NOTE

Moving Toward Neutrality: The National Telecommunications and Information Administration's New Stance on Sectarian Programming

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> Because absolute zero is not achievable, it is always possible to find some effect of advancing or inhibiting religion. Thus, if you look only at one side of the balance, you can always find a constitutional violation.[1]

I. Introduction

Neutrality is difficult to define and perhaps even more difficult to achieve, but it is critical to the understanding of the religion clauses. The First Amendment provides that the government seek a neutral balance between neither advancing nor inhibiting religion. However, modern debate surrounding the religion clauses often addresses only one side of the balance to the exclusion of the other: the concern is focused either entirely on the danger of government endorsement of religion or on the danger of government hostility toward religion.

Professor Douglas Laycock suggests that the search for a government stance which is neutral toward sectarian interests requires one to look both at the effect of advancing *and* inhibiting religion.[2] Until recently, the National Telecommunications and Information Administration (NTIA) had long been guilty of looking only one way, or of practicing "disaggregated neutrality,"[3] in its policy on sectarian programming.[4] The policy required the NTIA to categorically deny all funding to a government program[5] that provided *any* incidental or attenuated benefit to religion.[6] Thus, for the policy's sixteen-year reign, virtually all public broadcasting excluded any programming that could be construed as providing even the least benefit to religion. However, in December, 1996, in the wake of two recent Establishment Clause cases, the NTIA revised its policy to incorporate a concern for inhibiting, as well as advancing, religion.

Under the NTIA's modified interpretation of its policy on sectarian programming, a station may still receive funding even if its programming provides an attenuated or incidental benefit to religion. The NTIA's reinterpretation of its policy encompasses what Laycock refers to as substantive neutrality: a neutrality recognizing that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[7] Not only does the reinterpretation have profound constitutional implications, but great social and cultural implications as well. The relationship between public radio and religion can directly impact public perception of religion, even to the point of shaping private practice.

This Note analyzes the implications of applying the NTIA's new policy to public broadcasting stations and the larger implications for telecommunications law and the Establishment Clause in general. Specifically, this Note discusses whether the new policy achieves a neutral stance toward religion. Part II presents an overview of the NTIA itself, with emphasis placed on its prior bright-line policy on sectarian programming as applied in

Fordham University v. Brown. Part III considers the alternative standard of neutrality applied in cases such as *Rosenberger v. University of Virginia*, which directly influenced the NTIA's modified interpretation. Part IV examines the NTIA's revised policy in light of Laycock's concept of substantive neutrality and in light of relevant case law, namely *Rosenberger*. Part V discusses the cultural and social consequences of disaggregated and substantive neutrality in the area of broadcasting and telecommunications law. Ultimately, this Note recommends adopting an approach of substantive neutrality for public broadcasting policy and supports the NTIA's new policy as consistent with that approach.[8]

Finally, while this Note addresses the narrow issue of the NTIA's modified interpretation of its sectarian policy, it acknowledges the much larger implications the new policy holds for constitutional and telecommunications law. The NTIA, in comparison to other government agencies, awards a relatively small amount of funds; however, as an agency of the Department of Commerce and as an agency that works closely with the Federal Communications Commission (FCC or Commission), the NTIA's actions have much broader ramifications and often serve as a model for other governmental policies. Specifically, the NTIA's policy reinterpretation may foreshadow how the government at large will address telecommunications and Establishment Clause issues against a backdrop of growing societal and legal support of religious freedom.

II. An Overview of the NTIA

The NTIA, under the Department of Commerce, administers three major grant programs which fund eligible entities. The Public Telecommunications Facilities Program (PTFP) provides funding to public broadcasting facilities; the Telecommunications and Informational Infrastructure Assistance Program (TIIAP) assists facilities connecting computer networks; and the National Endowment for Children's Educational Television (NECET) aids the creation of new children's programming. For fiscal year 1995, the NTIA awarded a total of 27.6 million dollars in funds to 142 projects. The individual awards ranged from $5,694 to $954,518.[9] The NTIA requires eligible applicants to follow certain application procedures and awards the grants on the basis of neutral criteria. Although once excluded, sectarian organizations are now included in the list of eligible applicants.[10]

For example, Bloomington, Indiana's public television and radio stations, WTIU-TV and WFIU-FM, have received considerable funding from PTFP. In fiscal year 1994, PTFP gave WTIU-TV $421,500, or eight percent of its total budget, to purchase a digital-ready transmitter.[11] In fiscal year 1996, the NTIA gave WTIU-TV $56,000 for airplay tape equipment, and in fiscal year 1997 it gave $26,000 for computer video equipment, which comprised about two percent of its budget.[12] Additionally, the station received matching grants from Indiana University and other sources. Also, the NTIA indirectly aids public broadcasters by providing grants to National Public Radio and American Public Radio.[13]

In 1979, the NTIA extended its policy to PTFP grants,-"prohibiting funding for any equipment, facilities, and other materials[14] that would be used for any purposes the essential thrust of which is sectarian."[15] Specifically, the language of the regulation provided that "`[d]uring the period in which the grantee possesses or uses the Federally funded facilities (whether or not this period extends beyond the Federal interest period), the grantee may not use or allow the use of Federally funded equipment for purposes the essential thrust of which are sectarian.'"[16] The NTIA interpreted this policy to prohibit the use of NTIA-funded facilities and materials in connection with any sectarian activity.[17] The NTIA applied the same policy and interpretation to its two other grant programs.

The original policy interpretation allowed a station to broadcast religious matters only in an educational context. For example, the NTIA permitted the "`presentation [of religion] in an educational or cultural context of music or art with a religious theme or of programs about religion.'"[18] The NTIA also allowed "`distribution of instructional programming of a secular nature to church-related educational institutions.'"[19]

The NTIA claimed its policy interpretation relied upon the three-prong test of *Lemon v. Kurtzman*.[20] Under *Lemon*, the constitutionality of a statute, regulation, or funding policy depends on three factors: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits

religion; finally, the statute must not foster `an excessive government entanglement with religion.'"[21] The government action must pass each of these tests to establish constitutionality. The majority of the NTIA's analysis rested on the second prong of the *Lemon* test.[22]

Fordham University v. Brown[23] provides a recent example of how the courts have applied the NTIA's policy. In *Fordham University*, the United States District Court upheld the NTIA's bright-line test for sectarian programming as constitutional under the First Amendment. Specifically, the court held (1) that the NTIA properly determined that the university was ineligible for funding based on its broadcast of religious mass; (2) that the NTIA's "denial of eligibility [was] consistent with the Establishment Clause"; and (3) that the "regulations prohibiting sectarian use of federally funded [broadcast] equipment [did] not excessively entangle government with religion."[24]

Fordham University involved a university's forty-seven year tradition of broadcasting weekly an hour-long Catholic Mass. The University's noncommercial radio station, WFUV-FM, broadcast twenty-four hours a day, seven days a week, and was an affiliate of National Public Radio and American Public Radio. The station broadcast music, news, information, and other programs in addition to the Mass and was only one of two public radio stations in the New York City market.[25]

The controversy began when the station was forced to move its transmission facilities to meet the FCC's radiation standards. The University "submitted an application [to the NTIA] for $250,000 in federal funds to install a new transmission tower and antenna system, and $46,137 to rebuild its production control room."[26] The University included a program guide in the application which listed the airing of the Mass. Subsequently, the NTIA denied Fordham University any funding solely because of the Mass.[27] In fact, in a phone conversation between a University representative and Larry Irving, the Assistant Secretary for Communications and Information, Irving stated that "NTIA policy against awarding PTFP grants to stations broadcasting sectarian programming was `absolute,' and that [the University] would receive no funding until the religious service was removed from WFUV's schedule."[28]

The court rejected the University's argument "that its broadcast of a religious service for one hour a week out of 168 programming hours" demonstrated an overall secular purpose.[29] Instead, the court said that it was interested only in "the facts at hand," specifically the Mass itself.[30] It disregarded any analysis of the overall programming schedule. In fact, the court even argued that the University's *de minimus* claim was analogous to arguing that a woman could be "a little bit pregnant."[31] Thus, under the court's view, no station receiving NTIA funding could ever air religious programming. Ostensibly, even one program a year would be too much.

The University claimed that NTIA's regulations inhibited religion, stating that "where government action `fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations' and `conveys a message of government . . . disapproval of religion, a core purpose of the Establishment Clause is violated.'"[32] The court declined to find any inhibition to religion and instead focused almost exclusively on advancing religion.

The court also suggested that a bright-line policy better enabled the government to avoid excessive entanglement with religion under the third prong of the *Lemon* test.[33] However, the University argued that the government was already involved in evaluating whether religious issues were presented in a cultural, educational, or inherently religious context. Further, the University argued that the bright-line policy enabled the government to adopt a "`self necessitated role as the Grand Inquisitor of sectarian programming.'"[34] In some ways, the opposing views of the government and the University reflect Rehnquist's concern for a "Catch-22" in his dissent to *Aguilar v. Felton*:[35] if the University allowed the broadcast of the Mass, it violated the second prong of *Lemon*; if the University prohibited the airing after evaluating the program and finding it religious, it assumed a monitoring position and violated the third prong of *Lemon*.

Although *Fordham University* actually upheld the NTIA's policy, the NTIA took special notice of the court's statement in dicta that the court did not consider whether other alternative constitutional interpretations existed: "the Court emphasizes that it does not address the question of whether these regulations are required by law, whether there are

superior alternatives, or whether they would be problematic under other factual situations."[36] This disclaimer implied that the NTIA's policies may have been less than ideal and certainly gave the NTIA a reason to revisit its then existing interpretation.

Fordham University appealed the United States District Court's decision to the United States Court of Appeals for the D.C. Circuit. However, while the case was pending, the NTIA issued the reinterpretation of its policy on sectarian programming as discussed below.[37] Subsequently, the NTIA awarded the University a PTFP grant for $262,858 to build the radio tower.[38] Associate Attorney General John Schmidt supported the decision to give the University the requested funds, noting, "`We wanted to strike a proper balance under the Constitution, and I believe that with today's agreement we have done so.'"[39]

III. An Alternative Concept of Neutrality in *Rosenberger*

Exactly one year after *Fordham University* decision, the Supreme Court handed down a decision with a radically different reading of neutrality under the Establishment Clause: *Rosenberger v. Rector*.[40] In *Rosenberger*, the Court found unconstitutional a state university's denial of funding to a student organization because of the organization's religious nature. The Court found that the government's program was neutral toward religion and that "[s]uch neutrality is a significant factor in upholding programs in the face of Establishment Clause attack."[41] Specifically, the Court noted in *Rosenberger* that "the government follows neutral criteria and even-handed policies to extend benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[42]

The *Rosenberger* case involved a student group, Wide Awake Productions, "established `[t]o publish a magazine of philosophical and religious expression,' `[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,' and `[t]o provide a unifying focus for Christians of multicultural backgrounds.'"[43] While the group gained status as a university "Contracted Independent Organization,"[44] the University denied the group monies from its Student Activities Fund to cover its printing costs of $5,862.[45] The University explained its denial on religious grounds, noting that Wide Awake was a "religious activity" within the meaning of the University Guidelines since the magazine "`promote[d] or manifest[ed] a particular belie[f] in or about a deity or ultimate reality'" and found the magazine ineligible for funding.[46]

Both the District Court and the United States Court of Appeals for the Fourth Circuit ruled for the University on the basis of excessive entanglement. Specifically, the Court of Appeals feared that funding the magazine's printing costs would constitute an imprimatur of religion. The court stated that because:

> Wide Awake is "a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy," the University's provision of [Student Activities Fund monies] for its publication would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."[47]

The Supreme Court, however, found for the student paper and rejected the Court of Appeals' reading of the Establishment Clause. In considering the lower courts' concern that the University funding for the student group would advance religion, the Supreme Court found that "[t]here is no suggestion that the University created [the government program] to advance religion or adopted some ingenuous device with the purpose of aiding a religious cause."[48] Further, the Court noted that the state "program respects the critical difference `between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'"[49] Finally, the Court dismissed as implausible the Court of Appeals' fear that the newspaper's views would be attributed to the University: "there is no real likelihood that the speech in question is being either endorsed or coerced by the State."[50]

After finding that the University's action would not violate the second prong of the *Lemon* test, the majority argued that adopting the dissent's view would actually violate the third prong of the *Lemon* test.

> Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content. . . . That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. . . . [O]fficial censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.[51]

Justice O'Connor's concurring opinion endorsed substantive neutrality, rejecting both formalistic[52] and disaggregated neutrality: "Neutrality, in both *form and effect*, is one hallmark of the Establishment Clause."[53] Justice Thomas, also supporting an application of substantive neutrality, noted in his concurrence that "the Establishment Clause may be judged against either a baseline of `neutrality' or a baseline of `no aid to religion,'"[54] which corresponds to baselines of substantive and disaggregated neutrality, respectively. Justice Thomas, however, argued for a "`kind of benevolent neutrality toward churches and religious exercise.'"[55] Thus, Justice Thomas's balance may swing more strongly against government programs that inhibit religion and may ultimately recreate the problem of disaggregated neutrality.

While the NTIA cited *Rosenberger* as the case most strongly influencing its policy interpretation,[56] the agency noted that several earlier Establishment Clause cases had announced a similar understanding of neutrality. For example, in *Mueller v. Allen*,[57] the Supreme Court examined a Minnesota statute, allowing state taxpayers "to claim a deduction . . . for certain expenses incurred in educating their children."[58] The Court determined that the deduction, which was limited to "actual expenses incurred for the `tuition, textbooks, and transportation' of dependents attending elementary or secondary schools,"[59] did not violate the Establishment Clause. The Court noted its "consistent rejection of the argument that `any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause."[60]

The *Mueller* Court based its ruling on the fact that the Minnesota statute did not involve direct aid to religious organizations, but rather allowed indirect assistance under neutral criteria.[61] The Court distinguished its ruling in *Mueller* from that in *Committee for Public Education v. Nyquist*[62] on the ground that federal funds were available to the parents of children in both public and private schools rather than only to those with children in private schools.

In *Witters v. Washington Department of Services for the Blind*,[63] the Supreme Court upheld a law authorizing payment to a visually handicapped person for vocational rehabilitation services, which the recipient wanted to apply toward tuition at a Christian college. Justice Marshall held that the program provided "no financial incentive for students to undertake sectarian education" and did "not tend to provide greater or broader benefits for recipients who apply their aid to religious education."[64] In his concurrence, Justice Powell argued that the Court should have relied exclusively on the holding in *Mueller*, that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the [effect] part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries."[65]

Finally, in *Zobrest v. Catalina Foothills School District*,[66] the Supreme Court upheld a state statute that used public funds to pay sign interpreters for deaf students in parochial schools. The Court found that rather than creating an incentive to attend private schools, the law actually removed a burden that would have otherwise prevented deaf students from attending parochial schools. Thus, the Court held that although the law allowed public monies to flow indirectly to a parochial institution, the law reached a neutral result.[67] The NTIA's Final Policy Statement acknowledged *Mueller*, *Witters*, and *Zobrest* in a footnote.[68]

IV. The NTIA's Reinterpretation of Its Policy of Sectarian Programming

On June 20, 1995, the NTIA published a notice in the Federal Register proposing to reinterpret its policy on NTIA funding in connection to sectarian activities.[69] The NTIA noted that the public response to *Fordham University*

encouraged it to consider revising its policy.[70] The Clinton Administration's focus on religious freedom through such legislation as the Religious Freedom Restoration Act of 1993[71] also affected the NTIA's decision to seek comments on a possible change to its policy.[72] Eight parties, including the Corporation for Public Broadcasting, National Public Radio, and Fordham University, filed comments.[73] All commentators but one supported the NTIA's policy reinterpretation, relying primarily on *Rosenberger*.[74] Most of the commentators found that *Rosenberger* required the federal government to show neutrality toward religion.

Specifically, the commentators recommended how the government could best attain such a neutral stance toward religion in connection with public broadcasting. Their recommendations ranged from adopting "a specified or maximum percentage for the amount of permissible sectarian programming" to establishing "a reasonable minimal amount of sectarian programming."[75] Some commentators warned against allowing the proposed changes to create excessive government entanglement with religion.[76]

On December 22, 1995, the NTIA published its *Final Policy Statement* reinterpreting its policy on the use of NTIA-funded equipment and materials in connection with sectarian activities. The modification comprised two major changes. First, an attenuated or incidental benefit to religion no longer made a public broadcasting station ineligible for funding from the NTIA. Citing *Rosenberger*, the *Final Policy Statement* noted that "programs that neutrally extend benefits to recipients pass Establishment Clause muster, if religious interests are only incidentally served."[77] Second, the NTIA revised the definition of "public telecommunications services" to delete the last sentence, which provided that "public telecommunications services `[do] not include essentially sectarian programming.'"[78] However, the NTIA stressed that the revisions still required the grant programs to retain their secular purpose and that the use of NTIA funds must fall within the broad scope of a grant program's statutory purposes.[79] Specifically, the language of the reinterpretation provided:

> NTIA will retain its present requirement that grant funds not be used for purposes the "essential thrust of which are sectarian," but will modify its interpretation of this requirement as follows. No more than an attenuated or incidental benefit may inure to a sectarian interest if a grantee uses NTIA-funded facilities in connection with a
> sectarian activity. In addition, the use must fall within the broad scope of a grant program's statutory purposes. A grantee cannot, however, use NTIA grant funds primarily to support sectarian interests.[80]

Next, the NTIA's *Final Policy Statement* addressed how applying the revised policy would impact the NTIA's three grant programs: PTFP, NECET, and TIIAP. Under all of the programs, the NTIA stated that it would maintain its previous practice of reviewing a program's content only on the basis of a complaint or other notification that NTIA funds are being used toward a project whose essential thrust is sectarian.[81]

Regarding PTFP grants, the *Final Policy Statement* stated that the NTIA would apply the *Lemon* test to examine a public telecommunications facility's proposal and organizational purposes. This approach would allow a station to refine its programming during the application stage to satisfy the second prong of the *Lemon* test and hopefully to avoid an attack after the programming is established. PTFP applicants would also have a clearer sense of how the NTIA defines an attenuated or incidental benefit to religion. Currently, and as stated in the *Final Policy Statement*, *Fordham University* provides the only actual example of programming that was not acceptable under the earlier interpretation, but now is permissible. Thus, PTFP grantees know that they can air at least a weekly religious Mass and not risk a loss or denial of funding, provided their program does not have an overall secular purpose.

When awarding NECET grants, the NTIA actively reviews the actual content of NECET proposals to determine whether the funds are used toward the purpose of the NECET program, which is "`to enhance the education of children through the creation and production of television programming specifically directed toward the development of fundamental intellectual skills.'"[82] Under the NTIA's procedures for NECET, the modified sectarian policy applies to each *individual* program.[83] Thus, for NECET, the reinterpretation means that a program will be reviewed in its entirety rather than on the basis of any single portion of the program. Previously, any isolated aspect of a program

found to benefit sectarian interests would have rendered the program ineligible for funding. Thus, while the analysis is similar for NECET grant programs, the scope of the review is more narrow, reflecting the fact that grants are made to individual programs rather than to entire stations.

TIIAP grants present the NTIA with special problems since TIIAP grantees cannot exercise full control over the content of the subject communications.[84] The *Final Policy Statement* notes that a TIIAP grantee's network may include a public computer bulletin board where "the operator does not have control of messages sent among [private] individuals."[85] Thus, TIIAP applicants may sometimes be unable to certify that their facilities will not be used for essentially sectarian purposes. For example, under the prior policy, establishing a bulletin board could have rendered a TIIAP grantee ineligible if a church-affiliated youth group had used the board to post meeting times or other information.[86] Subsequently, under the modified interpretation, the NTIA accommodates TIIAP grantees who may be unaware of certain content by ensuring that the policy will apply only "to the extent that the applicant controls the content of network communications."[87] However, the policy prohibiting an essential sectarian thrust would still apply.[88]

The modified sectarian policy also changes how the NTIA reviews complaints raised against TIIAP grantees concerning sectarian activities. Rather than examining only the questioned activity as under the previous policy, the NTIA will examine the overall purpose of the project.

Here, the NTIA's new interpretation not only allows an attenuated or incidental benefit to religion, but also redefines the relevant denominator of evaluation. Specifically, the NTIA moves from looking at only one program to considering the general project under which that program is aired (or in the case of NECET, from one portion of a program to the program itself). Such a change in defining the denominator of the issue for review provides several benefits. First, a broader denominator may encourage substantive neutrality and discourage formalistic or disaggregated neutrality. Considering a single program or only a single portion of a program may result in overvaluing either the "advances" or the "inhibits" side of the balance and undervaluing the context of the program as evidenced by *Fordham University*. For example, under the previous policy, the NTIA could have ostensibly found a violation by almost any station if it drew its denominator with sufficient narrowness. However, under the new policy, the NTIA will be less likely to conduct an evaluation of a single isolated program or statement within a program. Also, in applying a balancing test between the "advances" and the "inhibits" sides of the *Lemon* test, the NTIA will have a greater pool of information from which to make a decision.

Second, while the size of the denominator does not guarantee a more accurate result, a denominator that coincides with the procedures the government uses to award the grants seems more in keeping with the NTIA's general policies for awarding grants. In other words, because the PTFP and TIIAP grants are awarded to entire programs, the government should investigate complaints concerning PTFP or TIIAP grantees by considering an entire program rather than any single program. Likewise, because the NECET grants are awarded to individual programs, the government should investigate complaints concerning NECET grantees by considering individual programs rather than any single portion of a program.

Third, a larger denominator of evaluation more accurately reflects public perception of the programming. The public views a station as one entity rather than a conglomeration of entities, and the FCC encourages such a view by requiring stations to announce their call letters, frequency or channel, and city of license hourly.[89] The public generally recognizes that public radio emits many different and often conflicting viewpoints among its many programs.[90] Clearly, the NTIA cannot suggest that the government is saddled with advocating every statement or opinion uttered on the airwaves of public radio just as the Court in *Rosenberger* quickly dismissed the lower court's fear that the public would ascribe Wide Awake's views to the University of Virginia. The *Rosenberger* Court, unlike the court in *Fordham University*, resisted the temptation to assume a paternalistic view of the public's ability to evaluate the reach of state endorsement.

Therefore, the modified policy is more consistent with substantive neutrality, with the NTIA's awarding criteria, with the NTIA's statutory secular purpose requirement, and with the public's perception of public broadcasting. The new interpretation insures that religious programming inquiries will encompass a broader review and will no longer be

evaluated outside the context of a station's general programming structure.

V. Cultural and Social Consequences of the Policy Reinterpretation

Decisions like reinterpreting the NTIA's sectarian policy, which involve issues of religious freedom, the Establishment Clause, and neutrality, often ignite strong public interest and heated legal debate. Such a response reflects a concern with the significant and far-reaching consequences of labels and definitions in this area of law. This Part examines the cultural effects of the NTIA's prior policy and anticipates the impact of its revised interpretation.

Under the NTIA's policy, sixteen years passed during which no station receiving NTIA funding could provide any attenuated or incidental benefit to religion. While surely some stations, like that of Fordham University, would have been found in violation of the program had they faced an investigation, most stations apparently adhered to the policy. Consequently, from 1979 to 1995, virtually all public broadcasting excluded any programming that could be construed as providing even the least benefit to religion. While the consequences of this sectarian cleansing of public broadcasting are not easily measurable, they are surely profound.

The NTIA's prior sectarian policy has paralleled and perhaps even contributed to the increasingly secular nature of our culture. After hearing and viewing virtually no religious broadcasting on public radio or television since 1979, the public could rationally conclude that the state either disapproved of, or simply disregarded, religious beliefs.

While some may argue that solely the private, and not the public sector, should address religious concerns, the two realms are inextricably linked. As Frederick Mark Gedicks and Roger Hendrix note:

> How we talk about ourselves eventually changes us. As religious language disappears from law, politics, and American public life in general, we will stop making the linguistic and conceptual distinctions called for by such language. When we no longer permit public description of ourselves, socially or individually, in religious terms, it will not be long before we become incapable of describing ourselves in such terms, even privately, at which point we will no longer be religious.[91]

Thus, government action in connection with religion can significantly affect public perception of religion, even to the point of shaping private practice.

Some may argue that the prior policy of allowing cultural or educational programming about religion should have satisfied any demand for a religious element in public radio. However, this view fails to see how the prior policy may actually have devalued religion by suggesting that religion as worship or faith has no intrinsic value and that religion's only value is in its secondary effect on art, music, or culture. The view of religion as merely a background influence may even have contributed to the current "religious right" phenomenon, which posits certain political, economic, and moral views as "Christian" and, arguably, uses religion as a vehicle for political activism. Modern Americans have surprisingly few examples of unadulterated religion—religion not co-opted for political, social, or commercial agendas. Unfortunately, under the NTIA's prior policy, public radio and television have only reinforced this view of religion by presenting religion in a limited educational context.

Thus, the prior policy can hardly be viewed as neutral toward religion from a cultural or social perspective. Even so, the remedy may not lie in injecting a strong dose of religious programming into public radio. In fact, Don Agostino noted that some religious leaders actually oppose religious programming on radio or television.[92] Such opposition may be less rooted in legal concerns than in social concerns about the actual portrayal of religion in a medium almost exclusively reserved for entertainment and commercialization. For example, scholar Neil Postman, in *Amusing Ourselves to Death*, notes the problems of mixing religion and television:

> On television, religion, like everything else, is presented, quite simply and without apology, as an entertainment. Everything that makes religion an historic, profound and sacred human activity is stripped away; there is no ritual, no dogma, no tradition, no theology, and above all, no sense of spiritual transcendence . . . . Though it may be un-American to say it, not everything is televisible. Or to put it more precisely, what is televised is transformed from what it was to something else, which may or may not

preserve its former essence. For the most part, television preachers have not seriously addressed this matter.[93]

While the NTIA may not have considered the issues Professor Postman discusses under its first policy interpretation, it may have indirectly incorporated some of his concerns. Because the NTIA has sought to avoid any excessive entanglement with religion, it has resisted imposing on itself any policy that would require evaluating religious programming. While the NTIA's concerns are understandable, the NTIA should also recognize that some degree of evaluation of religious programming is necessary under any policy regarding religion. Such evaluation may be especially important for religious programming due to the wide range of programming. For example, televangelism differs significantly from the airing of a Catholic Mass in content, purpose, and impact, and is not representative of religious programming in general. Televangelism usually involves the solicitation of funds, while a Catholic Mass does not. The NTIA should be able to consider these differences when awarding funding and should be insulated from the charge that the NTIA is actually evaluating the legitimacy of a particular religion.

Thus, under both the prior and modified interpretations of the sectarian policy, the NTIA may face strong criticism. Like the University of Virginia, the NTIA may be charged with assuming the role of "Grand Inquisitor of Sectarian Programming" or like author George Orwell's fictional government,[94] the NTIA may face a charge of becoming the "Big Brother of Religious Television and Radio." However, by applying a meaningful balancing test between the "advances" and the "inhibits" sides of the equation and by instilling general safeguards such as requiring a secular purpose for programming, the NTIA has a better chance of withstanding both types of accusations and satisfying the First Amendment.

Under the modified policy, religion will not be eviscerated from the public sphere of broadcasting, but neither will it receive a free ride. Hopefully, religious leaders will confront the issues unique to the mixture of television and religion and consider how, if at all, worship, ritual, liturgy, and the sacred can survive in a medium devoted to entertainment and commerce. In fact, religious leaders may even discover that public radio is more conducive to sincere religious programming since it is somewhat insulated from the commercialism of nonpublic radio.[95] Regardless of the conclusions of the religious community on this matter, the government must restrict its policies to the confines of the Establishment Clause and resist the temptation to protect religion from our technological age.

VI. Conclusion

The NTIA's revised interpretation of its policy on sectarian programming attains a more substantively neutral result and overturns a former policy that promoted disaggregated neutrality. Under the new policy, the government agency will consider both the "advances" and the "inhibits" sides of the balance and thus, will have a better chance of reaching results neutral toward religion. As the NTIA's prior policy of prohibiting any benefit to religion reveals, standards that categorically address the issue of religion most likely are stacked on either the "advances" or the "inhibits" side. Policies involving Free Exercise, the Establishment Clause, and government neutrality toward religion require a more careful analysis than that allowed under a bright-line policy. As Laycock notes, "substantive neutrality is harder to apply than formal neutrality."[96] However, ease of application should not direct results, much less constitutional doctrines, of religious freedom.

The NTIA's modified interpretation better reconciles its policy with Establishment Clause doctrines by reintroducing a concern for inhibiting religion and improving the chances of a neutral result. However, as revealed by the legacy of Establishment Clause cases and their quest for neutrality, the government continually finds itself caught between advancing or prohibiting religion. Even an approach of substantive neutrality is problematic and leaves the government open to such dangers. As Laycock states, "absolute zero is not achievable;"[97] thus, the government can always be accused of either advancing or prohibiting religion to some degree in any single situation. Hopefully, the revised policy will ultimately minimize the degree to which the NTIA advances *or* inhibits religion through its grant programs.

Finally, the NTIA's reinterpretation of its policy may signify a trend in governmental policies to adopt a less formalistic reading of neutrality. The modification itself may serve as a microcosm of how government will address

future Establishment Clause issues. Specifically, the NTIA's new policy suggests that telecommunications and public broadcasting law must adopt a less restrictive and more substantively neutral stance toward religion.

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1. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1007 (1990).

2. *Id.*

3. *Id.* at 1007 (stating that a disaggregated neutrality analysis applies either a test of no advancement or a separate test of no inhibition—but not both).

4. NTIA defined "sectarian" as "that which has the purpose or function of advancing or propagating a religious belief." 15 C.F.R. § 2301.2 (1997). Interestingly, one commentator notes that the term "sectarian" itself often invokes a less than neutral connotation and suggests that "[t]hroughout American history, `sectarian' has been used to exclude and to ostracize" and is a poor synonym for the term "religion" in the law. Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian"*, 6 J.L. & Pol. 449, 449 (1990). Baer concludes that "[s]o long as one can view religion as that which is `sectarian'_as essentially parochial, narrow, bigoted, idiosyncratic—it becomes relatively easy to dismiss it as marginal or even injurious to the public life of the nation." *Id.* at 467.

5. The governmental programs at issue are noncommerical educational broadcast stations or public broadcast stations which are defined as:

a television or radio broadcast station that is eligible to be licensed by the FCC as a noncommercial educational radio or television broadcast station and that is owned (controlled) and operated by a state, a political or special purpose subdivision of a state, public agency or nonprofit private foundation, corporation, institution, or association, or owned (controlled) and operated by a municipality and transmits only noncommerical educational, cultural or instructional programs.

15 C.F.R. § 2301.2.

6. Specifically, the Office of Management and Budget Circular A-110 ("Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations") provides remedies for noncompliance of NTIA grantees. The federal awarding agency may select from several different disciplinary measures according to the circumstances. For example, the agency may temporarily withhold cash payments pending correction of the deficiency, disallow all or part of the funding, or wholly or partly suspend or terminate the award. Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 58 Fed. Reg. 62,992, 63,004 (daily ed. Nov. 29, 1993).

7. Laycock, *supra* note 1, at 1001.

8. The Author has entitled this Note "Moving *Toward* Neutrality" (emphasis added) to suggest that the law can approximate or move toward neutrality but never ultimately achieve it. Similarly, the Author believes that NTIA's reinterpretation is a move toward substantive neutrality; however, the Author thinks that the policy could reach a result more closely approximating substantive neutrality were it more liberal toward religious freedom. However, for the purpose of this Note, the Author focused on the direction of the trend itself.

9. 61 Fed. Reg. 6912 (daily ed. Feb. 11, 1996).

10. 60 Fed. Reg. 66,491 (daily ed. Dec. 22, 1995).

11. Interview with Don Agostino, Director of Indiana University Radio and Television Services, in Bloomington, Ind.,

(Oct. 29, 1996) [hereinafter Agostino Interview].

12. *Id.*

13. *Id*.

14. The NTIA defines such facilities or public telecommunications facilities as including any:

apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including but not limited to studio equipment, cameras, microphones, audio and video storage or processors and switchers, terminal equipment, towers, antennas, transmitters, remote control equipment, transmission line, translators, microwave equipment, mobile equipment, satellite communications equipment, instructional television fixed service equipment, subsidiary communications authorization transmitting and receiving equipment, cable television equipment, optical fiber communications equipment, and
other means of transmitting, emitting, storing, and receiving images and sounds or information, except that such term does not include the buildings to house such apparatus (other than small equipment shelters that are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities).

15 C.F.R. § 2301.2 (1997).

15. 60 Fed. Reg. 66,491 (daily ed. Dec. 22, 1995).

16. *Id.* at 66,491 n.3 (quoting 15 C.F.R. § 2301.22(d)).

17. *Id.* at 66,491.

18. *Id.* (quoting Public Telecomm. Facils. Program, *Report and Order*, 44 Fed. Reg. 30,898, 30,902 (1997)) (second alteration in original).

19. *Id.* (quoting Public Telecomm. Facils. Program, *Report and Order*, 44 Fed. Reg. 30,898, 30,902 (1997)).

20. *Lemon*, 403 U.S. 602 (1971).

21. *Id.* at 612-13 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

22. Laycock notes that the practical effect of the second prong of the *Lemon* test is often to squelch religious expression:

[the second prong of the *Lemon* test] began simply as an elaboration of neutrality, but is often disaggregated into a test of no advancement and a separate test of no inhibition. If a law has some substantial effect that advances religion, that may be the end of the case. And there is sometimes a very low threshold for finding effects to be substantial.

Laycock, *supra* note 1, at 1007 (citation omitted). Laycock calls such a reading of the second prong "disaggregated neutrality" because it looks only at one side of the balance of advancing or inhibiting religion. He recognizes that either perspective can be faulted with such myopia: "Some of those who would have government sponsor their faith play the same game on the inhibits side of the balance: if government does not lead school children in prayer, or display religious symbols on major holidays, the public may infer that government is hostile to religion." Laycock, *supra* note 1, at 1007.

23. *Fordham Univ.*, 856 F. Supp. 684 (D.D.C. 1994).

24. *Id.* at 695.

25. *Id.* at 697.

26. *Id.* at 700.

27. *Id.* at 689.

28. *Id.* at 689-90 (paraphrasing Larry Irving).

29. *Id.* at 695.

30. *Id.*

31. *Id.* at 695.

32. *Id.* at 698 (quoting School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 389 (1985)).

33. *Id.* at 701 ("The Government's decision to implement a bright-line policy against federal support of religious broadcasting is a reasonable and principled approach to avoid the potential inconsistencies of a *de minimus* standard.").

34. *Id.* at 700 (quoting Opposition of Fordham University at 32).

35. *Aguilar*, 473 U.S. 402 (1985) (Rehnquist, J., dissenting). Justice Rehnquist noted that the Court had created a Catch-22 "whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement." *Id.* at 421.

36. *Fordham Univ.*, 856 F. Supp. at 697-98.

37. *See infra* Part IV.

38. Larry Witham, *Radio Stations with Religious Content Cleared to Get Grants*, Wash. Post. Dec. 21, 1995, at A5.

39. *Id.*

40. *Rosenberger*, 515 U.S. 819 (1995).

41. *Id.* at 820.

42. *Id.* at 821 (citing Board of Educ. of Kiryas Joel Village Sch. Dist. v. Gramet, 512 U.S. 687 (1994)).

43. *Id.* at 825-26 (quoting Rosenberger's App. to Petition for Cert. at 67) (alterations in original).

44. *Id.* at 823.

45. *Id.* at 827.

46. *Id.* (quoting Rosenberger's App. to Petition for Cert. at 66a) (alterations in original).

47. *Id.* at 838 (quoting Rosenberger v. Rector, 18 F.3d 269, 286 (4th Cir. 1994)).

48. *Id.* at 840.

49. *Id.* at 841 (quoting Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 250 (1988)).

50. *Id.* at 841-42.

51. *Id.* at 844-45.

52. Laycock defines formalistic neutrality by Philip Kurland's principle:

The [free exercise and establishment] clauses should be read as stating a single precept: that government cannot utilize

religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.

Laycock, *supra* note 1, at 999 (quoting Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 96 (1961)) (alteration in original). Laycock further notes that formal neutrality has been universally rejected because it "produces surprising results that are inconsistent with strong intuitions." *Id.*

53. *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) (emphasis added).

54. *Id.* at 862 (Thomas, J., concurring).

55. *Id.* at 861 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 677 (1970)).

56. NTIA Final Policy Statement, 60 Fed. Reg. 66,491 (1995) (codified at 15 C.F.R. § 2301 (1997)).

57. *Mueller*, 463 U.S. 388 (1983).

58. *Id.* at 391 (citing Minn. Stat. § 290.09, subd. 22 (1982)).

59. *Id.* (quoting Minn. Stat. § 290.09, subd. 22 (1982)).

60. *Id.* at 393 (quoting Hunt v. McNair, 413 U.S. 734, 742 (1973)).

61. *Id.* at 398-99.

62. *Id.* at 399 (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 781 (1973)). In *Nyquist*, the Supreme Court struck down a system of tax relief limited to parents of nonpublic-school children.

63. *Witters*, 474 U.S. 481 (1986).

64. *Id.* at 488.

65. *Id.* (Powell, J., concurring) (citation omitted).

66. *Zobrest*, 509 U.S. 1 (1993).

67. *Id.*

68. 60 Fed. Reg. 66,491 (daily ed. Dec. 22, 1995).

69. 60 Fed. Reg. 32,142 (daily ed. June 20, 1995).

70. *Id.*

71. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994)), *overruled by* City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

72. Telephone Interview with Susan Truax, Office of General Counsel for the NTIA, Department of Commerce, in Washington, D.C. (Oct. 15, 1996).

73. 60 Fed. Reg. 66,491 (daily ed. Dec. 22, 1995). The remaining five parties were Rep. Richard Burr, North Carolina Public Radio Association, Lisa Owens, Southern Public Radio, and Wake Forest University.

74. *Id.* at 66,492.

75. *Id.* (quoting Comments of North Carolina Public Radio Ass'n at 1).

76. *Id.* (quoting Comments of Corporation for Public Broadcasting at 3).

77. *Id.* at 66,492.

78. *Id.* (quoting Comments of Fordham University at 16-17) (alteration in original).

79. *Id.*

80. *Id.* at 66,491 (quoting 15 C.F.R. § 2301.22(d)).

81. *Id.* at 66,493.

82. *Id.* (quoting 47 U.S.C. § 394(i)(2) (1994)).

83. *Id.* at 66,494.

84. *Id.*

85. *Id.*

86. *Id.* The private speech or action analysis of *Rosenberger*, *Mueller*, *Witters*, and *Zobrest* may be most closely applied to the TIIAP grants since these grants often include private speech by an individual.

87. *Id.*

88. Susan Truax noted that the administration is still addressing such issues under TIIAP grants and has not resolved the special problems raised by private communications. Telephone Interview with Susan Truax, Office of General Counsel for the NTIA, Department of Commerce, in Washington, D.C. (Dec. 2, 1996).

89. Agostino noted that there is no real penalty for an occasional lapse, but that WFIU-FM, which broadcasts 24 hours a day, generally makes the requisite announcement 24 or more times a day. Agostino Interview, *supra* note 11.

90. Agostino noted WFIU-FM's interest in stretching its listeners' notion of the function of public broadcasting and public discourse by providing programming on free speech and diversity issues. Agostino said that when a listener ascribes particular views aired on a program to the station itself, the station explains that "the station serves the community by presenting a range and variety of ideas and viewpoints, and that [the station] respect[s] the viewer's intelligence to evaluate and assess the material." He added that the station warns listeners in advance of vulgar or adult material and injects a voice-over notice, such as stating that "the views expressed are not necessarily those of the station," for opinion pieces on local issues. E-mail from Don Agostino, Director of Indiana University Radio and Television Services, to Nancy Reynolds (Nov. 15, 1996) (on file with author).

91. Frederick Mark Gedicks & Roger Hendrix, Essay, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. Cal. L. Rev. 1579, 1609 (1987) (citations omitted).

92. Agostino Interview, *supra* note 11. Agostino noted that "the common concern [voiced by religious organizations] seems to be that theology and spirituality are dangerously simplified in most religious television/radio presentations; and that the hard work of scholarly exegesis, respect for genuine doubt, and acknowledgment of more difficult religious concepts and precepts are all shortchanged." *Id.*

93. Neil Postman, Amusing Ourselves to Death: Public Discourse in the Age of Show Business 117-18 (1985) (Postman is Chair of Communications Arts and Sciences at New York University).

94. George Orwell, 1984 (Knopf 1992) (1949).

95. Agostino noted that public radio enjoys "a less commercial commercialism" because it is driven by community service rather than private interest and depends on underwriting to survive rather than a profit. Agostino Interview,

supra note 11.

96. Laycock, *supra* note 1, at 1004.

97. *Id.* at 1007.