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Policing the Religious Airwaves: A Case of Market Place Regulation

*Jeffrey K. Hadden**

I. INTRODUCTION: OF TELEVANGELISTS, SCANDAL, MARKET PRESSURES AND GOVERNMENT

The movement of a few television preachers into politics during the early 1980s led to the widely held perception that the televangelists had trespassed the serpentine wall that has traditionally separated religion and politics.¹ As tormented money and sex scandals unfolded—not in the supermarket tabloids but on the evening television news and on ABC's *Nightline*—millions of Americans concluded that the televangelists were living beyond accountability.²

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1 This was not the first time religious broadcasters stepped over the preaching-politicking line. The most celebrated case was that of Father Charles E. Coughlin, a Roman Catholic parish priest from a Detroit suburb, who began radio broadcasting in 1926. Gradually, his sermons became highly politicized. In 1932, he actively supported the presidential candidacy of Franklin D. Roosevelt and then later became Roosevelt's bitter enemy. So daunting were Coughlin's attacks that Roosevelt had Coughlin's mailing privileges revoked under the Espionage Act of 1917, and considered having him indicted for sedition before choosing to persuade the priest's archbishop to silence him.

2 The televangelism scandals commenced in early 1987, when Oral Roberts sent out a direct-mail fundraising appeal in which he claimed that God would "call him home" if he failed to raise \$8 million by the first of April. The secular press picked up the story and treated it as something between a tragic scam and high comedy. The count down to April Fools Day was preempted, however, on March 19, when Jim Bakker, then head of the *Praise The Lord* (PTL) religious broadcasting empire, resigned in disgrace after allegations of sexual and other misconduct. Bakker, with his wife and broadcast partner Tammy Faye at his side, tearfully described the cause for his resignation. By his account, a long past and forgiven sexual encounter with a former church secretary was now being used against him by former friends. But there was more. The sordid details unfolded for months revealing high salaries and high living built on a pyramid-like scheme of "life time partnerships" guaranteeing free accommodations at Heritage USA, a Christian theme park created by the Bakkers. Bakker eventually turned the empire over to Jerry Falwell, a Virginia-based fundamentalist broadcaster who had gained

If ever the time was ripe for the government to step in and regulate religious broadcasters, it was in the late 1980s. But religious broadcasters had not taken orders from worldly authorities in the past, and the misdeeds of some of their broadcast colleagues were not enough to temper their fierce independence. When called before the oversight committee of the House Ways and Means Committee in October 1987, several of the nation's leading religious broadcasters told Congressman J. J. Pickle (D-Tex.) and his colleagues that they were quite capable of regulating themselves. While religious broadcasters spoke softly, if sternly, the executive director of their trade association, the National Religious Broadcasters (NRB), went on the attack. Ben Armstrong labeled the Pickle hearings an "insidious" attack and "the beginning of a new 'inquisition,'" against religious broadcasters.³

The new inquisition never materialized. Congressman Pickle's subcommittee has kept a watchful eye on religious broadcasters, as has the Internal Revenue Service. But the pattern of federal government agency monitoring has been one of quietly seeking information and, where questions of compliance with government regulations arose, of privately seeking compliance.⁴

Critics of religious broadcasters complained that the cozy political alliance between the televangelists and conservative White House incumbents effectively squelched inquiries by federal regulatory agencies. While this proposition would seem

international visibility in 1980 as the head of a political organization called the Moral Majority. But before all of the details of the PTL scandal were revealed, Louisiana-based televangelist Jimmy Swaggart was caught in the presence of a prostitute by a rival small-time television preacher. Some months later Swaggart was again caught in the presence of a prostitute, this time by police officers who had stopped him for a moving violation. These scandals destroyed the television empires of Bakker and Swaggart. Perhaps more importantly, they cast a shroud of doubt on the integrity of all religious broadcasters.

3 Michael Isikoff, *Evangelists Defend Funding Tactics*, THE WASHINGTON POST, October, 7, 1987, at C4.

4 While federal agencies have chosen a quiet, almost private path to monitoring religious broadcasters, this has not always been the case at the state level of government. For example, Texas Attorney General Dan Morales publicly pursued litigation against televangelist Robert G. Tilton following an expose by ABC's *Prime Time Live* in late 1991. U.S. District Judge Sam Sparks of Austin threw out the suit against Tilton and admonished Morales, noting that the attorney general's investigation was "neither professional nor responsible, bordering on unethical, and constitutes bad faith." Nancy St. Pierre, *U.S. Court Judge Criticizes Morales in Tilton Inquiry*, DALLAS MORNING NEWS, March 19, 1992, at 13A.

to have some *prima facie* merit, the argument advanced in this article is that market forces should be the primary instrument for the regulation of religious broadcasting. The conclusion reached is that notwithstanding the encroachments of some religious broadcasters into the arena of politics, and the scandals and shame that befell some broadcast ministries, governmental and market structures for policing religious broadcasters appear to be in place and working well. The future, however, may be more problematic. This uncertain future stems from underlying structural developments in the communications industry and in the changing legal character of the culture, not from the scandals that rocked religious broadcasting in the late 1980s.

To date, policing of the religious airwaves has taken place at two levels. First, religious broadcasters have been subjected to essentially the same regulatory principles that govern all broadcasting in America.⁵ If the radio and television preachers sometimes appear to be operating in a relatively unfettered manner, it is because broadcasting in the United States operates with greater latitude and freedom from government interference than broadcasting in any other nation. Although not the subject of this piece, it is interesting to note that religious broadcasting is, in many ways, a macrocosm of the broadcast industry itself.

The second level of regulation of religious broadcasters is a complex web of informal social controls. These informal social controls operate most effectively on the level of the broadcast networks, the level of local radio and television station managers and owners, and the level of the viewing and listening audiences which support the access of religious broadcasters to the airwaves. This Article takes on the task of exploring the history of how these informal social controls evolved and worked.

Notwithstanding the general effectiveness of informal social controls, the trend of the modern welfare state is toward the involvement of government in virtually every aspect of public and private life. This portends a similar fate for religion in general and religious broadcasting specifically. In the concluding section, this paper will explore the implications of this development.

⁵ The primary regulatory agency of the government, of course, is the Federal Communications Commission (FCC).

II. FORMAL REGULATORY STRUCTURES AND ACCOUNTABILITY IN RELIGIOUS BROADCASTING

The Radio Act of 1912, which actually preceded regular broadcasting, did not adequately anticipate the problems of this new communications medium. Indeed, these early days of radio broadcasting were characterized by few regulations. A talented engineer could build a station for a few hundred dollars, and anyone could obtain a license. These have been characterized as the "wild and wooly days of radio"⁶ and as a "frenzied frequency free-for-all."⁷ Ben Armstrong, former Executive Director of the National Religious Broadcasters, described what happened: "Stations competed for the airwaves all across the frequency band, drowning one another in bedlam of squeaks, whistles, and disjointed words."⁸

One of the most celebrated renegades of this early era was Aimee Semple McPherson, an early superstar of radio evangelism. McPherson's shifting of power and frequency was sufficiently annoying that Secretary of Commerce Herbert Hoover ordered her station in Los Angeles closed. Enraged by this action, McPherson fired an angry telegram to Hoover saying, "Please order your minions of Satan to leave my station alone. You cannot expect the Almighty to abide by your wave length nonsense. When I offer my prayers to Him I must fit into His wave reception. Open this station at once."⁹ In the end, Hoover didn't have the authority to shut down McPherson's station. It took the Radio Act of 1927, which created a federal agency with the power to license and regulate radio broadcasting, to bring it under some semblance of control.¹⁰ This episode teaches at least three enduring lessons

6 Kimberly A. Neuendorf, *The Public Trust Versus the Almighty Dollar*, in *RELIGIOUS TELEVISION: CONTROVERSIES AND CONCLUSIONS* 73 (Robert Abelman and Steward M. Hoover eds., 1990).

7 Dennis N. Voskuil, *The Power of the Air: Evangelicals and the Rise of Religious Broadcasting*, in *AMERICAN EVANGELICALS AND THE MASS MEDIA* 72 (Quentin J. Schultze ed., 1990).

8 BEN ARMSTRONG, *THE ELECTRIC CHURCH* 24 (1979).

9 JEFFREY K. HADDEN & CHARLES E. SWANN, *PRIME TIME PREACHERS* 188-89 (1981). Whether Aimee Semple McPherson believed the Department of Commerce agents literally to be "minions of satin" or merely intrusive bureaucrats, it is clear that she believed they had no legitimate basis for interfering with her broadcasting. There remains today a significant number of religious broadcasters who share that view.

10 This was one of the classic confrontations in the politics of American

concerning the relationship between religious broadcasters and public policy.

First, some regulation of broadcasting, religious and otherwise, would be necessary to safeguard stations from technical interference by other stations, to insure that the limited spectrum of frequencies available to broadcasters would be utilized efficiently and fairly, and to prevent misuse by those who would influence society in ways judged harmful.¹¹ These considerations, taken together, virtually assured that government would play some role, probably a critical one, in regulating radio and television broadcasting.¹² Government could not and would not, after all, stand by while renegade broadcasters transmitted their signals in whatever direction caught their fancy, or while high-power stations drowned out lower-power stations.

Second, while the incident of a flamboyant and highly visible female preacher, such as Aimee Semple McPherson, may lend credence to the perception that religious broadcasters are the principal abusers of the airwaves, in reality abuse of the airwaves is by no means restricted to religious broadcasters. Aimee Semple McPherson was not and would not be the only broadcaster to violate simple norms of civility, such as, avoiding interference with other broadcasters.¹³ Quite deservedly, the behavior of religious broadcasters has been the

broadcasting. McPherson was a self-made evangelist without professional credentials, yet she was one of the most gifted radio evangelists of the 20th Century. In her indomitable resistance she succeeded in facing down a powerful Washington politician who just three years later would become the President of the United States.

11 For a more detailed discussion of the rationale for broadcast regulation, see SYDNEY W. HEAD, *WORLD BROADCASTING SYSTEMS* 129-61 (1985).

12 Clearly, preventing technical interference and protecting a scarce resource are more readily defined and executed than determining "the public interest" and "misuse" of the airwaves. The first two objectives have been managed relatively easy by the regulatory agency, while the latter two have periodically engaged executive, judicial and legislative branches of government.

13 As to Aimee Semple McPherson being singled out for punitive attention, the historical record as to whether her practice was more egregious than that of others is not clear. My informed speculation is that it was not. I suspect McPherson was singled out because of the content and style of her broadcasts. An important lesson of the McPherson case is that we ought to examine the behavior of religious broadcasters in the light of broadcasting industry standards rather than from the perspective of externally imposed standards. To demand that regulatory agencies hold religious broadcasters to higher standards than other broadcasters is to introduce prejudice that, if acted upon, would likely result in violation of the Free Exercise Clause of the First Amendment.

subject of intense public scrutiny in recent years. But a fair-minded assessment of that behavior will recognize that every misdeed of religious broadcasters can be matched by parallel misdeeds by secular broadcasters. It might well be asserted, in fact, that non-religious broadcasters are responsible for the lion's share of questionable behavior broadcast over the airwaves.

Third, notwithstanding the inevitability of government regulation, religious broadcasters have tended to see their mission as special and, therefore, have believed that they should not be subject to regulation by any worldly or secular authority. For many broadcasters, this view is grounded in the belief that the air waves are quite literally an instrument given by God to facilitate the mission of preaching the Gospel to all the nations. They take seriously Christ's commandment to go into all the world and preach the gospel to every creature.¹⁴ The ability to transmit the voice and the visual image of the preacher has, for the first time in history, made it possible to reach all humankind with the Gospel message.¹⁵ When this perspective is taken seriously, it is understandable why some evangelicals view God's command to spread the Gospel as loftier and more worthy of obedience than any mortal decree. It is important to note here that this perspective focuses attention on the biblical commandment to preach the Gospel, rather than on any constitutional right to do so. From a secular perspective, however, the real issue is not a divine commandment so much as it is one of arrogance—arrogance stemming from the belief that religious broadcasters are accountable to God alone and,

14 *Mark* 16:15

15 The history of electronic communication is intertwined with religious significance and symbolism which serves to affirm these evangelical Christians' belief that this medium has providential purpose. In 1844 when Samuel F. B. Morse completed the installation of the first telegraphic line he seemed to have experienced a sense of awe, even sacredness, in what he was doing as is evidenced by the choice of his first transmission: "What hath God wrought." Head, *supra* note 11, at 108. Radio dates back to 1896 with Guglielmo Marconi's discovery of wireless communication, but the first successful voice transmission occurred a decade later when a Canadian engineer, Reginal Fessenden, beamed a signal from the coast of Massachusetts to ships at sea on Christmas Eve, 1906. The content of this first transmission was a religious service. HADDEN & SWANN, *supra* note 9, at 8-9. Marconi provided technical assistance in the construction of Vatican Radio and introduced the Holy Father to the world in the inauguration of the first global network. DONALD R. BROWNE, *INTERNATIONAL RADIO BROADCASTING* 306 (1982). These and other early developments in radio and television provide the rationale evangelicals express for the providential character of broadcasting.

hence, that any other accountability would be superfluous. At a press conference following Jerry Falwell's assumption of Praise The Lord (PTL) leadership in April, 1987, he confessed this to be the case—albeit in an underwhelming way: “[we] have had a little sense of arrogance out there in the [televangelistic] church that it is none of [the Government's] business or anybody else's what we do or how we do it.”¹⁶ Falwell promised that “the arrogance is over,”¹⁷ but six years after the televangelism scandals came to public light, a large proportion of America's religious broadcasters still stubbornly refuse to open their books to outsiders or to subject themselves to formal self-regulation.

III. INFORMAL SOCIAL CONTROLS AND ACCOUNTABILITY IN RELIGIOUS BROADCASTING

Radio and television broadcasting in the United States have passed through four stages of development. Each stage corresponds roughly to the formal regulatory environment,¹⁸ but formal regulatory structures are themselves determined by technological, organizational, and social developments.¹⁹

A. *Stage One: Unregulated Broadcast Experimentation (1906-1927)*

Reginal Fessenden's offshore airwaves transmission on Christmas Eve of 1906 inaugurated broadcasting and the ensuing stage of experimentation.²⁰ The technology was quickly grasped and widely explored around the globe. The first regularly scheduled radio broadcast in the United States commenced in November, 1920, in Pittsburgh. Owned by Westinghouse Electric, radio station KDKA was created to stimulate the sale of radios. Many other radio stations quickly commenced regular broadcasting. In less than two years, there were 382 stations in operation. In just over four years, there

16 *Excerpts from The Rev. Jerry Falwell's News Conference*, THE CHARLOTTE OBSERVER April 29, 1987, at 11A (emphasis added).

17 *Id.*

18 Neuendorf, *supra* note 6, at 72.

19 The dates attached to each stage are only rough approximations. Beginning dates correspond to specific developments, although the real impact of that development may not be felt for some years. Similarly, the denotation of a new phase does not usually represent a sharp departure from the previous stage.

20 *See supra* note 12.

were over 600 stations on the air. By 1927, just seven years since the establishment of the KDKA, the number of radio stations had escalated to 732.²¹ And religious organizations were into broadcasting from the beginning. For, of the 600 stations identified by *Popular Radio* magazine in January, 1925, sixty-three were owned by churches and para-church organizations.²²

By 1924, station owners discovered that they could sell time to business organizations to promote their products, and the rush to develop privately owned commercial radio was underway. Religious stations did not fare well under the stiff competition of a market that quickly turned commercial. In fairly short order, many of these radio pulpit preachers turned out to be short on the capital needed to keep up with the rapidly rising costs and technology of broadcasting, to say nothing of the political capital needed to protect themselves from the assaults of those who, for commercial reasons, coveted their broadcast licenses. While some religious broadcasters were blasted off the air by stations with greater power, others faced license challenges by commercial stations. Some were squeezed out by heavy-handed deals, others sold their licenses, and others still simply ceased to broadcast. Those who remained would face even stiffer challenges during the second stage of broadcasting.

*B. Stage Two: Sustaining-Time and the Politics of Exclusion
(1927-1956)*

During the first stage of experimental radio, commercial broadcasters had ample opportunity to observe that religious broadcasters tended to be noisy, often intolerant, and otherwise controversial. What was more, they came in large numbers seeking access to the airwaves. Dealing with them posed no small problem.

Most station owners preferred having liberal Protestants on the air to having Fundamentalists or Pentecostals, groups who were clamoring for the opportunity. But from the beginning, the liberal Protestant traditions were very much under-represented. Part of the problem was that liberal Protestants were ambivalent about broadcasting. They saw the possibility

21 Voskuil, *supra* note 7.

22 HADDEN & SWANN, *supra* note 9, at 73-74.

of some positive benefits, but they could also see potential negative consequences, and some were vociferous in their condemnation of evangelical broadcasters.²³ Their attacks provided legitimacy for the exclusive policies of the broadcast networks and the Federal Radio Commission²⁴ (FRC), policies which would remain in effect for nearly three decades.

The formal and informal mechanisms that restricted evangelical access to the airwaves first became evident in the late 1920s with the creation of FRC and the formation of radio networks.²⁵ In its early years of operation, FRC used its broad authority in a rather heavy-handed way. During the late 1920s, FRC reassigned some religious stations to low-powered frequencies, determined not to grant new licenses to new religious stations, and used its broad regulatory powers to examine complaints that existing religious stations were not operating in the "public interest."²⁶

At this time, the broadcast networks combined their informal efforts to control evangelical broadcasting. NBC, the first radio network, was founded in 1926. At the onset, NBC determined not to accept paid religious broadcasting. Time allocated for religious broadcasting would be offered at no cost (or as *sustaining-time*, as it is called in the industry), but would be offered "only [to] the central national agencies of great religious faiths."²⁷ The Federal Council of Churches, an affiliation of liberal Protestant groups, was solicited for counsel and manpower for religious broadcasts. This policy explicitly excluded "individual churches or small group movements where the

23 For a treatise that personifies the ambivalence of liberal church leaders toward radio and television broadcasting from the onset, see JOHN W. BUCKMAN, *THE CHURCH IN THE WORLD OF RADIO-TELEVISION* (1960). Their response was not totally negative. "As early as 1923 the Federal Council of Churches [the forerunner of the National Council of Churches] officially encouraged local church federations to develop cooperative radio ministries." Voskuil, *supra* note 5, at 76. This counsel was to some measure followed, but liberal church leaders never became as excited about the possibilities of broadcasting as did the evangelical traditions.

24 Forerunner to the FCC.

25 FRC was created by the Radio Act of 1927, which empowered an independent agency to assign frequencies, license stations, review the performance of those licensed, and otherwise exercise broad authority in the regulation of broadcast communications.

26 In 1931 the license of a powerful and controversial Los Angeles religious broadcaster, "Fighting Bob" Shuler, was withdrawn.

27 *Policy Statement of the NBC Advisory Committee on Religious Activities*, in JEFFREY K. HADDEN & CHARLES E. SWANN, *PRIME TIME PREACHERS*, at 77.

national membership is comparatively small.”²⁸ Small denominations and independent evangelical broadcasters were thus caught in a double bind; for, on the one hand, they were excluded by network radio, and, on the other they were squeezed out by the FRC. But for the free enterprise character of broadcasting, evangelicals might have been excluded from the airwaves altogether.

When CBS radio network was formed in 1927, they needed cash and, thus, determined they would sell air-time for religious broadcasting, but in 1931 they shifted to a policy of sustaining-time religious broadcasts only.²⁹ For the next four years, the only access to the airwaves for evangelicals was on local stations, but this was often difficult. Many local stations adopted the networks’ policy of sustaining-time only and, further, accommodated only “mainline” religious groups.³⁰

A major breakthrough for evangelicals came in 1935 with the formation of the Mutual Broadcasting Network (Mutual). Mutual accepted paid religious broadcasts, and Charles E. Fuller’s “The Old-Fashioned Revival Hour” quickly became Mutual’s largest account. By 1940, paid religious broadcasting accounted for more than one-quarter of Mutual’s revenues. In 1943, Mutual seemed ready to join NBC and CBS in a policy of sustaining-time only for religious programming, but then reversed its decision and announced, instead, restrictive policies. Most important among the restrictions was the banning of on-air solicitation of money from listening audiences. The prohibition against asking audiences to help pay for the programs made it impossible for some broadcasters to continue.

It is widely believed that Mutual’s decision to restrict access was the result of pressure from liberal church groups.³¹

28 *Id.*

29 Ostensibly, this policy shift was to bring CBS into conformity with the other network. In reality, it was a means of getting rid of Father Charles Coughlin, whose sermons were considered too controversial. CBS, like NBC, called upon the Federal Council for assistance in programming.

30 When evangelicals did get on local stations, they were twice as likely to be charged for the air time as were Roman Catholics and mainline Protestants. Voskuil, *supra* note 7, at 76.

31 Federal Council officials denied this and investigators of the controversy have failed to find a smoking gun. It is also likely that both networks and local stations were pressured by prospective advertisers for these choice time slots. William Martin, *Giving the Winds a Mighty Voice*, in *AMERICAN EVANGELICALS AND THE MASS MEDIA* 63 (Quentin J. Schultze ed., 1990). Lowell Saunders, in perhaps the most comprehensive investigation of the controversy, concluded that the charges against the Federal Council could only be considered hearsay, and that there exist-

Whether or not there was a conspiracy to exclude religious broadcasters from the air, evangelicals were having a difficult time gaining access to the air waves. In 1942, they created the National Association of Evangelicals, and one of the first official acts of that organization was to create a radio committee to explore the problem of discrimination in access to the airwaves. Furthermore, in April, 1944, just a month after Mutual announced its policy changes, 150 evangelical broadcasters met in Columbus, Ohio, and formed NRB,³² whose first official act was to retain a Washington-based communications attorney.³³ NRB claimed some early successes, including gaining access to some sustaining time on Mutual and NBC's newly created Blue Network (a forerunner to ABC), but then lost some of its initial zeal and vitality.³⁴

The rapid expansion of television in the 1950s, like the initial expansion of network radio, caught evangelicals off guard. NBC turned again to the Federal Council of Churches and representatives of Catholicism and Judaism and moved swiftly to put in place a policy that would exclude evangelicals. CBS, leery of earlier conflict with evangelicals, added the Southern Baptists to its consortium of liberal Protestants,

there existed a high correlation between the economic health of the broadcasting industry and their willingness to sell time to evangelicals. When local stations or networks needed money, they sold time to evangelicals. Lowell Saunders, *The National Religious Broadcasters and the Availability of Commercial Radio Time* (1968) (unpublished Ph.D. dissertation University of Illinois).

While there may have been no overt conspiratorial activities to exclude evangelicals, there can be no question that the Federal Council preferred to have its own members represented on the network airwaves rather than nonmember churches. Furthermore, it is clear that many liberal church leaders were openly hostile toward the evangelical broadcasters as is evidenced in the editorial policy of *The Christian Century*, long the most prominent independent publication of liberal Protestantism. When Mutual announced its decision to restrict access, *The Christian Century* published an article bitterly complaining that they had not gone far enough:

The network religious radio program racket, capitalized by independent super-fundamentalist revivalists, will not be eliminated nationally until Mutual goes the whole way and bans paid religious programs altogether, as the other networks have done.

Charles W. Crowe, *Religion on the Air*, 61 *THE CHRISTIAN CENTURY* 973-74 (1944).

32 Ralph M. Jennings, *Policies and Practices in Selected National Religious Bodies as Related to Broadcasting in the Public Interest, 1920-1950*, 317 (1968) (unpublished Ph.D. dissertation, New York University).

33 JAMES DEFOREST MURCH, *ADVENTURES FOR CHRIST IN CHANGING TIMES*, 173 (1973).

34 JEFFREY K. HADDEN & ANSON SHUPE, *TELEVANGELISM: POWER AND POLITICS ON GOD'S FRONTIER*, 48 (1988).

Catholics, and Jews. The Southern Baptists were evangelical, but not members of NRB. Thus, the large body of small evangelical denominations and independent broadcasters were effectively cut out of access to national television at the same time they were struggling to keep a foothold in national radio.

In summary, the late 1920s through the mid-1950s saw the rapid expansion of television and the formation of networks.³⁵ This period also saw evangelical broadcasters excluded from the communications marketplace.³⁶ One can pose questions of prejudice and First Amendment rights of access, but these questions are moot today. If evangelical preachers perceived their problem in constitutional terms of free access, they did not take their fight to the courts. Most important, however, is the fact that, at the time, evangelical religious broadcasters were not well-organized enough to challenge those who did not want them on the airwaves.

C. Stage Three: Free Market Access (1956-1977)

From the Radio Act of 1927, it has always been understood that an important criterion for retaining a broadcasting license is "public service" broadcasting. Just how much public service time is necessary has never been explicitly defined, but it has always been clear that religious programming constitutes public service. In 1960, the Federal Communications Commission (FCC) ruled that there was no intrinsic relationship between sustaining-time and public service. The implications of this ruling were monumental, for both religious broadcasters and local stations. Under the ruling, local stations could sell air-time for religious programs and still get FCC "public interest credit." Under the ruling, evangelical broadcasters found cause to renew their commitment to buying religious air-time. Their faith was buoyed. Market forces explain the rest of the story. The ensuing competition between religious broadcasters for religious air-time became fierce. Fierce competition greatly

35 A few radio broadcasters, like Charles E. Fuller and Walter E. Maier, gained network access and, thus, large national audiences. But on the whole, evangelicals found themselves struggling for access in local markets. The combination of a competitive free market and an unsympathetic Federal Radio Commission made it difficult for them to own radio stations. The policies of NBC and CBS offered access only through sustaining-time, and the cozy relationships the networks formed with the Federal Council of Churches alliance substantially blocked access to outlets for reaching a national audience.

36 *Id.*

enhanced the value of the air-time, which fact, in its turn, prompted many local stations, which had previously abstained from selling air-time to religious broadcasters, to cash in on the new demand.³⁷

In the course of the next two decades, the landscape of religious broadcasting was transformed from the rule of sustaining-time to the dominance of free market access. By 1977, ninety-two percent of all religious broadcasting in the U.S. was paid-time programming,³⁸ the overwhelming majority of which was being purchased by evangelicals.³⁹

The 1960 ruling of the FCC was a watershed in the long struggle of evangelicals to gain access to the airways. I have identified 1956 rather than 1960 as the beginning of this free market stage of religious broadcasting, because that was the year that James DeForest Murch became the executive director of the National Religious Broadcasters. Murch took several important initiatives that quickly made NRB a big player in the communications business. The most important step was to take the annual meetings of the NRB to Washington, D.C. In his autobiography, Murch explained his reasoning:

I felt that our position would be immensely strengthened if we could take our national convention to the Nation's Capital. This was the seat of the Federal Communications Commission and the lawmakers who could assure our constitutional rights to freedom of religion and freedom of speech on the airwaves. It was also the seat of the industry's National Association of Broadcasters and the leading trade journal of the industry, *Broadcasting* magazine.⁴⁰

One of Murch's early and most important moves was to call on Sol Taishoff, editor and publisher of *Broadcasting*. Murch persuaded Taishoff that evangelicals had a legitimate complaint and created in Taishoff a champion of NRB's campaign to purchase air-time. Murch and other NRB leaders also found their way to the offices of the FCC and pleaded their case for

37 HADDEN & SHUPE, *supra* note 34, at 51.

38 *Report by the Communications Committee of the U.S. Catholic Conference*, in PETER G. HORSFIELD, *RELIGIOUS TELEVISION: THE AMERICAN EXPERIENCE* 89 (1984).

39 The networks produced their sustaining-time religious programs for more than a decade, but with the lure of big bucks from the syndicated televangelists, local affiliates elected not to run the network productions.

40 MURCH, *supra* note 33, at 179.

fair treatment.

Soon enough, evangelical broadcasters moved beyond gaining mere parity with religious broadcasters of the "mainline" religious traditions. Eventually, evangelical broadcasters acquired absolute dominance of the religious airwaves, a dominance which they have maintained until the present. Just how have they maintained this absolute dominance? NRB continues to hold its influential annual meetings in Washington, D.C., meetings which perennially feature an appearance by the President of the United States and which attract the faithful attendance of the Commissioners of the FCC. One former FCC Commissioner recently commented that the religious broadcasters "have a lobbying capability that makes the National Rifle Association seem like a bunch of rank amateurs."⁴¹

Liberal Protestants and Catholics have attempted to check the dominance of evangelical broadcasters along two lines.⁴² First, liberal Protestants and Catholics have argued that a license to broadcast is a public trust, that those who hold this trust are obliged to offer sustaining-time for religious programming, and, further, that mainline religious traditions ought to be the recipients of such gratis air-time. Second, liberal Protestants and Catholics have assailed the worthiness not only of evangelical broadcasters, but also of television as a medium. The argument runs roughly like this: televangelists are scoundrels using a medium that is inherently corrupting.⁴³ In short, liberal Protestants and Catholics find difficulty in arguing for entitlement to gratuitous access to a medium that they barely trust. But this ambivalence towards the broadcast media is one they have lived with for the better part of the century.

The growth of syndicated religious broadcasting occurred during the 1970s as individual televangelists purchased air-time station-by-station. During the 1980s the marketplace of syndicated religious broadcasters became saturated. This led to increased competition that drove the cost of air-time beyond the

41 Personal interview, May 17, 1991. I did not sense that the former commissioner meant this literally but, rather, intended to emphasize the fact that religious broadcasters are sophisticated lobbyists.

42 The office of the Assistant General Secretary for Communications of the Nation Council of Churches has been the focal point of the counterattack.

43 William F. Fore, until recently the assistant general secretary for communications of the National Council of Churches, is the most important spokesperson for this argument. For an introduction to this perspective, see WILLIAM F. FORE, TELEVISION AND RELIGION (1987).

means of the broadcasters to pay, i.e., beyond their capability to raise money from the small proportion of the viewers who were willing to send in a donation. One theory advanced regarding the underlying conditions precipitating the scandals was that the market had become saturated and some broadcasters were covertly seeking reduced competition.⁴⁴

D. Stage Four: Techno-legal Regulation (1977-present)

As important as the televangelism scandals seemed at the time, they were relatively unimportant in terms of the overall regulatory picture. As noted at the beginning of this inquiry, the scandals did not escape the attention of various government regulatory agencies, but there was no zealous crusade to legislate or find existing regulatory structures that could be used to put the pinch on broadcasters. This was true for at least three reasons.

First, religious broadcasters succeeded in creating the impression that they had taken bold initiatives toward self-regulation. Several months before the PTL scandal broke, NRB approved in principle a plan to create an Ethics and Financial Integrity Commission (EFICOM). In the wake of the PTL scandal, NRB contracted with the Evangelical Council for Financial Accountability (ECFA) to independently manage EFICOM. In the end, NRB rhetoric was stronger than self-regulatory reality.⁴⁵ Impressions, nonetheless, counted for much.

Second, legislators who might have been inclined to craft legislation designed to reign in religious broadcasters quickly became aware of the difficulty of doing so without tackling much broader issues of broadcast regulation. The 1970s and 1980s witnessed ever broadening acceptance of what could

44 This thesis can be pursued in many possible directions. For example, when Marvin Gorman, an Assemblies of God minister, began to develop a significant television ministry in Louisiana, Jimmy Swaggart brought charges of sexual misconduct before the Assemblies of God. Gorman was defrocked and subsequently lost his New Orleans church and television ministry. Swaggart subsequently threatened to bring Jim Bakker's sexual improprieties before the Assembly of God. When this became public knowledge, Swaggart denied that he had his eye on the PTL Network. Jerry Falwell similarly denied that his motivation for taking over PTL had anything to do with acquiring a network for his own broadcasting ambitions. The truth of the "economic motivation" thesis will probably never be proven. For some of the best investigative research on this thesis see CHARLES E. SHEPARD, *FORGIVEN* (1989); LARRY MARTZ, *MINISTRY OF GREED* (1988).

45 See *NRB Moves Slowly to Enforce Ethics Code*, CHRISTIANITY TODAY, March 9, 1992, at 59.

appear in print, cinema, and on the airwaves under the "free speech" protection of the First Amendment. To regulate even the most outrageous televangelists would necessarily pose the question of the limits of First Amendment protection for the bizarre antics of the likes of Howard Stern and Morton Downey Jr. If the First Amendment doesn't protect broadcasters like Stern, then perhaps censorship of "Geraldo" and "Donahue" would be around the corner. Even the thought of a slippery slope towards greater regulation of commercial broadcasting serves as a powerful antidote against proposals to regulate radio and television preachers.

The third, and perhaps most important factor mitigating against the rush to regulate the televangelists, was the fact that the marketplace itself responded swiftly and effectively. Upon learning of the televangelism scandals of 1987-88, tens of thousands of formerly loyal viewers closed their checkbooks with devastating consequences. Virtually every television ministry in America was negatively impacted by the scandals. Six years after the scandals first broke, the religious broadcasting industry remains shrouded with public doubt as to its integrity. Of course, formerly loyal viewers had time to sort things out. And, on the whole, non-scandalized ministries eventually recovered both viewers and revenues.

In sharp contrast, scandalized ministries suffered serious and ostensibly permanent losses. Jim and Tammy Faye Bakker were forced to leave the air when the PTL scandal broke. Their network went bankrupt within a week, heroic fund-raising efforts of Jerry Falwell notwithstanding. The scandalized ministries of Jimmy Swaggart, Oral Roberts and Robert Tilton have all paid a heavy price as well. Even though all three remain on the air, each has been reduced to but a shadow of bygone glory. And there is no credible evidence to suggest that any of them will be able to rebuild to the point where they approach past financial and audience achievements.

The marketplace, then, has constituted a key force in both formal and informal regulation of religious broadcasters. Ultimately, a free press, not government regulatory intervention, brought the crimes and moral misdeeds of these televangelists to the attention of the public. The viewing public, in turn, played an important regulatory role by switching channels and closing their checkbooks. It may not be a perfect regulatory system, but it worked efficiently throughout the late 1980s.

As I read the history of religious broadcast regulation, the

fourth stage had been in progress fully a decade, when the scandals of the late 1980s broke. A defining feature of the fourth stage has been the rapid development of expensive, highly sophisticated delivery technology. Another defining feature of the fourth stage has been the expanding role litigation has come to play in the affairs of religious broadcasters. This latter feature is an inevitable consequence of rapid, technologically-driven growth and of the expanding role litigation has played generally in promoting individual and collective advancement.

1. *Technology*

In a strict sense, technology does not regulate religious broadcasting. But technology is a powerful factor in defining the parameters wherein broadcasting operates. The growth of communication technologies permitted rapid expansion of syndicated programming, satellite transmission, personalized direct mail and telemarketing, among other things. These innovations in communications technology were the driving force behind the phenomenal growth of televangelism during the 1970s and 1980s. Television ministries became big precisely because all of these technologies made rapid growth of parachurch organizations possible.

The technological advances that spawned dozens of syndicated religious television programs seems now to be working toward the concentration of economic power in religious broadcasting. This process can be dated to April 29, 1977, when the Christian Broadcasting Network transmitted its first satellite broadcast. In rapid succession, Trinity Broadcasting Network was founded in southern California, followed by the PTL Network in North Carolina. All three networks had state-of-the-art technology poised to deliver religious programming via cable even before the wiring of the nation for cable began in earnest. That cabling process was substantially achieved in the 1980s and continues towards saturation in the 1990s.

While the cabling of the nation has resulted in a significant loss of market share for the three major television networks, the religious networks have been among the beneficiaries of this redistribution of viewers. The costs for broadcasting on major networks have always been prohibitive for religious telecasters. This option will become even more prohibitive in the future. Loss of market share by major networks has not driven down the cost of air-time, but merely reduced the trajec-

tory of soaring costs. Similarly, local network-affiliated stations will continue to command top dollar for the purchase of air-time.

This portends a decline in syndicated religious broadcasting on local network stations. Religious broadcasters simply will not be able to raise adequate revenues to pay the high cost of being on the several hundred local network stations. Thus, it is increasingly clear that the future of religious broadcasting is in satellite delivery via cable television. The only economically viable long-term alternative for syndicated broadcasters is to turn to religious networks and a growing number of low power religious stations. Those who have satellite delivery capability, and have established an extensive network of cable systems to which they can deliver their programs, are in a position to dominate the future market.

At the present time there are four religious networks with significant cable access: Christian Broadcasting Network (CBN), Trinity Broadcasting Network (TBN), Vision Interfaith Satellite Network/American Christian Television System (VISN/ACTS), and Eternal Word Network (EWN). Pat Robertson's CBN now operates under the umbrella of the Family Channel which ranks among the largest cable systems in the nation. In late 1991 the Family Channel reached 92 percent of all cable households and 59 percent of all households in America.⁴⁶

Of the three networks devoted exclusively to religious programming, TBN is the most viable. Founder and owner Paul Crouch has aggressively bought up small powered television stations in addition to expanding cable system coverage. While Crouch is Pentecostal, and this is emphasized in programming, he is well positioned to sell air-time to non-pentecostal Evangelicals.

VISN is a collaborative effort of 28 main line Protestant, Jewish, Roman Catholic and Eastern Orthodox groups. ACTS was founded by the Radio and Television Commission of the Southern Baptist Church. Neither network allows on-air solici-

46 The Family Channel broadcasts *The 700 Club*, the flagship telecast of CBN, daily, and offers other related religious programs plus a substantial outlet for religious programming on Sunday. While Robertson found "family oriented programming" to be more profitable than a full diet of religious programming, the program schedule of the Family Channel is potentially elastic and could return to more religious broadcasting should that become profitable.

tation of funds. Both organizations have experienced financial difficulties and in 1992 began sharing a single cable channel. EWN was founded by Sister Angelica, a Roman Catholic nun from Alabama. While both VISN/ACTS and EWN currently have significant cable outlets across the nation, these operations do not appear to have adequate capitalization or management resources to be competitive in the long run competition for cable outlets. Even now, they are dependent on free access to cable systems. This gratuitous relationship with cable owners is unlikely to persist unless mandated by the Federal Communications Commission, which appears unlikely. The unknown quotient is the potential of technology to produce unforeseen and unanticipated options for production of delivery of television.

2. *Litigation*

The second half of the Twentieth Century has experienced a significant growth in the social welfare state. Social movements and lobbying have identified ever expanding domains where the benevolent social welfare state "ought" to protect or serve its citizens. Litigation has increasingly become the instrument whereby individuals and organizations press their claims for access to resources. Religious organizations generally, and religious broadcasters in particular, have not escaped this trend. Over the past decade-and-a-half, major ministries have devoted increasing resources to legal matters. Some of the increased legal work reflects a need among religious broadcasters for legal counsel in contractual matters as well as in matters respecting regulatory compliance. But religious broadcasters have been increasingly involved in litigation, both as defendants and as plaintiffs. Legal proceedings involving religious broadcasters have occurred on a wide range of issues. I can here offer only illustrations.

One of the major struggles religious broadcasters have faced is the issue of their tax-exempt status. In 1983 the State Board of Equalization of California revoked the tax-exempt status of Robert Schuller's Crystal Cathedral in response to the use of the cathedral for admission charging events. The Board of Equalization subsequently agreed to a compromise in which taxes would be paid on part of the Crystal Cathedral's "facilities used for such non-exempt commercial purposes as concerts

and community group meetings.⁴⁷ A ministry spokesperson characterized the taxation issue as "the beginning of a new kind of harassment [of] religious institutions."⁴⁸

Religious broadcasters as defendants: California was also the scene of *Swaggart v. Board of Equalization*,⁴⁹ which has not received great attention, but which nonetheless has had tax exemption implications for religious broadcasters specifically and for religious institutions more generally. This case involved the authority of the state of California to collect taxes on various items, including religious records, tapes, and books sold by the Swaggart ministry to Californians. The Supreme Court upheld a decision by the California appeals court permitting the state to tax items sold by the Swaggart ministry. The decision leaves open the question of whether any religious organization has a constitutional right to tax exemption.

Religion-based tax exemption challenges have also been brought against the ministries of television preachers by individuals. In Virginia, two Lynchburg residents appealed a Circuit Court ruling granting Jerry Falwell's Liberty University the right to issue \$61 million in tax-free government bonds on the grounds that this violated the Separation Clause.⁵⁰ Ultimately, the Virginia Supreme Court blocked the issuance of the tax-free bonds. Falwell, electing not to appeal to the Supreme Court, turned to Kemper Securities for assistance with a private bond sale. Kemper, finding no market interest in the bonds, withdrew from the underwriting agreement. Falwell, in turn, sued Kemper for default.⁵¹ The parties agreed to submit the dispute to arbitration. Arbitrators subsequently found the case "without merit."⁵²

Religious broadcasters as plaintiffs: Jerry Falwell sued *Hustler* magazine for "intentional infliction of emotional distress" resulting from a satirical parody.⁵³ In anticipation of his bid for the Republican nomination for the presidency in 1988,

47 *Crystal Cathedral to Pay Back Taxes on Concert Receipts*, N.Y. TIMES, August 31, 1983, at A18.

48 *Id.*

49 493 U.S. 378 (1990).

50 U.S. CONST., amend. I.

51 *Liberty University v. Kemper Securities Group*, Civil Action No. 90-0075-L (W.D. Va.).

52 *Liberty University v. Kemper Securities Group*, AAA Arbitration No. 11-136-00194-91.

53 *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Pat Robertson sued former California Congressman Paul "Pete" McCloskey and Indiana Congressman Andrew Jacobs for making statements about his Korean War military record that were alleged to be "wanton and reckless."⁵⁴ Neither Falwell nor Robertson's suits were ultimately successful, but they illustrate a perceived need to protect the good name and reputation of religious broadcasters. Interestingly, both Falwell and Robertson publicly interpreted the litigation outcome as vindicating their positions.

Apart from the need to litigate, legal departments have become a part of virtually every television ministry for other reasons. They seek to develop endowments and trust funds for long term support of their ministries. In addition to developing trusts and endowments, the legal departments of television ministries, more often than other nonprofit organizations, face challenges to wills by heirs of those who have made significant bequests.

More recently, radio and television ministries have found themselves embroiled in controversy and litigation with former employees. In the wake of the PTL scandals, CBN placed *The 700 Club* co-host Danuta Soderman on "temporary leave of absence" after the publication of her autobiography that included a discussion of a love affair outside of marriage. CBN, sensing that this could be grist for media that was on a feeding frenzy with the PTL scandal, concluded that they could not risk having Soderman, who had been called the, "Barbara Walters of Christian television," on the air. Ms. Soderman quietly disappeared from the scene.⁵⁵

Religious broadcasters also need good legal counsel to keep abreast of developments in constitutional law affect free exercise. Take for example, *Employment Division v. Smith*,⁵⁶ a Supreme Court case potentially with significant implications for the regulation of religious broadcasting. If *Smith* effectively establishes the precedent that religious organizations are entitled to no substantive protection under the Free Exercise Clause of the First Amendment, then religious broadcasters—along with other religious organizations—stand to be entangled in a much broader web of government regulation.

54 Charles R. Babcock & T.R. Reid, *Robertson's Libel Suit Dismissed*, WASH. POST, March 8, 1988, at A6.

55 *CBN Co-Host Is Reassigned*, THE DAILY PROGRESS, June 26, 1987.

56 *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Or, take the recent passage of the Religious Freedom Restoration Act⁵⁷ (RFRA), an act intended to lessen, if not altogether to defeat, the impact of *Smith*. Will RFRA substantially alter the fact that religious broadcasters have become deeply and increasingly involved in all kinds of litigation? Probably not. But, as a general proposition, we can postulate that religious broadcasters can expect to continue to spend precious resources on legal matters. It follows that, whereas larger ministries can more easily allocate resources to deal with legal costs, small ministries can be easily overwhelmed by such costs.

In the years since the PTL scandal, other religious broadcast employees have declined passively to accept what they perceive to be mistreatment by their employers. James Dobson's radio program *Focus on the Family* is broadcast daily on 1,350 outlets, second only to Paul Harvey. When co-host Gil Moegerle's marriage ended in divorce in 1987, Dobson reassigned Moegerle to the film department. Some months later, Moegerle married an employee of the ministry. Subsequently, both resigned claiming they were forced out. Moegerle sued claiming, among other things, "invasion of privacy, interference with business activities, and wrongful termination."⁵⁸ More recently, Bob Larson Ministries, which broadcasts a radio and television talk-show, has been a hotbed of employee grievances, including wrongful dismissal, sexual harassment, nonpayment of accrued overtime, and the like.⁵⁹ The day of religious broadcast employees passively accepting managerial decisions that affect their lives appears now to be a thing of the past.

This discussion of the impact of technology and the increasing propensity for problems to be resolved by litigation draws attention to the fact that the religious broadcasting industry no longer lives in a world apart. They have entered the mainstream of society. They have utilized technology to great advantage, even as technology has shaped the character of their ministry. An increasingly litigious society is similarly impacting religious broadcasting in ways that are only now beginning to be understood.

57 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

58 3 NATIONAL AND INTERNATIONAL RELIGION REPORT, No. 3, January 16, 1989, at 6.

59 Timothy C. Morgan, *Personnel Woes Persist at Larson Ministries*, 37 CHRISTIANITY TODAY 62 (1993).

IV. CONCLUSIONS: TOWARDS ACCOUNTABILITY IN TELEVANGELISM

We have come a long way since a leading religious broadcaster sent signals of varying strength in directions of her own choosing, and then sassed the Secretary of Commerce telling him, in effect, that where she sent her broadcast signals was a matter of concern only between her and the Almighty. That Aimee Semple McPherson did this, much less that she got away with it, seems today almost incomprehensible. Even Jerry Falwell's 1987 confession, on behalf of religious broadcasters, of "a little sense of arrogance" in believing that they were answerable only to God, seems archaic.

From the very beginning, it was inevitable that broadcasting and its related technologies would have to be regulated. What may be amazing is that we have not had much more regulation. The full implications of technological and legal developments on religious broadcasting cannot be fully understood at this point. It is possible, however, to offer at least limited speculation about how technology and legal process will affect the future of religious broadcasting.

First, the informal mechanisms of regulation discussed in this paper will continue to impact religious broadcasting. Networks, audiences, the press, and market competition will continue to play a significant role in shaping religious broadcasting.

Second, technology is a double-edged sword. On the one hand, the spread of technology tends to lower per unit cost to religious broadcasters and, thus, invites more players to enter the competition. The cost of a television studio and equipment once made participation in competition prohibitive. Today, local public access channels provide the opportunity for virtually everyone with an interest to try their hand at producing television programming. Nearly two decades ago the National Religious Broadcasters were offering regional workshops to would-be religious broadcasters. The novice could not then, and still cannot compete head on with broadcasters owning state of the art equipment. But skillful use of video equipment can still put one in business. In the past, the best of the local religious broadcasters were soon entering multiple markets, syndicating, and becoming contenders for national markets. Rising costs are rapidly closing off this option.

At the same time that technology was making it possible

for more players to get in the game, the expansion of satellite transmission and cable redirected delivery into the hands of a few who controlled access to satellites and cables. The result has diminished the role of syndicated programming except for those that have the resources to contract with networks. This trend is almost certain to continue. Programming that cannot deliver large markets, e.g. religious broadcasting, will become increasingly hard to sustain by syndicated selling to individual stations. While individual broadcasters will be able to buy time on satellite networks, their opportunities for developing large audiences will be significantly restricted.

In short, while technological innovations of the 1970s and 1980s made it possible for more broadcasters to syndicate, the technology of the 1990s is shifting delivery to cable via satellite. This development concentrates power in the hands of those who control the delivery technology. They will reserve prime viewing time for their own programming and cut hard bargains with independent newcomers.

Third, the second half of the Twentieth Century has seen an enormous expansion in the role of litigation in resolving competing claims for resources and demands for justice. Federal and state government agencies play an increasing role in the pursuit of claims, acting as enforcers of legislatively mandated regulations, interpreters of regulations, and investigators of claims brought by individuals. Even though most religious broadcasters are organized as tax-exempt organizations and, as such, are not subject to many state and federal rules that govern corporations, litigation and the need to comply with government regulations still impact religious broadcasters in many ways. As the religion-based tax exemption cases suggest, such regulations will continue to be a serious issue.

Finally, the future shape of broadcasting will be determined in part, at least, by technological developments that are yet to be discovered or invented. Since we don't know what these developments may be, we cannot anticipate their impact. But on the basis of everything we know about the first nine decades of technological development in broadcasting, we can anticipate that religious broadcasting is unlikely to be affected in ways very different from commercial broadcasting. Although both experienced a long history of only minimal regulation, that era seems likely to be coming to a close.