
Preface

Experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent.

Justice Louis Brandeis •

If nothing might be published but what civil authority shall have previously approved, power must always be the standard of truth; if every dreamer of innovations may propagate his projects, there can be no settlement; if every murmurer at government may diffuse discontent, there can be no peace; and if every skeptic in theology may teach his follies, there can be no religion. The remedy against these evils is to punish the authors; for it is yet allowed that every society may yet punish, though not prevent, the publication of opinions, which that society shall think pernicious: but this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may be afterwards censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief.

Samuel Johnson, *Lives of the English Poets*, 1780

In his well-known commentary on Milton's *Areopagitica*, a classic assertion of free speech, Samuel Johnson anticipates many of the issues confronting and defining electronic media in twentieth-century America. Johnson opposes censorship and prior restraint and equivocates on unqualified free speech rights. Even a thinker as orthodox and conservative as Johnson finds it difficult to determine finally the vexed issue of freedom of expression. To be sure, Johnson wrote in an earlier historical period: His was a shrewd Tory

pragmatism from Georgian England, as newspapers emerged as a new communications technology, looking back on the Puritan idealism of seventeenth-century England when typeset tracts and pamphlets constituted the latest communications innovation. Even so, Johnson's prudential reservations about free speech are as forceful today, especially among proponents of broadcast content regulation, as they were when he published this commentary.

Justice Brandeis made his observations in a wire tapping case in the 1920s at the height of Prohibition. In an effort to stop illicit importation of Canadian Scotch, police wire-tapped a residence without proper authority. A right of privacy was an essential liberty for Justice Brandeis, so he chided the police for violating an individual's right to privacy in their zeal to enforce "beneficent" prohibition laws.

In twentieth-century America, lawmakers and jurists came to grips with the new mass communications technology of radio and television with beneficently intended rules to ensure equal time and fairness in broadcasting. Neither equal time nor fairness worked. Politicians evaded or manipulated equal time for temporary pragmatic gain. Broadcasters ducked controversial issues for fear of triggering fairness objections, and interest groups of all stripes latched on to fairness to intimidate broadcasters. The public lost more than it gained by having equal time and fairness rules.

In this book I explain the evolution of equal time and fairness in American broadcasting. I present their proponents and detractors. I show that both standards waxed and waned as technology expanded the number of broadcast channels and First Amendment law provided more liberties for speakers. Articulated in earlier times under different conditions, each attempted to enhance average citizens' knowledge of the world they lived in and the issues that affected their lives. In so doing, Congress, the courts, and the Federal Communications Commission put a novel twist on free speech: Because of the scarcity of the spectrum, the rights of the radio listeners and television viewers superseded those of the radio and television speakers to express their views. This assault on broadcasters' First Amendment rights contributed eventually to the erosion of both standards. At the same time, Fairness Doctrine and equal time proponents' deeply held convictions that the airwaves belong to the public animate continuing efforts to sustain a fairness standard. Ad-

mittedly, equal time is still on the books. But Congress and the Federal Communications Commission have amended it extensively for the benefit of major party politicians and the public broadcasters. In 1987 the Federal Communications Commission discarded the Fairness Doctrine.