

as proscribed by the Supreme Court in *Lemon v. Kurtzman*.¹³

The Challenge by Fordham University. In 1993, Fordham University sued the Department of Commerce, alleging that NTIA's policy on sectarian broadcasting violated its right to free exercise of religion and its freedom of speech rights under the First Amendment of the Constitution. In *Fordham University v. Brown*, the court upheld NTIA's bright-line approach with respect to the PTFP as consistent with the First Amendment.¹⁴ In *dicta*, however, the court noted that it did not consider whether there were other acceptable interpretations of the Establishment Clause.¹⁵

Since the *Fordham* decision, NTIA has become aware that some public broadcast stations include in their schedules programs that might constitute impermissible sectarian programming, which could make them ineligible for PTFP grants. This was highlighted, in fact, following the *Fordham* decision, when NTIA received several requests to modify its policy.

Issuance of the Notice. As a result, NTIA sought comment on whether it should modify its policy regarding sectarian programming and information. Specifically the Notice sought comment on: (1) Whether the current prohibition on using NTIA grant funds in connection with any sectarian activities should be continued, or whether there are alternative approaches that would also be consistent with the First Amendment; (2) the underlying policy rationale for a given approach; (3) how such policy would, as practical and constitutional matters, be implemented and enforced; (4) whether the same policy could and should be applied to all three NTIA grant programs (PTFP, TIAP, and NECET) and, if not, what policy should pertain to each grant program; and (5) whether the current definition of "sectarian" would continue to be supportable if NTIA's current policy were modified.

The Rosenberger Decision. Subsequent to the issuance of NTIA's Notice, the Supreme Court decided *Rosenberger v. Rector and Visitors of the University of Virginia*,¹⁶ which further supports NTIA's announced policy interpretation change. The Supreme Court held in *Rosenberger* that a state university had erred in relying on the First Amendment's Establishment

Clause to deny grant funding to a student group publisher of a Christian magazine, when that student group otherwise satisfied neutral funding criteria applied by the university in making financial grants to other student organizations. As discussed in more detail below, this decision serves as a basis, in part, for the new policy approach adopted by NTIA.

Comments Filed in Response to the Notice. All but one of the eight commenters supported a change in NTIA's policy interpretation. The one commenter favoring retention of NTIA's long-term policy objected to a religious organization receiving any benefit, however incidental, from NTIA's grant programs.¹⁷ A majority of the supporting commenters, however, relied upon the recent Supreme Court case, *Rosenberger*, in arguing that a policy change was warranted. Most agreed that *Rosenberger* requires that the Federal government behave in a neutral manner toward religion. Two commenters recommended that NTIA adopt a specified or maximum percentage for the amount of permissible sectarian programming.¹⁸ Other commenters recommended allowing a "reasonable minimal amount of sectarian programming."¹⁹ Two other commenters expressed some concern that the proposed change in policy could result in excessive government entanglement with religion.²⁰

As noted above, we solicited comments on whether the definition of "sectarian" needed to be altered in light of a possible policy change. Most commenters agreed that no change in the definition of "sectarian" was required to allow NTIA to modify its policy interpretation. One commenter contended, however, that the definition of "public telecommunications services" had to be redefined because it provides that public telecommunications services "[do] not include essentially sectarian programming."²¹ This commenter also maintained that NTIA's prior policy should be changed because it burdened individuals' free exercise of religion in violation of the Religious Freedom Restoration Act.²²

III. Application of the Modified Policy To NTIA'S Grant Programs

As indicated, NTIA's new policy will retain the requirement that grant funds not be used for purposes the essential thrust of which is sectarian. The interpretation of that requirement will be modified, however, such that as long as the grant funds are used to fulfill the statutory purposes of the grant programs, attenuated or incidental benefits to sectarian interests will be permissible.

A. Constitutional Basis for Modified Policy

We believe the alternative approach we are now adopting passes constitutional muster under First Amendment case law. Having analyzed our new approach in light of *Lemon v. Kurtzman*,²³ we conclude that our new policy is consistent with *Lemon* and other Supreme Court jurisprudence. *Lemon* established a three-prong test to determine whether government action would have the "primary effect" of establishing religion in violation of the Establishment Clause. Under *Lemon*, the constitutionality of a statute, regulation, or funding policy depends on whether: (1) it has a secular legislative purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it avoids "an excessive government entanglement with religion."²⁴ If any one of these three questions is answered in the negative, government action is deemed unconstitutional.

Each of NTIA's grant programs has a secular purpose, which remains unchanged under the new policy, and thus NTIA's change in policy interpretation passes the first prong of the *Lemon* test. PTFP promotes public broadcasting, NECET supports development of children's programming, and TIAP promotes new telecommunications technologies. Each grant award will be reviewed to ensure it meets the appropriate statutory purpose.

NTIA's new policy interpretation also satisfies the second prong of the *Lemon* test as NTIA grant funds still may not be used primarily to advance or inhibit religion. As recently underscored by the *Rosenberger* court, programs that neutrally extend benefits to recipients pass Establishment Clause muster, if religious interests are only incidentally served:

²³ 403 U.S. 602 (1971).

²⁴ *Id.* at 612-613.

¹³ For a discussion of this point, see Section III.A. of this policy statement.

¹⁴ 856 F. Supp. 684 (D.D.C. 1994), appeal docketed, No. 94-5229 (D.C. Cir. Aug. 22, 1994).

¹⁵ *Id.* at 697-698.

¹⁶ 115 S.Ct. 2510 (1995).

¹⁷ Comments of Lisa Owens.

¹⁸ Comments of National Public Radio at 2,5; Comments of Wake Forest at 2-3.

¹⁹ Comments of North Carolina Public Radio Association at 1; Comments of Honorable Richard Burr at 1; Comments of Southern Public Radio at 1.

²⁰ Comments of Corporation for Public Broadcasting at 3; Comments of National Public Radio at 3.

²¹ Comments of Fordham University at 16-17.

²² Comments of Fordham University at 9.