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Secretary of State v. Joseph H. Munson Co.: State Regulation of Charitable Fundraising Costs

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I. Introduction

Public concern about misuse of funds solicited for charitable[1] purposes has led, over the last forty years, to state legislation aimed at regulating charities.[2] Despite "substantial unanimity" regarding the objective that the "greatest possible portion of the wealth donated to private charity must be conserved and used to further the charitable, public purpose,"[3] limitations on charitable fundraising costs remain the most controversial aspect of extant charitable regulation.[4]

In 1980, the United States Supreme Court struck down a local ordinance prohibiting solicitation by charitable organizations that did not use at least seventy-five percent of their receipts for "charitable purposes." The Court held that the ordinance was unconstitutionally overbroad and thus violated the first amendment rights of the charity in question.[5] In 1984, the Court followed its precedent and struck down a statute that had similar restrictions on charitable solicitation. The statute in

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1. The legal definition of "charitable" includes: "every gift for a general public use, to be applied consistent with existing laws, for benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical, or social standpoint." BLACK'S LAW DICTIONARY 212 (5th ed. 1979).

2. New Hampshire was the first state to enact a statute regulating charitable organizations. *See* An Act Establishing a Register of Public Trusts, ch. 181, 1943 N.H. Laws 259 (codified as amended at N.H. REV. STAT. ANN. § 7:19 (1971)). For a discussion of this statute, see *infra* text accompanying notes 37-38. *See also* Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633, 641-42 (1954); COMMITTEE ON OFFICE OF ATT'Y GEN'L, NAT'L ASS'N OF ATT'YS GEN'L, STATE REGULATION OF CHARITABLE TRUSTS AND SOLICITATIONS 10 (1977) [hereinafter cited as NAAG].

3. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 434 (1960).

4. B. HOPKINS, CHARITIES UNDER SIEGE — GOVERNMENT REGULATION OF FUND RAISING 96 (1980).

5. *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632-39 (1980).

question had a provision that allowed a charity to waive a twenty-five percent limitation on the amount of proceeds that could be used for non-charitable purposes whenever the charity demonstrated financial necessity.[6] In *Secretary of State v. Joseph H. Munson Co.*,[7] the Court held that the administrative waiver did not remedy the constitutional defect of overbreadth.[8] The narrowness of this holding belies the extent of its impact on the future of state regulation of charitable solicitations.[9]

Part II of this Note explores the historical and legal background of the common law regulation of charities, its modern statutory development, and its constitutional limitations. Part III discusses the factual setting, the procedural history, and the decision in *Secretary of State v. Joseph H. Munson Co.*. Part IV analyzes the Supreme Court's reasoning and examines the impact of the decision, reviewing the alternatives available to state regulators in the aftermath of *Munson*. Part V concludes that the correct, though difficult, decision in *Munson* effectively precludes future state regulation of charitable solicitations through percentage limitations on fundraising costs. Disclosure of fundraising costs to potential donors prior to solicitation is suggested as the only effective and acceptable alternative to percentage limitations.

II. Background

A. *Historical Regulation of Charities*

State supervision of charities dates back to Tudor England.[10] It was then that the Chancellor, representing the Monarch as parens patriae, first brought actions in the courts of chancery to enforce charitable uses.[11] Although once erroneously

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6. MD. ANN. CODE art. 41, §§ 103A-103L (1982).

7. 104 S. Ct. 2839 (1984).

8. *Id.* at 2850.

9. Although merely holding that the administrative waiver could not save the statute, the decision strongly indicates that the use of percentage limitations on fundraising costs is a constitutionally defective means of regulating charitable solicitations. *See infra* text accompanying notes 184, 195-238.

10. Forer, *Relief of the Public Burden: The Function and Enforcement of Charities in Pennsylvania*, 27 U. PITT. L. REV. 751, 751 (1966). *See also* Bogert, *supra* note 2, at 636.

11. NAAG, *supra* note 2, at 3 (citing FREMONT-SMITH, FOUNDATIONS AND GOVERN-

thought to have its genesis in the Statute of Charitable Uses,[12] the Chancellor's authority actually predated the statute and was found in the common law.[13] This common law authority devolved to the Attorneys General in almost all American states.[14]

The original rationale behind the Attorney General's power to enforce charitable uses was the state's interest in encouraging charitable solicitation as a means of lessening government's burden of providing aid to the needy.[15] The goal of lessening this governmental burden explains the special tax status of qualifying charitable organizations. An income tax deduction is provided to individual donors as a means of encouraging donations.[16] The public benefits indirectly from charitable donations because, in their absence, greater taxation would be required.[17] Consequently, the government has traditionally shown an inter-

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MENT — STATE AND FEDERAL LAW AND SUPERVISION, RUSSELL SAGE FOUNDATION 22, (1965)). *See* Comment, *The Enforcement of Charitable Trusts*, 18 SYRACUSE L. REV. 618, 625 (1966).

12. 43 Eliz. ch. 4 (1601). For an exploration of the history and features of English statutes regulating charities, see Bogert, *supra* note 2, 636-38. This erroneous view is exemplified by Trustees of Philadelphia Baptist Ass'n v. Hart's Executors, 17 U.S. (4 Wheat.) 1 (1819) (holding charitable trusts unenforceable under Virginia state law because English statutory law, including the Statute of Charitable Uses, had been repealed in 1791).

13. NAAG, *supra*, note 2, at 3. *See* Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844) (holding charitable trusts enforceable in equity despite the absence of Pennsylvania statutory authorization, and recognizing that the common law basis for enforcement authority in the Attorney General preceded the Statute of Uses); Parker v. May, 59 Mass. (5 Cush.) 336 (1850) (Attorney General has common law authority to file an information to effectuate a charitable donation); People v. Miner, 2 Lans. 396 (1868) (Attorney General retains common law power to proceed against charitable trusts).

14. *See* NAAG *supra* note 2, at 3; Comment, *supra* note 11, at 623; Forer, *supra* note 10, at 751.

15. The original rationale of the English Parliament in enacting the Statute of Charitable Uses was not to protect individual donors. It was enacted at a time when caveat emptor was the general rule and the government ordinarily did not interfere in private transactions. *See* Brief for the Amici Curiae in Support of Petitioner, at 20, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766). In contrast, most current state and local regulations on charities assert a state interest in preventing fraud, crime, misrepresentation, and undue annoyance. *See* Brief of Petitioner, at 34, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766). *See also* Village of Schaumburg v. Citizens for a Better Env't., 444 U.S. 620, 636 (1980); Hynes v. Mayor of Oradell, 425 U.S. 610, 615 (1976); Cantwell v. Conneticut, 310 U.S. 296, 306 (1940).

16. *See* I.R.C. §§ 170, 501(c)(3) (West 1984).

17. *See generally* B. HOPKINS, *supra* note 4, 3-13 (examining the public policy rationale of tax exemptions for charitable organizations).

est in promoting public regard for charities.[18] Moreover, the public, as the ultimate beneficiary, has had an interest in ensuring that diversion and waste of funds solicited for charitable purposes is minimized.[19]

From both a legal[20] and a practical[21] standpoint, however, the public is ill-equipped to protect its interest in conserving charitable funds. Moreover, Professor Bogert observes that "strictly speaking the state is the only party having a legal interest in enforcement, and the human beings who are favorably affected by the execution of the [charitable] trust are merely the media through whom the social advantages flow to the public."[22]

The role of the Attorney General as the legal representative of the state and its citizens logically[23] led to the rule that only he could sue to enforce charitable trusts.[24] But this common law authority was rarely wielded prior to state statutory enactments

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18. M. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT — STATE AND FEDERAL LAW AND SUPERVISION 28 (1965) ("indeed as a result of the enactment of the Statute [of Charitable Uses] in 1601, the number of charities rapidly increased."). *See* B. HOPKINS, *supra* note 4, at 18 (public regard is essential to the successful functioning of charitable groups); *see also* Secretary of State v. Joseph H. Munson Co., 104 S. Ct. at 2859 (Rehnquist, J., dissenting) (percentage limitations on fundraising costs encourage the public to give with confidence that money designed for a charity will be spent on charitable purposes); Karst, *supra* note 3, 482 n.192 (discussing support of registration and reporting requirements by the banking trust industry as promoting public confidence).

19. NAAG, *supra* note 3, at 5.

20. Charitable beneficiaries usually belong to an indefinite class that rarely has a right of action against a charity because most states deny standing to them. In states where rights of statutory enforcement of charitable trusts inure to "any interested party," courts may not hold beneficiaries to be "interested parties." NAAG, *supra* note 3, at 4 (citing M. FREMONT-SMITH, *supra* note 18, at 200-02). *See* Bogert, *supra* note 2, at 633-34; Winans & Rimlinger, *Charitable Trusts in South Dakota: Who Shall Supervise Their Trustees?*, 21 S.D.L. REV. 232, 241 (1976). *See also*, Karst, *supra* note 3, at 449 (state policy against subjecting charity to harrassing litigation).

21. Most charitable beneficiaries are unaware of their beneficial status, and even if they were aware that they qualify as beneficiaries, they would probably lack the funds necessary to bring an enforcement action. Considering the costs of litigation, the likelihood of alienating the trustees in whose discretion funds are normally distributed, and the uncertainty of success, the probability of beneficiary actions seems small. *See* NAAG, *supra* note 2 at 4. *See also* Karst, *supra* note 3, at 448.

22. Bogert, *supra* note 2, at 633.

23. Because the public is the ultimate beneficiary of charitable trusts, it is logical that a public official be responsible to enforce them. NAAG, *supra* note 2, at 5. Moreover, the beneficiaries of charitable trusts are often incapable of taking the financial risk involved in enforcing a charitable trust. *See supra* note 21.

24. Bogert, *supra* note 2, at 633-34.

regulating charities.[25] This circumstance was not the collective fault of the Attorneys General.[26] Although the common law provided them the authority to supervise charities, the Attorneys General were largely without information of any sort regarding the existence, no less the abuse, of charitable trusts.[27] Indeed, the common law provided no mechanism to collect the needed information[28] and imposed no duty on the charities to supply it. Thus, the limited exercise of this apparently discretionary[29] common law power is understandable considering the paucity of relevant information regarding charities, the minimal, if any, political pressure on this issue, and the more immediately pressing duties of the Attorney General's office.[30] Eventually, the deficiencies of this discretionary enforcement power and the consequential possibility for abuse of charitable funds led to state legislation that clarified and defined the authority of the Attorney General to supervise charitable trusts.[31]

B. *Modern Regulation of Charities*

Thomas Jefferson once said that "the duty of every man is to devote a certain portion of his income for charitable purposes and . . . his further duty is to see it is applied to do the most good."[32] Americans have traditionally shown the desire to aid the ill and the needy.[33] Charitable contributions have been

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25. *See* Bogert, *supra* note 2, at 634-35; Comment, *supra* note 11, at 625.

26. Bogert, *supra* note 2, at 634.

27. *Id.* at 634-35. *See* Karst, *supra* note 3, at 451; Klapp & Wertz, *Supervision of Charitable Trusts in Ohio — The Ohio Charitable Trusts Act.* 18 OHIO ST. L.J. 181, 181 (1957).

28. Although searches of probate and inheritance tax records, newspapers, and privately published directories might have provided at best an incomplete list, an effective enforcement system clearly needs an effective information gathering mechanism to ensure complete and accurate data. *See* Karst, *supra* note 3, at 451-52.

29. *See* Karst, *supra* note 3, at 449-51 (discussing Ames v. Attorney General, 332 Mass. 246, 124 N.E.2d 511 (1955), which refused to compel attorney general to bring an action).

30. Bogert, *supra* note 2, at 634-35.

31. *Id.* at 641. *See* Comment, *supra* note 11, at 629.

32. *See* Note, *The Regulation of Charitable Fund Raising and Spending Activities*, 1975 WIS. L. REV. 1158, 1158 (1975); B. HOPKINS, *supra* note 4, at 1.

33. *See, e.g.*, Forer, *Forgotten Funds: Suggesting Disclosure Laws for Charitable Funds*, 105 U. PA. L. REV. 1044, 1044 (1957); Note, *Charitable Solicitation Acts — An Attempt to Curb Charity Cheats*, 16 DE PAUL L. REV. 472, 472 (1967).

Of course, this tradition predates Thomas Jefferson. It is a part of the Judaeo-Chris-

steadily increasing in the United States.[34] Before 1943, however, very little statutory law ensured that charitable contributions were applied to do the most good.[35] The public's generosity generally exceeded its caution.[36]

In 1943, New Hampshire became the first state to enact legislation that required charitable trusts to register and file annual reports with the Attorney General.[37] That statute provided for public inspection of these records and authorized the Attorney General's office to promulgate rules necessary to obtain records and conduct investigations to effectuate the act.[38] Other states eventually followed New Hampshire's lead,[39] and in 1954, the National Conference of Commissioners on Uniform State Laws approved the Uniform Supervision of Trustees for Charitable

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tian ethic: "When you help the poor you are lending to the Lord — and he pays wonderful interest on your loan!" *Proverbs* 19:17 (The Living Bible, Paraphrased); "If thou wilt be perfect, go and sell that thou hast, and give to the poor. . ." *Matthew* 19:21 (King James); "He was a Godly man . . ., and gave generously to charity." The *Acts* 10:2 (The Living Bible, Paraphrased).

34. "Since World War I charitiable solicitation has become 'big business' in the United States." Note, *supra* note 32, at 1158. In 1964, charity was the fourth largest industry in the country. Forer, *supra* note 10, at 755. Total contributions for all charitable causes were estimated by the American Association of Fund Raising Counsel, Inc. (AAFRC) at $6.66 billion in 1955. By 1965 that figure nearly doubled, and was estimated at $13.29 billion. The AAFRC estimate of total giving doubled again in 1975 reaching $29.32 billion. In 1983 the figure had swelled to $64.93 billion, 82.9 percent of which was contributed by individuals. 11 AMERICAN ASS'N OF FUNDRAISING COUNSEL, INC., GIVING USA, 40-41 (1984).

35. Bogert, *supra* note 2, at 639. It was estimated some years ago that one percent of the billions contributed annually is diverted to fraudulent fundraisers. Note, *supra* note 33, at 472.

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> This was illustrated by an incident in a New York City bank. A mother had deposited the contents of her son's coin bank, but had forgotten to take the container with her when she left. Upon her return an hour later, she discovered the coin bank standing where she had placed it, but already half filled with small coins contributed by 'givers' who felt the urge to give, though there was not the slightest indication of a cause.

Note, *supra* note 33, at 472 (citing ANDREWS, PHILANTHROPIC GIVING 160 (1950)).

37. An Act Establishing a Register of Public Trusts, ch. 181, 1943 N.H. Laws 259 (codified as amended at N.H. REV. STAT. ANN. § 7:19 (1971)). The act did not include registration of charitable corporations although the draftsmen sought to include them. The draftsmen feared that including charitable corporations would prevent the passage of the act. *See* Bogert, *supra* note 2 at 642.

38. Bogert, *supra* note 2 at 642.

39. *See* Karst, *supra* note 3, at 453. After New Hampshire, Rhode Island, Ohio, South Carolina, and Massachusetts passed laws that regulated charitable trusts.

Purposes Act.[40]

Although these statutes generally regulated only charitable trusts,[41] there was an increasing incentive to extend this regulation to charitable organizations and solicitations.[42] Not only was the amount of charitable donation on the rise,[43] but also legal commentary addressing the increased need for charitable supervision proliferated.[44] Moreover, political pressure, which at one time had been lacking, mounted as a series of well publicized abuses directed national attention to the issue.[45] This publicity focused the nation's attention on the reasonableness of charitable fundraising, public relations, and administrative costs. By 1974, twenty-five states had annual financial reporting requirements for soliciting charities.[46] By 1977, thirty states required charitable organizations or their professional fundraisers to register before conducting charitable solicitations.[47]

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40. Uniform Supervision of Trustees for Charitable Purposes Act, 7A U. L. ANN. 748 (1954). The uniform law was adopted in California, Illinois, Michigan, and Oregon.

41. California adopted the Uniform Act, but extended its scope to charitable corporations.

42. *See generally* Karst, *supra* note 3, at 456 (advocating the extension to corporate charities); Taylor, *Accountability of Charitable Trusts* 18 OHIO ST. L. J. 157, 166 (1957) (discussing the trend toward philanthropic incorporation).

43. *See supra* note 34.

44. Karst, *supra* note 3, at 434. *See also* Forer, *supra* note 10, at 752 n.4 (provides an extensive list of law review articles published between 1947 and 1962).

45. For a discussion of the abuses leading to the evolution of governmental regulation of fundraising cost, see B. HOPKINS, *supra* note 4, at 14-17. Hopkins discusses the following cases: State v. Kline, 266 Minn. 372, 124 N.W.2d 416 (1963) (state prosecution for grand larceny of administrators of the Sister Kenny Foundation who, over a seven year period, expended 16.26 million dollars of 30.67 million received on fundraising public relations and administrative overhead); United States v. Kline, 205 F. Supp. 637 (D. Minn. 1962) (federal prosecution for postal fraud arising from the same facts); State *ex rel.* Scott v. Police Hall of Fame, No. 74-CH 5015 (Circuit Court, Cook County, 1976) (judgment ordering payment of punitive damages where fundraisers had received $622,000 in costs and compensation of the $785,731 that had been raised). *See also Children's Charities, 1977: Hearings Before the Subcommittee on Children and Youth of the Senate Committee on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974); *Fund Raising By or In Behalf of Veterans: Hearings Before the House Committee on Veterans Affairs*, 85th Cong., 2d Sess. (1958); *Federal Agencies and Philanthropies: Hearings Before a Subcommittee of the House Committee on Governmental Operations*, 85th Cong., 2d Sess. (1958); Note, *supra* note 33, at 472-73. *See generally* NAAG, *supra* note 2, at 40-42 (providing a review of other similar state actions).

46. NAAG, *supra* note 2, at 28.

47. *Id.* Reasonable state registration requirements that do not constitute a prior restraint and are neither vague nor discriminatory are constitutional. *See* Hynes v. Mayor

In addition to the registration and reporting requirements, the states began to regulate charitable fundraising and administrative costs directly by using percentage limitation statutes.[48] These statutes limited the amount, as a percentage of funds solicited, that a charitable organization might directly spend on its fundraising and administrative costs[49] or pay to a professional fundraiser or solicitor.[50] The "simplicity and ease of administration afforded by [percentage] limitations"[51] led twenty-two states[52] to employ them in an effort to protect the contribut-

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of Oradell, 425 U.S. 610, 620 (1976); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

48. *See* B. HOPKINS, *supra* note 4, at 110-23; NAAG, *supra* note 2, at 31-34. For a general survey of current state legislation regulating charities, see B. HOPKINS, *supra* note 4, at 35-74; Brief Amicus Curiae on Behalf of Independent Sector at 1a-15a, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766).

49. "The National Information Bureau suggests that at least 70% of all available contributed funds should be spent for *program activities*, that is, only 30% may be spent for fund-raising." Brief of Petitioner at 35 n.23, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766).

50. For a list of the statutes placing a percentage limitation on fundraising costs, see *infra* note 52. The National Health Council, Inc. recommends that "essential" legislative provisions should "set a limit on the amount of payment to a professional solicitor . . . by any charitable organization." NATIONAL HEALTH COUNCIL, VIEWPOINTS: STATE LEGISLATION REGULATING SOLICITATION OF FUNDS FROM THE PUBLIC 8-10 (rev. ed. 1976) [hereinafter cited as NHC, VIEWPOINTS].

51. Brief of Petitioner at 26 n.18, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766).

52. *See* ARK. STAT. ANN. § 64-1610 (1980) (25% to professional fund raiser); CONN. GEN. STAT. ANN. § 21a-179 (West 1983) (25% to 50% sliding scale); FLA. STAT. § 496.11(8) (1984) (25% to professional fundraiser); GA. CODE ANN. § 43-17-7 (1984) (30% for fundraising and administrative costs); HAW. REV. STAT. § 467B-7(a) (1981) (20% to professional fundraiser); ILL. REV. STAT. ch. 23 § 5109(c) (1982) (25% for fundraising and administrative costs); KAN. STAT. ANN. § 17-1747(c) (1974) (25% for fundraising and administrative costs); MD. ANN. CODE art. 41 § 103D (1978) (25% for fundraising and administrative costs); MASS. GEN. LAWS ANN. ch. 68, §§ 21-22 (West 1964 & Supp. 1984) (50% total; 15% to professional fundraiser); MINN. STAT. ANN. § 309.555 (1981) (30% to professional fundraiser); N.H. REV. STAT. ANN. § 320.20 (1965) (15% for fundraising and administrative costs); N.J. REV. STAT. § 45.17A-10 (1978) (15% to professional fundraiser); N.D. CENT. CODE § 50-22-04.1 (1981) (35% total; 15% to professional fundraiser); OKLA. STAT. ANN. tit. 18, § 552.3(B) (Supp. 1984) (10% to professional fundraiser); OR. REV. STAT. § 128.855 (1981) (25% for solicitation costs, 50% for solicitation and administration costs); PA. STAT. ANN. tit.10, § 160-6 (Purdon Supp. 1983) (35% total; 15% to professional fundraiser); R.I. GEN. LAWS § 5-53-4 (Supp. 1982) (50% total; 25% to professional fundraiser); S.C. CODE ANN. § 33-55-80 (Law. Co-op 1977) ("reasonable percent" to professional fundraiser); S. D. CODIFIED LAWS ANN. § 37-27-24 (1977) (repealed 1984) (30% to professional fundraiser); TENN. CODE ANN. § 48 2213 (1979) (less than 25% to professional fundraiser creates rebuttable presumption of reasonableness; WASH. REV. CODE ANN. § 19.09.100(1) (1974) (20% for solicitation costs); W. VA. CODE §

ing public from fraud and the charities from unscrupulous, professional fundraisers.[53] Noncompliance with these statutes generally resulted in fines, or imprisonment, or state cancellation of (or refusal to re-issue) solicitation permits.[54]

Although these statutes were easy for the state to administer and enforce, they raised many practical fairness issues. The absence of a universal standard for computing fundraising costs, for example, could yield dissimilar cost percentage results for nearly identical charitable operations.[55] Moreover, although an "objective evaluation of the worthiness of voluntary agency operations requires at the least consideration of . . . income percentage applied to purpose and program,"[56] it was clear that if comparisons of charities were to be accurate, other factors such as the nature of the purpose and the general operation of each charity should be considered.[57] Beyond this basic fairness issue, percentage limitations on charitable solicitation were challenged as an overbroad exercise of state power to further legitimate state interests.

C. *Overbreadth Review*

The fundamental legal problem presented by the regulation of charitable solicitations concerns the scope of the statute. Initially, the inquiry concerns the definition of "charity."[58] The

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29-19-7(a) (1977) (15% to professional fundraiser).

53. This protection is necessary because some charities may not scrutinize the professional fundraiser closely enough, and may consider only the immediate economic gain of employing one. From the charity's perspective *any* additional funds generated by the professional fundraiser are "found" dollars. Even if the professional fundraiser retains 90% of the funds solicited, the 10% of the money remaining constitutes dollars not otherwise available to the charity. *See* Brief of Petitioner at 26 n.18, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766).

54. *See, e.g.*, MD. ANN. CODE art. 41 § 103L (1978).

55. B. HOPKINS, *supra* note 4, at 111.

56. NHC, VIEWPOINTS, *supra* note 50, at 5.

57. Other factors that should be considered include: (1) the age of the agency; (2) the choice of campaign techniques employed; (3) geographic and population differences affecting costs; (4) acts of God; and (5) bequest giving. *Id. See also* Karst *supra* note 4, at 467 n.143 and accompanying text (some foundations must be costly to be effective).

58. Jones, *Solicitations — Charitable and Religious* 31 BAYLOR L. REV. 53, 60 (1979) (recognizing that "[o]ne of the problems in regulating charities is determining exactly what a charity is."). *See* Village of Schaumburg v. Citizens for a Better Env't., 444 U.S at 644 (Rehnquist, J., dissenting).

common law contemplated, and statutory law evolved from, the traditional concept of a charity.[59] Because statutory broadening of this definition has caused the definition to encompass organizations that, to a greater or lesser extent, advocate causes,[60] percentage limitations on charitable fundraising costs represent potentially overbroad encroachments on first amendment rights of speech.

The Supreme Court often invokes the overbreadth principle in an effort to protect freedom of speech. In essence, the overbreadth principle recognizes that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[61] There are two distinct methods that the Court employs

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59. "Traditional charities" have been defined as "those which simply act as agents to transfer funds to other charities or provide money and services to the poor." Note, *Ordinance Restricting Solicitation of Funds by Charities Restricts Freedom of Speech* — Village of Schaumburg v. Citizens for a Better Environment, 9 FLA. ST. U. L. REV. 185, 186 n.8 (1981). *See also* Citizens for a Better Env't v. Schaumburg, 590 F.2d 220, 226 (7th Cir. 1978) ("[w]here solicitors represent themselves as mere conduits for contributions").

60. Today, statutes may define "charity" to include benevolent, philanthropic, eleemosynary, patriotic, humane, social service, civic, fraternal, voluntary, public interest, cultural, artistic, environmental, social advocacy, recreational, and welfare purposes. B. HOPKINS, *supra* note 4, at 76. The ordinance in *Schaumburg* defined a charitable organization as "[a]ny benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group." SCHAUMBURG, ILL., VILLAGE CODE, ch. 22, art. III, § 22-19 (1975).

The Maryland Statute in *Munson* defines a charitable organization as "an organization which is or holds itself out to be a benevolent, educational, philanthropic, humane, patriotic, religious, or eleemosynary organization." MD. ANN. CODE art. 41 § 103A(b) (1978). These "charities" are "organizations whose primary purpose is not to provide money or services for the poor, . . . but to gather and disseminate information about and advocate positions on matters of public concern." Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 635 (1980).

61. NAACP v. Alabama, 377 U.S. 288, 307 (1964). The overbreadth doctrine orginated in Thornhill v. Alabama, 310 U.S. 88 (1940). In that case, the Court recognized a narrow exception to the general rule that a litigant only has standing to litigate his own constitutional rights. The Court justified the exception by stating:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . One who might have had a licence for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. . . . A like threat is inherent in a penal statute, . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute,

to eliminate statutory overbreadth: an "as applied" technique and an overbreadth technique.[62]

The judicially restrained "as applied" approach examines a statute in light of the challenger's activities. It truncates the reach of overbroad legislation by eliminating its application to the challenger's constitutionally protected activity.[63] This approach leaves the statute in force to operate within constitutional bounds.[64]

By contrast, overbreadth review is more aggressive.[65] The challenger is permitted to argue that other conceivable statutory applications might unconstitutionally burden protected activity.[66] This technique invalidates the challenged statute on its

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which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

Id. at 97-98 (citations omitted).

62. *See generally* Monaghan, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844-45 (1970); SHAMAN, *The First Amendment Rule Against Overbreadth*, 52 TEMP. L. Q. 259, 281 (1979); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

63. This approach frames the issue as "whether what has been done has deprived this appellant of a constitutional right. It is the law *as applied* that we review, not the abstract academic questions which it might raise in some more doubtful case." Saia v. New York, 334 U.S. 558, 571 (1948) (Blackmun, J., dissenting) (emphasis added). *See* J. NOWAK, R. ROTUNDA & R. YOUNG, CONSTITUTIONAL LAW 870 (1983) [hereinafter cited as J. NOWAK].

64. *See* Monaghan, *supra* note 62, at 844. This approach is advantageous in limiting the intrusion and disruption of state legislative processes and allowing the state an opportunity to construe the law in a constitutional manner. *Id.* at 849-51. *See also Munson*, 104 S. Ct. at 2856-57 (Stevens, J., concurring); New York v. Ferber, 458 U.S. 747, 768 (1982). *Cf.* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1188 (10th ed. 1980) ("Overbreadth analysis may be especially attractive to some Justices because it gives the appearance of leaving alternatives open to the legislature"); Shaman, *supra* note 62, at 282 (with overbreadth, "abrogation of legislative goals is relatively minimal").

The "as applied" approach ensures sounder, more focused, and better informed decisions by confining the analysis to the factual bases presented in a given situation. *See* Monaghan, *supra* note 62, at 849. *See also* Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1005 (1924).

65. *See generally* Shaman, *supra* note 62, at 265 (overbreadth review constitutes judicial activism).

66. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 432 (1963). In doing so, the Court often relaxes the rules of standing, ignoring the protected or unprotected status of the complainant's conduct. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). Granting overbreadth standing is justified because the chilling effect on potential challengers of the allegedly unconstitutional statute unacceptably delays "as applied" erosion of the

face.[67] In this area, the constitutional defect of the statute goes beyond application in a particular case;[68] the law is voided in toto to avoid a "chilling" effect in protected contexts.[69]

Because it is difficult to imagine a situation in which even the most precisely worded statute does not deter speech to some unknown extent, the Supreme Court formulated the doctrine of substantial overbreadth in *Broadrick v. Oklahoma*.[70] Relying on the principle that courts do not have unlimited power to pass judgment on the validity of state laws,[71] *Broadrick* relaxed overbreadth scrutiny for statutes that go beyond regulation of pure speech to regulate "conduct in the shadow of the First Amendment."[72] In these instances, the court must believe that "the overbreadth of the statute [is] not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[73] The Supreme Court first applied the overbreadth doctrine to charitable regulation by percentage limitation in *Village of Schaumburg v. Citizens for a Better Environment*.[74]

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overbreadth through case by case adjudication. Monaghan, *supra* note 62, at 855.

Proponents of the "as applied" method condemn consideration of extraneous applications as the "wholly result-oriented handiwork of a Court acting 'as if it had a roving commission' to find and cure unconstitutionality." Monaghan, *supra* note 62, at 846 (citing to A. Cox, The Warren Court 18 (1968)). *See* Broadrick v. Oklahoma, 413 U.S. 601, 610-111 (1972); *Munson*, 104 S. Ct. at 2857-58. The justification for this admittedly unrestrained method of statutory review lies in the favored status of first amendment rights of expression. This status derives from a recognition that they are essential to the continued existence of democracy. *See* McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182 (1959); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Thomas v. Collins, 323 U.S. 516, 529-30 (1945). For the utilitarian justification of the favored status of free speech, see J. S. Mill, On Liberty (1859).

67. *See Munson*, 104 S. Ct. at 2858 (Rehnquist, J., dissenting). *See also* Bogen, *First Amendment Ancillary Doctrines*, 37 Md. L. Rev. 679, 705 (1975).

68. Monaghan, *supra* note 62, at 853.

69. *See id. Cf. Munson*, 104 S. Ct. at 2858 (Rehnquist, J., dissenting).

70. 413 U.S. 601 (1973).

71. *See* Younger v. Harris, 401 U.S. 37, 52 (1971).

72. Broadrick v. Oklahoma, 413 U.S. at 614. As the regulated activity moves from speech toward conduct the Court also requires the overbreadth to be substantial, see *infra* note 133, because the preferred status of the first amendment right applies primarily to pure expression. *See generally* Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 995 (1963) (concluding that a "state may not seek to achieve other social objectives through control of expression . . . . [S]uch objectives can and must be secured through regulation of action.").

73. Broadrick v. Oklahoma, 413 U.S. at 615.

74. 444 U.S. 620 (1980).

D. Village of Schaumburg v. Citizens for a Better Environment

In *Village of Schaumburg v. Citizens for a Better Environment*,[75] the Supreme Court considered the constitutionality of a local ordinance[76] that conditioned the issuance of a charitable solicitation permit upon satisfactory proof that at least seventy-five percent of the proceeds of the solicitation would be used directly for the charitable purpose of the organization.[77] The "charitable purpose" was defined to *exclude* solicitation, salary, overhead, and other administrative expenses.[78] Citizens for a Better Environment (CBE) was denied a permit because it could not demonstrate that seventy-five percent of its receipts would be used for the organization's charitable purpose.[79] Concluding that the ordinance was "on its face a form of censorship," the district court awarded summary judgment[80] to CBE and declared the code to be facially invalid in contravention of the first and fourteenth amendments. The court of appeals[81] and the Supreme Court[82] affirmed.

The Supreme Court recognized that the village had legitimate interests in protecting citizens from fraud and disruptions of privacy, but the Court reasoned that because solicitation regulations affected first amendment interests, the regulations "must be done 'with narrow specificity.' "[83] Although the sev-

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75. 444 U.S. 620 (1980)

76. SCHAUMBURG ILL., VILLAGE CODE, ch. 22, art. III, §§ 22-1 to -24 (1975).

77. *See id* § 22-20(g); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 624. Most states, rather than specifying a minimum use of proceeds for charitable purposes, limit the amount a charity may expend on fundraising *costs*. *See, e.g., supra* note 52.

78. SCHAUMBURG ILL., VILLAGE CODE ch. 22, art. III, § 22-20(g) (1975).

79. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 625 (1980).

80. The Village protested the award because issues of material fact were disputed. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 627. It had alleged that in 1975 CBE had spent more than 60% of collected funds for employee benefits, while CBE contended that 23.3% of its income was spent on fundraising, and 21.5% on administration. The Supreme Court rejected this argument, as did the district court, reasoning that issues of fact were not material when a facial attack called the validity of the statute into issue. *Id.*

81. Village of Schaumburg v. Citizens for a Better Env't, 590 F.2d 220 (7th Cir. 1978).

82. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

83. *Id.* at 627. The Court stated that:

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

enty-five percent limitation might be enforceable against traditional charities,[84] the Court stated that there was a class of charities "to which the seventy-five percent rule could not be constitutionally applied."[85] These organizations, "primarily engaged in research, advocacy, or public education," might necessarily spend in excess of twenty-five percent of their receipts on reasonable salaries alone, and thereby be absolutely barred from solicitation within the village.[86] The presumption inherent in the ordinance was unfounded,[87] namely, that all organizations that spend more than twenty-five percent of their receipts on fundraising expenses are not charitable and that allowing them to represent themselves as such constituted fraud.[88]

The Court concluded that the governmental interests in protecting the public from fraud, crime, and undue annoyance are "indeed substantial" but that these interests are only peripherally promoted by the seventy-five percent limitation.[89] Regulations that were drawn more narrowly could serve these interests without unduly intruding on first amendment rights.[90] The Court noted that simply because some methods might be "less efficient and convenient" to administer than percentage

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> of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive 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.

Id. at 632. *See generally* Splitt, *Regulation of Charitable Solicitations on Private Property by Local Ordinance*, 13 URB. LAW. 781 (1981) (discussing precise, narrow statute drafting).

84. For a brief discussion of traditional charities, see *supra* note 59.

85. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 635.

86. *Id.* at 636.

87. This presumption was irrebuttable. *But see infra* text accompanying notes 92-96.

88. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 636.

89. *Id.*

90. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 637. *See* NAACP v. Button, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ."). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 764, 786 (1977) (state must employ means "closely drawn to avoid abridgement [of first amendment rights]"); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1975) (inhibitory effect of vague statute).

limitations, a municipality was not thereby empowered to abridge freedom of speech.[91]

Although the Court held that the *Schaumburg* ordinance was unconstitutionally overbroad,[92] it did not explicitly declare that all percentage limitations on fundraising costs were unconstitutional. In fact, the Court distinguished the *Schaumburg* ordinance from a percentage limitation enacted by the city of Fort Worth, Texas,[93] which was upheld in *National Foundation v. City of Fort Worth*.[94] The Fort Worth ordinance limited solicitation costs to twenty percent of receipts raised but, unlike the *Schaumburg* ordinance, it created a rebuttable presumption of unreasonableness for fundraising costs exceeding the statutory limits.[95] Costs in excess of twenty percent of receipts were

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91. *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 636-39. The regulatory methods suggested included using penal laws to punish fraudulent representations directly, *id.* at 637, and promoting the disclosure of finances of charitable organizations to prevent fraud by a better informed public. *Id.* at 637-38.

92. For a discussion of the overbreadth doctrine, see *supra* notes 61-74 and accompanying text.

93. FORT WORTH, TEX., CITY CODE ch. 32, § 32-3 (1964).

94. 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970).

95. "Unlike the ordinance upheld in *National Foundation v. Fort Worth*, . . . the Village ordinance has no provision permitting an organization unable to comply with the 75% requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable." Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 635 n.9.

The meaning of the Court's treatment of the *Fort Worth* rebuttable presumption has, however, been questioned. Most notably Justice Rehnquist in his dissent, questions it on vagueness grounds as a potentially open-ended grant of discretion. *Id.* at 643 n.1 (Rehnquist, J., dissenting). *See* Note, *Charitable Solicitation and the First Amendment: Village of Schaumburg v. Citizens for a Better Environment (CBE)*, 21 URB. L. ANN. 273, 285 (1981). *See also* Suhrke, *Schaumburg: A Supreme Court Reminder of the Basic Values*, THE PHILANTHROPY MONTHLY 6, (March 1980) (citing Adam Yarmolinsky, author of Brief of the Amici Curiae for the Respondent Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (No. 78-1335), who argues that the Court's omission of a rebuttable presumption in discussing alternate, less restrictive means of promoting state interests in preventing fraud amounts to an overruling of *Fort Worth* sub silentio). *But see* Stevenson, *Key Legal Aspects of Schaumburg*, THE PHILANTHROPY MONTHLY at 8, (Mar. 1980) (the "provision for waiving the fundraising cost lid is apparently a key element in determing whether or not a statute qualifies as one of the 'less instrusive measures available' "); Holloway v. Brown, 62 Ohio St. 2d 65, 403 N.E.2d 191 (1980) (ordinance that set percentage limitation costs in excess of which were presumed prima facie unreasonable, held not violative of charity's first amendment rights because presumption could be rebutted by showing the costs were reasonable); National Black United Fund, Inc. v. Campbell, 494 F. Supp. 748, 759-60 (D.D.C. 1980) (recognizing as valid on its face, a 25% limitation allowing for a showing of reasonableness, if limitation

deemed unreasonable and therefore were grounds for denial of a permit; this presumption could be rebutted if special facts or circumstances were presented showing that higher costs were reasonable.[96]

Thus, the Supreme Court apparently left open the possibility that the facial overbreadth of an absolute percentage limitation could be narrowed to constitutional dimensions. If a percentage limitation statute could be drafted precisely enough, overbreadth review would be theoretically inappropriate, and instead the "as applied" method of statutory review would be employed.[97] *Secretary of State v. Joseph H. Munson Co.*[98] exemplifies the tension between these two methods of review by focusing on whether the doctrine of substantial overbreadth should be applied to percentage limitation statutes.

III. *Secretary of State v. Joseph H. Munson Co.*

A. *Facts and Procedural History*

The Joseph H. Munson Co. was a professional fundraiser whose for-profit business was promoting fundraising events and advising customers on how best to conduct fundraising events. Munson's Maryland customers included various chapters of the Fraternal Order of Police (FOP).[99]

Article 41, section 103A of the Maryland Code regulated the activities of charitable organizations; section 103D prohibited charitable organizations from paying or agreeing to pay fundraising expenses in excess of twenty-five percent of the amount raised.[100] The statute provided for an administrative waiver of

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exceeded; but striking the statute as unconstitutionally applied).

96. National Foundation v. City of Fort Worth, 415 F.2d at 44.

97. The "as applied" overbreadth technique is discussed *supra* notes 63-64 and accompanying text.

98. 104 S. Ct. 2839 (1984).

99. Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839, 2843-44 (1984).

100. Section 103D reads in part:

> (a) A charitable organization . . . may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25% of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation . . . provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organi-

the twenty-five percent limitation if the limitation on expenses "would effectively prevent the charitable organization from raising contributions."[101]

Because the Munson corporation regularly charged an FOP chapter in excess of twenty-five percent of the funds raised from events it promoted, and because it alleged that the Secretary of State of Maryland intended to prosecute for continued violations of section 103D, it brought an action seeking declaratory and injunctive relief. Munson alleged that section 103D was an unconstitutional infringement on its rights of free speech under the first and fourteenth amendments.[102]

The circuit court upheld the statute, concluding that the waiver provision in section 103D(a) was sufficiently flexible to accommodate legitimate first amendment interests.[103] The court of special appeals affirmed,[104] but a unanimous Maryland Court

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zation to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations.

MD. ANN. CODE art. 41, § 103D (1982).

101. *Id.* § 103D(a).

102. *Munson*, 104 S. Ct. at 2843-44. On subsequent appeals, Munson asserted the first amendment rights of its customer, the FOP Charity. *Id.*, at 2847 n.6. *See infra* note 109 (discussing third party standing).

103. *Id.* at 2845.

104. Joseph H. Munson Co. v. Maryland, 48 Md. App. 273, 426 A.2d 985 (1981), *rev'd*, 294 Md. 160, 448 A.2d 935 (1982), *aff'd*, 104 S. Ct. 2839 (1984).

of Appeals reversed,[105] concluding that *Schaumburg* required that the statute be held unconstitutionally overbroad and void on its face.[106]

B. *Opinion of the Supreme Court*

In a five to four decision,[107] the United States Supreme Court affirmed the decision of the Maryland Court of Appeals, holding that the constitutional deficiencies in a percentage limitation on fundraising expenses are not remedied by the possibility of an administrative waiver of the limitation for charities that demonstrate the limitation would effectively prevent them from raising contributions.[108]

1. *The Majority*

In analyzing the facial validity of the Maryland statute, the Court distinguished the statute's waiver provision from the waiver provision of the statute in *National Foundation v. City of Fort Worth*,[109] which allowed a charity to rebut the presump-

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105. Joseph H. Munson Co. v. Maryland, 294 Md. 160, 448 A.2d 935 (1982), *aff'd*, 104 S. Ct. 2839 (1984).

106. *Id.* at 173, 448 A.2d at 943.

107. Justice Blackmun wrote the opinion in which Justices Brennan, White, Marshall, and Stevens joined. In a concurring opinion, Justice Stevens stated that he would not have granted certiorari to review a determination that Munson had standing to challenge § 103D. Justice Rehnquist wrote a dissenting opinion that was joined by Chief Justice Burger and Justices Powell and O'Connor. For a discussion of the standing issue, see *infra* note 109.

108. *Munson*, 104 S. Ct. at 2850.

109. 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970). For a discussion of this case, see *supra* notes 94-96.

On the threshold issue of standing, the Court held that Munson had jus tertii standing to assert the first amendment rights of the third party, FOP. Generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). A corollary to this principle is that "constitutional rights are personal and may not be asserted vicariously." Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). When, however, the underlying justification — ensuring concrete adverseness necessary to promote effective advocacy — for this rule is absent, the Court will not apply it. *See* Singleton v. Wulff, 428 U.S. 106, 114 (1976). If there is an important relationship between the litigant and the third party, the third party is somehow limited in his ability to vindicate his own rights, and there is little risk that granting "third party standing" to the litigant will dilute the rights of the party not before the court, the Court will allow jus tertii standing. *See* J. NOWAK, *supra* note 63, at 88. In granting standing to Munson, the Court reasoned that the protected first amendment activity was at the heart of the business relationship

tion of unreasonableness for expenses in excess of statutory limits by showing that they were nevertheless reasonable.[110] The Court adopted the Maryland Court of Appeals' construction of section 103D(a),[111] namely that the grounds for the statutory authorization of the administrative waiver were "extremely narrow."[112] The grant of a waiver was confined to instances in which the percentage limitation "effectively prevent[ed] the charitable organization from raising contributions."[113] The waiver was of no avail to a charity that made a legitimate and reasonable policy decision to incur high costs by disseminating, discussing, and advocating public ideas.[114] The statute, therefore, failed to distinguish between these legitimate charities and charities engaging in fraud.[115] Charities exercising their first amendment rights, were barred by section 103D from pursuing their constitutionally protected activities.[116]

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between Munson and FOP. Moreover, Munson's interest in challenging the statute was completely consistent with FOP's first amendment interests. *Munson*, 104 S. Ct. at 2848.

The Court rejected Maryland's contention that jus tertii standing must be based on a showing of substantial overbreadth. Having granted standing to Munson on third party grounds, the Court reasoned that Munson was then free to attack the statute on overbreadth grounds. The question of substantiality of overbreadth is more properly reserved for the merits of the facial challenge. *Id.*

Justice Stevens, in his concurring opinion, argued that the Maryland courts were free to grant standing to Munson. He reasoned that although the prudential considerations regarding standing were developed for the Court's own governance, *see* Ashwander v. TVA, 297 U.S. 288, 346 (1936), and may be imposed on the federal courts, they are insignificant when considering whether state courts should allow standing in a particular case. *Munson*, 104 S. Ct. at 2855 (Stevens, J., concurring). A complete discussion of the standing issue is beyond the scope of this Note. For a general discussion of standing, see Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Monaghan, *Overbreadth*, 1981 S. CT. REV. 1; Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981); Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308 (1982); Note, *Standing To Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

110. *Munson*, 104 S. Ct. at 2850.

111. Respondent argued that they were *bound* by the construction given to the statute by the Maryland Court of Appeals. Brief for the Respondent at 7, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766) (citing NAACP v. Button, 371 U.S. 415, 432 (1963)). *See also Munson*, 104 S. Ct. at 2857 (Stevens, J., concurring).

112. Munson v. Secretary of State, 294 Md. at 180, 448 A.2d at 946 (1982).

113. *See* MD. ANN. CODE art. 41, § 103D(a) (1982).

114. *Munson*, 104 S. Ct. at 2850.

115. *See id.* at 2845.

116. *Id.* at 2850. *But see id.* at 2860-61 (Rehnquist, J., dissenting) (claiming that

Maryland contended that because the statute contained the waiver provision it was not substantially overbroad, and it therefore should not be invalidated on its face. Instead Maryland urged the Court to review the statute "as applied" to a particular charity.[117] The Court rejected this argument stating that the substantial overbreadth doctrine is invoked to avoid striking down a statute on its face merely because there is some possibility that it might be applied in an unconstitutional manner.[118] The substantial overbreadth doctrine is appropriate, when, "despite some possibly impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.' "[119] The Court stated that there was no core of such conduct prohibited by the Maryland statute.[120]

Although the possibility of a waiver might decrease the number of impermissible applications of the statute,[121] the Court concluded that the waiver did nothing to cure the "fundamentally mistaken premise" of the statute, namely that high solicitation costs are an accurate measure of fraud.[122] Thus, because the state chose means that were too imprecise to achieve its objectives[123] and imposed direct, chilling restrictions on protected first amendment activities, its statute was subject to facial attack.[124] Affirming the judgment of the Maryland Court of Appeals, the Court held section 103D to be unconstitutionally overbroad.[125]

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under Maryland's "more carefully drawn statute," the *Schaumberg* plaintiff would not have been denied a permit to solicit funds).

117. *Munson*, 104 S. Ct. at 2851.

118. *Id.*

119. *Id.* (quoting United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 580-81 (1973)).

120. *Id.* at 2851.

121. *Id.* at 2853.

122. *Id.* at 2852. Charities with unpopular causes could just as easily have high fundraising costs as fraudulent charities could have low ones. *Id.* at 2853.

123. "[T]he statute promotes the State's interest only peripherally." *Id.* at 2854.

124. *Id.* at 2853.

125. *Id.* at 2854. In so doing, the Court rejected Maryland's contention that § 103D differed from the *Schaumburg* ordinance in that it did not operate as a prior restraint. *Compare* Lovell v. Griffin, 303 U.S. 444 (1938) (before-the-fact regulation) *with* Cantwell v. Connecticut, 310 U.S. 296 (1940) (after-the-fact regulation). The Court stated that the distinction made little difference. It reasoned that the same chilling effect on protected

2. *The Dissent*

Justice Rehnquist, writing for the dissent, focused on whether the statute's overbreadth was substantial in relation to its plainly legitimate sweep.[126] The dissent claimed that a *substantial* overbreadth analysis was appropriate in *Munson* because there was a "core of easily identifiable and constitutionally proscribable" conduct that the statute prohibits.[127] Section 103D served the state's interest in protecting charities from overcharging, unscrupulous, professional fundraisers. This unscrupulous behavior constituted that core of constitutionally proscribable conduct.[128]

The dissent viewed section 103D primarily as an economic regulation directed at professional fundraisers. It suggested that, if economic regulation were its sole purpose, the statute would be clearly constitutional under merely minimal standards of review.[129] The dissent, however, recognized that section 103D applied directly to fundraising expenses other than expenses paid to the professional fundraiser.[130] As a result, it directly affected the first amendment activities of the charities within its scope. Consequently, to the extent that it regulated nonfraudulant

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activity occurred whether caused by the lack of a solicitation permit or by the knowledge that one's fundraising activities were illegal. *Id.*

The Court also rejected the state's argument that because the statute regulated more than only door to door solicitation, as did the *Schaumburg* ordinance, it more thoroughly furthered State interests in preventing fraud. Brief for the Petitioner at 37, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766). "The statute's aim is not improved by the fact that it fires at a number of targets." *Id.* at 2854.

126. The initial discussion was on overbreadth standing. *See supra* note 109. The overbreadth doctrine has been chacterized as "strong medicine." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). The dissent argued that to invoke it in this case at the behest of a professional fundraiser on behalf of a charity alleging infringement of first amendment rights was "bad medicine." *Munson*, 104 S. Ct. at 2857. *But cf. id.* at 2856 (Stevens, J., concurring) (stating reasons for finding third party standing as a prudential matter).

127. *Munson*, 104 S. Ct. at 2860 (Rehnquist, J., dissenting). *But see supra* text accompanying note 119.

128. *Munson*, 104 S. Ct. at 2860 (Rehnquist, J., dissenting).

129. *Id.* at 2859-60. That such a regulation might have an indirect and incidental impact on speech would not be sufficient to trigger intense scrutiny. *Id.* Justice Stevens, however, observed that this issue was not before the Court. The dissent's opinion on the issue was, therefore, advisory in nature. *Id.* at 2855 n.3 (Stevens, J., concurring).

130. *Id.* at 2860 (Rehnquist, J., dissenting).

charities, section 103D was overbroad.[131] Assuming then, that a heightened standard of overbreadth scrutiny might apply, the dissent reasoned that the legitimate and substantial governmental interest in preventing the excessive diversion of charitable contributions for private gain is served by a percentage limitation on fundraising costs.[132] Solicitation involves conduct, not merely speech. The dissent stated that regulation of such conduct-infused speech must be substantially overbroad to be invalid on its face,[133] and it concluded that Maryland's statute was not substantially overbroad.[134]

Furthermore, the dissent contended that the majority had ignored "crucial differences" between section 103D and the *Schaumburg* ordinance.[135] Unlike the *Schaumburg* ordinance, section 103D allowed charities to exclude certain costs from their percentage calculation for fundraising costs, making it easier to meet the twenty-five percent limit.[136] According to the dissent, another important exclusion accommodated the first amendment rights of charitable organizations by exempting the cost of printing and postage for materials used to solicit funds.[137] Moreover, the dissent argued that the statute's waiver provision ensured that unpopular causes would not be barred from soliciting funds by the twenty-five percent limit.[138] Finally, the dissent stated that section 103D(a) appeared to provide for a pro rata allocation of expenses into fundraising and non-fundraising categories when an activity, such as door to door solicitation, encom-

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131. *See id.*

132. *Id.* at 2859.

133. *See* Broadrick v. Oklahoma 413 U.S. 601, 615 (1973).

134. *Munson*, 104 S. Ct. at 2862 (Rehnquist, J., dissenting).

135. *Id. Schaumburg* was an eight to one decision. Justice Rehnquist dissented. Chief Justice Burger and Justice Powell joined the *Munson* dissent because they believed that the differences in § 103D were "crucial" enough to narrow the overbreadth of the *Schaumburg* absolute percentage limitation to constitutional dimensions. *See id.* at 2857.

136. Salaries of researchers, policy makers and technical support staff, as well as general overhead were excluded from fundraising costs. MD. ANN. CODE art. 41, § 103D(a) (1982). For the text of the statute, see *supra* note 100.

137. *Munson*, 104 S. Ct. at 2861. The statute also exempted the cost of goods, food, entertainment, or drink sold at fundraising events. MD. ANN. CODE art. 41, § 103D(b) (1982). For the text of the statute, see *supra* note 100.

138. *Munson*, 104 S. Ct. at 2861 (Rehnquist, J., dissenting).

passed both.[139] Thus, "[e]xpenses associated with advocacy and public education would be completely excluded from the fundraising calculus."[140] Thus, because the features of the Maryland statute operated to minimize the potential overbreadth of an absolute percentage limitation on fundraising expenses, the dissent concluded that it was not substantially overbroad.[141]

IV. Analysis

A. *Facial Review: Was it Appropriate?*

Secretary of State v. Joseph H. Munson Co.[142] illustrates the maxim that "it remains a 'matter of no small difficulty' to determine when a law may properly be held void on its face and when 'such summary action' is inappropriate."[143] In a sense, the choice is "unarbitrable," because it rests upon value judgments concerning judicial methods of achieving the same goal: curing overbreadth.[144] Although Maryland's interests in regulating charitable solicitations were strong and legitimate,[145] the Court's difficult and controversial decision to invalidate section 103D on its face was correct.

Professor Monaghan has suggested that consideration of three factors should serve as a guideline for the appropriate use

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139. *Id.*.

140. *Id.* at 2862. The majority pointed out, however, that the regulation promulgated pursuant to the statute, MD. ADMIN. CODE § 01.02.04.04A(3) (1978), provided that "the expenses of public education materials and activities, which include an appeal, specific or implied, for financial support, shall be fully allocated to fund-raising expenses." *Munson*, 104 S. Ct. at 2850-51 n.11. The dissent replied that "possible constitutional failings of regulations passed pursuant to a statute do not form a basis for holding the statute itself unconstitutional." *Id.* at 2862 n.5 (Rehnquist, J., dissenting).

141. *Munson*, 104 S. Ct. at 2862.

142. 104 S. Ct. 2839 (1984).

143. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (quoting Coates v. City of Cincinnati, 402 U.S. 611, 617 (1971)).

Professor Monaghan notes that "[o]verbreadth scrutiny does not seem sufficiently 'principled' " because "[t]he opinions have not evolved general canons for determining when to abandon traditional methods of rehabilitating an overbroad law by carving away invalid portions." Monaghan, *supra* note 62, at 846-47. With overbreadth review there is "some risk of faulty or unreliable decisionmaking." *Id.* at 863. *See also* Younger v. Harris, 401 U.S. 37, 52 (1971) (Facial invalidation is "fundamentally at odds with the function of the federal courts in our constitutional plan.").

144. Monaghan, *supra* note 62, at 858.

145. *See Munson*, 104 S. Ct. at 2849.

of overbreadth review.[146] These guidelines, which have been substantially adopted by the Court,[147] are the degree of statutory overbreadth, the area of its impact on first amendment rights, and the availability of adjudicatory alternatives to overbreadth review.[148] Professor Monaghan states that if, upon consideration of these factors, the chilling effect of a statute is taken seriously, "as applied" review is inadequate.[149] Although an evaluation of the first guideline, the degree of overbreadth, lends little aid to an understanding of the *Munson* decision, consideration of the area of the impact and the alternatives to overbreadth review is helpful.

1. *Degree of Overbreadth*

The Supreme Court employs overbreadth review in cases in which it determines that there is a strong possibility that a statute's very existence will inhibit free speech. *Broadrick v. Oklahoma*[150] is often cited for the proposition that to invalidate a facially overbroad statute that affects *conduct*, and not merely speech, the degree of overbreadth must be substantial in relation to its plainly legitimate sweep. But, in order to be reviewed under the substantial overbreadth test, statutes regulating conduct in the "shadow" of the first amendment must do so in a neutral and noncensorial manner. Thus under *Broadrick*, if the statute effects conduct as well as speech, and is neutral and not censorial, facial invalidation is appropriate only if the statute's overbreadth is substantial in relation to its constitutional application.[151] To determine whether the fraudulent solicitation that section 103D seeks to regulate is conduct or speech, *Broadrick* presumably gives the Court the difficult task of locating fraudulent solicitation on the speech-conduct continuum before it can assess how substantial the statute's overbreadth must be in or-

146. Monaghan, *supra* note 62, at 858-63.

147. Professor Monaghan has influenced the Supreme Court's overbreadth thinking. In fact, his observations were incorporated into *Broadrick v. Oklahoma*. *See* Broadrick v. Oklahoma, 413 U.S. 601, 611 n.12 (1973). His influence was evident in *Munson* as well. *See Munson*, 104 S. Ct. at 2848 (citing Monaghan, *Overbreadth*, 1981 S. CT. REV. 1).

148. Monaghan, *supra* note 62, at 858.

149. *Id.* at 858.

150. 413 U.S. 601 (1973).

151. *Id.* at 614-15.

der to trigger facial invalidity.[152] Because this determination is difficult and subjective, it offers little guidance to both courts and legislators.[153]

Assuming that section 103D regulates conduct in a non-neutral, censorial manner,[154] a court must still determine what is meant by "substantial overbreadth." By definition, overbreadth review requires the court to envision potential encroachments on imaginary protected speech[155] in a "speculative and amorphous" process.[156] Moreover, the Court has not defined what it means by "substantial overbreadth" with a great degree of specificity.[157] Therefore, although its "flexible" features[158] make section

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152. *See id.* at 615.

153. It has been suggested that the "constitutional distinction between speech and conduct is specious." Henkin, *Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968) (Speech is conduct, and actions speak.).

154. Arguably, percentage limitations on fundraising expenses need not be subject to scrutiny under the substantial overbreadth rule because they do not regulate in a neutral manner. Percentage limitations affect charities of unpopular causes to a greater extent than charities with popular causes. In addition, percentage limitations would be non-neutral with respect to charities with different ages, geographic locations, and campaign techniques. *See* NHC, VIEWPOINTS *supra* note 50, at 5. *See generally* B. HOPKINS, *supra* note 4, at 110-23 (discussing various aspects of the fundraising cost percentage approach).

155. *See* Shaman, *supra* note 62, at 265-67. "Musings as to possible applications of a statute to third parties in hypothetical situations may be fitting for the classroom and the statehouse, but they are neither wise nor permissible in the courtroom." *Munson*, 104 S. Ct. at 2858 (Rehnquist, J., dissenting).

156. G. Gunther, *supra* note 64, at 1190 (citing Younger v. Harris, 401 U.S. 37 (1971)). *See also* Shaman, *supra* note 62, at 270 (maintaining that the "criterion of 'substantiality' is extremely amorphous and, therefore, prone to produce inconsistent result.").

157. Recently the Supreme Court elaborated on *Broadrick's* substantial overbreadth technique. Reviewing the overbreadth doctrine in Members of the City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984), the Court concluded that it would be inappropriate to entertain a facial overbreadth challenge to an ordinance when there is nothing to indicate that the challenged ordinance will have any different impact on the protected interests of individuals not before the court. *Id.* at 2127. Specifically, the Court commented:

> The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself—the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially chal-

103D less overbroad than the absolute percentage limitation on fundraising expenses in *Schaumburg*, the speculative nature of overbreadth review and the paucity of case law concerning percentage limitations,[159] make it difficult to understand or justify the *Munson* decision in terms of the degree of overbreadth.[160]

2. *Area of Impact*

The nature of the activity that a statute restricts also helps to determine whether overbreadth review is appropriate.[161] If the statute in question regulates activity outside the realm of the first amendment and it has only an incidental, indirect effect on protected speech, then "as applied" review is appropriate, unless the statute is substantially overbroad.[162] Strict overbreadth review with little or no attention to the degree of overbreadth is applicable if the statute, by its terms or in its effect, directly burdens protected activity.[163] Here the Supreme Court

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lenged on overbreadth grounds.
Id. at 2126 (footnote omitted).

Although *Munson* offered the Court a chance to apply the *Vincent* standard, the Court did not expressly rely on that standard. *See Munson*, 104 S. Ct. at 2852-53. Thus, the importance of *Vincent* is unclear. Justice Brennan's objection that the concept of substantial overbreadth is "obscure" is still true today. *See* Broadrick v. Oklahoma, 413 U.S. 601, 630-31 (Brennan, J., dissenting).

158. For a description of the fundraising cost exclusions, allocations, and waiver that make the statute "flexible," see *supra* notes 135-40 and accompanying text. Referring to § 103D, the National Association of Attorneys General states: "There appears to be a trend toward allowing more flexibility in the amount spent for fund-raising." NAAG, *supra* note 2, at 31.

159. Aside from *Munson*, Schaumburg v. Citizens for a Better Env't., 444 U.S. 620 (1979), is the only case in which the Court has spoken directly about the constitutionality of percentage limitations on fundraising expenses vis-a-vis free speech. In Larson v. Valente, 456 U.S 228, 246-47 (1982), the Court struck down, on establishment clause grounds, a Minnesota statute that imposed reporting and registration requirements only on religious organizations soliciting more than 50% of their funds from nonmembers.

160. As one commentator has observed: "In several instances, the overbreadth rule has served to allow the Court to sidestep difficult or sensitive issues." Shaman, *supra* note 62, at 266.

161. *See* Monaghan, *supra* note 62, at 860.

162. *See id.* at 860-61. Professor Monaghan asserts that "[l]awmaking machinery not aimed at first amendment activities may not normally be animated by the need to focus with the precision uniquely necessary in this area. The task of reshaping [these] overbroad statutes . . . may properly fall to the courts in these circumstances." *Id.*

163. *See id.* at 861. Of course, not all expressive activity is protected. "The First Amendment is not the guardian of unregulated talkativeness." A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 26 (1948).

has offered more guidance. It has established that charitable solicitations implicate speech interests protected by the first amendment.[164]

In *Village of Schaumburg v. Citizens for a Better Environment*,[165] for instance, the Court held that percentage limitations on fundraising expenses were direct and substantial limitations on protected activity.[166] The Court invoked overbreadth review, voiding the statute on its face without mentioning the *Broadrick* requirement of substantial overbreadth in the decision on the merits.[167] In *Munson*, section 103D, like the ordinance in *Schaumburg*, was directed at limiting the fundraising expenses of charitable organizations.[168] Thus, the direct nature of the statute's impact on protected expression rendered it vulnerable to overbreadth scrutiny and provides a stronger basis for the result in *Munson*, than the degree of overbreadth analysis does. A percentage limitation on fundraising directly and unnecessarily restricts protected first amendment activity.[169]

3. *Adjudicatory Alternatives*

The unavailability of "adjudicatory alternatives" to facial scrutiny of percentage limitation statutes is a third factor used

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164. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980). For the line of cases in which the Court has developed this proposition, see Hynes v. Mayor Oradell, 426 U.S. 610 (1976); Thomas v. Collins, 323 U.S. 516 (1945); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

165. 444 U.S. 620 (1980).

166. *Id.* at 636.

167. *See id.* 636-39. Passing reference was, however, made to substantial overbreadth with respect to the standing issue. *See id.* at 634.

168. MD. ANN. CODE art. 41 § 103D (1982).

169. The dissent, seeking to invoke the substantial overbreadth doctrine, argues unpersuasively that § 103D was directed primarily at "controlling external economic relations between charities and professional fundraisers." *Munson*, 104 S. Ct. at 2859 (Rehnquist, J., dissenting). Although the professional fundraiser was required by § 103F to register and comply with the whole subtitle, including the § 103D percentage restrictions on charitable organizations, *see supra* note 106, the language of the statute fails to evince this primary purpose. The preamble to the 1976 statute states that the legislation was a result of news articles regarding the Pallotine scandal in which $5.6 million of the $7.6 million raised was expended on a direct mail campaign. *See* Brief of Petitioner at 11 n.8, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766). The preamble makes no mention of the professional fundraiser.

by the Court to determine the method of statutory review,[170] and it provides a clear framework through which the *Munson* decision may be understood. If unconstitutional applications of the statute cannot be excised, for example, by placing a limiting construction on the statute, then overbreadth review is appropriate.[171] The possibility of a successful limiting construction depends on successfully defining the factual situations in which the statute is constitutionally applicable.[172] For this reason, the Court has held that the easy identification of a core of constitutionally proscribable conduct that is prohibited by the statute is a pre-requisite for a statute to avoid facial review.[173]

The definition of a "charity" is very broad.[174] Charitable organizations vary in many respects. These variables include the nature and age of the organization, the popularity of its cause, and its method of solicitation.[175] At one end of the spectrum, there are traditional charities "that represent themselves as mere conduits for contributions."[176] The Supreme Court has stated that percentage limitations "might be [constitutionally] enforceable,"[177] if applied to charities acting as conduits. At the other extreme, there are charities that are organized solely to advocate causes of a political, religious, social, or humanitarian nature. Absolute percentage limitations cannot be constitutionally applied to these charities.[178] In reality, however, most charities exist in between these extreme variables. In each instance, solicitation is characteristically intertwined to some extent with informative and advocatory speech.

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170. *See supra* text accompanying notes 147-48.

171. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."). *See* Ward v. Illinois, 431 U.S. 767, 774-75 (1977); Parker v. Levy, 417 U.S. 733, 754-55 (1974); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965).

172. Monaghan, *supra* note 62, at 862-63.

173. *See* New York v. Ferber, 458 U.S. 747, 770 n.25 (1982); Parker v. Levy, 417 U.S. 733, 760 (1973); United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 580-81 (1973).

174. *See supra* notes 58-60 and accompanying text.

175. Other variables include the effectiveness of management, the choice of campaign techniques, and the amount of bequests received. For an extensive list of variables, see NHC, VIEWPOINTS, *supra* note 50 at 5.

176. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 635.

177. *Id.*

178. *See id.*

To determine the class to which percentage limitations can be constitutionally applied, jurists would have to balance each of the many variables against the proffered state interests in regulating charitable solicitations.[179] Identifying the permissible class would be an enormously complex and subjective undertaking. The burden of that task makes successful attempts to judicially truncate[180] percentage limitation statutes to constitutional dimensions unlikely.[181] Section 103D was properly subject to facial review because the extremely diverse nature of charities falling within the statute makes the identification of a core of constitutionally proscribable conduct nearly impossible.[182]

B. *Impact of the Decision*

The meaning of *Secretary of State v. Joseph H. Munson Co.*[183] may be that percentage limitations imposed directly on charitable fundraising costs are no longer an acceptable means of regulating charitable solicitations. Although it is not absolutely clear, the decision seems to indicate that available alternatives to percentage limitations preclude the possibility that percentage limitation statutes can be legislatively narrowed to meet constitutional dimensions.[184]

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179. *See* Monaghan, *supra* note 62, at 862-63.

180. By modifying the statutory definition of a charity, legislators can also attempt to limit the permissible scope of the regulation. Religious and educational organizations are often exempt. Charities soliciting donations from their own members also enjoy a relaxed status. Section 103D exempts charitable salvage organizations. *See* B. HOPKINS, *supra* note 4, at 227-30.

181. In *Munson*, the Court recognized that limiting constructions on percentage limitations were unlikely. "[T]hough the dissenters are loathe to admit it, the State's highest court has had an opportunity to construe the statute to avoid constitutional infirmities and has been unable to do so." *Munson*, 104 S. Ct. at 2852 n.13.

182. *See id.* at 2852.

183. 104 S. Ct. 2839 (1984).

184. The Court considered that high solicitation costs are an accurate measure of fraud is a "fundamentally mistaken premise." *Id.* at 2852. Percentage limitations are too imprecise to achieve state interests. *Id.* at 2852 n.14. Despite this strong language, however, the Court seems to be reluctant to pronounce percentage limitations unconstitutional per se. Although the *Brief of the Petitioner* frames the issue in terms of per se constitutionality, the Court avoided this language. *Compare* Brief of the Petitioner at i, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984) (No. 82-766), *with Munson*, 104 S. Ct. at 2850. Moreover the Court seems reluctant to explicitly overrule National Foundation v. City of Fort Worth, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), which implies that percentage limitations with "reasonableness" waiv-

Overbreadth scrutiny is not concerned with the "substantive dimensions of protected speech"[185] but with the means that the legislature employs to pursue admittedly substantial governmental interests.[186] The statutory means to achieve these governmental ends must be narrowly tailored to avoid unnecessary interference with first amendment freedoms.[187] In *Schaumburg*, an absolute percentage limitation on fundraising costs was deemed to be a means insufficiently related to achieving governmental interests to justify interference with these freedoms.[188] Although some of the features of section 103D reduced its inter-

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ers might pass constitutional muster despite their inherent vagueness. *But see supra* note 95.

The possibility of drafting narrower percentage limitation statutes is perhaps rendered moot by indications that state regulators have largely read the *Munson* decision to preclude direct regulation of charities by use of percentage limitations. Telephone interview with C. Rosso, Illinois Attorney General's Office (September 26, 1984) (discussing a joint meeting of the Charitable Trusts and Solicitations Committee of the National Association of Attorneys General with National Association of State Charities Officials in Boston, Mass. September 20-21, 1984). Letter from R. Zarnoch, Ass't Attorney General of Maryland, to the Author (Nov. 29, 1984) (copy available at the Pace Law Review) ("In our view, [after *Munson*] there is nothing a State can do to salvage a percentage limitation on charitable fund raising).

The lack of absolute clarity on this point, the closeness of the five to four decision, and the likelihood of imminent changes in the Court's composition, do not totally rule out the possibility that a more precisely drafted statute might survive overbreadth review. Illinois, for example, claims that its statute, ILL. REV. STAT. ch. 23, §§ 5101-5114 (1982), is different because it provides for a deduction of reasonable and necessary expenses before application of the percentage limitation. Telephone interview with C. Rosso, *supra*.

185. G. Gunther, *supra* note 64, at 134. The opinions avoid explicity balancing interests. *Id. See supra* notes 179-81 and accompanying text.

186. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980). These interests have also been described as subordinating and compelling, Bates v. Little Rock, 361 U.S. 516, 524 (1960); legitimate, Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); and strong and subordinating, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980).

187. *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 637. *See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980) (maintaining that regulation "must be in proportion to that interest" and designed carefully); First Nat'l Bank of Boston, 435 U.S. 765, 786 (1978) (maintaining that regulation "must be closely drawn to avoid unnecessary abridgement"); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1975) (holding that the "government may regulate . . . only with narrow specificity"); NAACP v. Button, 371 U.S. 415, 438 (1963) (holding that the "precision of regulation must be the touchstone.").

188. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 639. *See also* NAACP v. Button, 371 U.S. at 438 (recognizing that "broad prophylactic rules in the area of free expression are suspect.").

ference with protected first amendment interests,[189] the availability of less drastic means to ensure that contributions will be used to benefit their intended purpose obviated consideration of whether this reduced interference could save the statute.[190]

The Supreme Court's decisions have not always indicated what "less drastic means" may be used to further state interests.[191] Nevertheless, the Court has suggested that direct prohibition of fraud[192] and disclosure of fundraising costs,[193] are viable alternatives to regulation by percentage limitations on charitable fundraising costs.[194] A reading of the *Munson* decision indicates that two distinct issues foreshadow the arena in which state legislators will seek to regulate charitable solicitations after *Munson*. The resolution of these issues will define the limits of the State's ability both to affect charitable solicitations by regulating the professional fundraiser, and to impose fundraising cost disclosure requirements upon charitable organizations.

1. *Regulation of the Professional Fundraiser*

The *Munson* decision clearly presages the first issue, namely, whether statutes regulating only the percentage rates charged by professional fundraisers for services rendered to

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189. *See supra* notes 135-41 and accompanying text.

190. Because the majority did not use substantial overbreadth as the basis for invoking facial review, it declined to consider "decrease[s] in the number of impermissible applications of the statute." *Munson*, 104 S. Ct. at 2853. The dissent, on the other hand, considered that reduced interference with protected first amendment interests was a significant factor "tending to decrease overbreadth in relation to the statute's legitimate sweep." *Id.* at 2861 n. 3. (Rehnquist, J., dissenting).

191. G. Gunther, *supra* note 64, at 1187 n.7. *See* Note, *Less Drastic Means and the First Amendment*, 78 YALE L. J. 464, 471 (1969).

192. Many states directly regulate fraud. Such regulations are unsatisfactory in that they are not effective and convenient methods of preventing fraud. They "relegate" governments interested in regulating charitable solicitations "to the role of Sisyphus." Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 639 (Rehnquist, J., dissenting).

193. *See infra* notes 208-38 and accompanying text.

194. *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 637-38; *See also Munson*, 104 S. Ct. at 2850 n.9; Henchey, *The Constitutional Implications of Regulation of Charities and Fundraisers*, NAT'L ASS'N. ATT'Y GEN., CONSUMER PROTECTION REPORT, 1, 6-7 (Aug. 1984) (copy available at the Pace Law Review). The reasoning and conclusions contained therein are Ms. Henchey's, and do not constitute the official positions of the National Association of Attorneys General.

charitable organizations would be constitutional.[195] Is the speech of a paid professional fundraiser sufficiently removed and distinct from the direct and protected speech of the charities which employ them, so that such regulations would be judged by "the minimum rationality standard traditionally applied to economic regulations"?[196]

Many states have directly regulated professional fundraisers for some time,[197] and other states are turning to direct regulation as a result of the *Munson* decision.[198] Although "the right to make a profit is not protected by the First Amendment,"[199] it is not clear whether the Court will review the speech of professional fundraisers under the minimum rationality standards used in economic regulation cases. If the Court does not, the rationale of *Schaumburg* and *Munson* will apply and will trigger facial review.[200]

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195. *Compare Munson*, 104 S. Ct. at 2860 (Rehnquist, J., dissenting) (concluding that statutes regulating only the rates professional fundraisers charge charities would be "clearly constitutional" under minimum rationality standards traditionally applied to economic regulations) *with id.*, 104 S. Ct. at 2855 n.3 (Stevens, J., concurring) (stating that the dissent's conclusion was advisory because the issue was not before the court).

196. *Id.* at 2859. *See* Shelton v. Tucker, 364 U.S 479, 488 (1960).

197. *See* Brief Amicus Curiae in Support of Respondent, at 1a-15a, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. at 2839 (1984) (No. 82-766). *See supra* note 52.

198. *See, e.g.*, MD. ANN. CODE art. 41 § 103F-2(0)(1) (1984) (limiting amount professional solicitor can charge charities to 30 percent of the total raised). Maryland's attorney general's office contends that this legislation will withstand constitutional scrutiny. Letter from R. Zarnoch, *supra* note 184.

199. Holloway v. Brown, 62 Ohio St. 2d 65, 70, 403 N.E.2d 191, 195 (1980).

200. In Bates v. State Bar of Arizona, 433 U.S. 350 (1976), the Court refused to apply overbreadth scrutiny to regulations on lawyer advertising. The Court stated that the justification facial review "applies weakly, if at all, in the ordinary commercial context" because commercial speech is less likely to be susceptible to the chilling effects of overbroad legislation. *Id.* at 380-81. *See also* California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 196 (1981) (suggesting that "speech by proxy" is not entitled to full first amendment protection, as long as direct limitations on speech are not imposed); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462-67 (1978) (invoking "as applied" review and holding that if pecunicary gain motivated lawyer solicitation of clients, a state could constitutionally promote its interests in protecting the public from fraud with disciplinary action); Grant v. Meyer, 741 F.2d 1210, 1212-13 (10th Cir. 1984) (one may not claim an invasion of speech because someone else cannot be paid to speak).

Nevertheless, one commentator maintains that restrictions on professional fundraisers implicate charities' first amendment rights. *See* Henchey, *supra* note 194, at 3. *Cf. Munson*, 104 S. Ct. at 2853 n.16. "The fact that paid solicitors are used to disseminate information did not alter the *Schaumburg* Court's conclusion that a limitation on

Assuming arguendo, that speech by professional fundraisers is deemed commercial in the future, a four-part analysis developed in *Central Hudson Gas & Electric Corp. v. Public Service Commissioner*[201] would apply. First, the regulated speech must be protected by the first amendment. For commercial speech to come within the first amendment, it must be lawful and not misleading.[202] A professional fundraiser's speech is plainly lawful. Moreover, the *Munson* Court rejected the contention that it was fraudulent, even if costly.[203]

Second, *Central Hudson* requires that the asserted governmental interest for the regulation must be substantial.[204] Protecting the public from fraud is clearly a substantial governmental interest.[205] Finally, because, in the hypothetical, both determinations "yield positive answers," *Central Hudson* then requires that, to avoid unconstitutionality, governmental regulation of commercial speech must directly advance the asserted governmental interest, and not be more extensive than necessary.[206] *Munson* and *Schaumburg* supply definite answers to these criteria.[207] Percentage limitations on fundraising costs do not directly advance state interests and are more extensive than necessary. Thus, even by the relaxed standard of review applied to commercial speech the direct regulation of professional fundraisers would seem constitutionally deficient. One effect of the *Munson* decision will be to foment future litigation regarding this issue, and resolution of the issue will define the limits of

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the amount a charity can spend in fundraising activity is a direct restriction on the charity's First Amendment rights. *Id.*

Two state supreme courts have considered the constitutionality of direct percentage limitations on professional fundraisers, and each has decided differently. *Compare Holloway v. Brown*, 62 Ohio St.2d 65, 403 N.E.2d 191 (1980) (upholding a regulation that prohibited professional fundraisers from retaining in excess of 75% of gross receipts, unless shown to be reasonable) *with* State ex rel. Olson v. W.R.G. Enterprises, Inc., 314 N.W.2d 842 (1982) (holding unconstitutional a limitation of 15 percent of funds raised which a charity could pay a professional fundraiser).

201. 447 U.S. 557 (1980).

202. *Id.* at 566.

203. *Munson*, 104 S. Ct. at 2852. *See* Henchey, *supra* note 194, at 3.

204. Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. at 566.

205. Village of Schaumburg v. Citizens for a Better Env't, 447 U.S. at 636.

206. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 566.

207. *See Munson*, 104 S. Ct. at 2853; Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 639.

state power to regulate professional fundraisers.

2. *Disclosure of Fundraising Costs*

The Court has twice suggested that a state can require disclosure of financial data by charitable organizations.[208] The state interest asserted to justify percentage limitations on fundraising costs is the prevention of fraud and misrepresentation.[209] *Munson*, however, deemed percentage limitations too imprecise and too peripheral to prevent fraud.[210] If fraud is a "false representation of a matter of fact, whether by words or by conduct . . . or by *concealment of that which should have been disclosed*,"[211] the most obvious and direct way to prevent fraud is to promote disclosure of fundraising costs.[212]

Disclosure of fundraising costs is attractive because it allows the recipient to protect his personal interests in giving, without deterring the free speech of the discloser.[213] Although consumerism has generally fostered an emphasis on disclosure,[214] requir-

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208. *Munson*, 104 S. Ct. at 2850 n.9 (citing Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637-38 (1979)). The idea is not new or unique to charitable solicitations. Federal legislation to promote disclosure has been introduced into Congress on several occasions. The "Wilson bill" would have increased the authority of the U.S. Postal Service to monitor fundraising by mail, requiring literature to contain specified information including percentage fundraising costs. H.R. 9584, 93d Cong., 1st Sess. 119 CONG. REC. 25,879 (1973). The "Mondale bill" grafted disclosure statement provisions onto the Internal Revenue Code, requiring charitable organizations to divulge information for the prior year concerning revenues, and expenditures for charitable and noncharitable purposes. The bill also required that charities within its scope distribute at least 50% of their gross revenues each year for charitable purposes. *Truth in Contributions Act*, S. 1153, 94th Cong., 1st Sess. (1975). *See also* H.R. 11991, 93d Cong., 2d Sess. (1974). All of these bills failed to pass. Lack of support among the philanthropic community contributed to their demise. *See* B. HOPKINS, *supra* note 4, at 218-20.

209. "There is an element of fraud in soliciting money 'for' a charity when in reality that charity will see only a small fraction of the funds collected." *Munson*, 104 S. Ct. at 2860 (Rehnquist, J., dissenting). *See also Munson*, 104 S. Ct. at 2849; Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 637-38.

210. *Munson*, 104 S. Ct. at 2849.

211. BLACK'S LAW DICTIONARY 594 (5th ed. 1979) (emphasis added).

212. *See* Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 637-38.

213. Note, *Disclosure as a Legislative Device*, 76 HARV. L. REV. 1273, 1275 (1963) ("The only sense in which this . . . 'deters' free speech is that it may render fruitless efforts to persuade . . . .").

214. *See, e.g.*, The Securities Act of 1933, 15 U.S.C. § 77a (1982) (requires full disclosure of material information concerning public offerings of corporate securities to protect investors against fraud); Truth in Lending Act, 15 U.S.C. § 1601-43 (1982) (promot-

ing disclosure of charitable solicitors raises serious practical and constitutional problems.[215] A central problem involves the means chosen by the state to effectuate the disclosure of fundraising costs.[216] There are two principal modes of disclosure: demand disclosure and point-of-solicitation disclosure.[217]

Demand disclosure requires charitable organizations to divulge financial data to the public only upon request.[218] Demand disclosure does not provide the public with the information necessary to illuminate a decision to donate to that particular charity.[219] Most solicitations invite immediate contribution, but demand disclosure involves after-the-fact disclosure and therefore does not promote informed giving. Moreover, it places the burden and cost of seeking a refund upon a discontented giver.[220]

Point-of-solicitation disclosure requires a charity to divulge the fraction of funds it applies toward charitable purposes before the request for money is made.[221] Although it is a highly effective means of providing information, its detractors claim that point-of-solicitation disclosure of fundraising costs is misleading, counter-productive, and impermissibly burdens first amendment expression.[222]

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ing meaningful and accurate disclosure of credit terms, reflecting "a transition in Congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose"); Real Estate Settlement Procedures Act, 12 U.S.C. § 2601-17 (1982) (insuring that consumers nationwide receive greater and more timely information regarding the nature and costs of the settlement process). *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Allen v. Beneficial Fin. Co., 393 F. Supp. 1382, 1384 (N.D. Ind. 1975), *aff'd*, 531 F.2d 797 (7th Cir.), *cert. denied*, 429 U.S. 885 (1976); B. HOPKINS, *supra* note 4, at 221.

215. *See generally* Ballew, *The New California Charitable Solicitation Disclosure Law: Application and Needed Amendments*, 12 PAC. L.J. 871 (1981) (exploring the difficulties inherent in disclosure requirements).

216. B. HOPKINS, *supra* note 4, at 109.

217. *Id.* A third approach has been taken by North Carolina. *See* N.C. GEN. STAT. § 131C-16 (1981) ("disclosure shall be published in the newspaper having the largest audited circulation in each county for three consecutive days each year").

218. B. HOPKINS, *supra* note 4, at 109.

219. *See* KURTZ, CONCEPTS FOR NAAG CHARITABLE SOLICITATION LAW PROJECT 9 (1984). In the year ending March 31, 1984 the Secretary of State of New York received 13,000 requests for financial reports; only 1.4 for each of the 9,400 registered charitable organizations in the state. *Id.*

220. *Id.*

221. B. HOPKINS, *supra* note 4, at 109.

222. *Id.* at 109-10.

Modified point-of-solicitation disclosure is also a possiblity. *See, e.g.*, ME. REV. STAT.

Conceivably it is misleading to evaluate the objective worth of a charitable cause by considering a single percentage figure for fundraising costs at the point of solicitation.[223] Because a myriad of factors determine the reasonableness of costs, contributors will ostensibly be incapable of making meaningful decisions based on such meager information.[224] People will respond merely to a number, favoring charities with low percentage costs and spurning charities with high percentages. That there may be advantages to ignorance, however, was the kind of argument soundly rejected as highly paternalistic by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[225] The unacceptable presumption of contributor short-sightedness, together with the spirit of the first amendment,[226] undermine the contention that contributors will be incapable of making meaningful decisions.

Charities claim that disclosure at the point of solicitation increases their relative costs[227] and is therefore counter-productive to the primary goal of donating the maximum portion of raised funds to charitable purposes.[228] Requiring disclosure may make solicitations confusing, less appealing, and more costly to

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ANN. tit. 9, § 50 (1978) (requiring disclosure of percent fundraising costs if less than 70% of funds raised are expended for program services). *See generally* B. HOPKINS, *supra* note 4, at 223 (ultimate method of disclosure chosen will be a compromise between the two modes); Stevenson, *Regulation in the 80's: A New Approach*, THE PHILANTHROPY MONTHLY 34 (1980) (Suggests that once a charity exceeds 50% of the total fundraising, disclosure at point of solicitation should be made in a nonspecific way. "Less than fifty cents of every dollar given is used for charitable purposes.").

223. The weakness inherent in employing percentage costs as an indicator of a charity's worth is the same whether it is the basis for a governmental decision to deny a permit or a private decision to refuse to contribute. *See supra* notes 55-57 and accompanying text.

224. "[F]irst amendment objectives are furthered if the bearer is able to make an informed, even if biased, choice." Note, *supra* note 213, at 1275.

225. 425 U.S. 748 (1976). The Court stated that "[i]t is precisely this kind of choice, between the dangers of supressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

226. *See* A. MEIKLEJOHN, *supra* note 163, at 26 (The first amendment functions primarily to enlighten public decisionmaking in a democracy.).

227. *See* B. HOPKINS, *supra* note 4, at 109. Increased direct costs include printing and mailing costs of disclosure notices, increased time to disclose during solicitation, and increased media time. Increased indirect costs result from the reduced effectiveness of solicitation anticipated to flow from disclosure requirements; the result is fewer dollars per solicitation.

228. *See supra* note 3, and accompanying text.

undertake.[229] Professor Karst suggests that governmental absorbtion or strict control of charities would result in reduced costs and that the very institution of private philanthropy is wasteful.[230] Governmental absorption of charities, however, is unacceptable because "there are values in private charity which justify some immediate economic waste."[231] Those values are philanthropic experimentation and risk-taking.[232] The cost of these values, borne by society at large, is a price society is willing to pay for private philanthropy.[233] The value of informed decisionmaking justifies any "immediate economic waste" caused by point-of-solicitation disclosure.

Although disclosure may not in an orthodox sense deter speech,[234] in some contexts disclosure represents a content-regulating burden on expression.[235] The Supreme Court has been largely silent concerning the burdens of point-of-solicitation disclosures on free speech.[236] The California Supreme Court, how-

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229. B. HOPKINS, *supra* note 4, at 109.

230. Karst, *supra* note 3, at 483. Professor Karst, however, does not advocate such absorption or control.

231. *Id.*

232. *Id.*

233. The burden of decisionmaking is shifted from governmentally exercised control through chilling percentage limitations on who may solicit, to private contributor decisions regarding who will receive their funds of all those permitted to solicit.

234. *See supra* note 213.

235. *See* Memphis Pub. Co. v. Leech, 539 F. Supp. 405 (W.D. Tenn 1982) (holding unconstitutional a state imposed requirement on newspaper advertisements for alcoholic beverages of disclosing the illegality and possible consequences of transporting such beverages into the state without a permit). *Cf.* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (unanimously holding unconstitutional a state statute granting political candidates a right to reply to newspaper criticisms). *But see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (unanimously upholding F.C.C. regulations requiring radio and television reply time to the public in cases involving personal attacks or political editorials).

236. Although regulators have been encouraged by the *Schaumburg* and *Munson* Courts' suggestion that disclosure is an acceptable alternative to percentage limitations on fundraising costs, the decisions shed little light upon the acceptability of point-of-solicitation disclosure requirements. The disclosure sanctioned in each case was that of financial data to the State Attorney General's office. *Munson*, 104 U.S. at 2850 n.9, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. at 638 n.12. States have been regulating charities in this manner for over 40 years. *See supra* text accompanying notes 37-53.

In International Soc'y for Krishna Consciousness v. City of Houston, 689 F.2d 541 (5th Cir. 1982), the Fifth Circuit rejected first amendment attacks on a city ordinance requiring solicitors to wear approved identification badges while soliciting, and filing re-

ever, addressed this issue in 1945 in *Gospel Army v. City of Los Angeles*.[237] The city had passed a municipal code requiring solicitors to exhibit an information card to all prospective donors. This card contained disclosure of percentage fundraising costs. Writing for the court, a forward-looking Justice Traynor stated that these provisions:

> are designed primarily to secure information that will assist the public in judging the nature and worthiness of the cause for which the solicitation is made and to insure the presentation of such information to prospective donors. We find nothing unduly burdensome or unreasonable in any of these provisions.[238]

Disclosure of fundraising costs at the point of solicitation directly serves state interests in preventing fraud by fostering informed giving, without preventing the advocacy of ideas. Although objections to disclosure have some merit, they seem insufficiently weighty to vitiate the state's interests in imposing some means of disclosure when the donation is requested. Whether point-of-solicitation disclosure represents an impermissible burden on speech is an issue likely to reach the Supreme Court if state legislators read the *Munson* decision as impliedly sanctioning these regulations as a less drastic means to serve state interests.

V. Conclusion

State regulation of charitable solicitations has long been considered essential to promote the substantial governmental interests of protecting the public from fraudulent diversion of charitable funds. State efforts to promote these traditional interests by regulating charities have conflicted with important first amendment rights. Resolving the tension between these conflicting interests was the difficult task of the *Munson* Court. *Secretary of State v. Joseph H. Munson Co.*[239] holds that percentage limitations on fundraising costs are overbroad, because percent-

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gistration statements disclosing costs and amounts of contributions to the state. This information was then available for public inspection.

237. 27 Cal.2d 232, 163 P.2d 704 (1945), *appeal dismissed on jurisdictional grounds*, 331 U.S. 543 (1947).

238. *Id.*

239. 104 S. Ct. 2839 (1984).

age limitations cannot accurately isolate a fraudulent class of charities and because such limits chill protected expression, while only peripherally promoting state interests.

State attempts at similar regulations directed solely toward professional fundraisers, under the guise of economic regulations, seem equally unsatisfactory. But regulations that require disclosure of charitable fundraising costs directly promote state interests and minimally chill protected expression. To effectively further the goal of informed decisionmaking, some form of disclosure should be given when the solicitation is made. Although point-of-solicitation disclosure has been criticized as misleading, costly, and burdensome, an analysis of these contentions indicates that the benefits to the giving public outweigh the disadvantages of disclosure. In the words of Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[240]

Jeffrey T. Zachmann

240. L. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914).