STATE REGULATION OF CHARITABLE SOLICITATION*

by

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INTRODUCTION

For the past decade, state regulation of charitable solicitation has been a hotly contested issue. On the one hand, modern fundraising techniques have created serious concerns about proliferation and abuse. On the other, government regulation of charitable solicitation inevitably raises important First Amendment concerns. Responding to these two different realities, state regulators have pushed the need for remedial legislation in their legislatures while charities and fundraisers have pursued their constitutional claims in court. In this paper, I will not argue that one set of concerns properly outweighs the other. Nor will I propose a Solomon-like solution that can accommodate the diverse and competing interests that surround charitable solicitation. To the contrary, I believe that these problems are real and that they cannot be easily resolved. Thus, the purpose of this paper will be to stress the significance and the depth of the interests that are implicated on both sides of the fundraising question and to suggest that the wisest course may well be a pragmatic and experimental approach to state regulation.

I. The Dilemma of State Regulation

A brief sketch of the history of state regulation plainly demonstrates the difficulties that confront state officials.[1] During the 1960's, many state legislatures passed statutes that imposed new requirements on soliciting charities. The law passed in Massachusetts was typical.[2] It provided for registration of soliciting charities,[3] percentage limitations on fundraising expenses,[4] registration of professional solicitors and counsel,[5] the filing of professional fundraising contracts,[6] and limitations on the percentage fees that could be paid to professional solicitors.[7]

At first glance, state regulation of charitable fundraising seems to represent enlightened public policy. The onset of mass communication and impersonal fundraising techniques has made charitable accountability an increasingly difficult

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1. For an informative and more detailed history of state regulation, see Espinoza, "Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving" (forthcoming, Southern California Law Review.)

2. M. G. L. c. 68. Sections 18 - 33 were added by St. 1964, c. 718, section 1. All subsequent references are to the 1964 law. Since Schaumberg and Munson, these sections have been amended or repealed. St.1985, c. 790, section 1.

3. M.G.L. c. 68, section 19.

4. M.G.L. c. 68, section 22.

5. M.G.L. c. 68, section 23.

6. M.G.L. c. 68, section 21.

7. Id.

problem. The targets of state regulation are unscrupulous operators that use phone banks and mass mailings to raise funds primarily for their own benefit; the aim is to prevent fraud and to preserve the public's willingness to give to "legitimate" charities by eliminating "bad actors" from the field. Underlying these interests is the state's traditional role in seeing to the due application of charitable funds.[8]

The difficulty, however, with state regulation is the clear sense in which charitable solicitation implicates a wide range of expressive, religious and political interests. When the state tries to separate "legitimate" charities from "bad actors," there are obvious issues of censorship and discrimination. And these issues exist whether or not the state targets "bad actors" directly or only indirectly by outlawing marginal fundraising practices. Regulating "inefficient" or "inappropriate" fundraising practices inevitably results in lessening the speech opportunities for some marginal and unpopular causes. Since the Supreme Court's decision in Schaumberg,[9] these constitutional concerns have occupied center stage in the controversy over state regulation.

It is difficult, under the best of circumstances, to balance legitimate needs for state regulation with First Amendment concerns. It has been particularly difficult in the area of charitable solicitations because the Supreme Court has given a series of misleading indications about what kinds of state regulation might be permissible. For

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8. Charitable funds are held subject to a trust that they will be duly applied to the "public" purposes for which they are raised. See, e.g., M.G.L. c. 68, section 33. Presumably, state regulation of fundraising practices helps to insure that this trust can be effectively enforced.

9. Village of Schaumberg v. Citizens for a Better Environment 444 U. S. 620 (1980).

example, in Shaumberg, the Court distinguished the Schaumberg ordinance from the flexible percentage limits upheld in National Foundation v. Fort Worth[10] and thereby seemed to suggest that a flexible percentage limit would be permissible. In addition, the analysis in Schaumberg seemed to turn upon the fact that the soliciting organization was a group that advocated social and political change[11] -- thus encouraging some states to enact legislation that provided an explicit escape hatch for advocacy organizations engaging in protected speech.[12] Finally, in both Schaumberg and Munson,[13] the Court emphasized that the state could combat fraud with less of an intrusion on First Amendment freedoms by simply forcing disclosure of material information. These arguments carried the clear implication that states could constitutionally require soliciting organizations to make financial disclosures as a part of their solicitation.

In each of these instances, however, the Supreme Court has struck down state attempts to utilize its earlier opinions. Thus, in Munson, the Court held that percentage limitations on fundraising expenses could not be saved by providing for adminis-

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10. 415 F. 2d. 41 (CA5, 1969), cert. denied, 396 U.S. 1040 (1969).

11. One could argue that solicitation activity that includes face to face discussions about a political issue prompts greater First Amendment concerns than a solicitation that is simply aimed at raising money for a worthy cause.

12. See, e.g., N. C. Gen. Stat. 131C-17.2 (the North Carolina statute that was struck down in Riley).

13. Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984).

trative waivers[14] and in Riley,[15] the Court struck down a percentage limitation even though it provided explicit relief for advocacy organizations.[16] Perhaps the greatest surprise,[17] however, was the Court's willingness to strike down disclosure requirements under the doctrine of "forced speech."[18] At issue in Riley was a North Carolina statute that required a professional solicitor to disclose the percentage of the donor's gift that would actually go to the charitable cause. The Court held that this requirement was "content" regulation that violated the First Amendment.[19]

There is little in this history that offers encouragement to state regulators. Despite the fact that the states have filed numerous amicus briefs, the Court has displayed remarkably little understanding of state regulatory concerns. In Munson, for example, the majority opinion failed to acknowledge that state regulation is aimed at

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14. 467 U.S. at 964.

15. Riley v. National Federation of the Blind of North Carolina, 487 U. S. 781 (1988).

16. 487 U.S. at 793.

17. Despite the fact that the Court's decisions on these two matters seem to conflict with earlier dicta, their basic thrust is not surprising to constitutional lawyers. Allowing state officials to decide on a case by case basis whether certain costs are excessive or whether certain groups are exercising legitimate speech rights truly eliminates the very essence of protection that the First Amendment is meant to provide.

18. 487 U.S. at 798.

19. 487 U.S. at 795 et. seq.

anything other than the prevention of fraud.[20] Indeed, the only recognition that the state had a legitimate interest in seeing to the due application of charitable funds came from the dissent.[21] In addition, the states are also handicapped by the Court's unwillingness to formulate general criteria that would assist them in defining the limits of permissible regulation. For example, the Court acknowledges that some disclosures are desirable but offers little guidance as to what disclosures the state might require. Under these circumstances, it is unlikely that the states can produce a general regulatory scheme that would effectively curb abuse and, at the same time, be likely to pass Supreme Court scrutiny.

II. The Presence of Constitutional Values

While there is no question that the constitutional interests surrounding charitable solicitation are substantial, it is difficult to categorize them and to precisely define their limits. In this section, I will briefly discuss the First Amendment interests that are implicated in the ability to organize and operate charitable organizations. In the

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20. In Riley, the Court acknowledges the state's interest but dismisses it as "paternalistic." The Court seems to assume that the state must be acting either for the donors (in preventing fraud) or for the charitable organization itself (in seeing to the due application of charitable funds.) Dating back to the English common law, however, the state's interest has been defined as deriving parens patriae from the interests of the charitable beneficiaries who do not themselves have standing to sue. See, e.g., Fremont-Smith, Foundations and Government, (Russell Sage Foundation, 1965) at p. 198. See also, Karst, "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility" 73 Harv. L. Rev. 433 (1960).

21. 467 U.S. at 980.

course of this discussion, I will attempt to explain why it is so difficult to define these interests in a way that will clear an uncontested space for state regulation.

Charitable organizations occupy a position that lies somewhere between for-profit business organizations and government institutions. They differ from businesses in that they are not driven by the profit motive. They differ from government institutions in that they are primarily vehicles for private decisionmaking. In the past few years, scholars have begun to analyze the distinct purposes of the charitable sector. These efforts have been led primarily by certain economists who have analyzed the sector as a rational response to various forms of market failure.[22] This has led other writers to question whether charitable enterprises can be satisfactorily explained solely by reference to economic motives.[23] Whatever may be the right answer to this question, it seems obvious to me that it is necessary to understand the charitable sector both in economic terms and in political terms if we are to think about its constitutional aspects. Whether one believes that there are important constitutional rights at stake in the operation of charitable programs depends in part upon the place of charitable endeavor within one's theory of political organization. In thinking about this question, I have found the recent discussions of communitarian theories such as civic republicanism and normative pluralism to be helpful and informative.

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22. See, e.g., Hansmann, "The Role of Nonprofit Enterprise" 89 Yale L. J. 835 (1980) and Weisbrod, "Toward a Theory of the Voluntary Nonprofit Sector in a Three Sector Economy" in Weisbrod, The Voluntary Nonprofit Sector (Lexington Books, 1977).

23. See, Atkinson, "Altruism in Nonprofit Organizations," 31 B.C. L. Rev. 501 (1990)

A number of contemporary scholars have proposed civic republicanism[24] as an alternative to traditional liberal political theory.[25] Liberal theory begins with an understanding of human beings as individual actors who are defined by their autonomous choices. Civic republicanism, on the other hand, starts with the notion that individuals are defined in important ways by their participation in the wider community. From these different conceptions of the individual follow different conceptions of the ideal state. The liberal theorist desires a limited government whose powers are defined by social contract; the republican proposes a political association where citizens can debate and enact the public good.

Traditional liberal theory supports an economic approach to understanding charitable organizations. Thus, there are certain goods and services that neither the free market[26] nor the government can provide,[27] and the provision of these goods is the particular mission of the nonprofit sector.

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24. See, e.g., Michelman, "The Supreme Court, 1985 Term-Foreword: Traces of Self-Government" 100 Harv. L. Rev. 4 (1986) and Sunstein, "Beyond the Republican Revival" 97 Yale L. J. 1539 (1988).

25. When I speak of "traditional liberal theory," I am referring to social contract theories of the kind propounded by Hobbes, Bentham, Locke and Mill.

26. The market can't supply certain desirable goods and services because of market failure. See, Hansmann, supra, n. 22.

27. Social contract theory entails democratic choice which in turn entails, from some perspectives, less than the optimal amount of certain public goods. See, e.g., Weisbrod, supra, n. 22.

The problem with this analysis is that it does not effectively illuminate the constitutional interests that are at stake in charitable solicitation. Its emphasis on the individual leads it to conceive of freedom of expression in terms of protecting certain kinds of speech transactions. These speech transactions are accorded greater or lesser protection depending upon their nature -- political speech receives more protection than commercial speech. Therefore, the issue in each First Amendment case is the nature of the individual speech act that is the subject of controversy. Since liberal theory views charitable solicitation as a way of seeking financing for goods and services which the private market cannot produce, charitable speech must be classified as a hybrid. On the one hand, it is not commercial speech because it functions outside the free market mechanism; on the other, it relates to financing goods and services whose value is ultimately determined by an aggregation of private preferences. The result is the somewhat unhelpful conception of "intertwined" speech. The doctrine of intertwined speech seems to sacrifice the ability to make distinctions based upon practical realities. For example, this doctrine, together with the liberal standing requirements for First Amendment claims probably means that a for profit business that urges you to help the homeless by purchasing a very expensive light bulb cannot be required to affirmatively disclose the percentage of the proceeds that it will apply for the benefit of homeless people.

The communitarianism of the civic republican, on the other hand, enables him to adopt a wider view of the nonprofit sector. Nonprofit organizations provide essential opportunities for participation in community life. Thus, Cass Sunstein writes:

> Citizenship, understood in republican fashion, does not occur solely through official organs. Many organizations including labor unions, religious associations, women's groups of various sorts, civil rights organizations, volunteer and charitable groups, and others, sometimes marking themselves outside of and in opposition to conventional society -- serve as outlets for some of the principal functions of the republican systems. These functions include the achievement of critical scrutiny of existing practices, the provision of an opportunity for deliberation within collectivities, the chance to exercise citizenship and to obtain a sense of community, and the exercise of civic virtue, understood as the pursuit of goals other than self-interest, narrowly conceived.[28]

Variations on the communitarian theme also support strong constitutional protection for nonprofit organizations. Writing in response to the recent interest in civic republicanism, Kathleen Sullivan proposes a kind of normative pluralism[29] that rejects the republican's commitment to "universalism"[30] and instead views "politics as the interac-

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28. Sunstein, supra n. 24 at 1573. This analysis of the nonprofit sector is not universally held by civic republicans. As Sunstein notes, "The problem with at least some forms of republicanism is that they tend to ignore or devalue groups of this sort." Id.

29. Sullivan, "Rainbow Republicanism" 97 Yale L. J. 1713 (1988).

30. Sunstein describes universalism as the process "of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue (in order) to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals." Sunstein, supra. n. 24 at 1554.

tion of groups that are more than simple aggregations of individual preferences, but less than components of a single common good."[31] Thus –

> Normative pluralism, like republicanism, acknowledges that persons and values are forged in social interaction. But, unlike republicanism, normative pluralism rejects any quest for agreement upon a single common good, and locates social interaction and value formation principally in settings other than citizenship. Normative pluralism thus envisions an ongoing and desirable role for groups that are social but not public -- groups intermediate between individuals and the state.[32]

Sullivan's normative pluralism honors diversity by forswearing the notion that honest deliberation will produce conformity and agreement. Like civic republicanism, Sullivan's theory requires strong constitutional protection for voluntary groups.[33]

These communitarian theories -- civic republicanism and normative pluralism -- are useful in understanding the basis of constitutional protection for charitable solicitation. Since voluntary groups are frequently the focus of community life, it is important to foster participation in these groups by according them strong protection under the First Amendment. A communitarian analysis need not focus upon individual speech transactions. Instead, the emphasis should be upon the context of speech, upon the ability of the organization to serve as a vehicle for group participation and expression. A for-profit company that uses a charitable hook to sell a light bulb is not

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31. Sullivan, supra n. 29 at 1714.

32. Id.

33. "Insulating voluntary associations from intrusion by the state serves a hybrid of individualist and communitarian ends." Id.

adding much to our opportunities for community life. On the other hand, a charitable organization that solicits contributions may be creating community both by providing information about a perceived community problem and by raising funds that will support an ongoing forum for discussion and participation.

III. The Need for State Regulation

If we assume that charitable activities play an important role both in defining the community and in providing opportunities for individual participation, then it would seem to follow not only that they are entitled to a high level of constitutional protection but also that it is important to preserve a communicative climate in which charitable appeals can be both heard and accurately understood. What must be avoided is a situation where appeals are so numerous that they drown each other out, where competition for funds is so intense that solicitors rely upon increasingly fraudulent claims, and where there is so little accountability that unscrupulous operators are able to enrich themselves with funds they have solicited from the public. I will consider each of these problems separately.

The Problem of Proliferation

We need to be more concerned about the fact that meaningful public discussion is undermined by the problem of proliferation. The basis for this concern is no further away than one's own mailbox, fax or message machine. Most of us receive a truly staggering number of unsolicited communications and these include countless appeals to our altruism. Few of us bother to read (or even to open) unmarked and

unidentified pieces of mail; many of us quickly get off the phone when we find a solicitor at the other end. Charitable solicitations, like other forms of mass communication, have fallen victim to information overload. Thus, an organization's exercise of First Amendment rights is frequently hampered by the pervasive noise of the public forum. It is as if the government said: "We won't interfere with your speech. We will even give you a microphone." and, at the same time, gave a microphone to so many speakers that no one could be heard above the resulting din. This creates a serious dilemma for charitable organizations who are particularly dependent upon an atmosphere of good will. On the one hand, they can risk creating ill will by aggressively pursuing potential donors into their homes and businesses or they can deliver their message quietly and politely and risk not being heard at all.

These circumstances pose a serious threat to the free flow of expression and community association. Government regulation of speech opportunities raises the specter of official favoritism. However, the problem of proliferation poses a specter of a different kind. When there are too many speakers, the advantage shifts to the largest and loudest and this raises a concern that public debate will be increasingly dominated by those who have large resources, shrill voices, and a limited commitment to truthfulness.

The Problem of Fraud

Charitable solicitation presents unique opportunities for defrauding the public. It is difficult for many people to refuse requests for money if the request is made for an appealing charitable cause. For example, cancer and homeless children have prov-

en to be effective subjects for fundraising schemes under almost any circumstances. Donors are eager to help and reluctant to examine the solicitation or the solicitor too closely. In addition, state regulation is non-existent in many areas of the country and, even in states with active programs, it is easy to leave the jurisdiction before any kind of legal proceedings can be initiated. These circumstances combine to make fraudulent solicitations an area of genuine concern.

Unfortunately, it is difficult to know the exact dimensions of this problem. My own experience as a regulator in Massachusetts would suggest that truly fraudulent schemes are surprisingly rare. I am reluctant, however, to draw too many conclusions from this experience. Massachusetts has stronger legislation and more enforcement resources than any of its neighbors. Fraudulent operators might therefore have thought that other states provided greener pastures for their solicitation schemes. Furthermore, the public rarely complains about charitable solicitations. A citizen who has been harmed by consumer fraud has every incentive to complain but a victim of charities fraud has none. This is because any donor who doubts the bona fides of a charitable solicitation has an instant remedy -- not to give -- and no need for government assistance. Thus, it is difficult, even with an active state program, to be confident that most fraudulent schemes would come to official attention.

We need to have much more information about solicitation activity before we could realistically assess the amount of charitable fraud and its impact on honest charitable endeavors.

The Problem of Private Inurement

The problem of private inurement is frequently lumped together with the problems of fraud and inefficiency. Categorizing inurement problems in this way, however, tends to obscure their distinctive importance in the charitable context. The problem with inurement is not simply that it defeats a donor's expectations about what will happen to her funds. Nor is it simply the problem that private inurement interferes with the efficient accomplishment of a charitable program. Instead, the prohibition on private inurement is the very foundation upon which the charitable community has been built. As the economists explain it, the nonprofit sector can correct the failures of the marketplace precisely because the prohibition against private inurement makes individuals willing to participate in ways that they would not participate in the for-profit sector.[34] More simply, the prohibition on private inurement is the goose that lays philanthropic egg and, thus, every time we overlook an instance of private inurement we undermine a public faith that is essential to the continued operation of the charitable community.

CONCLUSION: Formulating a More Pragmatic Approach

In this paper, I have emphasized the importance both of fundraising regulation and of the constitutional values that such regulation may offend. I will not, however, conclude by saying that the situation is hopeless and that this is just one more instance where we have to tolerate unfortunate conditions in order to vindicate our

34. See e.g., Hansmann, supra n. 22.

constitutional liberties. My conclusion is rather more hopeful. While I believe that the line of cases from Schaumberg to Riley have effectively sealed the fate of state fundraising legislation, I also believe that state interests can be more narrowly pursued. We know much less than we would like about the real world operation of the charitable sector. We need to know more. We also need to focus more closely upon the abuses that we see. The charitable sector is a very large and diverse collection of organizations that raise many different kinds of problems. Which of these problems rise to the level of abuse? What approach could we take that would narrowly deal with those abuses? How can we remedy the abuse without disempowering charities generally. This kind of discussion calls for a new mindset that is less dominated by the traditional debate over principles and more focused upon the practicalities of charitable speech and solicitation.