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## "Green River Ordinances": Where Does the Burden Belong?

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# "Green River Ordinances": Where Does the Burden Belong?

## **Cover Page Footnote**

Professor of Law, University of Oklahoma.

# “GREEN RIVER ORDINANCES”: WHERE DOES THE BURDEN BELONG?

Osborne M. Reynolds, Jr. \*

## I. Introduction

It has been observed that municipal ordinances are the most voluminous types of legislative barrier to free markets in our economy,<sup>1</sup> and that of all such ordinances, those that operate most heavily against non-residents of a community are *Green River* ordinances.<sup>2</sup> Another commentator has noted that until *Green River* ordinances came along, every local burden on interstate direct-to-consumer selling had been declared invalid.<sup>3</sup> What are *Green River* ordinances, and what is their importance in history and in modern America? The term is derived from an ordinance adopted in Green River, Wyoming, in November, 1931.<sup>4</sup> The measure declared the practice of going in or upon private residences for the purpose of peddling, or soliciting orders for the sale of goods without prior consent of the owners or occupants of the residence a nuisance and subjected such activities to criminal penalties.<sup>5</sup> The Green River, Wyoming, legislation was the first of its kind to be involved in litigation<sup>6</sup> and was thus the prototype for similar ordinances enacted by hundreds of other municipalities during the 1930's.<sup>7</sup> The popularity of—and controversy over—these ordinances continue to this day.<sup>8</sup>

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1. McIntire & Rhyne, *Municipal Legislative Barriers to a Free Market*, 8 LAW & CONTEMP. PROBS. 359 (1941).

2. *Id.* at 374. The authors also note that “[t]he history of local ordinances relating to economic affairs traces from the earliest of municipal legislative activities.” *Id.* at 359.

3. Jensen, *Burdening Interstate Direct Selling under Claims of State Police Power*, 12 ROCKY MTN. L. REV. 257 (1940).

4. Town of Green River, Wyo., Ordinance No. 175 (Nov. 16, 1931), *quoted in* Town of Green River v. Fuller Brush Co., 65 F.2d 112, 113 (10th Cir. 1933), *rev'g* 60 F.2d 613 (D. Wyo. 1932).

5. *Town of Green River*, 65 F.2d at 113. *See* Breard v. City of Alexandria, 341 U.S. 622 (1951) (validity of a *Green River* ordinance upheld).

6. Annot., 35 A.L.R.2d 355, 358 (1954).

7. *See* McIntire & Rhyne, *supra* note 1, at 374 (*Green River* ordinances were adopted by over 400 cities between 1935 and 1939).

8. This is illustrated by *Tipco Corp. v. City of Billings*, 642 P.2d 1074 (Mont. 1982), where it was held that a city could prohibit uninvited door-to-door solicitation despite state statutes licensing this activity.

The original ordinance in Wyoming applied to "solicitors, peddlers, hawkers, [and] itinerant merchants. . . ."<sup>9</sup> But not all municipal legislation affecting door-to-door salespersons is so inclusive. Therefore, some understanding of the various labels applied to such persons is necessary. As summarized in one excellent article,<sup>10</sup> three main categories may be distinguished: (1) Peddlers are those who travel from place to place carrying their goods with them. They normally sell and deliver at the same time.<sup>11</sup> (2) Solicitors are those who travel from place to place, or at least house to house but do not carry their wares with them. They merely take orders for future delivery.<sup>12</sup> (3) Itinerant merchants are those who occupy a fixed, but temporary, location, at which they sell and deliver from stock on hand. They trade in much the same manner as more permanent establishments.<sup>13</sup>

Over the years, many communities have attempted to restrict vendors in some or all of these categories.<sup>14</sup> All, particularly solicitors, are thought to pose special dangers of fraud and price-gouging to residents of the community.<sup>15</sup> The peddler and solicitor also are often consid-

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9. *Town of Green River*, 65 F.2d at 113.

10. Montgomery, *Municipal Regulation of the Itinerant Salesman*, 10 OKLA. L. REV. 37 (1957). But under many ordinances, the distinctions among the various categories are irrelevant since the ordinances are interpreted as forbidding uninvited visitation of private residences for business purposes by vendors in any of the categories. See *Town of Green River*, 65 F.2d 112.

11. See *Wilkins v. City of Harrison*, 218 Ark. 316, 319, 236 S.W.2d 82, 83-84 (1951). The word "peddler" is said to derive from "ped," which in Norfolk meant a pannier or wicker basket. Montgomery, *supra* note 10, at 38. Today this term generally includes those who were formerly termed hawker, *Excelsior Baking Co. v. City of Northfield*, 247 Minn. 387, 389-40, 77 N.W.2d 188, 191 (1956) (the terms peddler or hawker may be considered synonymous), as well as those sometimes called hucksters. See *Delight Wholesale Co. v. City of Overland Park*, 203 Kan. 99, 453 P.2d 82 (1969). At one time the word hawker signified a person who wandered from place to place buying and selling merchandise, often deceitfully. See *South Bend v. Martin*, 142 Ind. 31, 40, 41 N.E. 315, 317 (1895). But the implication of deceitfulness has disappeared with time.

12. See Montgomery, *supra* note 10, at 38; *Upchurch v. City of La Grange*, 159 Ga. 113, 125 S.E. 47 (1924). Whatever they are called, these salespersons are usually agreed to create the most problems. See Montgomery, *supra* note 10, at 40. Since they do not have their goods with them for the prospective buyer to inspect, their transactions are particularly likely to involve fraud. See note 22 *infra*.

13. See *J.R. Watkins Co. v. Salyers*, 384 Ill. 369, 374, 51 N.E.2d 574, 577 (1943). They are sometimes called itinerant vendors, *Commonwealth v. Gordon*, 354 Mass. 722, 724, 242 N.E.2d 399, 401 (1968), or transient vendors, see *State v. Feingold*, 77 Conn. 326, 59 A. 211 (1904).

14. Jensen, *supra* note 3, at 260.

15. See note 27 *infra* and accompanying text.

ered irritating invaders of the privacy of homeowners.<sup>16</sup> When they come without invitation, they may be regarded as “nuisances” in the everyday, and possibly also the legal, sense of the term.<sup>17</sup> On the other hand, much of the opposition to salespersons in all the above-listed categories may be thought to stem from the regular established merchants of a community.<sup>18</sup> Such merchants are understandably perturbed at the comparatively “cut-rate” operations of those who lack a fixed location and/or a continuously operating business.<sup>19</sup> Whatever their motives, merchants, and sometimes other concerned citizens, have frequently been successful in obtaining passage of legislation of the *Green River*-type. How have such measures fared in the courts during their more than 50 years of existence?

## II. Issues

### A. Due Process v. Police Power

One issue often raised is whether *Green River* ordinances are a valid exercise of the police power,<sup>20</sup> or whether they constitute a taking of private property without due process.<sup>21</sup> The United States Supreme

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16. Jensen, *supra* note 3, at 264.

17. *Id.* at 263.

18. *Id.* at 260.

19. These merchants generally have substantial fixed costs, such as rent. *Id.* They must pay property taxes on their business properties and pay large numbers of employees on a year-round basis. *Id.*

20. *City of Alexandria v. Jones*, 216 La. 923, 45 So. 2d 79 (1950) (question presented to the court was the power of a municipality to enact a *Green River* ordinance); *McCormick v. City of Montrose*, 105 Colo. 493, 99 P.2d 969 (1940) (issue raised in case was that an enactment of a *Green River* ordinance was not a valid exercise of police power); *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P.2d 456 (1936) (court considered town's right to enact a *Green River* ordinance), *appeal dismissed*, 300 U.S. 638 (1937). The original meaning of police power denotes the power of the government to govern men and things. 6 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.02, at 419 (rev. 3d ed. 1980). It is the power necessary for the effective conduct and maintenance of government. *Id.* at 420.

21. But several earlier cases had found that *Green River* ordinances have no connection with a police power purpose and are thus an infringement on home solicitors' right to conduct a lawful business. One decision stressed that there is no substantial involvement of the interests of the general public, because a bothersome home solicitation is at most an annoyance to the individual homeoccupier. *See White v. Town of Culpeper*, 172 Va. 630, 635-36, 1 S.E.2d 269, 272 (1939). Another opinion merely stated there was no relation to public health, safety, or general welfare. *See Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 A. 417 (1937). Finally, some authorities balance the householder's right of privacy with the solicitor's right to earn a living and find that protection of the former is not sufficient justification for so severe a restriction on the latter. *See DeBerry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940). It had been observed that mere

Court has found no violation of due process<sup>22</sup> and it may be urged that the Court's opinion should put this argument to rest.<sup>23</sup> In any case, most other courts have agreed. It has been said that the authority to restrict peddling on private residential premises is inherently within the police power<sup>24</sup> and that such regulation has a real and substantial relationship to the public safety and general welfare.<sup>25</sup> In citing specific justifications for these laws, a court may allude to the protection of homeowners from annoyance or disturbance and declare that there is no constitutionally guaranteed right in uninvited visitation on the part of peddlers and solicitors.<sup>26</sup> But more often, courts will cite the need to protect prospective purchasers from fraud. One court observed that many frauds "are perpetrated upon unsuspecting housewives by strange peddlers in the sale of their shoddy goods, and many fraudulent schemes are worked upon housewives by strange solicitors, who allow discounts for cash payments in full and keep the money and do not send in the orders."<sup>27</sup> Due process objections have uni-

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protection of homeowners' property values cannot justify a *Green River*-type exercise of the police power, at least in the absence of some compelling public necessity. *New Jersey Good Humor, Inc. v. Board of Comm'rs*, 124 N.J.L. 162, 169-70, 11 A.2d 113, 118 (1940).

22. *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (discussed at note 5 *supra*).

23. See Note, *Constitutional Law-Ordinance Prohibiting as a Nuisance Solicitation by Non-Resident Salesmen*, 5 ARK. L. REV. 429, 431 (1951).

24. *Alabama Law Enforcement Officers, Inc. v. City of Anniston*, 272 Ala. 319, 131 So. 2d 897 (1961) (under police power, municipality could declare both uninvited door-to-door solicitation and unwanted telephone solicitation to be nuisances). See also *ex parte Lewis*, 141 Tex. Crim. 83, 147 S.W.2d 478 (1941) (ordinance regulating peddlers, solicitors and transient vendors was valid exercise of city's inherent and statutory police power); *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10th Cir. 1933) (discussed at note 10 *supra*) (regulation of peddlers, itinerant merchants and transient vendors recognized as subject of police power).

25. *Village of West Jefferson v. Robinson*, 1 Ohio St. 2d 113, 119-20, 205 N.E.2d 382, 387 (1965). In addition, the court held that a *Green River* ordinance would be valid even if it conflicted with state statutes authorizing municipalities to license solicitors since such statutes are not general laws but purport only to grant legislative power to, and limit legislative power of, municipalities to adopt and enforce certain police regulations. *Id.* at 118, 205 N.E.2d at 386.

26. See *Town of Green River v. Bungler*, 50 Wyo. 52, 58 P.2d 456 (1936), *appeal dismissed*, 300 U.S. 638 (1937) and authorities cited therein. The prevention of noise and disturbances has also been cited as a justification for *Green River* ordinances, see *id.*; *Rowe v. City of Pocatello*, 70 Idaho 343, 352-53, 218 P.2d 695, 701 (1950), as has the prevention of criminals using "solicitation" as a device to determine whether the occupant is at home. *DeBerry v. City of La Grange*, 62 Ga. App. 74, 82, 8 S.E.2d 146, 152 (1940).

27. *City of Shreveport v. Cunningham*, 190 La. 481, 489, 182 So. 649, 651 (1938). See *Hall Omar Baking Co. v. Commissioner of Labor & Indus.*, 344 Mass. 695, 184 N.E.2d 344 (1962) (purpose of a *Green River* ordinance was prevention of

formly been rejected in cases challenging *Green River*-type restrictions on solicitation of magazine subscriptions.<sup>28</sup> The Uniform Consumer Credit Code also provides protection, within the terms of its coverage, against fraudulent home solicitation sales by providing for a buyer's right to cancel within a specified period of time.<sup>29</sup>

Municipalities are, of course, entities of limited governmental power.<sup>30</sup> The authority to pass a *Green River*-type ordinance must, as with any ordinance, be found in some grant from the state:<sup>31</sup> in the state constitution or in a statute;<sup>32</sup> or, in the case of a home-rule city, in the home-rule charter.<sup>33</sup> Because there is no dispute as to the state's

fraud); *Michaud v. State*, 163 Neb. 674, 80 N.W.2d 888 (1957) (object of a *Green River* ordinance was to protect public against fraud). In regard to the validity of a community's *Green River* ordinance, it has been held that evidence is admissible that the community is a stopping-off place for vagrant salespersons who are often financially irresponsible and who may practice frauds on the unwary. *Green v. Town of Gallup*, 46 N.M. 71, 73-74, 120 P.2d 619, 620 (1942).

28. See Annot., 9 A.L.R.2d 728 (1950).

29. U.C.C.C. § 2.502 (1968). A "home solicitation sale," to which the special right of cancellation applies, is defined in § 2.501 of the Code as a consumer credit sale which meets certain further requirements. The U.C.C.C. has disclosure requirements for all consumer credit sales. See *id.* §§ 2.301-.312. Some of the states that have adopted the U.C.C.C. in general and the previously noted sections in particular, include: (1) Colorado, COLO. REV. STAT. §§ 5-2-301 to -312, 5-2-501 to -502 (1974 & Supp. 1982); (2) Idaho, IDAHO CODE §§ 28-32-301 to -312, 28-32-501 to -502 (1980 & Supp. 1982); (3) Indiana, IND. CODE ANN. §§ 24-4.5-2-301 to -312, 24-4.5-2-501 to -502 (Burns 1982); (4) Iowa, IOWA CODE ANN. §§ 537.3201-.3212, 537.3501 (West Supp. 1982); (5) Kansas, KAN. STAT. ANN. §§ 16a-3-201 to -206 (1981); (6) Maine, ME. REV. STAT. ANN. tit. 9A, §§ 3-201 to -205, 3-501 to -502 (1980 & Supp. 1982-1983); (7) Oklahoma, OKLA. STAT. ANN. tit. 14A, §§ 2-301 to -313, 2-501 to -502 (West 1983); (8) South Carolina, S.C. CODE ANN. §§ 37-2-301 to -306, 37-2-501 to -502 (Law Co-op 1976 & Supp. 1982); (9) Utah, UTAH CODE ANN. §§ 70B-2-301 to -313, 70B-2-501 to -502 (1980); (10) Wisconsin, WIS. STAT. ANN. §§ 422.301-.307 (West 1974 & Supp. 1982). See Miller, *Living with Both the UCCC and Regulation Z*, 26 OKLA. L. REV. 1 (1973) (relationship between §§ 2.301-.312, .501-.502 and Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1691f (1976)); Miller & Warren, *A Report on the Revision of the Uniform Consumer Credit Code*, 27 OKLA. L. REV. 1 (1974) (purpose of the U.C.C.C. and changes therein since original was drafted).

30. Traditionally, the scope of municipal power is determined by the use of "Dillon's Rule" which takes its name from J. DILLON, LAW OF MUNICIPAL CORPORATIONS § 55, at 173 (2d ed. 1873) and which states that a municipality "can exercise the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in, . . . the powers expressly granted*; third, those *essential to the declared . . . purposes of the [municipal] corporation. . . .*" *Id.* See 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.01, at 5-4 (1982); 2 McQUILLIN, *supra* note 20, § 10.09, at 756 (rev. 3d ed. 1979).

31. 1 C. ANTIEAU, *supra* note 30, § 5.02, at 5-6; 2 McQUILLIN, *supra* note 20, § 10.03, at 740 (rev. 3d ed. 1979).

32. 1 C. ANTIEAU, *supra* note 30, § 5.02, at 5-6; 2 McQUILLIN, *supra* note 20, § 10.03, at 740 (rev. 3d ed. 1979).

33. "Home rule" is the concept under which a municipality is free to manage its own business and conduct its affairs to the fullest possible extent. 1 C. ANTIEAU,

ability to delegate police power to municipalities within that state,<sup>34</sup> the basic question of power normally comes down to the above-stated issue of the scope of the police power.<sup>35</sup> Where a municipality attempts to impose a *tax* on peddlers or solicitors, a separate question of power is presented. The authority to tax cannot be inferred from mere power to regulate,<sup>36</sup> as the latter justifies only a fee sufficient to cover the expenses incidental to the regulation.<sup>37</sup>

## B. Overbreadth Arguments

Even if *some* restrictions on door-to-door solicitation may be justified under the police power, a particular restriction may be attacked as overbroad. The overbreadth doctrine is based on the principle of substantive due process that forbids legislative interference with constitutionally guaranteed freedoms even where *some* applications of the challenged legislation would not infringe on any such freedoms.<sup>38</sup>

*supra* note 30, § 3.01, at 3-7; 2 McQUILLIN, *supra* note 20, § 9.08, at 634 (rev. 3d ed. 1979). The main reasons for home rule are: to stop legislative interference with local affairs and to develop a sense of civic responsibility. *Id.* at 634-35. The basic source of power is a self-executing state constitutional provision conferring home rule on municipalities or legislation passed pursuant to a constitutional mandate. 1 C. ANTI-EAU, *supra* note 30, § 3.01, at 3-7.

34. "[W]ithout doubt a state can delegate the [police] power or at least authority to exercise it to municipal and other governmental agencies of the state." 6 McQUILLIN, *supra* note 20, § 24.36, at 499 (rev. 3d ed. 1980).

35. See W. VALENTE, LOCAL GOVERNMENT LAW 343-44 (2d ed. 1980) (noting that some municipalities enjoy greater delegation of police power than others).

36. "There is a marked distinction between the exercise of taxing power and of police power." 16 McQUILLIN, *supra* note 20, § 44.02, at 7 (rev. 3d ed. 1979). "The authority to levy taxes is not within the police power." *Id.* § 44.05, at 12. "Since authority to levy taxes is an extraordinary one, it should never be left to implication. . . . It is generally held that the power to tax is not implied from the power to license occupations." *Id.* § 44.11, at 28.

37. 9 McQUILLIN, *supra* note 20, § 26.15, at 24 (rev. 3d ed. 1978). But in some states, municipalities are given the separate power to tax peddlers and solicitors, as well as to regulate them. See *Town of Sumner v. Ward*, 126 Wash. 75, 78, 217 P. 502, 504 (1923). For arguments that either a license fee or tax imposes an impermissible burden on interstate commerce, see notes 64-76 *infra* and accompanying text.

38. *Conchito v. City of Tulsa*, 521 P.2d 1384, 1386 (Okla. Crim. App. 1974); *Marks v. City of Anchorage*, 500 P.2d 644, 646 (Alaska 1972). For further discussion of the overbreadth doctrine, see *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Zwickler v. Koota*, 389 U.S. 241, 250 (1967), *on remand*, 290 F. Supp. 244, 250, 257 (E.D.N.Y. 1968), *rev'd sub nom. and remanded*, *Golden v. Zwicker*, 394 U.S. 103 (1969); *Kirkwood v. Ellington*, 298 F. Supp. 461, 466 (W.D. Tenn. 1969). See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). For a discussion of the distinction between the overbreadth doctrine and the void-for-vagueness rule, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 110-13 (1960).



Since constitutionally protected rights to freedom of speech and freedom to earn a livelihood are involved in the solicitation-regulation cases, the argument is frequently made that *Green River* ordinances unjustifiably infringe on these freedoms. This argument may fall into either of two closely related categories.

Under the first category it has been urged with success that the *Green River* ordinance in effect prohibits door-to-door solicitation since the burden of obtaining prior consent is so onerous as to make such solicitation impractical. On this basis, the ordinance can be struck down for totally proscribing conduct which at most needs only to be regulated.<sup>39</sup> Where state statutes empower municipalities to license solicitors, this grant can be taken as legislative recognition that solicitation is a lawful and useful occupation which cannot be prohibited.<sup>40</sup> The ordinance can then be invalidated, not as overly broad under constitutional limitations, but simply as beyond the scope of legislative authorization.<sup>41</sup> On either the constitutional or the legislative basis, the courts are saying that the municipality is using "overkill," that it should merely restrict, not forbid, a practice that is not inherently a nuisance.<sup>42</sup> If distribution of literature or dissemination of views can be shown to be involved in the solicitation, then the protection of the first amendment will come into play.<sup>43</sup> In such cases, it is clear that only reasonable regulations of time, place and manner can pass constitutional muster.<sup>44</sup> However, the argument can also be made that a *Green River* ordinance is, in fact, *not* a prohibition of solicitation, but merely a restriction of the locations and manner in

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39. See *Jewel Tea Co. v. City of Geneva*, 137 Neb. 768, 291 N.W. 664 (1940) (ordinance not regulatory but penal and prohibitive).

40. *City of Washington v. Thompson*, 160 N.E.2d 568, 570 (Ohio C.P. 1949).

41. *Id.* at 570-72.

42. See *Houston Credit Sales Co. v. City of Trinity*, 269 S.W.2d 579, 581 (Tex. Civ. App. 1954) (a city has no power to prohibit rather than regulate solicitors, hawkers and peddlers).

43. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (privilege of freedom of speech may not be withdrawn even if it results in litter which the community must remove); *Lovell v. City of Griffin*, 303 U.S. 444, 450-52 (1938) (ordinance prohibiting distribution by hand of literature of any kind without obtaining permit from municipal official violates first amendment safeguards).

44. *Martin*, 319 U.S. at 143; *Robert v. City of Norfolk*, 188 Va. 413, 49 S.E.2d 697 (1948) (city could enact reasonable time, place and manner regulations as to distribution of literature but could not deny its citizens the right to circulate, distribute or buy magazines and periodicals). Cf. *ex parte Luehr*, 159 Tex. Crim. 566, 266 S.W.2d 375 (1954) (ordinance would be unconstitutional if construed to apply to missionary evangelist preaching from house to house and taking orders for religious magazine). For a discussion of time, place and manner regulation, see J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 808-17 (1978).

which it may be conducted.<sup>45</sup> It has been pointed out that such an ordinance does not prohibit the sale of goods but merely forbids the particular practice of home-visitation without prior appointment.<sup>46</sup> Because of these differing ways of answering the question of whether the *Green River* ordinance is truly prohibitory in nature, this type of overbreadth argument has had limited use and success.

The second category takes the form of an assertion that the ordinance covers not only the really bothersome instances of solicitation, such as cases of dishonesty or of discourteous conduct; but also instances of perfectly proper behavior. Where substantiated by evidence that most salespersons are mannerly and honest and are welcomed by homeowners, this argument may be successful.<sup>47</sup> There is difficulty in justifying an ordinance that makes no distinction between the party who has the sale of a valuable article at a reasonable price and the party who is able to present a worthless article and so paint it as to be able to attract the interest of the general public.<sup>48</sup> Similarly, the *Green River* ordinance may be invalidated if it applies indiscriminately to peddling that disrupts the peace and quiet of the community and peddling which does not.<sup>49</sup> In these cases, the courts are saying that only certain *practices* of solicitors should be forbidden, not the solicitation itself.<sup>50</sup> No firm line is, of course, possible between these cases and those discussed in the first category.<sup>51</sup> In this second category, the conclusion of the courts may again be looked upon as a holding that only restriction, not prohibition, is justified. For instance, an ordinance that covers solicitation both at private residences *and* at other properties may be invalidated to the extent that it covers the "other" properties.<sup>52</sup> Such an ordinance totally prohibits solicitation rather than merely restricting the locations at which it may occur, *and* its coverage goes beyond the situations of real annoyance: the uninvited

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45. See Note, *Constitutional Law—Due Process—Freedom of Expression—Commerce Clause—"Green River" Ordinance as Applied to Door to Door Solicitation for Magazine Subscriptions*, 50 MICH. L. REV. 576, 578-79 (1952).

46. See Annot., 35 A.L.R.2d 355, 360 (1954), with a list of cases.

47. See *City of Orangeburg v. Farmer*, 181 S.C. 143, 150, 186 S.E. 783, 785 (1936).

48. *Ex parte Faulkner*, 143 Tex. Crim. 272, 275, 158 S.W.2d 525, 527 (1942).

49. See *New Jersey Good Humor, Inc. v. Board of Comm'rs*, 124 N.J.L. 162, 167, 11 A.2d 113, 116-17 (1940).

50. The court in *City of Orangeburg*, discussed at note 47 *supra*, was concerned not with the fact that solicitation was occurring but with the manner in which it was done (i.e., mannerly, honestly and welcomed by the homeowner). *Id.* See *Faulkner*, discussed at note 48 *supra*; *New Jersey Good Humor, Inc.*, discussed at note 49 *supra*.

51. See notes 39-46 *supra* and accompanying text for the cases discussed in the first category.

52. See *Day v. Klein*, 225 Miss. 191, 204-05, 82 So. 2d 831, 836 (1955).

visit to the home. Business premises are open to all those coming for business purposes,<sup>53</sup> including solicitors it may be assumed, unless notice to the contrary is posted.<sup>54</sup>

### C. Freedom of Religion Arguments

The argument that an ordinance is overbroad because it applies to instances of innocent and/or constitutionally protected conduct is related to the argument that an ordinance which restricts activities of religious groups is an unconstitutional infringement on freedom of religion. This argument has generally been unsuccessful as applied to *Green River* ordinances for a number of reasons. For instance, it has been noted that these ordinances apply in an equal and non-discriminatory manner to purveyors of religious materials and to distributors of other goods and materials.<sup>55</sup> In addition, such ordinances do not curtail the free exercise of religion but merely restrict entry onto certain locations for promotion of that religion.<sup>56</sup> Again, however, the question would seem to turn on whether the court looks upon the *Green River* ordinance as so burdensome as to amount to a prohibition, or as merely a limited, reasonable time, place and manner restriction. Sweeping prohibitions of distribution of religious literature are held invalid as violating constitutional guarantees.<sup>57</sup>

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53. "[T]hose who enter premises upon business which concerns the occupier and upon his invitation . . . [are] called . . . business visitor[s]." W. PROSSER, *THE LAW OF TORTS* § 61, at 385 (4th ed. 1971).

54. *Day*, 225 Miss. at 204-05, 82 So. 2d at 836; W. PROSSER, *supra* note 53, § 61, at 390-91 ("salesmen . . . are considered . . . [business visitors] when they come to a place they have good reason to believe to be open for possible dealings with them . . .").

55. *Ex parte Killam*, 144 Tex. Crim. 606, 162 S.W.2d 426 (1942), *cert. denied sub nom. Killam v. Floresville*, 317 U.S. 668 (1942). Some ordinances are interpreted as not covering solicitation for religious groups or causes. See *City of Anchorage v. Berry*, 145 F. Supp. 868 (D. Alaska 1956) (ordinance did not apply to door to door proselytizing); *Luehr*, 159 Tex. Crim. at 566, 266 S.W.2d at 376 (ordinance did not apply to evangelist soliciting orders for religious magazine). An exemption of religious and/or charitable groups can create problems of possibly unlawful discrimination. See *City of Derby v. Hiebert*, 183 Kan. 68, 325 P.2d 35 (1958) (discriminatory classification found). See also note 127 *infra* and accompanying text.

56. *People v. Bohnke*, 287 N.Y. 154, 38 N.E.2d 478, 27 N.Y.S.2d 241 (1941), *cert. denied*, 316 U.S. 713 (1942).

57. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state may regulate time, place and manner of solicitation for religious causes, but may not prohibit such solicitation); *Schneider v. State*, 308 U.S. 147 (1939) (municipal ordinance prohibiting solicitation and distribution of circulars except as permitted by police held void as to one who distributed literature and solicited contributions in the name of religion); *Donley v. City of Colorado Springs*, 40 F. Supp. 15, 19 (S.D. Colo. 1941). Cf. *Zimmerman v. Village of London*, 38 F. Supp. 582 (S.D. Ohio 1941) (ordinance invalid as applied to restrain distribution of pamphlets by Jehovah's Witnesses). See

#### D. Commerce Clause Arguments

In addition to arguments based on "taking without due process," the overbreadth principle, and freedom of religion, a challenge to a *Green River* ordinance can be grounded on the commerce clause. But, aside from situations in which fees or taxes are levied by the ordinance,<sup>58</sup> since the decision in *Breard v. City of Alexandria*<sup>59</sup> the validity of *Green River* ordinances seems now to be well established against this line of attack. The United States Supreme Court ruled in *Breard* that a *Green River* ordinance does not discriminate against or unduly burden interstate commerce and is therefore valid.<sup>60</sup> Even before the Supreme Court so ruled, it had been held that this type of ordinance does not conflict with the commerce clause,<sup>61</sup> and imposes no direct burden, but has merely an incidental effect, on interstate commerce.<sup>62</sup> It has been stated often in this context that only undue or discriminatory burdens on interstate commerce are forbidden under the federal Constitution.<sup>63</sup>

The commerce clause argument becomes more difficult, however, if the ordinance imposes a fee or tax on door-to-door solicitation. The Supreme Court in *Breard* dealt only with a police power restriction, not economic regulation.<sup>64</sup> But in *Nippert v. City of Richmond*,<sup>65</sup> that Court invalidated an annual license tax on solicitors of \$50.<sup>66</sup> The Court stated that policy considerations regarding the substantial effect, actual or potential, of the particular tax in suppressing or burdening commerce must be weighed,<sup>67</sup> and here found that the tax was too likely to result in exclusion of or discrimination against interstate commerce in favor of local competing businesses.<sup>68</sup> Prior to *Nippert*,

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generally Note, *Municipal Law—Ordinance Barring Uninvited Transient Vendors from City Residential Areas*, 27 Miss. L.J. 148 (1956).

58. See notes 64-76 *infra* and accompanying text.

59. 341 U.S. 622 (1951).

60. *Id.* at 633-41.

61. See *Commonwealth v. Dunham*, 191 Pa. 73, 43 A. 84 (1899).

62. *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P.2d 456 (1936), *appeal dismissed*, 300 U.S. 638 (1937).

63. See, e.g., *In re Mares*, 75 Cal. App. 2d 798, 803-04, 171 P.2d 762, 765 (Dist. Ct. App. 1946) (ordinance prohibiting solicitation on any public street or sidewalk for sale of magazine subscriptions upheld); *Borough of Collingswood v. Ringgold*, 66 N.J. 350, 331 A.2d 262 (1975); *Moyant v. Borough of Paramus*, 30 N.J. 528, 545-46, 154 A.2d 9, 19 (1959) (portions of ordinance regulating and licensing solicitors and canvassers upheld, other portions invalidated).

64. See Note, *supra* note 45, at 579.

65. 327 U.S. 416 (1946).

66. *Id.* An additional ½ of 1% of gross earnings in excess of \$1000 for the preceding license year was also levied on solicitors. *Id.*

67. *Id.* at 424.

68. *Id.* at 434.

the Court had invalidated another municipal ordinance which required payment of a license fee,<sup>69</sup> declaring that the law's expressed purpose of protecting the public from fraud did not justify a substantial interference with the free flow of legitimate interstate commerce.<sup>70</sup> Influenced by these decisions, some courts have, using rather sweeping language, invalidated municipally imposed license fees on solicitors, even where the fee was quite small in amount.<sup>71</sup> But some well-reasoned authorities have recognized that there is a distinction between a fee and a tax and that a fee reasonably designed to defray the costs of licensing can be charged to those involved in interstate commerce *if* the fee is not discriminatory or unduly burdensome.<sup>72</sup> Thus, it has been held that a fee required by a municipal ordinance regulating vehicles carrying foodstuffs was not assailable as a burden on interstate commerce where the fee-money was used to meet expenses of inspection and regulation, and was therefore not a "tax."<sup>73</sup>

What if the amount charged solicitors is clearly in excess of the cost of regulation and therefore must be regarded as a tax? It can be maintained that any such taxation by municipalities is necessarily an undue burden when applied to interstate commerce since it opens the door to multiple burdens imposed by a multitude of municipalities.<sup>74</sup> Because the Supreme Court in *Nippert* did not flatly rule out any such taxation<sup>75</sup> even a municipal *tax* can be, and has been, sustained if a court finds it not discriminatory or unduly burdensome.<sup>76</sup>

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69. *Real Silk Hosiery Mills v. City of Portland*, 268 U.S. 325 (1925). The Court also invalidated the requirement of filing a bond. *Id.* at 335.

70. *Id.* at 336.

71. *See Olan Mills, Inc. v. City of Nicholasville*, 280 S.W.2d 522 (Ky. 1955) (annual license fee of \$50 on each photograph gallery, itinerant photographer, or photographer maintaining a shop within city limits held invalid); *Olan Mills, Inc. v. City of Elizabethtown*, 269 S.W.2d 201 (Ky. 1954) (license fee of \$20 per year imposed on solicitors for photographs or magazine subscriptions held invalid); *Village of Bel-Nor v. Barnett*, 358 S.W.2d 832 (Mo. 1962) (solicitation license fee held invalid).

72. *Moyant*, 30 N.J. at 544-45, 154 A.2d at 17-18. *See Village of Mogadore v. Coe*, 29 Ohio Op. 2d 44, 197 N.E.2d 570 (C.P. 1963) (requirement that solicitors obtain identification card for \$5 fee upheld). *Cf. Olan Mills, Inc. v. City of Bogalusa*, 225 La. 648, 73 So. 2d 791 (1954) (furnishing of \$2000 bond and payment of \$50 license fee for each solicitor of a vendor held valid exercise of police power as against request for injunctive relief).

73. *Jewel Tea Co. v. City of Troy*, 80 F.2d 366 (7th Cir. 1935).

74. *See Nippert v. Richmond*, 327 U.S. 416, 429-31 (1946); *Taxi's Inc. v. Borough of East Rutherford*, 149 N.J. Super. 294, 312-13, 373 A.2d 717, 727 (Super. Ct. Law Div. 1977), *aff'd*, 164 N.J. Super. 160, 395 A.2d 912 (Super. Ct. App. Div. 1978); *Moyant*, 30 N.J. at 550-52, 154 A.2d at 21; *State v. Kromer*, 34 N.J. Super. 465, 468-69, 112 A.2d 804, 806 (Super. Ct. Law Div. 1955).

75. The Supreme Court only ruled against a tax which discriminated against interstate commerce in favor of local business. 327 U.S. at 434.

76. *See Acuff v. Mueller*, 93 F. Supp. 146 (W.D. Mo. 1950); *Moyant*, 30 N.J. at 545, 154 A.2d at 18; *Township of Mount Holly v. Omar*, 51 N.J. Super. 201, 143

### E. Nuisance Law Arguments

Since *Green River* ordinances generally declare the forbidden solicitation to be a public nuisance,<sup>77</sup> another line of attack has focused on that designation. Public nuisance which, despite its name, is actually quite different in many respects from the tort of private nuisance,<sup>78</sup> is both a criminal and a tort action.<sup>79</sup> The key elements in the crime are: (1) an interference with the rights of the public or community, or at least of a considerable number of people; and (2) a violation of some statute or ordinance defining the conduct that constitutes "public nuisance."<sup>80</sup> The "public" requirement was traditionally taken to mean that there must be interference with a public right, such as use

A.2d 600 (County Ct. Law Div. 1958); *Mobil Oil Corp. v. Town of Huntington*, 72 Misc. 2d 530, 339 N.Y.S.2d 139 (Sup. Ct. Suffolk County 1972).

77. See *Town of Green River v. Fuller Brush Co.*, 65 F.2d 112 (10th Cir. 1933), *rev'g* 60 F.2d 613 (D. Wyo. 1932); *Prior v. White*, 132 Fla. 1, 180 So. 347 (1938); *City of Mt. Sterling v. Donaldson Baking Co.*, 287 Ky. 781, 155 S.W.2d 237 (1941); *City of Washington v. Thompson*, 160 N.E.2d 568 (Ohio C.P. 1959); *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P.2d 456 (1936), *appeal dismissed*, 300 U.S. 638 (1937).

78. See W. PROSSER, *supra* note 53, § 86, at 572-73. See generally P. WINFIELD & J. JOLOWICZ ON TORT 353-57 (W.V.H. Rogers 11th ed. 1979). Some have taken the view that the distinction between public and private nuisance is less important and less supportable today than in the past. See G. LEFCOE, AN INTRODUCTION TO AMERICAN LAND LAW 211 (1974). Some cases over the years have indicated that a public nuisance becomes in effect a private nuisance to those specially injured thereby. *Ozark Poultry Prods., Inc. v. Garman*, 251 Ark. 389, 391-92, 472 S.W.2d 714, 716 (1971); *Fraday v. Portland Gen. Elec. Co.*, 55 Or. App. 344, 346, 637 P.2d 1345, 1348-49 (Ct. App. 1981); *Raymond v. Southern Pac. Co.*, 259 Or. 629, 634, 488 P.2d 460, 463 (Or. 1971); *Roy v. Farr*, 128 Vt. 30, 37, 258 A.2d 799, 803 (Vt. 1969).

79. W. PROSSER, *supra* note 53, § 88, at 583-86.

80. See Reynolds, *Public Nuisance: A Crime in Tort Law*, 31 OKLA. L. REV. 318, 320 (1978). The legislative definition of public nuisance usually encompasses everything that would have been a public nuisance at common law. *Id.* at 323. Tort action for a public nuisance also requires a showing by plaintiff of special harm that he has suffered, a showing that there has been a substantial and unreasonable interference with the public and with plaintiff's own enjoyment of life, and some recognized basis of tort liability. *Id.* at 320. The first of these additional requirements—the "special injury requirement"—has caused much difficulty in tort law. *Id.* at 332. See Fridman, *The Definition of Particular Damage in Nuisance*, 2 U.W. AUSTRALIAN ANN. L. REV. 490 (1953); *Nuisance—Public Nuisance—Suit by Private Citizen*, 24 COLUM. L. REV. 806 (1924). See generally Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966). There has been a recent tendency to de-emphasize the criminality requirement in the tort action. RESTATEMENT (SECOND) OF TORTS § 821B (1977) now merely lists the violation of a statute, ordinance or administrative regulation as one factor to weigh as to the *unreasonableness* of the interference with a public right. See W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 851-52 (7th ed. 1982); Bryson & MacBeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1972); Wade, *Environmental Protection, the Common Law of Nuisance and the Restatement of Torts*, 8 FORUM 165 (1972).

of a sidewalk, road or other facility.<sup>81</sup> Some modern cases continue to take the view that some disturbance of a public right is needed for criminal or tort liability,<sup>82</sup> and that, for instance, a public nuisance action cannot be brought on the basis of injury suffered on the stairs of a church.<sup>83</sup> But this common law rule is modified in a number of states by statutes declaring that a public nuisance may exist where a "considerable number of persons" (or similar language) are adversely affected.<sup>84</sup> Under such a statute, no public right need be involved in order to establish liability.<sup>85</sup> Even apart from such statutory modifications, there is a tendency to relax the "public right" requirement where a menace is posed to a substantial segment of the populace.<sup>86</sup>

The second (i.e. "criminality") requirement of public nuisance can clearly be satisfied by showing violation of a city ordinance.<sup>87</sup> City ordinances covering nuisances in general terms will, like comparable state laws, be interpreted as prohibiting all conduct that causes obstruction, inconvenience or damage to the public.<sup>88</sup> But like the state, the city may declare something a public nuisance even though it was *not* such at common law.<sup>89</sup>

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81. See Reynolds, *supra* note 80, at 320-22.

82. See Conlon v. Town of Farmington, 29 Conn. Supp. 230, 280 A.2d 896 (Super. Ct. 1971); Mandel v. Pivnick, 20 Conn. Supp. 99, 125 A.2d 175 (Super. Ct. 1956); Stremler v. Michigan Dep't of State Highways, 58 Mich. App. 620, 624-26, 228 N.W.2d 492, 495 (Ct. App. 1975); Smejkal v. Empire Lite-Rock Inc., 274 Or. 571, 547 P.2d 1363 (1976).

83. Cox v. DeJarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961).

84. See, e.g., ARIZ. REV. STAT. ANN. § 13-2917 (1978); CAL. PENAL CODE § 370 (West 1970); IDAHO CODE § 52-101 (1979); MINN. STAT. ANN. § 609.74 (West Supp. 1983); N.J. STAT. ANN. 2C:33-12 (West 1982); OKLA. STAT. ANN. tit. 50, § 2 (1962); S.D. CODIFIED LAWS ANN. § 21-10-3 (1979); UTAH CODE ANN. § 76-10-803 (1978).

85. See People v. Rubinfeld, 254 N.Y. 245, 247, 172 N.E. 485, 486 (1930); Mackey v. State *ex rel.* Harris, 495 P.2d 105, 107 (Okla. 1972) (disturbance to neighbors found enough); Ballenger v. City of Grand Saline, 276 S.W.2d 874 (Tex. Civ. App. 1955).

86. See State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 113 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (handling of snakes as part of religious ritual declared common-law nuisance). It has been suggested that the definition of "public nuisance" might be broadened to include all conduct so endangering social interests that injunctive relief would be more appropriate than other sanctions. Comment, *Injunction—Usury—Public Nuisance*, 19 N.C.L. REV. 586 (1941).

87. See Rodgers v. Ray, 10 Ariz. App. 119, 457 P.2d 281 (Ct. App. 1969); County of San Diego v. Carlstrom, 196 Cal. App. 2d 485, 16 Cal. Rptr. 667 (Ct. App. 1961).

88. See People v. McGregor, 65 Mich. App. 747, 751, 238 N.W.2d 183, 185 (1975) (ordinance prohibiting conduct resulting in nuisance refers to public nuisance).

89. Lane v. City of Mount Vernon, 38 N.Y.2d 344, 349, 342 N.E.2d 571, 573, 379 N.Y.S.2d 798, 801-02 (1976) (city has delegated legislative power to enlarge category of public nuisance).

The problem with *Green River* ordinances, then, is with the first requirement: does uninvited door-to-door solicitation amount to a disturbance to the public or community so that such conduct may be proscribed as a *public* nuisance? Some authorities have taken the view that the forbidden solicitation at most annoys a few individuals, not the whole community, and therefore can be no more than a private nuisance, which will justify a tort action but not criminal charges.<sup>90</sup> One such case comments: "While some annoyance may be said to result from a call of a solicitor, he can only be at one place at one time and such a call cannot reasonably be said to disturb at the same time an entire community or neighborhood or any considerable number of persons."<sup>91</sup> Under this view, the solicitor's call annoys only the person on whom the call is made, not the general public.<sup>92</sup> It is usually agreed that under state statutes delegating powers to municipalities, as interpreted in light of the common law, cities and towns cannot declare something a public nuisance that does not affect the interests of the general public.<sup>93</sup> Thus, one commentator has concluded, "[t]hat the solicitor's conduct, if courteous and gentlemanly, in soliciting for the sale of lawful goods is not a criminal nuisance is now well-established."<sup>94</sup>

It is submitted, however, that the authorities finding no possible public nuisance in solicitation situations are taking a narrow view of the matter. Surely the courts can take judicial notice that seldom, if ever, does a solicitor visit only one residence in a community.<sup>95</sup> There is no requirement that a nuisance must *simultaneously* disturb all

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90. *People v. Barton*, 216 Cal. App. 2d 542, 31 Cal. Rptr. 7 (Ct. App. 1963); *Prior v. White*, 132 Fla. 1, 180 So. 347 (1938); *City of Mt. Sterling v. Donaldson Baking Co.*, 287 Ky. 781, 155 S.W.2d 237 (1941); *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 A. 417 (1937); *City of Washington v. Thompson*, 160 N.E.2d 568 (Ohio C.P. 1949); *City of McAlester v. Grand Union Tea Co.*, 186 Okla. 487, 98 P.2d 924 (1940); *White v. Town of Culpeper*, 172 Va. 630, 1 S.E.2d 269 (1939); *Jensen*, *supra* note 3, at 274.

91. *City of McAlester*, 186 Okla. at 488-89, 98 P.2d at 926.

92. *City of Mt. Sterling*, 287 Ky. at 781, 155 S.W.2d at 237.

93. See *Jewel Tea Co.*, 172 Md. at 536, 192 A. at 417; *Kadash v. City of Williamsport*, 19 Pa. Commw. 643, 340 A.2d 17 (Commw. Ct. 1975); *White v. Town of Culpeper*, 172 Va. 630, 1 S.E.2d 269 (1939). Another way of phrasing it would be that a municipality cannot declare an activity a nuisance when it is not such in fact. *Ace Tire Co. v. Municipal Officers of City of Waterville*, 302 A.2d 90, 98 (Maine 1973); *Town of Rolesville v. Perry*, 21 N.C. App. 354, 357, 204 S.E.2d 719, 722 (Ct. App. 1974); *City of Washington v. Thompson*, 160 N.E.2d 568 (Ohio C.P. 1959).

94. *Jensen*, *supra* note 3, at 274.

95. On the willingness of courts to take judicial notice of conditions leading to the enactment of *Green River* ordinances, see Annot., 35 A.L.R.2d 335, 361 (1954) and cases cited therein.



members of the public who are bothered thereby.<sup>96</sup> It is true the ringing of one doorbell may, at most, disturb the occupants of one home. However, a solicitor is likely to ring many doorbells within a short period of time and may possibly disturb many persons. Furthermore, if the law allows solicitation to occur freely, *many* solicitors are likely to be seeking business on the streets of any given city, offering justification for a *Green River*-type ordinance.<sup>97</sup>

It has been called "debatable" whether solicitation, if a nuisance, is a public or private one.<sup>98</sup> It is submitted that it can be both; an annoyance to the public (which is thus a public nuisance) and a private nuisance to those disturbed thereby.<sup>99</sup> Indeed, an occasional municipal ordinance can be interpreted as merely declaring uninvited door-to-door solicitation a *private* nuisance.<sup>100</sup> But this interpretation would seem only to ease the way for a private tort action and is a dubious basis for any criminal prosecution.

Some authority has taken the view that even if the wrong word is applied to the criminal offense, this should not invalidate the ordinance forbidding the conduct, so long as the municipality does have the power to proscribe such activity.<sup>101</sup> Thus, it has been suggested that the unrequested solicitation might better be considered a criminal *trespass*, but that use of the word "nuisance" does not void the legitimate exercise of municipal power to prevent disturbances.<sup>102</sup> If power exists to penalize certain conduct in order to promote the well-being of the community, it arguably should make no difference that an improper term is used to describe the conduct, so long as the law makes clear exactly what conduct is forbidden.<sup>103</sup>

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96. The earliest cases of public nuisance involved obstructions to public highways which obviously would not disturb all travelers at the same time. See W. PROSSER, *supra* note 53, § 88, at 584. Nuisances may consist of odors, smoke, dust, etc., which may drift gradually from place to place. *Id.*

97. Note, *supra* note 57, at 150. "An occasional visit by a solicitor or peddler would certainly not constitute sufficient grounds for such an ordinance, but where the visits are multiplied they may easily become a nuisance and, as such, can be regulated by the municipality." *Id.*

98. McIntire & Rhyne, *supra* note 1, at 374.

99. As to the overlap between the two actions, see *Robie v. Lillis*, 112 N.H. 492, 495, 299 A.2d 155, 158 (1972); *Urie v. Franconia Paper Corp.*, 107 N.H. 131, 133-34, 218 A.2d 360, 362 (1966); *Adams v. City of Toledo*, 163 Or. 185, 192, 96 P.2d 1078, 1081 (1939).

100. See *Larsen v. City of Colorado Springs*, 142 F. Supp. 871 (D. Colo. 1956) (upholding an ordinance that provides criminal penalties but is ambiguous as to whether the "nuisance" is public or private).

101. *Town of Green River v. Bunger*, 50 Wyo. 52, 63, 58 P.2d 456, 459-60 (1936), *appeal dismissed*, 300 U.S. 638 (1937).

102. *Id.* at 459.

103. *McCormick v. City of Montrose*, 105 Colo. 493, 99 P.2d 969 (1939).

There are cases that take the view that uninvited solicitation is not a nuisance (public or private) at all, and that any criminal penalty is inappropriate. This can be argued on the basis that (1) solicitation is a lawful business,<sup>104</sup> (2) any disturbance to the privacy of homeowners is trivial,<sup>105</sup> (3) solicitation does not interfere with the health, peace, order, or good government of the city,<sup>106</sup> (4) the majority of solicitors are polite, honest individuals whose visits are welcomed by many homeowners.<sup>107</sup> But there is no requirement that a public nuisance (e.g., noise or smoke) disturb *all* those who come in contact with it, so long as a public right is infringed, or a substantial segment of the community is bothered.<sup>108</sup> It is submitted that a local legislative body could reasonably find that unrequested solicitation disturbs a great number of persons in the community, and thus the forbidding of this activity should, at least, be upheld against arguments based on the requirements of "nuisance" unless the old requirement of interference with a public right is applied strictly.

#### F. Equal Protection Arguments

While not an essential part of a *Green River* ordinance, classifications are often found in such legislation. For instance, some ordinances apply only to non-resident solicitors,<sup>109</sup> while others do not apply to those selling certain specified goods.<sup>110</sup> Any scheme of classification raises the possibility of violation of equal protection clauses of federal and state constitutions.<sup>111</sup> It is agreed, of course, that a city

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104. *City of Osceola v. Blair*, 231 Iowa 770, 2 N.W.2d 83 (1942).

105. *See City of McAlester*, 186 Okla. at 488, 98 P.2d at 926.

106. *See Jewel Tea Co. v. City of Geneva*, 137 Neb. 768, 291 N.W. 664 (1940).

107. *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783 (1936).

108. *See W. PROSSER, supra* note 53, § 88, at 585 (not necessary that entire community be affected so long as nuisance interferes with those who come in contact with it in exercise of public right).

109. *Ex parte Hartman*, 25 Cal. App. 2d 55, 57, 76 P.2d 709, 710 (Ct. App. 1938) (citing *City of Sacramento*, Ordinance No. 166); *Tipco Corp. v. City of Billings*, 642 P.2d 1074, 1076 (Mont. 1982) (citing *City of Billings*, Ordinances Nos. 5.20.050 & .060); *People v. Bohnke*, 287 N.Y. 154, 159, 38 N.E.2d 478, 479 (1941) (citing *Village of Southampton*, Ordinance No. 28), *cert. denied*, 316 U.S. 713 (1942).

110. *Day v. Klein*, 225 Miss. 191, 198, 82 So. 2d 831, 833 (1955); *State ex rel. Gall v. Wittig*, 42 Wis. 2d 595, 601, 167 N.W.2d 577, 579 (1969).

111. The equal protection clause of the fourteenth amendment guarantees that no state shall deny equal protection of the laws to any person within its jurisdiction. U.S. CONST. amend. XIV. Classifications contained in legislation must bear a rational relationship to government objectives. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979); *Craig v. Boren*, 429 U.S. 190, 197 (1976). In addition, certain classifications, such as those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964).

may make proper classifications and that an ordinance need not operate on all persons alike so long as it treats those in like situations alike.<sup>112</sup> In a case involving a *Green River* ordinance's exemption of local merchants with regularly established places of businesses,<sup>113</sup> it was noted that the classification must bear some rational relationship to a legitimate governmental objective.<sup>114</sup> Such an exemption for those having an established place of business in the community sometimes has been upheld. Some courts have reasoned that those with such establishments are easily accessible and are often known to local police officers.<sup>115</sup> Transient vendors may be considered especially likely, when soliciting, to use an alleged business purpose as a "cover" for gaining entry to homes in order to learn of good possibilities for burglary or larceny which they may later commit and then flee to another town.<sup>116</sup> It may also be considered that the annoyance of uninvited visits is less when the visitors are known, or at least identifiable and traceable residents of the community.<sup>117</sup> But at least as many cases have struck down exemptions of local businesses, finding no rational purpose behind the distinction<sup>118</sup> and/or detecting unjustified favoritism toward local businesses.<sup>119</sup> One authority has even generalized that discrimination against non-residents should be avoided,<sup>120</sup> even though some of the above-cited cases indicate that the "discrimination" can be successfully justified. Certainly it is true that a mere purpose of favoring local establishments and discouraging non-residents will not support a legislative distinction.<sup>121</sup> On this basis, for

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112. *Day*, 225 Miss. at 205-06, 82 So. 2d at 837 (upholding *Green River* ordinance as applied to businesses); *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 315, 313 N.W.2d 833, 838 (1982) (quoting *Dane County v. McManus*, 55 Wis. 2d 413, 198 N.W.2d 667 (1972)); *Harris v. Kelley*, 70 Wis. 2d 242, 252, 234 N.W.2d 628, 632 (1975); *Dane County v. McManus*, 55 Wis. 2d 413, 423, 198 N.W.2d 667, 672-73 (1972) (quoting *State ex rel. Real Estate Examining Bd. v. Gerhardt*, 39 Wis. 2d 701, 159 N.W.2d 622 (1968)).

113. *Tipco*, 642 P.2d at 1075.

114. *Id.* at 1078. Under the equal protection clause, a strict scrutiny test is not applied to such classifications which do not burden a fundamental right or contain invidious discrimination against a suspect class. *G.D. Searle & Co. v. Cohn*, 102 S. Ct. 1137, 1141 (1982); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

115. *Hartman*, 25 Cal. App. 2d at 59, 76 P.2d at 711. At the least, local merchants can be readily found and questioned if doubts exist regarding the conduct of their business. *Id.*

116. *Id.*

117. *People v. Bohnke*, 287 N.Y. 154, 159, 38 N.E.2d 478, 479 (1941), *cert. denied*, 316 U.S. 713 (1942).

118. *Tipco*, 642 P.2d at 1078.

119. *See Wilkins v. City of Harrison*, 218 Ark. 316, 236 S.W.2d 82 (1951).

120. *Montgomery*, *supra* note 10, at 44.

121. *See Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 A. 417 (1937).

instance, a requirement that solicitors be examined by a local physician has been invalidated.<sup>122</sup> Discrimination against non-residents as to the amount of fee that must be paid (where a fee is required for a solicitor's license) is particularly hard to justify and likely to be held invalid.<sup>123</sup>

What of exemptions for solicitors or peddlers of specified goods? An exemption for those offering ice, dairy products or farm and garden produce has been sustained on the grounds that: (1) the public need for these goods on a daily basis is great; (2) inconvenience could result from including solicitors or peddlers selling these products; and (3) the danger of fraud is not great regarding these commodities.<sup>124</sup> An ordinance applicable only to sellers of specified goods was upheld even though the legislation was found to list only some of the most common household items and those most commonly sold door-to-door.<sup>125</sup> The court in that case observed that exactness and precision were not required of the legislation where no arbitrary purpose to discriminate is shown.<sup>126</sup> Exemption of certain groups of organizations, such as religious or veterans groups, can also be upheld if a valid policy rationale exists.<sup>127</sup> Thus, classification based on commodities sold or organizations involved would seem to be accepted rather readily by the courts if supported by any rational ground or if it is shown that the ordinance is reasonably inclusive, covering the most common and most dangerous situations.

### III. Where Should the Burden Lie?

Thus, when all the arguments against the validity of *Green River* ordinances are considered, there is still a strong possibility of many municipalities successfully enacting and retaining these laws. The Supreme Court and most other authorities have found neither violation of due process<sup>128</sup> nor forbidden interference with interstate com-

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122. *Moyant v. Borough of Paramus*, 30 N.J. 528, 550, 154 A.2d 9, 20 (1959) (requirement said to have purpose of discouraging the canvassing of business rather than safeguarding public health).

123. *See State v. Schmidt*, 280 Minn. 281, 159 N.W.2d 113 (1968); *Nafziger Baking Co. v. City of Salisbury*, 329 Mo. 1014, 48 S.W.2d 563 (1932).

124. *City of Shreveport v. Cunningham*, 190 La. 481, 492-93, 182 So. 649, 652-53 (1938).

125. *Town of Sumner v. Ward*, 126 Wash. 75, 78, 217 P. 502, 504 (1923).

126. *Id.*

127. In *Slater v. Salt Lake City*, 115 Utah 476, 491-92, 206 P.2d 153, 161 (1949), the rationale was that public policy favored such groups. *But see City of Derby v. Hiebert*, 183 Kan. 68, 325 P.2d 35 (1958) (ordinance not applicable to religious, charitable or community service organizations held invalid as creating discriminatory classification).

128. *See* notes 24-29 *supra* and accompanying text.

merce.<sup>129</sup> Problems with classifications such as limitations of the laws to non-residents can be avoided by eliminating such categorization, still leaving the basic purpose of the laws intact.<sup>130</sup> The “overbreadth” and “nuisance” arguments are probably the most serious threats to the laws and will continue to have success in some cases. But the former can be avoided either by narrowing the practices forbidden by the laws or by establishing that unrequested solicitation, even if courteous and nonfraudulent, is a disturbing practice.<sup>131</sup> Similarly, the “nuisance” argument rests on the dubious contention that uninvited solicitation is not a serious bother to the general public—and the argument may be defeated by evidence to the contrary.<sup>132</sup> A basic question that underlies the dispute over *Green River* ordinances, however, is left unanswered by all this: Where should the burden of giving or obtaining consent to solicitation lie? Should a homeowner’s implied consent to solicitation be assumed unless he or she posts notice to the contrary, or should the solicitor have the burden of obtaining consent in order for his entry onto private property not to be considered a trespass?

The common law has traditionally assumed that a solicitor may lawfully conduct his business from house-to-house unless the owners or occupants indicate that solicitation on their premises is prohibited.<sup>133</sup> It has been urged that solicitors should be allowed to rely on this traditional implied invitation unless conspicuous notice to the contrary is posted.<sup>134</sup> Indeed, some courts have relied on the common law rule in invalidating *Green River* ordinances, emphasizing that custom and usage imply consent which only the householder may withdraw,<sup>135</sup> or that uninvited solicitation has been established as a lawful occupation which a person has a right to practice.<sup>136</sup> The inference, from custom, of the right to enter the premises may be considered an application of the general tort rule that custom may justify what would otherwise be a trespass.<sup>137</sup> The application of this rule to salespersons (based on the social custom of allowing such

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129. See notes 59-76 *supra* and accompanying text.

130. See notes 109-23 *supra* and accompanying text.

131. See notes 38-54 *supra* and accompanying text.

132. See notes 77-107 *supra* and accompanying text.

133. See *City of Osceola v. Blair*, 231 Iowa 770, 773, 2 N.W.2d 83, 84 (1942).

134. Jensen, *supra* note 3, at 280.

135. See *Prior v. White*, 132 Fla. 1, 21, 180 So. 347, 355 (1938); *City of Mt. Sterling v. Donaldson Baking Co.*, 287 Ky. 781, 785, 155 S.W.2d 237, 239 (1941).

136. See *DeBerry v. City of La Grange*, 62 Ga. App. 74, 81-82, 8 S.E.2d 146, 152 (1940).

137. See *McKee v. Gratz*, 260 U.S. 127, 136 (1922); *Fletcher v. Florida Publishing Co.*, 319 So. 2d 100, 104 (Fla. Dist. Ct. App. 1975), *rev'd*, 340 So. 2d 914 (1976), *cert. denied*, 431 U.S. 930 (1977).

persons to enter private premises), permits such entrants generally to be regarded as licensees, not trespassers, on private property.<sup>138</sup> There is even authority that a salesperson entering premises where he has good reason to think that dealings with him are desired will be classified as an invitee.<sup>139</sup>

None of this, however, explains why the common law cannot be changed by legislation, as it ordinarily may in the absence of violation of constitutional rights.<sup>140</sup> A *Green River* ordinance merely withdraws any previously given invitation, express or implied, of householders, and creates a presumption of lack of permission where a prior presumption of consent has existed.<sup>141</sup> Of course, if salespersons are considered to have a constitutional right to engage in unrequested solicitation that right may not be unduly infringed. But all occupations are subject to reasonable restrictions for police power purposes. The question then focuses, as in the due process cases, on the reasonableness of this restriction.<sup>142</sup>

An important factor in determining the reasonableness should be the weight of the burden on either party. The householder's posting of a notice (even as many authorities would require, a "conspicuous" notice) would not seem great. This would suffice, at common law and without aid of a *Green River* ordinance, to make a trespasser of any solicitor who proceeded in disregard of the notice.<sup>143</sup> The burden on a solicitor to obtain prior consent, by mail, phone, etc., is surely much greater; a burden multiplied by the number of prospects on whom the solicitor hopes to call.

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138. See *DeBerry*, 62 Ga. App. at 82-84, 8 S.E.2d at 152-53; *Malatesta v. Lowry*, 130 So.2d 785 (La. App. 1961); W. PROSSER, *supra* note 53, § 60, at 377. But see *Dunster v. Abbott*, [1953] 2 All E.R. 1572 (C.A.), where Lord Denning said, "A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away." *Id.* at 1574. Those soliciting money for charity are usually regarded as licensees also. *Ockerman v. Faulkner's Garage*, 261 S.W.2d 296 (Ky. 1953).

139. *Austin v. Buettner*, 211 Md. 61, 67-68, 124 A.2d 793, 796-97 (1956); *Lavitch v. Smith*, 224 Or. 498, 505-06, 356 P.2d 531, 535 (1960); *Hartman v. Miller*, 143 Pa. Super. 143, 145, 17 A.2d 652, 653 (1941); W. PROSSER, *supra* note 53, § 61, at 390-91. It should be noted that the *Austin*, *Lavitch* and *Hartman* cases all involved *business* premises, and the same rule might not be applied to a residence.

140. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 4 (1982).

141. See *McCormick v. City of Montrose*, 105 Colo. 493, 99 P.2d 969 (1940).

142. See notes 24-25 *supra* and accompanying text.

143. See notes 133-39 *supra* and accompanying text for a discussion of a salesperson's status as a business visitor or licensee.

Each party has a right at common law: the homeowner has a right to privacy, and the solicitor a right to enter private property in an effort to earn a livelihood. It is submitted that the homeowner can more easily meet the burden of limiting the solicitor's right through notice than the solicitor can bear the burden of obtaining permission to exercise his traditional right. It is, after all, the householder who is modifying the normal custom and common law rule. The reasonableness of *Green River* ordinances may be debated, and has often been sustained but, considering the burdens that can be imposed on the parties involved, such ordinances certainly do not seem the *most* reasonable type restriction possible.

#### IV. Alternative and Additional Regulations

##### A. An Alternative System of Regulations

Regulation of solicitors need not be so burdensome. A system of registration and licensing can be enacted validly which will be less onerous on solicitors than the *Green River* ordinance's requirement of obtaining prior consent. It is submitted that this less burdensome system is to be preferred if it will adequately safeguard the public, especially those who are not often able to journey outside their homes, from door-to-door solicitation. It seems that such a system *does*, in fact, operate as a deterrent to criminal or fraudulent conduct, and a means of apprehending those who engage in such conduct by providing law enforcement officers with ready means of identifying solicitors.<sup>144</sup> Indeed, the registration and identification procedures would appear to respond much more directly to the crime and fraud problems than does the prior-consent requirement.

A registration and licensing system does not appear to have any constitutional infirmities. It has been ruled that a licensing requirement<sup>145</sup> imposed by a municipality does not unduly burden interstate commerce, but has only an incidental effect thereon.<sup>146</sup> The whole

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144. See *Mogolefsky v. Schoem*, 50 N.J. 588, 236 A.2d 874 (1967) (the permit that the solicitor must carry affords a ready means of identification to police in the solicitation area and assurance to the householder that the permittee has been screened and approved).

145. Such requirements include the taking of a solicitor's fingerprints and photograph as prerequisite to the issuance of a license. See *Mogolefsky v. Schoem*, 50 N.J. 588, 236 A.2d 874 (1967).

146. *Nippert v. City of Richmond*, 327 U.S. 416, 425 (1946); *Budget Mktg., Inc. v. Commonwealth ex rel. Stephens*, 587 S.W.2d 245, 249 (Ky. 1979), *appeal dismissed*, 446 U.S. 901 (1980); *Borough of Collingswood v. Ringgold*, 66 N.J. 350, 360, 331 A.2d 262, 268 (1975); *Moyant v. Borough of Paramus*, 30 N.J. 528, 545, 154 A.2d 9, 18 (1959). *But see Pictorial Review Co. v. City of Alexandria*, 46 F.2d 337

system of registration is primarily intended as a safeguard against criminal activity by solicitors.<sup>147</sup> As discussed previously, a license fee or tax may raise more serious questions of infringement on federal power over interstate commerce.<sup>148</sup> But even so, a fee covering the cost of the licensing, if reasonable in amount and not discriminatory in effect, quite likely will be sustained.<sup>149</sup> Where exceptions are contained in the registration-requirement law, the legislation might sometimes be successfully attacked on equal protection grounds, just as with *Green River* ordinances. However, a requirement applicable to all those intending to solicit within a city, whether or not they are residents, may be sustained against charges of unreasonable discrimination.<sup>150</sup>

The scope of a municipal licensing scheme would be limited by the rule that any delegation of power by the city's legislative body to an officer or group must be accompanied by adequate standards to guide the exercise of that power.<sup>151</sup> This is considered essential in order to prevent arbitrary governmental action, allow for adequate judicial review, and inform interested citizens of the requirements for obtaining a license.<sup>152</sup> Thus, the grant of authority to a city police chief, for example, to award or deny solicitors' licenses must be limited by some reasonably definite criteria. Numerous cases have struck down delega-

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(W.D. La. 1930) (requiring permit of those engaged in interstate commerce held unreasonable restriction).

147. See *ex parte* Albrecht, 25 Cal. App. 2d 750, 76 P.2d 713 (Dist. Ct. App. 1938).

148. See notes 64-76 *supra* and accompanying text.

149. See *City of Miami Beach v. Kaiser*, 213 So. 2d 449, 453-54 (Fla. Dist. Ct. App. 1968) (fee of \$2.20 for each machine involved imposed on distributors of coin operated laundry machines held reasonable); *Mister B's Bar and Lounge, Inc. v. City of Louisville*, 630 S.W.2d 564, 567-68 (Ky. Ct. App. 1982) (license fee of \$250 sufficient only to compensate municipality for issuing license); *Phillips v. Borough of Folcroft*, 44 Pa. Commw. 83, 86, 403 A.2d 194, 196 (Commw. Ct. 1979) (license fee invalid if it is grossly disproportionate to municipality's cost of regulating a business). Compare *Moyant*, 30 N.J. at 546-47, 154 A.2d at 18-19 (fee designed to defray costs could be charged for license, but \$25 fee for six months found excessive). Cf. *Village of Bel-Nor v. Barnett*, 358 S.W.2d 832 (Mo. 1962) (fee of \$15 for 90 days held to be an undue burden on interstate commerce).

150. See *City of Washburn v. Ellquist*, 242 Wis. 609, 615-616a, 9 N.W.2d 121, 124, *reh'g denied*, 242 Wis. 609, 615-616a, 10 N.W.2d 292 (1943) (ordinance requiring registration for any person, resident and non-resident alike, engaged in house-to-house solicitation upheld).

151. *Melbourne Corp. v. Hearing Bd. on Denial or Revocation of Licenses for Nursing Homes, Sheltered Care Homes and Homes for the Aged*, 14 Ill. App. 3d 589, 302 N.E.2d 729 (App. Ct. 1973), *aff'd*, 59 Ill. 2d 409, 322 N.E.2d 481 (1974); *DePetrillo v. Coffey*, 118 R.I. 519, 376 A.2d 317 (1977); *State ex rel. Humble Oil & Ref. Co. v. Wahner*, 25 Wis.2d 1, 130 N.W.2d 304 (1964).

152. See 1 C. ANTIEAU, *supra* note 30, § 5.33, at 5-96.



tions of power that left the granting or denying of a license to some officer's uncontrolled discretion,<sup>153</sup> and it has been held insufficient to specify that the officer must be "satisfied."<sup>154</sup> Some specific standards are needed.<sup>155</sup> But in practice, the specificity required is often not too great. For example, in *People v. Mobin*<sup>156</sup> the police chief had the power to deny a permit if the applicant's moral character and business responsibility were unsatisfactory.<sup>157</sup> The court upheld the ordinance because the police chief's decision could be made only on the basis of objective facts.<sup>158</sup> In addition the courts generally will presume that a public official will perform his or her duty in a fair and lawful manner and will not act arbitrarily.<sup>159</sup> But a delegation totally lacking in standards or limitations will certainly be invalidated,<sup>160</sup> as will any grant of power, that makes a constitutionally protected right dependent on the unfettered will of an official or group.<sup>161</sup> Therefore the pitfall of "undue delegation of power" can be avoided easily if legislation prescribes adequate standards.

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153. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); *People v. Fogelson*, 21 Cal. 3d 158, 167, 577 P.2d 677, 682, 145 Cal. Rptr. 542, 547 (1978); *Flesch v. Metropolitan Dade County*, 240 So. 2d 504, 506 (Fla. Dist. Ct. App. 1970); *State ex rel. Gall v. Wittig*, 42 Wis. 2d 595, 610, 167 N.W.2d 577, 584 (1969).

154. *Hull v. Petrillo*, 439 F.2d 1184, 1186 (2d Cir. 1971); *City of Rockford v. Hey*, 366 Ill. 526, 9 N.E.2d 317 (1937); *Itzen & Robertson, Inc., v. Board of Health of Oakland*, 89 N.J. Super. 374, 382-83, 215 A.2d 60, 65 (Super. Ct. Law Div. 1965), *aff'd*, 92 N.J. Super. 241, 222 A.2d 769 (1966).

155. *Tillberg v. Township of Kearny*, 103 N.J. Super. 324, 331, 247 A.2d 161, 164 (Super. Ct. Law Div. 1968); *Gross v. Allan*, 37 N.J. Super. 262, 267-68, 117 A.2d 275, 278 (Super. Ct. App. Div. 1955).

156. *People v. Mobin*, 237 Cal. App. 2d 115, 46 Cal. Rptr. 605 (Dist. Ct. App. 1965).

157. *Id.*

158. 237 Cal. App. 2d at 119, 46 Cal. Rptr. at 608.

159. *Sandblom v. Corbin*, 125 Ariz. 178, 187, 608 P.2d 317, 324 (Ct. App. 1980); *Jones v. Scheduled Skyways, Inc.*, 1 Ark. App. 44, 49, 612 S.W.2d 333, 336 (Ct. App. 1981); *Nichols v. Council on Judicial Complaints*, 615 P.2d 280, 286 (Okla. 1980).

160. *Stroud v. City of Aspen*, 188 Colo. 1, 7, 532 P.2d 720, 723 (Colo. 1975) (leasing of city facilities improper delegation of power to city manager without any standards spelled out); *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764, 768 (Fla. 1975) (rent control ordinance defective due to delegation of power without sufficient objective guidelines); *City of South Euclid v. Glazer*, 43 Ohio Misc. 9, 11, 332 N.E.2d 780, 781 (S. Euclid Mun. Ct. 1974) (ordinance invalid for failure to prescribe any standards of guidance).

161. *See Staub v. City of Baxley*, 355 U.S. 313 (1958) (invalidating an ordinance prohibiting solicitation of city residents to become members of any organization which required dues of its members without first applying for and receiving from the mayor and council a permit, which they had the discretion to grant or refuse); *Genusa v. City of Peoria*, 619 F.2d 1203, 1217 (7th Cir. 1980) (ordinance subsection requiring adult bookstore license invalid due to city authorities' overbroad discretion to impose prior restraint on constitutionally protected speech); *Basiardanes v. City of*

## B. An Additional System of Regulation

Certain problems connected with solicitation may, of course, call for more stringent control than that provided by a mere registration and licensing system. For instance, many communities have, because of perceived dangers of fraud, imposed special restrictions on solicitation of funds for charitable, political, and similar causes.<sup>162</sup> This type of solicitation often is not within the typical *Green River* ordinance<sup>163</sup> and a different kind of control is sometimes considered desirable here. For example, a number of communities have attempted to limit the amount of money collected by charities that can be used for administrative expenses, assuring that the bulk of the funds are actually devoted to charitable purposes.<sup>164</sup> The basic power of a municipality to enact such an ordinance has been recognized.<sup>165</sup> But, where challenged, such ordinances have often been invalidated on a variety of constitutional grounds. The United States Supreme Court struck down one ordinance that did not sufficiently define such terms as "recognized charitable cause" and "federal, state, county, or municipal cause."<sup>166</sup> Some courts view limitations on the cost of collection as overbroad and not reasonably related to the alleged aim of preventing fraud or violence by solicitors.<sup>167</sup> It has been noted that the work of many organizations which solicit for funds involves informative and/or persuasive speech and is thus clearly within first amendment pro-

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Galveston, 514 F. Supp. 975, 978 n.5 (S.D. Tex. 1981), *aff'd in part, rev'd in part*, 682 F.2d 1203 (1982) (court noted that licensing provision of zoning ordinance represents prior restraint of speech under system lacking minimum procedural safeguards).

162. See *National Found. v. City of Ft. Worth*, 307 F. Supp. 177, 182 (N.D. Tex. 1967), *aff'd*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) ("if the gates were thrown wide open for solicitations . . . by all comers in the name of charity. . . [t]he public would be over solicited and a person wishing to make a donation would have no way of knowing the bona fide charities from the predators").

163. See *MacLeod v. City of Los Altos*, 182 Cal. App. 2d 364, 6 Cal. Rptr. 326 (Dist. Ct. App. 1960) (ordinance prohibiting door-to-door soliciting of business did not apply to soliciting for political party).

164. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); *National Found. v. City of Ft. Worth*, 307 F. Supp. 177 (N.D. Tex. 1967), *aff'd*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970); *Carolina Action v. Pickard*, 420 F. Supp. 310 (W.D.N.C. 1976).

165. *National Found.*, 307 F. Supp. at 177 (ordinance limited cost of solicitation of charitable contributions within city to 20% of amount collected upheld).

166. *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (1976) (additionally, ordinance did not sufficiently specify what those within its reach must do to comply).

167. *Village of Schaumburg*, 444 U.S. at 620; *Carolina Action*, 420 F. Supp. at 310 (limitation unconstitutionally vague and overbroad as applied to political organization).

tection.<sup>168</sup> In any case, even assuming that special restrictions on charitable solicitors may sometimes be necessary and lawful, such restrictions are clearly not appropriate and not normally encountered in the commercial solicitation situations with which *Green River* ordinances chiefly deal.

It is also true that a municipality has broad powers to limit use of public streets and ways in order to protect the public safety and prevent congestion.<sup>169</sup> Thus, a prohibition of sale of magazine subscriptions in a congested business district can be upheld as within local discretion and at most, as an inconsequential burden on interstate commerce.<sup>170</sup> Some communities had enacted laws in the past, aimed at suppression of "pullers-in"<sup>171</sup> who conduct solicitation in front of stores. The validity of these measures had been held a valid exercise of the police power, aimed at assuring unobstructed use of public ways.<sup>172</sup> Some doubted whether such measures could have validly been applied to private property, such as the entrances or doorways of buildings,<sup>173</sup> but one tribunal supported even that application.<sup>174</sup> In the past, some courts drew a fairly firm distinction between distribution of commercial matter on public streets which could be severely restricted or even prohibited<sup>175</sup> and non-commercial matter,

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168. *Village of Schaumburg*, 444 U.S. at 632 (solicitation said to be characteristically intertwined with informative and perhaps persuasive speech); *New York City Unemployed & Welfare Council v. Brezenoff*, 677 F.2d 232, 238 (2d Cir. 1982); *Conlon v. City of North Kansas City*, 530 F. Supp. 985, 987 (W.D. Mo. 1981).

169. *Hamer v. Musselwhite*, 376 F.2d 479, 481 (5th Cir. 1967); *Gillam v. Landrieu*, 455 F. Supp. 1030, 1037 (E.D. La. 1978); *Hill v. City of Lawrence*, 2 Kan. App. 2d 457, 461, 582 P.2d 1155, 1159 (Ct. App. 1978).

170. *Slater v. City of El Paso*, 244 S.W.2d 927 (Tex. Civ. App. 1951); *Slater v. Salt Lake City*, 115 Utah 476, 206 P.2d 153 (1949).

171. "Pullers-in" are persons involved in enticing customers into stores. *See Dinino v. Valentine*, 54 N.Y.S.2d 800 (Sup. Ct. N.Y. County 1939).

172. *Dinino v. Valentine*, 54 N.Y.S.2d 800; *People ex rel. Crennan v. Patrick*, 171 Misc. 705, 14 N.Y.S.2d 249 (Magis. Ct. 1939); *City of Portland v. Stevens*, 180 Or. 514, 178 P.2d 175 (1947).

173. *See McKay Jewelers, Inc. v. Bowron*, 19 Cal. 2d 595, 122 P.2d 543 (1942) (striking down an ordinance applying to entrances, hallways or doorways of places of business); *People v. Realmato*, 294 N.Y. 45, 60 N.E.2d 201 (1945) (finding a "puller-in" ordinance inapplicable to the passageway leading to a shop); *cf. In re Webb*, 51 Okla. Crim. 267, 1 P.2d 416 (1931) (ruling that city may prohibit soliciting of patronage in public places, but not such soliciting in private places). Compare, with city power in this regard, the power of owners of housing projects or apartment houses, who are generally allowed to restrict soliciting within the confines of their buildings but not in public or quasi-public areas. *See Annot.*, 3 A.L.R.2d 1431 (1949).

174. *People v. Phillips*, 147 Misc. 11, 263 N.Y.S. 158 (Ct. Sp. Sess. 1933) (ordinance applied to entrance or hallway of buildings within designated area of city).

175. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942) (prohibition on distribution of commercial advertising matter on streets upheld). *Cf. Murdock v. Pennsylvania*,

the distribution of which was held to come within the first amendment and could thus not be totally forbidden.<sup>176</sup> In recent years, the United States Supreme Court has extended first amendment protection to advertising and other commercial matter,<sup>177</sup> though it has recognized that such speech has a special character and is subject to reasonable "time, place, and manner" restrictions.<sup>178</sup> Total prohibitions or severe restrictions on dissemination of either commercial or non-commercial matter, in recent times, often have been invalidated.<sup>179</sup> But even assuming that reasonable regulations of distribu-

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319 U.S. 105 (1943) (state may not prohibit distribution of handbills on streets in pursuit of religious activity merely because the handbills invite purchase of books).

176. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (dissemination of religious literature involved). *But cf.* *Prince v. Massachusetts*, 321 U.S. 158 (1944), upholding a statute forbidding children under a certain age from selling in public places, even as applied to distribution of religious literature, and making it unlawful for parents to allow their children to work in violation of the law.

177. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (complete ban on promotional advertising by utility invalidated); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (total ban on lawyer advertising invalid); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (prohibition of any advertisement or display of contraceptives held unconstitutional); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (prohibition on pharmacists' advertising price of prescription drugs held unconstitutional); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (Virginia advertisements of New York organization engaged in arranging abortions held constitutionally protected). See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (prohibition on inclusion by public utilities, in monthly bills, of inserts discussing public issues held invalid). *Cf.* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state law could not forbid use of contraceptives, or aiding or counseling as to their use). See generally *Elman, The New Constitutional Right to Advertise*, 64 A.B.A. J. 206 (1978); *Annot.*, 37 L. Ed. 2d 1124 (1974); *Annot.*, 10 L. Ed. 2d 1386 (1964).

178. See *In re R.M.J.*, 50 U.S.L.W. 4185, 4188 (Jan. 25, 1982) (advertising by attorneys may be regulated); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503-12 (1981) (as regulation of commercial speech, ordinance prohibiting erection of billboards upheld); *Friedman v. Rogers*, 440 U.S. 1 (1979) (statutory prohibition on practice of optometry under trade name upheld); *American Future Sys., Inc. v. Pennsylvania State Univ.*, 688 F.2d 907 (3d Cir. 1982) (speech entitled to first amendment protection may be subject to time, place and manner regulations); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1219 (5th Cir. 1982) (state and local governments have freer rein to regulate commercial speech than expressive speech).

179. *Cable-Com General, Inc. v. Crisp*, No. Civ. 81-290-W (W.D. Okla. Apr. 22, 1982) (available Apr. 22, 1983, on LEXIS, Genfed library, Cases file); *Basiardanes*, 682 F.2d at 1219; *In re Philipie*, 82 Nev. 215, 414 P.2d 949 (1966) (ordinance banning distribution of non-commercial handbills invalid); *City of Elizabeth v. Sullivan*, 100 N.J. Super. 51, 241 A.2d 41 (Super. Ct. Law Div. 1968) (ordinance requiring permit for distribution of commercial handbills invalidated). *Cf.* *Welton v. City of Los Angeles*, 18 Cal. 3d 497, 556 P.2d 1119, 134 Cal. Rptr. 668 (1976) (city could not validly punish the selling of maps showing location of movie stars' homes). *But see Cardarella v. City of Overland Park*, 228 Kan. 698, 620 P.2d 1122 (1980) (ordinance restricting sale or display of items identified with drug usage upheld since such display held not to be "commercial speech"). *Cf.* *United States Postal Serv. v. Council of Greenburgh Civil Ass'ns*, 453 U.S. 114 (1981) (upholding a statute,

tion of literature and other activities on public streets and ways still may be sustained, for instance, in preventing congestion and/or litter, this does not lend support to *Green River* ordinances, which are aimed at protecting privacy and preventing fraud. Undoubtedly, some broad powers will continue to be recognized in municipalities to control their public ways, but the *Green River* ordinance applies to entry onto *private* property.

## V. Conclusion

The basic power of a municipality to enact a *Green River* ordinance has generally been recognized. But many pitfalls, most of them constitutional, lie in the way of sustaining any such legislation; and, on one ground or another, many *Green River* ordinances have been invalidated. Arguably, all the legal obstacles to these ordinances can be avoided by careful drafting in the legislatures and well-reasoned arguments to the courts. But this still leaves the question of whether these ordinances are the most desirable, most reasonable type of restriction that might be used. It is submitted that they are not, as they impose an onerous burden on solicitors where a very light burden on homeowners, posting a notice, would achieve the same result. Other means of governmental regulation of door-to-door solicitation exist and have become increasingly popular, such as registration and licens-

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applicable to both commercial and noncommercial materials, that prohibited the deposit of unstamped, mailable matter in a letter box).

Much the same protection of free speech that is connected with the use of public streets has also been attributed to public areas of company towns, *Marsh v. Alabama*, 326 U.S. 501 (1946), federal defense housing villages, *Tucker v. Texas*, 326 U.S. 517 (1946) and military reservations, *Flower v. United States*, 407 U.S. 197 (1972). *But see Greer v. Spock*, 424 U.S. 828 (1976) (no generalized constitutional right to make political speeches or distribute leaflets on military reservation).

At one time, it seemed that shopping-center malls would also be treated as public areas in which full rights of free speech had to be accorded. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). But the Supreme Court has now recognized a shopping center as basically private property. *See Hudgens v. NLRB*, 424 U.S. 507 (1976). It is, however, still possible, and permissible under the federal Constitution, for a *state* constitution to provide that persons are entitled to exercise rights of free speech and free petition in a privately owned shopping center to which the public is invited. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *See generally* Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977); Note, *The Shopping Center as a Forum for the Exercise of First Amendment Rights*, 37 ALB. L. REV. 556 (1973); Note, *Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board*, 45 GEO. WASH. L. REV. 812 (1977); Comment, *Hudgens v. NLRB—A Final Definition of the Public Forum?*, 13 WAKE FOREST L. REV. 139 (1977).

ing procedures. These can be drafted to avoid the legal difficulties to which *Green River* ordinances have often succumbed. These alternative procedures are less restrictive of what traditionally has been considered a lawful, and often desirable, activity. Municipalities may still be recognized as possessing special powers as to some aspects of solicitation-control, as where use of public streets is involved. But where regulation extends to prohibition of, or severe restriction on, entry to private property, it is submitted that control can best be left to the owner of that property.