Fundraising into the 1990s:

State Regulation of Charitable Solicitation After *Riley**

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I) Introduction[1]

In a society noted for mass communications and telemarketing, charitable solicitation has become big business.[2] In 1988 alone, Americans gave over $100 billion to charitable causes.[3] Coincidentally, the problem of solicitation abuses has become a pressing concern. Many charities rely on paid solicitors to conduct their fundraising campaigns. While this arrangement is usually beneficial to all parties involved, there is evidence that charities sometimes receive only a small portion of gifts directed to them.[4]

Under the rubric of consumer protection laws and anti-fraud statutes, state and municipal governments have been attempting to attack the problem of fraud and other abuses carried on under the guise of charitable solicitation.[5] Most states,

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One of the purposes of this paper is to provide a survey of state regulatory measures aimed at charitable solicitation, and the reactions of the courts to these various measures. It should be noted, however, that due to the ever-changing nature of the regulation of charitable solicitation, the case law and state statutes researched for this article should only be considered complete up to April 1989, unless noted differently in text or footnotes.

[2] Black's Law Dictionary defines "charity" as "a gift for, or institution engaged in, public benevolent purposes." *Black's Law Dictionary* 217 (5th ed. 1979). Black's also cites *Methodist Old People's Home v. Korzen*, which defines a "charitable institution" as:

> one which dispenses charity to all who need and apply for it, does not provide gain or profit in a private sense to any person connected with it, and does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses . . ..

Methodist Old People's Home v. Korzen, 39 Ill. 2d 149, 157, 233 N.E.2d 537, 542 (1968) (citing *Sisters of Third Order of St. Francis v. Bd. of Review*, 231 Ill. 317, 83 N.E. 272 (1907)).

[3] American Association of Fund-Raising Counsel, Inc., *Giving U.S.A.: The Annual Report on Philanthropy for the Year 1988* (1989) (hereinafter *Giving U.S.A.*). The actual figure for philanthropic giving in 1988, was $ 104,370,000,000. *Id.*

[4] *See* note 96 and accompanying text *infra*.

[5] State charitable solicitation law is in a state of transition. Sections of this article will examine some of the major statutory changes that states have considered and enacted since the Supreme Court's decision in *Riley v. National Fed'n of the Blind of N.C., Inc.*, _ U.S. _, 108 S. Ct. 2667 (1988). Because of rapid and widespread changes in this area of law, however, this survey should only be considered complete up to and through April 1989 with regards to state legislative action, *see* note 1. Those interested in a particular state statute should therefore consult the appropriate legislative materials and services for changes since April 1989.

however, do not have the resources to wage an effective war against this abuse. Thus, regulators are often forced to pass broad, prophylactic laws to monitor charitable solicitation. States and municipalities are often suspicious of the large number of individuals and organizations going door-to-door asking citizens for donations. Many fear that without regulation, fraud would run rampant and honest philanthropic organizations would suffer because of a decline in public confidence.

On the other side of this issue is the perspective of the charities themselves, as well as that of those managing and conducting solicitation campaigns. Fundraising is often vital to enable charities to provide services and benefits to the public. Solicitation also often provides the charities with an opportunity not only to raise funds but to communicate their message, disseminate ideas, and engage the general public in debate over important topics. Charities and fundraisers are concerned that, while state regulatory efforts may provide some benefit to the charities, the means used to achieve these ends may be overly intrusive. Specifically, there is concern in the charitable sector that state measures have resulted in serious infringements of the First Amendment rights of the solicitors.[6] Charities have consequently challenged statutes requiring detailed and burdensome filing requirements when registering for a solicitation campaign; limits on the amount charities can spend on fundraising; licensing schemes that place unbridled discretion in the hands of local enforcement agents; and requirements forcing disclosure of information at the point of solicitation that may cast the charities in negative light to potential donors. The imposition of many of these conditions would create only the slightest burden for well-established, large-scale charities. However, for the plethora of small organizations that, of necessity, rely on door-to-door campaigns and the altruism of individual donors, some of these state-imposed burdens would sound the death knell.

The purpose of this commentary is to address the concerns of both charities and regulators. It will provide discussion and analysis of the validity of state programs regulating charitable

[6] "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests - communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes - that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

solicitation and the legal doctrines under which such programs are analyzed.[7] This commentary will examine the legal history of charitable solicitation regulation, concentrating particularly on three recent cases decided by the United States Supreme Court, *Village of Schaumburg v. Citizens for a Better Environment*,[8] *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*,[9] and *Riley v. National Federation of the Blind of North Carolina, Inc.*[10] Finally, a substantial portion of this commentary will outline those measures by the states that are permissible, those that are unconstitutional, and those that remain open to debate. For example, it is now generally recognized that a state cannot prohibit charitable solicitation because the charity spends excessive amounts on the fundraising itself. It is also well established that regulators cannot condition solicitation on the issuance of a license to solicit, if the issuance of said license rests upon the unbridled discretion of a civic official.[11] Nor can the states themselves mandate that the solicitor disclose to the potential donor, at the point of solicitation, the amount of money that will actually be received by the charity.[12] On the other hand, regulators may require all organizations wishing to solicit to register by filing an application with a law enforcement authority, if such regulation is substantially related to a legitimate government interest.[13] Additionally, regulations may require the

[7] Narrowing the focus of this article on the programs used to regulate charitable solicitation necessitates only cursory discussions of important related topics such as the free-speech and free-exercise-of-religion clauses of the First Amendment.

[8] 444 U.S. 620 (1980). For discussion of *Schaumburg*, *see* notes 174 to 196 and accompanying text *infra*.

[9] 467 U.S. 947 (1984). For discussion of *Munson*, *see* notes 197 to 225 and accompanying text *infra*.

[10] __U.S. __ , 108 S. Ct. 2667 (1988). For discussion of *Riley*, *see* notes 227 to 281 and accompanying text *infra*.

[11] *See generally Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Schneider v. State*, 308 U.S. 147, 164 (1939).

[12] *Riley*, _ U.S. at _, 108 S. Ct. at 2678.

[13] *See, e.g., Hynes*, 425 U.S. at 616-619; *Cantwell*, 310 U.S. at 306; *Schneider*, 308 U.S. at 164; *International Soc'y for Krishna Consciousness v. Houston*, 689 F.2d 541, 551 (5th Cir. 1982); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Green v. Village of Schaumburg*, 676 F. Supp. 870, 873 (N.D. Ill. 1988); *Bellotti v. Telco Communications, Inc.*, 650 F. Supp. 149, 152 (D. Mass. 1986), *aff'd sub nom., Shannon v. Telco Communications, Inc.*, 824 F.2d 150 (1st Cir. 1987); *Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489, 1499 (D. Minn. 1986); *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 597 (N.D. Tex. 1984); *Wickman v. Firestone*, 500 So. 2d 740, 741 (Dist. Ct. of App. Fla. 1986).

filing of relevant financial information in the interest of preventing fraudulent organizations from soliciting door-to-door.[14]

II) The Nature and Scope of the "Problems" of Charitable Solicitation

Charitable fundraising is a major enterprise. For decades aggregate charitable giving has followed an upward trend; between 1955 and 1985, total donations to charitable organizations climbed from $7.70 billion to $80.31 billion in 1985.[15] Notwithstanding the elimination of the charitable deduction for non-itemizers in 1986[16] and the stock market "crash" of October 19, 1987, this growth has continued. The American Association of Fund-Raising Counsel, Inc. (AAFRC, Inc.), which has tabulated the sources and recipients of philanthropy for over thirty years, estimated in its annual report that Americans contributed $104.37 billion to the nation's gift-supported institutions during 1988.[17] This represents 2.15% of the total gross national product,[18] and an increase of 6.70% over the 1987 estimated figure of $97.82 billion in total giving.[19]

[14] *See, e.g., Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980); *International Soc'y for Krishna Consciousness*, 689 F.2d at 551; *Bellotti*, 650 F. Supp. at 153; *Heritage Publishing*, 634 F. Supp. at 1502; *Streich v. Pa. Comm'n on Charitable Orgs.*, 579 F. Supp. 172, 178 (M.D. Pa. 1984); *Wickman*, 500 So. 2d at 742.

[15] *Giving U.S.A., supra* note 3, at 11. *See also* Clotfelter, Charles, *Federal Tax Policy and Charitable Giving*, at 8 (University of Chicago Press: 1985) (Charitable giving is the largest single category of all receipts, representing more than one-third of the receipts of the philanthropic sector or tax- exempt sector in 1980).

[16] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

[17] *Giving U.S.A., supra* note 3, at 6, 11.

[18] *Id.* at 11.

[19] *Id.* at 11, 18. This growth is significant, although the AAFRC, Inc., points out that "when adjusted for inflation in the service sector (which is higher than inflation for the economy as a whole) total giving rose by under two percent." *Id.* at 18.

As another example of the magnitude of the charitable fundraising business, paid telephone solicitation alone for charitable, civic, police and firefighter organizations in the state of Connecticut was worth at least $ 8.6 million in 1987. *Paid Telephone Soliciting in Connecticut During 1987 for Charitable, Civic, Police and Firefighter Organizations*, (a report to Mary M. Heslin, Commissioner of Consumer Protection, and Joseph I. Lieberman, Attorney General; prepared by The Public Charities Unit, a joint program of the Dep't of Consumer Protections the Office of the Attorney General) (April 8, 1988) [hereinafter CT Survey].

The major source of charitable contributions is the individual contributor, who consistently accounts for four-fifths of the total.[20] In 1988, this group of donors gave 83.1%, or $86.70 billion, of the annual total.[21] In the other major source categories, foundations increased their giving by 4.32%, putting estimates for total foundation contributions at $6.13 billion, and bequests rose 3.19% to a total of $6.79 billion.[22] Corporate contributions for 1988 increased by 3.26% in 1988, to a total of $4.75 billion.[23]

The nonprofit sector spans across a spectrum of different groups, organized around a variety of issues, and with "estimated cash expenditures of $130 billion and a workforce of 6.5 million [in 1985], this sector includes almost anything that is not business or government."[24] Some 785,000 nonprofit organizations comprise the independent sector that makes use of the billions of dollars of charitable contributions each year.[25] In 1988, close to one half of total donations went to religious groups,[26] which use the money to support their own institutions or to provide backing for unrelated institutions and social needs.[27] The other major categories of uses of funds, according to the AAFRC, Inc., are health, education, human services, arts culture and humanities, and public/society benefit.[28]

[20] *Giving U.S.A., supra* note 3, at 8. *See also* Joseph, *What Lies Ahead For Philanthropy* 1 (1986: Council on Foundations). As an example, *see* 11 *Chronicle of Philanthropy* 5 (March 21, 1989) (Four out of five New Yorkers give to charity).

[21] *Giving U.S.A., supra* note 3, at 8. This figure represents a 7.36-percent increase in individual giving from 1987 to 1988. *Id.*

[22] *Id.* at 8.

[23] *Id.*

[24] Joseph, *supra* note 20, at 1. The National Taxonomy of Exempt Entities, developed by the National Center for Charitable Statistics, includes the following types of nonprofit entities, according to primary purpose: (1) arts, culture, humanities, (2) education and instruction, (3) environmental quality, protection, and beautification, (4) animal related, (5) general health and rehabilitation, (6) mental health and crisis intervention, (7) mental retardation and developmentally disabled, (8) consumer protection and legal aid, (9) crime and delinquency prevention, (10) employment related, (11) food, nutrition, and agriculture, (12) housing and shelter, (13) public safety, emergency preparedness, and relief, (14) recreation, leisure, sports, and athletics, (15) youth development, (16) human service (including individual and family social services), (17) civil rights, social action, advocacy, (18) community improvement, (19) science and technology, (20) religion and spiritual development. National Center for Charitable Statistics, National Taxonomy of Exempt Entities (1987).

[25] *Id.*

[26] *Giving U.S.A., supra* note 3, at 81 (Religious organizations received an estimated $48.21 billion in 1988, accounting for 46.19% of total donations.). *Id.*

[27] Joseph, *supra* note 20, at 3.

[28] *Giving U.S.A., supra* note 3, at 9.

Among these organizations, competition is quite intense. The AAFRC, Inc. reports that, according to one 1987 survey of 105 gift-supported organizations, average charitable funding was down almost a million dollars from the previous year; more groups reported a decline in giving income; and 12% fewer groups reported increases in donations.[29] Furthermore, according to the survey, competition among the groups themselves was the most commonly cited reason for the difficulties.[30]

Given the money involved and the many individuals and groups affected by charitable giving, it is not surprising that state governments have traditionally asserted an interest in the regulation of charitable solicitation.[31] The various justifications for the state role in this area are discussed in the next section of this commentary. This discussion is followed by an examination

[29] American Association of Fund-Raising Counsel, Inc., *Giving U.S.A.: The Annual Report on Philanthropy for the Year 1987* 19 (1988).

[30] *Id.*

[31] States have traditionally assumed the role of regulators of charitable fundraising at least to some extent because of the lack of direct Federal regulation in the area. Although there is no federal charitable solicitations law, Representative Major Owens (D-NY) introduced a bill proposing the enactment of the "Charitable Solicitation Disclosure Act of 1987" during the 1987 legislative year. H.R. 2130, 100th Cong., 1st Sess. (1987). The bill would have required the disclosure of certain information in connection with the solicitation of charitable contributions by mail, and for other purposes. Rep. Owens re-introduced the bill on March 2, 1989. H.R. 1257, 102nd Cong., 1st Sess. (1989). On March 9, 1989, the bill was referred to the Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service. As of April 11, 1989, no further action has been taken.

In the spring of 1989, a House subcommittee was also considering a proposal to bestow regulatory authority over interstate fundraising campaigns to the Federal Trade Commission. *See* Chronicle of Philanthropy, vol. 1, no. 11 (Mar. 21, 1989); (April hearing, Energy and Commerce Committee's Subcommittee on Transportation, Tourism, and Hazardous Materials).

Federal tax policy also implicates charitable solicitation. In particular, the Internal Revenue Code requires certain tax exempt organizations that are *ineligible* to receive tax-deductible contributions to disclose, in an express statement (in a conspicuous and easily recognizable format) the nondeductibility of contributions during fundraising solicitations. I.R.C. §6113. According to the Treasury Department, this section seeks to remedy a problem which occurred when many unknowing taxpayers made erroneous deductions. 88 TNT 177-8. Although the Internal Revenue Service "doesn't have any teeth," to enforce a similar policy on charitable organizations, tax officials have suggested that the Service "may be compelled to take steps to force charitable organizations to inform prospective donors how much of a donation may be deducted as a charitable contribution." 88 TNT 233-1, referring to statement by E. D. Coleman (Director, Exempt Organizations, Technical Division).

For an interesting idea about how the tax system may be used more affirmatively to regulate charitable solicitation, see note 337 *infra*.

of why charities seek to avoid intrusive regulation of their fundraising campaigns and the role which professional solicitors often play in these efforts.[32]

III) The Role of States Vis-a-vis Charities

A) State Support of Charitable Solicitation Laws

State regulation of charitable solicitation is arguably a natural and necessary outgrowth of states' interests vis-a-vis charities. State regulation of charitable solicitation, while reflecting a recently-growing concern with the scope and the problems of fundraising, is indicative of the historically close relationship between the states and charities. The states have long acted in a role of "parens patriae"[33] to ensure the integrity and public service character of charities.[34] This role dates as far back as the statute of Charitable Uses in England enacted in 1601.[35] This statute not only delineated the specific organizational purposes deemed charitable, it also set up commissions with broad powers to investigate and redress the misapplication of charitable funds.[36] Currently, the states' role vis-a-vis charities is multifaceted. States may act to "protect" or to "regulate" charities, providing a substitute for the market mechanisms which influence for-profit organizations. Charitable solicitation laws may act to regulate the "charitable environment," thereby encouraging charitable giving. These laws may also work to protect the interests of the general public, including both those who donate to charities and those who receive charitable benefits.

A state may argue that through charitable solicitation legislation, it "protects" charities from abuse by those who

[32] The subsequent discussion presents an overview of the arguments presented by states and charities and does not claim to critically analyze the substance of each of these arguments.

[33] "Parens patriae" is a legal term which, literally translated, means "parent of the country." According to Black's Law Dictionary, this term "refers traditionally to [the] role [of] state as sovereign and guardian of persons under legal disability. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc." *Black's Law Dictionary* 1003 (5th ed. 1979). *See Gibbs v. Titelman*, 369 F. Supp. 38, 54 (E.D. Pa. 1973).

[34] Reply Brief of the Secretary of State of Maryland, *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984) (No. 82- 766).

[35] Statute of Charitable Uses, 43 Eliz., ch. 4 (1601).

[36] *Id.*

provide high-cost solicitation services. Such legislation is often described as "pro-charity" because it is designed, at least in part, to ensure that charities receive the maximum funds to which they are entitled.[37] For example, limits on fees which professional solicitors may receive protect charities from being overcharged for these services.[38] Licensing and registration requirements protect charities against fraudulent professionals.[39] Thus regulators may argue that charitable solicitation laws aim to decrease charities' vulnerability to fraud.

State solicitation regulations limiting fees paid to fundraisers also may protect charities against their own corruptive self-interest. For instance, in hiring a professional solicitor, a charity generally bears no financial risk. The solicitor will raise all of the money she can, take a share of the money collected on either a percentage basis or by deducting her expenses, and turn the remainder over to the charity.[40] Hence, the charity is able to make a profit without incurring any costs. According to the State of Massachusetts, "when a solicitor offers to run the whole fundraising campaign for a percentage, the charity may view this as 'found money' . . .. In such cases, a charity may think it is getting the best of deals, something for nothing."[41] Charitable solicitation regulations may reflect a state's opinion that the

[37] Reply Brief for Randolph Riley at 5, *Riley v. National Fed'n of the Blind of N.C., Inc.*, _ U.S. _, 108 S. Ct. 2667 (1988) (No. 87-328) [hereinafter Riley Reply].

[38] For a discussion of percentage limitations on solicitation fees, *see* notes 330 to 337 and accompanying text *infra*.

[39] For a discussion of licensing and registration requirements, *see* notes 338 to 371 and accompanying text *infra*.

[40] According to the report on "Paid Telephone Soliciting in Connecticut During 1987 for Charitable, Civic, Police and Firefighter Organizations," under professional solicitation contracts, charities generally have very little to do with the fundraising. During a typical telephone solicitation campaign:

> A solicitation firm agrees to rent office space, install the phones, hire the callers, make the calls and collect the money pledged. With few exceptions, this method of fund raising involves selling tickets to an entertainment event and/or the sale of advertising space in a program book, journal or other publication. Again, the arrangements are handled by the soliciting firm including printing, renting a location for the show, obtaining insurance, and booking and paying for performers. For this, the organization hiring the solicitor agrees to accept a percentage of the funds raised or a fixed dollar amount.

CT Survey, *supra* note 19, at 1.

[41] Brief of the *Amici Curiae*, Including the States of Massachusetts, Connecticut, Illinois, Kansas, and New Jersey in Support of the Secretary of State of Maryland at 51-52, *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984) (No. 82-766) [hereinafter Mass. Brief].

appeal of "easy money" may leave charities unable to evaluate objectively the benefits and risks of undertaking a solicitation campaign.[42]

States may also assert that their solicitation laws act as "economic regulation" of the big business of charitable solicitation.[43] Charitable solicitation laws may be necessary to compensate for the lack of economic disincentive available to discourage charities from utilizing costly fundraising services. The conduct of trustees and directors of charities is subject neither to the traditional profit and loss constraints of the marketplace nor to the scrutiny of shareholders or investors.[44] Those who run charities may be volunteers, not professional managers, and may lack the expertise to choose the best fundraising alternatives. States may argue that state limits on solicitation fees ensure that charities are reasonably managed, and that money raised is not applied to wasteful, inefficient fundraising schemes.[45]

High-cost fundraising may ultimately provide a disincentive for charitable giving. Contributors may not want their donations going to a charity utilizing professional solicitors, believing that charitable fundraising should not be a means for other entities, beside the charity, to make a profit. Inefficient fundraising may also make more expensive the "product" which a donor purchases. That "product" could be, by way of illustration, the goods or services provided to the charity's beneficiaries. That "product" could also be the "warm feeling" the donor gets from knowing that her donation is used for charitable purposes. Assume a donor wishes to purchase $25 of either "product." If a charity spends 75% of donated funds on solicitation expenses, the donor would have to pay $100 for that

[42] Brief of Secretary of State of Maryland at 38, *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984) (No. 82-766) [hereinafter Maryland Brief]. This may be particularly true of organizations with a "strained budget" or those interested in "quick growth." Mass. Brief, *supra* note 41, at 31-32.

[43] *See* notes 15 to 28 and accompanying text *supra*. For a discussion of the economics of fundraising, *see generally* Young, *An Economic Perspective on Regulation of Charitable Solicitation*, 39 Case W. Res. _ (forthcoming in 1989); Steinberg, *Should Donors Care About Fundraising?*, in The Economics of Nonprofit Institutions 347 (S. Rose-Ackerman ed. 1986).

[44] Maryland Brief, *supra* note 42, at 38. The State of North Carolina has argued that "[t]he usual competitive forces that require most commercial operations to keep fees and underlying costs to the lowest possible level do not operate effectively as to charitable solicitors . . . because of both the type of emotional appeal present and the contractual practices [used]." Riley Reply, *supra* note 37, at 4.

[45] Mass. Brief, *supra* note 41, at 28.

"product." If the charity uses none of the donated funds for solicitation expenses, the donor would pay $25 for the $25 "product." Hence, high cost fundraising may be inefficient for both charities and donors.

Charitable solicitation laws also serve to regulate the "charitable environment" by promoting the public's perception of the integrity and efficiency of charities. These laws may represent a state's response to a perceived "growing public perception that charitable donations are used only to solicit more charitable donations in seemingly endless waves of unwelcome 'junk mail.'"[46] Donors may react to information about high solicitation fees by not continuing their support of a charity. Growing public cynicism might endanger the future marketability of a charity's good name. States may thus argue that solicitation laws attempt to guard against public cynicism concerning charitable giving much in the same way that political contribution laws attempt to protect against the eroding of public confidence in the political arena. In political contribution cases, the Supreme Court has noted that states have a valid interest not only in guarding against corruption, but also in guarding against the appearance of corruption.[47]

States may also argue that they have a substantial interest in maintaining a good "charitable environment" because charities generally provide many vital services to state citizens. These services involve meeting the educational, health, and welfare needs of many individuals as well as supporting the cultural, artistic, and social interests of the community. Without the support of charities, regulators may reason that these functions would otherwise have to be assumed by the government or would not be provided at all.[48] Money donated to an inefficient

46 *Id.* at 24.

47 *Buckley v. Valeo*, 423 U.S. 387 (1976). The Court noted that:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual, financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'

Id. (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1972)).

48 *See* Steele, *Regulation of Charitable Solicitation: A Review and Proposal*, 13 J. Legis. 149, 152 (1986). In *Charities Under Siege*, author Bruce Hopkins explains: "[c]learly the exemption for charitable organizations is a derivative of the concept that they perform functions which, in the organizations' absence, government would have to perform; therefore, government is willing to forgo the tax revenues it would otherwise receive in return for the public services rendered." B. Hopkins, Charities Under Siege 4 (1980). It should be noted, however, that Hopkin's theory cannot universally explain the basis for charitable exemption because this exemption is often used to support activities that the government would not otherwise "have to perform." For example, the separation of church and state mandated by the First Amendment to the Constitution forbids the government from providing religious services. Also, in the absence of nonprofit legal services, the government would not be likely to provide services to enable individuals to sue the government.

or wasteful charity may detract from the total amount of funds available to all charities through public contribution.[49] Consequently, charitable organizations are able to assume less of the burden of providing services to the community. Hence, states may assert that they have an important interest in encouraging "charity and charitable contribution and to maximize the funds which flow to the charity."[50]

Charitable solicitation laws also reflect the states' historic role as protector of the public interest. As the State of Maryland has argued, "[c]ontracts between charitable organizations and charitable fund-raisers are thus not merely bilateral, rather they establish a triangular relationship with the public as a third party whose interests must be protected."[51] The "general public" consists of two groups of individuals, those who donate to charity and those who benefit from it. (Of course, these two groups may overlap). Donors may benefit from limitations on fundraising costs which protect their expectations that their contributions will go primarily to a charitable purpose.[52] Also beneficial may be the

49 Riley Reply, *supra* note 37, at 10-11.

50 *Id.* In an important early article entitled "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility," Professor Kenneth Karst argued that "[t]he greatest possible portion of the wealth donated to private charity must be conserved and used to further the charitable, public purpose; waste must be minimized and diversion of funds for private gain is intolerable." Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility* 73 Harv. L. Rev. 433, 434 (1960).

51 Maryland Brief, *supra* note 42, at 37. Professor Steele explained that "individuals. . . are least able or willing to judge the credibility of solicitation campaigns and, therefore, are in need of a greater degree of regulatory protection." Steele, *supra* note 48, at 151. The State of Massachusetts has argued that "the decision of how inefficient marginal fundraising must become before it is abandoned may be a situation which pits the self-interest of a charity against the public whose dollar it spends." Mass. Brief, *supra* note 41, at 31-32.

52 Maryland Brief, *supra* note 42, at 35. According to Professor Steele, protection of a donor's expectations as to the use of his donation is included in a state's duties dictated by trust principles. She argues, "where the donor is led to believe that the lion's share of contributed funds will be used for the charitable purposes articulated in the solicitation campaign, application of these trust

dissemination of information concerning fundraising costs, which allows potential donors "intelligently [to] decide between the competing claims of charities."[53] Perhaps most importantly, state solicitation laws protect the ultimate beneficiaries of charitable services, who are often poor, elderly, handicapped, or disadvantaged. These groups generally have neither the resources nor the legal know-how to ensure that charitable donations are properly spent on charitable purposes.[54] If, as regulators assume, the universe of the "charitable dollar" is finite, solicitation laws prohibiting high solicitation fees prevent funds, which would very likely be used to provide charitable services, from being diverted to pay for fundraising services.[55]

The states have often guarded the interests of citizens under the rubric of their police powers. States have used this power to protect the general public from unwanted solicitation and intrusion. Generally, the task of discouraging the visits of unwanted callers falls on the shoulders of individual homeowners.[56] However, there are reasonable measures a state may take to supplement the individual's efforts. These measures are generally based on one of several broad bodies of legal theory. In addition to their reliance on the laws of fraud, regulators have

principles operate to prevent the diversion of a substantial portion of those funds to other purposes." Steele, *supra* note 48, at 153.

53 Brief for the Amici Curiae States of Maine and Connecticut in Support of Randolph Riley at 10, *Riley v. National Fed'n of the Blind of N.C., Inc.*, __ U.S. __, 108 S. Ct. 2667 (1988) (No. 87-328) [hereinafter Maine Brief]. According to the report on "Paid Telephone Soliciting in Connecticut During 1987": "[i]f fund raising costs cannot be controlled by legislation, at least the contributing public should and does have the right to know how much of its money reaches the organization." CT Survey, *supra* note 19, at 12.

54 Maryland Brief, *supra* note 42, at 38. Professor Karst has argued that:

> [T]here is no beneficiary in a comparable position who is sufficiently interested as an individual to call the charitable fiduciary to account. This is not simply a legal conclusion; in the typical case, no one knows who a beneficiary will be until the charity confers a benefit on him, and after such a benefit is conferred he has no right to expect further benefits, and thus no remaining interest in the charity's funds.

Karst, *supra* note 50, at 436-37.

55 *But cf.* Steinberg, Should Donors Care About Fundraising?, in The Economics of Nonprofit Institutions 347 (S. Rose-Ackerman ed. 1986) (charitable solicitation always is beneficial to charities because even a 99% contingent fundraising fee necessarily increases the amount of money going to charitable purposes).

56 "Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community." *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943). For discussion of *Martin*, *see* notes 156 to 160 and accompanying text *infra*.

based their use of the police powers on (1) the general arena of nuisance law; and (2) the law covering non-fraudulent criminal activity, such as burglary. Under nuisance laws, a state may try to pass regulations restricting the time, place and manner in which solicitors can call on people's homes in an attempt to maintain public order and peace, and to protect the citizens from nocturnal disturbances.[57] A state may also regulate solicitation in order to prevent criminal activity, particularly crimes such as burglary. This theory is based on the idea that burglars and other criminal intruders frequently pose as door-to-door solicitors in order to conduct surveillance on potential targets for future criminal conduct.[58] This reasoning has been used to justify registration requirements which act to keep police appraised of the identity of those travelling the neighborhood and going door-to-door.[59] It has also been used, unsuccessfully, to justify denying door-to-door solicitation permits to people with prior felony records.[60]

States thus may have varied interests in regulating charitable solicitation. Through solicitation laws, states act to protect both charities and donors from fraud. This protection may extend to ensuring that charities, lured by "easy money," make sound financial judgments. States also protect charitable beneficiaries, by making sure that as much money as possible goes to charitable goals and not to enrich professional fundraisers. Through their police powers, states protect their citizens against

57 *See, e.g., Pennsylvania Alliance for Jobs and Energy v. Council of Munhall*, 743 F.2d 182, 187 (3d Cir. 1984) (regulations "left open ample alternative channels of communication"); *May v. People*, 636 P.2d 672, 681 (Colo. 1981) (as applied to commercial speech, municipal ordinance was "not more extensive than is necessary to serve the governmental interest" in protecting the privacy and safety of homeowners). *But see Project 80's, Inc. v. City of Pocatello*, 857 F.2d 592, 599-600 (9th Cir. 1988) (municipality's time place and manner regulations did not employ the "least restrictive means" to limit solicitation); *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1257 (7th Cir. 1985) (city failed to show that regulations were necessary to accomplish legitimate state interest); *Ass'n of Community Orgs. for Reform Now (ACORN) v. City of Dearborn*, 696 F. Supp. 268, 274 (E.D. Mich. 1988) (restrictions did not "leave sufficient avenues of communication open" to the solicitors).

58 *See, e.g., Hynes v. Mayor of Oradell*, 425 U.S. 610, 618 (1976); *Martin*, 319 U.S. at 144. For discussion of *Hynes*, *see* notes 165 to 170 and accompanying text *infra*.

59 *See, e.g., Hynes*, 425 U.S. at 615.

60 *See, e.g., Fernandes v. Limmer* 663 F.2d 619, 629-30 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Green v. Village of Schaumburg*, 676 F. Supp. 870, 873 (N.D. Ill. 1988); *Holy Spirit Ass'n for the Unification of World Christianity v. Hodge*, 582 F. Supp 592, 598 (N.D. Tex. 1984); *People v. Am. Youth Found.*, 194 Cal. App. 3d. Supp. 6, 13-14, 239 Cal. Rptr. 621, 624 (Cal. App. Dep't Super. Ct. 1987).

the nuisance and criminal activity which may accompany fundraising. Charitable solicitation laws act to regulate charities in place of the market mechanisms which serve to regulate for-profit businesses. These regulations serve to maintain the "charitable environment" necessary for charities to continue their provision of public services in an age of government cutbacks. Fundraising regulations ensure that donors' expectations of charitable giving are fulfilled, thus encouraging the public's continued charitable support.

B) Charities Perspectives on Solicitation Laws

Charities have criticized recent solicitation laws as antithetical to their interests because these laws often impermissibly burden a charity's ability to freely communicate ideas.[61] Many charities also argue that solicitation laws may reflect an inaccurate and inappropriate conceptualization of the states' interests in the operation of charities, and unduly infringe upon the charity's autonomy and ability to operate.[62] Arguments for state regulation derived from historical precedents may no longer be relevant due to the changing nature of charities.[63] Traditionally, charitable institutions provided services to the poor, the sick, and the elderly. These interests implicated directly the concerns of the state as "parens patriae" with the health, safety, and welfare of its citizens.[64] Today's charities, however, include many public interest, educational, religious, and advocacy groups.[65] According to the American Civil Liberties Union, "[t]here is no historical support or precedent for the notion that these . . . organizations are subject to state oversight with respect to their financial decisions."[66]

Charitable solicitation laws, although designed as economic regulation, frequently impinge upon charities' free-speech interests.[67] Many charities utilize fundraising for the purpose of advocating ideas and disseminating information as well as for

61 *See* notes 67 to 71 and accompanying text *infra*.
62 *See* notes 72 to 76 and accompanying text *infra*.
63 Brief of the American Civil Liberties Union in Support of Joseph H. Munson Co. Inc. at 16, *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984) (No. 82-766) [hereinafter ACLU Brief].
64 *See* note 33 and accompanying text *supra*.
65 *See* note 24 and accompanying text *supra*.
66 ACLU Brief, *supra* note 63, at 16.
67 *See* notes 282 to 289 and accompanying text *infra*.

soliciting funds.[68] Thus, any regulation of solicitation campaigns will necessarily implicate free-speech concerns. The Constitution accords free speech, a "fundamental right," the "highest degree of protection."[69] Decisions concerning which beliefs to espouse and how to expend public support lie at the very heart of the constitutional guarantee of free speech.[70] Consequently, a charity may argue that if it regards a solicitation campaign as necessary to "spread its message," it should be able to contract for such a campaign no matter what the cost. Independent Sector, a group representing the interests of over 450 volunteer groups, has argued that "an organization should be free to pursue stubbornly an unpopular but legitimate charitable objective, free from second-guessing by state authorities."[71]

Thus, it is impossible to view charitable solicitation laws solely in terms of "economic regulation" as distinct from regulation-of-speech interests. Financial decisions relating to how much a charity will spend on fundraising are "inextricably related to policies and objectives."[72] In the eyes of some, percentage limitations on a solicitor's fee are particularly offensive.[73] They prohibit charities from choosing "the activity they deem best to promote their views and information, since they must choose the activity with the lowest cost-to-funds-raised ratio."[74] Disclosure laws which make successful solicitation very difficult, if not impossible,[75] may also add to the impracticability of a charities' ability to use professional solicitation services. As the National Federation of the Blind successfully argued in a recent case, "[i]f indeed the value of the First Amendment is to allow each idea, by whomever held, to reach the marketplace, and if it is our belief there is no such thing as a false idea or false opinion, then this

68 *See* note 180 and accompanying text *infra*; note 240 and accompanying text *infra*.
69 *Thomas v. Collins*, 323 U.S. 516, 530 (1945).
70 ACLU Brief, *supra* note 63, at 21.
71 Brief of Amici Curiae on Behalf of Independent Sector, et al. at 5, *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984) (No. 82-766) [hereinafter Munson Independent Sector Brief].
72 ACLU Brief, *supra* note 63, at 17.
73 For a discussion of the current standing of percentage limitations, *see* notes 330 to 337 and accompanying text *infra*.
74 Munson Independent Sector Brief, *supra* note 71, at 8.
75 For a discussion of the current use of disclosure laws, *see* notes 426 to 503 and accompanying text *infra*.

[type of] legislation inflicts too large a burden [on free-speech rights]."[76]

Charities provide a vital means of expression of the strong value which our society holds for pluralism.[77] The American enthusiasm for pluralistic forms of organizations was noted almost two hundred years ago by Alexis de Tocqueville, in his work *Democracy in America*: "Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive."[78] Charitable solicitation laws which encumber the ability of charities to support and communicate their diverse ideas are contrary to this tradition. Charitable solicitation regulations, by inhibiting charities' means of expression, may ultimately discourage the flourishing of a diversity of ideas and opinions. The National Federation of the Blind has argued that "[c]harities cannot, and should never be judged on the basis of their financial efficiency alone. Charities represent causes, ideas, concepts, and frequently offer an approach, if not a solution, to problems in contemporary society."[79] Individuals may also value their charitable contributions as an important means of self-expression. According to Bruce Hopkins, in *Charities Under Siege*, charitable organizations benefit society through "the variety of choices made by individual philanthropists as to which activities to further."[80]

Pluralistic activity by charities is also thought to foster economic efficiency and diversity regarding public services. John Stuart Mill, in his book *On Liberty*, observed "[g]overnment operations tend to be everywhere alike. With individuals and voluntary associations, on the contrary, there are varied

[76] Brief for National Federation of the Blind at 21, *Riley v. National Fed'n of the Blind of N.C., Inc.*, _ U.S. _, 108 S. Ct. 2667 (1988) (No. 87-328) [hereinafter National Fed'n Brief]. *See Riley v. National Fed'n of the Blind of N.C., Inc.*, __ U.S. _, 108 S. Ct. 2667 (1988); notes 227 to 281 and accompanying text *infra*.

[77] In *Riley v. National Fed'n of the Blind of N.C., Inc.*, the National Federation of the Blind argued that "[o]ur society does benefit, and has benefited historically, by allowing access to the marketplace of ideas by all would-be speakers who come to that place speaking openly and candidly to have their ideas and causes evaluated by society." National Fed'n Brief, *supra* note 76, at 15.

[78] de Tocqueville, Alexis, *Democracy in America* 106 (The Henry Reeve Text, 1980 ed.).

[79] National Fed'n Brief, *supra* note 76, at 15.

[80] Hopkins, *supra* note 48, at 5.

experiments, and endless diversity of experience."[81] Charities ensure a means by which the provision of public services can remain, at least in part, decentralized. Bruce Hopkins argues that charities act as a "bulwark against overdomination by government and a hallmark of a free society . . .; [they] help . . . nourish the voluntary sector of this nation and preserve . . . individual initiative."[82] Chauncy Belknap, in an article entitled "The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy" asserted, "[n]ot only our freedom but our continued progress toward a better life depend in part upon maintaining the rich diversity of values and abilities and the powerful motive force of individual initiative and insight which have hitherto characterized our culture."[83]

Charitable organizations, in general, are not adverse to the development of norms or standards that promote accountability. Within the philanthropic community, several professional fundraising associations and standard-setting bodies have been formed and are working to enhance the credibility and professionalism of charitable organizations, professional fundraisers, and the fundraising industry as a whole.[84] While some private sector associations openly endorse formal regulation enacted by appropriate legislative authorities, and others prefer more informal and private self-regulation, the consensus seems to be that adequate disclosure and ethical standards "will inspire public confidence, not only in the charities themselves, but in the nonprofit sector as a whole, and will ultimately increase public participation in philanthropy."[85] The National Health Council, for example, established a "Committee on Regulatory Legislation" in 1963 to study existing statutes regulating public charitable

[81] Mill, J.S., *On Liberty* 181 (1982 ed.).

[82] Hopkins, *supra* note 48, at 12. Bruce Hopkins argues that "[t]his decentralized choicemaking is arguably more efficient and responsive to public needs than the cumbersome and less flexible allocation process of government administration." *Id.*

[83] Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, reprinted in IV Research Papers Sponsored by the Comm'n on Private Philanthropy and Public Needs: Taxes 154 (1977).

[84] Steele, *supra* note 48, at 152. Some of these organizations include: American Association of Fund-Raising Counsel, Inc. (AAFRC, Inc.); the Philanthropic Advisory Service of the Council of Better Business Bureau (including the New York Philanthropic Advisory Service, NYPAS); and the National Charities Information Bureau (NCIB). *Id.* at 152 n.22.

[85] *NYPAS Standards for Charitable Solicitation*, New York Philanthropic Advisory Service of the Better Business Bureau of Metropolitan New York (June 1988).

solicitations and to discern whether guidelines, standards or principles could not be designed for incorporation in state and local regulatory legislation. The results of that inquiry led to the publication of *Viewpoints: State Legislation Regulating Solicitation of Funds from the Public* in 1965, which was revised in 1971, in 1974, and again in 1976 to reflect changes in financial reporting criteria and specific state experiences.

As the National Health Council explained in its 1984 publication, *The Realities of Charitable Accountability in the 1980s*, "[r]eputable voluntary agencies in the country share heartily in the desire to eliminate abuses that may arise from time to time in the solicitation of gifts from the public for philanthropic purposes."[86] The report stated that the generosity of the American people in giving to worthy causes must be "protected against fraud, deceitful claims and cynical disregard of the charitable purposes for which the funds are sought."[87] It went on, however, to lament the fact that, in its view, regulations "cracking the whip to catch 'charity racketeers' seldom lands on them, but leaves permanent welts on the backs of legitimate charities."[88]

Representatives of various charities were also actively involved with the Model Solicitation Law Project of the National Association of Attorneys General (NAAG) and the National Association of State Charity Officials (NASCO), which worked over a two-and-a-half year period to design a legislative scheme to regulate charitable solicitation. The Private Sector Advisory Group was made up of representatives of charitable organizations, the fund raising profession, and the legal and accounting professions, as well as donor representatives. According to the Group's report of its work, a broad spectrum of private sector concerns was sought and presented, as the group conveyed suggestions, concerns and recommendations to the regulators.[89]

86 National Health Council, *The Realities of Charitable Accountability in the 1980s*, 1-2 (October 1984).

87 *Id.*

88 *Id.* The National Health Council report stated that:

> Voluntary agencies recognize the responsibility of state governments to enact appropriate legislation which will protect the charitable instincts of citizens from exploitation and abuse and to enforce such legislation wisely and impartially. They are concerned, however, that these legislative objectives be accomplished without having adverse consequences for fulfilling the purposes of these agencies.

Id.

89 Private Sector Advisory Group To The Model Solicitations Law Project of the National Association of Attorneys General (NAAG) and National Association of State Charity Officials (NASCO), "A Summing Up," (October 20, 1986) (presented with the "Resolution Adopting a Model Act Concerning the Solicitation of Funds for Charitable Purposes," NAAG Winter Meeting, December 8, 1986).

Indeed, individuals in the Model Solicitation Law Project have commended the Group's work and suggested that the significant impact of the project was in providing a structure of cooperation between the private sector and the regulators, through which the groups reached at least a minimum level of consensus.[90] As a result of the concerted efforts, two-thirds of the main provisions of the first drafts of the Model Act were virtually identical to the provisions of model laws developed by AAFRC and the National Health Council and recommended by the Group, all of which remained in the final draft. Furthermore, the Group also reported that NAAG/NASCO accepted fifty nine additional recommended changes to be included of their final draft.[91]

The New York Philanthropic Advisory Service (NYPAS) of the Better Business Bureau of Metropolitan New York has also promulgated standards for nonprofit management against which it evaluates organizations.[92] The NYPAS standards focus on the five areas of operation which the organization deems essential: public accountability, use of funds, solicitations and informational materials, fundraising practices, and governance. NYPAS reports upon organizations' compliance with the standards and also assists charities in meeting the standards in each area.[93]

Charities thus often have mixed views of state solicitation efforts. Fundraising regulations may reflect a conception of the states' role vis-a-vis charities which is outdated and often insensitive to the varied interests and needs of charities. Solicitation laws, while under the guise of "economic regulation," may be unduly burdensome of charities' free-speech interests. As charities provide an important means of expression of the value of pluralism, charitable solicitation laws must be carefully drawn

90 Telephone conversation with Edward Van Ness, Executive Vice President, National Health Council (Mar. 2, 1989). *See also* Telephone conversation with Ross Laybourn, Administrator of Charitable Trusts, Department of Justice/Portland Division, Charitable Trusts Section (Feb. 15, 1989); Telephone Conversation with Jack Schwartz, Chair of Private Sector Advisory Group, (February 24, 1989) (Notes on file with N.Y.U. Program on Philanthropy and the Law).

91 *See* Private Sector Advisory Group, *supra* note 89.

92 *NYPAS Standards for Charitable Solicitation*, New York Philanthropic Advisory Service of the Better Business Bureau of Metropolitan New York (June 1988).

93 *Id.*

to avoid hampering the continued vitality of charities. Many charities support and have been active in the development of fair standards of accountability, recognizing the need to address state and individual concerns with the integrity of charitable fundraising.

C) State Problems with Charitable Solicitation

The primary state problem with charitable solicitation campaigns is the low percentage of contributions which is often received by a charity.[94] Fundraising, which previously had been largely conducted by unpaid volunteers, has become much more sophisticated and complex.[95] Subsequently, a majority of funds raised often goes to pay the expenses of costly professional campaigns. A 1983-1984 study by the State of North Carolina revealed that charities obtained an average of only 17% of funds raised by professional solicitors.[96] A 1987-88 survey by the State of Connecticut declared that only 26.58% of all charitable contributions solicited by telephone were received by the beneficiary organizations.[97] As solicitors generally exert much control over the operation of a campaign, it may be difficult for the charity or the state to monitor solicitation expenses.[98] Hence, it is asserted that fundraisers, unbeknownst to the contributing public, have in effect purchased a charity's good name and charitable reputation in order to take advantage of the public's charitable generosity.[99]

Some fundraisers simply may not be forthright when they solicit charitable donations. Contributors may be led to believe that most or all of their contribution will go to the charity, when, in fact, much of the contribution may go to pay solicitation

94 Steele, *supra* note 48, at 171.
95 Maryland Brief, *supra* note 42, at 37. *See* notes 15 to 28 and accompanying text *supra*.
96 Motion for Temporary Restraining Order at 40-45, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85-1208-CIV-5).
97 CT Survey, *supra* note 19, at 4-5. *See also 60 Minutes: Donor Beware* 12 (CBS television broadcast, March 12, 1989) (transcript on file at N.Y.U. Program on Philanthropy and the Law) [hereinafter "60 Minutes"] (National Emergency Medicine Association spent three cents on every $1 raised on charitable services during years 1985-1987).
98 *See* note 40 and accompanying text *supra*.
99 Maryland Brief, *supra* note 42, at 38.

expenses[100] or to finance additional solicitation campaigns.[101] According to Betty Griffin, Vice-President of the Better Business Bureau of South Piedmont, North Carolina, "individuals are misled as to whom is conducting the solicitation and what portion of the gross proceeds will actually be received by the sponsor in whose name the charitable appeal has been made."[102] Donors may also be given the impression that they are making a direct contribution to a charity when in actuality they are being sold a ticket for an event or a product.[103] Solicitors often do not reveal that they are being compensated for their services.[104] Finally, charitable solicitors may not forthrightly offer information concerning the donor's opportunity to contribute directly to the charity.[105]

States have also had problems with unscrupulous fundraisers who use actual misrepresentation or fraud in order to obtain charitable donations. Some may misrepresent their membership in the group for whom the funds are being solicited.[106] Professional solicitors may misrepresent or

100 Nancy Hope Willis, a prospective charitable contributor, related the following experience:

> Around the first of June 1985, I was contacted by a young lady who was selling tickets for the Greensboro Firefighters "Toys for Tots" programs. . . .
>
> I then inquired about the percentage of donations that would actually reach the sponsor. She assured me that one hundred percent (100%) of the donation would go to the sponsor. She then added quietly that one hundred percent (100%) would go 'after expenses.'

Affidavit of Nancy Hope Willis, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85- 1208-CIV-5).
101 A recent "60 Minutes" program on abuses by charitable solicitors highlighted this problem. The program focused on a health-care charity claiming to use the vast majority of funds raised for "public education." In reality, the money financed more direct-mail solicitation campaigns, part of which included a short list of health tips. 60 Minutes, *supra* note 97, at 13.
102 Affidavit of Betty Griffin, Vice-President of the Better Business Bureau of South Piedmont, North Carolina at 97, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85-1208-CIV-5).
103 Affidavit of Jim Everest, Executive Director of United Cerebral Palsy of North Carolina, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85- 1208-CIV-5) [hereinafter Everest Affidavit].
104 Affidavit of Norma Messer, president of the Better Business Bureau of Ashville/Western North Carolina, Inc., *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85-1208-CIV-5) [hereinafter Messer Affidavit].
105 Everest Affidavit, *supra* note 103.
106 The experience of Charles Pine is typical of this particular complaint:

> I received a[] call . . . from a man who led me to believe that he was a member of the West Ashville Kiwanis Club. I questioned the man to verify positively if he was a member of the West Ashville Kiwanis Club or a

"overload" their expenses.[107] Some solicitors may engage in abusive or coercive behavior, saying anything "that is necessary to close the 'sale.'"[108] Solicitation campaigns may be run under the guise of charitable appeal when in fact a charity has not authorized the use of its name.[109] Hence, contributors may think that they're supporting a charity which sees none of the contributed money. Fraudulent professional fundraisers have even gone so far as to form their own "charities" in an effort to attract contributions.[110] These charities may have similar sounding names and nearby addresses to legitimate, well-established charities, thus further confusing the prospective donor.[111]

D) Charities Needs and Uses for Solicitation of Contributions

Despite the various problems associated with charitable

member of a professional organization. The man stated that he was not a member of the West Ashville Kiwanis Club. However, he did not reveal that he was a professional solicitor.

Affidavit of Charles Pine, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85-1208- CIV-5).

107 Affidavit of Edwin J. Edgerton, Head of North Carolina Charitable Solicitations Licensing Branch at 218, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85-1208-CIV-5). Potential abuses by professionals include processing direct contributions as purchases of a product (*Id.*), charging two or more charities for the cost of compiling identical donor lists (60 Minutes, *supra* note 89, at 13), and providing solicitation materials, such as printed material, telephones, and supplies, at an inflated price (Deposition of Edwin J. Edgerton at 152, *Riley v. National Fed'n of the Blind of N.C., Inc.*, U.S. __, 108 S. Ct. 2667 (1988) (No. 87-328) [hereinafter Edgerton Deposition]).

108 CT Survey, *supra* note 19, at 3.

109 Messer Affidavit, *supra* note 104, at 105. *See* Edgerton Deposition, *supra* note 107, at 123. The experience of J. Stewart Humphrey, the head of the Eliada Home for Children, a residence for orphaned, neglected, and abused children, illustrates this problem:

> During the summer of 1985, a group promoting a circus to be held at Smiley's flea market [sic] used the name of the Eliada Home without its permission. The Eliada Home strongly opposes the use of its name without permission.
>
> The use of the Eliada Home's name without permission has the potential to cause the Home problems when it seeks to raise money on its own within the community.

Affidavit of J. Stewart Humphrey, *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85- 1208-CIV-5).

110 *Id.*

111 60 Minutes, *supra* note 97, at 11.

solicitation, it remains a necessary device to enable charities to meet their needs, particularly those caused by a rising welfare burden. Professor Steele, in her article, explained that "[c]urrent economic ills have increased dramatically the number of individuals and programs dependant upon the services provided by charitable organizations."[112] The National Health Council, a private, nonprofit association of national health-care organizations, has identified the "wild swings of the economy," along with "the vast movement of women into the workforce, the alarming rise in crime and the degradation of the quality of life" as factors which have increased the demands on charities.[113] Exacerbating the need of charities for increased funding is the concurrent trend of cuts in government support for welfare services.[114] The government has recently sought increasingly to transfer welfare responsibilities to the private sector. Professor Steele has argued that "[t]o some extent, economic policy is being formulated to reflect the assumption that there will be increased giving."[115] In order to meet growing demands, charities are forced to "reach out more widely and experimentally to new constituents."[116]

Charities often depend on professional solicitors in order to raise the funds necessary to accomplish their charitable goals. Many organizations simply have neither the time nor the resources to conduct solicitation campaigns on their own.[117] According to Independent Sector, "fundraising services can be especially important for new, small, controversial, and innovative organizations, as well as established charities seeking new supporters."[118] Such charities may be operated by officers who volunteer their time without the help of a paid

112 Steele, *supra* note 48, at 150.

113 National Health Council, *The Realities of Charitable Accountability in the 1980s*, 1 (October 1984).

114 "As federal, state, and local governments reduce their spending for social and charitable programs, charitable organizations are finding it more difficult to meet and provide for those needs and programs." Steele, *supra* note 48, at 150.

115 *Id.*

116 Brief of Independent Sector in Support of the National Federation of the Blind at 14-15, *Riley v. National Fed'n of the Blind of N.C., Inc.*, __ U.S. __, 108 S. Ct. 2667 (1988) (No. 87-328) [hereinafter Riley Independent Sector Brief].

117 Affidavit of Plaintiff National Federation of the Blind of North Carolina, Inc., *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp. 256 (E.D.N.C. 1986) (No. 85-1208-CIV-5) [hereinafter National Fed'n Affidavit].

118 Riley Independent Sector Brief, *supra* note 116, at 5-6.

administrative staff.[119] These organizations often have few or no volunteers who are able to donate their time to a solicitation campaign. Even if volunteers are available, the charity oftentimes does not have the expertise or the facilities to assemble and run a fundraising campaign.[120] Organizations may be particularly ill-equipped to hold the fundraising events or product sales necessary to generate contributions.[121] For example, the Optimist Club of North Raleigh, which is devoted to spreading their philosophy of optimism, has stated:

> [W]e do not have the manpower or the expertise to put on a variety show . . . without the aid of a professional fundraiser, which we have used for each event in the past . . .. We have very few other outside sources of income and without this source, some of the community projects which we support would be abandoned.[122]

Ultimately, utilization of professional solicitors may be necessary to enable many charities to survive.[123]

Fundraising, including that done by professionals is also an important means for charities to communicate with the public. Many charities may primarily be concerned with advocating ideas or disseminating information. For these groups, a fundraiser's

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119 Brief of Amici Curiae Alabama Sheriff's Ass'n on Behalf of the National Federation of the Blind at 12, *Riley v. National Fed'n of the Blind of N.C., Inc.*, __ U.S. __, 108 S. Ct. 2667 (1988) (No. 87-328) 12 [hereinafter Alabama Brief].

120 *Id.* Bruce R Hopkins, in *Charities Under Siege* describes that role of a professional solicitor in a charitable fundraising campaign. He explains that in order to ensure successful fundraising:

> Advance planning is essential and should include market assessment, such as the conduct of an objective feasibility study. Goals and objectives should be set by matching the carefully defined needs of the institution to the propensity for external support. . . . Leadership must be enlisted, trained, and motivated. Written materials must be developed and produced. Prospective contributors . . . must be identified, researched, rated, assigned to volunteers, contacted, cultivated, and solicited. Proposals must be prepared with budgets and provisions for accountability for the utilization of contributed funds. . . . These, and hundreds of other details from printing pledge cards to selecting menus, from developing meeting agendas to mailing gift acknowledgement receipts, require competent and experienced direction from a full-time, fundraising professional.

Hopkins, *supra* note 48, at 29.

121 *Id.*

122 Affidavit of Plaintiff Optimist Club of North Raleigh, North Carolina, Inc., *Riley v. National Fed'n of the Blind of N.C., Inc.*, 635 F. Supp 256 (E.D.N.C. 1986) (No. 85-1208-CIV-5) [hereinafter Optimist Affidavit].

123 "Indeed, in many cases, the very ability of [charities] to survive financially is dependent upon the services of professional third parties." Alabama Brief, *supra* note 119, at 12.

most important role may be to communicate ideas; the raising of funds may be secondary.[124] The Alabama Sheriff's Association is an example of one such group. Among the most important goals of this organization is to increase public knowledge and recognition of its members and to garner support in order to upgrade salaries and working conditions.[125] By necessity this group must "convey their message to the public in conjunction with one or more specific activities or events such as a sale of products, sale of tickets to a sponsored event, or sale of advertising in an association-sponsored publication" using a professional solicitor.[126] Charities may also rely on solicitors to enhance their name recognition with the general public[127] and to make contact with potential new members and supporters.[128]

Thus, the high cost of solicitation campaigns is an often unavoidable result of several factors and is not a reliable indicator of inefficiency or fraud. Dramatic growth in the charitable community, including an increasing number of single issue groups and advocacy agencies,[129] has forced many organizations to compete more aggressively in the market for the public's charitable dollars.[130] The augmented welfare burden which has befallen charities has compounded this competition.[131] Consequently, charities must broaden their basis of support.

Charities may feel that they must use experimental methods or expensive forms of media in order to raise funds effectively and spread their message. Many charities now use "sophisticated and costly public relations, media, and other means of mass outreach . . .."[132] Some means of communication, of course, will be more expensive than will others.[133] For example, door-to-door solicitation may be more costly than telephone

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124 Optimist Affidavit, *supra* note 122.

125 Alabama Brief, *supra* note 119, at 1-2. Other goals include developing training and educational programs for members, lobbying for legislation and "otherwise espousing and expressing opinions." *Id.* at 2.

126 *Id.*

127 Optimist Affidavit, *supra* note 122.

128 National Fed'n Affidavit, *supra* note 117.

129 *See* note 24 and accompanying text *supra*.

130 *See* notes 29 to 30 and accompanying text *supra*.

131 *See* notes 112 to 115 and accompanying text *supra*.

132 Riley Independent Sector Brief, *supra* note 116, at 15-16.

133 "For example, a professional, four-color, large circulation magazine which is distributed by an organization . . . in furtherance of its goals and objectives will likely result in much higher costs than some other type of fundraising program." Alabama Brief, *supra* note 119, at 9.

solicitation, solicitation by television more expensive than by radio. Charities may expect to incur increased costs if their solicitation campaigns combine the sale of goods or provision of services with raising funds.[134] Charities may use also costly fundraising dinners or other events primarily as an opportunity to introduce their officers to the philanthropic community.[135] A solicitation campaign which encompasses a relatively wide geographic area is another example of how fundraising might garner additional expense.[136]

Finally, solicitation costs may be proportionately very high for new groups, or groups espousing unpopular causes. A solicitor may have to spend much more time explaining the purposes of a little-known charity than she would soliciting for a popular organization. New groups may have to reach out to a broader-based audience in order to gain initial support. Charities embracing unpopular causes may have to solicit from many more people than would more popular charities in order to garner the same amount of funds. As Joseph H. Munson Co., Inc. has argued, "it is logical to assume that the more popular a cause is, the more funds that will be raised in its behalf, and therefore, the lower its fundraising cost per dollar raised will be . . .. Minority views simply cost more to advocate."[137]

Charitable solicitation regulation is a complex area of the law which must balance the interests of both states and charities. States have substantial interests in regulating charitable fundraising; charities have equally substantial interests in conducting their fundraising free of obtrusive government regulation. Many states feel that perceived abuses of charitable fundraising necessitates some measure of regulation. But solicitation is necessary to enable charities to carry out their public service and is furthermore often a valuable means of communicating a charity's message. Thus charitable solicitation laws have been increasingly passed by state legislatures,

134 Riley Independent Sector Brief, *supra* note 116, at 22-23.
135 *Riley v. National Fed'n of the Blind of N.C., Inc.*, __U.S. __, __, 108 S. Ct. 2667, 2675 (1988).
136 According to the Alabama Sheriffs' Association, "statewide associations . . . which seek support on a statewide basis will almost always have larger solicitation costs than organizations seeking support on the local level only." Alabama Brief, *supra* note 119, at 15-16.
137 Brief of Joseph H. Munson Company, Inc. at 23, *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984) (No. 82-766).

challenged by charities or solicitors, and reviewed by courts, resulting in a developing body of case law.

IV) Analytical Tools and Devices

The preceding sections provided a general profile of the underlying impetus for government intervention into the philanthropic sector, the perspectives of the charitable organizations on the asserted state roles, and the realities of charitable solicitation in a changing society. The balance of the article will proceed by focusing on the historical position of the courts as to the constitutional acceptability of state regulations of charitable solicitations. Building on that historical background, the remaining sections will examine the primary tools of judicial review, the lessons to be learned from the most important case law, and various avenues for regulation that may remain open to the government. To understand the complex array of laws and regulations governing charitable solicitation at the state level, and the concerns of both the regulators and the regulated, a logical and coherent framework for examination is invaluable.

The following discussion is premised on the assumption that the government has a proper role vis-a-vis charities which merits regulatory intervention of some kind, although the exact nature and degree of regulation may be subject to debate. Proceeding with this assumption, state regulatory efforts can be categorized according to the point in time at which the regulation affects the charitable organization's fundraising efforts. Specifically, the government can intervene before, during, or after the solicitation. At each of these three points, the government can apply its regulations to the charitable organizations themselves, volunteer fundraisers, or other actors in the fundraising business, such as professional fundraisers or fundraising consultants.

First, the government can assume a position before any charitable solicitation efforts occur at all, and impose "pre-solicitation requirements" upon those who wish to enter the competition for the public's charitable dollar. Pre-solicitation regulations include registration and licensing provisions, mandated disclosure of financial and other information to the state regulatory agency, auditing of organizational records, and certain standards for operation, expenses and record-keeping. Pre-

solicitation requirements thus serve as the necessary prerequisites for legal solicitation.

The next opportunity for governmental regulation of charitable solicitation, along this chronological outline, is at the very point of solicitation. Governmental efforts to regulate fundraising as the actual appeal is occurring, by mandating certain disclosures to each potential donor, have been especially controversial to the private sector. The particulars of state experiences with such "point-of-disclosure" requirements and their continued viability will be examined in the following in-depth discussion.

Finally, the government may also take advantage of chances to regulate charitable fundraising after the solicitation occurs. At this point, the government may devise follow-up disclosure and reporting requirements in order to get more information for official records or for the donating public. During this "post-solicitation" period, the government may also examine compliance with its other pre-solicitation or point-of-solicitation requirements.

An examination of the jurisprudence resulting from challenges to government regulation of charitable fundraisers must begin with cases decided by the Supreme Court. The Supreme Court has recently focused a significant amount of attention on the legal issues involved in charitable solicitation with decisions in three major cases, beginning in 1980 with *Schaumburg v. Citizens for a Better Environment*.[138] Earlier Supreme Court cases, however, lay an important foundation for understanding how the Court views charitable solicitation in a constitutional context.

V) Historical Background on the First Amendment Protection of Charitable Solicitation

In *Schaumburg v. Citizens for a Better Environment*, the Court declared door-to-door solicitation to be under the rubric of free speech, thus entitling it to the full protection of the First Amendment against state interference.[139] The notion that charitable solicitation deserves full First Amendment protection,

138 444 U.S. 620 (1980). *See Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Riley v. National Fed'n of the Blind of N.C., Inc.*, __ U.S. __, 108 S. Ct. 2667 (1988).

139 444 U.S. 620 (1980).

however, did not begin with the *Schaumburg* case. In fact, charitable solicitation has historically been protected by both the free-speech and free-exercise-of-religion clauses of the First Amendment. Among the most compelling statements in support of the protection of door-to-door solicitation is the introductory paragraph to Justice Hugo Black's majority opinion in *Martin v. City of Struthers*:[140]

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community.[141]

In 1940, the Supreme Court decided *Cantwell v. Connecticut*,[142] a landmark case because it was the first to hold that the religious freedom clauses of the First Amendment are fully applicable against the states.[143] At issue in *Cantwell* was a Connecticut statute that forbade any person from "solicit[ing] money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause . . . unless such cause shall have been approved by the secretary of the public welfare council."[144] The statute gave broad discretion to the Secretary to determine whether or not a potential solicitor represented a bona fide religious, charitable or philanthropic organization.[145] Three Jehovah's Witnesses, who were soliciting contributions as well as selling and distributing books and pamphlets on the street and door-to-door, were convicted for failing to comply with the statute. The Supreme Court held that the statute, by placing unbridled discretion in the hands of the licensing officer, acted as a prior restraint on the free exercise of religious views and, as such, was unconstitutional.[146] Although

140 319 U.S. 141 (1943).
141 *Id.* at 141.
142 310 U.S. 296 (1940).
143 *Id.* at 303.
144 *Id.* at 301-302.
145 *Id.* at 302.
146 *Id.* at 307. To support its position that the Connecticut statute violated the First Amendment freedom of religion clause, the Court stated that:

Cantwell was expressly based on the free-exercise-of- religion clause, subsequent decisions have consistently read *Cantwell* as providing free-speech protection to non-religious solicitation as well.[147]

Cantwell has become one of the leading cases for the protection of basic First Amendment rights. But it is noteworthy that six months prior to the *Cantwell* decision, in *Schneider v. State*,[148] the Supreme Court had granted similar protection to four separate petitioners who had been convicted under the laws of four different states.[149] Of the four distinct statutes involved in *Schneider*, the relevant statute for this discussion was an Irvington, New Jersey ordinance that prohibited door-to-door solicitation without a written permit from the Chief of Police. In order to obtain a permit, an applicant was required to file a detailed application, which included fingerprints and photographs of the potential solicitors. As in *Cantwell*, the issuing officer under the Irvington ordinance was granted the discretion to conduct investigations into the background of both the individual solicitors and the charitable organizations.[150]

Relying on a similar case, *Lovell v. City of Griffin*,[151] the Court specified door-to-door solicitation as a particularly powerful method for the exercise of guaranteed First Amendment rights, noting that "perhaps the most effective way of bringing [pamphlets] to the notice of individuals is their distribution at the

to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. *Id.*

147 *See Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 629 (1980) (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977)). For discussion of Schaumburg, *see* notes 174 to 196 *infra*.

148 308 U.S. 147 (1939).

149 The important difference between *Cantwell and Schneider* is that, despite the fact that the former has become a case of greater historical significance, the latter was decided directly under the rubric of freedom of speech and of the press. *See Cantwell*, 310 U.S. at 303; *Schneider*, 308 U.S. at 160.

150 *Schneider*, 308 U.S. at 158.

151 303 U.S. 444 (1938). The statute in Lovell, prohibited any distribution of literature without prior approval by the City Manager of the city. *Id.* at 447. The Supreme Court struck it down, since the overly broad measures subjected the free press to censorship through licensing without clarifying any standards by which the material was to be reviewed. *Id.* at 451.

homes of the people."[152] The Court went on to state that "to require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."[153] Thus, the *Schneider* Court held that the Irvington ordinance was unduly burdensome as applied to the petitioner, a Jehovah's Witness. The Court did not, however, overturn the ordinance on its face because it recognized that "there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty."[154] The Court acknowledged the legitimate state interest in the prevention of fraudulent appeals as well as the interest in establishing reasonable limits to the hours during which charitable solicitation may be conducted.[155]

The petitioner in *Martin v. Struthers*,[156] decided four years after *Schneider*, was also involved in door-to-door distribution of literature to advertise a religious meeting. She was found guilty of violating a town ordinance which completely banned door-to-door solicitation.[157] In striking down the ordinance, the Court recognized not only the right of the solicitor to disseminate information, but the right of the target of the solicitation to receive the information, stating that "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved."[158] Again, the Court recognized that a municipality may have a legitimate interest in establishing reasonable time, place and manner regulations so that homeowners need not be disturbed at unreasonable hours, and also in deterring criminals who pose as solicitors.[159] The Court held this particular statute to create an unconstitutional burden on free speech and concluded that this "stringent prohibition can

152 *Schneider*, 308 U.S. at 164.

153 *Id.*

154 *Id.* at 165.

155 *Id.*

156 319 U.S. 141 (1943).

157 *Id.* at 142.

158 *Id.* at 146-47.

159 *Id.* at 147. But the *Martin* Court found the "dangers" of door-to-door solicitation could "easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors." *Id.*

serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."[160]

In *Murdock v. Pennsylvania*,[161] decided on the same day as *Martin*, the Court struck down an ordinance that established a licensing system for canvassers and solicitors. Potential solicitors were required to pay a fee based on the length of time that they planned to carry on their campaign.[162] The Court agreed that a registration requirement was reasonable, but that the fee served as a flat licensing tax on the protected First Amendment freedoms. The Court held that "[t]he power to impose a license tax of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."[163] The Court acknowledged that those seeking to exercise First Amendment rights are not exempt from financial burdens imposed by the government. However, the tax in this case was considered a flat rate tax imposed as a condition to the exercise of those rights and served no apparent governmental purpose.[164]

The Supreme Court remained relatively silent on the issue of charitable solicitation until 1976. Perhaps serving advanced notice of the interest in charitable solicitation that it would develop in later cases, the Court reasserted its protection of door-to-door solicitation in *Hynes v. Mayor of Oradell*.[165] An Oradell, New Jersey, ordinance required all those wishing to engage in canvassing for a political cause or soliciting for a recognized charity to register with the town police department. The proffered reason for this requirement was to prevent crime, and to keep a record of those walking door-to-door throughout the primarily

160 *Id.*
161 319 U.S. 105 (1943).
162 *Id.* at 106.
163 *Id.* at 113 (citing *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *Largent v. Texas*, 318 U.S. 418 (1943); and *Jamison v. Texas*, 318 U.S. 413 (1943)). For discussion of *Lovell*, *see* note 151 *supra*.
164 *Id.* at 114. The Court has since held that a licensing fee is not per se unconstitutional. In fact, most states do impose a modest fee on parties wishing to conduct charitable solicitation. For discussion of state fee provisions, *see* notes 372 to 390 and accompanying text *infra*. The scrutiny focuses on whether or not the fee is reasonable and whether it is related to the administrative costs of filing the registrations. A reasonable license fee is not necessarily an unconstitutional prior restraint on the exercise of First Amendment rights.
165 425 U.S. 610 (1976).

residential town.[166] The Court again recognized a municipality's power to "protect its citizens from crime and undue annoyance by regulating soliciting and canvassing."[167] The majority noted that a "narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear may serve these interests without running afoul of the First Amendment."[168] The Oradell ordinance, however, "ran afoul of the First Amendment" because it was unconstitutionally vague.[169] The Court noted that the ordinance did not elucidate the meaning of the phrase "recognized charity" or political "cause," nor did it clarify exactly what was required of a potential solicitor when "notifying" the police of plans to solicit.[170]

Thus, it is quite clear that charitable solicitation has long enjoyed the protection of the First Amendment. As seen in *Cantwell*, this protection was initially based on the right to the free exercise of religion. As the case law developed, it became increasingly clear that charitable solicitation should more properly be considered a free-speech right. Nonetheless, the Supreme Court has consistently noted the fact that the states have valid interests that can be used to justify the regulation of charitable solicitation. It did not, however, explicate the proper methods for the states to use in pursuit of these valid interests. The extent to which the states can go toward this end has been an important topic in the past decade, and is deserving of a more careful examination. There have been recent cases throughout both the state and federal court systems that have furthered the development of the proper regulation of charitable solicitation.

VI) Recent Supreme Court Solicitation Cases

Since 1980, the Supreme Court has decided three cases concerning charitable fundraising which have had significant

166 *Id.* at 613 n.2.
167 *Id.* at 616-617.
168 *Id.* at 617.
169 *Id.* at 620. Vagueness is a doctrine used for constitutional scrutiny of statutes that are ambiguous as to their scope of application. The basic principle used to determine vagueness is that if "men of common intelligence must necessarily guess at its meaning," then the statute is unconstitutionally vague. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).
170 *Hynes*, 425 U.S. 621.

impact on the manner in which states can regulate professional solicitation campaigns. After a brief description of the cases, each will be discussed in turn. In the first case, *Schaumburg v. Citizens for a Better Environment*,[171] the Court invalidated an ordinance requiring at least 75% of all donated funds to be applied to "charitable purposes." In the second case, *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*,[172] the Court struck down a 25% limit on fundraising expenses, even though the statute contained a provision excluding charities which could prove that this limitation would altogether prevent them from raising funds. Finally, in 1988, the Court decided *Riley v. National Federation of the Blind of North Carolina, Inc.*,[173] finding several provisions of a state solicitation regulation to be impermissible infringements on free-speech rights. The North Carolina statute contained flexible percentage limitations on solicitation fees, oral disclosure requirements, and licensing prerequisites which the Court found to be unconstitutional.

A) *Schaumburg v. Citizens for a Better Environment*

A Village of Schaumburg, Illinois, ordinance prohibited door-to-door or on-street solicitation of charitable contributions if the charity did not use at least 75% of the donations for "charitable purposes." Such purposes did not include solicitation expenses, salaries, overhead, and other administrative expenses.[174] The Citizens for a Better Environment (CBE) requested permission to solicit in the Village, but were denied a permit because they could not demonstrate that 75% of the collected funds would go to

171 444 U.S. 618 (1980).
172 467 U.S. 947 (1984).
173 __U.S. __, 108 S. Ct. 2667 (1988).
174 *Schaumburg*, 444 U.S. at 624 (quoting Schaumburg, Ill., Ordinance No. 1052 (1974)). Solicitors had to provide "satisfactory proof" of compliance with the 75% requirement including "a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization . . .." *Id.* at 624 n.4 (quoting Schaumburg, Ill., Ordinance No. 1052, §22-20).

"charitable purposes."[175] CBE then sued the Village on the grounds that the Schaumburg ordinance was unconstitutional.[176]

In 1980, the Supreme Court, in an eight-to-one decision,[177] found the Schaumburg ordinance to be a direct and substantial limitation on free-speech rights. It ruled that the statute was facially overbroad and could not be sustained, as the government's interests in preventing fraud and protecting public safety could be served by means less intrusive of free-speech rights. The *Schaumburg* Court held charitable solicitation to be within the protections of the First Amendment.[178] It then categorized the Schaumburg ordinance as overbroad,[179] as there existed a class of charities to which it could not be constitutionally applied. Organizations whose "primary purpose" was to "gather and disseminate information about and advocate positions on matters of public concern" would necessarily spend more than 25% on fundraising expenses.[180] Although these charities might pay only "reasonable" salaries, they would be completely barred from solicitation in the Village.[181] The statute was thus a "direct

175 *Id.* at 625. CBE was organized for the purpose of "protecting, maintaining, and enhancing the quality of the Illinois environment." *Id.* at 624. CBE employed canvassers who: (1) distributed literature and answered questions on environmental topics, (2) solicited contributions for the organization, and (3) received grievances and complaints about the environment. It spent an average of 23% of its income on fundraising annually. *Id.* at 626.
176 *Id.* at 625. CBE alleged that the ordinance violated the First and Fourteenth Amendments. *Id.*
177 Justice White wrote the opinion for a majority of eight. *Id.* at 622.
178 *Id.* at 633. The Court held that "[o]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money." *Id.* (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1976) (citation omitted)). In footnote seven, the Court asserted that decisions holding commercial speech to be excluded from First Amendment protection are no longer good law. *Id.* at 632 n.7.

The Court had previously held that commercial speech concerning lawful activity, which is not misleading, is subject to some degree of constitutional protection. In *Central Hudson Gas & Electric v. Public Service Comm'n*, the Court set forth the test for determining the constitutionality of a particular regulation of commercial speech. The Court held that in order to withstand scrutiny, regulation of commercial speech must serve a substantial government interest, must directly advance the asserted government interest, and cannot be more extensive than is necessary to serve that interest. 447 U.S. 557, 561 (1980). *See generally* Stone, Theorizing Commercial Speech, 11 Geo. Mason U.L. Rev. 95-114 (1988); Note, Toward a Definition of Commercial Speech, 23 New Eng. L. Rev. 595-614 (1988); Recent Development, Trends in First Amendment Protection of Commercial Speech, 41 Vand. L. Rev. 173-206 (1988).
179 *See* notes 290 to 295 and accompanying text *infra*.
180 *Schaumburg*, 444 U.S. at 635.
181 *Id.*

and substantial limitation on protected activity" which could not be upheld unless it served a compelling government interest that the Village was entitled to protect.[182]

The Court next examined the Village of Schaumburg's proffered interests in "protecting the public from fraud, crime and undue annoyance" and found them inadequate. It noted that these interests were only peripherally promoted by the charitable solicitation ordinance.[183] The Village argued that any charity using more than 25% of its receipts on fundraising was fraudulently charitable.[184] The Court, however, emphasized that it is not possible to label groups concerned with research, advocacy, and public education, typical of those likely to incur high solicitation costs, as fraudulent.[185] The Court also failed to perceive any relationship between the amount of solicitation fees and nuisance problems. The majority argued that the 75% requirement protects privacy "only by reducing the total number of solicitors."[186]

The *Schaumburg* Court also labeled the government's interests inadequate because they could be served by "measures less destructive of First Amendment interests."[187] The prevention of fraud could be better served by prohibiting fraudulent misrepresentation.[188] Disclosure of the finances of a charity could also prevent fraud by "informing the public of the ways in which their contributions will be employed."[189] The Court held the Schaumburg ordinance to be unconstitutional as it was a "direct and substantial limitation on protected activity" which was not outweighed by a compelling government interest.[190]

182 *Id.* at 636. *See* notes 296 to 308 and accompanying text *infra.*
183 *Schaumburg*, 444 U.S. at 636.
184 *Id.* According to the Village of Schaumburg, any such organization qualifies as a "commercial, for profit enterprise and that to permit it to represent itself as a charity is fraudulent." *Id.*
185 *Id.* at 637. The Court argued that "[n]or may the Village lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking." *Id.*
186 *Id.* The Court further stated that "[t]he ordinance is not directed to the unique privacy interests of persons residing in their homes because it applies not only to door-to-door solicitation, but also to solicitation on 'public streets and public ways.'" *Id.*
187 *Id.* at 636.
188 *Id.* at 637.
189 *Id.* at 638.
190 *Id.* at 636.

Justice Rehnquist, in the dissent, argued that the challenged ordinance "deal[t] not with the dissemination of ideas, but rather with the solicitation of money."[191] He explained that charitable solicitation must be analyzed as commercial speech. He reasoned that "I believe that a simple request for money lies far from the core protections of the First Amendment."[192] Justice Rehnquist argued that the Court's holding was infirm as it gave no guidance as to how municipalities should separate those charities primarily concerned with communicating ideas to the public from those which merely emphasized fundraising. He argued that the Schaumburg community's interests in the ordinance were valid and concluded that "nothing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door to door while at the same time insulating themselves against panhandlers, profiteers, and peddlers."[193]

The *Schaumburg* opinion contains a footnote which appeared to give additional guidance as to what type of fundraising regulations the Court would find constitutional. In footnote nine, the Court wrote approvingly of a charitable solicitation statute, differing from the Village of Schaumburg's, which had been upheld by a California district court.[194] The California ordinance contained a provision permitting an organization unable to comply with a 25% limitation on fundraising expenses to demonstrate the "reasonableness" of its costs.[195] Through this dictum, the Court seemed to signal its support of percentage limitations qualified by a "reasonableness" exception. Thus the stage was set for the next examination of charitable solicitation laws in *Secretary of State of Maryland v. Munson.*[196]

B) *Secretary of State of Maryland v. Munson*

In 1984, a five-to-four Court decided *Secretary of State of Maryland v. Munson*, overturning a charitable solicitation statute

191 *Id.* at 641 (Rehnquist, J., dissenting).
192 *Id.* at 644.
193 *Id.*
194 *Id.* at 625 n.9. *See National Found. v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970).
195 *See National Found.*, 415 F.2d at 46-47.
196 467 U.S. 947 (1984).

containing a provision excepting charities incurring legitimately high fundraising costs.[197] The Maryland statute prohibited charities from paying more than 25% of funds raised for solicitation expenses. It authorized a waiver of the limitation, however, if a charity could prove that this requirement would effectively prevent the charity from raising contributions.[198] A professional fundraising company brought suit, based on its position that its contract with a particular charity, the Fraternal Order of Police, should not be subject to this regulation.[199]

The *Munson* Court found the statute to infringe free-speech rights impermissibly. The Court took notice of the "chilling effect" of the percentage limitation, and concluded that the possibility of waiver did not remedy the defects of the statute.[200]

The primary question for the *Munson* Court was the one which the *Schaumburg* decision left open: "whether the constitutional deficiencies in a percentage limitation on funds expended in solicitations are remedied by the possibility of an administrative waiver of the limitation for a charity that can demonstrate financial necessity."[201] The Court held that, because a waiver could be granted only for financial necessity, it would not apply to charities whose solicitation costs were high for nonfinancial reasons. A "nonfinancial" reason might include, for example, a charity's decision to disseminate information as part of a fundraising campaign.[202] Legitimate charities could still find themselves "barred by the statute from carrying on those

197 *Id.* at 950. Justice Blackmun's majority opinion was joined by Justices Brennan, White, Marshall, and Stevens. Justice Rehnquist's dissenting opinion was joined by Chief Justice Burger and Justices Powell and O'Connor. *Id.* at 949.
198 *Id.* at 950-51 (citing Md. Code Ann. §103 A, Art. 41 (1982)).
199 *Id.* at 950. Munson asserted that it regularly charged the Fraternal Order of Police more than 25% of the gross raised for the event it promotes. *Id.* at 950-51.
200 *See* note 292 *infra*.
201 *Id.* at 962. *See* notes 194 to 195 and accompanying text *supra*.
The Court first held that Munson had standing to bring this suit. Munson's clients were reluctant to contract with him and he faced possible criminal prosecution because of noncompliance with the statute. Consequently, he satisfied the "case" or "controversy" requirement as he had suffered both actual and threatened injury. *Id.* at 954-55. The Court found that prudential considerations also dictated that Munson be granted standing as one representing the interests of the charities regulated by the statute. The Court explained that standing requirements are often more liberal if there is a danger that a statute might have a "chilling effect" on free-speech. *Id.* at 956. *See* note 292 *infra*.
202 *Munson*, 467 U.S. at 963. *See* notes 124 to 128 and accompanying text *supra*.

protected First Amendment activities."[203] Consequently, the Court ruled that the waiver provision did not "save the statute."[204]

The Court stated that the Maryland statute was unconstitutional not only because it allowed impermissible applications, but also because it was overbroad, or "facially invalid."[205] The majority explained that the statute "in all its applications falls short of constitutional demands."[206] The statute was based on "a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud."[207] The possibility of waiver may have decreased the number of impermissible applications of the statute, but, in the Court's opinion, it did not remedy this fundamental defect.[208] The majority held that the means chosen to accomplish the state's goal were too imprecise and created a risk of "chilling free speech."[209]

The Court emphasized that its conclusion was not altered by various distinctions between the Maryland statute and the ordinance in *Schaumburg*. First, the Court dismissed the State's contention that the statute did not impose a "prior restraint" on fundraising, pointing out that registration requirements for professional solicitors may present the opportunity of "'before-the-fact' prohibition on solicitation."[210] The majority also argued that "whether the statute regulates before- or after-the-fact makes little difference in this case" because of the danger of a "chilling effect" on free speech.[211] The Court found the fact the statute

203 *Munson*, 467 U.S. at 963-64.
204 *Id.* at 962.
205 *Id.* at 968. *See* notes 290 to 295 and accompanying text *infra*.
206 *Munson*, 467 U.S. at 966.
207 *Id.* The Court explained:
> That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or simply attributable to the fact that the charity's cause proves to be unpopular.

Id. at 966-67.
208 *Id.* at 968.
209 *Id.* at 969. *See* note 292 *infra*.
210 *Munson*, 467 U.S. at 968-69. The Court explained that every professional solicitation contract must be filed with the Secretary of State before fundraising can begin. Also, the Secretary of State must approve each registration of a professional solicitor or professional solicitation counsel. *Id.* at 969.
211 *Id.* The Court asserted: "Whether the charity is prevented from engaging in First Amendment activity by the lack of a solicitation permit or by knowledge

restricted only fundraising expenses, and not other charitable expenses, to be inconsequential.[212] Finally, it addressed the State's claim that the statute was fair as it regulated all charitable fundraising, not just door-to-door solicitation. The Court concluded that "the statute's aim is not improved by the fact that it fires at a number of targets."[213]

Justice Rehnquist again wrote a dissenting opinion, this time joined by Chief Justice Burger and Justices Powell and O'Connor.[214] He characterized the Maryland statute as "controlling the external, economic relations between charities and professional fundraisers"[215] and labeled its impact on free-speech rights as "incidental and indirect."[216] The dissent contended that the statute served "a number of legitimate and substantial government interests,"[217] including guarding against the "element of 'fraud' in soliciting money 'for' a charity when in reality that charity will see only a small fraction of the funds collected."[218] The dissent concluded that the Maryland statute was not overbroad as "expenses associated with advocacy and public education would be completely excluded from the fundraising calculus,"[219] thereby ensuring the "extensive legitimate application of [the] statute."[220]

In *Munson*, as in *Schaumburg*, there were several points of interest in footnotes to the Court's opinion. In footnote twelve, the Court labeled the requirement of a license for the

that its fundraising activity is illegal if it cannot satisfy the percentage limitation, the chill on the protected activity is the same." *Id.*

212 *Id.* The Court argued that this distinction would "mean only that the statute will not apply to as many charities as did the ordinance in Schaumburg." *Id.*

213 *Id.* at 969-70.

214 *Id.* at 975 (Rehnquist, J., dissenting). Justice Rehnquist first rejected the majority's decision to grant Munson standing, arguing that Munson should not be allowed to argue that the Maryland statute was unconstitutionally applied to others. *Id.*

215 *Id.* at 979. The dissent argued that the Maryland statute was "merely an economic regulation controlling the fees the [fundraising] firm is permitted to charge." *Id.*

216 *Id.* "Of course, a ceiling on the fees charged by professional fundraisers may have an incidental and indirect impact on protected expression . . . in that marginal producers could be forced out of the market." *Id.*

217 *Id.* at 980. These interests include the prevention of the diversion of charitable funds to private gain, the encouragement public confidence that the money designed for charity goes to charitable purposes, and the carrying out of donors' expectations. *Id.*

218 *Id.*

219 *Id.* at 984.

220 *Id.* at 985.

information are paid.[223] The Court also firmly dismissed the dissent's contention that there is an "element of fraud" in high fundraising costs, noting that a charity's purpose could include public education and other legitimate charitable goals which might result in increased costs.[224] The Court concluded that concerns about unscrupulous fundraisers could be accommodated directly "through disclosures and registration requirements and penalties for fraudulent conduct."[225] Both disclosure provisions and licensing requirements were among the contested provisions in a case which would serve as the next testing ground for regulation of charitable solicitation: *Riley v. National Federation of the Blind of North Carolina, Inc.*[226]

C) *Riley v. National Federation of the Blind of North Carolina, Inc.*

In 1988, the Court decided *Riley v. National Federation of the Blind of North Carolina, Inc.*, invalidating several provisions of the North Carolina Charitable Solicitation Act.[227] The Act forbade professional fundraisers from charging "excessive or unreasonable" fees.[228] For this purpose, fees were defined to fall into three categories: (1) fees of less than 20% were automatically labeled as "reasonable"; (2) fees of between 20% and 30% were presumptively "excessive and unreasonable," unless the charity could prove the solicitation involved "dissemination of information, discussion, or advocacy relating to public issues;" and (3) fees of 35% or more were "excessive and unreasonable" unless they could be proved "necessary" to the campaign.[229] The North Carolina statute also required professional fundraisers to

223 *Id.* at 967 n.16.

224 *Id.* at 967-68 n.16.

225 *Id.* at 968 n.16.

226 __U.S. __, 108 S. Ct. 2667 (1988).

227 *Id.* at 2669-70.

228 *Id.* at 2671. North Carolina General Statute 131c stated, in relevant part: "[n]o professional fund-raising counsel or professional solicitor who contracts to raise funds for a person established for a charitable purpose may charge such person established for a charitable purpose an excessive and unreasonable fund-raising fee for raising such funds." *Id.* (citing N.C. Gen. Stat. §131c-3(5a) (1986)).

229 *Id.* at 2671 (citing §131C-17.2). The statute defined fees as "necessary" when caused by (1) the dissemination of information, discussion, or advocacy relating to public issues or (2) the otherwise inability of the charity to communicate its ideas. *Id.* at n.2.

disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[230] and to apply for and obtain a license from the Department of Human Resources, without which they could not solicit.[231]

Using a strict scrutiny standard, the *Riley* Court found the statute's percentage limitations not to be sufficiently narrowly tailored to the state's interest in preventing fraud. The Court held the disclosure requirements unconstitutionally burdensome of free-speech interests. Finally, the Court invalidated the professional licensing provisions because they allowed an unlimited delay and discretion in the issuance of licenses.

The *Riley* Court first addressed the North Carolina "reasonable fee" provision.[232] It cited *Schaumburg* and *Munson* for the proposition that the use of percentages to decide the legality of fundraisers' fees was not "narrowly tailored to the State's interest in preventing fraud."[233] The Court next examined the state's interests in regulation of fees: to ensure both that the maximum amount of funds was to reach a charity, and that the fee charged charities was not "unreasonable."[234] The Court rejected the "underlying premises" of these interests, that is, that charities are both unable to negotiate fair contracts and incapable of deciding for themselves the most effective way to exercise their free-speech rights.[235] The Court argued that "[t]here is no reason to believe that charities have been thwarted in their attempts to speak or that they consider the contracts in which they enter to be anything less than equitable."[236] The Court emphasized that charities must

230 *Id.* at 2671 (citing §131C-16.1). The Act provided that prior to any appeal for funds, a professional solicitor must disclose to potential donors: (1) his or her name, (2) the name and address of his or her employer, and (3) the average percentage of gross receipts actually turned over to charities by the fund-raiser for all charitable solicitations conducted in North Carolina within the previous twelve months. *Id.* at n.3. Only the third disclosure requirement was challenged. *Id.*

231 *Id.* at 2672 (citing §131 C-6). The North Carolina General Statutes provided, in relevant part, "[a]ny person who acts as a professional fund-raising counsel or professional solicitor shall apply for and obtain an annual license from the Department [of Human Resources], and shall not act as a professional fund-raising counsel or professional solicitor until after obtaining such license." *Id.* at n.4.

232 *See* notes 228 to 229 *supra.*

233 *Riley*, __ U.S. at __, 108 S. Ct. at 2673. *See* notes 187 to 190 and accompanying text *supra.*

234 *Riley*, __ U.S. at __, 108 S. Ct. at 2674.

235 *Id.*

236 *Id.*

be allowed to exercise their own judgment concerning speech issues without interference from the government. The majority wrote that "[f]ree and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities."[237]

The *Riley* Court next proposed several reasons charities might legitimately incur fundraising fees above the proscribed percentage limitations. It suggested that a charity might choose to conduct a certain type of campaign or hire a professional fundraiser with the expectation of an increase in the *total* amount of donations received, even if the percentage of dollars remitted to the charity were smaller.[238] A charity might also organize a solicitation campaign which would "sacrifice short term gains in order to achieve long-term, collateral, or non-cash benefits."[239] For example, a charity might use a solicitation campaign as an opportunity to advocate or disseminate information.[240] The Court concluded "even if the State has a valid interest in protecting charities from their own naivete or economic weakness, the Act [is] not . . . narrowly tailored to achieve it."[241]

The Court next found the provision allowing a solicitor to rebut the presumption of "unreasonability" to be of no significance in evaluating the constitutionality of the statute. The Court reaffirmed its previous holding that there exists no nexus between "the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent,"[242] and further argued that "[p]ermitting rebuttal cannot supply [this] missing nexus . . .."[243] The Court found particularly burdensome the requirement that a fundraiser rebut the presumption of fraud by proving either that the high costs were "necessary" to the campaign or that the solicitation involved communication of information.[244] The Court concluded that the North Carolina

237 *Id.* at 2675. The Court further argued that "we presume that speakers, not the government, know best both what they want to say and how to say it." *Id.* at 2674.

238 *Id.* at 2675.

239 *Id. See notes* 124 to 128 and accompanying text *supra.*

240 *Riley*, __ U.S. at __, 108 S. Ct. at 2675.

241 *Id.*

242 *Id.*

243 *Id.* The Court asserted that "imposing [a state's] notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test." *Id.*

244 *Id.* at 2675-76. The Court also noted that even if a solicitor submits "[p]roof that the solicitation involved the advocacy or dissemination of information . . .

statute would unconstitutionally chill free speech because "every fundraiser will be faced with the knowledge that every campaign incurring [high] fees . . . will subject them to potential litigation."[245]

The Court then discussed North Carolina's disclosure requirements which mandated that fundraisers disclose to prospective donors the percentage of funds collected over the past year which had been actually turned over to charity.[246] Although North Carolina argued that states have the right to regulate fundraising as "commercial speech,"[247] the Court refused to separate the parts of solicitation involving information and advocacy from the purely commercial parts. It asserted that "we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."[248] The Court labeled this requirement as a "content-based" regulation, as it mandated speech that the speaker would not otherwise make.[249] The majority also discounted the State's distinction that compulsory disclosure laws compelled speech, rather than compelling silence.[250] It thus held that speech associated with charitable solicitation must be judged as "fully protected speech."[251]

Subjecting the North Carolina statute to "exacting First Amendment scrutiny," the Court held it unconstitutional.[252] The majority concluded that North Carolina's interests were not

the factfinder . . . may still decide that the costs incurred or the fundraiser's profit were excessive." *Id.* at 2676.

245 *Id.* The Court explained that "the fundraiser must bear the cost of litigation and the risk of a mistaken adverse finding by the factfinder, even if the . . . fee was in fact fair." *Id.*

246 *See* note 230 *supra.*

247 *Riley*, _ U.S. at _, 108 S. Ct. at 2677. North Carolina argued that a professional solicitor voiced "commercial speech," as it related only to "the professional fundraiser's profit from the solicited contribution." *Id.*

248 *Id.*

249 *Id.* The Court explained that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Id.*

250 *Id.* The Court explained that

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.

Id. (emphasis in original).

251 *Id.*

252 *Id.* at 2678. *See* notes 296 to 308 and accompanying text *infra.*

"weighty enough,"[253] and the means chosen to accomplish these interests were "unduly burdensome and not narrowly tailored."[254]

The Court held insufficient the State's interest in informing donors "how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity."[255] The majority argued that this danger was "not as great as might initially appear [because] the State mistakenly had assumed that a charity derives no benefit from funds collected but not turned over to it."[256] The Court explained that when a charity combines solicitation with advocacy and dissemination of information, "the charity reaps a substantial benefit from the act of solicitation itself."[257] Also, an unchallenged portion of the disclosure provision required professional solicitors to reveal their professional status to prospective donors. The Court found this requirement to provide sufficient notice to the solicitee that "at least a portion of the money contributed [would] be retained."[258] The Court also pointed out that donors are "undoubtedly aware that solicitations incur costs" and that donors are "free to inquire how much of their donation will be turned over to the charity."[259]

The majority found the compulsory disclosure requirement unduly burdensome as it would "almost certainly hamper the legitimate efforts of fundraisers to raise money for the charities they represent."[260] First, the Court stated that the provision discriminated against small or unpopular charities, which oftentimes are forced to rely upon professional fundraisers. The Court explained that if a charity is able to rely upon volunteers or its own employees for fundraising, it would not be subject to the disclosure requirement. The Court explained the "predictable result [of this requirement is] that such solicitations will prove

253 *Riley*, _ U.S. at _, 108 S. Ct. at 2678.

254 *Id.*

255 *Id.* at 2678.

256 *Id.*

257 *Id.* "Thus, a significant portion of the fundraiser's 'fee' may well go toward achieving the charity's objectives even though it is not remitted to the charity in cash." *Id.* *See* notes 124 to 128 and accompanying text *supra.*

258 *Riley*, _ U.S. at _, 108 S. Ct. at 2678-79.

259 *Id.* at 2679.

260 *Id.*

unsuccessful."[261] Second, the Court argued that the effect of the disclosure was likely to be fatal to the solicitation because "the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone."[262]

The Court suggested several alternatives to the disclosure provision, which it labeled "more benign and narrowly tailored."[263] It noted that states could publish the detailed financial information which they receive from fundraisers. The majority explained that "this procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation."[264] The Court also suggested that states could vigorously enforce their anti-fraud laws, thereby preventing professional solicitors from "obtaining money on false pretenses or . . . making false statements."[265] The Court stated that: "'[b]road prophylactic rules in the area of free expression are suspect,'" emphasizing that "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'"[266]

Lastly, the Court addressed North Carolina's statutory provision requiring fundraisers to obtain a license before engaging in solicitation, while allowing volunteers or fundraisers employed by a charity to solicit immediately upon submitting their license application.[267] The majority reaffirmed that professional solicitors have the same free-speech rights as those not compensated.[268] It emphasized that a state's licensing power carries with it, unless properly constrained, "the power directly and substantially to affect the speech [which fundraisers] utter" and, therefore, was also subject to strict scrutiny analysis.[269] The Court held the North Carolina solicitation statute infirm as it

261 *Id.* The Court noted that "the identical solicitation with its high costs and expenses, if carried out by the employees of a charity or volunteers, results in no compelled disclosure, and therefore greater success." *Id.*
262 *Id.*
263 *Id.*
264 *Id.*
265 *Id.*
266 *Id.* at 2679-80 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).
267 *Id.* at 2680. *See* note 231 *supra.*
268 *Riley*, _ U.S. at __, 108 S. Ct. at 2680.
269 *Id.*

permitted an unlimited delay in the granting of a license.[270] The Court ruled that because the delay "compels the speaker's silence," the licensing provision could not stand.[271]

Chief Justice Rehnquist, joined by Justice O'Connor, wrote a dissenting opinion arguing that the North Carolina charitable solicitation statute was a constitutional exercise of state regulatory power.[272] The dissent first asserted that the statute's limitation on professional solicitation fees provided only a "remote" and "incidental" burden on free speech.[273] The Chief Justice argued that the fee provision was sufficiently narrowly tailored as it was designed to avoid any restrictions on the speech component of solicitation.[274] The dissent next asserted that the compulsory disclosure provision did not abridge First Amendment rights as it concerned only "true facts" and would have "little, if any, effect on the message itself . . .."[275] Finally, the dissent asserted that the licensing provision was also a valid regulatory mechanism, as it did not put any significant burden on a charity's right to speak. This provision would only require charities to hire solicitors

270 *Id.* The Court explained that, "[t]he statute on its face does not purport to require when a determination must be made, nor is there an administrative regulation or interpretation doing so." *Id.*
271 *Id.* The Court found insignificant North Carolina's argument that it had a history of granting licenses quickly. *Id.*
272 *Id.* at 2682 (Rehnquist, C.J., dissenting). Justice Scalia also contributed an opinion concurring in part and concurring in the judgment. *Id.* at 2681 (Scalia, J., concurring in part and concurring in judgment). Justice Stevens concurred in part and dissented in part, finding the licensing requirement to be constitutional. *Id.* (Stevens, J., concurring in part and dissenting in part).
273 *Id.* at 2683 (Rehnquist, C.J., dissenting). In footnote five, the majority rejoined the dissent by stating that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech." *Id.* at 2673 n.5 (opinion of the majority).
274 *Id.* at 2683-84 (Rehnquist, C.J., dissenting). The dissent noted that "the statute mandates that First Amendment considerations such as the desire to disseminate information and the ability of the charity to get its message across [are] taken into account by the factfinder in determining reasonableness." *Id.* at 2684.
275 *Id.* at 2685. Chief Justice's Rehnquist's dissent emphasized that the disclosure provision "is aimed at the commercial aspect of the solicitation." *Id.* He argued that this fact, coupled with the State's strong interest in disclosure, compelled him to conclude that constitutional safeguards do not prevent a State from "imposing the type of disclosure requirements involved here, at least in the absence of a showing that the effect of the disclosure is to dramatically limit contributions or impede a charity's ability to disseminate ideas or information." *Id.*

already licensed by the state, thus creating a burden on speech which "truly can be said to be incidental."[276]

The *Riley* decision also contained two footnotes which may be of importance to states trying to fashion valid solicitation regulations. In footnote fourteen, the Court noted other potential problems with licensing of professional charitable solicitors. In its brief, the National Federation of the Blind had asserted that North Carolina's licensing scheme was unconstitutional because it gave an administrative official "unbridled discretion to grant or deny a license"[277] and because it denied professional and non-professional fundraisers the "equal protection of the law" by treating them differently.[278] The Court did not, however, indicate its position on these issues stating that "[i]n light of our conclusion that the licensing provision is unconstitutional on other grounds, we do not reach these questions."[279] In footnote eleven, however, the Court gave a very clear indication of what it considers to be a constitutional regulation measure. The majority stated that: "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status."[280] It asserted that "[o]n the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny."[281]

VII) Methods of Constitutional Analysis

The *Riley* decision reemphasized the Court's warning to states that it will not tolerate charitable solicitation regulation that violates charities' First Amendment rights. *Schaumburg*, *Munson*, and *Riley* struck down various devices by which the government

276 *Id.* at 2686. The dissent concluded that "[w]hile this effect may limit to some degree the charity's ability to hire whomever it chooses as its professional fundraiser, it will still be able to choose from other, licensed professionals and obtain their assistance in soliciting donations." *Id.*
277 *Id.* at 2680 n.14 (opinion of the majority).
278 *Id. See* National Fed'n Brief, *supra* note 76.
279 *Riley*, _ U.S. at _, 108 S. Ct. at 2680-81 n.14.
280 *Id.* at 2679 n.11.
281 *Id.* Justice Scalia, in his concurring opinion, strongly disagreed with the Court's reasoning in this footnote. *Id.* at 2681 (Scalia, J., concurring). He stated that compulsive disclosure of professional status is not sufficiently narrowly tailored to withstand First Amendment scrutiny, explaining that a state "can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made." *Id.*

had attempted to regulate charitable fundraising: direct limits on solicitation fees, bald percentage limitations, percentage limitations with a "reasonableness" exception, oral disclosure of fee information, and licensing requirements placing "too much" discretion in the hands of government officials. In each case, the Court used a strict scrutiny standard, holding that the government's interest must be "compelling" as well as the "least restrictive means" of accomplishing its goal. The Court also used an "overbreadth" inquiry to determine that the statutes were facially invalid. Finally, the recent charitable solicitation cases reveal the Court's introduction of elements of Equal Protection Clause analysis.

A) Free Speech Scrutiny

The *Schaumburg* Court asserted that "it is clear" that charitable solicitation is within the protections of the First Amendment.[282] But solicitation regulation has continued to be challenged on the grounds that it is not "fully" protected by the Constitution. States may characterize charitable fundraising laws as "economic regulation," which only incidentally implicate free-speech concerns.[283] But the *Munson* Court labeled this assertion as "perplexing."[284] It explained that a state could label any fundraising fee restriction as "economic regulation," but this does not alter the amount of free-speech protection accorded to professional solicitors.[285]

States may also categorize fundraising as "commercial speech" because it often involves an economic transaction.[286] Although commercial speech had traditionally been a category of speech accorded limited constitutional protection, the *Schaumburg* Court made clear that this is "no longer good law."[287] The *Riley* Court held that even if charitable solicitation contains elements of

282 *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980).
283 *See* notes 43 to 45 and accompanying text *supra*.
284 *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 n.16 (1984).
285 *Id.* The *Riley* Court, in dictum, also stated that "the fundraiser has an independent First Amendment interest in the speech, even though payment is received." *Riley*, _ U.S. at _, 108 S. Ct. at 2676 n.8.
286 *See* note 178 *supra*.
287 *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 n.7 (1980). *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-59 (1976).

commercial speech, it is inextricably intertwined with otherwise fully-protected speech and therefore must be analyzed using the strict-scrutiny test. Regulators may also argue that charitable disclosure laws should not be thwarted by the First Amendment as they compel speech, not silence. The *Riley* Court, however, deemed this distinction as "without constitutional significance."[288] As indicated in *Riley*, there are currently only two Justices supporting the notion that charitable solicitation should not be afforded full constitutional protection under the First Amendment.[289]

B) Overbreadth Analysis

First Amendment claims in many charitable solicitation statute challenges are examined using an overbreadth analysis. Typically, a statute is overbroad if it is over-inclusive in its scope. Even if a statute addresses an important state interest, such as the prevention of fraudulent solicitations, it may not do so through broad, sweeping prohibitions that infringe upon fundamental First Amendment rights.[290]

Without the doctrine of overbreadth, many speakers making First Amendment challenges would be limited to attacking a statute only as it applies to them. Therefore, even if a speaker succeeds with a First Amendment claim, a court might not necessarily invalidate the statute in its entirety, and the

288 *Riley*, _ U.S. at _, 108 S. Ct. at 2677.

289 *See* notes 272 to 276 and accompanying text *supra*.

290 The essential principle of overbreadth is that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protective freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1963). An important correlative of the overbreadth doctrine is that courts will ease the traditional rules for standing if the petitioner claims a violation of a First Amendment right. *See Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984). The doctrine of standing is used to determine whether the particular parties to an action are properly before the court. The parties must meet the "case or controversy" requirements of Article III of the Constitution by "alleg[ing] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). *See also Warth v. Seldin*, 422 U.S. 490 (1975).

statute would continue to be generally applicable.[291] This raises the concern that people will not exercise their First Amendment rights because they fear prosecution; thus the offensive statutes will have a "chilling effect" on free speech.[292] If potential speakers do not challenge the laws, there will be no "live" cases or controversies through which a court can examine the constitutionality of the statute. To facilitate constitutional review of First Amendment rights, the Court has liberalized its standards for allowing a case to be brought.[293] This policy is designed to further the social benefit of free speech. "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society, to prevent the statute from chilling the First Amendment rights of other parties not before the court."[294]

Under the burden of overbreadth analysis, a statute is examined not only as applied to the petitioner, but on its face, in all its possible applications. A statute will fall if, in its applications, it infringes upon protected free-speech rights.[295] The

291 *See, e.g., Schneider v. State*, 308 U.S. 147, 165 (1939) (invalidating an Irvington, N.J. ordinance as applied to petitioner). For discussion of *Schneider, see* notes 148 to 155 and accompanying text *supra*.

292 "Chilling effect" has become a commonly used term in First Amendment jurisprudence. Generally, it refers to the notion that an overbroad statute would deter potential speakers from exercising their First Amendment rights for fear of prosecution. Additionally, the concern is that most people are too timid to oppose the authority of such a statute and proceed with litigation. Thus there would be no "case or controversy" for constitutional adjudication and the statute would go unchallenged. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

293 A litigant may, in some cases, present a "case or controversy" based on the rights of a third party. Generally, courts "hesitate before resolving a controversy . . . on the basis of rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). However, unlike most constitutional litigation, overbreadth challenges may be made on behalf of third parties, not before the court, whose First Amendment rights have been violated. "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). *See also Schaumburg v. Citizens for a Better Env't*, 444 U.S. 618, 634 (1980), where the Court stated: "a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court."

294 *Munson*, 467 U.S. at 958.

295 "[The state] may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Schaumburg*, 444 U.S. at 637 (citing

statute must clearly distinguish the conduct included in its provisions from that which is free from governmental interference. For example, many statutes aimed at the prevention of fraud in charitable solicitation are overbroad because they apply not only against fraudulent solicitors, for whom the right of free speech is no defense, but they are applied against all charitable solicitors, thus violating the fully protected First Amendment rights of those charitable solicitors who commit no fraud. Generally, those statutes that fall are invalidated because they are not drawn narrowly enough to permit unhampered exercise of free-speech rights.

C) Least Restrictive Means

According to the most recent charitable solicitation cases, the Court judges the government's interest in such regulation by a strict scrutiny standard: in order to be upheld, a regulation burdening free-speech interests must be the "least restrictive means" of ensuring a "compelling" government interest.[296] The Court has addressed several government interests which it did not find to be either "compelling" or promoted by the "least restrictive means." In *Schaumburg*, the Court found limits on fundraising fees did not sufficiently serve the government's concern with "protecting the public against fraud, crime, and undue annoyance."[297] The Court did not indicate whether it might otherwise consider these interests "compelling." In *Munson*, the Court also did not address whether the state's concern with preventing fraud was compelling; it concluded just that this interest was not served by the least restrictive means.[298]

Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)).

296 *Riley v. National Fed'n of the Blind of N.C., Inc.*, __U.S. __, __, 108 S. Ct. 2667, 2679 (1988). The Court in *Schaumburg* and *Munson* stated the "compelling interest" test in similar terms, holding:

> a 'direct and substantial limitation on protected activity . . . cannot be sustained unless it serves a sufficiently strong, subordinating interest that the [Government] is entitled to protect.' In addition, in order to be valid, the limitation would have to be a 'narrowly drawn regulatio[n] designed to serve [the] interes[t] without unnecessarily interfering with First Amendment freedoms.'

Munson, 467 U.S. at 960-61 (quoting *Schaumburg*, 444 U.S. at 636- 37).

297 *Schaumburg*, 444 U.S. at 636.

298 *Munson*, 467 U.S. at 967-68.

In *Riley*, the State of North Carolina defined its interests to encompass more than just the prevention of fraud and criminal activity. The state proffered two interests served by percentage limitations on fundraising fees: to ensure both that the maximum amount of donated funds reaches the charity and that the fees charged by professional solicitors are not "unreasonable."[299] The Court, in dismissing both of these justifications, rejected the underlying premises that charities are unable either to negotiate fair contracts or effectively to exercise free-speech rights, without government assistance.[300] The State of North Carolina put forth a different interest to justify its compulsory disclosure law: to inform donors how the money is spent so as to assuage their fears that too much money goes to professional solicitors.[301] The Court did not find this interest sufficiently compelling and dismissed it as "not as great as might initially appear."[302]

The Court has expressed support for several regulatory alternatives qualifying as the "least restrictive" means of accomplishing the government's interest. In *Schaumburg*, the Court noted that the state concern with preventing fraud could be carried out by (1) prohibiting fraudulent misrepresentation, or (2) informing the public of the ways which their contributions are employed.[303] The *Munson* Court noted that disclosure and registration requirements might qualify under a "least restrictive means" analysis.[304] Of course, the Court later invalidated a compulsory disclosure law in *Riley*.[305] But the *Riley* decision stated that there are other ways to disclose information about charitable solicitation to the public without unduly burdening free-speech rights. States could publish the detailed financial information which they customarily receive from fundraisers.[306] States could also vigorously enforce anti-fraud laws.[307] The *Riley* Court put the states on notice that it considered broad prophylactic regulations to be "suspect."[308]

299 *Riley*, _ U.S. at _, 108 S. Ct. at 2674.

300 *Id.* *See* notes 67 to 76 and accompanying text *supra*.

301 *Riley*, _ U.S. at _, 108 S. Ct. at 2678.

302 *Id.*

303 *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-38 (1980).

304 *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 968 n.16 (1980).

305 *Riley*, _ U.S. at _, 108 S. Ct. at 2679. *See* notes 426 to 503 and accompanying text *infra*.

306 *Riley*, _ U.S. at _, 108 S. Ct. at 2679.

307 *Id.*

308 *Id.* at 2679-80.

D) Equal Protection

Equal protection analysis represents another manner in which charitable solicitation laws could be challenged. According to the Equal Protection Clause, no state shall "deny to any person within its jurisdiction the equal protection of the laws."[309] Although the Supreme Court has never explicitly utilized this type of analysis in a charitable solicitation case, leading practitioners in the philanthropic field have asserted that the Equal Protection Clause may provide another method to strike down laws which apply to charities employing professional solicitors while exempting organizations which rely on volunteers or members of their staffs to run solicitation campaigns.[310] These laws often place an unfair and discriminatory burden on organizations forced to, or choosing to, employ an independent professional fundraiser.

There are be several ways by which an Equal Protection Clause analysis may be used to attack charitable fundraising regulations aimed solely at independent contractors. The National Federation of the Blind has argued that charitable solicitation laws favor "more established, popular organizations raising funds by outright solicitation over and against less-well-

309 U.S. Const., XIV.

310 Telephone interview with Marion Fremont-Smith (Feb. 15, 1989) (notes on file with N.Y.U. Program on Philanthropy and the Law). Ms. Fremont-Smith is the chair of the American Bar Ass'n Tax Section's Committee on Tax Exempt Organizations, chair of the Advisory Board to the N.Y.U. Law School Program on Philanthropy and the Law, and author of several books dealing with nonprofit organizations.

See also Suffern, "Where do the States Go From Here?," 21 Philanthropy Monthly, June 1988, at 5. Kevin Suffern is a former Assistant Attorney General of Massachusetts and the former Director of the Division of Public Charities in the Massachusetts Attorney General's Office. In his article, Mr. Suffern suggests that the licensing provision at issue in *Riley* (*see* note 23 *supra*) "would likely violate the equal protection standard of the Fourteenth Amendment;" however, the Court did not reach that argument because it invalidated the licensing provision on other grounds. *Id.* at 9. *See* notes 267 to 271 and accompanying text, *supra*. Suffern also suggests that the Equal Protection Clause could be used to attack state measures that treat commission-based solicitors differently than flat-fee professionals or volunteers. He maintains that solicitors who operate on a commission basis "create most of the problems in terms of fraudulent solicitation," but that state regulators have thus far failed to develop the necessary factual record to support this position against potential challenges based on the Equal Protection Clause. 21 Philanthropy Monthly, June 1988, at 10.

known organizations, which often must resort to professional assistance."[311] Such "favoritism" is discriminatory and "creates a forbidden content distinction."[312] Through charitable solicitation laws, new organizations, small organizations, and organizations espousing unpopular causes may be prevented from fully expressing their views. This may be anomalous since "it is certainly possible that the solicitation costs of [charities utilizing] volunteers or employees could exceed those experienced by an independent third-party professional."[313] Finally, as the *Riley* Court made clear, "a speaker is no less a speaker because he or she is paid to speak."[314] It may be argued that charitable solicitation laws which single out *professional* fundraisers for regulation inappropriately burden the speech interests of paid speakers more than those of volunteers.

Although it is infrequently utilized, some federal and state courts have used an Equal Protection analysis in reviewing charitable solicitation laws, with differing results.[315] The opinions of commentators in the field and the results of the case law reveal disagreement over the applicability of the Equal Protection Clause to charitable solicitation laws. In *Chicago Tribune Company v. Village of Downers Grove*,[316] the Supreme Court of Illinois invalidated a statute, under the Equal Protection Clause of the Constitution as well as the First Amendment, that applied to newspaper salespersons, but exempted charitable solicitors. The ordinance distinguished commercial from non-commercial

311 National Fed'n Brief, *supra* note 76, at 40.

312 *Id.*

313 *Id.* at 41.

314 *Riley v. National Fed'n of the Blind of N.C., Inc.*, _U.S. _, _, 108 S. Ct. 2667, 2680 (1988). "It is well settled that a speaker's rights are not lost merely because compensation is received." *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)).

315 *See Streich v. Pa. Comm'n on Charitable Orgs.*, 579 F. Supp. 172, 179 (M.D. Pa. 1984) (validating statutory exemption for volunteer solicitors from registration and reporting requirements imposed upon professional solicitors); *Wickman v. Firestone*, 500 So. 2d 740, 742 (Dist. Ct. of App. Fla. 1987) (upholding statute that exempted charities using volunteer solicitors); notes 322 to 324 and accompanying text *infra* (discussion of *Streich*); notes 325 to 326 and accompanying text *infra* (discussion of *Wickman*). *But cf. Chicago Tribune Company v. Village of Downers Grove*, 532 N.E.2d 821, 824 (Ill. 1988) (invalidating statute with different provisions governing newspaper salespersons and charitable solicitors); notes 316 to 320 and accompanying text *infra* (discussion of *Chicago Tribune*).

316 532 N.E.2d 821 (Ill. 1988).

solicitors,[317] requiring only the former to pay for solicitation permits, of which only fifteen could be issued at any one time. Commercial solicitors were also required to wait a minimum of five days until the permit was issued before they could begin soliciting. Non-commercial solicitors, on the other hand, "were required merely to register," and immediately received a permit.[318] The court reasoned that since fundamental free-speech rights were involved, the state was required to produce a compelling reason for the distinction between charities and for-profit solicitors. The state asserted its interest in "protecting its citizens from harassment by canvassers and peddlers."[319] The court found that a distinction between newspaper salespersons and charitable solicitors did not "reasonably further" this state objective and was thus invalid.[320]

While this view of the applicability of the Equal Protection Clause may imply a changing perspective on the relationship between paid and volunteer solicitors, it does not reflect, nor does it overturn prior case law that had validated programs distinguishing professionals from volunteer solicitors. Both a state and a federal court have upheld statutory schemes exempting volunteers from the constitutionally-permissible requirements imposed upon professionals.[321] In *Streich v. Pennsylvania Commission on Charitable Organizations*, the petitioners included both professional solicitors and the organizations they represented. The petitioners opposed a Pennsylvania charitable solicitation law on several grounds, one of which was derived from the Equal Protection Clause. One of the questioned provisions of the Pennsylvania law included a clause that exempted certain charitable groups from regulations. The statute exempted organizations that did not hire professional solicitors.[322] The federal district court ruled that the exemptions withstood

317 The statute categorized solicitors for charitable, religious, and political causes as "non-commercial" and those selling books, magazines, goods, etc., as "commercial". *Id.* at 822.
318 *Id.*
319 *Id.* at 824.
320 *Id.*
321 *See Streich v. Pa. Comm'n on Charitable Orgs.*, 579 F. Supp. 172, 179 (M.D. Pa. 1984); *Wickman v. Firestone*, 500 So. 2d 740, 742 (Dist. Ct. of App. Fla. 1987).
322 *Streich*, 579 F. Supp at 179. Additionally, other classes of organizations, most of whom were regulated through other statutes, received exemptions. As to these organizations, the court believed that the application of the statute at issue would be "wasteful and counterproductive." *Id.*

even the strictest scrutiny under the Equal Protection Clause.[323] According to the *Streich* court, the distinction made between professional and volunteer solicitors was valid.[324] Likewise, in *Wickman v. Firestone*, a Florida state court agreed with the state's contention that "the professional solicitor's complaint of unequal treatment vis-a- vis Girl Scouts is 'ludicrous.'"[325] The statute at issue in *Wickman* exempted from its provisions charitable ecclesiastical organizations and organizations that did not pay their solicitors.[326]

Streich and *Wickman* stand for the proposition that a statute may exempt volunteer solicitors provided it is not unconstitutional as applied to professionals. The professional nature of some solicitors is thought to place them in different category than volunteers. The basis of this distinction, as implied by the *Streich* court, is that a volunteer status adds an indicia of trustworthiness to the solicitor.[327] Although it may be permissible to infer that a solicitor who is paid for his or her services may not be as interested in the charity represented as might a volunteer, it remains improper to violate the First Amendment rights of a professional solicitor for this reason.[328] Thus, under *Streich* and *Wickman*, if regulators could apply a statute to all solicitors without violating the First Amendment, it is within their discretion to exempt volunteers.

The Supreme Court's recent emphasis on charitable solicitation laws has been reflected in the dockets of lower federal and state courts. These courts have shouldered a significant burden in interpreting the Supreme Court cases and examining the various efforts of the states to regulate charitable solicitation. As a result, there are certain "tension points" in the law of charitable solicitation created by divergent opinions on points

323 *Id.* For discussion of "strict scrutiny", *see* notes 296 to 308 and accompanying text *supra*.
324 To support its position, the court found that:
> [Organizations that use volunteers] are, facially, completely different from the organizations which the Act seeks to regulate. The Act is designed to protect the public from organizations hiring professional solicitors who may or may not be interested in the charity for whom they solicit. To include within the coverage of the Act organizations who do not pay their fundraisers would be absurd.

Id.
325 500 So. 2d at 742.
326 *Id.*
327 *See* note 324 and accompanying text *supra*.
328 *See* note 314 and accompanying text *supra*.

upon which the Supreme Court has not passed. An analysis of these tension points, using the doctrines of the Supreme Court's First Amendment jurisprudence - including overbreadth, prior restraint, and "least restrictive means" - is necessary for an understanding of the future of solicitation regulation.

VIII) The Post-*Riley* Tension Points.

In the wake of *Schaumburg*, *Munson*, and *Riley*, states have begun to re-evaluate charitable solicitation laws in an attempt to conform to the constitutional guidelines announced by the Supreme Court.[329] Certain forms of regulation are forbidden, while others are fairly clearly valid. There remain several tension points - measures on which the Supreme Court has not spoken. It is important to analyze these methods of regulation in order to understand what options may realistically be available to legislators without running afoul of the First Amendment.

The discussion of these tension points will be broken down into sections relating to the progression of a charitable solicitation campaign. The discussion will begin with a brief review of percentage limitations, the issue most squarely confronted by the three recent Supreme Court cases. It will then cover those measures which precede solicitation: registration, licensing, financial reports, etc. Frequently the justifications for and arguments against the various pre-solicitation requirements are based upon the same constitutional principles, such as the principle of prior restraint. The discussion will then proceed to disclosure requirements which apply at the point of solicitation and, in some cases, afterwards. This is a relatively new strategy by the states, and it lends itself to separate analysis because the requirements often create direct intrusions into the content of the solicitor's speech. Since these requirements directly affect the solicitor in relation to the potential donor, as opposed to the state registration official, the constitutional treatment will be slightly different.

329 *See, e.g.*, Cal. S.B. 502, 90th Reg. Sess., 1989; Mass. H.B. 552, 176th Gen. Ct., 1st Ann. Sess., 1989; Maryland H.B. 373, 395th Sess. of Gen. Ass., 1989; Okla. H.B. 1467, 42nd Leg., 1st Sess., 1989.

A) Percentage Limitations[330]

The Supreme Court has held that a state may not impose percentage limitations on the amount a charity can spend on its fundraising campaigns.[331] Nor can a state limit the amount that a professional solicitor can receive for running a solicitation campaign.[332] The former was made clear in *Schaumburg*,[333] and even more explicit in *Munson* where the Court explained that percentage limitations "operate[] on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud."[334] The Court thus indicated that it wasn't merely the particularities of the Maryland statute that caused it to violate the First Amendment, also suspect was the theoretical underpinnings of the regulation. In retrospect, it seems that the *Munson* Court was not inviting Maryland, or any other state, to correct minor infirmities in their percentage limitation statutes, but suggesting that the states would have to take an entirely new approach to regulation. Even after *Munson*, however, some states, still unconvinced, attempted to sift out the constitutional infirmities while maintaining a program that was based on percentage limitations.[335] For example, the North Carolina statute at issue in *Riley* did not possess the strict percentage limitations invalidated

330 As a matter of consistency for this commentary, percentage limitations should properly be understood as a pre-solicitation requirement. This is true because percentage limitations generally appeared as conditions to be met before a permit was issued to a potential solicitor. For a complete discussion of percentage limitations, *see* notes 174 to 196 and accompanying text *supra*.

331 *Riley v. National Fed'n of the Blind of N.C., Inc.*, _U.S. _, _, 108 S. Ct. 2667, 2676 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 968 (1984); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639 (1980).

332 *Riley*, _ U.S. at _, 108 S. Ct. at 2673-2674; *Munson*, 467 U.S. at 967 n.16; *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 152 (1st Cir. 1987).

333 "The 75-percent requirement in the village ordinance plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech." *Schaumburg*, 444 U.S. at 639. The *Schaumburg* Court also began to undermine the connection between high solicitation costs and protection of public safety and privacy: "[t]here is no indication that organizations devoting more than one-quarter of their funds to salaries and administrative expenses are any more likely to employ solicitors who would be a threat to public safety than are other charitable organizations." *Id.* at 638.

334 *Id.* at 966.

335 *E.g.*, Mass. Gen. Laws Ann. ch. 68§ 21 (1984) (invalidated in *Shannon v. Telco Communications, Inc.*, 824 F.2d 150, 152 (1st Cir. 1987)); N.C. Gen. Stat. §131C-17.2 (1986) (invalidated in *Riley*, _ U.S. at _, 108 S. Ct. at 2676); Okla. Stat. Ann. tit. 18§ 552.3(b) (West 1988) (subject of revision, H.B. 1200, 42nd Leg., 1st Sess., 1989 Okla. Laws).

in *Schaumburg* and *Munson*. To comply with those precedents, North Carolina attempted to provide greater flexibility in its charitable solicitation laws through the establishment of rebuttable presumptions of unreasonableness. The Court considered this an insufficient effort to "supply the missing nexus between the percentages and the State's interest [in preventing fraud]."[336] Thus, while it seems indisputable, particularly after *Riley*, that percentage limitations are strictly prohibited, the possibility remains that regulators may attempt to reformulate a statute that contains an element of percentage limitation.[337]

B) Registration Requirements

Government authorities have required potential solicitors to register with civic or law enforcement authorities before beginning their campaigns. In the past, however, many registration processes were actually licensing programs, which gave excessive discretion to the licensing officer.[338] Today, it seems quite clear that discretionary licensing provisions are

[336] *Riley*, __ U.S. at __, 108 S. Ct. at 2675. The Court went on to say that "[e]ven if percentages are not completely irrelevant to the question of fraud, their relationship to the question is at best tenuous, as *Schaumburg and Munson* demonstrate." *Id.* at n.7.

[337] *See* notes 479 to 481 and accompanying text *infra*; note and accompanying text *infra*.

Despite the holding on the percentage disclosure at issue in the North Carolina statute, such disclosures may, in another form, be acceptable regulatory measures. For example, Professor Henry Hansmann has proposed an interesting idea for using the tax laws to regulate charitable solicitation. His suggestion is that "perhaps tax exemption could be conditioned upon a nonprofit's willingness to reveal the percentage spent on fund raising to a state agency, which then in turn could publish the figure. Organizations that choose not to disclose need then simply forego tax exemption. H. Hansmann, *"Trouble Spots" in the Law Affecting Nonprofit Organizations* 17 (Sept. 1989) (Paper prepared for conference on "Research Agenda—Legal Issues Affecting Non-Profit Organizations" at New York University, Nov. 10-11, 1989; On file with N.Y.U. Program on Philanthropy and the Law). The suggestion merits attention, especially because the Supreme Court has sometimes been willing to sustain tax measures even when more direct measures may have been declared unconstitutional. *See, e.g., Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (lobbying restriction on 501(c)(3) tax-exempt organizations upheld in free speech challenge).

[338] *See, e.g.*, Conn. Gen. Stat. §6294, as amended by §860d (1937 Supp.) ("No person shall solicit . . . unless such cause shall have been approved by the secretary of the public welfare council . . . [who] shall determine whether such cause . . . is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity.") (held violative of the First Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

unconstitutional.[339] Another feature of registration requirements that has frequently been held unconstitutional is the existence of an unspecified delay period between the filing of a registration application, and the official approval needed before beginning the solicitation campaign.[340]

Removed of their elements of discretionary licensing and unspecified administrative delays, however, registration requirements remain favored mechanisms to regulate solicitation and prevent fraud. Since the Supreme Court has recently rejected some alternative measures used to regulate solicitation, it appears likely that registration requirements will be re-established as a primary and constitutional method for states to protect against fraud and other abuses.

Registration requirements are used to maintain files on the various organizations that conduct solicitation campaigns. A standard registration process requires the submission of name, address and function of the charitable organization, the names of the individual solicitors, the length of the campaign, and financial information, such as projected earnings from the campaign, and relevant general financial records of the charity.[341] In a situation where a professional solicitor is operating on behalf of a charity, relevant information may be required of the fundraiser, as well as the charity it represents.[342] Occasionally, a nominal fee or a bond will be required of the soliciting organization before the commencement of the campaign.[343]

Registration, in and of itself, has rarely been challenged. When challenges have been made, registration has consistently

[339] Generally, these provisions are deemed unconstitutionally vague because they vest unenumerated authority in the licensing agent. *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); note 169 *supra*. *See also Cantwell*, 310 U.S. at 307; *Schneider v. State*, 308 U.S. 147, 164 (1939).

[340] *See, e.g., Riley v. National Fed'n of the Blind of N.C., Inc.*, __ U.S. __, ___, 108 S. Ct. 2667, 2680 (1988); *Citizens for a Better Environment v. Village of Olympia Fields*, 511 F. Supp. 104, 108 (N.D. Ill. 1980); *Hillman v. Britton*, 111 Cal. App. 3d 810, 821, 168 Cal. Rptr. 852, 859 (Cal. Ct. App. 1980).

[341] *See, e.g.*, Ark. Stat. Ann. §4-28-404 (1987); Colo. Rev. Stat. §6-16-104 (1988); Fla. Stat. §496.03 (1985); Ga. Code Ann. §43-17-2 (1984); Mass. Gen. Laws Ann. ch. 68, 19 (West 1988 Supp.); Va. Code Ann. §57-49 (1988).

[342] *See, e.g.*, Ark. Stat. Ann. §4-28-404(9) (1987); Colo. Rev. Stat. §6-16-104 (1988); Ga. Code Ann. §43-17-3 (1984); Mass. Gen. Laws Ann. ch. 68, §23 (West 1988 Supp.); Va. Code Ann. §57-61 (1988).

[343] *See, e.g.*, Ga. Code Ann. §43-17-2(c) (1984); Haw. Rev. Stat. §467B-2(d) (1985); N.J. Stat. Ann. §45:17A-4(c) (West 1978).

been held constitutional.[344] A typical registration procedure was at issue in *International Society for Krishna Consciousness v. City of Houston*.[345] The statute required all persons soliciting contributions for "charitable or welfare" purposes to file "registration, identification and financial disclosure" statements with the Houston tax assessor-collector.[346] The Fifth Circuit found the statute adequately tailored to the legitimate governmental interest in "protecting its citizens from fraud and harassment" without being unduly burdensome on applicant's First Amendment rights.[347] The court stated that "[t]he information sought is purely objective - names, addresses, telephone numbers and related matters of an identifying nature.. . The regulatory scheme is based on providing the general public with facts identifying the solicitors and describing the solicitation."[348]

On the contrary, discretionary licensing provisions have generally not withstood constitutional scrutiny.[349] Generally, licensing schemes allow an administrator to forbid solicitation *before* a solicitor has had a chance to speak. Courts have held this administrative discretion to potentially place an unconstitutional prior restraint on protected First Amendment activity.[350] In other

344 *See, e.g., Hynes*, 425 U.S. at 616-619; *Cantwell*, 310 U.S. at 306; *Schneider v. State*, 308 U.S. 147, 164; *International Soc'y for Krishna Consciousness v. Houston*, 689 F.2d 541, 551 (5th Cir. 1982); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Green v. Village of Schaumburg*, 676 F. Supp. 870, 873 (N.D. Ill. 1988); *Bellotti v. Telco*, 650 F. Supp. 149, 152 (D. Mass. 1986), *aff'd sub nom., Shannon v. Telco Communications, Inc.*, 824 F.2d 150 (1st Cir. 1987); *Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489, 1499 (D. Minn. 1986); *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 597 (N.D. Tex. 1984); *Wickman v. Firestone*, 500 So. 2d 740, 741 (Dist. Ct. of App. Fla. 1986).

345 689 F.2d 541 (1982). The statute in question, Houston Municipal Code, Article IV, §§37-41 through 37-53 (1969) required such information as: "a brief description of the person registering, the charitable use for which the funds are to be solicited, and an explanation of the intended use of the funds towards that purpose" (§37-43(3)); "names . . . of all individuals who will be in direct charge or control of the solicitation of funds" (§37-43(5)); and a "projected schedule of . . . expenses" and "an estimated percentage of the total projected collections which the costs of solicitation will comprise." (§37-43(9)).

346 *International Soc'y for Krishna Consciousness*, 689 F.2d at 544.

347 *Id.* at 550.

348 *Id.* at 547.

349 *See* note 339 *supra*.

350 "When a municipality enacts permit requirements as a prior restraint to the exercise to free expression, it must do so without vesting broad discretionary powers in municipal officials." *Citizens for a Better Env't v. Village of Olympia Fields*, 511 F. Supp. 104, 108 (N.D. Ill. 1980) (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 617 (1976) and *Shuttlesworth v. Birmingham*, 394 U.S. 147, 153 (1969)).

words, such licensing provisions allow an administrative officer to censor speech by disapproving of the charitable cause, or the speakers themselves.[351]

The *Riley* Court reiterated the need for First Amendment scrutiny for the review of licensing schemes, as the "asserted power to license professional fund-raisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter."[352] Because it invalidated the licensing provision for its delay requirement, the *Riley* Court did not pass upon the validity of the degree of discretion allowed licensing officials under the North Carolina law. In a case decided immediately prior to the *Riley* decision, however, the Court did address discretionary licensing in a First Amendment context. In *City of Lakewood v. Plain Dealer Publishing Co.*,[353] the Court struck down on First Amendment grounds, a municipal ordinance applied to newspaper sales because its licensing provisions placed unbridled discretion in the hands of the Mayor.[354] Under the ordinance, there were no clear limitations on the Mayor's power to deny permits; the Court noted that "nothing in the law as written requires the Mayor to do more than make the statement 'it is not in the public interest' when denying a permit application."[355]

351 This does not mean that registration requirements are impotent. The prevention of fraud is a valid state purpose and if an applicant files fraudulent information in the process of registration, then the state can refuse to grant that organization solicitation rights. In upholding sections of a solicitation regulation the Federal Court of Appeals for the Fifth Circuit held that a "permit may be denied for the falsity of statements *in the application*, not for the falsity of the ideas the applicant wishes to disseminate. Since gaining relevant information as to the applicant is proper, the falsification of such information is not constitutionally privileged." (emphasis in the original). *Fernandes v. Limmer*, 663 F.2d 619, 629 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). *See also Holy Spirit Ass'n for the Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 598 (N.D. Tex. 1984).

352 *Riley v. National Fed'n of the Blind of N.C., Inc.*, _U.S. _, 108 S. Ct. 2667, 2680 (1988). The Court found the North Carolina licensing provision in *Riley* infirm because it contained an unspecified delay period in the licensing of professional fundraisers. These applicants were required to wait until receiving approval before they could commence their campaigns, while volunteers were entitled to begin soliciting as soon as they submitted an application. *Id.* For text of North Carolina licensing provision struck down in *Riley*, *see* note 231 and accompanying text *supra*.

353 _ U.S. _, 108 S. Ct. 2138 (1988).

354 *Id.* at 2150.

355 *Id.*

In one recent case, a district court upheld the validity of a Minnesota statute vesting discretionary licensing powers in the state Commissioner of Commerce. In *Heritage Publishing Co. v. Fishman*,[356] the court validated a law that allowed the Commissioner to:

> [D]eny, suspend or revoke a license if he finds that it is in the public interest to do so *and* he also finds that the professional fund-raiser has filed an incomplete or false application *or* has engaged in fraudulent, deceptive, or dishonest practices *or* has violated or failed to comply with a provision of the Chapter or a rule promulgated thereunder.[357]

The *Heritage Publishing* court explained that "[s]ince they are speech neutral, the criteria set out in the statute do not directly infringe upon First Amendment rights."[358] The court acknowledged the implication of First Amendment rights, yet, through a balancing of the competing interests, ruled in favor of the state's interest in "regulating professions."[359] It considered the statutes to be "narrowly drawn and [to] further the state interests of protecting the public from fraud and misrepresentations in charitable solicitations."[360]

Although limited to professional fundraisers, the *Heritage Publishing* decision is unique among recent cases in its acceptance of discretionary licensing. As such, the value of *Heritage Publishing* as a precedent is uncertain. The *Heritage Publishing* decision has not been relied upon by other courts to support similar licensing schemes. Additionally, *Heritage Publishing* was decided before *Riley*, in which the Court, in a 7- 2 decision, again protected the rights of charitable solicitors and professional fundraisers against licensing procedures that grant unbridled discretion to administrators.[361]

Furthermore, the Minnesota statute in *Heritage Publishing* allowed the denial of an application *if the Commissioner found that it was in the public interest to do so*.[362] However, the Minnesota statute did not accord the Commissioner unbridled discretion; it required him to make a further specific showing of fraud,

356 634 F. Supp. 1489 (D. Minn. 1986).
357 *Id.* at 1500 (citing Minn. Stat. Ann. §309.532 (1986)) (emphasis in original).
358 *Id.*
359 *Id.* at 1499.
360 *Id.* at 1500.
361 _ U.S. _, 108 S. Ct. 2667 (1988).
362 *See* Minn. Stat. Ann. §309.532 (1986) (emphasis added). *See also* note 357 and accompanying text *supra*.

dishonesty, or other illegal behavior on the part of the fundraiser. These added conditions serve to distinguish the *Heritage Publishing* statute from those in *Riley* and in *City of Lakewood*. Thus, the more narrowly tailored Minnesota statute may be seen as an exception to the general inadequacy of discretionary licensing provisions.

Thus, certain registration programs have been found to be unconstitutional because the level of discretion vested in an administrator created the danger that the statute may serve as a prior restraint on free speech. Another problem that may cause a registration program to be held unconstitutional, as evidenced in *Riley*, is the frequent administrative delay from the time an application has been submitted until it is approved, during which solicitors are not allowed to begin their campaigns. The *Riley* Court emphasized that "assuming that the State's interest does justify requiring fundraisers to obtain a license before soliciting, such a regulation must provide that the licensor 'will within a specified brief period, either issue a license or go to court.'"[363] Lower courts have also taken a narrow view of acceptable delay times.[364] Administrative delays, however, are seemingly inevitable, and are not per-se unconstitutional. Due process requires only that the delay be limited and brief, and that the statute specify when the determination will be made.[365] Due

363 *Riley v. National Fed'n of the Blind of N.C., Inc.*, _U.S. _, _, 108 S. Ct. 2667, 2680 (quoting *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)). *Freedman* set the general due process standards to be followed in a prior restraint situation. The issue in *Freedman* was the licensing of films, yet the procedural guidelines mandated by the case have been carried over to cover most First Amendment prior restraint statutes.
364 *See, e.g., Citizens for a Better Environment v. Village of Olympia Fields*, 511 F. Supp. 104, 108 (N.D. Ill. 1980) ("A statutory deadline for municipal action upon a permit application is essential if the permit requirement is to avoid being found constitutionally infirm."); *Hillman v. Britton*, 111 Cal. App. 3d 810, 821, 168 Cal. Rptr. 852, 859 (Cal. Ct. App. 1980) ("At a minimum, due process requires a prompt administrative decision on an application for a license and reasonably prompt access to the courts.").
365 *See Riley*, _ U.S. at _, 108 S. Ct. at 2680. Prior to *Riley*, *Heritage Publishing* also provided an exception from the general rule that unspecified administrative delays are unconstitutional. The court in *Heritage Publishing* distinguished the Minnesota statute as one that licenses only the "purveyors of the speech . . . not the speech itself." *Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489, 1501 (D. Minn. 1986). The court reasoned that the *Freedman* doctrine, requiring prompt administrative and, if necessary, judicial determination, applied only to statutes directly affecting speech and thus was inapplicable to the Minnesota statute. *Heritage Publishing*, 634 F. Supp. at 1501. (For discussion of the *Freedman* doctrine, *see* note 363, *supra*.) However, *Riley* erodes this holding in *Heritage*

process considerations that are applicable to volunteers from charitable organizations are also applicable to professionals who represent them.[366]

It appears that some state legislatures are responding to the Supreme Court's recent evaluation of administrative delays in solicitation registration by modifying the procedural requirements of their regulations.[367] For example, the General Assembly of Tennessee has recently amended its charitable solicitation law to reflect the mandates of the *Riley* decision.[368] Before the amendments, effective July 1, 1989, the Tennessee statute prohibited professional fundraisers from soliciting until they had filed an application *and* received a certificate from the secretary of state.[369] No brief fixed period is specified for issuing that certificate. The revision simply deletes the phrase "and received a certificate of registration," enabling solicitors to begin their campaign immediately after filing a complete registration application. Likewise, in Massachusetts, there has been a proposal[370] to eliminate a provision in the current statute that requires the issuance of a certification of registration and requires solicitors to wait until its receipt before soliciting.[371]

C) Registration Fees

Financial requirements, such as registration fees, bonds, financial reports, and audits of the charitable organizations, have

Publishing by advancing the First Amendment rights of professional solicitors. Comparable to the provision in the *Heritage Publishing* statute, the North Carolina licensing requirement in *Riley* applied only to professional solicitors, not to the charities themselves. *See* note 23 and accompanying text *supra*.

366 The *Riley* Court explained that "[a] speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, __U.S. at __, 108 S. Ct. at 2680 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)). *See* note 314 and accompanying text *supra*.

367 *See, e.g.*, Mass. H.B. 552 176th Gen Ct., 1st Ann. Sess., 1989 (proposal to revise the current statute (Mass. Gen. Laws Ann. ch. 68, §19 (West 1988 Supp.)); Tenn. H.B. 1255, 95th Gen. Ass., 2nd Sess., 1988 (proposal to revise the current statute (Tenn. Code Ann. §48-3-507(a) (1976)).

368 Charitable Solicitation Reform Act of 1989, ch. 285, no. 2, 1989 Tenn. Acts 271 (Advanced Legislative Service) (effective July 1, 1989).

369 "No person shall act as a professional solicitor . . . unless he has first registered with the secretary of state and received a certificate of registration." Tenn. Code Ann. §48- 3-507(a) (1976).

370 Mass. H.B. 552 176th Gen Ct., 1st Ann. Sess., 1989.

371 Mass. Gen. Laws Ann. ch. 68, §19 (West Supp. 1988).

also come under recent scrutiny.[372] Some of these measures are certain to be the sources of future litigation as regulators begin to use them more extensively.

Many states charge a nominal fee for those groups wishing to conduct solicitation campaigns.[373] The basic justification for registration fees is to mitigate the administrative cost of processing applications. The constitutional doctrine supporting this imposition is found in the 1943 case, *Murdock v. Pennsylvania*.[374] *Murdock* held that the licensing fee at issue was actually a flat licensing tax and was unconstitutional. Nonetheless, the Court recognized the legitimacy of a nominal fee "imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors."[375]

Currently, it appears that the range of permissible fees is extremely broad and there has been a significant division in the courts that have passed on the validity of such measures. Shortly after the *Schaumburg* decision, the Federal Court of Appeals for the Fifth Circuit, in *Fernandes v. Limmer*, examined a comprehensive statute that regulated the activities of solicitors and religious advocates in the Dallas-Fort Worth Airport.[376] The court invalidated the six dollar *daily* fee because the "parallels between [it] and the *Murdock* tax . . . [were] extremely strong."[377] The court did not find any link between the fee and the administrative process. Just ten months later, in *International Society for Krishna Consciousness v. Houston*,[378] the same court validated a fee provision that the city of Houston imposed on all who wished to solicit in the Houston Airport. The fee was five dollars, but it was imposed on each party only *once*, at the point of

372 *See, e.g., Fernandes v. Limmer*, 663 F.2d 619, 632-33 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). *See also Holy Spirit Ass'n for the Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 604 (N.D. Texas 1984).

373 Conn. Gen. Stat. Ann. §21a-190b (West 1988); Ga. Code Ann. §43-17-2 (1984); Ky. Rev. Stat. Ann. §367.515(1); Minn. Stat. Ann. §309.52 (West 1988).

374 319 U.S. 105 (1943).

375 *Id.* at 113, 116.

376 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). *See also Holy Spirit Ass'n for the Unification of World Christianity v. Hodge*, which struck down the $10.00 fee requirement because: 1) it exacted a fee for constitutionally protected activities; 2) there had been no demonstrated link between the fee and the administrative costs; and 3) it conditioned free exercise rights on the willingness and ability of an applicant to pay. 582 F. Supp. 592, 604 (N.D. Texas 1984).

377 *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).

378 689 F.2d 541 (5th Cir. 1982).

registration, and the court found that it was "nominal and could hardly cover the costs of administering the ordinance."[379]

Relying on the *Murdock* holding, a district court in Pennsylvania, in *Streich v. Pennsylvania Commission on Charitable Organizations*,[380] upheld a state solicitation provision that established a sliding-scale of registration fees, dependent upon the amount received in the campaign.[381] The court rejected the claim that the relation between the amount solicited and the fee charged made it a tax on free-speech rights. The court found that the fee did not violate *Murdock*, noting that "[h]ere the fees imposed upon solicitation are clearly nominal and related to the costs of supervising and policing the charities."[382] The court agreed with the reasonableness of charging higher fees to large-scale charities since the fees "while different in amount depending on the amount solicited, are set in a manner relative to the costs of enforcement."[383] The court accepted the state's position that "[s]ince more effort is required to review and police the charities with more detailed and complex statements, a greater fee is required."[384]

Another relevant consideration in determining the validity of a particular fee is whether the fee is being exacted from a professional fundraiser, or from volunteers of the charity. Some states have established fee schedules that either charge a reduced rate for volunteers, or exclude them altogether.[385] In *Wickman v. Firestone*, a Florida court validated a state statute that required an annual registration fee of $500, but only from professional solicitors.[386] Other states have followed the lead of the Florida legislature. Tennessee recently raised its fee for charities from $50 to $200 and for professionals from $300 to $1,000.[387] Similarly, a

379 *Id.* at 550.
380 579 F. Supp. 172 (M.D. Pa. 1984). For discussion of *Murdock*, *see* note 375 and accompanying text *supra*.
381 Pa. Stat. Ann. tit. 10, §160-1(A)(7) (Purdon 1974).
382 *Streich*, 579 F. Supp. at 177.
383 *Id.*
384 *Id.*
385 *See, e.g.*, Conn. Gen. Stat. Ann. §21a-190 (West 1988) ($20 fee for charities, $100 for professionals); Haw. Rev. Stat. §467B (1985) ($10 for charities, $50 for professionals); Me. Rev. Stat. Ann. tit. 9, §5005(2) (1988) ($25 fee applicable to professionals only); Wis. Stat. Ann. §440.41 (West 1988) ($10 for charities, $50 for professionals).
386 500 So. 2d 740, 742 (Fla. Dist. Ct. App. 1987) (holding that fee was "not too burdensome" for the professional fundraiser).
387 Charitable Solicitation Reform Act, *supra*, note 368, at §§9, 16.

recent California proposal suggests an annual fee of $200, applicable only to professional fundraisers.[388]

It is difficult to predict the judicial reaction either to fees of this size or to the distinction made between professionals and volunteers. On the one hand, it seems reasonable to exact a higher fee from a for-profit organization that would be more likely able to shoulder the burden than would a charity. Apparently, regulators have been operating on the premise that charities and their volunteers are less able to meet these burdens, or that they are deserving of exemptions. On the other hand, it seems as if the statutes have lost sight of the *Murdock* rule allowing only nominal fees.[389] It is difficult to reconcile fees of $200 for charities, when only eight years ago, a six dollar fee was invalidated.[390] Similarly, if the professional fundraisers are entitled to the same First Amendment protections afforded the charities that they represent, it is troubling to justify the imposition of fees ranging from $200- $1,000. The likely result is that these expenses, charged to professional solicitors, will be passed on to charities, in the form of fundraising fees. Solicitation regulation will then have come full circle to the pre-*Schaumburg* days when small, struggling charities could be precluded from reaping the harvest of charitable solicitation, unless they could conduct the campaign themselves.

D) Bonds

A regulation method closely related to registration fees is the requirement that fundraisers post a bond before soliciting. Bonds are often used in state regulation schemes, which frequently establish different rates for professional fundraisers.[391] This distinction was the key element in the bond provision of the Minnesota charitable solicitation regulation upheld in *Heritage Publishing Co. v. Fishman*.[392] Minnesota requires professional

388 Cal. S.B. 502 90th Reg. Sess., 1989.
389 319 U.S. 105 (1943). *See* note 375 and accompanying text *supra*.
390 *See Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).
391 *See, e.g.*, Haw. Stat. Ann. §467B-12(a) (1985) ($5,000 bond for professional fundraisers); Mass. Gen. Laws Ann. ch. 68, §23 (West 1988) ($10,000 bond for professionals); Minn. Stat. Ann. §309.531 (West 1989) ($20,000 for professionals). *But see* Conn. Gen. Stat. Ann. §21a-190 (West 1988) ($20,000 bond for all solicitors).
392 634 F. Supp. 1489 (D. Minn. 1986).

fundraisers to post a bond not to exceed $20,000, while exempting volunteers from the bond requirement.[393] A professional fundraiser challenged the provision as an impermissible fee for the exercise of free speech.[394] The fundraiser relied on the holding in *Holy Spirit Association for the Unification of World Christianity v. Hodge*[395] which invalidated a fidelity bond requirement for any "[p]aid promoters of the petitioning organization."[396] The *Heritage Publishing* court rejected the argument, distinguishing *Holy Spirit Ass'n* on the ground that the provision there applied to the charity itself, while the Minnesota statute applied only to "professional fund-raisers who actually handle the money raised for the charity."[397] The *Heritage Publishing* court's rationale reflected its emphasis on the business-oriented nature of professional fundraisers.[398]

While its holding on the validity of discretionary licensing provisions does not reflect the general judicial disapproval of such measures, the *Heritage Publishing* decision does reflect what appears to be the general acceptance of the validity of bond requirements. The Florida court in *Wickman v. Firestone* upheld a registration requirement for professional solicitors with a $10,000 bond provision.[399] The Supreme Judicial Court of Maine, in dicta, also noted the propriety of a bond provision in *State v. Events International, Inc.*[400] Events International, a professional fundraiser, successfully challenged a Maine statute requiring solicitors to disclose to potential donors, at the point of solicitation, the financial allocation of funds received in the campaign.[401] However, Events International complied with, and

393 Minn. Stat. Ann. 309.531 (West 1989).
394 *Heritage Publishing*, 634 F. Supp. at 1502.
395 582 F. Supp. 592 (N.D. Texas 1984).
396 *Id.* at 599.
397 *Heritage Publishing*, 634 F. Supp. at 1502.
398 The *Heritage Publishing* court stated that: "it is . . . clear that a state may regulate a profession to insure that individuals working within it maintain high standards." *Id.* at 1499 (citing *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 460-61 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 766 (1976); *Goldfarb v. Virginia State Bank*, 421 U.S. 773, 792 (1974)). The court went on to state that "[i]t is well established that a state may require a bond as a part of regulating a business." *Id.* at 1502 (citing 51 Am. Jur. 2d, Licenses and Permits, §140). For discussion of the regulation of fundraising as a profession, *see* note 359, *supra*. *See also* note 178 *supra* (articles on regulation of commercial speech).
399 500 So. 2d 740, 742 (Fla. Dist. Ct. App. 1987).
400 528 A.2d 458 (Me. 1987), *cert. denied* _ U.S. _ , 108 S. Ct. 2899 (1988).
401 *Id.* at 459 (citing Me. Rev. Stat. Ann. tit. 9, §5012 (1980)).

did not challenge, the statutory $10,000 bond requirement.[402] In a footnote, the court cited this requirement and noted that "[a]t all times pertinent to this litigation, Events was properly registered and bonded pursuant to section 5008."[403]

E) Financial Statements

As another anti-fraud measure, statutes frequently require that potential solicitors file a financial statement as part of their registration.[404] Occasionally, annual financial statements may be prepared by the organizations themselves, if they are "prepared in accordance with generally accepted accounting principles."[405] Most states that require financial reports, however, require that the reports be prepared "by an independent certified public accountant."[406]

Schaumburg suggested financial disclosure as a possible alternative to the percentage limitations which it held invalid.[407] *Riley* clarified the scope of legitimate financial disclosure requirements by suggesting that "the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file."[408] Financial reporting has been widely

402 *Id.* at 459-60 n.2 (citing Me. Rev. Stat. Ann. tit. 9, §5008 (Supp. 1986)).
403 *Id.* at 459 n.2.
404 *See, e.g.*, Ark. Stat. Ann. §4-28-406 (1987); Cal Bus. & Prof. Code §17510.5 (West 1987); Ga. Code Ann. §43-17-4. (1987 Supp.); N.J. Stat. Ann. §45:17A-6 (West 1988 Supp.); N.D. Cent. Code §50-22-04 (1981); R.I. Gen. Laws §5-53-2 (1987).
405 *See, e.g.*, Cal Bus. & Prof. Code §17510.5 (West 1987); Minn. Stat. Ann. §309.53 (Subd. 3) (West 1989).
406 Ga. Code Ann. §43-17-4. (1987 Supp.); Ill. Rev. Stat. 5104(a) (1988); N.Y. Exec. Law 172-b (McKinney 1988 Supp.); Pa. Stat. Ann. tit. 10, §161.6 (Purdon 1988 Supp.); R.I. Gen. Laws §5-53-2 (1987). The information required of both professional fundraisers and the charities themselves tends to include "a financial statement covering the preceding fiscal quarter or year of operation, clearly setting forth the gross income, expenses, and net amount inuring to the benefit of the charitable organizations." Ga. Code Ann. §43-17-4 (1987 Supp.).
407 *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638 (1980). It seems that the Supreme Court was suggesting financial disclosure *to the potential donor*, and not necessarily the filing of a financial statement, however, their suggestion has been interpreted to encompass a variety of financial reporting requirements. For example, *Indiana Voluntary Fireman's Ass'n v. Pearson* cites *Schaumburg* in support of the suggestion that charities should file "financial disclosure reports". 700 F. Supp. 421, 435 (S.D. Ind. 1988).
408 *Riley v. National Fed'n of the Blind of N.C., Inc.*, _U.S. __, __, 108 S. Ct. 2667, 2679 (1988). *See also People v. French*, citing *Riley*, suggesting that the "state . . . can compel fundraiser[s] to file financial information with the state for public dissemination . . .. " 762 P.2d 1369, 1375 (Colo. 1988).

accepted as a constitutional method for attacking fraud.[409] However, it is not without limits. The district court in *Holy Spirit Association for the Unification of World Christianity v. Hodge*,[410] held the Amarillo, Texas financial reporting requirement unconstitutional on three grounds: vagueness, overbreadth, and taxation of First Amendment rights.[411] The Amarillo statute required "detailed information" without specifying what information, and in what detail.[412] Secondly, it required information on the disbursement of *all* funds, which the court found overly inclusive in that it went "far beyond solicitation in Amarillo."[413] Finally, the audit requirement, analogous to excessive fee requirements, was held to exact a tax on free-speech rights. The court explained that "[c]onsequentially, the requirement is unconstitutional because only those who can afford an audit may obtain a permit."[414]

Thus, states can generally require the filing of financial statements of fundraisers without unduly burdening First Amendment freedoms. Similar to other registration requirements, this imposition can be justified if it is limited to the necessities of regulatory administration, without becoming a vague or overbroad request for irrelevant financial histories.

409 *See International Society for Krishna Consciousness v. Houston*, 689 F.2d 541 (5th Cir. 1982); *Bellotti v. Telco*, 650 F. Supp. 149 (D. Mass. 1986); *Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489 (D. Minn. 1986); *Streich v. Pa. Comm'n on Charitable Orgs.*, 579 F. Supp. 172 (M.D. Pa. 1984); *Wickman v. Firestone*, 500 So. 2d 740 (Fla. Dist. Ct. App. 1987).

410 582 F. Supp. 592 (N.D. Tex. 1984).

411 Amarillo Code, Art. IV, §13-68.2(d) required the filing of the:

> [N]ame of the person or persons by whom the receipts of such solicitation shall be disbursed; if the receipts are transmitted to a parent organization for further disbursement, detailed information of the methods of handling and disbursement of all funds and a certified, detailed and complete financial statement or audit of the parent organization for the last preceding fiscal year.

Holy Spirit Ass'n, 582 F. Supp. at 606 (appendix).

412 *Holy Spirit Ass'n*, at 601.

413 *Id.*

414 *Id.* Other related disclosure requirements in the Amarillo act were similarly held unconstitutional because they were overbroad and produced a chilling effect on the exercise of First Amendment freedoms. *Id.*

F) Miscellaneous Registration Limitations

An analysis of the case law reveals various other state attempts at charitable regulation through the registration process. In *Chicago Tribune Co. v. Village of Downers Grove*,[415] the Illinois Supreme Court invalidated a statute that limited the number of solicitation permits that could be issued at any one time. The court considered this measure to be a prior restraint on free speech, and thus constitutionally impermissible.[416]

Several cases have rejected state laws prohibiting solicitation by any individual who, in the past, had been convicted of a felony.[417] The court in *Fernandes v. Limmer* held that the fact that "the applicant ha[d] been convicted of a crime in the past is not a sufficient reason for his blanket exclusion in the future.. . . Persons with prior criminal records are not First Amendment outcasts."[418] Such prohibitions have been invalidated because they operate on a fundamentally mistaken premise, ostensibly in the interest of public safety, that "because a solicitor . . . was once convicted of committing any felony, he will similarly violate the law again."[419]

A recent Virginia innovation required that all professional solicitors file copies of the text of any oral solicitation "pitch."[420] The charity sponsoring the fundraising campaign had to certify the truthfulness of the material.[421] A federal court in Virginia invalidated this statute as a clear example of an impermissible prior restraint of free speech.[422] In *Telco Communications, Inc., v. Carbaugh*, the district court held that this requirement was a form of censorship and was "equivalent to asking a newspaper to submit its editorials to the state in advance of publication."[423] The

415 532 N.E.2d 821 (Ill. 1988). *See also International Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978).

416 *Chicago Tribune Co.*, 532 N.E.2d at 824.

417 *See, e.g., Fernandes v. Limmer* 663 F.2d 619, 629-30 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Green v. Village of Schaumburg*, 676 F. Supp. 870, 873 (N.D. Ill. 1988); *Holy Spirit Ass'n for the Unification of World Christianity v. Hodge*, 582 F. Supp 592, 598 (N.D. Tex. 1984); *People v. Am. Youth Sports Found.*, 194 Cal. App. 3d. Supp. 6, 13-14, 239 Cal. Rptr. 621, 624 (1987).

418 *Fernandes*, 663 F.2d at 630.

419 *Am. Youth Sports Found.*, 194 Cal. App. 3d Supp. at 14, 239 Cal. Rptr. at 624.

420 Va. Code Ann. §57-61-D (1988).

421 *Id.*

422 *Telco Communications, Inc. v. Carbaugh*, 700 F. Supp. 294 (E.D. Va. 1988), *aff'd*, 1989 WL 107186 (4th Cir. September 20, 1989).

423 *Id.* at 298.

Fourth Circuit Court of Appeals recently affirmed this particular holding of the district court.[424]

Telco is also a significant case because it confronted the question of whether a state can require solicitors to make certain disclosures to potential donors at the point of solicitation. This is an issue that has recently been the subject of close judicial scrutiny.[425] It is clear that percentage limitations are unconstitutional, and the various elements of registration requirements tend to clearly fall on one side or the other of constitutional validity. However, the validity of disclosure requirements, a relatively new regulatory strategy, has become one of the more intense debates in the arena of charitable solicitation.

G) Disclosure

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the Supreme Court struck down a North Carolina law requiring professional fundraisers to disclose to potential donors the percentage of charitable contributions actually turned over to the charitable beneficiary.[426] The holding in *Riley* was predicated on the Court's view that the disclosure requirement was "unduly burdensome and not narrowly tailored" to the state's purported goal of preventing fraud.[427] In addition, the Court invalidated the provision because of its potentially misleading character and because more "benign and narrowly tailored options" were available.[428]

Regulators and charities clash on many issues with respect to the acceptability of disclosure legislation. Disclosure forces fundraisers to address "state-selected"[429] issues, unrelated to the particular charity, which may require substantial explanation. Such diversion from the solicitor's presentation can potentially quell the possibility of success, as "the solicitation process involves competition for three commodities, all very scarce and

424 1989 WL 107186 (4th Cir. September 20, 1989). *See* notes 465 to 477 and accompanying text *infra*.
425 *E.g. Riley v. National Fed'n of the Blind of N.C., Inc.*, __ U.S. __, __, 108 S. Ct. 2667, 2667 (1988).
426 *Id.* For a general discussion of *Riley*, *see* notes 227 to 281 and accompanying text *supra*.
427 *Riley*, __ U.S. at __ , 108 S. Ct. at 2678.
428 *Id.* at 2679. *See* notes 263 to 266 and accompanying text *supra*.
429 *See* Riley Independent Sector Brief, *supra* note 116, at 30.

widely sought, a citizen's time, attention, and money."[430] As Independent Sector has noted, because attracting and then retaining people's interest is difficult, "[i]ssues outside the charity's chosen message, no matter how relevant to some citizens' contribution decisions, will dilute most people's attention or turn them away from the charity and its message."[431] With respect to financial information, a report issued by the National Health Council, an organization representing nearly 100 health charities, describes point-of-solicitation disclosure as an "illusory solution," and states that abbreviated financial information can "distort a charity's performance."[432] According to the report, "[i]ndividuals do not appreciate that it costs money to raise money."[433]

From the perspective of state regulators, however, mandatory point-of-solicitation disclosures are attractive and "clearly more effective" than disclosures to governmental agencies.[434] The State of Maine has argued that it is "impractical to believe that consumers who are solicited on the telephone, on the street, or by mail will take the time to request that a state agency send them financial information concerning the solicitation."[435]

The *Riley* decision did not diminish the friction between regulators and fundraisers; several significant tension points remain. In the post-*Riley* regulatory climate, lawmakers continue the struggle to define feasible disclosure options. Many are experimenting with variations on the first generation of point-of-solicitation disclosures. Provisions requiring fundraisers to disclose their professional status, mandated disclosure of financial information other than the percentage disclosures in *Riley*, and

430 *Id.* at 19.
431 *Id.* at 21.
432 National Health Council, *The Realities of Charitable Accountability in the 1980s* 4-5 (October 1984).

> In the various forms in which it [a point of solicitation percentage disclosure] has been proposed it can only mislead the potential donor and thereby be a disincentive for charitable giving. The average donor doesn't know what 'program services' means, much less understand what all the numbers and percentages indicate. Such financial information is wide open to misinterpretation because the format encourages oversimplification of complicated financial materials.

Id.
433 *Id.*
434 Maine Brief, *supra* note 53, at 11 n.4.
435 *Id.*

disclosures upon request of a potential donor characterize their efforts. Legislators are also considering post-solicitation regulations, such as written follow-up disclosures, and a variety of public education campaigns.

1) Point-of-Solicitation Disclosure

Although, at first examination, *Riley* seems to signify the Court's rejection of regulatory schemes requiring point-of-solicitation disclosure of fundraising-cost information, the *Riley* holding may not preclude more narrowly tailored legislation. The Court left several unanswered questions about exactly what types of disclosures, if any, states may require.[436] The Court did not make clear, for example, whether its disdain for the particular percentage disclosure mandated by the North Carolina statute extends to other (perhaps more meaningful) percentage disclosures.[437] The Court does not reveal its fundamental view on financial disclosure requirements, for the majority opinion does not explain whether laws ordering *post*-solicitation disclosures of certain financial information (which, as the next section explains, are arguably less intrusive than those requirements which directly interrupt the solicitor's presentation) would violate the Constitution.[438] Moreover, other than the footnote reference to status disclosure provisions,[439] the *Riley* Court did not address the constitutionality of other point-of-solicitation disclosure provisions, unrelated to financial information.

436 The Oregon Attorney General's office, for example, takes the position that the Court has applied a "balancing test":

> As part of that process, the Court weighs the perceived state interest as well as the relative burden of the compelled speech on the professional fundraiser. Therefore, the outcome can be different, depending upon the state interest advanced, the type of information to be disclosed, and the format or time, place and manner of the disclosure.

Letter from Ross Laybourn (Attorney in Charge, Charitable Activities Section, Oregon Department of Justice) to "Professional Fund Raising Firms" 2 (Dec. 6, 1988) (discussing Impact of *Riley v. National Fed'n of the Blind of N.C., Inc.*) [hereinafter "Oregon Letter"].

437 *See* note 230 and accompanying text *supra*.

438 The discussion in the following section on post-solicitation disclosure requirements, page 83 *infra*, suggests that these are arguable less intrusive than point-of-solicitation disclosures.

439 *See* notes 280 to 281 and accompanying text *supra*.

Despite the gaps in *Riley*, state regulators have, for the most part, interpreted the decision as striking the final, decisive blow to percentage limitations on fundraising costs and percentage disclosures of fundraising cost information.[440] With regard to other possibilities for disclosure requirements, however, state reactions have been quite varied.

a) Status Disclosures

The continued viability of professional status-disclosure requirements, or provisions which compel professional fundraisers working on behalf of a charity to disclose the fact of their professional status, may be the most prominent point of contention between regulators and charities in the wake of *Riley*.

The majority in *Riley* specifically stated in a footnote that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status . . .. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny."[441] In sharp disagreement, Justice Scalia, concurring in the judgment, attacked the majority's position. According to Justice Scalia, mandated status disclosure is not narrowly tailored to prevent fraud.[442] In his view, the First Amendment prohibited the State from imposing a prophylactic rule requiring disclosure even when no misleading statements are made; the State could only "assess liability for specific instances of deliberate deception."[443]

440 For example, the Minnesota Attorney General's office decided not to enforce Minn. Stat. §309.556, subd. 2 (Supp. 1987), which required all professional fundraisers to make point-of-solicitation percentage disclosures. Before *Riley*, a district court upheld the provision as an appropriate way for a state to prevent fraud. *Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489, 1504-1505 (D. Minn. 1986). Since *Riley*, however, a new understanding of the Court's rejection of the relevance of such percentages to any state interest in preventing fraud led the Attorney General to cease enforcement.

See also, Mass. H.B. 552, 176th Gen. Ct., 1st Ann. Sess. (1989) (eliminates percentage disclosures); Maine H.P. 165, 1st Sess., 114th Me. Legis., 1st Sess. (1989) (repeals Me. Rev. Stat. Ann., tit. 9, §5012, and thus deletes percentage disclosure provision).

441 _ U.S. at _, 108 S. Ct. at 2679 n.11. *See* notes 280 to 281 and accompanying text *supra*.

442 *Riley*, _ U.S. at _, 108 S. Ct. at 2681 (Scalia, J., concurring in part and concurring in the judgment).

443 *Id.*

Furthermore, he continued,

> Since donors are assuredly aware that a portion of their donations may go to solicitation costs and other administrative expenses, whether the solicitor is a professional, an in-house employee, or even a volunteer, it is not misleading in the great mass of cases for a professional solicitor to request donations 'for' a specific charity without announcing his professional status.[444]

Although it is dictum, many regulators interpret the majority's footnote eleven in *Riley* specifically to sanction the required disclosure of professional status.[445] At least one lower federal court has upheld the constitutionality of a status-disclosure provision.[446] In *Indiana Voluntary Firemen's Assoc., Inc. v. Pearson*,[447] the court held that, even if the footnote was "technically 'mere *dicta*'," it was of the variety of "carefully considered *dicta*" which can have persuasive force, absent directly contradictory precedent.[448] According to the court, a majority of the Supreme Court in *Riley* "clearly and unequivocally" declared that the status-disclosure provision was sufficiently narrowly-tailored to promote the state's interest in preventing fraud.[449] The *Pearson* court also interpreted Justice Scalia's specific dissent from footnote eleven as further support that the footnote was the "clear mandate of the majority."[450]

As of December 1988, at least twelve states' codes and the District of Columbia code contained provisions requiring a professional solicitor to disclose her status as a professional, or to otherwise explain her relationship to the charity.[451] In 1989,

444 *Id.*

445 *See* "Oregon Letter," *supra* note 436. Comments from many other state regulators are in concurrence. *See* Telephone Conversation with David Ormstedt, Assistant Attorney General for Connecticut and Chief, Public Charities Unit (Feb. 24, 1989) (status disclosure will probably pass scrutiny); Telephone Conversation with Henri Cawthon, Florida Department of State (Feb. 23, 1989) (same); Telephone Conversation with Roberta Berkwits, Deputy, New Jersey Attorney General's Office (Mar. 3, 1989) (same) (Notes on file with N.Y.U. Program on Philanthropy and the Law).

446 *Indiana Voluntary Firemen's Ass'n, Inc. v. Pearson*, 700 F. Supp. 421 (S.D. Ind. 1988).

447 *Id.*

448 *Id.* at 442.

449 *Id.*

450 *Id.*

451 The states are: Colorado, Connecticut, Indiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Oregon, Pennsylvania (disclosure on request), and Virginia. The District of Columbia also required

several other states were considering status disclosure provisions.[452]

Status disclosure provisions or proposals do not vary substantially from state to state; most are simple and direct. Minnesota law, for example, directs any professional fundraiser soliciting contributions in the state to disclose to potential donors "the name of the professional fund raiser as on file with the attorney general and that the solicitation is being conducted by a 'professional fund raiser.'"[453] The Massachusetts Charitable Solicitations law currently contains similar language, using the term "paid fund-raiser" instead of "professional fund raiser."[454] A proposed amendment would simplify the law to require a "disclosure that the solicitation is being conducted by a professional solicitor or commercial co-venturer."[455] In May of 1989, the Maine legislature amended its fund raising law to include a similar point-of-solicitation status-disclosure requirement, supplanting the previously required percentage-disclosure for professional fundraisers.[456]

More extensive disclosure schemes are either under consideration or being implemented in other states. In Tennessee, for example, the legislature enacted an act in May 1989 revising the state's charitable solicitations law to include status disclosure language.[457] The new law states that a professional solicitor shall, prior to an oral solicitation and at the same time as a written solicitation, disclose her name as on file with the state, the name of the company or corporation for which she is an agent or employee, and her status as a "'professional solicitor,' who will

such a disclosure (on information card). Furthermore, a Kansas law, effective January 1, 1989, requires several at-point disclosures by professional solicitors, including "if the solicitation is made by a person acting as a professional solicitor, the registration number obtained pursuant to [registration with the secretary of state]." Kan. Stat. Ann. §17-1766 (1988) (registration with secretary of state required by Kan. Stat. Ann. §17-1765 (1988)).

452 *See, e.g.*, Fla. H.B. 1195, Reg. Sess. (1989); Vt. H. 307, 60th Biennial Sess. (1989); Me. H.P. 165, 114 Leg., 1st Sess. (1989).

453 Minn. Stat. §309.556, subd. 2 (Supp. 1989) (Act of May 17, 198[illegible] 151, 1989 Minn. Laws 687 kept this provision intact).

454 Mass. Gen. L. ch. 68, 23 (1985 & Supp. 1988).

455 Mass. H.B. 552, 176th Gen. Ct., 1st Ann. Sess. (1989).

456 Act of May 1, 1989, 1989 Me. Laws ch. 55 (§4 of Act), amending the Charitable Solicitations Act, Me. Rev. Stat. Ann. tit. 9, §§5001-5016 (1980 & Supp. 1988).

457 *See* Charitable Solicitation Reform Act of 1989, ch. 285, no. 2, 1989 Tenn. Acts 271 (Advanced Legislative Service) (effective July 1, 1989). *See also* text accompanying note 368 *supra*.

receive as costs, expenses and fees a portion of the solicited funds raised through the solicitation campaign."[458]

In addition to express status-disclosure provisions, several state laws and proposals require less direct disclosures designed to accomplish the same objective of identifying a solicitor as a compensated professional fundraiser. The Kansas Charitable Organizations and Solicitations Act, for example, includes a requirement that a professional solicitor disclose, at the point of solicitation, both the charitable organization's registration number and the professional fundraiser's registration number.[459] A donor is thus notified of the solicitor's professional status.

The State of Washington has a proposal which would prohibit a charitable organization or solicitor from using language, orally or in writing, suggesting that "the person soliciting the charitable contribution is a volunteer or words of similar meaning or effect that create the impression that the person soliciting is not a paid solicitor unless such person is unpaid for his or her services."[460] This provision would prevent a professional solicitor from masking her professional status with ambiguous or misleading language, although no *affirmative* status disclosure would be required. A proposal before the Vermont legislature suggests that a charitable organization, in its contract with the professional solicitor, may require the solicitor to disclose to potential donors that she is a "paid solicitor."[461] Indirect measures such as these communicate the professional status of the fundraiser as do more explicit disclosure disclosure requirements.

b) Disclosure of Availability of Financial Data

Another tension point which remains after *Riley* relates to requirements that the fundraiser disclose information concerning the availability of financial reports or other data to each prospective donor. Disclosure of the availability of financial

458 *Id.* at §27, amending Tenn. Code Ann. §48-3-513(j) by deleting the section in its entirety and substituting in lieu thereof the status disclosure language.
459 *See* Kan. Stat. Ann. §17-1766(a) (Supp. 1988).
460 Wash. H.B. 1733, 51st Legis., 1st Sess. (1989) (would add this as Wash. Rev. Code. §19.09.020(3)(a)-(b)).
461 Vt. H. 307, 60th Biennial Sess. (1989), at §2472 (b)(1). The provision also allows for a similar, contract by contract, percentage disclosure provision. The circumstances under which a charitable organization would insist on such contractual provision are, however, difficult to imagine.

information may be analyzed by analogy to the compelled disclosure at issue in the North Carolina statute discussed above. The *Riley* Court recognized that compelled disclosure could hamper legitimate fundraising efforts, and stressed that this was especially so when complicated financial information is compressed into a few percentages or figures which unfairly stigmatize a worthy organization.[462] The Court was concerned not only with the possibility that compelled percentage disclosure "necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers,"[463] but also with the fact that a fundraiser probably would not have a chance to explain the figure to a potential donor who is unhappy. As the Court pointed out, in the context of an oral solicitation, often "the disclosure will be the last words spoken as the donor closes the door or hangs up the phone."[464]

When compared to a provision requiring the disclosure of the actual financial data, a requirement that a solicitor disclose only the fact that detailed financial information is available upon request arguably generates less cause for concern about the disruption of the fundraiser's speech. The latter disclosure would, for example, obviate the need for the solicitor to interrupt a presentation to actually discuss and try to explain the financial data.

At least one court has accepted the position that disclosures about the availability of financial information are relatively minimal intrusions that can survive First Amendment attack. In *Telco Communications, Inc. v. Carbaugh*,[465] the Fourth Circuit Court of Appeals upheld a disclosure requirement in Virginia's solicitation law which required every professional fundraiser to disclose to prospective donors, in writing, "the fact that a financial statement for the last fiscal year is available from the State Office of Consumer Affairs."[466] In so holding, the Fourth Circuit reversed the district court's ruling that the requirement violated the First Amendment.[467]

The district court had recognized that the provision was less burdensome than some provisions of the North Carolina law at

462 _ U.S. _, 108 S. Ct. 2667. *See* notes 255 to 262 and accompanying text *supra*.
463 *Riley*, _ U.S. at _, 108 S. Ct. at 2679.
464 *Id. See* note 262 *supra* and accompanying text.
465 1989 WL 107186 (4th Cir. Sept. 20, 1989).
466 Va. Code Ann. §57-55.2(iii) (1950).
467 *See Telco Communications, Inc. v. Carbaugh*, 700 F. Supp. 294 (E.D. Va. 1988).

issue in *Riley*.[468] Nevertheless, it rejected the state's proffered justifications for the disclosure requirement and held that the regulation was not precise enough to satisfy the First Amendment.

The Fourth Circuit, however, held that the disclosure promoted the Commonwealth's interests in public education and fraud prevention in a manner which was narrowly tailored enough to withstand First Amendment scrutiny.[469] According to the Fourth Circuit, the disclosure requirement served to educate the public generally about the availability of financial information on solicitors, information which the court found to be valuable for several purposes. First, it would enable a prospective donor to "determine if a particular solicitation is bona fide by ascertaining whether the solicitor is registered."[470] In addition, the court surmised that a donor might also used the information obtained to "learn further about a solicitor's operations."[471] By making such comparative information available, moreover, the court held that the section also assisted in preventing fraud. According to the court, "[w]hen comparative information is available, inaccuracies in inducements are less likely to occur. If they do occur, they are more likely to be discovered."[472]

In response to the argument adopted by the lower court, that the state has more benign means by which to communicate the information,[473] the Fourth Circuit held that the requirement

468 700 F. Supp. at 297-298. The North Carolina statute had required the professional fundraiser to make statements prior to or as part of an initial contact with a potential donor. N.C. Gen. Stat. §131C-16.1 (1986). The Virginia statute, however, was less explicit about the exact point in time of the disclosure. Va. Code Ann. §57-55.2(iii) (1950).

469 *Telco Communications, Inc. v. Carbaugh*, 1989 WL 107186, 9 (4th Cir. Sept. 20, 1989).

470 *Id.*

471 *Id.*

472 *Id.*

473 *Telco*, 700 F. Supp. at 298 (quoting *Riley*, 108 S. Ct. at 2679). The district court embraced the Supreme Court's reasoning in *Riley*, quoting passages in which the Court suggested that the state had available "more benign and narrowly tailored options . . . [to] communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation." *Id.*

See notes 263 to 266 and accompanying text *supra* for discussion of Court's suggestion in *Riley* that the state may itself publish the information and thus communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. *See also* notes 503 to 510 and accompanying text *infra*, discussing current state efforts to publish such information.

was "tailored to that group which would most desire the information and make an informed decision on the basis of it."[474] The court also emphasized that the requirement was not burdensome, even in the case of oral solicitations, as the written disclosure could be noted on the donor's receipt.[475] The Virginia provision was not, therefore, a pre-solicitation intrusion into the fundraiser's presentation. The court characterized it instead as a "neutral disclosure" which "affords 'more speech' to the public, but does not silence the solicitor."[476] Distinguishing *Riley*, the court stated that the "brief, bland, and non- pejorative disclosure" required was unlikely to discourage donations.[477]

c) Information Cards

Some states have interpreted the *Riley* Court's statement that "more benign and narrowly tailored options are available" to communicate certain information to the donating public[478] as the essential holding of the case. These states have thus acted to either reduce intrusions into the solicitor's presentation or to eliminate any mandated disclosures which have the effect of interrupting a solicitor's presentation with unwanted speech. One way states have tried to force charitable organizations to provide relevant information to the donating public is by requiring fundraisers to provide donors with information cards. This method is thought to be less intrusive than oral point-of-solicitation disclosures. The California Charitable Solicitations statute, for example, requires a solicitor to exhibit to the prospective donor or purchaser a card entitled "Solicitation or Sale for Charitable Purposes Card" or, in lieu of such a card, to distribute during the course of the solicitation printed material providing certain information and notifying the donor that it contains the required disclosures.[479] The statute specifically requires that the information card detail the manner in which the money will be used for charitable purposes and the amount of fundraising expenses to be incurred, expressed as a percentage of

474 *Telco*, 1989 WL 107186, at 9.

475 *Id.*

476 *Id.* at 10 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

477 *Id.*

478 *Riley*, __ U.S. at __, 108 S. Ct. at 2679.

479 Cal. Bus. & Prof. Code §17510.3 (West 1987).

total amounts raised.[480] The California statute provides that volunteers may meet the requirements of the section by providing the name and address of the organization, the charitable purposes of the campaign, and by stating that information about the revenues and expenses of the organization may be obtained by contacting the organization.[481] The District of Columbia fundraising statute requires fundraisers to exhibit similar information cards to potential donors.[482]

The constitutionality of solicitor information cards is difficult to evaluate. The provisions outlined above necessarily force solicitors to alter the content of their solicitations, and the distribution of the card may indeed set the tone for the ensuing interaction between the fundraiser and the prospective supporter. Furthermore, regulations like the California statute, directing fundraisers to disclose, on written cards, fundraising cost information expressed in percentages, *cannot* be so easily distinguished from regulations struck down by the *Riley* Court as to necessarily render the former constitutional. The Court has already suggested that such percentages, in and of themselves, are unrelated to the goal of preventing fraud.[483] Other written disclosure requirements, if more narrowly tailored to the state's goal of preventing fraud, however, may pass constitutional examination.

d) Disclosure on Request

Another way states have followed the Court's advice is by only requiring disclosures at the behest of the prospective donor.[484] New Mexico's charitable solicitations statute, for

480 *Id.* at §17510.3(a)(1)-(8). The information must also be in "10-point type." *Id.*

481 *Id.* at §17510.3(c). The statute completely exempts unpaid volunteers under 18 years of age who are involved in a solicitation campaign for a tax-exempt organization under Internal Revenue Code §501(c)(3). *Id.* at §17510.3(d).

482 D.C. Code Ann. §2-705 (Repl. 1988). Until recently Minnesota had a similar information card provision. *See* Act approved May 17, 1989, ch. 151, 1989 Minn. Laws 687 (effective August 1, 1989) (amending Minn. Stat. Ann. §309.556 (West 1969 & Supp. 1989)).

483 *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 966-67 (1984). *See* note 207 and accompanying text *supra*.

484 Writing subsequent to the *Riley* decision, one commentator has argued that such "demand disclosure" is the "only remaining alternative" left open to state regulators. *See* Note, *Charitable Fraud in New York: The Role of the Professional Fund Raiser*, 33 N.Y.L. Sch. L. Rev. 409, 439 (1988). The same commentator goes on to assert that a state's "demand disclosure statute should require fund raisers to disclose the very same information a point-of-solicitation statute would have required." *Id.* at 445. The way the author uses the term, "demand disclosure" refers to more than just a disclosure at the request of a solicitee, but a more affirmative requirement that solicitations include statements informing the public that certain information is available upon request. *Id.* at 436, 445.

As suggested earlier, there may be constitutional problems with requiring a disclosure of this sort if the information to be disclosed is unrelated to the state's goal of preventing fraud. *See* notes 479 to 483 and accompanying text *supra* discussing information cards in general. Furthermore, as this article argues, more creative, and perhaps more *effective*, regulatory options which do not violate the constitutional principles discussed in *Riley* are open to state regulators. *See* notes 503 to 510 and accompanying text *infra*, on Public Education options.

example, requires organizations to "disclose upon request the percentage of funds solicited which are spent on the costs of fund raising."[485] Lawmakers recently amended Tennessee's charitable solicitations law to include a requirement that a professional fundraiser disclose, on request of the solicitee, the percentage of gross receipts raised by the professional which the charity shall receive after solicitation expenses.[486] During the summer of 1989, the Illinois legislature was also considering a bill requiring disclosure on request of professional solicitor's hourly rate or percentage compensation.[487] Similarly, Florida's Solicitation of Charitable Contributions Act, recently amended,[488] requires each charitable organization to provide, upon the request by any person from whom it solicits a contribution, an annual financial report or written statement disclosing, at a minimum, the following information: the purpose for which the funds are raised; the total amount of contributions raised; total costs and expenses incurred in raising contributions; total amount of contributions dedicated to the stated purposes; and a statement as

485 N.M. Stat. Ann. §57-22-8 (1987 Replacement). The provision states that "[f]or purposes of this section, costs of fund raising shall include all money directly expended on fund raising and that portion of all administrative expenses and salaries of the charitable organization attributable to fund raising activities." This apparently applies to any solicitation, whether conducted by a volunteer, an organization employee, or a professional fundraiser.

But see Act effective July 1, 1989, ch. 58, 1989 Colo. Sess. Laws 364, repealing a similar provision in the Colorado Charitable Solicitations Act, Colo. Rev. Stat. §6-16-105(4) (Supp. 1988), which stated that a paid solicitor must provide, upon request, a written explanation of how contributions are spent.

486 *See* Charitable Solicitation Reform Act of 1989, *supra* note 368, §23 (amending Tenn. Code. Ann., tit. 48, ch. 3).

487 Ill. S.B. 514.

488 Solicitation of Charitable Contributions Act, ch. 89- 205, 1989 Fla. Laws 1807 (to be codified as amended at Fla. Stat. §§496.001-496.011).

to whether another person or organization has been contracted to conduct fundraising.[489]

Disclosure mandated only when the issue is raised by a prospective donor is not easily criticized as a "state-selected issue"[490] or an "issue outside the charity's chosen message."[491] In that respect, it therefore seems likely that such disclosure requirements could withstand First Amendment scrutiny, as they are fairly narrowly tailored to meet the government's objectives. To state regulators, however, disclosure on request will probably not be particularly effective as it adds little to the natural discourse between solicitor and prospective donor. Absent such a provision for disclosure on demand, members of the public are, of course, free to make inquiries when solicited and seek any information they deem relevant to a decision about whether to support an organization. Furthermore, a solicitor's refusal to provide such information to a possible contributor would seem unwise, as it could easily foil the solicitation attempt, with or without the mandated disclosure provision.

2) Post-Solicitation Disclosure

The preceding section focused upon the most common disclosure requirements, those which impact upon a solicitation while the request for a contribution is being made. In addition to these point-of-solicitation requirements, state regulators have also initiated efforts to regulate charitable fundraising after the solicitation has occurred. Given the strong language in *Riley* about the intrusiveness of certain regulatory measures[492] and the important First Amendment freedoms at stake, many state regulators are now paying closer attention to post-solicitation disclosures which they judge to be constitutional.

489 *Id.* (to be codified at §§496.005(1)-(2)). "Cost of fund-raising" is defined to include expenses incurred for services performed by or through a professional solicitor. *Id.* (to be codified at §496.004(5)).
490 Riley Independent Sector Brief, *supra* note 116, at 30.
491 *Id.* at 21.
492 *See Riley v. National Fed'n of the Blind of N.C., Inc.*,__ U.S. at __, 108 S. Ct. at 2679; notes 263 to 266 and accompanying text *supra* (discussing less intrusive means of state regulation of charitable solicitation).

Many state regulators and fundraisers disagree over the acceptability of written follow-up disclosure requirements. Provisions which direct a solicitor to provide specific information to potential contributors through written communication after an initial solicitation may not interrupt a speaker's presentation as intrusively as the point-of-solicitation requirements discussed earlier. Nevertheless, follow-up requirements do mandate disclosure of state-selected messages and, in this respect, the constitutional infirmities of other disclosure requirements, particularly those in *Riley*, affect analysis of post-solicitation requirements as well. Under the Oregon statute, for example, fundraisers who engage in oral solicitation must provide all contributors with a written disclosure stating the name of the professional fundraising firm, the fact that the firm is being paid to conduct the solicitation, and the percentage of gross receipts to be paid to the nonprofit beneficiary.[493] Although the Oregon regulators chose not to enforce that state's point-of-solicitation disclosure provision[494] after *Riley*, they have not abandoned the follow-up disclosure provision, including the percentage fee disclosure.[495] At least one court has held that some post-solicitation provisions do not withstand constitutional scrutiny. In *Indiana Voluntary Firemen's Association, Inc. v. Pearson*,[496] a district court held unconstitutional a post-solicitation provision which forced disclosure of certain financial information. The court seemed particularly concerned with the substance of the disclosure, rather than the point in time at which it was to be made. The court thus struck down an Indiana code provision directing fundraisers to make post-solicitation disclosures of the percentage of charitable contributions to be received by the beneficiary, or the professional fundraiser's fee.[497] In evaluating this provision, the court held that the "original solicitation and the coerced post-solicitation disclosure must be considered for constitutional purposes as a 'single speech' whose component parts are 'inextricably intertwined.'"[498] The court explained that:

493 Or. Rev. Stat. §128.836(2) (1987 Replacement).
494 *Id.* at §128.836(1)(b).
495 *See* Oregon Letter, *supra* note 436.
496 700 F. Supp. 421 (S.D. Ind. 1988).
497 *Id.* at 447 (citing Ind. Code. §23-7-8-6(c) (1971)).
498 *Id.* at 446.

> [T]he constitutional litmus test for determining whether the various component parts of a speech are "inextricably intertwined" is not composed merely of a mechanical inquiry into the chronological proximity of those various speech segments; it is constituted, rather, of a carefully discerning inquiry into the degree of impermissible impact that the lesser protected speech components have upon those portions of speech which are fully protected by the first amendment.[499]

With regard to the percentage disclosure under attack, the court held that it would be "artificial and impractical" to parcel out a post-solicitation disclosure which had a substantial impact on the protected speech and give it less First Amendment protection.[500]

Applying the exacting scrutiny required by *Schaumburg*, *Munson*, and *Riley*, the *Pearson* court stressed, first, that the post-solicitation disclosures were based on the mistaken premise that high solicitation costs are a precise measure of fraud; second, that the state had less burdensome regulatory means available; and, third, that new, smaller, and less-popular charities were necessarily discriminated against.[501] For the same reasons that the mandated point-of-solicitation disclosure of the percentage fee paid to a professional fundraiser was improper, the court thus invalidated the post-solicitation disclosure of the same information.[502]

The fact that the *Pearson* court had little difficulty upholding a second post-solicitation disclosure requirement, under which paid solicitors were obligated to provide written confirmation of their professional status after the solicitation,[503] suggests that the substance of the first disclosure was most troubling to the court. Furthermore, the *Pearson* court implicitly gave approval to status disclosure requirements as principally distinct from financial disclosure requirements. It therefore appears that, at least under the *Pearson* analysis, state regulators cannot avoid the constitutional infirmity of a disclosure requirement which would not pass scrutiny if applied at the point of solicitation simply by separating it in time and applying it post-solicitation.

499 *Id.*
500 *Id.*
501 *Id.* at 447.
502 *Id.*
503 *Id.* at 445 (referring to Ind. Code. §23-7-8-6(b)). *See* notes 446 to 450 and accompanying text *supra* (status disclosure provision discussion).

3) Public Education

The problematic aspects of disclosure requirements seem to disappear when the state compiles the information it has amassed through the registration and reporting process and independently presents the material to the public. In this way, the state can select its messages without in any way interfering with the First Amendment rights of charitable organizations. Indeed, in rejecting broad prophylactic rules in the area of free expression, the *Riley* Court specifically recommended this route to regulators, because it "would communicate the desired information to the public without burdening the speaker with unwanted speech during the course of the solicitation."[504]

Connecticut has pioneered state-initiated dissemination efforts, publishing such material even before the Supreme Court's directive in *Riley*. In April of 1988, the office of the Connecticut Attorney General published a report on paid telephone solicitation detailing the information accumulated in the financial reports filed for solicitation campaigns for charitable, civic, police and firefighter organizations in 1987.[505] The report focused upon fundraising costs, one factor of many which go into an individual's decision whether or not to give, but the one the authors considered "the most often obscured."[506] Connecticut regulators indicate that they plan to continue such publications.[507]

Other states can be expected to follow suit, to the extent possible.[508] Florida's new charitable solicitation act, for example, authorizes the Division of Consumer Services of the Department of Agriculture and Consumer Services to undertake a "public information campaign" on fundraising,[509] and a new Maryland

504 *Riley*, __ U.S. __, __, 108 S. Ct. 2667, 2679 (1988) "[T]he State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file." *Id.*
505 *See* CT Survey, *supra* note 19.
506 *Id.* at 14.
507 *See* Conversation with David Ormstedt, Connecticut Attorney General's Office (Feb. 24, 1989) [Notes on File with N.Y.U. Program on Philanthropy and the Law].
508 *See* Conversation with Roberta Berkwits, Deputy, New Jersey Attorney General's Office (Mar. 3, 1989) (intends to publish information); Conversation with Ross Laybourn, Oregon Attorney General's Office (Feb. 15, 1989) (may consider such publication, depending on the outcome of the next generation of cases) [Notes on file with the N.Y.U. Program on Philanthropy and the Law].
509 *See* Florida Solicitation of Charitable Contributions Act, *supra* note 488, at §496.011.

statute establishes a "Charitable Giving Information Program" in the Secretary of State's Office, including a toll-free number to obtain information about charitable organizations.[510] During the summer of 1989, Illinois lawmakers were also considering a law requiring the Attorney General to establish a register of charitable organizations and publish an annual report of all charitable organizations based on information filed with the state.[511] Other states may be interested in such public information programs, yet they may be unable to accomplish the task because of a shortage of lack of resources, personnel, or time.

IX) Conclusion

The Supreme Court's decision in *Riley* left unanswered many important questions about how states may constitutionally protect their citizens from charitable fundraising abuses. As legislators continue efforts to devise schemes which comply with the decision, they will certainly not renounce longstanding views on the important role of state regulation of charitable solicitation. In spite of the Court's apparent distaste for broad prophylactic measures, many states refuse to abandon such efforts, often as a matter of necessity.[512] The current task for regulators is to proceed with new techniques for both identifying and preventing abuse, and gathering and disseminating the information they perceive as vital to enable the donating public to make informed decisions. With equal vigor, charities can also be expected to continue to pursue their goals to prevent overly intrusive regulation.

The previous discussion has examined certain pre-solicitation requirements which are likely to withstand judicial examination. Included within this grouping are registration requirements, apart from those which give unchecked licensing discretion to regulatory officials or those that allow an unreasonable delay between the filing of the application and the beginning of the campaign. Additionally, the requisite filing of financial information statements and the imposition of modest

510 Act approved May 19, 1989, ch. 388, 1989 Md. Laws 2401. (program effective July, 1, 1990).

511 Illinois S.B. 514, 86th Gen. Ass., Reg. Sess. (1989).

512 Many states lack the resources which would be required to more closely monitor the charitable fundraising community and police for fraud and abuse. These states are short of money and personnel, and an increase in these resources is not usually high on the agenda of state legislators.

fees to finance the administration of the regulatory process have generally withstood constitutional scrutiny. A state cannot, however, impose "unreasonable" fees on charitable solicitors, although the limits of "reasonableness" in this case are unclear. In the wake of *Schaumburg*, *Munson*, and *Riley* it is also quite clear that a state may not prohibit charitable solicitation on the basis of percentage limitations of the amount spent on fundraising.

Point-of-solicitation and post-solicitation requirements are the most vexing. With regard to disclosure, state publication and donor education efforts have received definitive judicial approval. Nevertheless, regulators do not view these options as exclusive, but rather as examples of constitutional methods by which to protect citizens against abusive or fraudulent solicitation. For this reason, disclosure requirements have not disappeared.

Especially important to states are financial information disclosure requirements. Much of the uncertainty about exactly what type of disclosures are constitutional centers around the dispute over the proper interpretation of *Riley*. In particular, it is unclear whether the decision turned on the *content* of the disclosure or on the *intrusiveness* of the mandated disclosure and its effect on the relationship between the charitable solicitor and potential donors. Whatever the correct interpretation, it seems that laws requiring professional fundraisers to disclose their professional status may withstand scrutiny, although these laws arguably compel the communication of "financial information." Efforts to force post-solicitation disclosures of the same information the *Riley* Court rejected in the pre-solicitation context, however, are probably wasted. For example, at least one court has suggested that separation in time does not cure the constitutional infirmities of percentage fee disclosures. Whether this reasoning applies to other financial disclosures, however, remains unsettled.

If the past decade is any indication, many states will actively re-examine and remodel their laws governing charitable solicitation in the coming years. The next generation of judicial interpretations will therefore undoubtedly prove crucial to all of the players: charitable solicitors, professional fundraisers, state regulators and the donating public.

END