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C. Detour I: Justice Scalia's Conception of Standing

In his 1983 essay, Justice Scalia argued that "courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large." n235 Scalia acknowledged that this was "not a linguistically inevitable conclusion." n236 The text of Article III does not suggest that a personal injury is necessary. But in his key statement, discussed above, Scalia defended the limitation on grounds of tradition. n237

-Footnotes-

n235 Scalia, supra note 1, at 881-82.

n236 Id. at 882.

n237 See supra note 233 and accompanying text.

-End Footnotes-

Scalia explicitly claimed that "there is a limit upon even the power of Congress to convert generalized benefits into legal rights -- and that is the limitation imposed by the so-called 'core' requirement of standing." n238 A central concern is what Scalia describes the recent rise of the courts as "equal partners" with the legislative and executive branches. In his view, this unfortunate development is related to the law of standing. Thus Scalia suggests that "[t]he sine qua non for emergence of the courts as an equal partner with the executive and legislative branches in the formulation of public policy was the assurance of prompt access to the courts by those interested in conducting the debate." n239 Unlimited standing gave people this prompt access, thus impairing the system of separation of powers in two ways: first, by providing more occasions for judicial review of executive action; second, by changing the timing of that review.

-Footnotes-

n238 Scalia, supra note 1, at 886.

n239 Id. at 893.

-End Footnotes-

The core of Scalia's argument, however, lies elsewhere. [T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself. n240

It is through this lens that Scalia offers the distinction with which I began this article. In the first class of cases, "an individual who is the [\*216] very object of a law's requirement or prohibition seeks to challenge it"; here, standing is simple. In the second class, "the plaintiff is complaining of an agency's unlawful failure to impose a requirement or prohibition upon someone else"; here the harm is "a majoritarian one." n241

-Footnotes-

n240 Id. at 894 (emphasis omitted).

n241 Id.

-End Footnotes-

The central point in the analysis is that [u]nless the plaintiff can show some respect in which he is harmed more than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention. n242

Thus, the "doctrine of standing . . . is an essential means of restricting the courts to their assigned role of protecting minority rather than majority interests." n243 Scalia urged that judges had been assigned this role by the Constitution, and also that the other role -- the protection of majority interests -- would be poorly executed by judges.

-Footnotes-

n242 Id. at 894-95.

n243 Id. at 895.

-End Footnotes-

After all, judges are removed from political accountability and selected from a highly educated elite. This situation is just perfect for a body that is supposed to protect the individual against the people; it is just terrible (unless you are a monarchist) for a group that is supposed to decide what is good for the people. Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class. n244

-Footnotes-

n244 Id. at 896.

-End Footnotes-

Scalia was alert to the concern that, without broad standing for beneficiaries, legislative enactments would be unlawfully underenforced within the bureaucracy. Indeed, he noted that statutes might get "lost or misdirected" in the executive branch; furthermore, he admitted that this was indeed the consequence of his proposal. n245 But -- and this is the article's striking conclusion -- this is "a good thing." n246 Executive nonimplementation of statutes is part of a well-functioning democratic process, keeping law current with existing views. "Yesterday's herald is today's bore." n247

-Footnotes-

n245 Id. at 897.

n246 Id.

n247 Id.

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This is a provocative and arresting argument, made in short compass. But it faces several difficulties. One problem is that the argument [\*217] is strikingly ahistorical. The article does not address the question whether the Framers actually had this conception of Article III. As we have seen, there is no evidence that they did. There is considerable evidence to the contrary.

A second problem is that the approach seems inconsistent with some of the most prominent aspects of Justice Scalia's own jurisprudence. Justice Scalia usually insists that judges should read constitutional provisions at a low level of generality and avoid infusing them with broad "values" of their own. In his view, such impositions increase the occasions for judicial invalidation of legislation. n248 In this case, however, Scalia reads Article III broadly, invests it with general, controversial values, and ultimately recommends judicial invalidation of the outcomes of democratic processes. The theory of "minority rights" is after all a controversial theory of democracy, counselling courts to act in some cases but not in others. Let us assume that the argument is plausible, as it indeed appears to be. Should even a plausible theory of this kind be invoked in order to invalidate a law that is not inconsistent with the text and history of the Constitution?

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n248 See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2884-85 (1992) (Scalia, J., dissenting); *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991); *Michael H. v. Gerald D.*, 491 U.S. 110, 112 (1989) (plurality opinion of Scalia, J.).

- - - - -End Footnotes- - - - -

There is a further problem. In a case of beneficiary or citizen standing, courts are not enforcing "executive branch adherence to legislative policies that the political process itself would not enforce." n249 Instead, they are requiring the executive branch to adhere to the law, that is, to outcomes that the political process has endorsed. In *Lujan*, for example, the plaintiffs would have won only if they could have shown an unambiguous legislative judgment in their favor. n250 Standing would produce "legislative policies that the political process itself would not enforce" n251 only if courts systematically misinterpreted statutes. But this seems to be an unsupportable assumption.

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n249 Scalia, *supra* note 1, at 896.

n250 Cf. *Chevron USA v. NRDC*, 467 U.S. 837 (1984) (noting that EPA regulations under Clean Air Act would not be set aside unless such regulations were contrary to the express intent of Congress or based on an unreasonable interpretation of the statute).

n251 Scalia, supra note 1, at 896.

-End Footnotes-

In addition, it is hardly a good thing if agency implementation defeats legislative judgments. Suppose, for example, that the EPA decided that statutes calling for a form of cost-benefit balancing should be construed not to allow consideration of costs, and thus to require a kind of environmental absolutism. Would it be plausible to say that this is "a good thing," so long as the agency, supervised as it is by the President, had so concluded? Surely not. Agency rejection of congressional [\*218] enactments, even if motivated by the President himself, is inconsistent with the system of separation of powers.

There are of course important political constraints on administrative behavior, and an understanding of those constraints is a valuable part of administrative law. n252 Moreover, the power of the executive to temper legislative enactments is indeed an important aspect of democratic government. The President can appropriately exercise this power in many areas, including prosecutorial discretion, interpretation of ambiguities, incremental policymaking, and not-so-incremental judgments when Congress has spoken ambiguously. But the executive is not normally empowered to violate the law through enforcement activity in violation of the boundaries set by Congress. Justice Scalia cannot be taken to argue in favor of the "updating" that occurs when the President implements a law in such a way as to rewrite it.

-Footnotes-

n252 See R. Shep Melnick, Administrative Law and Bureaucratic Reality, 44 ADMIN. L. REV. 245 (1992).

-End Footnotes-

To bring this problem closer to the standing issue, suppose that an agency decides that the ESA should not be applied to American activities in foreign nations, when in fact Congress plainly intended that the ESA should apply abroad. Is this a good thing? On the contrary, it is a violation of democratic aspirations and (more relevant still) of the system for national lawmaking set up by Articles I and II of the Constitution. If agency enforcement beyond that intended by Congress is not "a good thing," even where the agency responds to political pressures, it is not "a good thing" where an agency undertakes a pattern of enforcement that violates congressional will through abdication or failure to act. Asymmetry on this point would simply translate judicial antipathy to regulation into administrative law. The foreclosure of standing cannot plausibly be defended as a means of allowing the bureaucracy to implement the law in a manner that conflicts with the governing statute.

Let us turn, finally, to Justice Scalia's argument from democratic theory, referred to briefly in Lujan itself. n253 That argument rests on a distinction between minority and majority interests. The distinction between regulatory objects and regulatory beneficiaries, for purposes of standing, is said to rest on this prior distinction, which is itself said to be well adapted to the special role of courts in the American legal system. "Objects" represent a minority whose interests require judicial protection; "beneficiaries" represent a majority who can protect their concerns through the political process. But there are two problems with this argument. The first is that it does not

justify a [\*219] distinction between the objects and beneficiaries of regulation. The second is that it turns on an inadequate conception of the workings of American democracy.

-Footnotes-

n253 See Lujan, 112 S. Ct. at 2145.

-End Footnotes-

Suppose we agreed that courts should not protect majority interests through administrative law. The result would be to jeopardize standing for many objects of regulation, not merely for beneficiaries. Often the objects of regulation are indeed majority interests. A regulation might, for example, affect a large number of companies at once, and in the process impose costs principally on consumers, which is to say on nearly all of us. Majorities are affected even when "objects" are at risk. But objects are not therefore to be deprived of standing, at least not without wreaking havoc on traditional administrative law. Indeed, the objects of regulation are not systematically more likely to be "majorities" than the beneficiaries. If we were to build our theory of standing on majority status, we must rethink standing in important ways -- but not in the ways recommended by Justice Scalia. The majority-minority distinction is too crude a basis for distinguishing beneficiaries from objects.

Now let us turn to the workings of American democracy. Justice Scalia's argument seems to be that courts are well-suited to protecting minorities, which cannot protect themselves through the democratic process, whereas they are in poor position to protect majorities, whose natural forum is the democratic process. The politically responsive institution is in turn the executive branch.

But this argument is too simple. Some minorities are especially well-organized and do indeed have access to the political process, including the executive branch. The point is well documented. n254 At least sometimes, regulated industries are a prominent example. But they are not therefore to be deprived of standing.

-Footnotes-

n254 See supra note 99.

-End Footnotes-

Moreover, some majorities are so diffuse and ill-organized that they face systematic transaction costs barriers to the exercise of ongoing political influence. This point is well documented in the area of environmental protection and elsewhere. n255 The citizen suit is designed as a corrective. n256 Essentially, this cause of action reflects the congressional judgment that some interests, including those of majorities, are so diffuse and unorganized that they require judicial protection in the implementation process. Congress' judgment to this effect [\*220] receives distinguished support from a significant body of empirical and analytic literature. n257 Even if judges do not agree with that judgment, they should not foreclose the cause of action in the name of the Constitution.

-Footnotes-

n255 See supra note 100 and accompanying text.

n256 See generally the analysis in Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in *PUBLIC INTEREST LAW* 4 (Burton A. Weisbrod et al. eds., 1978).

n257 See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1682-87 (1975).

-End Footnotes-

I conclude that Justice Scalia's essay does not justify the view that Article III forbids the citizen suit. If Congress has chosen to rely on the citizen suit, courts should not foreclose that choice.

D. Detour II: The Citizen Suit and the Administrative State

To make a full evaluation of Lujan, a good empirical picture of the citizen suit would be valuable. What effect does the citizen suit have on the real world? Is it a valuable instrument of environmental and regulatory policy? How many citizen suits have merit? Does the citizen suit produce greater compliance with the law or better regulatory policy? In how many cases does the citizen suit facilitate standing, or simplify standing issues, compared to a requirement of injury in fact? The answers to such questions may not help with the constitutional issue. But they will aid in an assessment of whether the demise of citizen suits is an important event for administrative law.

Unfortunately, we have only the most preliminary of answers to these questions. In the early period of the citizen suit, exceptionally few plaintiffs filed such actions. n258 Advocates of this form of enforcement were both surprised and greatly disappointed. But recent years, starting with 1983, have seen greater activity, especially under the Clean Water Act. n259 Between 1984 and 1988 (when the EPA ceased collecting data on citizen suits), there were over 800 notices of intent to sue under that Act. n260 The government was the defendant in 165 of these suits. Plaintiffs have won a large number of citizen cases under the Clean Water Act. n261 Indeed, plaintiffs readily prevail under the [\*221] Clean Water Act, apparently because some of the statutory provisions speak quite plainly and mandate unambiguous action. n262

-Footnotes-

n258 See Adeeb Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 *HARV. ENVTL. L. REV.* 23, 29 (1985); David A. Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 *DENV. L.J.* 553, 564-65 (1983).

n259 Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833, 868-69 (1985). This study shows the following pattern under the Clean Water Act: one suit in 1978; eight in 1979; four in 1980; six in 1981; 16 in 1982; 62 in 1983; and 26 in the first four months of 1984. *Id.* at 869.

n260 See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 353 (1990).

n261 See *id.* at 355. For discussion of the reasons why the number of citizen suits under the Clean Water Act have increased, see Robert F. Bloomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act*, 22 GA. L. REV. 337 (1988); Boyer & Meidinger, *supra* note 259; Sean Connelly, *Congressional Authority to Expand the Class of Persons With Standing to Seek Judicial Review of Agency Rulemaking*, 39 ADMIN. L. REV. 139 (1987); Fadil, *supra* note 258; David S. Mann, *Comment, Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act*, 21 ENVTL. L. 175 (1991); James L. Thompson, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656 (1987).

n262 See Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS, *supra* note 137, at 109.

- - - - -End Footnotes- - - - -

Post-Lujan, most environmental suits will be able to go forward under the injury-in-fact requirements. An environmental organization will typically be able to find a member who has the requisite injury. n263 But the need to show an injury will complicate such suits, and some occasions will arise when no plaintiff can be found. Moreover, regulatory cases will arise in which the insistence on an actual injury, as understood in Lujan, will bar the action altogether. I discuss this possibility in Part III.

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n263 See *infra* Part III.

- - - - -End Footnotes- - - - -

There is good reason to believe that the citizen suit has indeed helped bring about greater administrative compliance with law. But there is no reason to think that the citizen suit is a fundamental part of modern regulatory reform. I offer a brief account of a long story here. n264

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n264 Parts of the longer versions can be found in BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* (1992); SUNSTEIN, *supra* note 162.

- - - - -End Footnotes- - - - -

In its current form, the citizen suit should be seen as part and parcel of a largely unsuccessful system of command-and-control regulation. Under this system, Congress entrusts agencies with the job of issuing a massive number of highly centralized, rigid, and often draconian regulatory requirements. It should be no surprise that agencies are often unable to undertake their legally required tasks, especially in view of the fact that they infrequently receive

the necessary resources. The citizen suit is part of a complex system in which Congress delegates difficult or even impossible tasks, appropriates inadequate resources, imposes firm and sometimes unrealistic deadlines, n265 and enlists courts and citizens in order to produce compliance. n266 The system may well find explanation in terms of the self-interest of elected representatives. n267 Credit-claiming for apparently aggressive regulation [\*222] can coexist with a range of real-world loopholes, helping industry to escape from government controls. But the public is often the loser.

-Footnotes-

n265 On this issue, see Melnick, supra note 161, at 252-55, 300-01.

n266 See Richard B. Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 WIS. L. REV. 655, 666-67.

n267 See generally Daniel A. Farber, Politics and Procedure in Environmental Law, 8 J.L. ECON. & ORGANIZATION 59 (1992) (discussing the symbiotic relationship between legislators and environmental groups).

-End Footnotes-

In these circumstances, the citizen suit is probably best understood as a band-aid superimposed on a system that can meet with only mixed success. Instead of band-aids, modern regulation requires fundamental reform. Congress should replace the command-and-control system with more flexible, incentive-oriented measures. n268 Instead of a continuing emphasis on judicial review, modern bureaucracy needs large-scale shifts introduced and implemented by legislators and administrators themselves. n269 We should not, however, forget that band-aids can do some good. The citizen suit may serve as an effective if partial alternative to massive regulatory overhaul. In any case, the complex policy issues do not bear on the interpretation of Article III.

-Footnotes-

n268 See SUNSTEIN, supra note 162, ch. 3; Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 13 COLUM. J. ENVTL. L. 171 (1988); Sunstein, supra note 137.

n269 This is the lesson of such diverse works as ACKERMAN & HASSLER, supra note 264; JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990); Ackerman & Stewart, supra note 268; Melnick, supra note 161; Peter L. Strauss, Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community, 39 UCLA L. REV. 1251 (1992).

-End Footnotes-

E. Coda: What the Court Should Have Said

From what has been said thus far, we can offer some brief general words about the law of standing and Lujan itself. With respect to standing in general, the key question is whether Congress (or some other relevant source of law) has created a cause of action. Without a cause of action, there is no standing; there is no case or controversy; and courts are without authority to hear the case under Article III.

This point suggests that the real source of current difficulty is Data Processing, which diverted attention from the relevant question of cause of action to the irrelevant question of injury in fact. So long as injury in fact was thought to be the issue that Congress itself had made relevant under the APA, the difficulty was only minor. But when an injury in fact became both a necessary and sufficient condition for standing, the area grew badly confused.

The result was that courts began to grant standing in cases in which it should have been denied, and to deny standing in cases in which it should have been granted. n270 Worse, the Court viewed the [\*223] standing issue through the wrong lens. An injury in fact is not required by Article III, and it is not sufficient for standing. n271 Both history and principle show that people with "injuries in fact" may or may not have standing. The question is whether Congress has conferred a right to bring suit.

-Footnotes-

n270 Thus, for example, the court granted standing in United States v. SCRAP, 412 U.S. 669 (1973), an environmental case in which the law student plaintiffs could not easily show a cause of action conferred by Congress. Standing should almost certainly have been denied in SCRAP, even if an injury in fact might have been found.

n271 See Fletcher, supra note 15, at 223.

-End Footnotes-

Under this view of the matter, Lujan was a relatively simple case. The first question was one of positive law: whether Congress had granted or denied standing to the plaintiffs. Congress' grant of standing resolved that issue. The grant created the relevant injury for Article III purposes. There was no need to start with injury in fact and redressability, or even to address these issues at all. And if it should be thought -- contrary to the view presented here -- that there are some Article III limits on legislative power to confer causes of action on citizens, those limits surely were not reached in Lujan. This was, after all, a case in which the plaintiffs claimed an intention to go to a place where allegedly unlawful government expenditures placed endangered species at risk. The Constitution did not forbid that action from going forward. The Lujan Court should not have discussed redressability; the congressional grant of standing disposed of the issue. If redressability was relevant, the Court should have said that the injury created by Congress -- to prevent the U.S. government from threatening to produce extinction -- would indeed have been redressed by a decree in the plaintiffs' favor. n272

-Footnotes-

n272 See infra text accompanying notes 307-10 (suggesting that the ESA should be thought to confer a property interest on citizens).

-End Footnotes-

III. THE FUTURE

Lujan settled some important questions. But it left many issues open, and it raised at least as many new ones. The future looks particularly murky in

light of Justice Kennedy's concurring opinion, which refused to join the plurality on redressability, questioned any focus on the common law as the exclusive source of injury, and suggested relatively broad congressional power on the issues of injury and causation. n273

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n273 See supra text accompanying notes 188-93.

- - - - -End Footnotes- - - - -

In this Part, I outline the settled and unsettled issues. I also suggest how some of the current puzzles should be resolved. The most important conclusions involve possible congressional responses to Lujan. I suggest that the simplest and most effective response would be the creation of a bounty for successful citizen plaintiffs. Such a bounty [\*224] would build directly on the qui tam and informers' actions, and it should not raise a constitutional problem in the aftermath of Lujan.

A more complex response would be for Congress expressly to create a property interest in the various regulatory "goods" that it wants to authorize citizens to protect. It might, for example, say that citizens generally have a beneficial interest in certain endangered species that are at risk from acts of the U.S. government. This somewhat adventurous strategy would have the advantages of building on common law notions of interest and injury and of forcing focused congressional attention on the precise nature of the rights at stake. It would also respond to some of the concerns in Justice Kennedy's concurrence. Despite its relative novelty, an approach of this sort should also be constitutional.

A. Easy Cases: What Lujan Permits

The Lujan opinion does not reject a number of cases in which courts have given standing to environmental plaintiffs. On the contrary, it expressly endorses many such cases, even when the plaintiff is complaining that the executive has taken inadequate action to enforce the law. To this extent, the invalidation of the citizen suit allows a good deal of room for private litigants -- regulatory beneficiaries -- to initiate proceedings against the executive branch. The case therefore introduces some uncertainty into the law, but it probably does not work any fundamental shift in the environmental area.

The Court thus makes clear that, if an environmental plaintiff can show that its members use the particular environmental resource that is at risk, standing is available. It follows, for example, that a citizen in New York could, post-Lujan, complain about the failure to enforce clean air or clean water requirements in New York. The Court suggests as much by invoking the Japan Whaling case n274 to show that an environmental organization could complain of excessive whale harvesting when the "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting." n275 The Court also says that a citizens' council has standing to bring suit to challenge environmentally harmful construction in the area where its members live. n276

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n274 Japan Whaling Assn. v. American Cetacean Socy., 478 U.S. 221 (1986).

n275 Lujan, 112 S. Ct. at 2143 n.8 (endorsing standing in Japan Whaling, 478 U.S. at 230-31 n.4).

n276 112 S. Ct. at 2143 n.8 (endorsing standing in Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)).

- - - - -End Footnotes- - - - -

[\*225] It also remains clear that some procedural injuries can produce standing under Article III. The Court writes:

This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). n277 A citizen can thus complain about a failure to prepare an environmental impact statement (EIS) even though it is "speculative" whether the statement will cause the project to be abandoned. n278

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n277 112 S. Ct. at 2142.

n278 112 S. Ct. at 2142-43 n.7.

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Standing remains available in all cases under the National Environmental Policy Act (NEPA) n279 whenever plaintiffs can show that the project, if completed, would adversely affect their interests. A concrete injury of this kind is sufficient even if ordinary redressability cannot be shown. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." n280

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n279 42 U.S.C. @@ 4321-70 (1988).

n280 Lujan, 112 S. Ct. at 2142 n.7.

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It is clear that the Court believes this; but, as noted above, it is not clear why the Court does so. If Article III requires redressability, most NEPA suits indeed seem unconstitutional. In the typical NEPA action, there is no assurance that completion of an adequate EIS would have any consequence at all for the plaintiffs. One might well think, as the government urged in Lujan, that NEPA suits frequently violate Article III.

But as the Lujan Court appears to acknowledge, this would be an odd and far-reaching conclusion. It is almost always the case that procedural rights

have only speculative consequences for a litigant. If a judge is found to have ruled in favor of party A after taking a bribe from party A, it remains speculative whether an unbiased judge would have ruled for party B. Does party B therefore lack standing? Or suppose that an administrator is found to have violated the Administrative Procedure Act by promulgating a regulation without first publishing it for comment in the Federal Register. It is entirely speculative whether compliance would make any difference to the complainants. The Lujan Court, however, does not want the redressability requirement to bar standing in such cases.

Perhaps the Court is endorsing Justice Kennedy's suggestion that [\*226] "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." n281 More deeply, however, I think that the Court's conclusion on this point exemplifies several of the problems associated with the whole notion of redressability. A procedural right is created, not because it necessarily yields particular outcomes, but because it structures incentives and creates pressures that Congress has deemed important to effective regulation. The same is true for the sorts of interests at stake in the ESA and in many other environmental statutes. Congress is attempting not to dictate outcomes but to create procedural guarantees that will produce certain regulatory incentives. Redressability in the conventional sense is irrelevant.

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n281 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

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This point might well have arisen in Lujan itself. Even though it did not, the opinion makes clear that procedural harms remain cognizable when ordinary injuries are involved, despite the absence of redressability.

B. Easy Cases: What Lujan Forecloses

Thus far I have explained the types of suits Lujan has left untouched. But it is equally clear that Lujan forecloses "pure" citizen suits. In these suits, a stranger with an ideological or law-enforcement interest initiates a proceeding against the government, seeking to require an agency to undertake action of the sort required by law. Many environmental statutes now allow such actions, and plaintiffs have brought many suits of this kind. Under Lujan, these suits are unacceptable. Congress must at a minimum "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." n282 If Congress has simply given standing to citizens, n283 this requirement has not been met. The plaintiff must point to a concrete injury, not merely to a congressional grant of standing.

- - - - -Footnotes- - - - -

n282 112 S. Ct. at 2147 (Kennedy, J., concurring).

n283 See the provisions cited supra note 11.

- - - - -End Footnotes- - - - -

C. Injury in Fact?

The discussion thus far has focused to a large extent on changes in the law of injury in fact. Lujan extends this change, placing a renewed emphasis on the notion that the harm must be imminent and nonspeculative. This requirement will likely carry more weight than it has in the past. Before Lujan, requiring people to obtain a plane ticket or to make firm plans to visit the habitat of endangered species might [\*227] well have been unnecessarily formalistic. Now such actions are apparently required. But this is not a fundamental revision of previous law. The celebrated SCRAP case n284 is probably a relic. But on that point, the handwriting had been on the wall a long time, and, if the analysis thus far is correct, there is no reason to mourn for SCRAP, in which Congress had not conferred a right to bring suit.

-Footnotes-

n284 United States v. SCRAP, 412 U.S. 669 (1973).

-End Footnotes-

Harder questions could arise in consumer cases, which play a large role in contemporary administrative law. Suppose, for example, that the government imposes on automobile manufacturers fuel economy requirements that are less stringent than the law requires. n285 Typically, plaintiffs will argue that their injury consists of a diminished opportunity to purchase the products in question. n286 After Lujan, standing becomes a difficult issue in such cases. A court might find that the plaintiffs lack a concrete or particularized interest. They are perhaps not readily distinguished from the public at large. There is an issue about speculativeness as well: perhaps the relationship between a consumer and a product that he allegedly wants is the same as the relationship between the Lujan plaintiffs and an endangered species, in the sense that in neither case is it clear that the injury will occur as a result of the complained-of government acts.

-Footnotes-

n285 This was the allegation in Center for Auto Safety v. NHTSA, 793 F.2d 1322 (D.C. Cir. 1986), and Center for Auto Safety v. Thomas, 806 F.2d 1071 (D.C. Cir. 1986), vacated per curiam, 810 F.2d 302 (D.C. Cir. 1987), reinstated per curiam, 847 F.2d 843 (D.C. Cir.) (en banc) (by an equally divided court), vacated per curiam, 856 F.2d 1557 (D.C. Cir. 1988).

n286 See Center for Auto Safety v. NHTSA, 793 F.2d at 1332; Center for Auto Safety v. Thomas, 847 F.2d at 849.

-End Footnotes-

A consumer case of this sort may differ from Lujan, however, in the important sense that a consumer who complains of a diminished opportunity to purchase a product can very plausibly claim that he will in fact purchase that product. This claim is probably less speculative than that in Lujan. It is possible to discount an "intention" to undertake difficult foreign travel at an unspecified time; the intention may not show sufficient likelihood of harm. But it is harder to discount an intention to purchase a specified product, which usually applies to a single, simple transaction. The distinction suggests that, at

least as Lujan stands, it does not significantly affect the standard consumers' action. In the automobile case, the key point is that a more-or-less sharply defined category of consumers is distinctly affected in a relatively nonspeculative way, and this is probably enough for standing. n287

-Footnotes-

n287 But see Center for Auto Safety v. Thomas, 847 F.2d at 878 (Silberman, J., dissenting).

-End Footnotes-

The same would be true in the standard broadcasting case, in [\*228] which listeners or viewers in a defined area, or of defined programming, challenge an FCC decision that bears on their programming choices. n288 If the FCC refuses to license a classical music station, there is a concrete injury, and it is sufficiently particularized under Lujan. The intention to listen to a station is not as conjectural as the travel intention at issue in Lujan.

-Footnotes-

n288 See, e.g., Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1002 (D.C. Cir. 1967).

-End Footnotes-

Greater difficulties may arise in some similar actions, as when, for example, consumers challenge an FDA or EPA regulation allowing carcinogens to be added to food. n289 There may be serious standing problems in such cases. A person complaining about such a regulation might be said to be suffering an injury that is speculative or generalized. This is especially likely insofar as the injury is characterized as an actual incidence of cancer. It is extremely speculative to suggest that the introduction of carcinogenic substances into food additives will produce cancer in particular human beings.

-Footnotes-

n289 See Les v. Reilly, 968 F.2d 985 (9th Cir. 1992); Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987).

-End Footnotes-

The issue becomes harder if the injury is characterized as a greater risk of cancer. In that event, the injury is less speculative; but it is unclear that it is sufficiently particularized. On Justice Kennedy's view, there is probably enough for standing, for he insisted that standing can exist even if the injury is very widely shared. n290 This is indeed the correct view, because it is the most plausible conception of the injury that Congress sought to prevent. n291 But the issue is now open.

-Footnotes-

n290 Lujan, 112 S. Ct. 2130, 2146 (Kennedy, J., concurring).

n291 See supra text accompanying notes 195-200.

- - - - -End Footnotes- - - - -

D. Redressability

Because only four justices concluded that the redressability requirement had not been met in Lujan, the case probably offers no real lessons on that issue. After Lujan, the law of redressability thus remains as it was before: Extremely fuzzy and highly manipulable. It is manipulable, first, because there is no clear metric by which to decide whether it is "speculative" to say that a decree will remedy the plaintiff's injury. It is manipulable, second, because, as we have seen, whether an injury is redressable depends on how it is defined. If the injury in the Bakke case was defined as the right to attend law school, the redressability requirement was violated. If the injury in a standard environmental case is defined as the right not to suffer concrete personal health damage as a result of environmental harm, many environmental [\*229] plaintiffs will be unable to show redressability. If, however, the injury is defined as freedom from a certain risk of health damage, there is no problem of redressability. This indeed appears to be the way courts conventionally treat the issue.

Consider, for example, some of the regulatory cases described above. If an agency changes its policy for determining fuel efficiency, will prospective purchasers of fuel-efficient vehicles be affected? The answer is not clear. Perhaps manufacturers would simply pay civil penalties, rather than change their behavior. n292 It is speculative whether government policies will change the policies of manufacturers soon enough to affect particular consumer choices. n293 If the EPA refuses to allow carcinogens onto the market, perhaps the consumer will get cancer in any event; perhaps he will not get cancer whatever the EPA does. In fact, the EPA decision may well not make the difference in the life of any particular person. Standing might therefore be denied on grounds of redressability.

- - - - -Footnotes- - - - -

n292 See Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1344 (D.C. Cir. 1986) (Scalia, J., dissenting).

n293 See Center for Auto Safety v. Thomas, 847 F.2d at 870-72 (opinion by Buckley, J.).

- - - - -End Footnotes- - - - -

If we were to start afresh, the best way to handle the issue would be to say that the question of standing depends on whether Congress has authorized the plaintiff to bring suit. We should be asking whether the injury that Congress sought to prevent would likely be redressed by a favorable judgment. n294 The redressability requirement might be understood as a crude way of asking that very question under the general rubric of "injury in fact." We might therefore try to answer the redressability question by characterizing the injury in the way desired by Congress, and then seeing if that injury would be removed by a decree in the plaintiff's favor. Through this route, the question of characterization could be resolved through legislative judgments, not judicial ones. And while the resulting issues of statutory interpretation will not

always be simple, they raise the right questions.

-----Footnotes-----

n294 The same point is urged in connection with redressability in Fletcher, supra note 15: [T]he causation and redressability question is meaningful only at the level of determining whether a cause of action should exist for a certain group of plaintiffs under a particular statutory or constitutional provision . . . [G]iven the different purposes of different statutory and constitutional provisions, some variation is entirely appropriate from one provision to another. . . . The question is whether, under the statutory or constitutional provision at issue, the particular provision should be read to protect against the injury asserted by the kind of person who is seeking to bring suit. Id. at 242-43.

-----End Footnotes-----

E. What Role Remains for the Citizen Suit?

The status of the citizen suit is somewhat obscure after Lujan. At [\*230] a minimum, we know that Congress cannot grant standing to people who have no personal stake in the outcome of an agency action. But Justice Kennedy, joined by Justice Souter, said that Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." n295 This is a potentially crucial phrase. What does it mean? At a minimum, it means that Congress can create rights foreign to the common law. These include the right to be free from discrimination, n296 the right to occupational safety, n297 indeed, the vast panoply of statutory rights going beyond common law understandings. It must also mean that Congress has the power to find causation, perhaps deploying its factfinding power, where courts would not do so. n298 Justice Kennedy thus suggests that Congress can find causation and redressability even where courts would disagree. Perhaps courts will review such findings under a deferential standard.

-----Footnotes-----

n295 Lujan, 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

n296 See Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring). As noted above, the Havens Court found an injury to a "statutorily created right to truthful housing information," which it held sufficient for standing. 455 U.S. at 374. Effectively, Congress had created a kind of property interest in such information. The Lujan Court does not explain why Congress may not do the same for endangered species, or for the rainforest, or for clean air in an area in which one does not live. See supra text accompanying note 202; cf. United States Parole Commn. v. Geraghty, 445 U.S. 388, 404 (1980) (noting that a class action does not become moot after the named plaintiff's substantive claim has expired as the representative retains a "personal stake" in obtaining class certification).

n297 See Occupational Safety and Health Act, 29 U.S.C. @ 651 (1988).

n298 See generally Christopher Sprigman, Comment, Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing

Analysis, 59 U. CHI. L. REV. (forthcoming 1992).

- - - - -End Footnotes- - - - -

This view would not change the outcome in Lujan. In that case, there was no injury in fact. But it might well make a difference in the several cases in which the Court has previously rejected standing on grounds of causation and redressability. Congress might well have the power to alter those outcomes.

Suppose, for example, that Congress found that efforts to produce desegregation were adversely affected by a grant of tax deductions to schools that discriminated on the basis of race. This finding might well call for a reversal of the outcome in Allen v. Wright. n299 Or suppose that Congress found that failure to attain national ambient air quality standards in New York had adverse health effects on the citizens of New York, New Jersey, Connecticut, and Pennsylvania. Perhaps courts would have to respect this finding.

- - - - -Footnotes- - - - -

n299 468 U.S. 737 (1984).

- - - - -End Footnotes- - - - -

The more difficult question involves constraints on Congress' [\*231] "power to define injuries." Can Congress say that opportunity-type injuries are legally cognizable? Might Congress follow the Bakke strategy and conclude that standing exists in many cases involving increases in risks or attempts to alter incentives? Lujan provides no authoritative answer. But Justice Kennedy's concurrence suggests that Congress does possess power to define these events as injuries for purposes of standing. Justice Kennedy emphasized that standing need not be based solely on common law-like injuries; his concern was that, in creating the citizen suit, Congress had not even identified the injury it was attempting to redress. Congress can meet this concern by identifying injuries, building on the common law framework to recognize probabilistic, systemic, or regulatory harms. The decreased probability of injury, the grant of opportunities, and the provision of appropriate incentives are key goals of the regulatory state. It should not be difficult for Congress to connect these goals to the injuries it seeks to prevent. Nothing in Article III forbids this course, even after Lujan.

F. Private Defendants

Many citizen-suit provisions in the environmental laws give the citizen the option of initiating proceedings against the private defendant allegedly operating in violation of federal law. Formally, Lujan did not address this strategy because the case involved a governmental defendant. Does Lujan affect suits against private persons? The answer is unclear. We have seen that a large part of the Court's opinion relies on the fear that, without a particularized injury, courts will be displacing executive power under the Take Care Clause. This concern is entirely inapplicable when the executive is not even a party. n300 On the other hand, if Article III does indeed require a personal stake, the identity of the defendant should not matter. A case in which a citizen initiates proceedings against a private defendant would indeed test the claim that the Take Care Clause is a major impetus behind the Lujan decision.

-Footnotes-

n300 A qualification is necessary here. When private people sue other private people to enforce federal statutory law, there is a lurking issue about private interference with the exercise of prosecutorial discretion, and hence with the President's "Take Care" power. But this issue surely does not have constitutional status. Parallel public and private remedies are most familiar to American law; they do not violate the Constitution.

-End Footnotes-

I have argued that this claim makes little sense. If so, and if Lujan remains good law, a citizen should not have standing to proceed against a private defendant unless he can show some kind of personal [\*232] stake. After Lujan, the citizen-suit provisions are probably unconstitutional even when the defendant is a private citizen or corporation.

G. Cash Bounties

Perhaps Congress can respond to Lujan by granting cash bounties to citizen plaintiffs. Indeed, this possibility might produce some of the most important and difficult post-Lujan issues. If Congress wants to reinstate the citizen suit after Lujan, a cash bounty would be the simplest strategy. Indeed, an exceedingly short amendment to existing law, giving a bounty to all successful citizen plaintiffs, should be sufficient. For reasons that follow, the bounty should create an interest and hence standing. In this way, a system of bounties would fully overcome the post-Lujan doubts about the citizen suit. A bounty system would also be more straightforward than the principal alternative strategy now available to Congress, involving restructured property rights. n301

-Footnotes-

n301 See infra text accompanying notes 307-10.

-End Footnotes-

A bounty system would have the important advantage of building on the clear historical precedents of qui tam and informers' actions, precedents that are firmly established in American law. n302 To the extent that the citizen suit is a helpful device, n303 Congress should be encouraged to take this step. At least where administrative inaction is both harmful and predictable, and where it cannot be prevented through more fundamental regulatory reform, n304 a bounty system would make a great deal of sense. Indeed, the creation of a system of citizen bounties could well be a major step in administrative law.

-Footnotes-

n302 See supra text accompanying notes 59-67.

n303 See supra text accompanying notes 136-37.

n304 See supra text accompanying notes 265-69.

-End Footnotes-

1. Private Defendants

In the first case, Congress might allow citizens to proceed against polluters or others without requiring a conventional injury in fact, but with provision for a financial bounty to victorious citizen litigants. Does the bounty create the requisite personal interest or concrete stake?

In this context, Lujan is probably inapplicable by its own rationale. There is no risk that courts will usurp executive functions under the Take Care Clause. The executive is not a defendant. Not only is the executive not involved, but the plaintiff has a concrete interest in the form of the bounty. Standing seems perfectly appropriate. In fact, the [\*233] Lujan Court seemed to invite this conclusion: "Nor, finally, is [this] the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." n305 The qui tam action and the informers' action n306 seem to be decisive precedents in favor of this conclusion. In both of these actions, a bounty was provided, and it would be most adventurous to say that these arrangements violated Article III.

-Footnotes-

n305 Lujan, 112 S. Ct. at 2143.

n306 See supra text accompanying notes 59-67.

-End Footnotes-

2. Executive Defendants

In the second case, Congress might give a cash bounty to litigants who have prevailed against the government. It might, for example, award \$500 to plaintiffs in cases involving environmental harms. It might even amend all current citizen-suit provisions in order to provide a cash bounty. A simple statute could accomplish this goal. Would this entail a different outcome from that in Lujan?

The answer is unclear. On the one hand, the executive remains a defendant, and the Lujan objection from the Take Care Clause remains. On the other hand, the existence of a cash bounty gives the plaintiff the equivalent of a personal stake in the outcome, just like a case in which she has a right to obtain damages from a common law tortfeasor. This personal stake is probably sufficient to create standing. Here the informers' action is a direct precedent.

The Take Care Clause, even as understood in Lujan, is likely to be held irrelevant where a bounty is at stake. According to the Court, the clause furnishes no objection in a case in which the plaintiff can show that the government's allegedly unlawful inaction impairs her enjoyment of some environmental asset. Hence the Take Care Clause is not a freestanding objection to suits of this general kind. It is called into play only in cases without a personal stake for the plaintiff. If a plaintiff can show that she stands to gain or lose from the outcome of the action, she is no longer interested only

in "law enforcement for its own sake." She thus has standing to initiate the action.

If this analysis is correct, Congress has available a relatively simple corrective to Lujan if it believes that the decision will significantly undermine its regulatory goals. Existing statutes can be simply amended through the grant of a bounty to victorious citizen plaintiffs. No Article III problem would result from this initiative. If Congress wants to overcome Lujan, this is the best and simplest route. It would make [\*234] the various citizen-suit provisions constitutional in cases in which Lujan draws them into severe doubt.

H. Redefined Property Rights

I have criticized the injury-in-fact test on the ground that it undermines Congress' power to create property rights where they had not existed before. In Lujan, the plaintiffs might well have asserted that the conferral of a cause of action amounted to the creation of a form of property. Justice Kennedy had an answer to this claim: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." n307 But here Congress has refused to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." n308 Apparently, plaintiffs had no property right under the ESA, because Congress failed explicitly to define the relevant injury when it provided for citizen suits.

-Footnotes-

n307 Lujan, 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

n308 112 S. Ct. at 2147 (Kennedy, J., concurring).

-End Footnotes-

Suppose, then, that Congress attempts to create a citizen suit in the following way. It announces, first, that all Americans have a kind of property right -- a tenancy in common -- in some environmental asset. The asset might be clean air anywhere in the country, or pristine areas, or the continued existence of endangered species in the United States or abroad. If this seems odd, we might note that Congress could surely create property rights in unowned land within the United States; to the extent that such rights do not interfere with the claims of a competing sovereign, Congress can create them with respect to unowned land outside our territorial borders. n309 And surely Congress' capacity to create property rights is not limited to land. If Congress thus defines property rights and injuries and creates a correlative cause of action, has it acted appropriately and met Justice Kennedy's concern?

-Footnotes-

n309 The point may seem odd, but we can imagine an example. Suppose that an area in Argentina produces medicines especially beneficial to Americans. Suppose that the activities of private American companies in Argentina threaten to industrialize that area and thus to eliminate its medicinal capacities. Congress might respond by forbidding these activities and by creating a property right in all Americans, operating only against other Americans, to the continued productivity of the area. This could not possibly raise a constitutional

issue, or even a problem of international law.

- - - - -End Footnotes- - - - -

The answer would seem to be affirmative. The advantages of express legislative creation of a property right are that it would build on common law understandings and produce more focused congressional deliberation on the nature of the interest it is creating. The citizen suit [\*235] has become a relatively automatic part of environmental law, with little legislative attention to its nature and consequences. If the citizen suit is in fact intended to give all citizens the equivalent of a beneficial interest in environmental quality, it may well be desirable to focus congressional attention on exactly that question. And if Congress concludes that it seeks to create this kind of property, there should be no constitutional problem.

Indeed, the case would seem to be very close to Havens Realty, n310 discussed above. If there is a difference, it is that, in the cases under discussion, Congress has created a tenancy in common with respect to a collective good -- that is, property that is jointly owned. In Havens Realty, by contrast, the property right could be held by individuals rather than many people at once.

- - - - -Footnotes- - - - -

n310 Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); see supra notes 125-29 and accompanying text.

- - - - -End Footnotes- - - - -

Under Justice Scalia's conception of standing, this distinction would make a difference. In the collective good case, unlike in Havens Realty, we are hardly dealing with "minorities." Majorities may have less need for the citizen suit. But this conception of standing faces many problems, as elaborated above. In any event, Justice Kennedy clearly disagrees on this point. His opinion plainly says that standing is not to be denied simply because many people are adversely affected.

If all this is correct, some of the most interesting developments in the law of standing may arise when Congress is explicit in its intention to create new forms of property adapted to the problems and aspirations of modern regulation. If Congress creates property rights in environmental assets of various sorts, and grants correlative causes of action, it should be able to overcome the strictures of Lujan. Faced with such an enactment, the Court would not be dealing with a "citizen suit" at all. Instead it would be faced with a suit brought by property holders equipped with causes of action; and it would be odd if congressional initiatives in this direction would be held inconsistent with Article III.

CONCLUSION

At least in general, standing depends on whether any source of law has created a cause of action. To a large extent, that question is for congressional resolution. Congress can create standing as it chooses and, in general, can deny standing when it likes. n311 As an abstraction [\*236] independent of what the law says, an injury in fact is neither a necessary nor a sufficient condition for standing. Indeed, the notion of injury in fact is a

form of Lochner-style substantive due process. It assumes that there can be a factual inquiry into "injury" independent of evaluation and of legal conventions. There can be no such law-free inquiry. It is a conceptual impossibility, indeed a form of metaphysics.

-Footnotes-

n311 The foreclosure of standing might, however, raise problems under Article III and the Due Process Clause. On Article III, see Richard H. Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915 (1988); on due process, see Yakus v. United States, 321 U.S. 414, 431-33 (1944). The Constitution might also limit Congress' power to grant standing to people attempting to vindicate constitutional rights. See Fletcher, supra note 15, at 278-79.

-End Footnotes-

Despite the holding of Lujan, Congress should be permitted to grant standing to citizens. The text and history of Article III provide no support for judicial invalidation of congressional grants of citizen standing. On the contrary, England, the American colonies, and early Congresses all granted standing to strangers. No one suggested that this practice violated the Constitution. The Lujan Court's unprecedented invalidation of a provision for citizen standing has no basis in Article III. The Court should not have reached its important conclusion without investigating the relevant history, and the odd evolution of standing doctrine, in much more detail.

Lujan answers a long-unresolved issue; but it leaves a number of other significant questions unanswered. I have tried to describe how they might be resolved. It seems clear that citizen-suit provisions are now impermissible in the absence of a showing of injury in fact. But Lujan permits environmental actions whenever plaintiffs can show that environmental degradation will affect their geographical area in the form of dirtier air, dirtier water, or inferior aesthetics. Many suits by regulatory beneficiaries will thus remain viable.

Perhaps most important, Congress probably retains a relatively simple mechanism by which to accomplish the purposes that underlie current provisions for citizen actions. Certainly it can grant citizens standing against private defendants so long as it allows some kind of bounty for a victorious lawsuit. Almost certainly, Lujan permits Congress to allow citizens to bring suit against the government for insufficient regulatory action, if a bounty is made available in the event of success.

Most intriguingly, Justice Kennedy's concurring opinion leaves open the possibility that Congress has the power to create quite novel property interests, to grant those interests to many people or even to citizens, and to confer standing to enable people to vindicate those interests. It may be that, in cases raising this issue, we will see the ultimate depth of the Court's commitment to Lujan's odd adventure in substantive due process.

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1992 SURVEY OF BOOKS RELATING TO THE LAW; II. SPEECH AND DEMOCRACY: IMAGINING A  
FREE PRESS.

IMAGES OF A FREE PRESS. By Lee C. Bollinger.

Chicago: University of Chicago Press. 1991. Pp. xii, 209. \$ 22.50.

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-----Footnotes-----

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-----End Footnotes-----

SUMMARY:

... What can we do to improve its performance? To what extent does the Constitution, and particularly the freedom of the press guarantee of the First Amendment, preclude government regulation designed to redress the press' failures? The First Amendment was adopted at least in part to ensure a well-functioning democratic process. ... Sullivan's skepticism about government regulation of expression, which is so central to Bollinger's "central image" of freedom of the press, derives from our general free speech tradition and not from any special concerns about the press. ... In Images of a Free Press, Dean Bollinger asks us to jettison Sullivan's "central image" of press freedom and to replace it with "a more sophisticated model of quality public debate, in which there is some room for public institutions to . . . help moderate tendencies . . . that distort and bias the process of public discussion and decision making" (p. 23). ... Moreover, in defending broadcast regulation the Court has offered nothing less "than a complete conceptual reordering of the relationships between the government, the press, and the public that was established with New York Times v. Sullivan" (p. 66). The pivotal decision was, of course, Red Lion Broadcasting Co. v. FCC, which was to broadcast regulation what Sullivan was to the principle of journalistic autonomy. ...

TEXT:  
[\*1246] No thoughtful person can be satisfied with the current state of our political process. Effective political communication is too expensive. Money and incumbency play too large a role in the process. Citizens have little or no access to unorthodox or radical points of view. Political debate is

superficial; we are mired in an era of politics -- and government -- by sound bite. The press self-indulges in the virtually unrestrained disclosure of gossip and innuendo about the private lives of political candidates and routinely treats political campaigns as sporting events, denigrating the candidates and the process alike.

Although the causes of these problems are complex, there can be little doubt that at least some share of the responsibility belongs to the press. What can we do to improve its performance? To what extent does the Constitution, and particularly the freedom of the press guarantee of the First Amendment, preclude government regulation designed to redress the press' failures? The First Amendment was adopted at least in part to ensure a well-functioning democratic process. Does the First Amendment today promote or hinder that goal?

In Images of a Free Press, Dean Lee C. Bollinger n1 aspires "to enlarge our vision of the idea of freedom of the press" (p. xii) with an eye toward enabling government to improve the quality of public debate. Revisiting themes he first explored some fifteen years ago, n2 Bollinger now adds further to our understanding of the complex relationship among the First Amendment, the Supreme Court, the public, the press and the democratic process. This is a work of insight, sensitivity, and power. Bollinger has a profound knowledge of and a deep affection for his subject, and it shows.

- - - - -Footnotes- - - - -

n1 Dean, University of Michigan Law School.

n2 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. 1 (1976).

- - - - -End Footnotes- - - - -

I

Dean Bollinger's analysis can be divided into six separate steps. I [\*1247] will consider each in turn. Bollinger begins with what he describes as the "central image" of freedom of the press in the United States today. According to Bollinger, this image received its richest articulation in New York Times Co. v. Sullivan, n3 in which the Court identified a fundamental conflict in our constitutional scheme: The primary function of freedom of the press is to support the societal choice for a democratic form of government, but the very government that is established in this scheme will inevitably attempt to suppress speech that threatens its power. In Bollinger's view, Sullivan structured the "central image" of press freedom around this basic insight. The critical features of this image are that (a) "the government is untrustworthy when it regulates public debate"; (b) the citizens are "the ultimate sovereign"; (c) "open debate must be preserved for their benefit"; and (d) "the press is the public's representative . . . helping stand guard against the atavistic tendencies of the state" (p. 20). Bollinger notes that the consequence of this central image is that "whenever public regulation touches the press the alarm will be sounded. And the now conventional cry will issue that, when it comes to the press, the government must keep its hands off" (p. 21). In a long series of decisions since Sullivan, the Court has consistently reinforced and reaffirmed this "autonomy-based" conception of press freedom. n4

## -----Footnotes-----

n3 376 U.S. 254 (1964).

n4 See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress); *Minnesota Star & Tribune Co. v. Minnesota Commr. of Revenue*, 460 U.S. 575 (1983) (taxation); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) (free press/fair trial); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (privacy); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (libel); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (right-of-reply); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (national security).

## -----End Footnotes-----

This "central image" of freedom of the press is the book's primary target. Bollinger's core theme is that the reality of press freedom in the United States is significantly more complex than this conception indicates and that what is needed is "a more sophisticated model of quality public debate, in which there is some room for public institutions to . . . help moderate tendencies . . . that distort and bias the process of public discussion and decision making" (p. 23).

Bollinger is clearly accurate in his description of the "central image." He is on less solid ground, however, in tracing this image so emphatically to Sullivan. The Court's protection of press freedom did not begin with Sullivan. To the contrary, the Court had forcefully articulated a similar, though less complete, vision of press freedom much earlier, in cases like *Near v. Minnesota ex rel. Olson* n5 and *Grosjean v. American Press Co.* n6 Moreover, and more important, the "central image" that Bollinger ascribes to Sullivan really has nothing to do with freedom of the press, as such. Rather, it is essentially a restatement, [\*1248] with minor modification, of the central image of freedom of speech. This image originates, not in Sullivan, but in the dissenting opinions of Justice Holmes in *Abrams* n7 and *Gitlow*, n8 in Justice Brandeis' concurring opinion in *Whitney*, n9 and in a host of other decisions involving freedom of speech, such as *Lovell v. City of Griffin*, n10 *Terminiello v. Chicago*, n11 and *Cantwell v. Connecticut*. n12

## -----Footnotes-----

n5 283 U.S. 697 (1931).

n6 297 U.S. 233 (1936).

n7 *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting) (anti-war protest).

n8 *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting) (subversive advocacy).

n9 *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring) (subversive advocacy).

n10 303 U.S. 444 (1938) (licensing).

n11 337 U.S. 1 (1949) (hostile audience).

n12 310 U.S. 296 (1940) (hostile audience).

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Indeed, Sullivan itself was not about freedom of the press, as distinct from freedom of speech. It did not articulate a new "image" of press freedom; it drew upon and strengthened a tradition of freedom of speech and press that was already deeply rooted in our general First Amendment jurisprudence. Sullivan's skepticism about government regulation of expression, which is so central to Bollinger's "central image" of freedom of the press, derives from our general free speech tradition and not from any special concerns about the press. Moreover, although Bollinger sees Sullivan as a decision about freedom of the press, the Court both before and after Sullivan has consistently and with good reason resisted the invitation to embrace a separate and distinct conception of press freedom -- for otherwise, the Court would have had to determine whether Abrams' flyers, Gitlow's manifesto, Lovell's leaflets, and Cantwell's phonograph constituted "speech" or "press" within the meaning of the First Amendment, and something of consequence would have had to turn on the outcome of this not very promising inquiry.

This is not a trivial point. In *Images of a Free Press*, Dean Bollinger asks us to jettison Sullivan's "central image" of press freedom and to replace it with "a more sophisticated model of quality public debate, in which there is some room for public institutions to . . . help moderate tendencies . . . that distort and bias the process of public discussion and decision making" (p. 23). But if this "central image" is critical, not only to freedom of the press but to freedom of speech generally, then Bollinger is asking us to reconsider the entire corpus of First Amendment jurisprudence. After all, if we can trust government to regulate the press in order to improve the "quality of public debate," we can trust it to regulate speech as well. By targeting Sullivan as the root of the problem, and by defining freedom of the press as a right separate and distinct from freedom of speech, Bollinger creates the impression that he is tinkering with only one corner of the First [\*1249] Amendment. But the questions Bollinger asks us to consider about the legitimacy of the "central image" cannot be so easily cabined. In fact, the stakes may be a good deal higher than Bollinger admits.

## II

Dean Bollinger next considers the costs of an autonomous press, and finds two of these costs to be prohibitively high. First, Bollinger argues that the Court has purchased press autonomy at too high a price in terms of the sacrifice of competing interests and that the Court has systematically undervalued the importance of such interests in order to justify its results. As an illustration, Bollinger offers *Cox Broadcasting Corp. v. Cohn*, n13 in which the Court held that the state lacks a substantial interest in prohibiting the press from disclosing the identity of a rape victim once her identity has been made public in any way by officers of the state. Second, Bollinger argues that the Court has been inattentive to the ways in which press freedom may threaten, rather than enhance, the democratic process, the very value the autonomy model says press freedom is designed to promote. Bollinger notes that this threat can develop in many ways: the press can exclude important points of view from public debate, it can distort knowledge of public issues through misrepresentation,

and it can promote simple-minded over serious discussion of ideas (pp. 26-27). Bollinger finds it "astonishing" that the Court almost never seriously addresses these concerns (p. 34). Indeed, in many cases, the Court "seems to have gone out of its way -- to the brink of misrepresentation -- to ignore the risk that the press can become a threat to democracy rather than its servant" (p. 34). As an illustration, Bollinger offers Sullivan itself, in which the Court treated the state's interest in restricting libelous utterances as deriving entirely from the individual's interest in reputation and ignored the "other strong social concerns about the quality of public discussion" (p. 35). The Court failed, for example, to consider the important public interests in preventing the distortion of political debate by false statements of fact and in preventing capable individuals from being deterred from entering political life because of a fear that they will be subjected to false statements about their character or conduct.

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n13 420 U.S. 469 (1975).

-End Footnotes-

It is puzzling that Bollinger emphasizes these particular costs of an autonomous press, for they focus less on the actual costs of press freedom than on the failure of the Court to offer a full account of those costs. The actual costs are, of course, much broader in scope and much greater in magnitude than those Bollinger identifies. Consider, for starters, the Pentagon Papers case n14 and Nebraska Press Assn. v. [\*1250] Stuart. n15 What really interests Bollinger is not the costs of an autonomous press, but what he sees as the Court's systematic undervaluation of those costs.

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n14 New York Times Co. v. United States, 403 U.S. 713 (1971) (invalidating an injunction designed to protect the national security).

n15 427 U.S. 539 (1976) (invalidating an order designed to protect the administration of justice).

-End Footnotes-

Moreover, although such undervaluation may exist, Bollinger overstates his case. The Court in Cox Broadcasting did not trivialize the harm to the victim. Rather, it argued that whether or not that harm might otherwise be sufficient to justify a restraint on publication, the state cannot carry its burden of justification unless, at the very least, it takes the harm sufficiently seriously itself to prevent its own officers from carelessly or casually disclosing the information to the public. This was a sensible way for the Court to test the depth of the state's commitment. The Court's position was not that a limited disclosure of the information by officers of the state negates the harm of a widespread dissemination by the press. It was, rather, that the state should not be allowed to punish the publication of truthful information without a very strong justification, and that the state impeaches the strength of its own case when it fails to take reasonable precautions against such disclosure. This is a familiar and a sound principle of constitutional law, and it is not in any way peculiar to Cox Broadcasting.

Although Bollinger is also right in noting that the Court rarely considers the potentially adverse effects of some forms of press freedom on the quality of public debate, he again overstates his point. Whether the Court should empower the government to restrict expression that arguably undermines the democratic process turns in part on how far back the Court should delve into first principles. It may be that some propositions should be taken as given. Is it acceptable under the First Amendment, for example, for the government to suppress speech that calls for government suppression of speech? Is it acceptable under the First Amendment for the government to censor Images of a Free Press because it advocates restrictions on press freedom?

I do not mean to suggest that Bollinger's observation is without merit. To the contrary, it is perfectly legitimate for the Court to consider the argument that certain forms of press freedom may undermine the democratic process. But in considering such claims, the Court should apply the same standards it applies to any other justification for suppressing expression. There is nothing ironic or self-contradictory in protecting speech that might at some time in the future have potentially undesirable effects on the "quality" of political discourse.

For the most part, it seems to me that what the Court does in these cases is nothing different than what it does throughout its First Amendment jurisprudence -- it consistently resists the temptation to [\*1251] permit speech to be suppressed or regulated because of speculative or overblown claims about its potentially deleterious consequences. As Bollinger has so eloquently observed in other contexts, that is one of the great strengths of our free speech tradition. n16

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n16 See LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

-End Footnotes-

III

The third step in Dean Bollinger's analysis consists of an effort to explain why the Court systematically understates the costs of an autonomous press. At the outset, Bollinger briefly offers two very tentative explanations. First, having made up its mind to protect the press, the Court then succumbs to the all too human tendency to "argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion" to justify its results. n17 This rings true. Second, the Court may have a kind of "pathological fear . . . of confronting the possibility . . . that the problems with the press may originate with the people" (p. 39), a possibility that would require the Court to entertain a highly paternalistic view of the public in public debate. Bollinger suggests that it may be easier for the Court to embrace "a romantic view of the public and the press" than "to address . . . the potentially harmful impact of speech on the quality of democratic decision making" (p. 39). There may be something to this, but I suspect that this theory is dominated by Bollinger's first explanation, which applies across all areas of constitutional law, as does the underlying phenomenon that Bollinger seeks to explain -- less than candid opinions.

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n17 P. 38 (quoting JOHN STUART MILL, ON LIBERTY 47 (R.B. McCallum ed., Basil Blackwell 1946) (1859)).

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Bollinger then offers a third explanation, one that interests him more and derives from a more subtle understanding of the Court and a more refined vision of press autonomy. Bollinger observes that the Court performs a deeply educative role in society and affects, through its opinions, the values and images citizens hold (pp. 41-42). In this way, the Court helps to develop a dominant conception of the role of the press and a consensus about the meaning of a "good" press. Bollinger asserts that the Court, beginning with Sullivan, has consistently articulated a powerful image of the press and its relation to the government and the public, an image in which the press "performs a vital role in helping . . . to reduce the risks of official incompetence and abuse, to convey information about the affairs of government, and to serve as a forum for citizens to communicate among themselves" (p. 44). Within this image, the Court portrays the press "as playing a noble, even heroic, social and political role" and suffuses this image "with ethical content: journalists should focus their attention on the [\*1252] political issues of the day, speak the truth about official conduct, expose errors and abuse, represent the opinions of different groups, and, of course, avoid lies and misrepresentations" (p. 44). The Court defines the stakes "in very high terms indeed: a good press is a necessary condition of a good democracy," for it "stands as the guardian and agent of the political rights of the people" and "determines the quality of public debate" (p. 44). Bollinger contends that the Court, by articulating and reinforcing this image, directly affects the world and creates pressure on the press to conform to certain norms of quality journalism.

Although conceding that it is difficult to measure the extent to which the Court's articulation of this image actually affects the press, Bollinger maintains that such influence exists and that it is significant (p. 47). To support this conclusion, Bollinger observes that the press depends on the Court for its rights and so remains "continuously conscious of the importance of having the Court ready to stand between it and the next mood of political repression" (p. 48). The press therefore has a "compelling self-interest in meeting the Court's expectations about its role in society" (p. 49). Moreover, because the Court influences public opinion, the press, which must attend to such opinion, is further affected by the Court's image of its role (p. 49).

In Bollinger's view, much that seems strange about the autonomy model -- including what he sees as the Court's systematic undervaluation of the costs of press freedom -- can be understood as part of the Court's effort to shape the press. The Court conceives of a free press as independent, unafraid, and capable of exposing society's most fundamental shortcomings. There are enormous pressures against the realization of such a vision, however, for the "costs of exposing official corruption or of communicating unpleasant truths . . . are often great; the simpler, more lucrative path is to provide simplicities and entertainment" (p. 56). It is easy, in other words, "to perform badly" (p. 56). This explains why the Court conceives of itself as an advocate for the press and why it understates the costs of press freedom. In a world in which powerful constraints threaten to stifle an aggressive and independent press, the Court's voice must be forceful and its defense of the press must be bold. Moreover,

the extreme protection the Court gives the press may serve as a "metaphor for an intellectual style," for to "deny state regulation of the press, to declare it 'unaccountable' to official authority, is to emphasize its intellectual independence" (p. 57). Bollinger concludes that "the reasons for overprotection of the press are not so much the ones given by *New York Times v. Sullivan* -- that it is necessary because the government cannot be trusted, because human mistakes are inevitable, or because fear of litigation leads to timidity -- but the idea that the removal of a superior, supervising authority contributes to the creation of a spirit of intellectual independence" (p. 57). Thus, as the Court goes about its everyday business of [\*1253] deciding cases, it is "continually creating images of . . . American journalism" (p. 61), and those images directly and indirectly shape the press and the public's expectations of what a good press should be.

The underlying structure of Bollinger's argument is now clear. He maintains that the Court systematically understates the costs of press freedom. He then explains this phenomenon by offering his image of the Court as educator. As I have already indicated, however, it is not at all clear that the Court acts any differently in the press context than it does in most others. Indeed, so far as I can tell, the Court does not systematically undervalue the costs of an autonomous press any more than it systematically undervalued the costs of the exclusionary rule in the 1960s, the right of privacy in the 1970s, or the constitutional prohibition of affirmative action in the 1980s. In these as in other contexts, Bollinger's first explanation for the Court's behavior is, for me, the clincher: the Court undervalues competing interests because it is easier to write opinions that way.

Having said this, I hasten to add that I do not think that Bollinger needs to prove that the Court acts in an unusual manner in the press context to justify putting forth his theory of the Court as educator. To the contrary, his description of the Court's dialogue with the press and the public is an insightful and even inspiring conception of the Court's role in our constitutional system, and this is so whether or not it is uniquely tied to the Court's opinions about freedom of the press. But is it sound?

Like Bollinger, I would like to believe that the Court helps shape our images of the press and the police, our teachers and our wardens, our politicians and ourselves. I would like to believe that the Court can appeal to our better instincts, lift our spirits and set fire to our aspirations. I would like to believe that it can inspire us to be more careful reporters, more responsible parents, and more tolerant citizens. Moreover, like Bollinger, I do believe it. Granted, most citizens never Moreover, like Bollinger, I do believe it. Nonetheless, what the Court see, let alone read, a judicial opinion. Nonetheless, what the Court does and says seeps into the public consciousness, and it certainly affects those with a legal stake in the decisions. There are, of course, those who question whether the Court has any such effect. n18 Like Bollinger, however, I am not persuaded by their criticisms and, quite frankly, I don't wish to be.

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n18 See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (reviewed in this issue by Professor Stephen L. Carter. -- Ed.).

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But there is a deeper problem. For although I agree with Bollinger that the Court can educate the press and the public through the images it generates in its opinions, I fear that Bollinger credits the Court with too much vision and too much subtlety. His image of the Court may be every bit as "romantic" as the Court's image of the press. The reasons offered in Sullivan for its fervent protection of the [\*1254] press may not be the most exhilarating or philosophical, but they are sensible, pragmatic, and compelling. Moreover, they are the reasons that actually motivated the Court. Bollinger's problem is that he thinks the Court is as wise as he is. It is not.

IV

The fourth step in Dean Bollinger's analysis is his observation that, despite the dominance of the central image, we do not in fact have an autonomous press. To the contrary, much of this century has seen extensive government regulation of broadcasting. What Bollinger finds striking is that, despite this fact, we have clung tenaciously to the central image. "[P]sychologically," we have failed to acknowledge that "the broadcast media are highly regulated and that they are an integral part of the American 'press'" (p. 62).

Bollinger notes that the Court has provided the most forceful defense of broadcast regulation and that its decisions have both shaped and defined that experience. Moreover, in defending broadcast regulation the Court has offered nothing less "than a complete conceptual reordering of the relationships between the government, the press, and the public that was established with New York Times v. Sullivan" (p. 66). The pivotal decision was, of course, Red Lion Broadcasting Co. v. FCC, n19 which was to broadcast regulation what Sullivan was to the principle of journalistic autonomy.

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n19 395 U.S. 367 (1969).

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In Red Lion, the Court reaffirmed the traditional scarcity rationale for broadcast regulation n20 and went on to observe that, in the broadcast context, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." n21 Indeed, there "is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." n22 Bollinger notes that the "most striking feature" of Red Lion was "the Court's virtual celebration of public regulation" (p. 71). To read Red Lion is "to step into another world, one that encompasses a dramatically different way of thinking about the press and about the role of public regulation" (p. 72). Red Lion "reads like a tract that treats the press as the most serious threat to the ultimate First Amendment goal, the creation of an intelligent and informed democratic electorate" (p. 72). In "the triumvirate of parties that inhabit this universe, the public [\*1255] stands at the top and broadcasters at the bottom," while the government, "in the middle, executes the will of the people to insure that broadcasters provide adequate service to the realm of public

debate" (p. 73). Thus, contrary to popular belief, we have never had a modern press largely free of government control. Rather, we have had, and continue to have, a dual system in which only one branch of the press is autonomous.

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n20 The Court first enunciated this rationale in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

n21 395 U.S. at 390.

n22 395 U.S. at 389.

-End Footnotes-

V

Dean Bollinger begins the fifth stage of his analysis by observing that this dual system is today undergoing extensive reevaluation (p. 86). With the abandonment of the scarcity rationale for broadcast regulation, the central question has become whether the press should be made unitary and, if so, which model should prevail. Bollinger notes that the weight of opinion seems to have moved toward adopting the autonomous press model for the press as a whole (p. 86). Conceding that this model has worked reasonably well in the dual system we have had until now, Bollinger argues that the autonomous press model would not serve as well if the electronic media were permitted to operate under its principles, too.

Bollinger observes that, for most of its history, broadcast regulation has been treated as a largely uncontroversial and isolated phenomenon, so distinct from the rest of the press that it has seemed to have little impact beyond its own borders (p. 90). Viewed in that light, the extension of the autonomous press model to broadcasting would not seem likely to have any significant consequences for the print media. Bollinger argues, however, that it is not that simple, for "[t]he relationship between the electronic media and its treatment and the print media and its treatment has been subtle, shifting, and reciprocal" (p. 93). In fact, the "broadcast experience has not been simply a marginal enterprise" (p. 85), for as broadcasting has undergone continuing experimentation with public regulation, print journalism has lived under the constant threat that such regulation will become the dominant approach for the future. As a result, the broadcast experience "has exerted a profound influence over . . . the behavior of . . . the 'autonomous' print media" (p. 85), and the values "of fairness and balance in journalism" may continually have been reinforced in the print media by their "very real -- and looming -- regulatory presence in the broadcast media context" (p. 96). Bollinger warns that, viewed from this perspective, a decision to eliminate broadcast regulation could indirectly but significantly undermine the commitment to such values throughout the press (pp. 96-99).

Building upon his earlier work, n23 Bollinger maintains that the existing [\*1256] dual system in fact makes good sense in terms of both public policy and First Amendment theory because there are compelling reasons for being both receptive to and wary of regulation. The Court should not be forced into an "all-or-nothing" position, for we can have the "best of both worlds" (p. 110).

-Footnotes-

n23 Bollinger, supra note 2.

-End Footnotes-

In defending his theory of partial regulation, Bollinger contends that access regulation, exemplified by the fairness doctrine, both responds to constitutional traditions and cuts against them (p. 110). On the one hand, such regulation helps realize First Amendment goals by neutralizing disparities that impede the proper functioning of the marketplace of ideas and by equalizing opportunities to command an audience and to mobilize public opinion. Bollinger argues that these are important goals because unrestrained private interests can hamper the free exchange of ideas as severely as government censors. Access regulation directly addresses this concern by limiting the capacity of private power centers to control -- and to distort -- public debate.

On the other hand, Bollinger recognizes that access regulation constitutes a significant departure from our traditional constitutional norms concerning the need to maintain a distance between the government and the press. Such regulation can have at least three adverse consequences. First, it can chill journalistic motivation to address controversial issues of public importance. Second, it can necessitate the establishment of an administrative machinery that can be abused to force the press into an official line. Third, it can open the door to ever more oppressive press restrictions (pp. 111-13).

Because he sees access regulation as both desirable and dangerous, Bollinger concludes that a dual system of partial regulation offers important advantages over either complete regulation or complete nonregulation. Bollinger thus contends that the Court, by accepting the existing system of partial regulation, "has imposed a compromise, not based on notions of expedience but on a reasoned, principled, accommodation of competing First Amendment values" (p. 116). This system permits both "experimentation and the manifestation of ambivalence," both of which are healthy (p. 117). Bollinger emphatically rejects the claim that a system manifesting such ambivalence violates the virtue of consistency or impermissibly discriminates against the broadcast media. In his view, such differential treatment is acceptable because it "reflects no animus toward broadcasters" (p. 117) and because a concern with consistency in this context is "unduly fastidious" (p. 118). Bollinger warns that we must not allow ourselves to "be intellectually crippled by the charge of inconsistency" (p. 118).

I have puzzled over Bollinger's theory of partial regulation ever since he first articulated it fifteen years ago. Quite frankly, I have never managed to persuade myself that it is persuasive. Call me "unduly fastidious" but, in my judgment, the argument is "intellectually [\*1257] crippled" by its failure to come to grips with the charge of inconsistency.

Bollinger argues that broadcast regulation does not reflect any "animus towards broadcasters." It is probably true that there was no such animus when Congress first enacted broadcast regulation, for there were few if any broadcasters and, in any event, the initial regulators clearly accepted the scarcity rationale as a compelling reason for regulation. With the universal abandonment of the scarcity rationale, however, the decision to retain broadcast regulation may well be tainted by "animus," if animus is generously defined. The retention of broadcast regulation serves at least two quite suspect

purposes -- it protects the commercial interests of the competing media, and it renders broadcasters vulnerable to the oversight and possible manipulation of federal regulators and politicians. I do not know precisely what Bollinger means by animus in this context, but it is difficult to ignore these two problematic influences in the decision to continue broadcast regulation long after the abandonment of its initial rationale.

Moreover, and more important, the presence or absence of animus hardly ends the inquiry. Otherwise, virtually all of our equal protection and much of our First Amendment jurisprudence would go by the boards. The constitutional concern with equal treatment is about more than merely preventing government discrimination based on animus. n24 This is not to say, however, that the government can never treat different means of communication differently. To the contrary, the Court has "long recognized that each medium of expression presents special First Amendment problems." n25 It is not unconstitutional, for example, for the government to permit leafleting but not loudspeakers in an airport terminal. But such differential treatment must be based upon real differences in the methods of communication, and those differences must be directly relevant to the interests the government seeks to further. With the abandonment of the scarcity rationale for treating the electronic media differently from the print media, we are left with no relevant difference between these two means of communication that would justify subjecting one, but not the other, to regulation. This is hardly an "unduly fastidious" concern with consistency. It is rather the very essence of the fundamental precept that the government may not treat similarly situated individuals -- or institutions -- differently.

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n24 See generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189 (1983).

n25 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

-End Footnotes-

Bollinger's "best of both worlds" argument is superficially quite seductive. It is fundamentally incompatible, however, with the basic [\*1258] premises of our First Amendment jurisprudence. To say that there are competing approaches to a problem and that each has certain advantages and disadvantages is merely to say that competing interests are at stake. That is always the case in constitutional adjudication. To say that there is no reason to deny ourselves the best of both worlds by accommodating the competing interests is merely to say that we should engage in ad hoc, open-ended balancing, a form of analysis that has long been rejected in First Amendment doctrine. Restrictions on political expression that significantly and discriminatorily limit journalistic freedom are and should be presumptively unconstitutional. To sustain such restrictions, the government must bear a heavy burden of justification. It is no answer to say: "We'll compromise by inflicting the restrictions on only some speakers." We have never permitted such experimentation, such self-indulgence of our "ambivalence," when considering the constitutionality of significant and discriminatory restrictions on free expression. There is no reason to begin here.

In fact, Bollinger's conclusion that we should permit the government to regulate the electronic but not the print media is nothing short of arbitrary. Indeed, in his earlier work Bollinger expressly asserted that his theory of "partial regulation could be applied to any portion of the media" and that the government could decide at will "to shift from regulation of broadcasting to regulation of newspapers" (p. 120). In *Images of a Free Press*, however, Bollinger retracts that view -- he now believes that it would be unconstitutional to reverse the existing situation. In other words, "partial regulation" for now and ever more means regulation only of the "newer (electronic) media" (p. 120). But why? Without the scarcity rationale, there is simply no legitimate reason to impose the burdens of regulation on broadcast rather than on print journalism.

That, however, is only the tip of the problem. Bollinger considers the regulatory choice to be between the broadcast and print media. But if we are to live in the "best" of all worlds, why isn't our choice much broader? Why can't we choose to regulate all of the press, but not speech? Why can't we choose to regulate only cable television? Only broadcast television? Only magazines? Everything but magazines? Everything but cable? The opportunities to design the best of all worlds are virtually without limit. Would any of these choices violate the First Amendment? If so, which ones, and why? In Bollinger's realm of arbitrary choices to achieve the best of all worlds, there is not only "no law abridging the freedom of speech or of the press," there is no law. Indeed, it is revealing that in discussing *Red Lion* Bollinger enthusiastically applauds the Court for acting "as if it were reviewing a decision of an ordinary administrative agency" (p. 73). But that hardly seems the appropriate judicial stance for deciding whether the government may extensively regulate some, but not other, elements of the press.

[\*1259] One might argue that the decision to regulate broadcast but not print journalism makes sense even after the abandonment of the scarcity rationale because partial regulation has worked well in the past and has not appreciably impaired the freedom of the regulated media. On this view, the otherwise arbitrary decision to regulate the broadcast but not the print media is defensible because such differential treatment serves important societal interests at no real sacrifice of the rights of those who are subjected to regulation. But even if this argument is sensible in theory, it is implausible in fact. As the Court made clear in its unanimous decision in *Miami Herald Publishing Co. v. Tornillo*,<sup>n26</sup> the type of access regulation that Bollinger endorses for the broadcast press significantly restricts journalistic freedom. Such regulation seriously limits the freedom of broadcasters relative to that of print journalists. In light of *Tornillo*, such regulations can hardly be dismissed as *de minimis*. Even a cursory glance at the differences between broadcast and print journalism reveals the impact of government regulation. By comparison with the unregulated media, broadcasting is bland, cautious, and studiously nonpolitical. Broadcasters do not endorse political candidates and they do not stake out controversial positions on issues of public importance. There can be no doubt that these differences are due in part to the effects of regulation. Directly and indirectly, government regulation makes broadcasters less willing to participate vigorously in public debate. Indeed, recognizing that the fairness doctrine may chill more speech than it fosters, even the FCC now calls for a return to the free market system for broadcasting.<sup>n27</sup> Although Bollinger challenges this conclusion, his responses are insufficient to justify the discriminatory imposition of significant restrictions on only some members of the press (pp. 120-28).

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n26 418 U.S. 241 (1974) (invalidating a right-of-reply statute as applied to print media).

n27 Federal Communications Commission, General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (1985).

-End Footnotes-

One might argue further, I suppose, that the "best of both worlds" approach is uniquely appropriate in this context because there are First Amendment interests on both sides of the balance. As Bollinger observes, journalistic autonomy has certain advantages for the system of free expression, as does government regulation. To embrace either "extreme" may produce less effective public debate than a best of both worlds approach and thus frustrate the underlying goals of the First Amendment. In such circumstances, we are faced less with a conflict of competing interests than with a need to meld two competing models to produce the best possible First Amendment result. But this proves too much. On this view of constitutional law, the government could justify allowing school prayer for students who want to pray on the theory that such a policy accommodates the competing free exercise [\*1260] and establishment interests, thus giving us the best of both worlds. Similarly, the government could justify racial segregation in at least some of our public schools on the plea that such a policy accommodates the competing constitutional interests in freedom of association and racial equality, thus giving us the best of both worlds. And, on this view, the government could justify waiving the protections of New York Times v. Sullivan in libel actions brought by black or other minority political candidates on the plea that such a policy accommodates the competing constitutional interests in free expression and in expanding the opportunities for minority candidates, again giving us the best of both worlds.

I could go on, but the point is clear. The "best of both worlds" argument is an invitation to constitutional disaster. It cannot redeem a departure from the essential First Amendment principle that the government may not selectively impose significant restrictions on the political speech of some speakers, but not others, in the absence of an important difference between the speakers that directly furthers a substantial governmental interest.

Finally, I should note that even if Bollinger's partial regulation theory were otherwise sound, it is nonetheless seriously underinclusive as an effective response to many of the problems that plague our political discourse today. The theory of partial regulation was the product of thinking about the fairness doctrine and similar forms of access regulation to address one particular concern -- the underrepresentation of unconventional points of view in the mass media. But the theory is wholly inadequate to deal with a host of equally important concerns, many of which certainly trouble Bollinger, such as the tendency of the media to treat political campaigns as sporting events, to trivialize public discussion, and to sensationalize private facts about political candidates, all to the detriment of our political process. Any serious effort to address the failures of the press today must come to grips with these concerns, as well as with the issue of access. The theory of partial regulation does not reach these issues and would not enable us to confront them effectively.

VI

The final step in Dean Bollinger's analysis calls for a "new image" of the idea of freedom of the press (p. 133). Under the "primitive" image of Sullivan, "the goal of press freedom [was] viewed as the creation of a vast space for 'uninhibited, robust, and wide-open' public discussion," and it was "assumed that the role of the Supreme Court is to stand guard against government intervention, permitting it only when the public interest counters with an overwhelming competing [\*1261] interest to that of free and open debate." n28 Bollinger maintains that this approach is "insensitive to problems affecting the quality of public discussion that are posed by a laissez-faire system of modern mass media" (p. 133) and that before "we can be clearheaded in thinking about the great issues involving the press and the quality of public debate" we must develop "a new theoretical perspective" (p. 136).

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n28 P. 133 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

-End Footnotes-

In articulating this new perspective, Bollinger begins with the FCC's call for the abandonment of the fairness doctrine. In its 1985 report, the FCC reasoned that, with the proliferation of broadcast outlets and the emergence of new forms of print media, the fear of concentration that gave rise to government regulation was no longer reasonable (p. 136). Bollinger argues that this conclusion was premised on the faulty assumption "that the only acceptable rationale for public regulation must stem from some form of market failure" (p. 137). Bollinger identifies two now familiar objections to this assumption. First, because "the market for freedom of the press necessarily exists within the larger context of a market for goods and services . . . [c]itizens arrive at the system of press freedom with vast inequalities of wealth and, therefore, with very different abilities to participate effectively in public debate" (p. 137). Second, because "there 'is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy,'" there is a serious "conflict between the interests of those who manage for-profit media institutions and the interests of the democratic society in ensuring that citizens are supplied the information and ideas they ought to have." n29

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n29 P. 137 (quoting Owen Fiss, Why the State?, 100 HARV. L. REV. 781, 788 (1987)).

-End Footnotes-

In Bollinger's view, these criticisms, though powerful, "do not provide as full and clear a picture as we need to determine the appropriate role of the state in mediating the deficiencies of a free press in the context of a free market system" (p. 138). Rather, they "represent only an intermediate step toward a deeper, more fundamental understanding" (p. 138). Bollinger explains that we "must address the nature of our own behavior in the discussion of public questions" and that we must "be concerned about the character of our demands

in the market" (p. 139). Indeed, we "have good reasons to be wary of ourselves, and we should fear not just the failures of the market system but our own failures of intellect," for a "democratic society, like an individual, should strive to remain conscious of the biases that skew, distort, and corrupt its own thinking about public issues" (p. 139). Thus, "even in a world in which the press is entirely free and open to all voices, with a perfect market in that sense, human nature would still see to it that quality public debate and decision making would not [\*1262] rise naturally to the surface but would, in all probability, need the buoyant support of some form of collective action by citizens, involving public institutions" (p. 139). As an example, Bollinger cites our criminal justice system, in which "we go to great lengths to ensure the decision-making process is purified of biases, and we recognize that an entirely laissez-faire system is likely to produce great injustice" (p. 140). Bollinger speculates that we accept the extraordinary constraints in this context, exemplified by the rules of evidence, "because we understand that the stakes are so high for the individual defendant" (p. 140). He maintains that we should think the same way about democracy. Indeed, it "should be considered a sign of high intellectual development when a society is able to take steps to correct those problems within itself that interfere with quality decision making" (p. 140).

Although conceding that the mass media may "give viewers and readers what they 'want,' or demand, through the expression of their preferences in the marketplace," Bollinger finds it nonetheless imaginable "that we -- the same

. 'we' that issue our marketplace votes for what we get -- might be very concerned about how we are behaving, about what choices we are making, in that system" (p. 141). Accordingly, we may "decide together, through public regulation, that we would like to alter or modify the demands we find ourselves making in that market context," for we may "recognize that if we are left to choose on our own whether and how to inform ourselves, too many will neglect to undertake the burdens of self-education, choosing instead to pursue more pleasant things" (p. 141).

Bollinger argues that "it would be a more advanced society, a more advanced democratic society, that could act to correct deficiencies arising out of the . . . citizens themselves" (pp. 141-42). He maintains that such regulation should not be condemned as elitist or paternalistic, for it "is not paternalism when a majority of a society recognizes that its own intellectual limitations call for some institutional or structural correctives" (p. 144). Bollinger concludes that an approach to government regulation stemming from a "self-conscious awareness" of our own frailties and biases in order to promote a higher level of public discussion and decisionmaking would "be a great and important advance in the history of press freedom" (pp. 144-45).

It is in his articulation of this approach that Bollinger offers his most important contribution. His vision of freedom of the press and of its relation to public institutions and to the character of the American people represents a significant step forward. By emphasizing the need to address failings in our national character, this approach presents a vision of government intervention that is designed to improve the press, the political process, and the people.

Bollinger's analogy to the criminal justice system is especially powerful. [\*1263] As Bollinger notes, we exclude all sorts of evidence from the consideration of the jury in its decision of important questions of fact (p. 140). We do this for many reasons. Sometimes, as in the context of the

attorney-client privilege, we exclude relevant evidence because its probative value is outweighed by the harm that its admission would cause to extrajudicial interests, such as the confidentiality of the privileged relationship. In other situations, we exclude evidence because we fear that jurors will exaggerate its probative value. We generally exclude evidence of prior convictions of criminal defendants, for example, because, in the jargon of the law of evidence, the probative value of the evidence is substantially outweighed by the risk of undue prejudice to the defendant. In such circumstances, we conclude that jurors are more likely to reach a fair and accurate result if they are denied access to the evidence completely. Bollinger asks us to consider extending this approach to the democratic system.

Consider the following extension of the analogy. Traditionally, the press did not report information about the private sexual conduct of political candidates. In exercising such discretion, the press acted like a judge in a criminal trial, preventing the people -- the jurors -- from learning information that arguably would distort their judgment and distract their attention from more important matters. Today, however, as part of a general breakdown of journalistic standards, the press, driven by rampant commercialism, routinely sensationalizes such information to the (arguable) detriment of the political process.

In its defense, the press argues that it would be irresponsible not to report such information, pointing to polls indicating that perhaps fifteen percent of the public would not vote for a candidate who engaged in such activity. But on the same theory, the press presumably would have to argue that because seven percent of the public would not vote for a candidate who engaged in oral sex with his spouse, it must disclose that information, too. Similarly, because five percent of the people would not vote for a candidate who did not shower or change his socks everyday, or wear pajamas to bed, the press would have to regard those facts, too, as appropriate for public disclosure. There must be some limit, however, and this limit must be designed not only to respect the legitimate privacy interests of candidates, but also to reflect our right, as a society, to decide that some matters simply should not play a significant role in our political process, even if some of our fellow citizens disagree. And our right to make such a decision should be strongest when, as in the trial context, the information has a greater potential to distract and distort than to inform our better judgment. As in the trial context, we should be able to protect the political process against our own failures of judgment.

Bollinger has offered us an innovative and powerful new image of freedom of the press. It merits serious consideration. In that vein, I [\*1264] would like to venture a few tentative observations. First, although Bollinger does not seem to note this himself, his new vision of freedom of the press is much broader than his theory of partial regulation. It offers no justification for continued discrimination against the broadcast press. It does, however, provide a strong rationale for enabling the government to reach a much broader range of concerns than those addressed by mere access regulation. It offers a more principled and less arbitrary foundation on which to build a bolder and more innovative theory of government regulation of the press.

Second, Bollinger maintains that his new approach is neither paternalistic nor elitist. This is at least questionable. The mere fact that "a majority of us" agrees to enact restrictions on what the press may report does not mean that the restrictions are not elitist or paternalistic. Bollinger seems to assume

that there is no paternalism in these circumstances because those supporting the restrictions do so in recognition of their own frailties. They are, in effect, tying their own hands by denying themselves access to information they fear they themselves might otherwise abuse. In truth, however, many if not most of those who would support such restrictions probably think themselves perfectly capable of handling the information at issue. It is the "others" they worry about. In this sense, at least, such restrictions cannot escape the taint of paternalism. Moreover, the minority of citizens who are prevented from obtaining information they consider useful in making their own political decisions are certainly the victims of elitism insofar as the "majority" finds that judgment inappropriate. It does not further the analysis to insist that such regulations are not elitist or paternalistic. At least in a subtle way, they are. The important -- and difficult -- task is to determine when a "majority of us" has the right, if ever, to decide that certain information about political candidates is not to play a role in political debate, even though "a minority of us" disagrees.

Third, although Bollinger puts forth his new image with considerable conviction, in the end he adopts a tentative stance, noting that it is uncertain whether our society is sufficiently "advanced" to embrace this theory, and that the essential "question is whether the government can be trusted with the power to intervene into the field of public debate" (p. 142). Bollinger is wise to recognize the risks in his approach and to doubt whether the government "can be trusted" to implement it. There is some irony in this, of course, for at its very core Images of a Free Press directly challenges Sullivan's "central image" by attacking Sullivan's distrust of government regulation of the press.

On the other hand, although there may be some tension in Bollinger's ultimate distrust of government, it is also true that he is prepared seriously to consider whether we should grant government a good deal more discretion than we have in the past. For those who, like myself, [\*1265] generally accept Sullivan's central image, this is a disquieting prospect. I am convinced by Bollinger and others, n30 however, that it is time to ask some hard questions about our political process. If we are unwilling to trust government to regulate the press, we must be content to leave the critical decisions to the press. But it is no longer clear to me that a society dedicated to maintaining an effective, fair, and open political process should delegate the decision of such fundamental questions concerning the structure and nature of our political discourse to the unelected, unrepresentative members of the private press. It is one thing to guarantee and protect freedom of speech and of the press. It is at least arguably another thing entirely to cede to the press the essentially unrestrained authority to determine the basic ground rules of our democratic process. Viewed in that light, the critical question is not whether we should trust the government to regulate the press, but whether we should trust the press to define our political process. We must understand that the choice that confronts us is more subtle and more difficult than whether we want the government to control the press. It is a choice between two competing power centers -- one subject to political control, the other controlled increasingly by the market. That, in any event, is the choice and the challenge that Bollinger offers us in Images of a Free Press.

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n30 See Cass Sunstein, Free Speech Now, 59 U. CHI. L. REV. 255 (1992); Fiss, supra note 29.

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Throughout this work, Bollinger refers admiringly to a 1947 report on the condition of press freedom in the United States. n31 This report, which was the work of a prestigious commission chaired by Robert M. Hutchins, then Chancellor of the University of Chicago, concluded that the press "is not meeting the needs of our society." n32 Although the Commission stopped short of calling for full-scale government regulation, it emphasized that freedom of the press must be understood as a "conditional right" extended by the people to the press; it is not a law of nature, but a means of securing the advantages that "an autonomous press can provide a democratic society." n33 We have granted the press extraordinary protection for extraordinary reasons -- reasons that go to the very core of our self-governing process. On this view, freedom of the press is a means to an end, and a press that fails to serve the ends for which it is free may lose that freedom. As the Hutchins Commission observed, no "democracy . . . will indefinitely tolerate concentrations of private power irresponsible and strong enough to thwart the aspirations of the people." n34

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n31 See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

n32 Id. at 68.

n33 Id. at 12.

n34 Id. at 80.

- - - - -End Footnotes- - - - -

It is time "to establish a modern sequel to the Hutchins commission" [\*1266] (p. 135) in order to study the performance of the press today and to consider more fully the complex and important questions posed in Images of a Free Press. I can think of no more thoughtful or more knowledgeable person to chair that commission than Lee Bollinger.

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NOTE: The Country Music Television Dispute: An Illustration of the Tensions  
Between Canadian Cultural Protectionism and American Entertainment Exports

Andrew M. Carlson

SUMMARY:

... The United States is the dominant producer and exporter of entertainment and popular culture throughout the world. ... Among the tools the CRTC has used to protect Canada from the perceived onslaught of American culture are subsidies and tax measures. ... Cable television broadcasting clearly fits within the exemption's definition of cultural industries, which includes "all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network service." ... Another group of arguments in favor of removing cultural trade restrictions between the United States and Canada is based on a less sweeping economic analysis, asking how the Canadian entertainment industry would be affected if restrictions were no longer in effect. ... In fact, the limited protection offered by Canada's cultural trade policy is even more important in light of the quasi-monopolistic nature of the American entertainment industry and current advances in communications and other technology. ... It should come as no surprise, then, to companies engaged in international cultural trade that Canada has made it a national priority to try to save itself a lane on the information superhighway by shielding its entertainment industry from domination. ...

TEXT:  
[\*585]

The United States is the dominant producer and exporter of entertainment and popular culture throughout the world. n1 The largest n2 and arguably most important trading partner of the United States, in entertainment as well as other goods and services, is Canada. Like many other countries, Canada is fearful that American culture and entertainment will displace its own national culture and weaken its entertainment industries. In response to this fear, Canada has implemented subsidies, discriminatory taxes and tax deductions, and quotas against American cultural imports. Canada has also excluded entertainment goods and services from its responsibilities under the North American Free Trade Agreement (NAFTA), the central trade agreement binding it and the United States. n3 Furthermore, Canada, aligned with many other countries, has excluded cul- [\*586] tural industries from the agreements under the administration of the World Trade Organization (WTO), n4 the principal international multilateral trade organization.

- - - - -Footnotes- - - - -

n1. Canadian Ambassador to the United States Raymond Chretien recently asserted that the contents of more than 64% of television programs, 60% of

books, 90% of records, and 94% of films present in Canada originated abroad, almost entirely in the United States. Canadian Ambassador Defends Curbs on Imports of U.S. Magazines, TV Shows, 12 Int'l Trade Rep. (BNA) No. 4, at 178 (Jan. 25, 1995). See generally David Rieff, The Culture That Conquered the Earth: Why Conformist Consumerism is America's Greatest Export, Wash. Post, Jan. 2, 1994, at C1.

n2. Donald S. Macdonald, The Canadian Cultural Industries Exemption Under Canada-U.S. Trade Law, 20 Can.-U.S.L.J. 253 (1994). In 1989, "\$ 200 billion worth of goods and services flowed between the two nations [Canada and the United States]. In that same year, shipments from the U.S. to Canada accounted for more than 20% of the value of all U.S. exports of merchandise and nearly equalled total U.S. exports to the European Community." Stephen R. Konigsberg, Note, Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and the Liberalization of the Broadcast Ownership Laws, 12 Cardozo Arts & Ent. L.J. 281, 283 (1994), citing U.S.-Canada Free Trade Agreement Biennial Report, available in 1991 WL 329550, at \*1 (Jan. 1991).

n3. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

n4. General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the World Trade Organization, December 15, 1993, 33 I.L.M. 13 (1994). The 1994 Uruguay Round of trade agreements culminated in the creation of the WTO. The WTO's charter incorporates its predecessor, the General Agreement on Trade and Tariffs (GATT), as well as other major agreements made during the Uruguay Round.

- - - - -End Footnotes- - - - -

Although the United States and Canada are firm allies and generally maintain a cordial trade relationship, these cultural exemptions threaten to undermine trade cooperation between the two countries. The tensions between open trade and cultural protectionism that affect both countries were recently illustrated by a dispute arising from the Canadian government's refusal to allow Country Music Television (CMT), an American country music-video channel, to continue to operate in Canada.

Part I of this Note summarizes the historical and legal background of this dispute. Part II details the chronology of the CMT dispute itself. Part III analyzes the claims made by both the United States and Canada, uses those claims to illustrate the problems inherent in the system of existing agreements with regard to cultural trade, and examines arguments both for and against limiting cultural trade, with a view towards developing policies to balance the needs of all countries. This Note concludes that as cultural trade tensions continue to grow in importance, the lessons that can be learned from the CMT dispute can be applied to the benefit of both the United States and its trading partners.

I. BACKGROUND

A. The Canada-United States Relationship

The United States and Canada are intimately linked by ties of history,

geography, and trade. Both are former colonies of England and are wealthy, industrialized nations with abundant natural resources. Canada and the United States share the longest unprotected national border in the world, n5 and more than 80 percent of the Canadian population lives within 100 kilometers of that border. n6 This population distribution makes [\*587] the vast majority of Canadian consumers easily accessible to American exporters, whether of products or of cultural services such as television broadcasts. As a result, Canada is uniquely susceptible to American cultural exports.

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n5. U.S.-Canada Free Trade Agreement Biennial Report, available in 1991 WL 329550, at \*1 (Jan. 1991).

n6. John Herd Thompson, Canada's Quest for Cultural Sovereignty: Protection, Promotion, and Popular Culture, in North America Without Borders? 269, 271 (Stephen J. Randall et al. eds., 1992).

-End Footnotes-

For some time, there has been a movement in Canada to identify and nurture Canadian culture. n7 This movement is derived from policies, common to most governments, that attempt to foster national pride, sovereignty, and cultural achievement. For example, the Massey Report, n8 written in 1949, strongly urged the creation of a Canadian Council for the Arts, because

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n7. See generally id.

n8. The Massey Report was the product of the Royal Commission on National Development in the Arts, Letters, and Sciences, chaired by the Right Honourable Vincent Massey, Chancellor of the University of Toronto. Konigsberg, supra note 2, at 290. The creation of this commission was the first major postwar step taken by the Canadian government to create a framework linking the desire to preserve Canadian culture to a strong governmental policy. Id.

-End Footnotes-

... it is desirable that the Canadian people should know as much as possible about their country, its history and traditions; and about their national life and common achievements ... [and] it is in the national interest to give encouragement to institutions which express national feeling, promote common understanding and add to the variety and richness of Canadian life. n9

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n9. Id., citing Royal Commission on National Development in the Arts, Letters, and Sciences (1949-1951) (Can.), at xi-xii.

-End Footnotes-

Throughout the 1950s and 1960s, American cultural industries such as film, television, and popular music experienced dramatic growth. There was a corresponding rise in the export of American entertainment and culture. n10 During those decades, the Canadian government made its first attempts to nurture its domestic culture and entertainment industries by protecting them from American competition. n11 These efforts culminated in the Broadcasting Act of 1968, n12 and the creation of a Federal agency, the Canadian Radio-Television and Telecommunications Commission (CRTC). n13 The CRTC issues broadcast licenses and oversees Canada's centralized communi- [\*588] cations network, the Canadian Broadcasting Corporation (CBC). n14

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n10. Id. at 291.

n11. See id. for a detailed overview and history of the U.S.-Canada cultural trade relationship.

n12. Broadcasting Act, R.S.C., ch. B-11 (1985) (Can.).

n13. Canadian Radio-Television and Telecommunications Commission Act, R.S.C., ch. C-22 (1985) (Can.). The CRTC was originally named the Canadian Radio-Television Commission, but was soon renamed the Canadian Radio-Television and Telecommunications Commission. Konigsberg, supra note 2, at 292 n.78.

n14. "Subject to this Act, ... the Commission shall regulate and supervise all aspects of the Canadian broadcasting system." Broadcasting Act, supra note 12, 15.

-End Footnotes-

B. Canadian Protectionist Measures

Among the tools the CRTC has used to protect Canada from the perceived onslaught of American culture are subsidies and tax measures. For example, until 1987, any investment in a Canadian-produced film was 100 percent tax-deductible. n15 Another tax measure, known as Bill C-58, n16 denies advertising cost deductions for Canadian businesses that attempt to reach their domestic market by advertising in non-Canadian media. Total Canadian direct and indirect federal arts subsidies in 1989-1990 were estimated to be Canadian \$ 2.93 billion. n17

-Footnotes-

n15. This measure, called the 100% Capital Cost Allowance, is discussed in Steven Globerman, Cultural Regulation in Canada 12-14 (1983). In 1987, the deductible amount was reduced to 30%. Susan Walker, Sinking Arts Groups Send SOS to New Government, Toronto Star, Oct. 23, 1993, at L15 available in 1993 WL 7284952.

n16. Income Tax Act, R.S.C., ch.1, 19 (1985, 5th Supp.) (Can.). This restriction was the subject of a Section 301 action initiated in 1978. See infra notes 139-41 and accompanying text.

n17. Walker, supra note 15, at L15.

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Perhaps the two most important policies the CRTC has implemented to protect Canada from American entertainment are its restrictions on foreign ownership and on broadcast content. Until recently, broadcast entities such as television and radio stations and cable television providers doing business in Canada had to be at least 80 percent Canadian owned. n18 Canadian television and radio broadcasters are subject to "Canadian content" restrictions: 60 percent of all programming and 50 percent of all prime time programming must be of Canadian origin. n19

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n18. Canadian Radio-Television and Telecommunications Commission: An FM Policy for the Nineties, Pub. Notice 1990-111, C. Gaz. pt. I, at 455 (Can.) (1990). The current limit, enacted in April 1996, is 67%. See infra note 77 and accompanying text.

n19. Television Broadcasting Regulations, SOR/87-49, C. Gaz. pt. II, at 339 (Can.) (1987).

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Canada's protectionist stance toward cultural imports manifests itself in the key trade agreements to which Canada is a signatory, NAFTA and the WTO agreements. Although NAFTA generally discourages the use of quotas and other trade restrictions, it contains an exemption for cultural industries. Annex 2106 of NAFTA provides that "any measure adopted or [\*589] maintained with respect to cultural industries, ... and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada-United States Free Trade Agreement" (FTA). n20 FTA Art. 2012's definition of "cultural industries" includes the publication, distribution, or sale of books, magazines, periodicals, newspapers, films, video recordings, audio or video music recordings, and sheet music, as well as all radio, television, cable, and satellite broadcasting services. n21 Article 2005 states that "cultural industries are exempt from the provisions of the [FTA]" (and by incorporation, NAFTA). n22 NAFTA thus allows Canada to construct trade barriers to cultural services and products. n23

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n20. NAFTA, supra note 3, Annex 2106.

n21. Canada-U.S. Free Trade Agreement, Dec. 22-23, 1987 and Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281, art. 2012 (1988) [hereinafter FTA].

n22. Id. art. 2005.

n23. Konigsberg, supra note 2, at 299.

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The original GATT included an exception for screen quotas imposed on movie theaters, n24 but otherwise did not mention cultural products. There has been much debate over whether and how cultural products were covered under GATT, n25 most of which was resolved in 1994 with the creation and adoption of the Uruguay Round WTO/GATT agreements, which included the General Agreement on Trade in Services (GATS) n26 and the Trade-Related Aspects of Intellectual Property Agreement [\*590] (TRIPS). n27 Although GATS and TRIPS arguably cover certain sectors of the group of industries generally agreed to be "cultural," the WTO has no general provision concerning cultural products as a whole. Reasoning that anything not expressly prohibited is allowed, many WTO members consider themselves legally free to apply quotas and other trade restrictions to protect their domestic cultural industries. For example, just a week after the Uruguay Round ended, the French Senate approved a new requirement that French radio stations devote 40% of air time to French music, and Spain's Parliament passed a new law requiring one-fourth to one-third of all movies shown in Spanish theaters be of European origin. n28

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n24. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. IV.

n25. See, e.g., 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, 307-44 (1994); Timothy M. Lupinacci, Note, The Pursuit of Television Broadcasting Activities in the European Community: Cultural Preservation or Economic Protectionism?, 24 Vand. J. Transnat'l L. 113, 131-42, (1991); Michael Braun & Leigh Parker, Trade in Culture: Consumable Product or Cherished Articulation of a Nation's Soul?, 22 Denv. J. Int'l L. & Pol'y 155, 178-91 (1993); Jon Filipek, "Culture Quotas": The Trade Controversy Over the European Community's Broadcasting Directive, 28 Stan. J. Int'l L. 323, 345-62 (1992); Hale E. Hedley, Canadian Cultural Policy and the NAFTA: Problems Facing the U.S. Copyright Industries, 28 Geo. Wash. J. Int'l L. & Econ. 655, 682-83 (1995); Clint N. Smith, International Trade in Television Programming and GATT: An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade, 10 Int'l Tax & Bus. L. 97 (1993).

n26. General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments-Results of the Uruguay Round vol. 31; 33 I.L.M. 44 (1994) [hereinafter GATS].

n27. Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS].

n28. Roger Cohen, France and Spain Impose Quotas, N.Y. Times, Dec. 22, 1993, at C15.

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C. American Responses to Cultural Protectionism

The U.S. government's primary tool in combating foreign measures that exclude U.S. exports of entertainment and culture is contained in the 1974 Trade Act. n29 Section 301 of that Act n30 contains two main provisions: 301(a), which allows the Office of the U.S. Trade Representative (USTR) to take retaliatory action if a trading partner breaks a trade agreement with the United States; and 301(b), which does not require the breach of a trade agreement, but instead allows the USTR to take retaliatory action if the trading partner's actions are "unreasonable" or "discriminatory" and also "burden or restrict United States commerce." n31 Section 301 thus vests extremely broad discretion in the USTR. Section 301 claims are generally initiated by American citizens who make a complaint to the USTR, which then investigates the complaint and decides what action to take. n32 The United States can use Section 301 measures either indepen- [\*591] dently or in conjunction with remedies available under international trade agreements.

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n29. Trade Act of 1974, 19 U.S.C. 2101-2487 (1994).

n30. Section 301, 19 U.S.C. 2411-20 (1994).

n31. Id. 2411(a)(1), 2411(b)(1). There are two other types of Section 301 action: "Special 301" and "Super 301." Id. 2242, 2420. Special 301 is used when foreign countries deny American companies the market protection associated with intellectual property rights, and Super 301 is designed to force the Executive Branch to self-initiate Section 301 actions against "priority" nations. Because these provisions are applicable only within certain circumstances that do not concern disputes over cultural industries, they are not within the scope of this Note.

n32. Id. 2412-20.

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A second U.S. response to a perceived trade problem is through NAFTA. A Canadian measure could either be directed explicitly at limiting cultural imports into Canada, or could have the effect of restricting cultural trade, although enacted for a purpose that is putatively unrelated to culture. For example, a Canadian statute that banned, ostensibly for environmental reasons, the sale of magazines without recycled, non-glossy covers has a goal that is unrelated to cultural trade. Because nearly all American magazines have glossy covers, this measure would effectively prohibit the import into Canada of American magazines. In this case, if the Canadian measure breached some other aspect of NAFTA, the United States could combat the measure through NAFTA. n33 The United States would effectively be fighting to continue its cultural exports through the machinery of NAFTA, even though cultural industries are expressly excluded from NAFTA (through the FTA).

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n33. NAFTA, supra note 3, ch. 20.

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If the Canadian measure had been designed specifically to discriminate against American cultural imports, as allowed under the NAFTA/FTA cultural exemption, the United States could retaliate via Article 2005(2) of the FTA: "Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement." n34 These measures are not otherwise limited, and thus a Section 301 action that was of "equivalent commercial effect" against Canadian cultural industries seems to be implicitly allowed by the FTA.

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n34. FTA, supra note 21, art. 2005(2).

-End Footnotes-

Third, the United States may pursue a remedy for a trade grievance under the WTO agreements. There are several GATT provisions that allow a member to withdraw concessions or otherwise respond to a trade problem. n35 GATT Article XXIII provides that if the United States (or any other member of GATT) considers that the benefits it derives from being a member of the WTO are being "nullified or impaired" by another member's actions, whether or not those actions actually violate the agreement, it may take steps to retaliate. n36 Any dispute [\*592] that arises under Article XXIII is settled through the formalized dispute procedure codified in the Dispute Settlement Understanding (DSU). n37 Action via Article XXIII and the DSU is similar to action via Section 301, in that the United States could respond to a Canadian protectionist measure through GATT even if the measure did not violate any specific agreement between the two countries. However, unlike section 301 actions, responses through the WTO may be somewhat lengthy and time-consuming, in spite of the improvements made by adopting the DSU. n38 Section 301 procedures, because they are unilateral, can be relatively quick.

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n35. Two examples are Article XI, which provides remedies for "dumping," and Article XIX, which provides for emergency actions to prevent serious injury to domestic producers. GATT arts. XI and XIX.

n36. Id. art. XXIII:1(a)-(c).

n37. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round vol. 31; 33 I.L.M. 112 (1994) [hereinafter DSU].

n38. The sum of the maximum times allotted for each of the several stages of a DSU action is approximately 31 months. See generally John H. Jackson et al., Legal Problems of International Economic Relations, 341-44 (3d ed. 1995). By contrast, the maximum time allowable between initiation and implementation of a Section 301 action is under 14 months. Section 301, 19 U.S.C. 2412(a)(2), 2414(a)(2)(B) (1994).

-End Footnotes-

A fourth remedy for redressing international trade wrongs is simply a lawsuit, in either country involved. Depending on the laws of the country in which the suit is brought, an American person, corporation, or the U.S. government may make a claim for a tort (such as damages arising from unfair trade practices) or breach of contract (such as an implied contract of good-faith dealing) against a foreign entity or government. The availability and success of this remedy vary widely, depending on the circumstances of the case.

Finally, multinational companies do not have to take formal action at all - they can just conduct their business so as to achieve their ends without governmental assistance or interference. This type of action can range from purchasing decisions and other ordinary business activity to boycotts and public relations campaigns that are calculated to have a retributive effect on an international competitor.

## II. THE CHRONOLOGY OF THE COUNTRY MUSIC TELEVISION DISPUTE

The CMT dispute began in February 1994, when the CRTC began holding hearings to allot an undetermined number of ad- [\*593] ditions to Canadian cable broadcasting service. n39 CMT was one of forty-eight applicants, many of which had already been broadcasting in various parts of Canada. n40 CMT began operations in Canada in 1984, and in 1994 it had 464 system affiliates and approximately 1.9 million subscribers there. n41 At the hearings, Canadian broadcasters alleged that CMT would directly compete against their proposed channels n42 and did not adequately feature Canadian country musicians. n43 A total of seven broadcasters n44 applied to operate country music channels, and it seemed clear that the CRTC would decide that there was only enough room on Canadian cable for one channel in a country music format. n45

### -Footnotes-

n39. Barbara Wickens, Special Pleadings: The CRTC Screens Proposals for Television's New Frontier, MacLean's, Feb. 21, 1994, at 64.

n40. Id.

n41. Janet Stilson, Canadian Commission Forces Systems to Drop CMT, Multichannel News, June 20, 1994, at 12.

n42. Country Music Television Inc. v. CRTC et al. [1994] 178 N.R. 386, 389.

n43. Spence Bozak, president of Canada's Country Music Channel, one of CMT's competitors, testified at the CRTC hearings that there was a big difference between Canadian and American country music, and that "all the artists we talked to said, 'We just want our music exposed to Canadians.'" Wickens, supra note 39, at 66.

n44. The seven included five Canadian applicants plus CMT and The Nashville Network (TNN), which was also already established in Canada. Id. Until recently, CMT was a joint venture between Nashville-based country-music industry giant Gaylord Entertainment (owner of the Grand Ole Opry, Opryland Convention Center, and Acuff-Rose Music Publishing) and Group W Satellite Communications (GWSC), a division of Westinghouse (owner of the CBS television network and manufacturer

of everything from refrigerators to nuclear power plants). See Gaylord Entertainment Company, Inc., 1995 Annual Report 40 (1996); Westinghouse, Inc., 1995 Annual Report 21 (1996). TNN, owned wholly (at the time) by Gaylord, differs from CMT in that CMT broadcasts almost entirely country-music videos, whereas TNN broadcasts "country-lifestyle" programming, such as line-dancing, fishing, and motor sports shows. Gaylord Entertainment, supra at 13-15, 40. In early February 1997, Westinghouse announced that it was buying TNN and CMT from Gaylord for \$ 1.55 billion in Westinghouse stock. Geraldine Fabrikant, Westinghouse to Buy Country Music Units, N.Y. Times, Feb. 11, 1997, at C5.

n45. Even though there were proposals for 48 different channels, ranging from a pay-per-view hockey channel to all-animation channels, most cable carriers in Canada had only the capacity to carry six additional channels. Wickens, supra note 39, at 64. This made it unlikely that more than one channel in any given format would be allowed. Eventually, a total of seven new channels were allowed. Joanne Ingrassia, Canada Limits TV Investors, Electronic Media, Jan. 23, 1995, at 159.

- - - - -End Footnotes- - - - -

On June 6, 1994, the CRTC announced its decision: CMT was dropped from Canadian cable and the CRTC instead decided to license a similar, brand-new channel (New Country Network, or NCN) offered by Canadian programmer MH Radio/ [\*594] Rawlco. n46 Even though Canadian regulations stated a preference for mostly Canadian programming and suggested that foreign services would face cancellation if similar programming could be provided by a Canadian company, CMT said it was "disturbed" by what it called a "perplexing" CRTC decision. n47 CMT was the only American channel that was forced to stop broadcasting in Canada as a result of the CRTC's decision. n48

- - - - -Footnotes- - - - -

n46. CRTC Decision 94-284, 128 C. Gaz. pt. I, at 3047-48 (Can.) (1994); CRTC Public Notices 1994-60, 61-1, 128 C. Gaz. pt. I, at 3035-39 (Can.) (1994). Because CMT would, in the CRTC's view, directly compete against NCN, the CRTC placed CMT on a list of discretionary cable television services until the end of 1994, at which time it would be removed from the list of services that were eligible for broadcast at all. CRTC Decision 94-284, supra. At the same time, NCN was placed on the newly expanded list of basic cable television services. CRTC Public Notice 1994-60, supra at 3036.

n47. International Cable, Warren's Cable Reg. Monitor, June 20, 1994, available in 1994 WL 8368290.

n48. Stilson, supra note 41, at 12. In past CRTC actions, U.S. channels had been allowed to continue broadcasting even when Canadian competitors debuted, apparently because they were not challenged. James Careless, CMT Fights Being Booted off Canadian Cable, Multichannel News, July 11, 1994, at 14. For example, CNN remained in Canada after CBC Newsworld was licensed, as did Arts & Entertainment Network (A&E) when Canadian-owned Bravo was launched. Id. Because TNN, CMT's sister channel, was apparently not directly competitive with NCN or any other Canadian basic cable service, its Canadian broadcasting status remained unchallenged.

- - - - -End Footnotes- - - - -

On July 4, CMT applied for leave to appeal in Canada's Federal Court of Appeal. n49 It intended to fight the Commission's decision on the grounds that the CRTC denied CMT an opportunity to be heard on a matter directly affecting CMT's interests when it denied CMT's request to participate in public hearings, and failed to consider all of the relevant information in making its decision. n50

-Footnotes-

n49. Careless, supra note 48, at 14.

n50. Id.

-End Footnotes-

On August 26, Canada's Federal Court of Appeal granted CMT leave to appeal the CRTC's decision. n51 If the court agreed that CMT was denied its "natural justice," CMT could present its case before the CRTC again. n52 The appeal hearing was held on November 22, 1994, and on December 20, the court dismissed [\*595] CMT's appeal. n53 The court held that since its entry into the Canadian market in 1984, CMT had been on notice that it could become ineligible to broadcast if a similar Canadian service became competitive with it. n54 The court held further that since CMT had been given a reasonable opportunity to state its case to the CRTC, natural justice had not been denied. n55 On December 29, 1994, the Supreme Court of Canada denied CMT's application to appeal the Appellate Court's ruling. n56

-Footnotes-

n51. Music Notes, Billboard, Sept. 8, 1994.

n52. Id. "Natural justice" is roughly analogous to procedural due process in American constitutional and administrative law. Compare Donna Soble Kaufman, Broadcasting Law in Canada: Fairness in the Administrative Process 7, (1987) (describing natural justice), with Goldberg v. Kelly, 397 U.S. 254 (1970) (applying procedural due process in an administrative setting).

n53. Country Music Television Inc. v. CRTC [1994] 178 N.R. 386, 387; CMT Protests Eviction from Canada, Electronic Media, Jan. 2, 1995, at 50.

n54. Country Music Television Inc. v. CRTC [1994] 178 N.R. 386, 391.

n55. Id. at 390.

n56. Id. at 400.

-End Footnotes-

A few days earlier, on December 23, CMT had filed a petition with the USTR alleging that the CRTC's action violated NAFTA by limiting market access to service providers, confiscating investments, and generally discriminating against U.S. firms. n57 CMT argued that if the unfair practices were not remedied, the United States could take retaliatory action, including

restrictions on imports of goods and services from Canada. n58

-----Footnotes-----

n57. CMT Fights Back Against CRTC: Petitions U.S. Trade Rep., Cablefax, Dec. 23, 1994, available in 1994 WL 11049381. It is unclear exactly which NAFTA provisions CMT thought Canada's actions had violated. See infra notes 100-15 and accompanying text.

n58. CMT Fights Back, supra note 57.

-----End Footnotes-----

CMT's petition also asked the USTR to initiate a Section 301 action. n59 At the same time, CMT instituted a boycott of all Canadian country music artists on all of its broadcast outlets. n60 For the purposes of this boycott, CMT defined "Canadian" country musicians as any who did not have contracts with American record companies, thus allowing itself to continue to play videos by already popular country musicians who were from Canada. n61

-----Footnotes-----

n59. CMT Protests Eviction, supra note 53.

n60. Etan Vlessing, Now, Ousted CMT Gives Canadian Vids the Boot, Hollywood Rep., Jan. 12, 1995.

n61. Id.

-----End Footnotes-----

During the same period, other disputes based on cultural exports from the United States to Canada had flared up, including a new tax on American magazines sold in Canada. n62 On December 22, 1994, the USTR released a dispatch responding to Canada's actions. n63 In it, U.S. Trade Representative Mickey Kantor stated that the U.S. government was "examining all of [\*596] its options, including retaliation options, to appropriately respond to these unacceptable developments." This was a strongly worded hint that the United States would institute punitive measures (most likely a Section 301 action) aimed at Canadian entertainment industry companies operating in the United States. n64 Soon after, Kantor indicated that his office was initiating the Section 301 trade investigation and invited public comments on how the CRTC policy had harmed U.S. interests. n65

-----Footnotes-----

n62. New Canadian Tax Initiative Targets 'Split-Run' Magazines; USTR Concerned, 12 Int'l Trade Rep. (BNA) No.1, at 15 (Jan. 4, 1995).

n63. Office of U.S. Trade Representative, U.S. Response to Recent Canadian Trade-Related Decisions, U.S. Dep't St. Dispatch 21 (1995).

n64. Id.

n65. USTR Initiates Section 301 Probe of Canada TV Communications Practices, 12 Int'l Trade Rep. (BNA) No. 6, at 267 (Feb. 8, 1995).

-End Footnotes-

In response, U.S. entertainment conglomerate and CMT co-owner Westinghouse, along with several other American cable broadcasters, urged the federal government to impose annual penalties of \$ 750 million against Canada in retaliation for discriminating against CMT. n66 Kantor set a June 21 deadline for resolution of the dispute, threatening to compile a "hit list" of Canadian entertainment companies that would suffer retaliation. n67 Observers suggested that a "bona fide trade war" was erupting between the United States and Canada. n68

-Footnotes-

n66. U.S. Entertainment Firms Call for Retaliation Against Canada, 12 Int'l Trade Rep. (BNA) No. 11, at 504 (Mar. 15, 1995). One of the firms urging retaliation was The Weather Channel (TWC). A few months earlier, TWC's Canadian counterpart, Meteomedia/Weather Now, had requested that TWC become ineligible to broadcast in Canada, just as CMT had. CRTC Public Notice 1994-125, 128 C. Gaz. pt. I (Can.) (1994).

n67. Michael B<um u>rgi, Sabers Rattle in Row over Country Music; Canada's Ban on U.S. Cable Channel Leads to Threats from Washington, Adweek, May 29, 1995, at 12.

n68. Id.; see also U.S., Canada out of Tune over CMT, Broadcasting & Cable, June 5, 1995, at 27; Music Compromise, MacLean's, July 1, 1995, at 60; Justin Martin, Truce Declared in the Canadian Country Music War, Fortune, Aug. 21, 1995, at 126.

-End Footnotes-

The impending "trade war" was averted on June 22, 1995, when CMT and NCN agreed to form a joint venture to run a single Canadian country music network. n69 CMT would own twenty percent of the new network (the maximum foreign ownership allowed under Canadian law), n70 which was to be called "CMT: Country Music Television (Canada)." n71 The remaining eighty percent would be held by MH Radio/Rawlco, the original owners of NCN. n72 However, if the Canadian restrictions that kept foreign ownership of broadcasters below twenty percent [\*597] were eased to allow thirty-three percent foreign control, NCN would sell an additional thirteen percent stake to CMT. n73

-Footnotes-

n69. Tentative Accord Reached On Dispute With Canada Over Revoking CMT's License, 12 Int'l Trade Rep. (BNA) No. 26, at 1088 (June 28, 1995).

n70. See supra note 18 and accompanying text.

n71. Tentative Accord Reached, supra note 69.

n72. Id.

n73. Music Compromise, supra note 68, at 60. The loosening of the foreign investment provision, see infra note 79 and accompanying text, was presumably already being negotiated at that time.

- - - - -End Footnotes- - - - -

Nevertheless, in January 1996, there was still friction between the Canadian owners and CMT, which claimed that it was being prohibited from participating in the management of the channel. n74 CMT again asked Mickey Kantor for help, claiming that its Canadian partners had exhibited bad faith, and requesting that Kantor find the Canadian ownership restrictions unreasonable and take retaliatory measures. n75 As February 6, 1996, (the statutory deadline for the original Section 301 action) approached, Kantor hinted that if a settlement was not soon reached, the retaliatory measures would go into effect. n76 However, on February 6, Kantor declined to announce retaliatory action, noting that negotiations between the parties seemed to be on track. n77 Finally, on March 7, CMT announced that it had reached an agreement with its Canadian partners. n78 On April 11, the Canadian government announced the relaxation of its foreign ownership rules, permitting foreign business entities to purchase up to one-third of the voting shares of a Canadian holding company in the television, radio, and cable television industries. n79

- - - - -Footnotes- - - - -

n74. Michael B<um u>rgi, CMT Seeks Canada Links, Mediaweek, Jan. 15, 1996, at 5.

n75. Id.; Rich Brown, Group W Dispute with Canada Heats up, Broadcasting & Cable, Jan. 15, 1996, at 130.

n76. Retaliation is Threatened Over Canada's Limitations on the Broadcasting of U.S. Radio and TV Programs, N. Am. Free Trade & Investment Rep., Feb. 15, 1996, available in 1996 WL 10175250.

n77. USTR Says Canada Broadcast Policies Discriminate; CMT Talks Continue, 13 Int'l Trade Rep. (BNA) No. 7, at 244 (Feb. 14, 1996).

n78. CMT Makes Canada Connection, Mediaweek, Mar. 11, 1996, at 3; Country Music TV Dispute Resolved; U.S., Canadian Firms Finalize Deal, 13 Int'l Trade Rep. (BNA) No. 11, at 421 (Mar. 13, 1996).

n79. Direction to the CRTC (Ineligibility of Non-Canadians) SOR/96-192, 130 C. Gaz. pt. II, at 1296, 1299 (Can.) (1996); Canada Eases Foreign Ownership Limits on Broadcasting, Cable TV Holding Firms, 13 Int'l Trade Rep. (BNA) No. 16, at 646 (Apr. 17, 1996).

- - - - -End Footnotes- - - - -

Finally, on August 8, 1996, after more than two years of turmoil, acting U.S. Trade Representative Charlene Barshefsky n80 [\*598] announced that CMT and its Canadian partners had received final regulatory approval to begin broadcasting in Canada and had been issued a broadcast license good until 2000. n81 However, she warned that the United States would closely monitor Canada's actions regarding cultural industries, and the U.S. administration would "not tolerate discrimination against any U.S. industry." n82

-Footnotes-

n80. Mickey Kantor became U.S. Secretary of Commerce on April 13, 1996, and his assistant, Charlene Barshefsky, became acting USTR immediately thereafter. Paul Blustein, Clinton Expected to Name Barshefsky to Trade Post, Wash. Post, Nov. 14, 1996, at E1. Barshefsky was confirmed as USTR by the Senate on March 5, 1997. Paul Blustein, Barshefsky Confirmed by Senate; Vote on Trade Official Spurs Angry Debate, Wash. Post, Mar. 6, 1997, at E2.

n81. Gary G. Yerkey, U.S. Country Network to Begin Broadcasting in Canada This Fall, Ending Long Trade Dispute, 13 Int'l Trade Rep. (BNA) No. 33, at 1304 (Aug. 14, 1996).

n82. Id.

-End Footnotes-

III. ANALYSIS

A. Responses to Canada's exclusion of CMT

As outlined above, there were five avenues through which the United States and CMT could have responded to the CRTC's decision: the GATT/WTO system, NAFTA/FTA, Section 301, a lawsuit in Canadian court, and an independent private action. Because an intensive inquiry into Canadian administrative law would be outside the scope of this Note, it will be assumed that the CRTC's hearing and the Canadian legal decisions on appeal were procedurally and legally correct.

An examination of the CMT dispute under GATT, NAFTA, and Section 301 is the first step in an investigation of cultural trade exclusion policy in general. Responses involving two of these were threatened but not used: CMT alleged that the decision violated NAFTA, and the USTR threatened Section 301 action. Redress under the WTO/GATT system was neither used nor even mentioned by any party to the dispute. These three means of redress will be discussed in ascending order of their possible effectiveness.

1. GATT/WTO

At no point in the dispute did either CMT or the United States attempt to argue that the CRTC's action violated any GATT/WTO agreement. It would not have been surprising if the United States had made this argument, though, because it and other countries have been engaged in an ongoing debate over the status of cultural industries under the GATT/WTO system. n83

-Footnotes-

n83. See generally supra note 25.

-End Footnotes-

The first issue in the debate over whether the CRTC's denial of CMT's license is actionable under a WTO agreement is [\*599] whether cable

television broadcasting is considered to be a good or a service. If cable television is a good, then it is covered by GATT and the United States could respond to the CRTC's action by instituting a non-violation "nullification or impairment" proceeding under the Dispute Settlement Understanding. n84 Although this course of action has its uncertainties, n85 it does provide a dispute resolution system that is procedurally predictable and that, whatever the outcome, is likely to be adhered to by all concerned.

- - - - -Footnotes- - - - -

n84. See supra note 37 and accompanying text.

n85. Two large groups of problems with the GATT/WTO dispute settlement system have been identified: those that arise from the general structure and historical background of the GATT and those that arise from changes made during the Uruguay Round. The first group of problems include: (1) disuse, (2) delays in the establishment of panels, (3) delays in appointing specific panel members, (4) delays in the completion of panel reports, (5) uncertain quality and neutrality of panelists and panel reports, (6) blocked panel reports, and (7) non-implementation of panel reports. Jackson, supra note 38, at 344-45, summarizing William J. Davey, Dispute Settlement in GATT, 11 Fordham Int'l L.J. 51, 81-89 (1987). All of these problems continue to persist even after the adoption of the 1994 Uruguay Round improvements, and have been complemented by the problems particular to those improvements, such as major powers' possible non-compliance with adverse decisions and uncertainty about the effect and role of the new Appellate Body. Jackson, supra note 38, at 345.

- - - - -End Footnotes- - - - -

If cable television broadcasting is a service, it is covered under GATS, which contains a more limited non-violation nullification and impairment provision. n86 In prior disputes over cultural regulations (primarily with the EC), the United States has attempted to claim that television programming and broadcasting are goods and, as such, are governed by GATT. For example, when the EC passed its "Television without Frontiers" directive in 1989, the U.S. House of Representatives unanimously denounced the directive, calling it "GATT-illegal" and requesting the USTR to take action against the EC through GATT (and Section 301) on the basis that television programming constituted a good, not a service. n87

- - - - -Footnotes- - - - -

n86. See infra notes 93-94 and accompanying text.

n87. Lupinacci, supra note 25, at 128-29, 134, and n.103, citing 135 Cong. Rec. H7330 (daily ed. Oct. 23, 1989) (statement of Rep. Frenzel); see also Filipek, supra note 25, at 355-57; Smith, supra note 25, at 123-27.

- - - - -End Footnotes- - - - -

However, since the conclusion of the Uruguay Round, it can no longer be plausibly argued that cable television broadcasting is anything but a service. The simplest and most persuasive evidence of this is that the general list of services covered by GATS includes "Radio and television transmission services," which cer- [\*600] tainly describes cable television broadcasting. n88

Furthermore, there is strong precedent in Canadian, n89 U.S., n90 and international law n91 that cable broadcasting is a service. n92 Thus, the WTO agreement governing the CMT dispute is GATS, not GATT.

- - - - -Footnotes- - - - -

n88. Bernard Hoekman, World Bank, Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services 37-38 (1994).

n89. See, e.g., Attorney General of Canada v. Lount Corp. [1985] 2 F.C. 185, 197 (Can.) (holding that "television service, provided for the guests [of a hotel] is akin to the provision of heating, water, linens, furniture, towels and soap, and elevator service.") (emphasis added).

n90. See, e.g., Leathers v. Medlock, 499 U.S. 439, 442, (1991) ("[plaintiff] brought this class action ... to challenge the extension of the sales tax to cable television services") (emphasis added); Cable Communications Policy Act of 1984, 47 U.S.C. 522(7) (1994) (defining a "cable system" as "a facility ... that is designed to provide cable service ... to multiple subscribers within a community....") (emphasis added).

n91. Sacchi, 1974 E.C.R. 409, 427 (E.C.J.), 14 Common Mkt. Rep. (CCH) 177, 201-02 (1974) (holding that "a television signal must, by reason of its nature, be regarded as a provision of services .... It follows that the transmission of television signals ... comes, as such, within the rules ... relating to services").

n92. This conclusion, although accurate in the case of CMT, does not necessarily apply to all sectors of all cultural industries. For example, magazines and compact discs are clearly goods, not services. Television programming, as distinguished from television broadcasting, may also be a good. Thus, although GATS governs the CMT dispute, GATT or TRIPS may govern future disputes about films, magazines, records, and television, depending on the exact issues of each case. Notwithstanding this, most of the controversy over cultural protection has been, so far, over the means of distribution. Content and investment quotas have mostly been used by importing countries to control the means of dissemination of entertainment, not to control the importation of the physical media on which the entertainment is carried. Thus, it is useful to assume the commodity in question is a service, rather than a product, when examining cultural trade policy in general.

- - - - -End Footnotes- - - - -

GATS, although similar in structure to GATT, has some major differences. While GATT is founded on both the principles of Most-Favored-Nation (MFN) n93 and national treatment, n94 GATS has a MFN requirement but no general national treatment requirement. In other words, although the CRTC's actions distinguish between Canadian and foreign broadcasters, they are GATS-legal because they do not distinguish between U.S. broadcasters and other foreign broadcasters. However, GATS does contain a limited national treatment requirement. Part III of GATS, titled Specific Commitments, requires national treatment for measures that have been specified in each member's [\*601] Schedule. n95 Canada has not put its broadcast regulations in its Schedule, n96 so national treatment is not required in regard to its broadcast regulations under any WTO agreements. Even if national treatment were required, non-violation "nullification and

impairment" dispute resolution through the Dispute Settlement Understanding is available under GATS only for those services that are listed in each party's Schedule. n97 Thus, the United States can make no claim that the CRTC's decision was GATS-illegal, and there is no means by which it can make an "equitable" claim that although the CRTC's decision was GATS-legal, it still impaired benefits they might have reasonably expected under GATS.

-Footnotes-

n93. GATT art. I.

n94. Id. art. III.

n95. GATS art. XVI:1.

n96. GATT Secretariat, 28 Uruguay Round of Multilateral Trade Negotiations, (1994).

n97. GATS art. XXIII.

-End Footnotes-

The futility of a United States response to the CMT dispute through WTO/GATT agreements is augmented by several other disadvantages that might be present even if there were a way for the United States to bring this dispute before the WTO. WTO Dispute Settlement proceedings can be lengthy and bureaucratically complex. n98 Furthermore, presenting this dispute in front of the whole WTO might cause other countries and trade organizations, particularly the EC, to get involved. The United States and the EC have a long and contentious history of dealing with cultural trade issues, n99 and it is unlikely that the EC involvement would do anything except ensure that the WTO proceedings would become longer, more complex, and less predictable. In sum, the CRTC's exclusion of CMT is "legal" within the GATT/WTO system, and even if it were not, the GATT/WTO system would not be the most effective forum in which to settle this particular bilateral dispute between the United States and Canada.

-Footnotes-

n98. See supra note 85.

n99. See supra note 87 and accompanying text; see generally Kaplan, supra note 25.

-End Footnotes-

2. NAFTA

In its December 23, 1994 petition to the USTR, CMT alleged that the CRTC's decision violated NAFTA. n100 Although CMT never identified exactly which provisions of NAFTA it had in mind, it alleged that Canada had "unfairly discriminated [\*602] against U.S. firms" n101 by violating NAFTA "provisions that deal with market access for service providers and confiscation of investments." n102

-Footnotes-

n100. See CMT Fights Back, supra note 57 and accompanying text (discussing CMT's intention to file a petition).

n101. Rich Brown, CMT Appeals Ruling, Broadcasting & Cable, Jan. 2, 1995, at 22.

n102. Id.

-End Footnotes-

Whatever CMT's arguments may have been, the CRTC's exclusion of CMT was indisputably within Canada's prerogatives under NAFTA. As discussed above, n103 NAFTA Annex 2106 incorporates the cultural industries exemption of FTA Article 2005(1). n104 Cable television broadcasting clearly fits within the exemption's definition of cultural industries, which includes "all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network service." n105

-Footnotes-

n103. See supra notes 20-23 and accompanying text.

n104. FTA, supra note 21, art. 2005.

n105. NAFTA, supra note 3, art. 2107(e).

-End Footnotes-

There are several ways to interpret CMT's allegations that Canada "violated" NAFTA. The first is that CMT was merely focusing on different aspects of the agreement. Chapters 11, 12, and 13 all seem relevant at first glance. n106 Chapter 11 requires national treatment and MFN for investors from each party, n107 Chapter 12 requires national treatment and MFN for service providers from each party, n108 and Chapter 13 requires access to telecommunications for all parties. n109 Cable television is excluded, however, from the scope of Chapter 13. n110 In spite of these possibly applicable chapters, the cultural exemption applies "notwithstanding any other provision of [NAFTA]." n111

-Footnotes-

n106. Id. chs. 11, 12, and 13.

n107. Id. ch. 11.

n108. Id. ch. 12.

n109. Id. ch. 13.

n110. Id. art. 1302 P 1.

n111. NAFTA, supra note 3, art. 2106.

-End Footnotes-

The second possibility is that CMT was attempting to wage a public relations war. Perhaps CMT believed it would be able to present its case in a more sympathetic light if it seemed that Canada had acted unfairly.

Whatever CMT's motivation, its claim that the denial of its license "discriminated against U.S. firms" n112 may have been accurate, but the denial did not constitute a violation of NAFTA or the FTA. Likewise, the CRTC's actions did not violate any NAFTA "provisions that deal with market access for service providers and the confiscation of investments" as CMT had [\*603] claimed. n113 However, CMT's threat that the United States could "retaliate by restricting imports of Canadian goods and services" is accurate. n114

-Footnotes-

n112. Brown, supra note 101.

n113. CMT Fights Back, supra note 57.

n114. CMT to Appeal Against Canadian Ban, Music & Copyright, Jan. 18, 1995, at 15, available in 1995 WL 9764210.

-End Footnotes-

FTA Article 2005(2) allows a Party to take measures of "equivalent commercial effect in response to actions that would have been inconsistent with [FTA, and by extension, NAFTA] but for [the cultural industries exemption]." n115 Thus, the United States could retaliate in any number of ways to the CRTC's decision, as long as the retaliations added up to an "equivalent commercial effect." The United States did threaten to retaliate in exactly this way, through Section 301 of the 1974 Trade Act.

-Footnotes-

n115. FTA, supra note 21, art. 2005(2).

-End Footnotes-

3. Section 301

Section 301 of the 1974 Trade Act has been a very controversial tool of U.S. trade policy. n116 The principal critique of Section 301 is that its unilateral nature is contradictory to the multilateral goals and structures of the GATT/WTO. n117 The Section 301 proceedings that occurred in the course of the CMT dispute illustrate a different problem with Section 301: it is such a powerful tool that it may be easily abused. This abuse may occur in several forms. Section 301 is so open-ended that it allows extremely incommensurate retaliation, and its procedures allow it to be abused by individual American companies. [\*604] Furthermore, its design and immense power make it an inappropriate tool (especially when considered in conjunction with its open-ended nature) for the delicate work of dealing with barriers to cultural trade.

-Footnotes-

n116. "Of all the U.S. international trade statutes, perhaps none elicits greater international condemnation than Section 301.... [It has] brought forth ... a 'fusillade of censure' from foreign trade policy officials. One Canadian official, for example, characterized Section 301 as a 'threat to the central viability of the multilateral trade system.'" Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. Int'l L.J. 301, 301 (1990) (citations omitted). For a variety of critiques and defenses of Section 301, see generally Jagdish Bhagwati et al., Aggressive Unilateralism (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

n117. See, e.g., Jagdish Bhagwati, Aggressive Unilateralism: An Overview, in Aggressive Unilateralism, supra note 116, at 33-38 (describing Section 301 as GATT-illegal); Jared R. Silverman, Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 before the WTO, 17 U. Pa. J. Int'l Econ. L. 233 (1996) (concluding that the WTO should attempt to circumscribe the scope of Section 301, because its use is contrary to the goals of the WTO/GATT). A separate critique of Section 301 is that it violates the principles of extraterritorial jurisdiction that are codified in the Restatement (Third) of Foreign Relations Law. Chris Shore, Note, The Thai Copyright Case and Possible Limitations of Extraterritorial Jurisdiction in Actions Taken Under Section 301 of the Trade Act of 1974, 23 Law & Pol'y Int'l Bus. 725 (1992).

- - - - -End Footnotes- - - - -

On December 23, 1994, CMT filed a petition asking the USTR to initiate a Section 301 action. n118 This gave the USTR forty-five days to decide whether to initiate a Section 301 investigation. n119 On February 6, well within the time limit, the USTR announced it was initiating the action. n120 The USTR then had a twelve-month time limit to decide whether it would use a Section 301 action to respond to the CRTC's actions. n121

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n118. USTR Initiates Section 301 Probe, supra note 65, at 267.

n119. Section 301, 2412(a)(2).

n120. USTR Initiates Section 301 Probe, supra note 65, at 267.

n121. Section 301, 2414(a)(2)(B). Although the USTR may provide public hearings in regard to impending Section 301 actions within this 12-month period, it did not do so in this case because such a hearing was not requested by CMT. Id. 2412(a)(4)(A).

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Section 301(a) provides for mandatory retaliation if a U.S. international agreement has been violated. In contrast, Section 301(b) allows discretionary action in situations where an agreement has not been technically violated. n122 As shown above, the action violated neither GATS (or any other GATT/WTO agreement) nor NAFTA/FTA. The retaliation provision contained in FTA Article 2005(2) n123 is an implicit acknowledgment that discretionary Section 301

actions are a possible response to a cultural restriction.

-Footnotes-

n122. See supra note 31 and accompanying text.

n123. See supra note 34 and accompanying text.

-End Footnotes-

Discretionary Section 301 actions are available only if the act, policy, or practice is "unreasonable or discriminatory and burdens or restricts United States commerce." n124 Mickey Kantor's description of the USTR's approach to the dispute shows that the action contemplated was discretionary Section 301 action: "if the issue is not resolved expeditiously, USTR proposes to determine that the CRTIC practice is unreasonable and constitutes a burden and restriction on U.S. commerce." n125

-Footnotes-

n124. Section 301 2411(b)(1).

n125. USTR Initiates Section 301 Probe, supra note 65, at 267.

-End Footnotes-

In addition to determining whether retaliation is appropriate by this standard, the USTR also must decide what type and amount of retaliation is appropriate. Under Section 301, the USTR is authorized to suspend any obligations it has under any trade agreements, n126 and may impose any sort of fee, duty, or [\*605] restriction it determines to be appropriate. n127 The FTA's retaliation provision, Article 2005(2), establishes a standard of "equivalent commercial effect." n128 This constrains the economic consequences of the retaliatory effect, but does not limit the industry or sector to which the retaliation is to be applied. Section 301 makes explicit this open-endedness: the USTR may respond without regard to whether the response targets the same economic sector that was originally involved. n129

-Footnotes-

n126. Section 301, 2411(c)(1)(A).

n127. Id. 2411(c)(1)(B).

n128. FTA, supra note 21, art. 2005(2).

n129. Section 301 2411(c)(3)(B).

-End Footnotes-

One answer to the question of how much retaliation is permitted was provided on March 15, 1995, when a group of U.S.-based cable companies suggested to the USTR that the appropriate level of retaliation should exceed \$ 750 million annually. n130 These companies did not specify how they had reached this figure. CMT had just under two million viewers in Canada as of Jan. 1, 1995, when it

was forced to terminate service. n131 Its annual "cash flow" from Canadian operations was \$ 1.2 million. n132 CMT owner Westinghouse said that the financial impact of the CRTC's decision was "insignificant." n133 Retaliation of \$ 750 million seems incommensurate with an "insignificant" \$ 1.2 million. n134

-Footnotes-

n130. U.S. Entertainment Firms Call for Retaliation, supra note 66, at 504.

n131. Stilson, supra note 41, at 12.

n132. Gaylord Entertainment: Going Global with Country Music, Music & Copyright, May 10, 1995, at 12, available in 1995 WL 9764658.

n133. Rich Brown, Canada Cans Country Music Television, Broadcasting & Cable, June 20, 1994, at 22.

Lloyd Werner of CMT parent company Group W Satellite Communications .... says the financial impact of CMT's removal from the Canadian market will be insignificant to GWSC because its current [as of mid-1994] distribution of 1.9 million cable subscribers in Canada just barely covers the cost of marketing the service in the country. But GWSC had long-term growth plans for CMT in Canada that showed the channel turning a small profit at about 4 million subscribers.

Id.

n134. Maury Lane, director of government affairs for Westinghouse, offered an assessment of the retaliation which is entirely different in scale, but which presents the same inequity: "'the CMT issue was worth perhaps \$ 100 million ... But this move by Kantor could cost (the Canadian entertainment industry) multi-billions of dollars.'" Peter Morton, U.S. Draws up Canadian Culture "Hit List," Fin. Post (Toronto), Feb. 4, 1995, at 3.

-End Footnotes-

As Kantor's June 21, 1995 deadline approached, there was speculation over which Canadian companies or industries would be targeted. n135 The list of companies expected to face trade sanctions included Teleglobe, an international telecommunica- [\*606] tions company, Cineplex Odeon, a movie theater chain, and MuchMusic, a music video channel. n136 Since the Section 301 action was averted at the last minute by the joint-venture agreement, it is unclear how sanctions would be applied to these companies. However, one example will show the inequality of treatment that could easily have resulted: if MuchMusic was excluded from expansion into the U.S. just as CMT was excluded from Canada, MuchMusic would suffer far more. MuchMusic is a much smaller service than CMT n137 and is owned by a much smaller corporate parent. n138

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n135. U.S., Canada Out of Tune, supra note 68, at 27.

n136. Id.

n137. At the end of 1994, MuchMusic had a total viewership of 6.3 million (5.8 million in Canada and 500,000 in the U.S.), Lisa Kassenaar, While MTV is Off Conquering Europe, Canada's Own MuchMusic is Tackling the U.S. Music Video Network on Its Home Turf, Fin. Post (Toronto), Oct. 8, 1994, at S9, whereas CMT's international broadcasts reached more than 25 million viewers in 22 countries. Gaylord Entertainment, supra note 132, at 12.

n138. MuchMusic is run by CHUM Ltd., with total 1996 sales of Canadian \$ 239 million and a 1996 profit of Canadian \$ 10.25 million. CHUM Limited 1996 Annual Report 2 (1996). On the other hand, CMT owners Gaylord Entertainment had total revenues of about \$ 688 million and \$ 63 million profit in 1994, Gaylord Entertainment Income Rises to \$ 63.06 Million in '94, J. Rec.(Okl. City), Feb. 17, 1995, and Westinghouse had roughly \$ 9 billion in revenue for 1995, and its broadcasting division, GWSC, had \$ 303 million in revenue and \$ 9 million in profit just for the month of November 1995. Westinghouse Announces Fourth Quarter Results, PR Newswire, Feb. 8, 1996, available in Westlaw, Allnewsplus File.

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Perhaps the most important question facing the USTR was how the sanctions were going to be implemented. Typically, the response under Section 301 n139 is in the form of trade sanctions, such as imposing a tariff or quota on a product or service. n140 In this case, the USTR apparently intended to target specific companies. Although trade limitations frequently have a dramatic [\*607] impact on specific companies, it is unusual to first identify which individual companies to attack, and then figure out how to do so within the framework of trade regulations. The method apparently contemplated by the USTR seems more likely to anger a trading partner than to reach a compromise that works to the benefit of both countries.

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n139. More frequently than not, the initiation of Section 301 investigations, and the mere threat of sanctions, is the impetus that causes the other government to capitulate. See, e.g., Determinations Under Section 304 of the Trade Act of 1974, 55 Fed. Reg. 4294 (USTR 1990) (describing resolution of EC "Oilseeds" dispute after USTR initiated Section 301 investigation, (which was confirmed by a GATT panel report) but before sanctions were actually implemented). Only seven of forty-eight mandatory Section 301 actions initiated between 1974 and 1992 actually resulted in sanctions being imposed. Alan O. Sykes, Constructive Unilateral Threats in International Relations: The Limited Case for Section 301, 23 Law & Pol'y Int'l Bus. 263 (1992). As a result, exactly how sanctions will be implemented is a question that rarely emerges.

n140. See, e.g., Determination to Impose Increased Duties on Certain Products of the European Community, 53 Fed. Reg. 53115 (USTR 1988) (describing the imposition of increased customs duties in the EC "Beef Hormone" case). For more information on the Beef Hormone case, see Michele Carter, Note, Selling Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormone Controversy, 6 Minn. J. Global Trade 625 (1997).

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A second approach would be to adopt a non-trade measure, such as a tax or an administrative procedure or regulation. A prior Section 301 action, which also involved Canadian television broadcasting, provides an example. n141 In that case, Canada denied tax deductions to Canadian businesses for television advertisements on U.S. border stations received in Canada. n142 The United States responded not by punishing specific companies, but by enacting tax legislation that mirrored the Canadian legislation. n143 This less aggressive non-trade response does not seem to be a viable way to resolve or even respond to the CMT dispute. In the past, cable television in the U.S. has been subjected to significant government regulation, but with recent developments, culminating in the passage of the Telecommunications Act of 1996, n144 it is now subject to much less regulation. In contrast, cable television in Canada has been entirely under the regulatory control of the CRTC since that organization's inception. Although U.S. courts have in the past had some success in mandating that cable television providers carry some types of content (such as local channels), it is unlikely that the U.S. government could legally prohibit all cable providers from broadcasting a particular channel. n145 As a result, there seem to be no non-trade measures available for the United States to pursue.

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n141. Presidential Determination Under Section 301 of the Trade Act of 1974: Memorandum for the USTR, 45 Fed. Reg. 51173 (1980).

n142. Id.

n143. Id.

n144. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

n145. Even if the U.S. government was in the regulatory mood to try such a prohibition (which it certainly is not now), the prohibition would probably constitute a prior restraint on speech and thus be nearly per se unconstitutional. See Near v. Minnesota, 283 U.S. 697 (1931).

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The final option is to apply sanctions in cultural or entertainment sectors outside cable television broadcasting. n146 The USTR, in considering sanctions against film industry com- [\*608] panies such as Cineplex Odeon, was entertaining this option. One problem with applying these cross-sector sanctions is the possibility of arbitrary, abusive application: the U.S. government could very easily be used to serve the goals of one or a few particular American multinational companies. Assume it was Home Box Office (HBO) instead of CMT that had objected to the administration of Canadian cable television. HBO's parent company, Time/Warner, could request as a remedy that compact discs released by non-American owned record companies should be subjected to a prohibitively high tariff. Because Time/Warner is the only major American-owned record label, this would effectively give Time/Warner a monopoly on the entire U.S. record market.

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n146. Sanctions in these sectors could be GATS-illegal, and sanctions in industries outside of the general cultural industry exception could also be NAFTA-illegal. For example, Canadian telecommunications company Teleglobe was rumored to be the subject of possible sanctions in the CMT dispute. Unilateral changes in international telecommunications regulations, which would need to be made to affect Teleglobe, would likely violate the GATS Annex on Telecommunications.

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Admittedly, this hypothetical example is somewhat implausible. However, it is useful because it illustrates another problem inherent in Section 301 action. The right to retaliate against the "unfair" actions of their competitors places U.S. firms in a powerful position, since they can afford to disrupt or harass their foreign competitors at little cost to themselves. n147 There is simply nothing for an American company to lose in bringing claims, no matter how unjustified. Furthermore,

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n147. Andrew D. M. Anderson, Seeking Common Ground: Canada-U.S. Trade Dispute Settlement Policies in the Nineties 251 (Thomas D. Willett ed., 1995).

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...because the U.S. administrative agencies that carry out these actions on the behalf of U.S.-based firms ... face no penalty when they file unjustified actions or false "unfair" trade claims, [the abuse of Section 301] creates severe repercussions for Canadian exporters to the United States. [Section 301 action has been] found not only to have complicated Canada-U.S. relations, but to be one of the leading causes of trade disruption with other major U.S. trading partners, in particular Japan. n148

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n148. Id.

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The CMT dispute illustrates that Section 301 is, paradoxically, such a powerful tool that it barely works. The theoretical flexibility and seemingly unlimited size of sanctions that it offers are complicated by a number of problems in actual use. Only one type of sanction (cross-sector) was available, and there is no check preventing American companies from asking for incommensurate and arbitrary sanctions against their competitors.

Of course, by one standard Section 301 worked perfectly in this case. CMT eventually obtained 33 percent of what it wanted, a Canadian broadcast outlet. However, the fact that [\*609] the threat of Section 301 action can scare governments into negotiation does not illustrate that Section 301 is a truly useful tool. Instead, it only illustrates the unpredictable effect of trade

policy conducted by brute force rather than by diplomacy.

This unpredictability is especially inappropriate when dealing with such a potentially politically sensitive area as cultural trade. The aggressive response by CMT and the U.S. government may even have galvanized more Canadian support for limiting cultural trade than American support for increased cultural exports. n149 Canada's cultural trade policy is deeply rooted and strongly felt, even though U.S. policy does not recognize this. In fact, cultural trade policy is an increasingly crucial element of international trade, one that the United States should perhaps approach from a less contentious and simplistic viewpoint.

-Footnotes-

n149. Greg Quill, Country Music TV Deal Capitulation--It's All About Unfinished NAFTA Business, Toronto Star, June 23, 1995, at D12, available in 1995 WL 6001410; Jamie Portman, Tuning Out the Twang from U.S. Station, Montreal Gazette, Feb. 22, 1995, at B3, available in 1995 WL 6941095; Susan Kastner, Dagnabit. Looks Like We've Ruffled Those Old Yankee Feathers Again, Toronto Star, Nov. 6, 1994, at E2, available in 1994 WL 7948424.

-End Footnotes-

B. Canadian Cultural Trade Policy: Discriminatory Protectionism or the Defense of National Identity?

A U.S. Department of State Dispatch released soon after Canada's denial of CMT's license is typical of the American response to Canadian cultural protectionism:

The CRTC's decision ... amounts to nothing less than a confiscation of CMT's business and will reflect negatively on Canada as a safe place to invest.... These developments [are] concrete evidence of an increasing and disturbing trend in Canada toward the implementation of policies that are intended to protect Canadian industry by discriminating against legitimate U.S.... interests. n150

-Footnotes-

n150. U.S. Response to Recent Canadian Trade-Related Decisions, supra note 63.

-End Footnotes-

Around the same time, Canadian ambassador to the United States Raymond Chretien made a series of statements which exemplify Canada's defense of the CRTC decision:

For Canada, trade in cultural goods and services is not just like any other trade.... There was a strong commitment within the Canadian government to ensure that our cultural industries are allowed to progress and develop ... the ability to maintain viable, home-grown cultural industries that tell us about

ourselves, is key to our sense of [\*610] national identity ... [this commitment] is one thing that Canadian government policy has consistently recognized. n151

-Footnotes-

n151. Canadian Ambassador Defends Curbs on Imports of U.S. Magazines, supra note 1, at 178-79.

-End Footnotes-

These two quotes sound the main themes that reverberate throughout discussions of cultural trade policy.

One of several rationales that have been used to defend policies against limits on cultural trade is freedom of speech. n152 Limiting cultural trade, it is argued, inhibits the interplay of information between countries and obstructs the development of a diversity of viewpoints. n153 Although this argument is probably true in the abstract, it has to be taken to extremes to actually be applicable to Canada-United States trade policy. No one could suggest that there is not already a healthy exchange of ideas between the United States and Canada. Canada's policies have neither the purpose nor the effect of making Canada into another North Korea, isolated from the rest of the world by a communications barrier. Instead, they are designed to maintain limited protection for distinctly Canadian speakers (meaning film-makers, musicians, and other members of the entertainment industries) who might otherwise be effectively prohibited from expressing themselves at all. Similarly, although U.S. free-speech jurisprudence primarily emphasizes the need for the government to not restrict speech, it does leave room for balancing that need against other important governmental interests. n154 In the case of international broadcasting, the interests of the marketplace of ideas must be balanced against access to [\*611] the marketplace itself. Although Canada has had basically the same policies in place since 1968, U.S. entertainment still remains dominant. If the policies had not been in place, there is a real possibility that Canadian freedom of expression within Canada would have been diminished.

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n152. Robin L. Van Harpen, Note, Mamas, Don't Let Your Babies Grow Up to be Cowboys: Reconciling Trade and Cultural Independence, 4 Minn. J. Global Trade 165, 188 (1995).

n153. Id. at 188-90. Cf. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (suggesting that the rationale of the First Amendment is to allow a marketplace of ideas, in which the "best test of truth is the power of the thought to get itself accepted in the competition of the market"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether by the Government itself or a private licensee").

n154. [The] tradition [of free-speech jurisprudence] teaches that the First Amendment embodies an overarching commitment to protect speech from Government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. This Court, in different contexts, has consistently held that the Government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996). But see Buckley v. Valeo, 424 U.S. 1 (1976) (holding limits on an individual's expenditures in running for elected office to be unconstitutional restraints on speech, and holding that the government's attempt to "enhance" the speech of weaker parties by suppressing the speech of stronger parties is incorrect First Amendment jurisprudence). Buckley v. Valeo has been severely criticized. See, e.g., Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 464 (1996) (calling Buckley's rejection of enhancement theory "one of the most castigated passages in modern First Amendment case law"); Cass R. Sunstein, Democracy and the Problem of Free Speech, 94-101 (1993); Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1423-25 (1986). Time, place and manner restrictions on speech, although appropriate only when the restrictions are content-neutral, also illustrate this balancing. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

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A second way to analyze Canada's governmental broadcasting policy is to compare it to the U.S. experience with broadcast regulation. For much of its history, n155 the Federal Communications Commission (FCC) has attempted to maximize the diversity and quality of programming, and keep in check the monopolistic tendencies of entertainment and media companies, by giving preference to locally owned broadcasters. n156 The CRTC likewise pursues the dual objectives of creating diverse and high quality programming, n157 and restraining the profit-maximizing behavior of large companies operating in Canada. n158

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n155. There have been many recent changes in the FCC's jurisdiction, culminating in the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). However, the FCC and CRTC still have fundamentally comparable missions and roles in their respective governments.

n156. See generally Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 437-38, 441 (3d ed. 1992).

n157. The current Broadcasting Act states that the broadcasting policy of Canada is to "encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment

programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view..." Broadcasting Act of 1991, ch. 11, 3(d)(ii), 1991 S.C. 117 (Can.). The Act also requires that "the programming ... should be of high standard..." Id. 3(g).

n158. Robert E. Babe, Canadian Television Broadcasting Structure, Performance, and Regulation 33 (1979). Profit-maximizing, in this context, is not intended to mean the ordinary attempt to earn reasonable profits that is the incentive for private broadcast activity. Instead, it is intended to mean profit-seeking behavior that is excessive to the point of harming the public interest. "It can be deduced that television broadcasters earning very high rates of return in broadcasting are not providing the public service contemplated by the Broadcasting Act; the opposite is true." Id.; see also Broadcasting Act 3.

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[\*612]

It could be argued that the above parallels between the FCC and the CRTC show that CMT should have been allowed to continue broadcasting, on the rationale that the FCC has historically done an inconsistent at best job of administering broadcasting, n159 and so the CRTC is probably equally inept. n160 This syllogism fails to take into account the two-step process used by the FCC in broadcast licensing: it first must decide if the applicant meets the minimal statutory qualifications, and then it uses discretionary factors to decide between equally qualified applicants. n161 The FCC has generally had the most trouble at the second step. n162 On the other hand, the CRTC's denial of CMT's continued broadcasting was at the first step: CMT failed to meet basic Canadian statutory requirements of Canadian ownership, control, and content. n163

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n159. FCC comparative licensing hearings have been described as "unpredictable, excessively discretionary, complex and baffling, deficiently consonant with the rule of law, and producing results that seem inconsistent from case to case." Robert A. Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 Stan. L. Rev. 1, 39 (1971).

n160. Like the FCC (and probably every other administrative agency anywhere), the CRTC has been subjected to severe criticism. See generally Herschel Hardin, Closed Circuits (1985) (chronicling the CRTC from its creation in 1968 through the early 1980s). However, the CRTC's overall success (or lack thereof) in implementation of its goals does not mean that in any particular licensing denial (such as CMT's) it has acted incompetently.

n161. Breyer & Stewart, supra note 156, at 437-38.

n162. Id. at 439-48.

n163. Broadcasting Act of 1991, ch. 11, 3(a), (f), 1991 S.C. 117 (Can.). The CRTC's decision regarding CMT can thus be seen as analogous to the FCC's decision, in United States v. Storer Broadcasting Co., to deny a station's license because it did not meet the minimum guidelines for eligibility. 351 U.S. 192 (1956).

-End Footnotes-

The actions of media mogul Rupert Murdoch illustrate the importance and simplicity of these threshold requirements. One of the FCC's statutory thresholds prohibits the ownership of a broadcasting company in the United States by an alien or alien-affiliated foreign corporation. n164 In order to buy U.S. broadcast- [\*613] ing network Metromedia, the Australian-born Murdoch became a U.S. citizen. n165 If the United States' broadcasting policy limits foreign ownership, it seems strange that American companies should find Canada's similar requirements unfair.

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n164. 47 U.S.C. 310(b) (1994):

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

No broadcast ... 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 of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives ... 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 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 a license.

Id.

n165. William H. Meyers, Murdoch's Global Power Play, N.Y. Times, June 12, 1988, at 19.

-End Footnotes-

Furthermore, the CRTC has to consider an additional goal with which the FCC is not concerned. In addition to preventing profit-maximizing behavior by individual companies, n166 the CRTC must also protect Canada from what it perceives to be an even more threatening monopoly: the American entertainment industry. Just as American broadcasting policy historically has preferred local ownership and control, Canada's cultural trade policy can be seen as an attempt to prefer local (Canadian) broadcasters over a larger, external conglomerate.

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n166. See Babe, supra note 158, at 33.

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It has been strongly argued that the FCC's strategy of emphasizing local broadcasting may have been implemented in such a way as to actually inhibit programming diversity. n167 If so, then one might assume that Canada's strategy of emphasizing local (i.e., Canadian) broadcasters would have a similar paradoxical effect. However, a strategy and its implementation are not the same. The fact that the FCC's emphasis of local (market-by-market) ownership of broadcast media may not have worked does not necessarily mean that an emphasis on local (Canadian) ownership will not work. The reasons why the FCC's emphasis on local ownership (concern with the limited broadcast spectrum, and on the distribution sector rather than the transmission sector of the industry) n168 may have created results opposite of those desired simply do not exist when "local" [\*614] means Canadian, and when technological advances continually widen the broadcasting spectrum.

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n167. See, e.g., Jim Chen, The Last Picture Show (On the Twilight of Federal Mass Communications Regulation), 80 Minn. L. Rev. 1415, 1482 (1996).

n168. See id. at 1428-29. The creation and packaging of marketable goods and services is the transmission sector, and the delivery of that content to consumers is the distribution sector. This distinction is applicable in regulated industries ranging from natural gas to entertainment.

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Perhaps the chief American argument against cultural protectionism is that it is nothing more than disguised economic protectionism. Michael Jay Solomon, President of Warner Brothers International Television Distribution, has stated "the cultural argument is bullshit ... all people in television care about is ratings and profit." n169 This argument (although usually not so crassly expressed) is based on the premise, acknowledged by all, that cultural industries are big business. For example, Ian Morrison, spokesperson for the Friends of Canadian Broadcasting, estimates that the benefit to private Canadian television broadcasters and networks from federal protectionist policies is around Canadian \$ 200 million. n170

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n169. Ken Auletta, TV's New Gold Rush, New Yorker, Dec. 13, 1993, at 88.

n170. Van Harpen, supra note 152, at 174. Another example of this economic impact, from the EC, is French Communications Minister Alain Carignon's estimate that free trade in cultural industries would jeopardize 50,000 jobs and 50 billion French Francs (\$ 8.5 billion) in revenue for television and film alone. Id. at 177.

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However, just because cultural industries are big business does not mean that they are just like any other industry. In a general sense, the objective of free trade is economic efficiency. The best example of how free trade achieves this objective is the "Law of Comparative Advantage." n171 The Law of Comparative Advantage only works, however, if one assumes that goods and labor can be quantified into consistent monetary units. To begin with, services of all types are more difficult than goods to quantify this way. n172 The fundamental flaw in this economic analysis, though, is that it assumes that economic decisions are made [\*615] rationally. The value of a television program cannot be determined by identifying the cost of production or the price at which the viewing of the show is sold to the end viewer. In the entertainment industry, more than in perhaps any other, production and consumption decisions are made irrationally. n173 Aesthetic sensibilities, hype, and escapism are far more likely to influence television viewing sensibilities than reasoned choices made on the intrinsic "worth" of the program. n174 The law of comparative advantage does not make sense in a choice between an American television broadcast, such as CMT, and a Canadian one, such as MuchMusic, because the products simply can not be logically compared. n175 In sum, although limits on cultural trade have a large economic impact, it is overly simplistic to argue that the broad economic argument behind maximizing free trade applies to cultural trade.

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n171. The Law of Comparative Advantage posits that countries will, and should, export products in which they have production advantages relative to their trading partners, and import products in which they have production disadvantages. Charles P. Kindleberger, *International Economics* 17-34 (5th ed. 1973). Since Canada is, by any standard, disadvantaged relative to the U.S. in the production of entertainment, the Law of Comparative Advantage suggests that it should just give up.

n172. Quality is the only yardstick by which to measure the value of a service, and quality depends on the manner in which each particular service act is performed. [Thus, t]here may be no such thing as a standard of service, let alone a standard unit of service, which constitutes a uniform valuation basis for each particular service activity. If that is so, ... due to the fact that both output and price vary from one service act to another, there is no sound basis to calculate the productivity of any given service activity.

Jacques Nusbaumer, *Some Implications of Becoming a Services Economy*, in *Communication Regulation and International Business* 23, 27 (Juan F. Rada & G. Russell Pipe eds., 1984).

n173. "[There is in the entertainment business] a creative process in which artistic vision is subjective and unpredictable. The clash between 'art' and 'commerce' is a constant theme ... for the artistic value of any entertainment property or talent is mostly subjective." Donald E. Biederman et al., *Law and Business of the Entertainment Industries* 265 (3d ed. 1996). Because the value of entertainment property is so subjective, there is no objective way to comprehensively measure the entire societal value of a television program, song, or film. It is not hard to think of examples of entertainment that have had a societal impact far beyond their value at the cash register, such as the music

of Bob Dylan or the broadcast of the Apollo 11 lunar landing.

n174. Ordinarily, a necessary service is highly valued to the consumer and can be highly profitable to the producer. However, public television and arts funding programs, well established in both Canada and the U.S., exist because in many situations no producer will find it profitable to provide what the consumer needs. See, e.g., 47 U.S.C. 396(a) (1994) (stating that the purposes for the establishment of the Corporation for Public Broadcasting include "... to encourage the development of programming that involves creative risks and that addresses the needs of unserved audiences and underserved audiences").

n175. The argument that the two programs could be compared by airing them simultaneously in the same market and comparing their ratings does not work, because there is no logical rationale that can be used to explain why a viewer would prefer one over the other. If the value of entertainment lay only in its apparent economic value as measured by ratings, there would be no reason for protecting entertainment or culture under the First Amendment. Canada and the United States both recognized long ago that expression, including entertainment, has an intangible value that is worth protecting even when it offers no economic benefit.

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Another group of arguments in favor of removing cultural trade restrictions between the United States and Canada is based on a less sweeping economic analysis, asking how the Canadian entertainment industry would be affected if restrictions were no longer in effect. For example, it has been argued that imported American entertainment supports the Canadian local [\*616] entertainment industry, because the low cost of American entertainment products, such as films and television shows, allows broadcasters to stay in business, giving local producers a means with which to disseminate their more expensive product. n176 A similar argument is that the reduction of protection will lead local producers to specialize, which is economically more productive and efficient. n177

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n176. Van Harpen, supra note 152, at 183-84.

n177. Id. at 184-85.

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However, both of these arguments have major flaws. From an economic standpoint, the idea of using cheap imported entertainment to, in effect, subsidize more expensive domestic entertainment only makes sense if there are content quotas - if there are not, any rational broadcaster will soon find it even cheaper to use only the imported entertainment. n178 A related problem is that because increased specialization brings with it diminished flexibility and market power, a Canadian community of specialist producers will find that it is unable to assert itself in the international marketplace the way the more unified and integrated American film and record industries do. The ultimate result of increased specialization will be diminished competition in the North American and world marketplaces..

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n178. The imbalance of programming costs, and entertainment production generally, between the United States and Canada is partially due to the fact that the United States is currently the largest audience in the world in which nearly the entire population shares a common language. Canada has one-tenth the population of the United States and a bilingual audience, and there are many major language groups within the EC. Because U.S.-based entertainment companies can recover the large fixed production costs of making television programming and films, and other entertainment in their domestic market, they are able to sell their entertainment at variable-cost prices that non-U.S. producers cannot match.

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Maintaining competition in the entertainment industry is especially important for three reasons: the industry has an inherent trend towards monopolization; the ongoing revolution in communication technology will be most easily exploited by large companies; and most importantly, these industries are of unparalleled importance in the culture of individual nations, and of the world.

American entertainment industries have a long history of monopolistic behavior. n179 This historical trend is reinforced by [\*617] current market reality. The production and distribution of entertainment exhibit economies of scale, n180 and thus the entertainment industry can be thought of as a "natural monopoly". n181 Finally, from the Canadian perspective, although the American entertainment industry consists of eight or ten large but fiercely competitive companies, these companies all produce the same product (non-Canadian entertainment). It seems logical that the Canadian government would intervene when confronted with a market saturated with an undesired product.

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n179. See, e.g., Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (invalidating a film cartel's attempt to condition the distribution of film projectors upon an agreement to exclusively show the company's films); NBC v. United States, 319 U.S. 190 (1943) (upholding FCC regulations designed to prevent market-dominating practices by radio networks); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (prohibiting a movie studio's attempt to condition access to its copyrighted films only upon "block-booking" of its films in local theater); United States v. Loew's, Inc., 371 U.S. 38 (1962) (reaching the same result).

n180. Only a few companies can "amass sufficient capital to acquire, organize, deliver, and promote the constant stream of new programming needed to satisfy an easily bored public." Chen, supra note 167, at 1489.

n181. [Natural monopolies exist] when there is a relation between the size of the market and the size of the most efficient firm in that market such that one firm of efficient size can produce all the market can absorb at a remunerative price and can continually expand its capacity at less cost than that of a new firm entering the business.

Breyer & Stewart, supra note 156, at 236. The entertainment industry (broadly encompassing film, music, television, and publishing) fits this description. In each sector, there are seven or fewer monolithic firms that are vertically integrated from the production of the content through at least most of the distribution chain, and in film and music, the costs of starting a new company to compete with the "majors" has effectively prohibited the creation of any competitors in at least twenty years. Although three new television networks have been started in the last 10 years, none of them represent the entry of a new start-up competitor - they instead exemplify the trend that has dominated the entertainment industry for years: increased integration and mergers. See Biederman, supra note 173, at 3-5, 527, 556-57, 602-03, 627-28. The net effect of this increased integration is that there are perhaps a dozen really big firms that control the entertainment industry, and that operate on such a large and diversified scope that no new firm could possibly hope to compete with them. "Local distribution of power, gas, water, telephone, and perhaps CATV [cable television] service still tend to be considered natural monopolies." Breyer & Stewart, supra note 156, at 236 (emphasis added).

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The ongoing technological revolution in entertainment and communications has been used as an argument against culturally protective policies such as Canada's. In this view, communication advances allow producers to circumvent protectionist barriers, and if the barriers are futile, why have them at all? n182 Like the free speech argument, this only makes sense if one assumes that total protectionism is the desired goal. Cultural trade barriers like Canada's, even though semi-permeable, still [\*618] achieve their purpose: to provide a limited degree of protection, enough to shelter Canada's own cultural industries. n183

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n182. See generally Van Harpen, supra note 152, at 181 (describing the impact of changing technology on cultural industries).

n183. See, e.g., Bill Brownstein, Canadians in Cultural Denial; World Loves Our Performers but the Federal Government is What Helps them Flourish, Ottawa Citizen, Feb. 6, 1996, at C7.

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In fact, the limited protection offered by Canada's cultural trade policy is even more important in light of the quasi-monopolistic nature of the American entertainment industry and current advances in communications and other technology. New distribution systems, whether they be satellite communications or cable internet systems, require massive investments to implement. n184 Thus, the larger a company is, the better situated it is to take advantage of technological advances. At this late date, there can be no doubt that those who are able to take advantage of these advances will control the future of entertainment and communications. n185 It should come as no surprise, then, to companies engaged in international cultural trade that Canada has made it a national priority to try to save itself a lane on the information superhighway by shielding its entertainment industry from domination.

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n184. At the 1994 launch of its Full Service Network (an experimental interactive television service) in Orlando, Time Warner announced that it had committed \$ 5 billion to upgrade its cable systems over the next five years to allow movie-viewing, shopping, games, and telephone services via a "souped-up cable box and television set". Eben Shapiro, Time Warner Cites Role of Movies, Ads in Interactive Project, Wall St. J., Dec. 15, 1994, at B8.

n185. See Chen, supra note 167, at 1490-91.

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Thus, even if Canadian cultural industries are currently maintaining their tenuous position, technological change makes it important for the CRTC to keep a vigilant watch toward the future. Whoever controls the communications and entertainment networks of the future will control the terms of speech, exerting an ever-widening influence. n186 This is ultimately the danger about which the Canadian government is concerned: they want to protect their cultural industries because they see them as inextricably linked to their culture and its future. n187

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n186. Id.

n187. [Canadian] Broadcast Strategy recognizes that the tide of technological change cannot be stopped nor will simple reliance on barriers suffice. 'Even if Canadians wanted to, we could never build walls high enough to stop a flood that is coming from the sky alone.' 'But many Canadians have also recognized that something very precious - our heritage, our cultural identity, our sense of ourselves as a national community would be lost if their enhanced choice of programming does not include the creation of new programs by Canadians.'

Jake V. Th. Knoppers, A Perspective From Canada, in Communication Regulation and International Business 93, 100-01 (Juan F. Rada & G. Russell Pipe eds., 1984) (emphasis and quotation marks in original).

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A surprisingly common response to this argument is that there is no such thing as Canadian culture. n188 The obvious ethnocentrism manifested in non-Canadians passing judgment on the worth or very existence of Canadian culture eliminates this argument from having to be taken seriously. n189 A slightly more plausible argument asks why Canada has chosen to protect its culture by regulating television, instead of something more traditionally "cultural," like literature. The simple answer is that television can have enormous force on society. Great numbers of people watch television n190 for great periods of time, n191 and one [\*620] only has to consider events such as the 1960 Nixon-Kennedy debate and the coverage of Operation Desert Storm to realize television's dramatic impact. n192 Because broadcasting and

communications have traditionally been areas of regulation, and because of this enormous impact, television is a natural means for the implementation of cultural protection.

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n188. Jay Berman, CEO of the Recording Industry Association of America (the lobbying organization for the six major record labels), did not help his cause when he told the following joke on a Canadian radio show: "What's the difference between yogurt and Canada? Yogurt has an active culture." Ben Wildavsky, Culture Clashes, 28 Nat'l J. 648 (1996); see also Nina Munk, Culture Cops, Forbes, Mar. 27, 1995, at 42, 43 (asserting that Canadian efforts to protect Canadian culture are mere economic protectionism, on the basis that "it's hard to pinpoint anything distinctly Canadian").

n189. There are ... those on the American side of the border who can find no distinguishable Canadian cultural artifact that is definitively unique in relation to those produced in the rest of Northern America. It must be even more difficult for technocrats, industrialists, and policy-laden bureaucrats on both sides of the invisible border to recognize what is real to those who maintain a national consciousness and identity, who identify themselves as Canadian in terms of their collective existence as a nation, and, individually, through the cultural industries. Perhaps the differences between the two societies could be seen more readily if Canadian products were as available south of the border as American products are north of it.

Laurence S. Seidenberg, Canadian Cultural Identity and Copyright Law: The Signal-Piracy Imbroglia After the Free Trade Agreement, in Borderlands: Essays in Canadian-American Relations 263, 282 (Robert Lecker ed., 1991). Similarly, Raymond A.J. Chretien, Canadian ambassador to the United States, has asked:

Would you accept as a country to have 90 percent of everything shown on your television screens coming from another country? ... Would you accept half the penetration that we accept in Canada of foreign cultural products in our country? If the situation was reversed, I think there would be a huge outcry.

Wildavsky, supra note 188, at 650.

n190. In 1990, more than 7 million Canadians (roughly one-quarter of Canada's population) subscribed to cable television. Canadian Radio-Television and Telecommunications Commission, CRTC Year in Review 1990-1991, 71 (1991). In the U.S., 62.1 million households subscribed to cable television in 1996. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC Order No. 96-496 (1996) (on file with the Minnesota Journal of Global Trade).

n191. In 1990, each Canadian 2 years old or older viewed an average of 23.3 hours of television weekly. CRTC Year in Review, supra note 190, at 18.

n192. The power of television in Canadian political and cultural life is powerfully illustrated in the story of Canada's adoption of a Bill of Rights. Throughout the 1970s, Canadian television broadcast many American police dramas in which officers read Miranda rights to the criminals they apprehended.

Despite the entirely different constitutional and political system of Canada at that time, many Canadians grew to believe that they had "the right to remain silent, the right to counsel," and all the other protections existing under the U.S. Constitution. When Canada re-adopted its Constitution in the process of cutting governmental ties with the U.K., it added an American-style Bill of Rights. This was, at least in part, because so many Canadians had already assumed that they had such rights. George H. Quester, *The International Politics of Television* 109-10 (1990); see also Kaplan, *supra* note 25, at 257-59 (explaining the theory of 'la television toute-puissante' - the all powerful television).

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CMT contends that "country music videos reflect the best elements of American culture . . . . No political messages, no gratuitous sex or violence, just good music." n193 In other words, CMT asks "Why, of all the programming that comes into Canada from the U.S., ban us?" The answer is that the value of any individual program or cultural service lies in the eye of the consumer. Of course CMT thinks their programming is the best. The real question is what programming does Canada think is best, and the CRTC answered that it was not CMT.

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n193. This was said by GWSC's Lloyd Werner about CMT's expansion into Europe, but it applies equally to their expansion into Canada. Jack Hurst, *On the Road Again: Nashville Artists Find New Nations to Conquer*, *Chi. Trib.*, July 26, 1996, 5 (*Tempo*), at 1.

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C. Balancing Culture and Commerce

The CMT dispute demonstrates the problems that both governments and international agreements have with cultural trade policy. The WTO system, which has yet to explicitly address the problem, offers no guidance as to how to arrive at a resolution. NAFTA's asymmetrical cultural exemption is not a solution, but is instead an ongoing sore spot in Canada-U.S. relations. Section 301, the United States' primary tool in attempting to resolve the dispute, also poses problems. It can too easily be applied so as to serve every interest except a mutually satisfactory resolution, and its brute force is just as likely to irritate trade partners as it is to lend to an amicable compromise. [\*621]

The dispute also illustrates Canada's commitment to a sensible cultural policy, uncomfortable as that policy and commitment may be to the United States. What can be done to try to balance the interests of both Canada and the United States?

One option would be to adopt, at the WTO level, an agreement providing for some degree of cultural protection. The number of nations asserting their rights to protect their domestic culture industries is rising, as is their determination to do so vigorously. n194 At the same time, the U.S. entertainment industry is increasingly looking abroad for growth. n195 A well-crafted multilateral agreement could allow both sides to compromise. Canada, the EC,

and others could offer the United States certain sectors or types of culture or entertainment in which there would be open trade in exchange for United States accession to the agreement.

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n194. Biederman et al., supra note 173, at 6.

n195. For example:

CMT Latin America took flight in 1995, making CMT International's satellite signals available to more than 90% of the television households in the world. The next step is to build the base of households that are actually receiving CMT .... We are very enthusiastic about country music's reception around the world and CMT International's potential for growth.... We believe the international market is large enough that the investment we make today will be paid back in the years to come. We remain committed to CMT International and its goal of taking country music - America's music - to the world. We believe this is in the best interest of the Company and its shareholders for the long term.

Gaylord Entertainment Company, Inc., supra note 47, at 15.

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There is precedent in the WTO system for such a compromise. The WTO provides exclusions for industries such as defense n196 and government procurement. n197 Furthermore, it already provides an exclusion somewhat linked to a country's culture, the public morals exception of GATT Article XX(a). n198 All of these exceptions allow a country to determine what is in its own best interest in issues that it feels are central to its identity and sovereignty. If Canada, the EC, and others strongly feel that the importation of American cultural products endangers their national identities, or even sovereignty, that concern should be treated just as these other central concerns have been.

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n196. GATT art. XXI.

n197. Agreement on Government Procurement, Marrakesh Agreement Establishing the World Trade Organization, Dec. 15, 1993, Annex 4, reproduced as amended in The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 438 (1995).

n198. GATT art. XX(a).

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A second solution is just to scale back the level of disagreement through voluntary corporate behavior. Some Canadian broadcast networks have grown, thanks to the CRTC's policies, large enough to be competitive in the

international marketplace. n199 MuchMusic, one of the leaders of Canadian broadcasting's nascent export movement, attributes its growth and success to its concern for local content. n200 In Argentina, MuchMusic began operations with 80% Canadian content and 20% local content, and then worked with the local broadcaster to reach a goal of 50% Canadian, 50% local broadcasting. n201 Many Canadian broadcasters believe that this sensitivity to local cultural concerns, instilled by surviving in the shadow of the United States, has made Canadian television exporting more flexible and thus more profitable. n202

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n199. Tony Atherton, TV Nation; World Tunes in Canada's Television Set, Ottawa Citizen, June 30, 1995, at B1. In 1994, Canada exported Canadian \$ 300 million of television programming. Id. This made it a distant second in the world to the United States. Id. In 1993, U.S. exports of all visual media (movies, television, and home video) totaled approximately \$ 18 billion. David J. Fox, Entertainment Industry Gets Clinton's Free Trade Pledge, L.A. Times, Oct. 15, 1993, at D5.

n200. Atherton, supra note 199, at B1.

n201. Id. MuchMusic has also had similar success in Finland and Mexico. Id.

n202. Id.

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This approach may not work in all situations, but it is one that the United States entertainment industry may find it profitable to try. Perhaps if CMT had played more Canadian country artists in the first place, there would have been no complaints at the CRTC hearing.

CONCLUSION

The compromise ultimately reached between CMT and its Canadian co-venturers was a resolution that both sides could live with. However, it came with dramatic cost to CMT, consumers, and the Canadian country-music artists who were boycotted. Furthermore, the dispute caused the once relatively dormant issue of cultural trade protection to surface, unnecessarily creating international tension and illustrating the problems, for both the United States and Canada, that are inherent in the current system of agreements and laws dealing with cultural trade protection. Canada and the United States should seek to use the lessons learned from the CMT dispute to develop a compromise to this ongoing trouble spot in their relations. [\*623]

Although Canada is particularly susceptible to American cultural exports, most of the United States' other trading partners face the same issue: how to balance the desire to protect their own entertainment and cultural sovereignty with the desire to minimize barriers to trade to benefit their citizens and the global entertainment industry. Ever-quickenening technological change, increasing centralization of ownership, and the drive of the entertainment industry to expand across the globe will increasingly cause this issue to be important in international political and economic relations. Thus, there are lessons from

this dispute for all governments concerned about their economies and cultures.