# Congressional Maneuvering in the New Deal: The Regulatory Necessity of Radio, Changing Purpose, and the Circumvention of Police Powers

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**Abstract**

The aim of this thesis is to deploy and develop a new conception of how constitutional interpretation changed in the 1930s, to account for the agency of individual and institutional actors other than the Supreme Court. The theory is that radio regulation was the product of three premises, the nature of radio and regulatory necessity, the intellectual shift in regulatory purpose, and changes within the broader and narrower conceptions of the Commerce clause, which were all recognized by Congress, outside the Supreme Court. Institutional figures reconceptualized the purpose of radio regulation to be for the public benefit first. In turn, the Congress of the United States relied on a new purpose of regulation and relied on a new interpretation of constitutional doctrine that was not explicitly and fully endorsed by the Supreme Court. By studying the intellectual history of radio regulation, as well as the case law surrounding the constitutional Commerce Clause doctrine, this thesis seeks to supplement existing scholarship on the so-called Constitutional Revolution that occurred during the New Deal. The significance of this thesis is in arguing that this existing legal history scholarship is incomplete in its focus, and rather should seek to incorporate the agency of individual and institutional actors, who had the ability to shape constitutional interpretation outside the Supreme Court, as the ultimate expositor of common law.

## Introduction

The election of Franklin Delano Roosevelt is often considered to be a pivotal moment in American history. At his behest, a new regime came into the White House and Democrats assumed a majority of the seats in Congress. Reeling from the Great Depression, FDR and his party quickly capitalized on the moment to pass widespread legislation throughout his tenure that we now know as the New Deal. This included setting up countless new administrative agencies and organizing various relief efforts designed to ameliorate the effects of the Great Depression and to set up guardrails to prevent another economic maelstrom.[1] Many of these agencies persist to this day and many pieces of legislation from the time were some of the most sweeping reforms to take place in American history. On one hand, one of these agencies is the Federal Communications Commission, formed after the passage of the Communications Act of 1934. This agency, unlike others from that time such as the Securities and Exchange Commission, was a successor agency, which was formed from the brief Federal Radio Commission in the Radio Act of 1927. The FCC was founded with the purpose of promulgating regulations on the burgeoning radio industry based on a standard of "public convenience, interest, or necessity."[2] The FCC has had a strong and storied legacy that persists to this day, but what makes it so salient is how it compares to the other legislative efforts from those early days of the New Deal. In particular, that the FCC enjoyed bipartisan support to its sweeping authority, while other legislative efforts buckled under the scrutiny of the United States Supreme Court.[3] The Supreme Court during the 1930s was engaged in constitutional carnage, striking down the early New Deal,

[1] *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78.
[2] Communications Act of 1934, Pub. L. No. 73-416, § 303, 48 Stat. 1064, 1082 (1934).
[3] *See, e.g.*, National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195 (1933). *But see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act of 1933 on constitutional grounds).

which created a sense of animosity with the FDR Administration.[4] As a result, after the landslide election of 1936, FDR formulated a court-packing plan, seeking to fill the Supreme Court with new justices who could possibly better uphold the New Deal.[5] However, around the same time, observers noted that the Supreme Court had started to cease invaliding many aspects of the New Deal and thus many theorists started attributing it to political pressure.[6]

What happened was simple: during the 1930s, a shift in constitutional jurisprudence occurred.[7] Legal history scholarship focused on this shift focuses on whether the Supreme Court had reinterpreted a part of the Constitution: The Commerce Clause.[8] The Commerce Clause, permitting Congress to regulate interstate commerce, is one of the most potent tools in the federal government's legislative arsenal.[9] Yet, the scholars on this constitutional shift hone in on this period between the so-called *Lochner* Court and the New Deal Court, and in doing so tend to constrain in on the Supreme Court and the advocates that appeared before them.[10] As a result, much of their discussion invariably turns on whether the shift from the emphasis on broad constitutional concepts such as the "liberty of contract" and the "public/private distinction" was disregarded due to internal jurisprudential shifts or externalist political pressures.[11] Starting with

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[4] *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION, 11 (1998) (explaining when and why Roosevelt sent to Congress proposing to "reorganize" the Supreme Court).
[5] *Id.* at 11-12.
[6] *Id.* at 12-15.
[7] *Id.* at 3-5; *see also* Michael E. Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 THE HISTORIAN 286, 288 (1978).
[8] *See, e.g.*, Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1053-55 (2005).
[9] U.S. CONST. art. I, § 8, cl. 3.
[10] *See, e.g.*, Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005); DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM, (2012); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION, (1998); William Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York, 1995).
[11] *Contra* Cushman, at 4-5, Bernstein, at 2-3; *see, e.g.*, Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," *The Supreme Court Review, 1966*, 347-399.

Progressivist legal theorists following *West Coast Hotel v. Parrish* in 1937,[12] those following this latter theory, known as externalists, can be best summarized by the position of William Leuchtenburg.[13] In their conception, externalists believe that the landslide 1936 election and Franklin Delano Roosevelt's proposed court-packing plan convinced Justice Owen Roberts to break from the conservative Four Horsemen of the Court to join the liberal Three Musketeers in *Parrish* in finally upholding the New Deal legislative regime.[14] This creates the idea of the Constitutional Revolution of 1937 and the "switch in time that saved nine."

Externalism had been the predominant view for decades until the 1990s.[15] Gaining new ground among constitutional law scholars during the Rehnquist Revolution, a historical revisionist movement emerged among those considered internalists, who started rebuking the externalists' political pressure explanation by offering an alternative.[16] Most persuasive was Barry Cushman, who instead argued that the political pressures of the 1936 election and court-packing were less acute to the Court, and instead Justice Roberts' vote in *Parrish* was not a "switch."[17] Rather, a shift in the Court occurred during the 1934 case of *New York v. Nebbia*, which reconceptualized the Commerce Clause as no longer requiring a distinction between public and private activities.[18] Cushman argued internal jurisprudential shifts occurred with new appointments to the Court that made the institutional position of the *Lochner* Court no longer tenable by 1937 with *Parrish*.[19] In either case, both externalists and internalists still argue that

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[12] 300 U.S. 379 (1937).
[13] *See* Kalman, at 1056. *See also* Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," *The Supreme Court Review, 1966*, 347-399; LEUCHTENBURG, "FDR's 'Court-Packing' Plan," in ESSAYS ON THE NEW DEAL, 69-115 (Hollingsworth & Holmes eds., Austin, Tex., 1969); Leuchtenburg, "FDR's Court-Packing Plan: A Second Life, a Second Death," 34 DUKE L. J. 673 (1985).
[14] Kalman, at 1056-57 (summarizing Leutchenburg's externalist argument).
[15] *Id.* at 1059-61.
[16] *Id.* at 1058-60.
[17] CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION, 5-7.
[18] *Id.* at 7.
[19] *Id.*

constitutional interpretation, particularly with the Commerce Clause, occurred at the Supreme Court.

However, by attributing this shift mainly to the Supreme Court as the ultimate actor, this scholarship ignores what was going on in the background. Even as the *Lochner* Court was continuing to develop their own distinctions in the Commerce Clause, Congress, persuaded by various lower federal courts throughout the United States, was retooling that Clause in a new interpretation for radio regulation. Sparked by a need for a new legislative regime in radio regulation, Congress was driving a new constitutional interpretation in absence of the Supreme Court when it drafted and passed the Radio Act of 1927 and the later 1934 Communications Act. This legislative reinterpretation of the Commerce Clause was justified by divergence from the Supreme Court by the lower federal courts, because of other actors such as Herbert Hoover reconceptualizing the *purpose* of radio regulation.

Hoover, then the Secretary of Commerce, was originally in charge of the sole regulatory body in radio: The Department of Commerce. He sought to rectify the weak authority of the Commerce Department and radio regulators, while shifting away from the purpose of such regulation being a blend of antitrust, national security, and public welfare concerns toward a purpose of radio regulation being primarily for the public interest. However, because of judicial backlash to the Commerce Department, his regulatory regime collapsed. The resulting "chaos on the airwaves" convinced legislators on both sides of the political spectrum that a new regulatory regime was required.

These legislators in Congress, convinced by Hoover that the only way to effectively regulate the radio industry was to act with a public interest standard, set about creating a new regime with a stronger constitutional foundation. However, there was a problem. Within the

Constitution, the Tenth Amendment states that the powers not explicitly delegated to the federal government are reserved to the States.[20] Among those powers reserved to the States are their police powers, or the ability to regulate based on health, safety, morals, and the general welfare of their own citizens.[21] What Congress and Hoover sought to establish, rather, was a national regulatory regime that would be implied to do exactly that, by allowing a federal agency to regulate broadcasters based on content. They were able to do so in the Radio Act of 1927, with constitutional maneuvering, by applying a narrow exception to the broad powers of their ability to regulate interstate commerce under the Commerce Clause. That exception was by creating a regulatory regime based off a similar regime set up by the Interstate Commerce Commission in regulation of railroads, by declaring radio as a public utility. In doing so, they created the FRC and later imported much of the same language into the 1934 Communications Act to create the FCC. As a result, Congress created one of the most potent and powerful independent federal agencies of the New Deal Era, which withstood assault where other legislative efforts failed. How they did this is something that many of the same scholars above seem to ignore or gloss over as they focus on the Supreme Court.

Thus, outside of the Supreme Court, an intellectual shift on radio regulation occurred at the same time as lower courts were reconceptualizing the Commerce Clause as it applied to radio. Based on the necessity of radio regulation, coupled with that new Commerce Clause use, Congress founded the Federal Radio Commission and later the Federal Communications Commission to regulate on a public interest standard. Both shifts occurred separately but were indispensable to each other in ultimately creating the FCC. In this sense, when Congress founds the FCC, they are changing constitutional interpretation without the Supreme Court being needed

[20] U.S. CONST. amend. X.
[21] *See, e.g.*, Carter v. Carter Coal, 298 U.S. 238, 301 (1936).

to affirm them. This thesis, standing in opposition to both internalists and externalists, instead argues that the Supreme Court does not necessarily need to be the focus or an actor to facilitate constitutional change.

In pursuit of that argument, this thesis is focused on both the 1927 and 1934 Acts, and thus FRC and the FCC. However, this endeavor has many premises that need to be explored to understand how a complex issue such as radio regulation became a sort of constitutional dark horse. Three premises exist that, when taken together, demonstrates that Congress was not simply passing a law without regard to constitutionality, but instead had neatly packaged those three premises together to craft a constitutionally-sound yet ambitious regulatory regime. Each of the following three premises are explored separately and then analyzed in how they inevitably converged in the halls of Congress. The first premise is the nature of radio and subsequent regulatory necessity. The second premise is a history of the purpose of radio regulation, early legislative attempts, and Herbert Hoover's reconceptualization for the public interest. The final premise is the changes in the Commerce Clause in distinguishing different forms of commerce, the narrower state police powers prohibition, the public utility exception, and the juxtaposition of *New York v. Nebbia* to the 1934 Act.

All three of these premises converge in 1927 with the passage of the Radio Act, establishing the Federal Radio Commission. All three are necessary to understand that Act, as all three are mutually dependent upon each other. The nature of radio and the need for regulation drove Hoover's reconceptualization as to the purpose of radio regulation. The nature of radio also helped drive a distinction within the Commerce Clause by various federal courts, to facilitate a new regime. Hoover's reconception also helps understand the nature of radio as an

emerging industry and this reconception was the driving force behind Congress using the narrow exception to the Commerce Clause for national legislation. Lastly, the change in the Commerce Clause changed the nature of the radio industry into a fundamentally interstate good, and the narrow exception to the Commerce Clause cemented Hoover's public interest standard as applicable to radio. Yet with this convergence, the only absent primary actor remains the Supreme Court. As a result, it implies that for a constitutional reinterpretation to occur and be solidified, it is not necessary to focus solely on the Court as an institution.

The point of this thesis is not to reinvent the wheel. Rather, I hope it serves as a counter to the notion that shifts in constitutional law occur primarily at the Supreme Court. Whether it be the internal shifts explored by Barry Cushman, or the external pressures exerted upon the Court by the 1936 election and the court-packing plan, as argued by Leuchtenburg, my proposal is more modest insofar as it turns *away* from the Supreme Court. Like Laura Weinrib in her examination of civil liberties during this same period, the Supreme Court was not the final expositor of new doctrine.[22] But unlike Weinrib, an emerging constitutional reinterpretation was occurring *with* bipartisan congressional support. As a result of decades of regulatory and legislative history in the realm of radio, there is at least one constitutional shift in the same neighborhood as the Constitutional Revolution of 1937 that cannot be chalked up to the Supreme Court. By adhering to Hoover's reconception, Congress had adopted the public interest standard and created an administrative regime in radio that evinces the broader trend toward a burgeoning federal administrative state based on a new constitutional interpretation. Furthermore, by using the precedent set up by lower federal courts in empowering a new federal agency, Congress was

[22] LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE, 1 (2016) ([T]he architects of the modern civil liberties movement claimed a right 'prior to and independent of constitutions,' secured without recourse to law.")

cementing a reinterpretation of the Commerce Clause without the need for the Supreme Court to be an actor in that story but merely a roadblock. But in each of these premises, the throughline remains the same: these changes are occurring without the need to fully analyze and internalize the jurisprudence of the Supreme Court.

The salience of this example is simple. Unlike many other debates or dilemmas that characterized the First New Deal, the Communications Act of 1934 enjoyed support on both ends of the spectrum and drew bipartisan inspiration from those who scholars would call New Dealers *and* anti-New Dealers. In fact, the legislative records and debates reflect that both parties were focused not on why it was right or wrong, but rather on *getting it right*. The result was that, unlike other pieces of legislation during the First 100 Days and despite its ambitious nature, the Communications Act of 1934 survived. It would be easy to attribute this success to legislative necessity, but that is an incomplete picture. Rather, it is the culmination of legislative necessity, the machinations of district courts, and the missing piece to our understanding of the public interest standard: the shift that occurs because of Herbert Hoover. Yet because the Supreme Court does not exist as a primary actor in the final form of the regime, but rather an obstacle through which Congress navigated, it begs the question of whether internalists and externalists are too focused on the Supreme Court. Their hyperfocus on the Court ignores that Congress wasn't cementing constitutional shifts by sending appellate lawyers to argue for their legislation. They were doing it without the Court being in the room.

Thus, to summarize concisely, the purpose of this thesis is as follows: To start with an examination of scholarship, the legislative history of radio regulation, as well as the case law surrounding them, in search of the visible shifts in interpretation that justified a new regulatory

regime, to analyze and conclude upon the peculiarities of the FCC as juxtaposed to its underlying doctrine.

## Literature Review

Existing historiography on the legal history of constitutional interpretation during the 1930s is distinguished between internalist or externalist explanations for a shift in Supreme Court decisions. Externalists argue that the Supreme Court engaged in a Constitutional Revolution in 1937, by succumbing to external political pressures in the 1936 election and a court-packing plan threatening its institutional legitimacy. Internalists attribute the shift in constitutional jurisprudence to changing importance of old notions such as the public/private distinction and liberty of contract. The resulting shift was that the Supreme Court began upholding the New Deal regime. This scholarship characterizes the Supreme Court as the ultimate expositor of new constitutional law.

Other scholarship in regulation, such as by McCraw, afford more agency to individuals in regulatory institutions. In part, he demonstrates a pattern by which weak commissions sought to rectify their inherent weaknesses by cooperative approaches to regulation. Scholars such as Sawyer emphasize the interplay of politics and constitutional interpretation taking place in the early twentieth century. In the broader context of changing constitutional law, scholars such as Weinrib give agency to non-institutional actors in driving forward reinterpretation.

The last piece of scholarship regards the history of the Commerce Clause and the public interest standard, in relation to radio regulation. As a whole, it forms separate and incomplete pieces of the same puzzle. Namely, some scholars view the public interest standard as a contextual term for radio regulation. Others mention the Commerce Clause as applicable to radio regulation in passing. However, these individual pieces together, taken with the other categories of scholarship, create a coherent story in the evolution of radio regulation and legislative understanding of the Commerce Clause.

## Discussion

As previously mentioned, there are three separate premises that need to be explored and analyzed before arising at their convergence in the legislative history of both the 1927 and 1934 Acts. Each are mutually dependent upon one another, and the regulatory regime cannot exist in absence of any of them. In short, the three premises are the nature of radio and why it required regulation, the intellectual history of regulatory purpose in radio and Hoover's reconception, and the history of the broader Commerce Clause in relation to radio as well as the narrower exception for prohibitions against national regulation in traditionally state police powers. Eventually, the three premises convergence and their mutual necessity is demonstrated in the legislative history of both Acts, showing how truly unique the Communications Act was compared to the broader New Deal.

The first premise is the nature of radio itself and why it naturally requires a regulatory regime. Radio communications are a modern technological marvel that uniquely uses a finite yet renewable natural resource in the form of the electromagnetic spectrum.[23] Admittedly, I do not have a scientific background, but take some length in explaining the nature of radio technology, which is then summarized using a simple tunnel analogy. In brief, each radio transmission uses a certain amalgamation of frequency and amplitude to get from Point A to Point B. As such, it is much the need of using a tunnel under rock. Each variation of amplitude and frequency creates a new tunnel, but only one tunnel can be used at a time, and there are only so many tunnels that can be constructed. As a result of competing claims and usages, the nature of radio, when sufficient voices are seeking to be heard, requires some regulation as to who can use which tunnel and when. It is from this necessity that radio regulation emerges not just as a commercial

[23] *See* Harvey J. Levin, *The Radio Spectrum Resource*, 11.2 J. L. & ECON. 433 (1968).

benefit, but rather as a necessity to pursue the purposes of radio, thus encompassing the first premise.

Between the first and second premises is a brief layover in explaining the salience of the FCC and the 1934 Act. Namely, as it situates within the broader history of the First New Deal. The purpose of doing so is to underscore the importance of a bipartisan solution during this time. It also serves to explains some of the key terminology and implications of aspects of the 1934 Act, such as the public interest standard its legacy. By highlighting the salience of the FCC, it helps emphasize the dramatic leap that occurs during the second premise.

The second premise stems from the first, where through the first three decades of the Twentieth century, various changes in the nature of radio occurred that required regulators to reconceptualize the purpose of their regulations. At the start of the Twentieth century, the purpose of regulation was antitrust concerns in preventing monopolies, and in turn driving innovation and development, as well as the promotion of safety and preservation of national security. These purposes drove Congress to pass the first regulatory regime on these conceptions with the Wireless Ship Act of 1910 and the Radio Act of 1912. However, the nature of radio continued to change, and the advent of commercial broadcasting brought on rapid use of the aforementioned tunnels for different purposes such as news and entertainment. Thus, Herbert Hoover, in a series of conferences, cemented a shift in purpose from those original concerns to instead focusing primarily on securing radio for the public welfare and benefit.[24] That new purpose eventually became the public interest standard. But because the original regime was built for different purposes, that first regime collapsed when faced with judicial backlash in

[24] Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM'N'S L. J. 605, 608 (1998); *See also* Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio, GOV'T PRINTING OFF. (1926), accessible at https://earlyradiohistory.us/1925conf.htm.

implementing this vision. However, the new purpose had taken hold and was the focus of legislators in seeking a second regime built upon the changes which occurred in the third premise.

That third premise being the nature of the Commerce Clause itself. A powerful tool of Congress, the Commerce Clause allows the federal government to regulate interstate commerce. However, during the first three decades of the Twentieth century, the Supreme Court was keenly aware of its potency and was poised to strike down impermissible legislation based on this Clause. Starting with the titular case of *New York v. Lochner* in 1905, the Court was guided by old jurisprudential notions such as the public/private distinction in striking down legislation that impermissibly intruded upon individuals and state powers. However, over time, the Supreme Court and lower federal courts began to gradually qualify various forms of commerce as being more or less permissible for national legislation. One of these being commerce in the form of railroads, which was Congress's legislative and regulatory analogue to radio.[25] More narrowly within the Commerce Clause, there was the prohibition against national legislation intruding upon state police powers, as guaranteed by the Tenth Amendment.[26] But within that narrow provision was an exception for public utilities, as applied to railroads.[27] This narrow exception became the constitutional hook that legislators grasped to fulfill Hoover's vision of a public

[25] Franklin Delano Roosevelt, *Message to Congress Recommending the Creation of the Federal Communications Commission*, (Feb. 26, 1934), accessible at https://www.presidency.ucsb.edu/documents/message-congress-recommending-creation-the-federal-communications-commission (stating that Congress should base the authority of the Federal Communications Commission from the Interstate Commerce Commisssion).

[26] *See, e.g.*, United States v. Lanza, 260 U.S. 377, 380 (1922) ("Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the [Tenth Amendment], and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded.")

[27] *See* Charles Wolff Packing Co. v. Ct. of Indus. Rels. of State of Kansas, 262 U.S. 522, 535 (1923) (noting that railroads, other common carriers, and public utilities fall under businesses affected with a public interest that meets national regulation requirements).

interest standard in radio regulation with the Radio Act of 1927. This premise ends with distinguishing the 1934 Act, which reaffirmed that hook for radio, from the watershed decision of *New York v. Nebbia*, thus arguing that this case, while influential for internalist legal historians,[28] was not dispositive to the passage of the former.

When all three of these premises converge, it is analyzed in the legislative history of both the Radio Act of 1927 and the Communications Act of 1934. These two legislative histories demonstrate that Congress was seeking to adapt the public utility exception to further the public interest standard. In doing so, the drafters were cognizant as to how it could be wielded indirectly against certain content and thus traditionally fell under state police powers. However, even considering that recognition, Congressmen on neither side of the political spectrum mounted serious opposition to the either Act. In doing so, Congress indicated bipartisan support for a sweeping measure amidst a moment in time filled with political opposition to the broader New Deal. When all three premises converge in Congress, they are seen as mutually legitimate reasons to effectuate both the Federal Radio Commission and the Federal Communications Commission.

**First Premise: Understanding the Nature of Radio and the Need for Regulation**

While this thesis is legal history piece, it's conclusions are derived from the nature of radio. As a result, it is necessary to take a step back for a moment, to understand the nature of radio broadcasting and why it needs to be regulated.[29] Unlike many of the Earth's natural resources, the electromagnetic spectrum is a renewable, yet finite resource that radio taps into as

[28] *See* Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 129-30 (1991).
[29] Or, at least, as far as my undergraduate degree in political science and history permits me to understand the nature of transmissions across electromagnetic waves.

a sort of highway.[30] It must be noted that the electromagnetic spectrum is much broader than just encompassing radio waves; it also includes Gamma Rays, X-Rays, ultraviolet and infrared light, and most importantly, the visible light spectrum which allows our eyes to interpret vivid colors.[31] What distinguishes each of these from one another as a form of electromagnetic radiation is the distance between their waves, or wavelength, which is measurable from picometers to millimeters.[32] Radio waves create the largest category of this spectrum and fall on the wider end of the wavelength spectrum.[33] Each wavelength corresponds to a frequency, measured in Hertz, with the latter calculated as how frequent one can reach the top or bottom of the actual wave.[34] There is another aspect of waves, which is the height of the actual wave from the base at its median between the top and bottom of each wave. This is the *amplitude* of the wave.[35] Like waves in water, where a ripple in calm water is lesser than a tidal wave, the higher the wave on the electromagnetic spectrum, the higher its amplitude. Thus, within the electromagnetic spectrum itself, there are variations in the frequency and amplitude of waves that distinguish them from one another, even within the same wave. On the visible light spectrum, colors such as green have a higher frequency whereas colors such as yellow have a lower frequency. But even within those green colors, certain waves have more amplitude than others that distinguish it from the same frequency.

Hopefully, we haven't lost too many readers, but I promise it gets simpler. Radio, as a medium for transmitting messages, taps into this finite and renewable resource. As a ship uses a waterway to traverse from Point A to Point B, radio uses the electromagnetic spectrum as its

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[30] *See* Harvey J. Levin, *The Radio Spectrum Resource*, 11.2 J. L. & ECON. 433, 433 (1968).
[31] JEAN-MARC CHADUC & GÉRARD POGOREL, THE RADIO SPECTRUM: MANAGING A STRATEGIC RESOURCE, 4-10 (London, 2008).
[32] *Id.*
[33] *Id.* at 7.
[34] *Id.*
[35] *Id.*

highway to send a message from a transmitter to a receiver. For audio messages, radio begins with a transducer such as a microphone, which is then sent to an encoder, such as a transmitting antenna, or those massive radio towers which cross the country. The distance these messages can traverse is not necessarily global. It is dependent on the power of the transmitting antenna.[36] A lower power antenna can transmit to a localized area of effect, whereas larger and more powerful antennae can often send messages across massive or even global areas of effect. To receive these messages via radio, one requires a receiving antenna that can essentially "catch" the message. However, the message itself is only understandable with the use of an adequate receiver. A receiver functions much in the same way as the color cones in our eyes create color. It tunes out certain frequencies and decodes the remaining waves into a comprehensible message. For our eyes, it is color; for radio, it can be audio messages. From here, the message itself can be altered through an audio amplifier with a volume control. At this point, the receiver connects with an electrical output and reproduces the sound through a transducer, or a speaker.

With this cursory understanding, it is also important to briefly return to the difference between frequency and amplitude. To start, if there is no adequate message being "caught" by the receiver, the resulting audio will be static. Similarly, if a message is sent on the same frequency and amplitude, and in the same area as a competing message with the same characteristics, the resulting electrical output will *also* be static. We often hear this static driving across the country when the radio is on the same station, but gradually becomes incomprehensible when it encounters another station. This is the dreaded radio interference that concerned regulators and broadcasters at the turn of the Twentieth century.[37]

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[36] Chaduc & Pogorel, at 10-14.

[37] *See* John O. Robinson, *Spectrum Management Policy in the United States: An Historical Account*, 15 FCC OFFICE OF PLANS AND POLICY WORKING PAPER SERIES 1 (1985); *See also* CLARENCE C. DILL, RADIO LAW, PRACTICE AND PROCEDURE, 81 (1938) ("This bill is important because it shows that the purpose of Congress from the beginning of

At first, radio relied on a small subset of waves on the electromagnetic spectrum. As a result of the inevitable interference caused by broadcasters being on the same wave, starting in the last decade of the 19th century, broadcasters began to modify the amplitude of their waves to differentiate stations. This process, conducted by the transmitting antenna, is called *amplitude modulation,* and created everyone's least visited stations: AM radio. At first, this solution worked great, but as more broadcasters began to use radio, there were only so many variations in amplitude before interference resulted again. In absence of regulation, broadcasters elected to asserting their claims to one station by force or by cooperation. It is worth noting that through this time, innovation gradually expanded the limits of accessible wavelengths, thus creating more opportunities for stations and widening the field. However, as a finite resource, these new wavelengths were also eventually filled. While in 1933, *frequency modulation* was invented, thus introducing a whole new set of radio transmissions in FM radio, by then the issue had become very clear to both the industry and to legislators.

For the sake of brevity and kindness, there is a simpler way to conceptualize this problem through a tunnel analogy. Assume that a person seeks to go from Point A to Point B. However, there is a mountain in the way cannot be circumvented. Thus, the only way to travel point to point is by using a tunnel, but only one person can use the tunnel at a time. If the tunnel is in use, that person has two options: either wait for a time when the tunnel is *not* in use or build more tunnels. Even if they wait for another time, others are waiting too. This isn't too helpful in an urgent situation if that person needs to use it now. To make matters worse, while more tunnels can be built, only so many can be built before there is no more room for tunnels. Yet, with each

consideration of legislation concerning broadcasting was to prevent private ownership of wave lengths or vested rights of any kind in the use of radio transmitting apparatus.")

new tunnel, the timing problem inevitably appears again. Thus, without someone there to tell each person what tunnel to use and when, the foreseeable result is chaos.

With that in mind, I have no doubt that you can begin to see the issue that emerged over the first two decades of the Twentieth century. Radio users ran the gamut from commercial to amateur, and public to private.[38] From its inception, radio was seen as a valuable resource both economically and in terms of national security.[39] Because of its instantaneous communication, it doesn't take much imagination to see how truly groundbreaking its use. In a commercial sense, it facilitated faster trade and commerce. For national security purposes, one can see its utility in, for example, organizing rapid troop deployments. And for the broader public, and especially one so ingrained with a democratic tradition as the United States, it brought more instantaneous dissemination of information that touch and concern the whole people. In line with the Anglo-American common law traditions regarding public use, it isn't hard to see how ownership of this new medium, the electromagnetic spectrum, radically demarcated the United States from other nations dabbling in radio. From the outset, and without explicitly being affirmed, the underlying assumption to American radio remains that the no one entity owns the spectrum.[40] As a result, what distinguished the United States from almost every other nation was that the government did *not* own the spectrum, but rather the public at large.[41] Because of this conception, any sort of regulation would invariably steer away from direct ownership. Nonetheless, because of how an

[38] Robinson, at 5.
[39] *Id.* at 6 ("While the attention of governments was initially, and primarily, attracted to radiotelegraphy because of its importance in naval operations and maritime safety, the value of a commercial radiotelegraph service for public correspondence did not escape notice.")
[40] CHRISTOPHER H. STERLING & JOHN MICHAEL KITTROSS, STAY TUNED: A HISTORY OF AMERICAN BROADCASTING, (2002) ("The public at large owned the radio spectrum.")
[41] HAIM MAZAR, RADIO SPECTRUM MANAGEMENT: POLICIES, REGULATIONS AND TECHNIQUES, 348 (2016) ("The USA is different from Europe… The US telegraph, broadcasting and telecommunications services were never nationalized.")

area of effect has no regard for state borders, it becomes easy to see the national character of American radio as invariably becoming an interstate good.

**A Brief Interlude: Salience of the Communications Act of 1934 and the FCC**

While we have demonstrated how the nature of radio would by common sense be solved through national regulation, it doesn't complete the picture as to how the FCC and the 1934 Act stand out. It is understandable to consider the Communications Act of 1934 and the formation of the Federal Communications Commission to be the product of a foregone conclusion that the federal government had the power to regulate radio. To be fair, several court decisions indicated the national character, and "[b]y 1929, several federal district court decisions had obliterated the distinction between interstate and intrastate radio."[42] And contextually, the 1934 Act emerged as one of many pieces of legislation passed during Franklin Delano Roosevelt's first term, where the Roosevelt Administration was operating at the apex of their political capital and beginning to formulate his legacy: the New Deal Era.[43] Reeling from the repercussions of unfettered capitalism during the Great Depression and with the regulatory vacuum left by the retreating States, this first wave of legislation escalated the trend of setting up a burgeoning federal administrative state.[44] However, in doing so, during the First 100 Days, lawmakers were hastily and sloppily drafting these pieces of legislation that would be later struck down by the Supreme Court, one by one.[45] These decisions by the Court were neither cursory nor particularized, they were damning and widespread indictments of Congress's motives and actions. Regimes set up

[42] DOUGLAS A. GALBI, A DESPERATE CASE UNDER THE COMMERCE CLAUSE: FEDERAL JURISDICTION OVER ALL RADIO USE, 15 (2002), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=352361.
[43] Patrick J. Maney, *The Rise and Fall of the New Deal Congress, 1933-1945*, 12 OAH MAG. HIST. 13 (1998).
[44] *Id.*
[45] Michael E. Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 THE HISTORIAN 286, 289 (1978).

under legislation such as the National Industrial Recovery Act (NIRA) were so flagrantly unconstitutional to the Court that they became the landmark decisions taught to first-year constitutional law students to this day.[46] In fact, the fashion in which the Court struck down the first wave of the New Deal was so drastic that it forced legislators and their lawyers to radically reconceptualize their drafting and in selecting test cases that would uphold their later laws.[47] However, the question becomes: Where does the Communications Act of 1934 and the Federal Communications Commission factor into this history?

Unlike NIRA, the Communications Act was not struck down by the Court. In fact, unlike other independent agencies such as the Federal Trade Commission or the Interstate Commerce Commission, the Federal Communications Commission was neither gutted like the FTC, nor in need of supplementary legislation like the ICC that would seek to rectify its organic weaknesses.[48] From the start, the Communications Act of 1934 established a strong independent agency that survived the constitutional obstacles of the late *Lochner* Court and was later affirmed by the New Deal Era Court.[49] Unlike many of its peers from the First 100 Days, it survived the constitutional onslaught of that Court. This is despite the organic statute of the Federal Communications Commission basing its regulatory authority on a standard in which they could regulate in any way deemed to be within the public interest, necessity, or convenience.[50] This is

[46] *See* A.L.A. Schechter Poultry v. United States, 295 U.S. 495 (1935).
[47] *See* Cushman at 37 ("Senate Judiciary Chairman Henry Ashurst wrote of the first Hundred Days: 'We ground out laws so fast that we had no time to offer even a respectful gesture toward grammar, syntax, and philology. We counted deuces as aces, reasoned from non-existent premises and, at times, we seemed to accept chimeras, phantasies and exploded social and economic theories as our authentic guides.'")
[48] *See, e.g.*, THOMAS MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN, 61-65 (Cambridge, Mass. 1984) (noting that Congress needed to pass subsequent legislation to rectify the Interstate Commerce Commission's inherent weaknesses).
[49] *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding the both the FCC and its public interest standard).
[50] The Communications Act of 1934, Pub. L. No. 73-416, § 303, 48 Stat. 1064, 1082 (1934) ("Except as otherwise provided in this Act, the [FCC] from time to time, as public convenience, interest, or necessity requires, shall…")

especially salient given that a new statutory minimum for organic statutes was decided only six years prior in *J.W. Hampton*.[51]

Now, regarding that "public interest standard," you may be asking: "What does that mean?" After all, that seems *very* broad. The problem here is that Congress never explicitly defined what was constituted to be within the "public interest;" it was left to these agencies to decide.[52] Congress, in drafting the Communications Act of 1934, had essentially created an independent agency that could decide its *own* regulatory scope. In doing so, the FCC went beyond the initial textual prerogatives of the regulation: in licensing broadcasters and preventing interference on the airwaves. Over time, it began to blatantly wield the ability to remove certain broadcasters from the airwaves, barring certain content from being broadcast, and even requiring these radio broadcasters to present their content fairly and equitably.[53] That regime later became what we call "Fairness Doctrine,"[54] and it emerged from that 1934 organic statute and despite a provision within the same 1934 Act that *explicitly* prohibited censorship.[55] It was neither an unforeseen consequence nor was it considered unconstitutional. In fact, the Supreme Court later affirmed that it was an appropriate delegation to the FCC in 1969.[56] Moreover, as evinced from

[51] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.")
[52] *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO), 289 U.S. 266, 285 (1933) ("The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between states is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities.")
[53] *See* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 380 (1969) ("Congress, in 1959, announced that the phrase 'public interest,' which had been in the [1934 Communications] Act since [the Radio Act of 1927], imposed a duty on broadcasters to discuss both sides of controversial issues.")
[54] *See id.* at 369-70.
[55] *Id.* at 380; *see also* Communications Act of 1934, Pub. L. No. 73-416, § 326, 48 Stat. 1064, 1091 ("Nothing in this Act shall be understood or construed to give the [FCC] the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the [FCC] which shall interfere with the right of free speech by any means of radio communication.")
[56] *See generally*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

the legislative history of the Act itself, Congressmen from across the country and on all sides of the political spectrum were aware that this was *likely* to be the result of such drafting.[57]

In essence, this is what makes the Communications Act of 1934 truly peculiar. In an era where Congress and the Roosevelt Administration was cast as overstepping its bounds by a Court that was so steeped in notions of individual liberty and skeptical qualification of legislative deference, there was, pun intended, *radio silence* from that same Court. The likely explanation for this form of radio regulation is not that it was *always* considered constitutional by the Supreme Court, nor was it considered to be so immediately necessary as to be permissible. Rather, both the regulation of new infrastructure and technologies, and particularly radio, stemmed from a decades-long history of Congress legislating in this area. It is true that this history of regulation was based on necessity, but the scope and power afforded to radio regulation gradually expanded over time in tandem with changing conceptions as to the *purpose* of said regulation. The power of radio regulators ebbed and flowed, in some areas being dealt significant blows to its authority by the courts.[58] However, what made their authority persist and grow, so as reach the shape of an independent agency, was that it never truly attempted to overstep its bounds without some source of support from either Congress or the lower courts.

The authority of the radio regulators grew when supporting boundaries of constitutionality grew. Yet, there is a tremendous distinction between the start of radio regulation, which was originally aimed to clear up interference on the airwaves and promote healthy competition that would drive innovation,[59] and the resulting FCC, which was given the

[57] See *Infra* Section V, Convergence: The Congressional Records and Mutual Necessity.
[58] *See, e.g.*, United States v. Zenith Radio Corp. & E. F. McDonald, 12 F.2d 614 (N.D. Ill. 1926) (rebuking the Federal Radio Commission's authority to enforce frequency allocations).
[59] *See* Robinson at 1-4.

power to regulate the actual content of the airwaves.[60] To be fair, there were *always* concerns over what content and harmful information could be disseminated over these frequencies.[61] But for much of the first few decades of the 20th century, these were largely dormant concerns,[62] subsumed by more important concerns such as safety and national security.[63] Because the legislative history of the 1934 Act also largely ignored free speech concerns, or insofar as they are objections to the drafting of the organic statute, there remains one question: how did Congress make such a leap as to deem such a broad organic statute as necessary for the purposes of radio regulation? The drafters were neither oblivious nor naive. Rather, the legislators were keenly aware of the problems inherent in predecessor independent agencies, such as the ICC and the first radio licensing regime under the Department of Commerce.[64] Legislators even mentioned multiple instances in which broadcasters were removed because of their content by a less-independent agency.[65] Yet, despite this, a bipartisan Congress created one of the most

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[60] *See, e.g.*, G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME 3: 1930-2000, 306-07 (2019) ("The unproblematic status of content regulation of broadcasting by the FRC and the FCC was cemented in two decisions handed down by the Supreme Court between 1940 and 1953.")

[61] *See* Robinson at 26-27; *see also* "Report of the Inter-Departmental Board Appointed by the President to Consider the Entire Question of Wireless Telegraphy in the Service of the National Government;" [hereinafter "Board Report"] GOV'T PRINTING OFF. (1904), *reprinted in* DOCUMENTS ON AMERICAN TELECOMMUNICATIONS POLICY, VOL. I (John M. Kittross ed., 1977) ("This method of placing private stations under full Government supervision is desirable in order to regulate them for their mutual and the public welfare, as well as from considerations of national defense. Aside from the necessity of providing rules for the practical operation of such stations, it seems desirable that there should be some wholesome supervision of them to prevent the exploitation of speculative schemes based on a public misconception of the art.")

[62] *See* Robinson at 27 ("The 'speculative schemes' mentioned by the Board were, no doubt, a reference to questionable promotions of radiotelegraph company stock by some individuals.")

[63] *See* Board Report; *see also* Robinson at 27-28 ("Finally, there were matters of longstanding concern such as maritime safety, national defense, monopoly practices, and questionable business practices and stock promotion that many believed needed Congressional attention.")

[64] *Federal Communications Commission, Hearings before the Sen. Comm. on Interstate Commerce, United States Senate, 73rd Congress, March 9, 10, 13, 14, and 15, 1934* [hereinafter *First FCC Hearings*], 73d Cong., 32-33 (1934) (testimony of ICC Commissioner McManamy who described the benefit and need of using the Interstate Commerce Act as a foundation for the Communications Act of 1934).

[65] *Federal Communications Commission, Hearings before the H. Comm. on Merchant Marine, Radio, and Fisheries, United States House of Representatives, 73rd Congress, March 15, 16, 19, 20, 1934* [hereinafter *Second FCC Hearings*], 73d Cong., 134-37, 190-97 (1934) (describing the extensive discussion of John Brinkley's license revocation).

powerful agencies to regulate the most important medium of its time: radio. However, to understand why they thought a new regime was necessary, we need to analyze the history of radio regulation. To understand how Congress reached their conclusion in 1934, we must first analyze the intellectual shift between 1904 and 1925 as to the *purpose* of radio regulation.

**Second Premise: Intellectual History of Radio Regulation, Early Legislative Initiatives, and Hoover's Reconception**

At the start, radio was not the entertainment and news behemoth it became by the 1930s. Even if some recognized its potential, it was still seen as a mere utility, rather than an instrument of everyday life.[66] But even as a utility, policymakers were aware that regulation was necessary.[67] As radio evolved into a diverse and burgeoning industry, however, the conceptions as to the purpose of such regulation changed with it. Thus, we need to analyze its shift over time from the start. In doing so, there is pattern that emerges that mirrors how other early administrative agencies evolved, as studied by Thomas McCraw.[68] Namely, the actors who ultimately shifted radio regulation into a strong second regime, had done so by seeking to wield a weak commission for stronger ambitions.

Recognizing the nature of radio, and the inherent need for regulation, the first aspect of this shift to be examined is the changes that occurred in the intellectual history of radio regulation. While there were already three competing groups of radio users–government, commercial, and amateur–since the early years following the Marconi patent in 1896, a

[66] *See generally* Board Report.
[67] *See id.*; *see also* Robinson at 28 ("Spectrum management by government regulation seems to have been a widely accepted concept from the very beginning…")
[68] *See generally* MCCRAW, PROPHETS OF REGULATION.

commonly recognized solution in radio already was federal regulation.[69] This solution stems from the American intellectual history of radio regulation that first began in June 1904, under the presidency of Theodore Roosevelt.[70] Appointing an Interdepartmental Board on Wireless Telegraphy, Roosevelt sought a solution to the interference issues plaguing radio waves.[71] In its final recommendations, the Board recommended that all private stations be licensed by the Department of Commerce and Labor, which would occur in 1912.[72] More importantly, their findings formalized the first conception on the purpose of regulation. That is, regulation of radio would be in furtherance of national security as well as public welfare.[73] There was an awareness of commercial use as well as concerns for regulating to the public welfare, but they were not the primary considerations that persuaded Congress. While this shows that there were concerns for public welfare from the outset, it was not the main concern. More likely, however, is that public welfare, as a term, was closer to the safety and national security concerns that facilitated the 1912 Act.

Nonetheless, this first conception was incorporated into the first regulatory regime by Congress in 1910 and 1912.[74] What these original theorists and lawmakers did not anticipate, however, was the explosive growth of broadcasting and its everyday importance. In their original view, radio was a simple utility in the *means* of commerce, but not interstate commerce itself.[75] It was only after Herbert Hoover took over as the Secretary of Commerce in 1921 that radio

[69] Robinson at 10.
[70] Robinson at 5-7.
[71] *Id.*
[72] Board Report; *see also* Robinson at 11.
[73] *See* Board Report; *see also* Robinson at 27-28 ("Finally, there were matters of longstanding concern such as maritime safety, national defense, monopoly practices, and questionable business practices and stock promotion that many believed needed Congressional attention.")
[74] Wireless Ship Act of 1910, Pub. L. No. 36-262, 36 Stat. 629 (1910); Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).
[75] Radio Act of 1912, 37 Stat. 302.

regulation began to adhere to Progressivist tendencies more blatantly and shift the primary purpose of said regulation to the public benefit. Thus, from Hoover we derive the public interest purpose of radio regulation, which in turn required stronger regulatory authority. This intellectual shift subsequently was what persuaded Congress to imbue a new agency to be founded on a reinterpretation of the Commerce Clause.

In 1910, a national regime began and thus started the era of spectrum management, with the enactment of the Wireless Ship Act.[76] Recognizing the "chaos" that was created by the interference between wireless broadcasters, G. Edward White argues, both the United States Navy and Congress concluded that government regulation was necessary, thus recognizing the Board's 1904 recommendations.[77] At its baseline, the 1910 Act set a requirement for certain passenger ships operating at sea to employ radio operators and be equipped with radios in case of emergency.[78] However, unlike the Radio Act of 1912, it did not create a widespread licensing regime beyond ships. The Wireless Ship Act itself was aimed at safety concerns among passenger vessels and was influenced by RMS *Republic* incident, where the use of radio was attributed to be a decisive factor in averting disaster.[79] Ironically, what convinced Congress that the 1910 Act was incomplete was the type of disaster they sought to avoid. The *Titanic* disaster in 1912 convinced Congress that it could have been mitigated by radio operators, and thus needed a licensing regime to prevent radio interference from hearing the hails of the *Titanic*.[80] Only two years after the 1910 Act and following the *Titanic* disaster, the Radio Act of 1912 was

[76] Wireless Ship Act of 1910, Pub. L. No. 36-262, 36 Stat. 629 (1910).
[77] *See* WHITE at 296.
[78] Wireless Ship Act, Pub. L. No. 36-262, § 3 ("That every such apparatus shall at all times while in use and operation as aforesaid be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce and Labor.")
[79] HUGH RICHARD SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920-1960, 6-8 (2000).
[80] *See, e.g.*, *House Strengthens New Wireless Law*, N.Y. TIMES (June 4, 1912) (noting that legislative support increased in the aftermath of the *Titanic* disaster).

enacted, thus starting the first regulatory regime for widespread public use. In the 1912 Act, Congress had begun the practice of allocating large blocks of frequencies between commercial operators, relegating amateur users to short-wave frequencies, and restricting a group of the spectrum for government use.[81] In order to implement this allocation, Congress had created the first licensing regime in radio.[82] The Department of Labor and Commerce[83] was delegated the licensing authority for these radio transmitting stations.[84] Thus, between 1910 and 1912, the United States had finally begun regulating the radio industry. In this first conception, it is likely that when regulators advocated for a public welfare concern, they were speaking of public safety in avoiding disasters such as the *Titanic*.[85]

It is worth noting that scholars tend to gloss over the 1910 and 1912 Acts in their significance, and in doing so creating practical misunderstandings regarding the nature of radio regulation. At a minimum, scholars simply declare both Acts to be the federal entry into the regulation of the radio industry.[86] Some, such as White, take it further to argue that Congress had "resolved to take ownership of the airways," as well as "create a 'spectrum' for radio transmissions," particularly through the 1912 Act.[87] Even being generous as taking the argument that Congress resolved to "create" a spectrum to better conceptualize the 1912 Act, it would be misleading to argue that Congress took "ownership" of the airwaves. Doing so undermines the practical significance of the licensing regime, in which Congress had taken a resource that belongs to the public at large and regulated it on a national level. Similarly, this significance is

[81] Radio Act of 1912 Pub. L. No. 62-264, § 2, 37 Stat. 302, 303 (1912).
[82] *Id.*
[83] After March 1913, the Department of Labor and Commerce was renamed to the Department of Commerce.
[84] *Id.*
[85] Robinson at 27-28.
[86] *See, e.g.*, WHITE at 295-96; Robinson at 8-9 (calling it the first US domestic law dealing with radio communication).
[87] WHITE at 296.

heightened by the nature of the licensing regime, in the sense that Congress was delegated to an Executive officer the power to directly institute a form of regulation on a resource dedicated to public use.[88] Even if one argues that the 1912 Act established a proprietary interest in the spectrum, subsequent court decisions limited the licensing authority of the Commerce Department in such a way that the government did *not* have full control.[89] If one assumes that the government owns the spectrum, the later decisions of federal courts to disempower the Department of Commerce seems contradictory, as their decisions were in part driven from this public at large ownership.[90] In this publicly owned area, the Department of Commerce was responsible for issues these licenses and empowered to issue fines solely for violations of these allocation arrangements, and nothing further.[91] As such, continuing onward, we need to be wary of certain misconceptions regarding this scholarship. While their conclusions can still be sound, taking their premises as unqualified could lead to a diminished analysis.

Nonetheless, while the Radio Act of 1912 created a licensing regime in anticipation of the new potential of the radio industry, it did not anticipate the way in which commercial broadcasting fundamentally changed in the early 1920s.[92] It was during the first years of the Twenties that the broadcasting of news and entertainment to the general public began to

[88] Robinson at 10 ("The Radio Act of 1912 was the first domestic legislation that dealt with spectrum allocation.")
[89] *See* Zenith, 12 F.2d 614 (N.D. Ill. 1926); Hoover v. Intercity Radio Co., Inc., 286 F. 1003 (D.C. Cir. 1923).
[90] *See generally* Intercity, 286 F. 1003 (holding that the 1912 Act did not provide for licensing decisions for public use at the discretion of an executive officer).
[91] *See generally* Zenith (holding that the 1912 Act did not allow the Department of Commerce to limit the number of licenses issued nor designate frequencies).
[92] 826 S.rp. 772 (May 6, 1926) ("The present law of 1912 was passed by Congress for the purpose of regulating wireless telegraphy. Broadcasting was not only unknown then, but not even contemplated.") *See also* Robinson at 11 ("Spectrum management under the Radio Act of 1912 became increasingly ineffective when radio broadcasting emerged, and it was ultimately superseded by the Radio Act of 1927.")

emerge.[93] As a result, we come across arguably the greatest actor in the development of radio, the pariah of Progressivism, Herbert Hoover. Hoover, more than anyone else, should be considered the main actor in driving home an intellectual shift in radio regulation. As noted, even since Roosevelt's Interdepartmental Board recommendations, there had always been a concern for public welfare lurking in the background. However, neither Congress in 1912 nor the Department of Commerce had explicitly endorsed this as the primary regulatory consideration, until Hoover did so during the Fourth Radio Conference of 1925.[94] While the safety concerns that drove the 1910 and 1912 Acts were likely the definition of public welfare, that isn't the same as the public benefit and public interest standards brought by Hoover. To be fair to the Commerce Department, this lack of a cohesive purpose in regulation was in part due to their lack of enforcement power, but the fact remains that institutionally, public welfare or interest was not endorsed.

In March 1921, Hoover became the Secretary of Commerce, becoming responsible for shaping the rapidly changing radio industry.[95] Recognizing the inadequacy of the existing regime set up by the 1912 Act, namely in being constrained solely in issuing fines for violations, the Commerce Department issued the first regulations specifically addressing infant broadcasting in December 1921.[96] Within the narrow constraints of existing law, these new regulations set aside stations intended for general audience broadcasting, namely "entertainment" and "market and weather reports."[97] This seems minor, and scholars have tended to omit this moment, but doing

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[93] *See* Mark Goodman & Mark Gring, *The Ideological Fight Over Creation of the Federal Radio Commission in 1927*, 26 JOURNALISM HIST. 117, 119 (2000) ("Each year Hoover watched the growth of radio increase chaos on the airwaves.")
[94] Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio, GOV'T PRINTING OFF. (1926), accessible at https://earlyradiohistory.us/1925conf.htm.
[95] Goodman & Gring at 117-19.
[96] *Amendments to Regulations*, RADIO SERV. BULL. (Jan. 3, 1922), accessible at https://babel.hathitrust.org/cgi/pt?id=osu.32435066705633&view=1up&seq=200.
[97] *Id.*

so ignores its significance. This appears to be the first time that a regulatory body would differentiate radio stations based on content *within* commercial usage, rather than previously distinguishing between government, commercial, and amateur radio users. While it doesn't reach the point of weighing them differently as the public interest standard did, it does imply that the Department of Commerce could differentiate a station's content as being "entertainment" versus news. This growing distinction becomes more salient as the number of broadcasting stations grew rapidly,[98] thus expanding the danger of interference.

Because of the inherent challenges in this narrow licensing regime amidst a rapidly growing industry, between 1922 and 1925, Hoover hosted several industry conferences which met to deliberate and propose new regulations.[99] It was during these conferences that Hoover began to plant his Progressivist roots permanently into the history of radio regulation.[100] Most crucially, in an address before the Fourth Annual Radio Conference in 1925, Hoover began by reaffirming that the radio spectrum existed as "a public medium," with its intended use necessary to "be for public benefit."[101] Most importantly, Hoover proclaimed, was that the "dominant element for consideration" in radio was and should always be "the great body of the listening public."[102] While Hoover couched this concern between a cooperative spirit between "the broadcaster and the listener," by stating that their interests were mutual, the ultimate consideration for federal regulation from here on out would be guided and based upon the benefit

[98] Goodman & Gring at 119 ("By January 1926… radio had grown to include 15,111 amateur broadcasters, 1,901 ships, 553 land stations, and 536 broadcasting stations.")
[99] *Id.* at 118; *see also* Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio, GOV'T PRINTING OFF. (1926), accessible at https://earlyradiohistory.us/1925conf.htm.
[100] Goodman & Gring at 118 ("Hoover was a progressive in the sense that he believed in serving the public good, and that the way to do this was by promoting growth and technological development and having experts in the field to make decisions for the uneducated masses of people.")
[101] Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio, at 1.
[102] *Id.*

to the public.[103] It was at this point that the sole regulatory body on radio would shift to something closer to a public interest standard, thus formalizing a new intellectual framework for radio regulation.

Hoover's approach to radio regulation is the fundamental principle that created the public interest standard. Juxtaposed against the Interdepartmental Board, which strove equally for the public welfare in the form of safety and national security concerns, Hoover's approach cemented the principle that any regulation was to be examined *first* in service of the public's benefit, or in other words, the public interest.[104] This public benefit priority drove forward several proposed regulations that the policymakers of the Commerce Department often cooperated with industry leaders to devise. These attempts reflect not only the institutional foothold the public benefit standard had taken in the regulatory regime, but also reflect Hoover's Progressive roots. For example, based on the major concern in making broadcasters economically self-sufficient, Hoover solicited major foundations to subsidize educational programming as well as a 2% sales tax on radio sets to pay for these daily programs.[105] Initiatives such as these show Hoover's regulatory prowess insofar as he adapted a regime with a narrow scope and authority to cooperate with industry leaders in promoting a primary purpose of public benefit. This is not a novel innovation, even mirrors the same way that early regulatory pioneers such as Charles Adams took control of sunshine commissions.[106] In essence, like Adams, Hoover recognized the

[103] *Id.*; *see also* Goodman & Gring at 119 ("As Hoover told participants at the fourth radio conference, 'the greatest public interest must be the deciding factor' in any regulation of radio.")
[104] *See* Goodman & Gring, *The Radio Act of 1927: Progressive Ideology, Epistemology, and Praxis*, 3.3 RHETORIC & PUB. AFF.'S 397, 402-05 (2000).
[105] Sherille Ismail, *Transformative Choices: A Review of 70 Years of FCC Decisions*, 2, FCC STAFF WORKING PAPER (Oct. 2010), accessible at https://permanent.fdlp.gov/gpo114617/DOC-302496A1.pdf.
[106] MCCRAW, at 19-40, 57-65 (describing Adams' role in shaping the sunshine commission in Massachusetts, and in part relating it to the Federal Radio Commission in its role of shaping the formative stages of the railroad and radio industries, respectively).

institutional weakness of the Department of Commerce's licensing regime, but by wielding soft powers, promulgating reports, and cooperating with the industry directly to promulgate new regulations.[107] This also reflects another aspect of his Progressivist ideology. That is, as an industry, self-regulation among broadcasters was the preferred regime rather than direct conflict, with the Commerce Department as a leader.[108]

However, what ultimately undermined this first licensing regime stemmed from the nature of radio and the inevitable issue of interference. Regardless of how many viewpoints Hoover brought to the table, it was only a matter of time that stations would still come into conflict, especially as many were beginning to be centered in the same geographic area.[109] As a leader in the industry, Hoover believed that the Department of Commerce should be able to resolve these disputes, which included the ability to deny or refusal license renewals.[110] The ability to promulgate regulation, Hoover thought, should also include the ability to revoke licenses or restrict certain frequencies.[111] While he was aware of the shaky legal foundations of the 1912 Act, this new public benefit priority, coupled with the Department's attempts to wield its authority with that purpose is what ultimately led to the collapse of the first licensing regime and subsequently, the passage of the Radio Act of 1927.

In two major decisions, one in 1923 and another in 1926, federal courts had stripped the Commerce Department of its power and any legitimacy within the industry.[112] The first was *Intercity* in 1923, stemming from a 1921 act where the Commerce Department tried to refuse a license renewal to Intercity Radio Company, which the latter then appealed in 1923, and the

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[107] *See* Goodman & Gring, *Ideological Fight*.
[108] *Id.*
[109] WHITE at 298 ("Broadcasters dissatisfied with their frequencies or hours of broadcasting became frustrated, and eventually one defied Hoover.")
[110] *Id.* at 118-19.
[111] *Id.*
[112] Zenith, 12 F.2d 614 (N.D. Ill. 1926); Intercity, 286 F. 1003 (D.C. Cir. 1923).

Circuit Court of Appeals for the District of Columbia sided with the appellant.[113] Ruling for Intercity, the Court held that the 1912 Act did not provide for licensing decisions at "the discretion of an executive officer."[114] This was not the end of the story. In 1925, Zenith Radio Corporation established a high-powered station outside Chicago.[115] After they were informed that there might not be an available frequency, it was suggested that Zenith and its competitors limit themselves to one frequency at limited times. What would have been considered another success for self-regulation turned into the ultimate failure. Zenith, for whatever reason, later reneged on this agreement and began constant broadcasting using certain frequencies assigned to Canadian stations by an informal agreement between the US and Canada.[116] The Department of Commerce then stepped in, ordering Zenith to return to their assigned frequencies, which they ignored.[117]

In the 1926 case of *United States v. Zenith Radio Corporation and E. F. McDonald*, filed in Chicago, the Northern District of Illinois ruled that the 1912 Act did not allow the Department of Commerce to limit the number of licenses issued or enforce frequencies.[118] After Hoover sought legal clarification from the Acting Attorney General of the United States, the latter declined to support the Commerce Department.[119] The result was that until Congress passed new legislation, the Department of Commerce could not limit the number of new stations, which were free to operate on any frequency and use any amount of power they wished.[120] Thus, the first licensing regime collapsed, and between 1926 and until the Radio Act of 1927, there was a

[113] Intercity, 286 F. 1003, 1007 (D.C. Cir. 1923)
[114] *Id.* ("The only discretionary act is in selecting a wavelength, within the limitations prescribed in the statute, which, in his judgment, will result in the least possible interference.")
[115] Zenith, 12 F.2d 614, 617 (N.D. Ill. 1926).
[116] *See id.*; *see also* Robinson at 19.
[117] Robinson at 19.
[118] Zenith at 617-18.
[119] Robinson at 19-20.
[120] *Id.*; *see also* Ismail at 2 (noting that after Zenith, Hoover took the decisive step of discontinuing all regulation).

period called "chaos on the airwaves."[121] It was this sense of urgency, coupled with effective lobbying by Herbert Hoover,[122] Congress passed the Radio Act of 1927,[123] thus beginning the second licensing regime and formally adopting the public interest standard.[124] The resulting agency, the Federal Radio Commission, was the direct predecessor to the FCC.[125] In doing so, Congress formally included the public interest standard for both the FRC and FCC, with the latter importing the public interest standard.[126] As a result, Hoover had succeeded in repurposing radio regulation from a multi-pronged approach into a public interest priority that subsumed other concerns such as antitrust.

The history of radio regulation leading up the Radio Act of 1927 can be best characterized as an intellectual shift regarding the *purpose* of regulating the radio industry in the first place. It started with a multi-pronged approach, which above all else focused on encouraging competition in absence of regulation to drive innovation and development while simultaneously focused on the national security and public benefits of this new utility. Government regulation was necessary for the industry in this stage, but the industry itself was fundamentally a tool, not an instrument of daily life. Sparked by safety and national security concerns, Congress first strove to enter the fray with the Wireless Ship Act of 1910 and the Radio Act of 1912. While this evinces an institutional intent to regulate the industry, it encapsulates the conception of radio as a tool. Because of the rapid growth it facilitated, the Radio Act of 1912 amounted to nothing more than a stop-gap measure. As a result, the

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[121] Ismail at 2.
[122] Goodman & Gring, *Ideological Fight* at 118-120.
[123] Radio Act of 1927, Pub.L. No. 69-632, 44 Stat. 1162 (1927).
[124] *See, e.g., id.* at 1163-64 ("[S]uch changes will promote public convenience or interest or will serve public necessity…")
[125] Randolph May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMMC'N'S L. J. 427, 428-29 (2001).
[126] *Id.*; *see, e.g.*, Communications Act of 1934, Pub. L. No. 73-416, § 303, 48 Stat. 1064, 1082 (1934).

Department of Commerce had effectively been relegated to the same pattern of history as the early state railroad commissions analyzed by Thomas McCraw.[127]

Two changes in radio, one external and one internal, shifted the purpose of radio regulation away from regulating a utility toward the regulation of an instrument of interstate commerce. The first was the explosive growth of entertainment and news broadcasting that occurred during the early Twenties. As an external change, the rapid expansion of allocations necessary for these stations required several alterations by the Department of Commerce. This change invariably brought back conflict that undermined the regime. The second was the internal shift that occurred within the Department of Commerce under Herbert Hoover. As a result of the first change, Hoover shifted the priority of the sole licensing authority toward a primary consideration given for the public's benefit. That shift in purpose drove the Department of Commerce toward a cooperative approach to regulation, which is a common characteristic for weak, yet effective commissions.[128] However, the inevitability of interference issues, something unique to radio, drove this commitment to public interest in direct conflict with the inherently weak powers of the 1912 Act. As a result, while Hoover formalized the public interest standard, that same standard effectively rang in the regime's demise.

Because this change in prerogative was incompatible with the regime set up under the Radio Act of 1912, when Hoover attempted to alter the regime internally, it led to judicial backlash. Thus, in the face of Hoover's new purpose being utterly stripped of its authority, the Commerce Department elected to exert pressure on Congress to create a new licensing regime. By returning to a purely self-regulation model without the Department leading the industry, the

[127] *See, e.g.*, MCCRAW at 31-40 (noting how the Massachusetts rail commission pushed for rate regulation within the industry rather than directly imposing upon it).
[128] MCCRAW at 57-60, 61-65 (analyzing weak state commissions and the expansion into federal regulation with similarly weak commissions).

resulting chaos on the airwaves persuaded Congress that the licensing regime needed to be scrapped and a new one made from scratch.[129] In creating a new regime, Congress as an institution had to make the conscious choice of what the purpose and scope of this new regime would be. With Hoover's maneuvering, the purpose became the public interest standard, which was textually cemented.

However, to avoid another regulatory disaster by recreating a weak agency, the drafters of the 1927 Act needed a constitutional basis for its new agency. In much the same way as the regulators of the railroad industry looked back at the sunshine commissions of Massachusetts,[130] Congress looked back to the lessons of the Interstate Commerce Commission. In doing so, they found their constitutional basis in the Commerce Clause. The problem was that this clause had not yet been concretely adapted to the radio industry and had only in the last few decades been firmly established for railways.[131] The 1927 Act's use of the Commerce Clause was eventually affirmed not only as used for a valid interstate good, but later imported into the Communications Act of 1934.

There is another reason as to why Hoover's reconception needed the Commerce Clause. While Congress could pass legislation on matters of national security and antitrust, since Hoover had reconceptualized radio regulation as being based primarily on public interest which subsumed antitrust and national security, that was not constitutionally sufficient for a public interest standard. Because this public interest standard implied a need to differentiate content and thus regulate stations based on that content, it would need the power to impliedly regulate the

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[129] WHITE at 298 ("In abandoning his role as regulator of the radio industry, Hoover had hoped to provoke Congress to act, and in 1927 it did, revising the 1912 act.")
[130] MCCRAW at 57-59, 60-65.
[131] *Federal Communications Commission, Hearings before the Sen. Comm. on Interstate Commerce, United States Senate, 73rd Congress, March 9, 10, 13, 14, and 15, 1934* (*First FCC Hearings*), 73d Cong., 32-33 (1934) (testimony of ICC Commissioner McManamy affirming the FRC use of the ICC as valid to avoid constitutional litigation).

content itself. That regulation, however, would objectively fall into the ambit of what are constitutionally considered police powers.[132] Because the Tenth Amendment of the Constitution states that the powers not explicitly granted to the federal government remained with the states, and that same Constitution did not grant the federal government police powers, Hoover's public interest standard would be unconstitutional as it practically functioned as a police power. However, the Commerce Clause could be the vehicle to do so, and it was only possible through gradual changes occurring at the Supreme Court in reinterpreting what was considered permissible national regulation based on the Commerce Clause. Thus, to understand how the public interest standard came to be constitutionally sound, it is important to understand how the Commerce Clause broadly changed to allow it, and how a narrower exception within that Clause justified it.

**Third Premise: The History of Commerce Clause and Radio Regulation**

The Commerce Clause has always been one of the most potent tools at Congress's disposal to regulate on a national level.[133] At its baseline, it permits Congress to legislate that which affects commerce between the states, foreign nations, and the Native tribes.[134] The limits of such legislation are that it must not be a purely intrastate activity, and thus within the ambit of a State's powers, rather than the federal government.[135] Historically during the *Lochner* Court Era which started in 1897 with the case of *Lochner v. New York*, however, the Supreme Court

[132] Police powers being the ability of states to regulate certain behaviors and instill order to advance the health, morals, safety, and general welfare of their citizens, within their territory. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895).
[133] *See* Gibbons v. Ogden, 22 U.S. 1, 196 (1824) ("This power… is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.")
[134] U.S. CONST. art. I, § 8, cl. 3.
[135] *See* Gibbons v. Ogden, 22 U.S. 1, 2 (1824) ("The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State. But it does not extend to a commerce which is completely internal.")

began embracing old conceptions such as the liberty of contract as superseding in regard to due process rights under the federal Constitution.[136] While *Lochner* was focused on state police powers, according to internalists and externalists alike, the case caused a jurisprudential shift in the Supreme Court.[137] While internalists and externalists debate when the *Lochner* Era ended, the fact remains that temporally, the Radio Act of 1927 and arguably Communications Act of 1934 sit within that Era. Cushman does argue that the case of *Nebbia v. New York*, by removing the perception of Commerce Clause regulation requiring to distinguish between public and private property for permissible legislation, jurisprudentially ended the *Lochner* Era.[138] But it is worth noting that while *Nebbia* precedes the 1934 Communications Act, that Act was drafted before the decision and was not substantially modified considering *Nebbia*. Nonetheless, to understand how the Commerce Clause was used in relation to radio regulation, we need to analyze the cases of the *Lochner* Era in relation to radio and public utilities. First, we will focus on analyzing the broader Commerce Clause cases and how the scope of interstate commerce expanded, allowing radio as a form of commerce to diverge from the Supreme Court. Next, we will turn to the *Adkins v. Children's Hospital* cases to understand the permissibility of police power legislation, and how Congress used the Commerce Clause to effectuate Hoover's reconceptualization of the purpose of radio regulation. Lastly, in the latter section, by analyzing *Nebbia v. New York* (1934) and the 1934 Act, we will see that despite being a watershed moment to internalists such as Cushman,[139] Congress did not follow that case but instead followed the Commerce Clause interpretation of the lower federal courts. In doing so, during the lead-up to the 1927 Act and

[136] 198 U.S. 45, 53 (1903).
[137] *See, e.g.*, CUSHMAN at 6-7; *But see* ; LEUCHTENBURG, "FDR's 'Court-Packing' Plan," in ESSAYS ON THE NEW DEAL, 69-115 (Hollingsworth & Holmes eds., Austin, Tex., 1969).
[138] CUSHMAN at 6-7; *see also* Nebbia v. New York, 291 U.S. 502 (1934).
[139] CUSHMAN at 6-7.

through the 1934 Act, we can conclude that Congress had drafted the first Act to comport with the *Lochner* Era jurisprudence but drafted the 1934 Act in divergence from the Supreme Court.

**Subsection A: Broader Commerce Clause and Radio Divergence**

As noted, the broader Commerce Clause has been used to justify widespread national legislation, well beyond the ambit of radio regulation. However, during the *Lochner* Era and the First New Deal, it was wielded by the Court against Congress to strike down various pieces of legislation regulating on the national level.[140] But, regarding radio, there were shifts over time in the *Lochner* Era on the Commerce Clause that gradually opened the possibility of Congress legislating radio as a *form* of interstate commerce. In doing so, Congress had found an interstate commerce hook to base *some form* of regulation. The form of that regulation itself arose from the narrower conception of permissible regulation with the public utility model. Thus, through a combination of changes as to the form of interstate commerce, and then the permissibility of the form fitting aims, was Congress able to fulfill Hoover's vision despite the inference against national regulation.

For much of the *Lochner* Era, the Supreme Court seemed opposed to allowing Congress to pass national legislation on the grounds of interstate commerce, when the commerce in question was not seen as sufficiently interstate.[141] In these cases, the commerce in question was deemed sufficiently intrastate, and thus presumed to fall under that state's power over their own

[140] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[141] *See, e.g.* CUSHMAN at 38-39; *see also* THOMAS EMERSON, YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER'S MEMOIR OF THE ROOSEVELT YEARS, 23-24 (1991).

affairs, as per the Tenth Amendment.[142] Over time, however, the Supreme Court would gradually expand the category of what was considered interstate commerce. In doing so, it would distinguish between various forms of commerce that had either interstate or intrastate effects. As these various forms emerged, radio would gradually fall under interstate commerce and thus broadly permissible for some form of national legislation.

While the *Lochner* Era started in 1897, the first case on the Commerce Clause that appears most pertinent to radio as a valid form of interstate commerce is *United States v. E.C. Knight*.[143] Predating *Lochner*, in *E.C. Knight*, the Court held 8-1 that the Sherman Act, nationally focused on antitrust, could not suppress a monopoly in the manufacture of a good, as well as its distribution.[144] This holding was predicated on the proposition that the ability to regulate upon manufacturing monopolies should be at the state level, rather than at the national level.[145] There are three obvious distinctions from radio regulation that appear in comparison to *E.C. Knight*. Most obviously, *E.C. Knight* was focused on a different act. Second, radio had not been explicitly distinguished from manufacturing in the Supreme Court by 1927. Third, by the 1934 Act, radio was deemed by nature to extend beyond the boundaries of any single state.[146] Each of these three distinctions, however, were predicated on developments in case law and legislation *after* the holding of *E.C. Knight*. It is still probative that these developments had not been explicitly endorsed by the Supreme Court before 1927.

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[142] *See, e.g.*, Adair v. United States, 208 U.S. 161, 173 (1908) (quoting Mugler v. Kansas 123 U.S. 623 (1887) in determining that federal legislation cannot intrude upon the broadly defined state police powers to regulate the safety, health, morals and general welfare of the public).
[143] 156 U.S. 1 (1895).
[144] *Id.* at 17-18.
[145] *Id.*
[146] *See* Federal Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO), 289 U.S. 266, 279 (1933) ("No state lines divide the radio waves and national regulation is not only appropriate but essential to the efficient use of radio facilities.")

Regarding the first, one could stick to the maxim of 'comparing apples to oranges.' The Sherman Act was neither the Radio nor Communications Act, and vice-versa. However, that ignores the fact that much of the 1927 Act relied on antitrust language and law.[147] In fact, the 1927 Act was in part focused on breaking up the natural monopolization of radio that occurred because of the explosive growth in chain broadcasting that began to out-compete and squash local and amateur stations.[148] After all, being influenced by Hoover's Progressive roots, antitrust was considered to be within the ambit of public benefit.[149] Moreover, for the 1934 Act, by relying on the court-tested ability of the ICC to regulate railways as well as telephone and telegraph, the FCC had an administrative precedent that empowered them to focus on monopolizing in radio.[150] As such, by the time the FCC was established, the focus on regulating monopolies at the national level was considered permissible in communications.

Turning to the second, Supreme Court and lower court decisions following *E.C. Knight* further distinguished other areas from the prohibition against manufacturing monopolies. At the Supreme Court, the Shreveport Rate Case began carving out exceptions to the prohibition on directness from *E.C. Knight* for interstate commerce cases in railroad regulation.[151] Despite being focused on intrastate rates, the ICC was still permitted to regulate rail companies due to a "close and substantial relationship to interstate traffic."[152] Slowly, the Court was differentiating *forms* of commerce, whereby the groups *not* considered manufacturing could still be regulated

[147] *See, e.g.* Radio Act of 1912, Pub. L. No. 62-264, § 13, 37 Stat. 302, 309-10 (1912).
[148] 69 CONG. REC. H776, pt. 3, 2572-73 (daily ed. Jan. 29, 1932).
[149] *See* Goodman & Gring, *Ideological Fight* at 118-120.
[150] *First FCC Hearings*, 32-33 (1934) (testimony of Commissioner McManamy describing the constitutional litigation changes of the Interstate Commerce Commission).
[151] Houston E. & W. Tex. Rwy. Co. v. United States (Shreveport Rate Case), 234 U.S. 342 (1914)
[152] *Id.* at 351.

because of a changing approach that included, for example, effects emanating outside a particular state.[153]

The Shreveport Rate Case was frequently mentioned in the congressional records preceding the Communications Act.[154] The utility of relying on case law in railroad regulation was acceptable to Congress, as legislators viewed sufficient similarity between rail and radio.[155] However, this usefulness is still demurred by the fact that the Supreme Court had neither formally distinguished radio nor had they explicitly endorsed such similarity between rail and radio, even after the 1927 Act. It is important to note that in the drafting of the 1927 Act, legislators viewed the regulatory power as best fit with the Commerce Clause, as radio was "by its very nature" interstate in its effects.[156] The legislators based this on a legislative history of wireless telegraph and imported it to radio.[157] But as the Court did not speak on this matter, the drafters for the 1934 Act turned to lower federal courts to fill this constitutional gap, in order to reaffirm the 1927 Act's use.

In the lower courts, judges began sharpening the distinction of radio and communications technology as a distinct new form of commerce by holding that radio should not be considered purely intrastate. According to Douglas A. Galbi, writing in retrospect on the Commerce Clause in radio regulation, "[b]y 1929, several federal district court decisions had obliterated the

[153] *Id.* at 354-55.
[154] *See, e.g.*, *First FCC Hearings* at 153-55 (Mr. K. F. Clady, Chairman of the Legislative Committee of the National Association of Railroad and Utilities Commissioners: "I speak now, of course, of the Shreveport decision in the railroad situation…")
[155] *See generally*, *First FCC Hearings* (comparing extensively the constitutional basis of the Interstate Commerce Commission as applicable to the regulation of radio).
[156] *See* S. REP. NO. 67-772 (May 6, 1926).
[157] *Id.*

distinction between interstate and intrastate radio."[158] His conclusion was that these decisions "ruled that federal regulation of all radio communications" was constitutional as a form of interstate commerce for the Commerce Clause.[159] For example, in 1927, the Eastern District of Kentucky ruled in *Whitehurst v. Grimes* that "[r]adio communications are all interstate."[160] In support of this proposition, District Judge Andrew M. J. Cochran noted that it was not controlling if a transmission was intended to be intrastate, even if interstate transmission would be seriously affected by communications intended to be purely intrastate.[161] As such, based on the necessity of "a uniform system of regulation and control throughout the United States," the Eastern District of Kentucky ruled that a local ordinance was preempted by Congress.[162]

The Northern District of Illinois went further in the 1929 case of *American Bond & Mortgage Co. v. United States*, by interpreting the 1927 Act as asserting government control "over all channels of radio transmission" rather than "over all channels of interstate and foreign radio transmissions."[163] The basis being that a local station's area of effect would "almost certainly pass beyond the borders of the state" in which it was situated.[164] Because this would possibly cause interference to stations in other states, "unified public control is essential to secure the owners of broadcasting stations an assured channel" without interference "to secure to the listening public satisfactory reception."[165] Thus, radio regulation should be "on the receiving public, whose interest it is the duty of the Government, *parens patriae*, to protect."[166]

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[158] Galbi, *A Desperate Case Under the Commerce Clause: Federal Jurisdiction Over All Radio Use*, 15, FED. COMMC'N'S COMM'N (2002).
[159] *Id.*
[160] Whitehurst v. Grimes, 21 F.2d 787, 787 (E.D. Ky. 1927).
[161] *Id.*
[162] *Id.*
[163] Galbi at 16 (quoting *United States v. American Bond & Mortgage Co.*, 31 F.2d 448, 451 (1929))
[164] United States v. Am. Bond & Mortg. Co., 31 F.2d 448, 453 (1929).
[165] *Id.*
[166] *Id.* at 455.

The Supreme Court had the opportunity to reexamine the above case from the Northern District of Illinois, and thus the opportunity to interpret the 1927 Act, but the Court declined on other grounds. On January 5, 1931, the Supreme Court decided two cases: *American Bond & Mortgage Co. v. United States* and *White v. Johnson*.[167] The former, being a certificate from the Court of Appeals on an appeal from the same case in the Northern District of Illinois but was dismissed on the same grounds as *White v. Johnson*.[168] That latter case was based on five questions that involved seeking Supreme Court clarification of the term "property" and of the license renewal standards of the FRC.[169] Thus, the Supreme Court was faced with an opportunity to clarify the public interest standard or to even strike down the FRC. However, they declined on the grounds that the Court would "not answer questions of objectionable generality."[170] By ignoring the question, by the time Congress began contemplating the Communications Act, the lower courts had sufficiently distinguished radio as another form of commerce that was always considered to be interstate.

Thus, because of the prevailing changes in legislation and case law, *E.C. Knight* is not neatly applicable nor controlling to the Communications Act of 1934. By the time that the drafters of the 1934 Act began their work, they were relying on affirmation of their right to do so. Sure, these decisions were based on the 1927 Act, but that ignores the understanding among scholars that the 1934 Act largely imported the 1927 Act, in some cases being word-for-word.[171] Even if the 1927 Act was in doubt in its use of the Commerce Clause, the federal district courts had affirmed it and by the time of the 1934 Act, it held firm.

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[167] Am. Bond & Mortg. Co. v. United States, 282 U.S. 374 (1931); White v. Johnson, 282 U.S. 367 (1931).
[168] Am. Bond & Mortg. Co. v. United States, 282 U.S. 374, 374 (1931).
[169] White v. Johnson, 282 U.S. 367, 370-71 (1931).
[170] *Id.* at 371.
[171] *See* Thomas W. Hazlett, *Introduction: The Radio Act of 1927 Turns 90*, 56 REV. IND. ORG. 1, 1 (2019) ("The agency was reconstituted as the Federal Communications Commission in the 1934 Communications Act which incorporated, virtually word for word, the 1927 Radio Act.")

Cases after *E.C. Knight* also opened further distinctions that would allow radio regulation to be comfortably situated in the broader Commerce Clause by using railroads as an analogue. The Shreveport Rate Case, or *Houston, East & West Texas Railway Co. v. United States*, set limits on price discrimination that were effectively interstate commerce.[172] The railway company at issue set lower prices for intrastate carriers within the State of Texas, while charging more for carriers either going through or out of the state.[173] Ruling in favor of the ICC, the Court held that the max prices were set to limit the damage that other states could face due to price discrimination.[174] While the FCC was explicitly denied the ability to set rates on private companies during the drafting of the Communications Act,[175] the Congressmen debating the proposed Communications Act consistently referred back to the Shreveport Rate Case for the FCC's authority to regulate.[176] In absence of explicit guidance, it was not this case alone that empowered Congress to interpret radio as interstate commerce. Rather, it was the developments in *Whitehurst* and *American Bond & Mortgage* that reconceptualized radio transmissions as necessarily interstate that made this constitutional. In other words, it was not changes at the Supreme Court level, but in the lower courts veering away from the Supreme Court.

Thus arises the issue we must acknowledge regarding this inference. That is, Congress did not discuss these lower court decisions in the legislative history. If Congress were to rely purely on the Shreveport Rate Case and in absence of the lower courts, they would arguably need to first draw parallels between railroads and airwaves within the statute itself or reflect such

[172] 234 U.S. 342, 353-55 (1914).
[173] Houston E. & W. Tex. Rwy. Co. v. United States (Shreveport Rate Case), 234 U.S. 342, 350-52 (1914).
[174] *Id.*
[175] *First FCC Hearings* at 155 ("Provisions have been put in [the 1934 Act] to prevent that sort of interpretation [allowing the FCC to promulgate rate regulation] at least in the beginning of the operation of the [FCC].")
[176] *See, e.g. First FCC Hearings* at 155-56, 178-80.

intention in the Congressional Record. In the case of railroads, there were known owners (albeit mostly private) and thus could still arguably be grounded in a proprietary interest or at least as an instrumentality of interstate commerce. However, airwaves, which were neither private nor government property, belonged to the public at large.[177] Thus, if Congress does not explicitly mention *American Bond & Mortgage*, they at least impliedly subscribed to the notion that the Government had a *parens patriae* interest in radio regulation.

Again, without explicit reference to the lower court decisions, this is still simply an inferential connection by Congress. Scholars tend to insinuate that the precedents of trial cases set under the Commerce Clause emboldened Congress to use that interpretation for the Communications Act.[178] But this inferential chain is lessened by the fact that while Congress made explicit mention to other lower court decisions as well as agency determinations such as in the case of Dr. Brinkley,[179] it seems odd to omit two specific cases that would make their interpretation strongest.

The last case of the *Lochner* Era that important for the broader Commerce Clause could arguably be construed as directly opposed to the constitutionality of the 1934 Act's Commerce Clause. That would be the Court's decision in *Hammer v. Dagenhart*. In short, *Dagenhart* held that the power to regulate under the Commerce Clause did not include the authority to prohibit.[180] Interestingly, *Dagenhart* predates both the 1927 and 1934 Acts, which were both construed by the FRC and FCC respectively as granting the ability to consider content in their

[177] CHRISTOPHER STERLING & JOHN MICHAEL KITTROSS, STAY TUNED: A HISTORY OF AMERICAN BROADCASTING, 142-44 (Cambridge, Mass. 1978).
[178] WHITE at 296-99 (noting that Congress passed new legislation in order to rectify the chaos).
[179] *See generally* 76 CONG. REC. H776, 3680-82 (daily ed. Feb. 10, 1932) (describing the Brinkley case throughout).
[180] *See* Hammer v. Dagenhart, 247 U.S. 251 (1918)

license renewal determinations. In *Dagenhart*, the Court maintained that despite being goods that entered the stream of commerce and became interstate, the holding would not be construed as affecting the ability to keep certain products outside the stream of commerce.[181] The Court instead returned to the manufacturing distinction.[182]

The important point being that even in factoring in the lower court decisions, *Dagenhart*'s holding that the power to regulate does not include the authority to prohibit likely explains why Congress gave some ambiguity to the public interest standard, even if just an importation of Hoover's conception of regulation. If Congress explicitly permitted, in either the Radio Act or Communications Act, the corresponding agency to regulate based on content, it could run afoul of *Dagenhart*. After all, *Dagenhart* stands for the proposition that the court could look beyond the text of the statute to look at its true purpose.[183] And if the true purpose would be construed to be content regulation, according to *Dagenhart*, the end might not be legitimate, nor within the scope of the Constitution.[184] Thus, instead of directly imbuing the ability to regulate content, Congress allowed the FRC to promulgate rules that allowed them to consider content in license renewal.[185] Even in explicitly referencing not only the revocation of the Brinkley license by the FRC,[186] as well as discussing concerns over free speech in the case of Republicans and Father Coughlin,[187] legislators reaffirmed the public interest standard throughout the Communications Act. As such, I argue that the Communications Act was Congress legislating pursuant to the power to regulate that did not explicitly consider the authority to prohibit, but ancillary to that regulatory power was an implied authority to reject licenses based on content,

[181] *Id.*
[182] *Id.*
[183] *Id.*; *but see* Darby v. Wickard, 317 U.S. 111 (1942) (overruling Hammer v. Dagenhart).
[184] Dagenhart.
[185] *See* Great Lakes Broadcasting v. Fed Radio Comm'n, 37 F.2d 993 (1930).
[186] *See generally* 76 CONG. REC. H776, 3680-82(daily ed. Feb. 10, 1932) (discussing the Brinkley case).

thus prohibiting. This purpose is driven from the need to rectify the failings of the 1912 Act, which did not include any ability to revoke licenses. In this sense, the public interest is furnishing the contours of what the FCC was able to consider when wielding that power.

Thus, when Congress passed the both the 1927 and 1934 Acts, they are relying on lower court decisions that distinguished radio as an interstate form of commerce as a constitutional cushion. The Commerce Clause interpretation of the Communications Act was in a gray area in comparison to the line of cases between *E.C. Knight* and the Shreveport Rate Case and Stream of Commerce Cases. But when taken in conjunction with *Dagenhart*, by examining in conjunction with the lower courts, Congress twice endorsed a new use of the Commerce Clause. The leadup to the Communications Act demonstrates some sense of constitutional ambiguity. However, when turning to the last few cases of the Lochner Era, the 1934 Act is closer to the Court's view of the Commerce Clause but reached that similarity in absence of those rulings.

Because this gap exists, the likely explanation is that Congress was relying on the judiciary's acquiescence to the 1927 Act as well as the view of many scholars between 1927 and 1934 in viewing the Commerce Clause as permissible for radio regulation. My point being that– bear with me on this one–they did not *need* to explicitly reference these judicial decisions. The views these courts were expressing had either already been incorporated into the prevailing view, or more likely reflect it. After all, the committee members responsible for drafting were not rushing this bill to the floor. There are thousands of pages of legislative records that run the gamut in concerns from free speech to applicability of common carriers. Moreover, many of these committee members were well versed in the terminology and the practices of the industry. It thus seems *very* unlikely that Congress was legislating on pure necessity or the absence of any

favorable interpretation in mind. After all, unlike other pieces of legislation such as those establishing the Securities and Exchange Commission, Congress wasn't drafting in response to national crisis. Keep in mind, again, that the 1934 Act was only one of many pieces of legislation from the First 100 Days. As scholars note, legislation during this period and the First New Deal were constitutionally defective in part due to being hastily and sloppily drafted.[188] This is what makes the Communications Act of 1934 so salient: it wasn't hastily or sloppily drafted. The committee responsible was engaged in lengthy discussions on the Act. Moreover, they were not starting from scratch. Instead, they were largely importing the language of the 1927 Act, sometimes word-for-word. After all, they were aware of how the judiciary was responding to the 1927 Act and were aware of how the FRC was regulating broadcasters based on content. Thus, unlike the NIRA, for example, Congress wasn't just jumping into a new field with fresh conceptions. They were operating on years of regulatory history and expertise, listening to the concerns of FRC commissioners, and essentially reaffirming a conception of the Commerce Clause that was already permissible in the eyes of the judicial branch.

This isn't a shot in the dark. After all, the Supreme Court was still striking down other legislation from the First New Deal, such as the NIRA in *Schechter Poultry*.[189] Moreover, two years after the passage of the 1934 Act, the Court was still ruling on the Commerce Clause and Congressional interpretation in *Carter Coal*.[190] But, decided just over a month before *Carter Coal*, the Supreme Court ruled in *Fisher's Blend Station v. Tax Commission of State of Washington*.[191] Mirroring much of the holdings of lower court decisions in previous years, the Supreme Court thus finally adopted the view that radio regulation was permissible under the

[188] Michael E. Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 HISTORIAN 286, 289 (1978).
[189] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[190] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[191] 297 U.S. 650 (1936).

Commerce Clause.[192] According to the Court, "[b]y its very nature broadcasting transcends state lines and is national in its scope and importance."[193] These characteristics, the Court continued, "bring it within the purpose and protection, and subject it to the control, of the commerce clause."[194] Mere weeks before ruling on *Carter Coal*, the Court had given their consent to Congress's interpretation in the Commerce Clause. While not an explicit endorsement of content regulation, this at least settled the constitutionality of the 1934 Act's interpretation of the Commerce Clause.

While *Fisher's Blend* permits the Commerce Clause for radio regulation, *Carter Coal* declines the use of a public interest standard. However, it is important to note that one year prior to the 1934 Act, the Supreme Court did hold that the public interest standard for the FRC was sufficiently intelligible to permit a valid delegation by Congress.[195] While the later case of *NBC v. United States* endorsed the public interest standard in 1943 for the FCC,[196] at this point the 1934 Act survived in part by incorporating the same standard from the FRC that *did* survive the Court. At the least, we can draw one conclusion that Congress had revised the Commerce Clause to apply to radio by relying on lower court precedent in determining radio as an interstate good, and this principle was affirmed in passing by the Supreme Court. In combination with the intellectual shifts toward public interest, coupled with these changes in the Commerce Clause, a new way of looking at the 1934 Act arises. That is, it is the product of an intellectual change in radio regulation, as well as a constitutional reinterpretation that occurs in the near absence of the Supreme Court as an institutional actor.

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[192] *Id.*
[193] *Id.*
[194] *Id.* at 297.
[195] *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO), 289 U.S. 266 (1933).
[196] *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

Thus, at the broader level of viewing the Commerce Clause, radio was a valid interstate good for federal legislation. However, relying solely on the status as an interstate good does not answer Hoover's need for nationally regulating based on the public interest standard. This broad view would allow an agency to issue licenses, but not to regulate the licensees directly and distinguish their claims based on content. Even if an interstate good, it does not necessarily follow that Congress could regulate the content, as it would still fall under the state police power to regulate morals, which is barred to the federal government via the Tenth Amendment. As such, within the Commerce Clause, there were narrower constraints that had opened before 1927. Within those narrow constraints, if Congress could meet them, then an agency regulating on public interest could still be upheld. As such, to effectuate Hoover's vision, the drafters would turn to using the public utility model as their constitutional crux.

**Subsection B: Police Powers, Congressional Maneuvering, and the Relative Irrelevance of *Nebbia v. New York***

While a door opened for different forms of commerce to be conceived of as interstate despite being aimed at an intrastate level, Congress still had to comport with a narrower requirement of the Commerce Clause during the *Lochner* Era. To be a permissible national regulation based on the Commerce Clause, there was the requirement that it not intrude on the police powers of the States. Police powers being the capacity of the States to regulate behavior and enforce order in their own sovereignty, based on the health, safety, morals, and general welfare of the state citizens.[197] According to the Tenth Amendment, that which is not explicitly delegated to the federal government is thus reserved for the States.[198] As the Constitution does

[197] *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895).
[198] U.S. CONST. amend. X.

not afford general police powers to the federal government, thus the Tenth Amendment bars federal regulation on these grounds.[199] The *Lochner* Court was particularly opposed to national legislation that sought to regulate state citizens. However, the Commerce Clause is an explicit delegation to the federal government, and thus was consistently wielded by Congress when it sought to regulate on a national level. Because of the nature of radio, when Hoover reconceptualized the purpose of radio regulation, he had made clear to Congress that any regulatory agency *must* have a public interest standard that implied the power to regulate based on content.[200] As this invariably consists of regulating morals and general welfare, it would objectively be considered falling under state police powers. However, the line of cases following *Adkins v. Children's Hospital* in 1921 provided Congress with the new opportunity to fulfill Hoover's vision.

For much of the *Lochner* Era, permissible national regulation required that it first pass the public/private distinction. It stemmed from the nature of public regulation in the Nineteenth century, which William J. Novak states was considered the power of the state to restrict individual liberty and property for the common welfare.[201] Inherent in this notion is that it lies with the States, and not the national government. As Cushman notes, the public/private distinction was one of the fundamental concepts of Nineteenth and early Twentieth century American law.[202]As Cushman articulates, it was rooted in an old aspiration of American government to faction-free politics and revulsion against special privilege.[203] In this conception, there was a principle of neutrality that dictated that legislatures ought not to play favorites.[204]

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[199] *See, e.g.*, E.C. Knight, 156 U.S. 1, 11 (1895).
[200] *See* Goodman & Gring, *Ideological Fight*, at 117-121.
[201] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA, 2 (Chapel Hill, 1996).
[202] CUSHMAN at 47.
[203] *Id.*
[204] *Id.*

Legitimate statutes were seen as meeting this principle and needed instead to be enacted for genuinely public purposes.[205] As such, because the *Lochner* Court imports this broad conception, Cushman notes that there was general aversion in the Court against legislation targeting private property and activities, more than public property and activities.[206]

Private property and activities were generally outside the ambit of regulation, while public property and activities *could* be regulated. However, as Cushman highlights, as far back as 1877 with the case of *Munn v. Illinois*, the Supreme Court would consider property as being "clothed with a public interest" when it is used in such manner that makes it "of public consequence, and affect a community at large."[207] Thus, through this line of Court jurisprudence and through *Adkins*, in the case of private businesses, if the targeted business was affected with a public interest, it was providing a good or service so important as to be crucial to the public.[208] Especially at the national level, the property or activity could be so "clothed" with that public interest that it can be considered practically public.[209] In such cases, if the targeted business now considered public was effective interstate in its actions or behavior, it could be considered to fall under the Commerce Clause and thus permissible for national regulation so long as it was for a permissible reason.[210] Reaching that public interest has been met with varying interpretations, but for the purposes of radio regulation, the most dispositive in determining whether it affected the public interest was whether it could be considered a "public utility," or a good or service used so extensively by the general public as to be essentially indispensable.[211] When Congress was

[205] *Id.*
[206] *Id.* at 48.
[207] *See* Munn v. Illinois, 94 U.S. 113, 126 (1876).
[208] CUSHMAN at 67-69.
[209] *Id.* at 70-71 (referencing Chas. Wolff Packing Co. v. Court of Ind. Relations (Wolff Packing I), 262 U.S. 522, 534 (1923)).
[210] CUSHMAN at 71.
[211] *Id.* at 69-70; *see also* Wolff Packing I, at 535.

trying to decide on a model to base radio regulation, they clearly used the ICC model and used railroads as an analogue to radio. In doing so, Congressmen would note the Shreveport Rate Case, which had allowed the ICC to act as a national regulator because it was directed at businesses affected with a public interest, derived from railroads being public utilities.[212] Thus, when seeking to fulfill Hoover's vision, they determined that they would draft the Radio Act of 1927 in the same way, by arguing that radio was considered a public utility.

As such, when Congress drafted the Radio Act of 1927, they decided this new regime should be conceived as a "public utility" model, in which stations were public trustees. This was not an accident. Rather, it indicates that Congress was trying to comport with the Supreme Court's conceptions of permissible national legislation on the Commerce Clause. Using Barry Cushman's explanation of Commerce Clause jurisprudence leading up to *Nebbia v. New York*, the 1927 Act is formulated in such a way that fits around the Court's jurisprudence. Cushman starts with arguing that after the case of *Adkins v. Children's Hospital* in 1923, the only available route to sustaining legislation based on general police powers was for legislators to argue that the business in question was affected with a public interest.[213] Only in 1934, after *New York v. Nebbia*, was this public/private distinction dropped from the Commerce Clause.[214] So, in drafting the 1927 Act, Congress needed to base their new national police power that indirectly regulates content based on a Commerce Clause using this public/private distinction. By explicitly barring private ownership, the 1927 Act would turn to the public use grounds.[215] To be applied to businesses, including broadcasters, the targeted businesses had to be affected with a public

[212] *See, e.g. First FCC Hearings* at 155-56, 178-80 (drawing multiple references to the Shreveport Rate Case, 234 U.S. 342 (1914)).
[213] CUSHMAN at 72; *see also* Adkins v. Children's Hosp., 261 U.S. 525 (1923).
[214] CUSHMAN at 7, 79-82; *see also* Nebbia v. New York, 291 U.S. 502 (1934).
[215] *See* Robinson at 32 (quoting Mr. Dill regarding the Senate bill: "This bill is important because it shows that the purpose of Congress from the beginning of consideration of legislation concerning broadcasting was to prevent private ownership of wavelengths or vested rights of any kind in the use of radio transmitting apparatus.")

interest. In turn, to be affected with a public interest, those businesses had to be functioning within one of the three categories that Cushman notes in *Wolff Packing*, such as a public utility.[216]

Congress, persuaded by Hoover in seeing the need for a radio agency to regulate content through the public interest, realized it needed a strong constitutional grounding. By looking at other regulatory bodies such as the ICC, the strongest constitutional grounding would be the Commerce Clause. Congress explicitly turned to the ICC as the best model for permissible regulation in seeing railroads as public utilities.[217] Thus, by using the ICC model, Congress drafted the Radio Act of 1927 with a conception that made broadcasting and the radio industry as "public trustees" that were always beholden to the people's interests.[218] This way, broadcasters and radio stations would always be considered businesses affected with a public interest. In this conception, Congress's use of the public utility model makes far more sense. The public utility model met two requirements in creating a new agency. It addressed Hoover's conception as the purpose of radio being for the public interest, while giving that agency a strong constitutional basis.

After all, the Radio Act of 1927, by using this model seems to comport with cases after 1927 in the *Adkins* line, as noted by Cushman. Most pertinent was the aforementioned 1923 case of *Wolff Packing Co. v. Court of Industrial Relations*, which Cushman notes had distinguished businesses affected with a public interest as falling into three categories.[219] The most important for radio was the first, which were those that caried on under the authority of a public grant of

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[216] CUSHMAN at 69-72; *see also* Chas. Wolff Packing Co. v. Court of Ind. Relations (Wolff Packing I), 262 U.S. 522 (1923).
[217] *First FCC Hearings*, 32-33 (1934) (noting the testimony of ICC Commissioner McManamy seeing the use of the ICC and the Interstate Commerce Act as a valid constitutional basis for the FCC).
[218] Krasnow & Goodman at 610.
[219] CUSHMAN at 69-72; *see also* Chas. Wolff Packing Co. v. Court of Ind. Relations (Wolff Packing I), 262 U.S. 522, 535 (1923).

privileges which either expressly or impliedly imposed the affirmative duty of rendering a public service demanded by any member of the public.[220] Chief Justice Taft, writing for a unanimous Court, stated that among this first category were railroads, other common carriers, and public utilities.[221] Because radio regulation relied on railroad regulation, with both defined as regulation of public utilities, it demonstrates how the 1927 Act navigated Court jurisprudence. It is for this reason that Congress grounded the Radio Act of 1927 as a regulation on public utilities.

Cushman actually helps distinguish why it was likely the Court did not intrude upon the Radio Act of 1927. When analyzing the voting patterns between *Wolff Packing I* and *Wolff Packing II*, he points to the fact that so many supporters of minimum wage legislation *opposed* wage legislation designed to require business continuity.[222] He argues that this suggests the Justices believed there was a stronger public interest rationale that supported the former than the latter.[223] Radio, with its bipartisan support both inside and outside the federal government would undoubtedly suggest that same stronger public interest rationale. The problem being that, according to Cushman, *Adkins* had foreclosed any rationale based on health and morals, as any such regulation violated the principle of neutrality.[224] Thus, the Radio Act of 1927 undermines Cushman's argument but also reflects an unwillingness by the Court in striking down popular legislation. Albeit an implied power, regulating content was still traditionally a state police power. This demonstrates Congressional maneuvering, as drafters continued to follow the *Lochner* jurisprudence justified by lower courts in using the public utility model that persisted after *Adkins*, to justify this intrusion on traditional state police powers. In doing so, it undermines

[220] CUSHMAN at 71; *Wolff Packing I* at 534-35.
[221] Wolff Packing I at 535.
[222] CUSHMAN at 72.
[223] *Id.*
[224] *Id.* at 72-73.

Cushman's focus on the Supreme Court, as the ultimate expositor of constitutional interpretation, because this legislative maneuvering occurs in absence of the Court.

Cushman also notes the subsequent cases of *Ribnik v. McBride* in 1928 and *Tagg Bros. & Moorehead v. United States* in 1930, which support his proposition that the *Adkins* line remained firm for permissible national legislation until *Nebbia v. New York*.[225] In *Ribnik*, because the business in question was not affected with a public interest, it was thus beyond legislative power.[226] In *Tagg Bros*, the Packers and Stockyards Act of 1921 survived assault as the specific regulation targeted businesses with a public interest and the regulation itself was reasonably related to the protection of a legitimate public interest.[227] Because the Communications Act of 1934 imports from the public trustee model, it *should* rely on the *Adkins* line. After all, it would be hard to argue, based on the Radio Act of 1927, this national regulatory regime was targeting businesses affected with a public interest and was also reasonably related to the protection of the legitimate public interest conceptualized by Hoover. However, *Nebbia v. New York* was decided months prior to the 1934 Act.[228] While it was primarily a state case, Cushman notes its implications for the wider *Lochner* Era jurisprudence.[229] As Cushman argues, *Nebbia* dropped the public/private distinction altogether while needing to embrace a stream of commerce justification when reasonably related to a legitimate public interest.[230] But the 1934 Act was

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[225] CUSHMAN at 73-75; *see also* Ribnik v. McBride, 277 U.S. 350 (1928); Tagg Bros. & Moorehead v. United States, 280 U.S. 420 (1930).
[226] CUSHMAN at 73; Ribnik, 277 U.S. 350, 359-60 (1928).
[227] CUSHMAN at 73-74; Tagg Bros., 280 U.S. 420, 438-39 (1930).
[228] *Nebbia* was handed down on March 5, 1934, while the Communications Act of 1934 was signed into law on June 19, 1934.
[229] CUSHMAN at 7 ("When the Court abandoned the old public/private distinction in *Nebbia*, then, it pulled a particularly important thread from [their interwoven] fabric [of constitutional doctrine]… it was only a matter of time before that fabric would begin to unravel.")
[230] *Id.* at 154-55 ("With *Nebbia*, however, the restraint that the public/private distinction had imposed upon the current of commerce image was removed. Because *Nebbia* threw the class of businesses affected with a public internet wide open, the internal logic of the current of commerce doctrine impelled the Court toward a recognition of a broader conception of the current of commerce.")

already in years of drafting and makes no reference to the decision, and no significant amendments were made to the Act that reflect this jurisprudential shift.[231]

Thus, while Cushman focuses in on *Nebbia*, it isn't clearly relevant to the drafting of the 1934 Act and Congress's constitutional interpretations. Even as *Nebbia* drops the public/private distinction and instead embraces the view that a good can be considered interstate commerce if it enters the "stream of commerce," in other words flowing between states,[232] it does not change the circumstances of the 1934 Act. It was relying on the interpretation of the ICC and the 1927 Act, not *Nebbia*. Furthermore, as *Nelson Bros* was decided a year prior in 1933, the Supreme Court had already considered radio to be naturally interstate, thus circumventing the stream of commerce discussion altogether.[233] While temporally *Nebbia* precedes the 1934 Act's enactment, the drafting of the 1934 Act well precedes *Nebbia*, and was effectuated without regard to it. Moreover, while Cushman does note that *Nebbia* supports the proposition that if there was a federal power to regulate, that federal regulatory power is commensurate with the state's police power,[234] it is crucial to note that by 1934, radio regulation was already considered well outside the state police powers.[235] Thus, because the 1934 Act relies largely on importing the 1927 Act, radio regulation by the time *Nebbia* was decided appears to predate crucial developments of that case considered by scholars such as Cushman. But because the opportunity had opened for

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[231] *See* 76 CONG. REC. H776, 3680-3704 (daily ed. Feb. 10, 1932) (supporting the proposition that the drafting was occurring as far back as 1932).
[232] CUSHMAN at 146-52, 154-55 (discussing the jurisprudential roots of the stream of commerce doctrine within the Supreme Court and the previously-mentioned implications of *Nebbia* lifting the public/private distinction).
[233] Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO), 289 U.S. 266, 285 (1933) ("The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between states is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities.")
[234] Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine From* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 138-39 (1992) (quoting Carter Coal); *see also* Carter v. Carter Coal, 298 U.S. 238, 308 (1936) (citing Nebbia v. New York, 291 U.S. 502 (1934)) ("We are not at liberty to deny to Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce.")
[235] *See* Nelson Bros., 289 U.S. 266, 285 (1933).

Congress to regulate radio on public utility grounds, all three premises finally converge in Congress, evincing their mutual necessity.

**Convergence: The Congressional Records and Mutual Necessity**

Looking at the drafting of both the 1927 Act and the 1934 Act, we can see how Congressmen from across the spectrum both embraced the public interest standard as regulatory priority and in using a new interpretation of the Commerce Clause to effectuate that purpose. While lawmakers seemed to be arguing every aspect of the First New Deal, in 1934 they were reaffirming an Act predicated on a model that technically complied the Court's jurisprudence, but in practice implemented a vision that both parties knew *implied* content regulation that would traditionally be seen as within the state police powers. To effectuate Hoover's public interest vision, the 1927 Act needed to use the Commerce Clause as their only effective vehicle to empower the FRC, but in doing so, maneuvered to use the Clause in a way that circumvented state police powers and used the *Lochner* Era jurisprudence to justify it. Then, when the 1934 Act began its drafting, it was aware of the content regulation this standard entailed yet reaffirmed it in creating a less-accountable agency to enforce that same standard. As a result, because of well-understood implied content regulations, the 1934 Act should objectively run afoul of the Tenth Amendment, but instead uses an exception carved out by the *Lochner* Court to still circle back and meet the standards of a Court so deeply entrenched in traditional constitutional obligations.

In the drafting of the 1927 Act, we begin to see how legislators embraced Hoover's reconception of purpose while importing the public utility exception as a constitutional crux. As Krasnow and Goodman note, while searching for the public interest standard's definition,

Congress intended the Radio Act of 1927 "to delegate broad regulatory powers to the FRC," and in doing so limited the agency's discretion "mainly by the requirement that its actions serve the public interest."[236] In order to comport between this new purpose and the conception of radio as a public utility, Congress in drafting the 1927 "employed a utility regulation model."[237] This model, reflecting Hoover's Progressivist view of a regulatory agency in radio, "broadcasters were deemed 'public trustees' who were 'privileged' to use a scarce public resource."[238] Accordingly for the FRC, under this conception, despite the "conscience and judgment of a station's management [being] necessarily personal," the "station itself must be operated as if owned by the public."[239] Thus, reflecting Hoover, the "standing of every station" must be "determined by [the] conception" that it was "as if people of a community should own a station and turn it over to the best man" with the purpose that they "manage [their] station in" the public's interest.[240] To be sure, in a Debate to Amend the Radio Act of 1927, Senator White of Maine does suggest that one purpose of the 1927 Act "was to preserve competition in the communication field," however this is qualified as one "of the underlying purposes" subordinate to the public interest purpose.[241]

Congress and the 1927 Act drafters should not be viewed as oblivious to the fact that this public utility model needed be wielded with a public interest standard, nor that such a standard would invariably lead to some regulation based on content. In a Conference Report dated January 29, 1927, it notes that because of the growing demand of a limited number of stations in

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[236] Krasnow & Goodman at 610.
[237] *Id.*
[238] *Id.*
[239] *Id.* (quoting *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMMC'N'S BUS. J. 5, 14 (1950) (quoting *Schaeffer Radio Co.*, an unpublished 1930 FRC decision)).
[240] *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 FED. COMMC'N'S BUS. J. 5, 14 (1950).
[241] *To Amend the Radio Act of 1927, Hearings before the Sen. Comm. on Interstate Commerce, United States Senate, 72nd Congress, First Session, March 11 and 12, 1932* [hereinafter *First Debate*], 72d Cong., 16 (1932).

a given areas as well as recognizing that such limitation "would be based on the service needs of the community," it notes that as a public utility, the FRC would need to be "generally limited by the rule of public convenience and necessity."[242] In that Report, it also notes that there is a danger in "recognizing monopoly and implied censorship."[243] However, because the public interest of broadcasting was "rapidly widening," pure entertainment and amusement were no longer the "principal purposes."[244] Rather, Congress recognized that radio could be wielded by certain stations to disseminate harmful misinformation that would require moderation by the FRC.[245] But, by looking at the Transportation Act of 1920's legislative history, we can see how even in its closest analogue in railroads, a "public interest is not a selfish interest."[246] Instead, when Congress first used the public interest standard in that 1920 Act, it understood that the public interest "is the common interest," and that as long as the federal government stuck to it, an agency was "doing the things which are for the common benefit."[247] In such cases, "the selfish interest [would] have to give way," or else the regulatory authority would be dead in that area.[248]

While a different Act and a different Congress by composition, the implication taken into conjunction with the Conference Report was the same. In areas of regulating public utilities, these implied dangers were worthwhile sacrifices for the greater good. As a result, a public interest standard required empowerment by the Commerce Clause, but the public necessity and convenience of that same standard would still be the limiting principle in permissibly guiding the agency. After all, within the 1927 Act, Congress made sure to explicitly limit the FRC's content

[242] 69 CONG. REC. H776, pt. 3, 2572-73 (daily ed. Jan. 29, 1932).
[243] *Id.*
[244] *Id.* at 2573.
[245] *Second FCC Hearings*, 73d Cong., 134-37, 190-92 (1934 (recording a conversation between Mr. Sirovich and FRC Commissioner Sykes discussing the use of the public interest standard and the number of licenses denied renewal or revoked for violations).
[246] *See, e.g.*, 59 CONG. REC. S152, pt. 1, (daily ed. Dec. 6, 1919).
[247] *See, e.g.* 59 CONG. REC. S152, pt. 1 (daily ed. Dec. 8, 1919).
[248] *Id.*

regulation in egregious cases with an explicit prohibition against heavy-handed censorship encapsulated later in the 1934 Act.[249] The point remains, however, that in order effectuate that public interest, legislators saw it as a requirement that they conceptualize radio as a public utility. It is through this model that legislators could delegate an implied authority to regulate content that traditionally fell under the state police powers.

There is nothing to suggest that the FRC intended to wield this power too broadly and thus go outside the ambit of regulating a public utility. Between the 1927 Act and the 1934 Act, there were three cases before lower federal courts where the FRC's implied content regulation was subjected to judicial review.[250] After the passage of the 1927 Act, the lower federal courts affirmed this new public interest standard under the public utility model, and in doing so, recognized that the public utility model was appropriate even for a traditionally state police power. In *Great Lakes Broadcasting*, the FRC, in assessing competing claims among three Chicago stations, advanced guidelines as a gauge for assessing a licensee's performance under the public interest.[251] In particular, there were four criteria, with the first being that a station should meet the "tastes, needs, and desires" of *all* substantial groups among the listening public, in some fair proportion by a well-rounded program including entertainment consisted of both classical and "lighter grades" of music, religion, education, instruction, important public events and discussion of public questions, weather, market reports, news, and "matters of interest to all

[249] Communications Act of 1934, Pub. L. No. 73-416, § 326, 48 Stat. 1064, 1091 ("Nothing in this Act shall be understood or construed to give the [FCC] the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the [FCC] which shall interfere with the right of free speech by any means of radio communication.")
[250] Great Lakes Broadcasting v. Fed. Radio Comm'n, 37 F.2d 993 (1930); KFKB Broadcasting Ass'n v. Fed. Radio Comm'n (Brinkley Case), 47 F.2d 670 (D.C. Cir. 1931); Trinity Methodist Ch., S. v. Fed. Radio Comm'n (Bob Shuler Case), 62 F.2d 850 (D.C. Cir. 1932).
[251] Krasnow & Goodman at 611-12; *see generally* Great Lakes Broadcasting v. Fed. Radio Comm'n, 37 F.2d 993 (1930).

members of the family to find a place."[252] Under this first criteria, we see that the FRC had evolved beyond the Commerce Department's initial regulations promulgated in 1921.[253] Reflecting their new constitutional authority, the FRC felt comfortable now in distinguishing *beyond* just broadcasting and non-broadcasting, but in distinguishing between the content of broadcasters themselves.

Moreover, in the second criterion, the FRC would explicitly consider programming at renewal time in determining whether to renew a station's license if they had met these public interest requirements.[254] At no point does it primarily reflect the old national security or safety purposes of radio that would justify a narrower national regulatory regime seen from the Radio Act of 1912, but rather fully reflects the priority of public interest through the public utility model. The two last criteria support this, as in the third, when two stations applied for the same frequency, the station with the longest record of continuous service and compliance with the public interest would have an advantage, but when there was a substantial difference between their programming service, the FRC had the discretion of determining "the station with superior programming" who would have the ultimate advantage.[255] Lastly, the FRC promulgated the final criterion stating that there was no room for the operation of "propaganda stations."[256] These criteria were affirmed by the federal court in *Great Lakes Broadcasting*, and the FRC even wielded it against John Brinkley for medical misinformation and Reverend Bob Shuler for his antisemitism.[257] Moreover, Representative Ewin L. Davis noted in 1932, during a proposal to

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[252] Krasnow & Goodman at 611-12; *see* Great Lakes Broadcasting Company, 3 F.R.C. 32 (1929).
[253] *Amendments to Regulations*, RADIO SERV. BULL. (Jan. 3, 1922), accessible at https://babel.hathitrust.org/cgi/pt?id=osu.32435066705633&view=1up&seq=200.
[254] *See* Great Lakes Broadcasting Company, 3 F.R.C. 32, 33 (1929).
[255] *Id.*
[256] *Id.*
[257] Great Lakes Broadcasting v. Fed. Radio Comm'n, 37 F.2d 993 (1930); KFKB Broadcasting Ass'n v. Fed. Radio Comm'n (Brinkley Case), 47 F.2d 670 (D.C. Cir. 1931); Trinity Methodist Ch., S. v. Fed. Radio Comm'n (Bob Shuler Case), 62 F.2d 850 (D.C. Cir. 1932).

amend the 1927 Act, that the refusal to grant renewal of licences was "perhaps because the station was broadcasting speeches or material" that the FRC "conceived to be distasteful to a large portion of the public."[258]

Because the drafters of the 1934 Act explicitly reference these cases in the legislative debates, it demonstrates that Congress was not only aware of the public interest standard being wielded against content, but also the FRC doing so under the authority of their Commerce Clause exception for public utilities that circumvented the prohibition in interfering with traditional state police powers to regulate morals and the public welfare. As a result, it becomes clear that by reaffirming this delegation, Congress endorsed this new conception of permissible regulatory authority and interpretation through that public utility model. Those Congressmen in the 1934 Act who opposed the wielding of this standard against certain content, even for political reasons, did not mount serious challenges or propose amendments curtailing the FCC's delegation. True, Republican Congressmen Charles V. Truax of Ohio and Harold C. McGugin of Kansas offered individual amendments concerning the alleged censorship of the incendiary Father Charles E. Coughlin and fellow Republicans such as former Senator James A. Reed, allegedly on the basis of their political ideologies.[259] However, neither of these amendments made it out of committee nor enjoyed significant support *within their own parties*.[260] As such, it would be misleading to conclude that these proposals were affirmatively in good-faith or more than mere political posturing, but because the GOP did not broadly embrace these challenges, they reflect bipartisan support for this regulatory regime.

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[258] 76 CONG. REC. H776, 3682 (daily ed. Feb. 10, 1932).
[259] 78 CONG. REC., pt. 10, 10304-31 (daily ed. June 2, 1932) (noting the failure of the amendments proposed by Truax and McGugin in response to perceived censorship).
[260] Unfortunately, a voting breakdown does not seem to exist, but by virtue of the proposed bill being supported by Democrats and Republicans without significant hindrance is dispositive of this fact.

Many scholars tend to overlook or mention in passing why the FRC was eventually superseded by the FCC.[261] However, this is a blatant misstep. Understanding why helps reiterate Congress's content with the public interest standard and their utilization of the Commerce Clause exception for public utilities. In short, the principal reason for creating the FCC was to make it more politically insulated than the FRC, and to rectify the fact that Congress initially created the FRC as a temporary agency that was supposed to last for one year.[262] Congress extended that mandate indefinitely, but there were still concerns that the FRC's political accountability to the Executive Branch undermined its purpose of regulating in the objective public interest.[263] By noting these facts, coupled with the bipartisan nature of the 1934 Act, one sees comfort on both sides of the aisle in further empowering an agency for radio regulation in this new content-driven purpose. Even if an implied authority, it was directly referenced and well-known to Congress, the industry, and even the judiciary in upholding it. While a few amendments to the 1927 Act were proposed, they did not rectify the concerns that radio regulation was not independent *enough*. As such, industry leaders, lobbyists, and policymakers alike saw necessity in establishing a new independent agency, which occurred with FDR's support.

Before Congress began drafting the 1934 Act, we can see that the FRC was seen as insufficient.[264] Industry leaders, lobbyists, and policymakers, with Roosevelt's support to propose a new legislative measure, strove to establish an independent agency.[265] After some

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[261] G. Edward White, for example, in his chapter "The Laws of Mass Media" of LAW IN AMERICAN HISTORY, VOLUME 3, explains the lead-up to the 1927 Act, as well as the Brinkley and Shuler cases, but then jumps straight over the 1934 Act to the case of *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).
[262] *See* Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).
[263] *See* L. G. Caldwell, *Three Years of the Federal Radio Commission*, 270-73 RADIO BROAD. (Mar. 1930), accessible at https://archive.org/details/radiobroadcast16gardrich/page/271/mode/1up?view=theater.
[264] *See, e.g.*, *id.*
[265] Franklin Delano Roosevelt, *Message to Congress Recommending the Creation of the Federal Communications Commission*, (Feb. 26, 1934), accessible at https://www.presidency.ucsb.edu/documents/message-congress-

time, in a message to Congress dated February 26, 1934, President Roosevelt formally proposed the Communications Act of 1934.[266] Frankly, given how several amendments were being proposed, this was not the key moment but rather a formality.

In the drafting of the 1934 Act, legislators had not only fully dedicated to reaffirming the public interest standard but had fully embraced the public utility exception to uphold the national regulation. Regarding the public interest standard, it is important to note that while some Republican congressmen reference individuals negatively affected by the FRC's regulations, only on a few occasions does the public interest standard explicitly appear in the congressional record. In most cases, such as the conversation between Mr. Bellows and Senator Wheeler of Montana, there is an acknowledgement that what is determined to be serving the public interest "might mean many different things in the minds of many different people."[267] However, many of these concerns were largely tempered by the multi-membered nature of the FCC and the requisite expertise within it. Thus, this reflects that while some Congressmen were aware of the content regulation implications being given significant delegation to an independent agency, they still saw it as necessary and permissible through the public utility model. This occurs even as some Congressmen questioned the *necessity*, but not the permissibility, of leaving radio regulation in the hands of the national government rather than the States.[268] As such, while some in 1934 were eagerly attacking New Deal legislation on constitutional grounds, the main opposition with who Cushman and Bernstein call the anti-New Dealers were not seriously attacking the 1934 Act on those same grounds.

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recommending-creation-the-federal-communications-commission (evincing the broad intent to establish a new independent agency).

[266] *Id.*

[267] *To Amend the Radio Act of 1927, Hearings before the Sen. Comm. on Interstate Commerce, United States Senate, 72nd Congress, Second Session, December 22 and 23, 1932* [hereinafter *Second Debate*], 72d Cong., 6 (1932).

[268] *First FCC Hearings*, 153-55 (1934) (noting Mr. Clady's discussion of the rights of states versus a federal agency in regulating communications).

That is not to say that there was no opposition whatsoever to the proposed FCC. In a letter from the Chamber of Commerce Board of Directors, by transferring powers to the FCC from the ICC and FRC, the FCC would "nevertheless be substantially expanded in ways not required by the public interest and likely to interfere with continued efficiency of communications services."[269] However, this external concern seems to be outweighed by the internal discussions of the Congressmen. As was noted during a House debate to amend the proposed 1934 Act, Representative Schuyler Merritt of Connecticut noted that the FCC was not given any more power over regulation of radio than the FRC.[270] Inherent in this opposition is the fact that they were not taking issue with the constitutional grounding of the FCC through the public utility model, rather they were focused on how the public interest would be promulgated through an agency they saw as constitutionally sound. Thus, without serious challenge within either the House or Senate, or even the requisite committees, this indicates that Congress was comfortable in taking an agency that had its broad delegations tempered by political accountability as an Executive agency and removing those constraints by creating an independent agency. In doing so, it reflects a *deeper* commitment to the new public utility model in impliedly regulating content, as both the supporters and opponents of the 1934 Act did not see to attack its constitutional grounds.

The legislative history also deeply reflects a commitment to drawing parallels to the ICC to effectuate national regulation based on the continued use of the public utility model. In the First FCC Hearings, ICC Commissioner McManamy went to testify before Congress and noted that the drafter "used many of the provisions of the Interstate Commerce Act insofar as

[269] *Id.* at 177.
[270] 78 CONG. REC., pt. 10, 10317 (daily ed. June 2, 1932).

applicable as a foundation for the bill."[271] Commissioner McManamy follows by stating that this was wise as "much of the [Interstate Commerce Act] has been construed judicially and a new act based thereupon" would likely avoid litigation "as usually follows the enactment of new laws."[272] Commissioner McManamy's testimony is crucial as it was widely accepted by legislators as providing the constitutional support to the 1934 Act, as well as justifying the new independent agency framework. This becomes salient when noting a piece of the ICC's litigation in *ICC v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, where the Court stated that the regulative powers of agencies must be expressly granted by statute, not *implied*.[273] But because content regulation, albeit implied, was endorsed by Congress, it demonstrates that drafters were so comfortable with the public utility framework and the public interest standard, that they never reference this case despite relying in large part on the ICC's well-treaded path. What this indicates is by the drafting of the 1934 Act, for both regulators and legislators, there was considerable comfort in retaining the existing model and in viewing it as constitutional sound.

When Congress enacted the 1934 Act, it did so with bipartisan support and with little subsequent litigation. It had done so without accommodation to *Nebbia*, and without substantial divergence from the Radio Act of 1927. By withholding reference to *Nebbia*, it calls into question whether watershed implications highlighted by Cushman that would truly change constitutional interpretation by Congress. In passing both Acts, it cemented the convergence of the three premises of regulatory necessity, the priority of public interest, and the public utility

[271] *Federal Communications Commission, Hearings before the Sen. Comm. on Interstate Commerce, United States Senate, 73rd Congress, March 9, 10, 13, 14, and 15, 1934* (*First FCC Hearings*), 73d Cong., 32-33 (1934) (testimony of ICC Commissioner McManamy).
[272] *Id.*
[273] *See* ICC v. Cincinnati, N.O. & Texas Pacific Ry. Co., 197 U.S. 479, 494 (1897).

model as its constitutional crux. As a result of years of careful drafting and relying on well-treaded paths, the Communications Act of 1934 glided pass the judicial obstacles that so embarrassed other legislative efforts from the same period. But in doing so, it had effectuated a silent reinterpretation that did not rely on the Supreme Court to *affirm* its new use, unlike its predecessors such as the ICC. All of these developments occurred in plain sight but have somehow eluded the focus of legal historians dedicated to this period.

## Conclusion: Situating Radio Regulation in Broader Historiography

When scholars argue over the Constitutional Revolution of 1937, they scrutinize every aspect of the Justices, their cases, and their opinions. Ironically, what makes the 1934 Act such a salient counterexample is that, when examined in light of other cases from the same period, the Court seems as if it ruled on everything *except* the 1934 Act. Well before the 1927 Act, radio regulation had already shifted to prioritizing the public interest as the purpose of said regulation. Through the 1927 and 1934 Acts, Congress recognized this purpose and in turn granted the FRC and FCC the authority to pursue that public interest based on a changing notion of interstate commerce coupled with a narrow exception to the prohibition against intruding upon state police powers through national legislation. As such, Congress was maneuvering around the Supreme Court's jurisprudence by recognizing shifts occurring at the lower level of the federal judiciary, with the Court's own jurisprudence wielded against them.

Various scholars, such as Cushman, Leuchtenburg, and Bernstein write extensively about this period and the shifts in constitutional law that emerged. While their explanations diverge, their focus remains consistent on the Supreme Court. Other scholars such as Thomas McCraw also write about the changing views of administrative law and regulatory power. Some, such as

White, also write about this changing administrative state, but only in service of a larger analysis of the 20th century. Many, however, either omit an analysis of the Communications Act of 1934, or give it passing reference as a piece of legislation from the First New Deal.

Ignoring this legislative reinterpretation has two effects. First, by focusing mainly on whether constitutional interpretation shifted at *Nebbia* or *Parrish* ignores the fact that before and by the time the 1934 Act had been passed, lower federal courts and Congress had already reinterpreted forms of interstate commerce and in doing so, reinterpreting the Commerce Clause itself, to supply an agency with the regulatory power over one of the most important aspects of everyday American life. Second, and relatedly, it ignores that the Court did not explicitly rule on either Act, and thus this shift in constitutional interpretation was never occurring at the Supreme Court level. It was occurring largely in *absence* of that institution. At best, the Court was a preliminary obstacle that both Democrats and Republicans understood they needed to navigate around in support of the Radio Act of 1927 and the Communications Act of 1934.

Thus, I argue that, unlike Cushman or Bernstein, shifts in jurisprudence during the transition between the *Lochner* Era and the New Deal Era do not need to visibly occur at the Supreme Court. They can occur in absence of that institution, and still hold without its explicit approval. An internalist or externalist approach to constitutional law has the unfortunate side effect of focusing purely on the Supreme Court or its justices, making the Court and the justices primary actors in constitutional law. However, this thesis demonstrates that *other* actors, especially Hoover and Congress as an institution, had the ability to drive a constitutional reinterpretation without the Court and its justices. As such, while the Court began leaning like a kickstand into their shifting jurisprudence, Congress had already entered the fray. As a result, the Communications Act of 1934 should stand out further in legal history, as amidst a *judicial*

revolution in constitutional interpretation, Congress was carrying out a legislative reimagining with roots in the past, aimed toward the future.