AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal and Great Society Era – Separation of Powers

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National Broadcasting Co. v. United States, 319 U.S. 190 (1943)

In 1934, Congress passed the Communications Act, which created the Federal Communications Commission (FCC) and a system of regulating and licensing individual radio stations so as to encourage the "use of radio in the public interest." In 1941, the FCC issued the Chain Broadcasting Regulations. The regulations were aimed at radio networks, such as those operated by the National Broadcasting Co. (NBC), which simultaneously and exclusively broadcast the same programming on multiple radio stations across the country. After an extended set of hearings and public comment, the FCC found that over half of the country's radio stations were affiliated with three national networks, and those networks controlled 97% of nighttime broadcasting. A divided FCC concluded that such networks were detrimental to the public interest to the extent that they restricted what individual stations could play and impeded the ability of individual station managers to independently serve the public interest. The regulations blocked stations locked into traditional network contracts from receiving new or renewed licenses to broadcast.

The broadcasters immediately filed suit in federal district court in New York to enjoin the enforcement of those regulations. The district court granted summary judgment to the government, and the broadcasters appealed directly to the U.S. Supreme Court, which heard the cases together. The broadcasters argued that the Communications Act unconstitutionally delegated vague and expansive powers to the FCC. In a 5–2 decision, the Court upheld the regulations and affirmed the decision of the lower court.

Congress soon shifted from a concern with radio monopolies to a concern with excessive FCC regulation. The FCC continued to favor the development of local broadcasting over national broadcasting, with mixed effects. In recognition of the larger environment of competition in information provision, the Commission in 1985 significantly loosened its regulations to allow ownership of a large number of stations by a single company, allowing a significant consolidation of the radio industry.

Would the Court in National Broadcasting Company, Co., *have reached the same conclusion before the New Deal? How much guidance did the statute provide to the FCC? Is the "public interest" standard a sufficient direction to an agency of legislative intent? Does the fact that some justices dissented over the question of whether the FCC had sufficient statutory authority to issue these regulations indicate that Congress did provide meaningful legal guidance to the FCC? Could there be disagreement over an agency's statutory authority to take an action if Congress had effectively delegated legislative power to the agency? What might qualify as an unconstitutional delegation of legislative power after this decision?*

JUSTICE FRANKFURTER, delivered the opinion of the Court.

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The criterion governing the exercise of the Commission's licensing power [in the Communications Act] is the "public interest, convenience, or necessity." In addition, [the Act] directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." . . .

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." . . . The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *FCC v. Sanders Radio Station* (1940). The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." . . .

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. . . .

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . "

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. . . . In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. . . .

. . . . While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. . . . Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

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The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority . . . to control chain broadcasting." . . .

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It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any action it took would have to be tested by experience . . . . The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Here, as in *New York Central Securities Corp. v. United States* (1932), the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." . . . Compare *Panama Refining Co. v. Ryan* (1935) . . . .

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. . . . But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

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Affirmed.

JUSTICE BLACK and JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

JUSTICE MURPHY, joined by JUSTICE ROBERTS, dissenting.

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted. Since that is what the Court in substance does today, I dissent.

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. . . . To construe the licensing sections [of the Communications Act] as granting authority to require fundamental and revolutionary changes in the business methods of the broadcasting networks -- methods which have been in existence for several years and which have not been adjudged unlawful -- would inflate and distort their true meaning and extend them beyond the limited purposes which they were intended to serve.

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If this were a case in which a station license had been withheld from an individual applicant or licensee because of special relations or commitments that would seriously compromise or limit his ability to provide adequate service to the listening public, I should be less inclined to make any objection. As an incident of its authority to determine the eligibility of an individual applicant in an isolated case, the Commission might possibly consider such factors. In the present case, however, the Commission has reversed the order of things. Its real objective is to regulate the business practices of the major networks, thus bringing within the range of its regulatory power the chain broadcasting industry as a whole. By means of these regulations and the enforcement program, the Commission would not only extend its authority over business activities which represent interests and investments of a very substantial character, which have not been put under its jurisdiction by the Act, but would greatly enlarge its control over an institution that has now become a rival of the press and pulpit as a purveyor of news and entertainment and a medium of public discussion. To assume a function and responsibility of such wide reach and importance in the life of the nation, as a mere incident of its duty to pass on individual applications for permission to operate a radio station and use a specific wave length, is an assumption of authority to which I am not willing to lend my assent.

Again I do not question the need of regulation in this field, or the authority of the Congress to enact legislation that would vest in the Commission such power as it requires to deal with the problem. . . . It is possible that the remedy indicated by the proposed regulations is the appropriate one, whatever its effect may be on the sustaining programs, advertising contracts, and other characteristics of chain broadcasting as it is now conducted in this country. I do not believe, however, that the Commission was justified in claiming the responsibility and authority it has assumed to exercise without a clear mandate from the Congress.

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