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CARS AS AN APPROPRIATE VEHICLE FOR COMMUNICATION? EXPLORING "THE SHORT, THOUGH REGULAR, JOURNEY"* FROM THE WINDSHIELD TO THE PAVEMENT

NICOLE RUBIN**

INTRODUCTION

Imagine that you are walking to your car after a long, exhausting day at the office. You climb into the driver's side and immediately turn on the heat to combat the dark, cold night from which you have just temporarily escaped. As you are pulling out of the parking garage, you notice an advertisement on your windshield for the grand opening of a new nail salon in town. The advertisement is all too familiar – last week you received the same one advertising the impending opening, the week before your windshield promoted drink specials for a nightclub. Do you start thinking about the constitutional right to freedom of speech, or are you frustrated that you have found yourself frantically turning on your windshield wipers to dispose of this flier, once again, before you get onto the highway?

This hypothetical scenario recently has become the subject of spirited legal debate.1 While the Supreme Court has protected solicitations that are distributed door-to-door,2 courts have struggled to figure out how much protection this particular kind of speech—speech that is contained by your

* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983) (quoting Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967), summarily aff'd 386 F.2d 449 (2d Cir. 1967)). In that case, the Court struck down restrictions on unsolicited mailed advertisements, rationalizing that the "short, though regular, journey from mail box to trash can" was an acceptable burden to place on those unwilling to receive such speech. Id. This Note suggests that, with regard to vehicle leafleting, the true final destination for this kind of speech is not the trash can, but the street.

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1 See infra Part II.

car windshield—should receive. So far, Circuit Courts are split regarding the constitutionality of vehicle leafleting bans. All have applied a three-part test, resembling intermediate scrutiny, for determining the constitutionality of a time, place, or manner restriction, but have reached different outcomes. This is because the constitutionality of time, place, and manner restrictions is governed by the nature of the place where the speech occurs, and courts have been conflicted as to what type of forum a private vehicle parked on a public street or in a parking lot constitutes. For the purposes of analyzing time, place, and manner regulations, courts have likened vehicles with either the public forum or private property. Most recently, in Klein v. City of San Clemente, the Ninth Circuit considered vehicles private property, and invalidated a municipal ban on vehicle leafleting by analogizing cars to homes, a place where leafleting traditionally has been protected. Similarly, the Seventh Circuit in Horina v. City of Granite considered vehicles private property and struck down vehicle leafleting regulations, rejecting the government’s argument that automobiles were nonpublic fora. These cases stand in contrast to the Sixth Circuit’s decision in Jobe v. City of Catlettsburg, which also considered a vehicle private property but upheld a ban on vehicle leafleting because there is no “traditional right of access” to a car windshield. In yet another case, the Eighth Circuit in Krantz v. City of Fort Smith did not even reach the issue of what type of forum vehicles should constitute for the purpose of free speech analysis because both parties conceded that vehicles parked on public streets and parking lots were public fora, and not private property.

This Note argues that courts are using the wrong forum classification for vehicles in analyzing ordinances that ban vehicle leafleting. Vehicles parked on city streets and in city parking lots should be considered nonpublic fora—not private property and not public fora—for the purposes of free speech analysis, and thus subject to rationality review. There are

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3 See infra Part II.
4 See infra Part II.
5 See Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (holding that the nature of a place determines the reasonableness of time, place, and manner regulations); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985) (finding that the government’s control of a speaker’s right to access is based on the nature of the property).
6 584 F.3d 1196 (9th Cir. 2009).
7 538 F.3d 624 (7th Cir. 2008).
8 409 F.3d 261 (6th Cir. 2005).
9 160 F.3d 1214 (8th Cir. 1998).
10 CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 46 (3d ed. 2009) (explaining that under rationality review, the challenger has the burden of proving that the regulation is
several reasons why vehicles are more appropriately classified as nonpublic fora rather than private property or public fora. First, vehicles are not analogous to homes, which have been classified as private property. The government has more control over vehicles, there is no traditional right of access to vehicles, and there are other alternatives available for leafleters to reach car owners. Second, the amount of government control over vehicles is similar to the government’s control over private mailboxes, which have been considered nonpublic fora in free speech jurisprudence. Third, vehicle leafleting ordinances are legitimate exercises of a local government’s police power. Local governments deserve deference in this regard because they are in the best position to effectively balance the general needs of the citizens within their territories. Lastly, deferring to municipalities by subjecting vehicle leafleting ordinances to rationality review will bring uniformity to judicial treatment of vehicle leafleting bans. While courts differ as to whether litter prevention is a significant interest, all have agreed that litter prevention is a legitimate interest.11

Part I of this Note provides a historical overview of the development of the public forum doctrine, and explores how courts traditionally have regarded leafleting within each forum. Part II of this Note examines how Circuit Courts have divided in evaluating the constitutionality of municipal bans on vehicle leafleting. Part III of this Note argues that vehicle leafleting regulations should be analyzed under the nonpublic forum doctrine, which would subject the ordinances to rational basis review.

I. THE HISTORICAL PROTECTION AFFORDED TO TRADITIONAL PUBLIC FORA AND TRADITIONAL LEAFLETING

This Section will explain the history of two areas of free speech that customarily have received protection by the courts: speech that occurs in a traditional public forum and speech expressed by traditional leafleting. While these two areas of speech are not the only types of speech that have been given protection, they are among the types of speech that are considered so historically important to the free expression of ideas as to render them deserving of the highest level of constitutional protection.

Even for these two highly protected forms of speech, courts have not rationally related to a legitimate government objective, and noting that this form of review is deferential to the government); Mwagile v. Holder, 374 F. App’x 809, 816 (10th Cir. 2010) (clarifying that, in a rational-basis review, the party challenging the legislation bears the burden of “negativ[ing] every conceivable basis which might support it.”).

11 See infra Part II.
determined that some government regulation is permissible. For example, speech restrictions in nonpublic fora as well as restrictions that further significant government interests in maintaining the health and safety of citizens have been upheld. Thus, this Section provides an overview of the types of government restrictions that have been considered acceptable by the courts, as well as the kinds of regulations deemed unacceptable by courts.

A. Public v. Nonpublic Fora

a. Speech on Property That Has Been Considered a Public Forum

The public forum doctrine originated in Hague v. CIO, where the Court recognized that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public" and held that "[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." It is well established that streets and parks are traditional public fora for speech, but any place that has been devoted to public expression by tradition or government authorization could be considered a traditional public forum. Once a traditional public forum is implicated, the Court will usually apply strict scrutiny to the government's regulation of speech.

In 1946, the protection of free speech on public property was expanded beyond the traditional forum of public streets and parks in Marsh v. Alabama. Although the appellant, a Jehovah's Witness, was distributing literature on a sidewalk, Gulf Shipbuilding Corporation privately owned the sidewalk. The Court held that under some circumstances, privately
owned property may be considered publicly held for free speech purposes when such places were "accessible to and freely used by the public in general," and there was nothing to distinguish them from public places. After Marsh, the Court considered places such as privately owned shopping centers and auditoriums in privately owned buildings to be public places for the purposes of free speech analysis.

The civil rights movement further extended the concept of the public forum by creating constitutional rights of access to public places where speech and protest were not the primary functions of the property. For example, in the 1961 decision of Garner v. Louisiana, speech protection was provided to black students who staged a sit-in at a whites-only lunch counter. Four years later, First Amendment protection was given to protestors conducting a peaceful sit-in at a public library in Brown v. Louisiana. In 1972, the Court struck down regulations of a demonstration in front of a high school in Grayned v. City of Rockford. Thus, the evolution of the public forum preceded the Court's decision in Perry Education Association v. Perry Local Educators' Association in 1983, which formally classified the various types of public fora into three distinct categories: the traditional public forum, the limited public forum, and the nonpublic forum.

20 Id.
23 See Eric D. Strand, Constitutional Law—The Supreme Court's Misapplication of Public Forum Doctrine Creates Governmental Veto of Political Speech by Ballot-Qualified Candidates—Arkansas Educational Television Commission v. Forbes, 73 TEMP. L. REV. 331, 346 (1998) ("Corresponding with the civil rights movement of the 1960s and 1970s, the Supreme Court extended its public speech analysis beyond the traditional forum of streets and parks."); C. Thomas Dienes, The Trashing of the Public Forum: Problems in First Amendment Analysis, 55 GRO. WASH. L. REV. 109, 112 (1986) ("A significant factor . . . in expanding public forum was the civil rights movement of the 1960s.").
25 See Brown v. Louisiana, 383 U.S. 131, 143 (1966) ("A State or instrumentality may, of course, regulate the use of its libraries or other public facilities. But . . . [i]t may not invoke regulations as to use . . . as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."); see also Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (protecting a protest on statehouse grounds).
26 408 U.S. 104, 118 (1972) (protecting speakers' access on or "adjacent to" school grounds).
28 See supra note 17.
29 Perry, 460 U.S. at 45. A limited public forum is public property that the government intentionally designates for "use by the public as a place for expressive activity." Id.
30 See supra note 21 and accompanying text.
b. Speech on Property That Has Been Considered a Nonpublic Forum

Courts have held that the government's rights in nonpublic fora are "most analogous to that of a private owner," and that the government therefore enjoys "maximum control over communicative behavior." Nonpublic fora may be subject to prohibitions of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment, because government regulations in nonpublic fora need only be reasonable. Accordingly, the character of the property to which speakers seek access determines the extent of First Amendment protection the speech will receive, because strict judicial scrutiny will be applied to speech regulations in public fora, and rational-basis review will be applied to speech regulations in nonpublic fora.

The foundation for the nonpublic forum doctrine was laid in 1967 in Adderley v. State of Florida, where the Court gave state officials the power to stop demonstrations on public jailhouse grounds, and found that the "State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." Sixteen years later, the Court in Perry formally defined the nonpublic forum as public property that is "not by tradition or designation a forum for public communication." Perry held that an interschool mail system used by a school district was a nonpublic forum because it was not

31. Paulsen, 925 F.2d at 69.
32. See U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981) (upholding a ban on depositing unstamped papers in mailboxes, because such mailboxes were not a public forum); see also Philip L. Hirschhorn, Noncommercial Door-To-Door Solicitation And The Proper Standard Of Review For Municipal Time, Place, and Manner Restrictions, 55 FORDHAM L. REV. 1139, 1149 (1987) ("Unlike the public or the limited public forums, there is no constitutional right of access to nonpublic forums.").
33. Public property that is not by tradition or designation a forum for public communication is governed by a "reasonableness" standard. Perry, 460 U.S. at 46. The government may restrict speech in a nonpublic forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because [of the speaker's view most relevant in the vehicleicular message the speech conveys, are considered content-based restricts and are subject to the highest form of scrutiny. U.S. v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); Sable Comm'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989).
34. See Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984) ("[T]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.") (quoting Perry, 460 U.S. at 44).
36. Adderley, 385 U.S. at 47.
37. Id. at 46; see also Paulsen v. County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991) (defining nonpublic fora as places which, "by tradition, nature, or design, are not appropriate platforms for unrestrained communication-military installations and federal workplaces, for instance, fall into this category.").
open for use by the general public.\textsuperscript{38}

After the unofficial creation of the nonpublic forum doctrine in \textit{Adderley}, the Court went on to consider other public places nonpublic fora. Government regulations were upheld in military bases,\textsuperscript{39} charity drives for federal employees,\textsuperscript{40} utility poles on public streets,\textsuperscript{41} residential mailboxes,\textsuperscript{42} the sidewalk outside a post office,\textsuperscript{43} and the advertising space on city buses\textsuperscript{44} because these all were deemed nonpublic fora.

In the 1981 decision of \textit{United States Postal Service v. Greenburgh Civic Association}, the Court recognized that the First Amendment does not guarantee access to property "simply because it is owned or controlled by the government."\textsuperscript{45} The Court acknowledged that the question of whether a particular piece of personal or real property owned or controlled by the government is a public forum is a blurry one, but nonetheless held that residential mailboxes were nonpublic fora for free speech purposes.\textsuperscript{46} Thus, the Court upheld a statute that prohibited depositing unstamped matter into residential mailboxes.\textsuperscript{47} The Court accepted the government’s justifications for the challenged statute, including the protection of mail revenues, the efficient and secure delivery of mail, and the protection of postal customers’ privacy.\textsuperscript{48} The Court reasoned that although the postal customer

\textsuperscript{38} \textit{Perry}, 460 U.S. at 47. The Court went on to note that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." \textit{Id.} at 49.

\textsuperscript{39} \textit{See United States v. Albertini}, 472 U.S. 675, 684, 686 (1985) ("Military bases are not generally public fora . . . [t]here is 'no generalized constitutional right to make political speeches or distribute leaflets' on military bases, even if they are generally open to the public.'") (quoting \textit{Flower v. United States}, 407 U.S. 197, 838 (1976)); \textit{Greer v. Spock}, 424 U.S. 828, 840 (1976) (upholding government regulations that banned all political speeches and demonstrations on a military base and holding that military bases were nonpublic forums).

\textsuperscript{40} \textit{See Cornelius v. NAACP Legal Def. & Educ. Fund}, 473 U.S. 788, 804 (holding that the government did not violate First Amendment rights of various advocacy organizations by excluding them from participation in a charity drive, because the drive was a nonpublic forum and "the principal function of the property would be disrupted by [the] expressive activity[].")

\textsuperscript{41} \textit{See Members of City Council v. Taxpayers for Vincent}, 466 U.S. 789, 814 (1984) (noting that the application of the public forum doctrine to utility poles was inappropriate, because ""the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government."") (quoting \textit{U.S. Postal Service v. Greenburgh Civic Ass’ns}, 453 U.S. 114, 129 (1981)).

\textsuperscript{42} \textit{See supra} note 27.

\textsuperscript{43} \textit{See United States v. Kokinda}, 497 U.S. 720, 727 (1990) (distinguishing post office sidewalks from public sidewalks because they were not traditionally open to the public for speech related activities, and upholding a regulation prohibiting solicitation on postal property because post office sidewalks were nonpublic fora).

\textsuperscript{44} \textit{See Lehman v. City of Shaker Heights}, 418 U.S. 298, 301–02 (1974) (concluding that car card space on a city transit system was not a public forum).

\textsuperscript{45} 453 U.S. at 129.

\textsuperscript{46} \textit{Id.} at 132.

\textsuperscript{47} \textit{Id.} at 133–34.

\textsuperscript{48} \textit{Id.} at 117.
paid for the "physical components" of a mailbox, the mailbox was not purely private property because the customer also agreed to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his or her mail.\textsuperscript{49} The Court further explained that while people are not required to become postal customers, those that do wish to receive and deposit their mail do so under the direction and control of the Postal Service.\textsuperscript{50} Finally, the Court concluded that there was "neither historical nor constitutional support for the characterization of a [mailbox] as a public forum," because access to mailboxes had been unlawful since 1934 "except under the terms and conditions specified by Congress and the Postal Service."\textsuperscript{51} This further distinguished these authorized depositories from traditional public forums such as streets and parks.\textsuperscript{52}

Relying on \textit{Greenburgh}'s rationale, the Court in \textit{Members of the City Council v. Taxpayers for Vincent} upheld ordinances that forbid posting signs on public utility poles because the challengers failed to demonstrate "a traditional right of access respecting such items . . . for purposes of their communication comparable to that recognized for public streets and parks."\textsuperscript{53} The Court considered the government interest of avoiding "visual clutter" as an acceptable justification for the ordinance,\textsuperscript{54} recognizing that at some point, the government's relationship to things under its dominion and control is "virtually identical to a private owner's property in the same kinds of things[]."\textsuperscript{55} The Court reasoned that the mere possibility that government property can be used as a vehicle for communication did not necessarily mean that the Constitution mandated such uses to be allowed.\textsuperscript{56} Hence, both \textit{Vincent} and \textit{Greenburgh} illustrate the difficulty the Court has had in determining whether public property constitutes a public or a nonpublic forum.

\textbf{B. Leafleting Regulations}

Traditional leafleting is a form of expression where individuals offer handbills, pamphlets, advertisements, notices, and other information to

\textsuperscript{49} \textit{Id.} at 128.
\textsuperscript{50} \textit{Greenburgh}, 453 U.S. at 125–26.
\textsuperscript{51} \textit{Id.} at 128–29.
\textsuperscript{52} \textit{See id.} at 130–31.
\textsuperscript{54} \textit{Id.} at 816–17 (holding that the state has a legitimate interest in property's esthetic value because the condition of the environment affects the value of property and quality of life).
\textsuperscript{55} \textit{Id.} at 815 n.31.
\textsuperscript{56} \textit{See id.} at 814 (citing U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)).
individuals on the street or sidewalk who remain free to accept or reject the documents. Leafleting, in its traditional form, has a powerful history. Colonists like Thomas Paine and Paul Revere regularly utilized this method of communication because it was the only way to express their opposition to England during the American Revolution. This history explains why courts have given special solicitude to this form of communication, which in the past has been used by those who would not otherwise have been able to express their ideas. Courts as well as scholars have recognized that leafleting is an inexpensive and efficient way to disseminate information to a large audience.

a. Impermissible Government Regulations of Leafleting

The Supreme Court has made clear that bans on door-to-door leafleting are invalid. In its 1943 decision in Martin v. City of Struthers, for example, the Court held that whether leafleters are permitted into private homes depends upon "the will of the individual master of each household, and not upon the determination of the community." Similarly, four years

57 Vincent, 466 U.S. at 809–10; see also Schneider v. State, 308 U.S. 147, 156–57 (1939) (noting that some recipients of leaflets announcing a protest meeting, threw the materials on the sidewalk and into the street).

58 See Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (observing that the distribution of religious literature is a long held tradition of missionary evangelism, "as old as the . . . printing presses."); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (discussing the importance of leaflets in American history).

59 Lovell, 303 U.S. at 452 ("[P]amphlets and leaflets . . . have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."); JOSEPH M. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION 35 (Life Cycle Books 1985) ("During the American Revolution, the colonists were expert in the use of the leaflet; people like Tom Paine and Paul Revere regularly printed articles and handed them out to people. Since the press at that time was under the sway of England . . . . [i]f the colonists wanted to express their views on independence or some other facet of English oppression, they had to resort to the leaflet.").

60 See Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Distribution of circulars is essential to the poorly financed causes of little people."); U.F.C.W., Local 1518 v. Kmart Can. Ltd., 1999 Can. Sup. Ct. Lexis 52, 31 ("The distribution and circulation of leaflets has for centuries been recognized as an effective and economical method of both providing information and assisting rational persuasion."); GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 119 (Southern Illinois University Press 1999) ("In the case of . . . leafleting, the courts have recognized the importance of extending constitutional coverage to protect the communicative conduct of groups.").

61 See cases cited supra note 60; SCHEIDLER, supra note 63, at 36 (acknowledging that some people see leafleting as the "poor man's way" to distribute information); see also RICHARD K. TAYLOR, BLOCKADE: A GUIDE TO NON-VIOLENT INTERVENTION 166 (Orbis Books 1977) (pointing out that leafleting is easy to do); Shaun Parker, The History Of Leaflet Distribution (2008), http://www.articlesbase.com/direct-mail-articles/the-history-of-leaflet-distribution-477265.html (explaining that during the Holocaust the Nazi government used leafleting to widely propagate false information about the Jewish community).

62 See Martin, 319 U.S. at 149 (striking down an ordinance that forbade ringing a doorbell or otherwise summoning a resident to the door to receive handbills); Schneider, 308 U.S. at 165 (invalidating an ordinance that forbade door-to-door leafleters).

63 Martin, 319 U.S. at 141.
earlier, the Court in *Schneider v. State* recognized that the most effective way to ensure that individuals have notice of leaflets is to focus their “distribution at the homes of the people.”

The Court in *Schneider* also struck down bans on leafleting in public streets. The Court found that the government’s interests in “keeping the streets clean and of good appearance” was insufficient to justify an ordinance that prohibited a person from “handing literature to [those] willing to receive it.” Likewise, in *Jamison v. Texas*, which was decided the same year as *Martin*, the Court held that one who is rightfully on a street that the state has left open to the public has the constitutional right to express his views in an orderly fashion, including through leafleting.

Courts have also struck down licensing requirements for leafletters. In 1938, the Court in *Lovell v. City of Griffin* voided an ordinance that forbade distributing by hand any literature without the written permission of the city manager. The Court concluded that regardless of the government’s motive, penalties of license and censorship should not be imposed to abridge the freedom of speech. In 2002, the Court in *Watchtower Bible & Tract Soc’y of N.Y. v. Village of Stratton* voided similar licensing requirements for door-to-door leafleting, describing the requirement that citizens first inform the government of their desire to speak to their neighbors and then obtain a permit to do so as “offensive” to the First Amendment. Thus, like traditional leafleting, door-to-door leafleting has received substantial protection by the Court.

b. Permissible Government Regulations of Leafleting

Despite the protection afforded to traditional leafleting, courts also have indicated that the reserved police powers of the States permit them to...

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64 *Schneider v. State*, 308 U.S. 147, 164 (1939). It is also important to note that one of the statutes at issue in *Schneider* banned the distribution of handbills to passengers in any street car, and prohibited persons from throwing, placing or attaching “any hand-bill in, to, or upon any automobile or other vehicle,” but the Court did not address this particular issue because it only reached as-applied challenges to leafleting door-to-door and on public sidewalks. *Id.* at 154.

65 *Id.* at 163.

66 *Id.*

67 318 U.S. 413, 416 (1943).


69 303 U.S. at 451–52.

70 *Id.* at 451.

71 536 U.S. at 165–66.
impose reasonable time, place, and manner restrictions on leafleting. As a result, courts have upheld some regulations of leafleting activities as constitutional, recognizing that privacy rights and state interests can, in certain circumstances, outweigh First Amendment rights.

For example, in the 1988 decision of *Frisby v. Schultz*, the Court held that a municipal ordinance that banned picketing and leafleting “before or about the residence . . . of any individual” was constitutional, because it served a significant government interest in protecting residential privacy and only prohibited targeted picketing and leafleting that took place in front of a particular home. Seven years earlier, significant government interests were also held to justify restrictions on speech in *Heffron v. International Society for Krishna Consciousness*, where a state fair restricted leafleting to assigned booths. The Court considered the state interest in maintaining the orderly movement of crowds at the fair a sufficient time, place, and manner restriction on the First Amendment right to distribute literature.

The States’ police power to “protect the health and safety of their citizens” also has been used to justify restrictions on free speech in the context of anti-abortion leafleting. In the 1997 decision of *Schenck v. Pro-Choice Network of Western New York*, for instance, an injunction that created fixed buffer zones that prevented leafleters and protestors from approaching within fifteen feet of health clinic doorways was upheld on the ground that it served a significant government interest in securing “unimpeded . . . access to . . . clinics.” The injunction also promoted interests such as ensuring public safety and order, protecting the free flow of traffic, safeguarding property rights, and upholding a woman’s freedom.

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72 See *Cantwell v. Conn.*, 310 U.S. 296, 304 (1940) (stating that a State may “by general and non-discriminatory legislation” regulate the times, places and manner of soliciting information to protect the “peace, good order and comfort of the community”); *Ward v. Rock Against Racism*, 491 U.S. 781, 785 (1989) (“[E]ven in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

73 See infra notes 78–86 and accompanying text.


76 *Id.* at 649–50.

77 *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); see *Planned Parenthood Shasta-Diablo v. Williams*, 10 Cal. 4th 1009 (1995) (holding that a permanent injunction imposing place restrictions on the picketing activities of anti-abortion activists was proper where the restrictions were content neutral, supported a significant state interest, and burdened no more speech than necessary).

78 519 U.S. 357, 376 (1997).
to seek pregnancy-related services.\textsuperscript{79} Similarly, in the 2000 decision of \textit{Hill} \textit{v. Colorado}, a regulation forbidding leafleters who were within one hundred feet of a health care facility to come within eight feet of another person without first receiving that person’s consent was considered constitutional because it served significant government interests in ensuring safety and unobstructed access for patients entering such facilities.\textsuperscript{80} The Court recognized a privacy interest for unwilling listeners to avoid unwanted communications, noting that privacy interests are “far less important ‘when strolling through Central Park’ than when ‘in the confines of one’s own home,’ or [other situations] when persons are powerless to avoid” the communication.\textsuperscript{81} The Court found that the statute protected “those who enter a health care facility from the harassment, the nuisance, the persistent importuning . . . and the implied threat of physical touching that can accompany an unwelcome approach” by a person wishing to “thrust an undesired handbill upon her.”\textsuperscript{82} These cases reflect the notion that government interests can validate limits on speech in nonpublic fora and, even occasionally, in public fora.

II. THE SPLIT AMONG CIRCUIT COURTS REGARDING VEHICLE LEAFLETING BANS

Courts have been confused about how to apply the public forum doctrine to municipal time, place, and manner restrictions on vehicle leafleting. This Section highlights the facts and rationales of Circuit Court decisions that have addressed this issue. Each court analyzed the government regulations using a three-part test that assessed the reasonableness of time, place, or manner restrictions.\textsuperscript{83} Under this test, speech restrictions must: (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication.\textsuperscript{84} Section A discusses the Eighth Circuit’s decision in \textit{Krantz v. City of Fort Smith}, which struck down a city ordinance that prohibited leafleting of vehicles parked on public property.\textsuperscript{85} Section B

\textsuperscript{79} Id.
\textsuperscript{80} \textit{Hill}, 530 U.S. at 725–26.
\textsuperscript{81} Id. at 716 (quoting Cohen v. California, 403 U.S. 15, 21–22 (1971)).
\textsuperscript{82} Id. at 724.
\textsuperscript{83} See infra Part II.A–D.
\textsuperscript{84} See Ward v. Rock Against Racism, 491 U.S. 781, 798–800 (1989) (setting forth the time, place, and manner test); see also United States v. Albertini, 472 U.S. 675, 688–89 (1985) (holding that neutral regulations that control the time, place, and manner of expression are permissible so long as the neutral regulation would be achieved less effectively absent the regulation).
\textsuperscript{85} 160 F.3d 1214, 1222 (8th Cir. 1998).
explores *Horina v. City of Granite City*, where the Seventh Circuit invalidated an ordinance that banned leafleting of cars parked on city streets.\(^8\) Section C examines the recent Ninth Circuit decision of *Klein v. City of San Clemente* that invalidated a similar ordinance.\(^7\) Lastly, Section D reviews the Fifth Circuit’s decision in *Jobe v. City of Catlettsburg*, which differed from its sister circuits by upholding an ordinance that banned vehicle leafleting.\(^8\)

\[\text{A. The Eighth Circuit: Krantz v. City of Forth Smith}\]

The plaintiffs in *Krantz* were church members who were arrested or threatened with arrest for placing religious literature under the windshield wipers of unattended vehicles that were parked on public property.\(^9\) A series of ordinances from four cities had made it a misdemeanor to place a handbill or advertisement on vehicles parked on public streets, but allowed this practice if an occupant of the vehicle was willing to accept the leaflet.\(^9\) The plaintiffs sought declaratory and injunctive relief, arguing that the ordinances were facially unconstitutional because the ordinances violated plaintiffs’ First Amendment right to free speech.\(^9\) Specifically, the plaintiffs contended that the state interest in litter prevention could not justify a complete ban on plaintiffs’ speech activities.\(^9\) The defendants responded that the ordinances were narrowly tailored to serve significant governmental interests and left open alternative forms of communication, such as traditional leafleting.\(^9\) While the defendants conceded that public streets and parking lots were public fora, they maintained that the city had the power to regulate activities “affecting the safety and aesthetics of such public areas through direct or indirect regulation.”\(^9\) However, instead of applying strict scrutiny for regulations occurring in public fora, the court

\(^8\) 538 F.3d 624, 638 (7th Cir. 2008).
\(^7\) 584 F.3d 1196, 1208 (9th Cir. 2009).
\(^8\) 409 F.3d 261, 273–74 (6th Cir. 2005).
\(^9\) *Krantz*, 160 F.3d at 1215.
\(^9\) *Id.* at 1216. One of the four ordinances, which all contained similar language, provided that: “It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill . . . 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 to the receiver therefore, any handbill to any occupant of the vehicle that is willing to accept it.” *Id.*
\(^9\) *Id.*
\(^9\) *Id.* at 1218.
\(^9\) *Id.*
\(^9\) *Id.*
applied the time, place, and manner test without any explanation.\textsuperscript{95}

The Court of Appeals agreed with the District Court that the ordinances were content-neutral, and accordingly the city satisfied the first prong of the time, place, or manner test.\textsuperscript{96} As for the second prong, the court relied on \textit{Schneider} (which struck down an ordinance that forbade ringing a doorbell or otherwise summoning a resident to the door to receive leaflets) and \textit{Martin} (which invalidated an ordinance that forbade door-to-door leafleters) to hold that the ordinances were not narrowly tailored to serve a significant governmental interest.\textsuperscript{97} This departed from the District Court’s reasoning, which held that the ordinances were narrowly tailored to achieve a significant government interest because “unsightly litter is [a] blight in this country the eradication of which requires the expenditure of limited local government resources and presents a myriad of public health and safety concerns.” \textsuperscript{98} The Eighth Circuit stressed that a court can take into consideration the opportunity for the “would-be recipient to provide effective notice that the communications are not wanted” in the narrow tailoring analysis.\textsuperscript{99} This factor influenced the court to strike down the ordinance as overbroad, because it reasoned that those who do not want leaflets placed on their cars can “quite easily and effectively provide notice, for example, by placing a sign on the dashboard.”\textsuperscript{100}

Finally, the court held that the government failed to demonstrate a “reasonable fit” between its asserted goal and the means it used to accomplish that goal.\textsuperscript{101} Despite evidence that government officials had received complaints regarding leaflets left on cars, the court held that the government did not establish a “factual basis for concluding that a cause-and-effect relationship actually exist[ed] between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities.”\textsuperscript{102} Therefore, the ordinances were deemed unconstitutional because they suppressed “substantially more speech that [was] necessary” to accomplish their asserted purpose.\textsuperscript{103}

\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 1219.
\textsuperscript{97} \textit{Id.; see supra Part I.B.1 for a discussion of Schneider and Martin.}
\textsuperscript{98} \textit{Krantz,} 160 F.3d at 1217.
\textsuperscript{99} \textit{Id.} at 1220.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} at 1221.
\textsuperscript{102} \textit{Id.} at 1221–22.
\textsuperscript{103} \textit{Id.} at 1222.
B. The Seventh Circuit: Horina v. City of Granite City

The Seventh Circuit in Horina employed a similar rationale as the Eighth Circuit to strike down an ordinance that stated, in relevant part: "No person shall deposit or throw any handbill in or upon any vehicle . . . [or] deposit, place, or throw any handbill upon any private premises which are temporarily or continuously unoccupied." While the court considered the city's asserted interests in preventing litter, intrusion, trespass, and harassment substantial, the court could not accept the city's argument that common sense dictated that the ordinance was needed to combat these problems. The court did not necessarily require empirical evidence, but held that the government "must proffer something showing that the restriction actually serves a government interest," and that in this case, the city had introduced "absolutely no evidence" that the ordinance would prevent litter, intrusion, trespass, and harassment. The court likewise did not accept the city's argument that other states and cities have similar restrictions, because it revealed nothing regarding the specific defendant city. Thus, the court held that the ordinance was not narrowly tailored, and that the ordinance failed to provide adequate alternatives. Although the ordinance left persons with the opportunity for traditional leafleting or door-to-door leafleting, the court did not find these alternatives "realistic" because they "require a speaker significantly . . . more time to reach the same audience."

Horina differed from Krantz in that the parties had not conceded that vehicles were public fora. Rather, the city argued that the windshields of privately owned automobiles and privately unoccupied buildings constituted a nonpublic forum, and thus should only be assessed for reasonableness. The court disagreed on the grounds that this analysis only applies when a government restricts speech "on property that the government itself owns," and emphasized that the term nonpublic forum "is not synonymous with privately owned property." Thus, the court applied the time, place, and manner test because it considered vehicles private

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104 Horina v. City of Granite City, 538 F.3d 624, 628 (7th Cir. 2008) (quoting section 2(c) of the challenged ordinance).
105 Id. at 633.
106 Id. at 633–34.
107 Id. at 634.
108 Id. at 635–36.
109 Id. at 636.
110 Id. at 632.
111 Id.
property. In the court’s view, because the city had not shown sufficiently the connection between its regulation and the eradication of litter or intrusion, the court held that the city failed the time, place, and manner test and struck down the ordinance as unconstitutional.\textsuperscript{112}

\textbf{C. The Ninth Circuit: Klein v. City of San Clemente}

Most recently, the Ninth Circuit relied on \textit{Krantz} and \textit{Horina} to invalidate a similar statute, which stated in relevant part: “No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle.”\textsuperscript{113} Like the statute in \textit{Krantz}, this ordinance allowed persons to leaflet to occupants of vehicles who were willing to accept the documents.\textsuperscript{114} The city contended that the ordinance preserved the aesthetics of the community by curbing litter and visual blight, and protected against the unauthorized use of private property.\textsuperscript{115}

Like \textit{Krantz} and \textit{Horina}, the court in \textit{Klein} held that the city had not provided any evidence that placing leaflets on cars caused litter. Specifically, the court stated that the city would have to show “some nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets” before the court could hold that the ordinances were justified.\textsuperscript{116} Thus, the city had the burden of showing not only that such leafleting created litter, but that it created “an abundance of litter significantly beyond the amount the [c]ity already manag[ed] to clean up.”\textsuperscript{117}

The court also deemed the city’s interest in “preserving an individual’s right to decide how and when [his] private property will be used” insufficient.\textsuperscript{118} As in \textit{Krantz}, the court found that the ordinance prohibited persons from distributing leaflets to those who might want to receive such speech, even if they were absent at the time of distribution.\textsuperscript{119} As to unwilling recipients, the court considered the burden on these persons minimal, stating that “the mere fact that [a person] must take the unsolicited leaflet from her windshield and place it in the garbage cannot

\textsuperscript{112} \textit{Id}. at 636.

\textsuperscript{113} \textit{Klein v. City of San Clemente}, 584 F.3d 1196, 1199 (9th Cir. 2009) (quoting Section 8.40.130 of the City’s municipal code).

\textsuperscript{114} \textit{Id}.

\textsuperscript{115} \textit{Id}. at 1201–02.

\textsuperscript{116} \textit{Id}. at 1202.

\textsuperscript{117} \textit{Id}. at 1203.

\textsuperscript{118} \textit{Id}. at 1204.

\textsuperscript{119} \textit{Id}. 
justify an across-the-board restriction.”

According to the court, the city could also allow potential recipients to opt-out of receiving leaflets, just as homeowners can opt-out of door-to-door soliciting through the use of “No Solicitations” signs. The court recognized that vehicles are entitled to “less assiduous” protection than homes, which have always been afforded “a higher degree of privacy under our law,” thus if privacy interests could not justify door-to-door solicitation bans, it likewise could not justify an outright ban against vehicle leafleting. Ultimately, the court held that the ordinances were unconstitutional. Under the time, place, and manner test, the ordinances were not narrowly tailored because the court did not consider the city’s interests in preventing litter and the unauthorized use of private property significant.

D. The Sixth Circuit: Jobe v. City of Catlettsburg

While Klein and Horina followed the reasoning of Krantz regarding the evidentiary showing needed to prove a significant government interest in litter prevention, Jobe declined to follow Krantz in this respect. The ordinance at issue in Jobe prohibited persons to place, deposit, or affix “any handbill, sign, poster, advertisement, or notice of any kind whatsoever” to “any automobile or other vehicle . . . without first having secured in writing the consent of the owner thereof.” The court held that this was a reasonable time, place, and manner regulation of speech, and thus upheld the ordinance.

The plaintiff argued that his leafleting occurred on cars parked on public streets, while the city argued that his leafleting occurred on privately owned cars. Relying on Taxpayers for Vincent, the court agreed with the defendants, reasoning that if the public forum doctrine “does not apply to public items (e.g., utility poles) permanently located on public streets and sidewalks, it assuredly does not apply to private cars temporarily parked on

\[120\] Id.
\[121\] Id. at 1205.
\[122\] Id.
\[123\] Id. at 1207.
\[124\] Id. at 1208.
\[125\] See Jobe v. City of Catlettsburg, 409 F.3d, 261 (6th Cir. 2005); see also discussion supra Part II.A–C.
\[126\] Jobe, 409 F.3d at 263.
\[127\] See id. at 268.
\[128\] Id. at 266.
public streets." The court further stated that there was no "traditional right of access" to car windshields and that vehicle leafletting is not analogous to the forms of communication that have "long taken place on our 'public streets and parks.'" Thus, since the court concluded that vehicles were not public fora, it applied the traditional time, place, and manner test instead of strict scrutiny. The court noted, however, that an argument could have been made that the protection of private property rights mandated a lower standard of review, but the parties did not make such an argument.

The court accepted the city's asserted interests of preventing litter, visual blight, and protecting the unauthorized use of private property as significant. The court held that the "common-sense explanations for these types of laws" did not require proof that these problems occurred in the past or were presently necessary, because this would be a "daunting task" for the government. The court recognized that this ordinance was enacted in 1952, and that there might have been an absence of information due to the passage of time, and that it would be difficult for the city to show the "empirical necessity for a law that has been in place for more than 50 years." Further, the court broadened littering to include the very act of vehicle leafletting, stating that littering on private property "is not merely a possible by-product of the activity, but is created by the medium of expression itself." Therefore, the court held that the ordinance was narrowly tailored to address the "substantive evil" of littering on both private and public property.

The court held that the ordinance also satisfied the third prong of the time, place, and manner test by "leav[ing] open ample alternative channels of communication." The court stated that plaintiffs could leaflet in the same place by waiting in the parking lot and approaching car owners, that they could solicit door-to-door, that they could mail information to residents, or that they could leave leaflets at private residences so long as

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129 Id. at 267 (emphasis in original).
130 Id. (quoting Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984)).
131 Id.
132 Id. ("While one could argue that the protection of private property rights here calls for a lower standard of review... that argument has not been made...").
133 Id. at 269–70.
134 Id. at 269.
135 Id.
136 Id.
137 Id.
138 Id. at 270.
they were securely fastened to the door.\textsuperscript{139}

After holding the ordinances constitutional, the court gave three reasons why it declined to follow \textit{Krantz}.\textsuperscript{140} First, \textit{Krantz} did not consider vehicle leafleting itself to be a form of littering.\textsuperscript{141} Second, \textit{Krantz} ignored the decision in \textit{Taxpayers for Vincent}, which recognized that not all items on public streets are automatically transformed into public fora.\textsuperscript{142} Third, \textit{Krantz} failed to account for the "fundamental difference" between traditional leafleting and vehicle leafleting, which is that the car windshield has not historically been used as a communicative tool, and the recipients of leaflets under their car windshield have "no choice in accepting the burden of disposing of it and no choice in peeling it off the windshield after a rain shower."\textsuperscript{143}

\section*{III. How Courts Should Address Leafleting Regulations}

This Section argues that the standard of review for vehicle leafleting regulations should parallel the standard applied in nonpublic fora. Despite arguments that cars should be treated like homes for free speech purposes—because both are private property where the right to receive speech must be protected—cars differ from homes in three significant ways. First, there has never been a traditional right of access to a car the way there has been for private residences. Second, more alternative forms of communication exist to reach car owners than homeowners. Third, the government exercises considerably more control over cars than it does homes, as drivers are required to obtain a license, register their vehicle, and get insurance before driving. Therefore, cars more closely resemble private mailboxes, which have been considered nonpublic fora in the Supreme Court's free speech analysis. Classifying vehicles as nonpublic fora will bring uniformity and guidance to lower courts in evaluating vehicle leafleting bans, and will give municipalities the deference they deserve.

\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 273.
\textsuperscript{141} \textit{Id.} at 273.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 271, 274.
A. Vehicles Are Different From Residences And Are More Akin To Mailboxes

a. There is No Traditional Right of Access to Car Windshields

The importance of door-to-door solicitation lies in the historical right of access to a homeowner's doorstep. Traditionally, the home has been a place where a homeowner receives company and collects information, and the front door has symbolized a homeowner's consent to a visitor's entry. Because of this, it has been argued that speech regulations involving the home can be analyzed similarly to regulations in the public forum, where speakers also have a right of access to willing listeners. Of course, regulations of home solicitations are not absolute, and a homeowner also has the right to exclude any kind of communication on his or her property. Some have viewed the homeowners' right to exclude as a basis for treating homes similar to the nonpublic forum, but this has been considered unpersuasive because the argument ignores the traditional right of access to the home. This traditional right of access has been continually recognized in the Supreme Court's door-to-door solicitation cases, which have stated that when a homeowner's desires are unknown, a speaker's right to seek entry falls within the ambit of the First Amendment.

Unlike a homeowner's front door, a car windshield has never had a traditional right of access. This is not for lack of historical longevity—

144 See Breard v. Alexandria, 341 U.S. 622, 626 (1951) (stating that "[i]t is true that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers. . . ."); Jobe, 409 F.3d at 272 (recognizing that the "well-trodden path to the front door" exists to encourage communication).

145 See Hirschhorn, supra note 32, at 1154 ("Private property that is held open by the homeowner is similar to the public forum. Both are places where speakers traditionally have access to willing listeners. This similarity is the basis for the argument that the standard of review for regulations of solicitation on private property must parallel the standard applied in the public forum."); see also Dean v. Byerley, 354 F.3d 540, 551 (6th Cir. 2004) (upholding the right to engage in residential picketing just outside the home by analyzing the speech according to the same standard typically applied to speech within the public forum).

146 See Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610, 619 (1976) ("There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose"); Wis. Action Coal. v. City of Kenosha, 767 F.2d 1248, 1251 (7th Cir. 1985) (positing that the peaceful enjoyment of one's home is a legitimate governmental objective sufficient to support regulation of door-to-door solicitation and canvassing).

147 See Hirschhorn, supra note 32, at 1154 (noting that the argument equating private property with nonpublic fora "fails to consider the traditional right to seek access to open private property."); but see City of Watseka v. Ill. Pub. Action Council, 796 F.2d 1547, 1576 (7th Cir. 1986) (making the argument for analogizing the nonpublic forum with private property) (Coffey, J., dissenting).


149 Jobe v. City of Catlettsburg, 409 F.3d 261, 272 (2005) ("[T]he windshield wiper does not exist,
Mary Anderson's first patent for the device was issued in 1903 and windshield wipers became standard equipment on all American cars in 1916. The purpose of the invention was to prevent drivers from having to reach outside their windows in bad weather to clear their front windshield. Conversely, Joseph Henry's invention of the electronic doorbell in 1831 was intended to alert a homeowner to the presence of visitors wishing to gain access to the home. Given that the practice of leafleting has been used since the 1800s, predating both of these inventions as well as the invention of the first gasoline-powered American automobile in 1891, it is significant that courts have never recognized a traditional right of access to car windshields, or any other historical forms of transportation for that matter, the way they have for homes.

Thus, analogizing cars to homes for the purposes of analyzing restrictions on speech is improper because the traditional right of access that justifies
higher speech protection for homes is not present for cars.

Requiring vehicle owners to place a "no solicitation" sign on the dashboard, like those that are placed on the door or window of private residences, is an impractical burden to place on drivers. If the signs are too small, solicitors will not see them, yet if they are large, such signs may create safety hazards by impairing the driver's vision. Moreover, drivers that live outside of these cities would have no need for these kinds of signs otherwise and hence might not know about them. Thus, out of town drivers entering the city and wishing to have their vehicles remain free from unwanted leaflets would have to obtain or carry one of these signs when they happened to park inside cities with "no solicitation" requirements. Putting this kind of burden on drivers would be unnecessary, impractical, and unsafe.

b. More Alternative Forms of Communication Are Available to Reach Vehicle Users

There are more options available to reach car owners than there are to reach homeowners. For example, drivers typically wait in line to enter or exit public parking garages, giving solicitors ample opportunity to reach numerous car owners that remain free to accept or reject the leaflets.156 Even in private parking garages, automobiles are required to come to a complete stop, making it easy for solicitors to approach drivers.157 Approaching vehicles at stoplights, whether on the passenger or the driver side, is also a convenient and more direct way to distribute leaflets to drivers. Additionally, time restrictions for parking on city streets put canvassers on notice as to what time car owners must move their cars in order to avoid getting ticketed. If solicitors want to reach a group of vehicles in a given area, all they need do is solicit on the streets around the designated times that cars are allowed to park. These opportunities are unavailable to reach those in private residences.

Most importantly, upholding vehicle leafleting bans will not foreclose

156 Answering Brief of Defendant-Appellee at 28 n.11, Klein v. City of San Clemente, 584 F.3d 1196, 1199 (9th Cir. 2009) (No. 08-55015) ("[R]esidents of private houses do not have to queue up to enter or leave public garages or lots where they can be handed leaflets if they are willing to accept them[.]"), see Lloyd Corp. v. Tanner, 407 U.S. 551, 556–57 (1972) (discussing the ease with which literature could be given to a driver who has stopped his car to enter or exit a private parking lot).

157 See Lloyd Corp., 407 U.S. 551, 556–57 (1972) ("When moving to and from the privately owned parking lots, automobiles are required by law to come to a complete stop. Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets."); see also Hague v. CIO, 307 U.S. 496 (1939) (reaffirming the traditional notion that public streets were the domain of the people and could be used as a forum for discussion); Schneider, 308 U.S. at 162 (noting that some people willingly receive proffered leaflets).
leafflet in its most venerable form. Solicitors may still leafflet along the public streets where cars are parked, or inside parking lots to willing passersby, and can also wait in such parking lots until drivers return, all of which enables solicitors to communicate in the exact same areas. They can leafflet door-to-door in any given community, or mail the information to residents in the city. They may also stand and advertise in the desired areas with large signs, or temporarily place signs around the parking garages. These alternatives will still enable solicitors to reach their intended audience. Furthermore, they are adequate substitutes to the medium of expression closed off by the ordinances, because they provide an even more direct and effective means of communicating. Leafflets have less of a chance of reaching their target audience because they may be blown off of an unoccupied vehicle before the driver ever sees it. Since a leafflet that is placed under the windshield wiper is susceptible to being blown off by wind, rain, or even by an unaware driver who turns the wipers on, there is no guarantee that even those who would be willing to accept it will actually receive it. Therefore, these alternative forms of communication provide more protection for the willing listeners’ right to receive speech, not less, because they ensure that leafflets end up in the hands of these listeners instead of in the street as litter.

c. The Government Has Extensive Control Over Vehicles

Since the government has a substantial amount of authority to regulate vehicles, it is not inappropriate for the government to also regulate the kind of speech that can be placed on such vehicles. In South Dakota v. Opperman, the Supreme Court held that the Fourth Amendment allows for warrantless car searches because “automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls.” For

158 See supra notes 60–64 and accompanying text.
159 See Hill v. Colorado, 530 U.S. 703, 727 (2000) (recognizing that a statute that required leaffleters to remain eight feet away from persons entering a health care facility did not “prevent the leaffletter from simply standing near the path of pedestrians and proffering his or her material, which the pedestrians [could] easily accept.”); see also Heffron v. Int’l Soc’y For Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981) (upholding a state fair regulation that required a religious organization desiring to distrubite literature to conduct that activity only at an assigned location due to “the State’s interest in confining distribution, selling, and fund solicitation activities to fixed locations”).
160 See City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994) (striking city ordinance that banned all residential signs except those falling within exemptions because it “almost completely foreclosed venerable means of communication that is both unique and important”); see also Jamison v. Texas, 318 U.S. 413, 417 (1943) (holding invalid an ordinance that completely banned the door-to-door distribution of literature).
example, car owners must abide by a plethora of registration, inspection, licensing, and insurance requirements. In addition, drivers understand that they may be stopped at any time for violating traffic laws. In particular, when drivers park their vehicles on city streets or in city parking lots, the government controls where, when, and for how long a given automobile can remain parked, and failure to obey these parking regulations will result in either a ticket or a driver’s car being towed at his or her expense. Further, the Ninth Circuit recently held in United States v. Pinedo-Moreno that it is permissible under the Fourth Amendment for federal agents to secretly plant a GPS locator on one’s car without a warrant, even if it is parked in a private driveway.

As the Supreme Court recognized in California v. Carney, the public is “fully aware that it is accorded less privacy in its automobiles because of the compelling governmental need for regulation. Historically, ‘individuals always [have] been on notice that movable vessels may be stopped and searched.’” On the other hand, the occupants of homes are shielded from these exercises of government discretion while in the security of their dwellings, since “protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society.”

162 See Carprice.com, Driving Legal Requirements & Laws (2011), http://www.carprice.com/legal-requirements. Car owners must apply for registration with the Department of Motor Vehicles in any given state in order to drive. Registration requirements vary from state to state. Typically, an owner needs a signed certificate of title for the vehicle, proof of insurance, a driver’s license, and a home address in order to register. An auto title is a legal certificate of ownership that shows who the owner of the vehicle is. It lists the current owner’s name and address, the make, model, and year of the car, as well as the date of sale. Id; see also DMV.org, The Unofficial DMV Guide (1999-2011), http://www.dmv.org.

163 See e.g., New York State Department of Motor Vehicles Safety Inspection, available at http://www.nydmv.state.ny.us/vehsafe.htm (explaining the vehicle inspection requirements for New York); see also Delaware v. Prouse, 440 U.S. 648, 658 (1979) (ruling that states have a vital interest in confirming that licensing, registration, and vehicle inspection requirements are followed).

164 See Carprice.com, supra note 162. Before an individual is allowed to drive, one must obtain a driver’s license. Age requirements vary from state to state, ranging from 16-18. Additionally, dealerships must be licensed with the state in order to sell cars; see also Prouse, 440 U.S. at 658.

165 See Carprice.com, supra note 162 (“It is illegal to drive a car in the USA without the minimum levels of insurance required for each state.”); see also Collins v. Nat’l Gen. Ins. Co., No. 10-13344, 2011 U.S. Dist. LEXIS, at *12 (E.D. Mich. Sept. 28, 2011) (noting how insurance minimum requirements vary across states and drivers may be subject to such requirements).

166 See California v. Carney, 471 U.S. 386, 392 (1985) (noting that the public is “fully aware” that it is accorded less privacy with regard to vehicles, since historically, “individuals always [have] been on notice that movable vessels can be stopped and searched”) (quoting United States v. Ross, 456 U.S. 798, 806 n.8 (1982)); see also Carroll v. United States, 267 U.S. 132, 151 (1925).

167 591 F.3d 1212, 1215 (9th Cir. 2010). The court emphasized that there is no reasonable expectation of privacy to a driveway or “curtilage of a residence,” nor to the “undercarriage” of a vehicle, nor to cars parked on a street or in a parking lot.

society." As the Court’s Fourth Amendment jurisprudence has illustrated, vehicles are much more heavily regulated than are homes, and thus vehicles are “obviously” more public in nature.

Further, some activities are legal to partake in when inside one’s home, but not inside one’s car. In New York, for example, operating a motor vehicle while intoxicated “upon public highways, private roads open to motor vehicle traffic [or] any other parking lot” is a misdemeanor that can result in suspension or revocation of a driver’s license in addition to a potential fine or imprisonment. Additionally, under section 154 of the United States Code, each State must pass a law that “prohibits the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage” in any motor vehicle located on a “public highway, or the right-of-way of a public highway, in the State.” Under section 920 of the United States Code, indecent exposure is prohibited “in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.” Hence, by simply stepping outside the confines of one’s own home and into an vehicle—a place where a person’s conduct can readily be seen by others—one potentially becomes subject to a host of criminal liability, which further highlights the more public nature of a car. Therefore, contrary to the Seventh Circuit’s decision, the defendants in Horina were not mistaken in characterizing vehicles as nonpublic fora, since automobiles can be considered the government’s property, not private property—especially when they are parked on city streets or in city parking lots. Accordingly, vehicle leafleting ordinances should be subject only to rational-basis review because local governments should be given deference when regulating speech in nonpublic fora.

170 South Dakota v. Opperman, 428 U.S. 364, 367 (1976). “The expectations of privacy as to automobiles is further diminished by the obviously public nature of automobile travel.” Id. The Court went on to hold that a routine inventory search of the defendant’s locked automobile was not an “unreasonable” search and did not violate the Fourth Amendment. Id. at 376.
171 N.Y. VEH. & TRAF. LAW § 1192 (2009). The statute defines “parking lot” for the purposes of this section as “any area or areas of private property, including a driveway, near or contiguous to and provided in connection with premises and used as a means of access to and egress from a public highway to such premises and having a capacity for the parking of four or more motor vehicles. The provisions of this section shall not apply to any area or areas of private property comprising all or part of property on which is situation a one or two family residence.” Id.
172 N.Y. VEH. & TRAF. LAW § 1193 (2010).
d. The Same Degree of Government Control Exists in Cars And Mailboxes, And Leafleting Interferes Equally With The Functions of Both

Cars are more analogous to residential mailboxes for the purposes of free speech analysis than to homes. In Council of Greenburgh, the Court acknowledged that postal customers pay for the physical components of their mailboxes, but also agree to abide by the Postal Service’s regulations in exchange for the delivery and pickup of the customers’ mail.\textsuperscript{175} Similarly, while an individual purchases his or her own vehicle, that individual also agrees to abide by the Department of Motor Vehicle’s regulations in order to enjoy the privilege of driving on government-provided roads, as previously discussed.\textsuperscript{176}

While distributing leaflets door-to-door does little to interfere with the functioning of a home, unlimited leafleting on cars and mailboxes can have burdensome consequences. For example, leaflets on car windshields physically block a driver’s vision and disable the windshield itself from functioning properly. Similarly, if unsolicited leaflets are allowed to be deposited into mailboxes in addition to stamped mailings, eventually a mailbox will become overstuffed, impairing its utility. Despite this loss of function, drivers as well as those who receive mail have no way to prevent unwanted leaflets, because most of the time, no one is around their car or their mailbox. However, homeowners have more opportunities to avoid unwelcome leaflets because solicitors must ring their doorbell and greet the occupants of a home in order to distribute materials. Thus, while in a home, the occupant has the power to exclude visitors—and the leaflets they may bring. Cars and mailboxes do not give individuals this same option.

Since the government exercises just as much control over vehicles as it does mailboxes, and regulates vehicles far more than it does individual homes, courts should consider vehicles, like mailboxes, to be nonpublic fora when analyzing vehicle leafleting ordinances. As regulations of nonpublic fora, ordinances banning vehicle leafleting should only be subject to rational-basis review to determine whether they are reasonable, and should not be scrutinized under the time, place, and manner test.

B. Deference to Municipalities is Appropriate

Giving deference to municipalities that enact vehicle leafleting bans is

\textsuperscript{175} See supra notes 45–56 and accompanying text.
\textsuperscript{176} See supra Part III.A-3.
appropriate because cities are in the best position to recognize the needs of their citizens and the community at large. Local governments possess an inherent authority, through its police powers, to impose reasonable restrictions on private rights for the sake of general public welfare, health, safety, order, and security. This is because local governments can most effectively balance the general needs of the citizens within their territories. Most importantly, if individuals within a given jurisdiction do not agree with local government regulations, they are free to voice their concerns, contact local government officials, or vote against officials they feel are not adequately representing their needs. These devices ensure that local governments will pay attention to the public's concerns and reactions, thereby giving them leeway to use an investigational approach in assessing how individual rights are to be preserved when they enact laws for the general public.

Solicitation regulations in streets and other public places fall within the local governments' police powers. As the Court in Berman v. Parker recognized as early as 1954, "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Vehicle leafleting regulations are a legitimate exercise of these police powers. In this instance, local governments have determined that the unauthorized placing of leaflets on vehicles parked on city streets and in

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177 See M. David Gelfand, *Federal Constitutional Law and American Local Government* 357 (1984) ("Local governments often invoke their police power as a basis for various regulations designed to maintain public order"); see also Black's Law Dictionary 1156 (6th ed. 1990) (defining "police power").


179 See Current Condemnation Law, supra note 178, at 312 (noting that it is easier for people to contact local politicians and have their voices heard); see also Marci Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 320 (2003) (discussing that local governments both provide more opportunity for input from the people and creates greater accountability from the politicians).

180 See Kelo v. City of New London, 545 U.S. 469, 482 (indicating varied needs in different parts of the nation and "great respect" the Court owes to state legislatures in determining local public needs); see also Current Condemnation Law, supra note 178, at 315 (noting that courts may be following an "experimental approach" when they allow States to reach various solutions to the public use question in takings law).

181 Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 619 (1976); Gelfand, supra note 177, at 358 ("[L]ocal governments regulate the use of streets and other public areas for solicitation, advertising, and demonstrations.").

city parking lots is an annoyance to individuals, and a visual blight for the general public. As the facts of Krantz and Horina illustrate, cities receive complaints regarding vehicle leaflets. Given the political accountability that local governments have, their response to these complaints should be deferred to.

C. Rationality Review Will Resolve a Direct Circuit Split

Courts that have struck down bans on vehicle leafleting have recognized that while it may be debatable whether the prevention of littering is a significant interest under the time, place, and manner test, it is beyond debate that it is a legitimate state interest. Therefore, in most cases, as in other areas of the law, rational basis review will have the effect of validating these kinds of bans, which will promote judicial efficiency and uniformity. Since the Supreme Court denied certiorari review on the issue of vehicle leafleting in 2005, lower court cases have become the law. Establishing a presumption of legitimacy for litter prevention will give lower courts more guidance and consistency and will enable higher courts to make precedent.

While this standard may be criticized as being too deferential, it will still require cities to prove that their regulations are reasonable. This standard will not simply require courts to take judicial notice, even though this has been done in areas of the law dealing with constitutional rights that are as just historically important. For instance, if a city's vehicle leafleting regulation forecloses too many avenues of communication, or is content-based, it will likely be found unreasonable.

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183 See supra Part II.A–B; see also Answering Brief of Defendant-Appellee at 13–14, Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009) (No. 08-55015) (noting that the plaintiff presented evidence that "many intended recipients would be angry to the point of belligerence, threats and violence when offered leaflets").

184 See Krantz v. City of Forth Smith, 160 F.3d 1214, 1221 (8th Cir.) ("Nor do we disagree with defendants' assertion that they may, consistent with prevailing constitutional standards, protect legitimate aesthetic and safety interests through indirect regulations that impose some burden on speech."); Van Nuys Publ'g Co. v. City of Thousand Oaks, 489 P.2d 809, 821 (Cal. 1971) (referring to litter prevention as a "legitimate and, indeed an increasingly urgent, government objective"); Answering Brief of Defendant-Appellee at 33, Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009) (No. 08-55015) ("Of course, here, even [plaintiff] concedes that preventing litter is a legitimate government interest, while the City has shown that it is a significant one.").


186 See Crawford v. Marion County Election Bd., 553 U.S. 181, 199 (2008) (taking judicial notice of the State's interest in deterring and detecting voter fraud in a challenge to a state law requiring government issued photo identification to vote as violative of the Fourteenth Amendment); Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (recognizing that the plaintiff's strong interest in exercising "the fundamental political right" to vote countered the State's compelling interest in preventing voter fraud.) (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).
Classifying vehicles as nonpublic fora will bring uniformity to lower courts that have had difficulty categorizing vehicles within the public forum framework. Since nonpublic fora are scrutinized under rationality review where a legitimate interest is needed, placing vehicles in this category will resolve the ongoing battle between Circuit Courts as to whether or not litter prevention is a significant government interest. Significant governmental interests are unnecessary under rational-basis review, because municipalities are given deference in areas where their legitimate police powers are exercised. This will allow local governments to judge whether litter prevention is needed in their particular jurisdictions and whether their constituents desire these kinds of bans. It will respect the decision of states like New York, where the Court of Appeals has interpreted its free speech clause broadly, as well as the thirty-eight other cities that have enacted vehicle leafleting bans.\textsuperscript{187} This level of review also accounts for the many alternative forms of communication that are still left available to potential vehicle-leafleters. Indeed, one Circuit Court judge has already acknowledged that a lower form of review is appropriate with regard to vehicle leafleting.\textsuperscript{188}

Most importantly, rational-basis review accounts for the fundamental difference in the government's control over vehicles and over homes. While the government's control over cars and mailboxes is pervasive, it has much less authority to regulate actions in and around homes. Therefore, it makes sense for courts to consider vehicles, like mailboxes, nonpublic fora in analyzing vehicle leafleting bans—especially when they are parked on city streets or in city parking lots. As a result, ordinances that forbid vehicle leafleting will be subject to rational-basis review and local governments—who exercise a great amount of control over such vehicles—will be given the deference they deserve.

\textsuperscript{187} See \textit{Jobe}, 409 F.3d at 274 (listing all of the cities that have enacted vehicle leafleting bans); \textit{People v. Remeny}, 40 N.Y.2d. 527, 530 (1976).

\textsuperscript{188} See \textit{supra} note 132 and accompanying text. It should be noted that while Judge Sutton agreed that vehicle leafleting ordinances should be scrutinized under rational-basis review, he did so because he considered vehicles private property, not nonpublic fora. See \textit{Jobe v. City of Catlettsburg} 409 F.3d 261, 267 (5th Cir. 2005).