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# Free Speech and the Mandated Disclosure of Information

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## I. INTRODUCTION

This essay focuses on one element of an important, unresolved question in free speech law. The broader unresolved question concerns how freedom of speech, as a legal and social institution, operates best or most efficiently. Our society has often debated how an economy, as a legal and social institution, functions best. On this analogous question, we have generally concluded that the national economy ought to manifest a mixture of at least minimally voluntary marketplace exchanges[1] and appropriate forms of government regulation.[2]

On the other hand, any societal consensus on how freedom of speech should operate is limited. There is no consensus on the proper scope, or even the legitimacy, of what might be called directive government intervention into the free speech market. Is government constitutionally permitted to define the terms of public debate? For example, the question becomes whether and when government may catalyze, enrich, or enhance that debate by means other than its own speech,[3] such as redistributing wealth or distinctively subsidizing the speech of particular groups.[4]

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1. *See, e.g.*, M. FRIEDMAN, CAPITALISM AND FREEDOM (1962) (emphasizing the productive value and moral appeal of a regime of consent-based exchanges).

2. *See, e.g.*, S. BREYER, REGULATION AND ITS REFORM (1982) (distinguishing appropriate roles for different governmental regulatory techniques).

3. *See generally* M. YUDOF, WHEN GOVERNMENT SPEAKS (1983) (considering the appropriate scope of the government's own ability to speak, or propound ideas, as one speaker among others).

4. For a less than fully satisfactory judicial foray into this area, see the campaign finance reform case of Buckley v. Valeo, 424 U.S. 1 (1976). For examples of academic literature, see Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982). On subsidization through the tax system of particular speakers, see Regan v. Taxation With Representation, 461 U.S. 540 (1983). On the question of charging speakers for the additional direct financial costs imposed on the taxpayers by those particular speakers, see

This broad free speech issue has many dimensions. The focus of this essay is one such facet of the free speech debate: governmentally compelled disclosures of information by private speakers. The case law in this area cogently expresses an unresolved conflict between two contrasting visions of how freedom of speech as an institution best operates.

The most controversial cases in this area involve attempts by government to require public disclosure of arguably relevant factual information by persons soliciting donations for private charities.[5] These cases illustrate contrasting visions of how free speech operates to produce different results, or at least different legal tests or standards. As discussed below, these contrasting views loosely parallel particular contrasting visions of how an economy best operates.

One view states that government imposition of disclosure requirements on charitable solicitors is inherently suspect. Such disclosure requirements should be tested by relatively demanding standards. These standards should not be drawn from cases of government regulation of mere commercial speech,[6] but from classic case law striking down government attempts to compel private speech contrary to the conscience or belief of the speaker.[7]

The contrasting view, however, suggests such disclosure requirements may be viewed as legitimately enhancing the quality of public discussion and deliberation, rather than biasing or distorting such discussion in favor of governmentally approved viewpoints. This view posits there is greater scope for legitimate government intervention to mitigate recognizable failures in the marketplace of ideas. While this view is currently less influential, there are strong theoretical and historical grounds for looking to such a view for guidance in appropriate cases.

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Goldberger, *A Reconsideration of* Cox v. New Hampshire: *Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums*?, 62 TEX. L. REV. 403 (1983).

5. *See, e.g.*, Riley v. National Fed. of the Blind, 487 U.S. 781 (1989); Indiana Voluntary Firemen's Ass'n, Inc. v. Pearson, 700 F. Supp. 421 (S.D. Ind. 1988).

6. *See, e.g.*, the attorney advertising regulation cases of Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637, n.7 (1985); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

7. Such cases normally involve political or religious matters. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Util. Com'n, 475 U.S. 1 (1986) (plurality opinion); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

## II. THE LOGIC OF *Riley*

### A. *North Carolina's Mandated Disclosure Requirement*

The Supreme Court addressed the question of mandated disclosures by professional fundraisers for private charities in *Riley v. National Federation of the Blind.*[8] The North Carolina statutory scheme at issue in *Riley* required that all professional charitable fundraisers disclose to potential donors the average percentage of gross receipts actually passed along to the charity for all recent North Carolina operations.[9]

The *Riley* majority's analysis of the free speech challenge to this requirement assumed a tradition of non-intervention by the government into an allegedly pre-existing, autonomous realm of the private marketplace of speech. Justice Brennan's majority opinion referred to the general principle that "[t]he First amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."[10] The Court then quoted Justice Jackson, who emphasized that "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion."[11] The Court inferred that "government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."[12]

Against this general non-interventionist background, the Court

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8. 487 U.S. 781 (1989).

9. *See id.* at 784-786. The relevant North Carolina statutory subsection provided specifically that:

> During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited . . . (3) The average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting.

N.C. GEN. STAT. § 131C-16.1 (1986).

10. *Riley*, 487 U.S. at 790-791 (citing Tashjian v. Republican Party, 479 U.S. 208, 224 (1987)).

11. *Id.* at 791 (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

12. *Id.*

addressed the North Carolina disclosure requirement. The Court noted that the regulation essentially mandated speech by private persons that they would not otherwise make, thereby altering the content of that speech.[13] The Court concluded that the regulation should therefore be scrutinized by the demanding standards accorded content-based regulations of speech.[14] Typically, a content-based restriction on protected speech may be upheld only if the regulation promotes a sufficiently strong subordinating or compelling interest through the least restrictive means.[15]

Next, the Court rejected the argument that the speech of a professional charitable solicitor should be treated as merely commercial speech, which would allow the government regulation to be tested by a more deferential standard than that applied to fully protected speech.[16] Even if certain elements of the solicitor's speech could be characterized as commercial, the Court noted this speech would ordinarily be "inextricably intertwined with otherwise fully protected speech."[17] Given the perceived practical inseparability of commercial and fully protected speech on the part of the professional charitable solicitor, the Court determined that only a rigorous level of free speech scrutiny involving compelled statements of "fact" would be appropriate.[18]

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13. *See id.* at 795.

14. *See id.*; Indiana Voluntary Fireman's Ass'n, Inc. v. Pearson, 700 F. Supp. 438, 438 n.17 (S.D. Ind. 1988).

15. *See, e.g.*, Sable Communic. of California, Inc., v. FCC, 492 U.S. 115, 126 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986). For discussion and critique of the Court's use of the category of content-based restrictions on speech, see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114, 140-41 (1981); Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197-200 (1983).

16. *Riley*, 407 U.S. at 795. In commercial speech contexts, the regulation will, under current formulations, be upheld if it directly advances a substantial state interest in a way that is reasonably narrowly tailored, if not precisely the least restrictive means, to effectuate that interest. *See* Board of Trustees of State Univ. of New York v. Fox, 109 S. Ct. 3028, 2034-35 (1989).

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

18. *See id. But see* Fox, 109 S. Ct. at 3031 (distinguishes *Riley* on grounds of an allegedly lesser degree of "inextricability" of commercial and noncommercial speech in *Fox*. Justice Scalia observed for the Court in *Fox* that "[n]o law . . . makes it impossible to sell housewares without teaching home economics. . . . Nothing . . . prevents the speaker from conveying . . . noncommercial messages, and nothing . . . requires them to be combined with commercial messages"); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 n.7 (1985)(attorney advertisement classified as commercial speech despite the presence, if not intertwining, of otherwise fully protected speech discussing the legal rights of persons allegedly injured by the Dalkon Shield).

The Court further declined to distinguish *Riley* from classic compelled speech cases such as *Wooley v. Maynard*[19] and *West Virginia Board of Education v. Barnette*[20] which involved compelled expressions of "opinion."[21] The Court reasoned that although requiring a proponent of a particular government spending program to disclose the extent of cost overruns on similar past programs would involve disclosures of fact, this disclosure would normally be plainly objectionable on free speech grounds.[22] Compelled expressions of fact were therefore potentially no less objectionable than compelled expressions of opinion.

### B. *A Rigorous Constitutional Test*

In the Court's view, the mandatory disclosure requirement in *Riley* failed the appropriately rigorous constitutional test.[23] The asserted state interest underlying the regulation was fairly but colorlessly described by the Court as "the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity."[24] Of course, the primary state interest in mandatory disclosure does not focus simply on disabusing donors of certain misconceptions. Instead, the focus is on ensuring the potential donor's awareness of minimal basic factual information in time to be included as a factor affecting the decision whether to donate. Although this information is typically considered relevant, if not crucial, by potential donors themselves, absent compelled disclosure, the information is not likely to be provided to substantial numbers of potential donors who nonetheless fully concur in its materiality.

The *Riley* Court concluded, however, that the particular state interest it recognized "is not as weighty as the State asserts,"[25] This holding in itself would presumably be fatal to the regulation, but the Court additionally held the statutory disclosure requirement to be "unduly burdensome and not narrowly tailored."[26] The

19. 430 U.S. 705 (1977).
20. 319 U.S. 624 (1943).
21. *Riley*, 487 U.S. at 797.
22. *Id.* at 798.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

Court observed that the charity may benefit not only from funds turned over to it by the professional solicitor, but also from any publicizing or recruiting on behalf of the charity.[27] Additionally, an unchallenged statutory provision independently required the solicitor to disclose their professional status, thus raising the question of compensation.[28] Another statute forced the solicitors to disclose the percentage of donations actually furnished to the charity if such information was affirmatively requested by the potential donor.[29]

The *Riley* Court also reasoned that the requirement to disclose the percentage of funds turned over will tend to specially burden not only inefficient, wasteful, exploited, or fraudulent charities, but also "small or unpopular charities, which must usually rely on professional fundraisers."[30] Further, there is no assurance that the potential donor will give the solicitor a fair opportunity, at least in the case of oral solicitations, to explain and justify a solicitor-retention percentage figure deemed by the potential donor to be excessive.[31] This argument, by its very nature, concedes a crucial point: retention percentages will be an important, if not decisive, consideration for at least some potential donors, and at least some of those who consider such figures to be significant will not ask for the relevant retention percentage. If those potential donors who would have independently obtained the retention figure are the only ones who decline to contribute because of that figure, then the

27. *See id.* at 798-99.

28. *See id.* at 799. Had they been so inclined, the solicitors might have challenged even this minimal requirement of an affirmative disclosure of professional status. Doubtless some allegedly narrower, less burdensome alternative, such as anti-fraud statutes, registration with the state, and disclosure on demand would serve any state interest nearly, if not equally, as well. The Court in the past has struck down identity-disclosure requirements in the free speech context. *See* Talley v. California, 362 U.S. 60 (1960) (holding unconstitutional a city ordinance prohibiting anonymous handbill distribution). Remarkably, the *Riley* Court reached out, in pure dicta, to pronounce such regulations constitutionally sound, 487 U.S. 799, 803 n. 11, to the chagrin of Justice Scalia. *Id.* at 803 (Scalia, J., concurring in part and concurring in the judgment). Scalia concurred with the Court's opinion except for footnote 11 because in his view, professional status disclosure requirements are not narrowly tailored to prevent fraud.

29. *Riley*, 487 U.S. at 799 (citing N.C. GEN. STAT. § 131C-16 (1986)). That this statutory requirement was not challenged suggests, at the very least, that professional solicitors do not view retention percentage disclosure requirements as inherently so arbitrary, vague, ambiguous, equivocal, subjective, obscure, or otherwise burdensome as to make compliance unreasonably difficult.

30. *Id.*; *see* Indiana Voluntary Fireman Ass'n, Inc. v. Pearson, 700 F. Supp. 438, 443 (S.D. Ind. 1989) (quoting Riley v. National Fed. of the Blind, 487 U.S. 781, 799 (1989)).

31. *See Riley*, 487 U.S. at 800.

challenged statute is no more burdensome on any charitable solicitor than the unchallenged statute requiring disclosure of the same figure on request.

The Court in *Riley* concluded that other, less burdensome and more narrowly tailored means of promoting the state interests at stake were available.[32] In particular, the state itself might publish some or all of the financial disclosures which professional solicitors must file.[33] The state might also "vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."[34] The Court therefore struck down the regulation at issue as violative of the free speech clause, noting that in the absence of a compelling state interest pursued only by narrowly tailored means, the government cannot prescribe the content of speech.[35]

### C. *Designing a Narrow Fit*

Individually, the steps in the Court's logic in *Riley* are disquieting. The Court's own logic implicitly concedes that significant numbers of potential donors will both consider the percentage retention figure to be important and fail to take the initiative to ask for or independently ascertain that figure.[36] Assuming the validity of this premise,[37] the publication of those figures by the state[38] would less effectively promote the state's interest in a minimally well-informed population of potential donors than would timely disclosure by the solicitor in the course of each solicitation.

The *Riley* holding fails to indicate to what extent courts can force the state, in the name of free speech and narrow tailoring, to

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32. *Id.*

33. *Id.*

34. *Id.* The Court also noted that fundraising activities even from the recent past might be dissimilar in character to the present campaign, that the statutory disclosure provision is insensitive to legitimate costs and expenditures of solicitation, and that the statutory focus on a percentage of gross funds collected, as opposed to net funds collected, seems questionable. *See id.* at 800 n. 12.

35. *Id.* at 800; *see* Indiana Voluntary Fireman Ass'n, Inc. v. Pearson, 700 F. Supp. 438, 443 (S.D. Ind. 1989) (reviewing Riley v. National Fed. of the Blind, 487 U.S. 781, 800 (1989)).

36. *See supra* note 31 and accompanying text.

37. *See infra* notes 58-70 and accompanying text clearly demonstrating that this premise is at least plausible.

38. This article shall assume that state publication of the retention percentages is unequivocally less burdensome or more narrowly tailored than a requirement that the professional solicitor disclose the same figures in the context of individual solicitations.

adopt predictably less effective means of promoting legislative goals. The decision suggests that courts can intuitively sense how much less burdensome on free speech a narrowly tailored regulation should be. It implies courts can simply trade-off a quantitative notion of first amendment compliance in favor of some ambiguous reduction in effectiveness of the state's efforts. Furthermore, *Riley* offers no solution where the state interest underlying the regulation itself arguably creates a legitimate vision of how to promote free speech in practice.

Additionally, the issue of enforcing state antifraud laws was irrelevant in *Riley*. Fraud, false pretenses, or false statements, were not the issue because they were not the primary target of the statutory disclosure requirements. Instead, the statute more closely resembled a requirement that food manufacturers disclose the saturated fat content of their product. This type of regulation is not aimed primarily at fraud in any traditional tort or criminal sense,[39] but at promoting minimally well-informed consumer decisionmaking from the consumers' own subjective standpoint.

In one sense, the Court's logic in *Riley* is largely an extension of steps already taken in recent Supreme Court decisions in the area of restrictions on charitable solicitation.[40] But this Court's opinion may also be illuminated by contrasting it with the general approach in other recent free speech cases in other contexts.

For example, in *Meese v. Keene*,[41] the plaintiff, a member of the California State Senate, wished to show three documentary films publicly, but was allegedly deterred from doing so because of the federal statutory requirement that these Canadian films be publicly identified as "political propaganda" according to a determination by the Department of Justice.[42] The government's position argued that the term "political propaganda" was intended simply to apprise viewers of the foreign national interests potentially under-

39. *See* RESTATEMENT (SECOND) OF TORTS § 871A comment c. (1979).

40. *See, e.g.*, Secretary of State of Maryland v. Joseph H. Munson, Co., 467 U.S. 947 (1984) (Maryland statute limiting the expenditure of funds donated to a charitable organization was found unconstitutionally overbroad); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (Illinois community ordinance similarly limiting the expenditure of donated funds was found unconstitutionally overbroad).

41. 481 U.S. 465 (1987). For commentary, see Note, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking* Meese v. Keene, 1989 DUKE L.J. 654.

42. *See Keene*, 481 U.S. at 467-68.

lying the films' contents.[43] Keene argued, however, that the mandatory disclosure label was a classic content-based restriction on his free speech.[44] He offered polling data[45] and expert testimony[46] indicating that the phrase "political propaganda" is often understood to be pejorative, and that significant numbers of potential voters would be "less inclined" to vote for a political candidate who showed films bearing such government-mandated labels.[47]

The Court's holding in *Keene* is particularly remarkable in light of the subsequent *Riley* case. The *Keene* Court determined that the mandatory "political propaganda" disclosure placed no burden on Keene's protected speech.[48] Justice Stevens' opinion for the majority in *Keene* maintained that the statute in question:

> [S]imply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. The statute does not prohibit [the] appellee from advising his audience that the films have not been officially censured in any way. Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials. By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech . . . is fair, truthful, and accurate speech.[49]

The Court did not consider the government's film labeling program "paternalistic," but did consider the judicial inclination to exempt information that the films were officially classified as "political propaganda" from mandated public disclosure to be "paternalistic."[50]

The Court's logic in *Keene* is simply ignored in *Riley*. *Keene* may be read as a virtual anticipatory rebuttal of *Riley*. This is not

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43. *Id.* at 480.
44. *Id.* at 478.
45. *Id.* at 473-74 n.7.
46. *Id.* at 474 n.8., 477.
47. *Id.*
48. *Id.* at 480.
49. *Id.* at 480-81 (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
50. *Id.* at 481-2; *see also* SEC v. Wall Street Publishing Inst., Inc., 851 F.2d 365, 374 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (discussing *Keene* on this point).

to suggest that one must choose between *Keene* and *Riley*: a strongargument can be made that both cases were wrongly decided.

What is most noteworthy is that *Keene* and *Riley* are driven by plausible, but eventually inconsistent, contrasting visions of how the institution of free speech best operates, and what role, if any, we may reasonably allocate to the government in modifying the extent, nature, and quality of speech generated by the market.[51] These contrasting visions are not fully explicit in either *Keene* or *Riley*, but are fairly suggested by the respective opinions. *Riley* stated "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."[52] *Keene*, on the other hand, adds a significant qualification in referring to "the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false . . . ."[53] Of course, the necessary additional speech will often come from non-governmental sources.[54] But if it does not, *Keene*, unlike *Riley*, presupposes that government intervention may enhance and promote the institution of free speech, even by imposing mandatory disclosure requirements.[55]

## III. *Riley*, Failure in the Marketplace of Speech, and the Permissible Scope of Government Intervention

The traditional, mainstream, laissez-faire approach to the problem of government intervention, by means other than its own speech, into the marketplace of ideas has been encapsulated by Justice Robert Jackson in the following aphorism: "[e]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."[56] Professor Yudof has observed with similar cogency, "[t]he

51. The speech marketplace is not some autonomous, spontaneously arising institution; the content of private speech in the market will inevitably reflect the consequences of innumerable prior acts and omissions by governments, including the nature of its protection and redistribution of private wealth and provisions of public schools and libraries.

52. *Riley*, 487 U.S. 781, 790-1 (citing Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986)).

53. *Keene*, 481 U.S. at 480 n.15.

54. *See, e.g.*, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (pharmacists desired to provide relevant pricing information to the public).

55. *See generally Keene*, 481 U.S. at 480.

56. Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring), *quoted in* Meyer v. Grant, 486 U.S. 414, 419-20 (1988).

power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime."[57]

As a general rule, such principles or warnings are of the highest value. The following discussion of charitable solicitation disclosure requirements, however, illustrates that discrete circumstances exist, even outside the purely commercial speech context, in which a limited class of mandatory disclosure requirements may be justifiable on free speech grounds. If there are potential risks associated with government mandated disclosures in even the most carefully circumscribed circumstances, there may also be significant free speech costs associated with not having such disclosure requirements.

## A. *Speech and Informed Decisions*

Freedom of speech is, after all, at least partly instrumental. Freedom of speech is aimed at the triumph of "vigorous enlightenment" over "slothful ignorance."[58] A number of the constitutional framers emphasized the importance of an informed,[59] genuinely deliberative ongoing political dialogue.[60] They viewed this dialogue as promoted in part by a sound education[61] and aimed at the possibility of "substantively right answers"[62] to questions concerning the common good.[63] John Stuart Mill's classic defense of free speech similarly assumes the genuineness of potential distinctions between greater and lesser societal development, and between human excellence and human inadequacy.[64] Mill sees improvement as a goal of freedom of speech,[65] and "due study and preparation"[66] as typical requirements for individual growth or genuine

57. M. YUDOF, *supra* note 3, at 42.

58. *See* Martin v. Struthers, 319 U.S. 141, 143 (1943).

59. *See* Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549 (1988).

60. *Id.* at 1541, 1548-51; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

61. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985). *But cf. id.* at 40 (noting that Madison feared conscious shaping of private preferences by government would undermine rather than promote liberty).

62. Sunstein, *supra* note 59, at 1541. *But cf. id.* at 1554 n.79 (indicating that pragmatism does not presuppose any "ultimate foundations" for assertions in the realm of political morality, and citing various past and contemporary moral "pragmatists").

63. *Id.* at 1539, 1554.

64. *See* R. LADENSON, A PHILOSOPHY OF FREE EXPRESSION AND ITS CONSTITUTIONAL APPLICATIONS 152 (1983).

65. *See* J.S. MILL, ON LIBERTY 11-12 (D. Spitz ed. 1975).

66. *Id.* at 33.

progress through the regime of freedom of speech.[67]

Thus, there is no guarantee that any babel of uninhibited voices, either in fact or by definition, must collectively constitute an optimally functioning marketplace of ideas. Analogously, the theory underlying the efficiency of ordinary economic markets usually assumes,[68] but cannot guarantee, the presence of knowledgeable, well-informed participants in the market.[69] As a technical matter, "information often has the attribute of a pure public good and . . . voluntary exchange sometimes has problems in generating the optimal amount of information."[70]

There is good reason to believe that, in the absence of something like the mandatory disclosure regulations struck down in *Riley*, relevant information in the context of charitable solicitation will, from the potential donors' perspective, be undersupplied. Potential donors do not always base their decisions on what they themselves consider adequate information; their own values and preferences also influence them in this regard.[71] Whether this amounts to rational behavior or irrational behavior at some deeper level of the donor's psychic economy, expressed in utility-maximizing terms, is not crucial.

The decision to donate may or may not be dramatically influenced by knowledge of the charitable solicitor's retention rates or of the remarkable variations in those rates. Potentially interested people are not always aware that some well-known charities spend between five and ten per cent of their revenues on fundraising and administrative expenses,[72] while others may have arrangements

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67. *See* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 529 (1979) (noting Mill was concerned with promoting "true belief and individual growth").

68. *See, e.g.*, Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 523-23 (1980); Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385, 385-86 (1989).

69. See Ulen, *supra* note 68, at 385-86. *See generally* Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

70. Ulen, *supra* note 68, at 386.

71. For discussions of various possible motivations for donating to charitable organizations, see Ireland, *The Calculus of Philanthropy*, in THE ECONOMICS OF CHARITY 67-70 (I.E.A. 1973) (citing direct personal benefits, desire to see others benefitted, desire to act rightly to promote the public good, desire to advance politically, desire to meet conditions of employment); Johnson, *The Charity Market: Theory and Practice*, in THE ECONOMICS OF CHARITY 79, 92-94 (citing religious motives, income motives, psychic benefits from unselfish acts, and social pressures). Note that none of these motives is better served by waste or inefficiency from anyone's standpoint in the charitable donation decision.

72. *See* Kinkead, *America's Best-Run Charities*, 116 FORTUNE 145, 146 (Nov. 1987).

where the professional solicitor retains 75 per cent of the revenues.[73] Furthermore, some charities incur fundraising costs of between 80 and 85 per cent of receipts.[74]

Nor will every person who would find such information decisive[75] have the presence of mind, or the willingness to risk mutual embarrassment, to actively request such information in a timely fashion. Without legal requirements, charities may not consistently take the initiative to impart such information in a standardized, useful format.[76] Charities may invariably avoid all sorts of overreaching or undue influence.[77] The literature of experimental social psychology shows, however, that charities have the actual potential to enhance the total amount of dollar donations through sheer psychological manipulation of potential donors in ways largely unrelated to the donor's primary aims in contributing.[78]

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73. *See* City of El Paso, Texas v. El Paso Jaycees, 758 S.W.2d 789, 790 (Tex. Ct. App.), *writ denied* 1988.

74. *See* Secretary of State v. Joseph H. Munson, Co., 467 U.S. 947, 967 n.15 (1984). We hold in abeyance the question of the potentially misleading nature of such figures.

75. Note the summary advice of one investigator: "In evaluating a charity, you should have only one concern: Does the organization allocate enough of its resources to the cause you are concerned about?" H. KATZ, GIVE! WHO GETS YOUR CHARITY DOLLAR? 191 (1975). It would be unreasonable to strike down all such disclosure requirements on the grounds that some donors may not be influenced by the disclosures. Merely probable or statistically predictable results suffice to justify restrictions on even "core" political speech. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (permitting restrictions on advocacy that are merely "likely," and not certain, to produce the harms alleged).

76. *See* H. KATZ, *supra* note 75, at 179-80 (noting the problem of organizational filtering and distortion of the relevant information).

77. Compare the possibilities for overreaching and undue influence in the context of face-to-face solicitation by attorneys referred to in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641 (1985).

78. *See, e.g.*, Brownstein & Katzev, *The Relative Effectiveness of Three Compliance Techniques in Eliciting Donations to a Cultural Organization*, 15 J. APPLIED SOC. PSYCHOLOGY 564 (1985) (citing the "low-ball" technique as enhancing the likelihood of more costly later commitments) (also citing research indicating the impact of the gender of the solicitor (citing Lindskold, Forte, Haake & Schmidt, *The Effects of Directness of Face-to-Face Requests and Sex of Solicitor on Street Corner Donations*, 101 J. APPLIED SOC. PSYCHOLOGY 45 (1977)); Reeves, Macolini & Martin, *Legitimizing Paltry Contributions: On-the-Spot vs. Mail-in Requests*, 17 J. APPLIED SOC. PSYCHOLOGY 731 (1987) (citing experimental research on a variety of manipulative techniques); Reingen, *Test of a List Procedure for Inducing Compliance With a Request to Donate Money*, 67 J. APPLIED SOC. PSYCHOLOGY 110 (1982) (showing potential donor a fictitious list of other donors as enhancing probability and amount of contribution if the list of compliers is sufficiently long); Reingen, *On Inducing Compliance With Requests*, 5 J. CONSUMER RESEARCH 96 (1978) (discussing the "foot-in-the-door," "door-in-the-face," and "even a penny will help" techniques, but noting the likelihood of upper limits to the ability to manipulatively induce or enhance donations); Weyant & Smith, *Getting More by Asking for Less: The Effects of Request Size on Donations of Charity*, 17 J. APPLIED SOC. PSYCHOLOGY 392 (1987) (asking for a generous donation as de-

None of this is to suggest that charities are somehow more suspect than the for-profit sector, which is susceptible to market failure,[79] or than the government, which is susceptible to systematic failures.[80] Private charities may in part compensate for or help mitigate such failures.[81] But as the discussion above shows, the operation of charities in the absence of governmental disclosure requirements may not optimally serve the subjective interests of donors. Although every donation reveals the donor's preference for the donee organization or its goals,[82] it is implausible that all donors who contribute to a charity, ignorant of the fact that the majority of the donations go to administrative expenses,[83] would be equally willing to donate if minimally well informed of the use of their donation.

There is thus a legitimate, free speech-related governmental interest to be served in this area by minimal, standard, and neutral factual disclosure requirements. The interest is not in the prevention of traditional criminal fraud[84] or of "undetectable" fraud.[85] If we seek a genuinely reflective[86] quality to public discussion about individual charitable donations, there is an important public inter-

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creasing the percentage of donors without increasing average size of donation; asking for small amounts as increasing percentage of donors without decreasing average size of donation in a mail-out, as opposed to door-to-door, condition); Weyant, *Applying Social Psychology to Induce Charitable Donations*, 14 J. APPLIED SOC. PSYCHOLOGY 441 (1987) (the success of "even a penny will help" technique as at least partially explainable in terms of the solicitor's comfort with and confidence in the technique, affecting the demeanor of the solicitor).

79. *See generally* S. BREYER, REGULATION AND ITS REFORM (1982).

80. *See, e.g.*, J. BUCHANAN, LIBERTY, MARKET, AND STATE (1986); M. OLSON, THE RISE AND DECLINE OF NATIONS (1982).

81. *See* J. DOUGLAS, WHY CHARITY? (1983).

82. *See* Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1230 (4th Cir. 1989) ("[a] donor's contribution in response 'to a request for funds functions as a general expression of support' for the charity and its purposes" (quoting Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 799 (1984))).

83. Administrative expenses are obviously not to be equated with waste or inefficiency from the donor's perspective, but there appears to be some general correlation between high administrative expenses and organizational inefficiency. *See* H. KATZ, *supra* note 75, at 192-93. The philanthropist H. Ross Perot has emphasized the importance of determining "which [charities] are using the money for the people who need it, as opposed to chewing it up in overhead, making it disappear in enormous amounts, wasted." Kinkead, *supra* note 72, at 145.

84. *But cf.* People v. French, 762 P.2d 1369, 1375 (Colo. 1988) (crudely equating the interest in informing the donating public with that of preventing fraud).

85. *See* National Funeral Servs. v. Rockefeller, 870 F.2d 136, 144 (4th Cir.) (noting the problem of "undetectable" fraud and deception in telemarketing and in-person solicitation), *cert. denied*, 110 S. Ct. 409 (1989).

86. *See supra* notes 59-60 and accompanying text.

est in ensuring that potential donors are minimally informed about matters that the general population considers relevant and material.[87] Such an interest is widely recognized in purely commercial[88] and securities law[89] contexts. The interest does not disappear with the addition of allegedly non-commercial speech elements.

If courts are to recognize such an interest, it is crucial for them to avoid swinging the door open to governmental abuses. They must avoid distorting or biasing public discussion to self-serving governmental or partisan ends. No legislature or other governmental agency may be entrusted with the power to simply second guess privately held priorities.[90] There is no reason to suppose, however, that the sort of disclosure requirements at issue in *Riley* necessarily violate these or other legitimate constitutional requirements.

Disclosure requirements similar to, if not more severe than, those at issue in *Riley* have been widely imposed on charitable solicitors for a number of years, and frequently have been legally challenged.[91] A wide range of charitable organizations have brought such challenges, either as plaintiffs or by way of defense against enforcement. Even a cursory examination of the reported case law reveals that the charitable organizations involved tend to be politically uncontroversial. It is implausible that any state legislature or enforcement agency would be inclined to target those charities or their speech for suppression on the basis of disfavored content, viewpoint, or ideology. Such charities include the Ameri-

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87. *See, e.g.*, Telco Communications v. Carbaugh, 700 F. Supp. 294, 297 (E.D. Va. 1988), *aff'd in part, rev'd in part, and remanded*, 885 F.2d 1225 (4th Cir. 1989); Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489, 1499 (D. Minn. 1986) (citing an asserted interest in ensuring "that prospective contributors are adequately informed," along with an antifraud interest).

88. See, for example, the logic of Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

89. It has been said, for example:

> Requiring disclosure of a material fact in order to prevent investor misunderstanding is the very essence of federal securities regulation. "The appropriate test for the materiality of an omitted fact is whether there is a substantial likelihood that a reasonable investor would consider the fact important in making his or her investment decision."

SEC v. Wall Street Publishing Institute, Inc., 851 F.2d 365, 374 n.9 (D.C. Cir. 1988) (quoting Zweig v. Hearst Corp., 594 F.2d 1261, 1266 (9th Cir. 1979)).

90. *See supra* notes 10-12 and accompanying text.

91. *See* Annotation, *Validity and Application of Governmental Limitation on Permissible Amount or Proportion of Fundraising Expenses or Administrative Costs of Charitable Organizations*, 15 A.L.R. 4th 1163 (1982).

can Heart Disease Prevention Foundation, Inc.;[92] various cancer funds and research projects;[93] the National Emergency Medical Association, Inc.;[94] Adopt-A-Pet, Inc.;[95] the Dyersburg, Tennessee Jaycees;[96] the Optimist Club of White Station, Memphis, Tennessee;[97] the Optimist Club of North Raleigh, North Carolina;[98] the Knights of Columbus, Council 1604;[99] a number of chapters of the Fraternal Order of Police in Maryland;[100] a number of similar chapters in Virginia;[101] volunteer and professional firefighter groups in Indiana;[102] various Lions, Kiwanis, Jaycees, Exchange, and Optimist Clubs, along with Knights of Columbus and Big Brothers/Big Sisters chapters in Maine;[103] and special olympics and child abuse programs in Minnesota.[104]

This does not suggest that groups or charities of a remotely controversial nature or recognizably distinctive viewpoint never judicially contest these sorts of regulations. For example, relevant case law has involved the American Christian Voice Foundation,[105] the Unification Church,[106] and the Planned Parenthood League of Massachusetts.[107] A fair examination of the cases, however, suggests neither that the most locally disfavored or controversial charities are involved, nor that moderately controversial groups, such as those noted immediately above, are particularly prominent in the relevant litigation. It is fair to conclude that even regulations more restrictive than the disclosure requirements in *Riley* have not been intended to repress unpopular views.

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92. Commonwealth v. Watson & Hughey Co., ___ Pa. Commw. ___, 563 A.2d 1276, 1278 n.3 (1989).

93. *See id.*

94. *See id.*

95. *See id.*

96. *See* WRG Enters. v. Crowell, 758 S.W.2d 214, 215 (Tenn. 1988).

97. *See id.*

98. *See* Optimist Club v. Riley, 563 F. Supp. 847, 848 (E.D.N.C. 1982).

99. *See* State *ex rel.* Olson v. WRG Enters., 314 N.W.2d 842, 843 (N.D. 1982).

100. *See* Secretary of State v. Joseph H. Munson, Co., 467 U.S. 947, 950 (1984).

101. *See* Telco Communications v. Carbaugh, 700 F. Supp. 294, 296 (E.D. Va. 1988), *aff'd in part, rev'd in part, and remanded*, 885 F.2d 1225 (4th Cir. 1989).

102. *See* Indiana Voluntary Firemen's Ass'n v. Pearson, 700 F. Supp. 421, 425 n.1 (S.D. Ind. 1989).

103. *See* State v. Events Int'l, Inc., 528 A.2d 458, 459 n.1 (Me. 1987).

104. *See* Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489, 1492 (D. Minn. 1986).

105. *See id.*

106. *See* Holy Spirit Ass'n for Unification of World Christianity v. Hodge, 582 F. Supp. 592, 595 (N.D. Tex. 1984).

107. *See* Planned Parenthood League of Massachusetts v. Attorney General, 391 Mass. 709, 464 N.E.2d 55, 58, *cert. denied*, 469 U.S. 858 (1984).

There is certainly a sense in which disclosure requirements are not "neutral." Although they are intended to discourage uninformed donations in general, there is an intended or at least predictable "disproportionate impact" on charitable organizations falling into a particular category.[108] It is constitutionally significant that these disproportionately affected charities do not correspond to any obviously disfavored, unpopular, or even controversial point of view. The class of charities disproportionately burdened by modest disclosure requirements of the type at issue in *Riley* will be those who suffer significant or relatively large reductions in charitable donations because of having to disclose certain facts. The required factual disclosure may well be brief, uncontestedly true, ordinarily relevant, standard, neutral in phrasing, non-burdensome, and not impinging on the conscience or scruples of the charitable solicitor. It is fair to suppose that most, if not all, legislators voting to impose such a disclosure requirement will be largely unaware of its likely impact on a range of noncontroversial, controversial, or even unpopular charities.[109] The available evidence suggests that minimal disclosure statutes will not disproportionately burden[110] the charities whose speech it is plausible to imagine a legislator or other government actor has sought to repress on the basis of disapproval of the charity's message or viewpoint.

Thus, *Riley*-type disclosure requirements are admittedly not utterly neutral in all respects. In a broad sense, they might even be said to "enhance the relative voice"[111] of some speakers at the expense of other speakers. In intent and in practice, however, *Riley*-type disclosure requirements do not and cannot serve as particularly useful instruments of oppression of disfavored or unpopular ideas.[112] This suggests that courts unduly slight the legitimate and

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108. *See Pearson*, 700 F. Supp. at 446 (quoting Riley v. National Fed. of the Blind, 487 U.S. 781, 789 n.5 (1989).

109. The reader is invited to attempt to rank the best-known national charities on administrative expenditure percentages before consulting the actual rankings to be found in Kinkead, *supra* note 72, at 146.

110. Again, disclosure requirements of the kind at issue in *Riley* may well tend to have unequal impact on charities' behavior or donation rates. *See, e.g.*, *Carbaugh*, 885 F.2d at 1232.

111. Meyer v. Grant, 486 U.S. 414, 426 n.7 (1988) (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

112. One court has upheld a *Riley*-type disclosure requirement despite its awareness of the Supreme Court's opinion in *Riley*. City of El Paso v. El Paso Jaycees, 758 S.W.2d 789, 791-93 (Tex. Civ. App. 1988), *writ denied* (1988). Actually, this result is probably incorrect under *Riley*, however ultimately otherwise justifiable.

important public interest underlying *Riley*-type disclosure requirements by insisting that such disclosure requirements pass the most intensely exacting and demanding levels of scrutiny available under the free speech clause.[113]

A slightly less demanding free speech test is appropriate. This is not because *Riley*-type disclosure requirements are not literally a prohibition or prosecution of disfavored speech.[114] Rather, it is because absent the kind of selective enforcement to which any government regulation is susceptible, *Riley*-type restrictions inevitably fall on the favored and disfavored, the popular and the unpopular alike, as the cases themselves indicate.[115]

Although neither the cases[116] nor the relevant literature[117] demonstrate it, *Riley*-type disclosure requirements may disproportionately burden newer or smaller charities as a class.[118] Of course, the burden of *Riley*-type disclosure requirements alone may not be large in such cases, and newer or smaller charities will normally be free to attribute an apparently high level of administrative or fundraising expenses to their youth or size. If, as appears to be the case,[119] the vast majority of new or small charities cannot plausibly claim that *Riley*-type disclosure requirements are an attempt to persecute or suppress their message, even new or small charities should be permitted to challenge such requirements only on the basis of a free speech test less exacting than that imposed in *Riley*.

It has been suggested that charities engaged in the dissemination or advocacy of ideas of any sort will tend to have relatively high fundraising costs for reasons unrelated to organizational ineffi-

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113. *See Riley*, 487 U.S. at 796; *Carbaugh*, 700 F. Supp. at 296.

114. *Cf.* Bantam Books v. Sullivan, 372 U.S. 58, 66-67 (1963) (recognizing the constitutional objectionability of somewhat less formal or peremptory state restrictions on targeted speech).

115. *But cf.* State v. Events Int'l, Inc., 528 A.2d 458, 462 (Me. 1987) (speculating, in the absence of any adduced evidence, that there will be a correlation between unpopularity and high administration or management costs).

116. *See supra* notes 92-107 and accompanying text.

117. *See* Johnson, *The Charity Market: Theory and Practice*, in THE ECONOMICS OF CHARITY 92 (I.E.A. 1973) ("[r]eligious societies . . . are so organized that in small number groups, the problems of large numbers can be avoided and contributions can be obtained more effectively").

118. *See, e.g.*, Optimist Club v. Riley, 563 F. Supp. 847, 848 (E.D.N.C. 1982); State ex rel. Olson v. WRG Enters., 314 N.W.2d 842, 849 (N.D. 1982) (concluding that substantial economics of scale are available to larger charities).

119. *See supra* notes 92-107 and accompanying text.

ciency.[120] These cases raise special problems. Perhaps the most straightforward solution is for the state to formulate the required percentage disclosure in such a way that the actual costs of advocacy itself are not counted as administrative or managerial expenses. To the extent that this exclusion may prove unworkable, the problem can be resolved at the level of the constitutional test imposed. *Riley*-type disclosure requirements that genuinely burden the advocacy of ideas can be subjected to a free speech test between that imposed in *Riley* and that appropriate for merely commercial speech.[121] In the cases of charities not advocating or communicating ideas on any public issue, nothing more rigorous than the commercial speech test should be applied.[122]

## IV. Distinguishing *Riley*-Type Disclosure Requirements From Classic Violations of Freedom of Speech

The Court in *Riley* imposed an excessively stringent free speech test on the state's disclosure requirements. The Court relied in part on well-known free speech case law drawn from contexts in which a stringent free speech test was more justifiable.[123] The Court recognized that cases such as *West Virginia State Board of Education v. Barnette*,[124] *Miami Herald Publishing Co. v. Tornillo*,[125] and *Wooley v. Maynard*[126] involved governmentally-

120. *See* State v. Events Int'l Inc., 528 A.2d 458, 462 (Me. 1987). We shall simply assume that donors will be indifferent to whether donations go directly to charitable work itself or to promulgating the general "message" of the charity.

121. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) ("[c]ommercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest"); *see also* Board of Trustees of State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3032-35 (1989) (establishing that the "narrow tailoring" requirement in commercial speech cases requires only what amounts to reasonably narrow tailoring, and not the least restrictive means of achieving the governmental aim).

122. It is plausible, though not well supported by current case law, to suggest that logic and practical wisdom generally counsel only minimum judicial scrutiny of governmental regulation of speech where the speech in question does not seek to address any actual or proposed question of social or public policy. *See* R. Wright, The Future of Free Speech Law ch. 1 (1990).

123. *See Riley*, 487 U.S. at 797.

124. 319 U.S. 624, 628 n.4, 642 (1943) (holding unconstitutional a compulsory flag salute statute applicable to West Virginia public school students upon a challenge by Jehovah's Witnesses).

125. 418 U.S. 241, 256 (1974) (holding unconstitutional a Florida right-of-reply statute requiring newspapers to publish editorial replies by candidates criticized by the newspaper).

126. 430 U.S. 705, 707 n.2, 713-15 (1977) (holding unconstitutional a New Hampshire statute requiring display on state license plates of the state motto "Live Free or Die" upon

compelled expression of "opinion" as opposed to expressions of fact,[127] but found this distinction unpersuasive. The Court was perhaps correct in implying that restrictions on expression of factual matters are not generally subject to a less stringent test than are restrictions on matters of opinion.[128] Regardless, there remains a significant difference between the degree of governmental intrusion in *Riley*-type disclosure cases and the degree of intrusion in cases like *Barrette*, *Tornillo*, and *Wooley*. The North Carolina statute in *Riley* required only a brief, impersonal, presumably correct and uncontested statement of fact.[129] In contrast, the regulations in *Barnette*, *Tornillo*, and *Wooley* required the speaker to violate deeply held religious or political beliefs, or at a minimum compelled the speaker to promote distinctive points of view flatly opposed to his own.[130]

The *Riley* disclosure requirements are similarly distinguishable from the restrictions imposed in the Court's classic time, place, and manner regulation cases. These cases involve more of a burden on first amendment rights than do the disclosure requirements in *Riley*. For example, the ordinance struck down in *Lovell v. City of Griffin*[131] essentially banned all literature distribution, of any kind and by any means, in the absence of advance written permission from the City Manager.[132] The restrictions on charitable appeals struck down in *Schneider v. State*[133] were said to "require all who

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challenge by Jehovah's Witnesses).

127. *Riley*, 487 U.S. at 797-98.

128. *See generally* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (refusing to enjoin the publication of factual excerpts from the "Pentagon Papers"). *But cf.* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (denying recovery to public figure plaintiff in intentional infliction of emotional distress in the absence of a showing of a false statement of fact); Gertz v. Welch, 418 U.S. 323 (1974) (apparently immunizing, in dicta, all expressions of opinion, as opposed to expressions on matters of fact, in the defamation context).

129. *See Riley*, 487 U.S. at 797-98.

130. *See supra* notes 124-26; *see also* Pacific Gas & Elec. Co. v. Public Util. Com'n, 475 U.S. 1, 11 n.7, 14 (1986) (plurality opinion) ("[l]ike the Miami Herald . . . appellant [utility company] is still required to carry speech with which it disagree[s]"). Similarly, the identity-disclosure requirement in Talley v. California, 362 U.S. 60 (1960), was more burdensome, invidious, and viewpoint-sensitive than *Riley*-type disclosure requirements. As a rule, popular, mainstream organizations and individuals will be largely unaffected by a rule requiring that their handbills bear their name. Disproportionately, it will be the unpopular speakers, those who feel threatened or those who fear retribution, who will be motivated to engage in anonymous pamphleteering. *Id.* at 64-65.

131. 303 U.S. 444 (1938).

132. *See id.* at 447, 451; *see also* Schneider v. State, 308 U.S. 147, 161-62 (1939) (discussing the holding in *Lovell*).

133. 308 U.S. 147 (1939).

wish to disseminate ideas to present them first to policy authorities for their consideration and approval, with a discretion in the police to say some ideas, while others may not, be carried to the homes of citizens . . . ."[134] The ordinance in *Martin v. Struthers*[135] was similarly sweeping, intrusive, and burdensome.[136] The Court in *Martin* struck down an ordinance that prohibited summoning the occupant of any residence to the door for the purpose of distributing any sort of handbill or circular.[137]

To compare the disclosure requirements in *Riley* to the restrictions in cases such as *Lovell*, *Schneider*, *Martin*, or the Supreme Court's more recent precedents[138] is to ignore monumental qualitative differences in the burden on the speech involved. The classic time, place, and manner cases are as readily distinguishable from the *Riley* disclosure requirements as are the classic compelled speech cases.[139] Of course, if the *Riley* disclosure requirements are pointless rather than merely suspicious, there is no reason to distinguish them. But as suggested above,[140] in the world of imperfect actors encountered outside the pages of the economics textbooks, the *Riley* disclosure requirements are hardly pointless and may in fact genuinely advance free speech.

If, however, the important public interests promoted by the disclosure requirements in *Riley* could have been promoted just as well, or nearly as well,[141] by means even less burdensome on the free speech activities of charitable solicitors, the state is presumably required to adopt those alternative, less burdensome regulations. According to the Court, requiring the speech restriction to be narrowly tailored varies in its stringency, depending upon whether the speech restriction is said to be content-based,[142] con-

134. *Id.* at 164.

135. 319 U.S. 141 (1943).

136. *Id.*

137. *See id.* at 142.

138. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 628 (1980) (noting that while the ordinance at issue allowed some forms of door-to-door propagation of views without a permit, a strongly conditioned permit was required for all persons soliciting funds).

139. *See supra* notes 123-130 and accompanying text.

140. *See supra* notes 71-89 and accompanying text.

141. In Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), Justice Scalia's concurring opinion recognizes, with admirable candor, that the Court may strike down a content-based speech regulation without any showing that some less burdensome restriction is likely to be precisely as effective in promoting the governmental interest at stake. *Id.* at 131-32 (Scalia, J., concurring).

142. *Id.* at 126 (applying "least restrictive means" test for narrow tailoring).

tent-neutral,[143] or a restriction on merely commercial speech.[144]

As noted above, the Court in *Riley* characterized the disclosure requirement at issue as content-based.[145] The Court reasoned that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."[146] The Court in *Riley* therefore applied the most stringent test for narrow tailoring: the government must have adopted the least restrictive means for achieving its interests.[147] Whether the Court should in fact have imposed a rigorous version of the narrow tailoring requirement is debatable. Even assuming that the commercial character of some charitable solicitation speech is irrelevant, the speech of charitable solicitors is not being restricted in any way closely correlated with the viewpoint, ideology, or political or religious ideas or principles of the speaker.[148] This lack of invidiousness or even predictability of impact suggests that the reasons for a stringent formulation of the narrow tailoring requirement are largely absent in the context of *Riley*-type disclosure regulations.

Regardless of the stringent nature of the narrow tailoring test employed in *Riley*, it is not clear that the disclosure requirements in *Riley* should have failed that test. In *Riley*, the Court concluded that the disclosure requirements did not amount to a narrowly tailored regulation, because alternative, less speech-burdensome methods of achieving the same goals underlying the disclosure requirements were available.[149] This conclusion is questionable.

The Court suggested that the state could have advanced its interests in preventing fraud, false statements, and obtaining money under false pretenses, by more vigorously enforcing its antifraud

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143. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757-58 (1989) (content-neutral speech restrictions must be narrowly tailored, but "need not be the least-restrictive or least-intrusive means" of promoting the governmental interest).

144. Board of Trustees of State Univ. of New York v. Fox, 109 S. Ct. 3028, 3034-35 (1989) (restrictions on commercial speech must be narrowly tailored in only the loose sense applicable to content-neutral restrictions on speech).

145. *Riley*, 487 U.S. at 795; *see supra* notes 13-15 & accompanying text.

146. 487 U.S. at 795.

147. *Id.* at 795-98; *see Sable Communications*, 492 U.S. at 126.

148. *See supra* notes 84-106 & accompanying text. While it is true that concern over viewpoint bias does not exhaust the reasons for rigorously testing content-based restrictions, no other such reasons are decisively implicated. *See* Planned Parenthood League of Massachusetts, Inc. v. Attorney General, 391 Mass. 709, ___, 464 N.E.2d 55, 60, *cert. denied*, 469 U.S. 858 (1984) (concern that content-based restrictions may prohibit public discussion "of an entire topic").

149. *Riley*, 487 U.S. at 793.

laws.[150] According to the Court, this would have been less burdensome on free speech.[151] Of course, this overlooks the fact that the public interest in dissemination of some basic information about charities is based not on preventing fraud,[152] but on enhancing, in a non-invidious, unbiased way, the effective operation of the free speech marketplace of ideas.[153]

More crucially, the Court in *Riley* suggested that the state might regularly publish and disseminate some or all of the financial information it collects from charitable solicitors.[154] Whether this would truly be less invasive of the speech interests of the solicitors is questionable. Nonetheless, the state could easily argue[155] that a generalized, scattershot publication by the state of the relevant financial information, even if it reached more people, would simply not be as timely, salient, and effective as requiring disclosure at the time of a particular solicitation. If government publication of the relevant information is less effective in promoting the relevant state interest underlying the regulation, current case law seems to require some sort of vague judicial balancing of the interests involved before a finding of lack of narrow tailoring can be made.[156]

Admittedly, it is impossible to show decisively that the disclosure requirements in *Riley* were narrowly tailored, given the latitude available for judicial subjectivity in making the narrow tailoring determination.[157] The *Riley* Court announced that requiring fundraisers to disclose their professional status would be narrowly tailored and thus withstood first amendment scrutiny.[158] By a simple extension of the Court's own logic, the state's publishing this information itself would be less burdensome on the charitable solicitor's speech rights. Therefore, the hypothetical requirement

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150. *Id.* at 794

151. *Id.*

152. *See supra* notes 24, 34-38, 82 and accompanying text.

153. *See supra* notes 62-83 and accompanying text.

154. *See Riley*, 487 U.S. at 800. For cases referencing this *Riley* discussion, see Indiana Voluntary Fireman's Ass'n Inc. v. Pearson, 700 F. Supp. 438, 446 (S.D. Ind. 1989), and Telecommunications v. Carbaugh, 700 F. Supp. 294, 298 (E.D. Va. 1989).

155. The state bears the burden of proof on the narrow tailoring issue. *See* Board of Trustees of State Univ. of New York v. Fox, 109 S. Ct. 3028, 3035 (1989).

156. Sable Communications v. FCC, 109 S. Ct. 2829, 2859 (1989) (Scalia, J., concurring). For a broader discussion of the legitimacy of interest balancing in the free speech context generally, see Wright, *Does Free Speech Jurisprudence Rest On a Mistake?: Implications of the Commensurability Debate*, 23 LOY. L.A.L. REV. 763 (1990).

157. *See* Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57, 71 n.65 (1989).

158. *See Riley*, 487 U.S. at 799 n.11.

that solicitors disclose their professional status could not be narrowly tailored.[159] In sum, it is not difficult to imagine that a court might reasonably, under facts similar to those in *Riley*, find *Riley*-type disclosure requirements to be sufficiently tailored to effect the state purpose.

## V. CONCLUSION

There is an important public interest in ensuring that collective and individual decisionmaking in a democracy is conducted on at least a minimally well-informed basis.[160] More questionable is whether freedom of speech precludes achieving this aim through a generally applicable governmentally-required disclosure of an uncontested, brief, neutral, relevant statement of fact which does not implicate any privacy interest or political or religious principle of the speaker and where the speaker has ample opportunity to explain or justify any anticipated adverse effects of those mandated disclosures. Such a requirement, and similar requirements, may well be justifiable in appropriate circumstances, even though the government may be said to thereby intervene into the private market of ideas. The social institution of freedom of speech may function best in the presence of this sort of governmental intervention. The broader question suggested by this result is whether any general principle can be derived that will reliably indicate which sorts of governmental regulations of speech are consistent with the institution of freedom of speech. This question is unlikely to be resolvable except on the basis of experiment and pragmatic judgment.

It is possible to argue that since we now know that the value of governmental interventions into the private market of speech will be so limited, prudence requires we avoid the risks of governmen-

159. Justice Scalia found this hypothetical requirement not to be narrowly tailored, but on somewhat different logic. *See id.* at 803 (Scalia, J., concurring in part and concurring in the judgment). To the extent that the *Riley* disclosure requirements are thought of as ordinary business information disclosure requirements, the narrow tailoring requirement is somewhat more deferential. *See* Pacific Gas & Elec. Co. v. Public Util. Com'n, 475 U.S. 1, 15 n.12 (1986) ("[t]he State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations"). For a discussion of the debate between Justice Scalia and the *Riley* majority on this point, see Indiana Voluntary Firemen's Ass'n, Inc. v. Pearson, 700 F. Supp. 421, 441-42 (S.D. Ind. 1989).

160. *See supra* notes 56-68 and accompanying text. The Court has acknowledged that "the public interest requires that private economic decisions be well-informed" as well. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 483 (O'Connor, J., dissenting) (1988) (citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 762-65 (1976)).

tal suppression of ideas by opting for a rule that bars all such government intervention, at least beyond mere competing speech by the government itself.[161] However, it must be noted that we have little jurisprudential experience with attempts by the government to enhance or ensure a minimum floor for the quality of public discussion through compulsory means not implicating conscience, principles, or viewpoints. Given the lack of relevant case law, we cannot conclude that no such attempt can ever be justified, even taking the long-term risks of abuse or over-extension of such a principle into account.

Additionally, it is also possible to argue that there is no working distinction between government-mandated speech and speech by "private" parties that is shaped by the many ways in which public rules influence the content of speech.[162]

While what is government "intervention" and what is "background" may often be contestable, the cases follow a widely shared intuition that there is, for example, a qualitative difference worth making between a compulsory flag salute[163] on the one hand and the effects of government zoning, tax, and school lunch regulations on the contents of a student's speech on the other. To reject such a distinction is to embark on an apparently riskier, more uncertain course than that argued for here.

161. Analogously, an economist might recognize a pattern of systematic market failure, but argue that the indirect costs and risks of establishing and legitimizing a principle permitting some government intervention require that the government never intervene, no matter how cost-justified such an intervention might seem in a particular case.

162. For some general theory apart from the free speech context, see generally Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

163. *See* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).