (Brennan, J., concurring in judgment).

139. *See* Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 811(1984) ("Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance."). *But see* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 189 (1999) (holding that a statute that prohibited commercial advertisements of gambling casinos in order to "alleviate the social costs of casino gambling by limiting demand" was unconstitutional because of the counter-intuitive congressional aim of promoting tribal casino gambling).

140. N.Y. VEH. & TRAF. LAW § 375(b) (McKinney 2009) (emphasis added).

141. *See Metromedia*, 453 U.S. at 496 (detailing the various exceptions to San Diego's billboard ordinance).

The following is a recommended, but by no means exclusive, list of programs a municipality should be prepared to commit to if it wishes to show a comprehensive plan:

(1) Municipalities could demonstrate participation in an "Adopt-A-Highway" program. In the majority of surveys detailing the effectiveness of these programs, only Mississippi showed an increase in litter where the program was in place.[142]

(2) A municipality should institute measures that do not just ameliorate leaflet-type trash, but that also cut down on litter as a whole. For example, studies show that the most widely littered items are cigarette butts.[143] Of all the people who throw their cigarette butts onto the ground, twenty-three percent of these people did so because there were no ashtrays nearby.[144] A municipality can easily place more ashtrays throughout the city, or require businesses to provide them outside of their establishments. These measures would likely have a low cost with a potentially high reduction in litter.

(3) Like a lack of ashtrays, a lack of normal trash receptacles, and even the aesthetic quality of the receptacles, can contribute to the amount of litter in a city.[145] A municipality committed to providing more trash cans will see a drop in litter,[146] and doing something as simple as covering these trash cans with a coat of paint will decrease the litter rate.[147] Increasing the number of trash cans in areas where in-person leafleting is high would indicate to a court an attempt to prevent all types of litter.

(4) A municipality should show that it is committed to enforcing existing litter laws. Municipal police officers account for approximately eighty-four percent of all litter related arrests.[148] Because local enforcement is the key to enforcing these laws, a municipality should be prepared to levy fines and, if necessary, to secure convictions against litterers. However, littering as a crime is tough to prosecute,

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142. KEEP AMERICA BEAUTIFUL, LITERATURE REVIEW-LITTER: A REVIEW OF LITTER STUDIES, ATTITUDE SURVEYS & OTHER LITTER-RELATED LITERATURE 3-5 (July 2007). Note, however, that Mississippi's results may be skewed because adopted sites are more likely to be in "hot-spots" for litter. *Id.*

143. *Id.* at 6-4 (noting that cigarette butts make up 58% of all littered items). One Texas study concluded that cigarette butts make up 28% of all visible litter. *Id.* at 8-2.

144. *Id.* at 6-4.

145. *Id.* at 7-1.

146. *Id.* at 7-2.

147. *See id.* at 7-1 (finding that "attractive receptacles reduced litter by 14.7 percent, while . . . drums showed an insignificant reduction of 3.2 percent").

148. *Id.* at 11-1.

> and one 1971 study concluded that more than twelve percent of local police forces fail to report convictions in any single year.[149] This leads citizens to conclude that the litter laws are not effective, and that in fact, there is no punishment for littering.[150]

In sum, any municipality seeking to implement a car-windshield leafleting ban, or defend the constitutionality of one, should: (1) determine the effect of leaflet litter in the city and prepare empirical evidence on how it affects the community,[151] and (2) develop a comprehensive plan to combat all types of litter, especially leafleting, so a court will be more inclined to determine that the ordinance is narrowly tailored.[152]

VI. ADEQUATE ALTERNATIVE CHANNELS FOR COMMUNICATING

Once a municipality proves that its ordinance is narrowly tailored, it will need to prove that there remain adequate alternative channels of communication.[153] Courts dealing with this issue are split over whether alternatives that are not as "economically feasible" as the prohibited conduct are adequate alternative channels for communicating.[154] Some scholars have hypothesized that the Supreme Court's decisions on the issue would support an anti-leafleting ordinance like the ones discussed above, as long as the ordinance "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."[155]

Based on the assumption that alternative channels of communication are adequate—and notwithstanding the monetary cost of the speech—as long as the person wishing to disseminate information is allowed to do so in the same general location[156]—here, public streets—a municipality would have several ways of demonstrating to a court that channels of communication remain open. The presence of billboard space on public thoroughfares could be considered an adequate alternative means of communication because a leafleter would have the option, instead of printing out leaflets and reaching only those members of the public who have parked their cars on public streets, to erect a stationary billboard

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149. *Id.* at 7-1.

150. *Id.* ("A 1999 Florida study . . . found that 76 percent of respondents thought litter laws were ineffective.").

151. *See supra* Part V.A and accompanying text (discussing that the courts involved in the circuit split found this to be an extremely important factor).

152. *See supra* Part V.B and accompanying text (discussing ways in which a community may develop a comprehensive plan to combat litter).

153. Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989).

154. Durden & Ray, *supra* note 1, at 855.

155. *Id.* at 835.

156. *Id.* at 855.

which would reach many more viewers.[157] Additionally, as long as the municipality does not have other ordinances restricting person-to-person leafleting on city streets where cars usually park, the ability of the leafleter to hand out information to passersby would become another adequate alternative channel of communication.[158] While this prong of the "time, place, and manner" test has been called "puzzling and difficult to apply,"[159] it is unlikely that a municipality would have difficulty applying it when defending its vehicular anti-leafleting bans.[160]

VII. CONCLUSION

While American attitudes towards litter have changed dramatically over the past century, litter continues to plague our cities.[161] Anti-leafleting ordinances preventing the distribution of materials on car windshields can be an effective tool to fight this source of litter. However, these ordinances must be carefully crafted, and their benefits supported by the facts, in order to survive the necessary constitutional scrutiny.[162]

While environmental protection is a noble goal, many Americans understandably might more zealously guard their First Amendment rights. Because these ordinances restrict speech, municipalities should carefully examine the benefits of anti-leafleting laws before they decide anti-leafleting statutes are what their city needs. Municipalities that decide to enact ordinances that ban the leafleting of windshields would be wise to follow the suggested steps—create a comprehensive plan to combat litter[163] and provide empirical evidence of litter caused by vehicular leafleting[164]—if they are going to defend the ordinances against constitutional attack.

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157. *See* Members of City of Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 820 (1984) (Brennan, J., dissenting) ("[N]ot only must handbills be printed in large quantity, but many hours must be spent distributing them. The average cost of communicating by handbill is . . . likely to be far higher than the average cost of communicating by poster.")

158. *See* Carew-Reid v. Metro. Transp. Auth., 903 F.2d 914, 919 (2d Cir. 1990) ("The First Amendment . . . does not guarantee appellees access to every or even the best channels or locations for their expression.").

159. Durden & Ray, *supra* note 1, at 850.

160. *See supra* notes 157-58 and accompanying text (explaining ways a municipality could show that alternative channels of communication exist).

161. *See generally* KEEP AMERICA BEAUTIFUL, LITERATURE REVIEW-LITTER: A REVIEW OF LITTER STUDIES, ATTITUDE SURVEYS & OTHER LITTER-RELATED LITERATURE (July 2007) (examining the litter issue from environmental, economic, and societal costs).

162. *Supra* Part V and accompanying text.

163. *Supra* Part V.B and accompanying text

164. *Supra* Part V.A and accompanying text.