

suffer from the inherent limitations that characterize the broadcast media. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation.¹⁴⁰

The Court nonetheless applied intermediate scrutiny, but on the different rationale that the must-carry rules were not motivated by an intent to discriminate on the basis of programming content.¹⁴¹ Concluding that the government's asserted justification—protection of broadcasting for those too poor to afford cable—was substantial enough to satisfy intermediate scrutiny,¹⁴² the Court remanded the case for a determination of how narrowly tailored the statute was to achieving that purpose.

The same reasoning by which the Court distinguished cable television from broadcasting also would distinguish broadcasting from wireless point-to-point communications and even broadcasting as it is likely to be conducted in the near future. Digital compression will make all wireless services (including broadcasting) more spectrally efficient. Spread spectrum techniques, moreover, will make existing frequen-

140. *Id.* at 2457.

141. *Id.* at 2462.

142. *Id.* at 2461.

cies allocated to cellular telephony far more capacious and will greatly reduce the likelihood of physical interference. Thus, while purporting to distinguish *Red Lion* from *Turner*, the Court was actually sewing the seeds of *Red Lion*'s demise. When *Red Lion* is inevitably overruled or distinguished away into oblivion, the Court will cite the preceding passage from *Turner* as support for its holding.

Public Property

As with the argument that the broadcast spectrum is public property, and therefore may be regulated by the government, the question arises whether cable television's use of public property justifies regulation as well. A cable company that wishes to distribute its services must use and disrupt streets to some extent. The use and disruption are most severe when the company digs up the street to lay its cable. To the extent that local governments permit cable companies to do so, the argument goes, those governments should be permitted to subject cable operators to reasonable regulations. Thus, for example, government municipalities may franchise cable operators, subject them to fees, access obligations, and impose public service requirements.¹⁴³

These issues concerning use of public property return us to the public forum doctrine, mentioned earlier. As with all arguments in favor of reduced First Amendment protection, however, the use of public property fails for cable television as well.

First, most cable is not placed on government property. Most cable is attached to telephone poles, which are usual-

143. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377-78 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

ly owned jointly by telephone and electric companies.¹⁴⁴ The ground on which the poles rest may be owned as easements granted by private landowners or the government, or in fee by the electric or telephone company. In none of these arrangements can one say that the cable operator uses government property.

There is a stronger argument from public property when cable lines are laid underground. The cable lines may be laid before a residential subdivision is completed, in which case there are no streets disrupted. If streets already exist, the cable operator may either rent space from telephone company conduits and pull its wire through them, or the operator may cut trenches in the street to lay a new line. This last option raises the question of who owns the street and the land beneath it. This question is unclear, as the municipality may or may not hold title, and various utilities generally hold easements throughout the land (for pipes, sewers, cables, and so forth).¹⁴⁵

Even if one assumes that the local government owns the streets, however, that fact would not justify reduced First Amendment protection for cable operators. The mere fact that government owns the street does not necessarily mean it may control what is said there.¹⁴⁶ Under the public forum doctrines, government-owned land is either a traditional public forum, a designated public forum, or a non-public forum. In general, streets are considered traditional public fora.¹⁴⁷ Regulation of the content of what is expressed in a traditional

144. See Stuart N. Brotman, *Communications Policy Making at the FCC: Past Practices, Future Direction*, 7 *CARDOZO ARTS & ENTERTAINMENT L.J.* 55 (1985).

145. See HAZLETT & SPITZER, *supra* note 127.

146. *Forsyth County v. The Nationalist Movement*, 112 S. Ct. 2395 (1992); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 63 U.S.L.W. 4625 (June 19, 1995).

147. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

public forum must be narrowly drawn to serve a compelling government interest.¹⁴⁸ Time, place, and manner restrictions in the forum must be narrowly tailored to serve a significant government interest while leaving open alternative channels of communication.¹⁴⁹

There are two possible scenarios for applying the public forum doctrines to cable regulations. First, a cable company may hang its cables from poles. As discussed above, the poles on which cables are hung are seldom public property, and thus fail to provide an adequate argument for government regulation on this ground. But cable companies would have to use the streets to hang and service their cables. While streets are the quintessential public forum, their traditional First Amendment uses include marching and leafletting—not hanging cable. The cable company's use might seem more like conduct than speech. Yet the processes of communication between marchers and leafletters involves much intermediate conduct—such as marching and handing out leaflets—that resembles hanging cable. Both are necessary antecedents to the communication of ideas. One hands out leaflets before they are read by a recipient, yet the courts consider “leafletting” to be speech even though the leaflets themselves are literally the only speech involved. So too, hanging cable is a predicate to electronic speech, even though the only literal speech involved is what subsequently flows over the wires.

If a court rules that the use of the street involves a public forum, then the access regulations must be time, place, and manner restrictions that are content-neutral and reasonable. But nothing resembling the cable regulation challenged in *Turner* can be justified by time, place, and manner restrictions on when cables may be strung. If a court rules that use of the street does not involve a public forum, the regulation

148. *Id.* at 45.

149. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

might still fail even under nonpublic forum analysis. This is because a municipality's attempt to prevent excess traffic congestion and damage to roads—the inevitable justifications for limits on cable-hanging activity—have nothing to do with franchise fees, access rules, or public service requirements. The practical necessity of regulating street access, in short, has no rational extension to control over the content or distribution of speech that flows through the cable company's wires.

A similar analysis applies if cable is to be laid underground. Although the question of street disruption will be identical to that which arises when cable operators use streets to hang cable on poles, the issue of laying cable in subterranean space is somewhat different. It is likely that this space, if owned by government at all, will not be deemed a public forum: traditional uses of public fora never involved going *beneath* the street. The underground layer would probably be deemed a nonpublic forum. But, as discussed above, even if this were true, it would not justify extensive regulation of the content or distribution of cable signals. Monopoly franchising might survive, because it limits street disruption to a single cable. Thus, certain ancillary regulations on the monopolist might be upheld, such as leased access and public service requirements. But, absent a monopolist, regulations going to the heart of cable transmission (such as those that exist for radio and television) would still not be justified.

In short, the government property rationale fails almost entirely to justify any cable regulation. Much of the property the cable operator would use is not government property. Most of what is government property constitutes a public forum. Only where the government is found to “own” the ground under the street might cable regulation be upheld on a government property rationale. But even then, a municipality would be hard-pressed to justify regulations that are not rationally related to issues of public convenience and safety, which would be the putative basis for regulating cable placement in

the first instance.

In any event, the distinction between the street's surface and subsurface is too flimsy to support the entire body of cable regulation. If the First Amendment is to remain flexible, and thus capable of accommodating unanticipated technologies such as cable television, courts must see that the subsurface is the electronic equivalent of the street's surface for cable transmission purposes. Regulation of cable television should rest on a rationale more substantial than the cable operator's use of government property. This rationale certainly does not support restricting a cable operator's First Amendment rights.

TELEPHONY

The provision of telephone service differs from broadcasting and cable television in the obvious sense that there is no single source of speech. Although broadcasters and cable operators provide programming to listeners, telephone companies traditionally route calls between individuals on a point-to-point basis. Telephone companies are common carriers providing a pathway for communication rather than the communication itself. Furthermore, with the exception of the newer wireless services such as cellular telephony, paging, and mobile data transmission, telephone communication does not require use of the radio spectrum, but rather is provided through terrestrial networks of wires. Therefore, all the arguments discussed above support the conclusion that, of all telecommunications media, telephone service should be the most protected from regulations restricting the First Amendment rights of providers.

In fact, the notion that telephone service providers have First Amendment rights in the first place is new. The question arose in the landmark case of *Chesapeake and Poto-*

mac Telephone Company of Virginia v. United States (CPT).¹⁵⁰ The case involved a challenge to the constitutionality of the “cable-telco entry ban” in the Cable Communications Policy Act of 1984,¹⁵¹ which essentially prohibits local telephone companies from offering, with editorial control, cable television services to their common carrier subscribers.¹⁵² Curiously, the legislative history of this provision was silent, but for a boilerplate assertion that the provision was intended to codify existing FCC regulations.¹⁵³

Clearly, the new ability of telephone companies to provide cable programming raised the possibility of new competition in the cable television market. What public interest benefit could therefore justify suppressing such competition and compromising the free speech of telephone companies in the process? The government raised two justifications for section 533(b) of Title 47: preventing telephone companies from engaging in monopolistic practices against the cable industry (principally through the misallocation of common fixed costs), and maintaining diversity of ownership of communications outlets.¹⁵⁴

The U.S. Court of Appeals for the Fourth Circuit began by recognizing that, in light of *Turner Broadcasting*, the provision of cable television service is protected speech under the First Amendment.¹⁵⁵ The question before the court, then, was whether section 533(b) violated the First Amendment. The court first had to decide what level of scrutiny to employ. It rejected arguments for minimal scrutiny based on

150. 42 F.3d 181 (4th Cir. 1995), *cert. granted*, 63 U.S.L.W. 3906 (June 26, 1995).

151. Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. § 521 *et seq.*).

152. 47 U.S.C. §§ 533(b)(1), (2).

153. *CPT*, 42 F.3d at 187.

154. *Id.* at 190.

155. *Id.*

scarcity, diversity of ownership, regulation as a quid pro quo for the grant of local monopoly status, and construction of section 533(b) as a generally applicable antitrust law.¹⁵⁶

The court then rejected strict scrutiny. It first found that section 533(b) was not content-based.¹⁵⁷ The regulation did not discriminate based on the content of speech, but only distinguished speech based on its mode of delivery—in this case, as video programming. The government did not evaluate the content of the speech transmitted, and so the court reasoned that the government did not burden or benefit speech based on its content.¹⁵⁸ The court then found that section 533(b) was not rooted in a discriminatory intent.¹⁵⁹ Rather, the court's review of the legislative history revealed that Congress's motivation was to prevent monopolistic practices and preserve diverse ownership.¹⁶⁰ In addition, the court found that section 533(b) did not invidiously target a particular group of speakers, nor grossly diminish the quantity of speech available.¹⁶¹

The Fourth Circuit therefore applied intermediate scrutiny.¹⁶² It first found “no question” that the interests to be served by section 533(b) were “significant,” thus satisfying the first prong of intermediate-scrutiny review.¹⁶³

The court next ruled, however, that the statute failed the second prong because it was not narrowly tailored to meet these significant government interests.¹⁶⁴ The court was particularly disturbed that Congress failed to buttress section 533(b)

156. *Id.* at 191–92.

157. *Id.* at 192–95.

158. *Id.* at 194–95.

159. *Id.* at 195–98.

160. *Id.* at 195.

161. *Id.* at 196–98.

162. *Id.* at 198.

163. *Id.* at 199.

164. *Id.* at 199–202.

with any factual findings.¹⁶⁵ Thus the court held that the government failed to demonstrate why section 533(b) does not burden more speech than is necessary.¹⁶⁶

Last, the Fourth Circuit found that section 533(b) failed the third prong of intermediate scrutiny—the statute did not leave telephone companies with ample alternative channels for communication.¹⁶⁷ Although the First Amendment may tolerate regulations that ban a particular manner or type of expression at a given time or place, it does not accommodate regulations that ban a particular manner of expression altogether.¹⁶⁸ Because the statute could not satisfy the three requirements of intermediate scrutiny, the Fourth Circuit concluded that section 533(b) violated the First Amendment. In June 1995, the Supreme Court granted certiorari to hear the case.¹⁶⁹

CPT is a powerful precedent in support of First Amendment rights for telephone companies. It also symbolizes a consensus among the lower federal courts. *Every* challenge to section 533(b) has prevailed on First Amendment grounds.¹⁷⁰ This body of case law opens the door for greater competition in multichannel video by enabling telephone companies to exercise editorial discretion rather than function

165. *Id.* at 201.

166. *Id.* at 202.

167. *Id.* at 202–03.

168. *Id.* at 203.

169. 63 U.S.L.W. 3906 (June 26, 1995).

170. *U S West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994); *Southern New England Tel. Co. v. United States*, 886 F.Supp. 211 (D. Conn. 1995); *Southwestern Bell Corp. v. United States*, No. 3:94–CV–0193–D (N.D. Tex. Mar. 27, 1995); *United States Tel. Ass’n v. United States*, No. 1:94–CV–0196–1 (D.D.C. Jan. 27, 1995); *GTE South, Inc. v. United States*, No. 94–1588–A (E.D. Va. Jan. 13, 1995); *NYNEX Corp. v. United States*, No. 92–323–P–C, 1994 U.S. Dist. LEXIS 20414 (D. Me. Dec. 8, 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994).

solely as passive common carriers.

CPT is highly pertinent to the constitutionality of the foreign ownership restrictions. Although the Fourth Circuit acknowledged the substantiality of the government's objectives underlying the statute, the court found the means employed to achieve that objective to be too loosely woven, and the alternative channels of expression too limited, to satisfy the First Amendment. As we shall now see, those same infirmities plague the foreign ownership restrictions.

FOREIGN OWNERSHIP AND FREEDOM OF SPEECH

The preceding pages have reviewed the major regulations affecting broadcasting, cable television, and telephony that can restrict freedom of speech. We have seen that print receives far greater protection than broadcasting and cable television for reasons that are largely historical, factually incorrect, and intellectually specious. We have also seen that video programming over telephone lines is now receiving far more solicitous consideration under the First Amendment. We shall now apply this body of law to the foreign ownership restrictions in section 310(b) of the Communications Act to determine whether those restrictions violate the First Amendment.

It is first necessary to decide what level of scrutiny to employ. We will then analyze the interests purportedly served by the foreign ownership restrictions and the fit between those ends and the means by which Congress and the FCC have chosen to achieve them. Under several different lines of analysis, the existing case law would support the conclusion that various applications of the foreign ownership restrictions violate the First Amendment.

THE APPLICABLE LEVEL

OF JUDICIAL SCRUTINY

The restrictions in section 310 limit foreign investment in American telecommunications firms. The section applies only to radio-based technologies. First, our choice of a level of scrutiny must reference the standards of review that courts have used to analyze First Amendment challenges to regulations governing the various modes of electronic speech, particularly radio.

But this is only a first step. The activities to which section 310 applies include broadcasting and common carriage, and, under some circumstances, private carriage. Some activities to which section 310 applies might be considered non-speech. Furthermore, defenders of the constitutionality of section 310 might be able to advance a content neutral rationale for regulation of some types of activities, but not others.

Furthermore, individuals to which section 310 applies restrictions apply might themselves be alien natural persons, or corporations organized under the laws of a foreign government, or domestic corporations with alien investors, officers, or directors. In some circumstances, the identity of the plaintiff might affect the standard of review.

Thus, it is unlikely that a court would apply the same standard of review to all applications of section 310. The sections below will show, however, that at least intermediate levels of scrutiny will apply to many applications of section 310.

Red Lion or Turner Broadcasting?

Traditionally, the electronic media has received less constitutional protection than the print media. The early radio cases involving prior restraints, *Shuler* and *Brinkley*, point toward a minimal scrutiny, or rational relation, standard of

review.¹⁷¹ This is true of the cable television taxation case, *Leathers v. Medlock*, as well.¹⁷² In both situations, the courts deferred to Congress's commerce power on the one hand, and the states' general power to tax on the other. The Court's recent opinion in *Turner Broadcasting* suggests that First Amendment jurisprudence has advanced beyond this point, at least for cable.

But section 310 involves radio, not cable. Therefore, constitutional analysis of section 310 will depend on how a modern court would treat broadcasting. In light of the advances in First Amendment jurisprudence since the 1930s, no court today would rely on the discredited logic in *Shuler* or *Brinkley* in assessing the constitutionality of section 310. But one must still contend with *Red Lion* and *Pacifica*.

The first part of this chapter showed that the scarcity reasoning behind *Red Lion* has been amply rebutted. The decision is discredited and embarrassing—but not yet overruled. What standard of review, then, will apply so long as *Red Lion* remains the law?

The answer is complicated. For all its warts, *Red Lion* at least recognized that broadcasters did have First Amendment rights. But the exact "test" that the Court used to determine whether those rights had been violated was not clear. At issue was the legitimacy of a regulation that required a broadcaster to offer reply time to persons (usually candidates for office) whom the broadcaster (or even an unrelated third party) had personally attacked during a broadcast. In upholding this regulation, the Court spoke of various factors relevant to its analysis, chiefly concerning monopoly and the rights of listeners, but Justices did not formulate a general test. Although the right of reply was

171. *Trinity Methodist Church v. FRC*, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933) (*Shuler*); *KFKB Broadcasting v. FRC*, 47 F.2d 670 (D.C. Cir. 1931) (*Brinkley*).

172. 499 U.S. 439 (1991).

clearly content related, the Court did not apply the now familiar constitutional framework, under which the government must show a compelling interest for content related regulations.

Nonetheless, the Court did apply something more than a rational basis test and gave the FCC's proffered rationales for the right of reply something more than cursory scrutiny. This aspect of *Red Lion* implies that there are some regulations of broadcasting of which the Court might not approve:

There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensees to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.¹⁷³

This passage suggests that the standard in *Red Lion* is a form of intermediate scrutiny.

Until 1984, the Court's subsequent decisions failed to clarify where, along the continuum from rational basis to strict scrutiny, one would find the appropriate standard of

173. *Red Lion*, 395 U.S. at 396.

review for broadcast regulation. That year, in *FCC v. League of Women Voters*, the Court held that a provision of the Public Broadcasting Act that forbade public television stations to “engage in editorializing” violated the First Amendment.¹⁷⁴ The Court explained that in earlier broadcast cases, such as *Red Lion*, broadcast regulations

have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial government interest, such as ensuring adequate and balanced coverage of public issues. Making that judgment requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case.¹⁷⁵

The Court went on to identify the regulation in question as being “defined solely on the basis of the content of the suppressed speech.”¹⁷⁶ *League of Women Voters* thus established that content-related broadcast regulations would get intermediate, not strict, scrutiny.

Perhaps it would follow that content-neutral regulation of broadcast speech would get only rational basis review. But the D.C. Circuit rejected this argument in *News America Publishing*, noting that “the Supreme Court has for the regulation of speech insisted on a closer fit between a law and its apparent purpose than for other legislation.”¹⁷⁷ Judge Williams wrote that the court would look for a fit that snug even in broadcast regulation.¹⁷⁸ The court appears to have applied something between a rational basis test and

174. 468 U.S. 364 (1984).

175. *Id.* at 380.

176. *Id.* at 383.

177. *News America Publishing*, 844 F.2d at 805.

178. *Id.* at 805.

intermediate scrutiny.¹⁷⁹

Thus, if *Red Lion* is not immediately overruled, section 310 would probably receive intermediate scrutiny; as we will show below, it would be hard to argue that section 310 is content-neutral. Intermediate scrutiny requires the government to show that the restrictions (1) serve an important governmental objective, (2) are narrowly tailored to that objective, and (3) preserve ample alternative channels for communication. Applications of section 310 that were determined to be content-neutral would receive something less than intermediate scrutiny, but more than minimum rationality. Finally, *Red Lion* has been applied to other uses of radio besides ordinary broadcasting; private carriers or common carriers challenging section 310 would be unlikely to escape *Red Lion* by noting that they were not broadcasters.¹⁸⁰

If the Court is willing to overrule *Red Lion* and bring broadcasting under the precedents used for other media, then section 310 will get strict scrutiny if found to be content-related, and intermediate scrutiny if content neutral, as in *Turner Broadcasting*.¹⁸¹ There, the majority applied an intermediate level of scrutiny to the must-carry rules; the dissenters applied strict scrutiny, believing the rules not to be content-neutral.¹⁸² The Fourth Circuit also used intermediate scrutiny in striking down the cable-telco entry ban in *CPT*, and would have used strict scrutiny had it found the rules to be content-related.¹⁸³ The same standard would apply if the radio spectrum were treated as a public forum, as we discussed earlier in this chapter. As the sections below will make clear, the demise of *Red Lion* would also mean the demise of most applications of section 310.

179. *Id.* at 814.

180. See *TRAC*, 801 F.2d 501.

181. 114 S. Ct. 2445.

182. *Id.* at 2462.

183. *CPT*, 42 F.3d at 198.

Content-Specific or Content-Neutral?

Almost all regulations subject to strict scrutiny fail the test. Almost all regulations subject to a rational basis test pass. The outcome of constitutional analysis of section 310 therefore turns on which standard of review the Court would apply. This analysis depends in turn on whether or not section 310 is content-related, or content-neutral. Content-related restrictions are those that “suppress, disadvantage, or impose differential burdens upon speech because of its content.”¹⁸⁴

In determining whether a statute is content-related, courts ask first whether the statute is facially content-discriminatory.¹⁸⁵ But this analysis does not end the inquiry. A law that is content-neutral on its face will be deemed content-related if evidence is found that the statute was intended to suppress certain content.¹⁸⁶ “Our cases have recognized,” said the Court in *Turner*, “that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.”¹⁸⁷

Applying this basic framework to the various provisions of section 301 raises a additional problem. The statute does not make any direct reference to content. The restrictions do not distinguish between types of alien speech. According to this view, the limits on foreign ownership apply regardless of what the foreigner wishes to say. Technically, the section is facially content-neutral. But the statute does single out a class of speakers—aliens, among others—for differential treatment. The restrictions (1) can be enforced in an invidiously discriminatory manner, (2) presume the speech of aliens to be inherently suspect, and (3) limit speech solely

184. *Turner Broadcasting*, 114 S. Ct. at 2459.

185. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991).

186. *Texas v. Johnson*, 491 U.S. 397, 402 (1989).

187. *Turner Broadcasting*, 114 S. Ct. at 2461.

based on its source.

Legislation that singles out certain speakers for deferential treatment should be—and has been¹⁸⁸—treated with suspicion by the Court. Current precedents, however, do not quite establish the principle that speaker-specific laws will be always be treated as if they are facially content-discriminatory. *Turner* rejected “the broad assertion that all speaker-partial laws are presumed invalid,”¹⁸⁹ explaining that, “speaker-based laws demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).”¹⁹⁰ The Court added that, “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.”¹⁹¹ The description of suspicious speaker-specific laws in *Turner* exactly corresponds to the type of speaker-specific classification that section 310 creates. Section 310 singles out aliens because Congress did not like what some of them might say. Section 310 will therefore be treated as a statute that is content-related on its face.

The fact that the statute will be treated as content-related on its face has an important impact on the inquiry into

188. *Minneapolis Star & Trib. Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 584, 591-92 (1983). Justice O’Connor’s dissent in *Turner* explained:

Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome. Laws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions.

114 S. Ct. at 2476.

189. *Turner Broadcasting*, 114 S. Ct. at 2467.

190. *Id.*

191. *Id.*

the statute's legislative history. If content discrimination appears on the face of a statute, a court will often disregard content-neutral justifications for the law contained in the legislative history.¹⁹² If the statute is facially neutral, a court will look to the legislative history to see whether the law's purpose is content-related. But, the court is less likely to overrule the law on the basis of content-related commentary in the legislative history if it also finds that the main purpose of the law is not content-related. In *Turner*, for example, the Court stated: "Our review . . . persuades us that Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable."¹⁹³ In other words, just because some legislators had a content-related purpose in mind when voting for the statute does not mean that a court would necessarily strike down the statute.

What would the outcome be if these precedents were applied to section 310? The legislation should be treated as if it is content-related on its face. And, the legislative history makes clear that the primary purpose of the foreign ownership restrictions is content-related. The target was foreign speech that Congress thought might be a threat to U.S. interests, especially during a war.¹⁹⁴ The overwhelming legislative history shows that section 310 is clearly content-related.

Depending upon the extent to which the reviewing court had rejected *Red Lion*, the foreign ownership restrictions are properly reviewed under strict scrutiny, or at least intermediate scrutiny. A court applying strict scrutiny to

192. *Carey v. Brown*, 447 U.S. 455, 466-68 (1980).

193. *Turner*, 114 S. Ct. at 2461.

194. Ian M. Rose, Note, *Barring Foreigners From Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1211 (1995).

section 310 would strike down the statute unless the government showed that the statute (1) serves a compelling government interest, and (2) is narrowly tailored to meet that end in the manner that least restricts speech.

As always, however, defenders of the constitutionality of the section could raise one final argument. The legislative history is replete with evidence that the law was content-related. Nevertheless, defenders of the foreign ownership restrictions could offer content-neutral justifications for section 310(b) *not* found in the legislative history, such as its value as a tool of trade policy. Any court applying more than a rational basis test will not take seriously this stratagem of *post hoc* justification. Furthermore, because section 310(b) is content-related on its face, a court may disregard proffered content-neutral rationales. These canons of interpretation, of course, in no way limit the possibility that Congress could reenact the foreign ownership restrictions without referring to any forbidden purpose the second time around.

If the reviewing court had rejected *Red Lion*, and found the foreign ownership restrictions to be content-neutral, it would analyze them under intermediate scrutiny. If a reviewing court clung to *Red Lion*, the restriction would get a level of scrutiny in between intermediate and rational basis.

Given the legislative history, the proposition that section 310 is content-neutral lacks any support. We may therefore assume that, other things being equal, section 310 would be subject at least to intermediate scrutiny.

*Speakers, Would-be Speakers,
and Carriers*

So far, we have assumed that a plaintiff who challenges section 310 would be in a position to claim that the government has interfered with some aspect of his rights to speak. Not every activity, however, is considered speech. Challenges brought by some hypothetical section 310 plaintiffs

might not come under the protection of the First Amendment at all.

Clearly, some activities with which section 310 would interfere with *are* covered by the First Amendment. Suppose, for example, that a domestic broadcasting corporation that already held a broadcast license was found to be controlled by another corporation of which one officer was an alien. This condition would violate section 310(b)(4), and the domestic corporation's broadcast license could be revoked, effectively silencing its speech. This type of entity—a company that is already broadcasting—is the type of complainant whose First Amendment rights the Court recognized in *Red Lion*. Likewise, a company whose license to provide itself with aeronautical radio service (private carriage) was revoked would be treated as a speaker under the First Amendment. So would a common carrier who provided some sort of information service.

But what about a company or individual who did not yet hold a radio license of any kind? One might argue that this type of plaintiff is too remote from actually speaking to count under the First Amendment. This argument, however, conflicts with many First Amendment cases that recognize applicants for permits of every kind (would-be cable franchisees,¹⁹⁵ or applicants for public assembly or parade permits¹⁹⁶) as having First Amendment standing.

Red Lion, however, suggests an additional argument for denying an applicant for a license standing under the First Amendment—the fear that to recognize an applicant's First Amendment rights would require the FCC to license everyone, everywhere, resulting in chaos. That fear, in

195. See, e.g., *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327 (9th Cir. 1994).

196. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992) (striking down a permit scheme giving local government discretion to adjust parade fees to the level of policing it thought was necessary).

combination with the premise that the FCC could deny an applicant a license for perfectly legitimate reasons—if the spectrum that the applicant wished to use was already occupied, for instance—led the FCC, quoting *Red Lion* in the agency's *Seven Hills* decision, into folly:

Seven Hills' constitutional claims are faulty, for its compact rhetoric fatally confuses (1) the First Amendment rights of free speech accruing to those federally licensed to broadcast with (2) the conditional privilege of a broadcast license. "No one has a First Amendment right to a license" The Supreme Court has decreed [that] ["w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.["]¹⁹⁷

The assertion that no one has a First Amendment right to a broadcast license is beside the point, and the rest of the argument is fallacious.

First, the FCC's logic goes too far. Consistent with the Supreme Court's assertion in *Red Lion* that no one has a right to a license, one might claim that *no* broadcaster, licensed or not, has any First Amendment rights at all. There is no way to distinguish the would-be licensee from the extant licensee, as the FCC tries to do in *Seven Hills*. Indeed, the *Red Lion* Court itself said: "By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused."¹⁹⁸

197. *Seven Hills*, 2 F.C.C. Rcd. at 6876 ¶ 34 (quoting *Red Lion*, 395 U.S. at 388, citation omitted).

198. *Red Lion*, 395 U.S. at 339.

Furthermore, it does not follow from the fact that the FCC should be able to refuse to license a station for some reason unrelated to its content, that the FCC should be able to refuse to license a station for any reason at all. It does not cause the whole fabric of FCC spectrum allocation to unravel to recognize the First Amendment claims of an applicant for a radio license. One need not hold that the FCC must grant him a license, only that the agency must not refuse to consider his application because Congress has directed it to censor a certain group. We may conclude, then that a constitutional challenge to section 310 brought by a would-be radio licensee should not fail because he has not yet obtained a license.

Suppose instead that the plaintiff was a common carrier. This case would present not a would-be speaker, but a carrier of others' speech. The pure common carrier is more analogous to Federal Express than to a leafletter who is also a speaker, or to a telephone company that wants to use its own network to provide cable service. But the First Amendment does protect some distributors who do not themselves necessarily speak—newsracks¹⁹⁹ and bookstores,²⁰⁰ for example. And any common carrier who provides interactive broadband and enhanced services is now a speaker as well. As the convergence of technology daily erodes the distinction between common carriers and private carriers, the First Amendment claim here grows stronger.

So far, the Court has clung to the distinction between conduit and editor, most recently in *Hurley v. Irish-American*

199. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (ban on newsracks dispensing "commercial handbills" turns on content of handbills, and thus is content-based); *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984) (invalidating municipal ordinance giving city council discretion to deny newsrack license when applicant did not comply with certain regulations).

200. *Ex parte Jackson*, 96 U.S. 727, 733 (1877); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982); *Smith v. California*, 361 U.S. 147, 150 (1959).

*Gay, Lesbian and Bisexual Group of Boston.*²⁰¹ Here, an association of veterans' groups, the sponsors of Boston's St. Patrick's Day Parade, refused to allow an association of gays, lesbians, and bisexuals to march in the parade. The Court held that applying a state public accommodations statute to require parade organizers to include a group imparting a message that the organizers do not wish to convey violates the First Amendment. The Court analogized the organizers' control of the parade to a editor's control over a newspaper. But the Court was hard-pressed to distinguish its opinion in *Turner*, in which it was willing to approve, if the government could show on remand that the fit between means and ends was tight enough, regulations requiring cable systems to set aside capacity for broadcasters. To distinguish *Turner*, the Court emphasized its reliance on the idea that cable systems were a mere conduit for broadcasting.

*Media and Non-Media
Domestic Corporations*

The various provisions of section 310 apply, under certain circumstances, to media or non-media domestic corporations. This dichotomy again complicates the First Amendment analysis. Some cases suggest that corporations have full First Amendment rights; others suggest that the Court will allow those rights to be abridged in circumstances where it would not allow an individual's rights to be abridged.

In *Grosjean*, the Court easily concluded that corporations enjoyed First Amendment rights.²⁰² This case, of course, involved a First Amendment challenge brought by a media corporation, a newspaper, but the Court did not attach any significance to that fact. Denying corporations full First

201. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 63 U.S.L.W. 4625 (June 19, 1995).

202. 297 U.S. at 244.

Amendment protection would effectively undermine the media. Since the Court decided *Grosjean* in 1936, it has not hinted in any case that a media corporation could be given less than full First Amendment protection because it was a corporation.²⁰³

The treatment of non-media corporations, however, has been less consistent. In *First National Bank v. Bellotti*, the court struck down restrictions on a corporation's political action committee expenditures, finding that this was a form of speech and that a corporation did indeed enjoy First Amendment protection.²⁰⁴ The Court stated broadly that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."²⁰⁵ But the Court refrained from deciding whether in all cases corporations would be as protected as individuals:

In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment.²⁰⁶

Later, in *Austin v. Michigan Chamber of Commerce*, the Court upheld a statute restricting independent corporate expenditures in election campaigns, finding that the state had a compelling interest in preventing the appearance of

203. See *Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767 (1986).

204. 435 U.S. 765, 777 (1978).

205. *Id.*

206. *Id.* at 777-78.

corruption.²⁰⁷ In *Buckley v. Valeo*, however, the Court had struck down application of such a restriction to individuals, finding that the same asserted interest was not compelling.²⁰⁸ The *Austin* Court attempted to justify its unequal treatment of corporations by explaining that “[s]tate law grants [them] special advantages.”²⁰⁹ The Court did not alter the standard of review—only the balance it struck between government interests and First Amendment rights.

The Court’s reasoning in *Austin* would also imply that media corporations could be given less than full First Amendment protection. Justice Scalia, dissenting, objected strongly to the Court’s reasoning, noting that it proves too much: “[O]ther associations and private individuals [are] given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”²¹⁰ Justice Scalia thus joins former Justice Brennan in opposing the idea that non-media corporations should be given less than full First Amendment protection.²¹¹ Other cases involving the First Amendment rights of corporations do not contain the fallacies of *Austin*; it seems safe to say that, outside the campaign expenditure cases, corporations do and should enjoy full First Amendment rights.²¹² Under these precedents, whether a challenge to section 310 is brought by an individual, a media corporation (such as a broadcaster), or a non-media

207. 494 U.S. 652 (1990).

208. 424 U.S. 1 (1976).

209. *Austin*, 494 U.S. at 658

210. *Id.* at 680.

211. *Hepps*, 475 U.S. at 779–80 (Brennan, J., concurring).

212. *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 106 S. Ct. 903 (1986); *Consolidated Edison Co. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 544 (1980); see also HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* 59–106 (AEI Press 1995).