THE POST-*RILEY* ERA: AN ANALYSIS OF FIRST AMENDMENT PROTECTION OF CHARITABLE FUNDRAISING

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.

—Justice Harry A. Blackmun[1]

[T]he solicitation of charitable contributions is protected speech.

—Justice William J. Brennan[2]

I. INTRODUCTION

Donations to charitable institutions totaled approximately $122.6 billion in 1990,[3] yet a significant portion of that amount never reached the charitable causes.[4] Fees charities pay to professional fundraisers that solicit donations vary and can often be substantial. One North Carolina study indicates that many professional fundraisers withhold well over half of the contributions they collect,[5] and some solicitors keep an excess of eighty-five percent of the gross revenues from the charities.[6]

Prior to the 1980s, when the Supreme Court of the United States decided *Village of Schaumburg v. Citizens for a Better Environment*,[7] *Secretary of State of Maryland v. Joseph H. Munson Co.*[8] and

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[1] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976).

[2] Riley v. National Fed'n of the Blind, 487 U.S. 781, 789 (1988).

[3] AMERICAN ASS'N OF FUND-RAISING COUNCIL TRUST FOR PHILANTHROPY, GIVING U.S.A.: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 1990 (1991), *quoted in* Steven G. Greene, *1990 Giving: Smallest Increase in 3 Years*, CHRON. OF PHILANTHROPY, June 4, 1991, at 1.

[4] Several of the largest publicly supported charities commit less that 50% of their donations to the charitable causes (*e.g.*, American Cancer Society (Group) 42%; Covenant House (National) 23%; United Way Southeastern (Pennsylvania) 2%. On the other hand, there are charities that commit over 90% of their public donations to the charitable causes (*e.g.*, United Way Tri-State and Shriners Hospital (National)). James Cook, *Charity Checklist*, FORBES, Oct. 28, 1991, at 180.

[5] *Riley*, 487 U.S. at 784.

[6] According to Brenda Ball, President of Good as Gold Fundraising in Willoughby, Ohio, "'Some charities receive only 11 per cent of the donations and don't realize that's a bad rate.'" Kristin A. Goss & Jennifer Hoffman, *States Modify Laws on Fund Raising to Crack Down on Charity Fraud*, CHRON. OF PHILANTHROPY, Aug. 8, 1989, at 24.

[7] 444 U.S. 620 (1980).

Riley v. National Federation of the Blind[9] ("the *Riley* trilogy"), a state could impose severe statutory restrictions on both the amount of money fundraisers could charge for soliciting and the amount charities could spend for non-charitable purposes, such as paying fundraisers.[10] With the decisions in the *Riley* trilogy, however, the Supreme Court, relying on the First Amendment, practically eviscerated state regulation of charitable solicitation by invalidating several state statutes.[11]

A by-product of this First Amendment protection is the near inability of states to regulate fundraising effectively. The *Riley* trilogy shelters professional fundraising schemes from rigorous state control, while individual contributors go largely unprotected from potential abuses. Donors ordinarily assume that some entity, either the state or the charity itself, regulates how contributions are used.[12] Many people are unaware that charities may use a significant portion of their gifts to pay fundraisers[13] or that professional fundraisers are not required to inform contributors that part of their gifts will be employed for non-charitable purposes.[14] The donors' ignorance makes them vulnerable to being taken advantage of by common industry practices; the states, therefore, should intervene on the public's behalf to the fullest extent possible within the constitutional limits. Unfortunately, the Court's decisions in the *Riley* trilogy leave only a small

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8 467 U.S. 947 (1984).

9 478 U.S. 781 (1988).

10 *See, e.g.*, SCHAUMBURG VILLAGE CODE, ILL., § 22-1 to 24 (1975), which "prohibit[ed] the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for 'charitable purposes,' [Charitable purposes] . . . exclude solicitation expenses, salaries, overhead, and other administrative expenses." (*quoted in* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 622 (1980)).

Overhead, for the purposes of this Note, is the amount of money charities spend on fundraising and administrative costs. Any money the charity spends on overhead is necessarily subtracted from the amount the charity may use directly for the charitable cause.

11 *See* the *Riley* trilogy, discussed *infra* section III.

The First Amendment provides in relevant part, "Congress shall make no law . . prohibiting the free exercise [of religion] . . . or abridging the freedom of speech . . . ." U.S. CONST. amend. I. The Fourteenth Amendment extends First Amendment protection to state citizens. *See* Schneider v. State, 308 U.S. 147, 160 (1939) (incorporating First Amendment protection into state law); U.S. CONST. amend. XIV § 2.

12 John Doble, *Public Opinion About Charitable Solicitation and the Law*, 27, *in Conference*, CHARITABLE SOLICITATION: IS THERE A PROBLEM? (New York University Program on Philanthropy and the Law, ed. (1990) [hereinafter *Conference*]).

13 Doble, *supra* note 12, at 27. The majority of people Doble polled thought that professional fundraisers could *not* keep over 90 percent of the money they raised. *Id.* Although the study was not conducted scientifically, *see id.* at 57, the results point to the ignorance of most charitable donors. *See* Catherine Pierce Wells, *State Regulation of Charitable Solicitation*, 14-15, *in Conference*, *supra* note 12 (discussing the difficulty of ascertaining the number of charities engaging in fraud).

14 *See* Riley v. National Fed'n of the Blind, 487 U.S. 781, 799 (1988).

area of control within which states may act.[15]

Part II of this Note discusses the evolution of First Amendment protection of charitable solicitation, exploring the tension between pure speech and commercial speech. Part III discusses the state of charitable solicitation law as articulated by the Supreme Court. It examines the *Riley* trilogy,[16] with special emphasis on *Riley* itself. Part IV explains that the charitable contribution system will maintain its integrity only if the states can balance their interest in protecting the donating public with the charities' and solicitors' First Amendment rights. This balance might be achieved if states adopt legislation containing mandatory solicitation disclosure provisions. These laws would require solicitors to inform potential donors that they are professional fundraisers[17] and that information regarding the disposition of the solicited funds is available upon request. The disclosures would help put prospective donors on notice[18] that some portion of their gift may be used for non-charitable purposes and provide the donors with easy access to more information should they desire it.[19] Although a state might prefer more extensive regulation, the mandatory solicitation disclosures may be the only available constitutional method of regulating charitable fundraising.

II. Regulatory History

A. *Background*

Courts and commentators have long analyzed the meaning and probed the purpose of the First Amendment's protection of speech.[20] The Supreme Court's opinions offer various rationale, among them: the belief shared by Justices Holmes and Brandeis that truth will trump all else in the marketplace of ideas only if it

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15 For a synopsis of the holdings of the *Riley* trilogy, see *supra* text accompanying note 10; for an extensive discussion of the cases, see *infra* section III.

16 See *supra* text accompanying note 10 for a synopsis of the *Riley* trilogy.

17 The *Riley* Court stated that requiring a fundraiser to disclose his name and the name of his employer is permissible. *Riley*, 487 U.S. at 799 n.11.

18 *Id.* at 799.

19 The fundraising company would know what fees it received, even if its employees doing the actual solicitation did not know. The company would be responsible for giving the information to its solicitors.

20 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919), discussed *infra* note 21; Whitney v. California, 274 U.S. 357, 375-76 (1926), discussed *infra* note 21; Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948) (three lectures ardently supporting unabridged rights to free speech); Laurence H. Tribe, American Constitutional Law § 12-1, at 785-89 & 788 n.26 (2d ed. 1988). For the relevant text of the First Amendment, see *supra* note 11.

can be spoken;[21] Justice Harlan's assertion that free speech is an essential component of successful democracy;[22] and Justices Brennan's and Douglas's belief that the purpose of the First Amendment is, in part, to encourage dissent.[23] By any definition, the First Amendment is a cornerstone of American constitutional jurisprudence and an axiom of American popular culture. The First Amendment, though, is tempered by countervailing forces.[24] Protected speech is exemplified at times in the espousal of political views, religious beliefs or artistic expressions. When protected speech intertwines with unprotected speech, however, the result may receive lowered protection. For instance, protection is often lost when speech intertwines with certain activities, such as some forms of riot incitation,[25] or when speech goes beyond certain articulated legal boundaries, such as obscenity.[26]

First Amendment protection of charitable solicitation arose out of the nexus between pure speech and commercial speech. Before the 1980s, the Supreme Court had not declared that char-

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[21] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); *see also Whitney*, 274 U.S. at 375 (Brandeis, J. and Holmes, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

[22] *See* Cohen v. California, 403 U.S. 15, 24 (1971) (Harlan, J.):

> [F]ree expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id.

[23] *See* Texas v. Johnson, 491 U.S. 397, 408-09 (1989) (the flag burning case) (Brennan, J., in one of his last First Amendment opinions, quoting Douglas, J., Terminiello v. Chicago, 337 U.S. 1, 4 (1949)) (The " 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' ").

[24] An example of these countervailing forces is found in the "fighting words" case, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (unanimous opinion), *where the Court stated:*

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and . . . "fighting" words—those which . . . are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. (footnotes omitted).

[25] For a discussion of the "fighting words" doctrine, see *supra* note 24.

[26] One example of the Court's definition of obscenity is the Miller v. California, 413 U.S. 15, 24 (1973) "community standards" test. *Id.*

itable solicitation fell under the rubric of the First Amendment.[27] Thus, the states asserted unfettered control over most charitable fundraising, with the exception of charitable solicitation for religious causes.[28]

The initial legal distinction between religious and commercial solicitation,[29] and by implication nonsecular and charitable fundraising, became crystallized in the 1942 case of *Valentine v. Chrestensen*.[30] In *Chrestensen*, the Court created the commercial speech doctrine by dint of alchemy and without citation to precedent.[31] This opinion, which Justice Douglas later characterized as "casual, almost offhand," cordoned off commercial speech from First Amendment protection.[32] The *Chrestensen* Court upheld a New York City prohibition of a merchant's public distribution of leaflets containing political messages on one side and

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[27] *See* Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980)(discussing First Amendment import of charitable solicitation). For a discussion of First Amendment protection of charitable solicitation, see *infra* part IV.

[28] The Supreme Court first extended low level First Amendment protection for nonsecular solicitation in Schneider v. Town of Irvington, 308 U.S. 147 (1939) (municipal ordinance requiring solicitors to submit solicitation scripts to police in order to receive license amounted to unconstitutional censorship) and Cantwell v. Connecticut, 310 U.S. 296 (1940) (Jehovah's Witnesses' convictions for door-to-door distribution of pamphlets and sales solicitations overruled as violative of First Amendment). These cases held that a state or municipality could neither require religious fundraisers to submit their solicitation scripts to the police for approval, *Schneider*, 308 U.S. at 164, nor deny a religious group a permit because the group was not considered a religion by the state or municipality. *Cantwell*, 310 U.S. at 307.

The *Cantwell* Court carefully noted that its opinion had limited scope: "The general regulation . . . of solicitation, which does not involve any *religious* test and does not unreasonably obstruct or delay the collection of funds, is *not* open to a constitutional objection . . . ." *Id.* at 305 (emphasis added); *see also Schneider*, 308 U.S. at 165 ("[C]ommercial soliciting and canvassing" are statutorily regulable.).

Despite the opportunity for abuse that unregulated religious charitable solicitation created, the Court held that the Constitution precludes highly intrusive state control. *Schneider*, 308 U.S. at 164. The Court implicitly decided that the risk of damage from religious charitable misappropriation was less significant than the benefit conferred by First Amendment protection for such fundraising solicitation.

[29] The division is primarily between one's solicitation of another person's membership in, or donations to, a religious group and one's citation of another person to take a financial interest in a secular entity.

[30] 316 U.S. 52 (1942). The Court and commentators have failed to agree on a uniform definition of commercial speech. Thus, defining the doctrine more concretely is problematic. *See* TRIBE, *supra* note 20, § 12-15, 890-98; for an examination of the patchwork of Supreme Court commercial speech decisions, see *infra* note 36.

[31] *Id. See* JOHN E. NOWACK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § 16.27-.31 (3d ed. 1986) (discussing the commercial speech doctrine).

[32] Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring):

> Important as the First Amendment is to . . . cultural ends, it has not been restricted to them. . . . The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. *Those who make their living through exercise of First Amendment rights are no less entitled to its protection* than those whose advocacy or promotion is not hitched to a profit motive.

Id. (citations omitted) (emphasis added).

advertisements on the other.[33] The Court declared that, despite the political aspects of the solicitation, the leaflet was commercial. Consequently, the First Amendment "impose[d] no . . . restraint on government . . . respect[ing] purely commercial advertising."[34] Charitable solicitation, like the commercial speech in the banned handbills of the *Chrestensen* case, has both a pure speech aspect and a commercial—or profit motivated—aspect. The hegemony of *Chrestensen*'s commercial speech doctrine, and the consequent limited protection granted to commercial speech, led to the Court implicitly sanctioning state charitable solicitation statutes because the statutes regulated what historically would have been considered commercial speech.

B. *Tension Between Commercial and Noncommercial Speech*

The distinction between commercial speech and pure speech has significance for charitable solicitation because of the for-profit, and therefore commercial, component of professional fundraising. If the Court had chosen to classify charitable solicitation as commercial speech in the 1980s, which it did not,[35] it would have been able to use that distinction as the basis for extending a level of protection commensurate with that of commercial speech. Even if the Court had chosen to categorize charitable solicitation as commercial speech, the commercial speech doctrine in its present form is vague and difficult to implement because of the Court's failure to articulate concrete and easily applicable standards.[36]

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33 *Chrestensen*, 316 U.S. at 52.

34 *Id.* at 54.

35 For a discussion of First Amendment protection of charitable fundraising, see *infra* section IV.

36 *See* TRIBE, *supra* note 20, § 12-15, at 890-98. *See also* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977) ("for sale" and "sold" signs could not be banned in order to stem "white flight" from community); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (lawyers may advertise within certain guidelines based on truthfulness of claims asserted); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (lawyers' solicitation of individual accident victims is only marginally protected by First Amendment and therefore could be regulated by state); Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (public utilities may discuss controversial public policy issues in flyers accompanying monthly bills); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (city may regulate billboards' form and content within certain safety-based guidelines); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) (town may regulate sale of literature advocating the use of illicit drugs); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (federal statute prohibiting unsolicited mailing of pamphlets advertising prophylactics and discussing venereal disease declared unconstitutional) (Stevens, J., concurring in judgment, pointed out that "the impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted." *Id.* at 81); Cornelius v. NAACP, Legal Defense & Educ. Fund, 473 U.S. 788 (1985) (charities may be excluded from mounting fundraising

Despite the landmark case, *Virginia State Board of Pharmacy v. Virginia Consumer Council*,[37] which finally dismantled *Valentine v. Chrestensen*[38] by holding that commercial communication was not "wholly outside the protection of the First Amendment,"[39] the commercial speech doctrine remains elusive. In *Virginia Pharmacy*, the Court invalidated a state statute prohibiting pharmacists from advertising prescription drug prices.[40] The Court articulated a "commonsense" standard in determining whether an advertisement constituted commercial speech.[41] Despite its departure from precedent in *Virginia Pharmacy*, the Court retained vestiges of the *Chrestensen* dogma. The Court indicated that this newly articulated elevation of commercial speech entitles it to only a lower level of First Amendment protection when compared to more fully protected speech.[42] The Court ascribed importance to allowing the "free flow of commercial information,"[43] but stated that "the greater objectivity and hardiness of commercial speech[] may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."[44] Thus, the

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drives targeted at federal employees); Meyer v. Grant, 486 U.S. 414 (1988) (state lobbyists may pay to have initiative petitions circulated); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (mayor may not wield unrestricted discretion in granting permits for the placement of news racks on public property); Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (university may prohibit kitchen products demonstrations in student dormitory rooms even though noncommercial topics are also discussed).

37 425 U.S. 748 (1976).

38 316 U.S. 52 (1942).

39 *Virginia Pharmacy*, 425 U.S. at 761.

40 *Id.* at 773 n.25.

41 *Id.* at 771 n.24. The Court did not explain what "commonsense" is, as it is necessarily fact based and therefore case specific. The facts of *Virginia Pharmacy*, however, did lend themselves to this simplistic analysis; see *infra* text accompanying notes 49-51 for a discussion of the facts leading to this decision.

42 *See Virginia Pharmacy*, 425 U.S. at 771-72 n.24 ("In concluding that commercial speech enjoys First Amendment protection, [the Court has] not held that it is wholly undifferentiable from other forms [of speech]. . . . [A] different[, lower] degree of protection is necessary . . . ."); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978):

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution [of first amendment protection of noncommercial speech] . . . . Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Id. But see Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634-648 (1990), discussed *infra* note 44, deriding the commercial speech/noncommercial speech distinction.

43 *Virginia Pharmacy*, 425 U.S. at 764.

44 *Id.* at 772 n.24. *But see generally* Kozinski & Banner, *supra* note 42, and Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289 (1987). These articles argue that the Court should make no distinction

Court suggested that a state may be allowed to assert a greater level of control over commercial speech than over categorically pure speech. Consequently, *if* a state were constitutionally permitted to classify charitable solicitation as commercial speech, it could apply a higher level of regulation over professional fundraising by applying the commercial speech rationale.[45]

In the past, states tried to protect the consuming public from possible fraud by restricting commercial speech without regard for the truthful content of the message.[46] In *Virginia Pharmacy*, however, the Court explained that "information is not in itself harmful . . . . [P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them."[47] The state's attempts to protect its citizens by limiting the kind of information commercial entities could disseminate was, therefore, misguided.[48]

Virginia Pharmacy presented facts that made it unusually easy to distinguish between commercial and pure speech. The pharmacists' advertisements promoted low prescription drug prices,[49] and no other forms of speech were intertwined with the advertisements.[50] As a result, the Court's "commonsense" approach worked. Where, however, commercial speech intertwines with pure speech, as in charitable solicitation, the "commonsense" standard has failed primarily because of its lack of objective regulatory or analytic criteria.[51]

Apparently aware of the flaws in the *Virginia Pharmacy* "commonsense" test, the Court developed new commercial speech criteria. By adding substance to the subjectivity of the *Virginia Pharmacy* standard, the Court guided lower courts in determining whether a regulation violates the First Amendment. This new

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between commercial speech and pure speech. Furthermore, both argue that the durability of commercial speech is purely theoretical and, even if empirically true, does not provide a basis for creating a distinction between the two forms of speech. These arguments bolster the attack on commentators who would classify charitable speech as regulable commercial speech—a classification the Court rejects.

45 For a brief discussion of the potential profits made from charitable fundraising, see *supra* notes 3-6 and accompanying text.

46 *See Virginia Pharmacy*, 425 U.S. at 770-73. For a discussion of content-based regulation of speech, see *infra* notes 111-49 and accompanying text.

47 *Virginia Pharmacy*, 425 U.S. at 770.

48 *See id.*

49 *See id.* at 754.

50 For examples of cases presenting facts more troubling for the Court because the speech in those cases involved more than commercial speech, see *supra* note 36.

51 Several commercial speech cases and their disparate results are discussed *supra* note 36.

test, first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[52] and developed in *Posadas de Puerto Rico Ass'n v. Tourism Co.*,[53] established a five-point analysis that courts should apply to statutory limitations on commercial speech. The *Posadas* Court explained that:

> [C]ommercial speech receives a limited form of First Amendment protection so long as it [1] concerns a lawful activity and is not misleading . . . . Once it is determined that the First Amendment applies . . . then the speech may be restricted only if [2] the government's interest in doing so is substantial[;] [3] the restrictions directly advance the government's asserted interest[;] [4] the restrictions are no more extensive than necessary to serve that interest[54] [; and] [5] *the government could have enacted a wholesale prohibition of the underlying conduct* . . . .[55]

Applying this test in *Posadas*, the Court upheld a Puerto Rican statute that banned advertising for local casinos.[56] Since Puerto Rico had the power to ban gambling altogether, a less restrictive proscription was constitutionally acceptable.[57] Accordingly, the advertising ban withstood constitutional challenge.[58]

Under the *Central Hudson-Posadas* rationale, however, a restriction on commercial speech applied to charitable fundraising would surely fail to pass constitutional scrutiny.[59] Step five of the *Central Hudson-Posadas* analysis precludes a state from using the commercial speech doctrine to justify regulation of eleemosynary activities. The limiting principle of step five is that the state must be able to outlaw the underlying activity in order to invoke the commercial speech doctrine. Since a state presumably could not constitutionally outlaw charities, it may not promulgate regulations that the commercial speech doctrine would otherwise allow, despite the charities' for-

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52 447 U.S. 557 (1980) (prohibiting public utility from advertising violates First Amendment, despite possibility that such advertising might increase fuel consumption during energy crisis).

53 478 U.S. 328 (1986) (banning local advertising for gambling casinos does not violate First or Fourteenth Amendments).

54 *Id.* at 340 (citing *Central Hudson*, 447 U.S. at 566).

55 *Id.* at 346 (emphasis added).

56 *Id.* at 345-48.

57 *Id.* at 345-46.

58 *Id.* at 346.

59 *Compare* Board of Trustees of N.Y. v. Fox, 492 U.S. 469 (1989) (In a case involving the sale of merchandise and college dormitory home economics lessons—but not charitable fundraising—the Court found that commercial speech is separable from pure speech.) *with* Gaudiya Vaishnava Soc'y v. City & County of San Francisco, 900 F.2d 1369 (9th Cir. 1990) (holding that the sale of merchandise on sidewalks by charitable organizations was, *inter alia*, intertwined with the organizations' otherwise fully protected speech, and that broad regulation of the sales violated the First Amendment).

profit components.[60]

Moreover, when "[i]deological expression" becomes intertwined with charitable solicitation, the resulting combination is even further removed from permissible *Central Hudson-Posadas* regulation and provides an alternative basis for extending to it full First Amendment protection.[61] As Justice Stewart stated in *Virginia Pharmacy*, "Ideological expression . . . is integrally related to the exposition of thought . . . . Although such expression may convey factual information relevant to social and individual decisionmaking [sic], it is protected by the Constitution . . . ."[62] In *Village of Schaumburg v. Citizens for a Better Environment*, the Court stated that "because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech."[63] Taken together, the commercial speech doctrine and the intertwined speech doctrine[64] preclude the Court from treating charitable solicitation as commercial speech, and, therefore, states cannot heavily regulate such fundraising.

III. The State of the Law: Charitable Solicitation in the 1990s

A. *The Riley Trilogy*

In the *Riley* trilogy, the Court placed charitable solicitation squarely within the protection of the First Amendment.[65] The opinions left the states without an effective means to control fundraising directly,[66] state-imposed charitable fundraising

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[60] *But see* Kevin R. Knight, Note, *The Life of Riley: Complete First Amendment Protection Versus Deferential Commercial Speech Standards for Professional Fundraising Solicitors*, 23 IND. L. REV. 145, 166-67 (1990), arguing that a state should consider charitable solicitation as commercial speech, and that this speech should be subject to commensurate regulation governed by narrowly drawn statutes. This argument ignores the fifth step of commercial speech analysis.

[61] *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 798, 779-80 (1976) (Stewart, J., concurring).

[62] *Id.*

[63] 444 U.S. 620, 632 (1980). For a discussion of this case see *infra* notes 80-90 and accompanying text.

[64] For a brief discussion of the intertwined speech doctrine, see *supra* text accompanying notes 25-26, 76-79, 88 and 129.

[65] Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988). For a synopsis of these cases, see *supra* text accompanying note 10. For an extensive discussion, see *infra* section III.

[66] The following state statutes regulate charitable solicitation. Given the law's current orientation, many are of questionable constitutionality: CAL. BUS. & PROF. CODE § 17510.3 (West 1987) (Sales Solicitation for Charitable Purposes); CAL. GOV'T CODE

spending limits, among other controls, were invalidated because they potentially interfered with a charity's financial decisions, which could hinder its ability to communicate with the public.[67] The act of solicitation itself, whether or not it results in realizing a donation, is an exercise of speech that must be protected[68] since a charity's promotion of a cause often involves components of speech historically protected by the Court.[69] To help guarantee that the state not trample on these components, the Court mandated that the entire solicitation be protected.[70] A charity educates by advocating its causes in the public forum; thus, regardless of the money raised by or spent on solicitation, in simply expressing its message, the charity may engender a more in-

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§ 12586 (West 1980 & Supp. 1991) (Registration and Reporting of the Nature of Assets Held and the Nature Thereof); CAL. GOV'T CODE § 12599 (West 1991) (Registration and Reporting for Commercial Fundraisers for Commercial Purposes); CAL. PENAL CODE § 532(d) (West 1988 & Supp. 1991) (False Representation In and Local Regulations for Charitable Solicitations)(Peter K. Shack, Deputy Attorney General of California stated that "despite the fact that *Riley* clearly affected the current statute[, no] amendment is being considered" by the legislature. Letter from Peter K. Shack, Deputy Attorney General of California, to Stephen H. Block (Aug. 13, 1990)); COL. REV. STAT. § 6-16-101 to -113 (1973 & Supp. 1990); D.C. CODE § 2-701 to -714 (1988); GA. CODE ANN. § 43-17-1 to -23 (Michie 1988 & Supp. 1991); HAW. REV. STAT. § 467B-1 to -13 (1985 & Supp. 1990); ILL. ANN. STAT. ch. 23 paras. 5101-5114 (Smith-Hurd 1988 & Supp. 1991); KAN. STAT. ANN. § 17-1759 to -1775 (1988 & Supp. 1990); LA. REV. STAT. ANN. §§ 51:1901 to :1909.1 (West 1987 & Supp. 1991); ME. REV. STAT. ANN. tit. 9, §§ 5001 to 5016 (West 1988 & Supp. 1990); MD. CODE ANN. art. 41, § 3-201 to -219 (1990) (note that this is the form the code took after it was amended subsequent to the *Munson* decision); MASS. GEN. LAWS ANN. ch. 68 §§ 18-35 (West 1988 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 12 § 8F (West 1988 & Supp. 1991); MINN. STAT. ANN. § 309.50 to -.71 (West 1969 Supp. 1991); N.Y. EXEC. LAW §§ 171-a to 177 (McKinney 1982 & Supp. 1991) (Solicitation and Collection of Funds for Charitable Purposes); N.C. GEN. STAT. § 131C-1 to -22 (1986) (for a lengthy discussion of this statute, see *infra* part IV of this Note); OHIO REV. CODE ANN. § 1716.01 -.99 (Anderson 1985 & Supp. 1990); PA. STAT. ANN. tit. 10, § 162.14 -.24 (Purdon Supp. 1991); OR. REV. STAT. §§ 128.610 -.750, .801 to .898, .990, .992, .995 (1989); R.I. GEN. LAWS § 5-53-1 to -14 (1987); S.C. CODE ANN. § 33-55-10 to -230 (Law. Co-op 1990); S.D. CODIFIED LAWS ANN. § 37-30-1 to -29 (Supp. 1991) (Telephone Solicitation); TENN. CODE ANN. § 48-3-501 to -520 (1988 & Supp. 1990); UTAH CODE ANN. § 13-22-1 to -14 (Supp. 1991); VT. STAT. ANN. tit. 9, §§ 2471-2479 (Supp. 1990); VA. CODE ANN. § 57-48 to -61.1 (Michie 1986 & Supp. 1991).

See also STATE SURVEY OF LAWS, (looseleaf service published by the *Philanthropy Monthly* that periodically updates state charitable solicitation laws). *See generally* BRUCE R. HOPKINS, THE LAW OF FUNDRAISING (1991) (summarizing state and federal laws affecting charitable solicitation).

67 *Schaumburg*, 444 U.S. at 635-36; *Munson*, 467 U.S. at 967-68, 968 n.16; *Riley*, 487 U.S. at 794 n.8.

68 *Riley*, 487 U.S. at 798. *But see* Young v. New York City Transit Auth., 903 F.2d 146, 153 (2d Cir.) *cert. denied* 111 S.Ct. 516 (1990) (upholding a blanket prohibition against panhandling and begging in the New York City subways on the grounds that such requests for funds were "not inseparably intertwined with a 'particularized message' "). In *Young*, begging was pure conduct posing a threat to subway riders. *Id.* at 154. The Second Circuit, consequently, distinguished the *Riley* trilogy. *Id.* at 154-56.

69 *E.g.*, political or religious speech.

70 *Munson*, 467 U.S. at 969-70.

formed, sensitive public.[71] The Court was particularly concerned that less popular charities, which must spend more to raise money, would have their causes and their speech squelched by state-enforced spending limits.[72] The state, therefore, must treat charitable solicitation with the same deference that it extends to political or religious speech. In sum, the *Riley* trilogy practically liberated charitable solicitors from all statutory restrictions except for registration requirements[73] and all but the most fundamental anti-fraud or consumer protection statutes.[74] Under this newly articulated standard, states are no longer able to exercise extensive, intrusive controls over the charity or its fundraiser.[75] The "[i]deological expression"[76] that is mixed with the for-profit component of charitable solicitation renders it fully protected by the First Amendment.[77] As a result, charitable solicitation was granted safe haven and was extracted from the ranks of the theoretically "hardier" commercial speech[78] to which states may apply a higher level of regulation.[79]

B. *Village of Schaumburg v. Citizens for a Better Environment*

In *Village of Schaumburg v. Citizens for a Better Environment*,[80] the Court invalidated a local ordinance[81] requiring charitable solicitors to use at least seventy-five percent of their proceeds for charitable purposes.[82] The case arose when the plaintiff-charity was denied permission to raise funds for environmental protection because it did not demonstrate to the village that it would use twenty-five percent or less of the solicited proceeds for over-

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71 *See Riley*, 487 U.S. at 798; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799 (1985) (stating the Court's belief that a "contribution in response to a request for funds functions as a general expression of support for the recipient and its views"). By restricting charities' access to the public, the State diminishes the public's opportunity to voice its support of the charities' causes.

72 *Munson*, 467 U.S. at 966-67.

73 *See, e.g.*, NY State registration requirement. N.Y. EXEC. LAW § 172 (McKinney 1982 & Supp. 1991) (requiring charities to register with the Secretary of State).

74 *Riley*, 487 U.S. at 800; *see also infra* notes 99-103, 155-56 and accompanying text for a discussion of the Court's position on charitable fraud.

75 For a brief discussion of the holdings of the *Riley* trilogy, see *supra* text accompanying note 10; for a more extensive discussion, see *infra* part III.

76 *See* Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 799-80 (1976).

77 *See Riley*, 487 U.S. at 796.

78 For a discussion of the theoretical "hardiness of commercial speech," see *supra* notes 42-44 and accompanying text.

79 *See Riley*, 487 U.S. at 796.

80 444 U.S. 620 (1980).

81 For the relevant text of the ordinance, see *supra* note 10.

82 *Schaumburg*, 444 U.S. at 622 (1980).

head.[83] The charity challenged the constitutionality of the ordinance, claiming that the ordinance violated its First Amendment rights.[84] The village argued that the primary purpose of the ordinance was to prevent charitable fraud by monitoring how much a charity could spend.[85] It argued that the Court should uphold the ordinance because it simply regulated conduct, not speech, and did not impinge on the charity's right to "propagate its views from door to door . . . without a permit as long as it refrain[ed] from soliciting money."[86]

The Court, however, in an eight-to-one decision,[87] sided with the charity, concluding that the government may regulate charitable solicitation. Such regulation, though, "must be undertaken with due regard for the reality that solicitation is characteristically *intertwined* with . . . speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease."[88] Furthermore, the Court noted that although fraud prevention is a legitimate government interest, the government may only protect its citizens' interests with "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[89]

The *Schaumburg* Court left open the question of how the government could balance the charities' First Amendment rights and its own interest in regulating charitable solicitation and preventing fraud. In *dictum* the court implied, however, that had the village included a discretionary clause in the statute that allowed a charity to solicit contributions despite high, though "reasonable," overhead, such a statute might have passed constitutional muster.[90]

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[83] *See id.* at 625.

[84] *Id.* at 627. For the relevant text of the First Amendment, see *supra* note 11.

[85] *Schaumburg*, 444 U.S. at 636.

[86] *Id.* at 628. The Village's argument echoed the reasoning of the Court in Thomas v. Collins, 323 U.S. 516, 540 (1945) (Once fundraising begins, the solicitor "enters a realm where a reasonable registration or identification requirement may be imposed.").

[87] *Schaumburg*, at 621. Justice White wrote the opinion of the Court; joining him were Chief Justice Burger and Justices Brennan, Stewart, Marshall, Blackmun, Powell and Stevens. Justice Rehnquist dissented.

[88] *Id.* at 632 (emphasis added) (cited with approval in Secretary of State of Md. v. Joseph H. Munson, Co., 467 U.S. 947, 959-960 (1984) and Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988)).

[89] *Schaumburg*, 444 U.S. at 637.

[90] *Id.* at 635 n.9 ("[T]he village ordinance has no provision permitting an organization unable to comply with the 75-percent requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable."). The Court did not define "reasonable."

C. *Secretary of State of Maryland v. Joseph H. Munson Co.*

Following *Schaumburg*, the Court decided *Secretary of State of Maryland v. Joseph H. Munson Co.*,[91] after Maryland tried a new method for regulating charitable solicitation. The state's revised statute intervened directly between charities and their professional solicitors by prohibiting charities from spending more than twenty-five percent of the money they raised on fundraising costs.[92] Unlike the statute in *Schaumburg*, the Maryland statute gave the Secretary of State discretion to license a charity even though its expenses exceeded the statutory cap when the denial of such a waiver would likely result in the charity being unable to "effectively" raise funds.[93] Maryland tried to retain the effectiveness of its regulatory scheme by preserving a percentage limitation while concurrently attempting to harmonize its law with the *Schaumburg* decision by incorporating an elastic licensing provision.[94]

J. H. Munson Company, a for-profit fundraiser, challenged the statute, asserting that the First Amendment rights of several of the charities for which it worked were violated.[95] The case's central issue, as in *Schaumburg*,[96] was whether the law infringed upon the charities' free speech rights by excluding certain charities from soliciting funds.[97] The state argued that the purpose of the twenty-five percent expense limitation was to prevent a fundraiser or charity from defrauding the public.[98] The Court re-

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91 467 U.S. 947 (1984) (Blackmun, J., wrote the opinion of the Court; joining him were Justices Brennan, White, Marshall and Stevens; Rehnquist, J., wrote the dissent and was joined by Chief Justice Burger and Justices Powell and O'Connor).

92 MD. CODE ANN. § 103(D)(a) (1984), *quoted in Munson*, 467 U.S. at 950 n.2. Subsequent to this case, the statute was amended; *see supra* note 66.

93 *See infra* note 100. The Secretary of State has the discretion to allow a charity to exceed the 25 percent cap "where the 25% limitation would effectively prevent the charitable organization from raising contributions." *Munson*, 467 U.S. at 951 n.2. The statute did not define the word "effectively."

94 The inflexibility of the *Schaumburg* licensing provision is discussed *infra* notes 99-101 and accompanying text.

95 Munson did not claim the law abridged its own First Amendment rights but instead asserted third-party standing. Maryland objected, but the Court granted standing. *Munson*, 467 U.S. at 954-59. After lengthy discussions by all Justices submitting opinions, the majority explained that "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Id.* at 956; *see also* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (supporting third-party standing for charitable fundraisers); *contra Munson*, 467 U.S. at 972-74 (Stevens, J. concurring). For a general discussion of the standing issue and suggestions for expanded standing in charitable solicitation cases, see James J. Fishman, *New Approaches to Regulation of Charitable Solicitation* at 14-22, *in Conference*, *supra* note 12.

96 444 U.S. at 633.

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

98 *See id.* at 966; MD. ANN. CODE art. 41, § 103 (Preamble) (1984), *quoted in Munson*,

jected the state's argument, asserting "[t]hat [although] the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal[, that result] is little more than fortuitous."[99] In the Court's opinion, a charity or professional fundraiser determined to defraud the public would do so regardless of state-imposed spending limits.[100] Moreover, the restrictions might chill free speech:[101] "[A] limitation on the amount a charity can spend in fundraising activity is a direct restriction on the charity's First Amendment rights."[102] The statute was held unconstitutional because it could potentially impede free speech while it ineffectively prevented fraud.[103]

The state also argued that the law did not preclude honest charities from fundraising. In cases where professional fees exceed twenty-five percent of a charity's proceeds, the Secretary of State could, in her discretion, grant dispensation.[104] The Court, however, agreed with the professional fundraiser, Munson Company, that a statute "placing discretion in the hands of an official to grant or deny a license . . . creates a threat of censorship that by its very existence chills free speech."[105]

The *Munson* majority invalidated the statute, waiver and all, leaving the state regulators with no practical guidelines for drawing effective constitutional statutory schemes. The Court left open the question of whether it would be permissible for a state to impose fee restrictions on the *professional fundraisers* instead of on the charities for which they work. The *Munson* dissent, on the

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467 U.S. at 966 n.14. (The Maryland "legislature's announced purpose in enacting the [law] . . . was to 'assure that contributions will be used to benefit the intended purpose.' "). *Id.*

99 *Munson*, 467 U.S. at 966-67.

100 *Id.* at 967. But note, the minority points out that "[t]he concern is not that someone may abscond to South America with the funds collected. Rather, a high fundraising fee itself betrays the expectations of the donor who thinks that his money will be used to benefit the charitable purpose." *Id.* at 980 n.2.

101 A statute is considered to chill free speech if the shadow the law casts falls beyond unprotected speech and deters people from exercising their right to articulate protected speech. For a discussion of the "chilling effect," see TRIBE, *supra* note 20, § 12-28 at 1024-29, § 12-31 at 1034-35.

102 *Munson*, 467 U.S. at 967 n.16.

103 *Id.* at 964, 967-68.

104 *Id.* at 964 n.12 (The Secretary argued that she had granted waivers " 'in an extremely liberal manner, with special care shown for the rights of advocacy groups.' ") (citation omitted).

105 *Id.* For a discussion of the Court's precedents regarding such governmental discretion, see Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 640-643 (1980) (Rehnquist, J., dissenting) (discussing, *inter alia*, Schneider v. State, 308 U.S. 147, 163-64 (1939); Cantwell v. Connecticut, 310 U.S. 296, 305-06 (1940); Hynes v. Mayor of Oradell, 425 U.S. 610, 620-21 (1976)).

other hand, drew what it called a "clearly constitutional" hypothetical statute.[106] This statute was intended to side-step First Amendment issues by controlling the rates solicitors could charge charities, thus regulating the professional fundraisers, *not* the charities.[107] As the third case in the trilogy explains, however, the Court found a version of this hypothetical statute unconstitutional after North Carolina adopted it.[108]

D. *Riley v. National Federation of the Blind*

In *Riley v. National Federation of the Blind*,[109] the Court answered the question left open in *Munson* and in doing so dismantled most of what remains of state regulation.[110] The *Riley* Court held that all state-imposed limitations on either the charities' or the fundraisers' spending are unconstitutional. The case leaves only a narrow area in which state charitable solicitation regulators can maneuver while securing a First Amendment haven for charitable solicitors.

1. The Statute

In 1985, the year after the Court decided *Munson*, the North Carolina legislature amended its charitable solicitation laws.[111] The amendments reflected the legislature's apparent intent to incorporate the "clearly constitutional" *Munson* minority hypothetical statute[112] by regulating the professional fundraiser and not

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106 *Munson*, 467 U.S. at 981 (Rehnquist, J., dissenting).

107 *Id.* "The rates charged by professional fundraisers are in fact both 'easily identifiable' and 'constitutionally proscribable.' If Maryland's statute regulated only the rates charged by professional fundraisers to charitable organizations, this would be an easy case. The statute would be clearly constitutional." *Id.*

Note that the minority created this hypothetical statute without having a specific case and controversy before it, thus rendering an advisory opinion. *Id.* at 971 n.3. The Constitution extends "judicial Power . . . to all Cases . . . [and] to Controversies." U.S. CONST. art. III, § 2. Scholars generally interpret this clause to mean that the Supreme Court of the United States and the other Article III courts are not allowed to issue advisory opinions. For a general discussion of the "advisory opinion ban," see GERALD GUNTHER, CONSTITUTIONAL LAW 1593-98 (12th ed. 1991).

108 For a discussion of the North Carolina statute the Court invalidated in Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988), see *infra* notes 111-49 and accompanying text.

109 487 U.S. 781 (1988) (Brennan, J., wrote the opinion of the Court; joining him in part were White, Marshall, Blackmun, JJ.; Stevens, J., concurred in part and dissented in part, joining in all but n.11; Scalia, J., joined in n.11 but filed a dissenting opinion joined by O'Connor, J.)

110 *But see* Young v. New York City Transit Auth., 903 F.2d 146 (2d. Cir. 1990) (begging in subway is not charitable solicitation within the meaning of the *Riley* trilogy; states may ban it).

111 N.C. GEN. STAT. §§ 131C-1 to -20 (1986).

112 Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 981 (1984).

the charity.[113] The statute established a three-tier structure of "reasonable" and "unreasonable" fees that a fundraiser could charge charities for its services.[114] North Carolina also added a new dimension to solicitation law by not only requiring the professional fundraiser to disclose his name and the name of his employer, but also to disclose "[d]uring any solicitation and before requesting . . . any charitable contribution . . . [t]he average of the percentage of gross receipts actually paid to the [charity]."[115]

The statute operated on two principles. First, the law had a presumption against high solicitation fees, although the statute suggested that there might be circumstances under which the state should waive a fundraiser's compliance with the statutory percentage requirements.[116] Second, regardless of the fundraiser's compliance with percentage requirements, it was essential for the donor to have a general idea of what portion of his gift would be used for charitable purposes.[117] Prior to the solicitation, the solicitor was compelled by the state to inform prospective donors of the average percentage of funds raised that charities had actually received from that particular fundraiser in the preceding year.[118] The potential donor could then, theoretically, use that information to make a more informed decision about his contribution.

2. The Regulatory Scheme

i) Licensure

The statute provided, as most state statutes still do, that charitable solicitors must be state licensed.[119] Professional fundraisers were required to wait for licensure before engaging in solicitation, while all other charitable solicitors, such as volunteers, could commence fundraising upon applying for a license.[120] In *Riley*, the charity, National Federation of the Blind,

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[113] *See generally* N.C. GEN. STAT. § 131C (1986).

[114] *Id.* § 131C-17.2 (Excessive and Unreasonable Fundraising Fees Prohibited).

[115] *Id.* § 131C-16.1 (Mandatory Disclosures). The requirement that fundraisers disclose their name and the name of their employer is practically universal. For a list of other state statutes that regulate charitable solicitation, see *supra* note 66.

[116] *See* N.C. GEN. STAT. § 131C-17.2 (Excessive and Unreasonable Fundraising Fees Prohibited), discussed at length, *infra* notes 138-41 and accompanying text.

[117] *Id.* § 131C-16.1 (Mandatory disclosures), discussed at length, *infra* notes 125-34 and accompanying text.

[118] *Id.*

[119] *Id.* § 131C-4(a) (Licensure Required for Charitable Solicitation). "Any person who solicits charitable contributions shall apply for and obtain an annual license . . . ." *Id.* For a list of other state statutes, see *supra* note 66.

[120] *Id.* § 131C-4(b): "A person *other than* a professional solicitor . . . may solicit charitable contributions after filing the application . . . ." *Id.* (emphasis added). These regu-

argued before the Supreme Court that since the statute did not "indicate a time frame in which the licensor must act . . . [,it] vest[ed] . . . absolute discretion in the licensor, effectively granting to that individual the power of censorship over . . . professional fundraisers and the charities which they represent."[121] The charity further asserted that because there was no specific time period in which the state was required to grant a permit, "the opportunity to exercise free speech . . . rights [could] be postponed for substantial periods of time."[122]

The Court, agreeing with the charity, held that the licensing provision could not stand because of the risk it posed to free speech.[123] The danger resulted from the potential delay between the fundraiser's application for a license and the actual licensure during which time the statute "compel[led] the speaker's silence" unconstitutionally.[124]

ii) Mandatory Disclosure

The North Carolina statute compelled three disclosures at the point of solicitation.[125] The National Federation of the Blind did not challenge the provisions of the law requiring that fundraisers announce their names and their employers' names. The charity challenged only the third provision that required professional fundraisers to disclose their " 'track record' " percentage,

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lations apparently applied only to outside assistance. Thus, by implication, under the statute a charity could have side-stepped the statutory regulation by putting the fundraisers on its own staff, instead of contracting the work out to others. *See id.* § 131C-4(a).

121 Brief for Appellee at *7, Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) (No. 87-328), *available in* LEXIS, Genfed Library, Briefs File [hereinafter Charity's Brief]. It is important to note the broad support the charity received in its opposition to the statute. Additional members of the original suit included professional fundraisers and potential charitable donors. Furthermore, over sixty charities filed *amici curiae* from across the country in support of the appellee. *See, e.g., infra* note 150.

122 Charity's Brief, *supra* note 121, at *7.

123 *Riley*, 487 U.S. at 802.

124 *Id* at 802-03.

125 N.C. GEN. STAT. § 131C-16.1 (1986) (Mandatory Disclosures) provides:

> During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:
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> (1) His name; and
>
> (2) The name of the professional solicitor . . . by whom he is employed . . . ; and
>
> (3) The average of the percentage of gross receipts actually paid to the . . . [charity] by the . . . professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that . . . professional solicitor for the past 12 months . . . .

For a discussion of why the state probably included subsection three, see *supra* notes 108-10 and accompanying text, describing the hypothetical statute proffered by the minority in Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984).

which is the percentage of gross receipts that the fundraiser actually delivered to the charities in the previous year.[126] The state argued that this required disclosure was permissible because it regulated "only commercial speech [by] relat[ing] only to the professional fundraiser's profit from the solicited contribution."[127] A state is generally allowed to apply a higher level of restriction to commercial speech by regulating it more closely.[128] According to the Court, however, even if a component of commercial speech exists in charitable solicitation, it would not "retain[] its commercial character when it is *inextricably intertwined* with otherwise fully protected speech."[129] The Court, therefore, applied "exacting First Amendment scrutiny" to "North Carolina's content-based regulation" that required the solicitors' compelled speech.[130] Under the standard the Court articulated, "compelled disclosure [would] almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent."[131] The consequence of such a compelled disclosure would be detrimental to "small or unpopular charities, which must usually rely on professional fundraisers."[132] Mandatory disclosure would also "encourage [professional fundraisers] to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure."[133] Ultimately, this provision would result in chilling the charity's speech by signifi-

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126 *Riley*, 487 U.S. at 786. *See* Charity's Brief, *supra* note 121, at *7, *15.

127 *Riley*, 487 U.S. at 795.

128 For a discussion of the commercial speech doctrine, see *supra* notes 35-64 and accompanying text.

129 *Riley*, 487 U.S. at 796 (emphasis added).

130 *Id.* at 798. Regarding governmental regulation of the content of speech, Justice Marshall said, "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (invalidating as violative of the First Amendment an ordinance that allows demonstrations on a certain subject while disallowing others). "[T]he modern Court . . . scrutinize[s] content-based distinctions more carefully than those it considers content-neutral." GERALD GUNTHER, CONSTITUTIONAL LAW 1211 (12th ed. 1991). For a general discussion of content-based versus content-neutral scrutiny, see GUNTHER, *supra*, 1211-17.

131 *Riley*, 487 U.S. at 799.

132 *Id.* As discussed *supra* in the text accompanying note 72, the Court apparently believes it is more difficult for unpopular charities to raise money because they must spend more in fundraising costs than popular charities for each dollar donated.

133 *Id.* at 800.

> [The] chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately "reduc[e] the quantity of expression."

Id. at 794 (quoting Buckley v. Valeo, 424 U.S. 1, 19, 39 (1976)).

The charity also argued that the professional fundraisers' announcements of their

cantly diminishing the available speech organs; as such, the provision was unconstitutional.[134]

iii) Fundraising Fee Percentages

North Carolina claimed the central purpose of the statutory scheme scrutinized in *Riley* was to ensure "that the maximum amount of funds reach[ed] the charity, or somewhat relatedly, to guarantee that the fee charged to charities [was] not 'unreasonable.' "[135] By expressly limiting the rates fundraisers could charge the charities, the state hoped to limit the possibility that the fundraisers would take economic advantage of the charities and also reduce the chance that charities would spend large portions of gifts on fundraising costs without the donors' knowledge.[136] By building into the statute far greater flexibility than was present in either of the statutes overturned in *Schaumburg* and *Munson*, the state believed the statute would survive constitutional challenges.[137]

The statute established three categories upon which to base licensure.[138] First, fees less than twenty percent of the gross

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average profits from preceding years was irrelevant to the present one. Charity's Brief, *supra* note 121, at *16.

134 *Riley*, 487 U.S. at 799. The Court concluded that the State's interest was "not as weighty as the state asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored." *Id* at 798.

135 *Id.* at 789-90.

136 *Id.* at 788-90.

137 *Id.* In the prior cases, the Court first invalidated the Illinois village ordinance forbidding fundraising if more than 25 percent of the gross were spent on *any* non-charitable purposes. *See supra* text accompanying notes 80-82. The Court also invalidated the Maryland statute prohibiting charities from spending more than 25 percent of the gross donations on *fundraising* expenses unless the state granted the charity a waiver. *See supra* notes 91-94 and accompanying text.

138 N.C. GEN. STAT. § 131C-17.2 (1986) (Prohibiting excessive and unreasonable fund-raising fees), *repealed by* Act of Oct. 1, 1989, ch. 566, 1989 N.C. Laws 4.

> (b) For purposes of this section a fund-raising fee of *twenty percent* (20%) or less of the gross receipts of all solicitations on behalf of a particular person established for a charitable purpose is deemed to be *reasonable* and nonexcessive.
>
> (c) a fund-raising fee *greater than twenty percent* (20%) but *less than thirty-five percent* (35%) of the gross receipts of all solicitations on behalf of a particular [charity] . . . is excessive and *unreasonable if* the party challenging the fund-raising fee also proves that the *solicitation does not involve the dissemination of information*, discussion, or advocacy relating to public issues as directed by the [charity] . . . .
>
> (d) a fund-raising fee of *thirty-five percent* (35%) or more of the gross receipts of all solicitations on behalf of a particular [charity] . . . may be excessive and *unreasonable* without further evidence of any other fact by the party challenging the fund-raising fee. The . . . professional solicitor may successfully *defend* the fund-raising fee by proving that the level of the fee charged was necessary:
>
> (1) Because of the dissemination of information, discussion, or advocacy *relating to public issues as directed by the* [charity] . . . ; *or*

earned for the charity were deemed "reasonable."[139] Second, fees between twenty and thirty-five percent were deemed "unreasonable" if the "party challenging the . . . fee . . . prove[d] "that the solicitation [did] not involve" any kind of "advocacy" of a cause or "dissemination of information."[140] Third, fees over thirty-five percent were presumptively "unreasonable." Fundraisers, however, were given the opportunity to rebut the presumption of unreasonableness by proving either that the fees were essential for effective "advocacy" or that the charity's opportunity to be heard or "raise money . . . would be significantly diminished" without the higher fees.[141]

Despite the state's argument that the statutory scheme was directed at fraud prevention,[142] the Court reiterated that "solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the state's interest in preventing fraud."[143] The Court explained that even if the state's interest were to protect charities unable to fend for themselves in the professional fundraising market, the state may not replace the values of "speakers and listeners" with its own.[144]

3) The Court's Suggestions

The Court must have realized the conundrum into which the *Riley* decision thrust charitable solicitation regulators. Having stripped state regulators of all effective means of direct regulation, the Court simply suggested that states' "antifraud law" or consumer protection statutes would have to suffice in regulating charitable fundraising.[145] The Court conceded that perhaps con-

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(2) Because otherwise ability of the [charity] which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.

(e) Where the fund-raising fee charged by . . . a professional solicitor is determined to be excessive and unreasonable, the fact finder making that determination shall then determine a reasonable fee under the circumstances.

Id. (emphasis added).

139 *Id.* § 131C-17.2(b).

140 *Id.* § 131C-17.2(c). Curiously, the statute did not define these terms.

141 *Id.* § 131C-17.2(d)(1), (d)(2).

142 *Riley*, 487 U.S. at 789.

143 *Id.*

144 *Id.* at 791.

145 *Id.* at 795.

In striking down this portion of the [statute, the Court does] not suggest that States must sit idly by and allow their citizens to be defrauded. North Carolina has an antifraud law, and [the Court] presume[s] that law enforcement officers are ready and able to enforce it. Further North Carolina may consti-

sumer protection statutes are "not the most efficient means of preventing [charitable] fraud, . . . [but] reaffirm[ed] simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."[146]

The Court asserted, however, that the unchallenged provisions of the mandatory disclosures section of the North Carolina statute requiring that the solicitor give his name and the name of his employer[147] "would withstand First Amendment scrutiny."[148] The Court stated, "[N]othing 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 [be constitutional]."[149]

IV. A Possible Solution: Balancing the First Amendment with Regulatory Needs

There are alternative protective measures that states may take to replace the statutory schemes the Supreme Court invalidated in the *Riley* trilogy but none as effective or as practical as the laws that allowed states to control the disposition of donations. The alternatives are generally indirect and logistically dubious. One option is for the charitable industry to police itself by establishing fundraising fee guidelines. Since the industry—consisting of both charities and fundraisers—is generally opposed to state-imposed percentage limitations,[150] the likelihood that it

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tutionally require fundraisers to disclose certain financial information to the State . . . .

Id.

146 *Id.*

147 N.C. GEN. STAT. § 131C-16.1 (1986)

148 *Riley*, 487 U.S. at 799 n.11. *But see id.* at 803 (Scalia, J., concurring in part and concurring in judgment):

> I do not see how requiring the professional solicitor to disclose his professional status is narrowly tailored to prevent fraud. Where core First Amendment speech is at issue, the 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.

149 *Id.* at 799 n.11. This section of the *Riley* opinion forms the basis of this Note's recommendation for a change in charitable solicitation law.

Interestingly, the majority has given what amounts to an advisory opinion regarding this issue, which is exactly what it chided the *Munson* minority for when it drew its own hypothetical statute. *See supra* notes 108-10 and accompanying text. Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 971 n.3 (1984) (Stevens, J., concurring).

150 *See generally Amicus Curiae* brief filed on behalf of the Appellee-charity by the Alabama Sheriffs' Association, et al. *in* Riley v. National Fed'n of the Blind of N.C., Inc. [No. 87-328], *available in* LEXIS, Genfed Library, Briefs File; and *Amicus Curiae* brief filed on behalf of the Appellee-charity by the California Council of the Blind *in Riley* [No. 87-328], *available in* LEXIS, Genfed Library, Briefs File.

would impose its own limits is slim. Alternatively, launching a public campaign to teach prospective donors about fundraising practices could reduce predation on the unwary. Unfortunately, finding an appropriate, effective and willing vehicle for such an education program would be difficult. Professional fundraisers are not likely to volunteer the necessary information. Dissemination of this data would conflict with fundraisers' self-interests in two ways. First, it could discourage donations by revealing to donors the small percentage of their gifts that is finally applied to the charitable cause. Second, this dissemination could create enough market pressure to lower fundraising fees and profits by allowing donors to choose charities based on the percentage of their gifts that is finally applied to the charitable cause. The charities themselves are also not likely to educate the public because they generally support the *laissez-faire* charitable industry marketplace.[151] Thus, either the states or private organizations would have to educate the public.[152] Because the donating population is so large, such an education program would only be practical by way of the mass media. However, because of the high cost of advertising, limited state budgets, the scarcity of industry watchdog groups,[153] and the absence of a guarantee that this type of program would be effective, this option, too, may not be reasonable.

Despite the *Riley* Court's invalidation of a portion of North Carolina's mandatory disclosure requirement,[154] mandatory disclosure still remains the most flexible and hopeful area for charitable solicitation regulation. Although professional fundraiser's solicitations are protected by the First Amendment, the Supreme Court did recognize that a state's protection of its citizens from fraud is important.[155] The Court implied that giving potential donors notice that some portion of their gift will not go directly to charitable purposes is critical, and that notice may be achieved through some form of mandatory disclosure.[156]

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151 *See supra* note 148.

152 *See Riley*, 487 U.S. at 800 (suggesting that states could publish financial statistics about charities).

153 The Better Business Bureau of the Metropolitan Area (N.Y. City) has recently opened a toll telephone line (900 area code) that consumers may call to see whether a charity is "reliable" or not.

154 For a discussion of the North Carolina mandatory disclosure provision and the Court's reaction to it, see *supra* notes 125-34 and 145-49 and accompanying text.

155 For a brief discussion of the Court's position on fraud, see *supra* notes 90 and 148 and accompanying text.

156 For a discussion of mandatory disclosures, *see generally supra* notes 125-34 and accompanying text. The *Riley* Court said that certain mandatory disclosures are accepta-

The extent to which states may require mandatory disclosure from professional fundraisers is still unclear.[157] Certain requirements are impermissible; for example, a state may not require a solicitor to disclose the percentage of the total funds raised in the past year that the charities actually received.[158] A state may only require a professional fundraiser to announce to the solicitee his name and his employer's name. States should certainly insist on such disclosures, although many still do not.[159] States should also require fundraisers to announce that information is available to the potential donors, upon request, regarding financial arrangements between the charity and the fundraiser. States should, therefore, require each solicitor to have the charities' cost breakdown available in case a solicitee demands it. To achieve these ends, states must incorporate statutory mandatory disclosure provisions requiring solicitors to inform prospective donors of:

(1) His or her name;
(2) The name of his or her employer;
(3) The fact that further information regarding the disposition of donations is available from the fundraiser and/or the charity should the prospective contributor request it;
(4) The percentage of contributions that will be used for the charitable cause should the prospective contributor request such information.
And subsequent to the solicitation, inform the donor in writing that
(5) Copies of the charity's annual financial reports are available from the Secretary of State or similar office.[160]

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ble. *Riley*, 487 U.S. at 799 n.11. For a discussion of footnote 11, see *supra* notes 148-49 and accompanying text.

157 States may run across the First Amendment's implicit prohibition against compelled speech when they draw statutes mandating certain disclosures. *See generally* David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995 (1982) (discussing state-compelled speech). *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (compelling non-union member represented by the union to pay to union dues that would be used in part to support political activities violates First Amendment); Wooley v. Maynard, 430 U.S. 705, 714-17 (1977) (compelling state resident to display state motto on license plate violates First Amendment); West Virgina State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943) (compelling school children to recite pledge of allegiance violates First Amendment).

158 *See Riley*, 487 U.S. at 799-800; *see supra* notes 125-34 and 147-49.

159 For a list of state statutes that regulate charitable solicitation, see *supra* note 66.

160 In Telco Communications v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1923 (1990), the court of appeals upheld a Virginia statute requiring solicitors to " 'disclose, in writing, the fact that a financial statement for the last fiscal year is available.' " *Id.* at 1231 (quoting VA. CODE ANN. § 57-55.2(iii) (Michie Supp. 1991). The court stated that

[w]ith respect to written solicitations, a brief notation of this nature is not a

This simple amendment to state laws would assist states in alerting potential donors that a percentage of their donations may not be used for charitable purposes. Furthermore, it should greatly increase the chance that donors will educate themselves before donating to charities. Finally, this amendment would likely survive constitutional challenges because of its narrow breadth and low level of intrusion into the actual solicitation.

V. Conclusion

The charitable industry generates over one hundred billion dollars a year in contributions.[161] Despite its significant income, the industry is practically unregulated by virtue of the Supreme Court's rulings in the *Riley* trilogy.[162] The Supreme Court's placement of charitable solicitation within the protection of the First Amendment should not mean that a state must acquiesce to all charitable fundraising schemes. In fact, the Court's opinions will likely cause regulators to seek more creative ways to control the industry. One such method would require fundraisers to give notice to potential donors that information regarding the disposition of their gifts is available and to provide that information should it be requested. Perhaps as a result of this seemingly innocuous notice provision, the donating public would begin educating itself. A better educated public would demand that the charitable industry construct itself on more sound accounting—and accountability—principles.

Stephen H. Block

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burdensome requirement. With respect to oral solicitations, . . . the requirement of a written disclosure can be easily met through notation on the donor's receipt. Because the donation will have already been made in such a case, the disclosure will discourage donations only if donors . . . stop payment on their checks . . . .

Id. at 1232.

In New York, some mail solicitors already insert such written notices into their solicitations. *See, e.g.*, Insert, American Heart Ass'n, New York City Affiliate, Aug., 1991 mailing (on file with author).

161 The amount of contributions raised in 1990 exceeded $122 billion. For a discussion of the money raised, see *supra* notes 3-6 and accompanying text.

162 For a synopsis of the holdings in the *Riley* trilogy, see *supra* text accompanying note 11. For an extensive discussion of the cases, see *supra* section III.