C. SOLICITATION AND FUND-RAISING

In the Jehovah's Witnesses cases, it was noted that the activities at issue were an inextricable interweaving of evangelizing, distribution of tracts and solicitation of contributions. The majority of the Supreme Court in *Murdock v. Pennsylvania*[1] endorsed Justice Douglas' contention that

> The hand distribution of religious tracts is an age-old form of missionary evangelism.... It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.... [T]he mere fact that the religious literature is "sold"...rather than "donated" does not transform evangelism into a commercial enterprise.

The fact pattern in *Murdock* involved a flat license fee for a permit to go from door to door selling tracts. Justice Douglas noted that the Witnesses tried to obtain donations of specified amounts for their books and pamphlets, but if those were not forthcoming, the Witnesses often left the materials anyway, so he put quotation-marks around "sold" and "donated" to indicate their special meaning in this instance. In a later case, *Follett v. McCormick*,[2] the Court found no less protected by the First Amendment the sales of religious tracts by a Witness who resided permanently in the town and made his living from such sales. The license fees in both cases were struck down as imposts upon the exercise of First Amendment rights.

From these significant beginnings in cases focusing upon the mixed *religious* activities of the Jehovah's Witnesses have come several lines of cases shaping the law governing "public forums" for free speech of secular as well as religious character, spelling out the kinds of limitations of "time, place and manner" that can be imposed upon free speech, and applying such considerations to a broad range of governmental efforts to regulate charitable solicitations, both secular and religious. "The legal status of religious solicitation is intimately entwined with the development of the system of

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1. 319 U.S. 105 (1943), discussed at A2i above; see also the minority opinions in *Jones v. Opelika*, discussed at A2f above. That decision was overruled when the minority became the majority in *Murdock*.

2. 321 U.S. 573 (1944), discussed at A2m above.

freedom of expression. Indeed, the former might fairly be said to have begotten the latter, at least in part."[3]

This section will examine the case law that has developed since the Jehovah's Witnesses cases and now governs charitable and religious solicitations.

1. "Stewardship" Considerations

Religious bodies have a very direct and substantial interest in freedom to seek contributions for the support of their work with a minimum of governmental regulation. There is a cynical school of thought that looks with suspicion upon any human interaction that involves the passage of money between persons as crass, mercenary and probably venal—the opposite of moral or spiritual. Religious bodies are thought—from that standpoint—to have sullied their high character and calling when they stoop to appeal for funds. "Always asking for money" is a criticism often levelled at churches by such cynics, who do not themselves survive in altruistic penury.

Why should *religious* organizations alone be expected to survive on divinely distilled manna that falls from the heavens when others do not? It is a fact of life that religious organizations need money in order to operate. The more money they can obtain, the wider their operations can extend. If they believe in their gospel, they will strive to maximize their resources for spreading that gospel. Furthermore, since the disestablishment of religion in the United States, churches are obliged to obtain support from voluntary contributions; they should not now be micromanaged by governmental regulation when they seek to do so.

Money is neutral. It is neither good nor evil. It can be used for either kind of end, and most uses of money have in them elements of both. Churches can often put money to good uses, but they too have their temptations and shortcomings. It is not *money* that is said to be the "root of all evils," but the *love* of money,[4] and churches sometimes suffer from that, but probably not as much as some other kinds of human endeavors. The fact that churches need money to operate, then, is at worst a neutral fact, not a discreditable one. But it is far more than that. Religious bodies and their leaders should not feel apologetic about seeking adequate funding for their work; on the contrary, they should recognize it as part of their religious duty, and not just because it fuels the engines of their mission.

People do not contribute to what they do not understand or do not believe in. So the first and indispensable step in seeking their support is to tell them what it is to be used for. That means no more and no less than interesting them in the work and what it stands for, so that they will want to be a part of it, to invest themselves in it.

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3. Fisher, Barry A., "Current Issues in Government Regulation of Religious Solicitation," in Kelley, D.M., ed., *Government Intervention in Religious Affairs*, (New York: Pilgrim Press, 1983), p. 129.

4. I Tim. 6:10, RSV.

Another name for doing that is—evangelism. Thus evangelism and seeking support for the work of religion are closely linked; the latter will not succeed without the former, and the former has not been accomplished until it bears fruit in the latter.

But there is an even more important reason for enlisting the willingness of people to give to the work of religion, and that is because they need to *give* to what is *good* in life for the sake of shaping a better world and for the sake of their own spiritual health. Individuals and groups are daily influencing both of those outcomes as a result of their successive choices about what they do with their resources. They can invest them day by day in what is upbuilding or in what is degrading. If the religious body believes that it is working to build up the goodness that God wants to bring forth in persons and in history, it has a duty to help its members and everyone it can reach to make right choices in what they do with their money, since those choices are crucial in the ongoing struggle between good and evil.

So the religious body, in encouraging people to invest themselves and their *money* in what is good—including in itself and its work—is giving them a concrete, effective and readily intelligible means of serving God and advancing their own spiritual growth. Far from being tawdry or materialistic, talking about how people are spending their *money*—and about how they *should* spend it—is a matter essential to their spiritual health. "For where your treasure is, there will your heart be also."[5] And any religious body that does not press its members (and others) to invest their treasure where their hearts should be—in God's work—is lax in its duty.

To summarize this brief excursion in the theology of stewardship: *religious bodies rightly and necessarily ask people to give money to their work* for several reasons: (1) because they need money to carry on and expand the work that God has called them to do; (2) because such asking is a vehicle and a fulfillment of evangelism and of enlistment in the specific tasks or services undertaken in carrying out that work; and (3) because giving to good and important causes is essential to a person's spiritual health and to the health of society.

Demurrers from this thesis, to the effect that churches should not be preoccupied with money or that they are really only self-serving in such efforts, are known in the trade as "pocketbook protection"—justifications for refusing to contribute, or doing so in a pinched and grudging spirit that is the opposite of spiritual health. The world tries to teach people to work, to earn, to save, to spend, but few try to teach them to *give*. For spiritual health, a person needs to progress from cynical resistance through token giving to "giving 'til it hurts" and then on to "giving 'til it feels good," by which is meant giving that makes the cause one's own—"buying into it"—becoming a partner with God in advancing the good (which may sometimes mean giving generously to causes other than "religion" or the soliciting religious organization).

Not a few religious traditions have taught that *tithing*, usually defined as a tenth of one's income, is the *minimum* level of giving for spiritual health. Seventh-day

5. Matt. 6:21, RSV.

Adventists give a tithe for missionary and evangelism efforts alone, while giving for other (church) purposes *beyond* that. Members of the Worldwide Church of God are expected to give a *double* tithe, with special contributions beyond that for their annual Harvest of Blessings. And some religious traditions have taught that *true* spiritual health is attained by giving *everything* away and taking a holy vow of poverty, living on what is given to one by others. The mendicant religious orders of medieval Christianity and the Hindu rite of *sankirtan* or holy begging are but two well-known and respected expressions of this impulse.

Jesus' prescription for the spiritual health of at least one seeker was, "Sell all that you have and distribute to the poor, and you will have treasure in heaven; and come, follow me."[6] Another solution to the temptations of acquisition and aggrandizement was that of the early Christian church.

> Now the company of those who believed were of one heart and soul, and no one said that any of the things which he possessed was his own, but they had everything in common.... There was not a needy person among them, for as many as were possessors of land or houses sold them, and brought the proceeds of what was sold and laid it at the apostle's feet; and distribution was made to each as any had need.[7]

This was no casual matter. One couple turned in only part of the proceeds. Peter said to the husband, "Ananias, why has Satan filled your heart to lie to the Holy Spirit and to keep back part of the proceeds of the land? While it remained unsold, did it not remain your own? And after it was sold, was it not at your disposal? How is it that you have contrived this deed in your heart? You have not lied to men but to God." And at that Ananias "fell down and died." When his wife, Sapphira, came in later and told the same lie, Peter said, "How is it that you have agreed together to tempt the Spirit of the Lord? Hark, the feet of those that have buried your husband are at the door, and they will carry you out." And "immediately she fell down at his feet and died."[8]

The early church preserved this rather incongruous account apparently as a reminder that giving is serious business and should not be entered into in a grudging manner. It serves here as a reminder that Christianity (and other faiths) have looked upon possessions and poverty, gaining and giving, in ways that contrast sharply with the prevalent assumptions of an acquisitive society—then and now. So religious bodies today should not too readily capitulate to the assumptions that self-seeking, grasping and hoarding are the normal, healthy approach to money when the opposite may be true.

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6. Luke 18:22, RSV.
7. Acts 4:32, 34-5, RSV.
8. Acts 5:1-10, *passim*, RSV.

2. The Urge to Regulate: "Protecting" the Consumer

Unfortunately, not all appeals for donations to ostensibly religious causes represent disinterested opportunities for the donors to enhance their spiritual health, and in fact there may be some that are designed primarily to enhance the material wealth of the solicitor. From time to time some "racket" operating in the name of religion is exposed, and a public clamor ensues to clamp down on such frauds. Some of these supposed scandals were examined in the *Ballard* and *Article or Device* cases.[9] The free-wheeling finances of the Pallottine Fathers in Maryland, who invested heavily in Florida real estate and other speculative enterprises (including loans to then Governor Marvin Mandel), with the income ostensibly to be used for the missionary purposes for which the money was solicited, was one of the more recent such scandals.[10]

When these highly publicized "rip-offs" occur, public servants rise valiantly to the occasion with efforts to make the charities more "accountable" to the public from which they gain their funds. The National Association of Attorneys General has long interested itself in closer regulation of charitable solicitations, drafting model statutes for the same, some of which have been adopted in various states. These statutes invariably require charities intending to solicit contributions within the state to register with the attorney general and to disclose extensive information about their purpose, organization and past performance.[11]

Many such statutes exempt churches from such registration and disclosure requirements, at least for their "religious" appeals or for appeals addressed to their own members, though the constitutionality of such exceptions—if solely for religion—is no longer beyond question.[12] However, there is a disposition among some regulators to eliminate exceptions and to treat religious solicitors like their "secular counterparts." This disposition has been reinforced by the efforts of certain new religious movements to raise funds from the public by street solicitation or by selling flowers and candy at airports or shopping centers. The consequent strictures applied to such groups by state and local regulators, and their resistance to them, have resulted in a new chapter in the law of church and state.

That chapter has taken shape along certain current lines of thought developed in the recent movement for greater consumer protection from frauds of the marketplace. It is certainly true that consumers in a technological society cannot know enough by their unaided efforts to assess the inner processes and relative merits of the complicated products offered to them for sale, and so consumer research and testing

9. *U.S. v. Ballard*, 322 U.S. 78 (1944), discussed at § B6a above, and *U.S. v. Article or Device*, 333 U.S. 357 (1971), discussed at § B6c above.

10. For detailed accounts of several such scams, see the accounts of a reporter who investigated them: Sherwood, Carlton, *Inquisition* (Wash., D.C., Regnery Gateway, 1991), pp. 569-599.

11. See a discussion of the dubious efficacy of these provisions at § C4d below.

12. See *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (exemption from sales tax solely for religious publications held to violate Establishment Clause).

organizations have undertaken to advise them with product comparisons on points of economy, efficiency, and safety. And the consumer movement has been able to enlist the help of government to enforce certain minimal canons of responsibility upon manufacturers and merchants. Certain trusty tricks of salesmanship such as "bait-and-switch" are now frowned upon by the law in many states, and a "warrant of merchantability" is expected to accompany offers of sale (that is, a vacuum cleaner is expected to pick up at least *some* dirt).

But do the rubrics of consumer protection apply also to religious offerings? What kind of "warrant of merchantability" applies to such assurances as:

> [H]e who sows sparingly will also reap sparingly, and he who sows bountifully will also reap bountifully. Each one must do as he has made up his mind, not reluctantly or under compulsion, for God loves a cheerful giver. And *God is able to provide you with every blessing in abundance, so that you may always have enough of everything* and may provide in abundance for every good work.... He who supplies seed to the sower and bread for food *will supply and multiply your resources* and increase the harvest of your righteousness. *You will be enriched in every way* for great generosity, which through us will produce thanksgiving to God; for the rendering of this service not only supplies the wants of the Saints but also overflows in many thanksgivings to God.[13]

Here, it might be, is a smooth operator making a pitch for contributions that he claims he is going to take to the headquarters of his cult to support the leaders there, whom he calls "the saints," and he promises that those who give generously—through him—will receive "every blessing in abundance"; they will "always have enough of everything"; they will be "enriched," and God will "supply and multiply [their] resources." Now if someone were to make a large donation in reliance upon this promise of divine performance and then were to experience, not a shower of wealth, but increasing loss, failure and privation, would he not have a strong cause of action for consumer fraud?

But fortunately the civil authorities of the modern world are alert to the possibilities of fraud, and they would require such a fellow to register with the local aedile and produce his credentials, file an audited report of his previous year's receipts and expenditures, showing how much of the gross went for expenses of solicitation, and listing the names and addresses of "the saints" as well as of any "highly compensated officers or employees" (like himself?). If he passed muster, he would be given a laminated plastic badge with his picture on it to wear at all times when soliciting contributions.

And if such a fellow were brought up on charges of consumer fraud, what defense could he offer? That the donor really was not "cheerful" or "righteous," but actually contributed for ulterior motives, which in God's sight abrogated the contract? On the

13. II Cor. 9:6-8, 10-12, RSV, emphasis added.

failure of his Principal to appear for deposition on this subject, would he suffer a default judgment in favor of the disgruntled donor? Any court trying to sort out the particulars of an alleged consumer fraud in the realm of religion is apt to discover that the terms of the warranty are somewhat imprecise, the performance includes various intangibles, and the user or operator is supposed to exercise not only prudence and skill but faith, hope and love, and in the absence of these latter qualities the warranty is void. "Insufficient faith" is a standard defense to charges of religious fraud, with noted precedents: when the disciples asked Jesus why they could not heal an epileptic boy, he said, "Because of your little faith,"[14] and that has been an explanation for failure of performance in religion ever since.

That does not mean there are *no* actionable frauds in the realm of religion. As even Justice Jackson, dissenting in *Ballard*, admitted: "I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes."[15] But most religious solicitations have in them intangible elements that make them unrewarding objects for empirical verification. The main thrust of Justice Jackson's dissent was directed at that truth, and his other words (emphasized below) should be inscribed over every portal of religious solicitations:

> All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce.... *I doubt if the vigilance of the law is equal to making money stick by overcredulous people....* [T]he price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.... I...would have done with this business of judicially examining other people's faiths.[16]

The majority opinion in *Ballard* held that a civil court in this country cannot constitutionally undertake to determine the truth or falsity of religious beliefs, even when those formed the inducement for contributions that led to charges of fraud, and so *U.S. v. Ballard* stands as an ultimate bulwark against actions for fraud against religious solicitations in which religious teachings, doctrines, claims or representations form a causative element, though sometimes a dispute may arise over whether a solicitation *is* "religious."

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14. Matt. 17:20, RSV.
15. *U.S. v Ballard*, 322 U.S. 78 (1944), discussed at § B6a above.
16. Ibid., emphasis added. See § B6a for fuller text.

3. Jehovah's Witnesses Cases

An earlier section examined some of the Jehovah's Witnesses cases. In order to link this discussion with its origins there, some facets of a few of them will be revieweed that bear particularly upon solicitation.

a. *Schneider v. Town of Irvington* (1939). Under this caption the U.S. Supreme Court actually dealt with four cases, only one of which, *Schneider*, was religious. The others were a Los Angeles case involving "Friends of the Lincoln Brigade" in the Spanish Civil War, a Milwaukee case involving a labor dispute, and a Massachusetts case involving a protest over unemployment insurance. What they all had in common was prosecution under local ordinances prohibiting distribution of handbills on the streets, and the court struck those down as prior restraints on freedom of speech and press. The Town of Irvington, New Jersey, however, had an ordinance with an added wrinkle: it prohibited canvassing as well, and a woman member of Jehovah's Witnesses named Schneider was convicted under it of "solicitation and acceptance of money contributions without a permit." The U.S. Supreme Court in an opinion by Justice Roberts struck down that ordinance:

> Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens.... Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden....
>
> We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner.... We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit.[17]

b. *Cantwell v. Connecticut* (1940). This important decision, which first applied the Free Exercise Clause of the First Amendment to the states by way of the Fourteenth Amendment, involved a conviction for solicitation without a permit. Here is repeated only the statement of Justice Roberts for the U.S. Supreme Court that summarized its holding on that subject:

> Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct.... Without doubt a state may protect its citizens from fraudulent solicitation

17. ***Schneider v. Irvington***, 308 U.S. 147 at 159 (1939), discussed at A2b(2) above.

> by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.... But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[18]

4. Some Secular Solicitation Cases

As was true of evangelism cases, some of the pathmarking decisions occurred in cases that did not involve religion, though they may have implicated religious interests.

a. *Staub v. City of Baxley* (1958). The first secular solicitation case was the conviction of Rose Staub, an organizer for the International Ladies' Garment Workers Union (ILGWU), for violation of an ordinance of the city of Baxley, Georgia, which prohibited soliciting membership in any organization requiring payment of dues without first obtaining a permit from the mayor and council. The mayor and council were empowered to grant such a permit if satisfied as to "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley." The ordinance contained a remarkable additional proviso: "Section VI. In the event that person making application is salaried employee or officer of the organization...or received a fee of any sort from the obtaining of such members, he shall be issued a permit and license...upon the payment of $2,000.00 per year. Also $500.00 for each member obtained."[19]

Rose Staub and another ILGWU organizer went to Baxley as part of a drive by the union to organize a textile firm in the nearby town of Hazelhurst, many of whose employees lived in Baxley. Without applying for permits, they talked with several employees at their homes about joining the union. Blank membership applications were left with them, but no money changed hands. Before the day was out, Rose Staub was served with a summons by the chief of police to appear before the mayor's court, where she was eventually convicted and sentenced to thirty days or $300.

The case wended its way to the U.S. Supreme Court, which invalidated the ordinance in an opinion written by Justice Charles E. Whittaker. The city contended that Rose Staub had no standing to attack the constitutionality of the ordinance because she had made no effort to apply for a permit under it. The court rejected that contention, saying, "...the failure to apply for a license under an ordinance which on

18. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), discussed in greater detail at § A2c above.
19. *Staub v. City of Baxley*, 355 U.S. 313 (1958).

its face violates the Constitution does not preclude review in this court of a judgment of conviction under such an ordinance."

The court found that the permit was to issue only upon affirmative action by mayor and council after assessing—among other things—the union's "effect upon the general welfare of the citizens of the City of Baxley."

> These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit.[20] It is thus plain that they act in this respect in their uncontrolled discretion.
>
> It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Justice Frankfurter dissented for ten pages plus an appendix, in which dissent he was joined by Justice Tom Clark. The gravamen of all this was that the court had not accorded due deference to the state court's determinations that the appellant had not followed the proper procedure, particularly in failing to attack any specific sections of the ordinance. The majority had viewed that requirement with ill-concealed impatience: "To require her, in these circumstances, to count off, one by one, the several sections of the ordinance would be to force resort to an arid ritual of meaningless form." Justice Frankfurter devoted his many pages to showing that "There is nothing frivolous or futile (though it may appear `formal') about a rule insisting that parties specify with arithmetic particularity those provisions in a legislative enactment they would ask a court to strike down."

In a footnote, Justice Frankfurter mentioned in passing that "one of the most vulnerable provisions of this ordinance, the drastically high license fee, was taken out of controversy in this suit by the respondent's admission of its invalidity."[21] In that characterization, he highlighted the root issue that neither the majority nor the dissent mentioned. The draconian fee for paid recruiters ($2,000.00 per year in 1954 dollars), with its even more incredible "kicker" ("Also $500.00 for each member obtained.") was a clear tip-off to the purpose of this ordinance. It obviously was not intended to *permit* any solicitation of members by paid organizers—even if mayor and council approved—but to *prevent* it by a prohibitive charge that was more like a fine than a fee. It was clearly designed to be a union-busting law (or rather a union *banning* one), for what other kind of organization would be sending in hired recruiters to solicit membership "for any organization, *union* or society...which ***requires*** from its

20. Citing *Niemotko v. Maryland*, 340 U.S. 268 (1951), discussed at § A2q above.
21. Ibid. p. 332, n. 6.

members the payment of membership fees, *dues or is entitled to make assessment against its members*..." (a veiled reference to the payroll check-off)?

It was the purpose of the ordinance *as a whole* that was at fault, not just one section or another, and the ill was scarcely remedied by the city's belated admission that the fees were a little steep. It takes a remarkable kind of judicial obtuseness or disingenuousness to be so preoccupied with the procedural niceties (the "*arithmetic*" particularities) as to fail to see the bottom line to which they all added up, which was a statutory design to bar union organizers.

b. *Hynes v. Mayor of Oradell* (1975). A candidate for the New Jersey State Assembly, Edward Hynes, wished to campaign in the Borough of Oradell and challenged in state court a local ordinance requiring that advance notice in writing to the police department be given by anyone "desiring to canvass, solicit or call from house to house...for a recognized charitable cause...or...political campaign or cause." The U.S. Supreme Court in an opinion by Chief Justice Warren Burger, struck down the ordinance as unconstitutionally vague.

> There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety.... [But] in the First Amendment area "government may regulate...only with narrow specificity."... As a matter of due process, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."... The general test of vagueness applies with particular force in review of laws dealing with speech.... [W]e conclude that [the ordinance] must fall because in certain respects "men of common intelligence must necessarily guess at its meaning."...[22]

Justice Brennan concurred in part, joined by Justice Marshall, but he contended that, even if the ordinance were drafted with greater precision to eliminate the vice of vagueness, it would still be unconstitutional if it required solicitors to identify themselves, since anonymity should be possible to preserve in "the door-to-door exposition of ideas," just as it is in the distribution of handbills, as the court had held in striking down a Los Angeles ordinance requiring that handbills carry the names of those writing, printing or distributing them.[23] He felt that the requirement that canvassers identify themselves to the police would tend to discourage the volunteers upon whom political campaigns increasingly depend—a more sweeping stance with respect to in-person solicitation than the rest of the court was willing to take.

Justice Rehnquist dissented on the ground that, even if certain aspects of the ordinance might be considered "vague" for argument's sake, there was no one in the case with standing to raise that claim, since none of the appellants had any

22. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).
23. *Talley v. California*, 362 U.S. 60 (1960).

connection with "charitable" or any other "causes." They were engaged in a political campaign, which was quite clearly identified in the ordinance. Knowing that, they were under a duty to identify themselves to the police in writing. "Should he have any doubts as to whether his identification is sufficiently detailed he has simple recourse close at hand; he need only ask the Oradell police.... No constitutional value is served by permitting persons who have avoided any possibility of attempting to ascertain how they can comply with a law to claim that their studied ignorance demonstrates that the law is impermissibly vague."

Clearly Justice Brennan and Justice Rehnquist had very different views of the possible implications of identifying oneself to the police; their diametrically opposite views cancelled each other out, and the majority of the court sailed majestically on down the middle course with an "outrigger" extended against sudden swells from either side.

c. *Village of Schaumburg v. Citizens for a Better Environment* (1980). In 1974 the village of Schaumburg, Illinois, adopted "An Ordinance Regulating Soliciting by Charitable Organizations" that required such organizations to obtain a permit from the village collector before soliciting in the village. One of the requirements for the permit was "satisfactory proof that at least seventy-five percent of the proceeds of such solicitation will be used directly for the charitable purpose of the organization." No more than 25 percent could be used for administrative costs and salaries or commissions paid to solicitors. An organization called Citizens for a Better Environment (CBE) sought a permit but was denied because it could not meet the 75 percent requirement, so it went to court seeking to have that rule declared an infringement of the First Amendment. The village responded with the contention that "more than 60% of the funds collected [by CBE] have been spent for benefits of employees and not for any charitable purposes."

The U.S. Supreme Court, in an opinion by Justice Byron White, struck down the percentage limitations as unconstitutionally overbroad. First the court dealt with the village's claim that "the ordinance should be sustained because it deals only with solicitation and...any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money." The contention was rejected because:

> 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. 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.[24]

The court noted with approval the view of the Seventh Circuit Court of Appeals (whose decision in this case it was reviewing) that there is "a class of charitable organizations to which the 75-percent rule could not constitutionally be applied."

> These were the organizations whose primary purpose is not to provide money or services to the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern. These organizations characteristically use paid solicitors who "necessarily combine" the solicitation of financial support with the "functions of information dissemination, discussion, and advocacy of public issues...." These organizations also pay other employees to obtain and process the necessary information and to arrive at and announce in suitable form the organizations' preferred positions on the issues of interest to them. Organizations of this kind, although they might pay only reasonable salaries, would necessarily spend more than 25% of their budgets on salaries and administrative expenses and would be completely barred from solicitation in the Village.

The court dealt with the Village's claim that the ordinance was justified by the "substantial governmental interests" in "protecting the public from fraud, crime and undue annoyance."

> These interests are indeed substantial, but they are only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.... Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.... Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses. We also fail to see any substantial relationship between the 75-percent requirement and the protection of public safety or of residential privacy.... [H]ouseholders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations.

Because the court found the 75 percent requirement "insufficiently related to the governmental interests asserted in its support to justify its interference with

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24. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), emphasis added.

protected speech," it affirmed the holding of the Court of Appeals that the requirement was unconstitutionally overbroad.

Justice Rehnquist filed the lone dissent, in which he contended that the court had unwisely departed from its earlier cases, which had turned on considerations such as "the amount of discretion vested in municipal authorities to grant or deny permits" or the Constitutional protection for "the distribution of information, as opposed to requests for contributions"—"factors not present in the instant case."

> Shunning the guidance of these cases, the Court sets out to define a new category of solicitors who may not be subjected to regulation....[i.e.,] "organizations whose primary purpose is... to gather and disseminate information about and advocate positions on matters of public concern...." This result...seem[s] unwarranted...for three reasons.
>
> First, from a legal standpoint, the Court invites municipalities to draw a line it has already erased....

(He referred to the court's suggestion that commercial canvassing would not be entitled to as high a degree of protection, but that line had been erased in earlier decisions recognizing free speech elements even in commercial advertising.[25])

> Second, from a practical standpoint, the Court gives absolutely no guidance as to how a municipality might identify those organizations....
>
> Finally,...I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted.... Regardless whether one labels noncharitable solicitation "fraudulent," nothing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door to door while at the same time insulating themselves against panhandlers, profiteers and peddlers.
>
> The central weakness of the Court's decision, I believe, is its failure to recognize, let alone confront, the two most important issues in the case: how does one define a "charitable" organization, and to what authority in our federal system is application of that definition confided? I would uphold Schaumburg's ordinance as applied to CBE because that ordinance, while perhaps too strict to suit some tastes, affects only door-to-door solicitation for financial contributions, leaves little or no discretion in the hands of municipal authorities to "censor" unpopular speech, and is rationally related to the community's collective desire to bestow its largess upon organizations that are truly "charitable."[26]

Schaumburg thus stands for the Supreme Court's recognition of the intertwined functions of protected speech and charitable solicitation in such a way that both are protected by the First Amendment. It was thus a reinforcement of the thesis of this

25. E.g., *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

26. *Schaumburg*, *supra*, Rehnquist dissent, *passim*.

section that evangelism and solicitation of contributions are inseparable aspects of a single activity central to the religious impulse, and independently persuasive because drawn from an entirely secular fact situation.

Several religious bodies (including the National Council of Churches) joined a coalition of national charities in an *amicus* brief urging the Court to strike down the Schaumburg ordinance, as it did. The religious bodies, however, also filed a separate brief in the same case taking a position *opposing required disclosure* of finances as a condition to solicitation, at least in the case of religious bodies. The national charities had apparently made their peace with that proviso, but religious bodies have not, for reasons spelled out in the discussion of church autonomy.[27] The religious bodies evidently did not succeed in persuading the court to their view, since it suggested mandatory disclosure as a less intrusive device for preventing fraud.

d. Some Reflections on Disclosure. Disclosure is a greatly overrated panacea for public anxieties about potential fraud for at least four reasons:

1. Information about what an organization did with its funds *last* year is no necessary augury of what it will do with funds collected *this* year, as the court itself, in a footnote, came close to recognizing when it observed, "Moreover, because compliance with the 75-percent requirement depends on organizations' receipts and expenses during the *previous year*, there appears to be no way an organization can alter its spending patterns to comply with the ordinance in the short run."[28] If an organization can "alter its spending patterns" in the current year to comply with the ordinance, it can, of course, alter them for other reasons, and most charitable organizations do make various alterations in their use of contributed funds from year to year to meet changing needs and conditions. So what assurance do last year's financial dispositions provide about the current year's? And what of an organization that did not engage in solicitation in the previous year, or solicited for an entirely different cause or causes, or came into existence in the current year with no previous performance to report?

2. The proportion between "pipeline" costs and charitable "payload," which Schaumburg had contended should not exceed 25%/75%, can be deformed by the very means that it and many other states and municipalities have chosen to try to make soliciting charities devote more of their income to good works. If every solicitation in every village and hamlet must be preceded by filling out its own particular reports and forms, more of the donations received must go to complying with multiplying requirements and restrictions, as well as successive registration fees, which could produce an aggregate tariff on charitable solicitations so that soon no one could pass the 25%/75% threshold.

3. The logistics of "disclosure" are neither as simple nor as efficacious of their aim as many—including the court—suppose. In a footnote, the court referred

27. See IF5.

28. *Schaumburg, supra*, n. 9, emphasis added.

approvingly to a state disclosure statute: "Illinois law, for example, requires charitable organizations to register with the State Attorney General's Office and to report certain information about their structure and fundraising activities."[29] More and more states are enacting such "consumer protection" type statutes that require extensive applications, reports, and banks of files to hold them.

Sizable departments have grown up in the attorney general's office in some states, headed by an assistant attorney general for charitable organizations to police the applications and the applicants. Like public servants everywhere, they will tend to be more or less assiduous in getting the required marks in the spaces provided on the appropriate pieces of paper and filing them (more or less) in the proper file folders—no small task with an annual volume of 10,000 (or whatever). Soon they will come to look upon those acres of filing cabinets as their own proprietary domain, and members of the public wanting to examine the same will not be greeted with enthusiasm. Public inquirers will have their work cut out for them to get access to the "public" files erected to supply information about soliciting organizations—to whom? File clerks? No, to *potential contributors*. As the court said, "Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses."[30] So if asked by a solicitor at the door to contribute to such-and-such organization, one would have but to repair to the state capital, find the Department of Charitable Organizations in the attorney general's office, persuade the unenthusiastic public servant in charge to afford one access to the pertinent file, and check the latest financial report of the organization in question to arrive at an "informed" "contribution decision"!

Not surprisingly, the "public" files of reports on charitable organizations soliciting contributions in the state are not besieged by an inquiring public anxious to make informed contribution decisions. Compiled at considerable effort and expense on the part of both the state and the applicants, the annually multiplying files of financial data required to be disclosed for public edification are invariably out of all proportion to the actual traffic of inquirers seeking to use them. (To be sure, occasionally an industrious reporter may come around investigating some suspect charity, for whom such files are invaluable, but such investigative reporters are fewer all the time.[31])

4. But is this huge disclosure undertaking proportionate to the problem it is designed to remedy: fraudulent solicitation? Although the public concept of that problem is constituted largely of vague but colorful impressions of sensationalized media treatments of a few notorious scandals—magnified in recollection by the

29. Ibid., n. 12.

30. Ibid.

31. One of the few is Carlton Sherwood, author of *Inquisition*, *supra*, the account of the "persecution of Sun Myung Moon" recounted in IE2 and IF6, who has won a Pulitzer Prize for the story of misappropriation of funds by the Pauline Fathers, and a National Headliner Award for investigative coverage of Chicago's Cardinal Cody.

endemic human fear of being played for a sucker—the vast majority of charitable solicitations are carried on by well-known, reputable charities that are not trying to defraud anyone. Yet *they* have to bear the burden of filing onerous applications in every state and many lesser jurisdictions, paying application fees in each, and rendering annual financial reports in each, to fulfill the elaborate and ponderous mechanism designed to catch the few fly-by-night charlatans that have given the trade a bad name.

Supposedly the disclosure system should serve as a deterrent to those who might be tempted to defraud, but it does not at all insure that persons trying to make a fast buck off the public's generosity will be caught, since anyone really determined to fleece the gullible will not hesitate to begin by deceiving the Department of Charitable Organizations. When not beholden to truthfulness in the first place, an imaginative person could fabricate a far more impressive dossier and financial report than an honest charity can, complete with specious auditors' authentications. The charlatan will not be deterred by threats of prosecution for filing false statements, knowing that by the time anyone penetrates the layers of elaborate falsehoods of his application and tracks down the spurious addresses therein to various vacant lots, empty offices, and lapsed mail drops, he will have left the scene to try his luck in a distant state with its own imposing Department of Charitable Organizations. Yet attorneys general press forward with touching faith to obtain disclosure statutes and staff to enforce them, perhaps eager to show themselves diligent guardians of the public good in ways not nearly as expensive—or dangerous—as cracking down on the drug traffic or organized crime.

5. A New Wave of Religious Cases

With the appearance of several aggressive new religious movements on the American scene, a new wave of litigation swept over the land, focusing mainly on the means by which such movements sought to finance themselves. When yellow-robed "Hare Krishna" devotees and long-gowned "Moonie" girls began selling candy or flowers at airports and shopping centers, local authorities sought to ban such activities. A rash of lawsuits by the International Society for Krishna Consciousness (ISKCON) resulted in more than forty published opinions striking down such bans in city after city, beginning with a total exclusion from the Vieux Carre area of New Orleans.[32] Eventually *three* of these cases reached the U.S. Supreme Court, and this discussion will be confined largely to those.

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32. *ISKCON v. New Orleans*, 347 F.Supp. 945 (E.D.La. 1972), followed by *ISKCON v. New York Port Authority*, 425 F.Supp. 681 (S.D.N.Y. 1977); *ISKCON v. Griffin*, 437 F.Supp. 666 (W.D.Pa. 1977); *ISKCON v. Collins*, 452 F.Supp. 1007 (S.D.Tex.1977); *ISKCON v. Wolke*, 453 F.Supp. 869 (E.D.Wis, 1978); *ISKCON v. Engelhardt*, 425 F.Supp. 176 (W.D.Mo. 1977); *ISKCON v. Lentini*, 461 F.Supp. 49 (E.D.La. 1978); *ISKCON v. Eaves*, 601 F.2d (CA5 1979); *ISKCON v. Rochford*, 585 F.2d 263 (CA7 1978), etc.

a. *Heffron v. ISKCON* (1981). The first such case to be accepted for decision by the U.S. Supreme Court came from the Supreme Court of Minnesota. It arose from the effort by devotees of Krishna Consciousness to practice *Sankirtan* at the annual Minnesota State Fair. (*Sankirtan* is a religious practice of Hindu observance that the court characterized —from the joint stipulation of the parties—as enjoining members "to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion.") The Minnesota Agricultural Society, a public corporation which operated the fair, was authorized by statute to make rules governing the conduct of the fair, and its Rule 6.05, as applied in practice, required that "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds."

The Krishna devotees considered that the effect of this rule in confining their activities to an assigned booth and prohibiting their circulating at large among the throngs of fairgoers severely inhibited the full practice of *Sankirtan*, so they sued in state court to have the rule declared unconstitutional as a violation of their right to the free exercise of religion. The trial court upheld the rule, but the state supreme court struck it down, and the U.S. Supreme Court in a 5-4 decision reversed.

In an opinion by Justice White, the court found the rule to be content-neutral, since it "applies evenhandedly to all who wish to distribute and sell written materials or solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes." (The reference to rental casually introduces an added element of motivation on both sides—the interest of the fair in not losing revenue by having any groups get away with "freeloading" on the fair and the contrary interest of the practitioners of *Sankirtan* in avoiding payment of the booth rental—an element not further referred to by the court.) Furthermore, the court found the rule free from "the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system."

The court turned to the key issue: whether such a content-neutral, nonarbitrary regulation of time, place and manner also served a "significant governmental interest,"[33] which it must to be valid. The state had asserted several such interests, including (1) "the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair," (2) "protecting its citizens from fraudulent solicitations, deceptive or false speech, and undue annoyance," and (3) protecting the fairgoers from these perils by virtue of their being a "captive audience." The court did not assess the validity of the second or third claimed interest but disposed of the case solely on the first.

33. *Heffron v. ISKCON*, 452 U.S. 640 (1981), quoting *Virginia Pharmacy Board, supra*.

The court declined to recognize any special priority for *Sankirtan* or for religious solicitations in general over other First Amendment activities:

> None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum....

The court concluded that severe congestion would result among fairgoers if ISKCON, and any other "religious, non-religious and noncommercial organizations" wishing to do so, "could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will." ("Neutrality" of government toward religion is often interpreted to mean that religion is treated the same as other members of a broader category [such as "non-religious and noncommercial organizations"], though how much wider the category must be is not settled.) On this rationale the court concluded that the state had a substantial interest sufficient to sustain the rule, and that no less intrusive expedients would suffice to serve the state's interest.

A final consideration remained: whether "alternative forums for the expression of...protected speech exist despite the effects of the Rule." The court held that they did.

> First, the Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds. More importantly, the Rule has not been shown to deny access within the forum in question. Here, the Rule does not exclude ISKCON from the fairground, nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowds and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself. The Minnesota State Fair is a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious or political, to a large number of people in an efficient fashion. Considering the limited functions of the Fair and the combined [confined?] area within which it operates, we are unwilling to say that Rule 6.05 does not provide ISKCON and other organizations with an adequate means to...solicit on the fairgrounds.

Justice Brennan dissented in part, arguing that—although solicitation of funds could be confined to a booth in order to police more readily the possibility of fraud—

distribution of literature (as well as oral propagation of views) should be allowed throughout the fairgrounds. Justice Blackmun also dissented in part, agreeing that literature distribution should be permitted, but only *free* distribution. Sale of literature entailed exchange of objects for money, fumbling for change, etc., and thus was likely to clog the flow of traffic. Therefore sales, like solicitations, should be confined to booths.

b. Comments on *Heffron*. Perhaps the most notable feature of the Supreme Court's disposition of *Heffron* is its characterization of the urgency of the state's interest in the contested regulation. That interest was approached by the Second Circuit Court of Appeals in an identical case decided eighteen days before *Heffron* as follows: "If...the solicitation aspect of Sankirtan is merely a form of commercial speech, the state is required to show only that its regulation is reasonable. If, on the other hand, this activity is recognized as the good faith observance of religious belief, the existence of a *compelling* state interest would be the only justification for imposing a burden on its free exercise...."[34] Written by the respected Judge Irving Kaufman of the respected Second Circuit, the "compelling state interest" criterion was dutifully derived from the Supreme Court's own free-exercise test in *Sherbert v. Verner*, and under that test the Second Circuit struck down a comparable rule of the New York State Fair.

But when the Supreme Court approached the same problem three weeks later, it not only took no direct notice of the numerous lower-court decisions dealing with the same question—*all* of which had struck down booth-only rules[35]—as *Barber* did—but it chose a criterion of state interest that must be something less than "compelling," since it studiously avoided use of that term and referred instead to a "significant" or a "substantial" state interest. Whether it intended those words to be somehow equivalent to "compelling," or how, if not equivalent, they differed, it did not say. But it left lower courts in some quandary as to just what test they should apply in Free Exercise cases in the future. The trend seemed to be to allow governments greater leeway in designing restrictions as to time, place and manner.[36]

One may suppose that there *is* some difference between a "compelling" state interest and a merely "significant" or "substantial" one by the fact that the Second Circuit, using the former test, struck down the booth-only rule, while the Supreme Court, using the latter, upheld it. But that may be applying too meticulous a calibration to terms that are inexact at best, as well as discounting differences in fact situations. Still, one function of appellate courts, and particularly the Supreme Court, is to try to devise careful and meaningful gradations—a technology of the law—that

34. *ISKCON v. Barber*, 650 F.2d 430 (1981), citing *Virginia Pharmacy Board, supra*, and *Sherbert v. Verner*, 374 U.S. 398 (1968).

35. *Edwards v. Maryland State Fair...*, 628 F.2d 282 (CA4 1980); *ISKCON v. Bowen*, 600 F.2d 667 (CA7 1979), cert. denied 444 U.S. 963 (1980); *ISKCON v. Colorado State Fair...*, 610 P.2d (Colo. 1980); and *Barber*, *supra*.

36. See *Rock Against Racism v. Ward*, 110 S.Ct. 23 (1989).

lesser tribunals can apply with some precision, thus minimizing the elements of judicial impulse, intuition and unconscious prejudice that otherwise can create unpredictability in the application of the law.

One commentator, Barry Fisher, who handled most of the ISKCON cases cited above, and who assisted Laurence Tribe in presenting *Heffron* to the Supreme Court, no doubt has an understandable dissatisfaction with the outcome of that case, but his criticisms of it are worth noting:

> The state interest found to be "substantial" in *Heffron* was crowd control and the prevention of congestion. That the exercise of First Amendment rights might, in some cases, have to be limited when balanced against real needs of crowd control is nothing new. However, the Court misapplied the principle in *Heffron* since little or no evidence of an actual threat to this interest was found in the record or was even directly inferable from it. The Court did not analyze evidence of congestion but instead merely recited statistics describing the crowd size, the area of the Fair and the number of exhibitors and, in effect, accepted the conclusion of the Fair Manager that roving literature distributors would be disruptive in this environment. As Justice Brennan observed..., the state relied upon, and the Court accepted as adequate, "a general speculative fear of disorder" as a justification for restricting freedom of expression.[37]

(Justice Brennan had quoted from an earlier Supreme Court decision to the effect that "[u]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[38]) Fisher continued:

> Given this state of the evidence, which by itself does not even prove the existence of congestion, much less its exacerbation, the decision must rest upon the effect the Court perceived that potential hordes of literature distributors and solicitors would have. Not only is this spectre largely imaginary, but the opinion also seems to brush aside the possibility of a less-restrictive-alternative means of avoiding it.... The Court, apparently, either ignored the possibility of a ceiling on the *total* number of literature distributors that could be accommodated at the fair or else it illogically concluded that this device could not cope with the presumed hordes of solicitors.
>
> *Heffron* is a disappointment both for what it does not do and for what it does do. As to the former, *Heffron* does little if anything to resolve the analytical fuzziness of the time, place and manner doctrine. How "substantial" the government interest must be, whether the government must prove that its interest is effectively served by the challenged regulation, how comparable any proposed alternative measures must be, and, most important, in what order and in what fashion these factors

37. Fisher, "Current Issues," *supra*, p. 136.

38. *Heffron*, *supra*, p. 662, quoting *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1969), discussed at IIIE1.

> should be considered in relation to each other are questions not answered except perhaps by murky implication.
>
> What *Heffron* does do is uphold a regulation of expression on the barest evidence of the actual existence of a governmental interest. In effect, the Court held that a rational basis, in this case crowd control, is sufficient reason to uphold a content-neutral restriction on expression.... [A] rational basis for restriction will probably always exist....
>
> Fortunately, *Heffron* contains an inherent limitation on the scope of its holding. The *Heffron* result is explicitly declared to be applicable only to "a limited public forum," a new constitutional construct. The fair is a limited public forum because it exists to attract an audience and to juxtapose it with an array of exhibitors of various kinds.... In light of the uniqueness of the fair as a forum...whether any other place would also qualify as a "limited public forum" is open to substantial doubt.

Perhaps Fisher has both overdrawn and underdrawn the implications of *Heffron* in the paragraph last quoted. The words "limited public forum" may have been first used in this opinion, but the concept was implicit in earlier free-speech decisions, such as *Grayned v. City of Rockford*,[39] in which black-power demonstrators were convicted for holding a demonstration outside a public school. The Supreme Court had voided an antipicketing ordinance under which they were convicted, but upheld their conviction under an antinoise ordinance that prohibited making a noise or a diversion that disturbed classes in session, since it specifically prohibited only activity that interfered with the primary function of the place where it occurred, *viz*., disruption of the educational function of a school. The *Grayned* court cited *Tinker v. Des Moines School District*[40] as its "touchstone" on "how to accommodate First Amendment rights with the `special' characteristics of the school environment."

> Expressive activity could certainly be restricted, but only if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The wearing of [black] armbands [by students in protest against the war in Vietnam] was protected in *Tinker* because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder."[41]

Similarly, in *Cox v. Louisiana*, the court had found that "because of the special nature of the place, persons could be constitutionally prohibited from picketing `in or

39. 408 U.S. 104 (1972).

40. 393 U.S. 503 (1969), discussed at IIIE1.

41. *Grayned*, *supra*, at 118, quoting *Tinker*, *supra*, at 514.

near' a courthouse with the intent of interfering with, obstructing, or impeding the administration of justice."[42]

Just as freedom of expression can be restricted in the vicinity of a public school or courthouse when it interferes with the primary function ("the special nature") of that place, (i.e., education or the administration of justice), so too it can similarly be restricted in other places having a "special nature," such as state fairs. That is the meaning of a "limited public forum"; it is *limited* by the priority of its primary function. The only places not so limited are the public streets and parks, which the court has recognized have "immemorially...been used for assembly, communicating thoughts between citizens, and discussing public questions."[43]

The concept of the "limited public forum" is a very important and valuable tool in the free-speech area, as will be seen in the discussion of *Widmar v. Vincent* and the "equal access for religion" law.[44] It protects freedom of expression in forums other than public streets and parks, but only to the degree that such expression does not actually interfere with the primary use to which a particular place is devoted. Such a concept is of great significance to religious bodies because it protects *their* right to preserve the primary purpose of their own properties against disruption by persons trying to appropriate them for expressions extraneous to the religious uses having rightful preeminence there.[45]

c. *Larson v. Valente* (1982). Another solicitation case, also emanating from Minnesota, occupied the U.S. Supreme Court the next year. It came up through the federal system and involved the Holy Spirit Association for the Unification of World Christianity (Unification Church) and the constitutionality of a recent change in the state's charitable solicitations statute. From 1961 to 1978, all religious organizations were exempt from registration and annual reporting requirements of the sort described above.[46] In 1978 the legislature amended the statute to limit the religious exemption to those religious organizations that *received more than half of their total contributions from members or affiliated organizations*. Thus religious bodies obtaining more than half of their donations from the public would be obliged to register and report. The Unification Church was notified by the state that it must register under this amended Act "or we will take legal action to ensure your compliance."

The Unification Church and four of its members brought suit in federal court for declaratory judgment that the Act, on its face and as applied to them, was "an abridgment of their First Amendment rights of expression and free exercise of

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42. *Grayned*, *supra*, at 120, quoting *Cox v. Louisiana*, 379 U.S. 559 (1965) and *Cameron v. Johnson*, 390 U.S. 611 (1968).

43. Fisher, *supra*, pp. 137-138, quoting *Heffron*, *supra*, quoting *Hague v. CIO*, 307 U.S. 496 at 515 (1939).

44. See IIIE3b *et seq*.

45. See discussion of disruption and disturbance of religious bodies at VC1.

46. See § C4d.

religion" because of the "fifty percent rule" that discriminated between old, established religions and small, new ones that had to rely heavily upon the contributions of outsiders.

The state defended by maintaining that the Unification Church's solicitations "bore no substantial relationship to any religious expression," and that it was not entitled to challenge the Act until it had demonstrated that it was a religion and "that its fund raising activities were a religious practice." These defenses did not impress the District Court or the Eighth Circuit Court of Appeals, which held the 50 percent rule to be invalid on its face. When the U.S. Supreme Court agreed to hear the case, the state shifted its defense to the broader claim that the Unification Church was not a religious organization within the meaning of the Act. The Supreme Court observed that the Unification Church had not been required to register or report under the Minnesota statute until it was amended in 1978, whereupon the state ordered the church to register "in express and exclusive reliance upon the newly enacted fifty percent rule."

> [A]n essential premise of the State's attempt to require the Unification Church to register under the Act by virtue of the fifty percent rule...is that the Church *is* a religious organization. It is logically untenable for the State to take the position that the Church is not such an organization, because that position destroys an essential premise of the exercise of statutory authority at issue in this suit.[47]

The court turned to the main issue, the constitutionality of the 50 percent rule. Justice Brennan delivered the opinion of the court.

> The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.... Since Everson v. Board of Education...(1947), this Court has adhered to the principle... that no State can "pass laws which aid one religion" or that "prefer one religion over another...." In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.... The fifty percent rule...clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents.

For purposes of argument, the court was willing to accept the state's insistence that its charitable solicitation statute served a "compelling" secular purpose of protecting its citizens from fraud, and that religious solicitations were not necessarily outside that concern. But the court insisted that the state must also show "that the challenged fifty percent rule is closely fitted to further the interest that it assertedly

47. *Larson v. Valente*, 456 U.S. 228, 240, emphasis in original.

serves." The court analyzed the three premises of the state's justification of the 50 percent rule:

> (1) that members of a religious organization can and will exercise supervision and control over the organization's solicitation activities when membership contributions exceed fifty percent; (2) that membership control, assuming its existence, is an adequate safeguard against abusive solicitations of the public by that organization; and (3) that the need for public disclosure rises in proportion with the *percentage* of non-member contributions. Acceptance of all three of these premises is necessary to [the state's] conclusion, but we find no substantial support for any of them in the record.
>
> (1) [T]here is simply nothing suggested that would justify the assumption that a religious organization will be supervised and controlled by its members simply because they contribute more than half of the organization's solicited income.... Appellants have offered no evidence whatever that members of religious organizations exempted [under the] fifty percent rule in fact control their organizations.... In short, the first premise of appellant's argument has no merit.
>
> (2) Nor do appellants offer any stronger justification for their second premise—that membership control is an adequate safeguard against abusive solicitations of the public by the organization. This premise runs directly contrary to the central thesis of the entire Minnesota charitable solicitation Act—namely, that charitable organizations soliciting contributions from the public cannot be relied upon to regulate themselves, and that state regulation is accordingly necessary. Appellants offer nothing to suggest why religious organizations should be treated any differently in this respect. And even if we were to assume that the members of religious organizations have some incentive, absent in nonreligious organizations, to protect the interests of nonmembers solicited by the organization, appellants' premise would still fail to justify the fifty percent rule. Appellants offer no reason why the members of religious organizations exempted under [that] rule should have any *greater* incentive to protect nonmembers than the members of nonexempted religious organizations have. Thus we also reject appellants' second premise as without merit.
>
> (3) Finally, we find appellants' third premise—that the need for public disclosure rises in proportion with the *percentage* of nonmember contributions—also without merit.... [T]he need for public disclosure more plausibly rises in proportion with the *absolute amount*, rather than with the *percentage* of nonmember contributions. The State of Minnesota has itself adopted this view elsewhere...[since] charitable organizations that receive annual nonmember contributions of less than $10,000 are exempted....
>
> We accordingly conclude that appellants have failed to demonstrate that the fifty percent rule...is "closely fitted" to further a "compelling

> governmental interest."[48] It is plain that the principal effect of the fifty percent rule...is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. It is also plain that, as the Court of Appeals noted, "[t]he benefit conferred [by exemptions] constitutes a substantial advantage; the burden of compliance with the Act is certainly not de minimis." We do not suggest that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly. But this statute does not operate evenhandedly, *nor was it designed to do so*. The fifty percent rule...effects the *selective* legislative imposition of burdens and advantages upon particular denominations.[49]

In the most devastating part of the opinion, Justice Brennan cited episodes from the legislative history of the 1978 amendment to show that the legislators clearly stated their intent to excuse some groups and to catch others. The original version contained a proviso limiting the exemption to religious groups governed by elected bodies representing the members.

> [T]he legislators perceived that [this] language would bring a Roman Catholic Archdiocese within the Act, [and] the legislators did not want the amendment to have that effect, and...[it was deleted] for the sole purpose of exempting the Archdiocese from the provisions of the Act....
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> * * *
>
> One state senator explained that the fifty percent rule was "an attempt to deal with the religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in...our state."
>
> * * *
>
> Still another senator, who apparently had mixed feelings about the proposed provision, states, "I'm not sure why we're so hot to regulate the Moonies anyway."
>
> In short, the fifty percent rule's capacity—indeed its express design—to burden or favor selected religious denominations led the Minnesota legislature to discuss the characteristics of various sects with a view towards "religious gerrymandering".... [W]e think [the] fifty percent rule sets up precisely the sort of official denominational preference that the Framers of the First Amendment forbade.

Justice Rehnquist, joined by Chief Justice Burger and Justices White and O'Connor, filed a lengthy dissent challenging the procedural basis of the court's opinion mainly because the court had accepted the state's own (original) logic in treating the church as a religious organization subject to exemption but denying that exemption solely because of the 50 percent rule. The Rehnquist dissent contended

48. Ibid. pp. 248-251, emphasis in original.
49. Ibid., first emphasis added, second in original.

that the Unification Church was subject to the Act as a charitable organization, and qualified for the religious exemption only if, and after, it proved itself religious. Only then, at a third step, did the 50 percent rule come into play. Therefore, there was not (yet) a true "case or controversy" until the earlier steps had been taken, and thus the court was issuing a mere "advisory opinion" in the absence of any real case or controversy.

It is hard to see how four justices could be so preoccupied with procedural niceties—themselves highly debatable—in the presence of such a flagrant legislative act of deliberate "religious gerrymandering": the respectable people setting out to "get" the "Moonies," but without discommoding their own comfortable churches. Another example of this unlovely trait is apparent in the tale of the Clearwater Vendetta that follows. (The third religious solicitation case to reach the United States Supreme Court—*ISKCON v. Lee*—will be discussed following the Clearwater saga.)

d. The Clearwater Vendetta. In 1975 the city of Clearwater, Florida, awakened to an unsought honor befalling it unawares. The Fort Harrison Hotel, a major landmark in the center of town, and various other properties were being bought up by the Southern Land Development and Leasing Company for the "United Churches of Florida." An alert reporter for the St. Petersburg *Times* unearthed the fact that these were "fronts" for the Church of Scientology, which had chosen Clearwater as one of its two main centers in the Western Hemisphere (the other being Los Angeles). Not entirely flattered by this distinction, residents of the city expressed outrage that the Scientologists had invaded their precincts under deceptive identities (though no such outrage was expressed when vast acreage was acquired elsewhere in Florida under similar obscure auspices for what was to become Disneyworld; real estate acquisitions are often accumulated pseudonymously to avoid "kiting" of prices that might result if it were known that a well-heeled purchaser was looking for land in the vicinity).

Relations between the city and the church had gone from bad to worse, with several generations of mayors and city councilors winning election on the strength of their opposition to Scientology, and the Scientologists retaliating by lawsuits, denunciations in the press and other aggressive tactics, thus bringing out the worst in each other.[50] The city retained a Boston attorney, Michael Flynn, to prepare a report on the Church of Scientology. Flynn placed advertisements in the Washington *Post* and other national newspapers inviting anyone who had had adverse experience with the Church of Scientology to come forward and testify at hearings to be conducted in Clearwater. As a result of his researches—for which he was paid some $110,000 by the city—he rendered a 196-page "Preliminary Report to the Clearwater City Commission Re: The Power of a Municipality to Regulate Organizations Claiming Tax Exempt or Non-Profit Status."

50. Characterization of the situation by a resident of Clearwater, formerly the head of a national denominational agency.

Citing what were said to be the underhanded and nefarious tactics of the church, Flynn proposed legislation designed to visit civil retribution upon it. The rationale for a "charitable solicitations" ordinance was set forth in the report with some candor:

> Heretofore, Scientology has operated in almost total secrecy with regard to its operations and finances in the City. The ordinance is intended to give the City a legitimate means of investigating the affairs of Scientology, and to restrict the activities of Scientology if it obstructs an investigation or refuses to cooperate. The ordinance also gives the City the authority to seek abatement of specific acts which Scientology regularly engages in, and to warn the public of certain facts.
>
> It must be noted that through many years of litigation with...various agencies...and with private litigants, Scientology has consistently conducted itself in a profoundly rancorous, contentious, contemptuous, and deceptive manner. It may reasonably be expected that Scientology will behave in the same manner with the City....
>
> In view of the probable response of Scientology, the ordinance has been designed with several self-enforcing mechanisms. Refusal to provide the Commissioner with requested information is itself grounds for restriction of solicitation activities.... Thus, the enforcement of the ordinance is not dependent whatsoever upon the receipt of any information from the Scientologists. In fact, it is anticipated that they will produce nothing. In all likelihood they will not even file a registration statement.[51]

As part of his report, Flynn submitted a draft ordinance, which—after some controversy and repeated revisions—was eventually enacted by the City Council in 1983. The foregoing paragraphs of the Flynn Report are significant because they demonstrate the intention of the original author of the ordinance to provide the City of Clearwater with an instrument designed specifically to bring the Church of Scientology to account. There is no indication in the Flynn Report that its author was concerned about the impact of the ordinance on any other organizations carrying on charitable solicitations in the city. A *legislative* enactment designed to punish one particular person, group or entity without *judicial* trial and conviction is like a bill of attainder, which is outlawed by the United States Constitution.[52]

(1) The Clearwater Ordinance. The ordinance eventually adopted by the City of Clearwater[53] purported to protect the citizens of Clearwater from fraud and

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51. Flynn Report, n.d., pp. 147-148.

52. U.S. Constitution, Article I, § 9, ¶ 3, and § 10, ¶ 1. See Tribe, L., *American Constitutional Law* § 10-4, 2d ed. (Mineola, N.Y.: Fndn. Press, 1988), pp. 641 ff., and discussion of *Cummings v. Missouri* (1866) at ID1b.

53. The first version, No. 3091-83, adopted October 6, 1983, was the subject of two lawsuits and was found unconstitutional, but the City of Clearwater amended that ordinance March 15, 1984, just before the court's decision on the first version was announced. The second version, in the view of the religious bodies engaged in the lawsuit, was no improvement on the first, and they renewed their attack.

other perils by requiring all charitable organizations wishing to solicit contributions in the city to register with the city clerk, paying a fee and supplying certain specified (voluminous) information, to obtain a Certificate of Registration, and to report on the proceeds of the solicitation and the disposition of contributions. Failure to do so entailed criminal penalties of up to six months in prison or a fine not to exceed $1,000 or both.

The ordinance was adopted on October 6, 1983, to take effect January 31, 1984. On January 20, 1984, a group of religious organizations and officers filed a complaint in the federal district court seeking injunctive relief, and three days later the Church of Scientology Flag Service Organization, Inc., also filed a complaint seeking injunctive relief. The two suits were consolidated for hearing, and the city agreed not to enforce the ordinance until the courts had ruled on it. The religious bodies suing the City of Clearwater included the following plaintiffs: Americans United for Separation of Church and State, National Council of the Churches of Christ in the U.S.A., American Jewish Committee, Suncoast American Baptist Church, Clearwater, Fla., Joyce Parr, Moderator of Suncoast Baptist Church, and
James Christison, Treasurer of Suncoast Baptist Church. They were joined at a later stage in the litigation by: Florida Council of Churches, American Baptist Churches in the U.S.A., General Conference of Seventh-day Adventists, Florida Conference of Seventh-day Adventists, and Ronald Bensinger, Pastor of Seventh-day Adventist Church of Clearwater. They sued because of threats posed by the ordinance to their own fund-raising activities.

The national and state bodies were concerned because of the possibility of incurring criminal penalties under the ordinance without their intention to solicit in Clearwater or even their awareness that any solicitation was being made there on their behalf. The ordinance was completely open-ended in its scope. It covered *any* solicitation made by *anyone* to "*any* individual then located within the corporate limits of the City" on behalf of *any* charitable organization, and the solicitation was defined as "*any* request, within the City of Clearwater, for the donation of money, property, or anything of value," etc., "communicated to *any* individual" in Clearwater (emphases added). The communication could be by a door-to-door solicitor, a plea from a Clearwater pulpit, a direct-mail fund appeal posted in New York or San Francisco, a national television spot filmed in Chicago and broadcast from Tampa, St. Petersburg, or Orlando, or a squib in a church periodical published in Nashville or Cleveland urging readers to contribute to an evangelistic campaign being launched in Texas or a missionary venture in Brazil.

Any of these communications would bring those making them within the letter of the ordinance, even without their intent or even knowledge of their culpability, if they had not first registered with the city clerk of Clearwater, Florida. The author called the pastor of the First Christian Church (Disciples of Christ) in Clearwater during January 1984. The ordinance had been adopted the previous October with considerable local publicity and would take effect at the end of January. The pastor

said he had made an appeal from the pulpit on the previous Sunday for blankets for Church World Service (CWS), and some had already been received. He had been entirely unaware of the ordinance, and if he had made the same appeal a few weeks later without first obtaining a Certificate of Registration from the city clerk, he would have been culpable under the ordinance.

Suppose this pastor, or any other person in Clearwater, wished to collect blankets or anything else of value for what they believed to be a good cause, and wanted to obey the law in doing so. What would be involved in trying to comply with Clearwater ordinance No. 3479-84 in order to gather blankets for Church World Service? The pastor would first have to apply to the city clerk, or prevail upon CWS to do so, pay the $10 registration fee, and supply the information required. As a national organization operating throughout the world, CWS would face great difficulty in providing the information required by the ordinance. That information is not limited to the organization's activities or agents in Clearwater; quite the contrary. As part of the complaint in this suit, the author submitted an affidavit including a statement from Church World Service outlining what compliance with the ordinance would involve.

> Church World Service,...organizes within local communities committees of volunteers who solicit from the community-at-large contributions to fund programs of development and disaster relief overseas. It also makes available sizable amounts of funding to local domestic agencies for direct feeding programs within the United States—food pantries, Meals-on-Wheels, soup kitchens, etc. These solicitations are organized under the name of CROP....
>
> Additionally, Church World Service solicits from within the congregations gifts of used clothing and contribtuions to its Blanket Fund. A clothing collection depot now exists within Clearwater, Florida. While no CROP event now takes place within Clearwater, plans for the future may include that possibility.
>
> However, the ordinance of the City of Clearwater, Fla., makes impossible the continuance of the existing Clothing and Blanket Appeal and effectively prohibits future possibilities for the following reasons:
>
> 1. To provide a "reference to all determinations of tax exempt status under.. any state, county or municipality" will be an overwhelming task.
>
> 2. To give the names, addresses and phone numbers of persons disbursing funds would be nearly impossible, since a large portion of the funds support colleague agencies overseas which use hundreds of volunteers in their programs.
>
> 3. There is no practical way for us to learn if the "current agent...has been convicted of...a misdemeanor involving moral turpitude" since hundreds of volunteers are involved in our solicitations both within and outside the congregations.
>
> 4. To file a report within 60 days from the expiration of the permit, presuming a permit is limited to a particular day or specified period of

> time, is a practical impossibility, since in both the CROP and CWS Blanket Appeals many of the solicitations will not as yet have been reported, and decisions as to proposed utilization will not as yet have been made.
>
> 5. It is impossible in our type of organization to monitor every activity of every "agent" related to the fundraising activities of the organization if that "agent" is any person who makes a solicitation on behalf of the organization since these persons are all volunteers making solicitations at various times, some of whom are not even known to us.[54]

And Church World Service was but one department of the National Council of Churches. If the reportage requirements applied to the entire National Council of Churches, the difficulties recited above were compounded. The other national organizations expressed similar concerns and some additional ones. Some were concerned about the requirement to report convictions of agents or employees for felony or misdemeanor involving moral turpitude during the past seven years, deeming it an invasion of privacy. Some groups justly pride themselves on their having rescued and reformed sinners and put them to good work in the church. Such persons should not be stigmatized, they felt, by the spreading of their past (and presumably repented) convictions on a record available for inspection by the public, and the church rightly did not wish to be responsible for informing on them and exposing their past misdeed(s) to public obloquy.

In the light of the Flynn Report, it is easy to see that many elements in the Clearwater ordinance were clearly aimed at trying to "get" the Scientologists, and the religious bodies' complaint mentions that mainline church groups in Clearwater "have been assured by the City Attorney that the said ordinance would not be applied against their activities." "Plaintiffs contend that no such assurances have been made to plaintiffs nor may such assurances in fact be given consistent with the appropriate construction of the said ordinance, and such assurances therefore constitute preferential treatment in favor of certain organizations and against plaintiffs in violation of the First and Fourteenth Amendments to the United States Constitution."[55]

This Clearwater ordinance was an outstanding example of the incongruity of this type of legislation, seemingly a ponderous blunderbuss designed to hit a very minor target— ostensible abuses of the public's good will by charitable solicitors—but in actuality aimed at one specific target, the Church of Scientology. Appropriate regulation of time, place and manner—such as the (not-very-restrictive) prohibition in the ordinance against soliciting at private homes between 11 PM and 6 AM—would be perfectly in order, but that was not the aim of the ordinance. There were already adequate laws against fraud, but evidently evidence of fraud or other

54. Affidavit of Dean M. Kelley, attached to Complaint, Case No. 84-699-Civ-T-17, U.S. District Court for the Middle District of Florida, Tampa Division. Information on Church World Service prepared by the Rev. Lowell Brown, Director of Field Services, CWS, Elkhart, Indiana.

55. Complaint, p. 46, ¶ 108.

actionable wrongdoing by the Church of Scientology in Clearwater had not been forthcoming despite the extensive hearings on the subject, so a new category of offenses must be enacted by which the city hoped to make its precincts sufficiently uncomfortable that the despised Scientologists would clear out.

(2) *Church of Scientology Flag Service v. Clearwater* (1993). After this case had been circulating in the federal courts for nearly ten years, the Court of Appeals for the Eleventh Circuit eventually reviewed the case *de novo*, reaching varied results on several aspects of the matter. On the important question of whether the purpose of the ordinance was discriminatory against a particular religion, the court observed:

> A statute in which an impermissible purpose predominates is invalid even if the legislative body was motivated in part by legitimate secular objectives. Thus, for example, even if the ordinance in fact furthers a secular purpose, the "actual purpose" may in certain cases be found by asking "whether the government intends to convey a message of endorsement or disapproval of religion."[56]
>
> * * *
>
> When a plaintiff shows by direct evidence that a sectarian or religious purpose was a substantial or motivating factor, the burden shifts to the defendant to show by a preponderance of the evidence that action challenged under the Establishment Clause would have been undertaken even in the absence of such improper considerations....
>
> Scientology points to various materials, including newspaper articles, that it submitted to the district court, and which it argues tend to show sectarian motivation.... [T]hese materials provide explicit evidence that the city commission conducted its legislative process from beginning to end with the intention of singling out Scientology for burdensome regulation. The record shows a widespread political movement, apparently driven by an upsurge of sectarian fervor, intent on driving Scientology from Clearwater. It also shows that various members of the commission had made their affiliation with that movement known to the public in the plainest terms possible, not only in the official legislative record leading to adoption of the ordinances but also in documents concerning unrelated governmental activity and in extemporaneous remarks.[57]

The court found some minor elements of the ordinance acceptable, such as the initial requirement of identification of the charitable organization and its solicitors, but vacated most of it and remanded for trial on the merits, with rather clear implications that the city would have uphill going to defend the rest of the ordinance.

From the court's lengthy and rather diffuse discussion, several significant conclusions may be distilled.

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56. Citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984), O'Connor, J. concurring, discussed at VE2d(1).

57. *Church of Scientology Flag Service v. Clearwater*, 2 F.3d 1514 (CA11 1993).

1. Charitable solicitation is a practice protected by the First Amendment and therefore cannot be prohibited.

2. It can be regulated by limits narrowly tailored to meet compelling state interests.

3. The state has such an interest to protect church members and others from "affirmative, material misrepresentations designed to part them from their money."

4. When no such affirmative, material misrepresentations are made, the state does not have such an interest in requiring that members or the public be made aware of how their contributions are used (beyond what prospective donors may require before they contribute).

5. The ordinance at issue is not narrowly tailored to prevent fraud and other misconduct when it has not been shown that enforcement of existing criminal laws against such conduct is not adequate to achieve the state's interest.

6. With respect to charitable solicitations *by churches*, additional considerations are implicated by the Religion Clauses of the First Amendment:

a. Any regulation of church solicitations that does not have a secular purpose is invalid; an effort by legislators to target, trammel, penalize, punish or drive out religious solicitors of one religious organization or all such solicitors or organizations will invalidate the regulation.

b. The ordinance at issue entangles the city government excessively in the internal affairs of churches seeking to solicit contributions in the city.

c. The detailed disclosure requirements may have the effect of shifting the balance of power within the church and effectuating organizational changes that the church and its members have not chosen for themselves.

d. The city cannot delegate to individuals within churches rights to obtain financial and other information upon demand that city officials themselves cannot possess.

e. Obtaining such information and making it public may give ammunition to dissident members or outside critics of a church, thus lending the powers of government to one side against another in ecclesiastical disputes.

These holdings were important guideposts in the law of charitable solicitation by religious bodies, and they vindicated many of the concerns that actuated the plaintiff religious bodies at the outset. In mid-1995 the several parties agreed to a settlement that involved the City of Clearwater's repeal of its ill-fated (and never-actuated) ordinance and payment of $80,000 in attorney's fees to counsel for the national religious bodies and an additional amount to counsel for the Church of Scientology. It was a pity that those bodies and the city had to spend ten years and much money to attain a court's ruling that should have been obvious from the first.

e. *International Society for Krishna Consciousness v. Lee* and *Lee v. International Society for Krishna Consciousness* (1992). The Supreme Court of the United States gave its attention to another in the long series of religious solicitations cases involving the International Society for Krishna Consciousness, ruling on two different issues presented in a suit and countersuit between the religious group and

Walter Lee, late superintendent of the police of the Port Authority of New York and New Jersey. It arose out of a ban prohibiting repetitive solicitation of money or distribution of literature in the internal unleased ("public") areas of La Guardia Airport's Central Terminal Building, parts of Kennedy Airport's International Arrivals Building, and Newark Airport's North Terminal Building (referred to collectively in the decisions as the "terminals"). The effect of this ban was to bar the practice of *sankirtan* by Hare Krishna devotees within the terminals, and they brought suit charging that the ban deprived them of rights guaranteed by the First Amendment.

The federal district court viewed the terminals as traditional public forums akin to public streets where any regulation of speech must be narrowly tailored to serve a compelling state interest, and since no such interest was shown, the court voided the ban. The Port Authority appealed, and the Second Circuit Court of Appeals, informed by a subsequent Supreme Court decision holding that post office sidewalks are not public forums,[58] found that the terminals were not public forums, and therefore regulations of their use needed to meet only a standard of reasonableness. Under such a standard, the Second Circuit held that the ban on solicitation was reasonable, but the ban on distribution of literature was not. The religious group appealed the first conclusion, while the Port Authority appealed the second, which accounts for the two decisions discussed here involving the same two parties. The outcome turned on the question whether airports are public forums. The Supreme Court had taken an earlier case to decide that question—*Board of Airport Commissioners of Los Angeles v. Jews for Jesus*[59]—but did not reach it. To that issue the court now addressed itself in an opinion announced by Chief Justice Rehnquist.

> It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment. But it is also well settled that the government need not permit all forms of speech on property that it owns and controls. Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject....
>
> These cases reflect, either implicitly or explicitily, a "forum-based" approach for assessing restrictions that the government seeks to place on the use of its property. Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the state has

58. *U.S. v. Kokinda*, 497 U.S. 720 (1990).
59. 482 U.S. 569 (1987), discussed at § A3b above.

opened for expressive activity by part or all of the public. Regulation of such property is subject to the same limitations as that governing a traditional public forum. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.

The parties do not disagree that this is the proper framework. Rather, they disagree whether the airport terminals are public fora or nonpublic fora. They also disagree whether the regulation survives the "reasonableness" review governing nonpublic fora, should that prove the appropriate category. Like the Court of Appeals, we conclude that the terminals are nonpublic fora and that the regulation reasonably limits solicitation....

[Our] precedents foreclose the conclusion that airport terminals are public fora. Reflecting the general growth of the air travel industry, airport terminals have only recently achieved their contemporary size and character.... But given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having "immemorially...time out of mind" been held in the public trust and used for purposes of expressive activity.[60] Moreover, even within the rather short history of air transport, it is only "[i]n recent years [that] it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities."[61] Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidencing the operators' objections belies any such claim. In short, there can be no argument that society's time-tested judgment, expressed through an acquiescence in a continuing practice, has resolved the issue in [ISKCON's] favor.

[ISKCON] attempts to circumvent the history and practice governing airport activity by pointing our attention to the variety of speech activity that it claims historically occurred at various "transportation nodes" such as rail stations, bus stations, wharves, and Ellis Island. Even if we were inclined to accept [ISKCON's] historical account describing speech activity at these locations, an account [the Port Authority] contests, we think that such evidence is of little import for two reasons. First, much of the evidence is irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership....

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60. Quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939).

61. Quoting 45 Fed. Reg. 35314 (1980).

Second, the relevant unit for our inquiry is an airport, not "transportation nodes" generally. When new methods of transportation develop, new methods of accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity. To make a category of "transportation nodes," therefore, would unjustifiably elide what may prove to be critical differences of which we should rightfully take account. The "security magnet," for example, is an airport commonplace that lacks a counterpart in bus terminals and train stations. And public access to air terminals is also frequently restricted—just last year the Federal Aviation Administration required airports for a 4-month period to limit access to areas normally publicly accessible.... To blithely equate airports with other transportation centers, therefore, would be a mistake.

The differences among such facilities are unsurprising since...airports are commercial establishments funded by user fees and designed to make a regulated profit, and where nearly all who visit do so for some travel related purpose.... In light of this, it cannot fairly be said that an airport terminal has as a principal purpose "promoting the free exchange of ideas."[62] To the contrary, the record demonstrates that Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression.... Even if we look beyond the intent of the Port Authority to the manner in which the terminals have been operated, [they] have never been dedicated (except under threat of court order) to expression in the form sought to be exercised here: *i.e.*, the solicitation of contributions and the distribution of literature.

The terminals here are far from atypical. Airport builders and managers focus their efforts on providing terminals that will contribute to efficient air travel.... Although many airports have expanded their function beyond merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities. Thus, we think that neither by tradition nor purpose can the terminals be described as satisfying the standards we have previously set out for identifying a public forum....

The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness....

We have on many prior occasions noted the disruptive effect that solicitation may have on business.... Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. This is especially so in an airport, where "air travelers, who are often weighted down by cumbersome baggage...may be hurrying to catch a plane or to arrange ground transportation." Delays may be particularly costly in this

62. Quoting *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985).

> setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.
>
> In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.... The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.
>
> The Port Authority has concluded that its interest in monitoring the activities can best be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals. This sidewalk area is frequented by an overwhelming percentage of airport users. Thus the resulting access of those who would solicit the general public is quite complete. In turn we think it would be odd to conclude that the Port Authority's regulation is unreasonable despite [its] having otherwise assured access to an area universally travelled.
>
> The inconvenience to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem small, but viewed against the fact that "pedestrian congestion is one of the greatest problems facing the three terminals," the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive. Moreover, "the justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON."[63] For if [ISKCON] is given access, so too must other groups.... As a result, we conclude that the solicitation ban is reasonable.[64]

Justices White, O'Connor, Antonin Scalia and Clarence Thomas joined this opinion, while Justice Kennedy concurred in the judgment. Both Justice O'Connor and Justice Kennedy wrote separately. Justice David Souter filed a dissenting opinion, in which Justices Harry Blackmun and John Paul Stevens joined.

Justice O'Connor offered some additional thoughts on the subject of airport terminals.

> Not only has the Port Authority chosen *not* to limit access to the airports under its control, it has created a huge complex open to travelers and nontravelers alike. The airports house restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency

63. Quoting *Heffron v. ISKCON*, 452 U.S. 640, 652 (1981), discussed at § 5a above.
64. *ISKCON v. Lee*, 505 U.S. 672 (1992).

> exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices and private clubs.... In my view, the Port Authority is operating a shopping mall as well as an airport. The reasonableness inquiry, therefore, is not whether the restrictions on speech are "consistent with...preserving the property" for air travel,... but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.
>
> Applying this standard, I agree with the Court... that the ban on solicitation is reasonable.... In my view, however, the regulation banning leafletting...cannot be upheld as reasonable on this record.... With the possible exception of avoiding litter,[65] it is difficult to point to any problems intrinsic in the act of leafletting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.... I would affirm the judgment of the Court of Appeals in both [cases].

Justice Kennedy made a strong statement in favor of giving priority to protecting freedom of speech rather than permitting government to curtail it in various settings.

> In my view the airport corridors and shopping areas outside of the passenger security zones, areas operated by the Port Authority, are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum principles. The Port Authority's blanket prohibition on the distribution or sale of literature cannot meet those stringent standards, and I agree it is invalid.... The Port Authority's rule disallowing in-person solicitation of money for immediate payment, however, is in my view a narrow and valid regulation of the time, place and manner of protected speech in this forum, or else is a valid regulation of the nonspeech element of expressive conduct....
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> I
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> .... Airports are of course public spaces of recent vintage, and so there can be no time-honored tradition associated with airports of permitting free speech. And because governments have often attempted to restrict speech within airports, it follows *a fortiori* under the Court's analysis that they cannot be so-called "designated" forums. So, the Court concludes, airports must be nonpublic forums, subject to minimal First Amendment protection.
>
> This analysis is flawed at its very beginning. It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government. The Court's error lies in its conclusion that the public-forum status of public property depends on the government's defined purpose for the property, or on an explicit decision

65. Citing *Schneider v. Irvington*, 308 U.S. 147, 162 (1939) (littering can be controlled by proceeeding against litterers rather than banning leafletting).

by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property....

The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court's view the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there. The Court acknowledges as much, by reintroducing today into our First Amendment law a strict doctrinal line between the proprietary and regulatory functions of government which I thought had been abandoned long ago.

The Court's approach is contrary to the underlying purposes of the public forum doctrine. The liberties protected by our doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy.... Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.

A fundamental tenet of our Constitution is that the government is subject to constraints which private persons are not. The public forum doctrine vindicates that principle by recognizing limits on the government's control over speech activities on property suitable for free expression. The doctrine focuses on the physical characteristics of the property because government ownership is the source of its purported authority to regulate speech. The right of speech protected by the doctrine, however, comes not from a Supreme Court dictum but from the constitutional recognition that the government cannot impose silence on a free people.

The Court's analysis rests on an inaccurate view of history. The notion that traditional public forums are property which have public discourse as their principal purpose is a most doubtful fiction. The types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks. It would seem apparent that the principal purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse, and we have recognized as much. Similarly, the purpose for the creation of public parks may be as much for beauty and open space as for discourse. Thus under the Court's analysis, even the quintessential public forums would appear to lack the necessary elements of what the Court defines as a public forum....

The Court ignores the fact that the purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference. The jurisprudence is rooted in historic practice, but it is not tied to a narrow textual command limiting the recognition of new forums. In my view the policies underlying the doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares which are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.... Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity. In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.

One of the places left in our mobile society that is suitable for discourse is a metropolitan airport. It is of particular importance to recognize that such spaces are public forums because in these days an airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public. Given that private spaces of similar character are not subject to the dictates of the First Amendment..., it is critical that we preserve these areas for protected speech. In my view, our public forum doctrine must recognize this reality, and allow the creation of public forums which do not fit within the narrow tradition of streets, sidewalks, and parks. We have allowed flexibility in our doctrine to meet changing technologies in other areas of constitutional interpretation..., and I believe we must do the same with the First Amendment.

* * *

Under this analysis, it is evident that the public spaces of the Port Authority's airports are public forums. First, the District Court made detailed findings regarding the physical similarities between the Port Authority's airports and public streets. These findings show that the public spaces in the airports are broad, public thoroughfares full of people and lined with stores and other commercial activities. An airport corridor is of course not a street, but that is not the proper inquiry. The question is one of physical similarities, sufficient to suggest that the airport corridor should be a public forum for the same reasons that streets and sidewalks have been treated as public forums by the people who use them.

Second, the airport areas involved here are open to the public without restriction. Plaintiffs do not seek access to the secured areas of the airports, nor do I suggest that these areas would be public forums. And while most people who come to the Port Authority's airports do so for a reason related to air travel..., this does not distinguish an airport from streets or sidewalks, which most people use for travel. Further, the group visiting the airports encompasses a vast portion of the public. In 1986 the Authority's three airports served over 78 million passengers. It is the very

> breadth and extent of the public's use of airports that makes it imperative to protect speech rights there....
>
> Third, and perhaps most important, it is apparent from the record, and from the recent history of airports, that when adequate time, place, and manner regulations are in place, expressive activity is quite compatible with the uses of major airports. The Port Authority's primary argument to the contrary is that the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose, which is to facilitate air travel. The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech.... The Port Authority has for many years permitted expressive activities by the plaintiffs and others without any apparent interference with its ability to meet its transportation purposes.... And in fact expressive activity has been a commonplace feature of our Nation's major airports for many years, in part because of the wide consensus among the Courts of Appeals, prior to the decision in this case, that the public spaces of airports are public forums....
>
> The danger of allowing the government to suppress speech is shown in the case now before us. A grant of plenary power allows the government to tilt the dialogue heard by the public, to exclude many, more marginal voices.... We have long recognized that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment.[66] The Port Authority's rule, which prohibits almost all such activity, is among the most restrictive possible of those liberties.... The regulation is not drawn in narrow terms and it does not leave open ample alternative channels of communication.[67].... I would strike down the regulation as an unconstitutional restriction of speech.[68]

Justice Kennedy was joined by Justices Blackmun and Stevens thus far, but they did not join part II of his opinion, so he went on alone to express agreement with the majority of the court in upholding the ban on solicitations.

> II
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> It is my view, however, that the Port Authority's ban on the "solicitation and receipt of funds" within its airport terminals should be upheld under the standards applicable to speech regulations in public forums. The regulation may be upheld as either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct....
>
> I am in full agreement with the statement of the Court that solicitation is a form of protected speech. If the Port Authority's solicitation regulation

66. Citing *Schneider v. Irvington, supra,* and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), discussed at § A2i above.

67. Citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

68. *ISKCON v. Lee*, Kennedy concurrence.

> prohibited all speech which requested the contribution of funds, I would consider that it was a direct, content-based restriction on speech in clear violation of the First Amendment. The Authority's regulation does not prohibit all solicitation, however; it prohibits the "solicitation and receipt of funds." I do not understand this regulation to prohibit all speech that solicits funds. It reaches only personal solicitations for immediate payment of money. Otherwise, the "receipt of funds" phrase would be written out of the provision. The regulation does not cover, for example, the distribution of preaddressed envelopes along with a plea to contribute money to the distributor or his organization.... In other words, the regulation permits expression that solicits funds, but limits the manner of that expression to forms other than the immediate receipt of money.
>
> * * *
>
> For these reasons I agree that the Court of Appeals should be affirmed in full in finding the Port Authority's ban on the distribution or sale of literature unconstitutional, but upholding the prohibition on solicitation and immediate receipt of funds.[69]

Justice Souter, joined by Justice Blackmun and Stevens, dissented from the majority's affirmance of the ban on solicitation.

> I join in Part I of Justice Kennedy's opinion.... I agree with [his] view of the rule that should determine what is a public forum and with his conclusion that the public areas of the airports at issue here qualify as such. The designation of a given piece of public property as a traditional public forum must not merely state a conclusion that the property falls within a static category including streets, parks, sidewalks and perhaps not much more, but must represent a conclusion that the property is no different in principle from such examples, which we have previously described as "archetypes" of property from which the government was and is powerless to exclude speech.... To treat the class of such forums as closed by their description as "traditional," taking that word merely as a charter for examining the history of the particular public property claimed as a forum, has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life. If that were the line of our direction, we might as well abandon the public forum doctrine altogether.... We need not say that all "transportation nodes" or all airports are public forums in order to find that certain metropolitan airports are.... One can imagine a public airport of a size or design or need for extraordinary security that would render expressive activity incompatible with its normal use. But that would be no reason to conclude that one of the more usual variety of metropolitan airports is not a public forum.... [W]e should classify as a public forum any piece of public property that is "suitable for discourse" in its physical character, where expressive activity is "compatible" with the use to which

69. Ibid., Kennedy opinion concurring in the judgment.

it has actually been put.... Applying this test, I have no difficulty concluding that the unleased public areas at airports like the metropolitan New York airports at issue in this case are public forums.

From the Court's conclusion..., however, sustaining the total ban on solicitation of money for immediate payment, I respectfully dissent.... [T]he [Port Authority] comes closest to justifying the restriction as one furthering the government's interest in preventing coercion and fraud. The claim to be preventing coercion is weak to start with. While a solicitor can be insistent, a pedestrian on the street or airport concourse can simply walk away or walk on. In any event, we have held in a far more coercive context than this one, that of a black boycott of white stores in Claiborne County, Mississippi, that "Speech does not lose its protected character...simply because it may embarass others or coerce them into action."[70]... Since there is here no evidence of any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban..., the regulation cannot be sustained to avoid coercion.

As for fraud, our cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent.... The evidence of fraudulent conduct here is virtually nonexistent. Petitioners claim, and [the Port Authority] does not deny, that by the Port Authority's own calculation, there has not been a single claim of fraud or misrepresentation since 1981 [during most of which time the ban was, by mutual agreement, not enforced pending the outcome of this litigation]....

Even assuming a governmental interest adequate to justify some regulation, the present ban would fall when subjected to the requirement of narrow tailoring.... Thus, in *Schaumburg* we said:

> The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly....[71]

Finally, I do not think the Port Authority's solicitation ban leaves open the "ample" channels of communication required of a valid content-neutral time, place, and manner restriction. A distribution of preaddressed envelopes is unlikely to be much of an alternative. The practical reality of the regulation, which this Court can never ignore, is that it shuts off a uniquely powerful avenue of communication for organizations like the International Society for Krishna Consciousness, and may, in effect, completely prohibit unpopular and poorly funded groups from receiving funds in response to protected solicitation.... Accordingly, I would...strike down the ban on solicitation.[72]

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70. Quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982).

71. Quoting *Schaumburg, supra*, discussed at § C4c above.

72. *ISKCON v. Lee*, Souter dissent.

Thus the ban on solicitation was upheld by six votes to three under the style of *ISKCON v. Lee*. But the majority shifted with respect to the ban on literature distribution in the countersuit, *Lee v. ISKCON*. The three dissenters were joined by Justices O'Connor and Kennedy, who had concurred in affirming the ban on solicitation, and these five constituted the new majority, which affirmed the Circuit Court's decision striking down the ban on distribution of literature in a *per curiam* decision of ten lines.

The new minority in turn dissented in an opinion written by Chief Justice Rehnquist and joined by Justices White, Scalia and Thomas.

> Leafletting presents risks of congestion similar to those posed by solicitation. It presents, in addition, some risks unique to leafletting.... [Some travelers] may choose not simply to accept the material but also to stop and engage the leafletter in debate, obstructing those who follow. Moreover, those who accept material may often simply drop it on the floor once out of the leafletter's range, creating an eyesore, a safety hazard, and additional cleanup work for airport staff....
>
> In addition, a differential ban that permits leafletting but prohibits solicitation, while giving the impression of permitting the Port Authority at least half of what it seeks, may in fact prove for the Port Authority to be a much more Pyrrhic victory. Under the regime that is today sustained, the Port Authority is obliged to permit leafletting. But monitoring leafletting activity in order to ensure that it is *only* leafletting that occurs, and not also soliciting, may prove little less burdensome than the monitoring that would be required if solicitation were permitted. At a minimum, therefore, I think it remains open whether at some future date the Port Authority may be able to reimpose a complete ban, having developed evidence that enforcement of a differential ban is overly burdensome. Until now it has had no reason or means to do this, since it is only today that such a requirement has been announced.[73]

This rather lame rejoinder suggested that the dissenters continued to think in terms of administrative inconvenience as a countervailing factor, even though the court had repeatedly held that First Amendment freedoms were not to be held hostage to supposed or actual logistical difficulties of enforcement. Since *Schneider v. Irvington* the court had held that the proper way to prevent littering was not to prohibit leafletting but to arrest the litterers.[74] The open hint to the Port Authority to come back anon with tales of woe about the difficulties of coping with leafletters was predicated upon the possibility that a majority might be won by such laments, but that became less likely with the 1993 retirement of Justice White, one of the four

73. *Lee v. ISKCON*, 505 U.S. 830 (1990), Rehnquist dissent.
74. 308 U.S. 147 (1939).

dissenters. It might be that the Port Authority in future litigation could lose what it had gained if a court more oriented to civil liberties should decide that solicitation must be permitted as well as literature distribution.