CHARITABLE STATE REGISTRATION AND THE DORMANT COMMERCE CLAUSE

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Charitable solicitation in the U.S. is regulated by "the several States." For most of the nation's history, charities tended to be local endeavors, raising money and providing relief in their immediate vicinities. In the latter half of the twentieth century, charities increasingly grew beyond these local origins as new technologies enabled even the smallest charities to develop a national reach with direct mail and telemarketing campaigns. Nevertheless, primary authority for regulating charitable solicitations remained with the states.

I. REGULATION BY THE STATES

The states retain the general police power to regulate the solicitation of charitable contributions from their residents and within their jurisdictions. Forty-three states and the District of Columbia have exercised this power by enacting statutes regulating charitable solicitations.[1] Although the states posit various

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1. *See* ALA. CODE §§ 13A-9-70 to 13A-9-84 (1994 & Supp. 2003); ALASKA STAT. §§ 45.68.010 to 45.68.900 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 44-6551 to 44-6561 (West 2003); ARK. CODE ANN. §§ 4-28-401 to 4-28-416 (Michie 2003); CAL. BUS. & PROF. CODE §§ 17500 to 17510.85, 17200 to 17209 (West 1997 & Supp. 2004); CAL. GOV'T CODE §§ 12599 to 12599.5 (West 1992 & Supp. 2004); COLO. REV. STAT. tit. 6, art. 16 (2002 & Supp. 2003); CONN. GEN. STAT. §§ 21a-175 to 21a-1901 (1994 & Supp. 2004); D.C. STAT. §§ 44-1701 to 44-1714 (2001 & Supp. 2004);

justifications for these statutes, they typically boil down to two main reasons: public disclosure and fraud prevention.[2] The public disclosures most typically sought by these statutes are disclosure of the purpose for which contributions are solicited and disclosure of the manner in which contributions are actually used.[3] Although many statutes criminalize any violation of the Charitable Solicitation Act[4] (which would necessarily include missing a deadline or failure to include the proper wording of a required disclosure on a solicitation device), they also clarify the meaning of "fraud" in the context of charitable solicitations.[5]

FLA. STAT. ch. 496 (2002 & Supp. 2004); GA. CODE ANN. §§ 43-17-1 to 43-17-23 (2002); HAW. REV. STAT. §§ 467B-1 to 467B-13 (2002); ILL. COMP. STAT. §§ 460/0.01 to 460/23 (2000); IND. CODE §§ 23-7-8-1 to -9, 24-5-12-25 (1994 & Supp. 2004); IOWA CODE §§ 13C.1 to 13C.8 (2000); KAN. STAT. ANN. §§ 17-1759 to -1775 (1995); KY. REV. STAT. ANN. §§ 367.650 to 367.670 (Banks-Baldwin 2002); LA. REV. STAT. ANN. §§ 1901-1909.1 (West 1987 & Supp. 2004); ME. REV. STAT. ANN. tit. 9, ch. 385, §§ 5001-5016 (West 1997); MD. CODE ANN., BUS. REG. §§ 6-101 to 6-701 (1992-1998 & Supp. 2003); MASS. GEN. LAWS ch. 12, § 8 (2002); MICH. COMP. LAWS §§ 400-271 to 400-294 (1997); MINN. STAT. §§ 309.50 to 309.72 (2002); MISS. CODE ANN. §§ 79-11-501 to 79-11-529 (1973-2001); MO. REV. STAT. §§ 407.450 to 407.489 (2001); N.H. REV. STAT. ANN. §§ 7:19 to 7:19-b (2001); N.J. REV. STAT. §§ 45:17A-18 to 45:17A-40 (1995 & Supp. 2004); N.M. STAT. ANN. §§ 57-22-1 to 57-22-11 (Michie 2003); N.Y. EXEC. LAW art. 7-A, §§ 171-a to 177 (McKinney 2004); N.C. GEN. STAT. §§ 131F-1 to 131F-4 (2003); N.D. CENT. CODE §§ 50-22-01 to -05 (1999 & Supp. 2003); OHIO REV. CODE ANN. §§ 1716-01 to 1716-17, 1716-99 (West 1994 & Supp. 2003); OKLA. STAT. tit. 18, §§ 552.1 to 552.18, 553.3 (1999); OR. REV. STAT. §§ 128.801 to 128.898 (2003 & Supp. 2004); PA. STAT. ANN. tit. 10, §§ 162.1 to 162.24 (West 1999 & Supp. 2004); R.I. GEN. LAWS §§ 5-53-1 to 5-53-14 (1999 & Supp. 2003); S.C. CODE ANN. §§ 33-56-10 to 33-56-200 (Law. Co-op. 1990 & Supp. 2003); TENN. CODE ANN. §§ 48-101-501 to 48-101-521 (2002 & Supp. 2003); TEX. REV. CIV. STAT. ANN. § 9023e (Supp. 2004); UTAH CODE ANN. §§ 13-22-1 to 13-22-23 (2001 & Supp. 2004); VT. STAT. ANN. tit. 9, §§ 2451 to 2479 (1993 & Supp. 2003); VA. CODE ANN. §§ 57-48 to 57-69 (Michie 2003 & Supp. 2004); WASH. REV. CODE §§ 19-09-010 to 19-09-915 (1999 & Supp. 2004); W. VA. CODE §§ 29-19-1 to 29-19-15b (2001 & Supp. 2004); WIS. STAT. §§ 440.41 to 440.48 (1998 & Supp. 2003). Only Delaware, Idaho, Montana, Nebraska, Nevada, South Dakota, and Wyoming have refrained from enacting such laws.

2. *See, e.g.*, CAL. BUS. & PROF. CODE § 17510(b) (1997 & Supp. 2004); FLA. STAT. ch. 496.402 (2002 & Supp. 2004); N.C. GEN. STAT. § 131F-1 (2003); PA. STAT. ANN. tit. 10, § 162.2 (West 1999 & Supp. 2004).

3. *See, e.g.*, FLA. STAT. ch. 496.402 (2002 & Supp. 2004); N.C. GEN. STAT. § 131F-1 (2003); PA. STAT. ANN. tit. 10, § 162.2 (West 1999 & Supp. 2004).

4. *See, e.g.*, MINN. STAT. § 309.581 (2002); MISS. CODE ANN. § 79-11-529 (1973-2001); OKLA. STAT. tit. 18, § 552.18 (1999); PA. STAT. ANN. tit., 10 § 162.15(a)(1) (West 1999 & Supp. 2004).

5. *See, e.g.*, CONN. GEN. STAT. § 21a-190h (1994 & Supp. 2004); KY. REV. STAT. ANN. § 367.667 (Banks-Baldwin 2002); N.Y. EXEC. LAW § 174-d (McKinney 2004); PA. STAT. ANN. Tit. 10, §§ 162.15(a)(3)-(13) (West 1999 & Supp. 2004).

To effect these goals, most Charitable Solicitation Acts[6] require that charities secure a state charitable solicitation permit or license or otherwise register with the state prior to soliciting charitable contributions.[7] Fortunately, thirty-three jurisdictions accept one form, the Unified Registration Statement[8] (URS), for initial registrations. Six states require charities to file different forms promulgated by their own administrative agencies.[9] This initial "registration" consists primarily of a financial report and organizational information. Most jurisdictions accepting the URS allow registrants to satisfy the financial report requirement by

6. For convenience, this article will refer to these enactments generally as "Charitable Solicitation Acts." The actual enactments themselves are variously entitled "Charitable Solicitations Act" (*e.g.,* COLO. REV. STAT. § 6-16-101 (2002 & 2003 Supp.); GA. CODE ANN. § 43-17-1 (2002); ME. REV. STAT. ANN. tit. 9, ch. 385, § 5001 (West 1997); N.M. STAT. ANN. § 57-22-1 (Michie 2003); UTAH CODE ANN. § 13-22-1 (2001 & Supp. 2004)), "Solicitation of Contributions Act" (*e.g.,* FLA. STAT. ch. 496, § 496.401 (2002 & Supp. 2004)), "Charitable Organizations and Solicitations Act" (*e.g.* KAN. STAT. ANN. § 17-1759 (1995); MICH. COMP. LAWS § 400.271 (1997)), "Charitable Registration and Investigation Act" (*e.g.,* N.J. REV. STAT. § 45:17A-18 (1995 & Supp. 2004)), "Solicitation of Charitable Contributions Act" (*e.g.,* OKLA. STAT. tit. 18, § 552.1 (1999)), "Solicitation of Funds for Charitable Purposes Act" (*e.g.,* PA. STAT. ANN. tit. 10, § 162.1 (West 1999 & Supp. 2004)), "Solicitation of Charitable Funds Act" (*e.g.*, S.C. CODE. ANN. § 33-56-10 (Law. Co-op. 1990 & Supp. 2003); W. VA. CODE § 29-19-1 (2001 & Supp. 2004)), and other variations on the same theme.

7. *See, e.g.*, ME. REV. STAT. ANN. tit. 9, § 5004.1C (West 1997); N.C. GEN. STAT. § 131F-5(a) (2003); PA. STAT. ANN. tit. 10, § 162.5(a) (West 1999 & Supp. 2004).

8. The Unified Registration Statement (URS) is a product of a collaboration between the National Association of Attorneys General (NAAG), the National Association of State Charities Officials (NASCO), and the Multi-State Filer Project, Inc. The URS forms and instructions can be downloaded from http://www.multistatefiling.org/urs_webv231.pdf (last visited Oct. 1, 2004) [hereinafter URS pdf]. The URS is accepted by Alabama, Arkansas, California, Connecticut, the District of Columbia, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. *See* URS pdf at 28-37.

9. Alaska, Arizona, and Florida do not accept the URS. *See id.* at 38. Colorado is the only state that requires charities to register online. COLO. REV. STAT. § 6-16-110.5 (3) (2002 & Supp. 2003); 8 COLO. CODE REGS. § 1505-9.1(1) (2004). Although it appears from the most recent version of the URS that both Oklahoma and North Carolina accept the URS form, this is not accurate. Oklahoma has not accepted URS forms since it adopted a new document management system which does not support the URS in a scanned format. And North Carolina accepts either its own form or its own form plus the URS. In other words, a charity *must* fill out the form promulgated by the Charitable Solicitation Licensing Section of the North Carolina Department of the Secretary of State. A charity may choose to fill out the URS also.

submitting a copy of their most recent IRS Form 990.[10] The organizational information ranges from the mundane (e.g., name, address, and Taxpayer Identification Number) to the practical (e.g., the "purposes and programs of the organization") to the esoteric (e.g., whether any of the organization's directors have been convicted of a misdemeanor).[11] In addition, many states also require a registration fee and submission of copies of the organization's articles of incorporation, bylaws, IRS determination letter, and fundraising contracts.[12]

This initial registration is only the beginning of the process. To remain in compliance, charities must make additional filings in each state in subsequent years. Each state requiring registration also requires registered charities to make an annual financial report.[13] Most states allow registrants to satisfy this requirement by simply providing a copy of the organization's IRS Form 990.[14] However, other states require the financial information to be restated on separate forms promulgated by the states' regulators.[15]

10. IRS Form 990 is the "informational" tax return that most nonprofits must file with the IRS annually. Some states accepting the IRS Form 990 as an annual report also require submission of an audited financial statement depending on the applicant's gross revenues in the most recent fiscal year. *See* URS pdf, *supra* note 8, at 28-37. Although Mississippi, Tennessee, and West Virginia accept the URS and require submission of the applicant's most recent IRS Form 990, each of these states also require applicants to submit an additional financial report form. *See id.* at 17-18, 24-26. Among states that do not accept the URS, Alaska, Arizona, Colorado, and Florida accept IRS Form 990 in lieu of their own financial report forms. North Carolina and Oklahoma require registrants to fill out forms promulgated by their administrative agencies in addition to submitting their IRS Form 990.

11. *See id.* at 6-8.

12. *See id.* at 43 (summarizing these requirements).

13. *See, e.g.*, FLA. STAT. ch. 496.407(1) (2004); ILL. COMP. STAT. 460/4(a) (2004); N.Y. EXEC. LAW § 172-b (McKinney 2004).

14. *See, e.g.*, FLA. STAT. ch. 496.407(2) (2002 & Supp. 2004); KY. REV. STAT. ANN. § 367.657(3) (Banks-Baldwin 2002); VA. CODE ANN. §§ 57-49(A), 57-49(A)(6) (Michie 2003 & Supp. 2004). Many states also require submission of the organization's audited financial statement if the registrant's gross revenues exceeded a certain level in the previous fiscal year. *See, e.g.*, KAN. STAT. ANN. § 17-1763(c) (1995) (requiring filing of audited financial report if contributions exceeded $100,000 in the previous fiscal year); N.Y. EXEC. LAW § 172-b(1) (McKinney 2004) (requiring same if gross revenues exceeded $250,000 in the previous fiscal year); TENN. CODE ANN. § 48-101-506(b)(2)(A) (2004) (requiring same if gross revenues exceeded $300,000 in the previous fiscal year).

15. The process is complicated by the fact that the states requiring a separate financial report form for annual reports is *not* the same set of states (*see supra* text accompanying note 10) requiring one for initial registrations. For example, New York does not require any financial report form besides the IRS Form 990 for an

Many states require that the registration, which details the organizational information, be renewed. In most cases, the renewal and annual report are considered one filing.[16] However, some states effectively require that charities file separate registration renewals and annual reports.[17]

This entire process is further complicated by still more filings and by local ordinances regulating charitable solicitations. Six jurisdictions require charities to engage registered agents located within their borders even though the charity has no contact with the jurisdiction other than soliciting contributions from its residents.[18] And many jurisdictions require charities to register as foreign corporations[19] merely because they solicit residents through direct mail, telemarketing, or the Internet.[20] Finally, localities are

initial registration, but for annual reports New York requires submission of both an IRS Form 990 and New York's own form CHAR497. N.Y. EXEC. LAW § 172-b(1) (McKinney 2004), *available at* http://www.oag.state.ny.us/charities/forms/char497.pdf (last visited Oct. 1, 2004).

16. *See, e.g.*, N.C. GEN. STAT. § 131F-5(c) (2003); PA. STAT. ANN. tit. 10, §§ 162.5(a)-(e) (1999 & Supp. 2004); VA. CODE ANN. § 57-49 (2003 & Supp. 2004).

17. *See, e.g.*, ARK. CODE ANN. § 4-28-402(a)(1)(A) (Michie 2003) (requiring registration before solicitation; although the statute is not explicit on this point, in practice Arkansas issues licenses that expire after one year and must be renewed prior to the anniversary of the registration date); *id.* § 4-28-403 (requiring annual reports to be filed on or before May 15 of each year, although extensions are available and organizations can apply for another due date if its fiscal year does not coincide with the calendar year); S.C. CODE ANN. § 33-56-30(A) (Law. Co-op. 1990 & Supp. 2004) (requiring organizations to "file a registration statement . . . by July first of each year but in all cases prior to solicitation."); *id.* § 33-56-60 (requiring organizations to "file . . . an annual report of its financial activities . . . within four and one-half months of the close of the organization's fiscal year. . . ." although extensions are available); WIS. STAT. § 440.08(2)(a)23m (1998 & Supp. 2003) (requiring charitable organizations to renew registrations prior to August 1, 2004); *id.* § 440.42(3)(a) (requiring charitable organizations to file annual reports within six months of the previous fiscal year end).

18. The jurisdictions are the District of Columbia, Illinois, Michigan, Mississippi, New Mexico, and North Dakota. *See* URS pdf, *supra* note 8, at 28-37.

19. *See, e.g.*, CAL. CORP. CODE § 2105(a) (West 2004); KY. REV. STAT. ANN. § 271B.15-010(1) (Banks-Baldwin 2002); N.D. CENT. CODE § 10-19.1-134(1) (1999 & Supp. 2003).

20. Regulation of solicitations conducted over the Internet has been a nettlesome issue. Nearly all Charitable Solicitation Acts were enacted before the Internet came into widespread use in the mid-to-late 1990s. And most such Acts had defined "solicitation" broadly. For example, New York defines "solicit" as "[t]o directly or indirectly make a request for a contribution, whether express or implied, through *any medium*. A 'solicitation' shall be deemed to have taken place whether or not a contribution is made." N.Y. EXEC. LAW § 171-a(10) (McKinney 2002 & Supp. 2004) (emphasis added). Kansas defines "solicitation" as "*any* request or appeal, either oral or written, or any endeavor to obtain, seek or plead

free to enact their own charitable solicitation ordinances requiring registration as well;[21] at least four localities have already done so.[22]

The various registration requirements do not conflict with each other. They are, however, duplicative[23] and burdensome.

for funds, property, financial assistance or other thing of value. . . ." KAN. STAT. ANN. § 17-1760(f) (1995) (emphasis added). Tennessee defines "solicit" as "*any* oral or written request, *however communicated*, whether directly or indirectly, for a contribution." TENN. CODE ANN. § 48-101-501(9) (2002 & Supp. 2003) (emphasis added). Thus, even a "passive solicitation" website that merely described a charitable organization and allowed site visitors to donate via credit card, a private payment service, or other means would trigger a registration requirement under many state Charitable Solicitation Acts. However, the nonprofit community and regulators realized that literal application of these definitions to charities' webpages containing passive solicitations would likely raise numerous Due Process constitutional issues. After all, even though the charities could reasonably expect that residents of numerous jurisdictions would access the website and perhaps contribute, the charities had not purposefully availed themselves of the jurisdictions' markets or courts and had no other contact with it. Under such circumstances, regulatory jurisdiction over the charities would be unconstitutional. Asahi Metal Indus. Co. v. Superior Court of California, Solano County, 480 U.S. 102, 112-14 (1987). *See also* Am. Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County, 221 F.3d 1211, 1216-18 (11th Cir. 2000).

To address the issue, NASCO approved the "Charleston Principles" on March 14, 2001, which advises regulators on various aspects of charitable solicitations conducted via the Internet. Insofar as the Charleston Principles addressed charitable solicitations conducted via the Internet by nonresident charities that would otherwise not have to register in a jurisdiction, NASCO essentially recommended that these charities should be compelled to register in that particular jurisdiction if: (a) the charity used the Internet to specifically target (via email or other methods) donors in that jurisdiction or (b) the charity received contributions from that jurisdiction on a "repeated and ongoing basis or a substantial basis through its Web site." NASCO, THE CHARLESTON PRINCIPLES § III.B.1 (2001), *at* http://www.nasconet.org/public.php?pubsec=4&curdoc=10 (last visited Oct. 1, 2004) [hereinafter CP Website]. It is important to remember that the Charleston Principles are not legally binding, but merely represent the "informal, nonbinding advice of the NASCO Board of Directors to NASCO members." *Id.* Nevertheless, thus far the author is unaware of any instance in which a state has repudiated the Charleston Principles either explicitly or implicitly since their promulgation.

21. Many Charitable Solicitation Acts contain provisions explicitly providing that the Act does not prohibit localities from enacting their own charitable solicitation ordinances requiring an additional layer of registration with the locality. *See, e.g.*, FLA. STAT. ch. 496.421 (West 2002 & Supp. 2004); KY. REV. STAT. ANN. § 367.669 (Banks-Baldwin 2002); VA. CODE ANN. § 57-63 (Michie 2003).

22. COLUMBUS, OHIO, CODE §§ 525.01-.23. (2004); JEFFERSON CO., KY., CODE §§ 117.01 et seq. (2004); LOS ANGELES, CAL., CODE §§ 44.00-.15 (2004); PINELLAS CO., FLA., CODE §§ 42-266 to 42-344 (2004).

23. Not only are the various state filings duplicative of each other, they substantially duplicate federal law. In order to inform the public as to how charitable contributions are spent, State Charitable Solicitation Acts require charities to file IRS Forms 990, or to file state-designed forms that largely

The net effect of all these statutes and ordinances is that the typical charity that solicits contributions nationwide must meet at least forty-two deadlines per year[24] and pay $3400 to $5500 per year in filing fees, registered agent fees, and other direct expenses.[25] Additionally, the charity must expend significant resources on accountants, attorneys, and administrative staff to remain in compliance with each regulating jurisdiction.[26] Every dollar spent

rearrange data from the IRS Form 990 (for an example of an annual report form that merely seeks IRS Form 990 information in a different format, *see* Tennessee Form SS-6002, *available at* http://www.state.tn.us/sos/forms/ss-6002.pdf (last visited Oct. 1, 2004), which goes so far as to have line by line instructions merely mandating that the registrant rearrange its IRS Form 990 data in a different order), or to file both. However, federal law already requires that charities provide copies of their IRS Forms 990 directly to the public either at their offices or through the mail free of charge. Treas. Reg. §§ 301.6104(d)-1 to -3 (2004). Moreover, to the extent that Charitable Solicitations Acts prohibit fraud in charitable solicitations, they are also arguably duplicative of state and federal laws prohibiting fraud and false pretenses in general terms. *See, e.g.*, 18 U.S.C. § 1001 (2004); NEV. REV. STAT. § 205.375 (2001); VA. CODE ANN. § 18.2-178 (Michie 1996 & Supp. 2004).

24. As noted above, charities must meet deadlines for renewals, annual reports, and registration as a foreign corporation. The number of deadlines that a charity must meet varies based on where the charity solicits (for example, certain charities refuse to solicit in localities that require registration in addition to registration with the state in which the locality sits) and the various exemptions from registration written into state Charitable Solicitation Acts. For example, different states have different minimum gross revenue thresholds before registration is required. *See, e.g.*, PA. STAT. ANN. tit. 10, § 162.6(a)(8) (West 1999 & Supp. 2004) (exempting from the registration requirement organizations receiving less than $25,000 in contributions annually); CONN. GEN. STAT. § 21a-190d(6) (1999 & Supp. 2004) (exempting organizations receiving less than $50,000 in contributions annually); KAN. STAT. ANN. § 17-1762(d) (1995) (exempting organizations receiving less than $10,000 in contributions annually).

25. These expense figures are based on the author's experience with his clients. The total amount of registration expenses (excluding professional and administrative expenses) paid by a charity varies based upon the charity's gross revenues, as several states have a sliding registration fee scale based on the registrant's gross revenues.

26. Only part of the expenses imposed by state Charitable Solicitation Acts is attributable to the registration process. These Acts also require that certain language appear in fundraising contracts. *See, e.g.*, N.Y. EXEC. LAW § 173-a (McKinney 2002 & Supp. 2003) (mandating that contracts between charities and fundraisers contain cancellation provisions and other terms); MD. CODE ANN., BUS. REG. § 6-501(d)(c) (Michie 1997) (mandating that agreements with parties engaged to process contributions be attached to fundraising contracts); PA. STAT. ANN. tit. 10, § 162.8(d) (West 1999 & Supp. 2004) (mandating that contracts contain a statement of the charitable purpose for which the contributions are solicited and requiring certain disclosures be made during solicitations).

The mandatory disclosure issue can be particularly vexing. Mandatory disclosures of the charity's name and address (*see, e.g.*, CAL. BUS. & PROF. CODE §

on registration fees, staff time, accountants, or attorneys is a dollar that cannot be devoted to the organization's charitable purpose.

II. THE FEDERAL ROLE

Given the redundancy and complexity of regulation by states and localities, it would seem much more rational and efficient to regulate charitable solicitations at the federal level. Although the Commerce Clause[27] empowers the federal government to regulate nationwide charitable solicitations,[28] Congress has not chosen to do so.

To be sure, federal law controls many facets of a nonprofit organization's activities. Its very status as a tax-exempt organization is primarily a creature of federal income tax law.[29] Federal law determines what contributions are tax-deductible,[30] whether and in what form an organization's financial activities must be released to the public,[31] and which revenue generating activities will be taxed

17510.3(a)(1) (West 1997); FLA. STAT. ch. 496.411(2)(a) (West 2002 & Supp. 2004); ME. REV. STAT. ANN. tit. 9, § 5012 (West 2004)), charitable purpose (*see, e.g.*, IND. CODE § 23-7-8-6(a)(4) (West 1994 & Supp. 2004); N.Y. EXEC. LAW § 174-b(2) (McKinney 2002 & Supp. 2004); MINN. STAT. ANN. § 309.556(1)(c) (2004)), and procedures to request additional information (*see, e.g.*, MD. CODE ANN., BUS. REG. § 6-411 (Michie 1998); N.C. GEN. STAT. § 131F-9(b)(3) (2003); W. VA. CODE § 29-19-8 (2001 & Supp. 2004)) are not onerous. However, various states require an additional disclosure statement, each informing potential donors that financial information is available from the respective state's regulatory offices. Thus, a national direct mail solicitation campaign must contain *each* appropriate disclosure (most statutes either explicitly or implicitly require a verbatim reprinting of a mandated disclosure) even though the only material variation between them is the regulator's address. *See, e.g.*, FLA. STAT. ch. 496.411(3) (2002 & Supp. 2004); MD. CODE ANN., BUS. REG. § 6-411 (Michie 1998); MISS. CODE ANN. § 79-11-523(3) (2003); N.J. REV. STAT. § 45:17A-38 (2003); N.J. ADMIN. CODE tit. 13, §§ 48-11.2(a), (d) (1995 & Supp. 2004); N.Y. EXEC. LAW § 174-b.1 (McKinney 2002 & Supp. 2004); N.C. GEN. STAT. § 131F-9(c) (2003); PA. STAT. ANN. tit. 10, § 162.13(c) (West 1999 & Supp. 2004); VA. CODE ANN. § 57-55.3 (Michie 2003); WASH. REV. CODE § 19.09.100(4) (West 1998 & Supp. 2004); W. VA. CODE § 29-19-8 (2001 & Supp. 2004).

27. U.S. CONST. art. I, § 8.

28. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 583-86 (1997). *See also* Chapman v. Comm'r of Revenue, 651 N.W.2d 825, 833 (Minn. 2002).

29. I.R.C. § 501(a) (1992-1998 & Supp. 2003). *See also, e.g.*, KAN. STAT. ANN. § 79-32, 113 (1997); MD. CODE ANN., TAX-GEN. § 10-104(2) (Michie 1997); VA. CODE ANN. § 58.1-1 (Michie 2000).

30. I.R.C. § 170 (2004).

31. Treas. Reg. §§ 301.6104(d)-1 to -3 (2004).

notwithstanding the organization's tax-exempt status.[32] Federal law even regulates specific aspects of charitable solicitation activity such as: 1) sweepstakes campaigns promoted through the U.S. Mail;[33] and 2) how quickly and clearly potential donors must be told which charitable organization is making the call and its exact purpose to solicit funds.[34]

More importantly, federal courts have protected charities' First Amendment right to solicit contributions and to engage third parties to do so on their behalf.[35] But federal Commerce Clause jurisprudence may offer a means of bringing order and efficiency to the complicated welter of statutes, ordinances, and regulations currently governing charitable solicitations.

III. THE DORMANT COMMERCE CLAUSE

The U.S. Supreme Court has long held that the Commerce Clause does more than delegate to Congress the power to regulate interstate commerce; "it has a negative sweep as well."[36] "The negative or dormant implication of the Commerce Clause prohibits state . . . regulation that . . . unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'"[37] Dormant Commerce Clause jurisprudence makes an immediate distinction between state and local statutes that affirmatively discriminate against interstate commerce and those that simply burden interstate commerce incidentally.[38] As

32. I.R.C. § 501(b) (2004).

33. 39 U.S.C. § 3001(k) (2004).

34. FTC Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iv)(e)(1)(2) (2004).

35. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781-82 (1988) (holding that regulations of the content of charitable solicitation messages are subject to "exacting First Amendment scrutiny."); Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 966 (1984) (reaffirming that it is a "fundamentally mistaken premise" for legislators to believe that "high solicitation costs are an accurate measure of fraud"); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980) (holding that regulators cannot withhold licenses or implicitly label charities as fraudulent simply because they spend a certain percentage of their gross receipts on fundraising, salaries and overhead).

36. Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).

37. Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) (citations omitted).

38. Maine v. Taylor, 477 U.S. 131, 138 (1986). Those statutes that affirmatively discriminate against interstate commerce are virtually per se invalid. *Id.* at 148. This principle was recently affirmed in the context of charitable contributions. Chapman v. Comm'r, 651 N.W.2d 825, 834 (Minn. 2002). The *Chapman* court held that a statute allowing tax deductions for contributions to

Charitable Solicitation Acts impose nearly identical regulatory burdens on both in-state and out-of-state charities,[39] this article will consider these statutes only in light of the latter—the "incidental burden"—line of cases.

The leading case in the incidental burden line of decisions is *Pike v. Bruce Church, Inc.*,[40] which sets forth the "*Pike* test":

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[41]

It is well settled that the Charitable Solicitation Acts are enacted to effectuate legitimate local purposes.[42] In this light, the *Pike* test for Charitable Solicitation Acts is a two-part test; courts look to: 1) whether the burden a regulation imposes is clearly excessive in relation to the local benefits; and 2) whether the state or local interests could be promoted as well with a lesser impact on interstate activities.[43]

Although the *Pike* test appears to be a simple balancing test, in practice it is difficult to overturn a statute under the *Pike* test.[44] The

Minnesota charities but not for contributions to non-Minnesota charities was facially discriminatory against interstate commerce. *Id.* at 835. The court struck down the statute because it did not advance a legitimate local purpose that could not be adequately served by reasonably nondiscriminatory alternatives. *Id.* at 838.

39. *See, e.g.*, Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1254 (10th Cir. 2000). The only conceivable disparate burden that might be born by an out-of-state charity but not by an in-state charity is registration as a foreign corporation. And this burden is typically imposed by a state's corporation code and not by its Charitable Solicitation Act. *See, e.g.*, CAL. CORP. CODE § 2105(a) (West 1990 & Supp. 2004); KY. REV. STAT. ANN. § 271B.15-010(1) (2003); N.D. CENT. CODE § 10-19.1-134(1) (2001).

40. 397 U.S. 137 (1970).

41. *Id.* at 142 (citation omitted).

42. Vill. of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 636-37 (1980) (referring to Schaumberg's interests in protecting the public from fraud and promoting residential privacy and public safety as "substantial" and "legitimate").

43. *See id.*

44. *See, e.g.*, Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 217 (2d Cir. 2004) (explaining that under the *Pike* test an unequal burden must be shown);

Supreme Court itself has remarked on its own reluctance to invalidate under the Dormant Commerce Clause "state legislation in the field of safety where the propriety of local regulation has long been recognized."[45]

One case, though, stands out as a model for a potentially successful challenge to Charitable Solicitation Acts on Dormant Commerce Clause grounds. In *Raymond Motor Transportation, Inc. v. Rice*,[46] the Supreme Court invalidated a trucking regulation under the *Pike* test. The *Raymond* court noted that the regulation's benefit was difficult to discern. The regulation at issue prohibited sixty-five foot, double-trailer trucks on Wisconsin highways.[47] Although Wisconsin argued the regulation improved highway safety, the plaintiff undermined that claim by producing "uncontradicted evidence that the difference in passing time [did] not pose an appreciable threat" to safety and that Wisconsin had allowed numerous exceptions to the vehicle length regulation.[48] In response, Wisconsin "virtually defaulted in its defense of the regulations as a safety measure."[49] As for the burden, plaintiffs demonstrated "without contradiction" that the regulations increased shipping costs, slowed the movement of goods in interstate commerce, and limited the number of "interline transfers" it could accept.[50] In light of the evidence adduced at trial, the Court held that the regulation failed the *Pike* test.[51]

Of course, one cannot reasonably expect a regulator to fail to defend a Charitable Solicitation Act as Wisconsin did in *Raymond*.

Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 207 (2d Cir. 2003) (characterizing the *Pike* test as "permissive"); Alliant Energy Corp. v. Bie, 330 F.3d 904, 914 (7th Cir. 2003) (holding no legitimate state interest was offered to justify the burden on interstate commerce); Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 83 (1st Cir. 2001) (noting that the *Pike* balancing test calls for a low level of scrutiny); Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 395 (9th Cir. 1995) (explaining that the party challenging a regulation must establish that the burdens the regulation impose clearly outweigh the local benefits).

45. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443 (1978) (quoting *Pike*, 397 U.S. at 143). N.B. Fraud prevention would likely be considered as an equally proper field for state legislation, if not explicitly considered as a species of "safety" regulation.

46. 434 U.S. 429 (1978).

47. *Id.* at 442 (citing WIS. STAT. § 348.07(1) (1975)).

48. *Id.* at 444-45.

49. *Id.* at 444.

50. *Id.* at 445.

51. *Id.* at 447.

However, a strong case can be made both that the local benefits of such enactments are illusory and that the burdens they impose are significant. As discussed above,[52] Charitable Solicitation Acts arguably provide no marginal local benefits. To the extent that these Acts disclose to the public the purpose for which contributions are solicited and the manner in which contributions are actually used, they are essentially redundant.

IRS Form 990 requires charities to disclose the purpose for which their contributions are solicited.[53] And, of course, IRS Form 990 requires explanation of exactly how contributions are spent in a given fiscal year.[54] Most importantly, Treasury regulations mandate that charities make their IRS Forms 990 available to the public free of charge either at the charity's office or through the mail.[55] In light of this existing reporting and disclosure requirement, it is difficult to imagine what local disclosure benefit is added by a Charitable Solicitation Act. It would seem that states allowing charities to simply file their IRS 990 Forms as an annual financial report[56] would be particularly vulnerable to this argument. And while Charitable Solicitation Acts often single out particular solicitation acts as fraudulent,[57] such acts are generally prohibited in general terms by broadly written criminal fraud statutes[58] and by the common law.

Meanwhile, the burdens imposed by Charitable Solicitation Acts are certainly nontrivial and difficult to dispute. In *Raymond*, the burdens considered clearly excessive in relation to the benefits were increased costs for the regulated party, slowing the movement

52. *See supra* note 23 and accompanying text.

53. *See* IRS Form 990, Part III (2003).

54. *See id.* Part II.

55. Treas. Reg. § 301.6104(d)-1(a) (2004). Charities are allowed to charge reasonable expenses for photocopying and mailing. *Id.*

56. *See, e.g.*, ALASKA ADMIN. CODE tit. 9, § 12.010 (Michie 2002); FLA. STAT. ANN. ch. 496.407(2) (West 2002 & Supp. 2004); KY. REV. STAT. ANN. § 367-657 (2002).

57. *See, e.g.*, KAN. STAT. ANN. § 17-1769(h) (1995) (prohibiting the use of donations for purposes other than those stated in solicitations); MD. CODE ANN., BUS. REG. § 6-607 (Michie 1998) (prohibiting use of false or materially misleading advertising or promotional material in connection with a charitable solicitation); N.H. REV. STAT. ANN. § 7:28-f, I(d) (2001) (prohibiting use of a name, symbol, or statement so closely related or similar to that used by another charitable trust that the use thereof would tend to confuse or mislead a solicited person).

58. *See, e.g.*, 18 U.S.C. § 1001 (2000); NEV. REV. STAT. ANN. § 205.375 (2001); VA. CODE ANN. § 18.2-178 (Michie 1996 & Supp. 2004).

of interstate goods, and limitations on trading partners.[59] Charitable Solicitation Acts impose at least comparable burdens. The costs imposed by Charitable Solicitation Acts include the direct expenses such as registration fees and registered agent fees which can range from $3400 to $5500, the administrative expense of preparing and filing more than forty forms each year, and the professional fees for the attorney and accountant services necessary to compile the information and remain in compliance.[60] Just as the regulation at issue in *Raymond*, Charitable Solicitation Acts routinely slow interstate commerce and place a limit on the number of legal trading partners. Many states explicitly prohibit charities and fundraisers from contracting with each other unless both are registered.[61] In addition to the registration requirement, many states also require that the parties first register their fundraising contracts and make other filings before any particular solicitation campaign can begin.[62]

Certainly there is material available to make the case that "the burden imposed . . . is clearly excessive in relation to the putative local benefits" and that the "local interest involved . . . could be promoted as well with a lesser impact on interstate activities."[63] This is especially true since so much of the local benefit is already promoted by Federal regulations and existing fraud laws.[64] This is not to say that such an argument is necessarily likely to succeed. Such challenges are typically disfavored[65] and one such direct attempt has already failed in *Public Citizen, Inc. v. Pinellas County*.[66]

In *Public Citizen*, the plaintiffs produced significant evidence of the burden that the Pinellas County ordinance placed upon charitable solicitation. The plaintiffs noted that a) the ordinance had caused them to stop soliciting in Pinellas County and that their

59. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 445-46 (1978).

60. *See supra* note 25 and accompanying text.

61. *See, e.g.*, N.Y. EXEC. LAW §§ 172.1, 172-d.10, 172-d.12, 173.1, 173-a.1 (McKinney 2002 & Supp. 200); 10 PA. CONS. STAT. §§ 162.5(a), 162.8(a) (West 1999 & Supp. 2004); and TENN. CODE ANN. §§ 48-101-504(a), 48-101-507(a) (2002 & Supp. 2003).

62. *See, e.g.*, N.Y. EXEC. LAW §§ 172-d.5, 172-d.6 (McKinney 2002 & Supp. 2004); 10 PA. CONS. STAT. § 162.8(d) (West 1999 & Supp. 2004); UTAH CODE ANN. §§ 13-22-9(1)(b)(vii)(C), (D), 13-22-9(1)(b)(viii)(C), (D) (2001 & Supp. 2004); VA. CODE ANN. § 57-54 (Michie 2003).

63. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

64. *See supra* notes 57 and 58 and accompanying text.

65. *See supra* notes 44 and 45 and accompanying text.

66. 321 F. Supp. 2d 1275 (M.D. Fla. 2004).

commerce with that jurisdiction had "dropped off substantially"; b) any charity choosing not to register with the county "loses an opportunity to engage in interstate commerce"; c) tthe ordinance imposes significant compliance costs; and d) if other localities enacted similar ordinances "the aggregate administrative burden and cost would outweigh the county's legitimate local interest."[67] Despite the plaintiffs' showing, the *Public Citizen* court held that "[a]lthough nothing submitted by the parties conclusively attributes the low number of complaints [and inquiries] to the ordinance's regulatory scheme, overall the record indicates that the ordinance generates local putative benefits, which benefits are not demonstrably and clearly exceeded by the burden imposed on interstate commerce."[68] The ordinance was upheld under the Dormant Commerce Clause because "the county cannot promote the ordinance's purpose 'with a lesser impact on interstate activities.' The alternative, either no regulation or a regulation targeted at in-state organizations, would defeat the ordinance's legitimate goal."[69]

This line of attack against the Pinellas ordinance might have been bolstered by the argument that the local benefit was entirely illusory in light of existing federal regulations and state fraud laws.[70] After all, is there truly a local benefit provided when the county merely provides to the public a copy of the charity's IRS Form 990 that is already available from the Florida Department of Agriculture and Consumer Services[71] and from the charity itself?[72] The trucking regulation in *Raymond* was overturned in a similar fashion when the plaintiff in that case undermined the rhetorical potency of the highway safety measure by pointing out that Wisconsin's truck length limit was riddled with exceptions.[73] Even though challenges under the *Pike* test rarely succeed, it may be useful to point out that the choice is not necessarily between regulation and no regulation at all as the *Public Citizen* court conceived the question, but rather

67. *Id.* at 1308.
68. *Id.*
69. *Id.*
70. The purpose of the Pinellas County ordinance was to "prevent deception, fraud, or misrepresentation in the solicitation, use and reporting of contributions." PINELLAS COUNTY, FLA., CODE § 42-270 (cited in *Public Citizen*, 321 F. Supp. 2d at 1280). This purpose is duplicative, as indicated *supra* at note 23.
71. FLA. STAT. chs. 496.407(2), 119.01 (2004).
72. Treas. Reg. §§ 301.6104(d)-1 to 3 (2004).
73. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 442-44 (1978).

between adequate regulation and redundant regulation.

Additional useful jurisprudence may be available from the *Bellas Hess—Quill*[74] line of cases. These cases provide two potentially useful themes. The first is a bright line rule prohibiting the regulation of interstate commerce where the regulated entity's only connection with the state is by common carrier or the U.S. mail.[75] This is particularly attractive because many charities only have contact with most states by virtue of direct mail solicitations, Internet solicitations, or telemarketing solicitations. This argument was unsuccessfully used in a challenge to the Utah Charitable Solicitation Act under the Dormant Commerce Clause.[76] The Tenth Circuit rejected the argument, saying that the *Bellas Hess–Quill* rule was only a "bright line rule in the area of sales and use taxes."[77] Although this reasoning comes from a federal Court of Appeals and appears persuasive, it is unclear what principle justifies evaluating tax laws and non-tax laws differently under the Dormant Commerce Clause and rejecting normal legal reasoning by analogy. In fact, in *Pike* the Court freely considered tax cases[78] as precedent in deciding the non-tax issue before it.[79]

The second line of reasoning from the *Bellas Hess–Quill* cases justifies invalidating statutes on the grounds that, if left unchecked, the cumulative effect of states and localities enacting statutes and ordinances could produce a regulatory morass. One of the reasons the *Bellas Hess* court cited in overturning the Illinois use tax was that

> [i]f Illinois can impose such burdens, so can every other [s]tate, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with the power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping

74. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967); Quill Corp. v. North Dakota, 504 U.S. 298 (1992)

75. *Bellas Hess*, 386 U.S. at 758-59; *Quill*, 504 U.S. at 311-13.

76. *See* Am. Target Adver. v. Giani, 199 F.3d 1241 (10th Cir. 2000).

77. *Id.* at 1255 (citing *Quill*, 504 U.S. at 316).

78. Pike v. Bruce Church, 397 U.S. 137, 141 (1970) (discussing the applicability of Fed. Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934) and Chassaniol v. City of Greenwood, 291 U.S. 584 (1934)).

79. *Pike*, 397 U.S. at 141. The *Pike* court found these cases to be inapposite on the facts, but made no mention that the legal reasoning from their opinions was inherently inapplicable to a non-tax case evaluated under the Dormant Commerce Clause. *Id.*

> requirements could entangle [the plaintiff's] interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'[80]

Given the complicated nature of charitable solicitation regulation today—with forty-three state regulatory regimes, at least four localities seeking to enforce their ordinances on national fundraising campaigns, and additional regulation from the federal government for certain aspects of charitable solicitation—it would seem to be the feared "welter of complicated obligations to local jurisdictions." If the *Bellas Hess* admonition to consider the cumulative effect of state and local regulation were to apply to any regulatory arena, this would most likely be it.

Of course, this argument too would be countered with an insistence that cumulative effect evaluation should apply only to tax laws. But, as noted above, it is unclear that such strict interpretational rules were meant to apply to Dormant Commerce Clause jurisprudence. Moreover, in *Quill* the Court argued that the entire point of Dormant Commerce Clause jurisprudence is to prohibit "discrimination against interstate commerce . . . and [bar] state regulations that unduly burden interstate commerce."[81] Regulation is just as likely to burden and discriminate against interstate commerce as is taxation.

IV. CONCLUSION

The current charitable solicitation regulatory regime in the United States is complicated. It appears clear that this system is far more complicated and redundant than is necessary to accomplish its most commonly stated goals: informing the public as to the charitable purposes for which solicitations are being made, informing the public as to how the proceeds of charitable solicitations are being spent, and protecting the public from fraudulent solicitations. And while it would appear from a cursory reading of Dormant Commerce Clause jurisprudence that this mélange of different reporting forms, deadlines, fees, disclosures, and contract requirements is precisely the situation that the Framers sought to avoid when they established a common market

80. *Bellas Hess*, 386 U.S. at 759-60. *See also Quill*, 504 U.S. at 313 n.6; Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989); U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1069 (8th Cir. 2000).

81. *Quill* at 312 (citations omitted).

among the states, it has cropped up nonetheless.

There are numerous reasons why the Dormant Commerce Clause has not been successfully invoked to bring about a more uniform regulatory system. Courts have been reluctant to apply jurisprudence from tax cases to non-tax cases. Legislators and jurists nearly universally respect the legislative purposes behind the various Charitable Solicitation Acts. Legislators and jurists are apt to consider the regulatory burdens to be minor, particularly when analyzing one act at a time. And perhaps most importantly, the litigation environment does not favor challenges under the Dormant Commerce Clause.

Charities are averse to litigation in general. While it is expensive to comply with the various Charitable Solicitation Acts, it is more expensive to litigate. Charities are also unwilling to risk their reputations by challenging a statute meant to prohibit fraud in charitable solicitations. And finally, the most successful litigation against Charitable Solicitation Acts has been brought under the First Amendment, which has focused attention away from other avenues of attack.

Yet it seems that Dormant Commerce Clause jurisprudence was intended to prevent regulatory systems of precisely this nature. The jurisprudential foundations for a successful challenge to this regulatory monstrosity are already in place. The facts and arguments demonstrating the burdens imposed by this system are not difficult to assemble. The difficulty comes in finding willing plaintiffs and in convincing courts that the benefits of these enactments are illusory in light of other laws and therefore that these local interests can "be promoted as well with a lesser impact on interstate activities."[82]

[82] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (discussed *supra* note 41 and accompanying text).