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For Entertainment Purposes or Ad Majorem dei Gloriam: Televangelism in the Marketplace of Ideas

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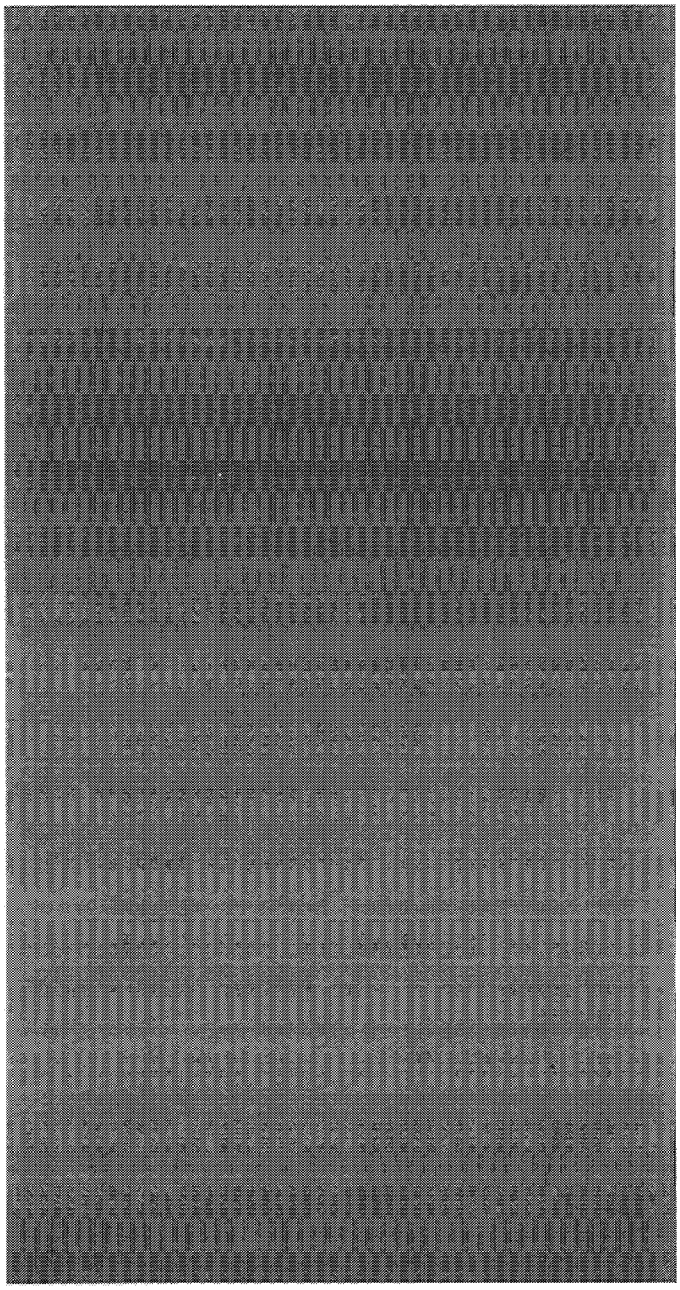
FOR ENTERTAINMENT PURPOSES OR AD MAJOREM DEI GLORIAM:

Televangelism in the Marketplace of Ideas



For we brought nothing into this *world,* and it is *certain we can carry nothing out. And having food and raiment let us be therewith content. But they that will be rich fall* into *temptation and a snare, and into many foolish and hurtful lusts, which drown men in destruction and perdition. For the love of money is the root of all evil: which while some coveted after, they have erred from the faith, and pierced themselves through with many sorrows.*[1]

—1 Timothy 6:3-10

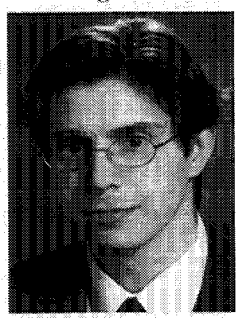
I. INTRODUCTION

Jane Doe, a terminally ill homemaker, turns on the television and surfs the channels. She stops on a station when she hears a man say, "Be healed in the name of Jesus! A deaf person is being healed right now; a sinus condition has been cleared. I give you the anointing! Touch! Touch!" The speaker, a preacher dressed in an impeccable white suit and a wig who stands on a stage in the midst of a jammed football stadium, turns to the camera and asks the viewer to feel the "anointing," to have faith in Jesus, to touch the screen and believe. Gospel music fills the stadium.

Overcome by emotion, Jane kneels in front of the screen with her hand outstretched, praying for a cure for her liver disease. She learns that the preacher will come to her town as part of his "miracle crusade," and he could touch her, like the people on stage, if she attends. All he asks in return is for a small donation to continue doing the "Lord's work." Contribute to his cause she must, for Jane wishes to live, to be healed.

The preceding fictional account[2] provides just one example of contemporary televangelism, representing one of the programs one could watch around the clock on any religious programming channel. The term "televangelism" refers to the combination of television and Christian evangelical preaching, usually fundamentalist in nature.[3] Televangelism encompasses a variety of activities. In general, they may be classified into five kinds: sermons, fundraising, news reporting, faith healing, and talk shows.[4] Prominent figures in the industry include Paul Crouch, Jerry Falwell, Billy Graham, Benny Hinn, John Kennedy, Oral Roberts, Pat Robertson, Robert Schuller, and Jack van Impe.[5] Two major cable televangelist networks, each with worldwide reach, exist: The Christian Broadcasting Network (CBN),[6] a product of Pat Robertson, and the Trinity Broadcast Network (TBN),[7] run by Paul Crouch and his wife, Janice Crouch.

Televangelists often target the Jane or John Does of the world—people with physical ailments, drug addictions, or financial problems, who seek to ease the pain, emptiness, and hopelessness of their lives.[8] Apart from broadcasting church services and preaching, religious networks offer programs dealing with the problems of today's society, and why people should turn to Jesus to achieve salvation. Others show testimonials of people who endured great suffering until they found Christ. Still others show great healing miracles, pastors performing exorcisms, or ministers proving that current events are in fulfillment of apocalyptic prophecies.



by Juan Gonzalo Villaseñor

The guarantee of salvation in the next life through repentance is, certainly, attractive to many whose present existence is a living hell. Indeed, as Christ himself proclaimed:

> What man of you, having an hundred sheep, if he lose one of them, doth not leave the ninety and nine in the wilderness, and go after that which is lost until he find it? . . . I say unto you, there is joy in the presence of the angels of God over one sinner that repenteth.[9]

Taking this command to heart, televangelists cater their message to such an audience. Catching the fancy of these susceptible viewers, who believe the preacher refers to their specific problems or spiritual travails, televangelists create parishioners-at-a-distance. Like all good parishioners, these viewers repay the debt of eternal salvation by making contributions to sustain the ministry, to save more "lost" souls.

The viewer may not know for what purpose the funds will be used, but he may regard that as unimportant as long as the ministry continues and more souls are saved. Of course, because these religious organizations are almost entirely free of any governmental regulation, they can collect unlimited funds for any purpose they desire.[10] The purposes often vary, ranging from producing a motion picture, to building a new hall for a university, to supporting relief missions in the Third World, or to simply meeting operating costs of the station.[11] Successful networks bring in enough cash to do all of the above and more. For instance, on a single day in January 2000, CBN received approximately $324,000 in contributions within thirty minutes.[12] This success is not unprecedented. Of all charitable institutions in the United States, religious organizations generate the most income. According to the American Association of Fund-Raising Counsel (AAFRC), Americans contributed $190.16 billion to non-profit organizations in 1999.[13] Of that amount, $143.71 billion (75.6 percent) was given by individuals.[14] Religious organizations, which constituted "the largest component of total giving," received $81.78 billion (43.0 percent) of all donations.[15]

The mass reach of television finds distraught John and Jane Does everywhere, many of whom will donate their money in exchange for promises of salvation. Within the past two decades, however, several prominent televangelists have been convicted of crimes related to their ministries.[16] Jim Bakker lends a prime example, but his is hardly an isolated case. Several others have been targeted by the media and other organizations for questionable practices in their ministries.[17] In some cases, legal action has even been pursued, including the following claims: (1) criminal prosecution for racketeering (e.g., mail fraud);[18] (2) revocation or

suspension of broadcasting licenses by the Federal Communications Commission (FCC or Commission);[19] and (3) private civil Racketeering Influenced and Corrupt Organizations Act (RICO) actions.[20]

These remedies, however, can be granted only after the alleged illegal conduct has occurred. Further, they are often unworkable solutions. But any proposal offering an alternative solution comes with important questions attached. Are prophylactic regulations by the government of certain televangelist programs feasible? Perhaps more importantly, are they constitutional? Finally, if the above solutions fail to be effective or constitutional, do individual viewers have a recourse if they are the victims of allegedly deceptive practices by televangelists?

This Note discusses the proposed legal responses to the problem of fraud[21] by televangelists. Finding the solutions constitutionally deficient, politically unsound, or practically ineffective as deterrents, it then explores the possibility of a content-based restriction on televangelists' speech. The Note concludes that such a deliberate restriction on speech cannot withstand First Amendment scrutiny, regardless of the dishonesty or disingenuousness one may find in televangelists' tactics. Accordingly, despite the great potential for deception, televangelists' activities are, and should be, absolutely protected by the First Amendment. Any proposed remedy to deal with televangelism must occur in the marketplace of ideas, which is an approach consistent with First Amendment values. Thus, each individual must determine what worth, if any, exists in televangelists' speech.

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THE INDUSTRY

To provide a better context for the present discussion, it is appropriate to trace briefly the history and prominence of religious broadcasting in the United States. Evangelism over the airwaves, either by radio or television, is not a new phenomenon. It goes back to the early days of radio in the 1920s. Tracing this history will show how religious broadcasters came from being pariahs of the airwaves to becoming a powerful force in the broadcasting world.

Religious broadcasters were present on the airwaves during the early period of unregulated radio broadcasting.[22] Although most Christian faiths were represented, evangelicals were certainly in the majority.[23] However, when station owners realized they could make a profit by selling airtime, turning radio into a business, most religious broadcasters faced stiff competition and were squeezed out of the picture.[24] This trend continued during the early years of regulation under the Federal Radio Commission (FRC).[25] The FRC used its authority to restrict "evangelical access to the airwaves."[26] For example, it did so by reassigning existing religious stations to low-powered frequencies (with less reach), and by not granting licenses to new religious stations.[27]

As a result of this systematic exclusion from the airwaves, both by radio networks and the federal government, a group of evangelical broadcasters formed the National Religious Broadcasters (NRB) in 1944.[28] However, the policy of exclusion by the networks continued even with the advent of television in the 1950s.[29] It was not until 1960 when religious broadcasters would not be excluded from the airwaves anymore. The FCC issued a Statement of Policy that allowed broadcasters to sell air time for religious programs and still satisfy the Commission's requisite "public interest" standard.[30] Broadcasters thus had a real incentive to sell their airtime to television preachers.

The law of supply and demand tells the rest of the story. By 1977, evangelical religious broadcasting came from systemic exclusion from the airwaves to taking up 92 percent of all religious broadcasting time.[31] This dominance continues presently. Most of the 285 Christian television stations in existence today are evangelical.[32]

Although religious in nature, these broadcasters behave like any other commercial television station—after all, they are in the telecommunications business.

Some of the main players in the religious broadcasting industry, like Paul Crouch, Rev. Schuller, and Benny Hinn, for instance, have established, or want to establish, themselves in Southern California, the Mecca of the entertainment and the entertainment technology industries.[33] It makes sense for religious broadcasters to concentrate in Southern California, in close contact with "the best people in the industry" and "within easy reach of many celebrities who help drum up support."[34]

But in spite of the remarkable success that televangelists have had in the last thirty years, religious broadcasting may be at a crossroads. Immense popularity with their viewers in the past may be changing. A recent study commissioned by Pat Robertson's CBN found that "a third of viewers polled who consider themselves evangelical Christians said they [do not] like religious television."[35] The figure increased to sixty percent when the persons responding identified themselves as not evangelical.[36] So an apparent mismatch between what televangelists offer and what viewers want to see may be taking place. As a Pepperdine University professor put it, "How many preachers can you watch in a twenty-four hour period?"[37] Thus, it appears that televangelists' present challenge is to transform their format based on what viewers really want to see.[38] Otherwise, these dissatisfied viewers will turn the television off, and televangelists' coffers may run dry.

"RELIGIOUS FRAUD" PROSECUTION

Arguably, none of the three main tools for preventing televangelist fraud—criminal prosecution, FCC regulation, and civil suits—adequately deter potential malfeasance. For instance, to assess fraudulent intent in a criminal "religious fraud" case, a court tests the sincerity of the alleged wrongdoer's belief in what he or she propounds. The defendant's belief is questioned because the First Amendment's free exercise guarantee[39] must be "subordinate to the criminal laws of the country . . . ."[40] Some enterprises, though claiming to be religious, may be merely commercial in nature and should not "enjoy the immunities granted to the sacred"[41] by the Free Exercise Clause. An irreconcilable problem and tension exists in this proposition. How can a court prove that a religion is not what it claims to be, that it is a sham?[42]

Similar problems hamper FCC regulation. In one respect, televangelists expose themselves to the rules and regulations of the FCC by virtue of their use of television. The FCC has extensive statutory authority, supported by case law, to regulate broadcasters in accordance with the public interest. Unfortunately, the FCC does not offer means by which a televangelist's audience could seek civil remedies for alleged fraud; it can only revoke television stations' licenses to operate, or prevent expanded transmissions by denying building permits. Further, the FCC cannot reach all televangelists. Only those who operate their own television stations, such as Pat Robertson's CBN or Paul Crouch's TBN, fall within the reach of the FCC. Ambulatory preachers, like Benny Hinn or W. Eugene Scott,[43] can buy airtime on different television networks and effectively escape FCC regulation.

The third option, RICO, appears better at first glance, but less attractive as the focus tightens. On its face, RICO seems to provide a civil remedy to persons wronged by televangelists, allowing plaintiffs to recover treble damages for all lost donations, as well as reasonable attorney's fees. Private actions by disillusioned viewers and wronged parishioners would surely signal financial ruin for disingenuous televangelists.

In theory, this approach appears both sound and equitable. However, what has actually occurred paints a very different picture. Since a commentator suggested this approach in 1988,[44] two civil RICO suits involving televangelists have been filed. Both of these cases raise questions as to the effectiveness and viability of civil RICO against televangelists. Taken with all of the above concerns, they also cast serious doubt over the viability of any present regulation or restriction aimed at preventing potential televangelist fraud.

Criminal Prosecution: Sincerity of Belief

In United States v. Ballard,[45] the only Supreme Court case dealing with the criminal prosecution of fraud in a religious context,[46] the Court in effect sanctioned the "sincerity of belief" test.[47] Ballard involved a prosecution for using, and conspiring to use, the mail system to defraud.[48] The three defendants, headed by Guy Ballard[49] (who also alleged to be "Saint Germain, Jesus, George Washington, and Godfre Ray King"), claimed to have been selected by divine will as the so-called "ascertained masters."[50] As such, they would communicate to the world the words of the "divine entity," the teachings of which constituted their "I Am" movement.[51] This dynamic trio claimed they had the ability, through their supernatural powers, "to heal persons of ailments and

diseases and to make well persons afflicted with any diseases . . . ."[52] The defendants, the indictment charged, "well knew" these representations were false, but nevertheless used the mails to organize and promote the "I Am" movement.[53]

At the request of counsel, the district court judge advised the jury that although some of the defendants' teachings "might seem extremely improbable to a great many people," it was immaterial to consider them.[54] Accordingly, the jury was not permitted to "speculate on the actuality of the happening" of their tenets.[55] In short, the court determined that the religious beliefs of the defendants could not be an issue.[56] Instead, the judge instructed them to determine whether the defendants "honestly and in good faith believe[d]" the things they professed to believe.[57] If so, they should be acquitted; if not, they must be found guilty.[58] The jury, following this instruction, found them guilty.

The Court of Appeals, reasoning that the jury should have considered the truth or falsity of the defendants' beliefs, reversed the district court's judgment and ordered a new trial.[59] The Supreme Court reversed.[60] The Court agreed with the district court's jury instructions, suggesting that inquiring about the truth of the claimants' beliefs would be prohibited. Writing for the majority, Justice Douglas stated that the First Amendment "precludes such a course" because "'[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'"[61] He continued:

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law . . . . Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.[62]

Because the only issue before the Court was whether the district court correctly suppressed the question of the truth of the defendants' beliefs, the decision did not explicitly sanction the instruction actually given. Nevertheless, lower courts have adopted the "sincerity of belief" test in subsequent fraud related to religious misrepresentation cases,[63] and the Supreme Court[64] and other courts,[65] have done so in related types of cases.

However, not everyone gives the "sincerity of belief" test such a warm reception. Even in Ballard itself, Justice Jackson's dissenting opinion[66] advanced three arguments that exposed the serious analytical and philosophical flaws of this test. More recently, the Texas Supreme Court has explicitly adopted Justice Jackson's arguments in Ballard, and the U.S. Supreme Court has implied that looking into the sincerity of someone's belief may be improper.

Justice Jackson first argued that, as a threshold matter, the "misrepresentation of religious experience or belief" is itself impossible to prosecute.[67] When the majority in Ballard distinguished between assessing whether someone's beliefs are sincerely held and whether those beliefs are actually true, it made a distinction without a difference. For, Justice Jackson asks, " . . . how can we separate an issue as to what is believed from considerations as to what is believable?"[68] That is to say, how can someone believe something to be false if the thing itself cannot be proven false? For example, if a defendant claims he has mental powers, bequeathed to him by his God, that allow him to heal people, how can anyone prove that he does *not believe* he has them? That he is unable to heal people would not prove he himself does not believe he possesses mental powers. While his inability to heal others may raise doubt as to whether his powers are effective, or even as to their reality, it would not prove that he does not believe he has them. The majority failed to consider these crucial epistemological[69] considerations, and instead opened the door to a pointless and dangerous inquiry, since it is impossible to prove the truth or falseness of religious representations, and since it involves a subjective determination on what the judge perceives to be "sincere" in each case.

However, this is not to say that a defendant in such a fraud case, who made representations *empirically verifiable in nature*, could not be convicted. On the contrary, in such a case the prosecution could very well submit proof of the representations' falsity, and thereby establish criminal liability. Indeed, this is the only kind of act that a televangelist could be prosecuted or be liable for under a fraud count. For example, if a defendant maintained that he shook hands with Saint

Germain in San Francisco on a given day and asked for donations based on that fact, it "would be open to the Government to submit to the jury proof that he had never been in San Francisco . . . ."[70]

Second, Justice Jackson raised a more practical concern in Ballard. Religious experience is diverse and unique. In a case for "religious fraud," the jury will likely be composed of nonbelievers relative to the defendant's faith,[71] especially if the religious association is new or non-traditional.[72] These nonbelievers will be asked to determine whether the defendant's religious beliefs or representations were sincere. Said Justice Jackson, quoting American psychologist William James, "'If you ask what these [religious] experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support . . . .'"[73] A non-believer is unlikely to understand the defendant's religious representation and, consequently, unlikely to believe him.[74] This problem is especially aggravated if the faith to which the defendant belongs is one that is viewed unfavorably by the general public.[75]

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Finally, even if the inquiry into the sincerity of belief is open-minded, how much "sincere belief" is sufficient for a person to escape liability for fraud?[76] For instance, in Mejia-Paiz v. INS,[77] the court upheld a decision by an Immigration Judge (IJ) who had determined that Mejia-Paiz did not hold a sincere belief in the Jehovah's Witness faith.[78] The evidence disproving Mejia-Paiz's supposed belief included his taking of the customary courtroom oath, his inability to remember when he became a Jehovah's Witness, and other inconsistencies in his testimony.[79] Swearing under oath, the IJ determined, was inconsistent with what a Jehovah's Witness would do, since past Jehovah's Witnesses who had appeared before the IJ had declined to "swear" under God and would only "affirm."[80]

Even if Mejia-Paiz's acts were not in accordance with the tenets of the Jehovah's Witness faith, the IJ, in so determining, "made a judgment, based on . . . his personal perception of the customs of Jehovah's Witnesses . . . ."[81] What if Mejia-Paiz had sworn under oath only once, and later affirmed? Would that be enough to make him a bona fide Jehovah's Witness? In reality, the determination of church membership was not a question for the IJ or the government at all; it was a question for the Jehovah's Witness Church.[82] Nevertheless, Mejia-Paiz illustrates what occurs when judges become "lay theologians,"[83] transforming a court of law into an ecclesiastical tribunal.

At least one court has agreed with Justice Jackson's arguments in Ballard. In Tilton v. Marshall,[84] the Texas Supreme Court concluded that the sincerity of belief test is "irrelevant" for cases where a claim for fraud is based solely on a "statement of religious doctrine or belief."[85] Because such a statement's falsity cannot be proved, it "is of no moment" whether the statement is made "honestly or in bad faith."[86] In holding this, the court followed the distinctions made by Justice Jackson's dissent in Ballard. Accordingly, the Texas Supreme Court established two categories on which claims for fraud, involving a televangelist, may be brought—only one of which may form a valid claim.

One concerns representations in which a person says he will perform "certain concrete acts."[87] For instance, in Tilton televangelist Robert Tilton had promised that he would read, touch, and pray over followers' prayer requests.[88] Since these representations could be proved false through experience,[89] fraud claims against Tilton based on these representations would not infringe on his First Amendment rights.[90] A claim based on the failure to perform a concrete act would not necessarily involve a person's beliefs; rather, the matter at issue would be whether the person indeed carried out the acts as he promised.[91] If he did not perform the acts, and the person was deceived intentionally, incurring a monetary

loss, he could be liable for fraud.

The second category involves representations based on "religious doctrine or belief."[92] For example, this would include soliciting funds, and justifying the request with biblical passages that emphasize believers to tithe.[93] Whether these representations are made sincerely or insincerely, they are representations of religious doctrine, and "no jury can be allowed to determine their truth or falsity . . . ."[94] By this statement, the Texas Supreme Court implies that no difference exists in evaluating whether a belief is sincerely or insincerely held and whether the belief itself is true or false.[95] Thus, a claim of fraud could not rest under this type of representations.

The U.S. Supreme Court may have taken the argument in Tilton to its next step in Employment Div. v. Smith.[96] Here, the Court characterized Ballard as a case in which the government may not "punish the expression of religious doctrines it *believes to be false* . . . ."[97] This implies that the government may not prosecute someone because it disbelieves a person who holds what the government feels to be a false belief. That is, if one thinks that a belief is false, it is reasonable to doubt that anyone could in all seriousness believe it.[98] When the government prosecutes someone in this scenario, it effectively and implicitly doubts the sincerity with which the person holds the belief. This, the Court stated, the government may not do. Smith, thus, supports the position that not only is it *irrelevant* to inquire into the sincerity of someone's belief, "when the religious representation forms the basis of a fraud claim,"[99] but that it is also *unconstitutional.*

Justice Brennan once referred to Ballard as the Court's severest test with regard to the "mandate of judicial neutrality in theological controversies."[100] The danger of religious persecution that Justice Jackson referred to[101] is a real possibility when courts apply the sincerity of belief test. Even though this test has been employed by courts to determine fraudulent intent, Smith and Tilton show that the justifications for its continued application in religious "fraud" cases have been called into doubt. Even if Guy Ballard or televangelists are frauds, their religious beliefs and representations are "beyond the reach of the prosecutor, for the price of freedom of religion . . . is that we must put up with, and even pay for, a good deal of rubbish."[102] Thus, the sincerity of belief test cannot be a practical or even desirable solution to prosecute or deter televangelist fraud.

FCC Regulation

With the Federal Communications Act of 1934,[103] Congress created the FCC and endowed it with broad statutory authority to enforce the provisions contained in the Act.[104] The FCC has authority to grant,[105] suspend,[106] or revoke[107] radio or television licenses, renewal permits, and construction permits to broadcasters. Further, the Supreme Court has explicitly determined that the FCC possesses concurrent authority with the U.S. Department of Justice in enforcing provisions of the United States Code.[108] In that light, for example, the FCC has the authority to revoke a station license or construction permit if a licensee violates 18 U.S.C. § 1343[109] (fraud by wire, radio or television).[110]

In order to grant or deny television or radio stations licenses to operate, the Commission must decide in accordance with the "public interest."[111] The Supreme Court has given the Commission "substantial judicial deference" in determining what constitutes the public interest.[112] Regulation under the public interest standard has varied throughout the years, ranging from skeletal programming requirements on licensees in the 1940s,[113] to more exacting conditions in the 1960s,[114] then less imposing requirements again in the 1970s with the FCC's adoption of a public interest "marketplace" approach.[115] Currently, the FCC imposes upon licensed broadcasters a "number of affirmative public interest programming and service obligations."[116] For example:

> [L]icensees must provide coverage of issues facing their communities and place lists of programming used in providing significant treatment of such issues in their public inspection files . . . . [Licensees] must also comply with statutory political broadcasting requirements regarding equal opportunities, charges for political advertising, and reasonable access for federal candidates [and] must provide children's educational and informational programming . . . . In terms of programming obligations, broadcasters are also prohibited from airing programming that is obscene . . . . Similarly, broadcasters also have obligations regarding closed captioning, equal employment opportunity, sponsorship

(continued at page 153)

PROTECTING THE EXERCISE OF RELIGION: CONGRESSIONAL REACTION TO EMPLOYMENT DIV. V. SMITH

Recently, Congress has tried to circumvent the Supreme Court's 1990 decision in Employment Division v. Smith[1] with four bills aimed at protecting the exercise of religion. Below is a brief summary of purpose, content, and status of each:

The Religious Freedom Restoration Act (RFRA)[2]

What it was: A 1993 attempt by Congress to "overrule" Smith and reinstate the "compelling governmental interest test" of previous Supreme Court cases.

What it said: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . [where the burden] is in furtherance of a compelling governmental interest . . . and is the least restrictive means of furthering that compelling governmental interest."

How it fared: Passed by Congress but overruled by the Supreme Court in City of Boerne v. Flores,[3] on the grounds that (1) it was not a properly "remedial" action under §5 of the Fourteenth Amendment, and (2) in passing the statute, Congress acted "against the background of a judicial interpretation of the Constitution already issued [in Smith]" and could not expect its enactment to control in the face of such a contrary Court precedent.

The Religious Freedom Act (RFA)[4]

What it was: A 1997 constitutional amendment, potentially to the First Amendment itself, offered as a Joint Resolution in the House of Representatives in reaction to the demise of the RFRA in Flores.

What it said: "To secure the people's right to acknowledge God according to the dictates of conscience: the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed."

How it fared: Failed to receive the necessary two-thirds majority in the House.

The Religious Liberty Protection Act (RLPA)[5]

What it was: A 1999 bill attempting to revive the RFRA in specific circumstances, particularly those at issue in Flores.

What it said: "A government shall not substantially burden a person's religious exercise in a program or activity, operated by a government, that receives federal financial assistance, or in any case in which the substantial burden . . . affects . . . commerce . . . even if the burden results from a rule of general applicability [except where the burden] is in furtherance of a compelling governmental interest . . . and is the least restrictive means of furthering that compelling governmental interest." In addition, the RLPA included sections that (1) placed the initial burden of proof on the person challenging the burden and (2) addressed the specific fact pattern in Flores, forbidding the government from applying a "land use regulation" in such a way as "to impose a substantial burden on a person's religious exercise," unless the government had a compelling interest to justify the regulation.

How it fared: Passed in the House, but failed in the Senate.

The Religious Land Use and Institutionalized Persons Act (RLUIPA)[6]

What it was: A modified, more successful version of the RLPA's land use regulations, enacted in 2000.

What it said: In situations involving "federal financial assistance," "commerce," or "land use . . . regulations [where] individual assessments" are made, "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, [except where the burden] is in furtherance of a compelling governmental interest . . . and is the least restrictive means of furthering that compelling governmental interest." In addition, governments may not treat unequally, discriminate against, or exclude "religious assembl[ies] or institution[s]" in the application of any land use regulations. Lastly, the RLUIPA prohibits government from burdening the religious exercise of institutionalized persons, even via laws of general applicability, unless the burden serves a compelling governmental interest by the least restrictive means possible.

How it fared: Became law in 2000, despite its similarity to the RLPA and RFRA—perhaps because its foundations lie in the Commerce Clause rather than §5 of the Fourteenth Amendment.

[1] 494 U.S. 872 (1990).
[2] 42 U.S.C. §§ 2000bb et seq. (1993)
[3] 521 U.S. 507 (1997).
[4] H.R.J. Res. 78, 105th Cong. (1998).
[5] H.R. 1691, 106th Cong. (1999).
[6] 42 U.S.C. §§ 2000cc et seq. (2000).

identification, and advertisements during children's programming.[117]

Armed with its malleable public interest standard, the FCC has over the years revoked existing licenses of, or denied licenses to, religious broadcasting stations which the Commission found not to further the public interest.[118] Curiously, however, when the FCC had the opportunity to exercise its recognized authority[119] over the most widely known case of televangelist fraud—Jim Bakker's television ministry—it declined to do so.[120]

In that case, the FCC launched an investigation of Bakker's Praise the Lord (PTL) television network after a newspaper reported that funds solicited from viewers had been improperly redirected.[121] PTL continuously refused to respond to the FCC's subpoenas for documents, acquiescing only after the Department of Justice became involved.[122] But even after an extensive gathering of PTL documents by the Commission over the course of two years, the FCC simply forwarded the documents to the Justice Department, without issuing a formal opinion.[123] Further, the results of the FCC's PTL investigation were not published in the FCC's Official Reports.[124] One commentator surmised that the FCC's actions, in light of its decision in the PTL case, signaled a retreat from the exercise of its authority over televangelists.[125] Viewed more broadly, it might have indicated an "outright retreat from controversial regulation issues."[126]

Since the FCC's non-involvement in the PTL matter, the Commission has revoked the broadcasting license of few televangelists.[127] Unfortunately, even in many of those instances, the FCC's regulation left much to be desired. For example, in a recent and unprecedented opinion, the Commission ventured to say what kind of religious programming would not qualify as "educational."[128] In WQED I, WQED, a noncommercial educational station (NCETV), applied to transfer its license to Cornerstone, a commercial television station whose programming was mostly religious in nature.[129] Called to decide whether Cornerstone could qualify as a NCETV, the FCC ruled in the affirmative,[130] but issued prospective guidelines "regarding the review of programs . . . for the reserved NCETV channels."[131] The Commission addressed what kind of religious programming would not qualify as "educational" for purposes of establishing compliance with NCETV guidelines. Such would include:

> [P]rogramming primarily devoted to religious exhortation, proselytizing, or statements of personally-held religious views and beliefs . . . . Thus, church services generally will not qualify as 'general educational programming under our rules.'[132]

This decision drew a flood of criticism against the FCC,[133] and swift reaction by Congress followed. The Commission received more than 1,000 letters from citizens who opposed the ruling.[134] In addition, Jerry Falwell attacked the opinion, calling it an effort to "silence Christian broadcasting in America."[135] Within a month after its release, the FCC vacated the prospective guideline portion of WQED I.[136] This attempted atonement did not appease the U.S. House of Representatives, which passed the Noncommercial Broadcasting Freedom of Expression Act.[137] The bill would have prohibited the FCC from imposing any content-based requirements on NCETV licensees,[138] like the ones imposed by the FCC in WQED I. The Senate did not vote on the bill before adjourning on December 2000 and, therefore, it failed during the past session of Congress.

WQED I provides an example of classic "knee-jerk" regulation. The Commission explained in WQED II that it had attempted to "clarify what constitute[d] noncommercial educational programming."[139] Unfortunately, in trying to clarify, the FCC overstepped its authority, engaging in content review of programs, and possibly infringing on broadcasters' protected rights of freedom of speech and exercise of religion.[140] Though curbing sectarian, intolerant, and divisive religious speech by televangelists may be a desirable social objective, accomplishing that goal through content regulation is inappropriate.

Clearly, then, the FCC has not regulated televangelists appropriately. After displaying great hesitance to intervene in the PTL case, the Commission attempted the opposite—active and aggressive regulation—in WQED I and WQED II. Again, its efforts backfired, leaving the FCC right back where it started. Ultimately, the tale of FCC regulation in this area consists of little more than erratic efforts of non-regulation and misregulation, none of which offer the public any real protection.

Private Civil RICO Actions

One commentator has argued that private attorney general suits under RICO may effectively deter fraudu-

lent religious solicitation by televangelists.[141] Section 1964(c) of Title 18 of the United States Code allows civil actions under RICO, providing:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .[142]

Establishing a prima facie civil RICO claim requires four elements. First, a plaintiff must allege an injury.[143] Second, two predicate acts of racketeering activity within a 10-year period must be established.[144] Third, those predicate acts must establish a pattern of racketeering activity.[145] Finally, the pattern of racketeering must be related to an existing racketeering enterprise.[146] According to commentators, these elements are "easily met and should pose little difficulty in most religious racketeering cases."[147]

Civil RICO can only be targeted at religious organizations that seek pecuniary contributions from members for specific advertised purposes, and then divert the funds to serve different purposes. Private suits under RICO do not implicate the validity of the religion or the "sincerity of belief" test. In other words, Ballard's concerns will not be present in a civil RICO case. A plaintiff can question the "use of funds solicited for a purpose wholly different than that advertised"[148] without questioning the televangelist's or the religious organization's theological tenets.

Establishing a prima facie civil RICO claim requires four elements. First, a plaintiff must allege an injury. Second, two predicate acts of racketeering activity within a 10-year period must be established. Third, those predicate acts must establish a pattern of racketeering activity. Finally, the pattern of racketeering must be related to an existing racketeering enterprise.

The remedies provided by RICO seem to make it an attractive solution for not only those defrauded by televangelists, but for the general public as well. Because racketeering includes not only mail or wire fraud but also a myriad of other illegal activities,[149] it gives private parties great incentives to bring suit against televangelists. A prevailing plaintiff may receive treble damages and attorney's fees.[150] More importantly, the televangelist would likely be financially ruined and unable to commit further frauds. Private RICO actions also "eliminate the need for governmental action . . . ."[151] Alleged fraud committed by televangelists is a controversial matter; government agencies often either lack the resources to get involved, or may refuse to do for fear of negative public feedback—recall the FCC in Bakker's PTL affair.

However, the reality of private RICO suits diverges from its hopeful potential, casting doubts as to the effectiveness and viability of such actions against televangelists. Two problems present themselves. First, in the only case on record in which private citizens sued a televangelist for fraud under a civil RICO cause of action, the plaintiffs failed to win a judgment.[152] Secondly, just as former faithful viewers can sue a televangelist under RICO, so too can a televangelist use RICO to sue others,[153] should his dubious ministry be scrutinized or threatened.

Teague I arose following the failure of infamous televangelist Jim Bakker's PTL ministry. There, a group of about 160,000 individuals filed a class action suit for fraud against Bakker, one of his personal aides, a PTL board member, and PTL's auditing firm. Bakker, through PTL, had solicited funds via mail to build Heritage USA, a "Christian retreat center for families."[154] Plaintiffs alleged that Bakker had oversold memberships to Heritage USA, despite having promised PTL viewers that he would limit the sale of such memberships so as to ensure that each member would be able to use the facility annually.[155] Also, the complaint alleged that Bakker had actually used few of the funds collected for building Heritage USA.[156] "Instead, Bakker used partnership funds to pay operating expenses of the PTL and to support a lavish lifestyle."[157] In addition, plaintiffs contended that PTL's accounting firm, Bakker's aide, and the board member aided and abetted "Bakker's claimed frauds."[158] In all, plaintiffs pursued five claims, based on violations of state common law regarding fraud, federal securities laws, South Carolina's Timeshare Act, federal RICO, and North Carolina's RICO statute.[159] The plaintiffs prevailed on only the common law fraud claim.

Considering that Bakker had already been convict-

ed[160] by another jury of twenty-four counts of federal mail and wire fraud—both racketeering offenses—his escape from civil RICO liability claims in Teague I is remarkable. Under the Federal Rules of Evidence, evidence of Bakker's conviction, though not admissible to prove his character "in order to show action in conformity therewith," could be admitted for other purposes.[161] It is unclear whether plaintiffs' counsel attempted to admit this evidence, but its failure to enter the record may account for the puzzling contradiction.

Simply because these particular plaintiffs could not to convince a particular jury that Bakker and his staff had committed racketeering acts does not foreclose the possibility that different plaintiffs in other RICO suits against televangelists may win. Nevertheless, considering that Bakker's case is a prime example of televangelist fraud, and considering his prior conviction of racketeering crimes, the failure of the plaintiffs in Teague I to secure a RICO judgment casts a doubt as to the effectiveness of this remedy against televangelist fraud.

More problems may exist in §1962 of the RICO Act, which does not limit who the potential plaintiff may be. According to that section, a civil RICO action is available to "any person who has been injured in his business or property by reason of" a pattern of racketeering activity.[162] Such a person may even include a televangelist. Indeed, Robert Tilton, a well-known televangelist in late 1980s and early 1990s, proved this point by suing ABC's Dianne Sawyer, among others, for alleged violations of RICO.[163]

The suit arose from a television report aired on ABC's news show *PrimeTime Live* in November 1991.[164] During the piece at issue, Sawyer criticized Tilton's fundraising practices, reporting that Tilton "personally acquired millions of dollars of donations sent to the Church" and threw away prayer requests before praying over them as he had promised.[165] As a result of the broadcast, membership in Tilton's church dropped sharply, forcing him to end his television ministry.[166]

In response, Tilton alleged that ABC had violated §1962(c), which prohibits persons employed by an enterprise from conducting or participating in the enterprise's affairs through a pattern of racketeering.[167] Ultimately, Tilton's suit was dismissed by the district court for failure to state a claim, a decision affirmed by the court of appeals.[168] The court held that Tilton failed to plead a pattern of racketeering activity by ABC, stating that the "alleged acts were all part of a single, lawful endeavor—namely the production of television news reports concerning a particular subject."[169] However, the court also stated in a footnote that "the law in other circuits might have allowed [Tilton's] case to proceed further."[170]

However, this was not Tilton's only lawsuit.[171] He also sued his nemesis, Ole Anthony (founder of Trinity Foundation, a televangelist watchdog organization), who assisted ABC in performing the "trash sweeps" of Tilton's church for the *PrimeTime Live* program. Here, the televangelist alleged a violation of 42 U.S.C. §1985(3) for depriving him of equal protection or equal privileges and immunities.[172]

Ultimately, all of Tilton's suits failed. Nevertheless, Tilton opened the door for the use of civil RICO as a weapon against individuals and organizations who attempt to expose questionable religious practices. Facing this possibility, prospective private attorneys general may be deterred from bringing these types of lawsuits against televangelists. As the Tilton cases show, a threatened televangelist can be litigious—not surrendering without a fight, taking full advantage of the judicial process, and prolonging the dispute. If the televangelist has deep pockets, stuffed perhaps with the donations of unwary souls, he may be able to drag out the suit until plaintiffs' counsel can no longer bear the financial burdens of the representation.

THE (IM)POSSIBILITY OF CONTENT-BASED REGULATION OF TELEVANGELISTS' SPEECH

As shown above, the proposed solutions[173] to prevent and deter televangelists from engaging in questionable practices in their ministries are constitutionally deficient, politically unsound or ineffective. As an additional alternative, content-based regulation should be briefly explored to determine whether it is constitutional to pursue such a restriction of a televangelist's speech.

If televangelist programming could fit within one of the categories of speech that are excluded from First Amendment protection, the state could regulate it with an end to prevent their improper practices. Through content-based speech restrictions, prophylactic measures could preclude financial injury to viewers who would otherwise send monetary donations to disreputable televangelist ministries. Such measures would apply to televangelists who solicit money from mass tel-

evision audiences.

A legislature could target the kinds of programs where it deemed that misrepresentation may occur, or where viewers' susceptibilities may be exploited. For instance, religious programs on television that consist of faith healing or apocalyptic prophesizing—in combination with solicitation for funds—could be targeted for regulation, for it seems likely that potential deception could stem from these kinds of programs.[174] Perhaps, then, a disclaimer may appear in these kinds of programs, stating that the viewer ought not believe what he will watch blindly, or that he ought to assure himself that the ministry is legitimate. Thus, viewers and listeners of these programs would be warned *before* donating their money to a religious ministry.

However, it is unlikely that televangelists' speech will fall within one of the exceptions to free speech protection. In addition, televangelists' speech will be constitutionally protected as involving the exercise of religion. Thus, the prospect of regulating the content of televangelists programs is most likely proscribed.

The First Amendment forbids the government from restricting "expression because of its message, its ideas, its subject matter, or its content."[175] Seminal to the values of the First Amendment is the principle that "the government must remain neutral in the 'marketplace of ideas.'"[176] Further, the First Amendment also prohibits bans of "public discussion of an entire topic."[177]

Moreover, as the Supreme Court stated in R.A.V. v. City of St. Paul, "content-based restrictions on speech are presumptively invalid."[178] This hostility against content-based regulations is not absolute. The presumption of invalidity may be overcome in two ways. First, content-based regulation is allowed if the speech "fall[s] within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression."[179] Accordingly, the government may apply content-based restrictions to so-called "fighting words,"[180] to speech that advocates illegal conduct,[181] to obscenity,[182] to child to pornography,[183] to conspiratorial speech,[184] and to defamation.[185] Secondly, if the speech does not fall within these established exceptions, a law may regulate the content of speech if it is "narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[186]

Here, it is easy to see that televangelists' speech does not fall into any of the established exceptions. They do not engage in obscenity, defamation, conspiracies, advocate illegal conduct, or utter fighting words. Rather, they proselytize, preach the word of God, pray, discuss current events, and ask for donations.[187] Thus, the legislature must offer a compelling reason for its proscription on the content of televangelists' speech. Under the hypothetical above, the reasons proffered by the legislature are simply not "compelling." Just because misrepresentations may have occurred in the past in charismatic healing programs, it does not mean they will occur again, or that it is a problem so widespread that the government should get involved. Further, it would be difficult to justify this viewpoint discriminatory regulation. This regulation "singles out particular programmers"[188] for regulation—preachers who engage in healing and prophesizing. Where the goal of the content-based restriction is to "shield the sensibilities of the [viewers], the general rule is that the right of expression prevails, even where no less restrictive alternative exists."[189] Thus, the hypothetical law would be held unconstitutional.

Televangelist speech is, therefore, protected speech and its content may not be regulated. If the government were to regulate the content of televangelists' speech, the state would become the "great censor,"[190] the judge of what ideas are harmful to the public, thus violating its mandate of neutrality in the marketplace of ideas. That televangelists' speech may be harmful to those who hear it only underscores its power and impact on its listeners.[191] But that does not provide a valid reason to proscribe the content of the speech; instead, it emphasizes the need for its protection.[192]

A content-based regulation of televangelists' speech could also be challenged under the Free Exercise Clause.[193] Because the hypothetical regulation here is content-based, or facially discriminatory, it falls under the rule of Hialeah.[194] There, the Court stated: "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral," that is, it discriminates on its face.[195] The law would be invalid unless the government had a "compelling interest" that was narrowly tailored to advance the purported interest.[196] Further, it is well established that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions . . . ."[197]

In this case, the regulation probably would be struck down because it suppresses the practice of religion. The object of the law is to prevent people from donating money to allegedly disreputable televangelists because of the value judgment made on faith healing and apocalyptic prophesizing. Again, just as with free exercise above, it is difficult to offer a secular compelling government interest that supports such a regulation. Presumably, if such a law were enacted, it would be because the government disliked and wished to curb those particular religious practices for the potential harm they cause citizens.[198] This is precisely what occurred in Hialeah. Because the citizens of Hialeah were hostile to the unconventional sacrificial practices involved in Santeria, they supported a regulation that proscribed such practices.[199] But this the government cannot do.

Thus, the prospect of a content-based regulation to curb televangelists' religious practices is unfeasible and, more importantly, unconstitutional. Televangelists would successfully raise free speech and free exercise claims under the First Amendment to any governmental attempt to interfere deliberately with their speech. Moreover, given the prior failures of other means, First Amendment success likely gives the televangelists the last word in more ways than one when it comes to formal regulation.

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THE MARKETPLACE OF IDEAS: THE PROPER REGULATOR

So the journey leads back to the starting point. Alleged fraud by televangelists is difficult to prosecute. Statements based on representations arising from religious tenets, articles of faith, or divine commands cannot be fraudulent because these statements cannot be proved false or true. Though many would agree that some activities carried out by televangelists are shameless, and would want them regulated, this is not constitutionally possible.

A valid, effective and constitutional approach to confront the present problem does exist—and that is to leave the worth of televangelists' speech to the judgment of the marketplace of ideas. This conclusion may dissatisfy the censors among us who have watched programs in religious channels, and know intuitively that something is awry, that miracles do not happen so nonchalantly, that the end of the world cannot be as near as is claimed, or that not every minister possesses the power to heal all ailments. But mere dissatisfaction and a desire to censor ideas for their content are simply inconsistent with American constitutional values. Tolerance for all opinions is a pivotal guiding principle in American society—even if the opinions proffered are themselves intolerant in nature. Thus, consistent with these principles, the First Amendment dictates that the government may not regulate televangelism.

The issue now at hand is to determine the extent to which the marketplace of ideas allows the participation of televangelists. This entails an explanation of the theory of the marketplace of ideas within the First Amendment. Then, applying the theory to televangelists, the role of the participants within the framework needs to be explored. That is to say, assuming the absolute constitutional protection of the free trade in ideas, which televangelists ought to enjoy, what is the antidote to the poisonous speech uttered by them? Or, put distinctly, what can the poisoned victims, or those who may be poisoned, do?

Justice Holmes, in his seminal Abrams[200] dissent, gave rise to modern First Amendment doctrine,[201] by offering the "marketplace of ideas" theory of free speech. In this case, which arose from convictions under the Espionage Act, Justice Holmes modified the "clear and present danger" test he had articulated in Schenk v. United States,[202] elaborating on the proximity and degree elements of the test. The "danger," he said, must be such that it "imminently threaten[s] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[203] As a rationale for the rule, Justice Holmes invoked the now-famous marketplace

metaphor:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.[204]

As Justice Holmes indicates by his language, the marketplace of ideas "envisions an unrestricted and robust exchange of views and opinions whereby such views and opinions may be available for each person to either accept or reject on their merits."[205] While "truth" is part of the metaphor, the emphasis is in the "free trade" that ought to occur in the marketplace.[206] Whatever the truth may be, when finally known, is secondary. Indeed, Justice Holmes notes that life is an experiment, where truth—or full truth—is unknown, since we operate "upon some prophecy based upon imperfect knowledge."[207]

Because our knowledge is thus limited, it necessarily follows that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . ."[208] Tolerance for the speech of individuals that we find utterly repugnant, baseless, and false is the cornerstone of the marketplace of ideas.[209] Hence, consistent with this precept, the Supreme Court stated that "under the First Amendment there is no such thing as false idea."[210]

Closely related to the above principles is that the free exchange of ideas—public or private, offensive or benign, blasphemous or orthodox—be encouraged and maximized.[211] In this process of exchange, then, both the freedom to distribute speech as well as the right to receive it are protected by the First Amendment.[212] What Justice Holmes never stated was what the "market" was, or wherein the "free trade" in ideas would occur. It was Justice Brennan who grounded the trade to a "specific locale and context."[213] He assigned the free trade in ideas to a "marketplace," alluding to the Ancient Greek agora, which served as the social meeting place for citizens, foreigners, tradesmen, artisans, and philosophers.[214] The marketplace of ideas, then, suggests "diversity and pluralism,"[215] an exchange in which everyone may participate, either by distributing or receiving information.[216]

Consistent with these principles, the marketplace[217] allows for two kinds of responses in the free trade of ideas if speakers disagree with what televangelists do. One is negative, the other positive. One rejects televangelists' poison, the other attempts to prevent others from being poisoned. Each is explored below.

First, what arguably is a very powerful response to televangelists is rather simple. Individuals have the right to distribute information in the marketplace. Individuals also have the right to receive such information. However, it is logical that people should have a right to *refuse* to receive information, for whatever reason, under any circumstances. This is part of the free trade in the marketplace. Ideas are exchanged; some are accepted, others rejected. This right to refuse information is similar to the right of an individual not to be compelled to associate with people who hold objectionable viewpoints,[218] or to the right of an individual not to speak.[219] While some argue convincingly that great barriers to access exist in the marketplace of ideas, because the "marketplace rewards the powerful"[220] to the detriment of powerless groups like women and minorities, everyone may easily refuse access to speech that they find objectionable, even by groups who are disenfranchised.

If a viewer finds a televangelist's speech distasteful, shameless, or disingenuous, she may turn the television off, or change the channel. Just as televangelists propagate their speech, so may the viewer choose to refuse to receive their speech. The rejection, in itself, is speech too. Though negative, it represents a disagreement and, perhaps, a condemnation of what televangelists do. For televangelists, when viewers turn off the television it proves fatal, since it means an end to financial support.

This is precisely what happened to televangelists in the 1980s. When the press revealed Jim Bakker's PTL scandal, viewers stopped watching him and sending monetary donations.[221] PTL "suffered serious and ostensibly permanent [financial] losses."[222] Oral Roberts, Jimmy Swaggart, and Robert Tilton had a sim-

ilar fate.[223] This shows that a free trade in ideas can have a powerful effect on particular individuals and society.

Integrally connected to the negative response is the positive one, which is proactive in nature. It requires an action, or a reaction, on the speaker's part. It has to be more than a rejection of the speech presented.[224] In fact, it follows, or should follow, naturally from the negative response.[225] After rejecting the speech, the person should explain why she rejected the speech. Of course, the First Amendment does not require that people justify their views; one may remain silent. But if a person wishes to convert others to her point of view, to change minds and attitudes in society, it is imperative that she should explain herself. A mere rejection of the speech will not suffice.

In this regard, consider Justice Jackson's comments in Ballard, which exemplify a positive response that occurs in the marketplace of ideas, and which could be applicable to a questionable televangelist today:

> The chief wrong which false prophets do to their following is not financial . . . . There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support . . . . The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get.[226]

Just as "mental confusion" and "moral anarchy" seek "truth and beauty and moral support," so too might the poisoned soul seek an antidote. In providing it, one may remonstrate with such a person, and tell him that answers to life may be found elsewhere, that salvation does not cost money, that many televangelists cater to Americans' religious taste "with a pretty dubious product."[227] One may offer reasons as to why some televangelists may be a sham.[228] How do you know, one may ask our believer, that Benny Hinn does in fact "cure" all the people who claim to have been cured by him? He never provides the viewing audience with a medical record of the person; in fact, nothing more is discussed about the person who is allegedly cured. Further, one may invite this person to read news reports that expose televangelists' dishonest practices.[229] One may cite to televangelists' abuses from the past.[230] One may allude to their gaudy opulence and question their sincerity.[231] This we are allowed to do in the marketplace of ideas.

The risk we run in this "experiment" is that the arguments presented will go unheard, unheeded. The hearer, being satisfied and content to give his money to a questionable television ministry, does not care about the arguments. In fact, he rejects them. He exercises his right to refuse to hear our pleas.

This is the double-edged sword built into the marketplace of ideas, in which no one is required to listen to or believe any particular propositions—even the ones that may seem obvious to us. If occasionally a weakness in the formula, that ultimate degree of freedom is also precisely its strength. The other "solutions" proposed in this Note (leaving aside ineffective FCC and RICO actions) all prescribe some kind of censorship; in doing so, each diagnoses its own failure. In the marketplace of ideas, on the other hand, we may not be able to convince our poisoned soul, but we may at least express our thoughts and ideas freely to him, without fear of being censored. As such, we respond to the potential poison of televangelism in the best way possible—the way consistent with the values of the First Amendment.

CONCLUSION

Many viewers of evangelical television ministries desire to regain their health, achieve financial security, or feel as though someone loves them. As long as people continue to search for the shortest path to physical happiness, televangelists will have a captive audience. Part of the problem, as Alexis De Tocqueville aptly commented in Democracy in America, is that Americans suffer from a "secret restlessness."[232] Realizing that time in this world is limited, we are "always in a hurry, for [we] have only a limited time in which to find [worldly good things], get them, and enjoy them."[233] Sickness, poverty or bad circumstances in life may prevent us from achieving our worldly goals.[234] Thus, we seek a quick assurance from God that our apparent failures here will not have been for naught. The next world holds a promise of eternal life. Televangelists fill the gap here, convincing vulnerable souls that salvation is guaranteed if they repent and accept Jesus Christ as their savior. Throwing in a little cash to the ministry does not hurt. After all, the Bible commands tithing.

But as seen in this Note, the marketplace of ideas need not be captive to any single command. Government regulation of televangelists, by any means attempted, may be destined to fail—but in the market-

place of ideas the people, not the government, are the ultimate arbiters. People who disagree with televangelists' tactics should speak out, loudly and clearly. In the meantime, while the free exchange continues, the same First Amendment that lends the best defense against televangelism also requires that we "put up with, and even pay for, a good deal of rubbish."[235]

This Note is dedicated to my mother, Maria Teresa Borrego, and my grandmother, Ernestina Ramos Ruiz (1922-1996).

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[1] I Timothy 6:3-10 (King James) (emphasis in original).

[2] Though fictional, the preceding account is the format for a well-known televangelist who will remain unnamed. Nothing in this Note should be read as an accusation of criminal activity against any individual.

[3] See Guy H. Brooks, Comment, Televangelism and the Federal Communications Commission: To Regulate or Retreat, 91 Dick. L. Rev. 553, 553 n.1 (1986).

[4] I have followed the four classifications suggested by Brooks, id. at 574-80, and added a fifth one (talk-shows) based on my own viewing of religious programming on cable television.

[5] This is by no means an exhaustive list. Many more televangelists, who buy time in the two major networks, exist.

[6] For general information on this network, visit CBNnow.com Christian Broadcasting Network, at http://www.cbn.org (last visited Feb. 13, 2000).

[7] For general information on this network, visit Welcome to TBN: The Largest Christian Television Network in the World, at http://www.tbn.org (last visited Feb. 13, 2000). Affiliated with this is another network called the All American Network.

[8] See Stephen Senn, The Prosecution of Religious Fraud, 17 Fla. St. U. L. Rev. 325, 329-30 (1990) (describing a televangelist's practice of targeting susceptible people). These observations are also based on my extensive viewing of televangelist programming—on cable channels 15 (TBN) and 21 (CBN) in Nashville, Tennessee—as part of my research for this Note.

[9] Luke 15:4, 10 (King James). See also "Parable of the Prodigal Son," Luke 15:12-32 (King James).

[10] See Jonathan Turley, Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation, 29 Wm. & M. L. Rev. 441, 447-48 (1988).

[11] For example, TBN conducted a series of fundraisers to fund their production of *The Omega Code*, a motion picture released in October 15, 1999. Jerry Falwell asked viewers to help him raise $2.5 million to help build a new hall at Liberty University. CBN's *700 Club* usually asks for money to support their relief missions. TBN and CBN also ask for support to keep the networks operating. Again, these statements are based on my viewing of TBN and CBN.

[12] 700 Club (TBN television broadcast, Jan. 21, 2000). Pat Robertson challenged the audience to raise $275,000 during a 30-minute challenge. The goal was exceeded by $49,000.

[13] See 1999 Contributions: $190.16 Billion by Source of Contribution, at http://www.aafrc.org/images/graphics/chart1.jpg (last visited Feb. 2, 2001) . This represented an 8.2% increase in donations from 1998. See AAFRC Press Release, at http://www.aafrc.org/press3.html (last visited Feb. 2, 2001). Donations to religious institutions "[have] historically been the area to which Americans donate the most." Id.

[14] See id.

[15] Id.; see also Giving 1999: Contributions Received by Type of Recipient Organization, at http://www.aafrc.org/images/graphics/chart2.jpg (last visited Feb. 2, 2001).

[16] See, e.g., United States v. Taggart, No. 92-6468, 1993 U.S. App. LEXIS 1067 (4th Cir. 1993); United States v. Bakker, 925 F.2d 728 (4th Cir. 1991); United States v. Daly, 756 F.2d 1076 (5th Cir. 1985); United States v. Grant, 933 F. Supp. 610 (N.D. Tex. 1996). Cf. SEC v. Deyon, 977 F. Supp. 510 (D. Me. 1997) (finding that a televangelist violated the 1933 Securities Act, and imposing a fine for the violation).

[17] See, e.g., Laura Watt, Crusade Lures Seekers, Protesters: Televangelist Packs Coliseum While Pickets Declare Him Fraud, Denv. Rocky Mountain News, Aug. 28, 1999, at 4A; Jennifer Harper, Celebrities' Falls Rarely Prove Fatal to Public Opinion: America Usually Forgives, Forgets, Wash. Times, Jan. 17, 1997, at A2; John O'Brien, Stage Set for Televangelist's Investment-Fraud Trial, Chi. Tribune, Aug. 22, 1997, at 10; Alberta Lindsey, First You Pay, Then He Prays for Healing: Donations Before 'Miracles' at Local Benny Hinn Crusade, Richmond Times-Dispatch, Oct. 5, 1996, at B1; Evangelist Pleads Guilty, Houston Chron., Nov. 23, 1995, at 32. See also NPR Weekend Saturday (radio broadcast, May 9, 1998) (reporting on televangelist watchdog organization Trinity Foundation); CNN Impact (CNN television broadcast, Nov. 23, 1997) (exploring Benny Hinn's ministry, finances, and faith healings).

[18] See *infra* notes 45-103 and accompanying text.

[19] See *infra* notes 104-41 and accompanying text.

[20] See *infra* notes 142-73 and accompanying text.

[21] "Fraud," when used in this Note, means to make "a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another . . . ." Black's Law Dictionary 660 (6th ed. 1990). The representation must be capable of being proved false by means of experience (that is, empirically). "Religious" and "religion" shall comprise the subjective notions and beliefs of the person making the statement, without taking into account any objective criteria, and without considering any established religions of the world. I make "religion" into a purely subjective notion, incapable of being defined, because "there is no essence of religion, no single features that all religions have in common . . . ." George C. Freeman, III, The Misguided Search for the Constitutional Definition of "Religion", 71 Geo. L.J. 1519, 1565 (1983) (arguing that attempts to define religion for constitutional purposes are unsatisfactory and misguided). But see Rebecca Redwood French, From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law, 41 Ariz. L. Rev. 49, 92 nn.10-12, 14 (1999) (reviewing law review material in which authors define "religion" for constitutional purposes). Fraud shall not include any claims relating to a Supreme Being, to religious doctrine, or to religious belief. But cf. Senn, *supra* note 8, at 326-28. In other

words, "religious fraud" shall be considered a contradiction in terms.

[22] See Jeffrey K. Hadden, Policing the Religious Airwaves: A Case of Market Place Regulation, 8 B.Y.U. J. Pub. L. 393, 400 (1994).

[23] Id. at 401.

[24] Id. at 400.

[25] Id.

[26] Id. at 401.

[27] Hadden, *supra* note 22, at 401. In addition the newly created radio networks, like NBC and CBS, also restricted access to religious preachers on their stations. Id. at 401-02. Only one network, the Mutual Broadcasting Network (Mutual), accepted paid religious broadcasters, but this did not occur until 1935. Id. at 402. In 1942, however, Mutual reversed itself, announcing that it would not allow on-air solicitation of funds from audiences. Id. As a result, this forced many religious broadcasters off the air.

[28] Id. at 403. The NRB is one of the more influential and sophisticated lobbying associations in Washington, D.C. See id. at 406, 416 n.41.

[29] Id. at 403-04.

[30] Id. at 404. See also Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7291, 7295 (1960). For a discussion of the FCC's "public interest" standard, see *infra* notes 112-18 and accompanying text.

[31] See Hadden, *supra* note 22, at 405.

[32] See Jerrold M. Starr, Signal Degradation, Am. Prospect, Aug. 14, 2000.

[33] See Patrice Apodaca, Southland: Television's Bible Belt, L.A. Times, Jan. 12, 1998, at A17.

[34] Id. Obviously, a religious broadcaster need not be located in Southern California to be successful. Pat Robertson's CBN, for example, is based in Virginia.

[35] Ted Parks, Poll Finds the Religious Aren't Religious TV Fans, Austin Am.-Statesman, Feb. 19, 2000.

[36] See id.

[37] Id.

[38] See id.

[39] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I, cl. 1.

[40] See Davis v. Beason, 133 U.S. 333, 342-43 (1890) (upholding the conviction of Beason, a Mormon, who was convicted of polygamy). See also Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("[The First Amendment] embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society . . . .").

[41] See Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969) (holding that Scientology was a bona fide religion and, consequently, its activities regarding an electronic measuring device in the practice of Scientology could not be examined under the Food, Drug, and Cosmetic Act). But see United States v. Article or Device "Hubbard Electrometer", 333 F. Supp. 357 (D.D.C. 1971) (holding that the Scientology writings, secular in nature, distributed with the device contained false unqualified scientific claims and, thus, were "labeling" within the meaning of the Food, Drug, and Cosmetic Act).

[42] In this light, a court went as far as listing factors to be considered in determining whether someone's beliefs were "religious" for purposes of the Religious Freedom Restoration Act "RFRA". The factors included beliefs in ultimate ideas, metaphysical beliefs, moral or ethical systems, and external signs such as the existence of a prophet, writings, rituals, holidays, or ministers. See United States v. Meyers, 906 F. Supp. 1494, 1502-03 (D. Wyo. 1995). However, the Supreme Court determined that RFRA was unconstitutional. See City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress lacks the power to define substantive constitutional rights under § 5 of the Fourteenth Amendment).

[43] See Turley, *supra* note 10, at 469. After the FCC revoked Scott's broadcasting license, he "simply bought time on other religious stations and continued his programming." Id.

[44] See id. at 477-93.

[45] 322 U.S. 78 (1944).

[46] See Senn, *supra* note 8, at 333.

[47] This was a divided 5-4 decision. The dissent was particularly fractured. Chief Justice Stone, speaking for three dissenters, explicitly approved the "good faith belief" charge to the jury, and considered the issue waived by defendants because they did not raise an objection at trial. Ballard, 322 U.S. at 91 (Stone, C.J., dissenting). Accordingly, he would have reinstated the guilty verdict reached by the District Court. Id. at 92. Justice Jackson, on the contrary, dissented for completely different reasons. He opined that no difference exists when one is asked to judge between the truth of a belief and the sincerity of the belief with which one holds it. Id. at 92-93 (Jackson, J., dissenting). Accordingly, he would have dismissed the indictment. Id. at 95.

[48] Id. at 79. See also 18 U.S.C. § 1341 (1999) ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article...places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both.").

[49] This gentleman, in spite of his many influential "alter egos," was dead at the time of the indictment. Ballard, 322 U.S. at 79.

[50] Id.

[51] Id. at 79-80.

[52] Id. at 80.

[53] Id.

[54] Ballard, 322 U.S. at 81.

[55] Id. For instance, the defendants claimed Jesus had appeared to them and dictated the works upon which the I Am movement was founded. Id.

[56] Id.

[57] Id.

[58] The judge continued: "If these defendants did not believe...that Jesus came down and dictated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty." Id. at 81-82. The actual charge to the jury reiterated the above admonition. Id. at 82.

[59] Id. at 83.

[60] Ballard, 322 U.S. at 88.

[61] Id. at 86 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1872)).

[62] Id. at 86-87.

[63] See, e.g., United States v. Daly, 756 F.2d 1076 (5th Cir. 1985), cert. denied, 474 U.S. 1022 (1985); United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); Anderson v. Worldwide Church of God, 661 F. Supp. 1400 (D. Minn. 1987). Additionally, the sincerity of belief test had been used prior to Ballard in other "religious fraud" cases. See, e.g., Hansel v. Purnell, 1 F.2d 266, 271 (6th Cir. 1924); New v. United States, 245 F. 710 (9th Cir. 1917); Post v. United States, 135 F. 1 (5th Cir. 1905).

[64] See, e.g., Frazee v. Illinois Dep't. of Employment Sec., 489 U.S. 829 (1989); Welsh v. United States, 398 U.S. 163 (1970); United States v. Seeger, 380 U.S. 333, 185 (1965) (applying the sincerity of belief test in a "conscientious objector" case).

[65] See, e.g., Mejia-Paiz v. INS, 111 F.3d 720, 723 (9th Cir. 1997) (upholding the Immigration Judge's questioning of "respondent's claim to religion and membership in the Jehovah's Witness"); Patrick v. Lefevre, 745 F.2d 153 (2d Cir. 1984); Childs v. Duckworth, 705 F.2d 915 (7th Cir. 1983); International Soc'y for Krishna Consciousness v. Barber, 650 F.2d 430 (2d Cir. 1981); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969); Meyers, 906 F. Supp. at 1507 (holding that while defendant's "Church of Marijuana" beliefs may be sincerely held, his sincerity was not enough to rise to the level of a "religion" for purposes of the Religious Freedom Restoration Act); Williams v. Bright, 658 N.Y.S.2d 910, 915 (N.Y. App. Div. 1997) (holding that the jury may consider the plaintiff's belief in religious tenets in a negligence action).

[66] Ballard, 322 U.S. at 92-95 (Jackson, J., dissenting).

[67] Id. at 92 (Jackson, J., dissenting).

[68] Id.

[69] For a discussion on the impossibility of proofs of God's existence using reason, see generally Immanuel Kant, Critique of Pure Reason 500-24 (Norman Kemp Smith trans., St. Martin's Press 1965) (1787) (showing that God's existence can be proved in only three ways, and demonstrating the impossibility of each proof); Benedict Spinoza, Theologico-Political Treatise 195 (R.H.M. Elwes trans., Dover Books 1951) (1677) (drawing the "absolute conclusion that the Bible must not be accommodated to reason, nor reason to the Bible.").

[70] Ballard, 322 U.S. at 89 (Stone, C.J., dissenting); id. at 95 ("I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes.") (Jackson, J., dissenting).

[71] This presents a serious dilemma for a trier of fact. If some of the jurors are members of the defendant's faith, they are probably going to believe that the defendant has a sincere belief in what she believes. Conversely, the jurors who are not members of the defendant's faith may automatically dismiss the defendant's beliefs as ludicrous. No matter how the jury is composed, then, the defendant may not have an impartial and fair jury.

[72] A religion is only labeled as non-traditional by judging it against the standard of "traditional" and "accepted" religions. This is obviously a culturally relative term.

[73] 322 U.S. at 93 (Jackson, J., dissenting) (citation omitted).

[74] Id.

[75] See, e.g., United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983); United States v. Moon, 718 F.2d 1210 (2d Cir. 1983). See generally Charles J. Ogletree, Reverend Moon and the Black Hebrews: Constitutional Protection of a Defendant's Religion in Criminal Cases, 22 Harv. C.R.-C.L. L. Rev. 191 (1987).

[76] See Ballard, 322 U.S. at 93-94 (Jackson, J., dissenting).

[77] 111 F.3d 720 (9th Cir. 1997).

[78] Id. at 723.

[79] Id. at 724

[80] Id. at 727 (Ferguson, J., dissenting) (quoting the IJ's oral decision).

[81] Id. at 729 (Ferguson, J., dissenting).

[82] Mejia-Paiz, 111 F.3d at 729 (citing Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714 (1976)).

[83] Id.

[84] 925 S.W.2d 672 (Tex. 1996)

[85] Id. at 678-79 (citations omitted).

[86] Id. at 679.

[87] Id. Cf. Ballard, 322 U.S. at 95 (Jackson, J., dissenting).

[88] 925 S.W.2d at 679.

[89] That is, the trier of fact could determine if Tilton in fact read, touched and prayed over the prayer requests—regardless of their ultimate desired outcome. See id. at 695-96 (Enoch, J., dissenting) (asserting that whether religious conduct amounted to fraud may be a proper inquiry for the jury). If Tilton did not pray over them, he did not keep his promise. If followers based their donations specifically on this fact, they could recover under a fraud theory, or under a restitutionary claim. However, they could not recover if they based their donations in the hope

that God would heal them *because* Tilton prayed over their prayer requests. See *infra* notes 92-95 and accompanying text.

[90] See Tilton v. Marshall, 925 S.W.2d 672, 679 (Tex. 1996).

[91] However, if a person offered a reason, based on religious doctrine or belief, for not performing a concrete act, a charge of fraud could not proceed based on such a statement. For example, suppose Ballard had said that he had to go to San Francisco to pray for Joe because that would be the only way in which God could heal him. Based on this, Joe made a donation to Ballard. If Ballard did not to go to San Francisco as he promised, Joe could allege that Ballard made a misrepresentation of a matter of fact by false allegations, which intended to deceive Joe. See *supra* note 22. But if Ballard countered that God had told him, at the last minute, that he could not go, the concrete act could not be a misrepresentation of a matter of fact because it is ultimately based on a statement of religious doctrine or belief and cannot be proved false. Following Tilton, a court would conclude that it is irrelevant whether Ballard made the statement honestly or in bad faith. See Tilton, 925 S.W.2d at 679.

[92] Id. Cf. Ballard, 322 U.S. at 92-94 (Jackson, J., dissenting).

[93] See Tilton, 925 S.W.2d at 679. The court quoted from Tilton's mail solicitations: "I feel the Holy Spirit prompting me to challenge you in the name of Jesus to send $100 right now . . . . I challenge you to prove Him now with a $100 offering to seed into the work of God and help us carry this anointed Elijah ministry . . . ." Id.

[94] Id.

[95] Cf. Ballard, 322 U.S. at 92 (Jackson, J., dissenting).

[96] Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). The Court here held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). Thus, because Oregon law proscribes the use of peyote, the state could deny claimants unemployment benefits for work-related misconduct based on the use of peyote for religious reasons. Id. at 890. The Court also concluded that the test developed in Sherbert v. Verner, 374 U.S. 398 (1963), in which the government may not penalize someone for exercising their religious practices unless it is justified by a compelling governmental interest, id. at 402-03, is inapplicable to criminal laws. See Smith, 494 U.S. at 885.

[97] Id. at 877 (emphasis added) (citing Ballard, 322 U.S. at 86-88).

[98] Suppose, for example, a person believes that God has three heads. If I think that is a false belief, I will doubt that anyone in his right mind could believe that God is a three-headed being. I would certainly question the sincerity of the person's belief in the three-headedness of God.

[99] Tilton, 925 S.W.2d at 679.

[100] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 244 (1963) (Brennan, J., concurring).

[101] Ballard, 322 U.S. at 95 ("Prosecutions of this character easily could degenerate into religious persecution.") (Jackson, J., dissenting).

[102] Id.

[103] See Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-610 (2000)).

[104] See 47 U.S.C. §§ 151, 154(i) (2000).

[105] Id. § 307.

[106] Id. § 303(m).

[107] Id. § 312.

[108] See FCC v. ABC, 347 U.S. 284, 289 (1954).

[109] Section 1343 states "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1343 (2000).

[110] See 47 U.S.C. § 312(a)(6) (2000). This subsection also allows for the revocation of a license if the licensee violates 18 U.S.C. §§ 1304 (broadcasting lottery information) and 1364 (broadcasting obscene, indecent or profane language). Id.

[111] See, e.g., 47 U.S.C. § 303 ("Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires...."). Although Congress does not uniformly use the term "public interest" throughout the Communications Act, the FCC's guiding principle in granting or denying licenses has been known as the "public interest standard." Erwin G. Krasnow & Jack N. Goodman, The "Public Interest" Standard: The Search for the Holy Grail, 50 Fed. Comm. L.J. 605, 608 n.8 (1998) (tracing the history of the FCC's public interest standard).

[112] See FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981); NBC v. United States, 319 U.S. 190 (1943) (holding that the public interest standard is not unconstitutionally vague); FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940) (describing the public interest standard as the "touchstone" of FCC authority).

[113] See Krasnow & Goodman, *supra* note 111, at 615 (stating that the "public interest [encompassed] four requirements: (1) 'sustaining' unsponsored programs; (2) local live programs; (3) programming devoted to the discussion of local public issues; and (4) the elimination of advertising excesses.") (footnote omitted).

[114] Id. The list included programs for children, religious programs, educational programs, news programs, sports programs, and service to minority groups, among others. Id.

[115] Id. at 616. Under the marketplace approach, "regulation is viewed as necessary only when the marketplace clearly fails to protect the public interest, but not when there is only a potential for failure." Id.

[116] See Public Interest Obligations of TV Broad. Licensees, 14 F.C.C. Rcd. 21633, 21634 (1999).

[117] Id. Because the FCC is considering whether to adopt new public interest guidelines in light of the current transition from analog to digital television, it has asked the public and broadcasters to offer their views on "how best to implement the public interest" during the change. Id. at 21637.

[118] See, e.g., Faith Center, Inc., 82 F.C.C.2d 1 (1980); Gilbert Broad. Corp., 68 F.C.C.2d 170 (1977); United Television Co., Inc., 46 F.C.C.2d 698, aff'd, 514 F.2d 279 (D.C. Cir. 1974), petition for license renewal denied, 55 F.C.C.2d 416 (1975); Bible Moravian Church, Inc., 28 F.C.C.2d 15 (1971); Brandywine-Main Line Radio, Inc., 27 F.C.C.2d 565 (1971); United Tel. Co., 55 F.C.C.2d 416 (1971); Independent Broad. Co., 14 F.C.C.2d 72 (1949); Young People's Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938). See also Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir 1974); Hartford Communications Comm'n v. FCC, 467 F.2d 408 (D.C. Cir. 1972); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Immaculate Conception Church v. FCC, 320 F.2d 795 (D.C. Cir.), cert. denied, 375 U.S. 904 (1963); Trinity Methodist Church v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932).

[119] See, e.g., James Albert, Federal Investigation of Video Evangelism: The FCC Probes the PTL Club, 33 Okla. L. Rev. 782 (1980) (examining court and FCC precedent which established the Commission's jurisdiction over Bakker's organization).

[120] See Brooks, *supra* note 3, at 572.

[121] Id. at 570.

[122] Id. at 571.

[123] Id.

[124] See PTL of Heritage Village Church & Missionary Fellowship, Inc., Order designating the case for closed hearing pursuant to 47 U.S.C. § 403, 409 (1976). No. 79-210. Not published in the FCC Reports, by direction of the Commission (adopted Mar. 30, 1979), cited in Brooks, *supra* note 3, at 571 n.133.

[125] See Brooks, *supra* note 3, at 573-74.

[126] Id. at 574.

[127] See, e.g., Trinity Broad. of Fla., Inc., 14 F.C.C. Rcd. 13570 (1998), aff'g in relevant part, 10 F.C.C. Rcd. 12020 (1995).

[128] WQED Pittsburgh, 15 F.C.C. Rcd. 202, at *66-69 (1999) (WQED I), vacated in part by WQED Pittsburgh, 15 F.C.C. Rcd. 2534 (2000) (WQED II) (vacating WQED I's "additional guidelines").

[129] Id. at *1, *55.

[130] Id. at *92-93. WQED amended its corporate charter, and promised to change its programming. But see Way of the Cross of Utah, Inc., 101 F.C.C.2d 1368 (1985) (denying the application for a religiously oriented channel to operate as a NCETV channel because the "applicant's Board of Directors was not sufficiently representative of the community of license and...the applicant had not provided a program schedule with a description of its programming.").

[131] WQED I, 15 F.C.C. Rcd. at *66. A NCETV station must be used primarily to serve the educational and cultural broadcasting needs of the entire community. Id. (citing 47 C.F.R. § 73.621(a)). See generally Public Broadcasting Act of 1967 (amending the Communications Act of 1934), Pub. L. No. 90-129, 81 Stat. 365 (codified as 47 U.S.C. §§ 390-99 (2000)). In contrast, a commercial television station is afforded great discretion in its choice of programming. See Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076 (1984).

[132] WQED I, 15 F.C.C. Rcd. at *67-69 (footnote 81 included).

[133] See, e.g., Pulling God's License, Am. Enter., Mar. 1, 2000; FCC Follies: Fairness Returns too Late for WQED, Pitt. Post-Gazette, Feb. 5, 2000, at A10.

[134] See WQED II, 15 F.C.C. Rcd. at *5 n.1 (Furchtgott-Roth, Comm'r, concurring).

[135] Jerry Falwell, Special Victory Report (discussing the FCC's decision to vacate WQED I's additional guidance portion of the decision), at http://www.falwell.com/action%20alerts/actarchives/special_victory_report.htm (last visited Feb. 13, 2000).

[136] See WQED II, 15 F.C.C. Rcd. at *2.

[137] H.R. 4201, 106th Cong. § 1 (2000). The act would have amended the Communications Act of 1934, 47 U.S.C. § 309, adding a new subsection thereto. Id. § 3. The House passed this act on June 20, 2000, and was placed on the Senate's calendar on September 5, 2000. Id. § 3.

[138] Id. The act also mandated that the FCC "shall not establish, expand, or otherwise modify requirements relating to the service obligations of noncommercial educational radio or television stations except by means of agency rulemaking...." Id. § 4.

[139] WQED II, 15 F.C.C. Rcd. at *2.

[140] See id. at *5 (Furchtgott-Roth, Comm'r, concurring); WQED I, 15 F.C.C. Rcd. at *112 (Powell & Furchtgott-Roth, Comm'rs, dissenting in part). For a helpful history of the WQED controversy and the ensuing battle in Congress, see Starr, *supra* note 32.

[141] See Turley, *supra* note 10. But cf. Norman Abrams, A New Proposal for Limiting Private Civil RICO, 37 UCLA L. Rev. 1 (1989) (arguing for the screening and prior approval by a prosecutor of private civil RICO actions). See generally 18 U.S.C. §§ 1961-68 (2000).

[142] Id. § 1964(c); § 1962(a)-(d).

[143] Id. § 1964(c).

[144] Id. § 1961(5).

[145] Id. § 1962(a).

[146] 18 U.S.C. § 1961(4).

[147] Turley, *supra* note 10, at 485.

[148] Id. at 487. See also Ballard, 322 U.S. at 89 (Stone, C.J., dissenting); id. at 95 (Jackson, J., dissenting).

[149] See 18 U.S.C. § 1961 (defining "racketeering activity").

[150] See id. § 1964(c).

[151] Turley, *supra* note 10, at 499.

[152] See Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994) (Teague I).

[153] See Word of Faith World Outreach Ctr. Church v. Sawyer, 90 F.3d 118 (5th Cir. 1996).

[154] Teague I, 35 F.3d at 982 (citation omitted).

[155] Id.

[156] Id.

[157] Id.

[158] Id. at 984.

[159] Teague I, 35 F.3d at 984

[160] See United States v. Bakker, 925 F.2d 728, 731-32 (4th Cir. 1991).

[161] FED. R. EVID. 404(b). The other purposes include proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id. However, counsel for Bakker could have objected to the admission of Bakker's prior conviction on the ground of undue prejudice. See FED. R. EVID. 403.

[162] 18 U.S.C. § 1962(c).

[163] See Sawyer, 90 F.3d at 120. Cf. Tilton v. Capital Cities/ABC, 827 F. Supp. 672 (N.D. Okla. 1993) (denying a preliminary injunction that would have prohibited a rebroadcast of *PrimeTime Live*'s original program dealing with Tilton's ministry).

[164] See Sawyer, 90 F.3d at 120. *PrimeTime Live* broadcast a brief update the week following the original news program, in which viewer reactions were reported. On July 9, 1992, the original program was rebroadcast with a follow-up report. See id.

[165] Id. at 120-21. "Trash sweeps" of Tilton's church were conducted to acquire this information. Id. at 121.

[166] Id.

[167] 18 U.S.C. § 1962(c).

[168] See Sawyer, 90 F.3d at 120.

[169] Id. at 122-23.

[170] Id. at 123 n.4 (citing Shields Enter., Inc. v. First Chicago Corp., 975 F.2d 1290 (7th Cir. 1992); Ticor Title Ins. Co. v. Florida, 937 F.2d 447 (9th Cir. 1991); United States v. Busacca, 936 F.2d 232 (6th Cir. 1991); Ikumo v.Yip, 912 F.2d 306 (9th Cir. 1990)).

[171] Tilton did not escape suit himself. Former church contributors to his Word of Faith Church sued him for fraud and intentional infliction of emotional distress. See Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996); see also Elliott v. Tilton, 89 F.3d 260 (5th Cir. 1996); Smith v. Tilton, 3 S.W.3d 77 (Tex. App. 1999).

[172] See Tilton v. Richardson, 6 F.3d 683 (10th Cir. 1993). For the lighter side of suits by televangelists, see Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that televangelist Falwell could not recover damages for infliction of emotional distress as a result of an ad parody, which claimed that Falwell's "first time" was during a drunken incestuous rendezvous with his mother in an outhouse).

[173] For an additional proposed solution, see Nicholas Barborak, Comment, Saving the World, One Cadillac at a Time; What Can be done When a Religious or Charitable Organization Commits Solicitation Fraud?, 33 Akron L. Rev. 577 (2000). The author proposes to enact a federal deceptive sales practices law to prevent televangelist fraud relating to the solicitation of funds. Id. at 606-09. Unfortunately, the author does not specify what kind of conduct the statute would cover, only stating that it "should prohibit deceptive and unfair conduct or advertising in the solicitation of funds." Id. at 608. This only begs the question. As his proposal stands now, it could cover televangelist solicitations based on "concrete acts," or solicitations based on "religious doctrine or belief." Tilton, 925 S.W.2d at 679; cf. Ballard, 322 U.S. at 92-95 (Jackson, J., dissenting). Bringing the former within the meaning of "deceptive and unfair conduct" would be allowed, but not the latter, for the reasons stated in this Note.

[174] See, e.g., Unmasked: Exposing the Secrets of Deception (TLC television broadcast Jan 21, 2001), which featured televangelist Rev. Peter Popoff, a so-called faith healer with an act very similar to Benny Hinn's. Popoff claimed that by speaking to God he could identify the attendees' afflictions and heal them. He claimed to know people's names from the audience, to know their addresses and afflictions without ever meeting them. In reality, Popoff had a radio transmitter and an earpiece hidden through which his wife, who sat back stage, fed him the information God "gave him." The program featured the captured audio of Popoff's wife, who knew so much about the attendees because they filled out and turned in "prayer cards" before as they came into the auditorium. His dishonest practices were uncovered in 1986.

[175] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[176] FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978).

[177] Consolidated Edison Co. v. New York Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980). Accord Burson v. Freeman, 504 U.S. 191, 197 (1992).

[178] 505 U.S. 377, 382 (1992).

[179] Cohen v. California, 403 U.S. 15, 25 (1971).

[180] See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[181] See Brandenburg v. Ohio, 395 U.S. 444 (1969).

[182] See Miller v. California, 413 U.S. 15 (1973).

[183] See New York v. Ferber, 458 U.S. 747 (1982).

[184] See Dennis v. United States, 341 U.S. 494, 572-73 (1951) (Jackson, J., concurring).

[185] See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[186] See United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878, 1886 (2000) (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) & Reno v. ACLU, 521 U.S. 844, 874 (1997)).

[187] See *supra* note 5 and accompanying text.

[188] Playboy, 120 S. Ct. at 1885.

[189] Id. at 1886. In the present hypothetical there are no less restrictive alternatives. All other alternatives, in order to regulate televangelists, would have to be content-based. Content-neutral regulations, such as time, place or manner regulations would fail to address the "evil" the legislature wished to remedy because the putative evil here consists in words.

[190] American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985) (Easterbrook, J.)

[191] Cf. id. at 329 ("Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women . . . . Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech.").

[192] See id. at 330 ("Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.").

[193] U.S. Const. amend. I, cl. 1.

[194] Church Of The Lukumi Babalu Aye, Inc. v. City Of Hialeah, 508 U.S. 520 (1993). If, on the contrary, the regulation was content-neutral and of general application, it would raise no free exercise problem. See Smith, 494 U.S. at 879.

[195] Hialeah, 508 U.S. at 533. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Id.

[196] Id.

[197] McDaniel v. Paty, 435 U.S. 618, 626 (1978).

[198] See Hialeah, 508 U.S. at 545 ("We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief.").

[199] Id. at 541-42 (quoting citizens' comments during a Hialeah City Council meeting where the ordinance was discussed).

[200] Abrams v. United States, 250 U.S. 616, 624-30 (1919) (Holmes, J., dissenting).

[201] See, e.g., Robert Post, Symposium on Law in the Twentieth Century: Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Calif. L. Rev. 2353, 2355-56 (2000); Theodore Y. Blumoff, 1999-2000 Oliver Wendel Holmes Devise Symposium: The Marketplace of Ideas in Cyberspace, 51 Mercer L. Rev. 817, 821 (2000); Todd G. Hartman, The Marketplace vs. The Ideas: The First Amendment Challenges to Internet Commerce, 12 Harv. J.L. & Tech. 419, 427 (1999); David Cole, Agon at Agora: Creative Misreadings in the First Amendment Tradition, 95 Yale L.J. 857, 882 (1986). Cf. Murray Dry, The First Amendment Freedoms, Civil Peace and the Quest for Truth, 15 Const. Commentary 325, 348 (1998).

[202] 249 U.S. 47, 52 (1919) ("The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.").

[203] Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

[204] Id. For an account of the evolution and development of his argument, see Cole, *supra* note 201, at 879-87. For the philosophical origins of Holmes' argument, see Dry, *supra* note 201, at 329-43.

[205] Hartman, *supra* note 201, at 427.

[206] See id. at 427-28; see also Cole, *supra* note 201, at 900 ("The market's test of truth gives way to every day exchange of the marketplace. Value lies not so much in the final result as in the process of exchange.").

[207] Abrams, 250 U.S. at 630 (Holmes, J., dissenting). But cf. Cole, *supra* note 201, at 886 ("Grounded not so much on the efficiency of the economic market as on the 'imperfect knowledge' of participants and overseers alike...Holmes' market nevertheless relies on an 'invisible hand.'").

[208] Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

[209] See United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.").

[210] Gertz v. Welch, 418 U.S. 323, 339 (1974); see also Hustler Magazine, 485 U.S. at 51.

[211] For example, the desired response under this model if the Ku Klux Klan decided to march through a Jewish community would be to have a counter-demonstration to compete with and thwart the effect of the Klan's march.

[212] See Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("This freedom embraces the right to distribute literature...and necessarily protects the right to receive it."). Justice Brennan agreed with this view, claiming that the right to receive information is "a fundamental right" because it is necessary for the proper operation of the marketplace of ideas. Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. *It would be a barren marketplace of ideas that had only sellers and no buyers.*" Id. (emphasis added).

[213] Cole, *supra* note 201, at 894.

[214] Id.

[215] Id.

[216] A fully free marketplace of ideas does not exist today, as evinced by the Supreme Court's First Amendment jurisprudence, because not all speech is protected. See *supra* notes 181-86 and accompanying text. In addition to these unprotected classes of speech, commercial speech may also be regulated, so long as the law meets the test set out under 44 Liquourmart, Inc. v. Rhode Island, 517 U.S. 484 (1996). Nevertheless, the marketplace theory is "alive and well." Blumoff, *supra* note 201, at 822. It has been applied to recent cases dealing with the Internet. See Hartman, *supra* note 201, at 441-48 (discussing three recent cases in which courts adopted the marketplace theory).

[217] Several commentators have criticized and attacked the marketplace of ideas theory. See, e.g., Catharine MacKinnon, Only Words (1993); Paul H. Brietzke, How and Why the Marketplace of Ideas Fails, 31 Val. U.L. Rev. 951 (1997); Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 Nw. U. L. Rev. 343 (1991); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on

Campus, 1990 Duke L.J. 431; Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1; Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982). They have also offered their own alternatives. See, e.g., MacKinnon, *supra*, at 98-103, 107-08 (equality theory); Post, *supra* note 201, at 2367-68 (participatory theory); Brietzke, *supra*, at 967 ("market-failure" theory); Alexander Meiklejohn, Free Speech and its Relation to Self-Government (1948) (self-government theory). Cf. Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring) (creating the basis of self-government theory); Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 26 (1971) (limiting protected speech to explicitly "political" speech under a self-government theory). Some critics, taking Justice Holmes' metaphor literally, argue that the free trade in ideas has suffered a "market-failure." Edwin Baker, Of Course, More Than Words, 61 U. Chi. L. Rev. 1181, 1187 (1994) (reviewing Catharine MacKinnon, Only Words); Brietzke, *supra*, at 961-63. For instance, with a monopolistic media controlling what information is diffused, with the ignorance of disfavored viewpoints, and with the lack of access of minorities and other disenfranchised groups, the marketplace of ideas fails. See Brietzke, *supra*, at 962, 965 n.49 (citing Edwin Baker, Scope of the First amendment Freedom of Speech, 25 UCLA L. Rev. 964, 981-82 (1978)). The ideas fail to flow freely among all members of the marketplace. Further, other critics argue that members who are targets of speech may not have the means (economic, educational or otherwise) to respond. See id. at 963-64. Another objection is that ideas already established as "true," like equality, may still be subject to attack by proponents of inequality. Mackinnon, *supra*, at 106. The solutions that critics of the marketplace model offer amount to censorship. Speech that tends to silence other viewpoints (that is, that causes "restraints of trade" or "monopolization," Brietzke, *supra*, at 967), or speech that perpetuates inequality, Mackinnon, *supra*, at 102, may be banned. Examples of this include racist speech, Brietzke, *supra*, at 967-68, and pornography, Mackinnon, *supra*, at 102. For example, Mackinnon argues that pornography should be regulated. She raises a sophistical distinction between what the speech says and what it does. She justifies regulation of pornography, for example, on what it does, not on what it says. Mackinnon, *supra*, at 23, 25. This does not distinguish pornography from any other speech, as all speech may be characterized as "doing" something. For instance, intolerant religious speech may be an exercise of power and contribute to cause physical harm to those who do not believe in it. This speech, like pornography, would contribute to "enforcing inequality." Id. at 102. Would this, then, justify the banning of virulent religious speech? Under her argument the answer is yes, in order to achieve equality. See id. at 106-07. Her argument would "permit the banning . . . of material that incontrovertibly contains value in the marketplace of ideas." Baker, *supra*, at 1191; cf. Hudnut, 771 F.2d at 329-30. Under Mackinnon's argument, pornography will not be the only category of banned speech; indubitably others will follow. Closely tied to this argument is that pornography is of "low value" and may be regulated because "the harm of the speech outweighs its value." Mackinnon, *supra*, at 91. However, as Judge Easterbrook suggests, pornographic speech is quite powerful, having the ability to influence society's views on women. See Hudnut, 771 F.2d at 329. This Mackinnon does not deny. Indeed, Only Words convincingly shows why pornography harms women and creates inequality in society. But, one may ask, if pornography was of such low value, how could it have the power it has to influence individuals? Were Mackinnon's approach adopted and declared valid, "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Cohen, 403 U.S. at 26.

[218] See Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate."); see also Boyscouts of America v. Dale, 120 S. Ct. 2446, 2451 (2000).

[219] See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 573 (1995) ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'")

[220] Mackinnon, *supra* note 217, at 102.

[221] See Hadden, *supra* note 22, at 408.

[222] Id.

[223] See id.

[224] Of course, technically speaking a rejection of a particular point of view is an "action," for it constitutes an act.

[225] Conversely, the positive response may come first. For instance, after the press brought to light the misconduct that Jim Bakker engaged in related to his PTL ministry (the positive response), viewers effected the negative response.

[226] Ballard, 322 U.S. at 95 (Jackson, J., dissenting).

[227] Id.

[228] See, e.g., *supra* note 174.

[229] See, e.g., *supra* note 17.

[230] See, e.g., *supra* note 16.

[231] See, e.g., Senn, *supra* note 8, at 329-30, and accompanying text.

[232] Alexis de Tocqueville, Democracy in America 536 (J.P. Mayer ed. & George Lawrence trans., Perennial Library 1988) (1835-40).

[233] Id.

[234] Cf. id. at 537 ("Apart from the good he has, he thinks of a thousand others which death will prevent him from tasting if he does not hurry. This thought fills him with distress, fear, and regret and keeps his mind continually in agitation, so that he is always changing his plans and his abode.").

[235] Ballard, 322 U.S. at 95 (Jackson, J., dissenting).