SUPREME COURT OF THE UNITED STATES

Nos. 91–155 AND 91–339

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AND BRIAN RUMBAUGH, PETITIONERS

91–155 *v.*

WALTER LEE

WALTER LEE, SUPERINTENDENT OF PORT AUTHORITY POLICE

91–339 *v.*

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 1992]

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join as to Part I, concurring in the judgment.

While I concur in the judgment affirming in this case, my analysis differs in substantial respects from that of the Court. 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 under the First and Fourteenth Amendments. 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. I would sustain the Port Authority's ban on solicitation and receipt of funds.

An earlier opinion expressed my concern that "[i]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control" the status of the property. *United States* v. *Kokinda,* 497 U. S. 720, 737 (1990) (KENNEDY, J., concurring in judgment). The case before us does not heed that principle. Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat. I believe that the Court's public forum analysis in this case is inconsistent with the values underlying the speech and press clauses of the First Amendment.

Our public forum analysis has its origins in Justice Roberts' rather sweeping dictum in *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 515 (1939); see also *ante,* at 6. The doctrine was not stated with much precision or elaboration, though, until our more recent decisions in *Perry Education Assn.* v. *Perry Local Educators' Assn.,* 460 U. S. 37 (1983), and *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.,* 473 U. S. 788 (1985). These cases describe a three part analysis to designate government-owned property as either a traditional public forum, a designated public forum, or a nonpublic forum. *Perry, supra,* at 45–46; *ante,* at 5. The Court today holds that traditional public forums are limited to public property which have as "`a principal purpose . . . the free exchange of ideas'"; *ante,* at 6 (quoting *Cornelius, supra,* at 800), *ante,* at 1 (opinion of O'CONNOR, J.); and that this purpose must be evidenced by a long-standing historical practice of permitting speech. *Ante,* at 7; *ante,* at 1–2 (opinion of O'CONNOR, J.). The Court also holds that designated forums consist of property which the government intends to open for public discourse.

Ante, at 6, citing *Cornelius, supra,* at 802; *ante,* at 2 (opinion of O'CONNOR, J.). All other types of property are, in the Court's view, nonpublic forums (in other words, not public forums), and government-imposed restrictions of speech in these places will be upheld so long as reasonable and viewpoint-neutral. Under this categorical view the application of public-forum analysis to airport terminals seems easy. 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. *Ante,* at 7. 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. *Ibid*. 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 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 fact that in our public-forum cases we discuss and analyze these precise characteristics tends to support my position. *Perry, supra,* at 46–48; *Cornelius, supra,* at 804–806; *Kokinda, supra,* at 727–729 (plurality opinion).

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. *Ante*, at 4–5; compare *Davis* v. *Massachusetts,* 167 U. S. 43 (1897); with *Hague* v. *Committee for Industrial Organization, supra,* at 515; *Schneider* v. *State,* 308 U. S. 147 (1939); *Grayned* v. *City of Rockford,* 408 U. S. 104, 115–116 (1972).

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. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 S. Ct. Rev. 1, 14, 19. 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. *Cornelius,* 473 U. S., at 802; *Frisby* v. *Schultz,* 487 U. S. 474, 480–481 (1988). 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. *Schneider* v. *State, supra,* at 160. 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 effect of the Court's narrow view of the first category of public forums is compounded by its description of the second purported category, the so-called "designated" forum. The requirements for such a designation are so stringent that I cannot be certain whether the category has any content left at all. In any event, it seems evident that under the Court's analysis today few if any types of property other than those already recognized as public forums will be accorded that status.

The Court's answer to these objections appears to be a recourse to history as justifying its recognition of streets, parks, and sidewalks, but apparently no other

types of government property, as traditional public forums. *Ante*, at 7–8. 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. There is support in our precedents for such a view. See *Lehman* v. *City of Shaker Heights,* 418 U. S. 298, 303 (1974) (plurality opinion); *Hague,* 307 U. S., at 515 (speaking of "streets and public places" as forums). 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, see *Hudgens* v. *NLRB,* 424 U. S. 507 (1976), 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, see, *e.g., Katz* v. *United States,* 389 U. S. 347 (1967), and I believe we must do the same with the First Amendment.

I agree with the Court that government property of a type which by history and tradition has been available for speech activity must continue to be recognized as a public forum. *Ante*, at 7. In my view, however, constitutional protection is not confined to these properties alone. Under the proper circumstances I would accord public forum status to other forms of property, regardless of its ancient or contemporary origins and whether or not it fits within a narrow historic tradition. If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. In conducting the last inquiry, courts must consider the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case before it; otherwise the analysis would be one not of classification but rather of case-by-case balancing, and would provide little guidance to the State regarding its discretion to regulate speech. Courts must also consider the availability of reasonable time, place, and manner restrictions in undertaking this compatibility analysis. The

possibility of some theoretical inconsistency between expressive activities and the property's uses should not bar a finding of a public forum, if those inconsistencies can be avoided through simple and permitted regulations.

The second category of the Court's jurisprudence, the so-called designated forum, provides little, if any, additional protection for speech. Where government property does not satisfy the criteria of a public forum, the government retains the power to dedicate the property for speech, whether for all expressive activity or for limited purposes only. See *ante,* at 5; *Perry,* 460 U. S., at 45–46; *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975). I do not quarrel with the fact that speech must often be restricted on property of this kind to retain the purpose for which it has been designated. And I recognize that when property has been designated for a particular expressive use, the government may choose to eliminate that designation. But this increases the need to protect speech in other places, where discourse may occur free of such restrictions. In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require. The difference is that when property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status.

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. 721 F. Supp. 572, 576–577 (SDNY 1989). 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. *Ibid.* 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, either because they are passengers or because they are picking up or dropping off passengers, this does not distinguish an airport from streets or sidewalks, which most people use for travel. See *supra,* at ––––. 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. Of course, airport operators retain authority to restrict public access when necessary, for instance to respond to special security concerns. But if the Port Authority allows the uses and open access to airports that is shown on this record, it cannot argue that some vestigial power to change its practices bars the conclusion that its airports are public forums, any more than the power to bulldoze a park bars a finding that a public forum exists so long as the open use does.

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 besides the point. Inconvenience does not absolve the government of its obligation to tolerate speech. The Authority makes no showing that any real impediments to the smooth functioning of the airports cannot be cured with reasonable time, place, and manner regulations. In fact, the history of the Authority's own airports, as well as other major airports in this country, leaves little doubt that such a solution is quite feasible. 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. App. 462, 469–470; see also *ante,* at 8 (opinion of O'CONNOR, J.). The Federal Aviation Authority, in its operation of the airports of the Nation's capital, has issued rules which allow regulated expressive activity within specified areas, without any suggestion that the speech would be incompatible with the airports' business. 14 CFR §§159.93, 159.94 (1992). 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. See, *e.g., Chicago Area Military Project* v. *Chicago,* 508 F. 2d 921 (CA7), cert. denied, 421 U. S. 992 (1975); *Fernandes* v. *Limmer,* 663 F. 2d 619 (CA5 1981), cert. dism'd, 458 U. S. 1124 (1982); *United States Southwest Africa/Namibia Trade & Cultural Council* v. *United States,* 228 U. S. App. D.C. 191, 708 F. 2d 760 (1983); *Jews for Jesus, Inc.* v. *Board of Airport Com-*

m'rs, 785 F. 2d 791 (CA9 1986), aff'd on other grounds, 482 U. S. 569 (1987); *Jamison* v. *St. Louis,* 828 F. 2d 1280 (CA8 1987), cert. denied, 485 U. S. 987 (1988). As the District Court recognized, the logical consequence of Port Authority's congestion argument is that the crowded streets and sidewalks of major cities cannot be public forums. 721 F. Supp., at 578. These problems have been dealt with in the past, and in other settings, through proper time, place, and manner restrictions; and the Port Authority does not make any showing that similar regulations would not be effective in its airports. The Port Authority makes a half-hearted argument that the special security concerns associated with airports suggest they are not public forums; but this position is belied by the unlimited public access the Authority allows to its airports. This access demonstrates that the Port Authority does not consider the general public to pose a serious security threat, and there is no evidence in the record that persons engaged in expressive activities are any different.

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. The first challenged Port Authority regulation establishes a flat prohibition on "[t]he sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material," if conducted within the airport terminal, "in a continuous or repetitive manner." 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. See, *e.g.*, *Schneider* v. *State*, 308 U. S. 147 (1939); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943). The Port Authority's rule, which prohibits almost all such activity, is among the most restrictive possible of those liberties. The regulation is in fact so broad and

restrictive of speech, JUSTICE O'CONNOR finds it void even under the standards applicable to government regulations in nonpublic forums. *Ante,* at 7–8. I have no difficulty deciding the regulation cannot survive the far more stringent rules applicable to regulations in public forums. The regulation is not drawn in narrow terms and it does not leave open ample alternative channels for communication. See *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989). The Port Authority's concerns with the problem of congestion can be addressed through narrow restrictions on the time and place of expressive activity, see *ante,* at 8 (opinion of O'CONNOR, J.). I would strike down the regulation as an unconstitutional restriction of speech.

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. The two standards have considerable overlap in a case like this one.

It is well settled that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions `are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward, supra,* at 791 (quoting *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288, 293 (1984)). We have held further that the government in appropriate circumstances may regulate conduct, even if the conduct has an expressive component. *United States* v. *O'Brien,* 391

U. S. 367 (1968). And in several recent cases we have recognized that the standards for assessing time, place, and manner restrictions are little, if any, different from the standards applicable to regulations of conduct with an expressive component. *Clark, supra,* at 298, and n. 8; *Ward, supra,* at 798; *Barnes* v. *Glen Theatre, Inc.,* 501 U. S. ––––, ––– (1991) (slip op., at 5) (plurality opinion); see generally Kalven, 1965 S. Ct. Rev., at 23, 27 (arguing that all speech contains elements of conduct which may be regulated). The confluence of the two tests is well demonstrated by a case like this, where the government regulation at issue can be described with equal accuracy as a regulation of the manner of expression, or as a regulation of conduct with an expressive component.

I am in full agreement with the statement of the Court that solicitation is a form of protected speech. *Ante,* at 4; see also *Riley* v. *National Federation of Blind,* 487 U. S. 781, 788–789 (1988); *Schaumburg* v. *Citizens for a Better Environment,* 444 U. S. 620, 629 (1980); *Murdock* v. *Pennsylvania, supra.* If the Port Authority's solicitation regulation prohibited all speech which requested the contribution of funds, I would conclude that it was a direct, content-based restriction of 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. As I understand the restriction it is directed only at the physical exchange of money, which is an element of conduct interwoven with

otherwise expressive solicitation. 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.

So viewed, I believe the Port Authority's rule survives our test for speech restrictions in the public forum. In-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress which is well recognized, and which is different in kind from other forms of expression or conduct. Travelers who are unfamiliar with the airport, perhaps even unfamiliar with this country, its customs and its language, are an easy prey for the money solicitor. I agree in full with the Court's discussion of these dangers in No. 91–155. *Ante,* at 10–11; *ante,* at 5 (opinion of O'CONNOR, J.). I would add that our precedents as well as the actions of coordinate branches of government support this conclusion. We have in the past recognized that in-person solicitation has been associated with coercive or fraudulent conduct. *Cantwell* v. *Connecticut,* 310 U. S. 296, 306 (1940); *Riley, supra,* at 800; *Heffron* v. *International Society for Krishna Consciousness, Inc.,* 452 U. S. 640, 657 (1981) (Brennan, J., concurring in part and dissenting in part); *Schaumburg, supra,* at 636–638. In addition, the federal government has adopted regulations which acknowledge and respond to the serious problems associated with solicitation. The National Park Service has enacted a flat ban on the direct solicitation of money in the parks of the Nation's capital within its control. 36 CFR §7.96(h) (1991); see also *United States* v. *Kokinda,* 497 U. S., at 739 (KENNEDY, J., concurring in judgment). Also, the Federal Aviation Authority, in its administration of the airports of Washington, D.C., even while permitting the solicitation of funds has adopted special rules to prevent coercive, harassing, or repetitious behavior. 14 CFR §159.94(e) - (h) (1992). And in the

commercial sphere, the Federal Trade Commission has long held that "it constitutes an unfair and deceptive act or practice" to make a door-to-door sale without allowing the buyer a three-day "cooling-off period" during which time he or she may cancel the sale. 16 CFR §429.1 (1992). All of these measures are based on a recognition that requests for immediate payment of money create a strong potential for fraud or undue pressure, in part because of the lack of time for reflection. As the Court recounts, questionable practices associated with solicitation can include the targeting of vulnerable and easily coerced persons, misrepresentation of the solicitor's cause, and outright theft. *Ante*, at 10–11; see also *International Society for Krishna Consciousness, Inc.* v. *Barber*, 506 F. Supp. 147, 159–163 (NDNY 1980), rev'd on other grounds, 650 F. 2d 430 (CA2 1981).

Because the Port Authority's solicitation ban is directed at these abusive practices and not at any particular message, idea, or form of speech, the regulation is a content-neutral rule serving a significant government interest. We have held that the content neutrality of a rule must be assessed based on whether it is "`*justified* without reference to the content of the regulated speech.'" *Ward,* 491 U. S., at 791 (quoting *Clark,* 468 U. S., at 293) (emphasis in original). It is apparent that the justification for the solicitation ban is unrelated to the content of speech or the identity of the speaker. There can also be no doubt that the prevention of fraud and duress is a significant government interest. The government cannot, of course, prohibit speech for the sole reason that it is concerned the speech may be fraudulent. *Schaumburg,* 444 U. S., at 637. But the Port Authority's regulation does not do this. It recognizes that the risk of fraud and duress is intensified by particular conduct, the immediate exchange of money; and it addresses only that

conduct. We have recognized that such narrowly drawn regulations are in fact the proper means for addressing the dangers which can be associated with speech. *Ibid.; Riley,* 487 U. S., at 799, n. 11.

To survive scrutiny, the regulation must be drawn in narrow terms to accomplish its end and leave open ample alternative channels for communication. Regarding the former requirement, we have held that to be narrowly tailored a regulation need not be the least restrictive or least intrusive means of achieving an end. The regulation must be reasonable, and must not burden substantially more speech than necessary. *Ward, supra,* at 798–800. Under this standard the solicitation ban survives with ease, because it prohibits only solicitation of money for immediate receipt. The regulation does not burden any broader category of speech or expressive conduct than is the source of the evil sought to be avoided. And in fact, the regulation is even more narrow because it only prohibits such behavior if conducted in a continuous or repetitive manner. The Port Authority has made a reasonable judgment that this type of conduct raises the most serious concerns, and it is entitled to deference. My conclusion is not altered by the fact that other means, for example the regulations adopted by the Federal Aviation Authority to govern its airports, may be available to address the problems associated with solicitation, because the existence of less intrusive means is not decisive. Our cases do not so limit the government's regulatory flexibility. See *Ward, supra,* at 800.

I have little difficulty in deciding that the Port Authority has left open ample alternative channels for the communication of the message which is an aspect of solicitation. As already discussed, see *supra,* at ––– the Authority's rule does not prohibit all solicitation of funds: It restricts only the manner of the solicitation, or the conduct associated with solicitation, to prohibit immediate receipt of the

solicited money. Requests for money continue to be permitted, and in the course of requesting money solicitors may explain their cause, or the purposes of their organization, without violating the regulation. It is only if the solicitor accepts immediate payment that a violation occurs. Thus the solicitor can continue to disseminate his message, for example by distributing preaddressed envelopes in which potential contributors may mail their donations. See *supra,* at ––––.

Much of what I have said about the solicitation of funds may seem to apply to the sale of literature, but the differences between the two activities are of sufficient significance to require they be distinguished for constitutional purposes. The Port Authority's flat ban on the distribution or sale of printed material must, in my view, fall in its entirety. See *supra,* at ––––. The application of our time, place, and manner test to the ban on sales leads to a result quite different from the solicitation ban. For one, the government interest in regulating the sales of literature is not as powerful as in the case of solicitation. The danger of a fraud arising from such sales is much more limited than from pure solicitation, because in the case of a sale the nature of the exchange tends to be clearer to both parties. Also, the Port Authority's sale regulation is not as narrowly drawn as the solicitation rule, since it does not specify the receipt of money as a critical element of a violation. And perhaps most important, the flat ban on sales of literature leaves open fewer alternative channels of communication than the Port Authority's more limited prohibition on the solicitation and receipt of funds. Given the practicalities and ad hoc nature of much expressive activity in the public forum, sales of literature must be completed in one transaction to be workable. Attempting to collect money at another time or place is a far less plausible option in the context of a sale than when soliciting

donations, because the literature sought to be sold will under normal circumstances be distributed within the forum. These distinctions have been recognized by the National Park Service, which permits the sale or distribution of literature, while prohibiting solicitation. *Supra,* at ––––; 36 CFR §7.96(j)(2) (1991). Thus the Port Authority's regulation allows no practical means for advocates and organizations to sell literature within the public forums which are its airports.

Against all of this must be balanced the great need, recognized by our precedents, to give the sale of literature full First Amendment protection. We have long recognized that to prohibit distribution of literature for the mere reason that it is sold would leave organizations seeking to spread their message without funds to operate. "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock,* 319 U. S., at 111; see also *Schaumburg, supra,* at 628–635 (discussing cases). The effect of a rule of law distinguishing between sales and distribution would be to close the marketplace of ideas to less affluent organizations and speakers, leaving speech as the preserve of those who are able to fund themselves. One of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak. A prohibition on sales forecloses that opportunity for the very persons who need it most. And while the same arguments might be made regarding solicitation of funds, the answer is that the Port Authority has not prohibited all solicitation, but only a narrow class of conduct associated with a particular manner of solicitation.

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.