

requirements would fail intermediate scrutiny.

The FCC might be wily here, however, and attempt to justify its interpretation of section 310(b)(4) as an exercise in trade policy. Here, however, the FCC has already refuted its own argument. In its 1980 decision on foreign ownership in cable television, the FCC explained that it had no jurisdiction under the Communications Act of 1934 (or any other statute, for that matter) to determine trade policy:

The Commission's responsibilities relate to "interstate and foreign communications," that is to telecommunications within the United States and between the United States and foreign countries. This does not imply, however, any responsibility for investment policy with respect to communications systems in foreign countries. We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part It is a matter which we believe is appropriately considered by other branches of the government.²⁶⁵

Thus, the FCC would be unable to defend the constitutionality of its interpretation of section 310(b)(4) as applied to a broadcast licensee.

Again, however, for reasons explained above, a corporation covered by section 310(b)(4) might not succeed under current case law in making a First Amendment claim for the right to be a common carrier or a private carrier for hire. If it sought to provide some content in the form of enhanced services, it would have a better argument.

265. *Foreign Ownership of CATV Systems*, 77 F.C.C.2d at 78-79 ¶ 13 (citation omitted).

Finally, such a corporation should be able to establish successfully a constitutional right to obtain a aeronautical radio license for private use. Again, the national security interest is virtually nonexistent.

RELATED CLAIMS BASED
ON EQUAL PROTECTION

The guarantee of equal protection of the laws is an additional ground on which section 310(b) may be legally suspect. The claim that a person has been denied the equal protection—perhaps the dominant theory in modern litigation over constitutional rights—arises when a law classifies persons differently who ought to be treated the same or, conversely, does not distinguish persons who ought to be treated differently. The federal courts generally permit disparate treatment of aliens if the federal government supplies a minimally rational justification. Not surprisingly, therefore, only one equal protection challenge has been made in federal court to the constitutionality of section 310(b), and it failed.

In *Moving Phones Partnership L.P. v. FCC*, the FCC denied, under section 310(b)(3), an application for a license to operate a cellular telephone system because the applicant had aliens among its general partners.²⁶⁶ The FCC had rejected the contentions that dismissal of the application violated the applicant's Fifth Amendment right to equal protection regardless of alienage.²⁶⁷

The D.C. Circuit applied a rational basis test and ruled

266. 998 F.2d 1051, 1053 (D.C. Cir. 1993).

267. *Id.* at 1054. Equal protection claims against the federal government are brought under the Due Process Clause of the Fifth Amendment, U.S. CONST. amend. 5, because the Fourteenth Amendment addresses only the states. The substance of these provisions, however, is identical. *Adarand Constructors, Inc. v. Peña*, 63 U.S.L.W. 3906 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

that section 310(b) does not abridge the equal protection of aliens. Relying on Supreme Court precedent, the court stated that “classifications based on alienage in federal statutes are permissible so long as the challenged statute is not a ‘wholly irrational’ means of effectuating a legitimate government purpose.”²⁶⁸ The court elaborated that application of strict scrutiny to aliens as a class “has been limited to ‘exclusions which struck at the noncitizens’ ability to exist in the community.’”²⁶⁹ Stating that the opportunity to own a broadcast or common carrier radio station “is hardly a prerequisite to existence in a community,” the court applied a weak rational basis test to section 310(b)(3).²⁷⁰ The court determined that the policy to “‘safeguard the U.S. from foreign influence’” bore a rational relationship to the classification in question.²⁷¹ It therefore upheld section 310(b)(3).

The U.S. Court of Appeals for the Seventh Circuit has considered an equal protection challenge to section 303(l),²⁷² which prohibits the FCC from granting commercial radio operator licenses to aliens. In *Campos v. FCC*, the FCC denied lawful permanent resident aliens the chance to take the qualifying examination to secure a radio operator license.²⁷³ The Seventh Circuit denied the aliens’ claim that section 303(l) violated their Fifth Amendment right to equal protection.²⁷⁴ The court stated that “where, as here, no substantive constitutional right is impaired, federal regulation of aliens must be upheld unless wholly irrational.”²⁷⁵ Relying on

268. *Moving Phones*, 998 F.2d at 1056 (quoting *Mathews v. Diaz*, 426 U.S. 67, 83 (1965)).

269. *Id.* (quoting *Foley v. Connelie*, 435 U.S. 291, 295 (1978)).

270. *Id.*

271. *Id.* (quoting *Kansas City Broadcasting Co.*, 5 Rad. Reg. (P & F) 1057, 1093 (1952)).

272. 47 U.S.C. § 303(l).

273. 650 F.2d 890 (7th Cir. 1981).

274. *Id.* at 892.

275. *Id.* at 893 (citing *Mathews v. Diaz*, 426 U.S. 67, 83 (1965)).

the Supreme Court's decision in *Mathews v. Diaz*, the court held that the national interest in providing an incentive for aliens to become naturalized was rationally related to the classification at issue.²⁷⁶ The court therefore upheld section 303(l), because it was not a "wholly irrational" means of serving the interest to be advanced.²⁷⁷

Although one can make better arguments than those advanced in *Moving Phones* that the foreign ownership restrictions violate the equal protection component of due process under the Fifth Amendment, the necessary legal arguments add little to what a foreigner could argue, with greater forcefulness, under the First Amendment. If a court were sympathetic to a constitutional challenge to the foreign ownership restrictions, it would more likely base its decision on a finding that the restrictions violated the freedom of speech rather than on a finding that they impermissibly discriminated against aliens as a class.

CONCLUSION

The premise of any constitution is that a nation may formulate general rules to govern the conduct of its affairs, and that those rules will remain valid over time. The specific premise of the First Amendment is that Congress may not be trusted with the power to control speech. Between technological revolutions, such as the development of broadcasting, and political revolutions, such as World Wars I and II and the rise of communism, the early twentieth century threw these premises into doubt.

In this context, the Supreme Court decided to loosen the constitutional constraints on Congress, declining to halt the experiment in rationing and centralized control that Congress

^{276.} *Id.* at 894 (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1965)).

^{277.} *Id.*

had initiated with the Radio Act of 1927 and continued with the Communications Act of 1934. The result was a line of decisions culminating in *Red Lion*.

Red Lion was intended to be a modern doctrine for the modern age. It is ironic, then, that two decades after *Red Lion* was decided, its faith in government and centralized control seemed more medieval than modern. The scarcity logic of *Red Lion* belongs in the dustbin, beside the command-and-control economic policies that collapsed with the Berlin Wall. The Court's opinion in *Turner*, in rejecting the application of scarcity logic to another new media, cable, represents a return to the premise of the First Amendment. It promises, though perhaps does not quite deliver, a victory of rules supported by reason over fear.

Section 310 epitomizes the mood of the *ancient régime*. It embodies fear and the exercise of power without understanding. It imposes an absolute bar on foreign control of most radio licenses without undertaking any inquiry into whether these potential licensees genuinely pose any danger to national security. It operates as an absolute bar to much electronic speech, motivated primarily by Congress' desire to censor certain content. As such, section 310(b) is too medieval even for *Red Lion*. Under current jurisprudence, the statute is plainly unconstitutional in most familiar circumstances. It is certainly unconstitutional in virtually any application to a U.S. citizen or domestic corporation.

9

Toward Global Competition

GLOBAL COMPETITION in telecommunications is the next frontier after privatization and domestic deregulation. Indeed, the demand for seamless international telecommunications services is a propellant of all three of these phenomena. To be sure, reform of the foreign ownership restrictions in the Communications Act is only one component of the set of policy initiatives that will be necessary to unleash the potential of telecommunications technologies on a global scale. But it is a good starting point, in part because it gives the U.S. the opportunity to do what it does well—to lead by example.

More than six decades have elapsed since the enactment of section 310(b), and more than eight since Congress placed the first U.S. restrictions on foreign investment in wireless. The original and foremost justification for these restrictions has been national security. Yet we have known since at least Pearl Harbor that encryption technology, and not mere access to wireless communications, is the real threat to national security. Denying foreigners the full opportunity to invest in the U.S. wireless industry on the grounds that they

might send harmful messages is like forbidding the sale of ink and paper to foreigners on the grounds that they might use them to write secret notes. For more than half a century, the national security justification for section 310(b) has been untenable.

Moreover, if national security *were* a compelling justification for section 310(b), then Congress would be remiss in not rewriting the statute to close the multitude of loopholes that it—and the FCC, through its enforcement of the statute—have allowed to develop. In fact, since 1934 Congress has repeatedly amended section 310(b) to narrow its scope. Today, the foreign ownership restrictions are applied in a way that makes arbitrary distinctions between different radio services that cannot plausibly be justified on the grounds that foreign ownership of one constitutes a larger security threat than foreign ownership of the other. Meanwhile, behind this foreground of utterly whimsical rules is a landscape of alternative statutory powers conferred on the President and the FCC that are far better suited to thwarting spies and provocateurs than is section 310(b).

The arbitrary distinctions that the FCC has lent in its administrative decisions to the already arbitrary statutory contours of section 310(b) has produced a body of law and agency folklore as intricate as a Persian rug. The only beneficiaries of this state of affairs are Washington communications lawyers, whom clients must retain to contort straightforward international business transactions. There are obvious transactions costs to this regulatory burden. But the larger category of costs are the agency costs that arise when parties cannot freely arrange the ownership and control of a firm in a manner that optimally allocates risk among willing parties and protects the firm's owners against the possibility that management will deviate from profit-maximizing behavior. The FCC's administration of the foreign ownership restrictions has been oblivious to this drag that it has imposed on productive economic activity. The public interest, it would seem, could

not possibly concern such mundane matters as preoccupy Nobel laureates.

In light of the costs and risks that the foreign ownership restrictions create, it no surprise that foreign investors have made relatively few billion-dollar investments in U.S. radio licensees. Admittedly, the small number of large transactions also reflects that the most likely investors—large foreign telecommunications carriers—were, until their recent privatizations, state-owned monopolies. Consequently, they were completely barred from being U.S. radio licensees. That state of affairs is changing, however, as even PTTs that have not yet been privatized, such as France Télécom and Deutsche Telekom, are investing to fashion global networks to compete with those offered by AT&T and by BT and MCI. Moreover, the experience around the world is that foreign carriers *are* willing to invest billions in nations with regulatory environments more hospitable than America's. The harm to consumers of America's inhospitality to foreign direct investment in telecommunications will become more apparent as the seven Regional Bell Operating Companies are released from the Modification of Final Judgment and allowed to compete in the interLATA market. It would seem inevitable that one or more of the RBOCs will combine with one or more of the major foreign carriers to form a fourth "supercarrier."

Future foreign investment in U.S. telecommunications thus implies a potent form of new competition that will benefit American consumers. It is therefore important that any revision of the foreign ownership restrictions not impose a regime that sacrifices the fruits of greater domestic competition in the name of opening markets overseas. The reciprocity proposals advanced in the Senate and at the FCC in 1995 are unlikely to achieve their market-opening objectives but *are* likely to shield incumbent U.S. firms from competition in the domestic market. Economic analysis provides strong reasons for not erecting a policy for foreign direct investment that is premised on bilateral reciprocity. If, rather than simply repealing sec-

tion 310(b), Congress chooses to redefine that statute to be a tool of trade policy, then the reciprocity test embodied in the version of H.R. 1555 passed by the House in August 1995 would be the second-best alternative.

Whether Congress uses section 310 to secure national security or market access overseas, it must recognize that the law restricts freedom of electronic speech. The Supreme Court may soon give the First Amendment the musculature it needs to protect speech that increasingly is conveyed by electronic means rather than by printed media. That jurisprudential breakthrough is inevitable and imminent. Congress and the FCC should therefore approach their revision of the foreign ownership restrictions with the foresight that the First Amendment will eventually demand, if it does not already, that the purposes of those restrictions be clear, compelling, and narrowly tailored to accomplish their goals.

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