

NOTES

STRANGERS IN THE NIGHT: ORDINANCES RESTRICTING THE HOURS OF DOOR-TO- DOOR SOLICITATION

The first amendment¹ protects the freedom of speech against legislative encroachment. Free speech includes the right to advocate beliefs and to solicit for organizations.² By exercising the right to speak freely to homeowners³ at their place of residence, political, religious and other groups can raise funds from and spread ideas to a community effectively and inexpensively.⁴

While homeowners have a right to receive a solicitor's message,⁵ they also have a judicially recognized right to privacy.⁶ Furthermore, local governments have an interest in protecting homeowners from crime and annoyance and may regulate the movement of persons through neighborhoods.⁷ Consequently, the first amendment rights of door-to-door solicitors conflict with the privacy interest of homeowners and the security

1. The first amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech" U.S. CONST. amend. I.

2. See *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

3. For the purpose of this Note, "homeowners" include apartment dwellers and property owners. Similarly, "homes" include all places of residence, whether purchased or leased.

4. See *Martin v. City of Struthers*, 319 U.S. 141, 145-56 (1943); *Schneider v. Town of Irvington*, 308 U.S. 147, 164 (1939). Door-to-door solicitation involves a degree of personal interaction greater than that afforded by other means of communication, such as by mail, telephone, or advertisement. These latter methods reach more people, but in a more passive, unilateral fashion. In addition, door-to-door solicitation may provide the least expensive method of circulating an organization's ideas and generating financial support. *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

5. See *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943); *Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104, 107 (N.D. Ill. 1980).

6. See *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976); *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 736-37 (1970); *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); see also Kamin, *Residential Picketing and The First Amendment*, 61 Nw. U.L. REV. 177, 182 (1967). Courts frequently express concern that homeowners not become a "captive audience" for unwanted speech. See *Association of Community Organizations for Reform Now (ACORN) v. City of Frontenac*, 714 F.2d 813, 819 (8th Cir. 1983); see also *infra* notes 110-12 and accompanying text (discussion of "captive audiences" problem).

7. See, e.g., *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976).

interest shared by local governments and homeowners.⁸ This clash of interests intensifies in the evening, when the solicitor can contact greater numbers of people and the homeowner and the local government have greater interests in privacy and security.⁹

Local governments frequently attempt to preserve homeowner privacy and security by limiting door-to-door solicitation to specific time periods. Local ordinances often restrict solicitation to the hours between 9:00 a.m. and 6:00 p.m.¹⁰ While restrictions on permissible hours of solicitation advance the interests of homeowner privacy and neighborhood security,¹¹ they also limit the solicitor's access to an audience and thus infringe first amendment rights.¹²

The United States Supreme Court has never addressed the constitutionality of ordinances limiting the hours of door-to-door solicitation.¹³ The Court has, however, examined regulations prohibiting solicitation,¹⁴

8. One commentator observed the conflict of interests between solicitors, homeowners, and local governments as follows:

Of all the methods of spreading unpopular ideas, this [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.

Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 406 (1954); see also *Martin v. City of Struthers*, 319 U.S. 141, 153 (1943) (Frankfurter, J., dissenting) (observing that local governments should regulate door-knocking and bell-ringing by professed peddlers of things or ideas to protect the privacy interests of homeowners); cf. *Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2860-61 (1984) (Rehnquist, J., dissenting) (addressing concern that solicitors might defraud homeowners); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 865 (N.D. Ga. 1979) (addressing concern that criminals may pose as solicitors at night).

9. Federal courts considering the validity of solicitation ordinances have readily accepted that more people are home during the evening, that people who are home during the evening have a greater expectation of privacy, that more criminal activity occurs at night, and that a city has a greater interest in crime prevention during the evening. See, e.g., *ACORN v. City of Frontenac*, 714 F.2d 813, 819 n.9 (8th Cir. 1983); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 865 (N.D. Ga. 1979).

10. An ordinance in Frontenac, Missouri, for example, prohibited solicitation of residential homes after 6:00 p.m. *ACORN v. City of Frontenac*, 714 F.2d 813, 815 (8th Cir. 1983); see *infra* notes 71-74 & 129-31 and accompanying text (discussing *ACORN*).

11. See *ACORN v. City of Frontenac*, 714 F.2d at 817 n.5 (citing *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967)).

12. See Weeks, *Optimal Times to Contact Sample Households*, 44 PUB. OPINION Q. 101, 107 (1980).

13. The Supreme Court had an opportunity to judge the constitutionality of a daylight ordinance in *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), but the Court found the ordinance invalid on other grounds and declined to decide the "hours" issue.

14. See *Martin v. City of Struthers*, 319 U.S. 141 (1943); see also *infra* notes 54-58 and accompanying text (discussing *Martin*).

requiring solicitation permits,¹⁵ and placing qualifications on the use of solicited funds.¹⁶ In these decisions, the Court has balanced the interests restricted by the ordinance in question against the interests advanced by the ordinance.¹⁷ Lower courts have reached inconsistent results in considering ordinances limiting solicitation to daylight hours.¹⁸

This Note examines the clash between the interests of door-to-door solicitors and the interest of homeowners and the community. It concludes that the community's interest in crime prevention and the homeowner's interest in privacy together outweigh the solicitor's right to reach an audience after dark.¹⁹ Consequently, local communities should respect the first amendment rights of homeowners and solicitors to receive and disseminate information by permitting door-to-door solicitation before sundown.²⁰

I. SOLICITATION IN GENERAL

A. Public Solicitation

First amendment rights occupy a "preferred position" above other constitutional rights.²¹ Courts impose an exacting standard of proof on local governments to show that "time, place, and manner" ordinances do

15. See *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); see also *infra* note 60 and accompanying text (discussing licensing of solicitation permits).

16. See *Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); see also *infra* note 61 and accompanying text (discussing use-of-funds qualifications).

17. E.g., *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 736-37 (1970).

18. Compare *Westfall v. Board of Comm'rs*, 477 F. Supp. 862 (N.D. Ga. 1979) (upholding ordinance limiting solicitation to daylight hours) and *McMurdie v. Douth*, 468 F. Supp. 766 (N.D. Ohio 1979) (same) with *ACORN v. City of Frontenac*, 714 F.2d 813 (8th Cir. 1983) (regulation of solicitation between 9:00 a.m. to 6:00 p.m. unnecessarily restrictive, but 9:00 a.m. to 9:00 p.m. time period valid); *Pennsylvania Pub. Interest v. York Township*, 569 F. Supp. 1398 (M.D. Pa. 1983) (exceptions granted to some classes of solicitors overly broad); *Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104 (N.D. Ill. 1980) (daylight ordinance invalid on first amendment grounds); *Connecticut Citizens Action Group v. Town of Southington*, 508 F. Supp. 43 (D. Conn. 1980) (exceptions unnecessarily broad); *Citizens for a Better Env't v. Village of Elm Grove*, 462 F. Supp. 820 (E.D. Wis. 1978) (ordinance invalid for allowing unlimited discretion in the issuance of solicitation permits) and *Alternatives for Cal. Women, Inc. v. City of Contra Costa*, 145 Cal. App. 3d 436, 193 Cal. Rptr. 384 (1983) (exceptions unnecessarily broad).

19. See *infra* notes 107-35 and accompanying text.

20. See *infra* notes 136-37 and accompanying text.

21. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). Disagreement remains as to the consequences of a "preferred position." Compare *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring) (laws affecting speech are not presumptively invalid)

not infringe upon the freedom of speech.²² A restriction on the exercise of free speech in public places must serve legitimate or significant governmental objectives without unduly infringing upon the exercise of first amendment rights.²³ A local ordinance must not regulate the content of speech and must permit "ample alternative channels" for communication.²⁴

The Supreme Court has recognized that local governments have a legitimate interest in preserving the peace and public safety.²⁵ Preserving the peace includes limiting noise²⁶ and maintaining orderly movement of people in confined areas.²⁷ The prevention of littering, which often accompanies the distribution of handbills, is not a legitimate interest.²⁸

In pursuit of these legitimate ends, local governments may regulate the "time, place, and manner" of free speech so long as they narrowly draw the regulation to minimize the degree of intrusiveness.²⁹ In *Schneider v. Town of Irvington*,³⁰ the Court ruled that local governments must provide solicitors with "appropriate places" to solicit.³¹ The Court has in-

with G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1106 (10th ed. 1980) (any attempt to abridge first amendment rights is presumptively unconstitutional).

22. See *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980).

23. See *id.* at 632; *ACORN v. City of Frontenac*, 714 F.2d 813, 816 (8th Cir. 1983); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 865 (N.D. Ga. 1979).

24. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647-48 (1981) (quoting *Virginia State Bd. of Pharmacists v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1978)); *Pennsylvania Alliance for Jobs & Energy v. Council of the Borough of Munhall*, 743 F.2d 182, 187-88 (3d Cir. 1984). "Ample alternative channels" means time and places for solicitation when persons may exercise their first amendment rights without government interference. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981). Alternative forums must allow solicitors access to a significant audience. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2132-33 (1984). Courts only require that local governments provide "ample," not necessarily equivalent, alternatives. See *infra* notes 97-99 & 105-06 and accompanying text (discussing "ample alternative forums" test).

25. See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). In *Cantwell*, the Court held that local governments may regulate the "peace, good order, and comfort of the community." *Id.* Local ordinances may not, however, give public officials broad discretionary authority to decide what speech is proper or improper for accomplishing these objectives. *Id.*

26. See *Grayned v. Rockford*, 408 U.S. 104, 117 (1972); *Kovacs v. Cooper*, 336 U.S. 77, 80 (1949).

27. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 649-61 (1981).

28. See *Schneider v. Town of Irvington*, 308 U.S. 147, 162 (1939).

29. See *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

30. 308 U.S. 147 (1939).

31. *Id.* at 163, see *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981) (holding that fixed booths at state fairgrounds constitute "appropriate places" for solicitation); *infra* notes 42-44 and accompanying text (discussing *Heffron*).

validated ordinances requiring prior written permission to distribute pamphlets,³² prohibiting the distribution of pamphlets,³³ and requiring a license to solicit funds for a religious organization.³⁴ The Court has held, however, that in proper circumstances³⁵ governments may prohibit noise³⁶ and may limit solicitation to fixed locations.³⁷ Furthermore, the Court has commented that governments may require solicitors to identify themselves.³⁸

The character of some public places justifies regulations of free speech that would not be constitutional in other settings. In *Grayned v. Rockford*,³⁹ the Court characterized schoolgrounds as a "special environment" necessitating the prohibition of disruptive conduct.⁴⁰ The Court looked to the nature of the forum and its pattern of normal activities to determine the permissible degree of intrusion upon first amendment rights.⁴¹ Similarly, in *Heffron v. International Society for Krishna Consciousness*,⁴² the Court found that the special nature of state fairgrounds justified a regulation limiting solicitation to fixed booths.⁴³ While the Court acknowledged that solicitation from a fixed position is less effective than solicitation from unfixed positions, the large number of patrons in a confined area necessitated regulations ensuring normal and orderly

32. See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (requirement of solicitation license constitutes invalid prior restraint).

33. See *Schneider v. Town of Irvington*, 308 U.S. 147, 161-64 (1939) (city's interest in preventing accumulation of litter does not justify prohibition as less restrictive means are available, such as punishing those persons who actually litter).

34. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (ordinance granting government officials discretion to decide whether a group was a religious organization qualifying for a solicitation license constituted an invalid prior restraint).

35. The validity of noise and place regulations depends upon whether they apply only to "special environments" or to "appropriate places." See *infra* notes 40-44 and accompanying text.

36. See *Grayned v. Rockford*, 408 U.S. 104, 117 (1972) (schoolgrounds are a "special environment" justifying prohibition of noisy picketing (manner) in front of school (place) during school hours (time)); *Kovacs v. Cooper*, 336 U.S. 77, 80 (1949) (intrusion of the noise of sound amplification trucks into homes justifies regulation).

37. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 649-51 (1981) (state fairgrounds and large crowds justified regulation limiting solicitation to fixed booths).

38. See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); see also *American Cancer Soc'y v. City of Dayton*, 160 Ohio St. 114, 124, 114 N.E.2d 219, 224 (1953).

39. 408 U.S. 104 (1972).

40. *Id.* at 116-17; cf. *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding regulation of "loud and raucous" noises on public streets). For a discussion of *Kovacs*, see *infra* notes 45-49 and accompanying text.

41. 408 U.S. at 116-17.

42. 452 U.S. 640 (1981).

43. *Id.* at 648-51.

movement.⁴⁴

B. *Private Solicitation*

The Court is less deferential in examining ordinances regulating public exercises of free speech that affect the privacy interests of homeowners. In *Kovacs v. Cooper*,⁴⁵ the Court upheld a local ordinance prohibiting "loud and raucous" noises.⁴⁶ The Court recognized that a homeowner's privacy interest includes the right to be free from invasive speech⁴⁷ and held that the solicitor's interest in reaching people cheaply and easily from a sound amplification truck did not outweigh the local government's interest in restricting the volume of sound or the time of use.⁴⁸ The Court noted that less intrusive means of communication are available to solicitors.⁴⁹

More recently, the Court demonstrated that the homeowner's interest in avoiding unwanted communication while in his home outweighs the solicitor's interest in free speech. In *Rowan v. United States Post Office Department*,⁵⁰ the Court held that the delivery of unwanted mail was a sufficient invasion of privacy to justify a statute permitting homeowners to remove their names from mailing lists.⁵¹ The Court balanced the

44. *Id.* The ordinance in *Heffron* did not regulate the content of the solicitor's speech because all organizations were subject to its provisions. *Id.* at 648-49. The regulation served a significant governmental interest by promoting orderly movement of the crowd through the fair. *Id.* at 649-50. In addition, the regulation permitted "ample alternative channels for communication" in the booths, outside the fairgrounds, and through nonsoliciting communications on the fairgrounds. *Id.* at 654-55. Thus, the regulation met the standard of *Virginia Pharmacy Board*. See *supra* note 24 and accompanying text (ordinance must not regulate speech content and must permit "ample alternative channels for communication").

45. 336 U.S. 77 (1949).

46. *Id.* at 80.

47. *Id.* at 85-87. The Court observed that "[t]he unwilling listener . . . is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality." *Id.* at 86-87; see also *Public Utilities Comm'n. v. Pollak*, 343 U.S. 451, 467-69 (1981) (Douglas, J., dissenting) (applying "no escape" rationale to passengers on public buses "forced" to listen to music).

48. 336 U.S. at 88-89; see also *Reeves v. McConn*, 631 F.2d 377, 384-85 (5th Cir. 1980) (sound amplification may be incompatible with the normal activity of a residential area at 9:00 p.m. or on a Sunday morning); cf. *Haiman, Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U.L. REV. 153, 182 (1972) (invasive speech is too audible to ignore).

49. 336 U.S. at 89. The Court noted that reasonable alternatives include communication by human voice, by newspapers, or by pamphlets. *Id.* Cf., e.g., *Schneider v. Town of Irvington*, 308 U.S. 147, 161-64 (1939) (example of Court's usual focus on less intrusive means of regulation).

50. 397 U.S. 728 (1970).

51. *Id.* at 737-38. The statute provided that any person receiving prurient material by mail

sender's right to communicate against the homeowner's privacy interest and found that freedom of speech does not include the right to force communication upon an unwilling recipient by mailing it to his home.⁵²

While mailed information intuitively seems less intrusive than noise from a sound amplification truck, the Supreme Court treated the two situations similarly, focusing upon the homeowner's right not to receive information in his home against his will. *Kovacs* and *Rowan* are distinguishable, however, because the regulation in *Kovacs* did not afford the homeowner the degree of choice to receive the solicitor's message that was present in the regulation in *Rowan*.⁵³

II. SOLICITATION AT THE HOMEOWNER'S DOOR

A. Regulation in General

The Supreme Court has considered various regulations of door-to-door solicitation other than those regarding hours and has always ruled in favor of the solicitors. The Court's opinions, however, reflect a concern that local governments remain able to protect the privacy and security of homeowners.

In *Martin v. City of Struthers*,⁵⁴ the Court invalidated a local ordinance prohibiting all door-to-door solicitation.⁵⁵ Although the Court recognized the government's power to enact time, place, and manner regulations,⁵⁶ it found a complete prohibition too broad.⁵⁷ The Court emphasized that a local government's interest in preserving the privacy of homeowners does not justify a regulation preventing homeowners from choosing to receive information from solicitors.⁵⁸

could request the Postmaster General to order the sender to refrain from future mailings. See 39 U.S.C. § 4009 (Supp. IV 1964) (current version at 39 U.S.C. § 3008 (1982)).

52. 397 U.S. at 737-38. In particular, the Court could find "no basis for according the printed word or pictures a different or more preferred status because they are sent by mail." *Id.*

53. The regulation in *Kovacs* did not provide the homeowner with any choice, as it prohibited "loud and raucous" sound amplification trucks. The regulation in *Rowan*, in contrast, permitted the homeowner to remove his name from mailing lists. See *supra* notes 45-52 and accompanying text (discussing *Kovacs* and *Rowan*). Arguably, the degree of regulation in each case was as narrow as possible, given the intrusive nature of loud noise and the relatively minor annoyance of unwanted mail.

54. 319 U.S. 141 (1943).

55. *Id.* at 146-49.

56. *Id.* at 148 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)).

57. *Id.* at 147-49.

58. *Id.* at 146-47; see also *Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104, 107 (N.D. Ill. 1980) (city's interest in preventing undue annoyance of its citizens does not justify

Local governments must draw regulations restricting door-to-door solicitation with such "narrow specificity" as to minimize intrusion into first amendment rights.⁵⁹ The Court accordingly has invalidated ordinances that give licensing officers unlimited discretion to grant or deny solicitation permits⁶⁰ or condition solicitation on the financial status of the applicant and the cost of solicitation.⁶¹ Furthermore, local regulation of door-to-door solicitation must serve important governmental interests.⁶² The Court has indicated that the preservation of homeowner privacy⁶³ and the prevention of crime⁶⁴ are governmental interests justifying

regulation that subordinates the rights of homeowners who may be "willing recipients" of the solicitor's message).

59. See *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

60. See *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). The *Hynes* Court invalidated the ordinance as unconstitutionally vague, finding that it did not provide any standards to determine what groups came within stated exceptions or what information was necessary for the issuance of a permit. *Id.* at 620-22; see also *American Cancer Soc'y v. City of Dayton*, 160 Ohio St. 114, 124, 114 N.E.2d 219, 224 (1953). For a definition of "vagueness," see *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (meaning "men of common intelligence must guess at its meaning").

Licensing and discretionary functions continue to be a source of controversy in solicitation litigation. The major unresolved issues include whether local governments should allow solicitation by persons convicted of a felony, the appropriate duration of solicitation permits, police investigations of permit applicants, and the appropriate criteria for revocation of a permit. For a discussion of licensing issues in solicitation, see *International Soc'y for Krishna Consciousness v. City of Houston*, 689 F.2d 541 (5th Cir. 1982); see also *McMurdie v. Douitt*, 468 F. Supp. 766, 776-77 (N.D. Ohio 1979); *Citizens for a Better Env't v. Village of Elm Grove*, 462 F. Supp. 820, 823-24 (E.D. Wis. 1978).

61. See *Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984) (prohibition of solicitation by organizations whose expenses exceeded 25% of funds raised invalid); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 635-38 (1980) (prohibition of solicitation by organizations that do not use 75% of funds raised for charitable purposes invalid). The *Munson* Court reasoned that the prohibition of costly solicitation was not necessary to advance the government's legitimate interest in preventing fraud, 104 S. Ct. at 2852-53, and disregarded the ordinance's waiver-for-good-cause provision. *Id.* In *Schaumburg*, the Court found that the prohibition was equivalent to a regulation of speech content, as political advocacy groups are less likely to have volunteer solicitors than nonpolitical groups. 444 U.S. at 636-37. In addition, the 75% rule failed to advance the government's legitimate interest in preventing fraudulent solicitation, crime, and annoyance. *Id.* at 636-39. The *Schaumburg* Court carefully distinguished *National Found. v. City of Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), in which the Fifth Circuit upheld a similar 80% rule that permitted any organization to obtain a permit upon demonstrating that its solicitation costs were reasonable. 444 U.S. at 635 n.9.

62. See *Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852-53 (1984) (discussing *Schaumburg*); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943).

63. See *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976); *Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943). Intrusive door-to-door solicitations may impose undue annoyance and impinge upon the homeowner's privacy interest. *Id.* at 146-49; cf. *Haiman, supra* note 48, at 193

solicitation regulations.

B. Hours Regulation

Although the Supreme Court has not addressed the constitutionality of local ordinances restricting door-to-door solicitation to specific hours of the day, several lower courts have considered the issue. Several courts have passed over the hours regulation and invalidated ordinances because of the broad exceptions for various classes of solicitors.⁶⁵ These courts have reasoned that numerous exceptions prevent solicitation ordinances from serving stated governmental purposes because the excepted solicitors will continue to annoy homeowners and pose threats to the security of the community.⁶⁶

In *Citizens for a Better Environment v. Village of Olympia Fields*,⁶⁷ the court invalidated an ordinance that restricted door-to-door solicitation to

(local governments should protect unreceptive citizens from “continued bombardment” of unsolicited information). In *ACORN v. City of Frontenac*, 714 F.2d 813 (8th Cir. 1983), however, the Eighth Circuit refused to characterize the homeowner as a “captive audience.” *Id.* at 819; *see infra* notes 112-14 and accompanying text (discussing “captive audience” analogy). Unlike the annoyed homeowner in *Kovacs* subjected to sound from amplification trucks, *see supra* notes 45-59 and accompanying text, the homeowner confronted with the intrusion of door-to-door solicitors has a choice—posting a “no solicitation” sign. *See Citizens for a Better Env’t v. Village of Olympia Fields*, 511 F. Supp. 104, 107 (N.D. Ill. 1980). The homeowner may specify certain hours when he does not want to receive solicitors or may instruct solicitors to call first for permission. *See infra* note 117 and accompanying text (discussing the advantages and disadvantages of “no solicitation” signs). Homeowners, however, may be unaware of this option, and solicitors may not honor the signs.

64. *See Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2849-50 (1984); *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976); *see also ACORN v. City of Frontenac*, 714 F.2d 813, 817-18 (8th Cir. 1983); *Westfall v. Board of Comm’rs*, 477 F. Supp. 862, 871 (N.D. Ga. 1979); *American Cancer Soc’y v. City of Dayton*, 160 Ohio St. 114, 124, 114 N.E.2d 219, 224 (1953). These cases address the possibility that criminals may pose as nighttime solicitors and defraud homeowners.

65. *See Pennsylvania Pub. Interest v. York Township*, 569 F. Supp. 1398, 1400 (M.D. Pa. 1983) (exceptions for farmers selling their own produce, people selling goods donated by owners, people selling bread, meat, milk and milk-related products, people who pay license tax at chief place of business and sell goods by showing samples, and authorized insurance brokers); *Connecticut Citizens Action Group v. Town of Southington*, 508 F. Supp. 43, 47 (D. Conn. 1980) (exception for ice cream vendors); *Alternatives for Cal. Women, Inc. v. County of Contra Costa*, 145 Cal. App. 3d 436, 450, 193 Cal. Rptr. 384, 393 (1983) (exception for solicitors not asking for funds or selling products).

66. Numerous solicitation exceptions are contrary to the government’s interests in preventing crime and protecting the privacy of its citizens. A commercial solicitor may disturb a homeowner’s privacy as effectively as a charitable solicitor. Furthermore, a homeowner may not be able to distinguish between an excepted solicitor and a criminal solicitor.

67. 511 F. Supp. 104 (N.D. Ill. 1980).

daylight hours.⁶⁸ The court reasoned that the interests of homeowners who wished to hear solicitors' messages during evening hours outweighed the interests of homeowners who did not.⁶⁹ The court noted that this latter group of homeowners could post "no solicitation" signs.⁷⁰

The Eighth Circuit Court of Appeals, in *Association of Community Organizations for Reform Now (ACORN) v. City of Frontenac*,⁷¹ held that an ordinance limiting solicitation to the hours between 9:00 a.m. and 6:00 p.m. was too restrictive. The court extended the permissible hours of solicitation to 9:00 p.m.⁷² The court found the government's interest in preventing crime to be legitimate but concluded that the hours restriction was unnecessarily broad.⁷³ The court noted that less intrusive alternatives such as requiring permit applications and solicitor identification, enforcing penal ordinances, and posting "no solicitation" signs could achieve the same end of preventing crime.⁷⁴

A few courts have upheld ordinances limiting solicitation to daylight hours.⁷⁵ In *Westfall v. Board of Commissioners*,⁷⁶ the court held that the daylight ordinance was a reasonable means of preventing crime because the darkness of night facilitates criminal activity.⁷⁷ The court found that a selection of specific hours of regulation, while arbitrary, is necessary to avoid vagueness.⁷⁸ In addition, the court noted that solicitors may reach

68. *Id.* at 108. The ordinance limited door-to-door solicitation to the time between 9:00 a.m. and some hour between 4:00 p.m. and sunset, allowing variations for daylight savings time. *Id.* at 105.

69. *Id.* at 107.

70. *Id.* A solicitor who ignores a "no soliciting" sign is subject to a suit in trespass. *See, e.g., Hall v. Commonwealth*, 188 Va. 72, 76-77, 49 S.E.2d 369, 371, *appeal dismissed*, 335 U.S. 875 (1948).

71. 714 F.2d 813 (8th Cir. 1983).

72. *Id.* at 818.

73. *Id.*

74. *Id.* at 818-19. Other courts have suggested these less restrictive alternatives. *See Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104, 107 (N.D. Ill. 1980); *Connecticut Citizens Action Group v. Town of Southington*, 508 F. Supp. 43, 46 (D. Conn. 1980); *Alternatives for Cal. Women, Inc. v. County of Contra Costa*, 145 Cal. App. 3d 436, 449-50, 193 Cal. Rptr. 384, 392-93 (1983).

75. *See Pennsylvania Alliance for Jobs & Energy v. Council of Borough of Munhall*, 743 F.2d 182 (3d Cir. 1984); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862 (N.D. Ga. 1979); *McMurdie v. Douth*, 468 F. Supp. 766 (N.D. Ohio 1979).

76. 477 F. Supp. 862 (N.D. Ga. 1979).

77. *Id.* at 865. Courts generally require a showing of a factual nexus between nighttime and crime related to soliciting. *See, e.g., Pennsylvania Pub. Interest v. York Township*, 569 F. Supp. 1355, 1402 (1983); *Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104, 106-07 (1980).

78. 477 F. Supp. at 865-66; *see supra* note 60 (defining "vagueness").

people not at home during the permissible time period by soliciting on weekends and in public places during the week.⁷⁹ Similarly, in *Pennsylvania Alliance for Jobs & Energy v. Council of Borough of Munhall*,⁸⁰ the Third Circuit Court of Appeals upheld an ordinance prohibiting door-to-door solicitation after 6:00 p.m., finding that it served a significant government interest and left open alternative channels of communication without regulating the content of speech.⁸¹

The foregoing cases highlight the points of controversy that arise whenever a local government attempts to regulate the hours of door-to-door solicitation. Solicitors oppose daylight ordinances because they deny access to the broader audience available at night.⁸² Local governments support daylight ordinances because they prevent solicitors from annoying homeowners⁸³ and prevent criminals from masquerading as solicitors at night.

III. RECONCILING THE INTERESTS OF CITY, HOMEOWNER, AND SOLICITOR

A. *Nature of the Forum*

The principal dispute in door-to-door solicitation decisions concerns the classification of the residential doorway as public or private.⁸⁴ Some courts have characterized the doorway as a public forum⁸⁵ for the ex-

79. 477 F. Supp. at 865-66; *see also* *McMurdie v. Douth*, 468 F. Supp. 766 (N.D. Ohio 1979) (upholding without explanation a daylight ordinance). *But see* *Citizens for a Better Env't v. Village of Schaumburg*, 444 U.S. 620 (1980) (regulation of door-to-door solicitation invalid in the absence of suitable alternatives); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (city cannot prohibit door-to-door solicitation).

80. 743 F.2d 182 (3d Cir. 1984).

81. *Id.* at 185-87; *see infra* notes 98-105 and accompanying text.

82. Most courts acknowledge that solicitors can contact more people in the evening. *See, e.g.*, cases cited *supra* note 65. *But see* *Westfall v. Board of Comm'rs*, 477 F. Supp. 862 (N.D. Ga. 1979) (observing that public and weekend solicitation provides access to larger audience).

83. Courts generally reject the argument that the government's interest in preventing annoyance of its citizens alone justifies regulation of door-to-door solicitation, as the individual homeowner may protect his privacy by posting a "no solicitation" sign. *See infra* note 117 and accompanying text (discussing homeowner privacy and "no solicitation" signs).

84. *Compare, e.g.*, *ACORN v. City of Frontenac*, 714 F.2d 813, 816 (8th Cir. 1983) (doorway as public forum) *with* *Pennsylvania Alliance for Jobs & Energy v. Borough of Munhall*, 743 F.2d 182, 186-87 (3d Cir. 1984) (doorway as private forum). Courts have recognized the unique character of the residential doorway. *See, e.g.*, *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Martin v. City of Struthers*, 319 U.S. 141, 164 (1943).

85. A "public forum" is a place where citizens may assemble and express their views. G. GUN-
THER, *CASES AND MATERIALS IN CONSTITUTIONAL LAW* 1195-96 (10th ed. 1981); *cf.* *Hague v.*

change of ideas.⁸⁶ These courts have focused upon whether regulation of door-to-door solicitation unreasonably restricts free speech or discriminates on the basis of the content of the speech.⁸⁷ In either event, the court will invalidate the ordinance as violative of the first amendment.⁸⁸

Characterization of the residential doorway as a public forum appears inappropriate. The normal activity of a public forum consists of public communication and assembly.⁸⁹ The private doorway, however, is not the scene of either activity.⁹⁰ A homeowner may exclude the public at any time and for any reason. Although certainly a forum for discussion and idea exchange, the doorway is not usually accessible to the public.⁹¹

Two recent decisions challenge the propriety of applying traditional public forum analysis to regulation of door-to-door solicitation. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*,⁹² the Supreme Court upheld the constitutionality of a city ordinance prohibiting the posting of signs on public property.⁹³ The Court refused to find that the ordinance regulated a public forum⁹⁴ and accordingly did not apply the stringent "least restrictive means" test, which is appropriate in

CIO, 307 U.S. 496, 515 (1939) (recognizing that "streets and parks . . . have been immemorially held in trust for the use of public and . . . have been used for purposes of assembly, communicating thoughts about citizens, and discussing public questions"). "Traditional public forum property occupies a special position in terms of first amendment protection." *United States v. Grace*, 103 S. Ct. 1702, 1708 (1983).

86. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *see also Hynes v. Mayor of Oradell*, 425 U.S. 610, 625 (1976) (Brennan, J., concurring); *ACORN v. City of Frontenac*, 714 F.2d 813, 816 (8th Cir. 1983).

87. *See, e.g., Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 658 (1981) (Brennan, J., concurring and dissenting); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

88. *See, e.g., Pennsylvania Alliance for Jobs & Energy v. Borough of Munhall*, 743 F.2d 182, 185-86 (3d Cir. 1984).

89. *See supra* note 85.

90. The normal functions of a doorway include providing the means for entering and exiting the home, alerting the owner when guests have arrived, and providing a safe and effective barrier from unwelcome intruders.

91. *See Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943).

92. 104 S. Ct. 2118 (1984).

93. *Id.* at 2128-36.

94. *Id.* at 2133-34. The Court observed that the first amendment does not guarantee public access to all government property. *Id.* at 2134 (citing *United States Postal Serv. v. Greenburgh Civ. Ass'n*, 453 U.S. 114, 129 (1981)). Rather, the government may reserve for its own use all public property that is not "by tradition or designation a forum for public communication . . ." *Id.* *See supra* note 85 (defining "public forum").

much first amendment analysis.⁹⁵ Instead, the Court characterized the ordinance as “viewpoint neutral”⁹⁶ and inquired into whether there were “alternative channels of communication” available under the ordinance.⁹⁷

In *Pennsylvania Alliance For Jobs & Energy v. Council of Borough of Munhall*,⁹⁸ the Third Circuit applied the “ample alternative channels” standard to daylight solicitation ordinances.⁹⁹ A charitable organization employing door-to-door canvassing techniques contended that door-to-door solicitation is a “traditional public forum” requiring the “least restrictive” form of regulation.¹⁰⁰ The court rejected this argument, concluding that time, place, and manner regulations that are “viewpoint neutral” regulate the forum for the speech, not the speech itself.¹⁰¹ The Third Circuit held that courts should only apply the least restrictive methods test to regulations of speech content or public forums.¹⁰² The court upheld the ordinance because it did not refer to the content of the solicitor’s speech,¹⁰³ served a significant government interest,¹⁰⁴ and left

95. 104 S. Ct. at 2133-34. The least restrictive means test requires that an ordinance accomplish its objectives in the narrowest fashion and with the utmost specificity. *See, e.g., Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

96. 104 S. Ct. at 2128-29. “The text of the ordinance is neutral—indeed it is silent—concerning any speaker’s point of view” *Id.* at 2128. “Viewpoint neutral” ordinances do not discriminate on the basis of the content of speech. *See Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981); *Pennsylvania Alliance for Jobs & Energy v. Borough of Munhall*, 743 F.2d 182, 185-86 (3d Cir. 1984).

97. 104 S. Ct. at 2123-34 (quoting *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640, 648 (1981)). The Court found that personal solicitation and the distribution of literature were adequate forms of communication. 104 S. Ct. at 2133.

98. 743 F.2d 182 (3d Cir. 1984).

99. *Id.* at 185.

100. *Id.* at 186.

101. *Id.* Previous door-to-door solicitation decisions focused entirely on the effect of the regulation on the content of the solicitor’s speech, rather than the forum. *See, e.g., Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 625-26 (1976) (Brennan, J., concurring); *ACORN v. City of Frontenac*, 714 F.2d 813, 816 (8th Cir. 1983); *Citizens for a Better Env’t v. Village of Olympia Fields*, 511 F. Supp. 104, 106 (N.D. Ill. 1980). The only decision other than *Munhall* to find that an hours ordinance regulated the forum is *Westfall v. Board of Comm’rs*, 477 F. Supp. 862 (1979) (upholding daylight ordinances that permitted solicitation from 9:00 a.m. to 6:00 p.m. as a reasonable government regulation to protect the privacy and safety of its citizens).

102. 743 F.2d at 185; *see supra* note 95 (describing least restrictive method test).

103. 743 F.2d at 185. Judge Becker, in dissent, rejected the majority’s contention that the ordinances were “viewpoint neutral,” asserting that numerous exceptions rendered the ordinances discriminatory and thus “patently viewpoint based.” *Id.* at 191-92 (Becker, J., dissenting).

104. *Id.* at 187-88. The ordinances serve a significant governmental interest in protecting residents against crime and undue annoyance. *Id.* The dissent pointed out, however, that many of the

open "adequate alternative channels of communication."¹⁰⁵

The adoption of the "ample alternative forums" test is a significant and logical development in door-to-door solicitation law. The *Munhall* court recognized that the government's intention in enacting regulations governing door-to-door solicitation is to protect the security and privacy of its citizens rather than to regulate the content of its citizens' speech.¹⁰⁶ Alternative times and places for solicitation provide the access necessary to ensure that regulation of door-to-door solicitation does not unduly restrict free speech in a private forum. Courts must still decide, however, whether "alternative forums" actually afford the solicitor access to a significant audience.

B. *Community's Interest in Homeowner Privacy*

Local regulation of door-to-door solicitation often reflects the community's collective judgment that individual freedom to choose whether or not to receive a solicitor's message does not adequately protect homeowner privacy. The Supreme Court has recognized as legitimate a city's interest in protecting homeowners from unreasonable intrusions upon their privacy.¹⁰⁷ The right to privacy in one's home is fundamental¹⁰⁸ and increases in the evening hours.¹⁰⁹

The solicitor's first amendment rights must yield whenever they con-

ordinances in question allowed commercial speech during prohibited hours, thereby destroying any privacy the residents might have had. *Id.* at 190-91 (Becker, J., dissenting). In addition, the dissent noted that the town did not establish any factual connection between solicitation and crime. *Id.*

105. *Id.* at 187-88. The court concluded that daylight hours, Saturdays, and public solicitation provided ample alternative forums for solicitors to reach their audience, although it did not cite any evidence in support of its conclusion. *Id.* at 188. The dissent agreed on the "alternative forums" standard but found that the town did not demonstrate that the proffered alternatives were satisfactory. *Id.* at 193-95 (Becker, J., dissenting).

106. *Id.* at 186-87; see *supra* note 101 and accompanying text; cf. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2132 (1984) (ordinance "responds precisely to the substantive problem which legitimately concerns the city" and "curtails no more speech than is necessary to accomplish its purposes").

107. See *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943). In *Martin*, the Court stated that consistent callers, whether peddling merchandise or soliciting funds, may impose a significant burden on the peaceful enjoyment of one's home and may be subject to reasonable regulation to prevent undue annoyance. *Id.*

108. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 483-86 (1965).

109. See, e.g., *Gooding v. United States*, 416 U.S. 430, 462 (1974) (Marshall, J., dissenting) ("No expectation of privacy [is] . . . more demanding of constitutional prosecution than our right to . . . be let alone in the privacy of our homes during the night.")

flict with the homeowner's privacy rights.¹¹⁰ In a public forum, interested people can seek or avoid the solicitor's message according to choice.¹¹¹ Door-to-door solicitation, in contrast, forces the unreceptive homeowner to engage in an exchange of information. The homeowner is a "captive audience"¹¹² and must persuade the solicitor that he is not interested in receiving the solicitor's message.¹¹³ Most unreceptive homeowners will not break social etiquette and habit by closing their door and turning away unwanted solicitors.¹¹⁴

Courts must also consider the individual homeowner's first amendment right to receive information in judging the constitutionality of ordinances restricting door-to-door solicitation.¹¹⁵ Some homeowners may welcome solicitation during the evening and others may desire the information at any time.¹¹⁶ Homeowners who do not wish to receive unsolicited information may post "no solicitation" signs.¹¹⁷ Thus, the

110. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976); *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 736-37 (1970).

111. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 653-54 (1981).

112. Courts formulated the captive audience doctrine to protect unwilling and unreceptive listeners from invasive speech. See *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949). In applying this doctrine, courts have considered the extent of the listener's voluntary action, the type of communication (visual or audible), and the listener's inability to escape from message. See, e.g., *ACORN v. City of Frontenac*, 714 F.2d 813, 819 (8th Cir. 1983) (rejecting captive audience theory).

113. *But cf. infra* note 117 and accompanying text ("no solicitation" signs may not be successful in fending off unwanted solicitation).

114. See *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949). Door-to-door solicitation would disappear if homeowners could disregard every stranger at their door. Most homeowners will not only answer the door, but will listen to the speaker's message in its entirety. Solicitation remains an effective method of conveying information because the homeowner's only defense, closing the door, seems impolite.

115. See *Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104, 107 (N.D. Ill. 1980).

116. *Id.* In judging the validity of a solicitation ordinance, courts should consider demographic statistics of the city, including the median age, the number of children, the number of retired people, the percentage of people living in the city that actually work in the city, and the percentage of households in which both spouses work. These statistics should assist courts in determining the number of homes that contain residents before 6:00 p.m. and should reveal the existence, if any, of alternative forums for solicitation. In *ACORN v. City of Frontenac*, 541 F. Supp. 765 (E.D. Mo. 1982), *rev'd*, 714 F.2d 813 (8th Cir. 1983), the city of Frontenac, Missouri, offered demographic statistics concerning its topography and police force. See *infra* note 131.

117. See *ACORN v. City of Frontenac*, 714 F.2d 813, 819 (8th Cir. 1983). "No solicitation" signs have several disadvantages that may deter homeowners from posting them. A sign may not afford sufficient flexibility to the homeowner who welcomes solicitors during certain hours. A "no solicitation after 6:00 p.m." sign, for example, may cure this defect. In addition, homeowners may want to receive certain classes of solicitors, such as representatives from their local church or club, girl scouts selling cookies, or local political candidates advocating their platform. While an advance

community's interest in protecting homeowner privacy, while legitimate, alone does not justify an ordinance restricting the first amendment rights of homeowners and solicitors.

C. *Community's Interest in Crime Prevention*

A second, more compelling reason for upholding a daylight ordinance is the community's interest in preventing crime. Under its police power, a city may regulate its streets to protect the welfare and safety of its citizens.¹¹⁸ The city's interest in crime prevention increases at night, when serious crimes occur more frequently.¹¹⁹ A daylight ordinance advances the city's crime prevention interest by reducing the number of people on its streets after dark.¹²⁰

A few courts have held that a local government's interest in preventing crime does not justify regulation of solicitation between 6:00 p.m. and 9:00 p.m..¹²¹ These courts have concluded that because a city allows

telephone call for permission may solve this problem, it is time consuming and expensive for the solicitor, annoying to unreceptive homeowners, and may discourage potential donations from interested persons.

The Eighth Circuit's suggestion that homeowners post "no solicitation" signs raises interesting state action questions. After the decision in *ACORN*, Frontenac's mayor Morgan Lawton sent a letter to every household, explaining the Eighth Circuit's ruling and recommending that they post "no solicitation" signs in their doorways. A city's interest in protecting the privacy of its citizens may justify other responses. The city may offer to provide signs free of charge at city hall or may mail a sign to every home with an accompanying letter of explanation. As a fourth response, the city may maintain a list of those homeowners who do not want to receive solicitors. This option would alleviate the problem of posting an unfriendly sign to the world and would allow solicitors to save time by only speaking to receptive listeners. Finally, a city may maintain a list of residents who do not want solicitors calling at their door after a certain hour. This response would protect the privacy interests of homeowners during the evening and permit homeowners to receive solicitors at a convenient time. This option does not place an absolute bar on solicitation and provides homeowners with a choice in receiving solicitors. There may be many homeowners who do not mind having solicitors come to their door, but do not want them intruding at an unreasonable hour.

118. See, e.g., *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-17 (1976); *ACORN v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983).

119. See *Pennsylvania Alliance for Jobs & Energy v. Borough of Munhall*, 743 F.2d 182, 187 (3d Cir. 1984); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 865 (N.D. Ga. 1979). But see *Pennsylvania Alliance for Jobs & Energy v. Borough of Munhall*, 743 F.2d 182, 190 (3d Cir. 1984) (Becker, J., dissenting) ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression") (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969)).

120. See *Pennsylvania Alliance for Jobs & Energy v. Borough of Munhall*, 743 F.2d 182, 184 (3d Cir. 1984); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 866 (N.D. Ga. 1979).

121. See *ACORN v. City of Frontenac*, 714 F.2d 813 (8th Cir. 1983); *Pennsylvania Pub. Interest v. York Township*, 569 F. Supp. 1398 (M.D. Pa. 1983); *Citizens for a Better Env't v. Village of*

solicitors to canvass from 9:00 a.m. to 6:00 p.m., it cannot deprive the solicitors of that right from 6:00 p.m. to 9:00 p.m.¹²² This rationale derives from the “appropriate places” test adopted in *Schneider v. Town of Irvington*.¹²³ In *Schneider*, the Supreme Court invalidated an ordinance prohibiting the distribution of literature in streets and alleys because the ordinance permitted distribution in other public areas.¹²⁴ The Court characterized streets and alleys as “appropriate places” for first amendment activities.¹²⁵ In applying the “appropriate places” doctrine to daylight ordinances, however, courts have committed a fundamental error.

These courts have equated “appropriate places” with “appropriate hours.”¹²⁶ This construction ignores the increase in the city’s interest in the prevention of crime at night. Daylight ordinances prohibit solicitation when the nature of the residential doorway changes from a daytime forum for the public exchange of information to a nighttime barrier against the world guarding the privacy of the occupant.¹²⁷

The Eighth Circuit recently employed a “least restrictive means” analysis¹²⁸ to invalidate a daylight ordinance in *Association of Community Organizations for Reform Now (ACORN) v. City of Frontenac*.¹²⁹ The Eighth Circuit recognized a city’s legitimate interest in preventing crime¹³⁰ but found that limiting solicitation to daylight hours was not the least restrictive means of accomplishing that goal.¹³¹ *ACORN* is thus

Olympia Fields, 511 F. Supp. 104 (N.D. Ill. 1980); *Connecticut Citizens Action Group v. Town of Southington*, 508 F. Supp. 43 (D. Conn. 1980); *Alternatives for Cal. Women v. County of Contra Costa*, 145 Cal. App. 3d 450, 193 Cal. Rptr. 393 (1983).

122. See, e.g., *ACORN v. City of Frontenac*, 714 F.2d 813, 819-20 (8th Cir. 1983). The city of Frontenac, Missouri argued unsuccessfully that the daylight hours of 9:00 a.m. to 6:00 p.m. on weekdays and Saturdays provide an adequate forum for solicitors to contact their audiences and for residents to receive the solicitor message. *Id.* at 819.

123. 308 U.S. 147 (1939); see *supra* notes 30-31 and accompanying text (discussing *Schneider*).

124. 308 U.S. at 163.

125. *Id.*

126. See, e.g., *ACORN v. City of Frontenac*, 714 F.2d 813, 819 (8th Cir. 1983).

127. See *supra* note 109 and accompanying text (right to privacy in one’s home increases at night).

128. See *supra* note 95 (discussing least restrictive means test).

129. 714 F.2d 813 (8th Cir. 1983); see *supra* note 71-74 and accompanying text (discussing *ACORN*).

130. 714 F.2d at 818.

131. *Id.* at 819-19. The drafters of the ordinance considered many factors peculiar to Frontenac. Every house is on a lot of one acre or more, and many houses are set back as much as 100 feet from the street. This zoning scheme hinders the police in detecting intruders on private property at night. This situation is compounded by the absence of street lights and sidewalks. The drafters of the

inconsistent with *Pennsylvania Alliance for Jobs & Energy v. Council of Borough of Munhall*,¹³² in which the Third Circuit explicitly refused to adopt the least restrictive means test in its consideration of a daylight ordinance.¹³³ The Eighth Circuit suggested the use of three less restrictive alternatives: enforcing trespass and burglary laws; implementing application and identification procedures; and posting "no solicitation" signs.¹³⁴ Upon close examination, each suggested alternative fails to advance the city's interest in preventing crime as effectively as a daylight ordinance.

Trespass and burglary laws will not deter a burglar posing as a solicitor who knows that his actions are illegal. In contrast, a prohibition on evening solicitation puts homeowners and police officers on notice that people travelling from house to house at night are probably not engaged in legitimate activity. Similarly, enforcement of application and identification procedures will not significantly advance a city's crime prevention interests. Few criminals will apply for a solicitation license, and most homeowners will be unaware that solicitors must carry city-approved identification cards. Finally, while "no solicitation" signs may protect individual privacy,¹³⁵ they will not prevent crime, which is a community problem. As long as the neighborhood remains open to solicitors, night-fall will not create notice of probable illegality. Thus, a city's interest in crime prevention justifies ordinances restricting solicitation to daylight hours.

IV. CONCLUSION

The constitutionality of daylight ordinances is uncertain. The Supreme Court has never addressed this issue, and lower federal courts have reached inconsistent results. The solicitor's first amendment right to free speech and the homeowner's right to receive information often conflict with the community's interest in preventing crime and annoy-

ordinance also considered the number of police officers on patrol at any one time. Record at 5974, *ACORN v. City of Frontenac*, 741 F.2d 813 (8th Cir. 1983).

132. 743 F.2d 182 (3d Cir. 1984); see *supra* notes 98-105 and accompanying text (discussing *Munhall*).

133. 743 F.2d at 185-86; see also *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2133-34 (1984) (rejecting application of least restrictive means test for "viewpoint neutral" regulation); *supra* notes 92-97 and accompanying text (discussing *Vincent*).

134. 714 F.2d at 818-19.

135. See *supra* note 117 and accompanying text (discussing "no solicitation" signs).

ance and protecting homeowner privacy. Courts have struggled to balance the competing interests of city, homeowner, and solicitor.

Courts should apply the “ample alternative forums” test, because it respects both the solicitor’s right to reach an audience and the city’s right to protect its citizens. The viability of an alternative forum depends on empirical and demographic evidence of the city and its residents to ensure that the alternative forum provides access to a significant audience.

Sundown ordinances are the best solution. An ordinance permitting door-to-door solicitation during daylight hours maximizes the amount of daylight time available for solicitation and provides necessary “ample alternatives.”¹³⁶ A prohibition of solicitation after dark protects the city’s interest in preventing crime and undue annoyance. Local governments should avoid possible vagueness problems¹³⁷ by varying the hours of a solicitation ordinance to coincide with the time of sundown.

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136. See *Pennsylvania Alliance for Jobs & Energy v. Borough of Munhall*, 743 F.2d 182, 184 n.2, 190 n.4 (3d Cir. 1984).

137. See *Westfall v. Board of Comm’rs*, 477 F. Supp. 861, 866 (N.D. Ga. 1979); see also *supra* note 60 (defining “vagueness”).

