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ARE "GREEN RIVER" ORDINANCES CONSTITUTIONAL UNDER THE FIRST AMENDMENT?

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In the early 1930s, the Fuller Brush Company, a Delaware corporation, sent solicitors throughout the country to accomplish the "sale and distribution of its goods, wares and merchandise to the public of the United States in general."[1] A number of Fuller Brush solicitors traveled to Green River, Wyoming, to visit the homes of Green River's residents and distribute information about Fuller Brush products. However, the town of Green River had a local ordinance prohibiting door-to-door solicitation and punishing door-to-door solicitors with a fine. The town of Green River enforced this local ordinance against the Fuller Brush employees.[2]

The Fuller Brush Company challenged the enforcement of the Green River ordinance against its employees under the First Amendment and opened a continuing constitutional and judicial debate. The debate centers around one principal question: do "Green River" ordinances—local ordinances regulating door-to-door solicitation—violate a solicitor's right to free speech under the First Amendment? This *Local Government Law Bulletin* explores the answer to this question and concludes that some door-to-door solicitation ordinances should be upheld under the First Amendment while others are unconstitutional under current judicial

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1. Town of Green River v. Fuller Brush Co., 65 F.2d 112, 114 (1933).
2. *Id.* at 113.

doctrine.[3] Whether a door-to-door solicitation ordinance will survive constitutional attack depends upon whether it is crafted to comport with current judicial standards. Consequently, this bulletin discusses the evolution of judicial review of local ordinances regulating door-to-door solicitation under four headings: (1) constitutional background, (2) U.S. Supreme Court decisions, (3) lower court decisions, and (4) conclusions and applications of the law.

I. Constitutional Background

When courts consider the constitutionality of local ordinances regulating door-to-door solicitation, they recognize two competing interests.[4] The door-to-door solicitor enjoys constitutional protection of his or her free speech,[5] and the resident in the home (the solicitee) enjoys a "fundamental" right to privacy in his or her home.[6] Both of these rights are discussed below.

A. Free Speech

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[7] Under the First Amendment, local governments, like state and federal governments, cannot pass regulations "abridging" free speech. However, this seemingly absolute rule contains an exception. In interpreting the First Amendment, the Supreme Court has concluded that expressive activity may be regulated *if* the regulation is a reasonable time, place, and manner restriction.[8] Consequently, although the Constitution provides a general rule that speech cannot be "abridged," the Supreme Court has recognized that in exceptional circumstances, local governments may regulate some speech.[9]

In the context of door-to-door solicitation, courts recognize that local ordinances regulating door-to door solicitation implicate solicitors' constitutional right to speak freely[10] and demand that any such ordinance qualify as a reasonable time, place, and manner regulation in order to survive a constitutional challenge. Accordingly, courts have created various tests designed to evaluate whether such regulations are constitutional time, place, and manner restrictions or unconstitutional and unreasonable restrictions on solicitors' rights.[11] These tests are discussed in section III of this bulletin.

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3. North Carolina has a series of state statutes regulating the solicitation of contributions in Chapter 131F of the North Carolina General Statutes. The statutes governing door-to-door solicitation of charitable contributions were held unconstitutionally overbroad in 1988. National Fed'n of Blind of North Carolina, Inc. v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), *aff'd*, 817 F.2d. 102 (4th Cir. 1987), *aff'd*, 487 U.S. 781 (1988). As a result, these statutes were amended in 1989. This bulletin restricts its scope to local ordinances rather than state statutes: a discussion of the North Carolina General Statutes governing the solicitation of contributions is beyond that scope.

4. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1377–79 (1992).

5. Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (holding a door-to-door solicitation restriction "invalid because [it was] in conflict with the freedom of speech and press").

6. Stanley v. Georgia, 394 U.S. 557 (1969).

7. U.S. CONST. amend. I. Originally, in Barron v. Baltimore, 32 U.S. 243 (1833), the Supreme Court held that the provisions of the Bill of Rights, including the First Amendment, did not restrict the states. However, after the Civil War, the Supreme Court held that the newly ratified Fourteenth Amendment "incorporated" the fundamental provisions of the Bill of Rights, including the First Amendment, and made them binding on the states. Gitlow v. New York, 268 U.S. 652, 666 (1925). The First Amendment also binds local governments. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (recognizing that municipal ordinances constitute state action and are within the prohibitions of the First Amendment).

8. *See Martin*, 319 U.S. at 143 [citing Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)].

9. *Id.*

10. *See, e.g.,* Breard v. City of Alexandria, 341 U.S. 622 (1951) (recognizing that some solicitors' rights to speak may be burdened by door-to-door solicitation restrictions); *Martin*, 319 U.S. at 149 (recognizing that solicitors' rights to speak are protected by the First Amendment); Amy F. Steerman, Note, *Regulation of Evening Door-to-Door Canvassing—Balancing Freedom of Speech with the Right to Privacy*—New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987), 60 TEMP. L.Q. 807 (1987) (stating that "canvassers' speech enjoys first amendment protection").

11. *See* Philip L. Hirschborn, Note, *Noncommercial Door-to-Door Solicitation and the Proper Standard of Review for Municipal Time, Place, and Manner Restrictions*, 55 FORDHAM L. REV. 1139 (1987) (recognizing that the "proper standard of review for municipal ordinances regulating the hours of noncommercial door-to-door solicitation is currently a subject of debate" and examining the various

B. Privacy in the Home

Just as the United States Constitution offers protection for free speech, the Constitution protects a person's expectation of privacy in the home. However, unlike free speech, which is protected by an express provision in the Constitution, privacy is protected only through the Supreme Court's interpretation of the general language in the Constitution. In *Griswold v. Connecticut*,[12] the Court concluded that people have a "right" to privacy in their homes that originates in the "penumbra" of rights articulated in the Bill of Rights.[13] This privacy interest includes the "right to be free from invasive speech."[14]

Door-to-door solicitors approach individuals in their homes and speak on their front porches. As such, solicitors threaten homeowners' privacy and "the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street."[15] Consequently, the homeowner's constitutionalized interest in privacy in the home conflicts with a solicitor's right to speak freely.[16]

In effect, as local governments craft ordinances to regulate door-to-door solicitation, they must balance the rights of solicitors to speak freely against the right of homeowners to maintain their privacy. The following discussion will trace the courts' evolving approach toward local solicitation regulations and demonstrate the courts' increasing unwillingness to uphold such regulations.

II. Supreme Court Decisions

In reviewing the constitutionality of door-to-door solicitation ordinances, courts attempt to resolve the conflict between a solicitor's right to speak freely and a local government's interest in protecting the privacy and security of its citizens.[17] Two principal United States Supreme Court decisions provide the foundation for judicial conversation in this area. The first of these cases, *Martin v. Struthers*,[18] concluded that the door-to-door solicitation ordinance in Struthers, Ohio, was *unconstitutional* because it was "in conflict with the freedom of speech and press."[19] Eight years later, in the second of these cases, *Breard v. City of Alexandria*,[20] the Court concluded that Alexandria's ordinance was a *constitutional* protection of the citizens of Alexandria "against practices deemed subversive of privacy and of quiet."[21] Essentially, in *Martin*, the solicitor's right to free speech prevailed over the solicitee's right to privacy, and in *Breard*, the solicitee's right to privacy prevailed over the solicitor's right to free speech.

Despite the fact that the Court held the ordinance in Struthers, Ohio, to be unconstitutional and the ordinance in Alexandria, Louisiana, to be constitutional, the Alexandria Court did *not* overrule the holding of *Martin*.[22] Instead, the Alexandria Court emphasized that its holding was "not necessarily inconsistent with the conclusion" in *Martin* and attempted to distinguish the Alexandria ordinance from the Struthers ordinance.[23]

In Struthers, Ohio, Jehovah's Witnesses approached the homes of strangers (knocking on doors and ringing doorbells) in order to distribute literature advertising a religious meeting[24] and to sell books and pamphlets articulating the beliefs of the Jehovah's Witnesses.[25] After delivering these materials to the residents in Struthers, one Jehovah's Witness, Thelma Martin, was convicted and fined $10 on a charge that she had violated Struthers' no-solicitation ordinance.[26] The Struthers ordinance provided that

> [i]t is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence

standards relied upon by courts in evaluating the constitutionality of such regulations).

12. 381 U.S. 479 (1965); *see also* Stanley v. Georgia, 394 U.S. 557 (1969) (recognizing a "fundamental" right to privacy *in the home*).

13. *Griswold*, 381 U.S. 479.

14. Howard B. Altman, Note, *Strangers in the Night: Ordinances Restricting the Hours of Door-to-Door Solicitation*, 63 WASH. U. L.Q. 71, 76 (1985); *see also* Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949) (observing that "[t]he unwilling listener . . . is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality").

15. Douglas v. City of Jeannette, 319 U.S. 157 (1943) (Jackson, J., concurring).

16. *Id.* at 167 (Jackson, J., concurring).

17. Altman, *supra* note 14, at 76–79.

18. 319 U.S. 141 (1943).

19. *Id.* at 149.

20. 341 U.S. 622 (1951).

21. *Id.* at 640.

22. *Id.* at 643.

23. *Id.*

24. *Martin*, 319 U.S. at 142.

25. Douglas v. City of Jeannette, 319 U.S. 157, 168 (1943) (Jackson, J., concurring).

26. *Martin*, 319 U.S. at 142.

> to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.[27]

Martin challenged her conviction and fine and claimed that the "ordinance as construed and applied was beyond the power of the State because in violation of the right[s] . . . guaranteed by the First and Fourteenth Amendments."[28]

The United States Supreme Court agreed with Martin and held that the Struthers ordinance was "invalid because in conflict with the freedom of speech and press."[29] In reaching this conclusion, the Court acknowledged that the Struthers ordinance aimed at two laudable goals: (1) protecting the privacy of the home from intrusion and (2) preventing the possibility of crime at the hands of burglars who "frequently pose as canvassers."[30] However, the Court gave priority to the "broad scope" of the right to free speech and asserted that "[t]he privilege may not be withdrawn even if it creates [a] minor nuisance for a community"[31] and, more specifically, that "[w]hile the door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion."[32]

The Court bolstered its conclusion to invalidate the Struthers ordinance as a violation of free speech by stating that "[t]he widespread use of [door-to-door solicitation] by many groups espousing various causes attests its major importance"[33] and that "door to door distribution of circulars is *essential* to the poorly financed causes of little people."[34] Further, the Court explained, such "essential" speech should be regulated by "traditional legal methods," not by methods as restrictive as the Struthers ordinance, which prohibited all door-to-door distribution of literature.[35]

Recognizing that less restrictive methods of regulating door-to-door solicitation might have survived constitutional muster under the First Amendment in *Martin*, both the majority and those dissenting attempted to articulate potentially permissible forms of regulation. Four such alternative forms of regulation may be gleaned from the opinions in *Martin*. First, in a footnote, the Court noted that the Struthers, Ohio, ordinance was "not directed solely at commercial advertising."[36] This notation clarified the issue before the Court and suggested that the Court might view a regulation of commercial advertising differently than it viewed the Struthers ordinance. Second, the Court stated that a city may leave "the decision as to whether distributors of literature may lawfully call at home . . . with the homeowner himself," and then the "city can punish those who call at home in defiance of the previously expressed will of the occupant."[37] Third, the Court suggested that a city "can by identification devices" (as opposed to strict prohibitions of solicitation) regulate door-to-door solicitation to "control the abuse of the privilege [to solicit] by criminals posing as canvassers."[38] Finally, Justice Frankfurter, in his dissent in *Martin*, provided a fourth alternative form of regulation that might withstand constitutional attack. Justice Frankfurter stated that "the Due Process Clause of the Fourteenth Amendment did not abrogate the power of the states to recognize that homes are sanctuaries from intrusions upon privacy and of opportunities for leading lives in health and safety."[39] Accordingly, Justice Frankfurter believed that "[d]oor-knocking and bell-ringing by professed peddlers of things or ideas may therefore be confined within specified hours."[40]

Essentially, the *Martin* Court held that broad local ordinances rendering it unlawful for solicitors to go door-to-door to distribute handbills, circulars, or other advertisements violate the First Amendment.[41] However, the Court also suggested that less restrictive local regulations of door-to-door solicitation (such as regulations limiting door-to-door commercial advertising, regulations punishing solicitation only after individualized notice, regulations creating an identification requirement for solicitors, and regulations imposing time limits on solicitation) might survive constitutional muster.

Eight years after *Martin*, the Supreme Court accepted a second case, *Breard v. City of Alexandria*,[42] in which a solicitor again challenged the constitutionality of a local ordinance prohibiting door-to-door

27. *Id.*
28. *Id.*
29. *Id.* at 149.
30. *Id.* at 144.
31. *Martin*, 319 U.S. at 142.
32. *Id.* at 145.
33. *Id.*
34. *Id.* at 146 (emphasis added).
35. *Id.* at 147.
36. *Martin*, 319 U.S. at 142, n. 1.
37. *Id.* at 148.
38. *Id.*
39. *Id.* at 153 (Frankfurter, J., dissenting).
40. *Id.* (Frankfurter, J., dissenting).
41. *Martin*, 319 U.S. at 143–44.
42. 341 U.S. 622 (1951).

solicitation. In *Breard*, Jack Breard, a regional representative of Keystone Readers Service, Inc., "was arrested while going from door to door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines," including *The Saturday Evening Post, Newsweek, Parents, Ladies' Home Journal,* and *Esquire*.[43] Breard was arrested "solely on the ground that he had violated" Alexandria's local ordinance restricting door-to-door solicitation.[44] The ordinance under which the arrest was made provided that

> the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.[45]

Breard and *Martin* share obvious similarities. In both cases, solicitors who went door-to-door to distribute and sell printed material were arrested and convicted under local ordinances prohibiting solicitation. Additionally, in both cases, the solicitor challenged his or her conviction on First Amendment grounds (among others).[46] However, despite these similarities, the Court reached a different conclusion in *Breard* than it did in *Martin*.

In *Breard*, the Court held that the City of Alexandria's regulation of door-to-door solicitation caused "no abridgment of the principles of the First Amendment."[47] Additionally, the Court claimed that "[i]t would be . . . a great misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."[48]

The *Breard* Court distinguished the facts of *Breard* and the facts of *Martin* (instead of focusing upon the similarities between the two cases) to reconcile the holdings of the two cases.[49] The Court explained that the Alexandria, Louisiana, ordinance, unlike the Struthers, Ohio, ordinance, regulated commercial speech and did not prohibit the general distribution of literature.[50] Additionally, the *Breard* Court noted that the Alexandria, Louisiana, ordinance was applied to a "possibly persistent solicitor" selling subscriptions, not to a person advertising a religious meeting with religious materials.[51] These distinctions which focus upon the commercial/sales aspect of Breard's activities are not entirely accurate, however, because the plaintiff in *Martin*, like the plaintiff in *Breard*, was selling published writings.[52] Regardless of the accuracy of these distinctions, the Court asserted that the Alexandria ordinance prohibiting "soliciting orders . . . and/or disposing of and/or peddling or hawking the same"[53] on residents' doorsteps was less restrictive than the broad prohibition on the "distribution of handbills, circulars or other adver-

43. *Id.* at 624.

44. *Id.*

45. *Id.* at 624–25.

46. In *Breard*, for example, the plaintiff challenged the constitutionality of the local regulation of door-to-door solicitation not only on First Amendment grounds, but also as a violation of the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. 341 U.S. 622 (1951) at 629, 633. The Alexandria ordinance was not found to violate either the Due Process Clause or the Commerce Clause. *Id.* at 633, 636–37.

47. *Id.* at 645.

48. *Id.*

49. *Id.* at 642–43.

50. 341 U.S. 622 (1951) at 642.

51. *Id.* at 642, 644.

52. *Breard*, 341 U.S. at 650 (Black, J., dissenting) (stating that *Martin* and *Breard* are identical cases and that *Breard* "cannot be reconciled with . . . *Martin*" and contending that "good judicial practice calls for [the] forthright overruling" of *Martin*). Justice Black further explained that the distribution of *Newsweek* subscriptions was not simply commercial solicitation; instead, according to Justice Black, publication and circulation of such literature (like the distribution of religious literature) is part of the First Amendment's "sanctuary" which "necessarily includes liberty to publish and circulate." *Id.* (Black, J., dissenting). This position has been accepted by lower courts.

Although the *Breard* Court suggests that the Alexandria ordinance simply limits commercial solicitation, the express language of that ordinance is much broader. The Alexandria ordinance not only prohibits individuals from going door-to-door for the purpose of soliciting orders for the sale of goods, but also for the purpose of "disposing of" any "goods, wares and merchandise." *Id.* at 624. Consequently, the express language of the Alexandria ordinance could prohibit an individual, like Martin, from going door-to-door to give away (at no cost) any merchandise reflecting her religious beliefs.

53. *Id.* at 624–25.

tisements"[54] in the Struthers ordinance. Consequently, the Court held that the Alexandria ordinance was constitutional and consistent with *Martin.* In effect, the *Breard* Court protected "the [privacy] rights of the hospitable housewife, peering on Monday morning around her chained door" at the expense of the free speech rights "of Mr. Breard's courteous, well-trained but possibly persistent solicitor, offering a bargain on culture and information."[55] However, to soften the Court's blow to Breard, the Court pointed out that he continued to enjoy alternate means through which he might collect subscriptions to magazines from interested individuals "without the annoyances of house-to-house canvassing."[56]

Taken together, the *Martin* decision and the *Breard* decision provide only general guidelines for future analyses of local ordinances regulating door-to-door solicitation. *Martin* took a position in favor of protecting free speech when speech was threatened by a local ordinance; however, *Breard* limited the potential scope of that decision, holding that in at least some instances citizens' privacy rights justify restricting speech through local ordinances. The next section of this bulletin discusses the approaches of lower courts as they attempt to reconcile the holdings of *Martin* and *Breard* in subsequent constitutional challenges to local ordinances regulating door-to-door solicitation.

III. Later Lower Court Decisions

Following *Martin* and *Breard*, courts have had a number of opportunities to clarify the constitutional status of various types of ordinances regulating door-to-door solicitation.[57] In doing so, courts have whittled away at local governments' power to protect the privacy of their citizens in their homes and have revitalized and expanded constitutional protections for doorstep speech.[58] Through this process, courts have applied one of two standards to determine whether any particular ordinance will survive or fall under a First Amendment challenge.[59] Courts select the proper standard based upon their classification of the doorstep as either a public forum or a nonpublic forum.[60]

Some courts view the doorstep as a public forum. (In a public forum a local government has only the barest of regulatory power.) These courts agree with the *Breard* Court that "the knocker on the front door is treated as an invitation or license [for the public] to attempt an entry.[61] Further, they value the tradition of access to the front porch (in this country and others) for the purpose of communicating ideas.[62] Essentially, the argument supporting the view that the doorstep is a public forum emphasizes the similarities between the public forum and the doorstep: (1) the doorstep, like a public forum, is held open by the owner to the public and (2) the doorstep, like the public forum, is a place where speakers traditionally have enjoyed access to willing listeners.[63] Courts that subscribe to this view apply a four-part test in First Amendment challenges to regulations of door-to-door solicitation. This four-part test requires that the regulation (1) is content neutral, (2) serves a legitimate governmental interest, (3) leaves open ample alternative channels of communication, and (4) is the least restrictive means of serving the governmental interest.[64]

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54. *Martin*, 319 U.S. at 142.

55. *Breard,* 341 U.S. at 644.

56. *Id.*

57. Unfortunately, the Fourth Circuit has not had an opportunity to hear a First Amendment challenge to a local ordinance regulating door-to-door speech. Therefore, as this portion of this bulletin discusses the trends and outcomes of lower court cases, it will focus upon courts from other jurisdictions.

58. Steerman, *supra* note 10, at 822 (recognizing that typically the balance between "citizens' privacy interests and first amendment freedoms have weighed in favor of free speech rights").

59. *See e.g.,* Altman, *supra* note 14 at 81–82 [discussing the two different standards applied by courts to evaluate the constitutionality of a door-to-door solicitation regulation and recognizing that the use of one of these standards over the other depends upon whether the doorstep is classified as a public or nonpublic (private) forum]; Hirshborn, *supra* note 11, at 1151–52 (same); Steerman, *supra* note 10, at 818–19 (same).

60. Both classifications of the doorstep (as a public and nonpublic forum) are imprecise because private property is by definition owned by individuals, while the public and nonpublic forums are by definition government held lands. Hirshborn, *supra* note 11, at 1153.

61. Breard v. City of Alexandria, 341 U.S. 622, 626 (1951).

62. Martin v. City of Struthers, 319 U.S. 141, 141 (1943).

63. Hirschborn, *supra* note 11, 1153–54.

64. *See, e.g.,* City of Watska v. Illinois Pub. Action Council, 796 F.2d 1547, 1552 (7th Cir. 1986), *aff'd mem.*, 479 U.S. 1048 (1987) (applying less restrictive means of inquiry to determine whether statute is narrowly tailored to state interests); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1255 (7th Cir. 1985) (relying on

Other courts decline to view the doorstep as a public forum; instead, these courts view the doorstep as a nonpublic forum. (A government has somewhat greater capacity to regulate speech in a nonpublic forum than in a public forum.) This view emphasizes the private property owner's power to exclude visitors from his or her doorstep. This ability of homeowners to exclude visitors parallels the government's right to exclude all speakers from the nonpublic forum.[65] Courts classifying the doorstep as a nonpublic forum apply a three-prong analysis in constitutional challenges to regulations of door-to-door solicitation. This analysis (like the public forum analysis) requires that the regulation (1) is content neutral, (2) serves a legitimate governmental interest, and (3) leaves open ample alternative channels of communication.[66] However, unlike the public forum analysis, the nonpublic forum analysis does not require that a regulation be the least restrictive means by which to serve the government's legitimate interest.[67]

Regardless of the standard of review applied to regulations of door-to-door solicitation (when they are challenged under the First Amendment), lower courts have revisited issues raised in *Martin* and *Breard* and begun to expand the constitutional protection of doorstep speech. This broader view of the constitutional protection available for door-to-door solicitors has two consequences. First, this view has resulted in decisions that eliminate two of the four "permissible" regulations of door-to-door solicitation articulated by the *Martin* Court.[68] Second, this view has bolstered the principal holding of *Martin* and diminished the scope of *Breard*.[69]

After holding that a complete prohibition of door-to-door solicitation was unconstitutional under the First Amendment, the *Martin* Court suggested that four alternative (less restrictive) regulations of doorstep speech might survive judicial scrutiny: (1) regulations of commercial speech on the doorstep, (2) regulations providing punishment of door-to-door solicitors only after notice by an individual homeowner that the solicitor was not welcome, (3) regulations imposing an "identification" requirement upon solicitors, and (4) regulations creating time of day restrictions on door-to-door solicitation.[70] Lower courts have addressed the constitutionality of each of these suggestions.

Lower courts continue to support the constitutionality of local ordinances that punish door-to-door solicitors after a homeowner has provided notice that he or she does not desire solicitation[71] and of local ordinances that prohibit door-to-door sales of gadgets (even without individual notice).[72] However, lower courts have also concluded that local ordinances imposing identification and licensing requirements[73] or

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less restrictive means standard to determine proper standard of review); ACORN v. City of Frontenac, 714 F.2d 813, 818 (8th Cir. 1983) (using less restrictive means of inquiry to determine whether a statute is narrowly tailored to satisfy state interests).

65. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S. Ct. 3439, 3448 (1985) (stating that "the Government 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated'") [quoting Greer v. Spock, 424 U.S. 828, 836 (1976)].

66. *See* Pennsylvania Alliance for Jobs and Energy v. Council of the Borough of Munhall, 743 F.2d 182, 185 (3rd Cir. 1984) (applying a three-part inquiry to determine the constitutionality of ordinances restricting door-to-door solicitation); *but see* Pennsylvania Pub. Interest Coalition v. York Township, 569 F. Supp. 1398, 1401 (M.D. Pa. 1983) (requiring that regulation be narrowly drawn to asserted governmental interest).

67. *PAJE*, 743 F.2d at 183.

68. *See supra* notes 36–40 and accompanying text (discussing the four potentially constitutional means through which local governments might regulate door-to-door solicitation in *Martin*).

69. *See supra* notes 24–56 and accompanying text (discussing the holdings of *Martin* and *Breard*).

70. *See supra* notes 36–40 and accompanying text.

71. *See, e.g.,* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 631 (1980) (affirming the recognition in *Martin* that "the right of an individual resident to warn off . . . solicitors" may be protected to protect the privacy of the citizen); New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd. Cir. 1986) (recognizing that local governments may enact ordinances requiring canvassers to observe individual residents' signs indicating that solicitors are unwelcome); City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1557 (7th Cir. 1986) (affirming the ability of residents to prevent a disturbance by door-to-door callers by posting a "no solicitation" sign and the ability of cities to prosecute any solicitor who disturbs a resident who has posted such a sign), *aff'd mem.*, 479 U.S. 1048 (1987).

72. *See, e.g., Breard*, 341 U.S. at 650 (1951) (Black, J., dissenting) (noting that although Justice Black disagreed with the majority that a local government could constitutionally regulate the sale of informative publications, Justice Black agreed that "the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots' ").

73. *See, e.g.,* Massachusetts Fair Share, Inc. v. Town of Rockland, 610 F. Supp. 682 (D.C. Mass. 1985); New

prohibiting the distribution of literature containing any information on issues of public concern[74] are unconstitutional. Additionally, courts are mixed in their reception of time-of-day restrictions on door-to-door solicitation. Some courts uphold such time-of-day restrictions[75] and others invalidate them under the First Amendment.[76] Cases addressing each of these types of restrictions are discussed below.

Identification and licensing requirements imposed upon door-to-door solicitors have been invalidated under the Constitution, despite the United States Supreme Court's suggestion in *Martin* that such regulations might survive a constitutional challenge. In 1976, in *Hynes v. Mayor and Council of the Borough of Oradell*,[77] Edward Hynes, a New Jersey state assemblyman, and three registered voters in the borough of Oradell brought a suit seeking a declaration that a local ordinance regulating door-to-door solicitation was unconstitutional. The Oradell ordinance required that written notice be given to the local police department by "[a]ny person desiring to canvass, solicit or call from house to house." This notice would identify the solicitor's name, address, employer, places of residence, and other personal information.[78] The United States Supreme Court held this ordinance to be invalid because it was unconstitutionally vague.[79] The Oradell ordinance requiring that solicitors satisfy licensing and identification requirements before going door-to-door with their speech was uncertain in scope and did not sufficiently specify how solicitors could assure compliance with the ordinance.[80]

Although the *Hynes* Court did not rely upon a First Amendment analysis to invalidate the Oradell licensing and identification requirement for door-to-door solicitors, lower courts have applied the First Amendment analysis in this context. In *New York Public Interest Research Group, Inc. v. Village of Roslyn Estates*,[81] canvassers from the New York Public Interest Research Group (NYPIRG) sought a license to engage in door-to-door solicitation under a local ordinance requiring that solicitors disclose personal information and obtain a license before beginning house calls.[82] NYPIRG planned to "go door to door circulating petitions on current public policy issues, distributing consumer information, recruiting volunteers, suggesting methods by which citizens may participate in and affect public policy decisions, and collecting small monetary contributions for the growth and maintenance of the organization."[83] NYPIRG was denied a license to solicit and brought an action challenging the constitutionality of the local ordinance.

The *NYPIRG* court proceeded through a constitutional analysis akin to the nonpublic forum, three-prong analysis for First Amendment challenges to door-to-door solicitation regulations. First, the court recognized that the local ordinance was content neutral, applying equally to all potential solicitors.[84] Second, the court acknowledged that a local government possesses a legitimate interest in protecting its residents from "a nuisance" and "criminal activities" which could, under special circumstances, justify regulation of solicitation.[85] However, the court found the licensing and identification requirement invalid under the First Amendment because it "chills first amendment rights" and fails to leave ample alternative channels of communication open to potential solicitors.[86]

Just as courts have invalidated local ordinances imposing identification and licensing requirements upon door-to-door solicitors, courts have also rejected ordinances that prohibit all distribution of commercial materials via door-to-door solicitation. Like the ordinances imposing identification requirements upon solicitors, ordinances prohibiting door-to-door distribution of commercial materials were originally inspired by the *Martin* Court's discussion of regulations that might survive constitutional scrutiny. However, also like identification requirements, prohibitions on the distribution of commercial materials by solicitors have been invalidated under the First Amendment.

York Public Interest Research Group, Inc. v. Village of Roslyn Estates, 498 F. Supp. 922 (E.D. N.Y. 1979).

74. *See, e.g.,* Ad World, Inc. v. Township of Doyleston, 672 F.2d 1136 (3rd. Cir. 1982).

75. *See Watseka*, 743 F.2d at 182.

76. *See* Pennsylvania Alliance for Jobs and Energy v. Council of the Borough of Munhall, 742 F.2d 182, 185 (3rd Cir. 1984).

77. 425 U.S. 610 (1976).

78. *Id.* at 611.

79. *Id.* at 620.

80. *Id.* at 621.

81. 498 F. Supp. 922 (E.D. N.Y. 1979).

82. *Id.* at 923.

83. *Id.*

84. *Id.*

85. *Id.* at 929.

86. *NYPIRG*, 498 F.Supp. 922 (E.D.N.Y. 1979) at 927; *see also*, New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986) (holding that a provision of a local ordinance that required that canvassers be fingerprinted violated the First Amendment).

In *Ad World, Inc. v. Township of Doylestown*,[87] a newspaper publisher brought suit seeking (among other relief) a declaratory judgment that Doylestown Ordinance 117 was unconstitutional under the First and Fourteenth Amendments. Ordinance 117 prohibited "depositing" any advertising materials at any residence within Doylestown Township "unless the person . . . distributing such advertising material does so based upon the affirmative request or consent of the person occupying the residence."[88]

According to Doylestown, *Piggy Back*, a "16 page tabloid which includes extensive advertising and a few pages of consumer and community information," was subject to Ordinance 117.[89] The city contended that *Piggy Back* was commercial speech under the ordinance because "only a few pages out of 16 in *Piggy Back* were nonadvertising."[90] Consequently, the city refused to allow distribution of *Piggy Back* at any residence from which individual consent had not been received.

Responding to the city's contention that *Piggy Back* was commercial speech, the Third Circuit clarified that a newspaper that both spreads "information generally" and provides a "medium for advertising" is not commercial speech and may not be regulated as such.[91] Then the Third Circuit invalidated Ordinance 117 under the public forum analysis for First (and Fourteenth) Amendment challenges to regulations of door-to-door solicitation. The court explained that it could "agree only that the regulation is not content based."[92] Then the court noted that, although the local government had theoretically identified a legitimate interest in protecting the privacy and security of its citizens through its solicitation regulations, the city provided no evidence that its privacy and security concerns were served by its regulation on speech.[93] Additionally, the court acknowledged that no equally accessible alternative means of communication was available to *Piggy Back*.[94] Finally, the court explained that "there were less restrictive alternatives for reaching the stated goal."[95] For example, the city could enforce its trespass laws against burglars, encourage homeowners to put up "no solicitation" signs, and provide other means to ensure that the local interest in privacy and security were satisfied.[96]

Although lower courts have consistently invalidated licensing requirements and advertising prohibitions in the context of regulations on door-to-door solicitation, local ordinances regulating the time of day at which solicitors may approach homes have received mixed responses by the courts. Most lower courts have held that local ordinances restricting the time of day during which individuals may engage in door-to-door solicitation are *unconstitutional* because they do not leave adequate alternative channels of communication open for the solicitor to exercise his or her First Amendment rights[97] or they are not the least restrictive means through which the local government's legitimate interests may be served.[98]

At least one court, however, has upheld a local restriction prohibiting door-to-door solicitation after daylight hours. In *Pennsylvania Alliance for Jobs and Energy v. Council of the Borough of Munhall*, the Third Circuit asserted that the doorstep was not a public forum and applied the nonpublic forum (ample alternative means) analysis to the Munhall ordinance. Under this analysis, the Munhall ordinance survived a First Amendment challenge.[99] The Court reasoned that (1) an ordinance prohibiting *all* solicitors from soliciting after daylight hours was content neutral; (2) the local government possessed legitimate

87. 672 F.2d 1136 (3rd Cir. 1982).
88. *Id.* at 1138.
89. *Id.*
90. *Id.* at 1139.
91. *Id.*
92. *Ad World*, 672 F.2d (3rd Cir. 1982) at 1141.
93. *Id.* at 1140–41.
94. *Id.* at 1141.
95. *Id.*
96. *Id.*
97. *See, e.g.*, New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1262 (3rd Cir. 1986) (holding that canvassers and solicitors whose political objective often makes it essential that they personally contact persons in their homes do not have ample alternative channels of communication when their soliciting is restricted to daytime hours); City of Wateska v. Illinois Public Action Council, 796 F.2d 1547, 1558 (7th Cir. 1986) (holding that personal, door-to-door communication has a "special significance not duplicated by less personal forms of contact" and that other means of communication are not "ample and adequate" when door-to-door solicitation is limited).
98. *See, e.g., Watseka*, 796 F.2d at 1558 (recognizing that a local regulation prohibiting solicitation after 5:00 P.M. was unconstitutional because the city "failed to show . . . that it could not achieve its objectives by less restrictive means"); Association of Community Organizations for Reform Now v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983) (holding that a local ordinance prohibiting door-to-door solicitation before 9:00 A.M. and after 5:00 P.M. was unconstitutional because the ordinance was not sufficiently tailored so as to avoid conflict with the solicitors' First Amendment rights).
99. 743 F.2d 183, 187 (3rd Cir. 1984).

interests in protecting the privacy and security of its residents, and the time-of-day ordinance served those interests, and (3) the time-of-day ordinance left ample channels of communication available to solicitors because solicitors could travel door-to-door on Saturdays as well as weekdays.[100]

Essentially, over time, lower courts have expanded the principal holding of *Martin* and concluded that several of the "less restrictive" measures for regulation suggested by the *Martin* Court remain too broad to survive First Amendment challenge by a door-to-door solicitor. Additionally, the holding of *Breard*, which under a different judicial history might have limited the holding of *Martin*, has been undermined as later courts have recognized that speech is protected even though "it is in the form of . . . a solicitation to pay or contribute money."[101]

100. *Id.* at 187–88.

101. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) [citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)]; *see also*, New York Public Interest Research Group, Inc. v. Village of Roslyn Estates, 498 F. Supp. 922 (E.D. N.Y. 1979) (recognizing that the "selling of ideas" is protected by the First Amendment because speech and publication are inherently intertwined).

IV. Conclusions and Applications of the Law

Various courts have struggled with their effort to balance the privacy rights of homeowners with the free speech rights of door-to-door solicitors. Initially, the Supreme Court provided conflicting messages about its approach toward regulations governing doorstep speech. However, after years of judicial review, the courts of several jurisdictions may have provided some general guidelines for local governments seeking to protect the privacy and security interests of citizens by limiting the access door-to-door solicitors may have to individuals' homes. Under these court cases, two types of local solicitation regulations should survive First Amendment challenges: (1) ordinances authorizing prosecution of door-to-door solicitors who continue to solicit after receiving notice from an individual resident that the individual does not desire solicitation and (2) ordinances prohibiting the sale of gadgets. However, three types of local ordinances should clearly fall if challenged by a solicitor under the First Amendment: (1) ordinances prohibiting all door-to-door solicitation; (2) ordinances prohibiting door-to-door distribution of literature containing information of public concern, even if the literature is primarily commercial literature; and (3) ordinances imposing identification and licensing requirements upon door-to-door solicitors. Finally, time-of-day restrictions on door-to-door solicitation may or may not survive constitutional challenges under the First Amendment, depending upon the jurisdiction hearing the challenge.

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