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Foreign Investment in Cable Television: The United States and Canada

By Colin J. Coffey
Member of the Class of 1983

I. INTRODUCTION

Historian Arthur Schlesinger, Jr., has said, "Karl Marx held that history is shaped by control of the means of production; in our times history is shaped by control of the means of communication."1 Over the past seven years, the issue of whether aliens should be allowed to control United States cablevision systems has steadily intensified. The Canadian impact is now significant, and American cable companies are objecting to their presence. American cable interests have twice petitioned the Federal Communications Commission (FCC), asking that the Commission impose citizenship requirements upon cable ownership.2 In July 1981, a bill was introduced in the United States House of Representatives to severely restrict alien ownership of cable systems and to force divestiture.3 In California, a bill was introduced in January 1982 to similarly restrict Canadian cable ownership in the state.4

The argument for restricting alien ownership is two-fold. First, the United States Communications Act of 1934 imposes citizenship requirements on common carriers and broadcast licensees.5 Those seeking similar restrictions on cable operations argue that the same policy considerations should apply.6 They argue that to promote security and nationalism, the rapidly growing cable-telecommunications industry should be owned and operated by Americans.7

The second point made by proponents of restrictions centers on the issue of trade reciprocity. Canada severely limits foreign ownership

6. See Report and Order, supra note 2, at 725.
7. Id. See also infra text accompanying notes 57-66.
in its cable industry while Canadians enjoy unrestricted investment rights in United States cablevision.\(^8\) So far, only Canadians are reported to be actively investing in the United States cable market.\(^9\)

This Note will examine the controversy, focusing on its issues of law and policy. These issues will be illuminated by a comparative analysis of relevant United States and Canadian communications law and history. A conclusion is reached that Congress should, and ultimately will, impose citizenship requirements on cable television ownership. It will be argued that legislation imposing foreign limitations should be based upon section 310 of the Communications Act\(^10\) and the policies behind it rather than upon principles of reciprocity.

**II. CANADIANS AND CABLE OWNERSHIP**

Investment in the growing cable television industry has been described as a "gold rush"\(^11\) and as "cablemania."\(^12\) *Canadian Business* has said, "Billions of dollars are at stake . . . and American business has been justifiably licking its collective chops over the sales and profit potential of this new industry."\(^13\) A 1981 FCC staff report on cable ownership remarked that there was no way of knowing when cable growth would slow.\(^14\) As of 1982, cable reached thirty-four percent of American homes with television sets, leaving much room for growth.\(^15\) The technological potential of cable is awesome. In the near future, two-way cable may transform the home into a personal transaction center.\(^16\) Eventually, it seems, the television, the telephone, and the home computer will hook up with one wire connecting everyone to

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8. See infra text accompanying notes 164-72.
9. Memorandum Opinion and Order, supra note 2, at 77. Senator Barry Goldwater has stated that Japanese citizens are now looking to invest in United States cable enterprises. *Cable Television Regulation, 1982: Hearings on S. 2172 Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2d Sess., 506 (1982).* The cable investment controversy has been described as "shaping up to be the biggest bilateral battle since the fisheries feud." *Unger, American Report, Canadian Business,* Feb. 1981, at 28.
13. Unger, supra note 9, at 28.
14. *Federal Communications Commission, FCC Policy on Cable Ownership* 16 & n.30 (1981). The report states, "The age of scarcity in communications paths appears to be ending, with enormous implications for the competitive structure of the broadcast industry, for other information providers, and for the regulatory environment." *Id.* at 16.
Amid this boom, it is not surprising to find United States cable interests resentful of foreign competition. Cable television has developed more rapidly in Canada than in the United States. Canadian cable operators have a particular expertise in urban systems, an area of relatively recent development in the United States. In the seven years of participation in the United States cable industry, Canadians have developed a reputation as tough and successful cable franchise bidders.

While there have never been any legal restrictions on alien ownership of cable franchises, section 310 of the Communications Act prohibited alien operation of microwave radio stations used in the Cable Television Relay Service. In 1974, Congress amended the Communications Act to exempt special and experimental radio from alien broadcast-licensing restrictions. The intent was to allow aliens to operate radios as part of their businesses, for example, in trucking, shipping, and farming. The 1974 amendment unintentionally permitted aliens to operate microwave stations as well. In effect, foreign operations of cable systems had been indirectly restricted before 1974 and then indirectly permitted by the 1974 amendment.

As the Canadian cable market approached saturation, Canadian cable companies began “a quiet but purposeful invasion” into the United States market, beginning in 1976. In 1980, the FCC placed the Canadian share of the United States market at less than one per-

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19. Id.
21. Notice of Proposed Rule Making, 56 F.C.C.2d 159, 161 (1975). When the Communications Act was written in 1934, it was designed to prevent aliens from receiving licenses to operate broadcasting stations in general. It did not envision cablevision or the Cable Television Relay Service. See infra p. 105-06, 110 & notes 40-46, 68.
22. Report and Order, supra note 2, at 724-25. See also The Canadian Connection, Broadcasting, July 9, 1979, at 33.
26. Goldenberg, supra note 20, at 11. The “invasion” has been widely reported in the business and communication trade press. See, e.g., Goldenberg, supra note 20; A Canadian Cable Giant Looks South, Business Week, June 8, 1981, at 60; The Canadians Are Coming, Broadcasting, June 23, 1980, at 26; Canadian Cable Owners Rush to U.S., supra note 25, at 62; The Canadian Connection, supra note 22, at 32; For Cable TV, It's a One-Way Border,
cent; other estimates made in 1980 and 1981 placed the Canadian share of the domestic market at three to five percent of American cable subscribers. Both present Canadian market share and estimates of future market share have risen due to the 1981 acquisition of UA-Columbia Cablevision by Rogers Cablesteams of Canada. The Congressional Research Service describes the acquisition as "the first major inroad the Canadians have made into the U.S. market." The new company, Rogers UA Cablesteams, is currently the ninth largest cable company in the United States. Of the fifty largest companies, three are now Canadian. Within five years, Canadians could obtain a seven to nine percent share of American cable subscribers.

Objections to the Canadian presence have so far gone unheeded. The FCC has twice rejected proposed regulations which would restrict alien ownership, and Congress has yet to act on legislation similarly designed.

III. SHOULD THE RATIONALE OF THE COMMUNICATIONS ACT OF 1934 APPLY TO CABLE TELEVISION OWNERSHIP?

Alien and foreign corporate investment has historically been restricted in the fields of merchant shipping, mining, energy, transportation, banking, and communications. Under the Communications Act of 1934, foreign ownership and operation of broadcasting systems (i.e., radio and television stations) is severely restricted. Alien participation in telegraph and communications satellite ventures has also

TV GUIDE, Jan. 12, 1980, at 31; Canadian Cable TV Enters U.S., N.Y. Times, Nov. 12, 1979, at D1, col. 2. See also Unger, supra note 9, at 28; Gits, supra note 20, at 95.
27. Memorandum Opinion and Order, supra note 2, at 80.
30. Id.
31. The Top 50 MSO's: As they are and will be, Broadcasting, May 3, 1982, at 99.
32. The Top 50 MSO's: As they are and will be, Broadcasting, Nov. 30, 1981, at 37.
33. See Gits, supra note 20, at 95; Goldenberg, supra note 20, at 11.
34. See generally Report and Order, supra note 2, at 723; Memorandum Opinion and Order, supra note 2, at 73. Pending legislation is discussed infra text accompanying notes 188-210.
35. A. Roth, A GUIDE TO FOREIGN INVESTMENT UNDER UNITED STATES LAW 3 (1979). Efforts in Congress to expand and add new restrictions upon foreign investment have multiplied in recent years, especially in banking and real estate. See Roth, FOREIGN INVESTMENT REGULATION IN THE UNITED STATES, 4 CORP. L. REV. 178, 178-82 (1981).
36. Supra note 10.
been restricted by amendment to the Act. As discussed below, cable ownership has not been similarly restricted.

A. The Communications Act of 1934

Since the beginning of mass broadcasting, aliens have been either restricted or altogether excluded from holding operating licenses. The Radio Acts of 1912 and 1927 contained citizenship restrictions upon the grant of a broadcasting license. With the advent of television, communications law was revised and alien ownership restrictions were extended to the new medium. These restrictions were codified in section 310 of the Communications Act of 1934. The Communications Act established a regulatory scheme governing common carriers and broadcasters. Both the United States Supreme Court and the FCC have held that cable systems constitute neither common carriers nor broadcasting operations. Rather, the FCC has said, "cable is a hybrid that requires identification and regulation as a separate force in communications.

38. The 1912 Act limited the issuance of radio licenses so that "such license shall be issued only to citizens of the United States or Puerto Rico or to a company incorporated under the laws of some State or Territory or of the United States . . . ." Radio Communications Act § 2, 37 Stat. 302 (1912). See also Radio Communications Act, ch. 169, § 12, 44 Stat. 1167 (1927).
39. Watkins, supra note 23, at 7 & n.23. Professor Watkins' article contains an overview of the historical development of statutory restrictions on alien ownership of broadcast stations.
40. The substantive provisions in the Communications Act, ch. 652, 48 Stat. 1064 (1934), regulating common carriers are contained in Title II. Title III contains those provisions governing broadcasting. Examples of communications common carriers in the United States include telephone, telegraph, telephoto, and microwave transmission services. The distinctive characteristic of common carriers is their availability for public hire. M. Seiden, Cable Television U.S.A. 125 (1972). In 1958, the FCC determined that cable systems were not common carriers. M. Hamburg, All About Cable 8 (1979). Cable operators do not generally hold themselves out for public hire, and their subscribers do not control the content of transmissions carried over the cable system. Id. See also M. Seiden, supra, at 125.
United States v. Southwestern Cable Co.\(^{43}\) recognized general FCC authority to regulate cable to the extent that such regulation is "reasonably ancillary" to the effective performance of the Commission's various responsibilities under the Communications Act for the regulation of television broadcasting.\(^{44}\) This concept of cable as merely a supplement to broadcasting prevailed,\(^{45}\) and a separate regulatory framework arose. In 1972, the FCC promulgated comprehensive cable television rules.\(^{46}\)

Petitioners before the FCC have twice sought to amend these rules to restrict alien ownership.\(^{47}\) The language of the proposed restrictions has been modeled after the provisions of section 310 of the Communications Act.\(^{48}\) Section 310 directly prohibits individual aliens from

\(^{43}\) 92 U.S. 157 (1968).
\(^{44}\) Id. at 178.
\(^{45}\) FEDERAL COMMUNICATIONS COMMISSION, supra note 14, at 11.
\(^{46}\) Cable Television Report and Order, supra note 42. See 47 C.F.R. § 76.1-.617 (1973). Unlike broadcasters, who are regulated solely at the federal level, cable television operators are subject to three tiers of government regulation: federal, state, and local. The Cable Connection, BROADCASTING, May 3, 1982, at 38. Despite substantial federal deregulation, FCC regulation continues to weigh heavily in cable development. On the deregulation of cable, see Bensen & Crandall, The Deregulation of Cable Television, 44 LAW & CONTEMP. PROBS. 177 (1981).
\(^{47}\) In 1980, Midwest Cable Inc. filed the petition seeking the rulemaking proceeding. Comments in support of the requested rule were filed by National Cable Television Association, Viacom International, Storer Broadcasting Company, jointly by Comcast, Metro Vision, Inc., NewChannels, Palmer Broadcasting Co., Inc., Simmons Communications, Inc., and Tribune Publishing Co. Comments in opposition were filed by the New Jersey Cable Television Association, the City of Atlanta, the Community Antenna Television Association, and 10 cable companies either wholly or partially owned by Canadians. Memorandum Opinion and Order, supra note 2, at 75, 76.
\(^{48}\) See Notice of Proposed Rule Making, supra note 21, at 159. Section 310 of the Communications Act states:

(a) The Station license required under this Act shall not be granted or held by any foreign government or the representative thereof.

(b) No broadcast or Common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

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

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

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

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.
holding broadcast licenses. Foreign corporations are also precluded. Foreign corporations are also precluded. Domestic corporate licensees, however, are allowed to have up to twenty percent foreign ownership of their capital stock, but no alien may be an officer or a director of the corporation. In the case of holding companies, a twenty-five percent alien ownership limit is imposed, and no more than twenty-five percent of its board may be alien. The FCC is given discretion to allow a greater proportion of foreign participation in holding companies if the public interest in broadcasting is thereby served.

B. The Section 310 Analogy

The proponents of cable ownership restrictions assert that the policy considerations behind section 310 should apply to cable ownership. In both 1976 and 1980, the rules proposed for FCC adoption bore close resemblance to section 310. Thus, domestic corporations would be limited to twenty percent foreign participation, and holding

52. Id. Professor Watkins states that § 310 operates on three distinct levels based on the degree of alien participation. An inverse relationship exists between the extent of alien ownership and the relationship of the alien to the broadcast licensee: larger amounts of nominal alien ownership are tolerated as the alien’s connection with the license holder becomes more remote. Watkins, supra note 23, at 3.
53. Joint Comments (in support of the Petition for Rule Making), at 1-2 (Dec. 19, 1979). Hereinafter, all references to “Comments” refer to comments filed with the FCC by parties supporting or opposing the Petition for Rule Making, RM-3528, reported in the Commission’s Memorandum Opinion and Order, supra note 2. The FCC maintains a public reference room in Washington, D.C., located at 1919 M Street, N.W., Room 239, where comments filed in regard to a proposed rule-making may be inspected.
54. In the 1980 proceeding, the proposed rule would have added § 76.503 to the FCC’s cable rules (47 CFR §§ 76.1-617). The proposed rule reads:

§76.503 General Citizenship Restrictions
(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station or any programming delivered by a radio facility licensed by the Commission if it is owned, operated or leased, by:
(1) Any alien or the representative of an alien;
(2) Any foreign government or a representative thereof;
(3) Any corporation organized under the laws of any foreign government;
(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government.
companies would be restricted to twenty-five percent participation unless the FCC finds that greater alien board participation is consistent with the public interest.\textsuperscript{55} Where section 310 restricts the granting of broadcast licenses, the proposed rule would simply apply to ownership or operation of cable systems.\textsuperscript{56}

There are two assumptions behind the attempt to impose citizenship requirements on cable ownership under the section 310 analogy. The first assumption is that the policy behind the restrictions of section 310 is a valid and desirable policy in the mass media field.\textsuperscript{57} Second, it is felt that cable has evolved past the point of being merely a supplement to broadcasting. In fact, it is argued, cable is surpassing the broadcasters in mass communication capacity and potential.\textsuperscript{58}

When citizenship requirements were first imposed in 1912, the

\begin{itemize}
\item \textsuperscript{55} Proposed \S 76.503, supra note 54.
\item \textsuperscript{56} Proposed \S 76.503(a), supra note 54.
\item \textsuperscript{57} See Joint Comments, supra note 53, at 23. See also Comments of Viacom International Inc., at 6 (Dec. 18, 1979).
\item \textsuperscript{58} See Comments of Viacom International Inc., supra note 57, at 4-6. The FCC itself noted, “Cable is a hybrid form of communications with functions analogous to those carried out by both broadcasters and common carrier entities and with the capacity to provide addi-
purpose was to prevent radio communications facilities from falling into anti-American hands (i.e., to protect national security interests.)

Trade reciprocity was also discussed by the 1912 lawmakers. By 1934, when the existing Communications Act was passed, national security concerns had intensified as a result of World War I. Many legislators in 1934 viewed the restrictions as representing what Senator Wallace White called a standard of "Americanism." Congress did not want to totally preclude foreign participation in domestic broadcasting corporations or their parent companies. Such preclusion, it was feared, would harm American communications companies with foreign interests. For this reason, Congress set twenty percent and twenty-five percent foreign participation limits on corporate operators and holding companies respectively. Senator Clarence Dill claimed that these provisions would "amply safeguard" American communications and at the same time "permit our international communications companies to compete with companies in foreign countries."

It can be concluded that historically a strong relationship between issues of nationalism and free trade has existed in the debate over alien restrictions in the communications industry. Nationalism has always prevailed. The issue remains unresolved, however, in the case of the cable television industry.
C. The FCC Proceedings and the Section 310 Analogy

The FCC was first petitioned in late 1975; thereupon the Commission instituted a rule-making proceeding to consider amendment of the Commission's cable rules to impose the foreign ownership restrictions modeled after section 310.67 In support of the proposed restrictions, the petitioners argued that "the framers of the Communications Act did not foresee the emergence of cable television, nor anticipate its becoming a significant medium of mass communications."68 Petitioners described cable as "a medium capable of influencing the lives and actions of people in this country with the potential of becoming one of the chief media of information and communication upon which the citizenry will depend."69

When the Commission agreed to consider adoption of the proposed rules, it observed that such consideration was appropriate because "[c]able is a hybrid form of communications with functions analogous to those carried out by both broadcaster and common carrier entities and with the capacity to provide additional services not now provided by either."70 A cable system, the Commission said, can both relay the information and entertainment product of others and make its own original contribution to the "electronic stream."71 The Commission concluded that "[b]ecause of this capacity of cable systems to originate programming as well as to forward that of others, we believe it appropriate to concern ourselves with the question of whether control of these facilities might fall into the hands of those who would use them against our national interests."72

Seven months later, however, the Commission issued a decision in which it refused to adopt the rule.73 The Commission expressed its belief that it was prudent to approach the issue while the industry was still relatively free of foreign influence,74 yet it concluded in its 1976 decision that "it would be premature at this time to adopt the rule proposed."75

The decision was based on several factors. First, the Commission

68. Id. at 160.
69. Id.
70. Id. at 160-61.
71. Id. at 161.
72. Id.
73. Report and Order, supra note 2, at 723.
74. Id. at 725.
75. Id. at 726.
felt there was no real threat to the security of the United States or to the development of the cable industry. The Commission noted that "[u]nlike broadcast licensees subject to the restrictions of Section 310, cable television operators, as a practical matter, have program control over a minor portion of the programming they distribute." The Commission urged that alien ownership restrictions did not exist in such communications industries as newspapers, wire services, networks, and film and television production. Hence, it could not be said that alien restrictions existed as a matter of general communications policy. A key factor in the decision was the FCC's deference to the franchise process controlled by local government: "It is these local jurisdictions that are initially in the best position to determine whether or not an individual operator's nationality will prevent him from satisfying his 'public interest' obligations." Finally, the Commission thought that citizenship limits might deter development of the cable industry by cutting off foreign capital. It felt inclined to allow free market forces to direct the flow of capital within the industry.

Despite its initial observations, the Commission refused to foreclose the possibility of adopting the proposed rule at some future date. Instead it adopted a policy of "watchful waiting," stressing that "the nature of the cable industry and the services it provides and the amount and type of foreign investment in it may change rapidly and in ways that would suggest a clear need for ownership restrictions of the type proposed." The bottom line, the Commission seemed to indicate, was that at that time there was "only a very limited amount of foreign investment in cable television . . . and most of this is by Canadian corporations."

Seizing on the opening left in the FCC's 1976 decision, proponents of alien restrictions again sought Commission approval of rule amend-
ments in 1980. Reiterating earlier arguments, supporters of the rule pointed to the Communications Act as reflecting “a clear congressional intent to insure that national communications media not be subjected to undue alien influence and control.”

Proponents stated that the amount of foreign ownership had greatly increased since the Commission’s 1976 proceeding. They urged the Commission to take prompt action to curb what they saw as a significant trend of foreign ownership and “domination” of cable television systems.

Supporters of restrictions insisted that foreign capital is not needed for domestic cable development and that American cable firms could be forced out of major markets because alien interests have access to foreign sources of capital unavailable to domestic firms. Grasping the FCC’s “watchful waiting” posture from the 1976 proceeding, proponents argued that dramatic changes had since occurred in the cable industry. Proponents pointed not only to increased foreign ownership but also to the large increase in programming control which cable operators had obtained as a result of cable deregulation, including relaxation of signal carriage rules, the elimination of access channel rules, higher channel capacity, and greater amounts of available programming, particularly in the pay-television field. Cable, it was as-

85. See Joint Comments, supra note 53, at 1.
87. See Midwest Cable, supra note 84, at 9. Midwest Cable argued that there were “wealthy foreign individuals and governments throughout the world which have the resources to control a major portion of the United States’ system of telecommunications.” Id. at 14.
89. Memorandum Opinion and Order, supra note 2, at 80.
90. November 1981, FCC report on domestic cable ownership included the following summary of technological developments and the accompanying deregulation:

The November 1981, FCC report on domestic cable ownership included the following summary of technological developments and the accompanying deregulation:

During the 1970's, cable continued to grow. Technological change, an increased range of available cable services, and reductions in regulation that occurred after 1974 led to greatly expanded opportunities for cable operators. Changes in cable
asserted, had evolved from a simple retransmitter of broadcast signals to a supplier of diverse programming and services, including unique security and emergency communications services.90

The case for the restrictions was thus made: the policies behind section 310 were sound and equally valid when applied to cable television, for cable had become the functional equivalent of broadcasting, with an even greater potential as a mass communications medium. Hence, Americans deserved the same protection against alien control of cable systems that they received against alien control of broadcast facilities.91

Opposition to the proposed restrictions was submitted to the FCC, mainly by Canadian companies operating systems in the United States.92 They accused the proponents of restrictions of being primarily motivated by anticompetitive self-interest.93 In response to the section 310 analogy, however, they argued that the amount of foreign ownership existing or likely to exist was insignificant.94 Opponents also maintained that there was no basis for suggesting that individual cable operators held dangerous power over the content of programming available to the public.95 Cable, they argued, is essentially a passive device for relaying programs whose content is determined by others.96

They thus attacked the fundamental proposition that cable had at-
tained a functional equivalency to broadcasting. In addition, it was asserted that the myriad sources of communications available to modern consumers reduces the cable operator's access to the public and, correspondingly, the operator's ability to influence or control the flow of information.97

Because cable operators—unlike broadcasters—are accountable to the local authorities responsible for the award and reissuance of franchises, opponents of restrictions insisted that foreign ownership of cable systems was not a threat.98 In this context, the Canadians argued, franchises are subject to continuing oversight by local governments and, moreover, every time a foreign company seeks a franchise it must present itself to a new franchising body.99 Citing their success in the local franchising process, Canadian operators emphasized the quality of their systems and Canada's close political, social, and economic ties to the United States.100

Generally, opponents to the proposed restrictions did not question the propriety of section 310 as it applies to broadcasters, they simply rejected its extension to the cable industry. Two Canadian operators, however, raised the issue of whether section 310 was anachronistic.101 It was pointed out that alien restrictions arose out of a xenophobic atmosphere existing when radio stations were scarce.102 In light of the vast number of broadcasting stations and other media of mass communications, one opponent suggested the prohibition of section 310 was perhaps obsolete.103

97. See Cable America, supra note 93, at 28-30; Selkirk, supra note 90, at 19.
98. See Cable America, supra note 93, at 19-20; Premier, supra note 93, at 25.
99. See Cable America, supra note 93, at 27.

U.S. Cablesystems stated that Midwest Cable is to be applauded for stopping short of alluding to the Mongol hordes, pouring over the mountains seizing American towns and villages—to say nothing of headends and trunk cables—or alluding to the oil-rich foreign sheikdoms controlling not only our oil pipelines, but our information pipelines as well. Indeed, Midwest Cable has shown admirable restraint, only hinting at xenophobia instead of addressing it outright.

U.S. Cablesystems, supra, at 5.

101. See Cable America, supra note 93, at 30-31; Suburban Cablevision and Maclean-Hunter, supra note 96, at 12.
102. Cable America, supra note 93, at 31.
103. Suburban Cablevision and Maclean-Hunter, supra note 96, at 12. While proponents of alien restrictions generally emphasized cable's likeness to the broadcasting medium, opponents, hoping to defeat the § 310 analogy, distinguished the two technologies. The Community Antenna Television Association (CATA), in opposition to alien ownership restrictions, argued in the broader context of broadcasting regulation vis-a-vis cable regula-
As in 1976, the FCC rejected the section 310 rationale as applied to cable.\textsuperscript{104} Acknowledging that changes had occurred in the interim, the Commission noted that in 1980 Canadian-controlled systems still served less than one percent of all cable subscribers.\textsuperscript{105} The Commissioners suggested that the receptiveness of local authorities to Canadian investment indicated that Canadian capital and experience is attractive.\textsuperscript{106} The Commission concluded that

\begin{quote}
we [do not] find anything in this record to change our earlier determination that action is not required directly by Section 310 of the Communications Act or by analogy to it. . . . We do not read it as reflecting a general policy against foreign investment in communications enterprises in the United States.\textsuperscript{107}
\end{quote}

The Commission proceeded to adopt the same “watchful waiting” stance it had taken four years earlier.\textsuperscript{108} It reiterated its 1976 stance that the nature of cable television, the services it provides, and the amount and type of foreign investment in it may change rapidly in ways suggesting a need for ownership restrictions.\textsuperscript{109}

\section*{IV. RECIPROCITY}

A second front in the battle against foreign ownership of cable systems arose in the 1980 proceedings: if ownership restrictions were
not imposed under the section 310 rationale, restrictions should be imposed under the principal of reciprocity in international trade. Based on reciprocity, the National Cable Television Association (NCTA), described as the most powerful voice in the industry, reversed its position of opposition in the 1976 proceeding. Since Canadians are presently the only foreign nationals investing in American cable, and since Canada severely restricts foreign ownership of its cable systems, the NCTA argued that

when one foreign government pursues a policy of discrimination and restriction regarding U.S. commercial interests, the agencies and establishments of the United States are empowered to impose reciprocal limitations. Such limitations are not aimed at punishing foreign nationals or restricting foreign commerce. They are intended to expand international commerce by inducing the elimination of barriers to it.

As already noted, the free-trade issue has existed since alien restrictions were first imposed under the Radio Act of 1912. During debate on that bill, Representative James R. Mann said that he had heard no good reason for imposing alien restrictions, especially in light of the President's power to seize radio stations in time of war. "It makes a difference on the borders of Canada," he said. "We want permission over there to operate radio stations. Why should we say they should not have permission here?" Representative Joshua W. Alexander, the bill's proponent responded:

[It can be readily seen that if these stations belonged to foreign governments or citizens . . . it might, and doubtless would, lead to serious complications in the event of war, and I do not know of any other country that extends to us the privilege of erecting radio sta-

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110. See id. at 76.
111. Cable Controversy, supra note 92, at 94.
112. See Report and Order, supra note 2, at 726; Memorandum Opinion and Order, supra note 2, at 75.
114. See supra text accompanying note 66.
115. Radio Communications Act, supra note 59.
117. Id. The Congressman continued:
What is the real need, when we are seeking in this world to obtain close interchange between nations . . . of saying that so far as commerce is concerned we will not permit foreigners to come on our shores? . . . What good is there in saying that a foreign company or a foreign citizen can not be permitted to own a radio station . . . .

Id.
During the 1980 FCC proceeding, it was suggested that it is inconsistent for proponents to argue for alien restrictions on the basis of both reciprocity and the analogy to section 310. The former would allow any alien to own United States cable companies as long as the alien's home country does not bar United States ownership. The underlying basis of section 310, on the other hand, is the nationalistic concept that such facilities should be owned only by Americans. Because of this logical inconsistency, reciprocity has generally been argued independently of the section 310 rationale. For example, the National Cable Television Association maintained that the FCC did not have to adopt the proposed restrictive rules; instead, the NCTA urged the Commission to impose limitations on Canadian ownership on a reciprocal basis. On the other hand, those urging adoption of the rules from a nationalist perspective used reciprocity—or the lack thereof under Canadian law—to counter the free-trade arguments of the rules' opponents. The 1912 Mann-Alexander debate was thus echoed during the 1980 FCC proceeding.

The fact that other countries restrict American investment in their own cable industries was also used to support the correctness of the nationalistic section 310 rationale. As a general response to com-

118. Id. (statement of Rep. Alexander). Representative Alexander continued: "Great Britain is erecting radio stations on her own soil, and is retaining absolute control of them, and . . . the same is true of Germany; and I think it is a wise national policy that we should retain the control of these stations . . . ." Id.
119. Memorandum Opinion and Order, supra note 2, at 77.
120. See U.S. Cablesystems Inc., Reply to Comments Filed on Petition for Proposed Rulemaking, at 4-5 (Jan. 8, 1980).
121. See supra text accompanying notes 59-66.
122. See National Cable Television Association, supra note 113, at 8.
123. See Midwest Cable, supra note 84, at 13-14; Storer, supra note 86, at 2-3.
124. It was generally asserted during the 1980 FCC proceedings that many nations, in addition to Canada and Mexico, prohibit controlling interests in broadcasting and telecommunications by foreign firms and persons. See, e.g., Storer, supra note 86, at 2. No evidence was offered detailing foreign ownership restrictions in nations other than Canada. One can assume that because cable television has not been developed extensively outside the United States and Canada, other countries have not promulgated specific cable ownership rules. In 1976 a study conducted by the United States Department of Commerce concluded: "Almost all the developed countries restrict foreign investment in key sectors considered of national interest concern. Typically, these include communications (radio, television and the press), finance . . . , transportation, public utilities, and defense industries." U.S. DEP'T OF COM-
ments filed with the FCC in opposition to the proposed rule, Midwest Cable offered Canadian nationalism as an example to be followed in the United States:

The Canadian restrictions arose from a determination that cable systems would have an increasingly important role in defining and forming a national culture and unity within that culture. The Canadian authorities recognized that American ownership was not a security risk, nor was American culture very different. Nevertheless, it was decided that whatever Canadian culture was and would be it should be reflected through cable systems under Canadian control.\(^{125}\)

Not only has Canada fully dealt with the policy considerations raised by foreign ownership of cable systems, but it has also enacted into law restrictions on foreign cable ownership bearing a close resemblance to the proposed rules submitted to the FCC in 1976 and 1980, as well as to section 310 of the United States Communications Act of 1934.\(^{126}\)

A. Cable and Foreign Ownership in Canada

Since Canadian confederation, government policy has addressed the issue of foreign investment in key economic sectors. Substantively, however, little was done to curb foreign investment until after World War II. The pace of foreign investment in Canada after the war was tremendous. By the 1960's, the federal and provincial governments were alarmed by extensive foreign ownership in key economic sectors. One of the first areas singled out for legislative protection was radio and television broadcasting.\(^{127}\)

The Canadian government began to license radio communications services in 1922.\(^{128}\) Eighty broadcasting licenses had been issued by 1930. Many of these licensed stations were controlled by Americans,
Prime Minister Richard Bennett, when introducing legislation creating the Canadian Radio Broadcasting Commission in 1932, expressed concern over this trend:

[T]his country must be assured of complete Canadian control of broadcasting from Canadian sources, free from foreign interference or influence. Without such control radio broadcasting can never be a great agency for the communication of matters of national concern and for the diffusion of national thought and ideals, and without such control it can never be the agency by which material consciousness may be featured and sustained and national unity still further strengthened.  

At the time that the United States was writing its Communications Act and extending existing citizenship restrictions, Canada was merely observing, with growing apprehension, foreign penetration of its communications industry. While concern in the United States was focused on problems of potential foreign influence, Canadians were faced with significant levels of actually existing foreign presence. While American lawmakers were emphasizing national security and "Americanism," Canadians were emphasizing Canadian culture and national unity.  

One commentator has stated, "Canadians, by their own diagnosis, are suffering from the disease of proximity to the United States. They fear being culturally absorbed by their neighbor." Restrictions on foreign ownership of broadcasting systems were not imposed, however, until 1958. Section 10 of the 1958 Broadcasting Act sought to ensure a Canadian broadcasting system with "varied and comprehensive broadcasting service of a high standard that is basically Canadian in content and character." Section 10 imposed foreign ownership limitations similar to limitations imposed under section 310 of the United States Communications Act. The Canadian act limited ownership to Canadian citizens or corporations: aliens were allowed twenty-five per-

129. Id. at 77.  
130. Id.  
131. See supra text accompanying notes 59-62.  
132. Note, Resurgence of Canadian Nationalism and its Effect on American-Canadian Communications Relations, 9 J. Int'l L. & Econ. 149, 149 (1974). The authors noted: Nonetheless, the United States has been a dominant influence in Canadian broadcasting since its beginning. The 1920's found the U.S. influencing Canadian radio both directly, by transmitting signals from U.S. border stations into Canada, and indirectly, by exporting large numbers of programs into Canada for use in their own broadcasts.  

Id. (footnote omitted).  
133. Special Report, supra note 128, at 77.  
cent ownership in Canadian corporations, and the chairman and two-thirds of the board of directors had to be Canadian citizens. The 1958 Act resulted in substantial elimination of foreign ownership of broadcasting stations in Canada.

Cable television was only six years old in Canada when the 1958 Broadcasting Act was written. As with the American Communications Act, the Canadian legislation did not take cable television into account. Until 1968, cable systems were licensed by the Department of Transport under the 1922 Radio Act. Under the Radio Act, cable systems were licensed as "land stations performing a Commercial Broadcasting Receiving Service." Licensing policy and commensurate regulation of cable enterprises were highly permissive. The evolution of Canadian cable regulation thus paralleled United States developments in that federal oversight was initially minimal due to the perceived supplementary role played by cable in relation to broadcasting. In Canada, cable was regarded as a public utility of sorts, subject to local jurisdiction. As cable technology advanced, federal regulation increased in both countries. In the United States, comprehensive federal regulation was not introduced until 1972, and local governments retained local regulatory powers within the scope of federal guidelines.

Initially, judicial interpretation of cable television's role in national communications also developed similarly in the United States and Canada. In United States v. Southwestern Cable Co., the Supreme Court in 1968 upheld the FCC's authority to regulate the cable industry in a manner "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." While finding that cable systems were not broadcasters or common carriers subject to specific regulation under the Communications Act, the Court concluded that cable com-

136. SPECIAL REPORT, supra note 128, at 77-78.
137. CRTC, supra note 18, at 4.
138. SPECIAL REPORT, supra note 128, at 2-3.
141. See supra text accompanying notes 36-42.
142. SPECIAL REPORT, supra note 128, at 2.
143. See supra text accompanying notes 40-46.
144. 392 U.S. 157 (1968). See also supra text accompanying notes 40-46.
145. 392 U.S. at 178.
panies were engaged in interstate communication of national transmissions and thus were subject to the FCC's broad responsibilities. The Court viewed cable as an integral part of a "national communications system" in which the "stream of communication is essentially uninterrupted and properly indivisible." In 1965 the British Columbia Court of Appeal, in *Re Public Utilities Commission & Victoria Cablevision, Ltd.*, was called upon to decide whether the British Columbia Public Utilities Commission had jurisdiction over local cable companies. The court ruled that since receiving transmissions by air was "beyond doubt within the exclusive jurisdiction" of the federal government under the Radio Act, cable was thus also within exclusive federal jurisdiction. The court held that cable constituted an integrated transmission receiving undertaking which could not be separated into its component parts; hence, it was subject to regulation exclusively under the Radio Act.

Here the parallels stop. In the United States, federal cable regulations were deemed ancillary to the FCC's general authority over interstate communications, and local governments continued to exercise concurrent powers (chiefly related to franchising) over local cable systems. In Canada, after the British Columbia *Public Utilities Commission* decision, all aspects of cable were in the regulatory hands of the national government. At the time of the *Public Utilities Commission* decision, advances were being made in cable technology, and microwave transmission came into use in order to import distant signals.

146. *Id.* at 168-69.
147. *Id.* at 164, 169. *See also* United States v. Midwest Video Corp., 406 U.S. 649, 651 (1972), in which the Court reiterated its view of cable's potential to provide a national communications system. The Court cited *General Tel. Co. v. FCC*, 413 F.2d 390, 401, in which then-Judge Burger described cable as an "integral part of interstate broadcast transmission." *Id.* at 662 n.21. In *FCC v. Midwest Video Corp.* (Midwest Video II), 440 U.S. 689 (1979), the Court came close to defining cable television as the functional equivalent of broadcasting. The Court did this in order to bar the FCC from imposing public access requirements to common carrier obligations. *Id.* at 709. The Court equated public access requirements to common carrier obligations and then noted that Congress has expressly prohibited the imposition of common carrier status on broadcasters. (The Court referred to § 3(h) of the Communications Act, 47 U.S.C. § 153(h). *Id.* at 700.) The Court held that the FCC "may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters." 440 U.S. at 709.

149. *Id.* at 718-19, 722-23.
150. *Id.* at 719-20, 722-23.
151. *See supra* text accompanying note 46.
154. *Id.*
In Canada this meant greater American programming penetration. As Canadian policymakers considered the growth of American programming coverage in Canada a serious threat to the maintenance of a "truly Canadian" broadcasting system, the Minister of Transport agreed to refer applications for cable undertakings to the Board of Broadcast Governors created under the 1958 Broadcasting Act, although the 1958 Act did not expressly govern the cable industry. In 1964, the Minister of Transport told the House of Commons that two main concerns faced the government in regard to cable television: foreign ownership and cable's competition with existing TV stations. The stage was thus set for the eventual incorporation of cable systems within the scope of the Broadcasting Act of 1968.

**B. The Broadcasting Act of 1968**

The Broadcasting Act of 1968 was prompted by some of the same concerns as those underlying congressional attempts to rewrite the United States Communications Act of 1934, for example, modernization. Beyond technological change in broadcasting, Canadian communications issues were engulfed in resurgent nationalism. The 1966 White Paper on Broadcasting, published after a decade of parliamentary debate, framed the issue this way:

Any statement of policy relating to broadcasting in Canada... starkly poses this question. How can the people of Canada retain a degree of collective control over the new techniques of electronic communication that will be sufficient to preserve and strengthen the political, social and economic fabric of Canada, which remains the most important objective of public policy?

A dominant feature of the new legislation was the incorporation of cable television within its scope. The newly created Canadian Radio-

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155. *Id.*


Television Commission (CRTC) in its first annual report said of the Broadcasting Act of 1968:

A significant new "element" included in the Broadcasting Act was CATV (or Community Antenna Television) which did not fall within the ambit of the 1958 legislation. CATV's development in the intervening decade, its effects on conventional broadcasting and its potential for program production encouraged legislators to consider CATV systems as an integral part of broadcasting and termed them "broadcasting receiving undertakings."\(^{163}\)

By its terms, therefore, the Broadcasting Act of 1968 put cable on an equal plane with radio and television for legislative policy purposes. The most important feature of the Act was its opening declaration of broadcasting policy for Canada. Section 3(b) proclaimed: "[T]he Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."\(^{164}\)

The 1968 legislation did not reenact the 1958 Act's provisions governing foreign ownership of broadcasting enterprises.\(^{165}\) Section 14 of the 1958 Act had not proved airtight, and because the foreign ownership problem was considered critical, it was decided that ownership provisions be directed by Orders in Council; this provided administrative flexibility in foreign ownership matters.\(^{166}\) Pursuant to section 22 of the 1968 Act, the Governor in Council is empowered to direct the CRTC concerning "the classes of applicants to whom broadcasting licences may not be issued."\(^{167}\)

The first government Order in Council regulating foreign ownership was issued in September 1968.\(^{168}\) It was revised twice in 1969, once in 1971, and finally in 1975, but its essential provisions have remained the same.\(^{169}\) The permissible level of foreign ownership was reduced from the twenty-five percent allowed in the 1958 Act to twenty

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\(^{165}\) Note, supra note 132, at 153.

\(^{166}\) See SPECIAL REPORT, supra note 128, at 3. Authority to issue broadcast licenses, which now included cable television, was given to the CRTC. See SPECIAL REPORT, supra note 128, at 78.


percent, and all the board of directors of a broadcasting undertaking are now required to be Canadian citizens.\(^{170}\) The Order in Council deals with potential loopholes by giving the CRTC discretion to deny a license to any corporation it deems "effectively owned or controlled


**Restrictions on License Issue and Renewal**

1 The Canadian Radio-Television Commission is hereby directed that on and after the twelfth day of January, 1971 broadcasting licenses may not be issued and renewals of broadcasting licenses may not be granted to applicants of the classes described in paragraph 2.

**Restricted Classes**

2 The classes referred to in paragraph 1 are as follows:

(a) persons who are not Canadian citizens or eligible Canadian corporations; and

(b) governments of countries other than Canada or of political subdivisions of countries other than Canada and agents of such governments.

**Eligible Canadian Corporation**

4 For the purposes of this direction, an "eligible Canadian corporation" is a corporation

(a) that is incorporated under the laws of Canada or a province;

(b) of which the chairman or other presiding officer and each of the directors or other similar officers are Canadian citizens; and

(c) of which, if it is a corporation having share capital, at least four-fifths of the shares having full voting rights under all circumstances, and shares representing in the aggregate at least four-fifths of the paid-up capital, are beneficially owned by Canadian citizens or by corporations other than corporations that are controlled directly or indirectly by citizens or subjects of a country other than Canada; except that, in any case where in the opinion of the Commission, notwithstanding that the corporation is one to which subparagraphs (a), (b) and (c) apply, the corporation is effectively owned or controlled either directly or indirectly and either through the holding of shares of the corporation or any other corporation or through the holding of a significant portion of the outstanding debt of the corporation or in any other manner whatever, by or on behalf of any person, body or authority of a class described in paragraph 2, the corporation shall be deemed not to be an eligible Canadian corporation.

4.1 Notwithstanding section 4, a corporation that is

(a) one to which paragraphs 4(a) to (c) apply, and

(b) in the opinion of the Commission effectively owned or controlled by a corporation to which 4 (a) and (c) apply but paragraph 4 (b) does not,

shall for the purposes of this Direction be deemed to be an eligible corporation if

(c) at least four-fifths of the directors or other similar officers of the owning or controlling corporation including the chairman or other presiding officer are Canadian citizens, and

(d) the Commission is satisfied that it would not be contrary to the public interest to grant a broadcasting license or the renewal of a broadcasting license to that corporation.
either directly or indirectly” by alien citizens or corporations.\textsuperscript{171} The Commission is also given discretion to allow up to twenty percent foreign participation on a corporation’s board if “the Commission is satisfied that it would not be contrary to the public interest to grant a broadcasting license” to such a corporation.\textsuperscript{172}

The impact of the Order in Council was heaviest in the cable industry.\textsuperscript{173} Radio and television had already been subject to the 1958 Act’s twenty-five percent restriction. In the cable industry, rapid divestiture ensued. By the end of 1971, fifty-four cable companies had divested foreign shares.\textsuperscript{174} Cable companies that were more than twenty percent foreign-owned before the Order in Council had total operating revenues representing 55.8% of the Canadian cable industry.\textsuperscript{175} In 1979, the CRTC concluded: “As a result of the Order in Council, there are now no broadcasting or cable television undertakings where foreign ownership exceeds 20 percent, or where there are foreign directors. The policy objective enunciated in the Broadcasting

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\item \textsuperscript{173} SPECIAL REPORT, supra note 128, at 80. The CRTTC's ANN. REP. FOR 1969-1970 contained the following description of how the Commission dealt with one major divestiture action. It graphically illustrates the application of antiforeign ownership policy to a then-existing cable and broadcasting corporate organization:

In November, 1968, a proposal to restructure the holdings of Famous Players Canadian Corporation was put to the Canadian Radio-Television Commission. This proposal involved three television companies and 17 [cable] CATV operations.

In December, 1968, the Commission indicated its intention to study the corporate and financial structures of the organization from the social, cultural and legal points of view. The Broadcasting Act and the foreign ownership direction of the Government to the Commission in September 1968 were prime considerations. [Emphasis added.]

The decision on the application was taken April 17, 1969. The Commission denied approval of the proposal . . . to transfer shares to TELTRON Communications Limited . . . . [Original Emphasis.]

The application was denied because, under the proposal as presented, the effective ownership by Famous Players Canadian Corporation Limited of the individual broadcasting companies included in TELTRON . . . would remain essentially the same as before . . . .

Another concern expressed in the decision was a failure to demonstrate satisfactorily to the Commission, policies which would contribute significantly—through such a large and important segment of the Canadian Broadcasting System—to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.'


\item \textsuperscript{174} SPECIAL REPORT, supra note 128, at 80.
\item \textsuperscript{175} Id. at 81.
\end{itemize}
Act has been achieved.'"176

C. United States: The FCC and Reciprocity

Having rejected the section 310 rationale for foreign exclusion, the FCC undertook an analysis of the reciprocity issue. The Commission highlighted three points raised in opposition to imposition of reciprocal limitations. First, it was argued that United States policy favors free trade and investment among nations and, second, that the Commission would be overstepping its power if it acted on a basis of reciprocity.177 Opponents argued vehemently that it is a legislative function to consider matters relating to international trade.178

The third point cited by the FCC was the opponents' attempt to contrast conditions in Canada at the time it imposed restrictions to the situation in the United States in 1980.179 Opponents asserted that the high level of American ownership of Canadian cable prior to the 1968 Broadcasting Act could not be compared to Canadian investments in United States cable in 1980;180 hence, reciprocal limitations based on the Canadian law were not justified.181 In response, a proponent of limitations noted that American divestiture in Canada was both disruptive and economically harmful to United States-based companies and that early imposition of restrictions in the United States would avoid a repeat of the Canadian experience.182

In its decision, the Commission denied any general responsibility on its part to intervene in foreign trade issues,183 and it failed to reach the issue of whether it was authorized to promulgate alien restrictions.184 The FCC concluded:

We do not believe a desire for reciprocity in international investment

176. Id.
177. Memorandum Opinion and Order, supra note 2, at 77.
178. See Premier Cablevision LTD, Reply Comments, at 5-6 (Jan. 8, 1980).
179. Memorandum Opinion and Order, supra note 2, at 77.
180. Id. The Commission cited opponents' figures showing that in 1967, 55% of Canada's subscribers were served by foreign-owned systems. Id. See also supra text accompanying note 175. This was contrasted to an estimated .82% of American subscribers served by alien controlled systems in 1980. Memorandum Opinion and Order, supra note 2, at 77. It has been estimated that within five years, seven to nine percent of American subscribers will be served by foreign-owned systems. See supra text accompanying notes 28 & 33.
181. Selkirk, supra note 95, at 20-22; U.S. Cablesystems, supra note 100, at 13-14.
182. Midwest Cable, supra note 125, at 13-14. One opponent argued that the size and expansion of the United States cable industry makes potential Canadian domination in the United States impossible. Selkirk, supra note 95, at 22.
183. Memorandum Opinion and Order, supra note 2, at 80.
184. See id. at 83 (Commissioner Fogarty concurring).
policies by itself provides an adequate basis for action on our part. Nor are we, in any case, in a position to know if such a policy on our part would in fact have the result intended or if, to the contrary, it would lead to increasing trade barriers in other areas.\textsuperscript{185} 

The Commission thought it likely that reciprocal treatment between the United States and Canada would merely reduce competition in the United States franchising process.\textsuperscript{186} Questions of international trade, the Commission stated, were more appropriate for consideration in other branches of the government.\textsuperscript{187}

\section*{V. LEGISLATION}

The issue of foreign ownership of cable systems has been the subject of two legislative efforts in the House of Representatives. Both bills sought to impose reciprocal limitations on foreign ownership. The first, H.R. 8206, authorized by Representative Harley Staggers, was introduced in 1980 but was never brought up for consideration.\textsuperscript{188}

In July 1981 Representative Doug Walgren introduced H.R. 4225.\textsuperscript{189} This bill was also never brought to committee and died with the Ninety-Seventh Congress. The proposed law would have bypassed the FCC by directly imposing reciprocity in cable ownership. The bill attempted to amend the Communications Act to provide that any ownership restrictions applying to United States companies by a foreign government shall be applied in "a like manner" to entities based in that foreign nation.\textsuperscript{190} Paralleling the allowance of small amounts of foreign ownership of broadcasting operations under section 310 of the Communications Act, the House proposal would have exempted from its reciprocal limitations any company with less than twenty-five percent foreign ownership.\textsuperscript{191} The measure would have forced divestiture within two years after its enactment.\textsuperscript{192}

\begin{footnotes}
185. Id. at 79.
186. Id. at 80.
187. Id. at 81.
190. Id. § 331(b)(2).
191. Id. § (a)(4), (a)(5).
192. Id. § 331(c). Walgren argued that this legislation would not place any restrictions on Canada that Canada had not placed on United States companies. 127 CONG. REC. E3603 (daily ed. July 21, 1981) (remarks of Rep. Walgren). Citing the Canadian Broadcasting Act and Orders in Council, Walgren said: "Following enactment of this law, American companies had to divest $150 million of Canadian broadcast and cable investment." Id. Walgren also argued the § 310 analogy, urging that "considerations that underlie alien ownership of broadcast licenses pertain also to cable." Id. "Furthermore," Walgren argued, "in
A similar proposal was introduced in the California State Senate in January 1982. It also subsequently died without being acted upon. The bill sought to directly prohibit in California the award or renewal of a cable franchise to companies which are more than twenty percent owned or controlled by Canadian citizens. Instead of broad application to aliens in general, this legislation chose to directly impose reciprocal restrictions on Canadian-based firms.

While these legislative endeavors did not prove of great significance, current legislation pending in the United States Senate has drawn much attention. The Senate will probably enact a law affecting foreign ownership of cable television systems. In late January 1983, Senator Barry Goldwater introduced S. 66, the Cable Telecommunications Act of 1983. The Act is a deregulation measure designed to limit local government regulation of cable television and to reform existing federal regulation. The bill is a slight revision of S. 2172, introduced in March 1982, which died within the Ninety-Seventh Congress. One of the revisions made in S. 66 concerns a provision in the Act affecting foreign ownership.

Section 605(b)(1) of S. 2172 would have granted the FCC authority to impose the reciprocal limitations urged upon the Commission in its 1980 alien ownership proceeding. Since the Commission did not decide the issue of whether it had authority to enact foreign ownership regulations, this proposal, if it had been enacted, would have confirmed such authority. For the stated purpose of ensuring fair and equitable treatment of United States cable companies seeking foreign markets, section 605(b)(1) provided that the FCC "shall have authority" to establish policies, rules, and regulations applicable to foreign cable interests, "with a view to assure that such United States cable enterprises are permitted access to such foreign markets upon terms and conditions which are reciprocal with the terms and conditions under which such foreign persons have access to domestic markets in the United

one way, cable operators are in a unique broadcasting position. There are a number of broadcast channels in a given area or market. With cable, however, it is far more likely that there will be a single cable franchise . . . providing the exclusive vehicle for home video services." *Id.*

194. Pending as of April 4th, 1983.
197. *Id.*
198. *See supra* text accompanying notes 110-25.
199. *See supra* note 184 and accompanying text.
States.”

Although FCC authority under the provision would have been discretionary, its passage would have seemed to the FCC as something more than just a grant of authority. As stated in Senate Report 97-518, "The Committee hopes that this provision will ensure that U.S. cable enterprises are treated fairly and equally in their ability to provide cable in foreign countries." Any reciprocity restrictions promulgated by the FCC would have applied only to future franchises and would not have affected the renewal of a franchise by a foreign-owned company.

Section 605(b) of the Act has been substantially altered in the new bill, S. 66. The legislation now grants the FCC authority to "conduct inquiries" into whether the country of origin of a foreign firm seeking access to domestic cable markets permits United States cable enterprises access to that foreign country's market. Instead of authorizing the Commission to impose reciprocal limitations, the legislation merely requires the Commission to submit information obtained through such inquiries to the United States Trade Representative, to "assist the Trade Representative in his identification and analysis of acts, policies or practices which constitute significant barriers to, or distortions of, United States exports of services."

During hearings on S. 2172 in April 1982 and on S. 66 in February 1983, Senators were presented with virtually the same arguments for and against foreign restrictions that were made before the FCC in 1980. Added to the debate, however, were the views of the Reagan administration on the issue of reciprocity. The Reagan administration opposed the push for cable reciprocity restrictions because of its general opposition to "sectoral reciprocity" as a trade policy, that is, approaching trade relations sector by sector instead of negotiating trade agreements over a broad range of trade sectors.

202. S. 2172, supra note 200, at § 605(b)(4).
203. S. 66, supra note 195, at § 605(b)(1).
204. Id. at § 605(b)(2).
206. See Hearings, supra note 205 at 650-56 (remarks of William E. Brock, United States Trade Representative).
An Administrative spokesman testifying on S. 2172 stated:

The Administration has recently recommended against passage of "sectoral reciprocity" legislation such as S.2172 proposes. We believe that such an approach is fundamentally flawed and, in this particular instance, could needlessly involve an independent regulatory agency in foreign trade and policy questions that are more appropriately the province of the Executive.\(^{207}\)

Federal Communications Commission Chairman Mark Fowler stated that while he favored reciprocity in international communications trade, he believed it was "primarily a trade question rather than a communications question."\(^{208}\) He therefore urged the lawmakers to place the matter into the hands of the Trade Representative or the Department of Commerce.\(^{209}\) Hence, when S. 2172 was reintroduced in 1983 as S. 66, the bill was rewritten to place the matter into the hands of the United States Trade Representative.\(^{210}\)

Senator Goldwater has stated his belief that the reciprocity provisions of the proposed Cable Telecommunications Act will pass.\(^{211}\) If S. 66 becomes law with its foreign investment provision intact, foreign ownership of cable television will be—for the time being—an issue strictly of trade policy. In the long run, however, the issue cannot possibly be divorced from national communications policy considerations.

VI. CONCLUSION

Whatever the outcome of current legislative endeavors, it is likely that citizenship requirements will ultimately be imposed as a condition upon cable ownership. The unmistakable impression left by the FCC proceedings is that the Commission did not impose restrictions because of the low incidence of foreign ownership and because the Commissioners were not bothered by Canadian ownership.\(^{212}\) If the level of

\(^{207}\) Id. at 191 (statement of Bernard Wunder, Jr., Assistant Secretary for Communications and Information, United States Department of Commerce).

\(^{208}\) Id. at 199.

\(^{209}\) Id.

\(^{210}\) See supra text accompanying notes 203-04.

\(^{211}\) Hearings, supra note 205, at 506.

\(^{212}\) Commissioner Washburn expressed this view in his concurring statement:

It would give me concern if foreigners acquired controlling interests or substantial interests in companies which supply basic television service to many hundreds of thousands of American homes . . . .

Nevertheless, I do not believe that there is a danger in allowing Canadian control of systems serving less than one percent of all cable subscribers. So far as the Commission now knows, Canadians represent the only foreign ownership interests in American cable systems.
foreign ownership increases sharply, or if it is discovered that other nationalities have begun to invest in United States cable franchises, it is fair to conclude that foreign ownership restrictions will swiftly be imposed.

Without these contingencies, the arguments in support of ownership restrictions are nevertheless compelling. The United States, Canada, and most of the industrialized nations have developed strong legislative policies designed to severely limit foreign ownership of mass broadcasting facilities. There exists the strong conviction that television and radio communications are of such national importance that for nationalistic and cultural reasons, these resources ought to be owned and controlled by citizens. Arthur Schlesinger Jr. stated a truism: "[I]n our times history is shaped by control of the means of communication." There is, as well, the anticompetitive conviction that exploitation of these resources should be reserved for native enterprise.

Extending these convictions to cable television is a simple and reasonable step, as the sheer importance of cable in relation to national television and radio communications is manifest. As fundamentally nationalistic, these convictions can be effectively translated into policy only at the national level. Because of current Congressional consideration of the issue, the FCC will undoubtedly continue to defer to Congress.

Legislative attempts to impose alien ownership restrictions indicate a preference among legislators for the reciprocity basis for limita-

Memorandum Opinion and Order, supra note 2, at 82.

213. See supra note 124.
214. See supra text accompanying note 1.
215. One example exists of arbitrary treatment of the foreign ownership question at the local level. In 1979, the Minneapolis (Minnesota) City Council granted a license to a Canadian cable company. The losing United States companies placed an advertisement in the Minneapolis Tribune entitled, "An Open Letter to the Citizens of Minneapolis," which read:

At a time when the U.S. is already too dependent on foreign resources, including Canadian oil, why must we import services that American companies can provide?

At a time when much of downtown Minneapolis is already owned or managed by foreign interests, including Canadian firms, why would we also turn over control of our future entertainment, communications and data transmission network to foreign control when American firms are available?

Minneapolis Tribune, Oct. 19, 1979, at A11. Several months later the City Council reversed itself and awarded the franchise to an American company. Litigation ensued. See Gits, supra note 20, at 103, 104. It should be noted that the National League of Cities opposes federal limits on foreign ownership because it believes foreign participation enhances the franchise bidding process and because it views the issue as one of local concern. Cable Television Regulation, 1982: Hearings Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2d Sess., Pt. 1, 16 (1982) (statement of Charles Royer, Mayor of Seattle, Washington, on behalf of the National League of Cities).
Contrary to these indications, however, the impetus for alien restrictions arises out of the nationalistic desire to prevent foreign ownership of cable television systems, rather than to promote reciprocal trade policies. It is no doubt easier for legislators to argue for reciprocity—as a matter of free trade and fundamental fairness—than to articulate the section 310 rationale and apply it to cable television.

Reciprocity also allows the National Cable Television Association to urge alien restrictions without arguing by analogy to broadcast regulation. The cable television industry in general seeks to avoid being regulated as broadcasters and prefers to be analogized to newspapers with the hope of gaining First Amendment protection from government regulation. Avoidance of the section 310 analogy is unfortunate, however, since the foreign ownership question can be easily divorced from analogies necessary for First Amendment analysis.

Legislative reliance on reciprocity, while rhetorically strong, is artificial. Senate Bill 2172, its offspring S. 66, and the debate on their provisions governing foreign ownership of cable television are entirely focused on the reciprocity issue. Contrary to this legislative thrust, however, foreign investment in domestic communications industries has always been primarily a question of communications policy. Trade policy played only a secondary role, and nationalistic protectionism has prevailed since 1912. Approaching the question as a trade issue is therefore artificial. If reciprocal limitations are imposed, it will not be to promote investment opportunities abroad—the avowed purpose of reciprocity—but rather to protect the domestic cable market.

The Canadian history of foreign ownership prohibitions represents an impassioned embrace of nationalistic convictions against alien ownership in its broadcasting and cable industries. Given this history,
it is unlikely that Canada will in any way weaken alien restrictions in order to meet United States reciprocity requirements. Reciprocal restrictions on ownership, therefore, will have the desired effect of shutting off foreign investment as long as Canada remains the only source of foreign investment. But new cable markets for American investors will not open up, and moreover, under reciprocal limitations it is possible that citizens of nations where cable ownership is not restricted will invest in United States cable. One does not have to be xenophobic to recognize that this would defeat the protectionist intent behind the imposition of alien restrictions.

In summary, Congress should, and at some point probably will, impose citizenship requirements on cable television ownership. Existing Canadian operators will likely be grandfathered out of these restrictions. In order to insure implementation of the true policy behind foreign ownership limitations, however, legislation should be modeled after section 310 of the Communications Act and not based upon the artificial reciprocity argument.

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222. Neglecting the history of Canadian communications nationalism, one Canadian business commentator suggested: "For Canadian firms to be able to compete in the U.S., Ottawa may have to let American firms compete north of the border. It's quite obvious that American industry simply won't tolerate two sets of players playing the same game by different rules." Unger, supra note 9, at 28.