The Emergence of Equal Time

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Worthwhile things cannot be bought or sold
. . . the stars belong to everyone
They gleam there for you and me
. . . the best things in life are free.

"The Best Things in Life Are Free," music and lyrics by B. G. DeSylva, Lew Brown, and Ray Henderson, 1927

Fiorello LaGuardia stood up. Just 5 feet tall and representing New York's polyglot East Side, Congressman LaGuardia wanted to know that the bill before the House guaranteed free speech over radio. Representative Wallace H. White, architect of the Radio Bill, said it did: "The pending bill gives . . . no power of interfering with freedom of speech in any degree." LaGuardia pressed, "It is the belief of the gentleman and the intent of Congress not to exercise . . . any power whatever in that respect in considering a license or the revocation of a license." Again, White assured him, "No power at all."[1]

In 1926 the United States was struggling to develop a national policy for radio. Radio had come on the national scene with all the energy of the Charleston, the brio of movies, and the popular appeal of automobiles. By 1926 there were over 20 million radios in American homes, up from 50 thousand only 5 years before.[2]

The radio industry needed ground rules to develop radio as a new technology of mass communications. Antiquated federal statutes, dating to 1912, when radio serviced shipping and ship-to-shore communications, inhibited federal regulation. The Clayton

and the Sherman antitrust acts prohibited cartelization of the sort that would have enabled radio companies to regulate the airwaves on their own. In December 1926 an Illinois state court ruling, in *Tribune Company v. Oak Leaves Broadcasting Station,* upheld a priority-in-use property right for broadcast licenses, and thus seemed to offer a way out. In a court of equity this common law ruling meant that broadcasters could develop exclusive claims to a radio frequency, based on the length of time they had operated a particular frequency, and could sue for damages other broadcasters who wilfully interferred. By 1927 the law was enacted.[3]

At this early stage America first had to settle systemic issues. Free speech over radio was at the center of competing systemic considerations. Three alternatives emerged: licensing radio frequencies to broadcasters, forming a nationalized system, or providing a common carrier system. A fourth alternative of creating a private market in radio with full free speech rights for broadcasters along the line outlined *Oak Leaves,* was stillborn.

A nationalized radio system, comparable to the British Broadcasting Corporation, appealed to varying interests. Educators and labor activists supported a nationalized system to produce cultural and ideological programming free from the dictates of commercial appeal or censorship by commercial broadcasters. The navy held on to some frequencies from World War I and wanted to extend its control over radio in peacetime. But the navy caught fire from angry Democrats in 1922 after allowing Indiana Republican senator Harry S. New to use a naval radio station in Washington, D.C., to address voters in a hotly contested primary contest. Navy secretary Denby denied charges of favoritism and banned "nonofficial" uses of navy radio to shun further contention.[4] *New Republic* editor Bruce Blevin also called for a nationalized system. These forces never coalesced, and they fought a losing battle against commercial and amateur licensees.[5] Major radio corporations opposed nationalization as well. Many had invested heavily in the new mass communication and resisted efforts to limit radio's commercial possibilities.[6]

In theory, a common carrier system appeared as a system with expansive free speech potential. The common carrier system would have enabled any producer to purchase air time for news, political, public affairs, or entertainment programming. Broadcasters would

have had no discretion to accept or reject programming. They would be required to behave much like phone companies, as public utilities.[7] The downside, of course, was that a common carrier system also resembled the American ideal of equal opportunity based on the ability to pay. Offering neither diversity nor excellence, a common carrier system could well have scuttled national radio programming because it short-circuited the economies of networking.

In the odd workings of American politics, opposite ends of the political spectrum backed a common carrier system. Progressives supported it as the system promising the fullest access opportunities for candidates and discussion of public affairs. American Telephone and Telegraph (AT&T), the reformers' nemesis, pressed for a common carrier system until 1926. AT&T had pioneered radio in the United States. It had developed an extensive network of "toll" broadcasting. In the toll system radio programmers and producers paid AT&T a fee or toll for use of the radio waves in much the same way one would pay the telephone company as a common carrier for a long-distance telephone call. But, as radio grew into a medium of mass communication rather than one-to-one communication, radio reaped greater profits by selling time to advertisers to reach potential buyers. AT&T chose not to pursue this market. In 1926 AT&T management decided that the company's future lay in telephones and took AT&T out of broadcasting. AT&T sold its eighteen radio stations to the Radio Corporation of America (RCA) for several million dollars and RCA's promise not to compete in telephones and to use AT&T's wires for interconnecting RCA's radio network.[8]

A licensed system proved more attractive and enduring. Under the Radio Act of 1912, licensing was the existing policy requiring revision for mass communications. Radio manufacturers and nascent amateur and commercial broadcasters backed licensing. An oligopoly, embodied in the Radio Corporation of America, supported licensing and dominated American radio in the 1920s. In 1919 General Electric (GE) formed the Radio Corporation of America with American Telephone and Telegraph, the American Marconi Company, the Federal Telegraph Company, and the United Fruit Company. At that time radio enabled the United States to overtake Great Britain in communications, which remained dominant in the older and slower technology of cable. GE

would later claim that it had refused to sell patent rights to the Alexanderson alternator, a device that facilitated transoceanic radio transmissions, to the British-controlled Marconi Company, in deference to Navy Department requests to keep wireless technology in the United States. This claim of patriotism served GE and RCA well, even though the primary corporate motive was to secure licenses to high-powered radio frequencies and to ward off Navy Department proposals to nationalize radio. By 1927, with the navy no longer a player, radio was open for commercial exploitation for mass communications.[9]

Despite America's competitive advantage in radio technology, neither radio manufacturers nor commercial broadcasters could exploit a mass communications market fully without an orderly market. Until then broadcasters' investments would remain a small fraction of their potential value. Of the three systems, licensing promised the best return and most flexibility. Broadcasters, who had already received the coveted privilege to broadcast, embraced licensing on the supposition that they would retain their licenses and gain a competitive advantage over challengers. Licensing also helped broadcasters because it remained unclear whether other state courts would follow the *Oak Leaves* precedent. Other state courts could well have ruled that the length of time that broadcasters operated a frequency and invested in equipment, transmitters, and talent did not provide them exclusive rights to a frequency. General "public interest, convenience, and necessity" obligations eliminated this uncertainty and provided a constitutionally acceptable standard for federal regulation.

Just how a licensed system emerged turned on free speech. Broadcasters pushed for licensing, with the primary goal of ordering the chaotic radio marketplace so that the industry might prosper. Licensing provided them with discretion over politics free of total government control as in a nationalized system and without the burdens of mandated access for the discussion of public affairs as in a common carrier system. Broadcasters would program news, politics, and public affairs in the "public interest" as a quid pro quo for lucrative licenses. However, in striking this deal, broadcasters opened the door for content control because the "public interest" standard provided politicians and future regulators of radio and tele-

vision a powerful tool with which to control broadcast news and public affairs programming.

Licensing, with an equal time proviso for candidates, emerged in 1927 as the dominant model. This hybrid fell within a political consensus defined by just enough control over speech to prohibit egregious acts of price discrimination and censorship by broadcasters but not so much government control that, it was argued, broadcasters' discretion over programming was violated. Industrial peace was at hand: AT&T and RCA had defined their markets a year earlier. RCA charted its future as a broadcaster; AT&T as a public utility. Both were eager to exploit radio, each accepted equal time as a sensible compromise. A licensed system with equal time also mollified Progressive proponents of a common carrier system.[10]

- The original federal statute for equal time is:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such a broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: Provided that such licensee shall have no power of censorship over material broadcast under the provision of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.[11]

Equal time remains in effect to this day with revisions for advertising rates and newsworthy events (chapters 4 and 6).

In 1927 Congress enacted equal time for several reasons. Politicians' ability to mount electoral campaigns over radio, a new mass communications medium, was at stake. Incumbents especially wanted to secure access to broadcasting. Progressive political ideals that an informed electorate reached political decisions by voting on the basis of the fullest information supported arguments that candidates enjoy access to radio during political campaigns. Ideological and sectional politics came into play. Several key Western Congressmen had made their political careers fighting railroad and utility interests and viewed broadcasters suspiciously as the monopolists' latest incarnation. Southern Congressmen protective of the legacy of their region's peculiar institution and anxious about encroaching urbanism, were equally suspicious of Eastern-

dominated radio. Perennial Democratic standard-bearer William Jennings Bryan viewed "impartial treatment of candidates" over radio as an effective counterbalance to a Republican press in contested states.[12] All demanded equal time for candidates before a national system of licensing was put in place.

- Secretary of Commerce Herbert Hoover, architect of American broadcasting regulation, supported licensing, argued for broadcaster discretion within general public interest guidelines, and accepted equal time pragmatically. Although many remember Hoover as a president incapable of coping with the Great Depression, he had a distinguished career as administrator of food relief in Europe following World War I and as a powerful commerce secretary. As commerce secretary, Hoover regulated radio under the 1912 Wireless Act.

  Through his power in the Department of Commerce, Hoover attempted to rationalize a rapidly changing, wildly popular, and technologically complex growth industry. He favored a nationally regulated system of commercially financed radio stations and networks along with a portion of radio channels set aside for government and nonprofit uses under control of the secretary of commerce.

  Antiquated statutes and the Illinois state court ruling in *Oak Leaves* stood in Hoover's way. The Radio Act of 1912 required the secretary of commerce to grant broadcast licenses to anyone who requested one. But mass communications of the 1920s differed from one-to-one radio communication. In 1923 the courts decided in *Hoover v. Intercity Radio* that the secretary of commerce could only assign frequencies and lacked authority to deny licenses. Then in April 1926, in *United States v. Zenith Radio Corporation,* a federal district court ruled that Hoover was powerless to require a licensee to broadcast at specified times and on designated frequencies. Hoover asked Acting Attorney General Donovan to clarify the secretary of commerce's duties. That July, Donovan agreed with the courts: Hoover was obliged by law to issue licenses on request but was denied authority to assign frequencies. In other words, once someone was granted a license, he was entitled to broadcast on whatever wavelength he wanted whenever he wanted. No matter how bad the interference, the secretary of commerce, as the responsible federal authority, could do nothing.

Following the attorney general's ruling, a period, commonly referred to as the "breakdown of the law," created the urgency for the Radio Act of 1927. During this period radio interference worsened and sales of radio receivers flattened briefly. Here was the opening Hoover needed to expand federal regulatory authority over broadcasting. Few disagreed that interference injured the radio industry and consumers alike. Of course, broadcasters could sue one another under the *Oak Leaves* precedent for deliberate interference. That was an uncertain course, however; it placed radio regulation in state courts and removed it from federal regulatory control. Neither Hoover nor Congress was willing to allow federal licensing authority over broadcasting to slip through their hands, nor were broadcasters willing to play roulette with court decisions.[13]

Hoover began setting the agenda for federal licensing authority by convening four national radio conferences from 1922 to 1925. At these conferences the dynamic, young commerce secretary shaped consensus on policy goals for a system of licensing among amateur and commercial broadcasters and among the competing departments of the federal government and military. Hoover insisted that the secretary of commerce retain authority to issue and revoke licenses. Policy issues turned principally on how to control an advertiser-supported mass medium.

Important for equal time both at these conferences and through lobbying for a revised radio act, Hoover articulated principles of a licensed system. Hoover's themes have become cornerstones of federal policy: public interest, listener sovereignty, spectrum scarcity. At the outset Hoover acknowledged a public interest in radio. At the First National Radio Conference in 1922, he called for regulation so that "there may be no national regret that we have parted with a great national asset into uncontrolled hands."[14] He said that the rights of listeners took priority over those of speakers in articulating a policy of listener sovereignty. "The dominant element in the radio field is, and always will be, the great body of the listening public," he told the Fourth National Radio Conference. Hoover insisted that radio was "too important for service, news, entertainment, education and vital commercial purposes to be drowned in advertising chatter or for commercial purposes that can quite well be served by other means of communication."[15]

Hoover connected the limited number of radio frequencies

with the many consumers of radio programming. He argued that spectrum scarcity (that is, a scarcity of radio frequencies compared with the number of those who wish to broadcast) supported listeners' sovereignty over broadcasters' free expression. "We do not get much freedom of speech if fifty people speak at the same time," Hoover said of the chaotic interference in radio. Jumping quickly to listener sovereignty, he continued, "Nor is there any freedom in a right to come into my sitting room to make a speech whether I like it or not. . . . There are two parties to freedom of the air, and to freedom of speech," Hoover pointed out. "There is the speaker and the listener. Certainly in radio I believe in freedom for the listener. He has much less option upon what he can reject, for the other fellow is occupying his receiving set. The listener's only option is to abandon his right to use his receiver. Freedom cannot mean the license to every person or corporation who wishes to broadcast his name or wares, and thus monopolize the listener's set. No one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purposes."[16]

Despite the stridency of Hoover's rhetoric on listener sovereignty, in practice Hoover granted more licenses at more powerful frequencies to large commercial broadcasters in preference to smaller educational, religious, or labor broadcasters. In his view commercial broadcasters provided a greater diversity of programming to the public than broadcasters in one special area.

House and Senate Republicans advanced Hoover's principles within a licensed system with broadcaster discretion. "The right of the public to [radio] service," Representative Wallace H. White, Republican floor leader on the Radio Bill, succinctly said, was "superior to the right of any individual to use radio."[17] This position had short-term benefits of providing a rationale for coming to terms with Democrats and Progressives, who were pushing for expansive access for politicians and public affairs. And White's formulation had long-term political and regulatory consequences. It stood the First Amendment on its head by taking free speech from speakers and granting it to listeners in broadcasting. This pragmatic rationale, highly useful in 1927, set in motion more than six decades of law and regulation disputing broadcasters' free speech rights.

Representative White cautioned that "we are here dealing with a new means of communication."[18] White argued that existing regulatory agencies like the Interstate Commerce Commission and the Federal Trade Commission—neither of which had ever indicated any capacity to regulate political speech in broadcasting—could police radio. The Clayton and Sherman antitrust acts protected the public adequately from monopolistic practices in radio, White insisted. "A reasonable doubt [exists] whether we are justified in applying to this industry different and more drastic rules than the other forms of communication are subjected to."[19] He continued, "Laws, narrow, restrictive, destructive to a new industry serve no public good. We should avoid them."[20]

Like White, Representative Arthur M. Free (R-Cal.) warned that burdensome regulation would retard an infant industry: "The question you . . . have got to consider is whether or not you are going to apply special rules to a new and baby industry that you do not apply to any other industry in the United States."[21] The Federal Trade Commission, with its focus on restraint of trade and monopolistic practices, and the Interstate Commerce Commission, with its focus on price fixing, were sufficient federal authority to police monopoly in radio and abuses in political programming by radio broadcasters, Free contended. Only AT&T's 18 out of 536 radio stations licensed to others were cross-licensed according to Republican figures. Two- to three-hundred competing firms manufactured receivers, and over three thousand manufactured radio parts and accessories. These industry dynamics, coupled with the "public interest standards" that suffused the radio bill, were sufficient, Free believed, to ensure the flow of news, political, and public affairs programming to the public.

- Powerful Senate Progressives Robert LaFollette, Jr. (R/Progressive-Wis.) and Hiram Johnson (R-Cal.) opposed the Hoover plan of imposing nothing more stringent than general public interest obligations on broadcasters. They insisted on common carrier stipulations for candidates' access to the radio airwaves during political campaigns and citizens' access for the discussion of public affairs. They charged that broadcaster censorship and price discrimination limited the diversity of political viewpoints. Each had felt the brunt of broadcaster censorship. Senators Johnson and LaFollette com-

plained that broadcasters in Detroit and Des Moines, respectively, had relegated them to low-power frequencies so that they reached only a fraction of their potential radio audiences. They insisted on a bipartisan commission, not the commanding commerce secretary, to oversee radio and pushed equal time for candidates and public affairs through the Senate Interstate Commerce Committee. The bill also put Secretary of Commerce Hoover on notice of strong support in the Senate for a bipartisan commission as the federal licensing authority.[22]

In the House, Democrats inserted language that radio would be considered as a "common carrier in interstate commerce" for candidates and public affairs. They were at the edge of creating a law that defined politicians' and the public's access rights as prior to the free speech rights of broadcasters. If the bill survived conference, broadcasters would have no choice but to grant equal time to opposing politicians seeking election and to citizens discussing controversial public issues. They also proposed a bipartisan commission of five members, chosen from various sections of the country, to oversee licensing. Such a regulatory body, they claimed, would be more responsive to equal time than the secretary of commerce. Through its bipartisan quality, the commission would also limit the potential for government suppression of freedom of speech, they asserted. Such a commission also put direct control of licenses beyond Hoover's reach for his upcoming presidential bid in 1928. Senator Clarence C. Dill (D-Wash.) remarked, for example, that in placing licensing authority in a bipartisan commission, broadcasters need not be "under the fear which they must necessarily feel, regardless of which party may be in power, when the control is placed in the hands of an administrative branch of the Government."[23]

Fear of media power animated Progressive and Democratic insistence on common carrier provisions for candidates and public affairs within a licensed system. "What greater monopoly," Representative Luther H. Johnson (D-Tex.) asked his House colleagues, "could exist than where a radio company could give the free use of its line to one candidate for office, one contender of some economic theory, and then deny such . . . to those who are on the other side of the question? . . . If the strong arm of the law does not prevent monopoly ownership, and make [price] discrimination by such stations illegal, American thought and American politics will be largely

at the mercy of those who operate these stations. For publicity is the most powerful weapon that can be wielded in a republic, and when such a weapon is placed in the hands of one, or a single selfish group is permitted to either tacitly or otherwise acquire ownership and dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people."[24]

Remarking on rapid technological innovations in radio and its diffusion into American society, Johnson continued, "It will only be a few years before broadcasting stations will . . . bring messages to the fireside of nearly every home in America." Broadcasters would use this immense power to shape public opinion: "They can mold and crystallize sentiment as no agency in the past has been able to do." He continued, "The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed."[25]

Johnson advanced equal time for candidates and public affairs. He proposed that "equal facilities and rates, without discrimination, shall be accorded to all political parties and candidates for office, and to both proponents and opponents of all political questions and issues," in essence a common carrier stipulation.[26]

Representative Emanuel Celler (D-N.Y.) supported Johnson by citing price discrimination and censorship. WEAF, AT&T's owned and operated station in New York, charged Celler "$10.00 for every minute [he] desired to use the radio during the last election." Celler said, "I have no knowledge that candidates of the opposing party were asked to pay the same amount for the same use." Representative Ewin Davis (D-Tenn.) complained that broadcasters censored news and politics. He cited congressional testimony by AT&T vice president W. E. Harkness that AT&T routinely rejected applications to use its toll broadcast facilities. Responding directly to LaGuardia's concern about government censorship, Davis told his colleagues, to the applause of the House chamber, "I am even more opposed to private censorship over what American citizens may broadcast to other American citizens. . . . There is nothing in the present bill which even pretends to prevent it or to protect the public against it."[27]

Nor was Progressive and Democratic concern about media

power without foundation. In the protracted fight over radio legislation, dating from 1922, Congress had authorized a Federal Trade Commission (FTC) investigation of monopolistic practices in radio. The FTC study had documented flagrant monopolistic practices. It showed that eight corporations—the Radio Corporation of America, General Electric, American Telephone and Telegraph, Western Electric, Westinghouse, International Radio Telegraph Company, United Fruit Company, and the Wireless Specialty Apparatus Company—had restrained competition and created an oligopoly in the domestic manufacture, purchase, and sale of radio transmitters and receivers as well as in domestic and international radio communication and broadcasting. "There is not any question whatever," Representative Davis said, that "the radio monopoly . . . is one of the most powerful, one of the most effective monopolies in the country . . . a monopoly, the capital stock whose members are quoted on the stock exchanges for $2.5 billion dollars."[28] An infant industry, indeed.

- Senator Clarence C. Dill (D-Wash.), the heartiest promoter of equal time, introduced the concept as "equal opportunities" for candidates to use radio during election campaigns. "Equal opportunities" quickly transmuted into "equal time." Dill's amendment stipulated equal opportunities for legally qualified candidates. In fact, Dill was so skillful that a journalist would later remark, "He did the one thing that in this day and age gives a man a stranglehold on his job. He became a specialist in a field so new, so complicated, and so interwoven with technicalities of speech and function that there were none to dispute him."[29] So commanding was Dill's technical competence that the senator from Washington became as influential in radio legislation as Commerce Secretary Hoover and Senate giants Hiram Johnson and Robert LaFollette, Jr.

Progressives criticized equal time for political candidates as restrictive, confusing, palliative, narrow, and anemic. Senator Albert B. Cummins of Iowa, a Republican with a career of progressive political reform against the railroad interests, complained that Dill's amendment was confusing. Although radio would not be designated as a common carrier in political programming, Dill's language of equal opportunities would nonetheless require broadcasters to behave as though they were.

Not so, Dill responded: "If a radio station permits one candi-

date for a public office to address the listener, it must allow all candidates for that public office to do so." This, Dill said, was far different from common carrier stipulations compelling broadcasters to "take anybody who came in order of the person presenting himself and be compelled to broadcast for an hour's time speeches of any kind they wanted to broadcast."[30] Dill's amendment required only that broadcasters provide equal opportunities to all legally qualified candidates if they had granted air time to one candidate. "In other words," Dill told his fellow senators, "a station may refuse to allow any candidate to broadcast; but if it allows one candidate for governor to broadcast, then all the candidates for governor must have an equal right; but it is not required to allow any candidate to broadcast."[31]

Equal time for political candidates was too restrictive, Cummins countered. It allowed broadcasters to regulate political programming. "If we are going to allow [radio] to be used for political purposes at all," Cummins said, "it will become a common carrier as to political service, and . . . Senator [Dill] is simply providing a situation in which broadcasting will be denied to political candidates." Dill parried. He promoted equal time in the spirit of fairness and pragmatism. "I think it would be better to deny [equal time] altogether than to allow the candidate of one party to broadcast and the candidates of the other party not to be able to secure the same right."[32]

Senator Robert B. Howell (R-Neb.), a Progressive advocate of public utility ownership, demanded that broadcasters be required to grant citizens' access for discussion of public issues. Spectrum scarcity vitiated radio industry arguments that broadcasters were like newspapers, he charged. Democracy required a constant flow of news and information to the public, Howell said. He worried about entrusting so important a task to commercial broadcasters. "We are not trying merely to place the privilege of broadcasting within the reach of all so far as cost is concerned," Howell said. "We want to place it within the reach of all for the discussion of public questions when one side or the other is allowed to be presented." He cited the tarriff fight. Democrats generally favored free trade and a low tariff, and Republicans defended a protective tariff. Equal time for political candidates was too narrow for full discussion of so vital an issue. "Under this amendment . . . a reduction of the tariff could not be

discussed over an eastern radio station. They could prevent it. It might be that in southern sections a discussion of the tariff from the Republican point of view would not be allowed"[33]

Citizens' access for public affairs would doom broadcasting, Dill cautioned. "There is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time, and thus a radio station would be placed in the position . . . that [it] would have to give all [its] time to that kind of discussion, or no public question could be discussed." He reassured Howell that setting federal policy for public affairs programming and access rights for issue-oriented citizens would be taken up by the Federal Radio Commission once the Radio Act was enacted. Right now, getting the Radio Act on the books was what mattered, and he could not get the bill through Congress with a stipulation that broadcasters be required to act as common carriers for public affairs programming.[34]

Unimpressed, Howell shot back, "Abuses have already become evident. . . . We do not need to wait to find out about these abuses. . . . We ought to meet these abuses now, and not enact a bill which in the future it will be very difficult to change, when these great interests, more and more control the stations of this country; and that, apparently, is the future of broadcasting." Howell continued, "We are discussing a supervehicle of publicity. . . . Unless we now exercise foresight we will wake up some day to find that we have created a Frankenstein monster. . . . The time to check abuses is at the beginning, in the infancy of development of this great vehicle of publicity. . . . Everyday, radio is reaching more and more homes, and there are the great interests, for instance, the General Electric Company, which can thus enter nearly every equipped home in the United States with their radio stations. They have them hooked up so that one station receives what another sends out. Moreover, the General Electric Company and the Radio Corporation of America have been afforded the most powerful stations in the United States. . . . Are we going to allow these great interests to utilize their stations to disseminate the kind of publicity only of which they approve and leave opportunity for the other side of public questions to reach the same audience?"[35]

Howell had offered solutions. He had proposed limiting discussion to one affirmative or negative rejoinder. If a number of people

requested time, they could either agree on a representative among themselves or, if no agreement could be reached, they could draw lots. The Senate Interstate Commerce Committee rejected the proposal. The Senate agreed with Dill. Howell had to settle for a clause in Section 18 that "it shall be the duty of the commission to adopt and promulgate rules and regulations" on equal time for candidates.

Senator Howell's rhetoric about Frankenstein is revealing for the anxiety it expresses toward media oligopolists, which, he feared, if uncontrolled, could destroy democratic institutions. The potential dangers of broadcaster manipulation of public opinion assaulted the Progressives' identification of good government with an informed electorate capable of making independent political decisions after digesting news and public affairs, hence Howell's insistence along with that of Senators Hiram Johnson and Robert LaFollette, Jr., that radio broadcasters be designated as common carriers in radio news, political, and public affairs programming.

This Progressive position differed appreciably from Commerce Secretary Hoover's. The difference turns on common carrier stipulations within a licensed system or broadcaster discretion in a system of licensing. Howell, Johnson, and LaFollette supported common carrier stipulations as a means of sustaining an informed electorate. Hoover, by contrast, advocated broadcaster discretion. In his view broadcaster abuses could best be curbed after a broadcaster had violated the "public interest" in the quality of his radio service or in the partiality of his news and political programming.

Dill emerged triumphant in Senate debate. Dill's amendment emerged as Section 18 of the Radio Act of 1927, which became Section 315 of the Communication Act of 1934, cornerstones of mass communications law in the United States. Equal time extended to candidates but not public affairs. Politicians could command equal time only if broadcasters had granted or sold air time to legally qualified candidates for the same office. Rather than deal with the statute's ambiguities, Congress empowered a bipartisan commission, the Federal Radio Commission (FRC), to make rules and regulations implementing the compromise rule.

By distinguishing broadcaster regulation from broadcaster discrimination, Dill succeeded in creating a law that provided broadcasters some discretion in political programming and ensured candidates' access. Such a course seemed wholly reasonable. Broad-

casters entered the radio industry voluntarily. Listeners paid nothing for radio service beyond the cost of receivers. The radio marketplace encouraged broadcasters to provide equal time to build their own reputations among listeners. With such incentives and constraints, common carrier stipulations were gratuitous. "It seemed unwise," Dill said, "to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered to him as long as the price was paid."[36]

- As president, Hoover vetoed a law to extend equal time to public affairs and stymied provisions for procedural changes and greater administrative authority for the FRC. The broadened legislation included equal time for people to speak for and against candidates, referenda, and public issues.[37]

The Federal Radio Commission realized Hoover's architectural scheme. Commercial broadcasters won more licenses at stronger frequencies than educational, labor, and religious organizations. First, the FRC redesigned licensing. Louis G. Caldwell, the FRC's first general counsel, proposed a license reallocation plan in 1928, designating forty "clear channels" with as much power as 50,000 watts, cutting back the number of existing frequencies, and effectively ending previous time sharing among some licensees. Many of the forty channels went to broadcasters affiliated with the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS), or commercial broadcasters. Educational, labor, and religious broadcasters competed for space on fifty additional channels that reached local and regional audiences. Second, the FRC articulated Hoover's policy of listener sovereignty, based on spectrum scarcity, as federal regulation. In *Great Lakes Broadcasting Company,* a regulatory ruling, the FRC stated that it would favor broadcasters serving "the entire listening public" with "well rounded" programming, which listeners, responding in a marketplace, could and would determine. Because of spectrum scarcity, broadcasters would be expected, the FRC noted, to cooperate with educational, religious, social, and labor groups so that the public would receive a diversity of information. "There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether."[38]

Educators split into a group that pushed for cooperation and a group that demanded frequencies for educational programming. The latter group demanded a clear national channel under government control, modeled after the BBC, that, they claimed, would provide public affairs programming and a quality alternative to the commercial networks. Commercial broadcasters censored controversial public affairs, they asserted; such "private" censorship in mass communications jeopardized democracy. In 1931 and 1932 they pushed unsuccessfully for 15% of the radio spectrum. In another setback the FRC reported that cooperation was the ideal way to reach mass audiences and that broadcasters depended on advertising to operate.[39]

■ At this early stage of broadcast regulation, politicians tended their own garden. Congress imposed licensing and enacted equal time for legally qualified candidates during electoral campaigns. Congress empowered a bipartisan commission, the Federal Radio Commission and its successor the Federal Communications Commission, with considerable discretion to regulate a system of commercial licensees.[40] The FRC and FCC relied on this enabling legislation to cow commercial broadcasters by granting and revoking licenses. Consequently commercial licensees promised greater compliance with politicians and regulators than religious, educational, or labor broadcasters with partisan agendas, operating either on nationalized or common carrier systems. Equal time was icing for the licensing cake. In the eyes of a subsequent observer, equal time was the "most human" and "amusingly specific" section of the Radio Act "bespeaking delightfully the solidarity of the political fraternity."[41]

Equal time, coupled with "public interest" obligations, proved to be the functional compromise between broadcasters, politicians, and regulators that enabled commercial broadcasters to dominate American radio. Western Progressives and Southern Democrats had won their point to the extent that equal time imposed common-carrier-like obligations on broadcasters for legally qualified political candidates. At the same time, Hoover, with his vision of a national system of licensees regulated "in the public interest," also emerged as a partial victor. Radio took the commercial direction, providing mass entertainment which Hoover, and later the Federal Radio Commission and Federal Communications Commission, supported

with licensing policies that favored larger commercial broadcasters.

Listener sovereignty and spectrum scarcity were twin pillars supporting the regulatory scaffolding. Congress enacted law making listeners, rather than speakers, sovereigns of broadcasting due to spectrum scarcity. To be sure, Congress created the scarcity by empowering the FRC to control allocation and assignment of radio frequencies. Policymakers dismissed broadcasters' free speech rights. Both the Progressives' position for common carrier stipulations and Hoover's in favor of broadcaster discretion in a commercially based system of licensees abrogated the free speech rights of radio broadcasters. Hoover's position on listener sovereignty is coincidental with Supreme Court decisions on "clear and present danger" in political speech. Both in Hoover's criterion and Court rulings the First Amendment rights of speakers may be justifiably abridged to achieve the public interest.

In agreeing to meet "public interest" obligations and equal time, broadcasters retained limited discretion in political programming. As Senator Dill put it, "a station [could] regulate, but it [could not] discriminate."[42] To be sure, it might be a negative power to deny access to all candidates. But it might be sound business sense to allow access to any number of politicians to indicate evenhandedness on public affairs to listeners. In either case, by accepting the quid-pro-quo of serving vague "public interest" obligations and providing candidates' access, broadcasters freed themselves to exploit radio's commercial potential and shackled themselves to FRC and FCC regulation.

This regulatory architecture promised confusion.[43] Equal time ensured broadcaster discretion and provided common-carrier-like guarantees for political candidates. The FRC was to be empowered to cope with difficult interpretative tasks that balanced these contradictory requirements. Equal time partisans would champion differing interpretations of congressional intent to manipulate commission decisions, and the commission behaved similarly for its own institutional purposes. Although precise in its provisions, the very name "equal time" suggested common carrier obligations exceeding broadcasters' responsibilities as licensees.