The Fairness Doctrine and the First Amendment

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The Fairness Doctrine was cooked up by the regulatory chefs at the Federal Communications Commission (FCC) in 1949. The Doctrine required radio and television licensees "to provide coverage of vitally important controversial issues of interest to the community ... and ... a reasonable opportunity for the presentation of contrasting viewpoints on such issues." Yet in recent months the Doctrine itself has proven to be just such an issue.

Several years ago, the FCC's policymakers, newly converted to the gospel of deregulation, refused to defend the Fairness Doctrine in pending federal litigation. In effect, they asked a federal district court to find that their own regulations violated the First Amendment. The court's response was, essentially, "You created it; you kill it." So in August 1987 the FCC did.

Outraged that broadcasters could now exploit their license privileges to sway the public in an unregulated fashion, Senator Ernest

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Hollings (D.-S.C.) moved quickly to counter the FCC by securing passage of a bill that would have reinstated the Doctrine in September 1987. When President Reagan vetoed it, Hollings responded by proposing a tax on all sales of radio and television broadcasting licenses, including a penalty tax on those licensees deemed insufficiently "fair." The provision very nearly found its way into the midnight budget compromise between the White House and Congress, both of which were struggling to avert a panic in the wake of the October 1987 stock-market crash. Hollings's provision was withdrawn upon the Administration's threat to veto it a second time.¹

To Hollings, "fairness" apparently meant taming any forces that would threaten to visit disagreeable views on a defenseless public. Hence, in a deal with his colleague Edward Kennedy (D.-Mass.), Hollings revoked a ruling that permitted Australian media entrepreneur Rupert Murdoch to own both Boston television station WXFT and the *Boston Herald-American*. The scheme was never intended to become public, but Hollings has now openly admitted that it was an attempt to sink the conservative *Herald-American* as a favor to Senator Kennedy. He has not, however, disavowed the use of federal power to silence opponents, even after a U.S. Circuit Court of Appeals ruled in March 1988 that his amendment unconstitutionally abridged the freedom of speech. Indeed, Hollings complained that the court "has arrested the policeman on the beat, while the culprit has gone free."

**When "fairness" is unfair**

Yet using any arbitrary standard to license the press—which radio and television surely are in an age when most Americans do not read newspapers—is sure to cause great political mischief, even if the standard seems as unexceptionable as "fairness." Fairness, after all, is in the eye of the beholder, and government officials make very self-interested beholders. As Justice John Paul Stevens put it, "The court jester who mocks the king must choose his words with great care."

The more subjective the standard, of course, the more nervous the supplicant. The FCC has never clearly defined the fairness re-

¹Since then, congressional leaders have repeatedly stated their intention to enact a Fairness Doctrine upon President Reagan's departure, and such legislation is currently moving through Congress. President Bush has indicated that he would likely veto such a measure.
quirement for license holders, preferring instead to cling to a case-
by-case method. Indeed, federal radio licensing began in the 1920s
with the vaguest standard of assignment the courts would allow:
rights were to be awarded to whoever satisfied “public convenience,
interest, or necessity.” In the early days of radio, Secretary of
Commerce Herbert Hoover found the views of labor organizations
to be less in the public interest than those of businessmen, and he
distributed valuable spectrum rights accordingly. Franklin Roose-
veld thought it eminently fair to forbid all newspaper publishers to
own radio stations (thus attempting the first “cross-ownership”
restrictions), on the ground that they were, as a class, unfairly hos-
tile to the New Deal. When provocative conservative editorials
sprang up on the airwaves of Yankee Radio outlets throughout New
England in 1937, the FCC came within an eyelash of ending the
network’s life. The network was spared only after promising to
give up editorializing altogether—a condition that was soon en-
forced as the FCC-set industry standard. The Fairness Doctrine
had its ironic origins in a 1949 Truman administration plan to
restore a limited measure of editorial controversy to radio pro-
gramming.

Whatever Republicans may have thought about the ends of the
New Deal, they were not averse to using its regulatory means. The
Eisenhower administration used a “public interest” standard to
award a mysteriously high proportion of television broadcasting
licenses to GOP businessmen. Lucas A. Powe, Jr., notes that of
nine newspapers awarded television licenses in comparative hear-
ings under the Eisenhower administration, “not a single one had
supported Adlai Stevenson in 1952, and only the Miami Daily News
[which had co-ventured its application with the Republican Miami
Herald] was a Democratic newspaper.... Of the fourteen losing
newspapers, nine were supporters of the Democratic Party. Two of
the losers had supported Eisenhower but were in a contest with
another newspaper that also supported Eisenhower. Three others,
although also Eisenhower supporters, classified themselves as
politically independent.”

The Nixon administration had broader concerns than simple
patronage. Hence Spiro T. Agnew went to great lengths to assure
the Silent Majority that the networks were to be monitored very,
very closely. License harassment of stations considered unfriendly
to the Administration became a regular item on the agenda at
White House policy meetings; during one thirty-day period there
were twenty-one specific presidential directives asking staffers to consider responses to unfair news reporting. The mischievous *Washington Post* even stood to suffer because of its cross-ownership of licensed broadcast properties, but in the event the *Post* got Nixon before Nixon got the *Post*. The bipartisan *coup de grâce* came when the highly rated but politically liberal "Smothers Brothers Comedy Hour" offended Rhode Island's Democratic senator Frank Pastore, the chairman of the FCC's oversight committee, by mockingly bestowing upon him the "Flying Fickle Finger of Fate" award. The Senator was unamused, and CBS quickly cancelled the profitable show.

While freedom of speech and the press has traditionally meant the absence of state controls, the rationale for broadcast regulation is that freedom permits bias. Public-spirited regulation is thought to be necessary to ensure equal media access for those on all sides of controversies, and to promote equal treatment of political candidates—in short, to mitigate the possible one-sidedness of the electronic publisher. Of course there are grotesquely unfair newscasts, and even wildly irresponsible entertainment programs. The relevant question, however, is whether political regulation will tend to reduce inequity, or exacerbate bias and kill important news sources altogether. Regulation moves the "fairness" programming decision away from those who compete for audiences to those who have secured bureaucratic power within a federal agency. It requires a very large leap of faith to believe that this substitution will enhance consumer choice or improve the character of our democracy.

**Why regulate broadcasting?**

The legal premise for licensing broadcasters on the fairness (or "public trusteeship") model is the brainchild of Supreme Court justice Felix Frankfurter. In his 1943 *NBC v. U.S.* majority opinion, Frankfurter gave the FCC wide latitude to regulate broadcasters in the "public interest," on the grounds that frequencies were physically scarce and—in the absence of government licensing—would yield no speech whatsoever. Left to the private marketplace, the opinion held, the airwaves would descend into "a cacophony of competing voices," each drowning out the other, as static interference dominated electronic speech. Indeed, Frankfurter asserted, prior to the Radio Act of 1927 commercial broadcasters had sunk into just this electromagnetic swamp, rescued only by farsighted policymakers in Congress. As speech had been made
possible by the federal government, so its content could be regulated by the federal government.

Yet Frankfurter's rationale for broadcast regulation is illogical and historically inaccurate. Commercial radio broadcasting began in the U.S. in November 1920, and though more than five hundred stations were active by 1923, the domestic broadcast market was in good shape through July 1926. First-come, first-served claims had been established in fairly orderly fashion and were well respected, until a federal court and the U.S. Attorney General upset the apple cart in 1926 by revoking the Commerce Department's ability to enforce exclusive rights in "the ether." The licensing scheme that Congress enacted the following year served the interests of political incumbents by placing authority over valuable broadcasting resources in the political sphere. It also helped major radio broadcasters by restricting band width, fixing all large stations on existing (preferential) assignments, and creating solid entry barriers. In short, the scheme brought political fun and economic profit, but no key player was confused about the premise: licensing was politically expedient, but not technologically necessary.

It was well understood that interference in the ether could be eliminated by the simple administrative act of demarcating broadcasting rights. Indeed, the courts had seen that judicial enforcement of property rights to broadcast frequencies was a viable alternative to federal licensing, and they were moving to provide it. It was mostly fear of private solutions to the spectrum-assignment problem that led Congress and the White House to nationalize the airwaves in the 1927 legislation, thus establishing political control over a sure-to-be important medium. Instead of selling broadcast-spectrum rights, Congress and the FCC chose to assign them without dollar payment, while using the assignment power to help friends, punish enemies, and promote favored socioeconomic views.

The Frankfurter argument is not only bad history, but bad logic as well. The government need not assign frequencies in order to be a good broadcasting-traffic cop; defining rights to them is enough. Once legal rights are established, they may be assigned by market forces—as in the daily auction on Wall Street in which broadcast frequencies are assigned and reassigned, just as they have been since the early 1920s. The interference problem is solved, not by the distribution of licenses, but by the courts and the enforcement arm of the FCC.
In this sense the newspaper market is similar to the broadcast market. Failure to enforce property rights could easily cause as much chaos for newspapers as it did for broadcasters, if newspapers could safely steal their rivals' columns and if customers could routinely steal newspapers. As Robert Bork concluded in an important Circuit Court decision:

[I]t is certainly true that broadcast frequencies are scarce, but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.

In fact, Frankfurter's "physical scarcity" rationale for overlooking the First Amendment is suspect on its face. Daily newspapers have no obligation of "fairness" despite commonly possessing monopoly power and immense political and financial influence in their regions. If the Miami Herald, delivered to 37 percent of all households in its region, escapes any public-service obligation, why should each of a dozen local television stations and forty local radio stations face the prospect of losing their licenses when disagreements over fairness arise? Indeed, the vast majority of serious Fairness Doctrine cases arose over radio stations, which typically vie in highly competitive markets; television stations, which face less competitive conditions, almost invariably decided to get rich blandly rather than air controversy and risk license-renewal challenges from competitors or aggrieved opponents. In effect, the Fairness Doctrine enforced a cartel of mediocrity. As Justice Douglas observed in 1973:

[T]he regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid or submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.

2That newspapers are under no obligation to be fair—no matter what their economic power, market share, or political influence—was firmly decided in Miami Herald v. Tornillo (1974). The Supreme Court unanimously held unconstitutional a 1913 Florida statute mandating that newspapers give political candidates a right to reply to personal attack.
In fact, the press of that day was almost entirely partisan. The economic and political circumstances in which publishers found themselves invited, if they did not require, an alliance between each publisher and some patron in power.

Not until the middle of the Nineteenth Century did the partisan press begin to pass largely out of existence. But its passing did not mark the emergence of a new period of altruism. Instead, the partisan press simply fell victim to circumstances which would in time lead to the mass media as we now know them. During this period, for example, the proprietors of the "penny press" discovered that mass circulation revenues were a profitable alternative to patronage.

The concepts of fairness and responsibility that we now routinely demand of the media did not emerge until this century.

The chilling effect of Red Lion

Waxing nostalgic about a pristine era of unbiased reportage—an age eclipsed by big-business domination of media outlets—is not a useful way to think about regulating media fairness. A more realistic approach would examine the actual regulatory institutions that arose, focusing on real actors influenced by real political and economic forces. While many recent volumes have done just this, the same effect can be achieved by examining just one Supreme Court case: Red Lion Broadcasting Company v. FCC (1969), the prevailing precedent delineating the First Amendment rights of broadcasters. 5

The Reverend John M. Norris owned a small, daylight-only radio station in Red Lion, Pennsylvania. By the mid-1960s the local market could boast of a twelve-channel cable-television system, seven broadcast-television stations, and twenty AM and twelve FM radio stations. Rev. Norris’s WGCB was far from the most powerful of these; indeed, customers could buy one hour of its most expensive time for twenty-five dollars. But the radio outlet found its own market niche, broadcasting a continuous flow of right-wing religious programming.

It was the Reverend Billy James Hargis’s “Christian Crusade” that focused federal attention on WGCB. After the 1964 elections, Hargis launched an attack on Fred Cook, a journalist who had gone to work for the Nation after having apparently been fired by the New York Times. Cook had written a book called Goldwater: Extremist on the Right, highly critical of the recently defeated

5Examinations of the four other most important Fairness Doctrine cases yield strikingly similar conclusions. (See Krattenmaker and Powe, pp. 169-174.)
Real controversy causes complaints virtually by definition, and the effect is felt at license-renewal hearings. (Licenses must be renewed every seven years, up recently from every three.) While the Fairness Doctrine mandated that stations cover important topics of controversy, stations had to respond only to public complaints.\(^3\) But no one ever complains about blandness; people file protests when incensed, not when drowsy.\(^4\) For their part, station managers and owners prefer news editors and reporters who cost them little in contentious renewal proceedings. The economics are straightforward: when you tax controversy, you tend to get less of it.

The First Amendment makes little sense if interpreted as a rule barring state regulation except when regulators believe that they can do good. There will always be instances in which the freedom of speech or of the press is abused in the sense that our democratic institutions and even our souls (not to mention our peace of mind) would be better off without some quantity of nonsense. But the First Amendment comes down against any case-by-case judgments, on the theory that state regulation of the press is more dangerous than nonsense. The Founders feared regulation not because it could never make democratic life better, but because it could occasionally fail so abusively.

The Founders were under no illusions about the objectivity of the unregulated press; indeed, the newspapers of their day make Rupert Murdoch look respectable. Senator Robert Packwood, the most outspoken congressional proponent of extending First Amendment protections to electronic media, notes that when the country was founded, "there were only eight daily newspapers—\(that\) was scarcity." Nonetheless, the Founders wanted to protect them, despite the fact "that most of those papers were highly partisan and inflammatory." As University of North Carolina law professor David Lange described America's first set of scribes:

\(^3\)The task of determining objectively what controversies should be covered on 1200 television and 9000 radio stations, who should speak to them, and when and for how long they should be discussed, is simply a monstrous chore. The Commission has never entertained any death-wish to undertake it.

\(^4\)As Thomas Krattenmaker and Lucas A. Powe, Jr., reported in 1985 in the *Duke Law Journal*, the FCC "has only once held a broadcaster to have violated the obligation to cover controversial issues." This single exception proves the rule: the complaint was filed by a group of investors who wanted to be reassigned the frequency of a classical-music station that broadcast nothing but the works of great composers. They complained about blandness not as listeners, but as capitalists—and won themselves a station.
Republican presidential candidate. Upon discovering the tome, Hargis used his radio forum to denounce Cook as a “professional mudslinger” whose book, he claimed, was largely false. His colorful attack consumed two minutes of a fifteen-minute commentary aired on November 25, 1964. The segment cost Hargis’s operation $7.50.

Although he had not been listening to WGCB at the time, Cook soon became aware of the Hargis broadcast, and wrote to the station demanding equal time to respond to the personal attack. Norris invited him to do so by sending him a rate card, offering to sell response time on the same terms available to Hargis. Cook declined the offer, and when free time was not forthcoming, filed a complaint with the FCC. The FCC informed the station that it was shirking its public-interest obligations, whereupon Norris sued in federal court. The Supreme Court voted 8-0 (with Douglas not participating) to uphold an appellate ruling that Norris’s Red Lion Broadcasting Company had indeed run afoul of the constitutionally sound Fairness Doctrine. Its reasoning relied heavily on Frankfurter’s physical-scarcity rationale for regulation:

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

Though the Court accepted completely the fanciful history and faulty logic of NBC, it had committed an even more embarrassing sin: it had been taken in by the Democratic National Committee (DNC). Recent evidence not available to the Court in 1969 has revealed that the federal enforcement mechanisms that the Fairness Doctrine put at the disposal of political interests were used flagrantly to suppress dissent in precisely the manner that led the Founders to fear governmental control of the press. The historic Red Lion decision was simply the successful end of a concerted campaign to silence a political viewpoint unpopular with those who held the power to regulate the press in the mid-sixties.

Fred Cook’s attack on Barry Goldwater was not disinterested; the volume was published only upon the pre-publication commit-
ment by the DNC to purchase 50,000 copies (the majority of the
total eventually sold). The book was a calculated attack by self-
interested partisans—and entirely protected under the First
Amendment.

But the Democrats' secret financing of attacks on their political
opponents was where the story began, not where it ended. During
the Kennedy administration's 1963 campaign to enact a nuclear
test-ban treaty, the DNC had initiated a national effort to monitor
right-wing broadcasters. The DNC found that under a recent FCC
ruling, it could effectively force radio stations airing anti-Adminis-
tration editorials to broadcast countering views for free, and that
the obligation for such "fairness" taxed stations that aired hostile
opinions. In the words of Nicholas Zapple, counsel to the Senate
Communications Subcommittee, the DNC realized that it could
"use the Fairness Doctrine to counter the radical right." Bill Ruder,
Assistant Secretary of Commerce in the Kennedy administration,
confirmed this: "Our massive strategy was to use the Fairness
Doctrine to challenge and harass right-wing broadcasters and hope
that the challenges would be so costly to them that they would be
inhibited and decide it was too expensive to continue." Thus the
real goal was not enhanced public debate of important issues, but
the silencing of opposition speakers.

The Red Lion case was part of this strategy. The DNC, carefully
monitoring the radio market, compiled a list of stations that had
aired Billy James Hargis's attack on the Goldwater book, and
passed it on to Cook with legal and strategic advice on how to
frame his right-of-reply demand. The FCC order that WGCB pro-
vide equal time at no cost was a victory for the DNC intimidation
campaign. The DNC had alertly devised a scheme to subsidize
speech favorable to Democrats with no obligation for balance or
"fairness," while taxing speech critical of Democrats—all in the
very same project. In this, the U.S. Supreme Court served as an
unwitting accomplice.

The "scarcity" paradox

The noted journalist A.J. Liebling once complained that free-
dom of the press applies only to those wealthy enough to own one.
He was right, but he missed the alternative. The publisher or
broadcaster may have some money to throw around, but generally
not to waste. American media moguls, at any rate, aim to make a
profit. They are constrained by the market forces that determine
what people will buy and, importantly, which journalists will work. The system is not ideal; you may have read USA Today, you may have seen "Donahue." But it is what the people want, subject to some constraints.

Not the least of these constraints is imposed by the FCC, which is notoriously parsimonious in licensing television stations. Home viewers could receive many more channels than they now do; any conceivable technical capacity constraints are far less severe than those imposed by policy. Because the available channels are so limited, they carry extremely high opportunity costs, and hence television programming tends to aim at the lowest common denominator. Only with expanded dials will more sophisticated specialty interests be accommodated, let alone cultivated. With the advent of cable and broadcast-satellite transmissions, we are seeing precisely this widening of choice. As 52 percent of all U.S. households now subscribe to cable, and over 90 percent of these enjoy choosing among more than twenty channels, viewers are increasingly defecting from the more vapid offerings of mass television.

Yet the federal government resourcefully attempted to withhold new information and entertainment technologies from the public altogether, as a well-appreciated favor to established broadcasting interests. Cable, satellite, microwave, and great chunks of additional VHF-UHF spectrum space have been claimed by American science, only to be forbidden by American regulators. Until the mid- to late 1970s, for instance, cable systems were virtually prohibited from entering the top fifty television markets in the U.S., specifically to protect the interests of entrenched television broadcasters. The FCC, which derived its authority from the "physical scarcity" of the airwaves, actually gained jurisdiction over a non-scarce medium (cable) because any competition to broadcasters would diminish the ability of the federal government to promote the public interest. But allowing competition to lower broadcasters' profits and to expand consumer choice is surely in the public interest, illustrating the anti-consumer premise at the core of the FCC's regulatory mission.

The paradox is rich: competition in broadcasting has been purposely suppressed because it would weaken the FCC's ability to regulate in the public interest—which is necessary because of "physical scarcity." So "physical scarcity" justifies the artificial creation of scarcity. If you think you smell a rat, your nose is working.
The Doctrine’s appeal

Still, stripped of the analytics of physical scarcity and the history of political chicanery, calls for “fairness” are intuitively appealing. Indeed, the broadcast industry’s cry for deregulation under the Constitution has been seen by some as a cynical corporate attempt to hide behind civil liberties. Dave Kaufman, writing in the television trade paper *Daily Variety*, says that the Fairness Doctrine “mandates that both sides of an issue should be presented to assure the public will be given fair coverage.” “Why,” he writes, “is it such a hardship to be fair in airing issues of interest to the public?”

Kaufman makes the obvious inquiry, and Potter Stewart preemptively supplied the appropriate answer in his 1973 *CBS v. DNC* opinion: “Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that ‘fairness’ was too fragile to be left for a government bureaucracy to accomplish.”

When the issue is stated as one of simple fairness, we wait for a simple definition. Kaufman shoulders without concern the curious burden of defending governmentally mandated fairness in an article entitled “FCC, Broadcasters Ignoring Fair Play in Fairness Doctrine Battle.” Not only does he not appreciate the pervasiveness of honest disagreements over fairness, but he also errs by parroting the traditional definition: mandating that “both sides of an issue” be presented suggests that just two points of view are worthy of discussion. Moreover, it begs the all-important questions: Which views appropriately constitute “both sides”? Still more fundamentally, who gets to decide which topics should be debated? If I am subjected to a series of eminently “fair” debates on the question of Soviet genocide in Afghanistan, I am likely to emerge with a markedly different worldview than an identical individual who continually witnesses equally unbiased discussions of the American use of Agent Orange in Vietnam.

That Reed Irvine and Phyllis Schlafly believe in the salvation of their agendas by FCC enforcement of the Fairness Doctrine every bit as strongly as do Ralph Nader and Edward Markey proves only that rightists and leftists both believe that the mass media are dominated by their ideological opponents. Both look to the Fair-

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6Which is precisely why Orwell might have so enjoyed the term “Fairness Doctrine.”
ness Doctrine for their salvation. Where both left and right err, however, is in their belief that governmental regulation will somehow guarantee a hearing for politically controversial minority opinions. No one would argue that mainstream views—assuming that we can define them—are to be slavishly enforced as our standard of fairness; the mainstream views of one generation, region, or class often prove dangerously wrong-headed. Yet mainstream views are all one can reasonably expect to emerge from a political regulatory process, since it would be irrational to define some minority viewpoint as the norm around which “fair” debate should be calibrated. Since fairness is indefinable in the abstract, prudent management confronted with the Fairness Doctrine will attempt to identify a corridor of mainstream views as acceptable to the regulatory authorities, and produce a balanced distribution around such a perceived mean.

If the hostile reaction of many constitutionally protected newspaper pundits to the Doctrine’s repeal is philosophically surprising, the interest of legislators in “fairness” is straightforward. Legislators are decidedly in favor of regulating the content of broadcasts; despite strong deregulation pressure from the National Association of Broadcasters—a considerable political force—Senator Hollings’s 1987 bill to codify the Fairness Doctrine passed the Senate by 59-31 and the House by 302-102 before it was vetoed. This fondness for regulation is motivated by self-interest; as Timothy Dyk has observed in the *Yale Journal on Regulation*, “Congress has been particularly concerned with content regulation designed to serve the interests of congressional candidates.” The equal-time rule, giving political candidates the right to whatever air time is allotted to their opponents, has been mandated by Congress since the very inception of broadcast regulation, the Radio Act of 1927.

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7A more direct, nonepistemological self-interest may be at work here as well. Policy entrepreneurs want to represent their constituencies against perceived opponents. Having the standing to lobby and even to bring formal legal complaints under the Fairness Doctrine expands the set of instruments with which they may supply their respective markets. The Doctrine brings such activists into a new loop that can increase the demand for their services no matter what the eventual outcome. In any event, the opportunity to be part of the content-control loop is seductive, and people from virtually all political vantage points—including, since the 1920s, the American Civil Liberties Union—seem to succumb to the urge.

8Of course, the FCC has often taken this course, defining Fairness Doctrine requirements (and public-interest obligations generally) according to the prejudices of the political elites with effective agency control.
The notion that Congress would voluntarily promote any truly unbiased form of access to the news media is simply incredible. In numerous policy decisions over the past two decades, Congress has had ample opportunity to legislate fairness in its very own marketplace: the competition for congressional seats. In determining staff funding levels, franking privileges, campaign-finance reforms, and many other policies, the members of the House and Senate have repeatedly redrawn the rules of their game. Their commitment to establishing an equal playing field is apparent in the fact that 98.4 percent of the incumbents standing for House reelection in 1986 won. Of these, nine in ten won by more than 60 percent. In 1988 the House reelection rate actually rose.

Imagine the absurdity of unregulated religion in America. With quack churches and rogue ministers, billions of dollars are wasted on ventures that God only laughs at. People are left to the mercies of wealthy preachers controlling vast empires, unaccountable to any agency, appearing unchallenged on powerful television networks, able to ignore or subvert the true spiritual interests of those who follow them.

Consider the alternative: a religious marketplace regulated by a Plausibility Doctrine, whereby each organized church is subjected to the simple federal standard of Plausibility. Is that not a plausible way to control religion in a free society? No more than the Fairness Doctrine is a fair way to regulate broadcasters.