

Charity's Grip On The First Amendment Constantly Under Assault

By Clifford Perlman

The struggle between charities that want to gather widespread support by circulating their messages and regulators who want to prevent fraud by limiting charitable speech seems to have escalated during the past 20 years and neither side has won the battle. Nor is there any sign of surrender.

Even though the Supreme Court of the United States, and various lower federal courts, ruled con-

sistently that the government cannot regulate charitable speech without showing a compelling need and a narrowly tailored regulation, states have continued to enact and enforce legislation that does not meet constitutional muster.

During the past two decades, the history of case law in this area began in 1988 when the Supreme

Court, in *Riley v. National Federation of the Blind of North Carolina*, held for the third time in a decade that charitable speech was core speech within the First Amendment's protection. This is because an inextricable portion consists of persuasive speech, advocacy or information, as opposed to purely commercial bids. Thus, charitable speech, which includes solicitations for charitable donations, was removed from the heavily regulated territory of commercial speech, and the Court imposed the strictest scrutiny in examining any governmental regulation of it. Under this rigorous standard, for a law that regulates charitable speech to avoid violating First Amendment rights, a state or local government must show a compelling need for such law and that the law is narrowly tailored to meet that need.

The question of constitutional limits upon the regulation of charitable speech had been tested twice before during the 1980s. The first time in 1980, the Supreme Court struck down a municipal ordinance prohibiting door-to-door charitable solicitations by charities which spend more than 25 percent of funds raised for fundraising or administrative costs. The Court stated that the town's interest in preventing fraud and misrepresentation could be served by less intrusive means, such as the enforcement of anti-fraud statutes.

The issue was tested again in 1984

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when the Supreme Court struck down a Maryland statute prohibiting charities from paying more than 25 percent of funds raised for solicitation expenses, but allowed the state to waive the 25 percent restriction upon a charity's showing of financial necessity. As part of its rationale for striking down the law, the Court opined that the statute was based on the "fundamentally mistaken premise" that high fundraising costs suggest fraud.

These decisions paved the way for the 1988 *Riley* case, in which the Supreme Court struck down several aspects of a North Carolina law which prohibited the retention by professional fundraisers of more than 20 percent of money solicited for charity. The Court held that the use of percentages to decide the legality of a fundraiser's fee is not narrowly tailored to the state's interest in preventing fraud.

The Court was particularly concerned that the statute was "impermissibly insensitive to the realities faced by small or unpopular charities, which must often pay more" than the amounts permitted by the law "due to the difficulty of attracting donors." The *Riley* Court also invalidated a requirement that fundraisers disclose to potential donors, before making an appeal, the percentage of funds they raised in the past year which went to charity,

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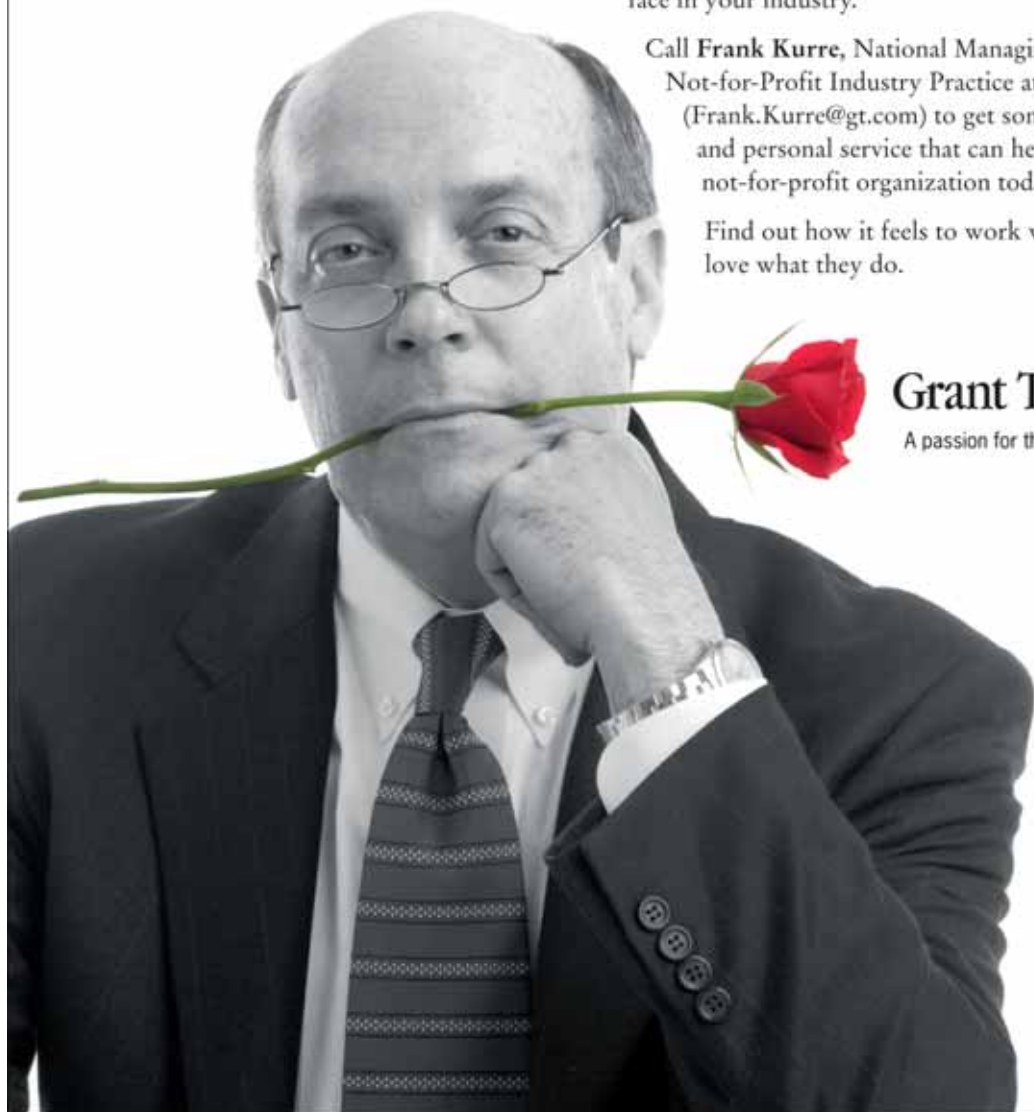
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finding such “compelled speech” to improperly burden protected speech.

After 1988, the tide of court decisions shifted from favoring the charities’ constitutionally protected solicitation activity to favoring the states’ interests in protecting charities and preventing fraud, but with mixed results.

In 1989, the Fourth Circuit Court of Appeals upheld a statutory provision mandating professional solicitors disclose in writing to prospective contributors that its financial statements are on file and available from the state. However, the same decision found a requirement that solicitors submit the script of an oral solicitation to the state in advance of the solicitation to be an unconstitutional prior restraint on speech.

Following this, the Illinois Attorney General filed a complaint against a small group of telemarketers in 1991, asserting that the telemarketers engaged in fraud because their fundraising contracts with charities provided that the telemarketers would receive 85 percent of the donations. The State Attorney general argued that retaining 85 percent of the funds, in and of itself, constituted fraud upon the public. Some 12 years later, in 2003, the Supreme Court heard the case. While reaffirming its holdings in the three pivotal cases decided in the 1980s, the Court declined to dismiss the case against the telemarketers on First Amendment grounds. Instead, the case was sent back to trial court to determine if actual fraud had occurred.

Curiously, both the charitable sector and state

regulators claimed a victory in this case. The charities applauded the Supreme Court for unanimously reaffirming the principles established in the 20 years before, specifically that:

1. The First Amendment protects the right to engage in charitable solicitation;
2. The percentage of fundraising proceeds turned over to a charity may not alone be a basis to prove fraud, because the percentage is not an accurate measure of the amount of funds used for a charitable purpose, and;
3. The failure to offer fundraising fee-arrangement information to a potential donor at the start of

ously created or reinforced.

More recently, a group of concerned charities sought to invalidate the charitable solicitation regulatory scheme in Pinellas County, Florida. The group was only partly successful. The charities convinced the court that excessive discretion was given to Pinellas County officials who prepare permit application forms.

Because fundraising applicants were forced to comply with requirements uniquely formulated by county officials, the ordinance conferred to the county unbridled and unconstitutional discretion to enforce a prior restraint and to silence protected speech. Nevertheless, the court rejected the charities argument that the ordinance was not narrowly tailored because the county’s registration requirement duplicated requirements by the state of Florida and the Internal Revenue Service.

The court found that “forbidding the county from promulgating a request duplicated by the state, the Internal Revenue Service, or another government agency would impede the ordinance’s legitimate purpose and would require potential donors or the county to retrieve information from disparate and remote sources.”

The impact these decisions have had on the regulation of charitable speech has been mixed. While many states (and Pinellas County, Florida) have either invalidated certain fundraising regulation provisions or abstained from enacting legislation in the wake of

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a solicitation does not in and of itself constitute fraud. Justice Antonin Scalia wrote in his concurring opinion that, “since there is such a wide disparity in the legitimate expenses borne by charities, it is not possible to establish a maximum percentage that is reasonable... Today’s judgment... rests upon a ‘solid core’ of misrepresentations... that go well beyond mere commitment of the collected funds to the charitable purpose.”

At the same time, the states viewed the *Madigan* decision as a triumph because the Court reaffirmed the states’ rights to pursue claims of fraud, arising when a fundraiser obtains a pledge or contribution from a donor by the use of deception, or fails to correct a false impression which the fundraiser previ-

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these decisions, some stalwart states keep clearly unconstitutional ordinances on the books and enforced.

A prime example of this is Connecticut's Unfair Trade Practices Act which attempts to regulate misleading charitable solicitations. The Act authorizes state courts to assess whether a charitable solicitation offends public policy or whether it is immoral, unethical, oppressive, or unscrupulous when determining if a particular solicitation violates the Act. This broad discretion granted to courts under the Act clearly violates the Supreme Court's requirement that charitable solicitation regulation be narrowly tailored. The Act was the subject of a constitutional challenge in 1998 which was subsequently dismissed on technical grounds.

Another Connecticut statute requires that, prior to orally requesting a contribution and at the same time a written request for a contribution is made, a paid solicitor must clearly and conspicuously state the percentage of the gross revenue the charitable organization is to receive. This is clearly "compelled speech," identical to the sort found to unconstitutionally infringe free speech rights under the *Riley* decision.

Similarly, a Florida law requires professional fundraisers to disclose the percentage of each contribution that is retained by the fundraiser and the percentage to be received by the charitable organization. Massachusetts and South Carolina also have laws requiring professional solicitors to inform a potential donor of the guaranteed minimum percentage of gross receipts from fundraising that will be used exclusively for the charitable purposes described in the solicitation.

It is, perhaps, a delicate balance to satisfy a charity's constitutional entitlement to engage in solicitations, on one hand, and allow regulators to protect the public from fraud. Although many challenges have been made during the past two decades to protect charitable organization's First Amendment rights, the progress is gradual at best. *NPT*

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5 Charitable Free Speech Cases to Know

1 *Riley v. National Federation for the Blind, 487 U.S. 781 (1988)*: The Supreme Court of the United States struck down several aspects of a North Carolina law regulating charitable solicitation because they impinged on the First Amendment rights of charities and their professional fundraisers, including a requirement that fundraisers disclose the percentage of funds they raised in the past year which went to charity.

The Court found that solicitation of charitable contributions is fully protected activity under the First Amendment of the United States Constitution, even when conducted by a professional fundraiser with a profit motive. However, in the same decision, the Court held that a "State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."

2 *Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989)*: The Fourth Circuit of Appeals sitting in Richmond, Va., affirmed the state of Virginia's right to require a professional solicitor to disclose to potential donors in writing that financial statements for the last fiscal year were available from the state. Distinguishing the disclosure from the percentage disclosure at issue in *Riley*, the court found that "[u]nlike the compelled disclosure of the percentage collected that will go to a charity struck down in *Riley*, the brief, bland, and non-pejorative disclosure required here is unlikely to discourage donations."

3 *Famine Relief Fund v. West Virginia, 905 F.2d 747 (4th Cir. 1990)*: Addressing the procedural aspects of a charitable solicitation law, the Fourth Circuit Court of Appeals found that a law imposes prior restraint on speech if it bars solicitation pending judicial determination of an administrative denial of permission to solicit. The Court ruled that, on its face, the statute did not violate the charity's First Amendment right to free speech. But the procedures under the law did not afford the charity sufficient due process before imposing a prior restraint on free speech, thus, the statute violated due process protection under the Fourteenth Amendment.

4 *Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc., et al., 538 U.S. 600 (2003)*: The State of Illinois brought a claim for fraud in 1991 against for-profit telemarketing defendants retained by a charity because the telemarketing contracts provided that the charity would receive 15 percent of gross receipts, but the charity actually received considerably less.

In its decision, the Supreme Court of the United States upheld and strengthened the most important aspects of prior Supreme Court decisions which carved out a Constitutional protection for charitable solicitations and rejected attempts by the states to place limits on the contractual arrangements between nonprofits and their professional fundraisers. The Supreme Court also reaffirmed its stance in favor of the state regulators that claims for fraud in charitable solicitations can be pursued by the states.

5 *Public Citizen, Inc. v. Pinellas County, 321 F.Supp.2d 1275 (M.D. Fla. 2004)*: A group of charities brought an action to enjoin the enforcement of a Pinellas County, Florida ordinance regulating charitable solicitations, which mandated rigorous registration and disclosure requirements by any charity or professional solicitor wishing to solicit charitable contributions in the county.

The charities contended that the ordinance imposed an impermissible prior restraint of protected speech and an unreasonable burden on protected speech in violation of the First Amendment and failed to achieve its stated purpose of "preventing deception, fraud and misrepresentation and of promoting disclosure of information useful to a potential donor."

The court found that ordinance provisions granting excessive discretion to county officials in preparing applications and provisions allowing for delays in permit approval process violated the First Amendment. However, the court upheld as constitutional other provisions that required disclosure of background, revenue and expense information.

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