THE HISTORICAL ROLE OF THE FIRST AMENDMENT IN CHARITABLE APPEALS

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I. INTRODUCTION

The appeal for public support has been, and remains, a popular focus for government regulation. What could be more appealing to the elected lawmaker than telling the electorate a law has been passed that will protect everyone from fraud?

On the other hand, government increasingly depends on nonprofit organizations to do more to cure social ills, because government is doing less. As charities rush to answer the call, they realize it takes funds to perform the needed services, and many must rely on mass public appeals to raise those funds.

These dynamics have induced a series of dramatic pronouncements over a span of fifty years of constitutional analysis by our courts. This Article will explore the early foundation of the application of the First Amendment to the appeal for public support by nonprofit organizations, and how its importance has increased during this period.

II. LOOKING BACK

In 1980, the United States Supreme Court delivered the landmark decision of *Schaumburg v. Citizens for a Better Environment*.[1] The Court ruled:

> Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of

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1. 444 U.S. 620 (1980).

> 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.[2]

This pronouncement by the Court was the end product of a doctrine that had been evolving for over forty years.[3] One factor that makes the *Schaumburg* opinion significant is that no religious organizations were involved.[4] The Court solidified the change in emphasis from religious freedom considerations to pure speech protection when analyzing regulation of an appeal for support.[5] It was an important development for the nonprofit community.

In the 1930s, we were a much different society. Many people were born, raised, and lived in the same community, and often resided in the same home throughout their lives.[6] Compared with today, there was little mass transportation or communication; rather, people stayed in their own environment with others like themselves, and those with different ideas or religious beliefs were frequently mistrusted.[7]

As a society, we valued our privacy and looked to local government to keep "undesirables" away from our street corners and our

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2. *Id*. at 632.

3. *See infra* notes 9–44 and accompanying text.

4. *See Schaumburg*, 444 U.S. at 624.

5. *See id.* at 633. The Court described the issue as being "whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech." *Id*.

6. The 1930s would mark the end of this era in American history, however. *See* SAMUEL ELIOT MORISON, 3 THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 1869–1963, at 223 (1972). Referring to the progressive era that ended in 1939, Morison stated that:

> [T]he American people were undergoing profound changes in their environment, their racial composition, their mental processes, and their moral climate. Rural America was moving to the city, horsey America was becoming motor-conscious, the American "melting pot" stopped bubbling; female America broke out of her former "only place, the home," and morally Puritan America, having over the puritanical Amendment XVIII, became a country of wild drinking and loose morals.

Id.

7. This prevalent intolerance for difference was reflected in the attitudes many Americans held toward immigrants and immigration. Although the United States had historically put few limits on immigration, these policies changed dramatically in the period following World War I. *See id.* at 234. Many "feared that the overwhelming number of immigrants . . . with different folkways and traditions . . . were a menace to American society." *Id.*

doorsteps.[8] Society, however, began to change soon thereafter. The nature of the change began to come clear with a case decided in 1938. In *Lovell v. Griffin*,[9] the Court reviewed an ordinance that prohibited the distribution of literature without the city manager's prior approval.[10] The Court struck down the regulation as a form of standardless censorship.[11]

A year later, the Court heard *Schneider v. New Jersey*.[12] *Schneider* involved door-to-door canvassing by a Jehovah's Witness who had been arrested for distributing tracts without a permit.[13] The issuance of the permit was discretionary, allowing the government to approve or deny an application without a specific standard.[14] The lower courts found the restriction to be a proper protection against fraud, but the Supreme Court reversed the finding.[15]

The decision was significant because the Court interpreted the solicitation activity as a potential blending of education, advocacy, and the appeal for support.[16] Because the challenged regulation included door-to-door advocacy, it was declared to violate the First Amendment.[17] The Court left open whether such a regulation could be properly applied to those "who canvass for private profit."[18]

About the same time, Newton Cantwell and his two sons, who were all Jehovah's Witnesses, were arrested in New Haven, Connecticut.[19] They were charged under a statute that prohibited solicitation for religious or charitable causes without first obtaining a permit.[20] The statute gave the would-be licensor the discretion to grant a permit to the applicant.[21] In addition, any such permit, once

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8. In many cases, this goal was accomplished by statutes limiting the rights of citizens who wished to advocate their beliefs door-to-door or in public places. *See, e.g., infra* text accompanying notes 10, 13, and 20.
9. 303 U.S. 444 (1938).
10. *See id*. at 447–48.
11. *See id*. at 451.
12. 308 U.S. 147 (1939).
13. *See id*. at 158.
14. *See id*.
15. *See id*. at 165.
16. *See id*. at 163.
17. *See id*. at 165.
18. *Schneider*, 308 U.S. at 163.
19. *See* Cantwell v. Connecticut, 319 U.S. 296, 300 (1940).
20. *See id*. at 301–02.
21. *See id*. at 302.

granted, could be summarily revoked by the licensor.[22] The Court's decision in *Cantwell v. Connecticut* was a major step forward for freedom of speech. The Court held that First Amendment rights applied to the states through the Fourteenth Amendment.[23] *Cantwell* spoke only in terms of religious solicitation, but ultimately the case would be relied upon in secular cases as well.[24]

The Court continued to distinguish door-to-door activities based upon the presence of a for-profit component. In 1942, the Court held that while communities were not free to arbitrarily restrict communication of ideas or information, no such protection was afforded to "commercial advertising."[25]

The following year, the Court was faced with the distribution of religious literature, coupled with a solicitation for support.[26] The significance of the case, *Murdock v. Pennsylvania*,[27] was the finding that the activity of distributing handbills was not "transformed into an unprotected commercial activity by the solicitation of funds."[28] Surprisingly, however, the full effect of this point would not be demonstrated until *Schaumburg* — some thirty-seven years later.[29] However, it would form a cornerstone for decisions following *Schaumburg*.[30]

Citizens continued to want privacy in their homes. They often wished to keep strangers from their door, and did not want to be confronted on the street corner by Jehovah's Witnesses or others who were dissimilar to what was then "mainstream" America.[31]

In these early cases, the Court recognized the right of government to protect citizens from fraud, but made it clear that it took

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22. *See id*.
23. *See id*. at 303.
24. *See Schaumburg*, 444 U.S. at 629; Bates v. State Bar of Ariz., 433 U.S. 350, 363 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976); *see also* Ellen Harris et al., *Fundraising in the 1990s: State Regulation of Charitable Solicitation After* Riley, *in* 1 TOPICS IN PHILANTHROPY 1 (N.Y.U. School of Law Program on Philanthropy and the Law ed., 1989).
25. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); *see also* Jamison v. Texas, 318 U.S. 413, 417 (1943).
26. *See* Murdock v. Pennsylvania, 319 U.S. 105, 106–07 (1943).
27. 319 U.S. 105 (1943).
28. *Schaumburg*, 444 U.S. at 630 (discussing the majority opinion in *Murdock*).
29. *See id*.
30. *See, e.g.*, Indiana Voluntary Firemen's Ass'n v. Pearson, 700 F. Supp. 421 (S.D. Ind. 1988); WRG Enters. v. Crowell, 758 S.W.2d 214 (Tenn. 1988).
31. *See supra* notes 12–23 and accompanying text.

something other than standardless licensing schemes to accomplish this goal.[32] The rights of free expression were just too important to be left to the whim or prejudice of the would-be licensor.

The problem, however, with creating standards for licensing solicitation was that "undesirables" might meet them. Likewise, the ability to protect privacy was severely eroded. In *Martin v. Struthers*,[33] the Court held that each citizen was, in effect, on his or her own, and could refuse to admit door-to-door canvassers "selling" religious ideology.[34] Conversely, however, the Court later found it apropos to protect residential privacy if the door-to-door canvasser was selling goods or services.[35]

The Court applied the doctrine of vagueness to the regulation of charitable solicitations in *Hynes v. Mayor of Oradell*.[36] The Court found that such regulation, like all regulation affecting free speech, must be made with "narrow specificity."[37]

The doctrine of prior restraint, first introduced in the 1931 case of *Near v. Minnesota*,[38] was also a crucial cornerstone for what would later become key issues in the 1980s.[39] In *Near*, the Supreme Court overturned a Minnesota law that prohibited a newspaper from publishing future editorials because of a series of past libelous statements.[40] This important doctrine states that almost all future speech is presumed proper, and, therefore, to impede its circulation violates the First Amendment.[41] Speech that is unlawful can be punished adequately after the fact. Unworthy speech, once circulated, will fail for lack of public support in the marketplace of ideas.[42]

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32. *See supra* notes 12–24 and accompanying text.

33. 319 U.S. 141 (1943).

34. *See id*. at 147.

35. *See* Beard v. Alexandria, 341 U.S. 622, 632–33 (1951).

36. 425 U.S. 610 (1976).

37. *Id*. at 620 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

38. 283 U.S. 697 (1931).

39. *See* Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) (holding that state statutes regulating the solicitation of charitable contributions are subject to strict scrutiny under the First Amendment); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) (holding that paid fundraisers' activities are not outside First Amendment protection); Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 620 (1980) (holding that charitable appeals for funds are within the protection of the First Amendment).

40. *Near*, 283 U.S. at 703.

41. *See id*. at 713–20.

42. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), for the most well-known exposition of the concept of the "marketplace of ideas." Justice

Another case worth noting is *Freedman v. Maryland*.[43] This case challenged a requirement, promulgated by the State of Maryland in 1957, that movies had to be submitted to a censorship board before exhibition.[44] The Court struck down the law, and used the case to further define procedural safeguards that must exist in any statutory scheme designed to license free-speech activities.[45] The burden to prove the speech unprotected, the Court stated, was properly placed on the would-be licensor since all free speech was presumptively protected; furthermore, the licensor must fairly apply objective standards, as well as act in a timely manner.[46]

In retrospect, the courts were being confronted with rather simple issues that were arising from a still non-complex society in an industry that was beginning to grow. In some ways, it could be summed up as "who is at my door, and why do you want money."

Communities were being told that political, religious, and charitable appeals could not be thwarted by discretionary licensing schemes.[47] While regulations to protect citizens from fraud were appropriate, they could not be vague or so broad as to allow prejudice in their application.[48]

Societal changes spurred similar changes in the nonprofit movement. More and more charities were becoming national in their scope of appeal and service.[49] More sophisticated methods of communication were evolving and being employed.[50] Non-local agencies were asking for support at an increasing rate.[51]

To this point, the Court consistently protected the constitutional rights of the minority groups going door-to-door seeking financial assistance in the name of a religious organization, principally from

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Holmes wrote that "the 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." *Id.*

43. 380 U.S. 51 (1965).

44. *See id*. at 53 n.1.

45. *See id.* at 58–59. This case would also play a key role in the Court's analysis of the decision in *Riley*, which dealt with challenged provisions of the North Carolina licensing scheme. *See Riley*, 487 U.S. at 802.

46. *Freedman*, 380 U.S. at 58–59.

47. *See supra* notes 12–23 and accompanying text.

48. *See supra* note 35 and accompanying text.

49. *See* Leslie G. Espinoza, *Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S. CAL. L. REV. 605, 635 (1991).

50. *See id*.

51. *See id*.

people who did not wish to be confronted and often considered these groups a nuisance.[52] In each decision, the Court noted that some regulation was appropriate, but the licensing scheme had to be fair and objective, and would not allow the licensor to make a subjective judgment.[53] In the area of freedom of speech, the majority cannot suppress the speech of the minority.[54] After all, we are a constitutional democracy — a point we must all realize and accept.

The Court still needed to address a number of issues on licensing and protected speech. For example, while the Court had noted that the appeal for support by a group was a form of protected speech,[55] it had not yet ruled on some aspects of the extent of protection; that is, there was no discussion concerning what impact, if any, compensated representatives (fund raisers) would have on the scope of protection; or whether government's judgment could be imposed; or if compelled disclosure could withstand constitutional scrutiny.

A study of cases leads to the following conclusions. When dealing with rights protected by the First Amendment, any scheme of licensing is suspect. To pass the First Amendment test, there must be no discretion left to the would-be licensor, and the restrictions must be reasonable as to time, place, and manner.[56]

As mass communication arrived, and as charities hired professionals to help their organizations grow into national and multinational forces, the pace of developments quickened. Charities began using new means of communication to deliver their appeal.[57] Specifically, mailings and the telephone became popular tools for charities to use in the appeal for public support.[58]

By 1960, the states had already begun to legislate how charities

52. *See supra* notes 12–25 and accompanying text (discussing Schneider v. New Jersey, 308 U.S. 147 (1939) and Cantwell v. Connecticut, 319 U.S. 296 (1940)).

53. *See Cantwell*, 319 U.S. at 302; *Schneider*, 308 U.S. at 163–65.

54. *See generally* STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT, ch. 1–3 (2d ed. 1996).

55. *See* Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943); *see also supra* notes 27–29.

56. These requirements limit the discretion of the state not only with respect to charitable solicitation, but also with respect to all forms of protected speech. *See generally* SHIFFRIN & CHOPER, *supra* note 54.

57. *See* Espinoza, *supra* note 49, at 635.

58. *See id.*

could solicit in their jurisdictions.[59] The focus on local ordinances changed to a focus on state regulation as national organizations used mass appeals to gain support.[60] By 1980, more than one-half of the states had some type of law in place.[61] Today, almost every state has a form of charitable solicitation law, which perpetuates the concept that citizens want government to create barriers to protect them from annoyance and fraud.[62]

One well-known regulator wrote in an article that:

> Government has two legitimate objectives with respect to fundraising by charities: (1) to ensure the assets raised for charitable purposes are, to the maximum extent possible, used for the charitable purpose intended by the donors, and (2) to ensure that the public has access to accurate information it can reasonably use to aid gift-giving decisions.[63]

That philosophy is, of course, simply a restatement of the *parens patriae*[64] approach, which would permeate many of the statutes that were drafted and tested in the last two decades of the millennium.[65]

III. A NEW COURT, BUT THE SAME RESULTS

By the 1980s, the composition of the Court had changed.[66] The

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59. *See id*. at 648.

60. *See id*.

61. *See id*.

62. Among the limitations placed on charitable solicitations are: requirements that charities or fundraisers file reports with the state, *see, e.g.*, CONN. GEN. STAT. § 21a-190c (1995); ME. REV. STAT. ANN. tit. 9, § 5005 (1995); OR. REV. STAT. § 128.670 (1996); prohibiting fraudulent or deceptive charitable solicitations, *see, e.g.*, GA. CODE ANN. § 43-17-12 (1996); KY. REV. STAT. ANN. § 367.667 (Banks-Baldwin 1995); N.H. REV. STAT. ANN. § 7:28-f (1996); and requirements that the charity register with the state, *see, e.g.*, ALASKA STAT. § 45.68.010 (Michie 1996); CONN. GEN. STAT. § 21a-190b (1996); WASH. REV. CODE § 19.09.065 (1996).

63. David E. Ormstedt, *A Regulation Primer: What the Laws Say*, ADVANCING PHILANTHROPY, Fall 1995, at 11.

64. *Parens patriae* literally means "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). It refers to "the principle that the state must care for those who cannot take care of themselves." *Id.*

65. *See supra* note 62.

66. At the time *Freedman v. Maryland* was argued in 1964, the Court was made up of Justices Black, Brennan, Clark, Douglas, Goldberg, Harlan, Stewart, Warren, and White. When *Schaumburg v. Citizens for a Better Environment* was decided in 1980, Justices Blackmun, Brennan, Burger, Marshall, Powell, Rehnquist, Stewart, Stevens, and White sat on the Court. *See* WORLD ALMANAC AND BOOK OF FACTS 1997, at 189 (Robert

issues were recast and new tests were waiting.

First came *Schaumburg*.[67] The Court was faced, for the first time, with a challenge to a form of "economic" *parens patriae*. The Village of Schaumburg enacted an ordinance which mandated that seventy-five percent of all funds raised had to go to the program service of nonprofit organizations.[68] Citizens for a Better Environment, a nonprofit group, went from door to door to espouse their cause, and at the same time, solicited support.[69] However, most of the funds raised were used to pay the canvassers.[70] Additionally, program service was the message that was being delivered.[71] An application was made to obtain a permit, and upon denial, the organization filed suit, which ultimately came before the Supreme Court.[72]

The *Schaumburg* decision laid the foundation for future gains that came to fruition with *Riley*.[73] The Court began by reviewing the precedents earlier cases established, and then made quantum leaps in several directions.

First, the Court determined that an appeal for support by a charitable organization was a form of fully-protected free speech and not a form of commercial speech, even though there was a solicitation for money.[74] The Court based its determination upon the fact that these appeals for support by organizations, through necessity, were so intertwined with ideas, information, and advocacy, that the entire activity was entitled to the full protection of the First Amendment.[75] This decision became the key to the cases that would follow.[76]

Famighetti et al. eds., 1996).

67. 444 U.S. 620 (1980).

68. *See id*. at 624.

69. *See id*. at 625.

70. *See id*. at 626.

71. *See id*. at 625.

72. *See id*. at 620.

73. *Compare Schaumburg*, 444 U.S. at 620, *with* Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 781 (1988) (showing a progression in First Amendment protection from certain aspects of door-to-door solicitation to any general solicitation of charitable contributions).

74. *See Schaumburg*, 444 U.S. at 633.

75. *See id.* at 634.

76. *See, e.g.*, Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) (demonstrating the Court's willingness to use the First Amendment to strike down laws infringing on charities' rights).

Next, the Court reintroduced the doctrine of overbreadth.[77] This doctrine, in the First Amendment context, requires that a law be tested in all of its possible applications.[78] It is not simply sufficient to apply the test solely to the party before the court.[79] The doctrine demands that if the law can be applied to persons not before the court to deny them otherwise lawful speech, then the law is overbroad and must be held unconstitutional.[80]

The doctrine of overbreadth is vital to analyzing the validity of a law that imposes any form of restriction on free-speech activities.[81] Professor Henry P. Monaghan wrote a comprehensive article on this subject, which stated in part:

> A more dramatic judicial response to a challenged enactment which impinges upon first amendment values is to declare it void on its face. It is virtually undisputed that legislation must fall if a court is convinced that its promotion of valid governmental interests is outweighed by its damage to expressive and associational interests.[82]

The challenged ordinance applied a dollar-efficiency standard on whether the organization's message could be disseminated by door-to-door canvassing.[83] The Court concluded that the ordinance was a "direct and substantial limitation on protected activity," and could not be sustained unless it served a compelling governmental interest in the least intrusive manner available.[84] While the Court recognized the Village's interest in protecting its citizens from fraud, crime, and undue annoyance, it found those interests inadequate to sustain the ordinance.[85]

Another pronouncement of great significance was made by the Court when it found that the high cost of fundraising, in and of it-

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77. *See Schaumburg*, 444 U.S. at 633–35.

78. Notice that the Court attempts to determine not only if the law is overbroad as applied to the charity in question, but as to *any* charity. *See id.* at 635.

79. *See id.*

80. *See* Henry P. Monaghan, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844 (1970).

81. *See id.* at 845–46.

82. *Id.* at 845.

83. For a discussion of the challenged ordinance, see *Schaumburg*, 444 U.S. at 636 n.9.

84. *Id.* at 636.

85. *See id.* at 639.

self, was not necessarily an indication of fraud.[86] The Court went on to note that high solicitation costs could be legitimately incurred in a number of circumstances.[87] The Court further noted that there was no relationship between high fundraising costs and protecting citizens from undue annoyance.[88]

The Court then proceeded to advise the Village, and all others who would listen and read, on how to deal with the problems that were perceived.[89] The Court pointed out that fraud could be combated through prosecution and, for the first time, in a footnote, the concept of disclosure was mentioned.[90] This, however, would not be the last time the Court would gratuitously create a footnote that would have extreme significance.[91] In the instant footnote, it referred to Illinois's charitable solicitation laws, which required disclosure by registration and filing.[92]

Justice Rehnquist, the lone dissenter in *Schaumburg*, argued that the appeal for funds should not be viewed as core-protected speech.[93] He believed the activity was only entitled to the same protection afforded commercial speech — a standard far less stringent.[94]

In 1984, the Supreme Court decided *Secretary of State v. Joseph H. Munson Co.*[95] The primary issues involved whether the existence of a variable percentage limitation could survive the scrutiny of *Schaumburg*, and whether a fundraising company had standing to bring the challenge on behalf of its nonprofit clients.[96] The case was an appeal following the denial of a state license to a professional fundraiser.[97] The facts in this case were far less desir-

86. *See id.* at 636–37.

87. *See id.* at 636.

88. *See id.* at 638.

89. *See Schaumburg*, 444 U.S. at 637.

90. *See id.* at 637–38 & n.12.

91. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (discussing the need for clarity in referring to property interests in regulatory takings cases); Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 471 n.18 (1992) (raising the concern for unjustified restriction on intraband competition).

92. *See Schaumburg*, 444 U.S. at 638 n.12.

93. *See id.* at 644 (Rehnquist, J., dissenting).

94. *See id*. at 639–44.

95. 467 U.S. 947 (1984).

96. *See id.* (holding that the plaintiff had standing); *id.* at 949–50 (stating that the issue was whether the challenged law could withstand *Schaumburg* scrutiny).

97. *See id.* at 947.

able as compared to *Schaumburg*.[98]

The Court quickly noted that the flexibility contained within the statutory prohibitions of the Maryland law, which allowed a variance of a percentage regulation upon administrative review, could not withstand an overbreadth analysis.[99] Despite the State's assertion that Munson could not sue on behalf of others not present,[100] the Court ruled that through the doctrine of *jus tertii*,[101] it had the right to bring the challenge.[102]

In a 5-4 decision the Court found the Maryland statute a prohibited prior restraint.[103] The Court took notice of the "chilling effect" of any kind of percentage regulation, and found that the flexibility of the administrative review mechanism was inadequate to remedy this fundamental defect.[104] The Court held that the statute was still based on "a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud."[105]

Equally important, the Court found that a charity delivering its message through a professional representative did not mean its speech was afforded less constitutional protection.[106] The Court aggressively attacked all issues present in *Joseph H. Munson Co.*, and went to great lengths to underscore the point that it was the charity's right of the protected speech that was at issue.[107] The fact that the message was delivered on behalf of the nonprofit was irrelevant. However, the 8-1 majority in *Schaumburg* had slipped to 5-4.[108]

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98. *Compare Munson*, 467 U.S. at 947, *with Schaumburg*, 444 U.S. at 620.

99. *See Munson*, 467 U.S. at 952.

100. *See id.* at 957 (demonstrating the Court's willingness to relax standing rules in an overbreadth challenge).

101. Under the doctrine of *jus tertii* standing, the "Court considers whether the third party has sufficient injury-in-fact to satisfy the Art[icle] III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Id*.

102. *See Munson*, 467 U.S. at 958.

103. *See id*. at 968.

104. *Id.* at 969.

105. *Id.* at 965.

106. *See id.* at 956 n.6.

107. *See id.* at 954–59.

108. In *Schaumburg*, only Justice Rehnquist dissented. In *Munson*, Chief Justice Burger and Justices Powell and O'Connor joined Rehnquist in his dissent. *See Munson*, 467 U.S. at 975; *Schaumburg*, 444 U.S. at 639.

IV. POINT-OF-SOLICITATION DISCLOSURE

Perhaps seizing on the footnote in *Schaumburg*, a number of states effected the requirement of a point-of-solicitation disclosure.[109]

In Maine, a professional fundraiser was sued for failing to give a point-of-solicitation disclosure of the allocation of received contributions.[110] At issue was a state statute that mandated a series of disclosures if seventy percent or less of the funds raised on behalf of the nonprofit went to program services.[111]

The last of the three cases to be considered by the United States Supreme Court in the 1980s was *Riley v. National Federation of the Blind of North Carolina, Inc.*,[112] decided in 1988, which resulted from a challenge to a North Carolina statute[113] that required professional fundraisers, at the point of solicitation, to disclose the average amount they delivered to their nonprofit clients for the preceding twelve months.[114] Also present in the case was another approach to the dollar-efficiency standard, making it illegal to enter into an "unreasonable" contract with a charitable organization.[115]

The plaintiffs prevailed by summary judgment at the district court level; their victory was affirmed by the Fourth Circuit Court of Appeals.[116] There was a great deal of conjecture about why the Court granted review of this case,[117] and some felt that the spirited minority led by Chief Justice Rehnquist would soon become a majority with the addition of Justices Scalia and Kennedy to the Court.[118] Chief

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109. *See Schaumburg*, 444 U.S. at 637–38 & n.12. Point-of-solicitation disclosure is a requirement that charitable organizations' solicitors must disclose the percentage of gross receipts actually paid to the charitable organization to the person solicited. *See id*.

110. *See* State v. Events Int'l, Inc., 528 A.2d 458 (Me. 1987).

111. *See id.* at 460.

112. 487 U.S. 781 (1988).

113. *See* N.C. GEN. STAT. § 131C (1994).

114. *See Riley*, 487 U.S. at 786.

115. *Id*. at 786 n.2. Instead of using the type of regulation challenged in *Schaumburg*, the law simply disallowed excessive fees charged by professional fundraisers.

116. *See id.* at 781.

117. The conjecture probably resulted from anticipation that the decision would resolve a split in the circuit courts. *See* Espinoza, *supra* note 49, at 684 n.85.

118. *See* Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1994 Term*, 23 HASTINGS CONST. L.Q. 1, 75 n.78 (1994) (dubbing Chief Justice Rehnquist and Justices Ginsburg, Kennedy, Scalia, and Thomas as the "conservative coalition").

Justice Rehnquist continued to state that the commercial interest of the compensated fundraiser could be regulated separately and apart from the free-speech interests of the charitable organization it represented.[119]

Curiously, during oral argument, the Office of the Attorney General of the State of North Carolina termed the legislation "pro charity."[120] For the first time, under the banner of the Independent Sector, major charities joined in the suit by filing an *amicus* brief opposing the legislation.[121]

Focusing on the impact of the legislation on the message of the charitable organizations, the respondent's oral argument opened as follows:

> The value of speech is its content — not its source. It is the activity not the actor which is at issue. The Court ruled twice in this decade that charitable solicitation is entitled to full First Amendment protection. It is a matter of constitutional indifference whether the activity is carried on by the charity directly, or through its professional representative. Charities perform many vital welfare functions to the benefit of the State and its citizenry. The State seems to recognize the desirability of having charities function in North Carolina. At page four of his reply brief, the Attorney General makes the assertion that the regulatory scheme at bar is "pro charity." Those who speak for the charitable community would answer by noting that if it is the aim of the State to help, it has missed by a wide margin.[122]

The decision was handed down on June 29, 1988, with the Court sustaining the challenge to all three provisions of the statute.[123] Equally important, the lineup of the Court had once again shifted. On the issues of disclosure and dollar efficiency, the majority had reverted back to a 7-2 vote, with only Chief Justice Rehnquist and Justice O'Connor dissenting.[124]

The declaration by North Carolina that the legislation was "pro

119. *See Riley*, 487 U.S. at 806.

120. *Id*. at 790 n.6 (referring to appellant's oral argument).

121. *See* Brief for Appellant, Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) (No. 87-328).

122. *Riley*, 487 U.S. at 790 n.6.

123. *See id*. at 781.

124. *See id*.

charity" surprised the charities and the Court. In one of several interesting footnotes, the Court noted, perhaps with tongue in cheek, the response of North Carolina when challenged by Justice Scalia on that point.[125]

Another footnote[126] worth noting dealt with disclosure of the status of the solicitor. The Court volunteered that certain point-of-solicitation disclosures would appear to be proper from a constitutional standpoint.[127] This dictum became increasingly important in the post-*Riley* era, as many states began to require solicitors to disclose that they were compensated before requesting support for the charity they represented.[128] The significance of this was seized upon by Justice Scalia, who challenged the logic of the dicta in his concurring opinion, to-wit: "I do not see how requiring the professional solicitor to disclose his professional status is narrowly tailored to prevent fraud. . . . Compensatory employment is, I would judge, the natural order of things, and one would expect *volunteer* solicitors to announce that status as a selling point."[129]

One of the decision's most satisfying aspects was to witness the new composition of the Court on these critical issues. Most significantly, recently appointed Justices Scalia and Kennedy joined Justice Brennan and others in protecting the right of charities to be heard.[130] Clearly, the issues transcended traditional liberal versus conservative ideological disputes.[131]

V. CONCLUSION

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125. *See id.* at 790 n.6 (stating that at oral argument, North Carolina "surmised that the charities had been misinformed").

126. *See id.* at 799 n.11.

127. *See id.*

128. *See* Espinoza, *supra* note 49, at 640 n.80.

129. *See Riley*, 487 U.S. at 803–04 (Scalia, J., concurring) (emphasis added).

130. This is demonstrated by Justices Scalia and Kennedy joining the majority, led by Justice Brennan. *See id*. at 784. Justice Scalia filed a concurring opinion. *See id.* at 803 (Scalia, J., concurring).

131. Liberal and conservative Justices voted together on this issue. *See* Frank I. Michelman, *Super Liberal Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1332 n.66 (1991) (naming Justice Brennan as a liberal-individualist); Wilkins et al., *supra* note 118, at 75 n.78 (including Justices Scalia and Kennedy, among others, in a group of conservative Justices); *see also* text accompanying *supra* notes 118, 124.

In the decade that has passed since the *Riley* decision, the Supreme Court has not been called upon to rule on any other case involving the fundraising process. The progeny of *Riley*[132] have been consistent and stand for several different propositions.

First, and foremost, any regulation of fundraising must be viewed from the perspective that it is an activity that is entitled to the full plenary protection of the First Amendment.[133] Therefore, the legislation must be tested on the basis of its impact on the free-speech rights of nonprofit organizations.

Second, the Court has made it clear that any statutory scheme attempting to incorporate dollar-efficiency as a criteria will not and cannot pass constitutional muster.[134] Third, the Court is convinced that adequate remedies are available through individual prosecution of wrongdoers.[135]

The Court is equally convinced that local and state governments do have a right of reasonable regulation of the activity.[136] The Court requires any regulation to be sensitive to the constitutional rights at issue, as well as being fair and objective.[137] In reality, the Court has done more to protect the nonprofit industry from the vagaries of local ordinances and state legislation than the industry has been able to do itself.[138] While the Court does seem to understand the issues, and is a proponent of nonprofits having free access to the marketplace of public ideas and acceptance,[139] legislation continues to spill forth from the states in contradiction to the Court's combined

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132. *See, e.g.,* Kentucky State Police Prof'l Ass'n v. Gorman, 870 F. Supp. 166 (E.D. Ky. 1994) (relying on *Riley* to find the Kentucky Consumer Protection Act unconstitutional).

133. *See id.* at 169.

134. *See generally* Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) (striking down a law using a percentage, or dollar-efficiency, approach to decide if a fundraiser's fee may be excessive to the point that it would be fraudulent).

135. *See* Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1979).

136. For example, states may require that the solicitor disclose his or her professional status. *See Riley*, 487 U.S. at 799 n.11.

137. *See* David Hebert, Carrew-Reid v. Metropolitan Transportation Authority: *Free Expression Sound and Fury*, 11 PACE L. REV. 643, 658 (1991) (demonstrating that sensitivity to constitutional rights is an issue by stating that a later court interpreted *Riley* to mean that states could not infringe on protected speech by regulation).

138. *See generally Riley*, 487 U.S. at 781 (striking down a law infringing on a charity's First Amendment rights); *Schaumburg*, 444 U.S. at 620 (using the First Amendment to strike down a law disfavoring charities).

139. *See Riley*, 487 U.S. at 781; *Schaumburg*, 444 U.S. at 620. The Court showed its support by striking down laws that inhibited the free operation of charities.

holdings in the 1980s.[140]

Those involved in the nonprofit movement owe a great debt to the many religious groups that tested prejudice and constitutional limitations in the late 1930s and early 1940s; and, of course, to the United States Supreme Court, which has been a vigilant watchdog for the rights of organizations to come into the marketplace to seek public acceptance free from overreaching governmental interference.

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140. *See, e.g.,* Kentucky State Police Prof'l Ass'n v. Gorman, 870 F. Supp. 166 (E.D. Ky. 1994) (holding unconstitutional a provision of the Kentucky Consumer Protection Act, KY. REV. STAT. ANN. § 367.667(3) (Banks-Baldwin 1995)); Indiana Voluntary Firemen's Ass'n v. Pearson, 700 F. Supp. 421 (S.D. Ind. 1988) (holding that an Indiana statute governing professional charitable solicitors was overbroad, IND. CODE § 23-7-8-6(a)(3) (1971)).