Notre Dame Journal of Law, Ethics & Public Policy

Volume 4
Issue 3 *Symposium on Religion Clauses*

Article 19

February 2014

Arguments for the Elimination of Religious Broadcasting from the Public Airwaves

Mark P. Gibney

Jeffrey L. Courtright

ARGUMENTS FOR THE ELIMINATION OF RELIGIOUS BROADCASTING FROM THE PUBLIC AIRWAVES

MARK P. GIBNEY*
JEFFREY L. COURTRIGHT**

> We are loath . . . to believe that radio preaching will ever become popular or successful. The fad will soon blow over . . . Any general adoption of the radiotelephone would be a positive disservice. One cannot worship over a telephone wire.[1]

These lines from the Chicago *Northwestern Christian Advocate* of 1922 demonstrate the early skepticism that greeted even the thought of religion on the public airwaves. Yet that journalist in the 1920's would have been chagrined to find what broadcast religion or "televangelism" has become. Not only has Sinclair Lewis' Elmer Gantry moved from the tentmeeting circuit to the radio "ether"; he (and female counterparts) have appeared in profusion on the front pages of our newspapers and tabloids, have testified and lobbied in the halls of Congress, and have permeated that most intimate of American entertainments, the living room television set.

With the advent of television, broadcast religion has become a bigger business than many could have imagined. In 1987, the National Religious Broadcasters reported the existence of 414 religious TV stations.[2] One writer estimated that two new outlets were opened somewhere in the United States each month.[3] Of larger moment is the income garnered from broadcast evangelism. Estimates of a total dollar figure have been placed in excess of $2.5 billion.[4] According to one

* Associate Professor of Political Science, Purdue University; B.A. 1974, Boston College; J.D. 1977, Villanova University School of Law; Ph.D. 1985, University of Michigan.

** B.A. 1979, Manchester College; M.S. 1984, University of Southwestern Louisiana; Doctoral Candidate, Department of Communication, Purdue University.

1. *Preaching by Wireless*, 72 CURRENT OPINION 650 (1922).

2. Nicholas, *The Quiet Revolution in Christian Broadcasting*, RELIGIOUS BROADCASTING 20 (Feb. 1987).

3. *Id.* at 20.

4. W. Martin, Perennial Problems of Prime-Time Preachers, address given at Baylor University, Waco, Texas, Oct. 20, 1987, at 9.

report, the most visible TV ministries were receiving $100-200 million a year.[5]

If, however, "love offerings" and Arbitron ratings are the indicia of success, televangelism appears to be in trouble. The controversial personalities of the early days of radio, such as Aimee Semple McPherson and Father Charles Coughlin, have been replaced by the better known names of Jim and Tammy Bakker, Jimmy Swaggart, *et al.*[6] According to a recent *Christianity Today* article, the charges of financial and other types of impropriety leveled at the Bakkers, Swaggart, and Oral Roberts have taken their toll on religious broadcasters in general.[7] Viewing and fundraising is off not only for Swaggart and Roberts, but also for others perceived to be untouched by scandal—Robert Schuller, Jerry Falwell, and Pat Robertson.[8] The great lamps of religion, however, will not be snuffed out; at most they will be replaced in popularity by newer faces or by those who had been less visible previously.[9]

To argue whether broadcast religion fulfills the Christian "Great Commission"[10] to evangelize the world or serves some

---

5. *Praise the Lord and Pass the Loot*, 303 THE ECONOMIST 27 (May 16, 1987).

6. March 1987 was a month that shook broadcast evangelism. PTL (Praise the Lord) shook from revelations that its founder, Jim Bakker, had paid large sums of money for a former staffer not to tell of her sexual encounters with him. PTL's accounts raised eyebrows at the Internal Revenue Service and the Evangelical Council for Financial Accounting. That same month, Oral Roberts locked himself in his Tulsa prayer tower and claimed that God would "call him home" unless his ministry received $8 million by month's end. Less than a year later, evangelist Jimmy Swaggart, who had been scathing in his remarks about Bakker's improprieties, would be accused of soliciting the services of a prostitute in Louisiana to perform sexual acts before him. *Praise the Lord*, *id.* at 23-24, 28; for a complete discussion of the Bakker affair, see L. MARTZ & G. CARROLL, MINISTRY OF GREED (1988); for the initial Swaggart episode, see New York Times, Feb. 20, 1988, at 9, col. 1; Feb. 21, 1988, at 30, col. 1; Feb. 22, 1988, at 1, col. 1; and Feb. 27, 1988, at 7, col. 1.

7. Frame, *Surviving the Slump*, CHRISTIANITY TODAY 32-34 (Feb. 3, 1989).

8. *Id.* at 33.

9. For example, the Rev. D. James Kennedy, of Coral Ridge Ministries, Coral Ridge, Florida, is one televangelist whose ministry has grown both in terms of audience and donations. *Christianity Today* reports a projected increase from $12.1 to 16 million dollars income for the 1988 fiscal year, while other major broadcasters felt indirect effects of scandal. Kennedy was one of few newcomers to testify before Congress. Frame, *id.* at 34; *Federal Tax Rules Applicable to Tax-Exempt Organizations Involving Television Ministries: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987).

10. *Matthew* 28:18-20a: "Then Jesus came to them and said, 'All authority in heaven and on earth has been given to me. Therefore go and

other public good would belabor a controversy that has waxed and waned since radio came into being. To frame the question in moral terms would shift the focus of an easily polarized issue. But to cast the discussion in an appropriate fashion, this paper will discuss the phenomenon of televangelism as an issue of public policy. Religious broadcasting certainly includes the aspects mentioned above, but it also encompasses questions of regulatory jurisdiction and the much larger question of constitutionality. This latter concern can not be understood without an investigation of the former; accordingly, this article will discuss the constitutionality of religious broadcasting in light of the problems found within the pages of its regulatory history.

The history of government regulation reveals a reluctance to intervene in religious broadcasting affairs, to the point that prosecution of such broadcasters only occurs after sustained publicity. This history is explored in three parts. Part I shows how the government's early concern over religious broadcasting gave way to a more "laissez-faire" approach, allowing a Judeo-Christian emphasis to appear, with the possible implication of a government "imprimatur." Part II examines the apparently inadvertent favor given religious broadcasting through both general Federal Communication Commission (FCC) requirements for station licensure and current deregulatory trends. Part III looks at other regulatory dilemmas posed by church-state concerns between religious broadcasters and agencies such as the Internal Revenue Service (IRS) and others. These sections serve as a backdrop for Part IV, in which it is argued that the very existence of religious broadcasting violates both the Establishment Clause and the Free Exercise Clause of the first amendment. Finally, Part V sets forth the argument that religious broadcasting has perverted the entire meaning of religion.

I.

In this section, a brief broadcast history reveals the tacit but patent interrelationship between religion and the mass media. Indeed, one finds many of the early radio stations and/or broadcasts to have been sectarian in nature.[11] This early history demonstrates how the great number of religionists on the air merely exacerbated an already chaotic problem of signal

make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you.' "

11. *See infra* this section, part A.

interference due to a lack of government control. Religious radio enjoyed an experimental period as legal efforts employed by the Department of Commerce to ride herd on broadcasting failed.[12] Congress met the need for regulation with the Federal Radio Act of 1927.[13] Although permitted to broadcast under this act, religious organizations came to be viewed as "propaganda" stations by the Federal Radio Commission (FRC).[14] During this time, the commission codified the free-market philosophy that has permeated American broadcasting to this day. The commercialism of that era took its toll on religious broadcasters. Only the strong survived.[15]

At the same time, however, commercial broadcasters, like their "educational" and "propaganda" counterparts, were required by the FRC to serve the "public interest, convenience, and necessity."[16] The successor to the FRC, the Federal Communication Commission (FCC), continued this requirement, but dropped the "propaganda" label with regard to religious programming.[17] In this era (1934-1940), the percentage of "sustaining" programs decreased, and the FCC abdicated a policy-making role as it deferred to the emerging radio networks (in the form of NBC and CBS) and to self-regulatory efforts (under the aegis of the National Association of Broadcasters [NAB]), creating, perhaps unintentionally, a predominantly Judeo-Christian electronic church.[18]

Since 1940, the increasing commercial influence on religious broadcasting has been felt in several ways. First, the value of airtime induced profit-minded broadcasters to diminish any sustaining time previously available. Catholic and mainline Protestant broadcasters, accustomed to free airtime, were reluctant to pay. Fundamentalist and conservative denominations stepped in to fill the void.[19] Second, the major network's hold on religious broadcasting loosened as local affil-

12. *See infra* note 43 and accompanying text.

13. Federal Radio Act of 1927, Pub. L. No. 632, 69th Cong., (1927).

14. F.R.C., Ann. Report 3 (1929).

15. Schultze, *Evangelical Radio and the Rise of the Electronic Church, 1921-1948*, 32 J. OF BROADCASTING AND ELECTRONIC MEDIA 292-95 (1988).

16. *See* Federal Radio Act, *supra* note 13, at section 11; see also M. Edelman, *The Licensing of Radio Services in the United States, 1927 to 1947*, 31 ILLINOIS STUDIES IN THE SOCIAL SCIENCES 9 (1949-1950).

17. Communications Act of 1934, Pub. L. No. 416, § 312, 73d Cong. (1934).

18. *See infra* note 65 and accompanying text.

19. A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 315 (1985).

iates acquired greater autonomy from the networks.[20] A third factor, that of changing attitudes of government agencies, is discussed in sections II and III. These factors have contributed to the landscape of religious broadcasting as we know it today: a multi-million dollar industry, programming replete with charismatic personalities, aired seven days a week on local stations and on cable.

A. *The Early Days of Radio: Religion and Regulatory Chaos*

The early history of radio discloses a seminal link between broadcasting and religion in the United States. The following discussion examines three aspects of this link: the willingness of some religionists to adopt radio as an evangelistic medium; the controversy over whether radio should be used by religion at all; and government efforts to curtail general abuses of the medium, with a focus on the effect of these efforts on religious broadcasters.

Radio was placed originally under the jurisdiction of the Departments of Commerce and Labor in 1912.[21] Necessarily broad in scope, the Radio Act declared "[t]hat a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States. . . ."[22] With the advent of broadcast stations in the 1920's, the government, especially the Department of Commerce under Secretary Herbert Hoover, was hard pressed to fit the law to the evergrowing radio industry. Although the 1912 Act provided some guidelines for non-governmental use of the airwaves,[23] the breadth of the law eventually resulted in chaos.

Religious broadcasting played no small role in the problems of broadcast regulation. Just as nonsectarian stations and programs sorely tested the governmental restrictions on power, frequency, and commercialism, so did their religious counterparts. Perhaps part of this attitude stemmed from a

20. Frankl, *A Hybrid Institution*, 5 CRITICAL STUDIES IN MASS COMMUNICATION 258 (1988).

21. Radio Act of 1912, Pub. L. No. 264, § 1 (1912).

22. *Id.*

23. *Id.*, Reg. 15, which states, in part: No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce and Labor contained in the license of the station. . . .

belief, among more optimistic religionists, that radio was just one more tool that God had provided to spread religion to the ends of the earth.[24] One of the earliest radio broadcasts was that of a church service from the Calvary Episcopal Church in Pittsburgh, on January 2, 1921.[25] Although the liberal rector of the church, Edwin J. VanEtten, regarded the attempt as an experiment, the weekly service would become a feature of KDKA, the nation's first station licensee.[26] The floodgates were opened. By 1923, approximately 2% of radio licenses were held by religious organizations.[27] By the following year, this figure had doubled.[28]

Although one critic has argued that "[e]vangelicals were far more optimistic about radio than were their mainline Protestant counterparts,"[29] it is important to note that the Federal Council of Churches (today the National Council of Churches) had recognized the potential of radio and began the program "National Radio Pulpit," featuring prominent mainline preachers of the day.[30] An extended history of religious broadcasting in the 1920's reveals, however, the non-mainline backgrounds of so-called "early giants."[31] Pioneer evangelists Paul Rader and R. R. Brown, both associated with the Christian and Missionary Alliance, began their broadcasts in 1922 and 1923, respectively. Brown's reaction to the report of a conversion through his Omaha broadcast in April, 1923, perhaps voices the height of enthusiasm for radio as an evangelical medium: "Hallelujah! Unction can be transmitted!"[32]

As noted earlier, not everyone believed that the public airwaves were an appropriate forum for religious display. Although some quietly voiced concern that the church is a place where people gather together to worship, and that perhaps radio would decrease church attendance, others framed the issue in terms of public harm. In 1924, H. Maxim wrote in *The Nation*:

---

24. *See infra* note 32.

25. Miller, *Radio and Religion*, 177 ANNALS OF THE AMERICAN ACADEMY OF PO. AND SOC. SCIENCE 135 (1935).

26. B. ARMSTRONG, THE ELECTRIC CHURCH 20 (1979).

27. BANNING, COMMERCIAL BROADCASTING PIONEER: THE WEAF EXPERIMENT 1922-1926, 132 (1946).

28. Armstrong, *Religion's Raid on Radio*, POPULAR RADIO 3-10 (1925).

29. Schultze, *supra* note 15, at 290.

30. OBERDORFER, ELECTRONIC CHRISTIANITY: MYTH OR MINISTRY? 18 (1982).

31. B. ARMSTRONG, *supra* note 26, at 20-24.

32. *Id.*, *quoted at* 23.

> "Let the Women's Christian Temperance Union and the Anti-Saloon League have control of the evening radio talks to children, and they will be in a position to fill their minds with superstitions and make them into men and women who shall be pawns of propagandists of blue laws and prohibitions."[33]

In 1927, *The Christian Century* questioned whether religion on the air was a "community friend or community nuisance."[34]

If controversy over radio's utility created debate within religious circles, religious broadcasting's existence contributed to the regulatory headache developing at the Commerce Department. The growth of religious radio, from both church and station sites, coincided with increases in the number of educational stations and those owned by large companies. The Commerce Department, until 1925, gave broadcast licenses to all and sundry.[35] But the Fourth National Radio Conference, held in Washington, resulted in Secretary Hoover telling applicants that all wavelengths were in use and that no further licenses would be granted. The result was an unregulated buying and selling of licenses, apparently condoned by the Commerce Department.[36]

Government policy thus resulted in a paradox: existing stations could change hands without federal intervention, yet the Commerce Department seemed to be arbitrary in its awarding of new licenses. Such practices brought into question whether Secretary Hoover and his subordinates had the right to make such decisions under the 1912 Radio Act. Court challenges arose, encouraged by AT&T's successful case against station WHN, New York, for the right to sell broadcast telephone lines, essential for transmission.[37] The case was settled out of court, but the subsequent license fees paid to AT&T by many stations for "pickup lines" led to these stations resorting to commercial sale of time to recoup the outlay for such fees.

The commercialization of radio inadvertently brought changes to religious broadcasting. One result was fundraising. WJR, Detroit, for example, went commercial, and by 1926, had religious programs on a paid basis. Furthermore, they persuaded Father Charles Coughlin to experiment in fundrais-

33. Maxim, *Radio—the Fulcrum*, 91 THE NATION (July 23, 1924).

34. *Should Churches Be Shut Off the Air?*, 21 THE CHRISTIAN CENTURY (May 12, 1927).

35. E. BARNOUW, 1 A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES 172-78 (1966).

36. *Id.* at 174.

37. *Id.* at 176.

ing;[38] the results were staggering.[39] Coughlin would go on to become one of religious broadcasting's better known figures.[40]

Commercialization also challenged the authority of Commerce Secretary Hoover under the 1912 Radio Act. The equivocal attitude of the Department in the mid-1920's had some interesting results for religious broadcasting. On the positive side, the number of religiously-based stations peaked in 1925 at 71.[41]On the negative side, wavelength and power questions were debated *via* letter and telegram by all types of broadcasters. The most famous of these is one sent by Aimee Semple McPherson, founder and preacher of the Foursquare Gospel Temple in Los Angeles. When threatened with a shutdown of her religious radio facility by the government for deviations from broadcast frequency, her wire to Secretary Hoover expressed her God-given right to broadcast:

> PLEASE ORDER YOUR MINIONS OF SATAN TO LEAVE MY STATION ALONE STOP YOU CANNOT EXPECT THE ALMIGHTY TO ABIDE BY YOUR WAVE LENGTH NONSENSE STOP WHEN I OFFER MY PRAYERS TO HIM I MUST FIT INTO HIS WAVE RECEPTION STOP OPEN THIS STATION AT ONCE[42]

Although her station complied with the order by getting a broadcast engineer on its broadcast site, McPherson's challenge did not go unheard. Others of a less doctrinaire stance did not perceive that the Radio Act provided the Commerce Secretary with as much authority as that which was being exercised at the time. In addition, the battles between network forerunners such as AT&T, Westinghouse, and others exacerbated the problems in an already unwieldy domain of jurisdiction. When finally challenged in Court, the Department was stripped of its power to regulate the airwaves at all.[43]

It can be argued, then, that religious broadcasting is merely a footnote in early broadcast history; but its contributions to the radio chaos of the 1920's cannot be ignored. That religious broadcasting existed at all not only created a sectarian controversy but added to the regulatory problems of the Com-

---

38. *Id.*

39. *See generally* Brown, *Selling Airtime for Controversy: NAB Self-Regulation and Father Coughlin*, 24 J. OF BROADCASTING 199-224 (1980).

40. *See infra* note 68 and accompanying text.

41. SUMMERS & SUMMERS, BROADCASTING AND THE PUBLIC 35 (1966).

42. *Quoted in* BARNOUW, *supra* note 35, at 180.

43. United States v. Zenith, 12 F.2d 614 (N.D. Ill. 1926).

merce Department in terms of license grants and wavelength assignments. Had the number of religious stations not grown, others might have stepped in. This can not be known for sure. The fact remains that religious radio added to the regulatory din faced by Secretary Hoover. The government's next attempt at radio regulation, however, would have severe repercussions upon religious broadcasting until the creation of the Federal Communications Commission in 1934.

B. *Regulation Arrives: The Federal Radio Commission (1927-1934)*

Although its jurisdiction in broadcast history was relatively brief, the Federal Radio Commission (FRC) helped shape the landscape of religious broadcasting in terms of stations and programming. First, the FRC winnowed the number of religious stations through a less accommodationist stance toward radio licensing. Second, it prepared the shift from sustaining to paid religious broadcasting through its tacit support of commercial broadcasting in general.

The Radio Act of 1927 gave the newly created FRC the power to regulate broadcasting in a manner not granted the Department of Commerce. The FRC created a distinction between commercial and noncommercial stations, and placed religious broadcasters within the latter group. As such, they were lumped with educational stations and reassigned a limited number of frequencies.[44] A year after the new regulations took effect, the number of religious station licensees decreased from 70 to 50.[45] Additional FRC requirements forced many noncommercial stations off the air by 1930.[46]

Unfortunately for religious stations, the FRC did not favor them as much as it did noncommercial, educational stations. The new agency classified sectarian licensees as "propaganda stations."[47] Furthermore, all broadcast stations were to offer "well-rounded program[s]." The FRC declared that:

> [T]o best [sic] serve the public . . . there is no room for the operation of broadcasting stations exclusively by or in the private interest of individuals or groups . . . As a general rule particular doctrines, creeds and beliefs must

44. SUMMERS & SUMMERS, *supra* note 41, at 39.

45. Schultze, *supra* note 15 at 292-293.

46. *Id.*

47. F.R.C., Ann. Report 3, 34 (1929).

> find their way into the market of ideas by the existing public-service stations.[48]

Religious broadcasting, then, was found to be "too narrow" in its appeal to listeners.[49] Therefore, those who stayed on the air had to determine the fine line between education and doctrine, or face possible charges by the FRC. For example, WMBI, the voice of the Moody Bible Institute in Chicago, kept in close contact with the FRC, and took care to conform to legal and engineering standards.[50]

Of those broadcasters who opted to seek sustaining or commercial time on "public service" stations, a survey taken in 1933 of 325 radio stations regulated by the FRC provides some indication as to the religious confessions represented in early radio.[51] These stations provided a sample of 3,820 religious programs. Only 416 of these were "commercial advertisers;" 608 provided no identification of religious affiliation. However, the predominance of "conventional Protestant" programs is striking. This category included 1,088 programs, compared with 336 "irregular Protestant" and 328 "fundamentalist Protestant" programs. Roman Catholic programs number 151, with Jewish, Christian Science, and Mormon broadcasts (in that order) considerably fewer.[52] The survey reveals the predominance of Christianity (especially mainline) in religious broadcasting. One must assume that the licensee's mandate did not forbid a station from exercising some preference as to which confessions would receive airtime.

Thus the FRC set the stage for an important development in religious broadcasting. Those who maintained a station license were subject to strict guidelines to avoid totally sectarian content. Those who wanted to broadcast but could not maintain a station of their own could seek access to commercial stations and radio networks.[53] Although the commercial nature of broadcasting might allow a shift in preference, the sound of religious broadcasting was predominantly mainline

---

48. *Id.*

49. T. CARTER, M. FRANKLIN, & J. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 333 (1986). The charge of "narrow appeal" has reappeared in recent years; see *Multiple and Religious Ownership of Educational Stations*, 54 F.C.C.2d 941 (1975).

50. Schultze, *supra* note 15, at 293. B. ARMSTRONG, *supra* note 26, at 25-26.

51. W. J. DuBourdieu, "Religious Broadcasting in the United States," 98 (1933) (unpublished dissertation available from Northwestern University).

52. *Id.*

53. Schultze, *supra* note 15, at 293-96.

Christian. The successor to the FRC, the Federal Communications Commission (FCC), would dictate how these legacies would be worked out in the coming decades.

C. *The FCC and Regulation by Proxy: 1934-1940*

The transition from the FRC to the FCC has been described as a "cleanup period," in which the agencies turned their attention "to quacks, cranks, and swindlers, driving the worst of them from the airwaves."[54] What is important to recognize here is that the Federal Radio Commission did not have the staff to deal with the variety of radio matters pressed upon it by an ever changing medium.[55] Yet Congress enlarged the scope of concern with the Federal Communications Act of 1934.[56] The new Federal Communications Commission was to have jurisdiction over "all forms of interstate and international telecommunication;"[57] the powers sought by the Department of Commerce under the 1912 Act were now a reality, but in the form of an all-encompassing agency. The responsibilities entailed in the new law subsumed the Radio Act of 1927 and its amendments.

Two trends in religious broadcasting mark the first decade of the FCC—one that favored less-traditional, evangelical broadcasters and another that allowed a more mainline Protestant focus. In either case, the market and regulatory forces promoted by the FCC (and earlier by the FRC) created a religious broadcast milieu Judeo-Christian in emphasis.

Since FRC policies remained in place, religious broadcasting continued to seek sustaining time in a highly commercial market. This was more difficult for non-mainline denominations and their preachers. As Q.J. Schultze has noted, most evangelical broadcasters looked to commercial stations for airtime, and had to generate money to pay for this time.[58] Requests for donations became important to the broadcast evangelist who was not part of a major denomination. As stations decreased the amount of sustaining time available, donations would help defray the cost of obtaining commercial time.[59]

---

54. WHITE, THE AMERICAN RADIO 127.
55. *Id.* at 156.
56. Communications Act of 1934, Pub. L. No. 416, 73d Cong. (1934).
57. *Id.*
58. Schultze, *supra* note 15, at 295.
59. The trend toward commercial time being devoted to non-mainline broadcasters would occur both in radio and television. *See infra* notes 72 and 78 and accompanying text.

Sustaining time, however, was not limited to the station level. The major networks also had such time available. Network policies toward religious broadcasting dictated a less doctrinaire message than non-mainline broadcasters would prefer. Although they adopted radically different policies, the Columbia Broadcasting System (CBS) and the National Broadcasting Company (NBC) promoted religious pluralism. CBS, on its "Church of the Air," set aside one hour each Sunday to provide time for a variety of confessions. A rotation system allowed access to thirteen denominations in all; thus, any person who listened would receive a "balanced" view of religion.[60] Additionally, CBS would not sell time to other religious groups. "Church of the Air" was its sole, sustaining program. Access was provided only to "major faiths" of the religious community.[61]

In contrast, NBC limited religious airtime to representatives of Protestantism, Catholicism, and Judaism only. The network provided five guidelines;[62] two excerpts are most enlightening. First, the broadcaster's message was to be "nonsectarian and nondenominational in appeal."[63] Second, the message was to be of "widest appeal; presenting the broad claims of religion, which not only aid in building up the personal and social life of the individual but also aid in popularizing religion and the church."[64] CBS saw religious broadcasts

60. Miller, *supra* note 25 at 138.

61. *Id.*

62. NBC's complete guidelines were as follows:

1. The National Broadcasting Company will serve only the central or national agencies of great religious faiths, as for example, the Roman Catholics, the Protestants, and the Jews, as distinguished from individual churches or small group movements where the national membership is comparatively small.

2. The religious message broadcast should be nonsectarian and nondenominational in appeal.

3. The religious message broadcast should be of the widest appeal; presenting the broad claims of religion, which not only aid in building up the personal and social life of the individual but also aid in popularizing religion and the church.

4. The religious message broadcast should interpret religion at its highest and best so that as an educational factor it will bring the individual listener to realize his responsibility to the organized church and to society.

5. The national religious messages should only be broadcast by the recognized outstanding leaders of the several faiths as determined by the best counsel and advice available.

Id. at 137.

63. *Id.*

64. *Id.*

to be a positive, socializing force. Like NBC, CBS favored tacit recognition of a generalized American faith, and opposed sectarian interpretations of the Gospel. Through such policies, endorsed by the Federal Council of Churches, this approach, ecumenical in scope, but diluted in dogma, maintained a favored position for some time.[65]

The late 1930's brought about concern over how much control local stations should be able to exercise with regard to programming. One major event in this debate occurred when the FCC ruled against rigid programming requirements placed upon local affiliates by the major networks.[66] As a result, stations had more discretion as to how much time they would fill with network programming. During the 1940's, wartime prosperity placed a premium on commercial time; stations were, therefore, able to devote less sustaining time to religion.

Another aspect of station control arose in the form of a trade association, the National Association of Broadcasters (NAB). The now famous NAB Code in 1939 set down guidelines in keeping with the network standard that requires religious programs to be nonsectarian and noncontroversial.[67] According to J. A. Brown, the revised Standards of Practice Code was developed, in part, to avoid the excesses of such political religious broadcasters as Father Coughlin, who attacked President Roosevelt and political actions of the day on his programs.[68] Self-regulatory efforts, then, implicitly favored a mainline Protestant viewpoint.

In short, network efforts to provide sustaining religious programming promoted a broadly-based, Americanized Christianity, one aimed at a diffuse mass audience. At the same time, the commercialization of American broadcasting, permitted to burgeon under the FRC and the FCC, allowed non-network programs to continue to be dominated by Protestant denominations, with paid programming becoming increasingly evangelical or fundamentalist. Whether conservative or liberal, however, religious broadcasting was of a publicly palatable Judeo-Christian stripe.

D. *Religious Broadcasting and its Commercial Evolution*

The face of religious broadcasting, as one would recognize it today, took shape in the increasing commercial environment

65. *See generally* OBERDORFER, *supra* note 30, at 13-29.
66. F.C.C., *Report on Chain Broadcasting*, Order No. 37 (1941).
67. Brown, *supra* note 39, at 210-11.
68. *Id.* at 211.

of the 1940's. In this section, we describe how religious broadcasting made the transition from radio to television; how the networks repeated their efforts at affiliate control in the early television era; and how, as network control loosened, televangelism became increasingly commercial, barely distinguishable from secular television.

The non-mainline religious broadcasters of the 1930's and 40's appreciated the entrepreneurial nature of the task that they faced.[69] To counteract the mainline hold on the networks, independent and conservative religious broadcasters worked at the station level. According to Q. J. Schultze, "[b]y the late 1940's radio stations derived 'a good proportion of their income from the sale of time for religious purposes.' "[70] To further increase their share of the market, evangelicals created their own interest organization in 1944, the National Religious Broadcasters (NRB).[71] The impact of these trends was great. When commercial stations started charging even mainline broadcasters for time in the name of profit, fundamentalists and evangelicals continued to pay for scarce airtime when the former would not.[72] Religious radio, however, did not remain the haven for conservative American Christianity. Television changed the landscape of religious broadcasting.

Like network radio in the 1920's and 1930's, network television in the 1950's was dominated by the three major communions: Catholics, mainline Protestants, and Jews.[73] The dominance can be traced to the fact that the networks applied to 50's television the same policies that they had used a generation earlier to deal with religious radio broadcasts.[74] Although the FCC[75] and the IRS[76] have played a role in the shift toward a more conservative picture of televangelism, the savvy with which fundamentalists and evangelicals approached television reveals that they had learned from their radio experience. His-

69. *See supra* notes 39 and 59; *see generally* J. HADDEN & C. SWANN, PRIME-TIME PREACHERS: THE RISING POWER OF TELEVANGELISM 103-24 (1981).

70. E. WILLIS, FOUNDATIONS IN BROADCASTING: RADIO AND TELEVISION (1951), cited in Schultze, *supra* note 15, at 296.

71. OBERDORFER, *supra* note 30 at 23.

72. A. REICHLEY, *supra* note 19.

73. P. HORSFIELD, RELIGIOUS TELEVISION: THE AMERICAN EXPERIENCE 3 (1984).

74. *Id.* at 3-6; *see also* O'Brien-Steinfels & Steinfels, *The New Awakening: Getting Religion in the Video Age*, CHANNELS OF COMMUNICATION 26 (Jan./Feb. 1984); R. Abelman, *Ten Commandments of the Electronic Church*, CHANNELS OF COMMUNICATION 64 (Jan./Feb. 1985).

75. *See infra* section II.

76. *See infra* section III, part A.

tory would repeat itself primarily because of network attitudes toward broadcast religion.

The networks, ever-mindful of profit, eventually adjusted their policies to allow commercial time for monied televangelists. By 1959, 53% of all religious programs on television came from purchasing producers.[77] In the 1960's, the networks loosened their hold on local television affiliates, just as they had for radio earlier. This gave local stations greater autonomy to sell time to religious sponsors without the threat of network sanctions.[78]

Along with FCC regulation changes,[79] the full-scale commercialization of religious television has yielded a definitely conservative cast to televangelism. Today's religious broadcasters have reaped the benefits from the foresight of Billy Graham, Oral Roberts, Rex Humbard, and others who had recognized television's potential in the 1950's.[80] In addition, commercial television has influenced the style of the later generations of broadcast evangelists. Religious broadcasting has become increasingly entrepreneurial and, as a result, increasingly less differentiated from secular television.[81]

Televangelism shares many similarities with its host medium. Fundraising has become closer in kind to a sales pitch than an appeal for offerings. As one author has succinctly put it, "fundraising is a major task of the technology of saving souls and television market shares."[82] In 1985, a survey of financial appeals revealed a variety of items offered in exchange for donations: Bibles, books and pamphlets, display items, magazines and newsletters, tapes and records.[83] In all fairness, however, it must be noted that explicit requests for funds are

77. Abelman, *Financial Support for Religious Television: The Impact of the PTL Scandal*, 1 J. MEDIA ECON. 24 (1988).

78. Frankl, *supra* note 20, at 258.

79. *See infra* section II, part A.

80. B. ARMSTRONG, *supra* note 26, at 83-84, 86-89, 91-99; *see also* H. W. Fulmer, "Traditional American Itinerant Preaching in the Television Age: The Evangelism of Billy Graham," paper presented at the annual meeting of the Speech Communication Association, New Orleans, LA (1988). W. F. Fore has termed these three men as the archetypes of the first, second, and third generations of televangelists, respectively. *See* W. FORE, TELEVISION AND RELIGION: THE SHAPING OF FAITH, VALUES, AND CULTURE 82-83 (1988).

81. W. FORE, *supra* note 80, at 84.

82. R. FRANKL, TELEVANGELISM: THE MARKETING OF POPULAR RELIGION, 128 (1987).

83. Abelman & Neuendorf, *How Religious is Religious Television Programming?*, 35 J. COMMUNICATION 107 (1985).

limited to a smaller percentage of religious broadcasters than one would surmise from the popular press.[84]

The current generation of televangelists is similar to secular broadcasting in more ways than just fundraising, however.[85] For example, failed UHF stations, since the 1970's, have provided homes for religious broadcasters and have served as bases for Christian networks.[86] One such station was purchased as early as 1959; today it serves as the flagship for the Christian Broadcasting Network (CBN).[87] Not only does religious broadcasting offer preaching and revival, but talk, drama, music/variety, and news magazine programs fill the religious airwaves as well.[88]

In summary, the increasing commercialization of religious broadcasting has resulted in a less than desirable situation, if, indeed, the public airwaves are to display a true picture of the spectrum of American religious beliefs. Instead, televangelism is predominantly conservative/fundamentalist/evangelical. This trend neither represents the more liberal, mainline tradition rooted in our country's early heritage, nor the more diverse, smaller denominations and sects that surface due to interest in alternative and foreign beliefs.

If it is the case that religious broadcasting represents a narrow band of the American religious spectrum, could it be that the federal government is, *de facto*, promoting one set of beliefs to the detriment of others? The next sections investigate this possibility.

II.

The implicit contract between church and state has been manifest in the FCC's treatment of religious programming. From its early laissez-faire approach in the 1930's and 1940's to a more accommodationist, albeit ambivalent, attitude through the 1970's, the FCC rarely has questioned the permissibility of religious broadcasting at all.[89]

In this section we discuss three issues: first, the promotion of religious programming through the Commission's "ascertainment" requirement; second, the "fairness doctrine" and its

84. Abelman & Neuendorf, *The Cost of Membership in the Electronic Church*, 7 RELIGIOUS COMMUNICATION TODAY 67 (1985).
85. W. FORE, *supra* note 80, at 83.
86. Abelman, *supra* note 77, at 24.
87. W. FORE, *supra* note 80, at 83.
88. Abelman & Neuendorf, *supra* note 83, at 109.
89. *See supra* section I, part C.

application to religious broadcasters; and third, the current controversy over the demise of the "fairness doctrine" as part of the federal government's efforts to "deregulate" broadcasting in general. Although there may be other regulatory topics within the purview of the FCC, these two, ascertainment and the "fairness doctrine," provide good examples of the Commission's ambivalent attitude in its dealings with religious broadcasters.

A. *Religion Preferred: The FCC and "Ascertainment"*

Prior to deregulation, the FCC adopted a license renewal requirement of "ascertainment"; i.e., station licensees were required to demonstrate that their programming was serving "the public interest."[90] Various methods of substantiation were to be used in the application process: program logs, letters from listeners, etc. In any event, some form of documentation was required to demonstrate the station's fulfillment of its mandate from the FCC. The 59-page report, *Public Service Responsibility of Broadcast Licensees*,[91] issued by the Commission in March of 1946, was the first major effort to explain in broader detail what was expected of stations as they "ascertained" for the Commission how they were meeting the needs of their broadcast area. The so-called "Blue Book" stated that

> [i]n issuing and in reviewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. . . . (1) the carrying of sustaining programs, including network sustaining programs . . ., (2) the carrying of local live programs, (3) the carrying of programs devoted to the discussion of public issues, and (4) the elimination of advertising excesses.[92]

Among the programs promoted by the FCC for fulfillment of the sustaining program factor were "nonprofit organizations—*religious*, civic, agricultural, labor, educational, etc."[93] The Commission would take into consideration not only the number of hours devoted to such programs, but also the time of day in which they occurred.[94] Clearly, the FCC favored religion as one of the licensee's options. Not only was this a carry-

90. *See infra* note 169 and accompanying text.
91. F.C.C., *Public Service Responsibility of Broadcast Licensees* (1946).
92. *Id.* at 55.
93. *Id.* (emphasis added).
94. Edelman, *supra* note 16, at 79.

over from the FRC,[95] but the Commission would continue to include religious programming as part of its license considerations.[96]

During his tenure as FCC Commissioner, Lee Loevinger commented upon the use of the categories listed in the "Blue Book" and expanded in 1960.[97] Basing his assertions on FCC regulations,[98] Loevinger noted that the Commission had utilized program categories, including religion, as "prima facie minimum requirements of acceptable programming."[99]

B. *The "Fairness Doctrine": A Threat to the Faithful?*

If, indeed, the FCC has, to some extent, promoted religion on the public airwaves, such a claim must be balanced by an investigation into the use of the "Fairness Doctrine,"[100] which specifically required the broadcaster to present opposing views held within the station's service community.[101]

The "Fairness Doctrine" rarely has been applied to religious programming per se; when it has, the cases purportedly turned upon free speech issues.[102] Some, however, have found that this resulted in an uneven, hands-off policy that encouraged the existence of religious media.[103] Although

---

95. *Supra* note 91, at part II, 10.

96. *See infra* note 169 and accompanying text.

97. Loevinger, *Broadcasting and Religious Liberty*, 9 J. BROADCASTING, 3-23 (1965).

98. 47 USC section 307(d), in part: ". . . on applications for renewal of broadcasting station licenses . . . the Commission shall not require any such applicant to file any information . . . which is not directly material to the considerations that affect the granting or denial of such application. . . ." (cited in Loevinger, *supra* note 97, at 20).

99. Loevinger, *supra* note 97, at 10.

100. The "Fairness Doctrine" was a further explication of the "Blue Book" requirement to carry programs devoted to the discussion of public issues as a step toward balanced programming. *See supra* note 92 and accompanying text. The doctrine was articulated in a 1949 FCC report entitled *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

101. *Id.* at 1249.

102. *See, e.g.*, Red Lion v. Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 24 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); Pillar of Fire, 99 F.C.C.2d 1256 (1984); *see generally* Brooks, *Televangelism and the FCC: To Regulate or Retreat*, 91 DICK. L. REV. 553 (1986), and Garay, *The FCC in Matters of Church and State*, 9 COMMUNICATIONS AND THE LAW 43 (1987).

103. L. J. Lacey has contended that the FCC gave religious organizations unique access to the airwaves through allocation of noncommercial educational broadcast frequencies, encouragement of religious programming on commercial stations, and inconsistent enforcement of the

some religious broadcasters' editorials have been highly critical of government intervention, and of the "Fairness Doctrine" specifically,[104] the general application of the doctrine has been extremely tolerant of religion, perhaps to the point of eschewing any hint of entanglement.[105] The current era of broadcast regulation is a case in point.

C. *A Lack of Fairness: The Deregulatory Era*

It has been argued elsewhere that the "Fairness Doctrine" is a prime example of the "orphaned progeny" of deregulation.[106] That is to say that Congress and the agency in question disagree as to whether an agency rule should remain on the books; if the agency is thwarted by Congress in dropping such a rule, the agency simply leaves it intact, but never enforces it.[107] Despite FCC Chairman Fowler's accession to Congress' wishes in the mid-1980's,[108] the current deregulatory trend allowed the Commission to repeal the "Fairness Doctrine" on constitutional grounds in August of 1987.[109]

Reaction to the repeal has been mixed.[110] Perhaps what is most instructive is the reaction among religious broadcasters. An editorial from the National Religious Broadcasters stated the organization's view tersely: the NRB was pleased to hear of

---

"Fairness Doctrine" across cases. More often than not, secular stations were more likely to lose broadcast licenses than were religious stations. Lacey, *The Electric Church: An FCC-"Established" Institution?*, 31 FED. COMMUNICATIONS L. J. 235 (1979).

104. *See, e.g.*, Hindson, *Fairness Doctrine Amounted to "Censorship,"* REL. BROADCASTING 29, Oct. 1987.

105. Contrary to the allusion to "Fairness Doctrine" considerations made by Guy H. Brooks, the FCC investigation of Faith Center, Inc., and the Rev. Dr. W. Eugene Scott did not entail such concerns. Instead, the case involved whether the FCC was within its rights to request financial information from the religious broadcasting station involved. See Brooks, *supra* note 102 at 568; *cf.* Faith Center, Inc., 69 F.C.C.2d 1123 (1978); Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983).

106. Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L. J. 59 (1987).

107. *Id.* at 59-60.

108. *Id.* at 61.

109. *See Syracuse Peace Council*, 2 F.C.C. Rcd. 5043 (1987).

110. For a brief discussion of the issues involved, see Hyde, *FCC Action Repealing the Fairness Doctrine: A Revolution in Broadcast Regulation*, 38 SYRACUSE L. R. 1175 (1987); for a history of the doctrine and an extended argument in favor of its reinstatement, see Bolton, *"In Stark Contravention of Its Purpose": Federal Communications Commission Enforcement and Repeal of the Fairness Doctrine*, 20 J. LAW REFORM 799 (1987).

the doctrine's demise, for it was tantamount to "censorship."[111]

In short, the FCC's laissez-faire approach has encouraged televangelists; indeed, they have profited by it. For most of this decade, broadcast ministries have grown in size and wealth, "able to command vast audiences—and vaster funds."[112] One well-known case points out the pitfalls of the FCC's reluctant policy. In 1979, the FCC failed to render a publishable opinion with regard to an alleged misappropriation of funds by PTL, headed by Jim and Tammy Bakker.[113]

This is not to imply that the FCC is reluctant to prosecute any religious broadcaster,[114] but the regulatory record does reveal a situation in which the Commission has treated such licensees with much more reserve than would be accorded secular stations. The latter, therefore, have been unduly burdened by the *de facto* favoritism accorded to religious media by the FCC. This effect is two-pronged: first, religious broadcasting was favored as part of ascertainment; second, it received less scrutiny than the average broadcaster. Even with the age of deregulation, the possibilities of excessive entanglement between church and state would seem to dictate that the FCC will continue to discriminate between the two types of stations, the secular and the sacred.

III.

The nodus of actors involved in public policy questions that swirl around religious broadcasting, of course, is not limited to the Federal Communications Commission. While the actors are many, two other agencies, one federal, the other professional, provide other perspectives on the role religious media are to fill in the American polity. The first is the Internal Revenue Service (IRS), which, by its power to accord tax-

111. Hindson, *supra* note 104, at 29.

112. *Praise the Lord and Pass the Loot*, *supra* note 5, at 23.

113. *PTL of Heritage Village Church & Missionary Fellowship, Inc., Broadcast Action*, instructing FCC staff to appraise Justice Department of investigation involving PTL. N. 18597. Not published in the FCC Reports, by direction of the Commission (released Dec. 8, 1982). (Commissioners Fogarty, Jones, and Rivera dissenting). For a complete discussion of the events surrounding the investigation, see Brooks, *supra* note 102, at 570-74.

114. Jonathan Turley, however, has argued that "FCC action against televangelists remains a rarity. The FCC is hampered by its own administrative limitations. An FCC decision not to renew a license spawns years of costly litigation and investigation." Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 470 (1988).

exempt status to churches and other nonprofit organizations, holds sway over regulatory questions not necessarily within the FCC's jurisdiction. The second is the organizational representative of approximately 1200 media groups,[115] the National Religious Broadcasters (NRB).

A. *The Reluctant Tax Man: The IRS and the Electronic "Church"*

If the FCC has been somewhat friendly to religious broadcasting, another government agency has seemed ambivalent at best. The Internal Revenue Service (IRS) has allowed certain organizations tax-exempt status when the following criteria are met:

> (1) it must be organized and operated exclusively for religious purposes;
> (2) no part of its net earnings may inure to the benefit of any private shareholder or individual; and
> (3) it must not engage in substantial lobbying activities or intervene in any political campaign.[116]

Although not readily apparent, a great deal of ambiguity exists in the Internal Revenue Code with regard to illegitimate religious organizations,[117] let alone broadcast ministries. The results are rather problematic. What constitutes a "church," and what it means to have "religious purposes" have never been defined by the IRS or the Department of the Treasury.[118] Moreover, an organization that wishes to qualify as a church with the IRS must meet an undefined portion of fourteen crite-

115. *National Religious Broadcasters: United for Excellence.*

116. I.R.C. § 501(c)(3) (1982).

117. *See generally* Casino, *"I Know It When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113 (1987).

118. Joint Committee on Taxation, *Overview of Tax Rules Applicable to Exempt Organizations Engaged in Television Ministries* 2-3 (JCS-21-87), Oct. 5, 1987.

ria;[119] however, the United States Tax Court views the criteria merely as guidelines, not as rules.[120]

The net result of these legal ambiguities is that broadcast ministries enjoy the same tax privileges as the Catholic cathedral downtown. Only the most extreme cases of religious fraud seem to be prosecuted easily.[121] But tax-exempt status is not a guaranteed right, as has been shown in the case of religious schools. Governmental interests may override a religious organization's tax privileges.[122] Such actions, however, have indicated to some that tax-exempt status could be offered on an arbitrary basis, and would thus be discriminatory. Such a charge is not new in legal discussions. In *Walz v. Tax Commission*,[123] the Supreme Court majority found such tax exemptions to be constitutional as a legislative grant. Justice Douglas, the sole dissenter, found such a practice to be a form of state aid to religion:

> If history be our guide, then tax exemption of church property in this country is indeed highly suspect, as it arose in the early days when the church was an agency of the state. . . . State aid to places of worship, whether in

---

119. These criteria include:
(1) a distinct legal existence;
(2) a recognized creed and form of worship;
(3) a definite and distinct ecclesiastical government;
(4) a formal code of doctrine or discipline;
(5) a distinct religious history;
(6) a membership not associated with any other church or denomination;
(7) a complete organization of ordained ministers ministering to their congregations and selected after completing prescribed courses of study;
(8) a literature of its own;
(9) established places of worship;
(10) regular congregations;
(11) regular religious services;
(12) schools for the religious instruction of the young;
(13) schools for the preparation of its ministers; and
(14) any other facts and circumstances that may bear upon the organization's claim to church status.

IRS Manual 7(10)69 Exempt Organizations Examination Guidelines Handbook § 321.3 (Apr. 5, 1982).

120. Joint Committee on Taxation, *supra* note 118, at 3.

121. *See generally* Casino, *supra* note 113; Turley, *supra* note 110.

122. *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574 (1983), in which the Court found that the university had violated public policy in its failure to eliminate racial discrimination and thereby had forfeited its privilege of tax-exemption.

123. 397 U.S. 664 (1970).

> the form of direct grants or tax exemption, takes us back to the *Assessment Bill* and the [Madison's] *Remonstrance*. The church qua church would not be entitled to that support from believers and nonbelievers alike. Yet the church qua nonprofit, charitable institution is one of many that receive that form of subsidy through tax exemption.[124]

At the present time, tax-exempt status seems in little danger of revocation. Although recent litigation has challenged the tax-exempt status of the Catholic Church itself,[125] the case never has been heard at the appellate level. The reason for this is the availability of evidence from church financial records. The U.S. Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB) appealed a contempt charge connected with the case. Although they were subpoenaed as nonparty witnesses, the Supreme Court held that the USCC and the NCCB could question the jurisdiction of the District Court in the underlying action. The appeal was reversed and remanded, and the contempt charge has not been reheard.[126] Without evidence from these Catholic organizations, the primary case can not be appealed. It seems unlikely that another such case will arise soon to challenge *Walz*'s holding for religious organizations in general.

Religious broadcasters, then, have benefitted greatly from the difficulties encountered by the government in according tax-exempt status to religious organizations. An excellent case in point is the celebrated PTL scandal. Jim Bakker's ministry was able to postpone serious governmental inquiry not only from the FCC,[127] but from the IRS.[128]

If the post-scandal reaction is any indication, the IRS may be attempting preventative measures against future abuse of the tax laws by televangelists. In late 1988, the IRS reported that it was auditing 26 television ministries.[129] However, one

---

124. *Id.* at 703, 707.

125. Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986) *aff'd sub nom. In re* Catholic Conference (USCC), 824 F.2d 156 (2d Cir. 1987), *rev'd*, 487 U.S. 72 (1988).

126. *In re* United States Catholic Conference, 824 F.2d 156 (2d Cir. 1987), *rev'd*, United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72 (1988).

127. *Supra* note 113 and accompanying text.

128. Frankl, *Televangelism*, *supra* note 82, at 129; *Praise the Lord and Pass the Loot*, *supra* note 5, at 28.

129. New York Times, Dec. 10, 1988, at 12, col. 1; Dec. 11, 1988, at 45, col. 1. The I.R.S. has since reduced the number of ministries under investigation to 23. New York Times, Mar. 15, 1989, at 11, col. 6.

wonders, based on the regulatory history, how willing the agency will be to tread the line between church and state. The religious media themselves, under the aegis of the National Religious Broadcasters, will have something to say about it.

B. *The National Religious Broadcasters and Mr. Jefferson's "Wall"*

The aftermath of the PTL scandal brought about a rare dialogue between Congress and religious broadcasters in the form of a House subcommittee hearing.[130] A brief history of the National Religious Broadcasters (NRB) in general, in addition to some excerpts from this hearing, provide some insight with regard to attitudes toward government regulation held by major televangelists and their representatives.

Formed in 1943, the NRB came into existence in part to "preserve access to the nation's airwaves."[131] According to a membership fact sheet, the NRB, *inter alia*, "maintains rapport with the FCC and the broadcasting industry."[132] The NRB's immediate reactions to the proposed hearing in 1987 tested that "rapport."[133] At one point, the organization was quite vituperative in its description of Congress' intent. Reportedly, a letter went out from NRB headquarters to its membership without the knowledge of its Executive Director Ben Armstrong.[134] In it, the hearing was described as unreasonable, "the beginning of a new 'inquisition' " against religious broadcasters.[135] The letter called for contributions to the NRB Defense Fund, designed to maintain the right of television ministries to use the airwaves.[136] Although Mr. Armstrong apologized to Chairman J. J. Pickle (D-Texas) and the subcommittee,[137] such commentary apparently set the tone for the televangelist witnesses.

Some broadcasters, such as Jerry Falwell and John Ankerberg, were rather diplomatic in tone toward the subcommittee.[138] However, the Rev. D. James Kennedy, of Coral

130. *Federal Tax Rules Applicable to Tax-Exempt Organizations*, *supra* note 9.

131. Hostetler, *National Religious Broadcasters: What If There Were No NRB?*.

132. *National Religious Broadcasters: Membership Fact Sheet* (no date).

133. *See, e.g.*, Armstrong, *The Hearings*, Editorial, RELIGIOUS BROADCASTING 8 (Nov. 1987).

134. *Federal Tax Rules Applicable to Tax-Exempt Organizations*, *supra* note 9, at 273.

135. *Id.* at 265.

136. *Id.* at 266.

137. *Supra* note 134.

138. *Id.* at 76 ff.

Ridge Ministries, opened the testimony from broadcasters with a great deal of concern that even the hearing itself was an investigation of churches.[139] Although Chairman Pickle reassured him that the hearing was not an investigation of churches,[140] Kennedy foresaw "a danger of the federal government taking control over the church."[141] These and subsequent, more tempered statements from televangelists and from Mr. Armstrong indicate that the NRB and its members would prefer to keep Thomas Jefferson's "wall of separation"[142] high and impregnable, at least as far as government crossing over into the churchyard is concerned.

In light of the reluctance of government agencies to intrude upon church territory, the wishes expressed by these broadcasters appear to be granted. The regulatory history of religious broadcasting thus intimates a curious construction of the "wall": broadcast ministries are protected by the First Amendment from undue intrusion by government regulation; yet the arrangement does not prohibit religious media involvement in political affairs. Indeed, one aspect of the New Christian Right (though not equivalent to it) is the power accorded conservative Christians through religious media.[143] What is striking is that these media encourage an interpretation of the "wall" metaphor that does not inhibit their activity. At the same time, this interpretation seems to promote religion.[144]

---

139. *Id.* at 66-67.

140. *Id.* at 67.

141. *Id.* at 69.

142. This phrase comes from Thomas Jefferson's letter to the Danbury Baptist Association: "I contemplate with sovereign reverence that act of the whole American people which declared that the legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed 1861). The phrase first appears in Supreme Court case law in Reynolds v. United States, 98 U.S. 145 (1879), and takes on greater currency in Everson v. Board of Education, 330 U.S. 1 (1947). Justice Rehnquist, in Wallace v. Jaffree, 472 U.S. 38 (1985) (dissenting opinion), refutes the usage of the phrase through a historical analysis.

143. *See generally* D. BROMLEY & A. SHUPE, NEW CHRISTIAN POLITICS (1987); R. LIEBMAN & R. WUTHNOW, EDS, THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMIZATION (1983); J. HADDEN & A. SHUPE, TELEVANGELISM, POWER, AND POLITICS ON GOD'S FRONTIER (1988).

144. *See infra* note 167 and accompanying text (section of prong two of *Lemon*).

IV.

We believe that the licensing and broadcasting of religious programs on public airwaves violates the Establishment Clause and the Free Exercise Clause of the First Amendment.[145] This position[146] is taken in the face of a long history of religious broadcasts on both television and radio,[147] and at a time when there now appears to be something close to a perfect marriage[148] between religion and the mass media.[149] Despite this long term relationship, and notwithstanding the present day status quo,[150] we believe that the broadcasting of religious programs—from its inception—constitutes a violation of the First Amendment. As counterintuitive as this argument seems, at one time prayer in public schools was also a common practice and one whose constitutional infirmities were either long overlooked or intentionally ignored. The same can be said for the broadcasting of religious programs on public airwaves. In fact,

---

145. The pertinent provisions of the First Amendment are: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

146. We cannot claim to have originated this thesis. A decade ago Linda Jo Lacey took this iconoclastic position. Lacey, *supra* note 103. Despite the compelling nature of this argument, it has apparently found few adherents, either in the church-state literature, or in policymaking or judicial circles. The present analysis is based on the same premise, although the effort is to extend some of Lacey's arguments and provide new ones. It should also be noted that our ultimate conclusion is different from Lacey's, in that we disagree with her on whether the Free Exercise Clause would be violated by removing religious broadcasting from the public airwaves. Despite these and other differences, we recognize our intellectual debt to her earlier article.

147. *See generally* sections I-III.

148. Quentin Schultze has pointed out how many religious denominations have viewed the advent of the mass communications as a godsend in their effort to carry their message far and wide. Schultze, *The Mythos of the Electronic Church*, 4 CRITICAL STUDIES OF MASS COMMUNICATION 245 (1987).

149. The estimates of how many individuals in this country watch religious programs, or listen to them on the radio, vary considerably. In terms of the former, there have been projections that as many as 13.3 million people in this country—or 62% of the national audience—watch religious programs regularly. Ostling, *Power, Glory and Politics*, TIME, Feb. 17, 1986, at 62, 63.

150. Quentin Schultze estimates that there are tens of thousands of religious broadcasts each year, and the trend seems to be an upward one. For example, between 1985 and 1986 there was a 10% increase in religious radio stations, and a *100%* increase in the number of religious television stations. Schultze, *The Mythos of the Electronic Church*, *supra* note 148, at 246. *But see* Frame, *supra* note 7, at 32 (showing the declining ratings of the major televangelists).

the analogy to prayer in schools and to state aid to religious affiliated schools goes even further; some of the same principles in this area of constitutional law are applied to the present analysis.

There are three related arguments for the position that religious broadcasts are unconstitutional and that they should be removed from the public airwaves. The first maintains that the "effects" prong and the "excessive entanglement" prong of *Lemon*[151] are violated by these practices,[152] thus constituting an Establishment Clause violation. A second argument against broadcasting religious programs is based on the inherent problem of government regulation in this area generally, particularly where any attempts to do so would violate the Free Exercise Clause, or be perceived as such by both church[153] and state.[154] It is conceded that thus far government has not found it necessary to "censor" religious broadcasts. There is no assurance, however, that this state of affairs will continue. The hypothetical employed to make the argument for the impossibility of regulating the content of religiously-based programs involves a Satanic cult that wants to broadcast a devil's worship ceremony on television.[155] There is no doubt that this would be particularly gruesome material to show on the public airwaves and it is quite understandable why the FCC would seek to prevent its broadcast. Yet the first amendment prohibits the government from favoring some religions over others,[156] or, in

151. Lemon v. Kurtzman, 403 U.S. 602 (1971). The three part test is as follows: the legislative enactment must have a secular purpose, its primary effect must be neither to advance nor inhibit religion, and it must not foster excessive entanglement between government and religion.

152. It will be assumed that the government's purpose in approving most broadcasting licenses is a secular one. Thus, there is no concern about the first prong of Lemon. This ready acceptance of the government's purpose in providing a license is sorely tested, however, when it provides one to stations that are wholly owned by religious organizations. In these instances one might well argue that the granting of this license serves no secular purpose whatsoever.

153. *See* Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983) (minister investigated for fraudulent solicitation unsuccessfully argued that any government investigation in church affairs violated the Free Exercise Clause).

154. *Supra* Part III-B.

155. In 1988, an episode of the "Geraldo" show focused on satanic worship and achieved one of its highest ratings. *See infra* note 220.

156. In Larson v. Valente, 456 U.S. 228 (1982) the Court applied a strict scrutiny standard to a Minnesota statute regulating charitable contributions because the effect of the statute was to treat the Unification Church ("Moonies") differently from other churches. The Court found that the scheme violated the clearest command of the Establishment Clause: "one

this case, allowing some forms of religious worship but proscribing other forms. The conclusion drawn here is that because the Constitution prohibits government censorship of religious practices, all religious broadcasts should be banned from the public airwaves.

The third and final argument involves answering the charge that removing religious programming from the public airwaves would violate the Free Exercise rights of preachers who use this medium to preach and similar rights of viewers who would wish to continue to watch these programs. Although this is the strongest argument against the position espoused here, the case law in this area offers little help to this position. A government proscription of *all* religious broadcasts would apply equally, and it would not test or pass judgment on the beliefs or practices of any religion. It is recognized that many churches and adherents would be forced to alter their present method of "worship," but this would not rise to the level of a constitutional violation.

A. *Applying the* Lemon *Standard*

1. The "Effects" Prong

The Establishment Clause of the First Amendment reads: "Congress shall make no law respecting an establishment of religion. . . ." In *Everson v. Board of Education*[157] the Supreme Court held that the Establishment Clause means that "neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[158] In a dissenting opinion in *Everson*, Justice Rutledge wrote:

> The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot such relationships. But the object was broader than separating church and state in this nar-

religious denomination cannot be officially preferred over another." *Id.* at 244.

157. 330 U.S. 1 (1947). Everson involved the constitutionality of a New Jersey statute that authorized state expenditures to transport all children to schools, including church-related schools. Although Justice Black's majority opinion established the metaphor of a "wall of separation" between church and state, these expenditures were found not to violate the Constitution because they were in the nature of public welfare expenditures.

158. *Id.* at 15.

> row sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[159]

In the landmark decision of *Engel v. Vitale*,[160] which struck down the practice of prayer in public schools, Justice Black discussed the concerns of the framers and the aims of the Establishment Clause:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.[161]

Since at least 1971, the Supreme Court's standard for detecting Establishment Clause violations has been the three prong *Lemon* test.

> First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[162]

Despite the common acceptance of the *Lemon* standard in the Establishment Clause area, this same standard has not been applied to religious broadcasting.[163] This fact is hard to explain.[164] When the government approves a broadcast license

---

159. *Id.* at 31-32.

160. 370 U.S. 421 (1962). Engel involved the constitutionality of a prayer prepared by the New York board of Regents that the local school board had directed be said in class. The Court held that this violated the Establishment Clause.

161. *Id.* at 431.

162. 403 U.S. at 612-613.

163. Lacey, *supra* note 103, at 237-47, points out how challenges to religious broadcasting have taken the form that such programs were not "educational," and thus not deserving of belonging on noncommercial television. The Establishment Clause has not been a central focus of such challenges, or the FCC's response.

164. The common acceptance of the Lemon standard should not mask the repeated criticisms that it has been subject to, both by commentators off the Court but also by many members of the Court as well. *See* Jones, *Accommodationist and Separationist Ideals in Supreme Court Decisions*, 28 J. CHURCH & STATE 183, 193 (1986) ("Not only are the tests themselves flexible enough

it is providing a valuable[165] public[166] good. When the government provides a broadcasting license based on the understanding that there will be X number of hours of religious broadcasting, this provision (and the broadcasting of religious programs themselves) violates the second prong of the *Lemon* test because this has the effect of advancing religion. As such, there is an Establishment Clause violation. No longer is government neutral towards religion. Instead, the effect of promoting the airing of religious broadcasts over government regulated public airwaves advances or promotes religion generally, particularly those religions that are able to obtain air time.[167]

The counter argument to this position might run along these lines. One could argue that the Federal Communications Commission's mandate is to regulate the public airwaves

---

to validate or invalidate any state action, it is also not at all clear when and how exactly the tests are to be applied.") *Id.* at 213; Aguilar v. Felton, 473 U.S. 402 (1985) (J. O'Connor dissenting); Wallace v. Jaffree, 472 U.S. 38 (J. Rehnquist dissenting); Lemon v. Kurtzman, 403 U.S. 602 (1971) (J. White concurring and dissenting).

165. One reason why the granting of a broadcast license is so valuable is that despite the increase in broadcast outlets, the demand for licenses still far outweighs the supply. Minow points out that when RKO's channels were made available for licensees, the FCC received 172 applications for the few stations available. Moreover, when the FCC announced new power stations, the FCC received almost 14,000 applications. Minow, *Being Fair to the Fairness Doctrine*, N.Y. Times, Aug. 27, 1985, at A23, col. 1. The Supreme Court sustained the constitutionality of the "fairness doctrine" at least partly on the basis of this scarcity rationale. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390. *But see* the FCC claim in the 1985 Fairness Report, "Currently there are a total of 54 vacant VHF channels and 462 vacant UHF channels. [O]f these vacant allocations, 34 are commercial VHF channels and 109 commercial UHF channels. These vacancies appear in both large and small markets." *General Fairness Doctrine Obligations of Broadcast Licensees*, 50 Fed. Reg. 35,418, 35,439. For a discussion of these issues *see* Bolton, *supra* note 110, at 815-16.

166. The fact that the assistance does not come in the direct form of money (although owning a broadcast license is generally quite lucrative) does not matter. For example, in Lynch v. Donnelly, 465 U.S. 668 (1984) the constitutionality of the publicly displayed nativity scene did not hinge on the fact that the city had originally paid $1365 for the creche and that the erection and dismantling of it cost the city of Pawtucket approximately $20 per year.

167. Although a distinction has been drawn between the licensing procedure that promotes the broadcasting of religious programs and the actual broadcasts themselves, the distinction is not essential to the argument made here. That is, even if the government did not promote religious broadcasting in determining the suitability of license applicants, the showing of religious programs over the public airwaves would still violate both the Establishment Clause and the Free Exercise Clause.

in the "public interest."[168] Moreover, the FCC has defined this term by specifying programming characteristics essential to meeting the public interest standard as follows:

> [T]he major elements usually necessary to meet the public interest, needs, and desires of the community . . . . have included: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) *religious programs*, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programming.[169]

There is no doubt that, by some, perhaps most, standards, religious broadcasts are in the public interest. The same argument has been made, repeatedly in fact, for a whole host of schemes that have been found to violate the Establishment Clause. For example, it has often been argued that prayer in public schools is in the public interest because it fosters a belief in a Supreme Being;[170] the same could be said for state financed salary supplements for teachers in religious affiliated schools,[171] and so on.[172] "Public interest," however, is not enough. When the government provides benefits it is bound by the strictures of the Establishment Clause. When the government provides a license to a broadcaster with the understanding that the broadcaster is to provide a certain amount of air time to religious programming,[173] the government is

168. The phrase used throughout the Federal Communications Act of 1934, 48 Stat. 1064, June 19, 1934 (current version at 47 U.S.C. Secs. 151-609 (1976)) is "if public convenience, interest, or necessity will be served," usually in reference to the granting of a broadcast license.

169. Federal Communications Commission, *Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 F.C.C. 2303 (July 29, 1960) (emphasis supplied).

170. *See* Engel v. Vitale, 370 U.S. 421 (1962) (striking down the reading in school of a prayer prepared by government officials); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (striking down the practice of reading the Bible in public schools).

171. This practice was declared unconstitutional in Lemon v. Kurtzman, 403 U.S. 602 (1971).

172. In fact, the "public interest" standard could be read to be synonymous with the "secular purpose" prong of the Lemon test.

173. One of the distinctions made (at times) in the area of state aid to religious affiliated schools is whether these schools were the direct beneficiaries of assistance or not. *See* Mueller v. Allen, 463 U.S. 388, 399 (1983) ("We also agree that, by channeling whatever assistance [a state income tax deduction] it may provide to parochial schools through individual

thereby providing a benefit to religion that is constitutionally impermissible. Moreover, the First Amendment is especially violated when the government provides a broadcasting license to a religious organization itself, thereby allowing this group to decide which programs are to be shown on the public airwaves.[174]

But it is not only the agreement between church and state to broadcast religious programs that is constitutionally infirm. The broadcasting of such programs are themselves constitutional violations. This position is made clearer if one adopts Justice O'Connor's "endorsement" view of the Establishment Clause. As she writes in her concurring opinion in *Lynch v. Donnelly*[175]:

> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.[176]

Later in the course of her opinion Justice O'Connor continues her explanation of this endorsement standard.

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or uninten-

---

parents, Minnesota has reduced the Establishment Clause objections to which its action is subject.") When a broadcast license is provided to one who agrees to provide religious broadcasting, it might be asserted that religion benefits only indirectly, and thus such assistance from the government is constitutionally permissible. This is not a strong argument, and in any event one that cannot be relied on when the FCC provides a license to a religious organization.

174. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) provides a somewhat analogous situation. In Larkin the Court struck down a Massachusetts statute which gave churches and schools the power to veto the issuance of liquor licenses to applicants located within a five hundred foot radius of these churches and schools. A unanimous Supreme Court struck down this law because it conferred government power to a religious organization. In terms of broadcasting, although the government certainly does not dictate what programs a licensee must show, still, when it provides a license to a religious organization the government is allowing this group to decide what will appear on that public airwave.

175. 465 U.S. 668 (1984).

176. *Id.* at 690.

> tionally, that make religion relevant, in reality or public perception, to status in the public community.[177]

Justice O'Connor then examined the public supported creche that was being challenged in *Lynch*, and she concluded that despite the religious trappings, "[t]he display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion."[178]

Even if one accepts Justice O'Connor's conclusion that the creche in question did not constitute an endorsement of religion,[179] still, contrast the example of a publicly supported creche during the Christmas season with a situation of government support for radio and television programs—all year round—that are unmistakably religious in tone and nature.[180]

It is readily conceded that the FCC does not "endorse" religious programming in a literal sense, but it certainly does

---

177. *Id.* at 692.

178. *Id.*

179. A dissenting opinion written by Justice Brennan, and joined by Justices Marshall, Blackmun and Stevens, rejects the idea that the creche's presence on public lands would not constitute an endorsement of the religious tenets behind it.

> The "primary effect" of including a nativity scene in the city's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition of their views. . . . The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.

Id. at 701.

180. It will be argued that the public generally is unaware of how the FCC licensing regulations operate—in fact perhaps few have ever heard of the FCC—and thus there can be no real government "endorsement" as such. Although Justice O'Connor seems to give a literal reading of "endorsement," this approach is too narrow. For example, in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) the Court found "state action" for purposes of the Equal Protection Clause of the Fourteenth Amendment where a privately owned coffee shop housed within a building owned by the Wilmington Parking Authority refused to serve blacks. The point here is that even if no one knew that the parking garage was owned by the state, this still would have constituted "state action." As the Court explained:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the coffee shop] that it must be recognized as a joint participant in the challenged activity. . . .

Id. at 725.

so implicitly, both by its licensing practices and by allowing religious programs to be transmitted over the public airwaves. In essence, the government regulates the medium that brings the viewing public tens of thousands of religious programs each year. Is this not the endorsement and advancement of religion?

The broadcasting of religious programs violates not only the Establishment Clause, it violates the Free Exercise Clause as well. To understand this it is necessary to examine the nature of broadcasting itself. In *FCC v. Pacifica Foundation*,[181] the Supreme Court upheld the power of the Federal Communications Commission to restrict "indecent" programs from the public airwaves. In rejecting the licensee's First Amendment challenge the Court held:

> We have long recognized that each medium of expression presents special First Amendment problems. . . . And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.[182]

The Court then gave two rationales for why "free speech" is more restricted in the broadcasting context.

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.[183]

In addition, the Court noted the suspectibility of the viewing audience.

> Second, broadcasting is uniquely accessible to children, even those too young to read. . . . Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. . . . We held in Ginsberg v. New York that the government's interest in the "well-being of its

181. 438 U.S. 726 (1978).
182. *Id.* at 748.
183. *Id.*

> youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.[184]

In sum, what the Court recognized in *Pacifica* was that broadcasters enjoyed fewer First Amendment rights because of the pervasiveness of the medium; the fact that these messages were received in the privacy of one's home, where individuals should not have to be faced and/or confronted with the free market of ideas;[185] and finally, the unique accessibility of these public broadcasts to impressionable young people.[186]

Apply the principles enunciated in *Pacifica* to the phenomenon of religious broadcasting. Consider first the interests or rights of non-believers or those who find "public" worship to be offensive. In his concurring opinion in *Abington School District v. Schempp*[187] Justice Brennan addressed these concerns:

> There are persons in every community—often deeply devout—to whom any version of the Judeo-Christian Bible is offensive. There are others whose reverence for the Holy Scriptures demands private study or reflection and to whom public reading or recitation is sacrilegious, as one of the expert witnesses at the trial of the Schempp Case explained. To such persons it is not the fact of using the Bible in public schools, nor the content of any particular version, that is offensive, but only the *manner* in

---

184. *Id.* at 749.

185. The Court reaffirmed this principle in Frisby v. Schultz, 108 S. Ct. 2495 (1988) where the Court upheld an ordinance that completely banned picketing "before or about" any residence. The Court held:

> Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different . . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 2502 (citations omitted).

186. Young people might not be the only ones who are quite impressionable. Studies have shown that viewers of televangelist programs tend to be older, have less education, and earn lower average salaries than viewers of non-religious television. *See* Note, *Televangelism and the Federal Communications Commission: To Regulate or Retreat*, DICK. L. REV. 553, 555 (1986) (providing the results of a study commissioned by the National Council of Churches).

187. 374 U.S. 203 (1963).

> which it is used. For such persons, the anathema of public communion is even more pronounced when prayer is involved. Many deeply devout persons have always regarded prayer as a necessarily private experience.[188]

Religious broadcasts do not respect the fact that some individuals will find such programs to be highly offensive and contrary to their religious teachings and beliefs. Moreover, as the Court held in *Pacifica*, the countervailing argument that those who are offended can simply turn the channel or change the dial is not a strong one. *Pacifica* held instead that individuals who are in the privacy of their own home should not have to continually turn away from messages over the public airwaves that they would find offensive.[189] The broadcasting of religious programs, however, confronts those who do not want to hear religious messages. As such, it violates the Free Exercise rights of those to whom such public displays of worship would be anathema to their religious beliefs.

A different kind of Free Exercise Clause violation occurs when religious messages over the public airwaves interfere with the ability of parents of raise their children with certain religious beliefs and creeds. The Court has unequivocally recognized parental autonomy in this vital area.[190] Yet, religious broadcasts might offer a version of religion that competes with the one that some parents are attempting to offer to their offspring. Moreover, children—perhaps even the parents—may not even be aware of the fact that they are being indoctrinated.[191] In a concurring opinion in *Pacifica*, Justice Powell wrote:

---

188. *Id.* at 283-84.

189. In a concurring opinion, Justice Powell explained the differences at more length.

> [B]roadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, a different order of values obtains in the home.

438 U.S. at 759 (citations omitted).

190. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

191. In the context of state aid to religious affiliated schools, the Court has held that students in these schools might not even be mindful that they are being religiously indoctrinated. For example, in Grand Rapids School District v. Ball, 473 U.S. 373 (1985) the Court held:

> When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, a teacher may

> The Commission properly held that the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts.[192]

Much the same could be said for religious broadcasting as well. Parents who wish to have their children imbibe certain religious beliefs—and only certain religious beliefs—will often find that their efforts are in direct competition with the religious messages of those on the public airwaves.[193] While mature adults might not be strongly affected by television's ministers,[194] there is far less certainty of this with children, given their impressionablity,[195] as well as the unique accessibility that they have to this media.[196] What adds to the seriousness of this threat is the fact that what is at issue—religious beliefs and values—goes to the very core of a person's being. One would not be denigrating the Court's concern in *Pacifica* by pointing out the obvious: that conflicting and perhaps frightening religious messages received over the airwaves

---

> knowingly or unwillingly tailor the content of the course to fit the school's announced goals. If so, there is no reason to believe that this kind of ideological influence would be detected or reported by students. . . .

Id. at 3225-26.

192. 438 U.S. at 758.

193. The Court in Wisconsin v. Yoder, 406 U.S. 205 (1972) not only sought to protect the general authority of parents to direct the religious upbringing of their children, but it also recognized that outside influences could pose a direct threat to these efforts. In Yoder, the Court refused to enforce Wisconsin's compulsory school-attendance requirement as it applied to adolescent Amish children, holding that forcing these children to go to public school beyond the period that the parents wished posed "a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant society." *Id.* at 218.

194. Given the enormous amounts of money that are given to the television evangelists—even in the face of ever-widening scandals—one must wonder. *See supra* notes 149 & 150 and accompanying text.

195. Teitel explains the impressionability argument this way:

> Children . . . may be unable to distinguish between government sponsorship and neutrality. Due to their inexperience and impressionability, it is difficult for them to differentiate government aid for a secular purpose from aid for a religious purpose.

Teitel, *The Supreme Court's 1984-85 Church-State Decisions: Judicial Paths of Least Resistance*, 21 HARV. C.R.-C.L. L. REV. 651, 678 (1986).

196. *Supra* note 184 and accompanying text.

might be far more detrimental to a young person than would "indecent" language.

Parents who desire to have their children watch television's ministers would not necessarily be prevented from doing so. Religious broadcasters always have the option of producing their programs on videocassettes[197] for viewers to rent/buy and watch in the privacy of their own homes. The difference between this situation and what exists at the present time should be obvious. No longer would the unsuspecting (and, perhaps, unwilling) public at large be subjected to the tirades, sermons, messages, and pleas for money from televangelists as they are now.

2. Excessive Entanglement

The licensing and broadcasting of religious programs also violates the third prong of *Lemon*—the excessive entanglement standard. There are two types of the excessive entanglement. One is "administrative" excessive entanglement that seeks to maintain an independence between church and state by avoiding a close and continuing relationship between these two spheres.[198] With the advent of television and radio, what has occurred is that church and state have been thrown together into a much closer relationship than ever before. Religious organizations now almost see it as some kind of right that they possess to participate in the making of FCC policy.[199] More-

197. While cable television differs to some extent from public broadcasting, the similarities are far more pronounced. For an excellent examination of these issues see Wardle, *Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming*, 63 DEN. U.L.R. 621 (1986).

198. The "administrative" excessive entanglement test has often served as a death-knell for many state efforts to provide aid to religious affiliated schools. In order to ensure that the state money is not being used by these "pervasively sectarian" schools for religious purposes, close supervision of these expenditures and the purposes to which they are put to is necessary. However, this close supervision serves as a Catch-22 of sorts because in closely supervising these schools the state would also become "excessively entangled" with the church. Justice White has called this the "insoluble paradox." Lemon v. Kurtzman, 403 U.S. at 668.

199. *See* Chopko and Grincewich, *Church Participation in Federal Communications Commission Licensing and Administration*, 31 CATH. LAW. 241 (1987). The authors write:

> The Bishops, individually and collectively, have important voices in contemporary society, speaking publicly on economic, social and family issues. Hopeful that their voices will be heard even more clearly and effectively in the future, the Bishops have a stake in the operations of regulated broadcast media. This concern must be

over, the only thing that has prevented this relationship from being that much tighter and stronger has been the fact that televised ministries have staunchly opposed government regulation on first amendment grounds, and the fact that the government has wholeheartedly accepted this argument.[200] What this in turn has caused, however, are the excesses which we are beginning only now to address.

The second strand of the excessive entanglement test is a "political" divisiveness standard. Chief Justice Burger, the framer of this part of the *Lemon* test, described the constitutional concern:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations or our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . The potential divisiveness of such conflict is a threat to the normal political process. . . . The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious beliefs.[201]

What has happened since religious broadcasts have become so dominant over the public airwaves? The line between church and state has become increasingly blurred,[202] and religion has become far more politicized, and vice versa.[203] This is not a healthy development, either for politics or for reli-

---

> reflected on two levels: on the national level, by influencing the regulatory framework to ensure that the public interest is served; and on the local level, by taking advantage of rights within that framework to monitor and participate in renewals and initial licensing of television and radio facilities.

Id. at 259.

Hardy and Secrest defend aggressive religious broadcasts this way: "most religious broadcasters cannot and will not be muzzled in their exercise of their religious freedom to discuss issues and the answers found in their faith." Hardy and Secrest, *Religious Freedom and the Federal Communications Commission*, 16 VAL. U.L. REV. 57, 67 (1981). *See generally, Federal Tax Rules Applicable to Tax-Exempt Organizations, supra* note 9.

200. *See generally, supra* Part III-B.

201. 403 U.S. at 622-23.

202. For example, in 1988 two ministers—Pat Robertson and Jesse Jackson—made serious bids to be elected President of the United States.

203. Peggy Shriver has pointed out that:

> Among heavy viewers of religious television, 75 percent had voted in the 1980 election. Citizens to whom religion is very important are more involved in their communities, attend more meetings, vote

gion. Under the guise of protecting the United States from becoming a godless country, we have become instead a nation where God and religion permeate most aspects of public life. With religious broadcasting, now, God and religion threaten to permeate our private lives as well.

3. The *Bowen* Decision

In 1988 the Court issued one of its more accommodationist decisions in the Establishment Clause area in *Bowen v. Kendrick*.[204] The question the Court faced in *Bowen* was whether a federal grant program[205] that provided pregnancy and sexuality counseling and services to adolescents was unconstitutional because the program provided for the involvement of religious organizations in the federally funded programs.[206] In an opinion by Chief Justice Rehnquist, the Court upheld the law on its face, relying essentially on three arguments. The first was that the services provided—counseling and advising—were not religious in character. In addition, the Court relied quite strongly on the argument that the institutions that were receiving federal money were not "pervasively sectarian."[207] Finally,

---

> more, and belong to more civic groups than those who are not very committed religiously.

Shriver, *Religion's Very Public Presence*, 480 AM. ACAD. OF POL. & SOC. SCI. 142, 148 (1985). *See also* WALD, RELIGION & POLITICS IN THE UNITED STATES (1987).

204. 108 S. Ct. 2562 (1988).

205. Adolescent Family Life Act, Pub. L. 97-35, 95 Stat. 578, 42 U.S.C. § 300z et seq. (1982 ed. and Supp. III).

206. Section 300z-2 provides that demonstration projects funded by the government:

> shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary organizations.

207. 108 S. Ct. at 2575-76. The Court noted that this concept originated in the numerous cases involving state efforts to provide assistance to parochial schools. However, the Court also seemed to imply that *only* such institutions would be considered as such. Justice Blackmun in dissent responds to this suggestion in two ways. He maintains that the institutions receiving federal money under this federal program were much closer to being "pervasively sectarian" than Justice Rehnquist would admit. Second, Justice Blackmun argues that this finding is not dispositive of the issue because, "the Court never has treated the absence of such a finding as a license to disregard the potential for impermissible fostering of religion." *Id.* at 2587. For a critique of the "pervasively sectarian" standard see generally Gibney, *State Aid to Religious-Affiliated Schools: A Political Analysis*, 28 WM. & MARY L. REV. 119 (1986).

because these religious organizations were not pervasively sectarian[208] in nature, the Court held that there would be less need for government monitoring to ensure that recipients of federal money were not using the funds to advance religion.[209] From this, the Court reasoned there would be less danger of excessive entanglement between church and state.[210]

What are the implications of *Bowen* to the argument made here? *Bowen* could be read in a very liberal fashion, and as an indication that the Supreme Court will take a much broader view of church-state relations. Not only is federal money going to religious organizations to perform services where religious doctrines might be advanced,[211] but, as Justice Blackmun noted in dissent, the targeted audience is composed of young adults where the "Court's insistence on adequate safeguards has always been greatest."[212] Despite the similarities between the Court's decision in *Bowen* and the present discussion, however, there are at least two distinguishing features that would dictate an opposite result. The most basic difference is that the recipients of AFLA money were not to advance religion during the course of their work that was being funded with federal money.[213] In contrast, religious broadcasters readily admit that they are using the airwaves to pursue and promote "God's

208. In a concurring opinion, the newest member of the Court, Justice Kennedy, took the position that even if an institution was in fact "pervasively sectarian," this would not necessarily be dispositive of the issue. 108 S. Ct. at 2582. The implications of this position are unclear, although it would seem to indicate that in Justice Kennedy's eyes many of the school-aid cases have been wrongly decided.

209. *Id.* at 2577.

210. *Id.* at 2577-78.

211. In his dissenting opinion, Justice Blackmun pointed out that the record developed by the District Court showed a number of instances where employees of religious organizations had engaged in advancing religion during the course of their counseling activities. *Id.* at 2590 n.9. In her concurring opinion, Justice O'Connor maintained that the record of the lower court is less clear, but that even the majority opinion noted that "there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." *Id.* at 2581.

212. *Id.* at 2589.

213. Chief Justice Rehnquist writes:

> [N]othing in our prior cases warrants the presumption . . . that religiously affiliated AFLA grantees are not capable of carrying out their functions . . . in a lawful, secular manner. Only in the context of aid to "pervasively sectarian" institutions have we invalidated an aid program on the grounds that there was a "substantial" risk that aid . . . would, knowingly or unknowingly, result in religious indoctrination.

Id. at 2575-76.

work." A second point is that even if *Bowen* signals that the Court is now going to make a radical departure from its previous decisions and be primarily—perhaps solely—concerned with the distinction between pervasively sectarian institutions and those that are not,[214] still, it is clear that religious organizations that have their own broadcast licenses would certainly be considered pervasively sectarian institutions.

B. *The Problems Inherent in Government Regulation*

The second argument against the broadcasting of religious programming involves the inherent difficulty of regulating the content of such programs.[215] There have been a few isolated instances where the FCC has denied or revoked the license of those broadcasting religious programs. These cases, however, have not directly involved censorship of religious worship itself or the religious message sought to be conveyed.[216] Moreover, the Free Exercise Clause of the First Amendment protects against any form of religious censorship in terms of the content of the speech. Rather than using this as a rationale for decreased government regulation in this area, the better course would be to remove all religious broadcasts from the public airwaves. Otherwise, government will eventually find itself in the impossible (and unconstitutional) position of approving certain religious messages or broadcasts on the public airwaves and proscribing others.

In support of this argument consider the following perhaps not so hypothetical situation. A group that worships Satan wants to purchase some broadcasting time (perhaps even

214. Justice Rehnquist is not clear on this point, but his opinion seems to suggest that this distinction is paramount in determining whether the expenditure of state money advances religion or not. However, this certainly cannot be the case, otherwise this would allow all sorts of state money and benefits to go to religious organizations which were not somehow "pervasively sectarian." This would turn the Establishment Clause on its head.

215. Turley has suggested that government oversight and investigation of religious solicitation over the public airwaves has been virtually nonexistent, despite the *billions* of dollars involved, and despite the frequent charges of fraud. Turley, *supra* note 114, at 447-48.

216. Thus, cases such as Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938) (FCC determined that programming proposed by applicant was too narrow and tended toward religious propaganda); United Telephone Co. Inc., 55 F.C.C. 415 (1975) (broadcaster's religious programs were "deceptive, misleading, and tainted with criminal activity"); Scott v. Rosenberg, *supra* note 105, and Brandywine, *supra* note 102, are not a form of religious censorship.

obtain an FCC broadcast license) in order to show a devil worship ceremony.[217] In essence they want to do the "devil's work," and they want to reach as large an audience as possible, much like their televangelist brothers. The ceremony that this group is going to show over the public airwaves, the FCC has been warned, will include the slaughter of several young animals, and the blood from these carcasses will be smeared over the bodies of the worshippers who will be gyrating and chanting their love of the devil and the fine work that he has brought to earth—the holocaust, Pol Pot, AIDS, and the like.

Would the FCC allow *this* to be broadcast over the public airwaves? It is suggested that the FCC and/or the local licensee would undoubtedly interpret the "public interest"[218] standard to preclude this kind of ceremony from being broadcast. Yet the Free Exercise Clause prohibits government censorship, particularly if the FCC would, at the same time, allow other forms of religious programming and worship to remain on the public airwaves. This is by no means to countenance this kind of religious ceremony; the same arguments employed earlier[219] to remove "normal" kinds of religious programming would particularly apply in this context. In fact, these kinds of programs might well be quite attractive to the young and impressionable, but they would also have a devastating effect on those sectors of the population.[220] Again, however, the First Amendment prohibits the government from favoring one form of religious worship over another.[221] Thus far the FCC has apparently not yet been put in the position of censoring the content of religious programming, but that date might not be far away, and in any event the government should not place itself in the position where it would have to make those kinds of determinations.

C. *Religious Broadcasting and the Free Exercise Clause*

The final constitutional issue to address is whether the proposal to remove religious broadcasting from the public airwaves would violate the Free Exercise rights of televangelists

---

217. Lacey has pointed out the obstacles facing atheist groups attempting to obtain air time, either under the "fairness doctrine," *In re* "Fairness Doctrine" Request, Madalyn Murray, 40 F.C.C. 647 (1965), Lacey, *supra* note 103, at 253, or simply to buy air time, *id.* at 260 n.12.

218. *Supra* note 169 and accompanying text.

219. *Supra* notes 190-197 and accompanying text.

220. *See* Sharbutt, *Cauldron Boils Over Geraldo's 'Devil Worship'*, L.A. Times, Oct. 27, 1988, Sec. VI, p. 1.

221. *See supra* note 158.

and viewers of these programs. To begin this analysis, it is necessary to point out that if the public airwaves were not so saturated with religious broadcasts as they are, or if these broadcasts were not so dominated by Judeo-Christian messages, this proposal would not seem so radical in form. In fact, if there had been a history with no religious broadcasting on the public airwaves it is likely that efforts to initiate such broadcasting would seem as disconcerting as the proposal being suggested here. This, however, is not the world we live in, nor does it begin to describe the longstanding relationship between church and state, particularly in the area of public broadcasting. As a result, the proposed removal of religious broadcasts now after they have achieved a place of near permanence on the public airwaves will be viewed as disestablishment with a vengeance, perhaps even outright hostility to religion.[222] The same kind of argument was made regarding the Supreme Court's decision to prohibit prayer in the public schools. At times the Court has refused to recognize what would otherwise be obvious First Amendment violations because of tradition[223] or the history of a certain practice.[224] In the present situation, neither the longstanding historical relationship between religion and the mass media nor the apparent popularity of reli-

---

222. Justice Brennan made similar remarks concerning the nativity scene in question in *Lynch*:

> I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable. Although the Court's reluctance to disturb a community's chosen method of celebrating such an agreeable holiday is understandable, that cannot justify the Court's departure from controlling precedent.

465 U.S. at 696-97.

223. *See* Marsh v. Chambers, 463 U.S. 783 (1983) (Nebraska state legislature's practice of opening each session with prayer did not violate Establishment Clause because of its unique history); McGowan v. Maryland, 366 U.S. 420 (1961) (although state's Sunday closing laws were originally motivated by religious forces, with passage of time religious significance has abated); Lynch v. Donnelly, 465 U.S. 668 (1984) (religious icons merely a part of Christmas celebration tradition).

224. One critic of this position writes:

> When the Court relied on tradition to uphold the *Lynch* nativity scene and the legislative chaplaincy in *Marsh*, it essentially decreed that minority religions must accommodate majoritarian religious practices which have become part of, and legitimated by, American culture. The mere passage of time thus acts as a statute of limitations; a practice that continues long enough becomes a tradition, insulated from later establishment challenge.

Teitel, *supra* note 195, at 655-56 (1986).

gious broadcasting should serve to perpetuate these unconstitutional practices.

The purpose of the Free Exercise Clause is to allow individuals to pursue their own religious beliefs and to practice their religion as they see fit, without facing interference from the government.[225] This does not mean, however, that the government necessarily has to pursue policies to enhance the ability of individuals to practice their religious beliefs. As the Court held in *Abington School Dist. v. Schempp*,[226] "while the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs."[227]

Lacey[228] has suggested that the current approach to free exercise of religion questions entails a two part balancing process where the Court weighs the strength of the individual's free exercise rights against the state's interest in restricting those rights. "First, the Court will ask whether a regulation places a substantial burden on a religious belief, second it will ask whether the regulation is justified by an overriding or compelling government interest."[229]

Applying these competing interests to the proposal to remove religious broadcasting from the public airwaves, it becomes clear that there would be no Free Exercise Clause violations. To begin, religious beliefs—and practices for that matter—are not in question. That is, the government is not dictating to televangelists and adherents, either implicitly or explicitly, what their religious beliefs should be.[230] Preachers can still preach and believers can still believe as they have for

225. The most eloquent description came from Justice Jackson in Board of Education v. Barnette, 319 U.S. 624 (1943) a case involving a Free Exercise challenge to a coerced flag salute ceremony brought by a group of Jehovah Witnesses. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

226. 374 U.S. 203 (1963).

227. *Id.* at 226.

228. Lacey, *The Struggle Over Deregulation of Religiously-Affiliated Institutions: A Classic Internal First Amendment Conflict*, 26 ARIZ. L. REV. 615 (1984).

229. *Id.* at 633.

230. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (denying unemployment compensation benefits to one who refused to work on Saturday, her Sabbath, would constitute a violation of the Free Exercise Clause); *Accord* Thomas v. Review Bd. Indiana Employment Security Div., 450 U.S. 707 (1981). *But see* Bob Jones University v. United States, 461 U.S.

centuries. It is readily recognized that televangelists and viewers of religious programs will undoubtedly be inconvenienced (and outraged[231]) if the proposal suggested here were ever enacted. Still, it is not the government's role simply to make religious worship as easy and as convenient as possible. This principle was decidedly underscored in 1988 in *Lyng v. Northwest Indian Cemetery Protective Association*[232] where the Court rejected the Free Exercise objections of Yurok, Karok and Tolowa Indians to a road that was to be built by the U.S. Forest Service in an area considered sacred by these tribes. In writing for the Court, Justice O'Connor pointed to the limits of the Free Exercise Clause:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. . . . This does not and cannot imply that incidental effects of governmental programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit."[233]

The second concern to be balanced in the Free Exercise area is the government's interest in pursuing the policies that it has. Here—as in the school prayer cases—the government's interest is a "compelling" one: it acts to avoid violating the Constitution. In sum, the removal of religious broadcasting would not constitute a Free Exercise Clause violation for either the televangelist ministers or for viewers and/or listeners of such programs. Religious beliefs are not in issue, thus there is no action on the part of the government that is arguably trying to change one's religious beliefs. In terms of the government's interest, the removal of religious broadcasting should not be taken on the basis of administrative convenience[234] or good

574 (1983) (Court upheld IRS's denial of tax-exempt status for two private schools which racially discriminated on the basis of religious beliefs).

231. Hardy and Secrest, *supra* note 199 at 58, point out how a 1974 effort to "freeze" religious institutions' requests for television or FM channels brought forth over 11 million letters to the FCC expressing a fear of removing religious broadcasting from public airwaves.

232. 485 U.S. 439 (1988).

233. *Id.* at 450-51 (citations omitted).

234. *See* United States v. Lee, 455 U.S. 252 (1982) (refusing to make an

public policy.[235] Instead, the government should do so to avoid violations of both the Free Exercise Clause and the Establishment Clause of the First Amendment.

The removal of religious broadcasts from the public airwaves would change the nature of religion as we know it in American society. Some might find it more difficult to practice their religion (although others ultimately might find the opposite to be true).[236] Others would have the soothing comfort[237] of today's religious programs removed from the immediate reach of the dial. As noted earlier, however, this does not mean that religious programs would necessarily disappear from our television screens. Televangelists could still reach their audience by providing videocassettes of their religious sermons and messages. Adherents thereby still could see religious programs on their television screens and in the privacy of their own homes. What would change—and should change—is that individuals who simply do not want to hear these messages or else find them offensive or contrary to their religious beliefs would no longer be subjected to them.

V.

This final section moves away from a constitutional analysis, and focuses instead on how religious broadcasting has perverted religion and our religious way of life, all in the name of promoting it. Neil Postman, one of the leading critics of the mass media writes:

> Though it may be un-American to say it, not everything is *televisible*. Or to put it more precisely, what is televised is transformed from what it was to something else, which may or may not preserve its former essence. For the most part, television preachers have not seriously addressed this matter. They have assumed that what had formerly been done in a church or a tent, and face-to-

---

exception of collecting Social Security tax despite Free Exercise objections of Amish employer).

235. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (military policy would not allow orthodox Jew to wear yarmulke, despite Free Exercise Clause objections).

236. The school prayer cases—Engel v. Vitale and Abington School District v. Schempp—offer similar examples. In both cases it was argued that removing prayer and Bible reading from school would violate the Free Exercise rights of children who desired to do so. This argument, however, was not strong enough to withstand the fact that such practices violated the Establishment Clause.

237. *See infra* section V.

> face, can be done on television without loss of meaning, without changing the quality of the religious experience. Perhaps their failure to address the translation issue has its origin in the hubris engendered by the dazzling number of people to whom television gives them access.[238]

The inattention to the changing message is not just the fault of the media preachers, however. The recipients of the message apparently also like this new approach to religion. For one thing it makes far less demands on the individual: one can "experience" religion in the privacy of one's home without ever having actually to attend religious services. In addition, this form of religion is seemingly far more palatable than religion used to be, or than it should be. Postman writes:

> There is no great religious leader—from the Buddha to Moses to Jesus to Mohammed to Luther—who offered people what they want. Only what they need. But television is not well suited to offering people what they need. It is "user friendly." It is too easy to turn off. It is at its most alluring when it speaks the language of dynamic visual imagery. It does not accommodate complex language or stringent demands. As a consequence, what is preached on television is not anything like the Sermon on the Mount. Religious programs are filled with good cheer. They celebrate affluence. Their featured players become celebrities. Though their messages are trivial, the shows have high ratings, or rather, *because* their messages are trivial, the shows have high ratings.[239]

William Fore has similarly suggested that the marriage between the mass media and religion has undoubtedly bastardized and perverted the latter.[240] However, Fore also holds out hope that the mass media can play some role in advancing religious thought and practice in this country. This is a very high hope, and one that contradicts all available evidence of what the relationship between religion and the mass media has been. The current climate of deregulation in mass communication public policy merely exacerbates the problems discussed in this essay. Sectarian organizations have received broadcast licenses at a rate unthought of by government officials in the early days

238. N. POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 118 (1985).

239. *Id.* at 121.

240. *See generally*, W. FORE, *supra* note 80.

of radio regulation.[241] Not only does the government allow sectarian programming, but sectarian stations. Such a policy might be permissible if all organizations are treated the same.

But the current complexion of religious broadcasting indicates otherwise. Despite an "open marketplace" approach to the public airwaves, the result has been a *de facto* support of Judeo-Christian belief, predominantly conservative and Protestant. Herein lies a paradox. If government intervenes to rectify the situation, it moves beyond the proscribed limits set by the Establishment Clause as interpreted under *Lemon*. But only to accommodate religion to the degree suggested by *Lyng* perpetuates a type of religious discrimination that is constitutionally undesirable. In short, all religious beliefs are equal in America, but some beliefs are more equal than others when placed on television.

To some extent, the regulation of religion in general has become a Hobson's choice due to the casuistry to which the religion clauses have been subjected in the last fifty years. The issue of religion and the public airwaves reveals the tensions that result from such a course. Unfortunately, the public policy debate surrounding the issue seems likely to remain at a level far removed from the deep concerns raised here. The decisions with regard to religious broadcasting will continue to deal with side issues. If, however, the broader constitutional issues are reached (and it is probable that they will not be), the course that ultimately will be more beneficial to religion, our constitutional values, and to the American people, will be to remove religious broadcasting from the public airwaves altogether.

241. *See supra* notes 2 and 3.