

1996

Foreign Ownership of Broadcasting: The Telecommunications Act of 1996 and Beyond

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Recommended Citation

W. Scott Hastings, Foreign Ownership of Broadcasting: The Telecommunications Act of 1996 and Beyond, 29 *Vanderbilt Law Review* 817 (2021)

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Foreign Ownership of Broadcasting: The Telecommunications Act of 1996 and Beyond

ABSTRACT

In an increasingly global market, severe restrictions upon foreign investment in broadcasting companies have enabled them to remain primarily domestic entities. This Note reviews these restrictions and advocates reforming the world-wide system of broadcasting ownership regulation. This author discusses the major policies underlying the current regulations and demonstrates their implications by looking at several hypothetical regulatory schemes. The Note then focuses upon regulatory systems that are currently being used, as well as a hypothetical system based upon reciprocity. In the process, the author reviews the ownership restrictions of the United States, Canada, Australia, the European Community, and several lesser-developed markets. Finally, the Note weighs the various approaches currently used and proposes an ideal system of regulation for the global broadcasting industry.

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I. INTRODUCTION

The broadcasting industry has become a hotbed for mergers and acquisitions activity¹ and legislative reform.² Well-established network leaders have sought new partners to help them expand and increase revenues.³ In the United States, Congress has cooperated with this movement by enacting the Telecommunications Act of 1996 (hereinafter 1996 Act), which removed many of the barriers that traditionally prohibited

1. Steve Lohr, *To Divide or Combine?*, N.Y. TIMES, Sept. 25, 1995 at D1.

2. See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

3. For instance, the Walt Disney Co. merged with ABC, Westinghouse merged with CBS, and Time Warner merged with Turner Broadcasting. Lohr, *supra* note 1.

communications companies from expanding into new sectors of the industry.⁴ From this flurry of activity, the message is clear: being profitable in the 1990s requires forming the right partnerships to win increased market share. In considering their options, broadcasters must find partners who will bring in high quality products to win over viewers and will supply the capital needed to keep the network competitive.⁵ Broadcasting companies should also search for areas ripe for expansion.⁶ Foreign markets are a potential source for new partners and offer more capital and expansion room.⁷

The move towards globalizing the broadcasting industry has picked up support in recent years.⁸ In the United States, for instance, Congress attempted a limited deregulation of the

4. See 110 Stat. 56. This Act "opens up all telecommunications markets to full competition including local telephone and cable. . . . It basically allows telephone companies into cable, cable into telephone, and provides the necessary competition that is going to benefit our consumers." 141 CONG. REC. H8281, H8286 (daily ed. Aug. 2, 1995) (statement of Rep. Oxley). For a discussion of the changes created by the 1996 Act and their expected impact upon the consumer, see Jonathan E. Canis & Enrico C. Soriano, *The Telecommunications Act of 1996: A Global Analysis*, 4 COMM. L. CONSPICUUS 147 (1996) and *Changes in Communication*, USA TODAY, Feb. 2, 1996, at 2B.

Upon signing the Act, President Clinton stated that "[t]his law is truly revolutionary legislation that will bring the future to our doorstep. It will create many, many high-wage jobs. It will provide for more information and more entertainment to virtually every American home." Mike Mills, *Ushering in a New Age in Communications*, WASH. POST, Feb. 9, 1996, at C1.

5. The need to look for new sources of capital and new markets is only going to increase. For instance, "[w]hen HDTV [High-Definition Television] does arrive, broadcasters wishing to remain competitive will need capital to upgrade much of their broadcasting equipment. Broadcasters can only get this infusion of capital from abroad." Jeffrey Kowall, *Foreign Investment Restrictions in Canadian Television Broadcasting: A Call for Reform*, 45 FED. COMM. L.J. 348, 349 (1993).

6. See, e.g., S. Twiston Davies & Miguel Smirnoff, *Time Warner Global Movement Surfaces*, Multichannel News, Dec. 6, 1993, at 73 (discussing Time Warner recent activities overseas), available in LEXIS, News Library, multnw File.

7. See Thomas Joseph Cryan et al., *Radio for the 1990s: Legal Strategies in an Emerging Global Marketplace*, 22 U. MIAMI INTER-AM. L. REV. 377, 378-79 (1991).

8. In 1993, the U.S. Department of Commerce recommended removing foreign ownership restrictions. NATIONAL TELECOMMUNICATIONS & INFO. ADMIN. (NTIA), U.S. DEP'T OF COMMERCE, SPECIAL PUB. NO. 93-290, GLOBALIZATION OF THE MASS MEDIA at 90 (1993). Similarly, in 1995, Rep. Mike Oxley (R-Ohio), the Chairman of the House Commerce Subcommittee and Vice Chairman of the House Telecommunications Subcommittee, introduced legislation that would lift the foreign ownership bans. *Broadcasting as 'Commodity'; Dole Sees Regulation as Gap with Democrats*, Communications Daily, Mar. 9, 1995, at 1. Although the measures did not pass, there was bipartisan support, as shown by comments made by Rep. Boucher (D-Va.). See Communications Daily, Mar. 29, 1995, at 4; *Oxley Pushes Repeal of Foreign Broadcast Ownership Restrictions*, NAT'L L.J., Jan. 12, 1995, Telecommunications Section.

communications industry when it enacted the 1996 Act.⁹ This deregulation has done little to ease the barriers traditionally encountered by foreign investors, however.¹⁰ U.S. investors who wish to invest in foreign broadcasting markets encounter similar barriers, because, like the United States, most countries are reluctant to allow foreign investors to gain any meaningful influence in their broadcasting industries.¹¹ Some countries follow policies reminiscent of the former Communist regimes¹² and completely prohibit foreigners from accessing their airwaves.¹³ Others follow the lead of the United States and allow

9. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). Passage of this legislation must have been a pleasant surprise for some, such as Henry Geller who, in a recent article advocating reform, wrote "[I]f legislation is not passed in 1995, passage in 1996, an election year, is dubious." Henry Geller, *Ownership Regulatory Policies in the U.S. Telecom Sector*, 13 CARDOZO ARTS & ENT. L.J. 727, 748 (1995). Not all commentators agree, however, that this legislation is the "deregulatory revolution" that it is hailed to be. Eli M. Noam, *Congress Sweeps It All Under One Big Top*, L.A. TIMES, Feb. 14, 1996, at B9.

10. Although the 1996 Act may affect foreign ownership in other areas, the Act maintains the level of restrictions on broadcasting imposed by the Communications Act of 1934 with only slight modifications. § 403, 110 Stat. At 130-32 (1996).

11. See, e.g., 47 U.S.C. § 310 (1934), amended by § 403, 110 Stat. At 130-32; Broadcasting Act of 1990, ch. 42, sched. 2, part II (Eng.); Broadcasting Services Act, 1992, 110 § 57 (Austl.). Traditionally, many countries have gone further than the United States by setting quotas on the amount of foreign materials that could be broadcast. See Laurence G.C. Kaplan, Comment, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 294-302 (1994) (reviewing the quotas imposed by many European countries prior to the adoption of the "Television Without Frontiers" Directive).

Section 712 of the Restatement (Third) of Foreign Relations indirectly addresses this issue. That provision provides that "[a] state is responsible under international law for injury resulting from . . . (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state." Although "the right to establish oneself in business" is included in the rights of nationals in the territory of another state, this right is "subject to the right of the host state to exclude aliens from certain 'sensitive' businesses such as communications." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 reporter note 12 (1987).

12. See Michael J. Bazyler & Eugene Sadovoy, *Government Regulation and Privatization of Electronic Mass Media in Russia and the Other Former Soviet Republics*, 14 WHITTIER L. REV. 427, 427-42 (1993) (describing the evolution of the mass media from the Communist Party domination under the Soviet Union to the current state of governmental influence in the former Soviet Republics).

13. Until recently, few countries, outside of the United States, have allowed private organizations to control broadcasting facilities. Patricia Diaz Dennis, *Telecommunications in the '90s—From Wasteland to Global Network*, 11 B.U. INT'L L.J. 133, 154 (1993). For example, while the mass media in China has experienced a trend towards more honest reporting covering a wider variety of issues, the media channels are still dominated and controlled by the Communist Party. See WON HO CHANG, *MASS MEDIA IN CHINA: THE HISTORY AND THE FUTURE* 45-58 (1989). On the other hand, Cuba, under the communist dictatorship of Fidel

some outside investment but severely limit the amount of foreign ownership.¹⁴ Thus, the globalization movement has run into a wall of protectionism.

Whatever their form, these protectionist regulations are suppressing a potential media boom around the world.¹⁵ Although implementation of meaningful reform in the area of foreign ownership restrictions on broadcasting may seem remote, efforts to remove the draconian restrictions are already underway.¹⁶ With the recent push for reforming and rewriting the communications laws, now is the time to study the benefits and feasibility of a new regulatory regime.

This Note examines foreign investment in the television broadcasting industry with an emphasis on providing a meaningful recommendation to the U.S. Congress on how to achieve an open, global television broadcasting market.¹⁷ Part II analyzes the spectrum of governmental control over broadcasting by focusing on the extreme levels of regulation and the policies underlying the regulations.¹⁸ This discussion will demonstrate

Castro, has seen a move towards allowing some joint ventures with foreign investors, including some from the United States, in the communications industries. Hopeton S. Dunn & Felipe Noguera, *Cuban Telecommunications Systems*, in *GLOBALIZATION, COMMUNICATIONS AND CARIBBEAN IDENTITY* 185, 194-96 (Hopeton S. Dunn ed. 1995).

14. Section 310 of the Communications Act of 1934 limits foreign investors to a maximum of 20% direct ownership of companies holding a broadcasting license and 25% ownership of a holding company that controls a company with a broadcasting license. 47 U.S.C. § 310(b) 3 & 4. For examples of other countries following this type of approach and limiting foreigners to a specific maximum percentage of ownership, see the Broadcasting Services Act, 1992, 110 § 57 (Austl.) (limiting foreigners to 15% control individually or 20% collectively of Australian broadcast licenses), and the Canadian Broadcasting Act of 1968, 376 C.R.C. §§ 2-4 (1978) (limiting foreign investment in Canadian companies with broadcasting licenses to 20%).

15. See 141 CONG. REC. H8281, H8286 (daily ed. Aug. 2, 1995) (statement of Rep. Oxley) (noting that a modernization of foreign ownership restrictions is necessary to make American companies "more competitive in a global economy").

16. See Communications Act of 1995, S. 652, 104th Cong. § 303; see also H.R. 514, 104th Cong. § 1(a) (1995) (attempting to repeal all of the restrictions imposed by section 310(b) of the Communications Act of 1934).

17. The focus of this Note is on broadcasting through the airwaves. Using cable as an alternative source for foreigners to transmit signals will not be a primary concern given the more relaxed standard that countries such as the United States and Canada have imposed upon cable ownership. See generally Collin J. Coffey, Note, *Foreign Investment in Cable Television: The United States and Canada*, 6 HASTINGS INT'L & COMP. L. REV. 399 (1983) (arguing for a tightening of ownership restrictions); Mary Louise Brown, Note, *Direct Foreign Investment in Cable Television Systems: An Analysis of Alien Ownership in the Context of the United States and Canada*, 10 SYRACUSE J. INT'L L. & COM. 113 (1983).

18. At first, this discussion will most likely appear to be unrelated to the ultimate issue of foreign investment in the broadcasting industry. This analysis,

the economic attractiveness of an open system¹⁹ but show the necessity of maintaining some minimal level of regulation. Part III evaluates various philosophies of regulation to determine the appropriate level of regulation for a uniform, world-wide standard. This discussion consists of case studies of the actual regulations of selected countries and a review of hypothetical alternatives. In addition, the broadcasting restrictions in the United States are analyzed in light of Section 310 of the Communications Act of 1934, the recent Federal Communications Commission (FCC) decision regarding Fox Television,²⁰ and the minimal changes to the foreign ownership restrictions made by the 1996 Act. Finally, Part IV suggests that a reciprocity-based, global relaxation of broadcasting ownership regulations is the desirable result. This system of regulation would open up economic opportunities around the world, while maintaining safeguards to protect national security. The United States should take the lead in removing its own protectionist barriers in order to achieve such an open market.

II. THE SPECTRUM OF GOVERNMENTAL CONTROLS: THE POLICIES AND THE TWO EXTREMES

The levels of government regulation of foreign investment in the worldwide broadcasting industry range from the extreme of complete control of all broadcasting activity²¹ to a policy of *laissez-faire*.²² As a result of a recent trend away from state-controlled broadcasting and towards a privatized system,²³ most

however, is essential as a starting point for considering approaches to regulation that are currently being used.

19. Within the context of this Note, an "open system" will be defined as one in which all those who wish to participate in the industry by investing in broadcasting companies are able to do so.

20. *In re Application of Fox Television Stations*, 11 F.C.C.R. 5714, (F.C.C. 1995) available in Westlaw, 1995 WL 447416.

21. Most countries around the world have few privately held broadcasting companies. *Id.* Dennis, *supra* note 13, at 154. In fact, the United States is the only country where the broadcasting industry began under private control.

22. "Laissez-faire" is a "hands-off" policy where the government allows for the market to operate relatively free of regulations. See BLACK'S LAW DICTIONARY 876 (6th ed. 1990).

23. Stephen R. Konigsberg, *Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of Broadcast Ownership Laws*, 12 CARDOZO ARTS & ENT. L.J. 281, 311 (1994). Examples of countries following this trend include Great Britain, France, Spain, Germany, Portugal, Italy, and Mexico. *Id.* at 311 n.187; Brent Lee Vannoy, *Comment Mexican Telecommunications: Privatization and NAFTA Open the Door for U.S. Expansion into Mexican Markets*, 17 HOUS. J. INT'L L. 309, 312-17 (1994).

countries impose regulations somewhere in between these two extremes.²⁴ Analyzing these approaches can help determine an ideal approach for a world-wide system of regulation. An optimum level of regulation maximizes economic opportunities and free speech, while minimizing the risks to national security and independence.²⁵

A. *The Cast of Characters*

There are four main policies regarding the analysis of an approach to regulating foreign investment: free speech, national security, economic opportunities, and governmental independence.²⁶ Each policy is important, and each often will conflict with the others.²⁷ Before looking at the impact of the various theories of regulation, a brief introduction to the goals of each policy is warranted.²⁸

This trend, however, has not included a move towards relaxing the barriers of foreign investment in the broadcasting industry.

24. There is no limit to the number of methodologies that governments can adopt to regulate broadcasting inside their own borders. As far as foreign ownership restrictions, these possibilities include total bans on foreigners, limiting foreigners influence, and allowing only the most favored of foreigners to invest.

25. Cecelia M. Waldeck, *Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment*, 42 HASTINGS L.J. 1175, 1190 (1991).

26. As with any regulatory policy, there are countless other considerations, such as protecting one's own industries from unfair competition, that will factor into the mix. These other factors, whenever relevant, will be taken into account. Most will be sufficiently handled in the discussion of the four main policies enumerated.

27. For instance, as the U.S. Supreme Court decisions note, there is often a strong tension between free speech and its effects on national security. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (upholding convictions for distributing anti-war leaflets in violation of the Sedition Act of 1917); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding the Smith Act of 1940 which made it unlawful to advocate the overthrow of the government); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (limiting state ability to proscribe speech to instances directed at inciting lawless action).

28. These policies are primarily local in scope because they focus upon the effects of a course of action upon an individual country. When trying to achieve a global system that is good for everyone, the optimal balance of these policies must be considered from many perspectives since the current state of the United States is not indicative of the world at large. The optimal balance for the United States, however, should be close to the proper balance for the other industrialized countries of the world. Third-world countries that do not have a broadcasting industry to speak of will not factor into the optimal mix because the lack of popular access to the media severely lessens any risks that foreigners would be able to enter and exert undue influence in the market.

Free speech is a critical element of a democratic society that demands protection.²⁹ Judge Learned Hand once observed that "in the end it is worse to suppress dissent than to run the risk of heresy."³⁰ When a government selects who may control the means of mass communication by setting licensing requirements, the government assumes that risk. Indeed, most licensing decisions are not conscious ones to exclude a specific dissenting view. But many of those decisions, such as the one to severely restrict foreign investment, have that undesirable effect.³¹ Justice Brennan acknowledged that "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's (Federal Communications Commission's) mission."³² Because the value of the "[p]ress is to interpret, criticize, analyze, and supply vital information to citizens so that they can make their own determinations about how best to set national, state, and local policies,"³³ the government should be wary of taking actions that will either stifle or promote potential speakers and their views.³⁴ Obstructing a message through licensing runs counter to the policies behind the First Amendment and its foreign equivalents across the world.³⁵ Therefore, the government should look for

29. U.S. CONST. Amend. I. See also Kaplan, *supra* note 11, at 337 ("Politics and democracy . . . are linked intimately with publicity, and indirectly, but no less importantly, with program diversity.").

30. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, 657 (1994) (quoting Judge Hand).

31. In opposing the renewal of the licenses for Fox Television, the NAACP claimed that minorities and other political outsiders were being denied access to the mass media because of the scarcity of broadcast frequencies. See *In re Application of Fox Television Stations, Inc.*, 11 F.C.C.R. 5714 (F.C.C. 1995), 1995 WL 447416, ¶12. The NAACP's opposition was based primarily upon its belief that renewing Fox's license would hurt future minority opportunities. *Id.* The NAACP did not argue that the FCC's rules were established for the purpose of exclusion.

32. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 567 (1990), *overruled by Adarand Constructors v. Pena*, 115 S.Ct 2097 (1995).

33. L. A. Powe, Jr., *Or of the [Broadcast] Press*, 55 TEX. L. REV. 39 (1976) reprinted in ERIC BARENDT, *MEDIA LAW* (1993).

34. "The obvious danger is that government persuaders will come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what makes them accede to government's plans, policies, and goals." Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 584 (1984) (quoting MARK J. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA*, (1983)).

35. The Supreme Court specifically condemned such a practice when it wrote: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). For a complete First Amendment analysis of restrictions on broadcasting, see L. A. Powe, Jr., *supra* note 34; Lee C. Bollinger, Jr. *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV.

ways to remove those barriers to political outsiders, and thus increase the opportunities for "outsiders" to express their messages and views.³⁶

Countering the policy of free speech is the need for national security. National security is often the justification for refusing to allow foreigners to gain any meaningful influence over broadcasting.³⁷ At one time, a hostile group could interfere, block, or intercept the confidential communications of the military.³⁸ Today, by having open access to the public, an enemy can subvert the integrity of the government or an ongoing military operation.³⁹ The severe restrictions regarding the amount of foreign broadcasting ownership allowed in those countries that do allow any involvement demonstrate this fear of foreign influence.⁴⁰

Another policy often provided as the justification for imposing regulations on broadcasting refers to the independence of sovereign states.⁴¹ The fear is that "subtle invasions of foreign

1 (1976) reprinted in BARENDT, *supra* note 34; Ian M. Rose, Note, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188 (1995).

36. For instance, the creation of a fourth network has given many speakers, including many minorities that are typically left out of the normal media, a new, national forum for their ideas and productions. *In re* Application of Fox Television Stations, 11 F.C.C.R. 5714, 1995 WL 447416 (F.C.C. 1995) (separate statement of James Quello) (discussing the benefits provided from the Australian-owned Fox Television Network). See also Geller, *supra* note 9, at 729-30 (discussing the value of diversity of viewpoints); Eli M. Noam & Lisa M. Domonkos, *Television Self-Regulation and Ownership Regulation: The American Experience*, 13 CARDOZO ARTS & ENT. L.J. 645, 651 (1995) ("The point of an open media system is only partly to provide more entertainment. The other important part is to provide diversity and choice.").

37. Security concerns originally led to the enactment of foreign ownership limits on broadcasting in the United States. James G. Ennis & David N. Roberts, *Foreign Ownership in U.S. Communications Industry: The Impact of Section 310*, 19 INT'L BUS. L. 243 (1991).

38. *Id.* at 243-44.

39. See cases cited *supra* note 27 (illustrating the United States fear of anti-government activities). Although these cases did not involve the mass media, such involvement would probably have intensified the fear.

40. See, e.g., 47 U.S.C. § 310(b) (limiting foreign investors to a maximum of 20% direct ownership of companies with a broadcasting license and 25% ownership of a holding company that controls a company with a broadcasting license); Broadcasting Services Act, 1992, 110 § 57 (Austral.) (limiting foreigners to 15% control individually or 20% collectively of Australian broadcast licenses); Canadian Broadcasting Act of 1968, 376 C.R.C. §§ 2-4 (1978) (limiting foreign investment in Canadian companies with broadcasting licenses to 20%).

41. State sovereignty is one of the chief reasons given for the development of state-run broadcasting stations in Europe. Kaplan, *supra* note 11, at 261-62. *But see* Kowall, *supra* note 5, at 357-58 (questioning the national unity and cultural sovereignty arguments for protecting the broadcasting industry from outsiders).

popular culture can infiltrate a nation and change the very fabric from which it is made."⁴² Certainly, no country is willing to give up control of its own borders in the name of economic opportunities. Similarly, no country wants to allow foreigners to dominate the thought, culture, and activities of its citizens by exerting excessive control over the mass media.⁴³ Any proposal that would require a country to subordinate its national identity and independence would be unacceptable. Balancing concerns over independence and control is an important part of achieving an ideal system of regulating foreign ownership of broadcasting licenses.⁴⁴

Restrictions on foreign investment in the broadcasting industry reflect a careful balancing of freedom and security. The primary reason for upsetting this balance is to increase the economic opportunities that are presently available.⁴⁵ As evidenced by the recent flurry of merger activity,⁴⁶ many communications companies are looking for new alternatives to improve the quality of their services and to increase profitability.⁴⁷ The value of new opportunities consists of more competition, reduced costs to the consumer, and more jobs.⁴⁸ Opening new markets offers business opportunities to increase the level of operations, to derive the benefits typically associated with economies of scale,⁴⁹ and to obtain new sources of capital.⁵⁰

42. Kaplan, *supra* note 11, at 263.

43. Fears over the "Americanization" of its culture led Canada to exclude the entertainment industries from NAFTA's overall relaxation of trade restrictions with the United States. Konigsberg, *supra* note 23, at 284. See also Brown, *supra* note 17, at 117. This fear is heightened because high-quality television programming from the United States can be purchased by Canadian broadcasters at a cost substantially lower than the cost of producing their own, lower-quality programs. MARY VIPOND, *THE MASS MEDIA IN CANADA* 74 (1989). European countries have also expressed concern about the dominance of American broadcasters. Kaplan, *supra* note 11, at 255, 262, 269-71.

44. See *infra* Part III.

45. See Rose, *supra* note 35, at 1226 (stating that a relaxation of ownership restrictions can lead to more opportunities in foreign media markets, new sources of capital, and an improvement in the quality of programming).

46. See, e.g., *supra* text accompanying note 4.

47. A primary goal of the Telecommunications Act of 1996 is to allow companies in the communications industry to expand into one another's businesses. See 141 CONG. REC. H8281, H8286 (daily ed. Aug. 2, 1995) (statement of Rep. Oxley); see also Joseph A. Pantoja, Note, *Desirable Economic Cooperation Among High-Technology Industries: A Look at Telephone and Cable*, 1994 COLUM. BUS. L. REV. 617 (discussing the value of removing these industry-based barriers).

48. See 141 CONG. REC. H8286 (predicting that deregulation could lead to annual savings of between thirty and fifty dollars in consumer costs as well as creating 3.5 million new jobs).

49. Broadcasters would be able to benefit by economies of scale when they are able to produce the same product or television show for several markets as

In the end, more providers of services will lead to more consumer choices, reduced costs for air time, and less-monopolistic practices by broadcasters.⁵¹

B. *One Extreme: Total Government Control of Broadcasting*

Although an exclusively state-run broadcasting industry "sets off alarms in the American mind, and conjures up images of an Orwellian Big Brother and his propaganda," many parts of the world feel that "this Big Brother is welcomed and respected for his efforts."⁵² Unlike its development in the United States, the broadcasting industries of most countries evolved under the control of the government.⁵³ While there has been a movement towards allowing private broadcasting stations in some parts of Europe—including the United Kingdom, France, Spain, Portugal,

well as when they would be able to use the same satellite network to transmit broadcasting signals. Although language barriers may hamper the benefits of the first, see Kaplan, *supra* note 11, at 268 (noting that, by 1990, less than 10% of EC programming was viewed in other member states), the ability to consolidate facilities could greatly reduce costs for the broadcaster.

In Canada, the broadcasting industry has become concentrated in the hands of a few broadcasters due to the economies of scale and the limits on foreign investors. See VEPOND, *supra* note 43. By eliminating national barriers, the monopolistic characteristics would begin to disappear because more broadcasters would be able to derive their own benefits of increased economies of scale by tapping into other markets and additional sources of capital.

50. Although liberalizing ownership restrictions will open up many new capital sources by enabling foreigners to invest in broadcasting entities, this opening will not necessarily cause a free-for-all in the investment communities since these broadcasters must abide by applicable securities regulations. See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200 (2d. Cir. 1968) (finding that the courts had jurisdiction over a cause of action under Rule 10b-5 even though the charges were brought against a foreign entity for actions occurring outside the United States because those actions were likely to have a detrimental effect upon American investors investing on the American Stock Exchange). While a full discussion of the effects of securities regulations upon a company's ability to raise capital is beyond the scope of this Note, it is important to understand that these regulations place additional costs upon the issuers of securities in an effort to protect the investors. Therefore, while the sources of capital are increased, not all broadcasters will want to target every possible investment market, since, in that process, they may be subjecting themselves to the additional costs.

51. The reduced cost of air-time could be passed on to advertisers in the form of lower prices for advertising. This would also make that broadcaster more attractive to potential advertisers. In addition, if a broadcaster charges customers for its services, as many cable and movie stations do, the cost to the consumers for those services would decrease as a result of the broadcaster's desire to outperform its competition.

52. See Kaplan, *supra* note 11, at 260; accord Jeffrey A. Smith, *Prior Restraint: Original Intentions and Modern Interpretation*, 28 WM. & MARY L. REV. 439 (1987) ("People generally associate state control of the news media with repressive regimes in other nations.").

53. Dennis, *supra* note 13, at 154.

and Italy—that move has not been universal.⁵⁴ Some nations still solely adhere to the old philosophy of government-run broadcasting.⁵⁵ Not only is this the most extreme governmental response to foreigners wishing to enter the industry, it also shows a distrust by governments of the citizens of their own countries.

This approach, however, offers the most protection for the physical security of a country.⁵⁶ Under such a restrictive policy, the government can minimize concern over threats to national security and independence because it has complete authority to set the agenda for broadcasters. If a message exists that the government does not support, the government could simply censor that statement.

That security, however, comes with a very high cost. First, and most importantly, such a restrictive policy sacrifices the freedom of expression. With the government in complete control, no alternative messages will be heard. No opportunity exists to shed light on wrongdoings by the government. Instead, broadcasters are forced to disperse messages, no matter how incorrect, that further the government's agenda.⁵⁷ Without a second, independent station to cleanse its audience by offering non-biased, accurate news reports, this danger will become a reality. In a democratic society, where the free exchange of ideas and opinions is essential to making informed decisions, this situation would be intolerable.⁵⁸

C. *The Other Extreme: Laissez-Faire*

The polar opposite of total government domination of broadcasting is the hands-off approach known as *laissez-faire*. Under this theory, the broadcasting market operates free of governmental interference and regulation. Only the market regulates the industry. This approach calls for no restrictions on the amount of control that foreigners have over the broadcasting

54. Konigsberg, *supra* note 23, at 311 n.187.

55. See DAVID B. WINN, EUROPEAN COMMUNITY AND INTERNATIONAL MEDIA LAW 179-80 (1994) (discussing the retention of a state monopoly on broadcasting in both Sweden and Italy).

56. The "physical security of a country" refers to the continued existence of that nation as an ongoing entity. It does not refer to the freedom of that nation's citizens.

57. Carter, *supra* note 34.

58. Although the picture painted by this discussion may be that of the extreme, without a check on the government's influence, this picture could easily become a reality. All government broadcasting is not suspect as mere propaganda, however. The quality and success of public television in the United States and in England shows that government can, in fact, be a responsible broadcaster.

industry in a particular country. Not even any licensing requirements would exist.

No country follows this model completely.⁵⁹ As a practical matter, this approach could lead to chaos because broadcasters would be able to interfere or block each other's signals by transmitting messages on the same frequency.⁶⁰ In fact, the possibility of foreigners using broadcasting stations to block military communications was the specific reason that led to the original limits on foreign involvement in the U.S. broadcasting industry.⁶¹ Although technological advances have alleviated this threat to some degree,⁶² the possibility of one broadcaster interfering with another remains.⁶³ Even though the *laissez-faire* approach is impractical as a regulatory scheme, analyzing this approach is helpful in studying the implications of relaxing foreign ownership regulations.

Besides the possibility that a foreign broadcaster would be able to threaten a country's national security by blocking confidential military communications, there is a realistic possibility that the airwaves could be used to oppose governmental policies. A broadcaster could, in theory, transmit misleading information about the government in an effort to subvert support for that government.

The previous argument, however, is not very persuasive given the realities of a truly open system. Other stations, presumably under the control of different groups, would remain free to broadcast their own views of a situation. In effect, opening the airwaves will have a cleansing effect because these other broadcasters could disseminate their own view of the truth. As long as more than one station broadcasts its message, a system that allows relatively free access to the airwaves will have a

59. There has, however, been a move towards a reduction of restrictions in many parts of the world. See generally WINN, *supra* note 55 (discussing media law in the European Community).

60. See Cryan, *supra* note 7, at 392 (discussing the chaos that ensued from France's privatization of its radio broadcasting industry before it enacted licensing requirements). As the government begins to take simple, non-suppressive measures, such as designating the frequency upon which a broadcaster can transmit, this threat of blocking will disappear.

61. Ennis & Roberts, *supra* note 37, at 243-44.

62. Technological advances that have allowed for a more efficient use of the broadcasting spectrum as well as new methods of transferring signals have greatly reduced the ability of broadcasters to block each other. Rose, *supra* note 35, at 1201-03. See also Cryan, *supra* note 7, at 381-87 (discussing technological advances in the area of radio broadcasting).

63. A real world illustration of this phenomenon, most often associated with radio broadcasts, can be seen (or heard) when the signals from broadcast stations begin to conflict with others as the listener nears the end of the signal's zone of reception. This conflict often results in static or, even worse, two broadcasts being heard at the same time.

reduced risk of citizens being misled into jeopardizing their own freedoms or the independence of their country.

The laissez-faire approach to governmental regulations in the broadcasting industry is the approach most supportive of the ideals of free speech in a democratic society. This argument is straight forward: By increasing the access to the airwaves, a larger forum exists for all individuals to express their point of view, regardless of their position. Some factors, such as the prohibitive cost of starting one's own broadcasting station or disagreements in ideological philosophy with those operating broadcasting facilities, may limit access to some speakers. Such barriers, however, would not change the reality that the overall size of the forum has increased.

Finally, a larger broadcasting forum increases the economic opportunities for investors. Broadcasting companies would have easier access to capital, including capital from foreign sources, which would enable the company to upgrade its facilities, improve the quality of the shows it broadcasts, and reach new audiences.⁶⁴ Advertisers would benefit from having more choice over where to display their goods and from the natural decrease in the costs associated with an increase in the supply of air-time.⁶⁵ And, in theory, there are vast amounts of other new economic opportunities that would become available, of which those mentioned above comprise just a small sample.

In 1944, Judge Learned Hand presented his now famous *Spirit of Liberty* address in which he remarked that "[a] society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few."⁶⁶ This observation holds true for a broadcasting industry operating under the laissez-faire approach. Although the advantages of this approach are great, the possibility of interference with broadcasting signals makes this approach unworkable, since it encourages the largest broadcasters (the savage few) to use their superior transmitters and resources for the oppression of the minority. Therefore, some regulation is necessary. As one commentator recently explained, one cannot "assume that liberalization and regulation are mutually exclusive."⁶⁷ After all,

64. See Kowall, *supra* note 5, at 349.

65. See VIFOND, *supra* note 43, at 90.

66. Learned Hand, *The Spirit of Liberty*, (1944), reprinted in LEARNED HAND, *THE SPIRIT OF LIBERTY* 189, 190 (Irving Dillard ed. 1952). Hand delivered these remarks at the "I am an American Day" celebration in New York's Central Park as part of the ceremony honoring new American citizens at a time when American soldiers were fighting for "liberty" against the oppressive regime of Hitler's Germany. *Id.*

67. Kaplan, *supra* note 11, at 294-95.

while "we are free to drive where we please, . . . we must still obey the rules of the road."⁶⁸

III. POINTS IN BETWEEN: VARIOUS APPROACHES TO REGULATING OWNERSHIP OF BROADCASTING AROUND THE WORLD

Several approaches and philosophies that fall in between the two extremes discussed above have been developed for regulating foreign involvement in a country's broadcasting industry. A study of these approaches reveals many insights that can be incorporated into an optimal system of global regulation.

A. *The Percentage Method*

Perhaps the most common method of regulating foreign involvement in broadcasting consists of setting a maximum percentage of foreign ownership. This approach draws a bright line so that, in theory, it is relatively easy to apply. Many countries, including the United States, Australia, and Canada, have followed this type of approach.⁶⁹

1. The United States Under the Communications Act of 1934

a. The History and Current State of FCC Regulation

"Historically, the United States has advocated an open door policy toward foreign investment."⁷⁰ Limitations on the amount of control and influence foreigners have over the broadcasting industry in the United States, however, is nothing new. These restrictions date back to the earliest days of radio broadcasting.⁷¹ In the Radio Act of 1912, Congress provided that broadcasting licenses could be given only to citizens of the United States and Puerto Rico.⁷² The President was also given the authority to seize

68. *Id.* at 295.

69. *See* 47 U.S.C. § 310(b) (1934) amended by Pub. L. No. 104-104, § 403 (1996); Broadcasting Services Act, 1992, § 57 (Austral.); Canadian Broadcasting Act of 1968, 376 C.R.C. §§ 2-4 (1978).

70. Waldeck, *supra* note 25, at 1181.

71. At the urging of the United States Navy, Congress first restricted alien ownership of broadcasting facilities in the Radio Act of 1912. Ennis & Roberts, *supra* note 37, at 243 (citing the Act of 13 August, 1912, ch. 287, § 2, 37 Stat. 302 (1912)). This measure was taken to alleviate the Navy's fear that foreigners would be able to use radio facilities to disrupt or intercept vital communications during times of war. *Id.*

72. *Id.*

radio facilities in times of war or other national emergencies.⁷³ These regulations were enacted in an effort to protect national security.⁷⁴ Congress feared that a foreign entity could use broadcast facilities in the United States to block the communications of the Navy, to disseminate important military information to the enemy, or to undermine the support of the people in the government's ongoing efforts.⁷⁵ This set of regulations did not directly address the ownership of broadcasting facilities.⁷⁶

Once Congress realized that restricting the holding of a license, by itself, would not eliminate these perceived threats, the regulations were tightened.⁷⁷ Current restrictions, which were enacted as part of the Communications Act of 1934,⁷⁸ include a complete prohibition on granting a license to any foreigner,⁷⁹ as well as limits on the level of foreign investment in corporations that directly or indirectly control broadcast licenses.⁸⁰ Because of

73. *Id.* During the early days of World War I, before the United States became involved, President Wilson exercised his authority under this provision, and ordered the seizure of two German-owned broadcasting facilities in New York after those stations transmitted messages that were not consistent with the United States policy of neutrality. *Id.* at 243-44.

74. Rose, *supra* note 35, at 1195.

75. Ennis & Roberts, *supra* note 37.

76. *Id.* at 243.

77. 47 U.S.C. § 310(b).

78. These restrictions first appeared in the Radio Act of 1927. Ennis and Roberts, *supra* note 37, at 244. Later, Congress incorporated them as part of the Communications Act of 1934. 47 U.S.C. § 310.

79. 47 U.S.C. § 310(a).

80. § 310. License Ownership Restrictions

(a) Grant to or holding by foreign government or representative.

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or holding by alien or representative, foreign corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative

these restrictions, no foreign company had been able to gain control of a broadcast license in the United States until 1995 when the FCC waived the limitations for Fox broadcasting.⁸¹

Under section 310(b) of the Communications Act of 1934, as amended by the 1996 Act,⁸² the United States regulates foreign investment through the use of a two-tiered percentage approach.⁸³ Section 310(b)(3) limits direct foreign control over corporations with broadcasting licenses to twenty percent.⁸⁴ This limit on direct investment includes the aggregate of all direct and indirect, non-controlling interests in the licensee.⁸⁵ Additionally, under Section 310(b)(4), foreigners are allowed to hold up to a twenty-five percent interest in a holding or parent company that controls a licensee.⁸⁶ This second limitation can be waived if the FCC concludes that it is in the public interest to do so.⁸⁷ In

thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310 (prior to 1996 Act). The 1996 Act amended § 310 to eliminate the bar against companies with foreign directors. Telecommunications Act of 1996, Pub. L. No. 104-104, § 403(k)(1)-(2), 110 Stat. 56, 130-32.

Section 310(b) and several other provisions of Title 47 of the U.S. Code "impose[] certain obligations and restrictions only on those stations that engage in 'broadcasting.'" *National Association for Better Broadcasting v. F.C.C.*, 849 F.2d 665, 666 (D.C. Cir. 1988). Broadcasting is defined as the "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1995). "[T]he determination of whether a station is engaged in broadcasting can at times be critical. In making the determination . . . , the Commission . . . must look to the licensee's intent." 849 F.2d at 666. As a result of these statutes, many activities such as the operation of private radio services are excluded from the coverage of the foreign ownership restrictions. Andrew C. Barrett & Byron F. Merchant, *Emerging Technologies and Personal Communications Services: Regulatory Issues*, 1 COMM. L. CONCEPTS 3, 13 (1993).

81. Despite Fox's efforts at creative financing, the FCC found that Fox was owned almost entirely by the Australian News Corp. *In re Application of Fox Television Stations*, 11 F.C.C.R. 5714, 1995 WL 447416, ¶13-18 (F.C.C. 1995).

82. Although the 1996 Act amended section 310(b), it has not removed the two-tiered approach. The 1996 Act removed the bar against foreign directors from section 310(b). See Telecommunications Act of 1996, Pub. L. No. 104-104 § 403, 110 Stat. 56, 130-32.

83. 47 U.S.C. § 310(b)(3)-(4).

84. 47 U.S.C. § 310(b)(3).

85. Ronald W. Gavillet, Jill M. Foehrkolb, and Simone Wu, *Structuring Foreign Investments in FCC Licensees Under Section 310(b) of the Communications Act*, 27 CAL. W. L. REV. 7, 11 (1990). An indirect, non-controlling interest is an investment in a company that holds investments in a licensee. *Id.* In calculating how much an indirect, non-controlling interest will count towards the twenty percent maximum, the FCC employs a multiplier equal to the percentage of the foreign investment in the holding company multiplied by the percentage of the holding company's investment in the licensee. *Id.* at 11-12.

86. 47 U.S.C. § 310(b)(4).

87. *Id.*

determining whether a licensee is in compliance with these ownership restrictions, Section 310(b)(3) and Section (b)(4) are treated separately; they are not aggregated.⁸⁸ With a little creativity, a foreign investor could, in theory, obtain a forty percent interest in a licensee in the United States.⁸⁹ Because the previously discussed "limitations on alien ownership, voting rights, and directorships, . . . [do not], [a]s the Commission is well aware, . . . always reflect reality,"⁹⁰ a foreign investor with a large enough interest may be subject to additional regulations if that investor is found to exercise *de facto* control over the licensee.⁹¹

Although the ownership regulations appear rigid, the "public interest" exception to the indirect ownership limit of Section 310(b)(4) gives the FCC broad discretion to waive the requirements of the statute.⁹² Allowance of this exception by the FCC, however, has been rare.⁹³ For the first time ever, in the 1995 *Fox Television* decision, the FCC granted a public interest waiver to allow a foreign owner to maintain control of a television broadcasting license.⁹⁴ In *Fox*, the Commission found that the Australian-based News Corporation, which is the alter-ego of media-mogul Rupert Murdoch, had ownership interests in excess of Section 310's indirect ownership limits.⁹⁵ Under the facts of the case, however, the Commission determined that "equity" required granting a public interest waiver.⁹⁶ At first blush, this

88. Gavillet, *supra* note 85, at 19.

89. A foreign investor could directly own 20% of the licensee as well as 25% interest in a corporation that controls the licensee. If the controlling corporation owns the remaining 80% of the licensee (100% - the foreign investors 20%), the foreign investor will have an additional 20% investment in the licensee, as computed by the FCC multiplier (80 X 25), thereby giving the foreigner a 40% interest. *Id.* at 40.

90. *Telemundo, Inc. v. F.C.C.*, 802 F.2d 513, 516 (D.C. Cir. 1986).

91. Gavillet, *supra* note 85, at 20-22.

92. 47 U.S.C. § 310(b)(4). Section 310(b)(4) calls for a case-by-case analysis looking at several factors including "(1) whether the alien's country of citizenship enjoys close and friendly relations with the United States, (2) the extent of foreign ownership or control of the corporation . . . , (3) whether the licensed facility involved is passive in nature . . . , (4) the qualifications of the applicant," and other additional factors. Gavillet, *supra* note 85, at 17-18. There is no corresponding flexibility in the direct ownership limit imposed by 47 U.S.C. § 310(b)(3).

93. See Gavillet, *supra* note 85, at 14-15.

94. *In re Application of Fox Television Stations, Inc.*, 11 F.C.C.R. 5714, 1995 WL 447416 (F.C.C. 1995).

95. *Id.* ¶¶13-18. After considering "the economic realities of the [situation] under review and not simply the labels attached by the parties to their corporate incidents," the Commission determined that the News Corporation's debt interest in *Fox* was "more properly characterized as a capital contribution." *Id.* ¶¶14-15. This interest exceeded the limit of § 310(b)(4). *Id.* ¶19.

96. The Commission considered many factors including *Fox Television's* good faith reliance upon its understanding of Section 310(b), the costs that

decision appears to provide a precedent for other foreign investors to argue that they too should be allowed to gain indirect control of a broadcasting license. That conclusion, however, is not justified because *Fox* was decided based upon the equities of that case, and not because the public interest was furthered by allowing this "foreigner" into the broadcasting industry.⁹⁷ The *Fox* decision concerned the unfairness of terminating broadcasting licenses held by a foreign corporation after that corporation held those licenses with the FCC's blessing for over a decade.⁹⁸ Because there is little chance that any other foreigner will be able to enter the U.S. television broadcasting market, and gain a substantial foothold as *Fox* did, it is doubtful that the *Fox* decision will be repeated under the present regulations.

b. Evaluation of the U.S. Regulations: Are the Regulations Valid?

The U.S. foreign ownership restrictions suffer from two flaws: the national security justification for those provisions is overstated and the benefits of foreign capital are underestimated.

(1) The Weakness of the National Security Justification

Although national security comprises a compelling governmental interest worthy of protection,⁹⁹ the original fears that led to broad restrictions on alien ownership are no longer applicable. Technological advances have removed the danger that a broadcaster could use transmission facilities to interfere with the military's lines of communication as was done before World War I.¹⁰⁰ As technology has advanced, so should views of the threats to national security.

One can use other measures to protect this country's interests without having to resort to a broad ban. One alternative, used to address threats during World War I, is to permit the President to seize or temporarily stop transmission of broadcasting facilities if they interfere with national security. Although this may not be the most desirable option, the provisions that would allow the President to adopt such measures

investors would face if they were forced to restructure *Fox*, and the decade long history of *Fox's* broadcasting and service to the community. *Id.* ¶¶19-28.

97. *Id.* ¶¶33-37.

98. *Id.* ¶34.

99. See, e.g., *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (finding that the government's compelling interest in preserving national security may justify withholding sensitive information).

100. See *Cryan*, *supra* note 7, at 381-87 (discussing technological advances in the area of radio broadcasting); *Rose*, *supra* note 35, at 1201-03 (discussing the greater availability of broadcasting frequencies).

are already in place under Section 606 of the Communications Act of 1934.¹⁰¹

Another possible justification for the current regulations would be to protect the independence and cultural integrity of the United States. Proponents of this argument suggest that the restrictions are necessary to prevent a foreign country from broadcasting its own anti-U.S. messages in an effort to promote its agenda and to erode support for the U.S. government at home.¹⁰² Although this raises some interesting issues, this argument directly conflicts with the established U.S. policy of promoting free speech.¹⁰³ The U.S. system operates under the assumption that all viewpoints should have an equal opportunity to be aired, so that the people can listen to the arguments and evaluate the positions for themselves.¹⁰⁴

101. "Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations . . . within the jurisdiction of the United States . . . and may cause the closing of any station for radio [or television broadcasting] . . . or he may authorize the use or control of such station." 47 U.S.C. § 606(c). The President is also authorized to use the armed forces to prevent any obstructions of necessary communication. 47 U.S.C. § 606(b).

While Presidential seizures are not necessarily desirable, history has shown that the President would probably not need to resort to this drastic measure. In fact, if today's technology was available at the time of World War I, the President would not have needed to seize the two German broadcast facilities.

102. Regulating foreign ownership for the purpose of inhibiting a foreign entity's viewpoint would amount to a content-based restriction on speech and should be reviewed by a court under strict scrutiny. For a discussion of the constitutionality of such a regulation, see Rose, *supra* note 35.

103. U.S. CONST. amend. I.

104. See *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (stating that "informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."); Carter, *supra* note 34, at 584; Powe, *supra* note 33, at 40. Allowing a foreign entity to express its views on an issue is not significantly different from allowing a political party, that is not in power, to express its disagreement and disgust with the course that the government is taking.

In 1991, the U.S. Court of Appeals for the Second Circuit was presented with an intriguing, yet frivolous claim that the Constitution provided a right for American citizens to be free of foreign owned or controlled media. *Young v. Matsushita Elect. Indus. Co.*, 939 F.2d 19, 20 (2d Cir. 1991). In this case, involving the acquisition of MCA motion pictures by Matsushita, a Japanese company, the Second Circuit Court wrote:

Appellants' complaint seeks to assert a right of national citizenship protecting essential features of the national government, among them an allegedly inherent right to receive information on national issues by means of mass media not accountable to foreign-owned or foreign-controlled entities. Appellants cite no case in support of their expansive concept of

Some have expressed the view that foreigners could attempt to distort actual events in order to make their point. If that is the case, there are other, much less restrictive means of preventing the dissemination of misleading information than completely shutting the door to outside influences.¹⁰⁵ In addition, the diversity of choice that exists in the broadcasting arena drastically reduces the risk that any one broadcaster could have a substantial impact.¹⁰⁶ Therefore, this rationale cannot justify keeping the current restrictions.

(ii) Fox: Making the Case for Deregulation

While concern about national security could sufficiently justify government regulation, one must also weigh other considerations, such as the adverse impact on free trade against this interest.¹⁰⁷ The current regulations on foreign investment are protectionist legislation aimed at preventing foreign broadcasters from gaining any meaningful share of the U.S. market.¹⁰⁸ The superiority of the technology and programming of

national-citizenship rights. We decline the invitation to issue such a decision. . . . The alleged right of U.S. citizens to receive communications through domestic media that are not subject to foreign control does not remotely resemble any extant right of national citizenship, all of which involve matters "connected with the powers or the duties of the national government."

Id. at 20 (citations omitted).

105. For instance, libel and slander laws would act as a deterrent to the spread of malicious lies.

106. See Dennis, *supra* note 13, at 155 (stating that the "marketplace of ideas" would act as a protector against harmful foreign broadcasts). Although one may be able to publish a harmful position on one station, there are thousands of other stations for the government or any other interested party to counter that position with its own view of the truth.

107. For instance, in the famous Pentagon Papers case, the Supreme Court allowed the New York Times and the Washington Post to publish the "sensitive" information concerning the Vietnam War over the government's national security objections because of the newspapers' First Amendment interests. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Although the interest in promoting free trade is not nearly as strong as the First Amendment justifications found in *New York Times Co. v. United States*, the claim of a national security justification was also much stronger in the later case. Therefore, the principles behind *New York Times v. United States* cannot be distinguished merely by the differences in the competing interest. The inherent strength or weakness of the government's claim must also be considered in determining which of the competing interests should prevail.

108. Foreigners do have some access to the American market. Like those without a broadcast license, they can purchase air-time to run advertisements, and they can pressure the networks into running their products and shows. This access is limited by the fact that they must expend money and effort every time a foreigner wants to show one of their productions in the United States. As a result

U.S. broadcasters, however, suggests that the industry does not need such substantial protection.¹⁰⁹ In fact, this superiority is one of the chief reasons cited for other countries' refusals to allow U.S. companies into their markets.¹¹⁰ Removing the unnecessary barriers to a foreign investor in the United States would result in a gain of many of the traditional benefits associated with a free market. There would be an increase in competition leading to better products, more choices, and increased efficiency.

Fox Television's emergence as the fourth major network underscores some of the advantages that will result from increased competition. This new forum benefits viewers,¹¹¹ producers of television shows,¹¹² advertisers,¹¹³ network affiliates,¹¹⁴ UHF stations,¹¹⁵ and other "source" industries.¹¹⁶

of the delay and expense, foreigners simply cannot compete in the broadcasting market in the United States. See Dennis, *supra* note 13, at 154.

109. This superiority is demonstrated by the extremely limited success of foreign programming in the United States. Less than two percent of television programming comes from abroad. Foreign films have not met with much success either. See *id.*

110. See Brown, *supra* note 17, at 117 (citing the Canadian government's fear of U.S. programming running rampant in the Canadian broadcasting market); The Honorable Donald S. Macdonald, *The Canadian Cultural Industries Exemption Under Canada-U.S. Trade Law*, 20 CAN.-U.S. L.J. 253, 254 (1994) (presenting statistics showing the success of American broadcasters in Canada); Konigsberg, *supra* note 23, at 284; Kaplan, *supra* note 11, at 255, 262, 269-71 (observing that European television has been dominated by reruns of American programming such as the *Cosby Show*, *Hogan's Heroes*, and *Dynasty*, and noting that Hollywood has an insurmountable economic advantage over its European counterparts).

111. Television viewers benefit by having additional choices when deciding what to watch.

112. Producers, writers, and actors gain from the increased opportunities to develop new shows. In turn, this leads to additional jobs associated with producing those shows.

113. Although advertisers are attempting to reach the widest possible audience, they are more concerned with tailoring their message to those "most likely to buy their particular product—as distinguished by age, sex, affluence and so on." VEPOND, *supra* note 43, at 90. From the additional broadcasting forum, advertisers gain more opportunities to direct their goods at particular audiences, and more bargaining power when dealing with the three networks that have monopolized the broadcasting industry in the United States for so many years. As the amount of available air-time increases, the cost to the potential purchasers decrease, thereby making time slots more accessible to smaller businesses.

114. The interests of the network affiliate stations must also be considered since they too can go elsewhere. The New Orleans television market, where three stations switched their affiliations at the end of 1995, is a perfect example of what can happen. Just because a station may have been with a network such as ABC for thirty years does not mean that they will never change. Ronette King, *Loose Ties Bind Networks, Stations; Affiliation Pact Only Temporary*, TIMES-PICAYUNE (New Orleans), Dec. 31, 1995, at A8.

115. *In re Application of Fox Television Systems*, 11 F.C.C.R. 5714, 1995 WL 447416 (F.C.C. 1995) (separate statement of Commissioner James H. Quello).

Minority broadcasters deserve separate attention.¹¹⁷ "Economists have demonstrated that the neglect of minority tastes occurs in any industry in which monopoly or monopolistic competition exists."¹¹⁸ Minorities primarily benefit from the increased broadcasting opportunities from this new network.¹¹⁹ In fact, one commissioner of the FCC has said that, "Fox has provided a national platform for minority producers, writers, actors, and other members of the creative community."¹²⁰ With the introduction of foreign investment and the corresponding increase in the number of broadcasting stations, minority opportunities for both viewers and broadcasters should continue to improve.

Easing current broadcast restrictions will increase foreign presence in the market. The first noticeable change would be an influx of new capital. Given the broadcasting companies'

116. The increased competition also results in a shifting of profits away from the major networks and towards other industries. An example of this can be seen in the tremendous increase in the amount of money paid by the networks for major sporting events. With one more bidder available, the price that is paid has increased. As CBS learned the hard way, by losing its contract for NFL football to Fox, the three major networks can no longer be complacent towards their existing clients. Now, the networks must consider the interests of those producing shows or face the realistic possibility that the producers will go elsewhere.

117. Recognizing the advantages of diversity in views, the FCC, at the direction of the U.S. Congress, and with the blessing of the U.S. Supreme Court, employed affirmative action measures to increase minority representation and to decrease the monopolistic nature of the broadcasting industry. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990). Writing for the Court in upholding these policies, Justice Brennan wrote "[j]ust as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568 (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 311-13 (1978) (opinion of Powell, J.)). The validity of these policies, however, is now in doubt. After a shift in the majority, the Supreme Court overruled *Metro Broadcasting* in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct 2097 (1995), when it adopted strict scrutiny as the test for race-based preference programs. Because *Bakke's* reasoning, that diversity can be a compelling interest in some circumstances such as education, has also come under fire, see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), whether or not diversity in broadcasting is a compelling interest, given the uniqueness of the industry and the scarcity of broadcasting frequencies, *Metro Broadcasting*, 497 U.S. at 566 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)), is, now, an open question.

118. *VIPOND*, *supra* note 43, at 90.

119. *In re Fox*, 11 F.C.C.R. 5714, 1995 WL 447416 (separate statement of Commissioner James H. Quello). Surprisingly, the NAACP opposed the renewal of Fox's licenses. *Id.* ¶¶10-12.

120. *Id.* (separate statement of Commissioner James H. Quello).

constant need for new sources of capital, this would be a welcome change for the industry.¹²¹

2. Other Countries Utilizing the Percentage Method: Canada and Australia

Like the United States, Canada has opted to use the percentage method to control foreign investment in its broadcasting industry in an effort "to safeguard, enrich and strengthen the cultural, political, social, and economic fabric of Canada."¹²² Originally, via the 1958 Broadcasting Act, the Canadian government attempted to create a "comprehensive broadcasting service of a high standard that is basically Canadian in content and character."¹²³ Thus, the 1958 Act imposed a foreign ownership limit of twenty-five percent of the stock of the licensee, with the additional requirement that the chairman and two-thirds of the licensee's board be Canadian citizens.¹²⁴ In 1968, in an effort "to preserve and strengthen the political, social, and economic fabric of Canada," the present set of restrictions were enacted.¹²⁵ The Canadian Broadcasting Act of 1968, which continues in effect with the adoption of the 1991 Broadcasting Act, expressly limits direct foreign ownership to twenty percent of a licensed broadcaster, with a requirement that all members of the board be Canadian citizens.¹²⁶ The remaining eighty percent of the licensee may be owned by a "qualified corporation."¹²⁷ By definition, a "qualified corporation" is one whose ownership is at least two-thirds Canadian.¹²⁸ A foreign investor could, in effect, gain a forty-six and two-thirds percent ownership share of a Canadian licensee by directly owning the statutory maximum of twenty percent and by obtaining indirect ownership through the

121. The success of the Fox network shows the advantages of new capital. As a direct result of the new network, there has been a revitalization of UHF stations. *Id.*

122. R.S.C. ch. B-11 § 3 (1978) (Can.) cited in Brown *supra* note 17, at 114 n.7. American domination of the Canadian market is the specific justification often presented for Canada's regulatory policies. For statistics on the dominance of the U.S. media in Canada, see Macdonald, *supra* note 110, at 254.

123. Coffey, *supra* note 17, at 417 (quoting Broadcasting Act, Can. Stat. ch. 22, § 10 (1958)).

124. *Id.* at 417-18.

125. *Id.* at 420.

126. 376 C.R.C. §§ 2-4 (1978) (Can.); Coffey, *supra* note 17, at 422. See Kowall, *supra* note 5, at 348 (noting that the Broadcasting Act, ch. 11, 1991 S.C. 117 (Can.), embodies the regulations of the 1968 Act).

127. 376 C.R.C. §§ 2-4 (1978).

128. Grant Buckler, *Smart 95 -Canadian Telecom Liberalization Continues*, NEWSBYTES NEWS NETWORK, Sept. 15, 1995, available in LEXIS, Market Library, lacnws File.

maximum one-third share of the qualified corporation.¹²⁹ The regulations, however, do have one additional protection. The Canadian government will not allow a corporation to obtain a license if it is effectively controlled by foreigners.¹³⁰

Australia follows a similar approach. Its regulations limit the "company interest" that an individual foreigner can own in a commercial television broadcasting station to fifteen percent and limit total company interest held by foreign investors to twenty percent.¹³¹ In addition, a foreigner cannot exercise control of a broadcasting license, but a broadcaster may have up to twenty percent of its director positions held by foreigners.¹³² Although the exact meaning of "company interest" is uncertain, the intent seems clear that one cannot exceed the foregoing thresholds. Although the Australian-based News Corporation was able to obtain a license to broadcast in the United States,¹³³ restrictions such as these indicate that the reverse cannot happen without a change in Australian law. Although many other countries follow some variation of the percentage method, their regulations do not materially differ from the samples above.¹³⁴

3. The Percentage Method: Pros and Cons

The percentage method, including the *de facto* ownership limits, is effective in keeping foreign investors out of the business of broadcasting. Policy benefits attributable to this approach include those that inure to a policy of exclusion, such as greater security and less opportunity for subversive messages. On the down side, such an approach compromises diversity of opinions and freedom of speech. In addition, countries following the percentage method have only limited access to foreign capital.

Further, while appearing to draw a bright line, this approach is administratively difficult to apply. In order to determine compliance under any of the percentage method regulations, the authority charged with regulating the broadcasting industry must undertake an intensive study of the licensee as well as anyone

129. *Id.*

130. 376 C.R.C. §§ 2-4 (1978).

131. Broadcasting Services Act, 1992, 110 § 57 (Austral.).

132. *Id.* §§ 57-58.

133. *See In re Application of Fox Television Stations*, 11 F.C.C.R. 5714, 1995 WL 447416 (F.C.C. 1995).

134. For instance, Poland sets a maximum foreign ownership limit at 33%. *Polish Law on Radio Television Broadcasting*, 1993 U.S. DEPT OF COMMERCE—NTIS CENTRAL & EASTERN EUROPE LEGAL TEXTS, Jan. 29, 1993, article 35.2.

with a significant interest in that licensee. This results in a time-consuming case-by-case analysis.¹³⁵

Finally, selection of an appropriate limit on foreign ownership, in order to protect the countries legitimate interests, results in the setting of an arbitrary line. As demonstrated by the three examples above, countries do not agree on an appropriate limit. One difficulty encountered in setting foreign ownership limits is that there is no clear demarcation of what percentage of ownership will result in control over the license. For instance, a ten percent stake in a large corporation may give a shareholder control, whereas a larger share of a smaller corporation may result in a minority position only. This difficulty, however, has been lessened by employing restrictions aimed at *de facto* ownership.

B. *The Friendly Nation Approach: The European Community*

Another philosophy of regulation that has gained popularity in recent years is that of lowering the restrictions imposed upon citizens of "friendly" countries,¹³⁶ while leaving the barriers up for all others.¹³⁷ This result is achieved through the use of free-trade

135. See, e.g., *In re Fox*, 11 F.C.C.R. 5714, 1995 WL 447416 (finding that Fox was a foreign-owned business more than ten years after Fox first received its license to broadcast).

136. A nation is considered "friendly" when it has reached agreement with other nations to treat each others citizens as they would treat their own.

137. England's Broadcasting Act of 1990 is an example of how foreigners, other than those from countries which are party to a free-trade treaty are excluded. The pertinent provisions are as follows:

- (1) The Commission shall do all that they can to secure—
 - (a) that a person does not become or remain the holder of a license if he is a person who is a disqualified person in relation to that license by virtue of Part II of Schedule 2 to this Act.

Broadcasting Act of 1990, ch. 42, part I, chapter I, § 5 (Eng.).

- (1) Subject to sub-paragraph (2), the following persons are disqualified persons in relation to a license granted by the Commission or the Authority—
 - (a) an individual who is neither—
 - (i) a national of a member State who is ordinarily resident within the European Economic Community, nor
 - (ii) ordinarily resident in the United Kingdom, the Isle of Man or the Channel Islands;
 - (b) a body corporate which is neither—
 - (i) a body formed under the law of a member State which has its registered or head office or principal place of business within the European Economic Community, nor
 - (ii) a body incorporated under the law of the Isle of Man or the Channel Islands;

treaties. The European Community (EC) members have used this approach in developing a system of regulation that generally allows free access to the broadcast industry to investors from other member states.¹³⁸ The drafters of the North American Free Trade Agreement (NAFTA) declined to follow the EC's lead when they exempted broadcasting from its coverage.¹³⁹

1. The EC: Opening Broadcasting Markets for Member States

The EC provides a common market throughout Europe with few territorial barriers between member states.¹⁴⁰ This liberalization of restrictions included lowering the barriers to foreign investment in the broadcasting industries of member states.¹⁴¹ England's Broadcasting Act of 1990, which treats nationals of EC states the same as its own citizens with respect to eligibility for a broadcasting license, is illustrative of this liberalization.¹⁴² By treating the citizens of other member states as equal to its own, England's Broadcasting Act of 1990 has effectively removed barriers to investment by citizens of EC member states.

The treaty also allows foreign broadcasters to make transnational broadcasts.¹⁴³ This right to transmission, however, is not without restriction. The EC's Court of Justice has ruled that a country may restrict the broadcasts in some ways, such as prohibiting the use of paid advertisements, as long as those restrictions are not employed as a means of discriminating against citizens of another member state.¹⁴⁴

Restrictions that are discriminatory are allowed when they are based on "public policy, public security or public health."¹⁴⁵ "Broadly speaking, the 'public policy' exception can be invoked only where there exists a genuine and sufficiently serious threat to one of the fundamental interests in society."¹⁴⁶ Because this exception departs from the stated goal of an open system, it is subject to the following qualifications: "(1) it may not be used to serve economic ends . . . (2) it must be interpreted in such a way that its effects are limited to that which is necessary in order to

Broadcasting Act of 1990, ch. 42, sched. 2, part II (Eng.).

138. See WINN, *supra* note 55, at 57-65.

139. Konigsberg, *supra* note 23, at 284; Vannoy, *supra* note 23, at 310.

140. WINN, *supra* note 55, at 51.

141. *Id.* at 51-52.

142. Broadcasting Act of 1990, ch. 42, sched. 2, Part II (Eng.).

143. WINN, *supra* note 55, at 57.

144. *Id.* at 61-62 (citing *Procureur du Roi v. Debauve*, Case 52/79 [1980] ECR 833, [1981] 2 CMLR 362).

145. *Id.* at 63.

146. *Id.*

protect the interests it seeks to safeguard . . . (3) it must be interpreted strictly . . . [and 4] fundamental human rights must be taken into account."¹⁴⁷ The Court of Justice has found that limitations on the number of broadcasting frequencies available does not constitute, in itself, a sufficient justification for discriminating against broadcasters from other member states.¹⁴⁸ The frequency limitations, however, do entitle the member countries to impose licensing requirements upon broadcasters, provided that this licensing is not merely a sham to avoid other treaty provisions.¹⁴⁹ Members of the EC can also refuse to license private broadcasters when seeking to preserve the government's monopoly on broadcasting.¹⁵⁰ Finally, content restrictions have been imposed to ensure that a majority of the broadcasting material is local in scope.¹⁵¹ In sum, the EC has created a relatively open system of broadcasting within the confines of the treaty's reach.

2. Evaluation of the EC Model

The friendly-nation approach offers many advantages over the relatively more restrictive percentage method. By lowering barriers to some nations, a country can gain the advantages of an open system. Under this system, however, the opening of the industry is controlled.¹⁵² While the home country will benefit from the new sources of programming and capital, as well as a

147. *Id.* at 63-64.

148. *Id.* at 65.

149. *Id.* at 178.

150. *Id.* at 179-80.

151. Paul Presburger & Michael R. Tyler, *Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive*, 13 HASTINGS INT'L & COMP. L. REV. 495, 499-501 (1990). This was done as a means of ensuring that broadcasting material was of European origin. *Id.* Without the restriction, a European broadcaster could have purchased a U.S.-made program, and distributed it freely throughout Europe.

In the recent Uruguay round of negotiations for the GATT, the United States strongly challenged the use of content-based restrictions in the EC as being a violation of the terms and spirit of GATT. Kaplan, *supra* note 11, at 303. The U.S. position was that, "culture is a market phenomenon: laissez-faire [is] the best and only strategy for dealing with it." That the United States would take such a position is logical since U.S. culture tended to predominate in an open market; as Kaplan noted, "[c]ulture happened in U.S. terms." *Id.* By failing to resolve the issue of cultural exemptions at the Uruguay round, the European position scored "a clear political victory for the EC and for proponents of cultural protectionism." *Id.* at 343.

152. "Perhaps the best one can say about privileged entry is that it permits society and other parts of the media system to adjust gradually to a more open system. Another positive aspect of privileged entry is that it is generally more palatable to opponents of openness in television, who tend to believe that the less there is of it, the better." Noam & Domonkos, *supra* note 36, at 651.

larger forum for speakers, it will also have the security of being able to adopt reasonable limits, such as licensing requirements, to maintain some semblance of order in the industry. If the broadcasts from a particular country threaten national security, the home country can choose not to enter into a treaty with the "unfriendly" nation.¹⁵³ The end result is a reasonable balance between the maximization of free speech and the minimization of the threats to national security.

The EC's treaty provides an additional feature that makes it attractive to nations with developing broadcasting industries. Any country with a purely state-owned broadcasting system is not obligated to open its industry to foreigners.¹⁵⁴ Any country that falls within this exception has the strongest justification for agreeing to a treaty modeled after the EC's system. Without giving up the integrity of its own broadcasting industry, that country could secure the economic benefits from the deregulation in other countries for its own citizens who wish to invest in those markets. This potential for abuse constitutes one downside for adopting a global treaty modeled after the EC's system.

The major drawback to the friendly-nation approach consists of persuading other countries to agree upon a treaty. Procedural difficulties associated with the ratification of a treaty present an initial problem. For instance, in the United States, a treaty will be ratified only after it has been negotiated by the President and approved by two-thirds of the members of the Senate.¹⁵⁵ Factoring in the procedural difficulties that would be encountered in the other nations makes the goal of creating a global treaty appear almost impossible.

This difficulty is amplified further by the recent failure of the United States to include the broadcasting industry in the relaxation of trade barriers under NAFTA, due to the inability to ease Canadian concerns that U.S. broadcasters could dominate the Canadian market.¹⁵⁶ Obtaining the goal of a uniform, global system of regulation would not only require a reconciliation of differences with Canada, but would also require finding common ground with all the major industrialized nations. In an area such as broadcasting, where countries are very protective of their

153. Using a treaty as a means of strengthening an industry among several nation-participants while excluding another dominating force is not new. In fact, a major goal of the EC's lowering of its barriers with respect to each other, but not to the United States, was to give the European industries a chance to strengthen while forcing a decrease in the pace of the "Americanization" of Europe. Konigsberg, *supra* note 23, at 302.

154. *Id.*

155. U.S. CONST. art. II, § 2, cl. 2.

156. Konigsberg, *supra* note 23, at 284.

borders, finding this common ground through negotiations is virtually impossible.¹⁵⁷

C. Reciprocity as a System of Regulation

The concept of "reciprocity" has become a popular solution for those advocating liberalization of foreign trade barriers.¹⁵⁸ Reciprocity is a "term used to denote the relation existing between two states when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the latter state."¹⁵⁹ In the arena of broadcasting ownership restrictions, reciprocity means lowering the ownership restrictions by country A only for the citizens of those countries that lower barriers to the citizens of country A. One can accomplish this type of regulatory policy either by the use of treaties¹⁶⁰ or by enacting legislation that automatically lowers restrictions to citizens of countries that have similarly reduced their barriers.¹⁶¹ The first method, which is essentially what the EC achieved by enacting their regulations, was analyzed in the previous section.¹⁶² Therefore, this section will focus on the latter method, which will be referred to as the "pure form."

The upside to the pure form of reciprocity is both immense and politically popular. If it works, and countries lower their barriers in order to trigger the opening of other markets, this approach will result in vastly increased economic opportunities as well as many new broadcasting forums for potential speakers to

157. Jonas M. Grant, *'Jurassic' Trade Dispute: The Exclusion of the Audio-Visual Sector from the GATT*, 70 IND. L.J. 1333, 1335-36 (1995).

158. See Coffey, *supra* note 17, at 413-28; Konigsberg, *supra* note 23, at 318-19; Brown, *supra* note 17, at 224-26.

159. BLACK'S LAW DICTIONARY 1270 (6th ed. 1990).

160. In a sense, any treaty is a reciprocity agreement. Under a treaty, a country is agreeing to undertake some activity, such as deregulation, if and only if the other party to the treaty will agree to undertake its own obligations under the treaty.

161. See Konigsberg, *supra* note 23, at 318-20 (proposing a reciprocity amendment to the ownership restrictions of the Communications Act of 1934). This proposed reciprocity amendment, however, is flawed. The new section (f) would allow the FCC to lower barriers to countries who have a bilateral agreement with the United States "if the Commission finds that the public interest will be served by the granting of such a license." *Id.* at 318. Because the present section 310 allows for a public interest waiver of the indirect control limits, the new section would not ease the formalities of obtaining a license. While the new section's application goes beyond the indirect ownership limits, it requires the administratively burdensome requirement of obtaining a bilateral trade agreement. In the end, this provision could be counterproductive because it may result in an additional requirement being added to the public interest waiver that is currently authorized.

162. See *infra* Part II.B.

express their views. As more nations join in the deregulation, the global regulatory scheme begins to look like an open system similar to that of the EC. One feature that makes this a popular alternative is that such deregulation excludes those who are not willing to lower their own barriers to outsiders, thereby preventing an opening of the "floodgates" to potential abuse.¹⁶³

Although reciprocity and the friendly-nations approach will tend to mirror each other in terms of the benefits derived, differences exist between the two approaches. Reciprocity could be accomplished without the obstacles of enacting a treaty. Therefore, it could theoretically be easier to create a global system using this approach. Under the pure form of reciprocity, however, there would be no control over selecting the countries that are able to avail themselves of these lowered restrictions. To gain entry into new markets, a nation would only need to lower its own barriers. Under the friendly-nation approach, any undesirable country could be excluded by refusing to negotiate with that country. Although this difference could be reconciled by adopting exceptions to the pure form of reciprocity, such as selectively excluding certain nations from this preferential treatment, that reconciliation would run counter to the goals of a global system of deregulation.

D. *Eastern Europe: The Desperate and the Uncertain*

Legal restrictions on broadcasting in many parts of the world, such as Eastern Europe and Latin America, are uncertain at best.¹⁶⁴ Although those countries that fall within this category do not have a uniform system of regulation that can be evaluated to help form an opinion of the ideal system of regulation, these underdeveloped markets are likely to be attractive areas for foreign investment.¹⁶⁵ The ultimate goal of liberalizing the ownership rules entails finding new markets for expansion. Because the economic needs of the underdeveloped markets tend to be the same regardless of their longitude and latitude, for

163. Konigsberg, *supra* note 23, at 319.

164. See Anne Moebes, *Channels of Communication Are Opening in Eastern Europe*, 10 U. MIAMI ENT. & SPORTS L. REV. 1, 13 (1993) (reviewing the state of broadcasting in Eastern Europe); Monroe E. Price, *Law, Force, and the Russian Media*, 13 CARDOZO ARTS & ENT. L.J. 795 (discussing the mass media in the former Soviet Union); Vannoy, *supra* note 23, at 320 (recognizing the "Latin American 'regulatory complexion' has been termed 'patchwork and piecemeal'")(quoting Bruce Willey, *A Latin American Telecommunications Primer; Telephony in Latin America and Tips for Deploying Networks*, TELECOMMUNICATIONS, Mar. 1992, at 45, available in LEXIS, Nexis Library, Tele File).

165. Moebes, *supra* note 164, at 7; Vannoy, *supra* note 23, at 333.

purposes of analysis, this Note will use Eastern Europe as a model for discussion.

Surprisingly, the Eastern European regulations of broadcasting that have been enacted tend to be liberal.¹⁶⁶ Even though Poland took the lead by enacting a percentage-method restriction capped at one-third foreign ownership,¹⁶⁷ others, such as the former Czechoslovakia, have opted for no restrictions at all.¹⁶⁸ The driving force behind these liberal restrictions is a need for investment capital strong enough to force Russia and others to turn to U.S. capitalists for assistance.¹⁶⁹ Because of these countries' unwillingness to shut off needed sources of capital, those countries that have not addressed the issue will probably adopt relaxed policies.¹⁷⁰

Any global agreement upon a level of broadcasting ownership restrictions would have little impact in Eastern Europe, because the need for additional capital will prevail over uniformity. Therefore, in formulating and achieving a global system of regulation, these countries, with the possible exception of Poland, are best viewed as valuable economic opportunities for broadcasting investors, and not players whose interests must be taken into account separately.¹⁷¹

166. Moebes, *supra* note 164, at 13. See also Hungarian Bill on Radio and Television, Art. 123, reprinted in 11 CARDOZO ARTS & ENT. L.J. 449, 498-99 (proscribing regulations for foreign control broadcasters).

167. Moebes, *supra* note 164, at 20.

168. *Id.* at 10.

169. See Bazylar & Sadovoy, *supra* note 12, at 444-45 (discussing the use of American programming and news sources such as CNN by both private and government run broadcasters as a means of reducing costs). Although Russia is willing to accept assistance, it is not ready to completely open the door to foreigners. Russia will not grant a license to establish a mass media outlet to a foreign citizen or to anyone living outside its borders. Price, *supra* note 164, at 800.

170. Moebes, *supra* note 164, at 7.

171. Not only are these markets attractive for potential investors in the broadcasting industry, they are also opportunities for investment in several other communication-based industries, since, unlike the United States before the Telecommunications Act of 1996, Eastern European countries do not have substantial barriers affecting expansion into those other fields. *Id.* at 13. However, investors must remember the dangers associated with these areas which include financial barriers and political instability. *Id.* at 16, 26.

IV. AN OPEN SYSTEM: ACHIEVING THE IDEAL

A. *The Ideal System: Global Relaxation with Security*

Now that the various alternatives have been presented, the goal shifts to selecting the best approach either individually or in combination with others, for a world-wide system. As mentioned previously, the goal is to maximize free speech and economic opportunities, while minimizing the threats to national security, territorial independence, and cultural integrity. No single system is best for achieving each of these goals. Instead, the optimal approach is the one that balances these policies in the most favorable way. In the end, the ideal is a modified version of reciprocity.¹⁷²

The regulatory scheme that maximizes economic opportunities and free expression is one with few barriers to market participants. Because of the need to preserve the integrity of the broadcasting spectrum, this type of scheme would include licensing rules to allocate only broadcasting frequencies. The rules would not constitute a means of discriminating against unwanted speakers or groups such as foreign investors. Unlike the percentage method, which is exclusionary by nature, the reciprocity-based approaches come close to this goal. In theory, reciprocity welcomes or invites all those who wish to participate to open their own industries.

A system which reduces the chances for airing unwanted threats, ideas and opinions further national security, territorial independence, and cultural integrity. Total government domination of the communications industries best promotes these goals. Because such an alternative is unthinkable in a democratic society such as the United States, the most feasible alternative is the percentage method approach.

Balancing reciprocity against the percentage method could lead to an endless political policy discussion since each has merit. But, from a planning perspective, there is a fortunate break. One can modify these systems to achieve a better alternative. For instance, one could alter the percentage method by lowering barriers on foreign investment to gain additional economic benefits.¹⁷³ This process, however, would become artificial since

172. For commentators arguing for the use of reciprocity in communications industries, see Coffey, *supra* note 17, at 413-28; Konigsberg, *supra* note 23, at 318-19; Brown, *supra* note 17, at 224-26.

173. For commentary on this approach, see Kowall, *supra* note 5, at 358 (advocating the raising of the ownership limits to between 30 and 49 percent to

it would lead to the conclusion that almost any additional raising of the maximum allowable foreign ownership percentage will be beneficial from an economic standpoint. Therefore, the proper starting place for constructing the ideal is from the open-end, reciprocity.

Reciprocity calls for no barriers to investors from countries who are willing to remove their own restrictions. The modifications needed for this system are those that will protect national security and independence.¹⁷⁴ One alternative is to move towards the treaty-based approach. As explained above, however, this approach is unworkable from a practical standpoint. Two modifications to the reciprocity approach that would work include selective exclusion and emergency executive authority.

Selective exclusion, which targets certain nations that do not deserve favorable treatment, is the polar opposite of negotiating a treaty with those countries to whom regulations will be lowered. This exclusion requires the suppression of broadcasting influence from nations that are determined to be hostile or threatening.¹⁷⁵ Although this approach can be effective at reducing threats, it has two fatal flaws. First, suppressing a message or a speaker runs counter to the goal of free speech. Second, recognition of a significant threat would often occur too late for the exclusion to be effective. Therefore, this alternative is not the favorable solution.¹⁷⁶

Modifying reciprocity to include emergency executive authority over foreigners in the broadcast industry is an effective means of protecting national security and independence. This would allow the executive to take measures necessary to prevent physical interference with security, such as by blocking or intercepting sensitive military communications, but would not extend to censoring anti-government messages. Not only would this method work, a comparable provision is already in place in the United States.¹⁷⁷ With the additional security safeguard, an

allow for more foreign investment capital to enter the Canadian broadcast market).

174. These additional protections are aimed at threats to national security such as interference with military broadcasts and other sensitive governmental activity. They are not aimed at controlling speakers and their messages because that would be a clear violation of the protection accorded to free speech in many countries including the United States.

175. Active involvement in terrorism is one example of a reason for the exclusion of a nation.

176. Selective exclusion is not the answer for protecting national security or silencing particular speakers. This process may, however, have valid uses such as forcing others to open their industries to outsiders. Therefore, selective incorporation may be useful as a means of preventing abuse.

177. See 47 U.S.C. § 606.

open system modeled upon reciprocity is the ideal end for world-wide regulation. Identifying this goal is the easy part. The difficulty arises in achieving the goal.

B. *The United States: The Telecommunications Act of 1996 as Proposed by the Senate*

The U.S. Congress enacted the 1996 Act as a response to a need for reform in the communications industry.¹⁷⁸ The 1996 Act, however, has done little to change the present regulations on foreign ownership of broadcasters.¹⁷⁹ Although early versions of the legislation looked promising for meaningful reform in this area,¹⁸⁰ such hopes died in the House-Senate Conference to reconcile differences in their respective bills.¹⁸¹ A brief look at the proposed changes that were deleted from the legislation (as enacted) is still warranted because it garnered enough support to pass the Senate. With this support, it is conceivable that the proposal will be introduced again in the near future.

Before the Conference Committee acted on the legislation, the Senate version of the 1996 Act included an amendment to Section 310 that would have provided a reciprocity-based exclusion to the restrictive percentage method approach of Section 310(b).¹⁸² This amendment would have moved the U.S. regulations into a "hybrid" state. By amending Section 310 to allow the Commission to reciprocate in lowering foreign ownership barriers (when the President has determined that it is necessary under an international trade agreement), the Senate would, in effect, have authorized the Commission only to meet U.S. treaty obligations.¹⁸³ Therefore, while this proposed amendment consisted of a reciprocity-based approach, it was not the "pure form." Instead, it called for reciprocity through the use of treaties, similar to the friendly-nation approach discussed above. Similar to the system in the EC, no restrictions would be lowered until the United States and another country went through the difficult process of negotiating a trade agreement. At final glance, this proposed amendment might be best characterized as Senate approval of the friendly-nation approach. Because of Canadian reluctance to enter into such a treaty,¹⁸⁴ European fears of

178. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

179. § 402, 110 Stat. at 120.

180. S. 652, 104th Cong., § 303 (1995) (Version 4) (not enacted). This proposed legislation closely resembles Konigsberg's recommendation. Konigsberg, *supra* note 23, at 318-20.

181. 141 CONG. REC. H1137 (Jan. 31, 1996).

182. S. 652, 104th Cong., § 303 (1995).

183. *Id.*

184. Konigsberg, *supra* note 23, at 284.

"Americanization,"¹⁸⁵ and the failed attempts at including the communications industry in the General Agreement on Tariffs and Trade (GATT),¹⁸⁶ this amendment would not have had any practical effect in the near future.

In the end, the failure to secure passage of this amendment was a defeat in name only, because the provisions would have been ineffective. A vast majority of the Senate has nevertheless recognized the need to change the current draconian restrictions on foreign investment.

C. Reaching the Goal of a Global, Open Market

Now that there is a recognition of the goal of an open market based upon the principles of reciprocity, the question is how to achieve that goal.¹⁸⁷ Answers to this question fall into two schools.¹⁸⁸ One view is that reciprocity consists of a self-achieving system.¹⁸⁹ The other is that one country, such as the United States, must affirmatively take the lead in lowering the wall of protectionism.¹⁹⁰

Reciprocity could be a self-achieving system in many industries where an outsider could enter the market with the expectation of being able to compete with existing businesses. In the broadcasting industry, however, foreigners have little reason to believe that they can compete against U.S. broadcasters because of the superiority of U.S. broadcasting technology and the quality of its produced shows.¹⁹¹ Therefore, if the United

185. *Id.* at 302. Article 4 of the EC's "Television Without Frontiers Directive" even includes limits on programming based upon the origin of its creation. Presburger & Tyler, *supra* note 151, at 499-501.

186. See Grant, *supra* note 157, at 1335 (stating that, because of the leading efforts of France, the audio-visual sector has been excluded from the GATT).

187. There is one procedural issue that merits brief discussion: Whose role is it to regulate or change the regulations on foreign ownership? If there was any doubt about the answer, that doubt was resolved by the Second Circuit Court in *Young v. Matsushita Elec. Indus. Co.*, 939 F.2d 19, 20 (1991), discussed *supra* note 105. The court wrote that "[t]he right appellants ask us to create is paradigmatically one for the legislative branch. As Section 310 of the Communications Act of 1934 illustrates, it belongs properly to Congress, if it chooses, to regulate . . . the communications media. . . . [W]e decline the invitation to undertake such regulation." *Id.*

188. "The real issue is reciprocity, or equivalency, whatever you want to call it. Now, should we follow that approach, or do we open out markets and hope that others will follow?" Dennis, *supra* note 13, at 157.

189. See, e.g., Konigsberg, *supra* note 23, at 318-20 (arguing for a reciprocity-based amendment to § 310(b) to encourage the lowering of barriers in other countries).

190. See Cryan, *supra* note 7, at 404 (arguing that the United States should take the lead in lowering investment barriers in the radio broadcasting industry).

191. See Dennis, *supra* note 13, at 154.

States merely enacted a reciprocity amendment to its foreign ownership restrictions, without taking additional proactive measures, there is little evidence that any other country would be willing to lower its barriers first.

Since other nations are not likely to take the initiative of easing restrictions, a global relaxation of broadcasting ownership restrictions can be achieved only if the United States takes the lead by lowering its own restrictions.¹⁹² Although an immediate, reciprocal response by others is unlikely,¹⁹³ time and patience can bring about the desired end. If the U.S. market is open to outsiders, U.S. broadcasters will become increasingly global entities as more foreigners invest in them. In turn, this will create new pressures on other countries to open their own markets to these companies that are partially owned by its own citizens.¹⁹⁴ This internal pressure has a far greater chance at

192. Besides a majority of the United States Senate, Rep. Mike Oxley, Rep. Jack Fields, and at least one other commentator agrees that the time has come for the repeal of the ownership restrictions of § 310(b). Henry Geller "believe[s] that such reform [as the repeal of § 310(b)] is sound and long overdue." Geller, *supra* note 9, at 749.

Although this point is likely to infuriate many Americans, provoking cries to "remember Detroit and the automobile industry," as Toyota was invading, or a renewed discussion of H. Ross Perot and the "glant sucking sound" heard as American jobs headed south across the U.S.-Mexican border, these fears are unwarranted in the broadcasting arena. Even in a global broadcasting industry, broadcasters will always remain somewhat local by necessity. Imagine the obstacles that would be encountered by the network news, for instance, if they did not have strong enough Community presence to obtain the sources upon which their broadcasts rely.

After factoring in language barriers, local prejudices, and the many other obstacles that would be encountered in an attempt to completely invade or relocate a country's broadcast media, it is clear that a globalization of the industry would not eliminate the need for employees on the local level. In the end, after the ownership interests have reshuffled and the markets have experienced the benefits of renewed competition and more diversity, those individuals that rely upon the broadcasters for their livelihoods will still have their source of income. In fact, with the addition of more broadcasting networks, it is likely that more local employees will be needed.

193. It has long been recognized that "[r]eciprocity of open, competitive markets remains a major impediment to a deregulated international communications market". Sean P. Farrell, Note, *Telecommunications in the United Kingdom: A Prototype for Deregulation or a Flash in the Pan?* 18 HASTINGS COMM & ENT L.J. 321, 330 (1996). In order to overcome this reluctance to reciprocate in lowering restrictions, there must be an incentive.

194. The idea of using cooperation and diversification of ownership to gain access to new markets is not new. The use of joint ventures, for instance, has been advocated as a means for the United States to retain a meaningful presence in the European broadcasting market by circumventing the EC restrictions on foreign-created programming. See Anne Moebes, *Structuring Media Joint Ventures in the European Community*, 14 HASTINGS COMM. & ENT. L.J. 1, 3-7 (1991). See also Konigsberg, *supra* note 23, at 314-15 ("Encouraging foreign investment in U.S. broadcast entities would allow dissemination of those uniquely Canadian

removing the ownership barriers than any outside influence could ever hope to achieve.

Time provides another incentive to outsiders. By allowing them a reasonable opportunity to develop their own broadcasting industries and to work with U.S. institutes on improving their facilities, the foreign countries would have a better opportunity to compete with U.S. companies. Once these nations feel that they can compete, they are more likely to allow competitors into their markets. In the end, increased competition, along with the internal pressure, can cause the walls of protectionism to come tumbling down, thereby creating a global broadcasting industry.

One final question remains: What should be done about countries who wish to take advantage of an open U.S. industry, but refuse to lower their own barriers? In the short term, nothing should be done. Those nations should be given a reasonable opportunity to take the necessary steps to comply with new U.S. regulations. After a reasonable amount of time has passed, however, the United States should expel the abusers through selective exclusion. Under these circumstances, selective exclusion does not generate the problems described above because it forces compliance only through economic means. It is not used to discriminate against any particular speaker or message based upon its content. After a country is identified as an abuser, unwilling to allow others into its own broadcasting markets, Congress, or maybe even the FCC, could force investors to divest themselves of their interests in U.S. broadcasting companies and could require the withdrawal of foreign broadcasters by refusing to renew their licenses.¹⁹⁵ After this process has had an opportunity to run its full course, the global broadcasting regime will resemble reciprocity as the markets open to all those that have complied by lowering their own restrictions.

Products in the U.S. as well as offer incentives for the Canadian government to loosen its regulations and potential barriers to foreign cultural trade.”).

195. Requiring this withdrawal is easily distinguished from the *Fox* decision. In *Fox*, the FCC renewed the broadcasting license after the Fox Network had been operating in the United States, with FCC approval, for over a decade based upon a good-faith understanding of the foreign ownership restrictions. *In re Application of Fox Television Stations*, 11 F.C.C.R. 5714, 1995 WL 447416 at ¶23 (F.C.C. 1995). Forcing a withdrawal of foreigners that were abusing the openness of the U.S. system is different in that these investors were not “innocent.” They have reason to know that this preferential treatment was subject to their country’s eventual reciprocation in lowering ownership barriers.

V. CONCLUSION

Restrictions on foreign investment in the broadcasting industry have stifled the development of a world wide media boom. One commentator recently observed that "[w]hen Canada, Mexico, and the United States finally agree to bring basic telecommunications services into the free trade arena, opportunities for investment will increase again."¹⁹⁶ But why stop with these three countries only? Instead, in the spirit of the new millennium that is soon to come, reformers should "shoot for the stars." If fate should have it that reform efforts fall a little short of the ultimate goal,¹⁹⁷ merely landing on the moon, so to speak, would not constitute a failure.

In the end, free trade and investment in the broadcast arena comprises the ultimate goal. The current focus on reforming communications law should not end with the 1996 Act, but rather, should be the beginning. The United States should take the lead in tearing down the wall of protectionism around the world by lowering barriers to foreign broadcasters and investors in order to trigger the opening of markets abroad. By creating open markets, valuable opportunities will arise for broadcasters and investors from all over the world. For, "In time we shall experience a [broadcasting market] of openness, open to the access of new voices—commercial and nonprofit—open across frontiers, and open to viewer choices."¹⁹⁸

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196. Vannoy, *supra* note 23, at 333.

197. Actually "reaching the stars" would require all nations to open their markets to outside investors. Because there are always stubborn outsiders who refuse to change their ways, the initial efforts will probably fall short. In the long run, possibly over a period of decades, these outsiders will realize the benefits that they are missing and will want to open their markets also.

198. Noam & Domonkos, *supra* note 36, at 655.

* The author wishes to thank Vanessa A. Richelle for her expert editorial assistance and thoughtful advice. The author also wishes to thank the editors and staff of the *Journal of Transnational Law* for their invaluable help throughout the publication process.

