



Fliers & leafleting

[Bill Kenworthy](#)

Legal Researcher

Friday, September 28, 2007

Leafleting is a time-honored and inexpensive way to spread political, religious and commercial messages. In its traditional form, in which leaflets, fliers or pamphlets are handed to people face-to-face on the street, leafleting is a method of speech protected by the First Amendment.

Another form of leafleting has come into fashion — placing information on car windshields. No federal statute prohibits placement of leaflets on windshields, but the activity is not specifically protected, either — the federal government has left any regulation up to the states. One state — New York — does prohibit the practice, as do ordinances in many cities and towns.

If the constitutionality of such an ordinance is challenged, a court must determine whether the ordinance is content-based or content-neutral; that is, if it restricts speech on the basis of its content or message or if its restrictions apply to all speech regardless of the content or message. If the ordinance is deemed content-based, it will be subject to strict scrutiny, which means it must serve a compelling government interest and employ the least-restrictive means to achieve that interest. Content-based ordinances are least likely to withstand a First Amendment challenge.

Content-neutral restrictions, on the other hand, are subject to a lesser, intermediate level of scrutiny. Intermediate scrutiny means any restriction must be substantially related to an important government purpose. Content-neutral ordinances are also subject to [time, place and manner](#) restrictions. Such restrictions merely limit when and where speech can take place in order to reduce or prevent annoyance or inconvenience to the public. Restrictions on written forms of expression must be 1) content-neutral, 2) narrowly tailored to serve a significant government interest, and 3) leave open ample alternative channels of communication. This three-part test was adapted from several court rulings.

The question of public forums

One more principle needs to be considered regarding restrictions on speech: [public-forum](#) doctrine.

There are three types of forums under this doctrine: the traditional public forum, the designated public forum (one created by the government) and the non-public forum. The traditional public forum consists of “government property that has traditionally been available for public expression,” such as public

streets and parks. The designated public forum consists of public property “that the State has opened for expressive activity by part or all of the public,” as defined in a 6th U.S. Circuit Court of Appeals decision, [Jobe v. City of Catlettsburg](#) (2005). The non-public forum is all remaining public property.

Various courts have heard cases concerning distribution and/or posting of leaflets. The 1984 U.S. Supreme Court decision [City Council of Los Angeles v. Taxpayers for Vincent](#) involved political signs on telephone poles rather than leaflets on cars, but it does indicate the Supreme Court’s view concerning the public forum and a government’s interest in aesthetic values.

Aesthetic concerns are often brought up as a government interest when anti-leafleting ordinances are passed. In *Taxpayers for Vincent*, the Supreme Court cited its precedents in ruling that municipalities have a legitimate interest in prohibiting “intrusive and unpleasant formats of expression” for aesthetic reasons. The high court wrote, “The problem addressed by this ordinance — the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property — constitutes a significant substantive evil within the City’s power to prohibit.”

The Court also tackled the question of public forum. The group Taxpayers for Vincent argued that the public property covered by the ordinance, such as telephone poles, should be considered a traditional public forum or at least be treated as such. The Court disagreed, saying:

“Appellees’ reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks, and it is clear that ‘the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.’ *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). “Lampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. Cf. *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S., at 131. Public property which is not by tradition or designation a forum for public communication may be reserved by the State ‘for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.’ *Perry Education Assn. v. Perry Local Educators’ Assn.*, 460 U.S., at 46.”

Lower court rulings

Although *Taxpayers for Vincent* did not address windshield leaflets, two U.S. circuit courts and one district court did.

In 1998, the 8th Circuit struck down four Arkansas town ordinances prohibiting vehicle leafleting as unconstitutional in [Krantz v. City of Fort Smith](#). Members of the Twentieth Century Holiness Tabernacle Church, including Albert Krantz, were arrested for distributing religious leaflets under the windshield wipers of parked cars. Analyzing the ordinances using the three-part test for written forms of expression, the 8th Circuit found the ordinances content-neutral. However, it also found they were

not narrowly tailored to serve a significant government interest and therefore declared them unconstitutional.

The 8th Circuit ruled that “the ordinances suppress considerably more speech than is necessary to serve the stated governmental purpose of preventing litter.” First, the court seemed to question whether the prevention of litter was indeed a legitimate governmental interest. The court cited [Schneider v. New Jersey](#), a 1939 U.S. Supreme Court decision that said preventing litter was insufficient justification for an ordinance prohibiting individuals from handing out literature to those willing to receive it. Oddly, the 8th Circuit did not mention the more recent case, *Taxpayers for Vincent*.

Next the 8th Circuit noted that “the narrowly tailored analysis, where appropriate, takes into consideration the opportunity for the would-be recipient to provide effective notice that the communications are not wanted.” This “effective notice” was the final consideration for the 8th Circuit, which wrote, “When that factor is considered in the present case, the balance tips in favor of striking the ordinances as overbroad because those individuals who do not want handbills placed on their vehicles can quite easily and effectively provide notice, for example, by placing a sign on the dashboard.” The opinion added: “As the Supreme Court reasoned in [Martin](#)[*v. City of Struthers* (319 U.S. 141 (1943))] and *Schneider*, defendants’ goal of preventing litter can be accomplished by punishing the handbill distributors who defy such notices, as well as the ‘litterbugs’ who choose to throw papers on the ground.”

The 8th Circuit did not consider the public-forum doctrine in its decision, as all parties in the case conceded that public streets and parking lots were public forums. Still, the city of Fort Smith, speaking for the other municipalities, maintained “that they have both the duty and the power to regulate activities affecting the safety and aesthetics of such public areas through direct or indirect regulation,” according to the opinion. Despite this contention, no discussion of the public forum took place.

However, in 2005, the 6th Circuit came to a different conclusion in *Jobe v. City of Catlettsburg*, ruling against a Kentucky windshield leafleter.

In this case, Leonard Jobe placed leaflets for the American Legion under the windshield wipers of cars parked on public property. Jobe was cited and fined for violating a city ordinance. The court analyzed the ordinance using the three-part test for written forms of expression. Both parties agreed that the ordinance was content-neutral, thus satisfying the first part of the test. The court then decided that the ordinance was narrowly tailored, left open other channels of communication and advanced the government’s interests in “prohibiting litter and visual blight” and in allowing individuals to have “their private property left alone by those who do not have permission to use it.” The 6th Circuit also looked at the *Taxpayers for Vincent* case and cited the Supreme Court’s discussion of aesthetic interests and of the public forum.

Concerning the public forum, the 6th Circuit said (all emphasis added by the court):

“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 public streets. And if *Taxpayers for Vincent* was wary about permitting citizens to co-opt utility poles to serve as bulletin boards and signposts, one would expect the Court to be equally wary, if not more wary, of permitting citizens to co-opt privately owned cars to serve as receptacles for the distribution or display of literature and other information. See [*Taxpayers for Vincent*] at 815 n.31 (noting that ‘appellees could not seriously claim the right to attach “Taxpayer for Vincent” bumper stickers to city-owned automobiles’ and reiterating that ‘the State, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated”’). In neither of these settings, whether the utility pole or the car, does the ostensible public forum deal with a method of communication for which one can say there has been a ‘traditional right of access’ and in neither instance does it offer an apt analogy to the forms of communication that have long taken place on our ‘public streets and parks.’”

Defendant Jobe urged the 6th Circuit to follow the precedent set by the 8th Circuit in *Krantz*. The 6th Circuit refused, saying it disagreed with three facets of the 8th Circuit’s opinion.

First, in *Krantz* the 8th Circuit did not consider putting leaflets on cars to be littering. In contrast, the 6th Circuit’s view was that “Placing unrequested fliers on a car windshield (or some other part of the car) shares as many qualities with littering as placing the fliers on the front lawn of a residence, on the top of a boat or for that matter on top of any piece of private property that is not otherwise designed by intent or usage to receive and hold literature distributed by others.”

Second, the 8th Circuit did not address, or distinguish, the case *Taxpayers for Vincent* in its *Krantz* opinion. The 6th Circuit pointed out: “*Taxpayers* established that not all items that appear on public streets are transformed into public fora. If public utility poles and private mailboxes located on public streets and sidewalks are not public fora, neither is a car windshield.”

Third, the 6th Circuit took issue with the 8th Circuit’s failure to “account for the fundamental difference between traditional leafleting,” hand-to-hand on the street or door-to-door, “and the activities of Jobe and *Krantz*,” which “unlike traditional leafleting ... do not readily allow the recipient to opt out of receiving the flier and to opt out of the responsibility for disposing of it.”

The 6th Circuit thus concluded that the Catlettsburg ordinance was constitutional.

In 2001 a U.S. District Court in Wisconsin found unconstitutional a Milwaukee ordinance that prohibited placing pamphlets or leaflets on cars in *Deida v. City of Milwaukee* (176 F. Supp. 2d 859, (E.D. Wis. 2001)).

Under the ordinance, all pamphlets or leaflets were prohibited *except* for those containing “educational material ... approved by the council on physical disabilities...related to the parking privileges of physically disabled persons.” The district court ruled that this exception made it a content-based ordinance and therefore subject to strict scrutiny. The court wrote: “Under strict scrutiny, laws regulating the content of speech will be upheld only when they are justified by compelling

governmental interests and employ the least restrictive means to effectuate those interests.”

The opinion quoted the U.S. Supreme Court in *Swanner v. Anchorage Equal Rights Commission* (1994): “A compelling interest is a ‘paramount [interest,] ... [an] interest of the highest order.’” The district court ruled that the interests claimed by the city were substantial but not compelling and that the ordinance was unconstitutional.

Unless and until the U.S. Supreme Court hands down a definitive ruling on the subject, placing leaflets on cars will be subject to local laws and lower courts.

Posted September 2007.

<http://www.firstamendmentcenter.org/fliers-leafleting#tab-section>