

# MAKING SENSE OF *SCHAUMBURG*: SEEKING COHERENCE IN FIRST AMENDMENT CHARITABLE SOLICITATION LAW

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*The Supreme Court shaped its approach to charitable solicitation in a trilogy of cases in the 1980s: Schaumburg v. Citizens for a Better Environment (1980), Secretary of State of Maryland v. Joseph H. Munson Co. (1984), and Riley v. National Federation of the Blind of North Carolina (1988). Owing largely to ambiguity surrounding the concepts of content analysis, tiered scrutiny, and commercial speech emerging during that era, the Court failed to articulate a coherent framework for evaluating regulations of charitable solicitation. The result has left the Court without a clear rationale for the value of charitable solicitation and lower courts without a workable test for evaluating regulations affecting this form of speech: the Eighth and Tenth Circuits interpret Schaumburg as an intermediate scrutiny test, the Third and Eleventh Circuits view it as a strict scrutiny test, and the Fourth Circuit has simply noted that the Court has been “unclear” about the appropriate standard.*

*After examining the Court’s approach to charitable solicitation, I propose a new test that incorporates current notions of content analysis and tiered scrutiny and better accounts for the speaker-based interests tied to charitable solicitation. My normative approach adopts a “civic conception of free speech” that is cognizant of the matters of public concern advanced both directly and indirectly through charitable solicitation. I conclude that a balancing of interests offers a more appropriate review of charitable solicitation regulation than the cumbersome formulations arising out of the Schaumburg trilogy.*

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## I. INTRODUCTION

The Supreme Court shaped its approach to charitable solicitation in a trilogy of cases in the 1980s: *Village of Schaumburg v. Citizens for a Better Environment*,<sup>1</sup> *Secretary of State of Maryland v. Joseph H. Munson Co.*,<sup>2</sup> and *Riley v. National Federation of the Blind of North Carolina*.<sup>3</sup> Owing largely to ambiguity surrounding the concepts of content analysis, tiered scrutiny, and commercial speech emerging during that era, the Court failed to articulate a coherent framework for evaluating regulations of charitable solicitation. The result has left lower courts unable to judge “the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.”<sup>4</sup> The Eighth and Tenth Circuits interpret *Schaumburg* as an intermediate scrutiny test, the Third and Eleventh Circuits view it as a strict scrutiny test, and the Fourth Circuit has simply noted that the Court has been “unclear” about the appropriate standard. The lack of doctrinal coherence has also left an important form of speech without adequate First Amendment protections.

My objective in this Article is to articulate a framework for reviewing charitable solicitation regulation that better accounts for the important democratic values of this kind of speech. This requires

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

2. 467 U.S. 947 (1984).

3. 487 U.S. 781 (1988).

4. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in 110 HARV. L. REV. 991, 1007 (1997).

understanding the relationship between charitable solicitation and related First Amendment concepts. I begin by reviewing the state of three of these concepts—content analysis, tiered scrutiny, and commercial speech—when the Court decided *Schaumburg* in 1980. In Part III, I review the Court’s charitable solicitation decisions. Part IV proposes an alternative test to that constructed under the *Schaumburg-Munson-Riley* trilogy. My normative approach accounts for the speaker-based interests related to charitable solicitation and builds upon a “civic conception of free speech” that better ensures “broad communication about matters of public concern” advanced both directly and indirectly through charitable solicitation.<sup>5</sup> I contend that a balancing of interests rooted in a concern for democratic discourse offers a more principled and more cogent review of charitable solicitation regulation than the cumbersome formulations applied today.

## II. CONTENT ANALYSIS, TIERED SCRUTINY, AND COMMERCIAL SPEECH

Content analysis<sup>6</sup> and tiered scrutiny<sup>7</sup> emerged independently of one another in First Amendment law. The latter originated in the equal protection context: by the early 1970s, commentators had observed that the Court applied strict scrutiny to classifications that were suspect or involved a fundamental interest while subjecting all other statutes to a “standard of minimal rationality.”<sup>8</sup> Because speech was deemed to be a

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5. CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 19, 28 (2d ed. 1995).

6. Government regulation of expressive activity is content-neutral when justified without reference to the content of speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Whether a restriction is content-based or content-neutral is not always readily discernible. See Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 *IND. L.J.* 801, 809 (2004) (“[T]he distinction between content-based and content-neutral laws is too amorphous to serve as a determinative test of constitutionality.”); see also Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 *STAN. L. REV.* 113 (1981) (the use of content distinction is “both theoretically questionable and difficult to apply”); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 *U. CHI. L. REV.* 81, 107 (1978) (“[S]ince content-neutral, like content-based, restrictions may at times have a differential impact or reflect a latent government hostility toward certain ideas, the differences between these two types of restrictions often seem to be differences more of degree than of kind.”).

7. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (strict scrutiny); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (intermediate scrutiny).

8. See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972) (“The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive ‘new’ equal

fundamental liberty interest under the First Amendment, the Court evaluated regulations of most forms of speech under strict scrutiny.<sup>9</sup>

As the Court assimilated tiered scrutiny into its First Amendment doctrine, it limited its application of strict scrutiny to regulations that discriminated based upon the *content* of speech. This distinction first appeared in the 1972 decision *Police Department of City of Chicago v. Mosley*, which involved a Chicago ordinance prohibiting picketing or demonstrating on a public way within 150 feet of any school but exempting “the peaceful picketing of any school involved in a labor dispute.”<sup>10</sup> Mosley challenged the ordinance on equal protection grounds, and the Court rejected the City’s distinction between labor picketing and other peaceful picketing.<sup>11</sup> Regulations based on content were “never permitted”<sup>12</sup> and would be subjected to a high degree of scrutiny.<sup>13</sup>

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protection, with scrutiny that was ‘strict’ in theory and fatal in fact; in other contexts, the deferential ‘old’ equal protection reigned, with minimal scrutiny in theory and virtually none in fact.”).

9. The Court made an important distinction in 1942 when it clarified that categories of speech were either protected or unprotected. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Regulations of speech in the latter category were of little constitutional concern. *Id.* (“[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”); *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 670 (1st ed. 1978) (“From the dictum in *Chaplinsky* the Supreme Court had gradually derived what became known as the two-level theory of the first amendment, recognizing speech at one level as fully entitled to first amendment protection and relegating to a lower level speech so worthless as to be beyond the constitutional ken.”).

10. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 93 (1972). Stephen Gottlieb contends that *Mosley* “reinterpreted [past] cases in terms of the obligation of government to remain neutral with respect to the content of speech.” Stephen E. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. 19, 24 (1986).

11. *Mosley*, 408 U.S. at 94.

12. *Id.* at 99. Noting that “the equal protection claim in this case is closely intertwined with First Amendment interests,” the Court concluded that “[t]he central problem with Chicago’s ordinance is that it describes permissible picketing in terms of its subject matter.” *Id.* at 95, 99.

13. Kenneth Karst has observed that *Mosley* marked the Court’s first full acknowledgment that a content-based regulation was particularly odious because it violated “the principle of equal liberty of expression . . . inherent in the first amendment.” Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975). Karst contends that “[t]he absence of a clear articulation of the principle of equal liberty of expression in Supreme Court decisions before *Mosley* may be attributable to a belief that the principle is so obviously central among first amendment values that it requires no explanation.” *Id.* at 29.

Contemporaneously with *Mosley*, the Court reconsidered its two-fold regime of strict and rational basis scrutiny. Writing of the 1971 Term that included *Mosley*, Gerald Gunther suggested that there was “mounting discontent” with two-tiered scrutiny and that the Court was prepared to intervene in some circumstances with something less than strict scrutiny.<sup>14</sup> Gunther presaged that an “intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry.”<sup>15</sup>

Gunther’s prediction of an emerging intermediate scrutiny was consistent with the adumbrations of the Court’s 1968 decision in *United States v. O’Brien*.<sup>16</sup> *O’Brien*, a case involving “expressive conduct,” announced a previously unseen standard of review:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>17</sup>

Writing about *O’Brien* in 1975, John Hart Ely commented: “[T]he Court is surely to be commended for here attempting something it

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14. Gunther, *supra* note 8, at 12.

15. *Id.* at 24. Several years after Gunther’s article, the Court began extending a lesser degree of scrutiny toward speech regulations that it concluded were not based on content. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court noted that it had “often approved” time, place, and manner restrictions “provided that they are justified *without reference to the content* of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.” 425 U.S. 748, 771 (1976) (emphasis added). The term “content-neutral” also entered the Court’s lexicon. *See* *Brown v. Glines*, 444 U.S. 348, 368 (1980) (Brennan, J., dissenting) (referring to a “content-neutral time, place, and manner restriction”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (Stewart, J., dissenting) (same).

16. 391 U.S. 367, 377 (1968).

17. *Id.* This new test was consistent with the jurisprudential developments in equal protection analysis under the Fourteenth Amendment. *See, e.g., Mathews v. Lucas*, 427 U.S. 495, 503–04 (1976); *Reed v. Reed*, 404 U.S. 71, 75–76 (1971).

attempts too seldom, the statement of a coherent and applicable test.”<sup>18</sup> But Ely observed that *O’Brien*’s language revealed an ambiguity in the Court’s strict scrutiny test.<sup>19</sup> Prior to *O’Brien*, strict scrutiny review upheld a speech regulation only if there were no “less restrictive means” available.<sup>20</sup> Ely noted that this phrase could be either strongly or weakly construed.<sup>21</sup> Strongly construed, the test would invalidate almost any regulation because, as Justice Blackmun observed four years later, “[a] judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation.”<sup>22</sup> Weakly construed, some regulations would survive review.<sup>23</sup> *O’Brien* substituted the phrase “no greater than is essential” for “less restrictive means”<sup>24</sup> and upheld the defendant’s criminal conviction for violating a speech regulation.<sup>25</sup> Ely concluded that the analysis and result were consistent with the weak formulation of strict scrutiny.<sup>26</sup> He suggested that this weak formulation “turned out to be no protection at all,” and he equated *O’Brien*’s review to rational basis scrutiny.<sup>27</sup> Here, his otherwise trenchant analysis was exaggerated. The plain language of *O’Brien* indicated something beyond minimal scrutiny.<sup>28</sup> The case signaled the emergence of an intermediate standard

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18. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975). Ely foreshadowed a broad applicability of the new test, observing that *O’Brien*’s standard was “not limited to cases involving so-called ‘symbolic speech.’” *Id.*

19. According to Ely, the fourth prong of *O’Brien*’s test “involves a choice between different conceptions of [the ‘no greater than is essential’] standard, a choice made by reference to factors neither *O’Brien* nor any other Supreme Court decision has yet made explicit.” *Id.*

20. *Id.* at 1484–85.

21. *Id.*

22. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

23. Ely wrote that “this weak formulation would reach only laws that engage in the gratuitous inhibition of expression, requiring only that a prohibition not outrun the interest it is designed to serve.” Ely, *supra* note 18, at 1485.

24. *See United States v. O’Brien*, 391 U.S. 367, 377 (1968).

25. *Id.*

26. “Further language in the *O’Brien* opinion, and the holding of the case, indicate that [the weak formulation] is the strongest form of less restrictive alternative analysis in which, under the circumstances, the Court was prepared to engage.” Ely, *supra* note 18, at 1485.

27. *Id.* at 1486 n.18.

28. In 1984, the Court characterized *O’Brien* as “little, if any, different from the [intermediate scrutiny] standard applied to time, place, or manner restrictions.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 797–98 (1989).

of review that was less than strict scrutiny but greater than rational basis review.<sup>29</sup>

Although the Court initially failed to classify *O'Brien* as an intermediate scrutiny test, it tightened its strict scrutiny definition in two First Amendment decisions issued the year after Ely's article, supplanting the settled "less restrictive means" with the previously unseen "least restrictive means."<sup>30</sup> The slight language shift ensured that the Court's strict scrutiny test was no longer vulnerable to the weak formulation that Ely had exposed.

Ely observed that *O'Brien*'s crucial inquiry was its second prong—whether the governmental interest was unrelated to the suppression of free expression.<sup>31</sup> A regulation that failed to satisfy this prong was not per se unconstitutional, but the Court's analysis would be "switched onto another track."<sup>32</sup> That other track was strict scrutiny.<sup>33</sup> The conclusion that a regulation related to the suppression of free expression (i.e., a content-based regulation) required strict scrutiny was the same

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29. A similar development was evolving more explicitly in the Court's equal protection analysis. A 1977 Note in the *Harvard Law Review* observed that "[m]any commentators ha[d] noted the emergence from the Supreme Court of an intermediate standard of scrutiny in equal protection analysis, more deferential than the 'strict scrutiny' exercised in challenges to suspect classifications and classifications impinging on fundamental rights, but more exacting than the 'rational basis' test traditionally applied to economic and social welfare legislation." Note, *Intermediate Standard of Review*, 91 HARV. L. REV. 177, 177 (1977). Although this intermediate scrutiny in equal protection analysis was strikingly similar to the new *O'Brien* standard for expressive speech jurisprudence, the Court had not yet linked the concepts when it decided *Schaumburg*.

30. See *Elrod v. Burns*, 427 U.S. 347, 372 (1976) ("Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end."); *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) ("[D]isclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist"). *Buckley* and *Elrod* were the Court's earliest uses of the phrase "least restrictive means." Three years later, in *Illinois State Board of Elections v. Socialist Workers Party*, the Court asserted that it had previously "required that States adopt the least drastic means to achieve their ends." 440 U.S. 173, 185 (1979). The Court supported this somewhat apocryphal claim by citing two previous decisions: *Lubin v. Panish*, 415 U.S. 709, 716 (1974), and *Williams v. Rhodes*, 393 U.S. 23, 31–33 (1968). *Rhodes* contained no discussion about the burden that a regulation could place on a protected interest. *Lubin* noted that a "legitimate state interest . . . must be achieved by a means that does not unfairly or unnecessarily burden . . . an . . . important interest." 415 U.S. at 716. Neither case supported the principle that strict scrutiny required the "least drastic means."

31. Ely, *supra* note 18, at 1484.

32. *Id.* Tribe uses the "track" terminology in his analysis of communication and expression. TRIBE, *supra* note 9, at 580–688.

33. Ely, *supra* note 18, at 1484.

conclusion that *Mosley* had reached.<sup>34</sup> But *Mosley* had failed to distinguish *O'Brien's* more relaxed test from strict scrutiny. Ely clarified the distinction by inferring not only the connection between content-based regulation and strict scrutiny but also its converse: content-neutral regulations were subject to something less than strict scrutiny.<sup>35</sup> The Court, however, had not yet adopted the term “intermediate scrutiny,” and the litmus for content-neutrality had not yet become whether a regulation was unrelated to the suppression of free expression.<sup>36</sup> Ely’s analytical prescience about the link between content-neutrality and intermediate scrutiny likely went unrecognized because the relevant descriptive terms were not yet embedded in the Court’s vernacular.

The terminology, however, was close at hand. In 1978, Laurence Tribe observed that “[w]here government aims at the noncommunicative impact of an act [i.e., when the regulation is not content-based], the correct result in any particular case thus reflects some ‘balancing’ of the competing interests.”<sup>37</sup> Several months later, Geoffrey Stone, in the first of three articles that tracked the development of the Court’s content analysis doctrine in the 1970s and the 1980s, explained that “[g]overnmental restrictions of expression may be divided into two general categories—content-neutral restrictions and content-based restrictions.”<sup>38</sup> Stone observed that the Court subjected content-based restrictions of “fully protected” expression to “a stringently speech-protective set of standards” and upheld such regulations “in only the most extraordinary circumstances.”<sup>39</sup> Conversely, the Court reviewed content-neutral restrictions with “a balancing of first amendment interests against competing government concerns.”<sup>40</sup> Thus, only two years before the Court’s landmark charitable solicitation decision in *Schaumburg*, commentators had

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34. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 99 (1972).

35. Ely, *supra* note 18, at 1484.

36. The Court clarified the latter in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

37. TRIBE, *supra* note 9, at 581. Tribe traces the roots of the academic debate between absolutist protection and balancing to the early 1960s. *See id.* at 582–83 n.19.

38. Stone, *supra* note 6, at 81. The other two articles are Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983), and Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

39. Stone, *supra* note 6, at 82.

40. *Id.* at 81; *see also* Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 762 (1980) (Review of content-neutral regulation “consists of a middle-tier equal protection test, similar to that used in cases of discrimination on the basis of gender or illegitimacy, coupled with a controlled balancing test.”).

zeroed in on the emergence of an intermediate scrutiny balancing test for content-neutral regulations of protected speech.

One other emerging concept affected the context in which the Court examined *Schaumburg*: commercial speech analysis, “a notoriously unstable and contentious domain of First Amendment jurisprudence.”<sup>41</sup> Since its 1942 decision in *Valentine v. Chrestensen*, the Court had viewed commercial speech as unprotected.<sup>42</sup> In the mid-1970s, the Court reversed this classification in two decisions, *Bigelow v. Virginia*<sup>43</sup> and *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>44</sup> After *Virginia Board of Pharmacy*, the Court protected commercial speech, but the degree of that protection remained unclear because commercial speech was not “wholly undifferentiable from other forms” of speech.<sup>45</sup> As Justice Powell elaborated in *Ohralik v. Ohio State Bar Ass’n*:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.<sup>46</sup>

Commercial speech, then, although within the realm of First Amendment protection, was something less than fully protected speech. The distinction created a conundrum. Under the old two-tiered scrutiny, the Court subjected regulation of protected speech to strict scrutiny and regulation of unprotected speech to rational basis scrutiny.

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41. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000).

42. 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no such restraint on government as respects purely commercial advertising.”), *overruled by* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

43. 421 U.S. 809, 829 (1975).

44. 425 U.S. 748, 780 (1976).

45. *Id.* at 771 n.24.

46. 436 U.S. 447, 456 (1978).

With the advent of content analysis, the Court applied a form of intermediate scrutiny to content-neutral regulation of protected speech. But what about content-neutral regulation of *commercial* speech? No longer unprotected, commercial speech merited something other than rational basis scrutiny. But because commercial speech was not “wholly undifferentiable” from other forms of protected speech, it did not warrant the same degree of protection as these other forms.

### III. THE CHARITABLE SOLICITATION CASES

The appearance of content analysis, tiered scrutiny, and a new understanding to commercial speech during the 1970s provided the context in which the Court formulated its approach to charitable solicitation in *Schaumburg*, *Munson*, and *Riley*. I now turn to these cases.

#### A. Village of Schaumburg v. Citizens for a Better Environment

*Schaumburg* addressed a city ordinance that prohibited door-to-door or on-street solicitation by an organization that did not use at least 75% of donations for “charitable purposes.”<sup>47</sup> The Village of Schaumburg offered three justifications for its regulation: policing fraud, protecting public safety and protecting residential privacy.<sup>48</sup> The Court concluded that the “legitimate interest” in preventing fraud “[could] be better served by measures less intrusive than a direct prohibition on solicitation,”<sup>49</sup> and found no “substantial relationship” between the 75% requirement and the protection of public safety or residential privacy.<sup>50</sup> The village’s interests were thus only “peripherally promoted” by the

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47. Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 622–23 (1980). The ordinance regulated “peddlers and solicitors,” who were defined as “any persons who, going from place to place without appointment, offer goods or services for sale or take orders for future delivery of goods or services.” *Id.* at 622 n.1. The Court devoted the bulk of its analysis to the First Amendment overbreadth doctrine and held that the Village’s ordinance was unconstitutionally overbroad. *Id.* at 635. The First Amendment overbreadth doctrine traces its roots to *Thornhill v. Alabama*, 310 U.S. 88 (1940). See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991). The doctrine permits someone whose conduct may be legitimately proscribed to challenge the proscription as it applies to others. *Schaumburg*, 444 U.S. at 634; see Fallon, *supra*, at 863–67. Because overbreadth is an “ancillary” doctrine that comports with the Court’s more substantive doctrines like content analysis, see *id.* at 866–67 (citing David S. Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 681 (1978)), *Schaumburg*’s principles are applicable outside the overbreadth context.

48. *Schaumburg*, 444 U.S. at 636, 638.

49. *Id.* at 637.

50. *Id.* at 638.

limitation and “could be sufficiently served by measures less destructive of First Amendment interests.”<sup>51</sup> Although the Court never synthesized these observations in *Schaumburg*, its underlying test might be formulated as follows:

A direct and substantial regulation of door-to-door or on-street charitable solicitation will be sustained if it serves sufficiently strong, subordinating interests by means of narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.<sup>52</sup>

Four months after *Schaumburg*, Justice Rehnquist, joined by Justice Blackmun, asserted in his dissent in *Carey v. Brown* that *Schaumburg* had articulated a content-neutral intermediate scrutiny test.<sup>53</sup> At least one lower court reached the same interpretation that year,<sup>54</sup> as did Professor Stone in an article published three years later.<sup>55</sup>

B. Secretary of State of Maryland v. Joseph H. Munson Co.

Four years after *Schaumburg*, the Court revisited restrictions on charitable solicitation in *Munson*.<sup>56</sup> The Maryland statute at issue in *Munson*, like the *Schaumburg* ordinance, limited the percentage of charitable solicitations that charities could spend on fundraising costs.<sup>57</sup>

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51. *Id.* at 636.

52. This phrasing is derived from Stone’s characterization of *Schaumburg*’s test. See Stone, *Content-Neutral Restrictions*, *supra* note 38, at 49–50.

53. *Carey v. Brown*, 447 U.S. 455, 476–77 (1980) (Rehnquist, J., dissenting) (citing *Schaumburg* for the proposition that the Court “has upheld state authority to restrict the time, place, and manner of speech, if those regulations ‘protect a substantial government interest unrelated to the suppression of free expression’ and are narrowly tailored, limiting the restrictions to those reasonably necessary to protect the substantial governmental interest”).

54. *Houston Chronicle Pub. Co. v. City of Houston*, 620 S.W.2d 833, 837 (Tex. App. 1981) (citing *Schaumburg* for the notion that “[r]easonable restrictions on the time, place and manner of the exercise of First and Fourteenth Amendment rights will be upheld if they are justified without reference to the content of the regulated speech and are narrowly drawn, limiting the restrictions to those necessary to protect significant governmental interests”).

55. Stone, *Content Regulation and the First Amendment*, *supra* note 38, at 245 (intimating that the ordinance in *Schaumburg* was a content-neutral, speaker-based restriction).

56. *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

57. *Id.* at 950. Unlike the *Schaumburg* ordinance, the Maryland statute included a discretionary provision under which the Secretary of State could license a charity whose

The statute, however, covered any “fund-raising activity” rather than simply door-to-door and on-street solicitation.<sup>58</sup> The plaintiff, a professional charitable solicitor, asserted that the statute violated his rights to free speech and assembly.<sup>59</sup>

*Munson* relied heavily on *Schaumburg*. Justice Blackmun explained for the Court that the government restriction in *Schaumburg* had not been “a precisely tailored means” and had borne “no necessary connection” to the Village’s asserted interests.<sup>60</sup> Because these phrases, absent from *Schaumburg*, were not strict scrutiny terms, it appeared that *Munson* was cryptically endorsing *Schaumburg* as an intermediate scrutiny test. But *Munson* then cited *Schaumburg* for the strict scrutiny proposition that certain statutes would be invalidated if they “[did] not employ means narrowly tailored to serve a compelling governmental interest.”<sup>61</sup> *Schaumburg* had asserted that a restriction had to be “narrowly drawn”<sup>62</sup> but had never used the strict scrutiny phrase “narrowly tailored to serve a compelling governmental interest.” *Munson* thus recharacterized *Schaumburg*’s test as akin to strict scrutiny,<sup>63</sup> approximating the following:

A direct and substantial regulation of charitable solicitation will be sustained if it furthers a compelling governmental interest, and if the regulation is narrowly tailored to serve that interest and does not unnecessarily interfere with First Amendment freedoms.<sup>64</sup>

Following *Munson*, a federal district judge,<sup>65</sup> a federal appellate judge,<sup>66</sup> and the Supreme Court of Maine<sup>67</sup> cited *Schaumburg* for the

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fundraising expenditures exceeded the statutory cap if enforcing the cap would “effectively prevent the charitable organization from raising contributions.” *Id.* at 962.

58. *Id.* at 950 n.2. In addition to door-to-door solicitation, any “fund-raising activity” presumably encompasses solicitation ranging from telemarketing to newspaper advertisements. At least one of the governmental interests in *Schaumburg*, protecting public safety, fails to justify restrictions on these other forms of fundraising.

59. *Id.* at 950, 952.

60. *Id.* at 961.

61. *Id.* at 965 n.13.

62. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 637 (1980).

63. Like *Schaumburg*, *Munson* never addressed whether the Maryland regulation was content-neutral or content-based.

64. This formulation approximates the standards articulated or implied by *Munson*.

65. See *Hornstein v. Hartigan*, 676 F. Supp. 894, 897 (C.D. Ill. 1988) (citing *Schaumburg* for the principle that even a compelling interest “must be drawn with the least restriction on First Amendment freedoms”).

strict scrutiny principle that a regulation must be the “least restrictive means” available to accomplish a legislative purpose, a strict scrutiny interpretation that exceeded even *Munson*’s recharacterization of *Schaumburg*. Conversely, Stone, in an oft-cited article on content analysis, adhered to his earlier assessment that *Schaumburg* articulated an intermediate scrutiny test for a content-neutral regulation.<sup>68</sup> The confusion stemming from the convergence of tiered scrutiny and content analysis in evaluation of charitable solicitation regulation was becoming evident.

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

Four years after *Munson*, the Court examined three provisions in the North Carolina Charitable Solicitations Act, which directly regulated professional charitable solicitors.<sup>69</sup> Turning first to a requirement that the percentage of contributions retained by professional charitable solicitors be “reasonable,” Justice Brennan began by reviewing *Schaumburg* and *Munson*.<sup>70</sup> Justice Brennan noted that *Munson* had applied “exacting First Amendment scrutiny,”<sup>71</sup> and concluded that *Schaumburg* and *Munson* “teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser’s fee is not narrowly tailored to the State’s

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66. See *Daily Herald Co. v. Munro*, 758 F.2d 350, 359 (9th Cir. 1984) (Norris, J., concurring in part and dissenting in part) (citing *Schaumburg* in the context of strict scrutiny for the principle that a state “must demonstrate that [a] regulation is ‘the least restrictive means available that would accomplish the legislative purpose’”).

67. See *State v. Me. State Troopers Ass’n*, 491 A.2d 538, 542 (Me. 1985) (citing *Schaumburg* for the principle that a law “must be narrowly drawn so that it is the least restrictive means of achieving the compelling government interest”).

68. Stone, *Content-Neutral Restrictions*, *supra* note 38, at 49–50. Stone considered *Schaumburg* to correspond to a test of intermediate scrutiny under which “the Court takes seriously the inquiries into the substantiality of the governmental interest and the availability of less restrictive alternatives.” *Id.* at 52. Under this intermediate standard of review, “the government cannot satisfy the less restrictive alternative requirement merely by demonstrating that less restrictive measures would serve its ends ‘less effectively’ than the challenged regulation. Rather, to withstand intermediate scrutiny, the government must prove that its use of a less restrictive alternative would seriously undermine substantial governmental interests.” *Id.* at 53.

69. *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781 (1988). Unlike the regulations in *Schaumburg* and *Munson*, the North Carolina statute was explicitly limited to professional solicitors. *Id.* at 784 n.2.

70. *Id.* at 787–89.

71. *Id.* at 789.

interest in preventing fraud.”<sup>72</sup> The Court held that the reasonable fee provision was unconstitutional under this standard.<sup>73</sup>

Addressing next a requirement in the statute that professional solicitors make certain disclosures, Justice Brennan abruptly concluded that the provision was a content-based regulation because “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”<sup>74</sup> This perfunctory conclusion was the first time that the Court had explicitly applied content analysis to a charitable solicitation regulation. Justice Brennan then noted that “North Carolina’s content-based regulation [was] subject to exacting First Amendment scrutiny.”<sup>75</sup>

The Court concluded that the disclosure provision was unconstitutional because the means chosen to accomplish the State’s interest in informing donors were “unduly burdensome and not narrowly tailored.”<sup>76</sup> Justice Brennan’s choice of wording here is curiously vague. When *Riley* was decided in 1988, it was settled doctrine that courts applied strict scrutiny to a content-based regulation of protected speech.<sup>77</sup> But rather than follow this standard, Justice Brennan hedged with the phrase “exacting scrutiny” and avoided the familiar terms of “compelling interest” and “least restrictive means.”<sup>78</sup> The Court was either deliberately carving out a unique standard of review for content-based regulation of charitable solicitation or unnecessarily perpetuating ambiguity and imprecision. *Riley* made clear, however, that whatever exacting scrutiny meant, it was the test

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72. *Id.*

73. *Id.*

74. *Id.* at 795.

75. *Id.* at 798.

76. *Id.* The Court opined that “[i]n contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available.” *Id.* at 800.

77. See, e.g., Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413, 449–50 (1993) (“The period of the early 1980’s [sic] marked the beginning of the relatively consistent practices, by the Supreme Court, of clearly distinguishing between content-based and content-neutral regulations of speech.”).

78. Although the majority in *Riley* never used the term strict scrutiny, Justice Rehnquist’s dissent classified the majority’s test as such. *Riley*, 487 U.S. at 810–11 (Rehnquist, J., dissenting) (“The Court concludes, after a lengthy discussion of the constitutionality of ‘compelled statements,’ that strict scrutiny should be applied and that the statute does not survive that scrutiny.”).

that the Court had used in *Munson*, and by implication, in *Schaumburg*.<sup>79</sup>

*Riley* added an additional wrinkle in its analysis of the disclosure provision. Having concluded that “[m]andating speech that a speaker would not otherwise make” rendered a regulation content-based,<sup>80</sup> *Riley* appeared to have announced that *any* disclosure provision would be subjected to exacting scrutiny. But Justice Brennan then cited two examples of compelled disclosures that would be constitutionally permissible—requiring financial disclosure reports<sup>81</sup> and requiring that a professional solicitor disclose his or her professional status.<sup>82</sup> The latter exception drew disagreement from Justice Scalia, who observed that it

represent[ed] a departure from our traditional understanding, embodied in the First Amendment, that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.<sup>83</sup>

#### D. Revisiting *Schaumburg*, *Munson*, and *Riley*

Not surprisingly, the federal appellate courts have split in their interpretations of *Schaumburg*, *Munson*, and *Riley*. The Eighth<sup>84</sup> and

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79. Compare *id.* at 789 (The Court used “exacting scrutiny” in *Munson*.) with *id.* at 798 (North Carolina’s content-based regulation is subject to “exacting First Amendment scrutiny.”).

80. *Id.* at 795.

81. *Id.* at 788. *Riley* noted that *Schaumburg* had observed that the government would have been free to require charities to file financial disclosure reports. *Id.* Leslie Espinoza asserts that *Schaumburg* took

an absolutist first amendment approach to fund-raising disclosure statutes, leaving no room for the Court to balance the potentially different regulatory interests in charitable solicitation as opposed to charitable advocacy. Backed into a corner, the Court issued an internally contradictory opinion on disclosure and left little opportunity for states to develop appropriate regulation.

Leslie G. Espinoza, *Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S. CAL. L. REV. 605, 612 (1991).

82. *Riley*, 487 U.S. at 799 n.11.

83. *Id.* at 804 (Scalia, J., concurring in part and concurring in judgment).

84. See *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591, 597 (8th Cir. 2005) (“Although the Supreme Court has not specified whether the *Schaumburg* test is an intermediate scrutiny review of a content-neutral regulation, we have interpreted it as such.”)

Tenth<sup>85</sup> Circuits have concluded that *Schaumburg* established a test of intermediate scrutiny for a content-neutral regulation. Conversely, the Third<sup>86</sup> and Eleventh<sup>87</sup> Circuits have cited *Schaumburg* for the modern strict scrutiny test. The Fourth Circuit has recently announced that “[i]t is unclear” whether the Court’s standard amounts to strict scrutiny or intermediate scrutiny.<sup>88</sup> The confusion is equally apparent in the trial courts.<sup>89</sup>

I turn now to the possible reasons for the Court’s confusing guidance in its charitable solicitation cases. *Schaumburg*’s difficulties begin with its failure to address content analysis and tiered scrutiny, even though both concepts were squarely before the Court. The Village of Schaumburg asserted in its reply brief that its ordinance should not face strict scrutiny because it was “[neutral] on its face and neutral in its

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(citing *Pryor*, 258 F.3d at 851); *Nat’l Fed. of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851, 854–55 (8th Cir. 2001) (comparing *Schaumburg* to *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). *But see* *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (noting that *Sable Comm’n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), quoted *Schaumburg* as part of its strict scrutiny formulation).

85. *See* *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000) (citing *Schaumburg* for intermediate scrutiny test of content-neutral regulation).

86. *See* *ACLU v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000) (citing *Schaumburg* for the proposition that “[a]s in all areas of constitutional strict scrutiny jurisprudence, the government must establish that the challenged statute is narrowly tailored to meet a compelling state interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech”) *vacated by* *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *see also* *United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 344 (3d Cir. 1992) (characterizing *Schaumburg* as having struck down “a content-based restriction on door-to-door solicitation because restriction was not sufficiently narrowly tailored”).

87. *See* *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1542 n.34 (11th Cir. 1993) (“We believe the same can be said with respect to *Village of Schaumburg* and the other strict scrutiny cases relied upon by the city.” (citation omitted)).

88. *Nat’l Fed. of the Blind v. FTC*, 420 F.3d 331, 338 n.2 (4th Cir. 2005). Curiously, the court concluded that “[r]egardless of the label, the substance of the test is clear.” *Id.* *Cf.* *Famine Relief Fund v. West Virginia*, 905 F.2d 747, 754 (4th Cir. 1990); *Telco Comm’n, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989). The Ninth Circuit has cited *Schaumburg* in addressing charitable solicitation regulation but has not explicitly characterized the case under content analysis or tiered scrutiny. *See* *Kreisner v. City of San Diego*, 1 F.3d 775, 788 (9th Cir. 1993) (*Schaumburg* and other cases hold that solicitation of charitable contributions is protected speech, and “restrictions on solicitation in traditional public forums must be narrowly drawn to serve a compelling government interest.”).

89. *See, e.g.,* *Pub. Citizen, Inc. v. Pinellas County*, 321 F. Supp. 2d 1275, 1296 (M.D. Fla. 2004) (citing *Schaumburg* as intermediate scrutiny test); *Fraternal Order of Police v. Stenehjem*, 287 F. Supp. 2d 1023, 1029, 1030 (D.N.D. 2003) (relying on *Schaumburg* and asserting both that “[t]he statute does not have to be the least restrictive means of regulation” and that the restriction “must withstand strict scrutiny”); *Tenn. Law Enforcement Youth Found., Inc. v. Millsaps*, No. 89-2762-G, 1991 WL 523878, at \*5 (W.D. Tenn. Sept. 3, 1991) (citing *Schaumburg* as strict scrutiny test).

administration.”<sup>90</sup> The Village cited *Virginia Board of Pharmacy* for the proposition that “[r]estrictions on the time, place or manner of expression are permissible provided that ‘they are imposed without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.’”<sup>91</sup> Conversely, the nonprofit group Citizens for a Better Environment contended that “[o]nly a narrowly-drawn ordinance that serves a compelling state interest with narrow specificity and is closely drawn to avoid unnecessary abridgment can survive the exacting scrutiny necessitated by a state-imposed restriction on freedom of speech.”<sup>92</sup> In essence, then, the parties asked the Court to decide whether the relevant standard of review was strict or intermediate scrutiny. But rather than employing the standards briefed by the parties, the Court ignored content analysis altogether and sidestepped the debate over whether strict scrutiny was warranted.

The Court’s lack of clarity may be partially attributable to the views about tiered scrutiny held by the Justices central to the development of its approach to charitable solicitation. Four Justices were in the majorities of all three major cases: Justice White (the author of *Schaumburg*), Justice Blackmun (who authored *Munson*), Justice Brennan (who authored *Riley*), and Justice Marshall.<sup>93</sup> Two years before *Schaumburg*, these same four Justices had expressed their reservations about tiered scrutiny in the landmark affirmative action

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90. Petitioner’s Reply Brief at 6, *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (No. 78-1335).

91. *Id.* at 12 (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

92. Respondents’ Brief at 14, *Schaumburg*, 444 U.S. 620 (No. 78-1335) (internal quotations omitted). The Village countered that “[t]he cases cited by the respondents in their brief simply do not lend any credence to the concept that an ordinance regulating the solicitation of funds is subject to strict scrutiny.” Petitioner’s Reply Brief, *supra* note 90, at 10.

93. *Schaumburg* was an 8-1 decision in 1980, with only Justice Rehnquist dissenting. Justice O’Connor replaced Justice Stewart in 1981. *Munson* was decided in 1984 by a 5-4 margin, with Justice Stevens concurring and Chief Justice Burger and Justices Powell and O’Connor joining Justice Rehnquist in dissent. Justice Burger’s departure in 1986 resulted in Justice Rehnquist’s elevation to Chief Justice and Justice Scalia’s introduction to the Court. The following year, Justice Kennedy replaced Justice Powell. In 1988, *Riley* was a more fractured decision with Justices White, Marshall, Blackmun, and Kennedy fully joining Justice Brennan’s majority opinion. Although Justice Stevens joined the majority in *Schaumburg* and *Munson* and most of the Court’s opinion in *Riley*, his concurrence in *Munson* distinguishes him from the other four Justices in all three majorities.

case *Regents of University of California v. Bakke*.<sup>94</sup> In their joint partial concurrence, the Justices found it “necessary to define with precision the meaning of that inexact term, ‘strict scrutiny.’”<sup>95</sup> They contended that “a government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”<sup>96</sup> But wary of endorsing tiered scrutiny, the Justices made clear that “[w]e do not pause to debate whether our cases establish a ‘two-tier’ analysis, a ‘sliding scale’ analysis, or something else altogether” because “[i]t is enough for present purposes that strict scrutiny is applied at least in some cases.”<sup>97</sup>

The following year, Justice Blackmun distanced himself from his qualified recognition of strict scrutiny in *Bakke*. Concurring in *Illinois State Board of Elections v. Socialist Workers Party*,<sup>98</sup> Justice Blackmun lamented the Court’s ongoing efforts to clarify strict scrutiny:

I have never been able fully to appreciate just what a “compelling state interest” is. . . . And, for me, “least drastic means” is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less “drastic” or a little less “restrictive” in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court’s indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional

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94. 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, & Blackmun, J.J., concurring in the judgment in part and dissenting in part).

95. *Id.*

96. *Id.*

97. *Id.* at 357 n.30. Two months prior to *Bakke*, Justice White, joined by Justices Marshall and Brennan, had derided any attempt by the Court to recalculate a legislative balancing of interests. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting) (“What is inexplicable, is for the Court to substitute its judgment as to the proper balance for that of Massachusetts where the State has passed legislation reasonably designed to further First Amendment interests in the context of the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest.”).

98. 440 U.S. 173 (1979).

analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them.<sup>99</sup>

Justice Blackmun, at least, had serious reservations about the application of strict scrutiny to constitutional matters.

Notwithstanding the apparent hesitancy of some members of the Court to endorse tiered scrutiny, much of the confusion in *Schaumburg* was likely genuine rather than obscurantist. The Court had not yet settled on a consistent application of either content analysis or tiered scrutiny in First Amendment cases when it decided *Schaumburg*, and the analytical difficulties posed by these emerging concepts were compounded by the Court's newfound acceptance of commercial speech. *Virginia Board of Pharmacy* announced that commercial speech would receive some kind of protection, ostensibly something more than the rational basis scrutiny that the Court had previously applied to commercial speech regulation.<sup>100</sup> But *Ohralik v. Ohio State Bar Ass'n* made clear that commercial speech would not receive the same protection as other protected speech.<sup>101</sup> *Schaumburg* introduced another complexity by insisting that charitable solicitation was not simply commercial speech because it "[did] more than inform private economic decisions and [was] not primarily concerned with providing information about the characteristics and costs of goods and services."<sup>102</sup> But nor was there any indication that charitable solicitation was core political speech. Taken together, *Schaumburg* and the commercial speech cases meant that commercial speech received something more than rational basis scrutiny and charitable solicitation received something more than the protection afforded commercial speech but less than that given to core political speech.<sup>103</sup> This hierarchy proved difficult to keep straight.

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99. *Id.* at 188–89 (Blackmun, J., concurring).

100. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 779 (1976).

101. 436 U.S. 447, 455–56 (1978).

102. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

103. The confusion caused by these concepts was evident in footnote 7 of the Court's opinion in *Schaumburg*, which noted that

[t]o the extent that any of the Court's past decisions . . . hold or indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law. For the purposes of applying the overbreadth doctrine, however, it remains relevant to distinguish between commercial and noncommercial speech.

The emerging commercial speech doctrine also complicated content analysis. By the time the Court decided *Schaumburg*, it was clear that a content-based restriction of protected speech received strict scrutiny and a content-neutral restriction received something less than strict scrutiny. But the Court's uncertainty of how to address commercial speech and charitable solicitation left unclear what level of scrutiny would be applied to content-neutral regulations of those forms of speech. When *Schaumburg* signaled that charitable solicitation was "fully protected speech," it did so to distinguish charitable solicitation from commercial solicitation.<sup>104</sup> It did not mean that regulation of charitable solicitation would always be subject to strict scrutiny because content analysis required varied levels of scrutiny for all forms of protected speech, even core political speech.<sup>105</sup> *Schaumburg*'s avoidance of content analysis left unclear whether charitable solicitation always merited the same degree of protection as other core speech, or whether, like commercial speech, it sometimes fell into an ambiguous middle category.<sup>106</sup>

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*Id.* at 632 n.7 (citations omitted). The Court did not explain why distinguishing between commercial and noncommercial speech remained relevant in the context of the overbreadth doctrine. Three years earlier, in *Bates v. State Bar of Arizona*, the Court had cryptically asserted that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." 433 U.S. 350, 380 (1977). The only support the Court offered for this assertion was that "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* at 381.

104. The distinction was by no means nontrivial. Tribe has highlighted the importance of "maintaining some residual distinctions between commercial and ideological expression on the ground that the former is valued only for the 'facts' it conveys while the latter 'is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man.'" TRIBE, *supra* note 9, at 655 (quoting *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 779 (1976) (Stewart, J., concurring)). Writing two years prior to *Schaumburg*, Tribe cautioned that distinguishing between commercial speech and other kinds of speech "may be needed if constitutional doctrine is to recognize the 'commonsense differences between speech that does no more than propose a commercial transaction and other varieties.'" *Id.* (quoting *Va. Bd. of Pharmacy*, 425 U.S. at 771 n.24). Ten years later, in the second edition of his treatise, Tribe lamented that "the Court has repeatedly struggled with defining the differences between commercial and non-commercial speech, notwithstanding its offhand announcement that the difference between the two is based on 'commonsense.'" LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 894 (2d ed. 1988).

105. *Cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 54 (1980) ("The 'absolutely protected' character of the message cannot insulate [all] forms of expression from regulation: context—the threat the particular expressive event poses—obviously is relevant and sometimes will be dispositive.").

106. *Cf.* KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 1159 (15th ed. 2004) ("[C]ommercial speech continues to stand as the lone formal exception to the

Unable or unwilling to synthesize the concepts before it, the Court failed to articulate a workable framework in *Schaumburg*. Four years later, the Court's significant reliance on *Schaumburg* in *Munson* prevented it from drawing upon more cogent developments elsewhere in its First Amendment jurisprudence. This tunnel vision is particularly evident when *Munson* is compared to another First Amendment case decided just forty-two days earlier, *Members of City Council v. Taxpayers for Vincent*.<sup>107</sup> *Vincent* involved a Los Angeles ordinance that prohibited the posting of signs on public property.<sup>108</sup> Supporters of a local political candidate contracted with a political sign service company to create and post campaign signs.<sup>109</sup> After the signs were duly removed by the City, the supporters and the sign company sought an injunction.<sup>110</sup> The Court determined that the ordinance was neutral as to viewpoint and then cited *O'Brien* for "the appropriate framework for reviewing a viewpoint-neutral regulation."<sup>111</sup> The Court concluded that the Los Angeles ordinance withstood *O'Brien*'s test and left open adequate alternative means of communication.<sup>112</sup> Justice Brennan, joined by Justices Marshall and Blackmun, dissented, explaining that:

The Court's first task is to determine whether the ordinance is aimed at suppressing the content of speech, and, if it is, whether a compelling state interest justifies the suppression [citing *Consolidated Edison* and *Mosley*]. If the restriction is content-neutral, the court's task is to determine (1) whether the governmental objective advanced by the restriction is substantial, and (2) whether the restriction imposed on speech is no greater than is essential to further that objective. Unless both conditions are met the restriction must be invalidated.<sup>113</sup>

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two-level approach to speech set forth in *Chaplinsky* . . . [I]t enjoys First Amendment protection, but not as much First Amendment protection as other speech.").

107. 466 U.S. 789 (1984).

108. *Id.* at 791.

109. *Id.* at 792.

110. *Id.* at 793.

111. *Id.* at 804.

112. *Id.* at 812.

113. *Id.* at 821 (Brennan, J., dissenting).

Disagreeing with the Court's intimation that the Los Angeles ordinance left open ample means of communication like handbill distribution,<sup>114</sup> Justice Brennan wrote that:

The message on a posted sign remains to be seen by passersby as long as it is posted, while a handbill is typically read by a single reader and discarded. Thus, not only must handbills be printed in large quantity, but many hours must be spent distributing them. The average cost of communicating by handbill is therefore likely to be far higher than the average cost of communicating by poster. For that reason, signs posted on public property are doubtless "essential to the poorly financed causes of little people,"<sup>115</sup> and their prohibition constitutes a total ban on an important medium of communication. Because the City has completely banned the use of this particular medium of communication, and because, given the circumstances, there are no equivalent alternative media that provide an adequate substitute, the Court must examine with particular care the justifications that the City proffers for its ban.<sup>116</sup>

Justices Brennan, Marshall, and Blackmun thus highlighted three important factors in analyzing a speech restriction: (1) the need to begin with content analysis; (2) the appropriate test for reviewing a content-neutral regulation; and (3) the importance of considering the potentially disparate effects of a regulation on "the poorly financed causes of little people."<sup>117</sup> One month later, these same three Justices joined the narrow majority in *Munson* in an opinion authored by Justice Blackmun. Yet none of the doctrinal or equitable considerations from the *Vincent* dissent surfaced in *Munson*.<sup>118</sup> Four years later, *Riley* alluded to disparate effects and acknowledged the need for content-analysis but did little else to clarify the ambiguities in *Schaumburg* and *Munson*.

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114. *Id.* at 812.

115. Justice Brennan quoted *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (invalidating a city ordinance that restricted door-to-door distributions of circulars).

116. *Vincent*, 466 U.S. at 820 (citations omitted).

117. *Id.* at 820-21.

118. See *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

*E. Subsequent Cases*

Less than a year after *Riley*, the Court issued its decision in *Sable Communications of California, Inc. v. FCC*, striking down under strict scrutiny review a ban on “dial-a-porn” telephone messages that were indecent but not obscene.<sup>119</sup> *Sable* is interesting in the present context not for its substantive analysis but for its formulation of strict scrutiny. Justice White observed that:

The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. . . . [T]o withstand constitutional scrutiny, “it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.” [citing *Schaumburg*]. It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.<sup>120</sup>

Because Justice White had authored *Schaumburg*, his citation to that case as part of his strict scrutiny analysis in *Sable* added further support to the view that *Riley*’s “exacting scrutiny” (derived from *Schaumburg*) was actually strict scrutiny.

The Court’s only substantive post-*Riley* discussion of *Schaumburg*’s charitable solicitation principles came one year after *Sable* in *United States v. Kokinda*.<sup>121</sup> *Kokinda* involved a challenge to a Postal Service

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119. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

120. *Id.* at 126.

121. 497 U.S. 720 (1990). Other than *Sable* and *Kokinda*, the Court has cited *Schaumburg* only seven times since *Riley*: *Davenport v. Washington Education Ass’n*, 127 S. Ct. 2372, 2382 (2007) (citing *Schaumburg* for overbreadth doctrine); *McConnell v. Federal Election Commission*, 540 U.S. 93, 140 (2003); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (overbreadth doctrine); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 611 (2003); *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 163 (2002) (citing *Schaumburg* for principle that “our cases involving nonreligious speech” show that “the Jehovah’s Witnesses are not the only ‘little people’ who face the risk of silencing by regulations like the Village’s”); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677–78 (1992); and *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989) (overbreadth doctrine). Of these, only *Madigan* discusses *Schaumburg* in detail (and it leaves unaltered the Court’s approach to charitable solicitation). 538 U.S. at 612–17. *Madigan* involved a fraud prosecution of a professional charitable fundraiser. *Id.* at 617. The Court made clear that its “opinions in *Schaumburg*, *Munson*, and *Riley* took care to

regulation that permitted charitable advocacy but not charitable solicitation.<sup>122</sup> A plurality of the Court began its analysis by citing *Schaumburg* and *Riley* for the proposition that “[s]olicitation is a recognized form of speech protected by the First Amendment.”<sup>123</sup> The plurality continued that “[u]nder our First Amendment jurisprudence, we must determine the level of scrutiny that applies to the regulation of protected speech at issue.”<sup>124</sup> Applying forum analysis<sup>125</sup> (which had not been at issue in *Schaumburg*, *Munson*, or *Riley*) and content analysis, the plurality concluded that the content-neutral Postal Service regulation governed a nonpublic forum and upheld the constitutionality of the regulation under rational basis scrutiny.<sup>126</sup>

Although the Justices disagreed on the application of forum analysis,<sup>127</sup> *Kokinda* is most interesting for its parsing of solicitation and advocacy. Joined by Justice Kennedy, the plurality approved of the regulation’s content-neutral distinction “because solicitation is inherently disruptive of the Postal Service’s business.”<sup>128</sup> In *Schaumburg*, the Court appeared to have foreclosed such an easy separation of solicitation and advocacy, having pronounced 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.”<sup>129</sup> *Kokinda*’s distinction between solicitation and advocacy is also tenuous because it appears to discriminate based on content. *Mosley* had indicated that regulations making subject matter distinctions were content-based, a view that the Court reinforced five months after *Schaumburg* in *Consolidated Edison Co. of New York v. Public Service Commission of New York*.<sup>130</sup> In light of these cases, the *Kokinda* plurality’s reasoning is

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leave a corridor open for fraud actions to guard the public against false or misleading charitable solicitations.” *Id.*

122. *Kokinda*, 497 U.S. at 722–23.

123. *Id.* at 725.

124. *Id.*

125. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–03 (1974).

126. *Kokinda*, 497 U.S. at 732–33.

127. See, e.g., *id.* at 741 (Brennan, J., dissenting).

128. *Id.* at 732 (plurality opinion). The issue of content analysis provoked an extended exchange between the plurality and the dissent. See *id.* at 733–36; *id.* at 753–54, 760 (Brennan, J., dissenting).

129. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

130. 447 U.S. 530, 536 (1980) (“[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.”). Concurring in the judgment, Justice Stevens questioned this assertion, arguing that

questionable. It is unlikely, for example, that a regulation excluding religious advocacy would have been subjected to rational basis scrutiny simply because the Postal Service believed that religious advocacy was more disruptive than other forms of advocacy.

#### IV. A NEW TEST FOR CHARITABLE SOLICITATION

I have argued above that the Court's failure to incorporate the concepts of content analysis and tiered scrutiny in *Schaumburg*, *Munson*, and *Riley* and the ambiguous relationship between charitable solicitation and commercial speech have produced an ill-defined test for reviewing charitable solicitation regulation. The Court exacerbated these problems with its decisions in *Sable* and *Kokinda*, which modified its approach to charitable solicitation with the seemingly contradictory suggestions that: (1) *Schaumburg* had applied strict scrutiny to a regulation governing charitable solicitation; and (2) charitable solicitation was less protected than *Schaumburg* had implied.<sup>131</sup>

The best way to bring a more coherent approach to judicial review of charitable solicitation regulation is to reconcile *Schaumburg* with current understandings of content analysis, tiered scrutiny, and commercial speech. In doing so, we should also take care to recognize the value of charitable solicitation in a democratic polity, the kind of normative concern that can too easily be lost in rigid application of doctrinal formulas. With these doctrinal and normative concerns in

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every lawyer who has read . . . our cases upholding various restrictions on speech with specific reference to subject matter must recognize the hyperbole in [*Mosley's*] dictum: 'But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'

*Id.* at 545 (Stevens, J., concurring in the judgment). Stone's 1978 article intimated that subject matter restrictions were in some "intermediate position" between content-based and content-neutral restrictions and might be "properly subject to a more variable sort of analysis." Stone, *supra* note 6, at 100; *see id.* at 83. More recently, the Court has been less than clear about subject matter distinctions. Compare *Hill v. Colorado*, 530 U.S. 703, 723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation") with *id.* at 724 (A regulation that distinguishes between speech activities likely to have the consequences against which it seeks to protect and speech activities unlikely to have those consequences "cannot be struck down for failure to maintain 'content neutrality.'").

131. One way to reconcile these two developments is to characterize *Schaumburg* as a strict scrutiny test of a content-based regulation, which would mean that a content-neutral regulation like that at issue in *Kokinda* would be subject to a lesser degree of scrutiny. *Schaumburg's* lack of any content analysis makes this characterization difficult to sustain.

mind, I argue for a more flexible approach to charitable solicitation regulation rooted in a balancing of interests. I turn now to the project of constructing that approach.

*A. The First Amendment Value of Charitable Solicitation*

I base my approach to charitable solicitation regulation on a “civic conception of free speech” that pays particular attention to forms of speech that advance self-governance and democratic discourse.<sup>132</sup> From this framework, I suggest that regulation of charitable solicitation should be carefully scrutinized for three reasons: (1) the link between charitable solicitation and advocacy; (2) the inequalities among different kinds of charitable organizations; and (3) the disparate effects of content-neutral regulation on smaller and less popular charitable organizations.

1. Solicitation and Advocacy

One of the challenges of a civic conception of the First Amendment is brought to light when the government regulates speech in order to protect the privacy interests of an unwilling listener.<sup>133</sup> Two seemingly incommensurable interests—speech and privacy—are pitted against each other, and we must consider what factors should be considered in striking an appropriate balance between these interests. Settled doctrine points to the location in which the speech occurs as one factor to consider.<sup>134</sup> A more civic-minded approach might also consider the content of the speech—the degree to which the speech contributes to the democratic project. But a civic approach goes beyond even this instrumental value. As Robert Post has suggested:

To include speech within public discourse is to signify that it is constitutionally valued not merely for the

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132. SUNSTEIN, *supra* note 5, at 28. Sunstein links this civic conception to Justice Louis Brandeis’s famous concurrence in *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Sunstein describes Justice Brandeis’s theory as rooted in “classical republican thought, with its emphasis on political virtue, on public-spiritedness, on public deliberation, and on the relationship between character and citizenship.” SUNSTEIN, *supra* note 5, at 27.

133. The privacy interests of an individual were famously advanced by Justice Brandeis and his law partner, Sam Warren. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (defining privacy as the right “to be let alone”).

134. For example, the Court has observed that the government’s interest “in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society,” and that “[o]ne important aspect of residential privacy is protection of the unwilling listener.” *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

contribution it may make to public discussion, but also, intrinsically, for the engagement it represents in the public life of a nation. A democracy cannot flourish unless its citizens actively participate in the formation of its public opinion. Such participation is “precious” and to be encouraged for its own sake.<sup>135</sup>

The civic importance of charitable solicitation stems partly from the link between solicitation and advocacy. Even the act of solicitation can itself be a form of advocacy. In *Schaumburg*, the Court stated 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 . . . without solicitation the flow of such information and advocacy would likely cease.”<sup>136</sup> Solicitation is also linked to advocacy because solicitation may fund speech undertaken on a separate occasion. Justice Scalia alluded to this in *McConnell v. Federal Election Commission*: “an attack upon the funding of speech is an attack upon speech itself.”<sup>137</sup>

These observations hold not only for charitable solicitation but also for other forms of solicitation, including commercial solicitation and panhandling. Is there a principled distinction between these latter forms of solicitation—neither of which receives elevated First Amendment

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135. Post, *supra* note 41, at 20. Post contends that the Court’s charitable solicitation cases hold “that charitable solicitations are part of public discourse rather than commercial speech.” *Id.* at 20 n.86.

136. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980); *see also Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 798 (1988) (criticizing the state’s assumption that “the charity derive[d] no benefit from funds collected but not turned over to it” because “where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself”). The Court provided an example of an organization whose advocacy interests are directly advanced by solicitation in *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 622 n.11 (2003) (“Telephone solicitors retained by [Mothers Against Drunk Driving] ‘reach millions of people a year, and each call educates the public about the tragedy of drunk driving, provides statistics and asks the customer to always designate a sober driver.’”).

137. 540 U.S. 93, 253 (2003) (Scalia, J., concurring in part and dissenting in part). Justice Scalia cited *Schaumburg* and several other cases to support his contention. *See also* *TRIBE*, *supra* note 104, at 829–30 (“Solicitation of contributions, wherever it takes place” is an activity that has “historically been recognized as inextricably intertwined with speech or petition” and its regulation “must therefore be assessed with particular sensitivity to the possible constriction of that breathing space which freedom of speech requires in the society contemplated by the first amendment.”); Gottlieb, *supra* note 10, at 45 (“Central to any meaningful right of speech are the resources necessary to exercise the right.”).

protection—and nonfraudulent charitable solicitation?<sup>138</sup> In *Young v. New York City Transit Authority*, the Second Circuit suggested that panhandling failed to implicate core First Amendment values:

The only message that we are able to [discern] as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that [subway] passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment. We certainly do not consider it as a “means indispensable to the discovery and spread of political truth.”<sup>139</sup>

The Supreme Court expressed a similar view about commercial speech in *Ohralik v. Ohio State Bar Ass’n*, observing that commercial speech was afforded “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”<sup>140</sup>

These distinctions are not impervious to challenge. *Young* was written over a vigorous dissent from Judge Meskill, who noted that the panhandler plaintiffs had stated in affidavits that “they often speak with potential donors about subjects such as the problems of the homeless and poor, the perceived inefficiency of the social service system in New York and the dangerous nature of the public shelters in which they sometimes sleep.”<sup>141</sup> Jed Rubenfeld has similarly posited that begging is political speech “from a certain, perfectly plausible point of view sounding in political theory, sociology, and so on.”<sup>142</sup> But Sunstein offers a different perspective:

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138. The state can always regulate fraudulent charitable solicitation. See *Madigan*, 538 U.S. at 612 (“Like other forms of public deception, fraudulent charitable solicitation is unprotected speech.”).

139. 903 F.2d 146, 154 (2d Cir. 1990).

140. 436 U.S. 447, 456 (1978).

141. *Young*, 903 F.2d at 165 (Meskill, J., concurring in part and dissenting in part).

142. Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 801 (2001); see also Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 899 (1991) (“The beggar may describe in her plea why she has been forced to beg, and the begging may lead to a discussion of larger issues. But even if the beggar conveys nothing more than that she wants the listener to give her money, this information contributes to the collective search for truth.”).

[I]t is plausible to think that almost all speech is political in the sense that it relates in some way to the existing social and political structure. Commercial speech and obscenity are examples. But if some people understand the speech in question to be political, it cannot follow that the speech qualifies as such for constitutional purposes, without treating almost all speech as political.<sup>143</sup>

Elsewhere, Sunstein observes that the absence of constitutional protection for some forms of speech “owes at least something to the common-sense judgment that different values are placed on different categories of speech.”<sup>144</sup>

Although my contention that there is a principled distinction between charitable and other forms of solicitation is contestable, it is no less plausible than any line-drawing short of absolutism.<sup>145</sup> Moreover, my distinction tracks similar demarcations made elsewhere, notably, in the federal tax code, which extends favorable benefits to many charitable organizations but not to commercial entities or beggars.<sup>146</sup>

## 2. The Distinctions Within Charitable Solicitation

As a practical matter, charities compete for limited financial resources with unequal ability. As the umbrella organization Independent Sector argued in its amicus brief in *Riley*: “[s]olicitations and communications about the substance of a charity’s work, especially when oral, are inherently fragile—each contact involves competition for

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143. SUNSTEIN, *supra* note 5, at 132.

144. *Id.* at 125.

145. Justice Brandeis, for example, argued that the government could abrogate the right of free speech “in order to protect the state from destruction or from serious injury, political, economic or moral.” *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). Justice Brandeis provides a partial answer as to when the protection of the state might justify a restraint on speech: The evil should be “so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.” *Id.* at 377. This, of course, only bounds the indeterminacy; it does not eliminate it. (What is an emergency? Who decides imminence? What constitutes a falsehood, and by whose standards?) *Cf.* SUNSTEIN, *supra* note 5, at 149 (“There is no way to operate a system of free expression without drawing lines.”).

146. *See* 26 U.S.C. § 501(c)(1)–(28) (2006) (containing extensive definitions as to which entities qualify as “exempt organizations”).

the citizen's limited time, attention and money."<sup>147</sup> Leslie Espinoza makes a similar contention, noting that "at least theoretically, there is to some extent a limited 'pool' of potential charitable contributions."<sup>148</sup> According to Espinoza, this constraint became visible in the years following World War II, when "[e]xponential growth in communication and the mechanization of solicitation, both through direct mail appeals and telephone appeals, opened new opportunities to reach donors and increased competition for contributions."<sup>149</sup> Because increased competition "lowered the revenues of established charities,"<sup>150</sup> these charities "consciously promoted" fund-raising limits "to restrict diversity and competitiveness within the charitable community."<sup>151</sup> Under Espinoza's thesis, the states, persuaded by larger established charities to enact greater regulation, actually diminished the diversity of viewpoints in the charitable sector.

Espinoza's perspective is consistent with the Court's observation that regulation of professional charitable solicitation disproportionately affects small or unpopular charities.<sup>152</sup> These charities include law enforcement foundations, veterans groups, and social advocacy groups whose purposes are unmistakably among those of core political speech: endorsing legislation, promoting messages and programs in the interest of public welfare and safety, and furthering the causes of marginalized groups. Regulations that vanquish these voices from the public square, whether directly or indirectly, endanger "those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained."<sup>153</sup>

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147. Brief for Independent Sector et al. as *Amici Curiae* supporting Appellees, *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) (No. 87-328). ("Amici include advocacy organizations (of all political stripes), who also must overcome many citizens' discomfort with troubling issues and viewpoints. Accordingly, any compelled disclosure, especially when on a topic not chosen by the organization, tends to chill free speech by diverting the citizen's attention and undercutting the good will that links solicitor and citizen.")

148. Espinoza, *supra* note 81, at 654.

149. *Id.* at 635.

150. *Id.* at 654.

151. *Id.* at 610. Espinoza highlights the protectionist bias of established charities that was evident in a report issued by an ad hoc committee of academics and representatives from corporations and nonprofit organizations. *Id.* at 650. This report advocated that service-oriented charities would be better off with "a smaller number and a greater joint effort." *Id.* at 651 (quoting VOLUNTARY HEALTH AND WELFARE AGENCIES IN THE UNITED STATES: AN EXPLORATORY STUDY BY AN AD HOC CITIZENS COMMITTEE 30 (R. Hamlin ed., 1961)).

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

153. Post, *supra* note 41, at 7.

### 3. The Disparate Effects of Content-Neutral Regulation

Regulation of charitable solicitation will seldom if ever be content-based under the current test for content analysis articulated in *Ward v. Rock Against Racism*.<sup>154</sup> The government will rarely attempt to regulate charitable solicitation out of disagreement with the message it conveys, but will typically do so in order to advance government interests unrelated to the content of expression such as public safety, fraud prevention, or residential privacy.<sup>155</sup> Accordingly, these regulations will be subject to less than strict scrutiny.<sup>156</sup> But putative distinctions between content-neutral and content-based regulations threaten diversity in the charitable sector because, as Kenneth Karst has observed, “regulations that are formally neutral as to speech content” may result in “*de facto* content discrimination.”<sup>157</sup> Justice Marshall, joined by Justice Brennan, expressed a similar concern in his dissent in *Clark v. Community for Creative Non-Violence*, decided three days before *Munson*.

[T]he Court has dramatically lowered its scrutiny of governmental regulations once it has determined that [time, place, and manner] regulations are content-neutral. The result has been the creation of a two-tiered approach to First Amendment cases: while regulations that turn on the content of the expression are

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154. 491 U.S. 781, 791 (1989).

155. Government regulation of professional charitable solicitation may take the form of subject-matter or speaker-based restrictions, but will seldom be viewpoint-discriminatory.

156. Of course, a regulation deemed to be content-based under *Ward* would be subject to strict scrutiny and would likely be unsustainable.

157. Karst, *supra* note 13, at 35, 37. Karst viewed this kind of discrimination as “presumptively invalid” under the First Amendment’s “equality principle.” *Id.* at 37. For Karst, “[t]he principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the ‘central meaning of the First Amendment.’” *Id.* at 21 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964)). A showing “that a formally neutral law has discriminatory effect deserves great weight in persuading a court to look closely at the necessity for the regulation.” *Id.* at 39. For more on the concept of *de facto* differential effects of content-neutral regulations, see SUNSTEIN, *supra* note 5, at 171 (Some content-neutral restrictions “may foreclose important expressive outlets and have profound content-differential effects.”); TRIBE, *supra* note 9, at 682–83 (“Even a wholly neutral government regulation or policy, aimed entirely at harms unconnected with the *content* of any communication, may be invalid if it leaves too little breathing space for communicative activity, or leaves people with too little access to channels of communication, whether as would-be speakers or would-be listeners.” (emphasis in original)); Stone, *Content Regulation and the First Amendment*, *supra* note 38, at 221 (There can be “*de facto* content-differential effects of content-neutral restrictions.”).

subjected to a strict form of judicial review, regulations that are aimed at matters other than expression receive only a minimal level of scrutiny. The minimal scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection. By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity.<sup>158</sup>

Justice Marshall elaborated in a footnote:

[A] content-neutral regulation does not necessarily fall with random or equal force upon different groups or different points of view. A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse.<sup>159</sup>

The problem with contemporary scrutiny of content-neutral regulations is that it focuses on the legitimacy of the government's action but ignores the impact of the regulation on the speaker. As Stephen Gottlieb has argued, the Court's adoption of neutrality "shifted its gaze" from the behavior of the speaker which meant that "many problems, such as . . . limitations on access to information and access to opportunities for political broadcast and inexpensive speech, [became] relatively less visible."<sup>160</sup> Once the perspective shifted from the behavior of the speaker to the behavior of government, "governmental interests no longer had to be particularly weighty; they only had to be pure."<sup>161</sup>

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158. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 312–13 (1984) (Marshall, J., dissenting).

159. *Id.* at 313 n.14; *see also* Stone, *Content-Neutral Restrictions*, *supra* note 38, at 57 ("[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others. This is a central first amendment concern: to the extent that content-neutral restrictions actually have this effect, they necessarily dampen the search for truth, impede meaningful participation in self-governance, and frustrate individual self-fulfillment."); *cf.* Stone, *Content Regulation and the First Amendment*, *supra* note 38, at 192 n.5.

160. Gottlieb, *supra* note 10, at 34.

161. *Id.* at 36.

In the area of charitable solicitation, the more burdensome regulations usually threaten less established charities. The reason for this inverse relationship is unsurprising: large charities often have either an established donor base or sufficient in-house employees or volunteers to conduct solicitations; small or unpopular charities, particularly those without a donor base or name recognition, often have to undergo the “necessary evil” of relying on professional charitable solicitors.<sup>162</sup> The Supreme Court has also recognized this reality, noting that some disfavored methods of solicitation are “essential to the poorly financed causes of little people”<sup>163</sup> and that “small or unpopular charities” must “usually rely on professional fundraisers.”<sup>164</sup> The disparate effects of regulating charitable solicitation thus endanger the very speakers that the First Amendment should most staunchly protect. A civic conception of the First Amendment requires scrutiny of even a content-neutral regulation to ensure that any disparate effects are considered in light of the democratic project at stake.

### B. *The Need for Balancing*

Kathleen Sullivan has observed that “[t]he suspension of categorical reasoning in favor of [intermediate scrutiny] typically comes about from a crisis in analogical reasoning” when “[a] set of cases comes along that just can’t be steered readily onto the strict scrutiny or the rationality track.”<sup>165</sup> *Schaumburg* and its progeny fall within Sullivan’s observation.<sup>166</sup> As a practical matter, strict scrutiny of charitable solicitation regulation is implausible under the Court’s current framework for content analysis because a regulation will almost never

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162. See Note, *Developments in the Law—Nonprofit Corporations* (pt. 4), 105 HARV. L. REV. 1634, 1635 (1992).

163. *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

164. *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 799 (1988).

165. Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297–98 (1992) (“‘Intermediate scrutiny,’ unlike the poles of the two-tier system, is an overtly balancing mode. . . . Where intermediate scrutiny governs, the outcome is no longer foreordained at the threshold. Instead of winning always or never, the government may sometimes win or sometimes lose—it all depends.”); see also *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., dissenting) (“We sometimes make . . . ‘balancing’ judgments in determining how far the needs of the State can intrude upon the liberties of the individual, but that is of the essence of the courts’ function as the nonpolitical branch.” (citation omitted)). *But cf.* TRIBE, *supra* note 9, at 583 (Strict scrutiny also involves a kind of balancing.)

166. Sullivan also points out that balancing has been vituperated by both liberal and conservative jurists in different political contexts. Sullivan, *supra* note 165, at 316–17.

be aimed at the content of the charitable message itself.<sup>167</sup> More substantively, strict scrutiny could hinder the state from protecting important interests like fraud prevention and residential privacy. Rational basis scrutiny, on the other hand, fails to account for the fundamental speech interests at stake in charitable solicitation.<sup>168</sup> Balancing, as an alternative, “tends to make the articulation and comparison of competing rights and interests more explicit.”<sup>169</sup> A carefully constructed balancing test—despite the risk inherent in the discretion it leaves to individual judges—may be preferable to either of the more rigid alternatives of strict or rational basis scrutiny.<sup>170</sup>

### C. Formulating a New Test

A judicial test for the regulation of charitable solicitation should account for the concerns identified above. It should also reflect the principles of content analysis and tiered scrutiny now ensconced in First Amendment law. I turn now to constructing such a test, using as a starting point the Eighth Circuit’s decision in *National Federation of the Blind of Arkansas, Inc. v. Pryor*.<sup>171</sup>

*Pryor* involved a challenge to an Arkansas statute that required a telephone charitable solicitor to end the solicitation when requested to do so by the recipient of the call.<sup>172</sup> After examining *Schaumburg* and *Ward*, the Eighth Circuit noted that the standards enunciated in those cases were “obviously very similar.”<sup>173</sup> Without explicitly announcing its

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167. Even regulations that distinguish between professional charitable solicitors and in-house solicitors are at most speaker-based restrictions, which “are not always considered the practical equivalent of content restrictions, so long as the ground on which speakers are classified can be described as related to some aspect of their status independent of their beliefs or points of view.” SULLIVAN & GUNTHER, *supra* note 106, at 1199. Similarly, regulations restricting charitable solicitation as a whole are at most subject matter restrictions, a classification that might be subject to “a more variable sort of analysis.” Stone, *supra* note 6, at 100.

168. See Espinoza, *supra* note 81, at 612.

169. Sullivan, *supra* note 165, at 301.

170. Ely observed that “balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with the relative confidence or paranoia of the age in which they are doing it—and we must build barriers as secure as words are able to make them.” Ely, *supra* note 18, at 1501. Ely was writing specifically about regulations that proscribe messages because they are dangerous, and although my invocation of his words decontextualizes the quote, the abstracted principle retains its importance.

171. 258 F.3d 851 (8th Cir. 2001).

172. *Id.* at 854.

173. *Id.* at 855.

own test, the court reviewed: (1) whether the state had a legitimate interest; (2) whether the interest was significantly furthered by a regulation narrowly tailored to meet that interest; and (3) whether the regulation substantially limited charitable solicitation.<sup>174</sup> These principles may be reformulated as follows:

A content-neutral regulation of charitable solicitation will be sustained if the regulation furthers a legitimate interest and the interest is significantly furthered by a narrowly tailored regulation that does not substantially limit charitable solicitation.<sup>175</sup>

The critical prong of the *Pryor* test is whether the regulation “substantially limits” charitable solicitation. This emphasis forces a balancing of interests because it examines the degree of the burden that the government’s regulation places on charitable speech. But while *Pryor* comes closer to a workable standard than *Schaumburg*, it remains unsatisfactory for three reasons:

1. *Pryor* unnecessarily expands an already subjective intermediate scrutiny review by supplanting *Turner*’s “important or substantial” interest with a “sufficient or legitimate” interest that hovers closer to rational basis scrutiny than to an elevated standard of review. Although the important or substantial formulation is itself malleable and subject to abuse, terminology consistent with precedent provides a modicum of accountability.

2. *Pryor*’s use of the phrase “significantly furthers” unnecessarily introduces an additional subjective factor to the test. If a regulation is narrowly tailored to advance an important or substantial interest, a subjective assessment of the degree to which the regulation advances that interest adds little substantive value to the test. The “significantly furthers” inquiry can also unwittingly slip a strict scrutiny standard into an intermediate scrutiny review. Suppose an unchallenged law requires a charity to disclose X in order to advance the state’s interest in preventing fraud. Suppose further that a new law requiring the compelled disclosure of X + Y is challenged on First Amendment

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174. *Id.* at 855–56.

175. *Id.* at 854–55. Although my formulation differs slightly from the test explicated by the court at the beginning of *Pryor*, it is consistent with the language used by the court in its substantive analysis.

grounds. Assuming that both regulations are content-neutral, the state need not show that X + Y is the least restrictive means of advancing its interest in fraud prevention. But if X + Y must significantly further the state's interest, the charity could argue that, given the existence of X, the marginal benefit of Y does not significantly further that interest. This leaves the state with justification only for disclosure of X. The charity thus indirectly forces the state to comply with a standard more akin to a least restrictive strict scrutiny despite the content-neutrality of the regulation.<sup>176</sup>

3. Pryor's "substantial limitation" component tilts too restrictively against the government. By intimating that a regulation cannot substantially limit charitable solicitation, Pryor introduces a near-absolute presumption reminiscent of strict scrutiny. Some content-neutral regulations may justifiably substantially limit or even foreclose charitable solicitation, just as some content-neutral regulations limit other forms of protected speech. Precluding the government from any regulation that substantially limits solicitation skews the balance against the government's ability to regulate.

*Pryor's* test can be modified to address the three concerns described above by: (1) replacing "sufficient or legitimate" with "important or substantial"; (2) removing the "significantly furthers" requirement; and (3) adding a balancing component that is effectuated if the regulation substantially limits charitable solicitation. These adjustments produce the following test:

A content-neutral regulation of charitable solicitation will be sustained if it furthers an important or substantial interest through a narrowly tailored regulation that does not substantially limit charitable solicitation (unless the harm the regulation prevents clearly outweighs the harm caused by the regulation's limitation).<sup>177</sup>

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176. A similar critique can be made of the commercial speech test developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561–66 (1980). Under *Central Hudson's* second prong, the government "must demonstrate that the challenged regulation 'advances the Government's interest "in a direct and material way.'" Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625–26 (1995) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993))).

177. Although I confine this proposed test to the scope of this Article—charitable solicitation—the test has potentially broader applicability as a modification of the intermediate scrutiny formulation in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 661–62 (1994).

This test, of course, introduces its own vagaries. But premised on the need for a balancing of interests, it is a more transparent representation of that balancing. It also invites courts to consider the potentially disparate effects of content-neutral restrictions.

The balancing component in the parenthetical of the proposed test is conditional: it operates only when a regulation substantially limits charitable solicitation. A narrowly tailored content-neutral regulation that furthers an important or substantial government interest should be upheld if its limitation on charitable solicitation is insubstantial. But the substantial limitation requirement operates as a check against my elimination of *Pryor*'s requirement that a regulation significantly further the government interest. Consider again a disclosure requirement X. Removing the "significantly furthers" requirement allows the state to regulate X + Y even if Y is only marginally effective and therefore protects my test from becoming a de facto least restrictive means test. But left unchecked, the state could rely on this rationale to require disclosure of X + Y + Z and beyond. At some point, the aggregate effect of these disclosures may cause considerable harm to a charity. The substantial limitation language forces the parenthetical balancing test when this occurs. When a court concludes that the limitation is substantial, the balancing test favors the charitable speech over the restriction by requiring that the harm prevented by the regulation clearly outweigh the harm that it causes. This initial position accords with a speech-protective view and signals to legislatures that they must account for the speaker's interests in crafting their regulations.

The balancing component also recasts the government's stake from the importance of the government interest to the harm that the regulation prevents. The focus on harm encompasses both the gravity of the government's interest and the regulation's effectiveness in furthering that interest. In this way, the parenthetical in my proposed test recaptures the "significantly furthers" aspect of *Pryor*, but this inquiry is only made when the regulation substantially limits speech.

## V. CONCLUSION

Although I have argued for a test that more adequately protects the values of charitable solicitation, the Court's test is ostensibly already speech-protective: *Schaumburg*, *Munson*, and *Riley* all struck down attempts to regulate charitable solicitation. My critique, however, is structural rather than results-oriented. I have argued that the test

derived from *Schaumburg* lacks coherence, clarity, and doctrinal sustainability. The most direct support for my contention is the inability of lower courts even to agree whether the Court's test is one of strict scrutiny or intermediate scrutiny. When interpreted as the former, the test is inconsistent with the application of content analysis in other areas of speech regulation. When interpreted as the latter, *Schaumburg* fails to account adequately for the civic interests at stake with charitable speech. My concern is the same that Robert Post has expressed with respect to commercial speech:

Commercial speech doctrine is now almost a quarter of a century old. Yet in all that time it has never systematically queried its own justifications and implications. By settling quickly and easily into a test whose bland provisions were indifferent to a disciplined account of the constitutional value of commercial speech, the doctrine has allowed fundamental differences of perspective to fester and increase. These differences now threaten to explode the doctrine entirely.<sup>178</sup>

My aim has been to propose an alternative test that reflects greater clarity and transparency.<sup>179</sup> My argument has been chiefly analytical, but it also contains a normative element: the Court's inability to establish a coherent test has exposed an important form of speech to an unwarranted risk of overregulation. This assertion flows from my view that the protections of the First Amendment should be at their highest for political speech and that charitable solicitation is a kind of political speech. I have thus adopted a broader conception of political speech than some. But I have also argued for principled line-drawing that prevents an exceptional category of speech from being swallowed by the whole. Thus, for example, I have contended that neither begging nor commercial speech warrant the same level of protection that should be extended to charitable solicitation. Others might argue that both of those forms of speech contribute to a rich and diverse civic discourse as much as charitable solicitation. These discussions need to be taking place with greater frequency. Principled distinctions between different forms of speech, and even distinctions between speech and non-speech, have become increasingly thin. To take but one obvious example, we

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178. Post, *supra* note 41, at 54–55.

179. Cf. LON L. FULLER, *THE MORALITY OF LAW* 63 (rev. ed. 1969) (“The desideratum of clarity represents one of the most essential ingredients of legality.”).

have amply demonstrated that, when it comes to pornography, we haven't known it when we've seen it.<sup>180</sup>

Evolving technology will ensure that the regulation of charitable solicitation remains a timely legal issue,<sup>181</sup> and First Amendment jurisprudence must be capacious enough to resolve unforeseen challenges as the speech interests underlying charitable solicitation continue to intersect in new ways with competing interests. Left unaltered, *Schaumburg's* test may be incapable of meeting those challenges; indeed, it may be reduced to an "abstract concept" that becomes "filled with whatever content and direction one can manage to put into [it]."<sup>182</sup>

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180. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

181. See, e.g., *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 855 (10th Cir. 2003) (upholding distinction between charitable and commercial solicitation under the national do-not-call registry); see also *First Spam and Spim, Now 'Spit: VoIP Annoyance Defies Regulatory Categorization*, 73 U.S. LAW WEEK, Nov. 30, 2004, at 2316 (describing "spit" as "a next-generation annoyance that delivers unsolicited commercial messages to users of Internet telephony").

182. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 102 (1994).