# *Krishna v. Lee* Extricates the Inextricable: An Argument for Regulating the Solicitation in Charitable Solicitations

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## I. INTRODUCTION

The telephone rings and you answer it. The voice on the other end greets you and makes you feel like a long-lost friend. Momentarily caught off guard, you try to identify the voice, and while you are distracted, the voice makes the pitch. You have been invited to an event to help a worthy cause. Before you can respond, the voice suggests that you might consider donating your tickets, if you cannot attend, so that a disabled child or some other disadvantaged individual can enjoy the evening's entertainment.

It is not until much later, if at all, that you discover that the voice did not belong to the altruistic, volunteer-supporter of the cause, as you had assumed. Instead, the voice was that of a paid employee of a for-profit company, independent of and retained by the nonprofit organization solely to raise money.

The use of paid fundraisers is not intrinsically wrong or illegal. Many contributors, however, feel that they have been somehow duped when they later discover that a substantial portion of their contribution was absorbed as fundraising costs and thus was not available for the charity to use in providing the direct services of the cause.[1] Whether contributors are partially motivated to give by guilt, as in the phone call described above, or by a "get-rich-quick" sweepstakes scheme, they are nonethe-

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1. *See* Stephen H. Block, Note, *The Post-*Riley *Era: An Analysis of First Amendment Protection of Charitable Fundraising*, 10 CARDOZO ARTS & ENT. L.J. 101, 102 (1991) (citing John Doble, *Public Opinion About Charitable Solicitation and the Law*, *in* CONFERENCE, CHARITABLE SOLICITATION: IS THERE A PROBLEM? (New York University Program on Philanthropy and the Law ed., 1990)).

less unquestionably motivated also by the solicitor's representation that the contribution will help the cause.

Whatever the motivation, this fundraising pitch, and others like it, are repeated and consummated frequently enough to maintain an entire industry of telemarketing and direct mail fundraisers. These fundraisers assert that their efforts support their clientele of nonprofit charitable organizations. The degree to which the charities are actually supported is questionable. Without question, however, fundraising schemes conducted by phone, door-to-door, and through the mail have raised the ire of enough citizens to make charitable solicitations the object of the perennial plea: there ought to be a law!

Several states have responded to those pleas with a variety of statutes concerning charitable solicitations.[2] Most of those statutes, however, display schizophrenic tendencies. Apparently, legislators realize that efforts to control charitable solicitations necessarily implicate First Amendment protections. Rather than confront this issue directly, the drafters appear to have attempted to characterize their regulations as something other than what they are. The result has been a decade during which the Supreme Court, in a line of cases known as the *Riley* trilogy,[3] consistently struck down those regulatory schemes as violating charities' free speech rights.[4] One surveyor of the carnage concluded that a "by-product of this First Amendment protection is the near inability of states to regulate fundraising effectively."[5]

There is an alternative explanation for the Supreme Court's harsh treatment of state fundraising regulation. Because most charitable solicitation statutes are actually only thinly veiled attempts to regulate how charities' funds are used,

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2. *See generally* BRUCE R. HOPKINS, THE LAW OF FUNDRAISING (1991) (summarizing state laws on charitable solicitations).

3. The three cases comprising the *Riley* trilogy are Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

4. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. First Amendment prohibitions are extended to states through the 14th Amendment. U.S. CONST. amend XIV, § 2; *see* Schneider v. State, 308 U.S. 147, 160 (1939) (incorporating 1st Amendment into state law); *see, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 749 n.1 (1976).

5. Block, *supra* note 1, at 102.

not how the funds are solicited,[6] the statutes invite constitutional challenge as intrinsically overbroad. These statutes affect the speech of the vast majority of honest charities in an attempt to control the improper use of donated dollars by a few bad apples.[7] In each of the three primary charitable solicitation cases in the last decade,[8] efforts to control fraud through prohibitory and prophylactic methods have been held to be not tailored narrowly enough to survive heightened First Amendment scrutiny.[9]

Regulators should embrace a different approach to regulating charitable solicitation. Controls need not be broad or prohibitory. Rather, controls need only be true to the avowed purposes of existing legislation. For example, current Washington State law purports to target "deceptive and dishonest practices in the conduct of soliciting funds for or in the name of charity."[10] A constitutionally defensible approach would be to adopt legislation or ordinances that faithfully and honestly focus on identifying and penalizing such fundraising practices.

This Comment argues that, in the wake of the Supreme Court's decision in *Society for Krishna Consciousness v. Lee*,[11] state and local regulations are more likely to pass federal constitutional muster if they regulate obnoxious fundraising practices defined with sufficient precision. The *Riley* trilogy and the continued existence of charitable solicitation scams have shown that attempting to prevent the "improper use of contributions intended for charitable purposes"[12] by regulating how much charities pay for fundraising services has been not only unconstitutional but also ineffective.

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6. Is it fair to accuse states of being as misleading as some of the dishonest fundraisers they try to regulate? At least the State of Washington was honest enough to identify as one of its purposes the prevention of "improper use of contributions" when the Charitable Solicitations Act was extensively rewritten in 1986. WASH. REV. CODE § 19.09.010(2) (1992).

7. The Author used a "few bad apples" metaphor when testifying in favor of amendments to the Charitable Solicitations Act before the Judiciary Committee of the Washington State House of Representatives. The Honorable Earl Tilley, representing the center of Washington's apple-growing region, objected to the reference, reminding the Committee that "in Washington, there is no such thing as a bad apple."

8. *See* cases cited *supra* note 3.

9. *See, e.g.*, Village of Schaumberg v. Citizens for Better Env't, 444 U.S. 620, 637 (1980).

10. WASH. REV. CODE § 19.09.010(1) (1992).

11. 112 S. Ct. 2701 (1992).

12. WASH. REV. CODE § 19.09.010(1) (1992).

To reach this conclusion this Comment examines four subjects. Part II is a brief review of the *Riley* trilogy, with an emphasis on the commercial speech analysis the Supreme Court employed. In striking down those state and local efforts to regulate charitable solicitations, the Court suggested that speech does not retain "its commercial character when it is inextricably intertwined with otherwise fully protected free speech."[13] Some other authors, fixated by the "inextricably intertwined" language, believe the *Riley* trilogy inflicts an inevitably fatal injury on any attempt to regulate charitable solicitations.[14] This Part focuses on the word that precedes and limits the words "inextricably intertwined," emphasizing that speech loses its commercial character only when it is so intertwined with the charity's message as to be inextricable.

In Part III, *Krishna* is analyzed as an example of one situation where part of the solicitation was successfully extricated and regulated. In *Krishna,* the Court said that a charity could be restricted from soliciting contributions for immediate payment, but could not be restricted from distributing pamphlets.[15] This decision demonstrates that some speech (in this case, solicitation for immediate payment) does not rise to the level of being inextricably intertwined with the protected speech of charitable solicitations.[16]

For charitable solicitation to survive First Amendment scrutiny, it is essential to extricate the offensive kinds of speech from the otherwise fully protected speech. Under the federal

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13. Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988). "But even assuming, without deciding, that such speech in the abstract is indeed merely commercial, we do not believe that the speech retains its commercial character *when* it is inextricably intertwined with otherwise fully protected free speech." *Id.* (emphasis added).

14. Ellen Harris et al., *Fundraising into the 1990s: State Regulation of Charitable Solicitation After* Riley, 24 U.S.F. L. REV. 571 (1990). "The *Riley* Court held that even if charitable solicitation contains elements of commercial speech, *it is inextricably intertwined* with otherwise fully protected speech and, therefore, must be analyzed using the strict scrutiny test." *Id.* at 615 (emphasis added). Note the more conclusory tone of this author's statement when compared to the direct quote from the majority opinion. *Riley*, 487 U.S. at 796.

15. Society for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2709, 2710 (1992).

16. *See also* Board of Trustees v. Fox, 492 U.S. 469 (1989) (discussing the differences between commercial and pure speech). *But see* Gaudiya Vaishnava Soc'y v. City & County of San Francisco, 900 F.2d 1369 (9th Cir. 1990) (holding that broad regulation of sidewalk sales violated 1st Amendment because merchandise sales were "intertwined" with organization's purpose). *See generally* Harry Kalven, Jr., *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1, 23-27 (arguing that all speech contains elements of conduct which may be regulated).

constitution and Bill of Rights, the extricated speech could command some lesser level of protection and can be subjected to narrowly drawn regulation.[17] But the federal constitution is not the only source of constitutional law. Washington, like the other forty-nine states, has its own unique state constitutional perspective. In Part IV, this Comment examines whether and to what extent the Washington Constitution provides greater or different protection to charitable solicitations under the state constitutional freedom of speech provision.[18]

Finally, in Part V, the elements of a regulatory scheme that passes both federal and state constitutional limitations are discussed.

## II. Becoming Intertwined

### A. *It Takes Two To Tango: Intertwining Requires Two Kinds of Speech*

The First Amendment does not classify speech by categorizing the degree of protection it receives. It simply prohibits Congress from making any law "abridging the freedom of speech."[19] However, some scholars distinguish, at the outset, between "the two ways in which government might abridge speech."[20] Abridgment can be governmental action either aimed at noncommunicative impact but nonetheless having an adverse effect on communicative opportunity, or directly aimed at communicative impact itself.[21]

One example of the noncommunicative impact of speech is the playing of loud music in a residential neighborhood in the middle of the night. Regulations aimed at these impacts are less strictly reviewed by the Court, as long as they are content neutral.[22] Regulatory action aimed at communicative impact is

17. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. New York Pub. Serv. Comm., 447 U.S. 557 (1980) (describing factors to use to categorize speech as "commercial speech," which is subject to a lesser level of 1st Amendment protection).

18. Wash. Const. art. I, § 5.

19. U.S. Const. amend I.

20. Laurence H. Tribe, American Constitutional Law § 12-2, at 789 (2d ed. 1988).

21. *Id.*

22. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); U.S. v. Albertini, 472 U.S. 675, 688-89 (1985); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 n.8 (1984); *see also* Carney R. Shegerian, *A Sign of the Times: The U.S. Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions*, 25 Loy. L.A. L. Rev. 453 (1992).

generally content specific, and is strictly scrutinized by the Court.[23]

Charitable solicitation regulation is clearly content specific: its aim is to curtail or compel speech.[24] It clearly is "aimed at communicative impact," the type of regulation normally subjected to close scrutiny.[25] Under close scrutiny, the government must satisfy the heavy burden of showing not only that the regulation is necessary to further a compelling state interest, but also that it is precisely drawn or narrowly tailored to serve that interest.[26]

Within the realm of content specific regulation of speech, the Supreme Court has carved out exceptions where the strict scrutiny test is not applied.[27] Commercial speech is one such category, theoretically receiving relatively less First Amendment protection. The Court has struggled to define the philosophical foundations and to identify characteristics of commercial speech.[28] The Court, on occasion, has resorted to defining commercial speech as "speech which does 'no more than propose a commercial transaction,' "[29] and has attempted to explain the distinction between commercial and noncommercial speech as a matter of "common sense."[30]

Regardless of what factors are used to determine whether speech is commercial,[31] the Court now provides commercial speech some level of protection. However, the scrutiny that the Court applies to the regulation of commercial speech is not as

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23. *See* TRIBE, *supra* note 20, § 12-8, at 832-36.

24. *See infra* notes 61-72 and accompanying text.

25. *See* TRIBE, *supra* note 20, § 12-8, at 832-36.

26. Central Hudson Gas & Elec. Corp. v. New York Pub. Serv. Comm., 447 U.S. 557, 564 (1980); *see also* TRIBE, *supra* note 20, § 12-8, at 833.

27. *See* TRIBE, *supra* note 20, §§ 12-8, 12-18, at 836-37, 931-34. For example, the 1st Amendment does not excuse "falsely shouting fire in a theatre and causing a panic," Schenck v. United States, 249 U.S. 47, 52 (1919), using fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), or engaging in other types of activities comprising "no essential part of any exposition of ideas" or that by their "very utterance inflict injury." *Id.* at 572.

28. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Valentine v. Crestensen, 316 U.S. 52 (1942); *see also* TRIBE, *supra* note 20, § 12-15, at 890.

29. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762; *see also* Alan Howard, *The Constitutionality of Deceptive Speech Regulation: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1117 (1991).

30. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

31. *See Bolger*, 463 U.S. at 60.

strict as that applied to fully protected speech. To justify an abridgment of noncommercial, protected speech, the state must advance a compelling interest.[32] However, the regulation of commercial speech requires only a substantial interest.[33] In addition, under the commercial speech doctrine, the regulation must not be "more extensive than is necessary to serve [the governmental] interest."[34] Compare this standard to the substantially more severe standard applicable under traditional protected speech analysis: "Whenever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary."[35]

### *B. Intertwining That Which the State Tries To Extricate*

Those who write charitable solicitation regulations understandably attempt to fashion them to meet the commercial speech doctrine's demands. If they succeed, the regulation will be subjected to reduced scrutiny. However, when the Court examines charitable solicitations regulations, it is often unsympathetic. The Court considers the protected speech aspects of the communication as dominating the commercial aspects.[36] As discussed below, a first reading of the three primary charitable solicitation cases decided in the last decade can be viewed as evidence that the Court applied the greater protection of "pure" speech to the entire solitication, driving into submission any commercial speech applicability. However, a close reading of the *Riley* trilogy reveals that the domination is not as absolute as some might suggest. Each case in the trilogy is examined in turn, with this close reading in mind.

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32. *See* TRIBE, *supra* note 20, § 12-8, at 832-36.

33. Central Hudson Gas & Elec. Corp. v. New York Pub. Serv. Comm., 447 U.S. 557, 564 (1980).

34. *Id.* at 566.

> As a threshold matter, the speech must concern lawful activity and not be misleading. Turning to the nature of the regulation, the state interest advanced by the restriction must be "substantial." Next, the regulation must directly advance that state interest. Finally, the regulation must not be "more extensive than is required to serve the governmental interest."

TRIBE, *supra* note 20, § 12-15, at 900.

35. TRIBE, *supra* note 20, § 12-18, at 833-34.

36. *See* Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 633 (1980). "[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money." *Id.* (summarizing New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964)). *But see* Board of Trustees v. Fox, 492 U.S. 469, 474-75 (1989) ("Including these home economics elements no more converted [a Tupperware party] into educational speech, than opening sales presentations with a prayer . . . would convert them into religious or political speech.").

### 1. *Village of Schaumberg v. Citizens for a Better Environment*

In 1980, the Supreme Court decided *Village of Schaumberg v. Citizens for a Better Environment,*[37] the first of the *Riley* trilogy. At the core of the controversy was a village ordinance effectively prohibiting door-to-door solicitation by organizations failing to provide "proof that at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization."[38] The Court refused to characterize charitable solicitations as commercial speech, noting categorically that "because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and cost of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech."[39] The Court felt that whatever commercial speech was conducted by the canvassers was subsumed by a "variety of speech interests . . . that are within the protection of the First Amendment."[40]

Although the Court did not apply the less strict commercial speech test in this case, it did not adopt the notion that charitable solicitation is immune from regulation.[41] Any regulation of charitable solicitation, however, would need to be "reasonable" and "undertaken with due regard for the reality that solicitation is *characteristically intertwined*" with protected speech.[42]

In *Schaumberg,* the Court saw a communication in which the solicitation fell under the umbrella of protected speech. Thus the strict scrutiny test applied. However, the Court provided for and described a less rigorous test that apparently

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37. *Schaumberg,* 444 U.S. at 620.

38. *Id.* at 624 (citing SCHAUMBERG, ILL., CODE ch. 22-20(g) (1975)).

39. *Id.* at 632.

40. *Id.* (referring to protected speech interests in "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes").

41. The issue before us, then, is not whether charitable solicitations . . . are within the protections of the First Amendment. It is clear that they are. . . . The issue is whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech.

*Id.* at 633.

42. *Id.* at 632 (emphasis added). The Village of Schaumberg's ordinance obviously failed to give this reality its due; the ordinance was invalidated as facially overbroad. *Id.* at 634-35. The regulations were not drawn narrowly enough to serve the Village's legitimate interest of preventing fraud without interfering with 1st Amendment freedoms. *Id.* at 637 (citing NAACP v. Button, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . .")).

would apply when the commercial speech was not so overwhelmed by pure speech considerations. By using words such as "reasonable," the Court suggested that given the right facts it would apply a test resembling that traditionally applied to commercial speech.

### 2. *Secretary of State v. Joseph H. Munson Co.*

The extent of the intertwined relationship between commercial and protected speech was expanded four years later when the Court decided *Secretary of State v. Jospeh H. Munson Co.*[43] In *Munson*, the Court found unconstitutional a state statute that prohibited charities from paying fundraisers more than twenty-five percent of the amount raised in connection with any fundraising activity.[44] The action was not brought by a charitable organization but by the Joseph H. Munson Co., an Indiana for-profit organization in the business of promoting fundraising events.[45]

By allowing a for-profit fundraiser to argue on behalf of Maryland charities, the Court extended the domination of protected speech over commercial speech. After *Munson*, the existence of a commercial fundraising relationship between speaker and audience would not be enough to detract the Court from applying the highest level of protection to the speech. The commercial nature of the relationship of the parties involved is apparently irrelevant in determining whether speech is, or is not, governed by the commercial speech doctrine.[46]

As the Court expanded the reach of the commercial speech doctrine, it also reinforced the presumption that the protected speech aspects of charitable solicitation dominates its commercial aspects. In examining Munson's First Amendment claim, the Court restated the basis for the conclusion it reached in *Schaumberg*.[47] According to the *Munson* Court, the key to the *Schaumberg* decision was the reality that solicitations are

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

44. *Id.* at 970.

45. *Id.* at 950. The Court granted standing to Munson even though the company did not claim that the statute infringed upon its own rights. Instead, its argument rested solely on its ability to assert the 1st Amendment rights of the Maryland charities it served. *Id.* at 955 n.6.

46. *Id.* at 967 n.16 (citing *Schaumberg*, 444 U.S. at 635-36). *But see* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983) (providing that the economic motivation of the speaker is one consideration in establishing speech as commercial).

47. *Munson*, 467 U.S. at 959.

"characteristically intertwined" with protected speech.[48] However, the *Munson* Court's restatement was not entirely faithful to the *Schaumberg* language. Instead of an admonition to respect that reality, *Munson* proclaimed "that charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment."[49]

After *Schaumberg*, the intertwining of protected and commercial speech arguably had to be respected when drafting regulations affecting charitable solicitations. To give this argument meaning, it must be presumed that the Court believed it possible that some aspect of charitable solicitation could fall outside the scope of protected speech. However, the *Munson* Court appeared to dismiss that possibility and opted instead for a presumption that charitable solicitations are, categorically, "so intertwined" that there is no need to examine any other possibility.[50] As a result, any regulation affecting charitable solicitation would be strictly scrutinized and must advance a compelling governmental interest and be narrowly drawn to achieve that goal in the least restrictive manner, a task seemingly impossible to achieve.

### 3. *Riley v. National Federation of the Blind*

In *Riley v. National Federation of the Blind*,[51] the final case of the trilogy, the Court seemingly reaffirmed *Munson's* categorical presumption that charitable solicitations always fall within the scope of protected speech.[52] In *Riley,* the challenged North Carolina statute required that fundraisers' fees not be "unreasonable."[53] The reasonableness of fees was defined by a three-tiered scheme. At the first tier, fees below a certain percentage were presumed reasonable.[54] At the second tier, a greater percentage fundraising fee was deemed reasonable if the fundraising activity involved the "dissemination of information, discussion, or advocacy."[55] At the third tier, a fee above a certain percentage was deemed unreasonable and was prohibited,

48. *Id.*
49. *Id.*
50. *Id.*
51. Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988).
52. *Id.* at 796.
53. N.C. GEN. STAT. § 131C-17.2(a) (1986).
54. *Id.* § 131C-17.2(b).
55. *Id.* § 131C-17.2(c). In its apparent attempt to favor clearly protected speech activities, North Carolina logically included such speech within its regulation, thereby suffering the consequences of full 1st Amendment scrutiny.

absent a special showing by the fundraiser prior to conducting the solicitation.[56] The statute also required fundraisers to disclose to potential donors the average percentage of gross receipts actually turned over to charities by the fundraiser during the previous twelve months.[57]

Rather than invoking the commercial speech doctrine, North Carolina characterized its three-tiered scheme as an economic regulation with only an indirect effect on protected speech.[58] The Court rejected North Carolina's attempt to avoid the commercial speech/protected speech question. The Court considered the regulation to burden speech, and acccordingly "subjected the State's statute to exacting First Amendment scrutiny."[59] The Court again asserted that "using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud."[60]

The Court confronted a new commercial speech argument when it turned to the provision requiring disclosure at the "point-of-solicitation."[61] The Court recognized that "compelled speech" is inherently content based because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."[62] North Carolina attempted to avoid strict scrutiny of this provision by arguing that the compelled speech provision "regulates only commercial speech because it relates only to the professional fundraiser's profit from the solicited contribution."[63]

Recalling *Schaumberg's* holding that solicitations cannot be considered merely a variety of commercial speech,[64] the Court could have rejected the state's proposition outright. Instead, the Court considered, arguendo, that the fundraiser's speech was commercial because it related to the fundraiser's motivation for speaking.[65] Even assuming that such speech, in the abstract, is indeed merely commercial, the Court did not believe "that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected

56. *Id.* § 131C-17.2(d).
57. *Id.* § 131C-16.1.
58. Riley v. National Fed'n of the Blind, 487 U.S. 781, 790 (1988).
59. *Id.* at 789, 790.
60. *Id.* at 789.
61. *Id.* at 795-801.
62. *Id.* at 795.
63. *Id.*
64. *Id.* at 796; *see also supra* notes 39, 40 and accompanying text.
65. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).

speech."[66] Instead, the Court simply found that "the component parts of a single speech are inextricably intertwined."[67] As a result, the Court refused to "parcel out the speech, applying one test to one phrase and another test to another phrase," and applied the test for fully protected expression.[68] The Court found the point-of-solicitation compelled speech provision "unduly burdensome," "not narrowly tailored," and unconstitutional.[69]

Curiously, *Riley* implies that compelled speech would not necessarily fail under strict scrutiny. After announcing that its "lodestars in deciding what level of scrutiny to apply . . . must be the nature of the speech taken as a whole and the effect of the compelled statement thereon,"[70] the Court authorized, albeit in dicta, one instance where the state could compel the speech of a person making a charitable solicitation.[71] Referring to an unchallenged provision in the state's disclosure law, the Court pronounced that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status."[72]

*Riley* may not have been the final nail in the coffin of state efforts to regulate charitable solicitations. Instead, *Riley* illuminates two approaches that avoid the rule that content specific speech regulations are subjected to the highest scrutiny. The first approach is to craft regulations narrowly enough to withstand strict First Amendment scrutiny. The Court's approval of compelled disclosure of certain unambiguous information establishes the validity of that approach.[73] The second approach implied by *Riley* is the possibility that commercial speech might not always be inextricably intertwined with protected speech during a charitable solicitation. If such speech does not retain its commercial character when it is inextricably intertwined with protected speech, it must be possible that commercial speech is not always so intertwined. The *Krishna* case, discussed in the next Part, proves that the possibility exists.

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66. *Riley*, 487 U.S. at 796.

67. *Id.*

68. *Id.*

69. *Id.* at 798.

70. *Id.* at 796.

71. *Id.* at 799 n.11. *But see id.* at 803 (Scalia, J., concurring) (accepting majority's reasoning except for footnote 11).

72. *Id.*

73. *Id.*

## III. *KRISHNA* SHOWS THAT SOME SPEECH CAN BE EXTRICATED FROM CHARITABLE SOLICITATIONS

In the *Riley* trilogy, the Supreme Court looked with disfavor on charitable solicitation regulations premised on the purported evil of outside commercial interests. Even interjecting a commercial interest, such as *Munson*'s paid fundraiser or solicitor, did not tarnish the purity of the charity's protected speech.[74] Perhaps the Court discounted the severity of the commercial evil, or perhaps it generally found no distinction between commercial and protected speech.[75] Whatever the reason, the intertwining of commercial and protected speech appeared as inextricable as ever.

In *Krishna,* however, the Court separated a charitable solicitation's commercial and protected speech components. The Court held constitutional the New York and New Jersey Port Authority's ban on solicitation within its airport's terminals.[76] But the prohibition against the distribution of printed materials in the same areas of the airport was struck down.[77] Although the Court repeated the *Riley* trilogy's proposition that solicitation is a form of protected speech,[78] it distinguished between the "solicitation and receipt of funds" and, the "distribution of flyers . . . or any other printed or written materials."[79]

The Port Authority in *Krishna* uniformly prohibited the solicitation of funds and the distribution of written materials "within the interior areas or structures at an air terminal."[80] The ban applied only in the terminals; soliciting contributions and distributing materials were permitted on the sidewalks outside the terminal buildings.[81] Although the terminals contained various commercial establishments where funds were exchanged for goods and services. However, the plaintiff was prevented from performing *sankirtan*, the ritual of going into public places to disseminate religious literature and solicit funds.[82]

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74. Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984).

75. *But see* Board of Trustees v. Fox, 492 U.S. 469 (1989) (separating commercial and pure speech in the context of a Tupperware party at a public institution of higher education).

76. Society for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2709 (1992).

77. *Id.* at 2710.

78. *Id.* at 2705; *see also id.* at 2721 (Kennedy, J., concurring).

79. *Id.* at 2704.

80. *Id.*

81. *Id.*

82. *Id.*

Neither the majority nor the concurring justices used a commercial speech analysis. In striking down the ban on the distribution of printed materials, the Court agreed that "the right to distribute flyers and literature lies at the very heart of the liberties guaranteed by the . . . First Amendment. The Port Authority's rule, which prohibits almost all such activity, is among the most restrictive possible of those liberties."[83] In justifying the ban on solicitations, however, the Court depended on doctrines that, like the commercial speech doctrine, afford a lower level of First Amendment protection.

With respect to the ban on solicitations within the government-owned airport terminals, the majority applied "a 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property."[84] This approach is applicable when "the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license."[85] In these situations, a government's "action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."[86] When speech occurs within government property that is not considered a traditional public forum, "[t]he challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."[87]

In the majority's view, prohibiting solicitations within airport terminals operated by the Port Authority is reasonable.[88] In upholding the regulation, the Court recognized the considerable difficulty facing the Port Authority in achieving its legitimate interest of assuring that travelers are not interfered with unduly.[89] The Court deemed that in the confines of a busy airport terminal, the disruptive effects and risks of duress presented by face-to-face solicitations were undue interferences.[90]

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83. *Id.* at 2720 (Kennedy, J., concurring) (citations omitted).

84. *Id.* at 2705 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

85. *Id.* (citing United States v. Kokinda, 497 U.S. 720, 725 (1990) (plurality opinion)).

86. *Id.*

87. *Id.* at 2705-06 (citing Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

88. *Id.* at 2709.

89. *Id.* at 2708.

90. *Id.*

Justice Kennedy concurred with the Court's holding on the ban on solicitations. However, he applied an analysis that "differs in substantial respects from that of the Court."[91] Justice Kennedy's analysis did not depend on finding that the airport terminal was a nonpublic forum, deserving special consideration under a forum-based analysis.[92] Instead, Justice Kennedy argued that the regulation should "be upheld as either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct."[93]

Justice Kennedy acknowledged that if the Port Authority had attempted to prohibit all speech soliciting contributions, the regulation could not have been considered content neutral.[94] As he characterized the regulation, it does not "prohibit all speech that solicits funds . . . it is directed only at the physical exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation."[95] Referring to many of the same "risks of duress" cited by the majority,[96] Justice Kennedy concluded that

> [b]ecause the Port Authority's solicitation ban is directed at these abusive practices and not at any particular message, idea, or form of speech, the regulation is a content-neutral rule serving a significant government interest. . . . The government cannot, of course, prohibit speech for the sole reason that it is concerned the speech may be fraudulent. But the Port Authority's regulation does not do this. It recognizes that the risk of fraud and duress is intensified by particular conduct . . . and it addresses only that conduct. We have recognized that such narrowly drawn regulations are in fact the proper means for addressing the dangers which can be associated with speech.[97]

According to Justice Kennedy, the regulation succeeds in part because it burdens only soliciting money for immediate receipt, which is the evil the regulation seeks to avoid.[98]

Charitable solicitation regulation would be straightforward in the future if the Court had adopted Justice Kennedy's rea-

91. *Id.* at 2715 (Kennedy, J., concurring).
92. *Id.*
93. *Id.* at 2720.
94. *Id.* at 2721; *see also supra* notes 19-23 and accompanying text.
95. *Krishna*, 112 S. Ct. at 2721.
96. *See supra* notes 88-90 and accompanying text.
97. *Krishna*, 112 S. Ct. at 2722 (citations omitted).
98. *Id.*

soning. States would become virtual laboratories for regulation in this area, narrowly tailoring restrictions to address only the time, place, and manner of solicitation and carefully assuring themselves of justifications "unrelated to the content of the speech or the identity of the speaker."[99] However, the Court apparently is not ready to open the floodgates of regulatory fervor, which have been restrained by the content specific barrier for over a decade. The Court's lack of enthusiasm for Justice Kennedy's concurrence[100] is a clear signal that it is not ready to embrace the view that regulation of charitable solicitation regulations can be characterized as content neutral. The Court is unwilling to lower the standard of review to the level of reasonable time, place, and manner restrictions.

On the other hand, the lesson of *Krishna* is not limited to government-operated facilities, such as public airports and miliary bases that have been designated nonpublic fora. *Krishna's* value stems from the possibility that the Court may be ready to recognize some distinction between a solicitation's commercial and protected speech, whether it occurs in a public or a nonpublic forum. It does not matter whether the decision was based on Justice Kennedy's content neutral analysis, or on the majority's forum-based approach. The Court treated similar face-to-face encounters differently: those involving an immediate financial exchange were deemed subject to regulation; those involving only the dissemination of information were not. The element that distinguishes the two similar encounters is the commercial transaction. In *Krishna,* the Court has effectively shown that the commercial transaction is not inextricably intertwined with the protected speech of a charitable solicitation.[101]

If a monetary transaction is severable from the expressive portion of a charitable solicitation because the transaction intensifies the risk of fraud or duress, then other similarly severable components of a charitable solicitation can also be regulated as commercial speech. The challenge is to craft a

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99. *Id.*

100. No Justices joined the section of Justice Kennedy's opinion in which he argued for the content neutral analysis. Justices Blackmun, Stevens, and Souter joined only with reference to sections other than the content neutral analysis.

101. Thus, in these situations, we can ignore the *Riley* admonition that the Court "[c]annot parcel out the speech, applying one test to one phrase and another test to another phrase." Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988). The admonition is applicable only where "[t]he component parts . . . *are* inextricably intertwined." *Id.* (emphasis added). This is not the case here because the component parts are not inextricably intertwined.

regulation that directly, and not more extensively than necessary, advances the government's interest in preventing that fraud or duress.[102]

Even if a regulation of speech survives federal constitutional review, it does not necessarily satisfy the potentially stricter requirements of a state's constitution. As discussed below, state constitutions also protect individual rights, independent and distinct from the federal constitution. Thus, to determine the exact contours of the limits of charitable solicitations regulation, the state constitutional provision protecting the free speech rights of Washington citizens must also be examined.

## IV. State Constitutional Analysis

### A. *The Need for Independent State Constitutional Analysis*

In this Comment I have argued that charitable solicitations have presumptively and erroneously received the same high level of protection afforded political expression. I have also argued that when, as in *Krishna*, certain, less protected aspects of the speech can be extricated from the protected speech, less protected speech can be regulated. These arguments are based on recognized classifications of expression, such as political speech and commercial speech. Such is the nature of contemporary jurisprudence under the First Amendment of the federal constitution.

The federal constitution is only one of fifty-one expressions of fundamental individual rights enjoyed by citizens of the United States. Although the federal constitution establishes minimum levels of individual protections,[103] each state also has a constitution that expresses a unique understanding of the relationship between the state and the people from which it draws its sovereign power.

After selected fundamental rights began to be recognized as incorporated under the Fourteenth Amendment and extended to the states,[104] many state courts appeared to apply exclusively federal analysis to resolve fundamental rights issues even though parallel or analogous state constitutional provisions

102. *See infra* Part V.

103. *See, e.g.*, Wash. Const. art. I, § 2 ("The Constitution of the United States is the supreme law of the land.").

104. *See supra* note 4.

existed.[105] Not until the Burger and Rehnquist Courts slowed and reversed the Warren Court's expansion of individual rights in the criminal justice arena did state courts actively begin to reassert, on independent state grounds, additional individual rights.[106]

In deciding cases based on these rights, a state court must establish clearly that the grounds supporting the decision are based on state constitutional analysis, independent of federal rationale. Only if the state court's decision rests on a truly independent state constitutional analysis will the state court's decision avoid the Supreme Court's assumption of jurisdiction.[107] States with an actively independent judiciary have developed mechanisms to articulate clearly not only what grounds are being employed to establish a new state constitutional jurisprudence, but also that these grounds are intended to be and actually are independent of federal precedent.[108]

The Washington State Supreme Court enunciated its version of a mechanism designed to establish clearly such independent state grounds in *State v. Gunwall*.[109] Six nonexclusive, neutral criteria were identified as helpful in establishing a principled state constitutional jurisprudence: (1) textual language, (2) differences in the texts of the state and federal constitutions, (3) constitutional history, (4) preexisting state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state or local concern.[110]

The *Gunwall* factors are used to determine not only "whether on a given subject the Washington constitutional provision affords greater protection than the minimum protection afforded by the federal constitutional analysis,"[111] but also to determine what level of greater protection should be

105. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984).

106. Utter, *supra* note 105, at 493.

107. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

108. *See* Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992).

109. 106 Wash. 2d 53, 720 P.2d 808 (1986).

110. *Id.* at 61-62, 720 P.2d at 812-13.

111. Ford Motor Co. v. Barrett, 115 Wash. 2d 556, 568, 800 P.2d 367, 374 (1990).

afforded.[112] With regard to the first determination, the Washington Supreme Court has applied the *Gunwall* factors to the freedom of speech provision[113] of the Washington Constitution.[114] Because this is the provision that applies to charitable solicitations, the court has determined tacitly that these factors demand an independent analysis in these circumstances. The question remaining is the degree of difference in the protection afforded.

### *B.* Gunwall *Factors Applied to the Washington Freedom of Speech Provision*

Since *Gunwall* was first applied, the six nonexclusive factors have been applied in different ways,[115] so that today it may be expedient to characterize the analysis as having three essential components: (1) a textual analysis; (2) an immutable structural fact demanding that the state constitution receive independent interpretation; and (3) an historical analysis to discover the framers' intent, any principled bases for an extension of greater individual rights, and areas of particular local concern. Each factor will be examined separately.

#### 1. Textual Factors

The First Amendment to the federal constitution states simply that "Congress shall make no law . . . abridging the freedom of speech."[116] Washington's declaration of the right to free speech guarantees that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[117]

The First Amendment and Washington's declaration of free speech contain obvious textual differences. The First Amendment begins "Congress shall make no law," while the state free speech provision has no similar phrase suggesting a state action

112. *See* First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 225, 840 P.2d 174, 186 (1992).

113. WASH. CONST. art. I, § 5.

114. *See* State v. Reece, 110 Wash. 2d 766, 778, 757 P.2d 947, 954 (1988) (obscenity), *cert. denied*, 493 U.S. 812 (1989).

115. *See, e.g.*, State v. Earls, 116 Wash. 2d 364, 805 P.2d 211 (1991) (Utter, J., dissenting). In his dissent, Justice Utter treated the first two criteria together and argued that the 5th factor (structure of state constitution) will "always support" an independent interpretation. *Id.* at 390, 396, 805 P.2d at 227.

116. U.S. CONST. amend I.

117. WASH CONST. art. I, § 5.

requirement.[118] Because the issue under review in this Comment, the statutory regulation of charitable solicitations, inherently involves state action, this aspect of free speech is not relevant here.

For purposes of this discussion, the more relevant difference between the state and federal free speech provisions is that the state right begins expansively but is qualified by the phrase "being responsible for the abuse of that right."[119]

Justice Robert Utter, a member of the *Gunwall* court, provides guidance regarding whether a phrase such as this warrants judicial interpretation:

> In determining whether a constitutional provision is plain and unambiguous, and in interpreting it when it is not, the words used must be given their common and ordinary meaning. Of course, since the common and ordinary meaning of a given word may have changed over the last century, the judge must also inquire about the accepted meaning of the words at the time the provision was adopted, and this information must often be sought from extrinsic sources.[120]

"Abuse" generally has the same meaning today that it did at the turn of the century. As used today, the noun sense of "abuse" typically means a "wrong or improper use; [or] misuse."[121] Similarly, the 1856 Webster's dictionary defined abuse as "[i]ll use; improper treatment or employment; [or] application to a wrong purpose."[122]

The etymology of "abuse" suggests a possible emphasis that may have affected the word choice of the framers of the Washington Constitution. Three of the seven roots of "abuse" reflect an emphasis on the misuse of words: "[t]o misrepresent . . . to . . . cheat, or deceive . . .[t]o wrong with words [or] speak injuriously of . . . [or]; to malign, revile."[123] A comparison of current synonyms carries a similar verbal misuse connotation: "Abuse

118. Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 7 U. PUGET SOUND L. REV. 157, 170-71 (1985).

119. WASH. CONST. art. I, § 5.

120. Utter, *supra* note 105, at 509.

121. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 9 (2d ed. 1987).

122. WEBSTER'S UNABRIDGED AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 7 (George and Charles Merriam eds., 1856).

123. THE OXFORD ENGLISH DICTIONARY 59 (2d ed. 1989).

implies an outburst of harsh and scathing words against another."[124]

One implication deriving from the choice of the word "abuse" in this context is that it refers to common law restrictions against defamation, particularly libel. Whether the choice was intended to imply a limitation on the reach of this restriction is unclear and will be discussed in the context of constitutional history. However, one historic application of the word "abuse" challenges the seemingly immutable nature of the structure of state constitutions.[125]

### 2. Structural Factors

The structural factor is most typically employed to argue that a state constitution should be interpreted independently. Generally speaking, state constitutions immutably differ from the federal constitution. While the U.S. Constitution is a grant of enumerated powers, state constitutions serve "only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. . . . Hence, the explicit affirmation of fundamental rights in [a state] constitution can be seen as a guarantee of those rights and not as a restriction upon them."[126]

*Gunwall*'s structural factor does not necessarily force the conclusion that the Washington Constitution affords greater protections than does the federal constitution. It is not inconsistent with the view of a state constitution as essentially a guarantor of rights to recognize that those rights also may be restricted by the constitution. Only through the device of a constitution can the sovereign be constrained. The sovereign capable of being so constrained includes not only the government created by the sovereign people, but also the sovereign people themselves.

Limiting the liberties of the sovereign people may have been on the minds of the framers of the Washington Constitution in 1889. The editors of the 1856 Webster's dictionary chose the following quote attributed to James Madison to portray the meaning of abuse: "Liberty may be endangered by the *abuses* of

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124. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (Portland House 1989).

125. *See supra* note 115 and accompanying text; *see also infra* Part IV.B.2.

126. State v. Hunt, 450 A.2d 952, 966 (N.J. 1982) (Handler, J., concurring) (citations omitted).

liberty, as well as by the *abuses* of power."[127] Madison recognized that unfettered liberty was as dangerous as absolute power. The absolute liberty of free speech was considered as much in need of restriction as were the powers of government. It is axiomatic that only through the means of a constitutional provision could the people restrict themselves. Despite the general view that a state constitution is a restriction on government power, it is not inconceivable that a proper constitution would also restrict some individual liberties. Thus, as the people restrict their right to speak freely, the government receives the power to sanction abuses of the right. In this way, the Washington Constitution operates much the same as the federal constitution, enumerating a specific power transferred to the government to punish abuse of the right to speak freely.

### 3. Historical Factors

An historical review of the free speech provision requires an examination of various restrictions on speech that were recognized when the Washington Constitution was written, and of the status of charitable solicitations at that time. Unfortunately, we are limited to indirect methods of discovering the meaning of the state's free speech provision as it relates to charitable solicitations because little direct evidence to that effect exists: "Washington's enabling act was silent on the subject of freedom of expression, and none of the members of the Preamble and Declaration of Rights Committee of the Washington Constitutional Convention appears to have written any articles relevant to the state free speech provision."[128]

What was to become Washington's freedom of expression provision went through several revisions. The unsuccessful constitutional convention of 1878 provides a first indication:

> Every person may freely speak, write and publish his opinion on all subjects, *being responsible for the abuse of that liberty*;

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127. WEBSTER'S UNABRIDGED AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 7 (George and Charles Merriam eds., 1856). The passage comes from Madison's defense of "a senate appointed not immediately by the people, and for the term of six years." THE FEDERALIST No. 63, at 428 (James Madison) (Jacob E. Cooke ed., 1961). In these words, Madison rejects the criticisms that such a body would "acquire a dangerous preeminence in the government, and finally transform it into a tyrannical aristocracy" overwhelming the more numerous and democratic House of Representatives. *Id.* A "well constructed Senate," Madison argued, was needed to safeguard against the tyranny of the people's own passions and "popular liberty." *Id.* at 425.

128. Utter, *supra* note 118, at 158 n.4, (citing Utter, *supra* note 105, at 510-13).

> and no law shall be passed to restrain or abridge the liberty of speech or the press. In all prosecutions for libel, the truth may be given in evidence to the jury, and if it appears that the matter charged as libelous to be true, and was published with good motives and for justifiable ends, the party accused shall be acquitted.[129]

The *Portland Oregonian*, on the opening day of the 1889 Olympia convention, provides the next official documentation of the free speech provision.[130] This version stated that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever, but every person shall *be responsible for the abuse of this right.*"[131]

Delegate Weir officially submitted the following text to the convention one week later, on July 11, 1889: "The right of free speech written, printed or spoken, *when not infringing the rights of others*, shall forever remain inviolate, and shall be secured to every citizen."[132]

Two weeks later, on July 25, 1889, the Committee on the Preamble and Declaration of Rights presented the current wording: "Every person may freely speak, write and publish on all subjects, *being responsible for the abuse of that right.*"[133] This version was eventually adopted without recorded amendment or comment.

Each of these successive versions contains a similar limitation: that those exercising the right to free speech are responsible for the abuse of the right. Yet, only the 1878 proposal specifically references libel. Because Washington's constitutional convention delegates drew heavily from Oregon's experience, the debates of the 1857 Oregon Constitutional Convention may provide some explanation.

The original report of the Oregon committee on the bill of rights contained a freedom of speech provision and a separate

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129. John T. Condon, *Documents-Washington's First Constitution, 1878,* WASH. HIST. Q., Jan. 1919, at 62 (emphasis added).

130. *See* W. Hill, *Washington: A Constitution Adapted to the Coming State*, THE [PORTLAND] MORNING OREGONIAN, July 4, 1889, at 9 (typed edition available in the Washington Room of the Washington State Library, Olympia).

131. *Id.* This version is identical to OR. CONST. art. I, § 8.

132. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 51 (Beverly Rosenow ed., 1962) (emphasis added).

133. *Id.* at 154 (emphasis added).

"truth defense to libel" provision.[134] The freedom of speech provision included a sentiment similar to the eventual Washington free speech restriction that "every person shall be responsible for the abuse of this right."[135] It was adopted without amendment.[136]

Oregon's proposed truth defense to libel provision, however, prompted lengthy debate[137] and was eventually defeated, not in any small measure because of the argument that "the previous section [making publishers responsible for what was printed] covered all the ground."[138]

More than three decades later, the Oregon Supreme Court clarified the effect of defeating this provision. In *Upton v. Hume*,[139] decided less than four years after Washington achieved statehood, the Oregon high court said that

> [t]he term "freedom of the press," which is guarantied [sic] under the constitution, has lead [sic] some to suppose that the proprietors of newspapers have a right to publish with impunity charges for which others would be held responsible. But this is a mistake. The publisher of a newspaper possesses no immunity from liability on account of a libelous publication, not belonging to any other citizen.[140]

The Washington Supreme Court decided similarly, in separate libel cases involving a matter relating to the character of a public official[141] and "certain actions and conduct of [a private] individual at the time of the supposed discovery of a crime, from which damaging inference might be drawn."[142] Relatively early in statehood the Washington court established that libel was not the only potential abuse of the right to speak freely that was beyond constitutional protection and within the police power of the state.[143]

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134. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 119 (Charles H. Carey ed. 1926).

135. *Id.*

136. *Id.* at 309.

137. *Id.* at 310.

138. *Id.*

139. 33 P. 810 (Or. 1893).

140. *Id.* at 812.

141. Byrne v. Funk, 38 Wash. 506, 512, 80 P. 772, 773-74 (1905).

142. Haynes v. Spokane Chronicle Publishing Co., 11 Wash. 503, 503, 39 P. 969, 969 (1895).

143. *See* State v. Fox, 71 Wash. 185, 186, 127 P. 1111, 1112 (1912), *aff'd*, 236 U.S. 273 (1915) (holding that fighting words establishing clear and present danger are unprotected under the 1st Amendment); State v. Gohl, 46 Wash. 408, 410, 90 P. 259,

The Oregon Supreme Court recently summarized the logical extension of these turn-of-the-century decisions. That court held that the Oregon freedom of speech provision[144] prohibits any law relating to free speech that goes beyond providing a remedy for the abuse of this right.[145] The Oregon court said that

> [t]his forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communications unless the scope of the restraint is wholly confined within some historical exception that was well established when the First American guarantees of freedom of expression were adopted and that the guarantees then or [at statehood] demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.[146]

In addition to a review of the development of freedom of speech under the state constitution, *Gunwall* also requires an historical examination of preexisting state law and other facts that help demonstrate the sources and nature of the state's interest in regulating charitable solicitations.

Even before Washington became a state, benevolent and charitable societies found their way into the Territorial Code.[147] These societies typically were fraternal organizations or institutional social or health care branches of religious sects, bearing little resemblance to today's diverse range of social service agencies dependent on organized public fundraising campaigns. However, the precursor to one of today's best-known charitable fundraising organizations, the United Way, got its start in

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260 (1907) (holding that nonlibel defamation is generally within police power under state constitutions); State v. Tugwell, 19 Wash. 238, 253, 52 P. 1056, 1061 (1898) (holding that utterances or writings tending to obstruct the administration of justice in a pending case are not protected by Article I, § 5).

144. OR. CONST. art. I, § 8.

145. State v. Robertson, 649 P.2d 569, 576 n.9 (1982).

146. *Id.* at 576.

147. TERRITORIAL CODE OF WASHINGTON §§ 2450-54 (1881) ("The incorporation of colleges, seminaries, churches, luceums, libraries and other societies for benevolent, temperance, charitable and scientific purposes."). These provisions were codified at statehood by W. Lair Hill in the *General Statutes and Codes of the State of Washington* §§ 1638-42 and are the direct antecedents to the current Nonprofit Corporation Act, WASH. REV. CODE § 24.03 (1992).

America two years before Washington's entry into the United States.[148]

Society has long recognized a legitimate governmental interest in assuring that public charities operate in conformance with the public trust.[149] Even while invalidating the regulatory schemes of the 1980s, the Supreme Court recognized that the government has a significant interest in preventing fraud in charitable solicitations.[150]

Washington's constitutional history demonstrates that the responsibility for the abuse of the free speech right goes beyond libel and includes a wide range of damages arising from criminal or misleading communications. With respect to charitable organizations, the state traditionally and specifically has extended special status to nonprofit corporations and has continuously embraced them within the same statutory scheme since before statehood.[151] Thus, the state constitution does not prohibit the regulation of solicitations by charitable organizations. The Washington Constitution appears to approve regulations that are limited to providing relief for damage caused by the abuse of a charity's freedom of speech. It is from the lesson of *Krishna* that we learn how to focus the regulation so that it accomplishes that goal.

## V. LEARNING THE LESSON OF *KRISHNA*

### A. *Narrowly Crafted, Transaction-Specific Regulation*

One lesson to be learned from *Krishna* is that although there may be other ways to curb overzealous charitable fundraising, regulators should focus on those aspects of the solicitation that are transactional, rather than substantive. Both transactional and substantive aspects of a solicitation clearly relate to the content of the speech and are normally subjected to the Court's highest scrutiny. After *Krishna*, however, transaction-based regulation is more likely to be accepted as falling within the confines of commercial speech and thus subjected to a less stringent level of review.

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148. *See* WILLIAM ARAMONY, THE UNITED WAY: THE NEXT HUNDRED YEARS 34 (1987).

149. *See* GARETH JONES, HISTORY OF THE LAW OF CHARITY, 1532-1827, 160-68 (1969).

150. *See* cases cited *supra* note 3.

151. *See supra* note 147.

A second lesson to be gleaned from *Krishna* has to do with the severity of the regulation's sanction. Each of the regulations invalidated in the *Riley* trilogy was essentially a prohibition; the effect of the regulations was to deny speech absolutely.[152] On the other hand, in *Krishna,* the Port Authority did not absolutely ban the solicitation of contributions; it merely required that the speech occur in a location that is not unduly disruptive to airport operations.[153]

A more constitutionally successful style of regulating charitable solicitation is narrower in its scope and less severe in its sanction. The approach *Krishna* suggests is twofold: (1) to identify the particular obnoxious fundraising practices, such as the repetitious solicitation for immediate payment; and (2) to provide a remedy that minimizes or eliminates the obnoxiousness without prohibiting the speech. In the context of speech regulation, Supreme Court Justice Brandeis stated that this can be accomplished constitutionally only through "more speech."[154]

The approach suggested by this reading of *Krishna* provides a foundation for effective charitable solicitation regulation. Under a *Krishna*-style commercial speech analysis, content specific regulation could be applied within the narrow range of speech affecting the transactional part of the solicitation. With properly drafted regulations, the charitable speech continues, but when the speech involves certain activities that intensify the risk of fraud or have been defined as misleading or suspicious, proper disclosure could be mandated.

Regulations drafted following these guidelines will most likely be narrowly tailored to prevent fraud, a recognized legitimate state interest. For example, a regulation mandating additional speech appears most constitutionally defensible when the activity regulated (1) is a discrete, identifiable, verifiable or purely commercial transaction, such as the exchange of money

152. *See* Riley v. National Fed'n of the Blind, 487 U.S. 781, 784, n.2 (1988); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 950 n.2 (1984); Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 624 (1980).

153. Although Justice Kennedy's reasonable time, place, and manner restrictions would yield the same result, they would be applicable only in content neutral situations.

154. "[W]henever 'more speech' could eliminate a feared injury, more speech is the constitutionally-mandated remedy." TRIBE, *supra* note 20, § 12-8, at 834 (referring to Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 377 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969)); *see also* Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990) (holding that disclosure of information is more likely to help decision making than concealment).

or some other subpart of a financial transaction; and (2) occurs in situations where the recipient of the solicitation is particularly vulnerable to the risk of fraud or duress (as are harried travelers rushing to catch a plane).

Washington's Charitable Solicitations Act,[155] which has never been challenged, contains several content specific restrictions.[156] For example, solicitors may not misrepresent the tax deductibility of the donor's contribution, nor misrepresent the solicitor's employee or volunteer status with the soliciting entity.[157] Further, if the soliciting organization's name is similar to a unit of government, the solicitor is required to reveal "whether the charitable organization is or is not part of [that] unit of government and the true nature of its relationship with the unit of government."[158] Both of these provisions, however, remain constitutionally suspect under a *Krishna* commercial speech analysis. Although the provision regarding disclosure of tax deductibility arguably deals with a commercial component, it nonetheless is essentially a prohibition. On the other hand, the provision requiring an explanation of the relationship with a governmental entity provides a nonprohibitory, "more speech" remedy, but falls outside any reasonable category of speech that is commercial or transactional in nature.[159]

The prototypical speech that *Krishna* permits to be regulated deals with the severable financial aspects of the solicitation, and is similar to a deceptive trade practice regulated by the Federal Trade Commission.[160] For example, the *Krishna* commercial speech analysis could be employed to require clear and conspicuous disclaimers, such as "This is not a bill" or "You are not obligated to pay this amount," on solicitation material that is presented in the form of an invoice or billing. It could also be used to require solicitors to explain clearly, conspicuously, and adequately the various details of a sweepstakes solicitation, including the chances of winning and the true value of each prize available.

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155. WASH. REV. CODE § 19.09 (1992).

156. *Id.* § 19.09.100(4)-(6).

157. *Id.* § 19.09.100(4).

158. *Id.* § 19.09.100(5).

159. *Compare* Riley v. National Fed'n of the Blind, 487 U.S. 781, 799 n.11 (1988) *with* Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1231-32 (4th Cir. 1989), *cert. denied,* 495 U.S. 904 (1990). Both courts held that requiring disclosure of status as a commercial fundraiser and the availability of financial records was constitutional.

160. The Federal Trade Commission Act, 15 U.S.C. § 52 (1988).

One often-abused fundraising tactic that is particularly ripe for a *Krishna*-style regulation is the "why not donate your tickets to the disadvantaged" scenario sketched at the beginning page of this Comment.[161]

The state has a legitimate interest in preventing the solicitor from not fulfilling the promise, perhaps fraudulently made, that a disadvantaged individual will be given the opportunity to enjoy the event. A new law,[162] administered jointly by the Washington State Attorney General and Secretary of State, will help achieve this goal by requiring the solicitor to obtain "written commitments from persons stating that they will accept donated tickets," presumably (although not required by law) to pass on to the intended disadvantaged individuals.[163] If such commitments are not obtained, the law prohibits the solicitation.[164] Whether the prohibitory sanction is more extensive than necessary to advance the interest of preventing fraud remains the crucial, judicially reviewable question.

The primary difference between this new law and a regulation fashioned from the lessons of *Krishna* is that the *Krishna* regulation would not prohibit the donate-your-ticket scheme. Rather, a regulation following the *Krishna* lessons would require the solicitor to tell the potential donor certain, prescribed information. For example, the solicitor could be required to disclose the names of the organizations that have agreed to assist in making sure that each donated ticket is appropriately assigned, the maximum number of seats to be reserved for donated use, or how the contributor can verify that his or her ticket was actually used.

Requiring solicitors to disclose specific material facts relating to the promise is a much more direct regulation of speech than Washington's new provision, which resembles the essentially prohibitory regulations struck down in the *Riley* trilogy. In addition, the *Krishna* regulation delves no more deeply into the operations of the charity than is absolutely necessary to provide the public with relevant information upon which to make an informed choice.

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161. A similarly abused fundraising tactic is the practice of soliciting advertisements for a publication addressing an issue of interest to the charitable organization (e.g. drug abuse prevention, fire safety) with the commercial component being a promise to distribute an unstated quantity of publications to the community.

162. Act of July 1, 1993, ch. 471, 1993 WASH. LAWS 1941.

163. *Id.* § 9, 1993 Wash. Laws at 1949-52.

164. *Id.*

### *B. Toward a Donor's Bill of Rights*

To make any regulatory system work, two ingredients are essential. First, the solicitor must be required to inform the potential contributor that the regulatory system is in place, what protections it provides, and how to access it: a "Donor's Bill of Rights." This disclosure of rights would be in addition to the particularized disclosures intended to respond to identified obnoxious practices. The second essential element of an effective regulation of charitable solicitation is an enforcement mechanism that empowers donors, individually or collectively, to seek restitution.

Under the regulatory approach envisioned in this Comment, an effective Donor's Bill of Rights incorporates three affirmative rights:

(1) The right to know who is asking for the donation.
(2) The right to financial information about the solicitor.
(3) The right to a full refund if the donor is deceived.

These are affirmative rights in that they impose a duty on the soliciting organization to voluntarily provide information. The solicitor must disclose these rights to the prospective contributor at each solicitation.

Included in the right to know who is asking for the donation is the right to know whether a solicitor is a separate commercial enterprise, distinct from the charitable organization. Similarly, included in the right to financial information is the right to know that such information exists and how to access it. For example, solicitors could be required to provide a toll-free number to call to receive a copy of the solicitor's annual registration. Finally, included in the right to a refund is the right to know that the donor has this right.

The effective enforcement of these rights is dependent, both constitutionally and operationally, on the specificity with which the forbidden practices are defined. The targets for regulation are those obnoxious tactics that both meet the commercial speech test and are severable from the expressive or substantive portion of the charitable solicitation. As commercial speech, the targeted practices are subject to regulation and become, de facto, the deceptive practices upon which donors may base claims for restitution.

The donate-your-ticket scheme again serves to illustrate. Assume a solicitor makes the appeal sketched in the opening of

this Comment, but fails either to distribute every donated ticket as promised or to submit to the central registration agency the required reports evidencing appropriate ticket distribution. In that case, those donors whose expectations were not satisfied would need to be notified, at the solicitor's expense, and provided with a range of restitution alternatives: total refund, pro rata reimbursement for unused tickets, or waiver.

Solicitors need to be encouraged to comply with the requirement to disclose the information comprising the Donor's Bill of Rights at the point of solicitation. A substantial penalty, perhaps a stated amount such as fifty dollars per contributor, in addition to full restitution of the amount paid, could be imposed on solicitors that fail to provide written notice of the Donor's Bill of Rights.

Previous attempts to regulate charitable solicitations have involved both prior restraint and prohibitive elements. Rather than repeat these errors, regulators should move away from trying to prevent fraud and toward making it easier to punish perpetrators and to provide restitution for the victim. To accomplish this, regulators should refocus the attack on abusive charitable solicitations as a tort, analogous to the communicative crimes considered at statehood to be an abuse of the liberty.

Under this tort approach, the state constitution provides support for establishing that, at least in the area of charitable solicitations, the solicitor owes a duty to the prospective donor not to abuse the right to speak freely on the subject of the charity's activities and fundraising needs. This tort scheme gives specific definition to the solicitor's duty by describing those practices that are presumptively deemed misleading.

Careful drafting can avoid language that would run afoul of both federal and state constitutional provisions barring the prohibition of speech, even offensive speech. For example, instead of making it a punishable offense to use the name of a governmental agency (such as the city firefighters), a less constitutionally invasive restriction would state the regulation in an "if clause." The regulation could state that if the solicitor uses the name of a governmental agency in its solicitation, the solicitor has a duty to describe in sufficient detail the true nature of the relationship between the agency and the soliciting organization.

To make this regulatory scheme effective, the duty must be clearly defined in a statute or administrative regulation, and a mechanism to enforce the breach of the duty must be assured

and inexpensive. To accomplish this, the scheme should authorize actions in small claims court. In addition, once the dissatisfied donor makes a prima facie showing that a specified duty not to employ abusive tactics was breached, the burden should shift to the solicitor to prove that the solicitation was not objectively misleading. In fairness to solicitors, an action in damages should provide that a complete and timely refund of disputed donations is a complete defense. If the solicitor does not return disputed donations before the donor files an action in small claims court, a presumptive damage award should be established that adequately compensates disgruntled donors for the time, costs, and inconvenience of pursuing the claim. Solicitors that fail to either refund upon demand, or to honor judicially validated claims, should be required to post a surety bond.

Such provisions would not run afoul of either federal or state constitutional restrictions and, in addition, would resolve the current practical difficulties that make it virtually impossible to enforce Washington's Charitable Solicitations Act.[165] The greatest limitation remains the federal constitutional issue of extricating and controlling the obnoxious fundraising tactics from the protected types of speech (advocacy, education, programmatic description) usually intertwined with an appeal for financial support. However, by identifying and focusing on what makes specific tactics and financial schemes misleading, and empowering individual donors to seek their own retribution, rather than instituting broad prophylactic measures, progress undoubtedly will be made in reducing the abuse of the public's generosity.

Although the Washington State Attorney General is empowered to investigate and prosecute violations of the Charitable Solicitations Act, such actions are rare and difficult to pursue successfully. The entrenched, unscrupulous fundraisers undoubtedly count on the fact that enforcement comes only from a single, centralized, and overworked state agency. This Comment envisions an enforcement mechanism that empowers each disgruntled donor to pursue an individual claim, or perhaps some way to band together more easily to facilitate class

165. WASH. REV. CODE § 19.09.340 (1992) makes violations of the Charitable Solicitations Act an unfair practice under WASH. REV. CODE § 19.86 (1992) (the Consumer Protection Act); *see* Hangman Ridge v. Safeco Title, 105 Wash. 2d 778, 780, 719 P.2d 531, 532 (1986) (listing elements required to establish an action under WASH. REV. CODE § 19.86).

action suits. The overwhelming prospect of defending a multitude of such claims may serve notice on these fundraisers that their practices need to improve, at least temporarily.

## VI. Conclusion

Regulation of charitable solicitation has, for too long, focused on the use of the funds collected rather than the manner in which those funds are collected. The result has been disastrous. Instead of addressing narrow commercial aspects of solicitations, regulations were drawn inartfully overbroad, violating charitable organizations' free speech. A succession of Supreme Court decisions striking down these regulations led some to conclude that meaningful regulation of solicitations is impossible.

That conclusion is premature, if not completely incorrect. The hasty conclusion is founded on a misreading of a key phrase recited in each of the three primary cases on the subject. Those who say effective regulation of charitable solicitation is dead misread the *Riley* trilogy as saying "commercial speech is inextricably intertwined with fully protected speech" and thus commands the Court's highest protection. A more careful reading of the phrase includes an important qualifier: "*when* [commercial speech] is inextricably intertwined with otherwise fully protected speech."[166] Only when speech is so intertwined does it lose its commercial nature and command higher protection.

*Krishna* is an example of a charitable solicitation that did not inextricably intertwine all of its elements with fully protected speech. Combined with the approval of limited compelled speech announced in *Riley*, *Krishna* provides an effective approach to regulating the financial heart of charitable solicitations. By regulating only the transactional elements of solicitations, to the exclusion of substantive issues or expressive speech, regulators avoid the overbroad scope that contributed to the fatal injury suffered by the regulations in the *Riley* trilogy. And, by establishing sanctions mandating more speech instead of banning the speech altogether, regulators will more directly and effectively advance the state's legitimate interest in preventing fraud.

The Supreme Court has not made it impossible to regulate charitable solicitations. In *Krishna* and the *Riley* trilogy, the

166. Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1980) (emphasis added).

Court has instead identified a narrow arena where regulators ought to focus their efforts. Regulators who artfully and carefully apply the concepts found in the commercial speech doctrine will find the arena wide enough to control most offensive fundraising practices.