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ABSTRACT

The Supreme Court has not yet ruled whether begging is protected by the First Amendment. A majority of lower courts have favorably compared begging to organized charitable solicitation, which the Supreme Court has held is protected. Those lower courts have accordingly held that begging is also constitutionally protected. A minority of lower courts believe that begging is more akin to conduct than speech and therefore falls outside the ambit of the Free Speech Clause.

This Article examines the Supreme Court's charitable solicitation cases and speech versus conduct cases to reach the conclusion that begging should be considered speech. This Article asserts that the disagreement among lower courts relates more to what level of constitutional protection should be extended than how the disagreement impacts the threshold question of whether begging implicates the Free Speech Clause. This Article concludes that begging should be afforded full constitutional protection when a court determines it is characteristically intertwined with core value speech.

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ARTICLE

IS BEGGING COMMUNICATIVE ACTIVITY PROTECTED BY THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT?

Tim Donaldson[†]

I. INTRODUCTION

The Supreme Court held in *Village of Schaumburg v. Citizens for a Better Environment* that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."[1] The Court has not directly addressed whether panhandling (i.e., begging) is constitutionally protected speech.[2] However, a vast majority of lower courts have held that begging is a type of charitable solicitation protected by the First Amendment.[3] A minority have held that panhandling is more akin to unprotected conduct than speech.[4] As a California appeals court explained in *People v. Zimmerman*: "The mere fact that the proscribed act may be accomplished by speech does not in and of itself bring the activity within the protection of the First Amendment."[5]

The disagreement about whether to treat begging as conduct or speech is best illustrated by two cases from the Second Circuit Court of Appeals: *Young v. New York City Transit Authority* and *Loper v. New York City Police Department*.[6] In *Young*, a Second Circuit panel upheld a subway system ban

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[1] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) [hereinafter Schaumburg II].

[2] Evans v. Sandy City, 944 F.3d 847, 852–53 (10th Cir. 2019); *Schaumburg II*, 444 U.S. at 644 (Rehnquist, J., dissenting) (asserting that nothing in the Constitution should prevent a community from insulating itself "against panhandlers, profiteers, and peddlers").

[3] *See, e.g.*, Speet v. Schuette, 726 F.3d 867, 874–78 (6th Cir. 2013) (summarizing authorities).

[4] *E.g.*, Young v. N.Y.C. Transit Auth., 903 F.2d 146, 152–54 (2d Cir. 1990); Ulmer v. Mun. Ct., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976).

[5] People v. Zimmerman, 19 Cal. Rptr. 2d 486, 489 (Cal. App. Dep't Super. Ct. 1993).

[6] Loper v. N.Y.C. Police Dep't, 999 F.2d 699 (2d Cir. 1993).

on panhandling.[7] The majority in *Young* doubted whether begging constitutes the kind of expressive conduct protected by the First Amendment.[8] The court commented, "Common sense tells us that begging is much more 'conduct' than it is 'speech.'"[9] The *Young* majority wrote that conduct is constitutionally protected as speech only if it is intended to convey a particularized message and there is a great likelihood that the message will be understood by those who view it.[10] The court went on to explain that begging is not inseparably intertwined with any social or political message and instead conveys only a generic desire to collect money which the majority thought "falls far outside the scope of protected speech under the First Amendment."[11]

A dissenting judge in *Young* and a different Second Circuit panel in *Loper* reached an opposite conclusion.[12] Each saw little difference between the organized charitable solicitation efforts that *Schaumburg* regarded as protected speech and begging by individuals.[13] The panel in *Loper* wrote, "The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes."[14] Judge Meskill additionally explained in his *Young* opinion that it is unrealistic to try to distinguish between beggars who hold signs and those who do not, because both send the same message.[15] The *Loper* panel elaborated that, even without particularized speech, "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance."[16]

The Supreme Court held in *Reed v. Town of Gilbert* that a speech restriction will be considered content-based if it targets a particular type of speech, even if the regulation has no improper censorial motive.[17] Therefore,

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[7] *Young*, 903 F.2d at 150, 164 (explaining the regulatory ban and holding the regulation does not violate the First Amendment).

[8] *Id.* at 153.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 154.

[12] *Id.* at 164–66 (Meskill, J., concurring in part and dissenting in part); Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993).

[13] *Loper*, 999 F.2d at 704; *Young*, 903 F.2d at 165 (Meskill, J., concurring in part and dissenting in part).

[14] *Loper*, 999 F.2d at 704.

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

[16] *Loper*, 999 F.2d at 704.

[17] Reed v. Town of Gilbert, 576 U.S. 155, 163–71 (2015).

Reed has become the focus for the evaluation of anti-panhandling laws because content-based speech restrictions are presumptively invalid and subject to strict scrutiny.[18] However, the threshold question remains open at the Supreme Court level: whether begging constitutes constitutionally protected speech.[19] In addition, the position of lower courts on that threshold question may have become insulated from Supreme Court review by the judicial reaction to *Reed's* dominating impact on free speech analysis.[20]

This Article analyzes whether begging constitutes a constitutionally protected communicative activity. It reviews Supreme Court cases regarding the issue of conduct versus speech. It further reviews Supreme Court cases addressing First Amendment protection afforded to charitable solicitations. This Article also looks at how lower courts have applied those authorities, and it proposes a framework for analyzing threshold First Amendment issues surrounding panhandling.

II. BACKGROUND

A. *Supreme Court Cases Re: Conduct vs. Speech*

The Supreme Court commented in *United States v. O'Brien* that it could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[21] *O'Brien* did not, however, provide additional guidance about how to distinguish unprotected conduct from speech.[22] It

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[18] *See* Thayer v. City of Worcester, 576 U.S. 1048 (2015) (remanding Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014) for further consideration in light of *Reed*); Thayer v. City of Worcester, 144 F. Supp. 3d 218, 232–38 (D. Mass. 2015) (reviewing the City of Worcester's panhandling ordinances after remand and invalidating them in light of *Reed*); *see also* Norton v. City of Springfield, 806 F.3d 411, 411–13 (7th Cir. 2015) (reconsidering and revising an earlier decision by the Court of Appeals in *Norton* upholding the validity of a panhandling ordinance and directing entry of an injunction against enforcement of the ordinance in light of *Reed*); Norton v. City of Springfield, 324 F. Supp. 3d 994, 1001–02 (C.D. Ill. 2018) (analyzing the impact of *Reed*); Mass. Coal. for the Homeless v. City of Fall River, 158 N.E.3d 856, 861–62 (Mass. 2020) (analyzing the impact of *Reed*).

[19] Champion v. Commonwealth, 520 S.W.3d 331, 334 (Ky. 2017). One commentator suggests that the Supreme Court's remand of a panhandling case, *Thayer v. City of Worcester*, 576 U.S. 1048 (2015), with instructions to further consider the case in light of the First Amendment content neutrality test announced by *Reed*, heavily implies that the Court considers panhandling to be protected speech. Anthony D. Lauriello, Note, *Panhandling Regulation After* Reed v. Town of Gilbert, 116 COLUM. L. REV. 1105, 1122 (2016).

[20] *Champion*, 520 S.W.3d at 335 n.13.

[21] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[22] *See* Cowgill v. California, 396 U.S. 371, 372 (1970) (Harlan, J., concurring) ("The Court has, as yet, not established a test for determining at what point conduct becomes so

instead assumed that the conduct at issue, draft card burning, contained a communicative element and analyzed whether the governmental interests at stake in regulating the non-speech element of that conduct were sufficiently important to justify incidental limitations upon free speech.[23] The Court held that a sufficient justification exists to regulate a course of conduct comprised of combined speech and non-speech elements if a regulation furthers an important or substantial governmental interest, the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on free speech is no greater than is essential to further the governmental interest.[24]

Spence v. Washington provided clarification upon the conduct versus speech question.[25] A college student in *Spence* affixed a peace symbol to a flag and hung it in his window.[26] He was thereafter arrested, charged, and convicted under a flag misuse statute.[27] In addressing a First Amendment challenge against the conviction, the Supreme Court initially needed to determine whether the student's activity was sufficiently communicative to warrant constitutional protection.[28] The Court found that the student's display of an altered flag constituted symbolic speech because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[29]

The Supreme Court applied its *Spence* holding in another flag case in *Texas v. Johnson*, explaining that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message

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intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression." (citing *O'Brien*, 391 U.S. at 376)).

[23] *O'Brien*, 391 U.S. at 376–82.

[24] *Id.* at 376–77. Later cases describe *O'Brien* as establishing a four-part test: (1) is a regulation within the constitutional power of the government to enact; (2) does the regulation further an important or substantial government interest; (3) is the governmental interest unrelated to suppression of free expression; and (4) is the restriction no greater than is essential to further the government interest? *E.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 296, 301 (2000) (plurality opinion); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–72 (1991) (plurality opinion).

[25] *See* Spence v. Washington, 418 U.S. 405, 409–11 (1974).

[26] *Id.* at 406.

[27] *Id.* at 406–08.

[28] *Id.* at 409.

[29] *Id.* at 410–11.

would be understood by those who viewed it.'"[30] The *Johnson* Court noted that the Court had, in prior cases, recognized the expressive nature of sit-in demonstrations by African-Americans in "whites only" areas to protest segregation, students wearing black armbands to protest the Vietnam war, picketing in a variety of settings, and donning military uniforms in dramatizations critical of American involvement in Vietnam.[31] *Johnson* also provided a helpful example to differentiate expressive conduct from mere action.[32] It held that burning a flag in protest can qualify as expressive conduct.[33] However, dragging a flag through the mud due to fatigue might not qualify as expressive conduct if a tired person is not doing so to express an idea, even though the person knows that the conduct is likely to offend others.[34] The Court, therefore, made clear that context is important, and actions cannot automatically be considered expressive conduct.[35]

Johnson also provided a checklist for the application of *O'Brien*.[36] First, determine whether an action constitutes expressive conduct.[37] This is ostensibly done using the two-part *Spence* test and depends upon context.[38] Second, if conduct is expressive, determine whether a regulation "is related to the suppression of free expression."[39] If unrelated, the *O'Brien* standard applies.[40] If related, *O'Brien* does not apply.[41] This second determination is made by looking at whether a regulation is directed at the communicative nature of the conduct.[42] If particular conduct is prohibited because of its expressive elements, then *O'Brien* is inapplicable.[43]

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[30] Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410–11).

[31] *Id.*

[32] *See id.* at 403 n.3.

[33] *Id.* at 403, 406.

[34] *Id.* at 403 n.3.

[35] *Id.* at 405.

[36] *Johnson*, 491 U.S. at 403.

[37] *Id.*

[38] *See id.* at 404–06.

[39] *Id.* at 403.

[40] *Id.* at 403, 407. The *O'Brien* standard has been referred to as intermediate scrutiny. *E.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 26 (2010).

[41] *Johnson*, 491 U.S. at 403. *Johnson* also indicates that the standard of scrutiny used to evaluate a regulation is irrelevant if the governmental interest behind a regulation is not implicated by the facts in a particular case, because such interest drops out of the picture in that situation. *Id*. at 403–04.

[42] *Id.* at 406.

[43] *See id*. at 406–07.

The focus of the *O'Brien* test has shifted over time. A plurality in *City of Erie v. Pap's A.M.* wrote, if a "government interest is related to the *content* of the expression, . . . then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard."[44] The effect of this subtle change in terminology is evident in *Turner Broadcasting System, Inc. v. FCC*, where the Court indicated that *O'Brien* applies to "content-neutral" regulations.[45] By the time *Holder v. Humanitarian Law Project* was decided, the Supreme Court reasoned that "*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech . . . ."[46]

The contours of *O'Brien* as an autonomous analytical tool have, therefore, eroded over time. The Supreme Court commented in *Clark v. Community for Creative Non-Violence* that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions."[47] The Court later clarified in *Johnson* that *Clark* meant only to highlight that *O'Brien* is limited to situations where a governmental interest is unconnected to expression.[48] Nonetheless, it has occasionally appeared to apply the *O'Brien* test interchangeably with the time, place, and manner standard.[49]

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[44] City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (emphasis added).

[45] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).

[46] Holder v. Humanitarian L. Project, 561 U.S. 1, 27 (2010).

[47] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[48] *Johnson*, 491 U.S. at 407.

[49] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566–72 (1991) (plurality opinion). Justice Kennedy commented in his concurrence in *International Society for Krishna Consciousness, Inc. v. Lee* that their similarity leads to a "confluence of the two tests." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 704 (1992) (Kennedy, J., concurring). It is beyond the scope of this Article, but it is conceivable that the Supreme Court might reevaluate the erosion of *O'Brien* in light of its decision on content neutrality in *Reed*. *O'Brien* allows regulation of conduct incidentally affecting speech if a regulation is unrelated to suppression of expression. United States v. O'Brien, 391 U.S. 367, 377 (1968). This criterion was similar to the pre-*Reed* content neutrality test which was primarily concerned with whether a time, place, or manner restriction on speech was adopted for a censorial purpose. *See* R.A.V. v. St. Paul, 505 U.S. 377, 385–86 (1992) (comparing *O'Brien*'s prohibition against suppression of ideas to the content neutrality test in Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), which focused upon "whether the government has adopted a regulation of speech because of disagreement with the message it conveys"). The content neutrality test after *Reed* is no longer directly analogous to the *O'Brien* factor guarding against suppression of expression. *Compare Johnson*, 491 U.S. at 406–07 (explaining that the *O'Brien* test applies when the governmental interest behind a restriction is unrelated to suppression of expression), *with* Reed v. Town of Gilbert, 576 U.S. 155, 165–

B. *Supreme Court Cases Re: Charitable Solicitations*

In *Schaumburg,* the Supreme Court invalidated a local ordinance that prohibited charitable organizations from soliciting contributions door-to-door or in public rights-of-way unless the organization first submitted satisfactory proof to the village that at least 75% of solicited proceeds would directly benefit charitable purposes.[50] The Court reviewed its prior cases and ruled that they protected more than just the right to propagate a charity's views.[51] The Court noted that the solicitation of funds did not transform protected speech into mere commercial activity.[52] It wrote that solicitation and speech may be so intertwined that the collection of funds may be regulated only if done in a manner that does not intrude on the right of free speech.[53] The Court explained:

> Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.[54]

Schaumburg ultimately concluded that the question before the Court was not whether charitable solicitations are protected by the First Amendment because "[i]t is clear that they are."[55] Instead, the issue was whether the ordinance regulated solicitation in a manner that did not unduly intrude on

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68 (2015) (holding that a time, place, or manner regulation may be content based even without a censorial motive).

[50] Schaumburg II, 444 U.S. 620, 622–24, 628–39 (1980) (describing contents of ordinance and invalidating ordinance).

[51] *Id.* at 628–32.

[52] *Id.* at 630.

[53] *Id.* at 631.

[54] *Id.* at 632.

[55] *Id.* at 633.

free speech rights.[56] The Court, therefore, analyzed whether the 75% charitable use requirement imposed by the ordinance served "a sufficiently strong, subordinating interest."[57] It determined that the principal interest asserted by the village was fraud prevention but found that less intrusive measures could be used to prevent fraud than a ban based upon a charitable expenditure restriction.[58]

Schaumburg introduced some uncertainty as to whether all solicitation activity is protected.[59] The Supreme Court repeated portions of the Court of Appeals' ruling, which indicated that a charitable use requirement might be applied against charitable organizations whose solicitors were "mere conduits for contributions."[60] The limitation could not be constitutionally applied against organizations that necessarily combined "the solicitation of financial support with the 'functions of information dissemination, discussion, and advocacy of public issues.'"[61] Those organizations were, however, distinguished from organizations that did not gather and disseminate information but instead "provide[d] money or services for the poor, the needy or other worthy objects of charity" without advocating positions on matters of public concern.[62] It is important to note that the Court of Appeals wrote only that a solicitation restriction *might* be valid when applied to non-advocacy organizations.[63] In addition, the Supreme Court expressly endorsed only the ultimate holding of the Court of Appeals.[64] The Supreme Court's discussion of the Court of Appeals' opinion in *Village of Schaumburg* nonetheless left an impression that some sort of information dissemination, discussion, or advocacy must intertwine with solicitation activity for First Amendment protection to apply.[65]

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[56] *Schaumburg II*, 444 U.S. at 633.

[57] *Id.* at 636.

[58] *Id.* at 636–39.

[59] *See id.* at 635–36.

[60] *Id.* at 635 (quoting Citizens for a Better Env't v. Vill. of Schaumburg, 590 F.2d 220, 226 (7th Cir. 1978) [hereinafter Schaumburg I]).

[61] *Id.* (quoting *Schaumburg I*, 590 F.2d at 225); *Schaumburg I*, 590 F.2d at 225 (referring to such advocacy organizations as "'public interest' groups").

[62] *Schaumburg II*, 444 U.S. at 635.

[63] *Schaumburg I*, 590 F.2d at 225–26.

[64] *See Schaumburg II*, 444 U.S. at 636.

[65] *See* Young v. N.Y.C. Transit Auth., 903 F.2d 146, 155 (2d Cir. 1990) ("[N]either *Schaumburg* nor its progeny stand for the proposition that begging and panhandling are protected speech . . . . Rather, these cases hold that there is a sufficient nexus between solicitation by organized charities and a 'variety of speech interests' to invoke protection under the First Amendment.").

The Supreme Court invalidated a Maryland statute in *Secretary of State of Maryland v. Joseph H. Munson, Co.* that was similar to the ordinance it found unconstitutional in *Schaumburg*.[66] The statute prohibited charitable organizations from paying fundraising expenses greater than 25% of the amount raised.[67] The statute included a waiver provision that afforded some flexibility absent from the ordinance considered in *Schaumburg*.[68] The Supreme Court held, however, that the provision was not sufficient to save the restriction.[69]

The Court wrote in *Munson* that the solicitation activities restricted by the Maryland statute "clearly encompass the types of speech determined in *Schaumburg* to be entitled to First Amendment protection."[70] However, it also indicated that charitable solicitations were entitled to protection because they were intertwined with other speech.[71] The Court wrote that the impact of an expense restriction upon charities whose high costs were due to information dissemination, discussion, and advocacy of public issues was a primary concern.[72] The Court commented, "[T]here no doubt are organizations that have high fundraising costs not due to protected First Amendment activity and that, therefore, should not be heard to complain . . . [but] this statute cannot distinguish those organizations from charities that have high costs due to protected First Amendment activities."[73] Therefore, it again left unclear the extent to which charitable solicitation must intertwine with information dissemination, discussion, or advocacy to merit First Amendment protection.[74]

In *Riley v. National Federation of the Blind*, the Supreme Court clarified its prior discussions about solicitations intertwining with other speech.[75] A North Carolina statute was challenged in *Riley* that was directed against

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[66] Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 950–52 (1984) (describing statute); *Id.* at 959–70 (invalidating statute).

[67] *Munson*, 467 U.S. at 950 n.2.

[68] *Id.* at 952 (describing Maryland Circuit Court's ruling regarding statutory flexibility); *Id.* at 962 (explaining the statute).

[69] *Munson*, 467 U.S. at 962–64.

[70] *Id.* at 960 n.8.

[71] *Id.* at 959–60.

[72] *Id.* at 963–64.

[73] *Id.* at 966.

[74] *See id.* at 959–68; *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799 (1985) (implying that *Schaumburg* requires a "nexus between solicitation and the communication of information and advocacy of causes").

[75] *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795–96 (1988).

professional fundraisers.[76] It prohibited fundraisers from charging unreasonable or excessive fees and provided various benchmarks by which determinations of reasonableness would be made.[77] The statutory scheme included a provision that higher fees might be considered reasonable if a "solicitation involved the dissemination of information or advocacy on public issues directed by the charity."[78] The Supreme Court nonetheless found that North Carolina could not dictate how much a charity could spend on fundraising, because that would be a direct restriction on protected First Amendment activity.[79] It also reiterated that "the solicitation of charitable contributions is protected speech."[80]

The *Riley* Court wrote that its analysis in *Schaumburg* began by categorizing the type of speech at issue because the Village of Schaumburg had "argued that charitable solicitation [was] akin to a business proposition, and therefore constitute[d] . . . commercial speech,"[81] which is afforded less robust constitutional protection than core-value speech.[82] It explained that the *Schaumburg* Court rejected the effort to classify charitable solicitation as commercial speech because charitable solicitation involved a variety of speech interests.[83] The *Riley* Court clarified that this was because speech does not retain "commercial character when it is inextricably intertwined with otherwise fully protected speech."[84] Intertwining is, therefore, an issue only insofar as the level of constitutional protection is concerned.[85] If "component parts of a single speech are inextricably intertwined," the less favorably protected parts will not be separated from a more favorably protected whole for less favorable treatment.[86] Intertwining does not, however, appear to be a

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[76] *See id.* at 784–87.

[77] *Id.* at 784–86.

[78] *Id.* at 785.

[79] *Id.* at 784, 788–89.

[80] *Id.* at 789.

[81] *Riley*, 487 U.S. at 787.

[82] *See id.* at 795; *see also* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (explaining that the First Amendment provides its highest protection to speech on matters of public concern or public issues, because it is considered more than self-expression and is instead the essence of self-government); *cf.* Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000) (coining the phrase "core-value speech" to describe speech that is given this special protection). *See generally* Va. State Bd. Of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

[83] *Riley*, 487 U.S. at 787–88.

[84] *Id.* at 796.

[85] *See id.* at 795–96.

[86] *Id.* at 796.

prerequisite for charitable solicitation to qualify as speech because even commercial speech is entitled to some First Amendment protection.[87]

A Supreme Court plurality reiterated in *United States v. Kokinda* that "[s]olicitation is a recognized form of speech protected by the First Amendment."[88] *Kokinda* dealt primarily with how the forum where speech occurs affects the standard of review and did not directly address the question of intertwining.[89] The *Kokinda* plurality did, however, recognize that solicitation activity can impede the normal flow of traffic because those solicited must listen, comprehend, and decide whether to contribute, and, if they decide to do so, retrieve and exchange money.[90] *Kokinda* held that such interests may be sufficient in some situations to uphold a solicitation restriction.[91]

International Society for Krishna Consciousness v. Lee upheld a prohibition against soliciting in an airport terminal.[92] The case again dealt primarily with forum analysis, and the Court held that airport terminals are not considered public fora.[93] The majority opinion noted that the parties agreed the

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[87] Edenfield v. Fane, 507 U.S. 761, 765–66 (1993) (holding that the First Amendment protects personal solicitation for commercial purposes). *See generally Va. Citizens Consumer Council*, 425 U.S. at 758–70.

[88] United States v. Kokinda, 497 U.S. 720, 725 (1990) (plurality opinion); *see also* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981).

[89] *See Kokinda*, 497 U.S. at 725–33 (plurality opinion); *Id.* at 740–53 (Brennan, J., dissenting).

[90] *Kokinda*, 497 U.S. at 733–35 (plurality opinion); *accord* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683–84 (1992); *see also Heffron*, 452 U.S. at 664–65 (Blackmun, J., concurring in part and dissenting in part) (indicating that crowd control and safety can, in certain circumstances, constitute a substantial governmental interest).

[91] The *Kokinda* plurality felt that the prevention of disruptions to the flow of traffic on Postal Service premises provided a sufficient reason to justify a solicitation prohibition under the reasonableness standard applicable to a nonpublic forum. *Kokinda*, 497 U.S. at 734–35. Justice Kennedy concurred, but he believed that such interests were significant and would satisfy the higher standard applicable to time, place, and manner restrictions. *Id.* at 738–39 (Kennedy, J., concurring).

[92] *Lee*, 505 U.S. at 685. The District of Columbia Court of Appeals later applied *Lee* when concluding that an entryway to a subway escalator is a non-public forum and upholding a ban against panhandling at a subway station or stop. McFarlin v. District of Columbia, 681 A.2d 440, 447–49 (D.C. 1996).

[93] *Lee*, 505 U.S. at 679. Supreme Court cases generally recognize the following three types of governmentally controlled areas: (1) *traditional public forums*—parks, streets, and sidewalks—in which the government may impose reasonable time, place, and manner restrictions, but content-based restrictions must satisfy strict scrutiny, and viewpoint-based restrictions are prohibited; (2) *designated public forums*—public forums intentionally opened by the government for public discourse—in which the same rules apply; and (3) *nonpublic*

solicitation at issue in *Lee* was entitled to First Amendment protection, and it did not further explore the issue.[94] Having determined that an airport terminal was not a public forum, the majority opinion held that the terminal's solicitation ban "need[ed] only satisfy a requirement of reasonableness."[95]

Justice Kennedy, along with three other Justices, believed that "airport corridors and shopping areas outside of the passenger security zones" should be considered public fora.[96] Justice Kennedy, alone, also felt that a ban on solicitation and receipt of funds within an airport terminal satisfied either the standard for time, place, and manner restrictions on speech or the *O'Brien* test for regulations directed at the non-speech element of expressive conduct.[97] He wrote that the two standards overlapped under the circumstances of the case and acknowledged their similarity.[98] Justice Kennedy wrote that he would conclude a ban violated free speech rights if directed solely at the communicative solicitation of funds.[99] In his view, however, the ban at issue in *Lee* was valid because it applied only to immediate receipt of funds and was, therefore, "directed only at the physical exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation."[100]

Justice Kennedy wrote in *Lee* that in-person solicitations for immediate payment of money create a well-recognized risk of fraud and duress.[101] He cited various instances in which the Supreme Court and federal agencies identified problems and the potential for undue pressure when solicitors target individuals and give them only limited time to reflect upon requests to instantaneously provide funds.[102] Justice Kennedy concluded that a ban directed at such abusive practices, and not any particular message, was

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forums—those forums which are not by tradition or designation open for public communication—in which the government may reserve such fora for its intended purposes as long as regulations on speech are reasonable and not imposed in an effort to suppress expression merely because public officials oppose a speaker's views. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018). In addition, some public property may not be considered a forum for speech at all. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–79 (1998).

[94] *See Lee*, 505 U.S. at 677, 679.

[95] *Id.* at 683.

[96] *Id.* at 693 (Kennedy, J., concurring).

[97] *Id.* at 703–04.

[98] *Id.* at 704.

[99] *Id.*

[100] *Lee*, 505 U.S. at 705 (Kennedy, J., concurring).

[101] *Id.*

[102] *Id.* at 705–06.

content neutral and served a significant governmental interest.[103] He further wrote that a ban on solicitation of money for immediate receipt was narrowly tailored because it applied only to that limited category of activity.[104] Justice Kennedy opined that only a particular manner of conduct associated with solicitation was restricted.[105] In his view, solicitors could continue making requests for funds by other means. For example, solicitors were able to distribute pre-addressed envelopes to those targeted, and alternative channels of communication were, therefore, left open.[106]

C. *Lower Court Rulings Re: Begging*

The California Court of Appeals wrote in *Ulmer v. Municipal Court* that the First Amendment and its counterpart in the California State Constitution "protect the freedom of individuals to speak, write, print, or disseminate information or opinion," but not "conduct bearing no necessary relationship" with those activities.[107] It reasoned that begging is not constitutionally protected because it does "not necessarily involve the communication of information or opinion."[108] The Appellate Division of the Los Angeles County Superior Court later explained in *People v. Zimmerman* that a prohibition against accosting people while begging prevented "individuals from going about on the streets accosting others, i.e., walking up to and approaching others, for handouts" but did not preclude someone from passively receiving donations.[109] Therefore, the court held that such a prohibition pertained only to the conduct of beggars and not their message, so, it concluded the prohibition did not impinge constitutionally protected speech.[110]

In *Young v. New York City Transit Authority*, a panel of the Second Circuit Court of Appeals acknowledged that passersby generally understand the message conveyed by someone who begs, but it felt something more was required for First Amendment protection to attach.[111] The court indicated the expression that occurs during begging does not involve an exchange of ideas or spread of information sufficient to bring it within the First

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[103] *Id.* at 706.

[104] *Id.* at 707.

[105] *Id.*

[106] *Lee*, 505 U.S. at 707–08 (Kennedy, J., concurring).

[107] Ulmer v. Mun. Ct., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976).

[108] *Id.* at 447.

[109] People v. Zimmerman, 19 Cal. Rptr. 2d 486, 489 (Cal. App. Dep't Super. Ct. 1993); *see also Ulmer*, 127 Cal. Rptr. at 447–48.

[110] *Zimmerman*, 19 Cal. Rptr. 2d at 489.

[111] Young v. N.Y.C. Transit Auth., 903 F.2d 146, 154 (2d Cir. 1990).

Amendment.[112] According to the majority in *Young*, the object of begging and panhandling is the transfer of money. It wrote: "Speech simply is not inherent to the act; it is not of the essence of the conduct."[113] This speech versus conduct distinction was not, however, the basis for the majority ruling in *Young*.[114]

The majority in *Young* principally held that the New York subway system ban on panhandling satisfied the *O'Brien* test.[115] The court wrote that the real question to decide when determining whether the governmental interest advanced by a regulation is not related to the suppression of free expression under *O'Brien* is "whether the dangers relied on as justification for the regulation arise at least in some measure from the alleged communicative content of the conduct."[116] The majority in *Young* found that the ban at issue protected users of the subway system from intimidating, threatening, and inherently aggressive panhandling that the court felt was tantamount to an assault in the close confines of the subway atmosphere.[117] It also wondered whether the message conveyed by someone begging in those circumstances is not somehow "divested of any expressive element" for purposes of First Amendment analysis.[118] The majority concluded that begging in the subway implicated legitimate public safety concerns because "[t]he conduct 'disrupts' and 'startles' passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment."[119] It, therefore, held that the governmental interests behind the ban were unrelated to the suppression of free speech, and "the exigencies created by begging and panhandling in the subway warrant the conduct's complete prohibition."[120]

In *Blair v. Shanahan*, the United States District Court for the Northern District of California held that *Ulmer* controls when applying the California Constitution, but the court rejected both *Ulmer* and *Young* when it came to the protection of begging under the U.S. Constitution.[121] The court felt that

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[112] *Id.* at 154.

[113] *Id.*

[114] *Id.* ("[O]ur holding today does not ultimately rest on an ontological distinction between speech and conduct . . . .").

[115] *Id.* at 157–61.

[116] *Id.* at 158–59.

[117] *Young*, 903 F.2d at 158.

[118] *Id.* at 154.

[119] *Id.* at 158.

[120] *Id.* at 159; *see also* People v. Schrader, 617 N.Y.S.2d 429, 436–39 (N.Y. Crim. Ct. 1994) (upholding the constitutionality of the New York City Transit System ban on panhandling).

[121] Blair v. Shanahan, 775 F. Supp. 1315, 1321–24 (N.D. Cal. 1991), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996).

Schaumburg, and the Supreme Court cases that followed, held that the First Amendment clearly protected charitable solicitations, and that "[n]o distinction of constitutional dimension exists between soliciting funds for oneself and for charities."[122] It wrote that begging conveys information regarding both a beggar's plight and the way that society treats its poor.[123] Additionally, the court opined that begging can change the way someone views the poor because begging appeals to that person's sense of compassion and social justice.[124] The District Court wrote in *Blair* that it is irrelevant for First Amendment purposes whether every beggar conveys such a message or enlightens those solicited, because many solicitors for organized charities similarly fail to convey that message, and constitutional protection is not limited to effective speech.[125] In addition, it explained that those who beg do not lose their free speech rights by keeping the funds they solicit, because the value of speech does not depend upon the identity of its source.[126]

The court in *Blair* did not see any meaningful distinction between begging and the organized charitable solicitation protected by *Schaumburg*.[127] It recognized that the messages conveyed by organized charities might more effectively intertwine with particularized social commentary or political speech, but commented that it would be "fair to say" most professional fundraisers are not soliciting for those social or political reasons, but rather, to collect money.[128] Therefore, someone seeking personal financial help should not be disqualified on the basis of speaker motivation.[129] In addition, a person in need should not be held to the same level of sophistication as a professional fundraiser in communicating a message.[130] The court concluded that begging should have the same protection as organized charitable solicitation because "First Amendment protection should not be limited to the articulate."[131]

Having concluded that begging constitutes protected speech, the court in *Blair* found efforts to distinguish between the speech versus conduct aspects

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[122] *Id.* at 1322.

[123] *Id.* at 1322–23.

[124] *Id.* at 1323.

[125] *Id.*

[126] *Id.*; *see also* Rodgers v. Bryant, 942 F.3d 451, 456 (8th Cir. 2019) ("The fact that they intend to ask for money does not mean that their speech is unprotected.").

[127] *See Blair*, 775 F. Supp. at 1322–24.

[128] *Id.* at 1323–24.

[129] *Id.*

[130] *Id.* at 1324.

[131] *Id.*

of begging unavailing.[132] It acknowledged that a properly drawn regulation could prohibit intimidating, threatening, or coercive public encounters, but begging cannot be automatically assumed to include such behavior.[133] The court found that a California statute targeted expression rather than conduct by barring anyone from begging.[134] It reasoned that a regulation truly directed at intimidation, threats, or coercion would specifically target those behaviors rather than begging in general.[135] Consequently, a statute that proscribed public encounters based upon whether or not a person was begging was an unconstitutional infringement on speech rather than a restriction on conduct.[136] The court ruled that neither prevention of public annoyance nor avoidance of intrusion on the public at large provided sufficient justification for a content-based restriction on speech.[137] It explained: "The speech of the needy around us may well be subjectively felt as an unwelcome intrusion by some, but the expressive freedom guaranteed by the Constitution has never been costless."[138] Therefore, the *Blair* court declared that a California anti-panhandling statute was unconstitutional.[139]

However, the appellate panel in *People v. Zimmerman* declined to follow *Blair*.[140] The panel wrote that it was bound by *Ulmer* and swayed by *Young*.[141] The *Zimmerman* court focused on physical aspects of begging (i.e., accosting others), and it held that such conduct is not sufficiently communicative to merit First Amendment protection.[142] It distinguished begging from soliciting for charitable purposes based on a lack of intertwining.[143] In the court's view:

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[132] *Id.* at 1324–26.

[133] *See Blair*, 775 F. Supp. at 1324–25.

[134] *Id.* at 1317 n.1 (quoting statutory prohibition); *Id.* at 1324 (concluding that the statute was a content-based restriction).

[135] *Blair*, 775 F. Supp. at 1324–25.

[136] *Id.* at 1325.

[137] *Id.* at 1324.

[138] *Id.* at 1325.

[139] *Blair*, 775 F. Supp at 1325. The Ninth Circuit Court of Appeals remanded *Blair* to the District Court to determine whether its declaratory ruling should be vacated due to a settlement that procedurally barred appeal. Blair v. Shanahan, 38 F.3d 1514, 1520–21 (9th Cir. 1994). The District Court ultimately vacated its ruling that declared the California anti-panhandling statute facially unconstitutional. Blair v. Shanahan, 919 F. Supp. 1361, 1364–67 (N.D. Cal. 1996).

[140] *See* People v. Zimmerman, 19 Cal. Rptr. 2d 486, 488 (Cal. App. Dep't Super. Ct. 1993).

[141] *Id.* at 488–489.

[142] *Id.* at 489.

[143] *Id.* at 490–91.

> [T]he nexus between charitable solicitations and the communication of information and advocacy of causes implicates interests protected by the First Amendment. On the other hand, "with or without words, the object of begging . . . is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct."[144]

The Second Circuit panel in *Loper v. New York City Police Department*, invalidated a citywide ban against loitering for the purpose of begging.[145] The panel explained that the court's earlier subway system ruling in *Young* could not be applied to traditional public forums like sidewalks, which have historically been open for expressive activity.[146] The court acknowledged that begging does not always involve the expression of particularized social or political messages, but it saw little difference between solicitation by organized charities and those who beg out of personal need.[147] It wrote, "Certainly, a member of a charitable, religious or other organization who seeks alms for the organization and is also, as a member, a beneficiary of those alms should be treated no differently from one who begs for his or her own account."[148] The *Loper* court recognized the Supreme Court's references to intertwining speech-types in *Schaumburg,* but it did not find the distinctions to have constitutional significance.[149] Accordingly, the *Loper* court held that begging could not be prohibited in a public forum absent a compelling governmental interest.[150]

The *Loper* court additionally examined the *O'Brien* test.[151] It wrote that a total prohibition against begging in public rights-of-way would not satisfy the test because such a ban would give rise to much more than just an incidental limitation on free expression.[152] The *Loper* court listed many New

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[144] *Id.* at 490 (quoting Young v. N.Y.C. Transit Auth., 903 F.2d 146, 154 (2d Cir. 1990) (citations omitted)).

[145] *See* Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 701, 706 (2d Cir. 1993).

[146] *Id.* at 702–04.

[147] *Id.* at 704–05.

[148] *Id.* at 705.

[149] *Id.* at 704.

[150] *Id.* at 704–05.

[151] *Loper*, 999 F.2d at 702, 705.

[152] *Id.* at 705; *cf.* C.C.B. v. State, 458 So. 2d 47, 50 (Fla. Dist. Ct. App. 1984) (holding that begging cannot be considered a nuisance per se and a total ban on begging is unconstitutional). *See generally* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental limitations* on First Amendment freedoms." (emphasis added)).

York statutes that separately address aggressive, obstructive, and fraudulent behaviors, and opined that the statutes were adequate for those types of concerns in the context of begging.[153] Furthermore, the court recognized a distinction between a general ban on begging and a restriction applicable only to aggressive begging, which the court felt targeted conduct beyond speech, expression, and communication.[154] The court wrote that a total prohibition could not, however, "be characterized as a merely incidental limitation, because it serves to silence both speech and expressive conduct on the basis of the message."[155]

An overwhelming majority of appellate courts have held that begging is protected by the First Amendment.[156] Reported decisions from trial courts say the same.[157] The Sixth Circuit Court of Appeals reviewed many of these authorities in *Speet v. Schuette*.[158] It noted that the Supreme Court "has held—repeatedly—that the First Amendment protects charitable

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[153] *Loper*, 999 F.2d at 701–02.

[154] *Id.* at 706.

[155] *Id.* at 705. *See generally O'Brien*, 391 U.S. at 388–89 (Harlan, J., concurring) (writing separately to make explicit his understanding that *O'Brien* would not foreclose consideration of "First Amendment claims in those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate").

[156] McCraw v. City of Okla. City, 973 F.3d 1057, 1066 (10th Cir. 2020); Rodgers v. Bryant, 942 F.3d 451, 456 (8th Cir. 2019); Reynolds v. Middleton, 779 F.3d 222, 225 (4th Cir. 2015); Speet v. Schuette, 726 F.3d 867, 878 (6th Cir. 2013); Clatterbuck v. Charlottesville, 708 F.3d 549, 553 (4th Cir. 2013); Gresham v. Peterson, 225 F.3d 899, 903–05 (7th Cir. 2000); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999); *Loper*, 999 F.2d at 704–05; State v. Boehler, 262 P.3d 637, 641 n.4 (Ariz. Ct. App. 2011); *C.C.B.*, 458 So.2d at 50; Champion v. Commonwealth, 520 S.W.3d 331, 335 (Ky. 2017); Benefit v. City of Cambridge, 679 N.E.2d 184, 188 (Mass. 1997); City of Lakewood v. Willis, 375 P.3d 1056, 1059 (Wash. 2016). *Contra* Ulmer v. Mun. Ct., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976); People v. Zimmerman, 19 Cal. Rptr. 2d 486, 489–90 (Cal. App. Dep't Super. Ct. 1993); *cf.* Young v. N.Y.C. Transit Auth., 903 F.2d 146, 152–54 (2d Cir. 1990) (explaining why the panel majority believed that begging is not constitutionally protected, but not ultimately resting its decision on those grounds).

[157] Brown v. Gov't of D.C., 390 F. Supp.3d 114, 124 (D.D.C. 2019); Blitch v. City of Slidell, 260 F. Supp. 3d 656, 663–64 (E.D. La. 2017); Petrello v. City of Manchester, 2017 U.S. Dist. LEXIS 144793, at *52 (D.N.H. Sept. 7, 2017); McLaughlin v. City of Lowell, 140 F. Supp.3d 177, 183–84 (D. Mass. 2015); Browne v. City of Grand Junction, 85 F. Supp. 3d 1249, 1256–57 (D. Colo. 2015); ACLU of Idaho v. City of Boise, 998 F. Supp. 2d 908, 916 (D. Idaho 2014); Blair v. Shanahan, 775 F. Supp. 1315, 1322–24 (N.D. Cal. 1991), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996); People v. Schrader, 617 N.Y.S.2d 429, 434–35 (N.Y. Crim. Ct. 1994).

[158] *Speet*, 726 F.3d at 874–76.

solicitations performed by organizations."[159] The *Speet* court further explained that most lower courts cannot see how begging by individuals can be treated differently than soliciting by charitable organizations.[160] It stated that "begging is indistinguishable from charitable solicitation for First Amendment purposes. To hold otherwise would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group."[161]

The court in *Speet* rejected Justice Kennedy's assertion in *International Society for Krishna Consciousness v. Lee* that the part of begging where money actually changes hands can be separated from a communicative request for funds.[162] In so doing, the *Speet* court took a different approach to the question of intertwining.[163] While some opinions look at whether a solicitation sufficiently intertwines with other types of speech to qualify for constitutional protection, the *Speet* court held this type of intertwining may be presumed "whether or not any speech incident to the solicitation actually takes place," because all types of charitable solicitation are indistinguishable and "*characteristically* intertwined" with protected speech.[164] The *Speet* court expanded upon the concept of intertwining and also concluded that the physical exchange of money during begging cannot be isolated, because "it is 'intertwined' with speech that the First Amendment protects."[165]

The Seventh Circuit Court of Appeals recognized in *Gresham v. Peterson* that the Supreme Court in *Schaumburg* focused upon how the flow of social, economic, political, and cultural information would be impeded if charitable

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[159] *Id.* at 874.

[160] *See id.* at 874–76.

[161] *Id.* at 877 (quoting *Young*, 903 F.2d at 167 (Meskill, J., concurring in part and dissenting in part)); *see also Blitch*, 260 F. Supp. 3d at 664 ("[T]he availability of an organizational outlet for speech should not shield individual restrictions on speech from First Amendment scrutiny."); *Benefit*, 679 N.E.2d at 188.

[162] *Speet*, 726 F.3d at 876. *See generally* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 704–05 (1992) (Kennedy, J., concurring).

[163] *See Spee*t, 726 F.3d at 876.

[164] *See id.* at 877 (emphasis added) (reviewing Young v. N.Y.C. Transit Auth., 903 F.2d 146, 164–65 (2d Cir.1990) (Meskill, J., concurring in part and dissenting in part)). *But see* People v. Zimmerman, 19 Cal. Rptr. 2d 486, 490–91 (Cal. App. Dep't Super. Ct. 1993) (distinguishing begging from charitable solicitation on the basis that begging is not characteristically intertwined with core value speech).

[165] *Speet*, 726 F.3d at 876; *see also* Petrello v. City of Manchester, 2017 U.S. Dist. LEXIS 144793, at *52 (D.N.H. Sept. 7, 2017) ("[T]he physical exchange of money is an integral component and the ultimate purpose of panhandling, which is expressive activity protected by the First Amendment.").

solicitations were not constitutionally protected.[166] It did not, however, feel that this provided a basis by which to distinguish solicitations by charities from begging by individuals.[167] The court explained, "Beggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment, and disability, to name a few. Like the organized charities, their messages cannot always be easily separated from their need for money."[168] The *Gresham* court concluded that the analysis in *Schaumburg* suggested little reason to distinguish between beggars and charities and, therefore, found the same framework that limits governmental regulation of solicitations by charitable organizations applies to panhandling.[169]

III. PROPOSAL

"[B]egging is at least 'a form of speech.'"[170] It generally occurs when a "person seeking assistance either asks for money or expresses need through some other clear form of communication such as a sign, a donation cup, or an outstretched hand."[171] When someone uses words to make a plea, any distinction between speech and conduct seems irrelevant.[172] A person speaks and conveys a particularized message when asking if a passerby can spare some change. "Similarly, a beggar who holds a sign saying 'Help the Homeless' or 'I am hungry' is engaged in First Amendment activity."[173] A request may use words that are less direct, but "[p]lainly, a sign reading 'Sober,' or 'Two children,' conveys a message about who is deserving of charitable support, just as a sign reading 'God bless,' expresses a religious

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[166] Gresham v. Peterson, 225 F.3d 899, 903–04 (7th Cir. 2000) (discussing Schaumburg II, 444 U.S. 620, 632 (1980)).

[167] *Id.* at 903–05.

[168] *Id.* at 904.

[169] *Id.* at 904–05; *see also* Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) ("We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed."); Champion v. Commonwealth, 520 S.W.3d 331, 334–35 (Ky. 2017).

[170] *Loper*, 999 F.2d at 704 (quoting Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 677 (1992)).

[171] Benefit v. City of Cambridge, 679 N.E.2d 184, 188 (Mass. 1997).

[172] *Cf.* Cohen v. California, 403 U.S. 15, 18 (1971) (holding that someone could not be punished for offensive conduct by wearing a jacket bearing the words "F[ ] the Draft," because "[t]he only 'conduct' which the State sought to punish is the fact of communication").

[173] Young v. N.Y.C. Transit Auth., 903 F.2d 146, 165 (2d Cir.1990) (Meskill, J., concurring in part and dissenting in part).

message."[174] As a practical matter, an incomprehensible appeal for funds would not implicate a panhandling restriction because enforcement action is typically undertaken only when a message is clear enough to indicate that a violation has occurred. In other words, a message is not characterized as panhandling unless that is how it is understood by those who hear or see it. Efforts to disqualify spoken or written solicitations as speech on the basis of message quality, therefore, appear misplaced. Constitutional protection should not be limited to those who speak or write eloquently.[175]

With respect to the threshold question of whether speech has occurred, the distinction between speaking versus acting is relevant, but only in determining if wordless conduct is sufficiently expressive to bring the First Amendment into play.[176] Under the two-part test adopted by *Spence v. Washington*: (1) conduct must be intended to convey a particularized message, and (2) there must be a great likelihood that those who witnessed the conduct understood the message.[177] The bar is not high, and the sight of someone in an impoverished condition holding out a cup or hand in hopes of charity should suffice.[178] Begging in silence is another self-evident situation when panhandling restrictions are enforced. The wordless conduct of a person cited for panhandling obviously conveyed an effective message from the viewpoint of the authority that issued the citation.

However, the necessity of intertwining is an issue. It pertains to the level of constitutional protection provided rather than the threshold question of whether speech has occurred.[179] The Supreme Court explained in *Snyder v. Phelps* that speech on matters of public concern receives special protection because the First Amendment expresses a principle that uninhibited, robust, and wide-open debate on public affairs is essential to self-government.[180] The law, therefore, affords greater protection to speech related to any matter of political, social, or other concern to the community and speech on matters

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[174] McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 184 (D. Mass. 2015).

[175] *See* Blair v. Shanahan, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996).

[176] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

[177] Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[178] *See* Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993); Benefit v. City of Cambridge, 679 N.E.2d 184, 188 (Mass. 1997).

[179] *See* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 787–89, 795–96 (1988) (explaining that intertwining determines whether soliciting should be treated as commercial speech or as better-protected core-value speech); Gresham v. Peterson, 225 F.3d 899, 903–04 (7th Cir. 2000).

[180] Snyder v. Phelps, 562 U.S. 443, 451–52 (2011).

having news interest to the public.[181] The Court also indicated in *Snyder* that when speech on "matters of purely private significance are at issue, First Amendment protections are often less rigorous."[182] It recognized that "the boundaries of the public concern test are not well-defined."[183] The content, form, and context of speech must be examined to decide whether speech is of public or private concern, and no single factor is determinative.[184] The Court wrote, "it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[185]

The Supreme Court of Illinois has interpreted *Snyder* as allowing use of an intermediate level of scrutiny when reviewing regulations upon private matter speech.[186] Thus, private matter speech arguably may receive diminished constitutional protection in a manner similar to traditionally less favored commercial speech.[187] It is doubtful, however, that *Snyder* would ever provide grounds to completely strip private matter speech of any constitutional protection.[188]

The courts in *Young*, *Ulmer*, and *Zimmerman* all characterized their doubts about the adequacy of the message conveyed by beggars as a matter of conduct versus speech.[189] However, the tenor of the discussion in each was that begging did not, in their collective judgments, involve speech on issues of public concern and was, therefore, not entitled to full constitutional

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[181] *Id.* at 453.

[182] *Id.* at 452; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–61 (1985); Connick v. Meyers, 461 U.S. 138, 146–47 (1983).

[183] *Snyder*, 562 U.S. at 452.

[184] *Id.* at 453–54.

[185] *Id.* at 454.

[186] People v. Austin, 155 N.E.3d 439, 458–59 (Ill. 2019) (upholding an Illinois statute criminalizing revenge porn).

[187] *Compare* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) (describing the analysis used to evaluate restrictions on commercial speech), *with Austin*, 155 N.E.3d at 459 (describing the intermediate scrutiny test used by the court to evaluate a restriction on private matter speech).

[188] *See* United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

[189] Young v. N.Y.C. Transit Auth., 903 F.2d 146, 153 (2d Cir. 1990) (stating that "begging is much more 'conduct' than it is 'speech'"); Ulmer v. Mun. Ct., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976) ("Regulation of conduct bearing no necessary relationship to the freedom to speak, write, print or distribute information or opinion does not abridge the guarantees of the First Amendment."); People v. Zimmerman, 19 Cal. Rptr. 2d 486, 489 (Cal. App. Dep't Super. Ct. 1993) (stating that the anti-begging statute at issue "proscribes certain *conduct* by an individual who begs or solicits alms, rather than the *message* he seeks to convey").

protection.[190] Other courts have reached an opposite conclusion.[191] Consequently, intertwining might be an important post-*Snyder* topic when considering the extent to which begging is protected by the First Amendment.[192]

In common experience, begging takes many forms. Everyone has probably at some point seen a needy person holding a sign saying, "Homeless Veteran, Please Help" or something similar. Everyone likewise has undoubtedly, and possibly to their annoyance, encountered many persons who have asked nothing more than: "Can you spare some change?" Depending upon the number of times a person experiences each situation, it is understandable why people's opinions about begging differ. Those who frequently encounter others who ask for help while making known the reasons for their plight likely perceive a broader social message. Those who daily receive only unexplained requests for change might be more inclined to view begging differently. Thus, reasonable minds may differ about whether begging constitutes speech of public or private concern under a test that evaluates all the circumstances surrounding it, including what, where, and how something was said.[193]

Similarly, judicial opinions vastly differ. The majority in *Young* wrote that "[t]he only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost."[194] In contrast, as the Supreme Judicial Court of Massachusetts recognized in *Benefit v. City of Cambridge*: "Many times a beggar's solicitations will be accompanied . . . by communications that convey social or political messages."[195] The court in *Loper* wrote that begging "usually involves" some

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[190] *See Young*, 903 F.2d at 153 (opining that people do not beg to "convey any social or political message" and instead just "beg to collect money"); *Ulmer*, 127 Cal. Rptr. at 447 (asserting that "[b]egging and soliciting for alms do not necessarily involve the communication of information or opinion; therefore, approaching individuals for that purpose is not protected by the First Amendment"); *Zimmerman*, 19 Cal. Rptr. 2d at 490 (distinguishing begging from charitable solicitations on the basis that "the nexus between charitable solicitations and the communication of information and advocacy of causes implicates interests protected by the First Amendment").

[191] *E.g.*, Blair v. Shanahan, 775 F. Supp. 1315, 1322–23 (N.D. Cal. 1991) ("Begging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised."), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996).

[192] Gresham v. Peterson, 225 F.3d 899, 905 n.1 (7th Cir. 2000) (noting that someone could argue panhandling is commercial speech, but that argument seems more farfetched).

[193] *See* Snyder v. Phelps, 562 U.S. 443, 453–54 (2011).

[194] *Young*, 903 F.2d at 154.

[195] Benefit v. City of Cambridge, 679 N.E.2d 184, 188 (Mass. 1997).

communication containing a particularized social or political message because it "frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation."[196] The extent to which the First Amendment protects begging may therefore come down to the issue of intertwining.

The lineage of the Supreme Court's charitable solicitation cases is instructive and may be determinative as to how much intertwining is actually required. The Court began in *Schaumburg* by suggesting that charities that do not disseminate, discuss, or advocate positions on matters of public concern while soliciting might not be protected to the same extent as those who do.[197] In succeeding cases, the Court addressed governmental efforts to utilize this apparent loophole. In *Munson*, the Court invalidated a statute that tried to exploit the opening left by *Schaumburg*, but it again indicated that a charity whose high fundraising costs were not attributable to intertwined advocacy efforts might not have First Amendment grounds to complain about solicitation restrictions.[198] However, the Court in *Riley* seemingly put to rest any misunderstanding regarding the extent to which actual intertwining is required.[199] The statute at issue in *Riley* was specifically directed at the fees of professional fundraisers and, in particular, those whose activities did not include public issue advocacy on behalf of the charities for whom they solicited.[200] In the end, any distinction between solicitors who do advocate and those who do not advocate did not matter.[201] The Court wrote, "Regulation of a solicitation 'must be undertaken with due regard for the reality that solicitation is *characteristically* intertwined with informative and perhaps persuasive speech . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease.'"[202]

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[196] Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993).

[197] Schaumburg II, 444 U.S. 620, 635–36 (1980).

[198] Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 966 (1984).

[199] *See* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 795-96 (1988).

[200] *See id.* at 784–86 (describing statute limiting fundraiser fees which provided a case-by-case exception for those who could show that their solicitation activities included advocacy).

[201] *See id.* at 794 (rejecting arguments that the structure of the statute distinguished it from the rulings in *Schaumburg* and *Munson*).

[202] *Id.* at 796 (emphasis added) (quoting *Schaumburg II*, 444 U.S. at 632). As Second Circuit Judge Meskill explained:

> Notably, the Court [in *Village of Schaumburg*] did not suggest that charitable solicitation is protected expression because it is always accompanied by speech on social issues. If that were the test, then it is

It could be reasonably argued that organized solicitation is different than begging because it is presumed that matters of public concern always underlie and thereby intertwine with charitable fundraising activities whether or not expressly communicated.[203] The same presumption cannot be indulged with respect to individuals who beg solely for private need.[204] However, to rephrase the position taken by the *Blair* court as a question, if all organized charitable solicitation is fully protected because it sometimes intertwines with core-value speech, why would the same not apply to begging?[205] Other courts have made similar observations. The United States District Court for the Eastern District of Louisiana wrote in *Blitch v. City of Slidell* that it seems backward that organizational speech would be more protected than individual speech.[206] In *Benefit*, the Supreme Judicial Court of Massachusetts elaborated:

> Indeed, it would be illogical to restrict the right of the individual beggar to seek assistance for himself while protecting the right of a charitable organization to solicit funds on his behalf. Such a conclusion would require citizens to organize in order to avail themselves of free speech guarantees, a requirement that contradicts the policies underlying the First Amendment.[207]

> doubtful that any organized charity soliciting contributions in the New York subway would be engaged in protected expression.

Young v. N.Y.C. Transit Auth., 903 F.2d 146, 165 (2d Cir. 1990) (Meskill, J., concurring in part and dissenting in part).

[203] *See* Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (acknowledging that begging does not always involve the transmission of particularized social or political messages, but the concept that canvassers for charities are more than mere solicitors is inherent in all the charitable solicitation cases).

[204] *See Young*, 903 F.2d at 155 (opining that, unlike charitable solicitations, begging lacks a nexus with the communication of information and advocacy); *see also* People v. Zimmerman, 19 Cal. Rptr. 2d 486, 490–91 (Cal. App. Dep't Super. Ct. 1993).

[205] Blair v. Shanahan, 775 F. Supp. 1315, 1322–23 (N.D. Cal. 1991) ("Begging can promote the very speech values that entitle charitable appeals to constitutional protection . . . . That many beggars fail to so inform or affect their listeners is irrelevant. Many charitable solicitors fail to educate, enlighten, or persuade their listeners."), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996).

[206] Blitch v. City of Slidell, 260 F. Supp. 3d 656, 664 (E.D. La. 2017).

[207] Benefit v. City of Cambridge, 679 N.E.2d 184, 188 (Mass. 1997); *see also* Speet v. Schuette, 726 F.3d 867, 877 (6th Cir. 2013); *Young*, 903 F.2d at 167 (Meskill, J., concurring in part and dissenting in part).

A central teaching of *Schaumburg* and its progeny is that less favored speech is protected to the same degree as core-value speech when they are inextricably intertwined.[208] Begging sometimes, but not always, includes readily identifiable core-value speech.[209] So, even if begging is not considered "means indispensable to the discovery and spread of political truth,"[210] the real question is presumably whether enough begging is intertwined with core-value speech for the Supreme Court to generally characterize begging as speech on matters of public concern. Most lower courts conclude that it is.[211]

This article therefore proposes the following framework for analyzing First Amendment issues related to panhandling: (1) Begging is speech. If the wordless conduct of a person in need is inadequate to convey an appeal for support and assistance, it is not protected speech, but it then also cannot be considered begging because an uncertain message is simply unclear for all purposes; (2) Begging is entitled to constitutional protection, regardless of whether it is considered speech on a matter of public concern or private matter speech, because characterization of the type of speech determines only the level of protection that is provided; and (3) Even if begging is considered private matter speech when standing alone, it should be given the greater protection if it is sufficiently intertwined with core-value speech.

IV. CONCLUSION

A minority of judicial opinions assert that begging should be treated as conduct rather than speech.[212] Such opinions conclude that begging is not inseparably intertwined with a particularized message worthy of First Amendment protection.[213] Prohibitions against panhandling, therefore, do

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[208] Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 796 (1988). *See generally* Schaumburg II, 444 U.S. 620, 632 (1980).

[209] Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) ("While we indicated in *Young* that begging does not always involve the transmission of a particularized social or political message it seems certain that it usually involves some communication of that nature." (citation omitted)); *see also* Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000) ("Beggars *at times* may communicate important political or social messages . . . ." (emphasis added)); *Benefit*, 679 N.E.2d at 188 ("*Many times* a beggar's solicitations . . . convey social or political messages." (emphasis added)).

[210] *Young*, 903 F.2d at 154 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

[211] *See, e.g.*, Speet v. Schuette, 726 F.3d 867, 875–78 (6th Cir. 2013) (reviewing authorities).

[212] *See Young*, 903 F.2d at 153–54; Ulmer v. Mun. Ct., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976); People v. Zimmerman, 19 Cal. Rptr. 2d 486, 489 (Cal. App. Dep't Super. Ct. 1993).

[213] *E.g.*, *Young*, 903 F.2d at 153–54.

not impinge on free speech but only the taking of money.[214] Those in need may still speak to others about their plight as long as they do not also immediately hit them up for cash.[215] They might also passively accept donations as long as they do not physically accost others.[216] In the view of those opinions, anti-begging laws merely protect "citizens from unwanted exposure to certain intrusive and unpleasant methods of expression which may properly be deemed a public nuisance."[217]

In response to the conduct vs. speech distinction, Judge Meskill of the Second Circuit Court of Appeals opined that such a worldview is unrealistic. He wrote, "To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity in their spare time ignores the harsh reality of the life of the urban poor."[218] A majority of lower courts conclude that begging intertwines with messages of social importance in the same manner as organized charitable solicitations and is therefore fully protected speech for purposes of the First Amendment.[219] The majority recognizes that begging may entail some annoyance to those solicited but explain that "[p]rotecting citizens from mere annoyance is not a sufficient compelling reason to absolutely deprive one of a first amendment right."[220] They further explain that truly harmful fraud, intimidation, coercion, and assaultive conduct may be addressed by laws targeted specifically at those behaviors.[221] The Seventh Circuit Court of Appeals commented in *Gresham v. Peterson*, "While some communities might wish all solicitors, beggars and advocates of various causes be vanished from the streets, the First

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[214] *Id.* at 154.

[215] *Id.*; *cf.* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 707–08 (1992) (Kennedy, J., concurring) (opining that restrictions against charities asking for immediate receipt of funds do not unconstitutionally impair free speech because solicitors can still provide envelopes and ask those solicited to mail contributions).

[216] *See Ulmer*, 127 Cal. Rptr. at 447–48.

[217] *Zimmerman*, 19 Cal. Rptr. 2d at 491; *see also Young*, 903 F.2d at 156 ("While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.").

[218] *Young*, 903 F.2d at 166 (Meskill, J., concurring in part and dissenting in part).

[219] *See, e.g.*, Speet v. Schuette, 726 F.3d 867, 875–78 (6th Cir. 2013) (reviewing cases).

[220] C.C.B. v. State, 458 So. 2d 47, 50 (Fla. Dist. Ct. App. 1984); *see also* Benefit v. City of Cambridge, 679 N.E.2d 184, 188 n.4 (Mass. 1997); Coates v. Cincinnati, 402 U.S. 611, 615 (1971).

[221] *E.g.*, Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 701–02, 705 (2d Cir. 1993); Blair v. Shanahan, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996).

Amendment guarantees their right to be there, deliver their pitch and ask for support."[222]

The Supreme Court held in *Snyder v. Phelps* that speech pertaining purely to matters of private significance may receive less constitutional protection than speech related to matters of public concern.[223] It may be reasonably argued that begging by an individual communicates private need rather than commentary upon political or social issues.[224] However, as a justice on the Washington State Supreme Court wrote, it may also be reasonably argued that "[e]ven the statement 'I am hungry' communicates a fact of social existence of some relevance to public discourse."[225] The extent to which the First Amendment protects begging may therefore depend upon whether begging is seen as something that characteristically intertwines with core-value speech.[226]

The Supreme Court held in *Schaumburg* that charitable solicitation by organized charities is fully protected by the First Amendment.[227] It reasoned that charitable fundraising activities are characteristically intertwined with advocacy and other speech on matters of public concern that would cease without such solicitations.[228] Most lower courts see no distinction of constitutional significance between organized charitable solicitations and begging.[229] The court in *Blair v. Shanahan* explained that "First Amendment protection depends on the type of speech, and not on the organization promoting the message. 'The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.'"[230] Those courts, therefore, hold that begging should receive the same level of protection as charitable solicitation.[231] The court in *People v. Schrader* bluntly

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[222] Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000).

[223] Snyder v. Phelps, 562 U.S. 443, 452 (2011).

[224] *See* Young v. N.Y.C. Transit Auth., 903 F.2d 146, 153–54 (2d Cir. 1990); Ulmer v. Mun. Ct., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976); People v. Zimmerman, 19 Cal. Rptr. 2d 486, 489–91 (Cal. App. Dep't Super. Ct. 1993).

[225] Seattle v. Webster, 802 P.2d 1333, 1342 (Wash. 1990) (Utter, J., concurring in part and dissenting in part).

[226] *See* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 796 (1988).

[227] Schaumburg II, 444 U.S. 620, 632 (1980).

[228] *Schaumburg II*, 444 U.S. at 632; *see also Riley*, 487 U.S. at 796.

[229] *See, e.g.*, Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993); Benefit v. City of Cambridge, 679 N.E.2d 184, 188 (Mass. 1997).

[230] Blair v. Shanahan, 775 F. Supp. 1315, 1323 (N.D. Cal. 1991) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978)), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996).

[231] *E.g.*, Speet v. Schuette, 726 F.3d 867, 875–78 (6th Cir. 2013); Gresham v. Peterson, 225 F.3d 899, 903–05 (7th Cir. 2000); *Loper*, 999 F.2d at 704; *Benefit*, 679 N.E.2d at 188.

explained why, in its opinion, those who beg on their own behalf should not be treated differently for First Amendment purposes than those who solicit on behalf of organized charities: "No rational distinction can be made between the message involved, whether the person standing on the corner says 'Help me, I'm homeless' or 'Help the homeless.'"[232]

It remains an open question whether begging is communicative activity protected by the Free Speech Clause of the First Amendment.[233] The reality of the situation faced by those who, for whatever reason, rely on begging to survive should not, however, get lost in the discussion. As the court in *McLaughlin v. City of Lowell* reminds: "Panhandling is not merely a minor, instrumental act of expression. . . . [A]t stake is 'the right to engage fellow human beings with the hope of receiving aid and compassion.'"[234]

[232] People v. Schrader, 617 N.Y.S.2d 429, 435 (N.Y. Crim. Ct. 1994).

[233] *See* Evans v. Sandy City, 944 F.3d 847, 852–53 (10th Cir. 2019) (acknowledging that the Supreme Court has not directly addressed the issue).

[234] McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 184 (D. Mass. 2015) (quoting *Benefit*, 679 N.E.2d at 190).