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Regulating Religious Broadcasting: Some Comparative Reflections

Rodney K. Smith*

I. INTRODUCTION

The number of television sets in homes worldwide has grown from approximately 400 million in 1978 to almost 650 million in 1988 and to over one billion today.¹ This dramatic growth continues, and there is no indication that it is slowing. With television sets in an ever increasing number of homes worldwide, issues related to the regulation of television broadcasting² take on

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1. It has been calculated that from 1979 to 1988, "the number of television sets in the world increased from 399,208,674 to 648,480,765." Donna C. Gregg, *Opening the International Television Market to Greater Program Diversity*, 14 N.C. J. INT'L L. & COM. REG. 239, 239 (1989). By 1995, the number of television sets worldwide had increased to 985,943,727. See WORLD RADIO TV HANDBOOK 382-439 (Andrew G. Sennitt ed., 1995) (The number of television sets was calculated based on numbers provided by nation and continent.). It is also reported that Toshiba's "[w]orld TV market exceeded 100 million sets for the first time [in 1994] Sales rose by 8.4% to 104.3 million sets from 96.2 million in 1993." TELEVISION DIG., July 31, 1995, at 16. Given this rapid growth rate, it is clear that there are more than one billion television sets in the world today.

2. One author has noted:

When we refer to the media today we refer to an array of communication systems that, in their collective strength, are truly staggering. The media comprise many avenues of dissemination: books, newspapers, journals, magazines, proceedings, documents of various kinds, tapes, cassettes, faxes, satellite dishes, Internet, television and radio, stage, screen, happenings, museums.

James Finn, *The Cultivation and Protection of Religious Human Rights: The Role of the Media*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 161 (Johan D. van der Vyver & John Witte, Jr. eds., 1996). This Article will largely focus on television and related media as a broadcasting medium. When the term "broadcasting" is used, therefore, it will generally refer to television. Even though the emphasis is on television, the discussion often can be equally applicable to other broadcasting media.

added significance because regulations can determine who or what information is permitted to find its way into the homes of the populace. Even though admission of a broadcasting signal into a home does not ensure that a particular program will be watched, regulations prohibiting or limiting entry increase the likelihood that a certain message will not be received or will completely prevent reception in a particular household.

It is not surprising, therefore, that Serge Regourd recently observed that "a nation is owned by [the one] who controls the media of communication."³ Although Regourd may be indulging in an overstatement, it must be acknowledged that the media has enormous potential power in our lives as a political, economic, cultural, and even religious matter.⁴

The media has increasingly played a significant role in the political arena. In some democratic countries, the broadcast media, particularly television, has come to dominate electioneering by candidates for political office.⁵ Vast sums of money are expended in efforts to obtain media time to reach the electorate in their homes.⁶ Even politicians in office scramble to use the media

3. SERGE REGOURD, *LA TÉLÉVISION DES EUROPÉENS* 8 (1992), quoted in Laurence G.C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 *EMORY INT'L L. REV.* 255, 255 (1994).

4. James Finn points out, "In the protection and cultivation of human rights, the media play a crucial, though not . . . uncontroversial role." Finn, *supra* note 2, at 161.

5. One commentator recently noted:

Up until ten years ago, academics insisted that the media had only a minimal effect on political behavior. Audiences, the academics insisted, were "autonomous": they made up their minds about politics on pre-existing grounds of income, party identification, whatever. Now, however, television is thought to "frame the issue"; even if it does not tell people what to think, it tells them what to think about.

ECONOMIST, Jan. 25, 1995, at 31. In an interview of a number of political advisors in Great Britain, Jack Cunningham, Member of Parliament, and campaign coordinator for the Labor party, emphasized, "When it comes to campaigning, remember it's TV first, second and third." Clare Sambrook, *Selling the Party: The Campaigners Talk Political Marketing*, *MARKETING*, Mar. 12, 1992, at 17. Des Wilson, campaign director for the Liberal Democrats in Britain, adds:

These days in one television appearance politicians can get through to more people than, say, Gladstone saw in his entire life, or than they would talk to if they went into a townhall every night for the next five years. . . . The media builds leaders up. . . . So get your leader on the telly at every possible opportunity.

Id. (first alteration in original).

6. In the United States it is reported that "[p]oliticians across the country spent a record \$350 million on television advertising in [the] 1994 [elections], a 17 percent

to reach the electorate for the purpose of garnering support for a particular political agenda.⁷ In countries in which the media is controlled by the government or the party in power, efforts to prevent opposition groups from gaining effective access to the media contribute to minimizing the impact of opposition views.⁸

increase from the previous record of \$299.6 million in 1992." Michael Freeman, *Pols Set Spending Record*, *MEDIAWEEK*, Nov. 14, 1994, at 6. It is anticipated that this figure will be eclipsed in 1996: "The Television Bureau of Advertising, or TVB, is expected to report to its member stations within the next 10 days that 1996 political advertising spending will exceed \$500 million, a jump of 41% from 1994's \$355 million and a 67% increase from 1992's \$300 million." Kevin Goldman, *Jump in Ad Outlays Should Make TV a Winner in 1996 Elections*, *WALL ST. J.*, July 14, 1996, at B6. In other nations similar expenditures on television are not unusual, even though the figures are not as dramatic as those recorded in the United States. In Australia, for example, "[m]ore than \$22 million was spent on ads during the five week campaign [in 1993] by political parties, representative organizations, unions, businesses and consumer groups." Penny Warneford, *Australia Endures Election Ad Blitz*, *ADWEEK* (Eastern Edition), Mar. 22, 1993, at 14. Warneford adds that these spending efforts and their fruits

attracted more complaints to the ad industry watchdog, the Advertising Standards Council, than any other campaign in Australian history. The ASC met to decide whether the parties should be forced to pull their campaigns, said to be factually misleading. The Council ruled that, as political promotion, the spots constituted advocacy advertising, deemed opinion rather than fact.

Id.

Concerns over the misleading nature of political advertising has led some nations, such as France, to place strict regulations on political advertising. In France, "[i]n lieu of conventional advertising, each candidate is allotted free equal TV and radio time on government channels during the two weeks before the first-round vote. During this period, candidates usually present documentary-style footage that mops out their positions. Negative or comparative messages are prohibited." *Id.*

7. For example, a major advertising campaign designed by the Democratic National Committee to influence public opinion regarding health care issues in the United States was launched in 1994. See Roy Furchgott & Nora FitzGerald, *Pols Turn to TV for Healthcare Cure*, *ADWEEK* (Eastern Edition), July 4, 1994, at 4. That campaign was largely unsuccessful, however, because they were countered by a series of effective spots designed to oppose the Clinton health care platform. Rance Crain, *Politicians Respect Ads More Than CEOs*, *ADVERTISING AGE*, Sept. 5, 1994, at 16. Even in France, where political advertisements by candidates are strictly regulated, issue-oriented television advertising campaigns have been promoted by the government in an effort to increase private ownership of state companies to block renationalization efforts. See Philip Revzin, *Selling Capitalism: France Urges Citizenry to Break with Habit, Become Stockholders*, *WALL ST. J.*, Nov. 5, 1986, at 1, 33.

8. For example, as a result of the "nearly airtight government control of Cuba's media . . . not one compelling opposition figure has emerged in thirty-one years to rally dissent against Castro." Katherine Ellison, *Succeeding Castro: Will Cuba's Revolutionary Hero Share the Fate of Other Communist Leaders?*, *ATLANTIC MONTHLY*, June 1990, at 36. Similar prohibitions on access have hampered efforts of opposition groups in other nations. See, e.g., Jim Mann, *Nationalism Is Changing the Face of Taiwan Politics*, *L.A. TIMES*, Dec. 12, 1986, at 1 (discussing government dominance of the media and the exclusion of opposition parties from the media); Leonard R.

The economic influence of the media is also noteworthy. Significant sums are expended in many countries for advertising⁹ in recognition of the fact that advertising is an effective means of inducing the consumer to purchase a given product.¹⁰ This influence has, in turn, helped establish broadcasting as a significant industry in national and international markets.¹¹ Indeed, in its

Sussman, *'Pressticide' and Press Ethics*, EDITOR & PUBLISHER, Jan. 14, 1995, at 30 (noting government control and closing of the media in Tajikistan); Richard Zoglin, *Subversion by Cassette*, TIME, Sept. 11, 1989, at 80 (describing the use of video cassettes to counter government control of the media and exclusion of the opposition party in Burma from the media).

9. The expenditure of significant sums for advertising, particularly in developed countries, has been documented. According to THE ECONOMIST BOOK OF VITAL WORLD STATISTICS 130 (1990), which relies on figures from the late 1980s, many nations spend billions of dollars in advertising each year, with expenditures in the U.S. exceeding 100 billion dollars:

Advertising is a phenomenon of free markets and consumers with high levels of disposable income. It is not surprising therefore that the US and Japan head the list of advertising spenders, although with very different patterns of spending. Print advertising is proportionately much more important in the US. Television advertising accounts for as much as half the total in southern Europe and various developing countries.

The US spends more than five times as much on advertising as Japan, its nearest rival, but in terms of spending per head the gap narrows—almost \$450 a person compared with \$190. Within the OECD, the highest spenders in per capita terms are Switzerland (\$277) and Finland (\$252), although most European countries spend between \$100-200 a head, considerably less in southern Europe. Hong Kong is the highest spender per head among non-OECD countries at \$88, slightly more than Austria and Spain.

Id. The U.S. is reported as spending 34.2% of its advertising dollars on television, 47.8% on print, 10.4% on radio, and 1.9% on outdoor/transit. *Id.* By 1993, advertising expenditures in the U.S. alone exceeded 138 billion dollars. THE AMERICAN ALMANAC 580 (114th ed. 1995).

10. The impact of television advertising has been acknowledged:

Although some viewers regard TV advertising as exaggerated and misleading, the medium has an undeniable capacity to induce belief because, as the old saying goes, seeing is believing. Viewers can actually see product users succeed where they have formerly failed, smile with satisfaction, and receive the visible and tangible rewards of success—praise, gratitude, and approval.

ALBERT C. BOOK ET AL., THE RADIO AND TELEVISION COMMERCIAL 98 (2d ed. 1992). Those authors add that "[t]here are many who question the psychological and cultural benefits of television. However, few can deny that, for better or worse, television has transformed American life, especially the consumer marketplace. Television reaches big numbers of people with big impact at big costs. *Id.*

11. For example, in the United States, revenues generated by radio and television broadcasting increased dramatically from \$13 billion in 1985 to \$23 billion in 1991. Based on 1991 figures, radio and television revenues compared favorably to revenues generated by other mainstays in the U.S. market: transportation services (\$13 billion);

efforts to maintain a favorable balance of trade with Europe, the United States has increasingly found it necessary to promote its broadcasting and entertainment industries abroad.¹²

The influence of broadcasting on national, regional, and world culture is significant.¹³ It should not be surprising, therefore, that many nations and regions have used public regulation of broadcasting to limit access to certain programming.¹⁴ Nevertheless, even though European nations fear the impact of television on their culture and economy and have implemented regula-

lumber and wood products (\$26 billion); petroleum and coal products (\$23 billion); and apparel and other textile products (\$24 billion). *THE AMERICAN ALMANAC*, *supra* note 9, at 447.

12. Battles over quotas imposed in Europe limiting the broadcasting of entertainment and related materials exported by the United States demonstrate the importance of such material to trade policy in the United States. See, e.g., Jon Filipek, "Cultural Quotas": *The Trade Controversy over the European Community's Broadcasting Directive*, 28 *STAN. J. INT'L L.* 323 (1992). Another author adds, "One of the United States' most valuable trade commodities in the European Union is its popular culture. The entertainment industry accounts for the United States' second largest export." Jamie Shelden, *Television Without Frontiers: A Case Study of Turner Broadcasting's New Channel in the Community—Does It Violate the Directive*, 7 *TRANSNAT'L LAW.* 523, 524 (1994).

13. See, e.g., Kaplan, *supra* note 3. Kaplan argues that European fears regarding a "cultural crisis" caused by American television are well founded. He asserts:

The European Community (EC) reacted to this predicament by passing a Directive—a law—requiring that its members dedicate at least one-half of their television air time to European-made programs. The Directive was the European answer to the fear that European culture was being assimilated into the "Great American Melting Pot", a fear corroborated by numbers, statistics, and trends. The tentacular American intrusion seemed to undermine the cultural autonomy (and in so doing stifled the cultural creativity) of the European countries. The experience was especially galling to the "old world" precisely because it was old and took pride in its multi-secular capital of culture. It was one thing for the United States to purvey jeans and Coca-Cola; it was wholly another, and far more ominous, to commodify culture.

Id. at 256.

Responding to the imposition of quotas, as a result of passage of the Broadcasting Directive, Jon Filipek agrees, at least in part, with Lawrence Kaplan: "The United States demands that the European works quota be altogether eliminated. But some level of air time is going to be reserved for works of national, or 'European,' origin. It cannot be denied that television programming has a cultural quality that is of concern to national governments." Filipek, *supra* note 12, at 369. Filipek, however, acknowledges that "early evidence [regarding enforcement of the Directive's quota] suggests that national authorities responsible for implementing the quota are less interested in preserving the national identity than in fortifying the European entertainment industry." *Id.*

14. See ERIC BARENDT, *BROADCASTING LAW* 96-111 (1993) for a comparative analysis of program standards in a number of nations.

tions to deal with anticipated excesses, they have sought to open the market, at least among members of the European Community, and to ensure some exposure to a wide variety of programming.¹⁵ It is likely, however, that the interrelationship between economic interests, in terms of protecting a nation's or region's (as is the case with Europe) own broadcasting and entertainment industries by limiting access to programming from another country, and the expression of cultural concerns, is not coincidental.¹⁶ Cooperative efforts in Europe to harmonize, or at least coordinate, broadcast regulations and to create "television without frontiers" evidence an increasing willingness to deregulate on a national basis as well as the notion that such deregulation does not have an immediate and adverse effect on general European economic and cultural concerns.¹⁷ This move toward regional reg-

15. Professor Barendt summarizes the Broadcasting Directive, as applied to European participants:

In its final version the Directive is presented as a co-ordinating, rather than a harmonizing, instrument. As already stated, the fundamental principle is that provided broadcasts satisfy its minimum standards, other member states must ensure freedom of reception and not restrict retransmission on their territory. There is, however, a very limited right to suspend retransmission where there is clearly a serious and repeated breach by the transmitting state of its obligation to ensure that violent and pornographic programmes do not prejudice the development of minors. This represents a much narrower concession to the interests of recipient states than that allowed in the Council of Europe Convention. Member states remain free to impose more stringent controls on their own internal broadcasts.

Id. at 234 (footnotes omitted).

16. As is the case in Europe, cultural and economic concerns combine to provide the basis for regulatory policy that restricts competition from other cultures and economic forces, especially the United States. The economic and cultural basis of regulations work in concert, although from a policy perspective, regulation to preserve a culture seems to be less suspect than regulation based on economic protectionism.

17. Speaking of the European experience, Professor Wolfgang Hoffman-Riem concluded:

The motivation for legal harmonization in the EC [by virtue of the Directive] is relatively easy to understand. The traditional structures of the European markets in the audiovisual sector are still quite heterogeneous. The international ramifications of technology and industry, however, make it possible to think in terms of large regions and markets in telecommunications. In addition, European cooperation in broadcasting has a long tradition. A Europe-wide market for the production and use of broadcast programs has existed for some time, and there is multinational cooperation in their distribution. The privatization and development of satellite technology has also provided numerous commercial stimuli for harmonization. Broadcasting is also important to Europe's political integration. Industrial policy also requires a unified media market to ensure that European companies remain competitive.

ulation through the creation of "television without frontiers," however, may ultimately lead to international regulation ("television without *any* frontiers") that would necessarily have the effect of undermining regional, cultural, and economic concerns to some extent.¹⁸

Finally, in areas in which politics, economics, and culture collide, religious issues will generally be raised as well. This is certainly true in the broadcasting context. Many religions engage in proselyting in one form or another. For those religions, access to broadcasting media may provide needed access to the souls of listeners and viewers. Broadcast regulation is important for nonproselyting religions, as well, because use of the media may be an effective means of reaching existing members of those religions in an effort to maintain their allegiance and to help develop the faith of their children. Additionally, especially where they are in a majority, nonproselyting religions often seek to use broadcasting regulation to limit the capacity of minority religions to gain converts from among adherents of the majority religion. Majority religions do so by regulating broadcasting in a manner that limits the access of minority religions to the media or by increasing their own share of time on the media.

Acknowledging the importance of broadcasting regulation in the realm of religion, this Article seeks to examine the impact of broadcasting regulation on religion. Part II discusses the various rationales proffered in support of regulatory efforts. Part III sets forth an analytical framework by distinguishing between the

Finally, there is concern that "Americanization" jeopardizes European traditions and cultural identity. Therefore, since the beginning of the 1980's, the institutions of the EC have tried to create "television without frontiers."

Wolfgang Hoffman-Riem, *The Broadcasting Activities of the European Community and Their Implications for National Broadcasting in Europe*, 16 HASTINGS INT'L & COMP. L. REV. 599, 606 (1993) (footnotes omitted). This move toward regional and perhaps, eventually, international integration is discussed at greater length. See *infra* notes 72-81 and accompanying text.

18. In an international world characterized by "television without [any] frontiers," Hoffman-Riem, *supra* note 17, at 606, some regulations designed to foster regional and even national culture might persist in the likely form of regulations that require a certain amount of local programming. Those access regulations, however, would necessarily be limited by the very expansiveness of the frontiers. With broader frontiers, or no frontiers at all, viewers would be given more programming from which to choose and would be less likely to opt for local programming unless it is a competitive product. Cultural protections will, as a practical matter, suffer as a result of such expansion.

nature of regulation (formal and informal) and the forms (direct and indirect) of broadcast regulation. Part IV examines three regulatory models that deal specifically with religious broadcasting, and Part V is a brief conclusion. As this outline reveals, however, this Article does not purport to be exhaustive. Rather, it is illustrative in its analysis of comparative materials related to broadcasting. Also, this Article does not claim to be definitive from a theoretical perspective. Rather, it seeks merely to raise issues and thereby contribute to the scholarly dialogue.

II. JUSTIFICATIONS FOR BROADCASTING REGULATION

Despite the fact that there are those who support deregulation of broadcasting and complete reliance on market forces¹⁹ and despite the presence of a developing trend toward increasing deregulation in broadcasting,²⁰ a number of justifications for regulating the media have been accepted and serve as the continuing basis for existing regulation. Understanding these reasons for regulation assists in evaluating efforts to regulate religious broadcasting.

The major rationale offered to support broadcast regulation is scarcity. In *Red Lion Broadcasting Co. v. FCC*,²¹ Justice White summarized the scarcity rationale:

Before 1927 [in the United States], the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing

19. See, e.g., *infra* text accompanying notes 86-88 (outlining Ayn Rand's position).

20. Professor Barendt notes:

[T]he controls on broadcasting are now being reduced. This is most clearly the case in the United States, where in the last few years the Federal Communications Commission (FCC) has repealed most of the restrictions previously imposed on licensees. Similar developments have occurred in Britain and France, though deregulation has not gone nearly so far. Arguably, even in Europe, the regulation which remains in place is increasingly of a cosmetic character.

BARENDT, *supra* note 14, at 2.

21. 395 U.S. 367 (1969).

applicants in a manner responsive to the public "convenience, interest, or necessity."²²

Another commentator notes that courts in the United States permit much more extensive regulation of broadcasting than of the press on the ground that:

The unique nature of electronic media and the present state of the art mean that there is no comparable right of everyone to broadcast on radio and television what one could speak, write, or publish elsewhere. Frequencies presently available for wireless broadcast are finite, and when some are given the privilege to use some bands of the airways, others must be denied. No particular licensee has a First Amendment right to broadcast and his existing privilege may be qualified through reasonable regulation.²³

This scarcity justification has been accepted as a rationale supporting broadcast regulation in many nations.²⁴

However, this rationale, which has been used to distinguish broadcast media (where regulation is widely permitted) from print media (where regulation is often much more limited), has been undercut somewhat by technological developments. With cable television and related technological advances, access to broadcasting is arguably no more limited than is access to the print media, which has recently been subjected to considerable monopolization, resulting in decreased access.²⁵

22. *Id.* at 375-77 (alteration in original) (footnotes omitted). Reed E. Hundt, Chairman of the Federal Communications Commission, recently recounted:

The theory of broadcast policy has its origins in the Communications Act of 1934, which adopted a uniquely American approach to regulating the new technology of broadcasting. Broadcasters would be private, Congress decided, but the frequency spectrum would remain public and its use would be limited to those who served the "public interest." Ever since, implementation of that theory has required an effort to find a balance between permitting commercial use of the public airwaves by the private sector and ensuring that this private use accords with the public's view on the desirable use of this very public resource.

Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 528-29 (1996) (footnotes omitted).

23. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1028 (5th ed. 1995).

24. BARENDT, *supra* note 14, at 4-6.

25. Chairman Hundt acknowledges that scarcity arguments have been challenged on technological grounds but asserts:

There are additional justifications for permitting the regulation of broadcasting.²⁶ Professor Hoffman-Riem, for example, notes:

While there are almost no special regulations in the area of the press, Europe has a long tradition in broadcasting regulation. The justification is not limited to spectrum scarcity. Other justifications refer to prohibitive costs, to the threat of a high concentration of ownership, and to broadcasting's unique persuasiveness and influence on society.²⁷

Thus, although available access to the broadcast media has theoretically increased due to the development of new broadcasting technology, actual access to the broadcast media may remain

The facts demonstrate the continuing scarcity of the broadcast spectrum despite technological breakthroughs. Engineers are devising new ways—notably, digitization—to get more use out of the spectrum. But they are figuring out new ways to use the spectrum even more quickly than they are figuring out how to use the spectrum more efficiently.

The constraint on the use of spectrum is illustrated by the fact that bidders recently paid \$7.7 billion for licenses to use sixty megahertz of spectrum to provide wireless telecommunications services. The losing bidders are shut out of the wireless telecommunications market. If one of them subsequently persuades a winning bidder to sell its license, that winning bidder will have to relinquish its use of the spectrum. In short, at present, it is simply not possible for more than a handful of broadcasters to use the spectrum in any geographic area.

Hundt, *supra* note 22, at 542. Professor Bollinger counters that, even if there is empirical support for the scarcity rationale, the rationale does not necessarily justify the legal distinctions that have been drawn in the United States between broadcast and print media:

The scarcity rationale does not, however, explain why what appears to be a similar phenomenon of natural monopolization within the newspaper industry does not constitute an equally appropriate occasion for access regulation. A difference in the cause of concentration—the exhaustion of a physical element necessary for communication in broadcasting as contrasted with the economic constraints on the number of possible competitors in the print media—would seem far less relevant from a first amendment standpoint than the fact of concentration itself.

Lee Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 10-11 (1976) (footnotes omitted).

Whether the scarcity rationale, as developed in case law in the United States to distinguish between broadcast and print media for regulatory purposes, is supportable as an empirical or a theoretical matter remains at issue. However, the scarcity rationale is the historic source that continues to be articulated as a justification for regulating broadcasting.

26. For an effective discussion of four additional justifications, see BARENDT, *supra* note 14, at 4-10.

27. Hoffman-Riem, *supra* note 17, at 601.

limited by cost factors and by the concentration of ownership in a few hands.²⁸ Even if cost and ownership limitations on access to broadcasting are minimized over time, the unique persuasiveness²⁹ and pervasiveness³⁰ of the broadcasting media, particularly television, may continue to provide some justification for regulating broadcasting more vigorously than the press.

Television packages ideas in a particularly powerful visual medium. That medium has a significant capacity to influence or shape views, and regulation is frequently justified as being in the public interest in a political³¹ and a cultural³² sense. Given the peculiar influence of television, the broadcast media is often considered to be a public resource that must be regulated in the public interest³³ in ways that the press is not.

28. As Professor Bollinger notes, however, this cost or monopolization justification may apply as much to the print media as to broadcasting. See Bollinger, *supra* note 25, at 10-11. Nevertheless, these factors have served as justifications for regulating broadcasting. With the rise of the Internet and other media that blend broadcasting and print media, the historic solicitude (in terms of nonregulation) offered to the print but not the broadcast media may gradually come to an end.

29. The saying "a picture is worth a thousand words" captures the unique persuasiveness of television broadcasting. Words may conjure up images, but television provides the image without requiring any act on the part of the viewer. Furthermore, words are subject to interpretation and argument in ways that visual images may not be.

30. As noted previously, the growth of television has placed broadcast media in most homes in the developed world. See *supra* note 1.

31. Professor Hoffman-Riem, for example, recognizes an affirmative role on the part of government in "guaranteeing the functioning of broadcasting order and in protecting the public interest, including the democratic quality of public discourse . . ." Hoffman-Riem, *supra* note 17, at 601.

32. The European desire to protect its culture and moral foundations against the intrusiveness of American television programming illustrates the belief that culture is severely impacted by the broadcasting media. In a poem, Wendell Berry captures this concern over the impact of the media:

TV, computers, and the Internet
 Democratize our sins, so that
 The smallest child may have a dirty mind,
 And this is progress for our kind

Wendell Berry, *The Air of the Free*, reprinted in PROGRESSIVE, July 1996, at 32.

33. Chairman Hundt states:

[S]tudies have found that violence on television harms children. Conversely, other studies have found that educational television helps children—that it can prepare children, particularly lower income children, for school, and that it can mean the difference between whether a child will develop into a full participant in our economy and our democracy.

Hundt, *supra* note 22, at 540 (footnote omitted). In supporting his call for a new paradigm in regulating broadcasting, Hundt adds, "It seems to me that broadcasters

The broadcast media is also pervasive in that the broadcast signal regularly finds its way into the homes of the populace. Certainly, a viewer may decline to watch a particular program, but the signal enters the home nevertheless, waiting only to be activated by the viewer. Radio signals and communications through the Internet and other media share, in some measure, this pervasiveness in ways that the press does not. The inherent persuasiveness and pervasiveness of the broadcast media raise serious policy concerns that translate into regulatory issues. For example, numerous regulations have been justified on the ground that they are necessary to protect children against obscene, pornographic, or particularly violent programming to which they may have access.³⁴

Thus, in addition to the scarcity rationale, the cost, persuasiveness, and pervasiveness of broadcasting may justify a higher level of regulation than is applied to the print media. Even without accepting these justifications for a higher level of regulation of broadcasting than for the print media, Professor Bollinger asserts that the newer medium—broadcasting—should be regulated more vigorously than the older medium—the press—has been. He argues that greater regulation of broadcasting merely compensates for the long-standing tradition of underregulation of the press.³⁵

have an obligation to respond to the growing body of evidence establishing the social costs of violent programming and the lost benefits of educational programming." *Id.* at 541.

34. See, e.g., Children's Television Act of 1990, 47 U.S.C. §§ 303a, 303b (1994); NEWTON MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* (1995); Hundt, *supra* note 22 (for responses in the United States). For a discussion of the regulation of indecency and violence in programming in Europe see *infra* note 63 and BARENDT, *supra* note 14, at 112-15.

35. Bollinger, *supra* note 25, at 27-37. Professor Barendt summarizes Professor Bollinger's view as follows:

[Bollinger] admits that there is no fundamental difference in the character of the two mass media. But they have been perceived as different, a phenomenon to be explained in terms of their history. Broadcasting is still a relatively new means of mass communication, and it is understandable that society has wanted to regulate it, just as it has treated the cinema with more caution than it has the theatre. Bollinger's case is, however, not based solely on tradition. He justifies the divergent treatment of the two media on the ground that society is entitled to remedy the deficiencies of an unregulated press with a regulated broadcasting system. That may be preferable to attempting to regulate both sectors. Regulation poses the danger of government control, a risk which is reduced if one branch of the media is left free.

The debate over public regulation of broadcasting, as opposed to reliance solely on market factors, will likely continue regardless of whether the empirical basis for the scarcity and other regulatory rationales is undercut with new technological advances or with increased solicitude for the rights of the broadcaster. Furthermore, it remains unlikely that regulation will diminish significantly, although the globalization of broadcasting will probably result in some melding of various regulatory systems into a uniform set of regulations allowing fairly broad latitude to market forces.³⁶ In that process of formal and informal harmonization, various models related to religious broadcasting should be considered.

III. FORMS OF REGULATION

Regulation of religious broadcasting comes in two basic forms: (1) specific regulatory rules that affect religious broadcasting, which may be referred to as formal regulation and (2) informal regulation based on cultural, technological, economic and other factors that effectively limit access to and affect the content of religious broadcasting without taking the form of a written regulation. Informal limitations of this sort do not come in the form of express regulatory rules promulgated by an agency or other rulemaking body, but they have much of the same limiting effect.

A. Formal Regulations

Formal regulations may also be divided into two types: (1) direct regulation—rules that are expressly intended to regulate religious broadcasting and (2) indirect regulation—rules that are not expressly intended to regulate religious broadcasting but substantially affect religious broadcasting. It will be helpful to

BARENDT, *supra* note 14, at 8. Professor Barendt, however, concludes that Bollinger's compromise is "unsatisfactory" and lacks "coherence" because "it attempts to justify unequal treatment of the liberties of broadcasters and newspaper proprietors and editors, when in all material respects their position is identical." *Id.* He adds that, "the partial remedy of regulating one sector of the media to correct market defects in the other is clumsy." *Id.* at 9. In a practical sense, whether one accepts the various rationales for its regulation, broadcasting has historically been subject to more regulation, which is likely to continue in the future.

36. For a discussion of this phenomenon see *infra* notes 72-80 and accompanying text.

examine direct and indirect regulations separately, using examples of each. It should be noted, however, that the examples used are not intended to constitute an exhaustive comparative examination of extant regulations in various jurisdictions; rather, they are used merely to provide the reader with a sense of the types of regulation that are currently being used.³⁷

1. *Direct formal regulations*

Jurisdictions have often resorted to direct formal regulation in dealing with access and content issues related to religious broadcasting. If placed on a continuum, regulations of religious broadcasting range from outright prohibitions placed on religious broadcasting at one end to complete reliance on market factors as the sole means of allocating time for religious broadcasting at the other end. In between these two poles is a broad middle ground, occupied by a variety of regulatory systems designed to provide religious broadcasters with access under some quota or related allocational methodology. The continuum may be delineated as follows:

Prohibitions — Allocational Regulations — Market

A brief examination of some of the forms that regulation has taken at points along the continuum will be illustrative.

a. Regulations prohibiting religious broadcasting. Outright or total prohibitions on access for religious broadcasting have historically been used by more totalitarian regimes, which seek to control religious broadcasting for political and ideological reasons.³⁸ Not surprisingly, with the global trend toward democrati-

37. An exhaustive comparative treatment of formal and informal regulations affecting religious broadcasting is beyond the scope of this Article. The Article is intended to introduce the reader to the various theoretical permutations that occur and that should be considered by policymakers making choices about the regulation of religious broadcasting.

38. See Gregg, *supra* note 1, at 244. Totalitarian regimes committed to control of the media for political reasons often prevent religious broadcasters from gaining access to the media on Marxist (religion as the opium of the people) and other grounds. The People's Republic of China limits religious broadcasting on the further ground that the government is opposed to having its people involved with nongovernmental associations, claiming that such associations undermine the solidarity of the state. *Id.* For a further discussion of outright and related prohibitions on religious broadcasting, see *infra* text accompanying notes 39-44.

zation and a free market, outright prohibitions on religious broadcasting are rarer than they once were.

Despite the move toward democratization and a freer broadcasting market with increased access for religious organizations, significant limitations remain. In Poland, for example there are major limitations on access to the airwaves for non-Christian religious organizations. These limitations have been sustained by the Polish Constitutional Court.³⁹

Additionally, some antipathy toward religious advertising and paid religious programming is evidenced in regulations in place throughout much of Europe. For example, in Britain until 1989, religious advertising in the broadcasting media was prohibited under the Broadcasting Act 1981.⁴⁰ With passage of section 8 of the Broadcasting Act 1990, however, religious advertising was permitted in Britain under a number of restrictions.⁴¹ The Broadcasting Directive adopted by the European Community's Council of Ministers on October 3, 1989⁴² also limits religious advertising in broadcasting if that advertising is found to "be offensive to religious or political beliefs."⁴³ If read broadly,

39. In the "Christian Values Case," decided June 7, 1994, the Polish Constitutional Court upheld a portion of Poland's broadcast law that provided for the promotion of Christian values in broadcasting. Telephone Interview with Leszek Garlicki, Member of the Polish Constitutional Court (Nov. 1996). It is also likely that "Christian" will largely be defined in light of Catholic doctrine.

40. BARENDT, *supra* note 14, at 152. Some general religious programming was permitted, but religions could not buy time for programming. Political advertising was also prohibited until 1990.

41. Professor Barendt summarizes the Act as follows:

The most important standards in the [Act] are that 'advertisements must be clearly distinguishable as such and recognisably separate from the programmes', and that they must be legal, decent, honest, and truthful. (Similar requirements are found in other systems, for example, in the Italian broadcasting statute and in the decrees and *cahiers des charges* governing the French broadcasting companies.)

Id. at 199 (footnotes omitted). The general requirement that advertisements be "legal, decent, honest, and truthful," could limit religious broadcasting by a minority religion that engages in proselyting and may be perceived as challenging (acting indecently relative to) an established religion and its adherents.

As to the direct regulation of religious advertising, Barendt adds, "The absolute ban on advertising by religious bodies or for religious purposes has been removed, but these commercials will only be accepted in certain types of case [sic] and subject to a number of restrictions. Broadly they may provide information about religious services and other activities, but not fundraise." *Id.*

42. Council Directive 89/552, 1989 O.J. (L 298) 23 (commonly referred to as the "Television Without Frontiers Directive").

43. *Id.* art. 12(c). Article 22 of the Directive requires "Member States" to further

limitations of this sort may ultimately constitute a ban on virtually all paid religious broadcasting by evangelical and other groups promoting their faith or seeking converts through proselyting on television because such proselyting might be considered to be "offensive" to the religious beliefs of others.⁴⁴ Similar limitations on paid religious programming were self-imposed by the major broadcasters in the United States for nearly 30 years (from 1927 to 1956), effectively preventing evangelical and other nonmainline religious groups from gaining access to the broadcast media.⁴⁵ Even though outright prohibitions on religious broadcasting rarely appear in the regulation of contemporary broadcasting, other types of prohibitions may effectively prevent certain religions from gaining access to the media.

b. Regulations allocating access for religious broadcasting. Contemporary prohibitions on religious broadcasting are frequently limited to particular religious groups or combined with some other system that provides access only to certain religious broadcasters, as was the case in the United States from 1927 to 1956.⁴⁶ For example, as Britain has moved away from its complete ban on religious advertising and paid

"ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality." *Id.* art. 22.

44. Since some existing religions may view such religious broadcasting as antagonistic to their faith or reprehensible as a matter of doctrine, it might well be found to be "offensive."

45. Professor Jeffrey K. Hadden chronicles this period in broadcasting regulation in the United States, referring to it as the era of "Sustaining Time and Politics of Exclusion." Jeffrey K. Hadden, *Regulating Religious Broadcasting: Some Old Patterns and New Trends*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 184-87* (James E. Wood, Jr. & Derek Davis eds., 1993). Professor Hadden notes that this era was ushered in at the urging of more-liberal church groups that opposed the message of smaller, evangelical religious organizations. The mainline liberal churches, however, were given free access to the broadcasting media under what was referred to as the "sustaining policy." *Id.* This policy of effective exclusion remained in effect until the mid-1950s, when free market forces began to prevail, resulting in paid access for minority religions. *Id.* at 185-91.

46. During this era the major broadcasting networks in the United States provided free access for religious broadcasters under a series of "sustaining time" provisions. In the words of Professor Hadden:

NBC [and eventually other major broadcasting networks] determined at the onset not to accept paid religious broadcasting. Time allocated for religious broadcasting would be free (or "sustaining time" as it is called in the industry) and it would be available "only [to] the central national agencies of great religious faiths."

Id. at 185.

religious broadcasting, it has opted for a regulatory requirement that certain licensees offer two hours of religious broadcasting per week, including worship services.⁴⁷ Not all religious organizations, however, have been permitted equal access to this brief time period because no viable system has been established to ensure such equality of access.⁴⁸

In most European regulatory systems, there is some effort to recognize and perhaps even advance religious pluralism by allocating broadcasting time to a variety of religious organizations. In this regard, Professor Barendt points out:

German law sometimes recognizes an entitlement to broadcasting time (*Anspruch auf Sendezeiten*). Although this is not constitutionally required, the laws governing public, and to a lesser extent private, broadcasting channels confer rights on the Churches and some other denominations to appropriate time for the transmission of their services and other religious programmes. Similar arrangements must be made for the Jewish communities.⁴⁹

Barendt goes on to note, however, that problems have arisen in relation to the enforcement of religious access provisions in Germany:

The drafting of the [religious access] rules in, for example, the ZDF *Staatsvertrag* raises a number of problems typical of access provisions: Which organizations are entitled to access and what is 'appropriate broadcasting time'? The ZDF rules give access to the established Protestant and Catholic Churches, and to other religious associations active throughout the whole country, a rule which excludes minor sects and new cults with a local following.⁵⁰

47. See BARENDT, *supra* note 14, at 107.

48. For a discussion of the difficulties that attend assuring equal access, particularly for short time periods, see *infra* notes 108-115 and accompanying text.

49. BARENDT, *supra* note 14, at 153.

50. *Id.* at 153-54 (footnote omitted). Barendt adds, "It is right that the privilege was extended to Jewish communities, but now the question would arise in many countries whether the same facilities should be afforded the Muslim community." *Id.* at 154. Professor Barendt's references to "new cults" and "the Muslim community," however, further evidence the problems inherent in such a system of allocation. That some sects are pejoratively referred to as "cults" may well serve to rationalize decisions by majority religions and others in power (in a regulatory sense) to prevent "cults" from gaining access. Additionally, his reference to "the Muslim community" (emphasis added) evidences an inclination to group many quite different religious sects or

In Germany, Protestant, Catholic, and Jewish groups reached an agreement regarding access for religious groups.⁵¹ Even though access was spread consensually among those groups, minority religious sects were not involved in the allocation of broadcast time and are effectively denied access. Questions have been raised regarding the constitutionality of these religious access regulations, particularly as they are applied in Germany to private, as well as public, broadcasters.⁵²

Religious access regulations exist in Italy and France as well. In Italy, religious organizations are allocated a certain amount of broadcast time.⁵³ Under French law, churches are provided time on public access channels to transmit their religious services.⁵⁴ The Conseil Constitutionnel has opined that these access rules are designed to guarantee pluralism of opinion.⁵⁵ Professor Barendt also notes that, under the Dutch regulatory system, "a large amount of broadcasting time is allocated to denominational and political associations in proportion to the number of their members."⁵⁶ As is the case in France and Germany, proportional allocations of this sort often tend, as a practical matter, to prevent minority sects from gaining access to the broadcast media because the access time is effectively reserved for larger, more traditional sects.⁵⁷

Even if there were an effort to accommodate all religious organizations on a nonpreferential basis, however, significant practical difficulties would arise. Given the large number of sects and possibly individuals that could potentially desire access under a system designed to provide access to religious broadcasters, and the limited amount of time allocated, it would be difficult to de-

organizations into a single sect (there are many Islamic religious organizations, not a single community) and offer but one such "community" access. If, on the other hand, all religious sects are offered access in some form, the demand may be too great for the limited time provided. See *infra* notes 108-115 and accompanying text (briefly discussing the practical difficulties that attend equal access in this context).

51. BARENDT, *supra* note 14, at 154.

52. *Id.* at 155.

53. *Id.*

54. *Id.* at 154. Unlike the German law, however, the French law does not require access on private, as well as public, stations. *Id.*

55. *Id.*

56. *Id.* at 97.

57. See *infra* notes 103-107 and accompanying text (further analysis of such allocational regulatory systems).

termine what "equality of access" requires. Larger sects would no doubt argue for an allocation system based on membership, whereas smaller sects would argue for equal access for all sects, regardless of size.

Practical problems of the type just described, coupled with political problems related to the likely desire of regulators either to exclude or ignore certain less popular minority sects, may render religiously pluralistic access provisions ineffectual, ensuring that only limited diversity of religious opinion will be broadcast.⁵⁸

c. Market regulation. In Part III.B.3, the impact of the market as an *informal* limitation on religious broadcasting is discussed. For the most part, deregulation through reliance on market factors may remain an informal limit on religious broadcasting because the regulator may be ignorant of the consequences such deference to the market may impose upon religious broadcasters. If, however, the regulator understands the likely impact on religious broadcasting that attends reliance on market factors and intentionally chooses to defer to the market, it may be said that the regulation takes on an air of formality. A regulator who understands that reliance on the market may favor hierarchical and evangelical churches, as argued in Part III.B.3, and chooses to defer to the market in order to benefit those churches may be said to be engaging in more formal regulation. This is, of course, equally true of the regulator who understands how to use other informal limitations on religious broadcasting in ways intended to benefit one religion over another.

2. *Indirect formal regulations*

In addition to formal regulations directed specifically at religious broadcasting, indirect formal regulations (regulations not expressly directed at religious broadcasting) may have a significant impact on religious broadcasting. Provisions designed to preserve culture, protect the moral development of children, and protect against "incitement to hatred" or discrimination on certain grounds may all affect religious broadcasting, sometimes in dramatic ways. This brief list of possible forms of indirect formal

58. If religious groups are required to produce their own religious programming, production costs may create further inequalities—larger religious organizations are typically wealthier and would be able to produce higher quality programming.

regulations is hardly exhaustive, but it serves to illustrate that religious broadcasting may be subjected to regulation on the basis of certain indirect formal regulations.

Regulations designed to preserve a nation's or region's culture may limit religion and adversely affect religious broadcasting. There are two major ways in which formal regulatory efforts to preserve culture may impact religion: (1) cultures are often rooted in a particular religion, thereby disadvantaging other religions in the name of preserving the national culture or identity and (2) certain cultures may be "culture[s] of disbelief,"⁵⁹ placing religion at a disadvantage when that "culture of disbelief" is preserved.

The indirect impact of provisions to preserve culture ("cultural quotas") on religious broadcasting is illustrated by the European Community's Broadcasting Directive, which provides:

Member States shall ensure where practicable and by appropriate means that broadcasters reserve for European works . . . a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively on the basis of suitable criteria.⁶⁰

59. The phrase "culture of disbelief" is taken from Stephen Carter's book of the same title. See STEPHEN L. CARTER, *CULTURE OF DISBELIEF* (1993). In that book, Professor Carter argues:

[W]e should stop the steady drumbeat, especially in our popular culture, for the proposition that the religiously devout are less rational than more "normal" folks and . . . we should avoid the pat assumption, all too common in our rhetoric, that religion is more dangerous than other forces in American society and must therefore be more carefully reined in.

Id. at 16 (citation omitted).

60. Council Directive 89/552, *supra* note 42, art. 4(1). Article 5 of the Directive, in turn, provides:

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five

These efforts to protect European regional and national culture from "being subjugated by a foreign one,"⁶¹ through the creation of limitations on materials produced outside Europe, are sometimes referred to as a "cultural quota."⁶² This cultural quota, while not expressly directed to religious broadcasting, may have a significant informal impact on religious programming produced outside Europe. It could be argued that religious programming from outside Europe or from religious groups with smaller membership in Europe undermines European culture, which may itself have a religious basis.

The Directive also includes formal provisions designed to protect children, which may have an informal impact on religious broadcasting.⁶³ For the ostensible purpose of protecting a child's moral development or sense of national identity from exposure to religious views that are not shared by the child's family or the general populace in a particular nation or region, regulators may limit broadcasting access on the part of certain religious groups.⁶⁴

years of their production.

Id. art. 5.

61. *Television Broadcasting and the European Community: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 48 (statement of Robert Maxwell, Chairman and Chief Executive Officer, Maxwell Communications and MacMillan, Inc.).

62. See generally Filipek, *supra* note 12.

63. Article 22 of the Directive provides:

Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts. Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

Council Directive 89/552, *supra* note 42, art. 22. The juxtaposition of the formal restriction on "incitement to hatred on grounds of . . . religion or nationality" to the limitation based on the need to protect the "mental or moral development of minors" adds some credence to the apprehension that this provision (or ones like it) may be used to limit religious programming on the ground that it limits the moral development of children by exposing them to religious material that could affect their moral development.

64. It is not clear whether such a regulation would be permissible under the European Convention for the Protection of Human Rights and Fundamental Freedoms,

Provisions designed to avoid "incitement to hatred," as well as nondiscrimination provisions designed to protect ethnic or religious groups or to protect against certain forms of discrimination (e.g., discrimination based on sexual orientation) may also have the effect of limiting certain religious programming. For example, religious programming asserting that homosexuality is a sin may be considered to be an "incitement to hatred" or discrimination based on sexual orientation, and may be regulated on that ground. Similarly, "incitement to hatred" provisions may be invoked to limit some religious broadcasting on the ground that it creates a clash between religions or ethnic groups that might result in increased misunderstanding and ultimately increased hatred.

Indirect formal regulations have the potential of limiting religious broadcasting. The three examples briefly discussed above are but illustrative. Informal limitations on religious broadcasting—limitations based on informal factors and not express regulatory provisions—may similarly have a substantial impact on religious broadcasting.

B. Informal Regulations (Limitations)

Informal regulations are not based on any formal or express regulatory provision and are, therefore, distinguishable from indirect formal regulations, which are based on specific regulations that do not expressly address religious broadcasting but potentially affect it. This section will focus on three major informal limitations on religious broadcasting: (1) culture, in a gen-

Article 9, which provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

RALPH BEDDARD, *HUMAN RIGHTS AND EUROPE* 245 (3d ed. 1993). To date, there is little case law under Article 9, so it would be difficult to assess whether such a provision would be justifiable under Article 9(2). For a discussion of the cases, see D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 363-68 (1995).

eral sense, and not, as was the case in the prior section, as a matter of formal regulation; (2) technological factors, which may ultimately stimulate an internationalization or harmonization of the law governing broadcasting regulation; and (3) market factors or the extent to which a given government declines to engage in formal regulation and simply defers to the marketplace. There may be other informal limitations or factors that influence the regulation of religious broadcasting, but focusing on culture, technology, and the market amply demonstrates the significant impact of informal factors on religious broadcasting, an impact that is often more significant than the impact of formal regulations.⁶⁵

1. *Culture as an informal limitation*

As previously noted, regulatory efforts specifically designed to preserve culture can have a significant impact on religious broadcasting.⁶⁶ It is not necessary, however, to promulgate a specific regulation protecting culture for culture to have a limiting effect on broadcasting generally and on religious broadcasting specifically.

Cultural attitudes toward religion may significantly influence religious broadcasting. If Stephen Carter is right when he asserts that the prevailing legal and political culture in the United States "presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them,"⁶⁷ then a prevailing legal and political culture may have the effect of marginalizing religion. If the faithful are influenced by the prevailing culture to act, at least in the public sphere, as if their religion does not matter, then their marginalization would certainly have an impact on religious broadcasting. Broadcasters and the viewing public might be disinclined to produce and broadcast religious

65. Jeffrey Hadden concludes his study of religious broadcasting in the United States by stating, "The emphasis and main conclusion of this inquiry into the history of religious broadcasting is that the social organization and informal structures of broadcasting have been more important than the role of government in regulating religious broadcasting [in the States]." Hadden, *supra* note 45, at 180.

66. See *supra* notes 59-62 and accompanying text.

67. CARTER, *supra* note 59, at 3.

programming, feeling that religion is too personal for such a public medium.⁶⁸

Cultural factors influence religious broadcasting in Europe, as well, although those factors often translate into direct regulation. It is possible, for example, that British and European regulations on advertising by religious groups are a product of what those in power consider to be the proper place of religion in the quasi-public broadcasting realm. Additionally, some European nations have created access-to-broadcasting rules that effectively permit the mainline churches to determine what is appropriate religious fare for broadcasting purposes.⁶⁹ The regulations provide for access, but dominant or mainline church groups are able to allocate the access based on content. This control by dominant churches results in content that must necessarily reflect in some measure both the theological culture of the dominant churches and the broader culture insofar as it influences those churches.

2. *Technology as an informal limitation*

Rapid changes in broadcasting technology will influence the regulation of broadcasting. Today, broadcasting signals (e.g., satellite⁷⁰ and related telecommunications technology⁷¹) are

68. In referring to the experience in the United States, Jeffrey Hadden concludes that "liberal church leaders just never got as excited about the possibilities of broadcasting as did the evangelical traditions." Hadden, *supra* note 45, at 200 n.15. Unfortunately, Professor Hadden does not explain *why* the liberal Protestant traditions were skeptical about broadcasting as a medium for their religious message. It may well be that their skepticism was born of a sense that it was unbecoming for a religious group to broadcast the sacred, which was personal and should remain private, being shared only with a congregation of like believers. Alternatively, it may have been the result of a decision that spending money on broadcasting would be an inappropriate allocation of resources in a world often characterized by poverty and temporal suffering.

Professor Hadden further notes:

If liberal church leaders were generally unenthusiastic about broadcasting, some were vociferous in their condemnation of the evangelical broadcasters. This condemnation of evangelical broadcasters provided the legitimacy for the policies of both the network and the Federal Radio Commission [forerunner of the Federal Communications Commission]. These policies had the net effect of significantly restricting evangelicals' access to the mainstream of broadcasting for nearly three decades.

Id. at 185.

69. See, e.g., BARENDT, *supra* note 14, at 152-56 (discussing the German and French systems for allocating access to religious broadcasters).

70. Over 25 years ago, Arthur C. Clarke was quoted as saying, "The advent of communications satellites will mean the end of present barriers to the free flow of

transboundary in scope and have contributed to efforts to regionalize the regulation of broadcasting.⁷²

With the rise of transboundary broadcasting it may become increasingly difficult for nation-states and even regions to regulate broadcasting on an individual basis. The transboundary impact of broadcasting, as a technological matter, will likely lead to a desire on the part of governmental entities to harmonize⁷³ or at least coordinate, through regional or international means, the regulation of broadcasting.

information; no dictatorship can build a wall high enough to stop its citizens (from) listening to the voices from the stars." C.M. Dalfen, *Direct Satellite Broadcasting: Towards International Arrangements to Transcend and Marshal the Political Realities*, 20 U. TORONTO L.J. 366, 367 (1970). Joel R. Paul adds:

Traditionally, countries have regulated the flow of information across borders by censoring publications, restricting access to airwaves, and regulating domestic print and broadcast media. As the media have made remote events more immediate and accelerated the flow of news, information, and culture across national frontiers, governments have struggled to exclude alien ideas and values. Despite these attempts, soon a direct broadcast satellite (DBS) over the Pacific Ocean could beam a program from the West Coast to a home television set in Indonesia. Unlike prior generations of satellites, which bounced electromagnetic waves between ground stations, the DBS acts as a powerful and self-contained broadcasting station. Not only is there a significant saving, but also the DBS has the capacity to reach home television audiences without the cooperation of ground stations subject to the control of the receiving country.

Joel R. Paul, *Images from Abroad: Making Direct Broadcasting By Satellites Safe for Sovereignty*, 9 HASTINGS INT'L & COMP. L. REV. 329, 329-30 (1986) (footnotes omitted). The day of the direct broadcast satellite is no longer a matter of science fiction to be written about by Arthur C. Clarke—it is a reality. With the continual improvement of satellite technology, broadcasting will not easily be contained within recognized political boundaries.

71. Daniel L. Brenner notes that "[c]ommercial satellite communications systems may be grouped into three categories": international systems (e.g., INTELSAT, the International Telecommunications Satellite Organization); regional systems (e.g., EUTELSAT, the European Telecommunications Satellite Organization, and ARABSAT, the Arab Satellite Organization); and domestic systems (over a dozen nations either operate or are developing domestic satellites, DOMSATS). DANIEL L. BRENNER, *LAW AND REGULATION OF COMMON CARRIERS IN THE COMMUNICATIONS INDUSTRY* 233 (1992).

72. Given the close proximity of European nations and the fact that the technology that produces broadcast signals has made it possible for the same signal to be picked up throughout Europe and much of the world, Europe has recognized the transboundary nature of broadcasting and sought to develop directives and other regulations to deal with broadcasting on a regional basis. See *supra* notes 14-18 and accompanying text.

73. Harmonization occurs when nations recognize the need to create laws that are compatible across borders in order to facilitate economic and regulatory cooperation on a number of fronts. Professor Hoffman-Riem explains why this harmonization process in broadcasting regulation is well underway in Europe. See *supra* note 17.

Short of such harmonization or coordination of broadcasting regulation, it is possible that nations might continue to endeavor to opt for more or less restrictive regulations than their neighbors. Nations opting for more restrictive regulations, regulations designed in part to cater to their own internal producers, however, will face pressure from consumers to provide increased access to a wider variety of broadcast media through deregulation⁷⁴ and from advertisers,⁷⁵ who find it difficult to adjust to a wide variety of regulatory requirements. Additionally, internal producers may be subjected to reciprocal regulation by other nations protecting their own producers. Consumer pressures, coupled with the potential for reciprocal trade barriers, may make it difficult for nations to sustain more restrictive regulation of broadcasting within their borders than exists in neighboring and competing nations. Nations opting for less restrictive regulations, on the other hand, may mollify their consumers but may create some disadvantages for their own internal producers in the process.⁷⁶

On the other hand, harmonization, or at least coordination, of broadcasting laws is more likely to strike a viable balance between consumer demands for increased access to broadcasting and the demands of internal producers for protectionist regulation. Technological advancements which make broadcasting increasingly available across boundaries, in turn, will undoubtedly

74. As one author puts it:

The high cost of producing programs in the European Union [as a result of protectionist and regulatory policies] may discourage U.S. companies from continuing expansion in Europe, as other world markets may prove to be more cost effective. This, in turn, could be detrimental to the European people since they are then left with fewer choices. In fact, culture is not decided by governments or television programs, but by people. After all, people are culturally who they choose to be.

Shelden, *supra* note 12, at 539.

75. See BARENDT, *supra* note 14, at 188-210 for a discussion relating the opposition of advertisers to variable regulations.

76. It may be possible for nations engaging in less regulation to reap some benefits in the form of increased activity on the part of broadcasters in their nation, in much the same way that some states gain benefits by deregulating banking or other industries. In other words, by deregulating or providing only limited regulation for broadcasters, a nation might create a very appealing market for broadcasting entities. It is not clear, however, that such an appealing market will in fact induce broadcasters to do anything other than send their signals to that nation. Without more than mere deregulation of broadcasting, a broadcaster might not have any reason to locate its corporate or technical offices in that nation.

push that harmonization effort in the direction of less rather than more formal regulation, as broadcasters, advertisers, and consumers join in the effort to increase access. In Europe, this movement toward harmonization and some unification of broadcasting regulation on a regional basis is clearly underway, as Europe deals with the realities of transboundary or cross-frontier broadcasting.⁷⁷ The United States, in turn, remains quite concerned about issues of access for its broadcasting industry in Europe and other markets.⁷⁸ With pressure from consumers in Europe, who increasingly desire access to American broadcasting,⁷⁹ coupled with diplomatic and related pressure for free trade in broadcasting from the United States government,⁸⁰ it is likely that some regulatory coordination or harmonization of an informal (self-imposed by broadcasters) or a formal (regulation by government) nature will ultimately be reached to permit broadcasters from the United States to have greater access to European markets. The price that broadcasters from the United States might have to pay for this access, however, will likely come in the form of having to harmonize broadcasting regula-

77. Professor Barendt notes:

The phenomenon of cross-frontier broadcasting has long been familiar in Western Europe. The small size of the countries has made inevitable some spill-over of radio and later television broadcasts into neighbouring states. In a few cases culture and language are the same on both sides of a border, so making the export of broadcasts to another country attractive. Large international media groups have emerged, anxious to exploit new technological possibilities to create something like a genuine European broadcasting industry. . . . Groups of public broadcasting companies from different countries have combined to transmit satellite programmes over a large area. . . .

With these developments there is a good case for some common broadcasting regulation. Otherwise states would be able to impose their own controls on foreign broadcasts, with regard, say, to advertising or programme standards. The exercise of these powers might substantially inhibit the reception of satellite programmes or their retransmission by cable systems. Advertisers in particular have complained about the difficulties they face in having to meet divergent legal requirements. On the other hand, a state would be unwilling to surrender its broadcasting powers over foreign programmes with complete equanimity, unless it were satisfied that they met some minimal standards, for example, to prevent the excessive interruption of programmes by advertising or the showing of grossly indecent films.

BARENDT, *supra* note 14, at 222-23.

78. See Fred H. Cates, *The First Amendment and the International "Free Flow" of Information*, 30 VA. J. INT'L L. 371, 407-11 (1990).

79. See BARENDT, *supra* note 14, at 218-22.

80. Cates, *supra* note 78, at 409-11.

tions in the United States with somewhat more restrictive European regulations. American broadcasters may choose, on their own, without the need for formal regulation, to yield their desire to be completely free from European regulation on the ground that this is a small internal price to pay for access to a greater market. If such anticipated informal or formal harmonization occurs, religious broadcasting may be affected because there will be a need to unify European and American regulations applicable, directly or indirectly, to religious broadcasters.⁸¹

3. *The market as an informal limitation*

Existing regulatory limitations on the access of religious entities to the broadcasting media may be mitigated somewhat by market forces. European systems are moving from extensive public regulation and control of broadcasting to a private, more market-oriented system in the sense that access to broadcasting media is in increasing measure based on the ability to pay for that access.⁸² With increased access to the broadcasting market for all groups, including religious sects and individuals, smaller religious groups that may have been previously denied access under governmental control of the media may now purchase broadcasting time in the market. As previously noted, however, such access is sometimes offset by selective access provisions that permit established religions greater access to publicly controlled media or otherwise limited by regulations designed to curb religious advertising and paid religious programming.⁸³ Given the general high cost of paid market access, however, some smaller or poorer religious groups are financially precluded from obtaining access.⁸⁴ New technology, which is increasing

81. For discussions related to this move toward harmonization and the various regulatory models currently applied to religious broadcasters see *supra* notes 17-18 and *infra* notes 93-116.

82. Professor Hoffman-Riem, for example, notes that whereas European broadcasting systems were initially "realized through public monopolies . . . European nations have since developed, to differing degrees, dual systems of private and public broadcasters." Hoffman-Riem, *supra* note 17, at 503. Professor Hoffman-Riem, however, adds that "[e]ven after opening up broadcasting to private broadcasters, it is still subject to regulations." *Id.*

83. See *supra* notes 45-57 and accompanying text.

84. In the United States, for example, the move to a market-driven system of access to broadcasting has effectively limited access for some religious groups. See Hadden, *supra* note 45, at 187-94.

available access for broadcasters, may ultimately lower the costs of access, resulting in fewer limitations for religious broadcasters seeking access now and in the future.⁸⁵

The move to a freer market may have already had the effect of increasing access for many religious groups that have not historically been provided access under prevailing regulatory systems. In arguing in support of the market and against direct governmental regulation of the broadcast media on the ground of scarcity, Ayn Rand asserts:

The chief argument in support of the notion that broadcasting frequencies should be "public property" has been stated succinctly by Justice Frankfurter: "[Radio] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another."

The fallacy of this argument is obvious. The number of broadcasting frequencies is limited; so is the number of concert balls; so is the amount of oil or wheat or diamonds; so is the acreage of land on the surface of the globe. There is no material element or value that exists in *unlimited* quantity. And if a "wish" to use a certain "facility" is the criterion of the right to use it, then the universe is simply not large enough to accommodate all those who harbor wishes for the unearned.⁸⁶

Rand argues for a free market on political grounds as well:

Who, on a free market, determines the economic success or failure of an enterprise? The *public* (the public as a sum of individual producers, viewers, and listeners, each making his own decisions—not as a single, helpless, disembodied *collective* with a few bureaucrats posturing as the spokesmen of its will on earth).⁸⁷

She also cautions that:

Since "public property" is a collectivist fiction, since the public as a whole can neither use nor dispose of its "property," that "property" will always be taken over by some political

85. See generally *id.* at 194-99; *supra* notes 70-77 and accompanying text.

86. Ayn Rand, *The Property Status of Airwaves*, in *CAPITALISM: THE UNKNOWN IDEAL* 122-23 (1967) (alteration in original).

87. *Id.* at 124.

"elite," by a small clique which will then rule the public—a public of literal, dispossessed proletarians.⁸⁸

Despite the allure of neutrality that Ayn Rand and others find in the free market, the market is not a neutral means of ensuring access for all religious entities to the broadcast media. The market is, in some measure, but another informal means of regulating broadcasting.

Just as certain religious broadcasters tend to be favored under existing broadcast regulations, some religious broadcasters appear to be particularly well suited to gain access to broadcast media through the market. In his article discussing the regulation of religious broadcasting in the United States, Jeffrey Hadden notes that, with increasing reliance on market factors: "The evangelicals moved beyond gaining parity with the mainline church traditions to absolute dominance in access to the airwaves. And having gained dominance, they have successfully protected their turf."⁸⁹

Hadden acknowledges that the evangelical dominance of broadcasting has come as a result of "the FCC ruling that uncoupled the link between free air time and public service"⁹⁰ and the resultant need for religious broadcasters to purchase time on the market. He concludes, however:

The case for the proposition that church liberals are victims of discrimination is very weak. If they want to get on the air, all they have to do is lay down the cash and step up to the microphone. That mainline churches have been unsuccessful or unwilling to raise the funds to buy air time speaks to a host of issues that say a lot about their priorities.⁹¹

Hadden's conclusion implies that the market is somehow neutral among religious broadcasters—"to get on the air, all they have to do is lay down the cash"—and fails to recognize inherent differences between various religious traditions that may have the effect of favoring evangelical religious groups, which tend to be more hierarchical.

88. *Id.* at 128.

89. Hadden, *supra* note 45, at 189.

90. *Id.* at 197.

91. *Id.* (footnote omitted).

A hierarchical religion or church, for this purpose, is one that is subject to governance by a single individual or group of individuals who are able to direct the use of the church's resources. Traditional mainline churches, while often governed in some ways by a national or international board, historically have tended to be less hierarchical, with most resource decisions being left to smaller local churches or units. At the local level, in turn, decisions are often made by a board or other group which is less centrally controlled than in the evangelical tradition. Congregations in mainline churches often select a pastor but retain for the governing board the power to make major resource decisions.

Evangelical congregations, on the other hand, are often formed as a result of the congregants being drawn to a particular evangelist or pastor, who retains significant control over resources. Additionally, the evangelist may resort to use of televangelism to create, sustain, and stimulate growth in his or her congregation. In this sense, evangelical religions are often more concerned with proselyting than are their mainline counterparts, who tend to focus their concern on keeping members of their congregation in the fold.

Given the cost of access to major media, linear mainline religions may be at a disadvantage in directing the use of resources to obtain access to broadcasting. The absence of a hierarchical structure necessary to direct major purchases of broadcasting time, the lack of significant interest in proselyting,⁹² and concerns that it would be improper to spend money on broadcasting for proselyting when other needs (e.g., hunger and poverty) cry out for a larger share of the church's limited resources, may place less-hierarchical religions at a disadvantage, in terms of sharing their message through broadcasting, when such access to the media is market driven. Given that this is the case, the market is not neutral; rather it is another form of informal regulation. Obviously, poorer churches (churches that do not command the resources necessary to purchase time on the market,

92. Some religious groups may even be opposed on theological grounds to proselyting. For example, they may view religion as being a matter of obligation and not choice (i.e., a member is born into a tradition rather than choosing it). Much of Judaism, for example, does not engage in proselyting, believing rather that one is Jewish as a matter of birth and covenant, not purely as a matter of choice. To be proselyted out of that status is to deny one's very being. It is little wonder, therefore, that many Jewish sects consider proselyting to be wrong.

regardless of their structure) are also informally disadvantaged by a market system.

The market may constitute another informal form of regulation (or limitation) on religious broadcasting. Surely, the market ensures access for those who are able and willing to purchase time and serves a salutary purpose in doing so. However, there are some major factors inherent in the nature of certain religions that effectively prevent them from having equal access to the media in a system based solely on the market.

IV. REGULATORY MODELS IN THE RELIGIOUS BROADCASTING CONTEXT

In a broad sense,⁹³ there are three major regulatory models regarding religious broadcasting: (1) no access for religious broadcasters; (2) limited, preferential access for specified religious broadcasters; or (3) nonpreferential access for all religious broadcasters. These models can, as demonstrated in the prior section, be founded on formal (direct and indirect) or informal regulatory bases.

A. *No Access for Religious Broadcasters*

The most restrictive regulatory model, in terms of access to the broadcasting media by religious groups, is a model that would prohibit all access on the part of would-be religious broadcasters. In its purest form—complete exclusion of religious broadcasting from the media—this model is formally adhered to by at least one major nation in the world today, the People's Republic of China.⁹⁴ Even in China, however, this model may not be followed out of antipathy for religion qua religion; rather, its pol-

93. Elsewhere, I have written in greater depth regarding various models of government regulation of religion. See, e.g., Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917, 919-26 (1993) [hereinafter Smith, *Conscience, Coercion and the Establishment of Religion*]; Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 248-51 (1991); Rodney K. Smith, *Establishment Clauses Analysis: A Liberty Maximizing Proposal*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463, 488-509 (1990).

94. See *supra* note 38 and accompanying text.

icy may be based on a generalized apprehension of organized groups.⁹⁵

In addition to direct formal regulations specifically prohibiting access by religious broadcasters to the media, access may be limited by indirect formal and informal regulation.⁹⁶ Indirect formal regulations that limit access for religious broadcasters come in a variety of forms, including but not necessarily limited to limitations on religious advertising;⁹⁷ limited hours of access for religious broadcasters;⁹⁸ divisiveness requirements that could be enforced to limit religious broadcasting on the ground that such broadcasting has a divisive effect or otherwise (explicitly or implicitly) shows disrespect for the religious beliefs of others;⁹⁹ and other content-based requirements (e.g., preservation of culture).¹⁰⁰ These indirect regulations may simply limit access for some religious broadcasters, while effectively eliminating access for others.¹⁰¹

95. *Id.* The government in China appears to be concerned that organized groups, including religious ones, threaten the solidarity of the Republic. In the eyes of the government, the Chinese people owe their allegiance to the Republic, and the existence of other allegiances would depreciate allegiance to the government. There was a time when even family ties in China were placed in question on these grounds, although the government discovered that it was simply not possible to sublimate family allegiance.

96. See discussion *supra* accompanying notes 59-90.

97. Formal limitations on advertising by religious broadcasters may limit access because they prevent religious broadcasters, unlike other broadcasters, from relying on revenue generated from such advertising to defray the costs of programming time.

98. If hours of media time allocated to religious broadcasters are limited, some and possibly all religious broadcasters will have less time for broadcasting than they would be able to have under a different regulatory system. Additionally, limiting hours of access may also lead to preferential treatment for some religions in the time to be allocated.

99. Religious discourse is occasionally rancorous and often leads to disagreement over doctrine. These disagreements, which often go to those matters considered to be of utmost importance in the lives of the disputants, might be labelled as "divisive" and limited under regulations restricting the broadcasting of divisive material. Professor Barendt, for example, generally discusses positive broadcast regulations designed to "respect human dignity and moral, religious, and cultural values, and . . . promote unity," as well as negative limitations on programs that promote violence, racism, or that are offensive or indecent. BARENDT, *supra* note 14, at 105.

100. Efforts to protect a nation's indigenous culture may have the effect of limiting religious broadcasting on the part of religions that are not perceived as being tied to that culture. There are other content-based regulations that, while not directed at religious broadcasting, may have the effect of limiting access.

101. For example, an indirect regulation designed to preserve culture and not directed specifically to religion may merely limit access on the part of religions that are considered to be consistent with or a part of the larger culture, while newer, less-established religions may be denied access on the ground that they undermine the

Regulations that prevent religious groups from having access to the broadcasting media disfavor religion in a way that would appear, on its face, to be discriminatory and unjustified. Limitations on religious broadcasting might be justified on the ground that religious speech is particularly divisive, pitting religion against religion and that which is religious against the secular. However, what may be said of religious broadcasting could also be said with equal force about political broadcasting. Religious speech, in its various forms, is divisive or unsettling precisely because it addresses fundamental questions. If the price of political peace is avoidance in the media of those ultimate questions that may bring personal peace, it is a high price to pay. Additionally, just as religion can divide, it has a unique capacity to edify¹⁰² and should be accommodated on that ground.

B. Access Limited to Specific Religious Groups

Access for religious groups may also be limited by regulatory systems that prefer certain religious groups over others. Some regulatory methodologies may prefer specific, national religions,¹⁰³ while others may prefer certain religions and exclude or limit others.¹⁰⁴

In addition to formal direct regulations that prefer one religion or group of religions over another, indirect and informal regulations can have a similar effect. As noted in the prior section,¹⁰⁵ indirect regulations that prohibit advertising, preserve culture, prohibit divisiveness and disrespect, or otherwise have the effect of limiting religious broadcasting may have a discriminatory or preferential impact. Indeed, it can be expected that the majority religion or religions will be able to take advantage of those indirect regulations or at least will be able, through their political presence, to avoid the negative consequences of such indirect regulation in ways that minority religions cannot.

culture.

102. For a discussion of the unique capacity of religion and conscience to edify, see Smith, *Conscience, Coercion, and the Establishment of Religion*, *supra* note 93, at 952-57 and Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little "Conscience,"* 1996 B.Y.U. L. REV. 645, 669-71.

103. See *supra* notes 38-44 and accompanying text.

104. See *supra* text accompanying notes 48-49.

105. See *supra* text accompanying note 101.

Finally, informal factors may limit access for certain broadcasters, while effectively permitting access for others. It was previously pointed out that the market is not neutral among religious groups in that it tends to prefer evangelical, hierarchical, and proselyting groups.¹⁰⁶ Cultural and technological factors may have some impact too. Even when there are not specific regulations protecting the dominant culture, which may in part be religiously based, the culture itself may have significant influence in a manner that effectively prefers one religion over another. For example, if religious groups adverse to proselyting predominate in a given culture, they may be able to exert influence on the viewing public that ultimately leads to the rejection of any programming that is proselyting in nature. This would be done by creating a norm of privacy (being undisturbed by religions other than one's own) or by creating a sense of public disapproval for religions that are too direct in conveying their message.¹⁰⁷

Limiting access to broadcasting on the part of all religions might seem more desirable than a system of preferential access, on the ground that such a system at least treats all religions in a similar manner. In that sense, it has the appeal of a limited equality principle—it treats all religions equally, albeit in a disfavored manner. On the other hand, a limited access system may be preferred on the ground that at least some religious broadcasting is finding its way to viewers. In any event, at least intuitively, the preferred regulatory model would be one that facilitates access on a nonpreferential basis.

C. *Nonpreferential Access for All Religious Broadcasters*

At least as a theoretical matter, a model permitting nonpreferential access¹⁰⁸ for all religious broadcasters should be preferable. It is arguably the better choice from among the three

106. See *supra* text accompanying notes 89-92.

107. Culturally, a dominant nonhierarchical religion may be able, over time, to establish a sense of disapproval on the part of the public for religious activities, including proselyting, that intrude on the space or privacy of the viewing public. This is essentially what happened for a period of time in the United States when the liberal Protestant and mainline religious traditions were able to paint religious broadcasters of other traditions as "the principal abusers of the airwaves." Hadden, *supra* note 45, at 182-84.

108. For articles discussing various justifications for the nonpreferential model, and for a discussion of various permutations on the nonpreferential model see *supra* note 93.

models to further religion in society and to do so in a nonpreferential or equitable manner, leaving the choice to the viewing public. This conclusion may be questioned on theoretical and practical grounds, however.

Practically, there is no system today that can claim that it provides equal access to all religious broadcasters. For example, European nations purport to foster religious pluralism by permitting religious groups to have access to the media for religious purposes, but that access is rarely nonpreferential.¹⁰⁹ It is not surprising, however, that nonpreferential access for religious broadcasters is rare or unattainable. It may be unattainable because of the difficulty of defining *nonpreference* or *equality of access*. Given the finite amount of broadcasting time available to all groups and the large number of religious individuals and groups with varying numbers of members, it would be exceedingly difficult to develop a system that would be truly nonpreferential. Professor Barendt recognizes this practical difficulty when he states:

None of the European jurisdictions considered in this book has wholly abrogated the standards of comprehensiveness and impartiality. This radical position is found to some extent in the idiosyncratic Dutch system, where a large amount of broadcasting time is allocated to denominational and political associations in proportion to the number of their members.¹¹⁰

The Dutch system endeavors to be both comprehensive and impartial, but, as Professor Barendt notes, it can only do so "to some extent." Given that potential religious broadcasters could be represented by groups as small as one member and as large as millions of members, allocating time would be no simple matter. Even if the Dutch could allocate time evenly, giving each individual one second of access, and thus a church of 600,000 access to 166 hours, such a solution fails to recognize the possible cumulative value of 166 hours when compared to a single second.¹¹¹ Of course, if a church had a membership of 6 million it

109. See *supra* notes 48-51 (discussing the German system, which purports to foster pluralism, but which actually promotes religious programming by certain groups over programming from less-favored groups).

110. BARENDT, *supra* note 14, at 97.

111. One can say "little" in a second. If that single individual could persuade 599 others to join her group, she could get ten minutes. That ten minutes might well be

would have to be given over 1600 hours or nearly 70 days of time to compensate for the single second allocated to each individual. Impartiality clearly is not practically attainable in such a regulatory system. Furthermore, treating each individual alike (allocating each one a certain amount of time) fails to recognize major variations in terms of commitment to religion. In other words, it cannot be said that two individuals are being treated equally when one who is very serious about her beliefs is given the same amount of time as one who is indifferent about her religion.

Theoretically, a nonpreferential regulatory system is less assailable, although it does raise questions. A system of nonpreference implies that all religious groups deserve equal access. The values adhered to by religious groups differ greatly. Providing each religion with equal access, however, equates the values and implies a certain moral relativism.

Thus, even if a nonpreferential system could be devised, in terms of direct formal regulation, it would experience formidable practical and theoretical problems in application. Similarly, it would be difficult to sustain such a direct formal system of regulation against informal pressures that might promote a certain preferential system. Specific cultures may prefer certain religions over others,¹¹² technology may prefer those religions with a membership sufficiently educated to take advantage of it,¹¹³ and the market may prefer certain kinds of religions over others.¹¹⁴

With these practical and theoretical problems, the nonpreferentialism model loses some of its appeal. It may nevertheless remain a fitting aspiration—a means of ensuring that concerns over equity are not ignored. The other models—prohibiting all access or preferring one religion over another in terms of access to the broadcasting media—could have a pronounced and possibly negative effect on the populace's pursuit of truth and the religious nature of the populace itself.¹¹⁵ Further

worth much more than 600 individual seconds. There is a synergistic sense, therefore, in which allocation schemes, even when equal in terms of time allocated, are not equal in terms of marginal impact.

112. See *supra* notes 59-62, 101.

113. See *supra* text accompanying notes 71-81.

114. See *supra* text accompanying notes 82-92.

115. James Madison favored nonpreferentialism as a principle and feared preferentialism: "Who does not see that the same authority which can establish Christianity to the exclusion of all other Religions, may establish with the same ease

more, James Madison essentially argued that God needs nothing more than "equal liberty" (some variant of a nonpreference principle) to further His aims.¹¹⁶ It remains likely that even an imperfect form of nonpreferentialism would do as an aspiration.

V. CONCLUSION

Broadcasting is a particularly persuasive and pervasive medium of communication. Not surprisingly, the regulation of broadcasting impacts religious communication in significant ways. Indeed, the nature and extent of religious broadcasting regulation may greatly influence the competition for souls in contemporary society.

There are numerous rationales supporting the regulation of broadcasting. Those rationales, including the rationale of scarcity that has predominated as a justification for more rigorous regulation of broadcasting, are subject to criticism. It is likely, nevertheless, that regulation of broadcasting will continue for practical, traditional, and theoretical reasons.

The form that regulation will take may vary, however. Broadcasting regulation or limitations on access come in a variety of forms: formal direct regulation; formal indirect regulation; and informal regulation or, perhaps more accurately, informal

any particular sect of Christians, in exclusion of all other Sects?" JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS para. 3 (1785), reprinted in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973).

116. As to the view of James Madison, I have previously noted:

Madison . . . battled the strongly-held and conventional colonial view that establishing generalized, nondenominational Christianity would be proper, provided other non-Christian religious views were treated with tolerance. He began by observing that "[t]he first wish of those who enjoy this precious gift [of Christianity] ought to be that it may be imparted to the whole race of mankind." After thus reassuring his fellow Christians that he shared their desire to convert the non-believer, he concluded that the policy of the assessment bill would lessen the likelihood of such conversion, because the bill "at once discourages those who are strangers to the light of revelation from coming into the religion of it [Christianity], and countenances by example the nations who continue in darkness [nonbelief in Christianity] in shutting out those who might convey it [the Christian faith] to them."

Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 592 (1984) (alterations in original) (footnotes omitted) (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)).

limitations. Formal regulations involve express regulations, while informal limitations (e.g., culture, technology, and market forces) are not express but are nevertheless quite influential as limitations on access by religious broadcasters to the media. Both formal and informal limitations must be considered in an effort to have a coherent and equitable regulatory system.

Formal broadcasting regulations are now being harmonized or coordinated in Europe. It is likely that this trend toward harmonization and coordination will soon include the United States and other nations with an interest in developing markets for broadcast producers and consumers. In that process of formal and informal harmonization, various models related to religious broadcasting should be considered.

Methods or forms of regulation of religious broadcasting necessarily combine in ways that tend toward one of three models: no access for religious broadcasters; limited access (in terms of who gets access under what conditions); and nonpreferential or equal access. The latter model—nonpreferential access—has the virtue of permitting government to remain neutral among religious voices while permitting those voices to be facilitated on some equal basis. There are, of course, substantial challenges related to developing a model of nonpreference but that aspiration remains a worthy one.

