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ESSAY

AN ECONOMIC CRITIQUE OF FREE TRADE IN MEDIA PRODUCTS

C. EDWIN BAKER*

The issue of free trade in media or “cultural” products has been one of the most contentious aspects of recent trade negotiations. Framed as a dispute between culture and economics—or giving audiences around the world the media they want—the American pro-free-trade position has recognized, but downplayed, the cultural claims and has asserted that economic principle clearly shows the merits of free trade. In this Essay, Professor Baker’s primary aim is to show that the American economic argument is wrong. In making this critique, Professor Baker has two tasks. He first must show that free trade in the media context systematically fails to best satisfy people’s preferences. The Essay does this by examining the nature of monopolistic competition in mass media goods, the effects of positive and negative externalities, and the propriety of reliance on the market’s “willingness and ability to pay” standard as a method to identify or measure consumer preferences about media products. Professor Baker accomplishes the second necessary task of the critique by showing that nation-neutral laws will not be adequate to correct the problems of the market; that is, the Essay argues that international trade exacerbates all the problems that exist with the market such that special treatment of foreign media products is justified.

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* Nicholas F. Gallicchio Professor, University of Pennsylvania School of Law. I have benefited greatly from the opportunity to present versions of this Essay at the Mass Communications Law Section of the American Association of Law Schools Annual Meeting (New Orleans, Louisiana, Jan. 1999), at a conference, Commodification of Information (Haifa, Israel, May 1999), and at the annual meeting of the Union for Democratic Communications (Eugene, Oregon, Oct. 1999); I also received helpful comments from Michael Madow.

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INTRODUCTION

The United States has pressed hard to apply free trade principles to cultural products.¹ Its unrelenting pressure to establish this position almost derailed the final agreement—seven years in the making and signed on April 15, 1994—in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations.² Despite extraordinary efforts, the United States lost on this issue, just as it had a few years earlier in the 1992 North American Free Trade Agreement (NAFTA) negotiations.³ Similarly, in the late 1970s and early 1980s, a dispute between the United States and Third World nations over problems with free market dominance of the world communications order was a central cause of the United States leaving the United Nations Educational Social and Cultural

1. Unless context indicates otherwise, I will use "cultural products" and "media products" interchangeably to refer to types of products that would receive First Amendment protection in the United States, for example: film, television, music and other audio recordings, video recordings, text materials, live performances, and, somewhat more controversially, advertising.

2. See W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 107 & n.9 (1995). Although President Clinton apparently asserted that trade in film and other audio-visual products was "a defining issue" that would "make or break" the negotiations, the United States lost the dispute in an eleventh-hour accord. Bernard Weinraub, *Clinton Spared Blame by Hollywood Officials*, N.Y. TIMES, Dec. 16, 1993, at D1 (quoting Hollywood executives). Newspapers reported that "France defeated the film moguls of Hollywood," Steve Doughty, *Gentlemen, We Have a Deal*, DAILY MAIL (London), Dec. 15, 1993, at 10, and French Prime Minister Edouard Balladur could tell Parliament that "[t]he European cultural identity has been saved," Scott Kraft, *In French Parliament, A Resounding "Oui" for Accord*, L.A. TIMES, Dec. 16, 1993, at A19 (quoting Edouard Balladur).

3. NAFTA followed the earlier Canada-United States Free Trade Agreement, Jan. 2, 1988, Can.-U.S., art. 2005, 27 I.L.M. 281, 396, in not covering trade in cultural products. See North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605, 701, 702, art. 2106, annex 2106.

Organization (UNESCO).⁴ Both Canada and Europe resolutely reject free trade rules for cultural products, and the United States stands almost alone in its view. But the American position is correct in the opinion of American trade advocates and most American legal scholars. I, however, will dissent from their view.

The practical importance of this issue is immense. People in many countries consider the ability to protect their cultural industries to be vital to their cultural and democratic development, and possibly even to their survival as nations.⁵ Moreover, huge monetary stakes are implicated, as cultural products are the United States's second largest export item.⁶ On a more theoretical level, the issue raises central questions of journalistic freedom, democratic discourse, foreign policy, and the international equivalent of multiculturalism. Not surprisingly, then, although some rounds of the dispute have been settled, the struggle over media products' trade status continues.⁷

4. The United States withdrew from UNESCO on January 1, 1985, citing UNESCO's communication initiatives as one of its main reasons. See Colleen Roach, *American Textbooks vs. NWICO History*, in *THE GLOBAL MEDIA DEBATE: ITS RISE, FALL, AND RENEWAL* 35, 43-46 (George Gerbner et al. eds., 1993); *infra* notes 182-94 and accompanying text.

5. This view is not new. In the 1920s, a Canadian editorial by Frederick Paul argued that "'if we depend on the[] United States . . . for our reading matter we might as well move our government to Washington . . . The press is a stronger cohesive agent than [P]arliament.'" Ted Magder, *Franchising the Candy Store: Split-Run Magazines and a New International Regime for Trade in Culture*, CAN.-AM. PUB. POL'Y, Apr. 1998, at 1, 8 (quoting MARY VIPOND, *THE MASS MEDIA IN CANADA* 26, 27 (1989) (quoting Frederick Paul, Editorial, *National Periodicals or Annexation*, SATURDAY NIGHT (Toronto), Mar. 20, 1926, at 2)) (alterations in original).

6. See Thomas M. Murray, *The U.S.-French Dispute over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory: How an Efficient Market Solution Was "Rent-Seeking"*, 21 MD. J. INT'L L. & TRADE 203, 207 (1997) (reporting that cultural products are second after aerospace and aviation and noting that the American entertainment industry produced \$18 billion of foreign revenues and generated a \$4 billion trade surplus in 1992 (citing Kirsten L. Kessler, Note, *Protecting Free Trade in Audiovisual Entertainment: A Proposal for Counteracting the European Union's Trade Barriers to the U.S. Entertainment Industry's Exports*, 26 LAW & POL'Y INT'L BUS. 563, 563-64 (1995))). Organization for Economic Co-operation and Development (OECD) statistics list the United States net surplus in 1993 for international film rentals to be \$1.742 billion. See ORGANIZATION FOR ECON. CO-OPERATION & DEV., SERVICES: STATISTICS ON INTERNATIONAL TRANSACTIONS: 1970-1993, at 108 tbl. A.21 (1996) [hereinafter OECD]. Trade is vitally important to some of these American media industries, with foreign markets providing about half of the revenue for U.S. film and television products. See STEVEN S. WILDMAN & STEPHEN E. SIWEK, *INTERNATIONAL TRADE IN FILMS AND TELEVISION PROGRAMS* 1 (1988).

7. An important recent round resulted in decisions by a World Trade Organization (WTO) panel and an appellate board holding that Canadian laws protecting its magazine industry violate older provisions of GATT. The United States brought the legal challenge

Given the passions and the stakes, the outcomes may primarily reflect power politics, probably dominated by corporate interests. Nevertheless, the dominant view in this country is that the United States wins all the theoretical arguments, especially the rational economic arguments. Free trade is justified as a matter of principle, not simply American economic self-interest.

I will argue the contrary. Admittedly, empirical issues cause my economic analysis to be inconclusive. Nevertheless, I argue that economic theory suggests that neither consumer welfare nor economic efficiency support the prevailing American position. In a prior article, I described three ways in which the special nature of media products causes markets systematically to fail to give audiences what they want.⁸ These arguments, applied below, involve (1) the nature of monopolistic competition in goods with substantial public good aspects; (2) the impact of externalities on proper pricing; and (3) the market's means of measuring preferences. In economic terms, media markets predictably fail to provide efficient or welfare-maximizing outcomes. This Essay argues that each of these three failures applies in the context of international trade in cultural products.

The broad outlines of the competing arguments in the trade debate can be stated succinctly. Widely accepted premises justify the claim that free trade benefits people of all countries, especially consumers, more productive workers, and more efficient firms. While free trade disadvantages comparatively inefficient industries within a nation, free trade advocates argue that a country is better off in the long term because it is forced to improve the lagging sector's efficiency or, more often, to move resources now used in comparatively inefficient sectors to economic activities in which it holds a comparative advantage. This motivating premise underlies GATT and most of the world's attempts to expand free trade.⁹ The

after Canada had carefully assured that its policy would not be covered by NAFTA. See World Trade Organization Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, June 30, 1997 (last modified Apr. 14, 2000) <<http://www.wto.org/wto/ddf/ep/public.html>> [hereinafter WTO Report]; *infra* notes 170–81 and accompanying text.

8. See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 316–22 (1997).

9. An additional notable consideration supporting free trade is the long-standing belief that an economically interdependent world will increasingly find warfare to be a disruptive and hence unappealing form of action. See, e.g., Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), in KANT'S POLITICAL WRITINGS 93, 114 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991).

United States contends that this conclusion applies aptly to cultural products, particularly to films and television programming, and also to magazines, books, newspapers, and advertising. Americans contend that there is nothing economically singular about these products that justifies repudiating settled free trade premises, especially considering that deviations from free trade disadvantage consumers in the country that is imposing the restrictions. Free trade gives these consumers the media or cultural products that they want and leads to more efficient use of material and creative resources. If there is anything special about media products, advocates contend, it lies in the products' expressive or informational role. By invoking international norms concerning freedom of the press and access to information,¹⁰ free trade advocates argue that the unique nature of these products provides an independent "human rights" reason to disapprove of trade restrictions for media products.¹¹

An alternative view posits that culture is special and that countries should have the rights to protect and to promote their own cultures internally. American commentators label this view as "protectionist." These commentators accept that cultural trade policy comes down to a difficult choice between the free trade premise of letting people have the products that they want (or, equivalently, advancing economic efficiency) and the admittedly real value of preserving local culture. Still, commentators typically disparage cultural claims, usually either attacking their internal coherence or, more often, exhibiting suspicion that protectionists invoke culture as a smoke screen for purely self-interested policies designed to benefit politically influential commercial interests.¹²

Thus, typical analyses support the U.S. position. Although

10. See, e.g., 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, 187-89 (1995).

11. Interestingly, despite the similarity of many of the issues—that is, national attempts to assure a rich local communications order in the face of global market forces—the United States routinely invoked First Amendment values—freedom of information and freedom of the press—to attack UNESCO, while changing to an "economic parlance" to oppose Europe and Canada in the dispute about cultural products. Fred H. Cate, *The First Amendment and the International "Free Flow" of Information*, 30 VA. J. INT'L L. 371, 407 (1990). Maybe the United States feels less confident in lecturing Western Europe and Canada on what democracy means.

12. See, e.g., Amy E. Lehmann, Note, *The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity*, 23 SYRACUSE J. INT'L L. & COM. 187, 206-13 (1997); Van Harpen, *supra* note 10, at 174-80. But cf. Murray, *supra* note 6, at 223-24 (concluding that the French protectionist position was public-good oriented, not rent-seeking, from the perspective of public choice theory).

commentators admit that non-economic values might be considered, they find ways to disparage reliance on such values. Most important, the economic reasoning fundamental to the U.S. position normally remains unchallenged in the academic literature, especially within the legal academy.¹³ Part II of this Essay critiques that traditional reasoning on the basis of the special qualities of media products.¹⁴ As noted, I offer three types of critiques of international free trade—critiques based (1) on the non-rivalrous-use aspect of most media products; (2) on positive and negative externalities created by media products; and (3) on the way that markets identify and weigh preferences for media products. In order to show that the problems

13. A few of the best articles on these trade disputes do challenge the simple economic argument as I have presented it. See, e.g., Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203, 247-49 (1998); Shao, *supra* note 2, at 119-36; Richard L. Matheny, III, Comment, *In the Wake of the Flood: "Like Products" and Cultural Products After the World Trade Organization's Decision in Canada Certain Measures Concerning Periodicals*, 147 U. PA. L. REV. 245, 257-59 (1998). In each case, however, I will argue that the author is more averse to protectionism than is appropriate (though less averse than many others) either because of inadequacies in his development of the economic critique or because of related inadequacies in his conception of culture.

14. I generally accept the claims that the law of "comparative advantage" results in benefits of free trade and the view that international free trade is generally desirable, although the devil is often in the details. Thus, this Essay offers no general critique of free trade, but rather focuses on special aspects of media products that justify restrictions on trade in this context. There are naysayers to the free trade position, though. See, e.g., Noam Chomsky, *Free Trade and Free Markets: Pretense and Practice*, in THE CULTURES OF GLOBALIZATION 356, 356-70 (Fredric Jameson & Masao Miyoshi eds., 1998). For example, at the theoretical level, a common claim is that the market induces firms to seek profits as much by taking wealth from labor as by increasing efficiency, see *infra* note 155 and accompanying text, and that a major aspect of increased freedom of international trade, which expands the mobility of capital, is to increase capital's power in the fight with labor over the distribution of wealth rather than to increase total wealth. Moreover, even those whose livelihoods depend on free trade can question the terms on which it takes place. Only this observation can explain why longshoremen played a prominent role in the Seattle demonstrations during the January 2000 World Trade Organization meeting as well as in shutting down West Coast ports with job actions in solidarity with the demonstrators. See David Moberg, *After Seattle*, IN THESE TIMES, Jan. 10, 2000, at 14, 14; Bill Mongelluzzo, *Dockers Return to Work After WTO Protest*, J. COM., Dec. 2, 1999, at 16, 16; Kim Murphy & Nancy Cleeland, *Labor Unions Revive Powerful Past as WTO March Looks to New Future*, L.A. TIMES, Dec. 4, 1999, at A18.

More empirically, some critics ask whether the data actually show the supposed benefits of the law of comparative advantage. For example, one critic observes that in the 20 years before Mexico embraced a development strategy based on free trade in 1983, its economy grew at an average of 6% a year, with growth varying between roughly 4% and 11%. During the dozen years after it embraced free trade, its economy grew at an average of 2% annually, varying from -4% to 4% a year. And although trade exports rose during this period by 450%, the rate of productivity increase fell, most people's real incomes fell, and income inequality increased. See Carlos Roza, *Mexico's Failed Growth Strategy*, DOLLARS & SENSE, Sept. 1999, at 10, 10-11.

cannot be corrected by trade-neutral domestic regulation, Part II argues that international trade can exacerbate each of these problems. Then, in Part III, I argue that a policy of "weak protectionism" often makes sense. I proceed to suggest that people's legitimate interest in limiting government's power to deny them access to media or cultural products is better considered under human rights law than under trade law. Before getting to these issues, however, Part I of this Essay will comment on a democratic "dialogic" conception of culture that responds to many doubts raised by critics of protectionism. These comments not only increase the concreteness of the economic analysis, but also suggest some normatively appropriate limits to cultural protectionism—limits possibly already embodied, although certainly ineffectively enforced, in non-trade portions of international law.

I. CULTURE

The normal framing of the media trade policy dispute weighs cultural claims against competing claims of economic efficiency. This Essay is primarily about the economic side of the debate. Still, some consideration should be given to what is at stake under the label of "culture." The term "culture" is notoriously difficult to define.¹⁵ This difficulty reflects more than its ubiquitousness and plasticity and the fact that culture can take different forms, such as high, ethnic, and popular, among others.¹⁶ Rather, the difficulty also reflects different commentators' use of the term as a surrogate for very different concerns.

This potential for different conceptions of culture reflecting different concerns is evident in disputes about trade. Scholarly treatments sympathetic to the United States's free trade position typically recognize the presumptive legitimacy of the concern with cultural values,¹⁷ but then proceed to denigrate its significance in one

15. See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (1985) ("Culture is one of the two or three most complicated words in the English language."); John David Donaldson, "Television Without Frontiers": *The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 *FORDHAM INT'L L.J.* 90, 147 (1996) ("Without doubt, culture is one of the most difficult and problematic English terms to define due to its amorphous and inherently subjective nature.").

16. See Goodenough, *supra* note 13, at 209–10.

17. See, e.g., Shao, *supra* note 2, at 136–37. This respectful treatment is much less universal in the political sphere. U.S. Ambassador Carla Hills called the European quotas for television "blatantly protectionist[,] unjustifiable, and discriminat[ory]." Donaldson, *supra* note 15, at 109 (quoting Ambassador Hills) (alterations in original). Similarly, U.S.

way or another.¹⁸ A close reading of the literature, however, reveals that these scholars' implicit conception of culture differs from a second conception held by many defenders of national rights.¹⁹ Supporters of free trade typically invoke what I label a "museum," "commodity," or "artifact" conception of culture, which considers culture and cultural integrity to be *content*-oriented.²⁰ Based on this conception, free trade advocates are right to question whether its value justifies trade restraints. Even as they quote and initially purportedly credit foreign claims for culture, however, these scholars do not hear the protectionist arguments or comprehend the conception of culture invoked.

Consider the nature of the artifact view of culture. In this view, culture and cultural integrity are *content*-oriented and largely *backward-looking*. Cultural integrity involves preservation of this historical content. Undoubtedly, traditional cultural content often merits respect; it would be wrong as well as ungenerous to uniformly

Trade Representative Mickey Kantor characterized the Canadian cultural identity argument as an "excuse" to "protect the financial and economic viability of the Canadian industry." Shawn McCarthy, *U.S. Challenges Our Magazine Law: Asks World Trade Group to Kill Tax on Split-Run Editions*, TORONTO STAR, Mar. 12, 1996, at D2 (quoting Mickey Kantor), available in LEXIS, News Library, News Group File, All; see also Goodenough, *supra* note 13, at 207 (quoting the same language).

18. For example, Eli Noam does not deny that culture is "worthy of support," but explains that his aim is to create skepticism and to show that these notions are "not necessarily benign; they may well mask a form of information protectionism that serves entrenched interests." ELI NOAM, *TELEVISION IN EUROPE* 25 (1991). Similarly, Donaldson exhibits considerable skepticism when he writes: "Few will argue that cultural integrity and preservation are not worthy goals, but . . ." and: "While cultural concerns may be legitimate, . . ." Donaldson, *supra* note 15, at 169 (emphases added).

19. In a discussion summarized below, see *infra* notes 131-45 and accompanying text, Will Kymlicka identifies two visions of "cultural community" in terms that parallel the argument here. A common view, which Kymlicka associated with communitarians and conservatives such as Lord Devlin, see, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS passim* (1965), identifies culture with some specific content and treats it as inherently valuable to preserve. In contrast, Kymlicka argues that the liberal must recognize empirically that membership in a cultural community is often crucial for individual identity and enabling for individual agency. The (liberal) value of cultural community lies in it being a necessary context of choice. But if serving "choice" is the cultural community's value, then the importance of providing for the existence of a context of choice cannot justify denying choice. Rather, members of a cultural community should have the right to be constantly changing the community's specific content. See WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 168-70, 196 (1989).

20. I will use these terms interchangeably as context suggests. Their common feature is that they all treat the crucial aspect of culture as its identifiable *content*. The museum view emphasizes the historical claims made on behalf of that content. The commodity view emphasizes that culture consists of items or intellectual property containing specific content that can be possessed, valued, and (presumably) transferred. The artifact view may be the most general, suggesting both of the above elements.

condemn efforts at preservation or those who value these contents.²¹ Still, many historical cultures, especially in their pure forms, are vulnerable to criticisms. Too often, elites manipulate these historical contents to deflect challenges to their rule, to justify historically developed forms of domination, and to stifle liberating change. In the extreme, preservation treats people as constituting a "living museum" in which the "natives" live as exhibits. Sectarian systems are kept pure. Aboriginals, Third World patriarchal cultures, and maybe even Frenchmen are seen as interesting specimens.²² Identifying culture with particular content invites the question of whether the culture is worth preserving—as illustrated by a critic of protectionism who, after implicitly asking this question, quoted Canadian "[a]rtists of the cultural industry . . . equat[ing] 'Canadian content' with 'crap.'"²³

Of course, free trade can threaten preservation of the museum. Any liberal commentator, however, even if admitting that the loss of any historical culture impoverishes the world in some respects, must question the justness of forcing preservation when the bulk of the people would like to change, for example, by watching American television. Free trade advocates note that some people within these societies gain by keeping their cultures roughly the way they are, but also observe that others do not. Thus, the free trade advocate properly questions how much should be given up for preservation—how much oppression can be justified in its name. The advocate asks who benefits and who pays, often with the implicit suggestion that certain elites benefit and that members of the broader public, who are denied the imported cultural goods they want, pay.

Contrast this artifact conception of culture with a second one, which I will refer to as the "discourse" or "dialogic" conception. The notion of discourse or dialogue makes participants, rather than content, central to culture. In this conception, the primary audience of a cultural product is other members of the same community.

21. Cf. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 *passim* (1995) (examining laws regarding the protection of cultural property in the United States); Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723 *passim* (1997) (assessing the validity of various theoretical justifications for the repatriation of Native American cultural artifacts under federal law).

22. After I defended trade restrictions in cultural products at a conference, a participating economist in a private side remark rhetorically asked me: "Surely you don't think the French are worth preserving, do you?"

23. Lehmann, *supra* note 12, at 200 (quoting Hester Riches, *Faith in the Future*, VANCOUVER SUN, Mar. 22, 1995, at B2, available in WL database, Canadian Newspapers, PAPERSCAN) (internal quotation marks omitted).

Members' speech to other members of the community often is contextually specific, even if universal meaning can sometimes be found in the particulars. Content with an overtly universal orientation is frequently devoid of much relevance for the cultural discourse. In this dialogic conception, culture is a living practice. Like all practice, discourses of identity and value require a context, which makes heritage crucial. Thus, this second conception treats culture as the integration of a specific heritage into a current behavioral discourse. Addition, development, and, sometimes, rejection of cultural content are inherent in this conception of culture. Rather than to preserve specific, backward-looking content, the relevant protectionist goal is to assure an adequate context for participation of members of the cultural community and to provide resources for the dialogic participants. Protection of culture in this context means assuring that members of the cultural community have meaningful opportunities to be cultural "speakers."²⁴ Culture as dialogue emphasizes both a past as context and a present as an arena for affirming, critiquing, and transforming identity.

This discourse conception of culture is implicit in defenses of a cultural exception to free trade principles. It has been a constant, for instance, in Canada. Even in the 1920s, a Canadian editorial by Frederick Paul argued that " '[n]ational periodicals allow people in the different parts of [the country] to understand one another's viewpoints, which is the first step towards co-operation and the removal of grievances.' " ²⁵ In the 1990s, Raymond Chretien, the Canadian Ambassador to the United States, saw the trade issue as centering on "the ability to maintain viable, home-grown cultural industries that tell us about ourselves."²⁶ In approving the Canadian

24. Any reader familiar with my prior work on freedom of speech will recognize a similarity. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994) (reviewing CATHARINE A. MACKINNON, *ONLY WORDS* (1993)). I have emphasized freedom of speech as an aspect of individual liberty—the right of a speaker to speak and a listener to listen to those willing, protected speakers. This liberty focus can be contrasted with a market place of ideas theory in which content is crucial—in which "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1965).

25. Magder, *supra* note 5, at 7 (quoting VIPOND, *supra* note 5, at 27 (quoting Paul, *supra* note 5, at 2)) (alterations in original). Of course, free trade might be hoped to do the same at the global level, but even the fulfillment of this aspiration would not reduce the essential need to promote understanding and cooperation within smaller political units. See *infra* Part II.E.

26. Andrew M. Carlson, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 MINN. J. GLOBAL TRADE 585, 609 (1997).

law that prohibited Canadian advertisers from placing advertising directed toward Canadians in split-run (basically foreign) magazines,²⁷ Ted Magder, a communications scholar who has taught in both Canada and the United States, argued that "the Canadian government made a choice between the speech rights of Canadian magazine publishers addressing Canadian readers, and the speech rights of Canadian advertisers."²⁸ Similarly, in explaining the fundamental importance of the Canadian broadcasting system, former Canadian Minister of Communications Flora McDonald asserted that "[i]t plays a major role in defining our national, regional, local[,] and even our individual identities."²⁹ As the Canadian-born Magder explained, "[m]ost of all, culture is an ongoing dialogue, a conversation about who we are and who we want to be."³⁰

The same dialogic conception has been crucial to the European position. In attempting to explain the "the European mind," an American academic, although critical of the European Community's Television Without Frontiers Directive,³¹ noted that the Europeans resist total domination of market forces in part because of "the vital role broadcasting has played in the development of informed democratic political discourse."³² French President Francois Mitterrand argued that the question raised by free trade "is the right of each country to *forge* its imagination and to *transmit* to future generations the representation of its own identity."³³ "Forging" is an active, essentially dialogic process that, Mitterrand emphasized, must involve the people of the country. "Transmitting" does not imply forcing an artifact on a future generation that they must then preserve, but rather giving them access to a heritage. Culture being

27. Split-run magazines are magazines produced in two or more editions with all or mostly the same editorial content. The primary difference usually is advertising directed at a different group of consumers—for example, a Canadian edition of an American magazine might have Canadian advertising and maybe one or two Canadian stories or a Canadian cover.

28. Magder, *supra* note 5, at 50. He explained that magazines "are an important forum for the expression of the ideas, attitudes and values of the reading communities they represent." *Id.* (emphasis added).

29. Lehmann, *supra* note 12, at 197 (quoting McDonald).

30. Ted Magder, *Going Global*, CANADIAN F., Aug. 1999, at 11, 15.

31. The 1989 Directive, among other elements, directed member states to require that television broadcasting contain at least 50% European content, as therein defined and subject to certain exceptions. See, e.g., Lawrence G.C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe to Regulate Culture*, 8 EMORY INT'L L. REV. 255, 256 (1994).

32. Donaldson, *supra* note 15, at 145.

33. Shao, *supra* note 2, at 137–38 (quoting Mitterrand) (emphasis added).

crucial to identity does not imply a need to preserve any specific cultural content. Rather, culture is a historically developed context in which those whose identity is at stake participate. Moreover, "the right of each country" does not require (or arguably even permit) limits on the cultural possibilities considered by the participants. As one group of European leaders has indicated, the watchwords of cultural protectionists are pluralism, diversity, and citizen opportunity, choice, creativity, and participation.³⁴ Significantly, the dialogic conception of culture emphasizes the desirability and necessity of people considering or forging identity in a grounded and internally accepted manner.

Cultural discourse arguably is distorted and its helpfulness to people is reduced to the extent that the profit needs of market-oriented firms, rather than the creative and normative impulses of human creators, determine its content. Importantly, this view of distortion does not claim that a culture has an essentially "right" content or that culture has a specific historical content that needs to be preserved. Rather, the focus is on the integrity of the cultural process. The normative claim is that, whatever its evolving content, culture should reflect more the discourse of civil society and the lifeworld than the self-directed logic of the economic subsystem.³⁵ A properly "living culture" embodies judgments that grow out of

34. See INTERNATIONAL MEETING ON CULTURAL POL'Y, FINAL REPORT: PUTTING CULTURE ON THE WORLD STAGE *passim* (1998) (reporting on the results of an international meeting of Ministers of Culture from 20 countries, held in Ottawa, Canada, June 29-30, 1998) [hereinafter FINAL REPORT]. The Stockholm Action Plan of an Intergovernmental Conference on Cultural Policies for Development, *see id.* at 24-30, the result of an earlier meeting in Stockholm, March 30 to April 2, 1998, exhibited an attitude to culture very different from the commodity perspective promoted by the United States. The "plan" stated that "cultural goods and services [are] . . . not like other forms of merchandise," *id.* at 28, and emphasized the need for governments to support "the development of a local, creative and participatory cultural life and pluralistic management of diversity," *id.* at 27.

35. See C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 374-80 (1998) (describing this view of distortion from a democratic perspective). Jürgen Habermas effectively argues that pathologies occur due to colonialization of aspects of the lifeworld and public sphere by the system realms of the market and bureaucratic power. He shows that "[u]nlike the material reproduction of the lifeworld, its symbolic reproduction cannot be transposed onto foundations of system integration without pathological side effects." 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 322-23 (Thomas McCarthy trans., 1987); *see id.* at 304-05, 311-12, 330, 345. The liberating cultural and political potential of the mass media, with feet in realms of both the lifeworld and the systems worlds of the state and economy, is undermined to the extent that the imperatives of the latter control its role in the former. See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger trans., 1989); 2 HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, *supra*, at 389-91.

people's own experiences and their efforts at self- and world-understanding. Critics of market influences claim that the market, in contrast, generates culture to serve its internal system needs—that is, profit maximization. More concretely, critics often conclude that the market mainly promotes culture with particular commodified content and materialist values. Some forms of trade protectionism (often also involving subsidies to domestic non-market cultural products) could help a country restrict this market colonization of culture and empower less market-dominated bases of discourse. Thus, an international meeting of cultural ministers has observed that “the production and distribution of cultural works cannot be left to the marketplace alone,” and the Greek Minister of Culture has argued that “some protection [is needed] in order to respect and preserve political, aesthetic and ideological *liberalism*.”³⁶

International (and American) critiques of U.S. media products regularly deplore their consumerist, individualist, and materialist orientation, as well as their cultural shallowness.³⁷ Under the rubric of defending the importing country's domestic culture, this critique may represent, in part, resistance to that ideological content. Still, this content-based concern is hardly the only ground for defending domestic culture. The defense can reflect people's views about the appropriate discursive or internal process of national cultural life as much or more than any claim about this cultural life's content.³⁸

Of course, trade restraints that favor domestic cultural industries are no panacea. They will not necessarily protect a free, undistorted domestic culture. The optimistic hope is that a country will design a regulatory regime to increase the independence of a public sphere from both governmental and market distortions. Nevertheless, state regulatory regimes sometimes merely replace market distortion with governmental distortion. In the United States, this evil is partially blocked by the First Amendment. In contrast, reliance on a free trade regime may do little to alleviate the danger of improper,

36. FINAL REPORT, *supra* note 34, at 14, 16 (emphasis added).

37. This ideological tilt may be a predictable economic consequence of producing media for international distribution. See *infra* notes 77–81 and accompanying text.

38. Thus, although making the content critique when he notes that “[t]he claim of the cultural imperialists is that global cultural industries are pushing all human cultures toward the culture of consumer capitalism,” Daniel Hallin illustrates this dialogic emphasis when he states as obvious “that issues of access, voice, the representation of diverse social interests and the creation of dialogue among them[] belong today at the forefront of the agenda for . . . media politics.” Daniel C. Hallin, *Broadcasting in the Third World: From National Development to Civil Society*, in MEDIA, RITUAL AND IDENTITY 153, 164, 162 (Tamar Liebes & James Curran eds., 1998).

distortive governmental regulation. Governments that would impose content censorship presumably could do so on a geographically non-discriminatory basis, thereby adhering to free trade mandates.

More generally, an international legal order that permits protectionism hardly guarantees that a country will regulate to prevent the commercial distortion of its culture. At best, the protectionist option allows and invites each country to struggle over the extent and form of commercialization of its cultural spheres. A free trade regime, however, can seriously impede a country's resistance to commercialized distortion. Free trade rules might enable foreign commercialized media to overwhelm domestic non-commercialized media or at least to make subsidization much more expensive.³⁹ Still, as compared to international commercialization, even unimpeded domestic commercialization may be more responsive to internal needs and domestically salient issues. Domestic commercialization is likely to manifest a greater focus on specifically domestic demand and to embody the background experience and interests of the local people that domestic firms are more likely to employ to create domestic content. Thus, both domestic non-market and domestic market media are likely to contribute to a "discursive" culture—that is, a dynamic reflection or meditation on identity and on collective problems, values, policies, and ambitions, that is grounded in a particular heritage.

The policy implications of this dialogic conception of culture are very different from those suggested by the artifact or museum view. The goal of the dialogic conception is to maintain (or create) a dynamic local cultural discourse. This goal requires preserving (or creating) local cultural industries. It could justify both direct and indirect subsidies—for example, screen or broadcast percentage quotas providing guaranteed space for domestic products—as well as some discriminatory burdens on imports, especially burdens designed to enhance opportunities for domestic cultural products. Nevertheless, because the value of culture lies in it being a context for choice, any categorical exclusion of imports should not be allowed because it would stunt discourse. Accordingly, a Canadian government advisory group, while proclaiming governmental policy

39. In the GATT negotiations, the United States offered to compromise its free trade position concerning the illegitimacy of film subsidies if the subsidizing country would agree to give its subsidies to Hollywood too! See *French Do Not See Culture as a Good to Be Bought and Sold*, IRISH TIMES, Dec. 9, 1993, at 6, available in LEXIS, News Library, News Group File, Beyond Two Years; Julie Wolf, *GATT Talks Stumble on Films and Flying*, THE GUARDIAN (London), Dec. 8, 1993, at 15.

objectives of developing "Canadian cultural content" and ensuring that it "is available to all Canadians," has emphasized that this should be done "without limiting [Canadians'] access to foreign cultural products."⁴⁰

In contrast, the artifact conception limits itself to preserving heritage or, at most, to adopting or creating conforming additions that illuminate and maintain that heritage. Preservation could require fanatical protectionism. Exclusion of all "polluting" outside content would be necessary. Interestingly, this illiberal practice might seem more comprehensible to free trade advocates, who often attribute this goal to cultural protectionists, than to the actual defenders of a national cultural discourse. Although contrary to free traders' interests, purity of local content and exclusion of outside content make sense given the free traders' tendency to view culture as a commodity or, at least, as a potentially possessable and, thereby, saleable content.⁴¹ Conveniently, however, the extremism of a purity goal—and the inevitable ineffectiveness of its implementation—make such cultural protection efforts very vulnerable to the free traders' critiques.

Free traders' museum or artifact conception of culture is evident in their five main critiques of a cultural exemption to free trade principles. Each criticism implicitly assumes the artifact conception, but loses force against protectionists who value the dialogic conception. First, some commentators question the positive value and pedigree of "national" culture. Eli Noam, for example, argues that the emphasis on national culture is largely a nineteenth century innovation used by elites to manipulate subject populations and to extract loyalty.⁴² The primary beneficiaries of allegiance to national culture, he argues, are political elites who use it to prop up their rule by generating hostility and sometimes violence against outsiders. Noam's observations have obvious merit⁴³ and are related to why the

40. CULTURAL INDUS. SECTORAL ADVISORY GROUP ON INT'L TRADE, CANADIAN CULTURE IN A GLOBAL WORLD: NEW STRATEGIES FOR CULTURE AND TRADE 3 (1999) (emphasis omitted) [hereinafter NEW STRATEGIES].

41. Thus Magder characterizes Jack Valenti's view as considering "culture as something that is fixed and immutable," although for Valenti this reflected a view that Hollywood's products, despite their appeal, would not "tear a nation's allegiance from its culture," and thus that free trade would not create any problem. Magder, *supra* note 30, at 15 (quoting Valenti, head of the Motion Picture Association of America).

42. See NOAM, *supra* note 18, at 23. Noam also observes that sometimes protection of national culture is used as a mask for "information protectionism that serves entrenched interests." *Id.* at 25; see Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667 *passim* (1994).

43. For current examples, Noam easily could refer to Serbian and other Balkan

merits of nationalism as a social phenomenon are a matter of continuing controversy. His objection, however, has force only against particular uses and particular contents of national culture—presumably not against a nationalistic dialogic practice of people trying to make sense of themselves in a modern world. In any event, the imminent disappearance of either nation-states or nationalism is doubtful. Although some forms of participatory global politics may develop,⁴⁴ any democratic politics will long be grounded largely in independent sovereign states and in subgroups and sub-jurisdictions of these nation-states.⁴⁵ As long as this situation holds, the policy question should concern the necessary conditions for a “good” or “liberal”—that is, a more open and more democratic—nationalism. Surely these conditions include the preservation (or creation) of both national and local subgroup discourses.⁴⁶ This dialogic conception of culture discredits oppressive historical uses of national cultural politics. From this dialogic perspective, the issue becomes how to distinguish protectionism that supports an open and vibrant discourse from protectionism that undermines the discourse’s openness and fairness.

Second, free trade advocates often question the depth of national culture. Their characterizations can reduce distinctly Canadian culture to two guys sitting before a map of Canada, talking about beer and hockey.⁴⁷ Similarly, given the multiplicity of nations and cultures in Europe, commentators wonder whether protectionist quotas for European-produced television—which presumably still allows

nationalisms. In an excellent, sensitive article, Oliver Goodenough notes that having a foreign threat may be useful or even necessary for nation-building. The *battle* over cultural protectionism, for example, could itself help establish the United States as the enemy and create a Canada, defined as “not United States.” Goodenough, *supra* note 13, at 247–49. Thus, the “real point of the fight [over cultural protectionism] is the fight itself.” *Id.* at 247. Goodenough concludes, however, that this strategy is fatally flawed. By accepting the legitimacy of cultural protectionism and of the protected identity as a basis of nationhood, he argues, cultural protectionists justify the unraveling of Canada, first as Francophone Quebec secedes and then as the First Nations peoples exit. *See id.* at 250–52.

44. *See infra* Part II.E.

45. In this Essay, I use “nation-state” as the equivalent of “sovereign country,” and this usage implies nothing about the relation or lack of relation between the “state” and the “nation.”

46. *See* KYMLICKA, *supra* note 19, *passim*; Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE, at 109, 109–42 (Craig Calhoun ed., 1992).

47. *See* Lehmann, *supra* note 12, at 201. Lehmann also illustrates her complaint that no one “has verbally articulated what [Canadian] identity is,” with the Canadian joke that “define[s] a Canadian as an unarmed American with Medicare.” *Id.* at 200.

dominance by a few firms that can ignore most more specific cultures contained in Europe—can possibly be premised on a concern for culture rather than merely on advantage for European cultural industries.⁴⁸ Critics of protectionism question the reality of this European culture, asking whether Spain actually has more in common culturally with Sweden than with Argentina.⁴⁹ But again, the critics are treating culture as specific content—an object or artifact. They are right, for instance, in noting that a great deal of England's cultural content, including its language, is more like that in the United States than in Greece. A dialogic conception, however, answers these objections. If Europe hopes to forge governmental and other collective institutions in which people relate on grounds of equality and respect, then it needs to foster a European discourse. For that purpose, people in Greece *are* more relevant to the British than are Americans. Moreover, the legitimacy of protecting discourses against domination by global trade—the premise that allows legal protection of “European” culture—also authorizes additional domestic laws protecting Europe's many, more local, national cultures. Dialogues oriented to forging and understanding “national” identity (or identities), whatever the current depth of these identities, are crucial for a democratic political order.

Free trade advocates' third claim argues that “[u]sing the nation as a cultural unit is to some extent arbitrary.”⁵⁰ Protectionism makes little sense on cultural grounds because “[c]ulture is often more alien across social classes and age groups than across borders.”⁵¹ Cultures, such as youth culture or proletarian culture, provide many people with their central foci.⁵² This point, of course, is persuasive if culture is identified with people's habits and perceptions. The claim looks at what cultural content, what artifacts, play a major role in people's lives—not at what dialogues need nurture. National culture may not be intrinsically a more vital part of a person's life than various transnational categories. Nevertheless, the nation as a cultural unit is hardly arbitrary if the concern is the discourse of people living in the same area, especially people who potentially participate in the same political order and who are bound by the same laws. The nation can

48. See Donaldson, *supra* note 15, at 154. Noam suggests that the motives behind “[e]fforts to create a common European cultural front against Hollywood . . . have often been suspiciously economical.” NOAM, *supra* note 18, at 24.

49. See, e.g., NOAM, *supra* note 18, at 24; Donaldson, *supra* note 15, at 150; Shao, *supra* note 2, at 140.

50. NOAM, *supra* note 18, at 23.

51. *Id.*

52. See Shao, *supra* note 2, at 140.

provide a central, grounded locus of dialogue about identity, values, and politics. Moreover, only national sovereignty authorizes market interventions to protect or enhance subgroup identity and dialogue as a means of supporting a meaningful pluralist or multicultural democracy.⁵³ Thus, from a dialogic perspective, the importance of a national democratic discourse justifies resistance to automatic acceptance of free trade rules.

Similarly, free trade advocates suggest that the protectionists' focus on the nation is arbitrary because ethnic culture does not track national borders.⁵⁴ Cultural integrity is an arbitrary value, they argue, because few cultures are pure; rather, they are themselves mixtures of different cultures.⁵⁵ In fact, the United States, the land of immigrants, presumably embodies all European (as well as most of the rest of the world's) cultures—a factor sometimes suggested as a reason for the international success of Hollywood products.⁵⁶ Again, this point has force only if the protectionists' concern is with the quality or purity of a museum culture, of some particular historical cultural system. True, "any governmental trade measure aiming at cultural specificity [is arbitrary]."⁵⁷ The claim that "a Canadian from Toronto has more in common with a Bostonian than with someone from Alberta"⁵⁸ is surely right for some purposes—at least, for some people in Boston and Toronto. Nonetheless, the Toronto *citizen* has much more in common with the person in Alberta, even when they disagree, when the issue is selecting a Prime Minister and probably when the issue is considering relations with the First Nations peoples, determining whether health insurance is a national or regional issue, or deciding how to relate to the United States. In other words, the Toronto and Alberta residents have in common the issues themselves. If Canada is to exist as a country, it almost certainly is more important for the person from Toronto to hear the views of people from Alberta and Quebec than from people in Boston.⁵⁹ The crucial concern is with the

53. See Baker, *supra* note 35, at 383–87 (arguing that a preferable complex theory of democracy would require interventions when, as likely, the market did not adequately support media for subgroups within society).

54. See NOAM, *supra* note 18, at 23; Donaldson, *supra* note 15, at 151; Shao, *supra* note 2, at 146.

55. See Shao, *supra* note 2, at 140. Shao's focus on culture as an artifact with particular content as opposed to a discourse is also evident in his complaint about the difficulty of "delineat[ing] a particular culture at a given time." *Id.*

56. See NOAM, *supra* note 18, at 22.

57. Shao, *supra* note 2, at 140.

58. Nina Munk, *Culture Cops*, FORBES, Mar. 27, 1995, at 41, 42, *quoted in* Goodenough, *supra* note 13, at 253 n.153.

59. The cross-border connections, however, are not always irrelevant. Because some

maintenance and quality of a participatory discourse.

The fourth criticism made by free traders is that even if cultural integrity is worth protecting, protectionist measures may be ill-designed to achieve that goal.⁶⁰ From the artifact view of culture, this objection is correct. The European Community's local-content requirement, for example, may be "entirely ineffective at encouraging programs produced in Europe or elsewhere that promote European culture."⁶¹ The requirement relates more to employment than to meaningful cultural content. Thus, U.S. programming, such as an American documentary on European art, "may promote European culture more than European programs."⁶² This criticism, however, clearly assumes a concern with "content" rather than with "discourse." For example, a quality American film on the French Revolution could contribute more as an accessible representation of French history, even for the French, than a French knock-off of an American game show.⁶³ European television quotas that advantage the latter over the former seem particularly ill-suited for preserving French culture. From the perspective of preserving space for people engaged in a national discourse, however, the rules make sense, even if the quality of the discourse is sometimes questionable (and, often questioned).

Fifth, protectionism purportedly encourages parochialism in a country's cultural industries, while free trade allegedly allows these domestic industries to show the world their quality as well as to induce them to produce more popular, and hence more desirable, material.⁶⁴ Even if the economic premises of this suggestion were plausible,⁶⁵ it assumes that the value of culture lies in the universal appeal of its content rather than in its appeal to domestic audiences.

groups within a state will identify with those outside, some forms of protectionism—for example, a Canadian law restricting access to French culture—might seriously hamper some Canadians' participation in internal Canadian discourse.

60. See Donaldson, *supra* note 15, at 174–75 & n.491; Shao, *supra* note 2, at 140.

61. Donaldson, *supra* note 15, at 174–75.

62. *Id.* at 175 n.491 (citing 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. LAW. 97, 134 (1993)).

63. See *id.* at 170–71.

64. Lehmann recommends that Canada can best preserve its culture by "open[ing] its doors and eliminat[ing] borders" and "show[ing] the world its identity." Lehmann, *supra* note 12, at 217–18. If the economics was plausible, this recommendation would make considerable sense if culture is a particular content, but not if it is a dialogue among a nation's citizens.

65. But see *infra* Part II.A (arguing that markets are ineffective at producing "public goods").

If cultural value lies specifically in members of a national community speaking to other members, which is the claim of the discourse theory, the proposal is unhelpful. *Even if* free trade enabled a nation to export plenty of cultural material, it could also impoverish the domestic cultural dialogue if it caused the nation's cultural industry to change its content to compete better internationally, but to speak less directly or subtly to domestic audiences.

Although free trade advocates purport to recognize the protectionists' concern for culture, the two groups talk about very different things—a museum or artifact culture on the one hand and a dialogic culture on the other.⁶⁶ A crucial subsidiary point is that the two conceptions of culture have very different policy implications. Free trade advocates view culture as particular content, and cultural products are ultimately valued or disvalued because of good or bad features of their content. Protection of culture under this museum or artifact conception requires rules that block outside content or that at least limit its availability sufficiently to prevent successful challenges to a country's traditional cultural content. Free traders are correct that, historically, some authoritarian—often sectarian—regimes have tried to protect or promote culture as conceived here, usually not only with censorious import restrictions, but also with severe internal limits on expressive freedoms. More importantly, free traders are right to object to the protectionist policy that this conception suggests.

The free traders' critique, however, misses the point if the cultural concern is with protecting internal creative and discursive processes as well as the conceptual resources that a local heritage makes available for such processes. The key policy implication of the discourse conception of culture is the need to maintain and nourish domestic media. Outside content cannot be excluded, however, because it too can contribute usefully to local discursive processes about national and subgroup identities and their social and political needs. Given this goal, the often-observed fact that few countries have a monolithic culture does not negate—indeed is not even relevant to—the propriety of trade restrictions. Rather, from the discourse view, border restraints are legitimate if they help to protect diverse internal sources from decimation without excluding outside content. Intelligent democratic media policy also probably requires

66. For the protectionists, this is somewhat of an overstatement. Although I have given examples of an emphasis on the dialogic conception, cultural protectionists often are not specific and sometimes appear to mix the two notions.

non-market internal policies to promote subgroups' self-understanding and their participation within the country's overall cultural and political processes. Unrestricted international free trade could block some policies to promote both national and subgroup public spheres that rely heavily on local products. Moreover, by reducing the ranks of people employed in domestically oriented media production, competition from cheap global media products could undermine the economic viability of professional participation in national discourses. In other words, many of the free traders' objections to cultural protectionism are well taken when applied to the target as they conceive it, but their arrows completely miss most protectionists' legitimate concerns.

II. ECONOMICS

Acceptance of the market's merits has achieved considerable hegemony. Although general critiques are common, I will not take them up here. Instead, I want to consider whether media products have special attributes that undermine the general assumption that markets achieve proper outcomes in this context.

The standard economic (and democratic) perspective treats consumers' own evaluations of their needs and interests as "sovereign." This consumer sovereignty approach is questionable in some contexts, most obviously when the consumer is a child. Nevertheless, even accepting this standard economic perspective, my claim is that markets predictably and dramatically fail to provide appropriate production and distribution of media products. This Part considers three analyses supporting this assertion.⁶⁷ First, markets work well only with respect to "private goods." But because media products have substantial "public good" aspects—specifically, substantially non-rivalrous use of media content—markets fail to produce enough, and they sometimes favor less-desired media products. Second, markets work only if goods are properly priced, that is, priced at roughly their true cost. Substantial negative and positive externalities of media products result in improper pricing. This pricing leads to excessive demand and over-supply of media products with substantial negative externalities and to too little demand for and production of those with positive externalities. Third, markets work well given the premise that they properly identify and measure people's preferences. Identification takes place

67. These three analyses are developed more extensively in Baker, *supra* note 8, at 322–411.

only within market transactions, and measurement is based on an individual's willingness and ability to pay. Significantly, there is nothing "objectively" correct or accurate about this method of identification or its results. Although all capitalist societies rely on market-based identification and measurement for many purposes, all democracies reject these methods for other purposes.⁶⁸ Many, though maybe not all, media products have important traits that are similar to those for which societies rely on non-market measures of people's values or preferences. This similarity makes reliance on the market at least questionable.

If markets fail to provide the media products that people want, then governmental interventions or, in some cases, non-market, voluntaristic actions, are necessary. This conclusion, however, is not relevant to the dispute over free trade unless domestic and foreign media products differ in ways relevant to how markets in these goods fail. International trade law generally does not forbid regulation. Rather, it primarily requires "national treatment"—that is, the application of the same rules to domestic and foreign goods and no other disfavorable treatment to foreign products. If markets in both domestic and imported media products create the same problems, free trade principles presumably would not prevent responsive regulations aimed equally at both. For example, if consumption of pornography is unacceptable, a ban on sales of both foreign and domestic pornography should not offend trade law.⁶⁹ Thus, each of the three analyses must consider whether international free trade exacerbates market failures in ways that justify differential treatment of foreign and domestic media products.

A. *Public Goods and Monopolistic Competition*

Markets do not adequately respond to demand for and, therefore, are ineffective at producing pure "public goods"—those

68. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 64-91 (1983).

69. If, however, the concern is that production of pornography results in harm to the people involved in its production (children for instance) and if the United States (legitimately) asserts this concern only with respect to American children, then uniform treatment of domestic and foreign child pornography is arguably constitutionally overbroad. In *New York v. Ferber*, 458 U.S. 747 (1982), however, the Court apparently rejected this view. Although the majority seemed not to consider the issue in the overbreadth challenge, see *id.* at 774, Justice Stevens read the majority opinion to hold that New York's interest in protecting children from exploitative use could justify its ban on child pornography even though the ban applied to foreign films in which the child actor resided abroad, see *id.* at 779 (Stevens, J., concurring in the judgment).

goods the use of which is both “non-rivalrous,” where one person’s use does not affect another’s use, and “non-excludable,” where no one can be stopped from using an available good. Once Sue eats an ice cream cone, which is a private good, it is not available to Sam. However, the government’s national defense system that protects Sue unavoidably protects Sam too, even if he does not pay for it. Providing a public good for one customer unavoidably benefits other potential customers. An enterprise that cannot collect from all who benefit, however, will have inadequate incentives to produce.

Media products, and intellectual property more generally, have at least one public good characteristic: their use is substantially or completely non-rivalrous due to the low cost, as in the case of print media, or zero cost, as in the case of broadcast media, of providing them to additional users. Still, media producers often can create a substantial amount of “excludability,” which allows them to charge additional users. Of course, an initial reader can pass on a newspaper or book, and an over-the-air broadcaster may be unable to exclude any listening or viewing audience. On the other hand, desire for possession, convenience, and contract or copyright terms often leads to individualized purchases of books or newspapers. A film owner can require a separate ticket for each moviegoer, scramble the film when broadcast, or provide it over pay cable. Moreover, many media providers transform some freely or cheaply available media content into a different private good—namely, audience members’ attention, an excludable product that owners can then sell to advertisers. The centrality of excludability to the economic incentive to produce is the reason the U.S. Constitution authorizes grants of copyright.

The key factor for the economic analysis here, however, is the other public-good element: media products’ substantially non-rivalrous use. This element exists as long as copy costs of media products are sufficiently low. And it differentiates media economics from the economics of typical private goods—for example, the ice cream cone mentioned above.

Unless a firm can adequately price discriminate—that is, sell to different users at different prices—it will have inadequate incentives to provide sufficient goods. Sometimes, it will have inadequate incentives to provide the good at all, even though people collectively value the good at more than it would cost to supply it.⁷⁰ Even when

70. For example, assume that a good costs \$12 to produce initially, but that copies are costless, and that three potential purchasers are willing to pay \$9, \$5, and \$3 respectively for the good. If it is unable to engage in effective price discrimination, the producing firm

the firm can produce a good, any selling price above zero, or whatever the "copy cost" is, will exclude some potential users and create an inefficiently restricted distribution.⁷¹

Non-rivalrous use has both explanatory and policy relevance for international trade. First, media outlets sell their products at radically different prices from country to country.⁷² Commentators sometimes disagree about how to characterize this difference. For most private goods in competitive industries, substantially lower prices for foreign sales strongly suggest "dumping," that is, selling at below cost. International trade law considers dumping a major "sin" because the dumped goods' low prices compete unfairly with those of the importing country. Trade law agreements generally outlaw dumping and often allow various defensive responses, including retaliation by the receiving country.⁷³ Non-rivalrous use, however, means that the exported media product is not sold below cost because there are no significant additional costs beyond those already incurred by producing it for its domestic audience. The price differential occurs because national borders segment markets, making price discrimination easier. Unlike dumping, this price discrimination presumably increases efficiency by making it profitable to produce and more widely distribute goods that people want.⁷⁴

Second, this public good aspect of media products explains the commonly observed dominance of the United States in the international trade in films and television programming.⁷⁵ *If the price*

would have three pricing options to recover its costs: (1) to sell the good for at least \$12 to one customer; (2) to sell at \$6 each to two customers; or (3) to sell at \$4 each to three. The result is that a good that costs \$12 and is collectively valued at \$17 ($9 + 5 + 3$) will not be produced because the customers would not accept any of the company's pricing options.

71. In the example *supra* note 70, if the second user valued the good at \$6, the firm could cover its costs by selling the good for \$6 each to two customers. However, this price would exclude the third user even though it would cost nothing to supply this customer too, and the customer would receive a \$3 value by gaining access.

72. See WILDMAN & SIWEK, *supra* note 6, at 4-7.

73. See The World Trade Organization, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, pt. I, art. 2 (Apr. 15, 1994), *reprinted in* H.R. DOC. NO. 103-316, vol. 1, at 1463 (1994) (Sup. Docs. No. Y1.1/7:103-316/V.1); EDWIN VERMULST & PAUL WAER, E.C. ANTI-DUMPING LAW AND PRACTICE 3 (1996).

74. See WILDMAN & SIWEK, *supra* note 6, at 3-4; *see also* Shao, *supra* note 2, at 124 (recognizing that this price discrimination "in world markets is beneficial to the extent that it reduces inefficiency").

75. Wildman and Siwek create a simple economic model that largely explains trade patterns in media products based on this public good quality combined with several other obvious assumptions, such as the existence of some preference for domestic culture and language. See WILDMAN & SIWEK, *supra* note 6, at 2-3, 67-77. In contrast, Noam merely creates confusion when he treats trade in audio-visual products as functionally equivalent to trade in traditional private goods such as Swiss watches and New Zealand kiwi fruits.

to a consumer is the same, a consumer typically prefers the stereo, meal, car, or suit on which more was spent to produce, or, in other words, which has better inputs. Of course, specific tastes of a consumer for a particular item or a unique design can sometimes override this tendency. So can the inaptness of a producer in the use of even high quality inputs. Nevertheless, consumers seldom get this choice—that is, seldom are goods that cost a lot to produce sold for as low a price as are cheaply produced goods. Usually, the high product cost means a higher price, which requires finding a consumer willing and able to pay more. Therefore, purchasers typically must make a trade-off between higher quality and lower price. Or, at least, this trade-off holds true for most private goods.

For media goods, the dynamic is very different. As long as copy costs are minimal, the production budget for a single item depends not on the amount one individual will pay but on the number of such paying consumers to which the firm can sell the single product (or its cheap copies). The producer's opportunity to create a "better" product—one with higher monetary inputs—is tied directly to the size and wealth of the potential audience. Looking solely at domestic markets, this fact means that media products in larger and wealthier countries will have the largest production budgets, a situation that has long permitted American producers to have large budgets.⁷⁶

Now introduce international trade and hold constant other factors, especially local tastes. If distributors sell domestic and imported media products at the same price, consumers in all countries generally should prefer the products with the higher budgets, typically the American products. In reality, however, other factors cannot be held constant. Most audiences prefer their own domestic content—content in their own language and dealing with their own cultural experiences and social issues. For the country with a large and wealthy domestic audience, both the larger production budget and

See NOAM, *supra* note 18, at 15. Why he suggests this equivalence is difficult to understand. Maybe he refuses to note the public good aspect of media products because to do so would undermine his attempt to deny the structural economic basis of the advantage that U.S. firms, that is, "Hollywood," have in the audio-visual arena. Unlike Wildman and Siwek, Noam finds the export success of Hollywood's high cost producers paradoxical. He tentatively explains the success by invoking various factors such as U.S. concerns being universal and thus having foreign appeal and the United States being in the technical forefront of filmmaking just as France is in winemaking. *See id.* at 21–23.

76. After putting aside countries with non-market economies, such as China, Wildman and Siwek show that English speakers are the largest and wealthiest market and that the United States clearly dominates as to English. *See WILDMAN & SIWEK, supra* note 6, at 85.

the domestic content preference should favor the domestic product. Predictably, then, Americans consume primarily American media products.⁷⁷ For countries with smaller domestic audiences over which to spread costs, the U.S. advantage of a higher budget and the local advantage of domestic content should push in opposite directions, leading to some balance between imports and domestic products. Logically, the proportion of consumption devoted to domestic media products should increase the greater the size and wealth of a country's domestic audience and the greater the separation between its domestic culture and language and the culture and language of exporting countries. Likewise, similarities between language and culture help explain observed regional trading patterns. Still, the larger production budgets permitted by the large and wealthy domestic audiences predictably give American products a significant advantage in the export market—precisely the result reported.⁷⁸

This predictive analysis can be taken a step further. Eli Noam, for instance, offers a simplified but useful approach that can explain some of the impact of international trade on media content.⁷⁹ Noam suggests that a media producer might consider three types of content inputs: domestic (*D*), universal (*U*), and foreign (*F*)—with the assumption that, on average, domestic audiences will positively value *D* and, perhaps to a lesser extent, *U*, but will disvalue *F*. A foreign audience will have the reverse reactions to some of this content, disvaluing the first country's *D* content and potentially valuing *F* (if it is about them) but, like the domestic audience, will positively value *U*.⁸⁰ In creating media content, the economic prediction is that a

77. See *id.* at 22–26 (discussing the limited success of film imports in the United States). In 1983, 2% of American television programming was imported, while every other Latin American or European country (except for the Soviet Union at 8%) for which there was data reported import percentages in the double digits, ranging up to 66% in Ecuador and Iceland. See *id.* at 42–43.

78. See *id.* at 13–48, 83–98, 170–75. This economic logic need not be the only factor contributing to American dominance. Some commentators describe American foreign policy (imperialistic) initiatives as having contributed to the prevalence of U.S. products. Others less persuasively attribute the popularity of U.S. products in part to Americans just being better at this form of service production. See, e.g., NOAM, *supra* note 18, at 22.

79. See NOAM, *supra* note 18, at 18. Of course, any analytic modeling of audiences' tastes or preferences must be designed to further the purpose of the modeling. Moreover, as all television network programmers and Hollywood studio heads know, popular tastes are sufficiently unpredictable that any modeling will be quite primitive.

80. Henceforth, I mostly ignore foreign content, *F*, because it is the least favored content—at least for a producer from any country that has a significant domestic audience. Of course, sometimes a producer will create content primarily for a particular foreign market, especially a lucrative foreign market. For example, both Canadian and U.S. companies operating in Canada for labor or location reasons sometimes produce content

producer should include each element until its cost becomes greater than the revenue its inclusion allows the producer to extract from potential audiences. This model predicts that media products made for domestic audiences will contain mostly *D*, some *U*, and little if any *F*. Although producers might increase the amount of *F* if they believe there is a potential for significant export sales, this approach has a serious disadvantage in that *F* reduces the content's value to domestic audiences. Therefore, generally the dominant strategy for a producer seeking to export its creations is to increase *U* and sacrifice some *D*. The amount of *D* sacrificed should increase as the portion of revenue the producer expects to obtain from export markets rises. This expectation of revenue should be greater for producers in any country, in particular the United States, that has a natural trade advantage due to larger program budgets reflecting the larger size and wealth of its domestic market. This analysis indicates that America's pro-free trade policy is not only economically advantageous, but also is essentially a content-related media policy that tilts production toward more *U* and less *D*.⁸¹

The precise content suggested by these symbols is not obvious. Indeed, studio executives are paid handsomely for the treacherous task of predicting audience appeal. Still, the categories' coverage is not entirely opaque. Local language, complex dialogue, local humor, references to local or national history and culture, themes dealing with unresolved national issues, and even universal themes dealt with through complex weaving of national or local cultural materials tend to be heavily *D*. Although literary and film critics often praise such

primarily for the U.S. market. Similarly, many multinational media companies produce and sell domestic content within a country in which they operate, even though the content is foreign to the place where the companies are incorporated and where the bulk of their equity owners live. Mostly, this and related complexities raise issues of corporate globalization more than of trade law. See generally EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA: THE NEW MISSIONARIES OF CORPORATE CAPITALISM* (1997) (describing the corporate globalization of media firms). Of course, domestic trade law must decide whether to characterize particular products as imports or local.

81. See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (holding that a content-discriminatory law is presumptively unconstitutional); cf. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 619–20 (1991) (arguing that facially neutral laws that have significant content-discriminatory effects should be treated constitutionally as content discriminatory). Contrary to strong dicta in *Turner*, as long as a law's purpose is not to *suppress* certain content, content-oriented media laws have, historically and appropriately, been regularly upheld against First Amendment challenges; the merits of such laws should be judged as a policy matter. See C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 93–114.

content, free trade disfavors it. Maybe the often-criticized shallowness of American cultural products is less intrinsic to American creativity or tastes—for example, does it apply to less exported American theater?—than to the commercial realities of producing these products for export. In contrast to these *D* items, which the exporter should avoid, most observers believe action, violence, sex, and slick production qualities have relatively universal appeal. Thus, the predictions about content: American video products will feature these *U* elements more than will the cultural products of countries relying less on export revenues. Foreign audiences will buy relatively large amounts of these American imports, not so much because they affirmatively value this type of content—they predictably would prefer more of their own *D*—but because of *U*'s relative acceptability, combined with the advantage of the low price of these imports,⁸² and the imports' use of large production budgets to infuse the content with slick and appealing production attributes.

So far, this analysis has been explanatory—accounting for the leading role of the United States (Hollywood) in the media export market and examining the impact this export trade predictably has on content. Nothing said yet suggests any reason to object to U.S. dominance, at least on economic or welfare grounds. To the contrary, many observers assert that any trade restriction would cause a loss to the people (consumers) of the importing country as well as to the exporting country. In addition, as noted above, the enhanced opportunity for price discrimination provided by national borders should lead to more efficient levels of production. These conclusions are the mainstay of the pro-free trade position. Nevertheless, an evaluative inquiry provides substantial reasons to worry. Features of competition in these semi-public goods can undermine the production of the most valued cultural goods.

Audio-visual products in particular and media products in general compete against each other and, to a lesser degree, against other products and activities for audience time and money. Predictably, American exports usually take market share from and to some degree reduce demand for an importing country's domestic media products.⁸³ The economic viability of these exports also leads

82. See WILDMAN & SIWEK, *supra* note 6, at 4-7 (providing data noting the wide variation of prices for which American television shows and films are sold in different countries).

83. The lower price of the imports should cause an increase in the total size of the market for media products. Unusual circumstances could be imagined where this

them to take some American market share from those American media products that have little or no export appeal. Of course, this situation is not intuitively bad. Competition always produces winners and losers. For a typical "private" good, competitive winners usually satisfy consumer demand to a greater extent or at a cheaper cost than their rivals. Producing a product that, due to competition, is no longer economically viable wastes social resources. The export good may be socially "efficient," while the failed domestic media product is "inefficient."

Media products, however, are not typical private goods. Assuming that media producers are unable to price discriminate adequately, many media products will not be commercially viable even though their creation and distribution would be a valuable use of social resources. That is, many media products would satisfy a demand that is greater than the cost of the goods, making their production and distribution "efficient," even though they cannot be sold profitably. In such situations, selling at a high price causes the loss of too many customers to be profitable, while selling at a low price does not produce enough revenue per customer.⁸⁴ This market

expansion could result in some increase in demand for local media, a point suggested by Gerry Neuman in conversation. Still, at least as long as the cost of producing local media goods does not go down, the cheaper (or otherwise successful) imports normally will replace, rather than increase demand for, local products.

84. Consider the following demand for a media product with real but low copy costs:

Person	Demand (T2)	Marginal Cost	Average Cost	Original Demand (T1)
1	10	20	20	11
2	8 $\frac{1}{2}$	1	10 $\frac{1}{2}$	9 $\frac{1}{2}$
3	7	1	7 $\frac{1}{3}$	8
4	5 $\frac{1}{2}$	1	5 $\frac{3}{4}$	6 $\frac{1}{2}$
5	4	1	4 $\frac{4}{5}$	5
6	2 $\frac{1}{2}$	1	4 $\frac{1}{6}$	3 $\frac{1}{2}$
7	1	1	3 $\frac{5}{7}$	2
8	0	1	3 $\frac{3}{8}$	$\frac{1}{2}$

In this example, at the present time, T2, the average cost stays above the demand curve. Therefore, without price discrimination, no selling price will allow the good to be sold profitably. The value that the first seven people place on the product, however, totals 38 $\frac{1}{2}$ (summing the individual demand), while the cost of providing the product for these seven would be 26 (summing the marginal cost for each). Failure to produce the product causes a lost welfare surplus of 12 $\frac{1}{2}$ —an inefficient result.

If this demand curve at T2 represents a downward shift of 1 unit from an original demand at an earlier time (T1) due to the current entry of imports, this inefficient non-production can be attributed to free trade. In the above hypothetical, without the international competition, the original demand of five persons could have been fulfilled at a selling price between 4 $\frac{4}{5}$ and 5, with a production cost of 24 and providing a value of 40 to consumers, generating a surplus of 16. Unless the import creates a surplus greater than

failure, always possible, is predictably more common for media products with comparatively smaller audiences.⁸⁵ Thus, some, possibly many, domestic media products, especially those with limited audiences, fail due to competition from internationally traded products, even though they remain in demand by the local audience. In these circumstances, competition can drive those goods that are most beneficial in consumer-welfare terms out of the market.

Similar effects occur in the United States. An increase in export-oriented products causes the competitive failure of some smaller-audience, domestic-oriented media products that U.S. audiences still want. Using the categories described earlier, fewer American products emphasizing *D* (domestic) content will be successful because of competition with American products emphasizing *U* (universal) content. Some informed observers conclude that this effect explains a greater prevalence of violence, action, and sex in American products than can be attributed to domestic audience preferences, as indicated by the violent media products' comparatively poor domestic performance in program ratings and audience reports.⁸⁶ Thus, in both domestic and foreign markets, media products with culturally specific, discursive content fail even when they are strongly valued by local audiences and even though they would exist if free trade were subject to appropriate restrictions. In this circumstance, free trade hurts

16 (plus enough to cover lost value from any additional small local media products whose fate was like this hypothesized product), introducing international competition would cause an inefficient loss of media valued by audiences. Whether this actually occurs, of course, depends on the specific demand curves.

85. Because average costs go down continuously, if demand stays above the marginal cost for a sufficiently large audience, there will be some price at which producing the good will be profitable. Thus, the effect described in the text—inefficient non-production—should occur more often for media products with comparatively smaller audiences. This effect can be illustrated using the example *supra* note 84. In that particular hypothetical, by tripling (actually, by slightly more than doubling) the number of people who want the product at each price level, the good that failed in the example would be successful. If priced at $2\frac{1}{2}$, the 18 people (3×6) who value the good at least $2\frac{1}{2}$ should pay up to 45 ($18 \times 2\frac{1}{2}$) for the product, which is more than the 37 that it costs to produce the good for 18 people (20 for the first copy plus $17 \times 1 = 17$ for the 17 copies). Thus, if the audience size is tripled, the competition from the import would not eliminate the market for this domestic good.

86. See George Gerbner, *The Hidden Side of Television Violence*, in *INVISIBLE CRISIS: WHAT CONGLOMERATE CONTROL OF MEDIA MEANS FOR AMERICA AND THE WORLD* 27, 32 (George Gerbner et al. eds., 1996) (reporting that non-violent programming has higher Nielsen ratings than violent programming in the United States, but that violent, action, and crime programming was much more likely to be exported). As will be noted *infra* notes 104-05 and accompanying text, *U* is not of one mold. It may also include content supporting such universal values as freedom, democracy, toleration, and empathy—contents that some authoritarian elites may wish to restrict.

consumers.

Free trade also can produce consumer benefits. People value the imported products, otherwise they would not buy or watch. No abstract economic theory can predict whether free trade generates more loss or more gain in consumer welfare. Rather, the answer depends on the specific shape of people's demand curves. There is, however, no systematic reason to expect that those products which are most desired by the public will prevail in a free market regime. In fact, some economic considerations give reason to predict the opposite. The domestic products most likely to fail are those that are also among those most likely to generate a proportionately high consumer surplus if produced and distributed. That is, the products most likely to fail from a slight downward shift in the demand curve caused by competition from exports include: (1) those with smaller audiences;⁸⁷ (2) those for which some of the audience have a relatively high demand but for which the demand declines relatively steeply;⁸⁸ and (3) those for which opportunities for effective price discrimination are especially unavailable.⁸⁹ On the other hand, the greater the degree to which one or another of these conditions does not hold—and none hold for most major export products—the more likely the media product will be produced and will be produced at a level that generates proportionately little consumer or producer surplus. Because these three qualities are more descriptive of domestic media products, free trade is likely to cause a loss of consumer welfare as compared to a well designed set of trade regulations. Specifically, trade rules that increase the likelihood of survival of those domestic products that would barely fail under a free trade regime could produce significant gains in social welfare. Although restricted trade would decrease the availability of

87. See *supra* note 85.

88. For example, in the illustration in *supra* note 84, as for the five people for whom the product was available before the introduction of the import but who now no longer have access to it, there is a lost surplus from the product not being available at T2 of 11. If their demand curve were flattened, so that the demand of valuation of the first five was 6, $5\frac{1}{2}$, 5, $4\frac{1}{2}$, and 4, the lost consumer surplus from not producing the good for these five would have only been 1. Alternatively, assuming an equally flat but higher demand curve—for example, going down by the same $\frac{1}{2}$ point but with the top valuation being 7 and with the fifth person valuing it at 5—the product would be produced but would only generate a surplus of 6. In either case, with this flatter demand curve, the surplus either gained or lost would be less than the 11 lost in the original example.

89. When costless, effective price discrimination allows any good that increases welfare—at least as identified in the current analysis—to be produced. Under these circumstances, the seller can capture the value placed on the good by the consumer, and this value will be enough to pay for producing the good.

marginally successful imports, the net effect could be positive for the country imposing the rules.

Note that the three conditions—large audience, relatively flat demand curve, opportunities for price discrimination—are not independent. Assuming a demand curve with the same shape and same high and low points, the larger audience simply flattens the curve.⁹⁰ Having a larger audience—and, as will be noted below, an international audience—also increases opportunities to price discriminate. These three factors support a general expectation that the media products justified by consumer welfare criteria but eliminated by market competition will most often be comparatively unique products desired by smaller subparts of the population. International free trade predictably exacerbates the problem, most obviously by increasing the audience size and the capacity to price discriminate. The consequent inefficiency or market failures can justify governmental interventions.

Price discrimination merits further discussion. Effective ability and willingness to price discriminate allows products to be commercially viable up to the point that they generate no consumer or producer surplus. Domestically, by using different “windows”—such as movie theaters, video cassettes, television, pay and free cable, or an original or spin-off book—a media company can increase its ability to sell the original product to different people at different prices. To the extent that the company can market each of these versions for different prices in different countries, which is the norm, this multinational reach adds significantly to the number of windows available.

Using different windows, however, costs money that must be recovered. The possibility of recovery increases with the size of the audience over which to spread the overhead cost of creating different windows. Exporting mass-appeal products, especially blockbusters, should increase both audience size and the number of windows, allowing for more effective price discrimination. As price discrimination increases, the success of these products increases up to the limit case, where no social surplus, either consumer or producer, is produced. Specifically, marginally successful export products, that would fail under even a relatively small trade burden, may exist only because of international trade's enhancement of their ability to price discriminate, leading them to produce little welfare gain. Their success, however, generates an overall welfare loss due to the

90. See *supra* note 85.

resulting failure of valued, smaller-audience domestic products that are less able to price discriminate. That is, the loss from the failure of domestic products is predictably greater than any gain from marginally successful imported media products. In such situations, audiences would benefit if governments could burden these mass-appeal media exports' competitive opportunities.

In sum, the "non-rivalrous use" attribute of media goods first explains the competitive success of American media products internationally. It also provides an efficiency as opposed to a dumping explanation of the tendency to price U.S. products differently in different countries. More important for policy purposes, this attribute explains why economic theory cannot predict that free trade in these products will be better at giving audiences what they want than would a well-designed system of trade restraints. Economic theory even gives some reasons to expect that international free trade will be inefficient as compared to an optimal system of restraints from the perspective of both American audiences and audiences in importing countries.

The most obvious policy response is to subsidize those categories of media products that are most likely to be economically justified but that will not survive in a free market. Nevertheless, the United States has argued that domestic subsidies violate free trade principles. Equally contrary to a defensible policy regime and possibly even more insensitive politically, the United States has suggested that subsidies would be permissible as long as equally available to American media products.⁹¹ The economic justification for subsidies applies uniquely to local media products disadvantaged by the free trade regime.

Responsive policies do not necessarily end with subsidies. Because competition with imports causes the failure of some domestic products valued by consumers, these consumers could benefit if those imports that produce the smallest proportionate surplus per consumer were kept out of their country or if the importing country could limit the reach of the imports to audiences

91. Although the dominant position of the United States was that European, especially French, subsidies for domestic films violate the free trade principles that should be enshrined in the GATT agreement, the United States also apparently suggested that subsidies would be acceptable if France and other European countries made them available to American film companies on a non-discriminatory basis. See *Aircraft Subsidies, Audiovisuals Remain Barriers to U.S.-EC Accord*, 10 Int'l Trade Rep. Current Reps. (BNA) No. 48, at 2038 (Dec. 8, 1993); J.E. Ferry, Letter to the Editor, *Seeking Same Subsidies*, FIN. TIMES (London), Dec. 20, 1993, at 12.

that valued them comparatively highly. That is, the policy aim should be to enhance structural rules that eliminate the gain from importing marginally valued, large-audience products or that at least reduce the reach of such blockbuster imports.

A country could pursue both pro-audience policies with properly designed import duties or taxes discriminating against the imports, especially if the proceeds were then used to subsidize local media products. In contrast, a flat duty per imported movie or show would eliminate mostly imports with small, even if rather intensely interested, audiences—precisely the imports that are most clearly justified on consumer welfare grounds. Thus, to achieve the desired effect, the duty or tax ideally should be tied to audience size, for example, x cents per viewer, rather than being the same for each film, program, or title.

Some countries mandate “screen quotas,” typically requiring theaters to show domestic films in a certain percentage of their screenings, or “broadcast time quotas,” typically requiring domestic programming for a certain percentage of the broadcast day.⁹² Others have similar rules requiring a minimum percentage of domestic music in radio broadcasts.⁹³ These rules also can be beneficial. They marginally reduce the reach of imports, but, importantly, they do so without barring any particular import desired by people in the receiving country. Moreover, by allowing house-packing imports that help make a theater (or station) profitable, these rules in effect subsidize screen or air time for local content. While directly aiding local media products, these quotas still allow importing firms to determine what combination of blockbuster and more specialized imports produce the larger capturable surplus. In contrast, quotas on the *number* of imported movies or television programs would favor

92. This policy created a major controversy when embodied in a European Community Directive in 1989. See Donaldson, *supra* note 15, at 92–93; *id. passim*. Countries such as Australia, Canada, France, Italy, Mexico, and Spain have adopted domestic content requirements for broadcast programming. See NEW STRATEGIES, *supra* note 40, at 18–19. France, Mexico, and Spain are among those that impose minimum film screening requirements for domestic films. See *id.* at 19.

93. Various countries, including Australia, Canada, France, Israel, and South Africa, impose domestic content requirements on radio broadcasts of popular music. See NEW STRATEGIES, *supra* note 40, at 10, 18; Tim Cohen, *After Hours—SA Music Goes Number One with a Rocket—Homegrown Heroes Set to Dominate Their Own Pop Charts for the First Time in History*, BUS. DAY (South Africa), May 14, 1999, Music §, at 1, available in 1999 WL 5794485 (attributing the increased taste for and sales of South African music in part to the government’s 20% domestic content requirement for radio music broadcasts); *Hebrew Melodies, Please*, N.Y. TIMES, Dec. 23, 1998, at A3 (reporting on a new Israeli law requiring that one out of two songs broadcast over public radio stations be in Hebrew).

importing only blockbusters even if these blockbusters turn out to damage local production more and produce less surplus than importing a larger number of products appealing to smaller audiences. Therefore, as a policy matter, the screen and time quotas seem far better. Finally, this public goods argument clearly does not justify any outright ban on imports in general or a ban on any category of media content in particular.

Interestingly, this analysis of the economic problems that free trade creates for potentially more valued local products, when combined with the policy possibilities for improving on free trade, suggests that the existing media regulation in democratic regimes in much of the world—including Europe, Canada, and Israel—make rough economic, audience-serving sense, while the goals of U.S. trade policy do not.

B. Externalities

Markets achieve efficient results only when products are sold at roughly their real cost. Selling at above cost is, for example, the economic evil most often attributed to monopolists. The harm is that this price restricts the availability of goods that people want. Similarly, this concern with proper pricing purportedly justifies free trade advocates' condemnation of dumping.⁹⁴ Monopolies and implicit subsidies are not the only reasons, however, that enterprises sell products above or below their real cost. Improper pricing also occurs when products create large negative and positive "externalities"—that is, harms or benefits to people other than the owner or purchaser of the product. The product's real cost is the sum of the cost to the producer plus the cost imposed on third parties. Proper pricing will include both costs. Moreover, purchasers are not properly charged for benefits to third parties; the selling price should be reduced by the amount of these positive externalities. Nevertheless, because negative externalities are costs not borne by either the producer or the purchaser, producers of goods with negative externalities can sell these goods at below their real cost. Because purchases (demand) usually increase when price goes down, this improperly low price causes the overproduction of these goods. The converse is true for goods with positive externalities. Purchasers

94. See *supra* notes 72–74 and accompanying text. Dumping also can be a means to get rid of excess inventory or can be distressed pricing to cover short term operating costs even if too low to also cover fixed costs. Regardless of the motive, this pricing strategy of the exporter can undermine the economic basis of efficient local industry in the importing state or in another exporting state.

pay not only for the value they receive but also for benefits that go to third parties. This situation makes the cost to purchasers too high, resulting in too little effective demand and concomitant underproduction.

Media products generate huge externalities, both positive and negative. Of course, identification, measurement, and even characterization of these externalities can be extremely controversial. If Thomas Paine's *Common Sense* increased rebelliousness among colonial readers, was this effect a benefit or harm to nonreaders—those colonists and British who did not purchase the book? Is a woman's greater readiness to be assertive after reading feminist literature a benefit or harm to third parties? What is clear is that by affecting readers' or viewers' behavior—behavior that in turn affects other people—media products have positive or negative values for people other than their buyers and sellers. Of course, specific behavioral effects of media products are not automatic; typically, they depend on the particularities of each product's reception.⁹⁵ Indeed, the *same* image or story can be a crucial element in radically different causal chains. Whether or not likely, a Dostoevsky novel could lead one reader to commit murder, a second to become a pacifist and (intelligently) vote socialist, a third to vote Republican, and a fourth to fall in love. The same diverse possibilities exist for viewers of a Tarantino film, although the likelihood of each effect would presumably change. Still, despite difficulties in identification, measurement, and characterization, some behavioral and, hence, third-party effects of communication are inevitable. Neither the educational establishment nor the advertising industry are likely to be totally wrong! Likewise, even if a person does not directly consume particular media products, those products can deeply influence the cultures in which that person negotiates her identity and develops her ideals. Moreover, in addition to externalities from their consumption,

95. Although negative externalities of other products often give rise to tort liability, this should not occur with media products for two reasons. First, there is an ethical value in respecting the autonomy of the listener as well as the speaker. Second, the effects vary from person to person and are hard to measure objectively. Thus, First Amendment protection of communications that may cause great harms to the receiver or third parties with whom the recipient interacts is justified because that level of protection allows for choice by speakers and respects the autonomy of, rather than paternalistically protecting, the listener by leaving responsibility for (and choice of) responses to that recipient. That is, the First Amendment should protect communicative content that has great negative externalities, even though in non-speech contexts negative externalities often are subject to tort liability. See C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 986-93 (1997).

the production of media products also can have major consequences not fully captured by the market. Sustained investigative reporting by a local paper that deters or exposes local corruption can dramatically affect people in the community other than the paper's readers (and advertisers).

The market will not properly price and produce a media product unless, by improbable chance, the product generates roughly equal negative and positive externalities. Because the externalities can be huge, public policy cannot sensibly ignore them.⁹⁶ Nevertheless, to understate the problem, the first difficulty is that, even if media externalities are huge, their measurement is virtually impossible. Still, some relevant generalizations are plausible. Praise by cultural critics, commentators, or educators for particular media products (and probably for genres) commonly relates to elements of the products that not only create appeal to immediate consumers but also that indirectly benefit third parties—and the converse is true for criticism by similar observers. Elsewhere I have argued that society should and does have policies that respond to media products' externalities, that these policies should and often do promote media products that have positive externalities rather than the converse, but that policy measures should not and constitutionally cannot take the

96. *But cf.* Shao, *supra* note 2, at 141, 146–47 (arguing that the market alone should be relied upon in the formulation of public policy). Citing STEPHEN BREYER, *REGULATION AND ITS REFORM* 26 (1982), Shao implies that soft variables should be largely ignored for policy purposes. He argues that “the less susceptible objectives are to monetary estimation, the less useful externality-type characterizations are to policy formation,” Shao, *supra* note 2, at 141, and that the market should be relied upon, especially because any invocation of such unmeasurable values would violate the critical norm that governments not act arbitrarily. Contrary to Shao's view, I believe that it is the height of irrationality to ignore variables that could be the most significant for human welfare merely because they are not scientifically quantifiable. Ignoring soft variables can simply lead to dramatically wrong results. *See, e.g.*, Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972); Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1317–22 (1974). Although Breyer might be interpreted as recommending that policy makers ignore soft variables, his main point seems different—that in cases in which variables cannot be quantified monetarily, “one is better off speaking directly of non-economic reasons for and against taking a particular action.” BREYER, *supra*, at 26. That position is clearly defensible. Still, my inclination, at least here, is to reject it. Breyer's approach may be understood to suggest that, on economic grounds, some policy is best while admitting that there *might* be other considerations. The argument is pitched as a dispute between following hard-headed economic grounds and other soft considerations. This description mischaracterizes the dispute. On the basis of the usual economic concerns—promoting what people value, using resources efficiently, providing for individual preferences—economics and the “other” considerations may both argue against the policy. Moreover, a discursive gain results from recognizing that the honest economic recommendation is controversial or indeterminate.

form of censorship.⁹⁷ These policies correspond to the common sense view that both individually and collectively we have self-interested reasons, as well as friendly or paternalistic reasons, to encourage others to favor some or avoid other media products.

Significant externalities do not automatically justify differential treatment of foreign and domestic media products. Free trade principles generally allow restrictions that are uniformly applied to both.⁹⁸ Thus, for the existence of externalities to have implications for trade policy, the externalities of imports would have to differ from those of the domestic products that the imports would supplement or replace. Even then, a uniform policy response would often be most efficacious. Sometimes, however, such differences can provide an economic reason to deviate from a general free trade regime.

Whether significant differences exist between the externalities of domestic and imported media products is contextual. Even if, counterfactually, under a free trade regime different countries chose roughly the same (often American) imports, these imports likely would replace dramatically different types of domestic products; the

97. See Baker, *supra* note 8, at 346–85, 414–17. Here, I use the term “censorship” narrowly to refer only to rules or practices that forbid or punish expression criminally or civilly or that are designed to suppress particular content. Repeated, heated arguments with legal representatives of the media and civil liberties community have taught me that some people use the concept of censorship much more broadly—for example, to describe any policy that has the effect of reducing the availability of some media content. Cf. Jonathan L. Wolff, Comment, *The V-Chip: Giving Parents the Ability to Regulate Television Violence*, 37 SANTA CLARA L. REV. 785, 819 (1997) (claiming that “opponents of the V-Chip, most of whom are either part of the television industry or television manufacturing industry, argue that the V-Chip censors one’s First Amendment right to watch whatever one wishes”). That usage, I think, robs the term of its legitimate bite. Thus, I do not here use “censorship” to include requirements, for example, that a media producer include information about the product, much as the government requires of drug manufacturers, if the requirement imposes no direct restrictions on the production or availability of the media product and is designed to serve a policy other than suppressing the speech. For constitutional purposes, however, the difficulty is distinguishing between a governmental *purpose to aid the potential consumer*, with awareness that the effect may be to reduce demand for identified content, and a *purpose to reduce demand* by manipulating the consumer. Cf. *Meese v. Keene*, 481 U.S. 465, 478–80 (1987) (upholding over a strong dissent a requirement that certain foreign films be labeled as “political propaganda”).

98. These principles compare roughly to those of the negative or dormant Commerce Clause, which constitutionalizes an internal free trade regime in the United States. The Commerce Clause bars states from overtly discriminating against out-of-state goods or activities, but leaves states almost totally free to impose restraints, prohibitions, or burdens on goods or activities, *see, e.g., City of Phila. v. New Jersey*, 437 U.S. 617, 623–24 (1978), even if the burden falls mostly on out-of-state firms or practices, as long as the law plausibly serves a local purpose (including non-discriminatory economic purposes) and does not facially discriminate against outsiders, *see, e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125–29 (1978).

displaced products would hardly be the same in Canada or Italy as in Saudi Arabia or Cuba.⁹⁹ Predictions of systematic differences between the externalities of imported media products and of those that they replace or supplement will be speculative and, as noted, evaluative characterizations will inevitably be contested. Under these circumstances, the question of who should make policy-determinative judgments becomes central. An obvious reason to exclude cultural products from free trade agreements is the premise that such judgments ought to remain a matter of democratic politics. Without an abstract reason to predict that the externalities of products favored by an international free trade regime would be the same or better than those of domestic products, rather than relying blindly on the market,¹⁰⁰ the more appropriate response is for the parties most affected to reach a judgment through the only mechanism available to them to make structural decisions: residents of each country should express their judgment through their political order.

Beyond this generic argument for leaving the issue to internal politics, I want to explore whether the externality analysis tilts toward any substantive policy conclusions. Some characteristic differences between imports and displaced domestic media products may apply quite widely. A description could aid a discussion of whether free trade predictably increases either negative or positive externalities over an optimal set of trade restrictions.

The comparative success of imports that results from greater expenditures on merely creating a slicker appeal has in itself no obvious relation to greater positive or negative externalities. Rather, the predictable differences in content between imports and exports are probably most relevant for an externality analysis. As a category, imports characteristically bring in new and different perspectives. They can support greater cross-cultural understanding. Additionally, imported products can bring with them ideas about equality, liberty, gender roles, environmentalism, democracy, or other "foreign" ideas. Thus, authoritarian regimes that wish to manipulate their subjects' views have reason to fear free trade.¹⁰¹ But even if authoritarian or

99. Typical domestic media products vary between countries in many dimensions in addition to production values and overt political values. For example, Hallin notes that commercial Mexican television focuses almost exclusively on wealthy characters while Cuban programs portray everyday lives of ordinary people. See Hallin, *supra* note 38, at 165. These are quite different contents for an import to displace.

100. See *supra* note 96.

101. Even a democratic regime that censors certain content, such as pornography, may find free trade difficult to police, particularly if the products are imported by individual customers. See Amy Harmon, *Internet Sales of Nazi Books in Germany Assailed*, N.Y.

traditional elites reject these outside or dissident ideas, many people in a society, including those who are not direct consumers of the media products, would find such content beneficial, and perhaps even transformative.¹⁰² Economic analysis is an awkward tool with which to evaluate an externality that is negative for some—for example, authoritarian elites or traditionalists—but is positive for others. Still, normative theory symmetrically discredits policy reliance on some perspectives that identify negative externalities of media products—for example, the view that counts undermining hierarchical or undemocratic authority as a negative effect.¹⁰³ Thus, on the whole, bringing in new ideas should be considered a major plus of free trade.

Introduction of liberating content is not the only predictable content difference, however. Other differences relate to imports having more negative externalities or replacing local media that have more positive aspects. The earlier discussion suggested that an export's success often relates to having comparatively high levels of *U* (universal) inputs and comparatively less *D* (domestic) inputs than do nonexport-oriented products. For the United States, as a major exporter, this means that free trade should lead internally to more products with high levels of *U* and fewer with high levels of *D*. For importing countries, the imports with typically high levels of *U* and little *D* to differing degrees will supplement, marginalize, or replace domestic products with high levels of *D*. Of course, the labels "domestic" and "universal" encompass a vast array of variable specifics. Still, because even rough characterizations will suggest policy implications, I offer a few limited hypotheses about each category.

TIMES, Aug. 9, 1999, at C12 (describing Internet customers' access to books that are banned in the consumers' home country).

102. See, e.g., Larry Gross, *Minorities, Majorities and the Media*, in MEDIA, RITUAL AND IDENTITY, *supra* note 38, at 87, 87–88 (describing the transformative experience of finding as a youth a book about American gay identity in the Hebrew University library).

103. In its purportedly most "neutral" version, economic analysis counts each person's preferences, although wealthy people's greater ability to pay causes their preferences to weigh more heavily, which shows one troublesome ideological feature of typical welfare economics. The normative reason for valuing economic efficiency or consumer sovereignty, however, is either the utilitarian goal of satisfying audiences' desires or the liberal enlightenment principles concerning respect for people's autonomy and equality. Neither would significantly credit authoritarian elites' interest in maintaining a repressive status quo. The utilitarian should not overly weight hierarchical elites' views or interests based on their wealth or power. In a policy context, as opposed to a rights context, the enlightenment framework should reject any "counting" of preferences that are in opposition to the "liberal" reasons that justified counting people's interests in the first place. See C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381, 399–413 (1978).

Universal content tends to avoid cultural complexity and to exhibit simplicity in discursive structure. As noted earlier, favored elements are likely to include violence, action, and possibly sex¹⁰⁴ or romance on the theory that these translate comparatively easily between cultures. Although the issue is subject to dispute, overwhelming evidence indicates that some violent media content generates overtly negative externalities.¹⁰⁵ If, as suggested by many critiques, it also tends toward cultural shallowness, this could add to objections.

Possibly more important than an import's universal content is the domestic content lost to the displacement or marginalization of the local media products. This loss can have major significance because media products serve diverse functions for any society or group of people. The news media, for example, hopefully performs various vital democratic functions ranging from being a watchdog that exposes corruption and an information source that informs democratic decisionmaking to a partisan stimulant for political participation and a medium for subgroup deliberation. Quality performance of these functions can have significant positive externalities. It can dramatically improve the well-being of people beyond the immediate consumers of the media products. For these purposes, domestic content is usually crucial.

The relevant concerns about not displacing local media, however, extend beyond the news and public affairs media. Those concerns include the quality and content of popular fiction and non-political, non-fictional materials. Neither individuals, nor groups, nor nations float free of their contexts. As members of traditions and groups, individuals need to confront their own historically situated problems and concerns. In addition to using a local language, domestic-oriented media products typically either reflect, react against, or implicitly comment on the world views that dominate within their own country. Although culture has real value as a museum piece,¹⁰⁶

104. Cultural taboos and interpretative practices relating to sex may make this common assertion problematic. Countries may be clustered in how sexual content is understood and valued. I make no claims to sort out this issue.

105. See 1 COMMISSION ON VIOLENCE & YOUTH, AMERICAN PSYCHOL. ASS'N, VIOLENCE AND YOUTH: PSYCHOLOGY'S RESPONSE 32-35 (1993); Committee on Communications, American Academy of Pediatrics, *Media Violence*, 95 PEDIATRICS 949, 949-51 (1995); see also JAMES T. HAMILTON, CHANNELING VIOLENCE: THE ECONOMIC MARKET FOR VIOLENT TELEVISION PROGRAMS 20-30 (1998) (reviewing numerous studies on the effects of violent television programs on individuals).

106. Not only the discursive but also the museum aspects of cultural items can have significant positive externalities. I certainly do not want to belittle the museum aspect.

as noted in Part I, cultural materials more importantly provide the discursive means and medium for individuals and groups to address issues of identity, values, and motivation. Individuals' success in addressing these issues can impact profoundly all those with whom they directly or indirectly interact. Thus, the quality of any individual's discursive opportunities affects all those with whom she associates. In sum, to the extent that a country's own media products better provide (or provide in ways not duplicated by imports) domestic content that people need directly for their political process to function or, more generally, for their cultural discourses of identity, meaning, and value, domestic media can have tremendous positive externalities not supplied by the imports that threaten to replace the local content.

These observations on differences between and uses of domestic and imported media suggest the following propositions. First, the quality and availability of cultural and other media content influence the functioning of democracy, the quality of individuals' normative reflections, and the development and richness of their identities. Second, what counts as good media content will vary among persons, among groups, and among nations. Even within a group or nation, the identification of quality will inevitably be contested. Third, imported media products can have positive qualities. For instance, they can introduce new and potentially transformative values, perspectives, and cultural resources that can be particularly important for individuals or groups that are oppressed or marginalized by the dominant local culture.¹⁰⁷ Fourth, imports often embody less culturally valuable and less culturally specific material. Some imports—for example, those emphasizing violence—predictably produce significant negative externalities.¹⁰⁸ Of course, domestic media products can generate negative externalities as well, but, if my analysis is correct, this result is less common. Fifth, imports often will

People can and do value maintenance of cultural relics—in museums and graveyards—and are often impassioned about their preservation, even if, as individuals, they do not own and never visit or “use” the items.

107. See, e.g., Annabelle Sreberny-Mohammadi, *The Global and the Local in International Communications*, in *MASS MEDIA AND SOCIETY* 118, 132–33 (James Curran & Michael Gurevitch eds., 1991) (describing how a Moroccan woman, in a region where “public space is male space,” defiantly wore a denim skirt and earrings to a traditional religious feast).

108. Note again the caution that these statements always require. Did violence arguably inspired by Thomas Paine create negative or positive externalities? Partly because of the difference among different viewers'/listeners'/readers' reception of media materials and partly because of the different evaluations of behavior in different contexts and by different people, the same violent content can have either good or bad effects.

replace domestic media products that are more oriented toward local needs. A substantial portion of the value of these lost domestic products lies in the benefits that non-readers and non-viewers gain from their availability and consumption by their compatriots. That is, the displaced media products would have generated large positive externalities. Finally, although depending on empirical matters such as the extent and significance of the externalities described in the third, fourth, and fifth points above, unrestrained trade in media products is likely to reduce consumer welfare in the importing country. In other words, implementation of free trade principles could prevent audiences from getting what they want had products been priced on the basis of their real costs. If so, welfare-maximizing results require governmental interventions, including local subsidies and possibly well-designed trade restraints.

Trade restraints, of course, vary in desirability and legitimacy. Imports can be liberating and transformative. Restrictions can be motivated by a desire to maintain systems of domination. On the other hand, democratic, vibrant societies require domestic media content. Restraints on imports can protect and promote these domestic products. Happily, the legitimate and illegitimate interests to a considerable degree are furthered by different policies such that, with will and wisdom, a nation can choose only appropriate restrictions. This difference makes the ideal not free trade, but rather intelligent interventions. Of course, protection of state sovereignty guarantees neither the needed will nor the needed wisdom.

Overt exclusions—censorship or blockage of content-based categories of materials—likely reflect illiberal aims of maintaining oppressive elements of a country's political or social order.¹⁰⁹ However, unless this censorship is imposed on a massive scale, content-based exclusions are unlikely to do much to protect the local media's economic base. In contrast, properly designed subsidies can benefit local media. In addition, taxes or duties that target but only marginally burden imports (especially if the proceeds are used to subsidize local media) and devices such as screen or airtime quotas that are designed to preserve space or markets for domestic products do not bar any outside content. Not only do quotas serve local economic interests, but also they often can be justified economically

109. Of course, international law seems to permit, if not require, such censorship of certain racist material and perhaps other purportedly equality-denying speech, such as pornography. In this Essay, I take no position on such restraints. *But see* Baker, *supra* note 24, at 1181–1211 (arguing that, properly understood, constitutional notions of both equality and autonomy reject the suppression of such speech).

as, in effect, subsidies for local media products that produce positive externalities.¹¹⁰ The justification for these discriminations against imports becomes stronger in proportion to the size of the threat to domestic media.

This difference in justification depending on national circumstance leads to an interesting asymmetry. A country like the United States—and, today, possibly only the United States¹¹¹—cannot rely on these externality considerations as a justification for burdening incoming materials. Where domestic media are not materially threatened, the main consequence of imports—particularly imports containing domestic content of the exporting country—is to increase cultural diversity and to add to discursive possibilities in the importing country. In contrast, for countries whose domestic media, or relevant portions of them, are threatened, the economically justified role of tariffs, discriminatory taxes, or time/screen/place quotas (but not categorical exclusions of imports), recommends something close to the existing international trade regime: an exception for cultural products from international agreements imposing free trade principles.¹¹² Rules that reduce imports' competitive advantage resulting from their ability to spread huge first copy costs over more customers and to more effectively engage in price discrimination often will be welfare advancing. Therefore, these countries should not negotiate away their prerogative to burden or restrict trade. Countries need this authority to better structure their media industries and to promote domestic media products.¹¹³

110. The political support that these laws receive from benefited economic interests does not discredit the legitimate justifications. *Cf.* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7, 471 & n.15 (1981) (concluding that, for equal protection and dormant Commerce Clause purposes, local discriminatory economic benefits raised in the legislature as a basis for approving a particular law do not undermine legitimate justifications for the statute based on possible environmental benefits).

111. *See supra* note 77–78 and accompanying text.

112. This economic analysis might suggest an international trade rule that allows such restraints only when imports in a particular media category are over some arbitrary percentage, say 33%. Otherwise, general free trade rules should apply. In the United States, imports do not come close to reaching this level in any media sector. In other countries, they often do. For example, in Canada, U.S. magazines have often captured roughly 80% of the market. *See infra* note 180. Wildman reported that in eight leading countries of Western Europe, American films obtained from 92% (United Kingdom) to 45% (France) or 30% (Italy) of the market. *See WILDMAN & SIWEK, supra* note 6, at 19. While in the United States only about 2% of television programming is imported, in most countries more than 25% originates in other countries. *See id.* at 42–44. Thus, a rule such as that suggested above would usually prohibit restrictions in the United States, but allow them in most other countries.

113. Rather than a broad cultural exemption in international trade agreements, the developing view in many countries is that a new international instrument is needed that

C. *Non-Market Measures of Preferences*

Free trade advocates assume that people's willingness and ability to pay within a market properly identifies and measures consumer preferences. Only if this assumption is valid can unimpeded markets be expected to give people what they want; only then is the consumer really sovereign. Significantly, however, the market is only one place where people express preferences. Indeed, people often express preferences simply by saying they prefer something, and what they will say they prefer often changes as the context changes. Indeed, people often express preferences in discussion, and such preferences often change as the context or the nature of the discussion changes. People also express preferences by choosing to spend time engaging in one activity rather than another. Moreover, the market's willingness and ability to pay standard is merely one way to measure preferences. Other methods of identifying and measuring preferences are possible. A system could refuse to credit any expression that does not survive discussion and reflection. Another system might weight preferences on the basis of how much a person would be willing to pay under circumstances in which everyone begins with equal wealth. Both these systems would allow the person to be sovereign, counting only her expressions of preferences. They both offer a method of identifying and, at least in the second system, measuring preferences, but both would get results different from the market's.

No neutral or logical principle indicates that one or another measure is more accurate, legitimate, or "real." The determination of which measure to credit depends on the purpose of the measurement and, possibly, on a conception of what personal qualities to treat as most significant. Presumably, the measure that a society would want to credit will vary depending on the issue or context. With this in mind, I will consider three types of possible objections to reliance on market measurement and the relevance of these objections for international trade in media products: (1) market measures are misguided because they are too commodified;¹¹⁴ (2) relatedly, market

affirmatively speaks to countries' right to develop without retaliation their own cultural policies, including trade restrictions. See, e.g., NEW STRATEGIES, *supra* note 40, at 30-32; see also FINAL REPORT, *supra* note 34, at 16 (statements of the Italian and South African Ministers). Nothing in my analysis speaks to which route is preferable.

114. The mere use of economic terms such as externalities to discuss the issues raised in this Essay can be criticized as contributing to improper commodification. See MARGARET JANE RADIN, CONTESTED COMMODITIES 174-76, 178, 180-83 (1996) (evaluating this criticism). Certainly, particular languages are out of place in particular

measures only identify expressions made in one context and that context should not be privileged; and (3) the market's criterion—willingness and ability to pay—is inappropriate largely because it is insufficiently egalitarian.

1. Commodification

People may lose something of great value when entertainment and culture become “too” commodified. George Gerbner regularly observes that the age of commercial television is the first time in human history that children have learned about themselves and the world primarily by listening to corporations with something to sell rather than to people with something to tell.¹¹⁵ Family storytelling and a town's participatory ritual celebrations or reenactments differ from their commercialized counterparts. The differences are three-fold. First, opportunities for the practices are distributed differently. Second, their overt content is likely to differ for various reasons. Third, even if the overt content remains the same, the experience of receiving (and providing) the content can differ dramatically. A story or drama told or enacted by a friend or family member, like a plate won in a competition or a bottle of wine received as a gift, has a different significance than if purchased from a seller. Commodification changes, and sometimes worsens, the experience of receiving access to culture and entertainment.

The above points about the value of and people's desires for non-commodified practices should be obvious. Less obvious is why it matters for policy purposes. The question is: why not merely allow people to choose? According to one view, people can seek out whichever type of entertainment they prefer whenever they want. Sometimes they prefer commodified cultural content, and sometimes they prefer non-commodified cultural content. Of course, commodified and non-commodified cultural options often compete for people's time and resources. When commodified forms become

contexts. Still, any language can be explored, as this Essay is doing with economics, to see if it provides insight on an issue. No single language can do all that others do, but a given insight is seldom (if ever) available in only one language. The danger of hegemony arises when a particular language either implicitly or explicitly claims to be the only way to reach insight. In contrast, to use a language for purposes of internal critique, to show that it does not lead to conclusions in which its “native” speakers dominantly believe, can be particularly instructive. That ambition motivates this Essay.

115. This theme is one that I have constantly heard George Gerbner, former Dean of the Annenberg School of Communications at the University of Pennsylvania, invoke over the last six years at meetings of the Cultural Environment Movement, which he founded in the early 1990s, and at other conferences of communications scholars and activists.

cheaper, they will be chosen more often. But that is not a reason to object. Indeed, this scenario presumably sees more preferences satisfied. Even though non-commodification is often valued, its value does not provide a basis for systemic critique of market practices because the two can co-exist and because people's choices will lead to an optimal mix. Just as history has shown in relation to sex, neither commodified nor non-commodified entertainment or discourse is likely to disappear. On this voluntarist view, commodification sometimes may be unwanted, but this fact is irrelevant for policy purposes. Nevertheless, I will consider three possible responses to this view and the possible relevance of each to the international trade issue.

First, sometimes allowing unrestricted choice can create a domino effect in the movement toward particular results. For instance, a particular choice can be so contagious that a few people's choice in one direction makes other people's contrary choices irrelevant, or at least places great pressure on others to make the same choice.¹¹⁶ Likewise, the choice of one or a few hunters to shoot at an animal that is a member of an endangered species can eviscerate the effectiveness of the choice of all others to preserve the species by refraining from shooting. The same might be true if one person sets off a backyard nuclear weapon while everyone else in the community chooses not to do so. Nevertheless, culture generally does not work that way. It generally reflects the summation of each person's choices.¹¹⁷ Without implausible assumptions about a universal tendency for imitative commodification, the fact that one person seeks or consumes commodified culture does not require and maybe does not even create significant pressure for others to do so.¹¹⁸ Thus,

116. See RADIN, *supra* note 114, at 95–103; see also Baker, *supra* note 103, at 404–08 (describing how some choices affect the world in an “additive” manner and others in a “determinative” manner and arguing that there is greater justification for collective control over the latter).

117. This claim may reflect only one possible way of characterizing or seeing the world. If my preference is for less commercialization of sex (or less homosexual sex), then each person's choice adds to or detracts from this result. If my preference, however, is to live in a world where prostitution or homosexual conduct never occur, one person's practice can determine the world in an objectionable way. Thus, a more normative argument is required to show why the first, “liberal” way of seeing the world should prevail, at least in policy contexts.

118. Radin presents the “domino” theory and then rejects at least the extreme version. See RADIN, *supra* note 114, at 98. She argues that the assumption that once some people commodify, everyone will be drawn to that practice, assumes a “natural” tendency to commodify, a “debatable ideological postulate . . . that utopian noncommodifiers can[not] afford to endorse.” *Id.* at 97.

A natural tendency does not have to be relied upon, however, if an initial choice is

at least in the extreme form, this domino-effect argument should be rejected.

Once it is granted that both commodified and non-commodified media and cultural experiences have value, the issue becomes how to obtain the right quantity of each. This question leads to the second and third responses to the voluntarist critique of policy interventions. Legal rules inevitably shape choice without determining it. For example, generally, the greater the scope of copyright law, the more the opportunities for commodified versions of communications expand and the more opportunities for non-commodified versions contract. If, at the extreme, all words were copyrighted and there were no fair use rights, no non-commodified conversation could occur.¹¹⁹ This example illustrates that legal rules always provide part of the background framework within which people make individual choices, especially market choices. Given these facts, no references to what individuals choose under a particular market regime can show the extent to which people prefer commodified or non-commodified communications or culture. Rather, actual individual choices merely show what people prefer given the rules in place. With different background rules, their choices—their apparent preferences—would be different. The market itself cannot make the choice between legal regimes. Rather, it inevitably relies on prior legal choices made and enforced by the political order or on prior customary practices effectively enforced within the social order. Thus, the only obvious evidence of the extent of people's preferences for non-commodified

structurally enforced on others rather than being a matter of their comparatively free choice. When a person relies on market sales for her livelihood, she must replace the resources used to produce the items she sells. If she is unable to sell at a price at least equal to the replacement cost, she loses her livelihood and goes bankrupt. This incapacity occurs if others with whom she competes sell at a price lower than her replacement cost; the others could do this if they introduced a more efficient (cheaper) way to produce while the first person continued to employ the old method. In these circumstances, the first person is structurally compelled to imitate the new efficient practice. Here, markets enforce domino effects in the direction of efficient practices—a point relied on by grand theorists ranging from Marx to Weber and implicit in conservative defenses of the market. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 198–206 (1989); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 48, 51–68 (1962). Much earlier in *The Prince*, written in 1513, Niccolò Machiavelli made a similar point about political power in explaining why the Prince had to adopt behavior not generally praised by the ethicist. Unless the Prince acts in the most effective strategic manner, he will lose out to one who does. Radin, however, seems right about consumer choices unless the mere existence of commodified goods necessarily comes with a structure that compels people to seek or use only the commodified version and not the non-commodified alternatives, a scenario that seems unlikely.

119. See Henry Beard, Editorial, *English: The Hostile Takeover*, N.Y. TIMES, Mar. 2, 2000, at A27 (imagining precisely such a development).

goods comes from their collective decisionmaking, most obviously discursive political choices, that registers these preferences as shown by adopting legal frameworks that do or do not facilitate non-commodified options.

Thus, the second response to the voluntarist view is that various legal rules inevitably tilt choices between commodified and non-commodified media.¹²⁰ The market, however, cannot be used to resolve the question of which tilt best gives people what they want. This point has considerable significance in some contexts, as the copyright illustration suggests. Nevertheless, I do not see how it is at issue in the dispute about international free trade in media products. Granted, rules allowing trade will make some commodified products more cheaply available. This availability, then, can be expected to increase choices for the commodified option. Free trade, however, does not seem to raise the cost or difficulty for consumers of choosing the non-commodified option, which was a problem in the copyright example. As long as it does not, there seems to be little basis to criticize the increased choice that free trade makes available.¹²¹

Third, one particular feature of non-commodification makes it relevant for media policy. The meaning of non-commodification lies in part precisely in the goods or activities not being allocated by or overtly participating in the market. For some activities, storytelling within the home for example, people may simply make individual choices about time and other individualized resources (assuming storytelling, non-commodified theatrical performances, or singing does not violate copyright or some similar rule). By comparison, other participatory and non-participatory non-commodified cultural activities such as public broadcasting, storytelling as a community activity in a public facility, free public concerts in the park, and public access to video production and broadcasts over cable channels, all depend upon collective allocations of resources. Collective action

120. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 *passim* (1999); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law* 88–91 (Mar. 2, 2000) (unpublished manuscript, on file with the *North Carolina Law Review*).

121. It should be emphasized that this only relates to a comparison between commodified and non-commodified options on the basis of whether the background rules improperly tilt the choice away from people's preferences. As Part I shows, free trade can have an objectionable effect of reducing choice by effectively increasing the price and reducing the availability of domestic commodified media products; and, as Part II suggests, if non-commodified choices have more positive externalities or if commodified choices have more negative externalities, then an objection to the pricing implicit within a free regime could be made.

and free-rider problems, as well as distributive issues that will be considered later, operate to prevent gifts or other voluntary non-market allocations from making these non-commodified activities available in the amount that individual preferences would wish. Only collective, usually governmental processes can register and respond properly to these preferences.¹²² These observations, however, support an argument for subsidies of non-commodified communications, not for trade restrictions.

In sum, the market is unable to register preferences adequately for non-commodified media or culture. Preferences for these goods may be great and socially significant. They may justify various structural and intellectual property rules. Nevertheless, this aspect of the market's failure to give people the media they want may have little apparent bearing on trade policy. Only if trade policy decreases the availability of non-commodified behavior—tilting against non-market choices the way copyright law can—or if trade law encumbers the subsidization of non-commodified media would this failure be relevant here.

2. Preference Identification

Markets measure preferences only when a person is willing and able to make a purchase. Such purchases, however, are not the only times or the only ways in which people express preferences. As noted above, some preferences will be inconsistent with this manner of expression. This inconsistency will occur, for example, if the preference is for a non-commodified good. A related but separate observation is that a person will express different preferences in different contexts: a person expresses a preference in the ballot booth, in conversation after reflection, or by giving a list to Santa Claus. These expressions will not always be consistent. Both the ranking and intensity of preferences for the same items often are not the same across modes of expression. A person may rank three equally expensive goods in one order as shown by her market behavior, in another after discussion if not required to publicly disclose those views, and in a third order if she must express the rankings publicly. A person might choose differently if she now chooses something that she will do or receive in the future than she

122. Ullamaija Kivikuru makes the empirical claim that non-commodified forms are both more common and more empowering under conditions of scarcity of commodified media. See Ullamaija Kivikuru, *Peripheral Mass Communication: Rich in Contradictions*, in BEYOND NATIONAL SOVEREIGNTY 145, 149-55 (Kaarle Nordenstreng & Herbert I. Schiller eds., 1993).

would if the decision were based on her preferences at that future time. For instance, a person may express one preference in making a New Year's resolution and indicate a different one the next day when she breaks the resolution. That is, her preference may change either with time or with a change in context.¹²³ None of these expressions need be dishonest or inaccurate. They differ because the person considers different matters in each context. But none of those matters is unreal. A person rationally could identify more with, wish more for the opportunity to make, or otherwise want to privilege one or another of these expressions. Moreover, her choice about which type of expression with which to identify will often depend on the issue or context.

Most societies honor different expressions of preferences depending on the issue or context. Sometimes, choices must be expressed publicly: a defendant must plead in open court as to the charges brought against her, and often a member of a deliberative body must publicly express her vote. At other times, society counts only choices that are expressed anonymously or secretly, as in many balloting systems. Some expressions of preferences can become binding on the basis of impulse, as is usually the case with market decisions. Alternatively, sometimes reflection is structurally favored. For instance, either to reduce the influence of sellers on buyers or possibly to promote reflection and deliberation, the law makes some purchase decisions revocable for a period of time, privileging later over earlier expressions. Promoting reflection and deliberation is at least the purported reason to require waiting periods, spousal or parental notification, or mandatory exposure to certain information before getting an abortion.¹²⁴ The legal order counts other expressions of preferences—for example, the waiver of certain

123. Laurence Tribe famously noted that some pigeons would peck a button to force a delay in obtaining food if the delay would allow them to get more food over the long term, but that without the button the pigeons would choose to obtain the smaller amount now. People are more advanced than pigeons in that they can create such forced-delay buttons, which provides one interpretation of the role of the Constitution. Still, there is no obvious reason why something people would impulsively want in the future is worse than what they now calmly think they should receive in the future. Until additional premises show which expression should be favored, they are just different choices at different times in different contexts. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 22–24 (3d ed. 2000).

124. See *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.). The joint opinion's constitutional critique of these requirements did not object to these goals, but rather questioned whether these reasons were the real ones motivating the requirements and whether they actually advanced the goals. See *id.* at 878–79 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

constitutional rights—only if the person is adequately informed or receives the advice of a professional whose training and ethics forbid allowing her own market gain or personal interests from skewing her guidance.

The question whether the market under a free trade regime identifies people's preferences for media products better than does a political system responsive to public input has no objectively right answer. It is not merely that the two institutions aggregate individual preferences differently. Rather, they respond to different expressions. Of course, political mechanisms may be especially prone to ossification, may sometimes ignore subgroup interests, and are subject to corruption and ideological distortion, although these last two are also true of market systems. On the other hand, political mechanisms may promote more or better reflection about some preferences relating to media needs. For example, they may promote more reflection on choices between more or less commodified media. Moreover, they may be more open than market actors to subgroup input both about the subgroup's needs and its view of societal needs. The Federal Communications Commission, for example, may respond better than the market to the needs and views of minority groups. Furthermore, political mechanisms are obviously structurally better equipped to be responsive to preferences for non-commodified media.

Thus, both market and non-market mechanisms for registering and responding to preferences have advantages and disadvantages. Reliance on a combination makes pragmatic sense, and both are always used. Ultimately, however, the decision about the mixture of the two cannot be made by the market. Only legally effective political decisions can determine the role of each. Fear of majoritarian or elite oppression provides an important constitutional reason not to suppress market mechanisms. The law, however, inevitably structures these mechanisms, thereby affecting how the market responds to preferences. The structuring is best if done self-consciously with the aim of producing more responsiveness and more desirable content. The more that media consumption relates to identity formation, education, or aiding discursive activities involving public opinion, the more the choice among media products resembles decisions that societies often try to partially insulate from market processes. These factors suggest the propriety of at least some reliance on non-market expressions of preferences for media content.

The extent to which society chooses to privilege non-market expressions of preferences—especially preferences identified through

political mechanisms—is the extent to which it rejects the assumption that even an ideal free trade regime properly or adequately identifies and measures preferences. This better-responsiveness justification, however, does not justify suppression or censorship of content provided by a market. Although some tax impositions or other restrictions may play a legitimate role in promoting valued content—domestic content for example—any attempt merely to keep out foreign content could hardly be justified by (partially) relying on non-market means of identifying preferences.

3. Measurement

Possibly the most serious objection to exclusive reliance on the market involves the criterion it uses to measure or weigh preferences. As noted, the market counts preferences only if backed by willingness and ability to pay, but other criteria are possible. This market criterion counts preferences of the wealthy more than those of the poor. Nothing about the liberal idea of respecting or satisfying people's preferences implies the propriety of this weighting. No premise that the economy ought to satisfy people's preferences requires the conclusion, implied by the market criterion of "willing and able to pay," that a rich person's \$240 French dinner (with a "good" wine) necessarily fulfills three times as many preferences as a poor family's \$80 spent on food staples intended to last for over a week. Of course, economists do not make this claim. They seldom attempt interpersonal comparisons, there being no logically or objectively correct way to compare different people's preferences. Still, any claim that the market gives people what they want implicitly accepts the criterion of money for making comparisons.¹²⁵ For practical and normative reasons, society often uses the medium of money to determine who gets what. But this mechanism is no more a correct measure of weighting preferences than is subjective evaluation. There is no reason to believe that the market criterion best provides for fulfilling preferences—for giving people what they want. Once this fallacy is recognized, other possibilities open up. Indeed, all democratic societies reject the market criterion in many contexts.

125. Of course, when being careful, economists do not claim that the perfectly working market fulfills the most preferences; they do not claim that it maximizes "utility." Rather, their claim is that the market maximizes fulfillment of preferences "given the existing distribution of wealth," or they avoid interpersonal comparisons by only claiming that the perfectly working market creates a "pareto optimal" result, not that it best or maximally satisfies preferences. See *infra* note 152.

Most modern democracies try to operate on a more egalitarian basis by providing for people's desires for voting rights, basic education, and police protection. Many countries guarantee access to basic levels of food, shelter, and medical care as well as access to some parks, public spaces, and cultural opportunities. In the case of media content, most democracies use a combination of market and non-market devices. Historically, some government publications and, probably most importantly, public libraries have served as means of providing media content beyond what people receive through the market. More recently, public broadcasting has played the same role. This combination of market and non-market provision makes sense. A market measure of preferences *might* be perfectly appropriate for media content that primarily serves an entertainment function.¹²⁶ And there is no legitimate reason to prevent people from receiving media products that the market will provide. On the other hand, remember that the vote and education are purportedly distributed in a more egalitarian fashion. A democracy could rationally conclude that media content that is crucial to people's democratic participation or their continued education ought to be provided on an egalitarian basis. Likewise, access to culturally important media arguably should not depend solely on ability to pay.¹²⁷

If availability is to be based on egalitarian premises, then the problem becomes one of describing the egalitarian standard. Assuming, as seems likely, that different groups have preferences for different media products, the question is: what policies provide for all people equally? This question is deceptively difficult. By comparison, equality for voters was easy: each person has a right to vote in equal population districts.¹²⁸ And in education, equality could

126. There remain the problems not with the willingness and ability to pay standard, but with the market functioning described earlier that independently justify public provision.

127. Of course, even if in principle they are different, distinguishing between educational, political, and cultural media on the one hand and entertainment media on the other creates difficult, possibly insurmountable, line-drawing problems. See *Hannegan v. Esquire*, 327 U.S. 146, 158-59 (1946) (refusing to allow the U.S. Post Office to enforce content distinctions among magazines applying for second-class postal rates).

128. The simplicity as to voting may seem superficial. In addition to the number of voters in the district, the effectiveness of a person's vote depends on the relation of (1) the voter's specific political orientation to (2) the political orientation of other people within her district. Because districts vary in political and demographic composition, the second part of the relationship means that the effectiveness of a person's vote always will depend on how the district lines have been drawn. Moreover, the first part of the relationship means that even within a single district different people will experience the effectiveness of their vote differently. For example, a person on the far left or right may want a strong majority for her party so that she can influence who in the party gets the "safe" seat. In

mean roughly equal per-student expenditures.¹²⁹ Following these examples, strict equality in the media context could mean that each person has a right to the same amount to spend on the media products that she prefers or, at least, the egalitarian goal might be that society move closer to such an allocation.

The economics of public goods, however, complicates the analysis of equality. The more that consumption of a good is non-rivalrous, the more the good's availability to a person will depend on not just her expenditure but the aggregate expenditures of all those who want it. For media goods, the lower the copy costs are as compared to the first copy costs, the more each person who wants the good will benefit from others' expenditures on the media good. For example, if copy costs are zero, if each person gets to spend one dollar, and if each of one thousand people uses her dollar to buy the results of an investigative journalism effort, then each person can receive a thousand-dollar investigative report for her dollar. But if only ten people want that investigative journalism, then each can expect only a ten-dollar product. That is, a person in the mainstream sends a dollar and gets a thousand dollar media product while the person closer to the margin gets a ten dollar product for her one dollar expenditure. Clearly, equal individual amounts to spend on non-rivalrous goods, which includes most media products, provides much better media products for a person in the broad mainstream. "Culture" and news are provided more lavishly for such a person than for others. This inequality, of course, embodies one possible view of equality: each person gets an equal amount to spend, and the

contrast, a moderate person may have a more effective voice if the parties are roughly equal so that the candidates of both parties race toward the middle and try hard to appeal to her views to get her vote, a situation that denies any effectiveness to the far right or left. Thus, a one-person-one-vote system can not provide voters with the "equally effective voice" that the Court says the Constitution demands. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). In fact, nothing but proportional representation could come close to satisfying this so-called constitutional mandate. Still, one-person-one-vote does provide formal equality, which is the minimum equality that the Constitution properly requires. See C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1072-84 (1980).

129. Of course, a different result would be required if the egalitarian goal was either to equalize educational outcomes or to provide opportunities equally proportionate to a person's capabilities because such goals would require per-person expenditures to vary. Likewise, the sometimes-proposed goal of equalizing the capacity of each school district to spend on education, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 10 (1973), could drastically deny individual equality by sacrificing some children's educations because of the anti-public education views of their neighbors. The failure to specify what theory of equality was being asserted by the plaintiffs in *Rodriguez* may have led the Court to be wary of providing relief.

standard is equal per-person "inputs."

Alternatively, the egalitarian premise could be that each person has a right to have the same amount spent on the media products that she desires. That is, each person legitimately has an equal interest in a system that satisfies her cultural or media needs. Under this second interpretation, equality exists when each person gets media products that she wants on which the same amount has been spent; the standard is an equal "output." The first interpretation is analogous to, or a contestable version of, equality of opportunity, while the second suggests equality in results. The difference is between each person getting the same amount *to spend* and each person getting the same amount *spent* on her preferred media.¹³⁰ The second is a more radical standard. Imagine, for example, if society spent the same amount on creating products oriented toward the political or cultural concerns of gay and lesbian people and of heterosexual people, such that these cultural needs of homosexuals were provided for to the same extent as those of heterosexuals. The first interpretation of equality privileges the mainstream; the second does not. Which is better?

Will Kymlicka argues that individuals typically require a relatively stable cultural context for identity formation and for maintenance of self-respect and self-confidence. As an empirical matter, people's capacity for effective choice and their ability to find meaningful life options normally depend on membership in a cultural community with a cultural heritage; coercive assimilation can have literally deadly results, leading to suicide and destroying people's very sense of agency.¹³¹ Cultural structure is a vital *context* of choice. Given the above observations, Kymlicka then draws on John Rawls's "claim[] that we should have the social conditions needed to intelligently decide for ourselves what is valuable."¹³² Because people cannot intelligently examine and choose options except from within "a rich and secure cultural structure," the Rawlsian liberal "should be concerned with the fate of cultural structures."¹³³ Rawls reasons that

130. As to some goods, equality is more concerned with equality in outcomes, or what people get, than with equality in expenditures. Few people argue that everyone should have the same amount spent on their health care. Equality here involves something more like everyone being cared for to a roughly equal degree when they are in need. Alternatively, maybe the claim is not that they should have the same amount spent on their health needs, but that they should get the same amount to spend on health insurance, possibly with the caveat that health insurance should not be risk-adjusted.

131. See KYMLICKA, *supra* note 19, at 174-76.

132. *Id.* at 164.

133. *Id.* at 165. For similar reasons, Jürgen Habermas argues that "[a] correctly

“‘parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect,’”¹³⁴ and Kymlicka observes that “the loss of cultural membership is one such condition.”¹³⁵ For these reasons, liberals such as Rawls should see membership in a viable community with its own cultural heritage as a “primary good” concerning which inequalities are a matter of injustice.¹³⁶ Cultural heritage’s value as a primary good lies “in its capacity of providing meaningful options for us, and aiding our ability to judge for ourselves the value of our life-plans.”¹³⁷ For these reasons, cultural communities have crucial importance. The relevance of this observation is, of course, hardly limited to Rawlsians. For example, these considerations led Jürgen Habermas to conclude that a liberal version of the system of rights must ensure “*strict equal treatment*, directed by the citizens themselves, *of the life contexts* that safeguard their identities.”¹³⁸

Treating cultural structures as Rawlsian primary goods suggests that justice requires that they be distributed equally unless inequality benefits the worst off. But this equality cannot mean merely making a single dominant culture equally available to anyone who wants to join. Such an interpretation would “misconstrue the universalism of basic rights as an abstract leveling of distinctions.”¹³⁹ Empirically, most people find that their own background culture provides the context for their subsequent choices,¹⁴⁰ even if those choices sometimes deviate from aspects of the person’s cultural tradition—

understood theory of [individualistically designed] rights requires . . . [protection of] the life contexts in which [an individual’s] identity is formed.” JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER* 208 (1998); see also *id.* at 220–21 (discussing the integrity of an individual’s identity in a multicultural society).

134. KYMLICKA, *supra* note 19, at 166 (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 440 (1971)).

135. *Id.*

136. *Id.* at 169, 177.

137. *Id.* at 166.

138. HABERMAS, *supra* note 133, at 210 (emphasis added).

139. *Id.* Habermas’s point tracks the common feminist critique of the inadequate notion of equality that merely means equal opportunities for both men and women to assimilate to the dominant male norm. See *id.* at 209–11.

140. Kymlicka argues that the liberal project crucially depends on the distinction between “context” and “choice.” KYMLICKA, *supra* note 19, at 186. A person has no complaint if her own choices frustrate her life plan, but does have a complaint if she, more than others, is disadvantaged by context. Thus, liberal theorists properly favor compensating for disadvantages that are not “chosen,” but rather reflect context—for example, a person’s social environment or natural endowments. See *supra* note 130 (discussing medical care). Likewise, the legal order treats people unequally if it disadvantages them because of their cultural heritage, for example, by not providing equal support for that heritage. See KYMLICKA, *supra* note 19, at 186–90.

choices which, when added to the choices of others, will change that tradition. Because a cultural structure, not income, is the Rawlsian "primary good" here, equality in relation to this primary good requires something closer to equal amounts spent on one's culture, which is the notion of outcome equality. Obviously, satisfying preferences for cultural goods, when weighted in this egalitarian manner, requires drastic deviations from market allocations.

Crediting any criterion for measuring preferences or for allocating resources that is more egalitarian than the willingness and ability to pay standard has implications for a just trade policy. First, a more egalitarian weighting obviously requires subsidies for those educational, cultural, or politically salient media products targeted at and desired by the poor. Given ubiquitous claims that tariff reductions make (some) media products more available to the poor, such an egalitarian standard might favor freer trade. On the other hand, if domestic media products predictably contain higher portions of politically and educationally salient or culturally meaningful content than imports, which may predominantly offer entertainment,¹⁴¹ a country might better satisfy preferences of the poor for these goods by adopting trade rules that improve the domestic media's competitive position. And, of course, it also might need to make subsidies available but presumably only for domestic media.¹⁴²

The view of cultural communities as "primary goods" justifies making egalitarian claims on their behalf. Kymlicka made this argument in the context of defending minority rights within a single

141. Wildman and Siwek suggest that copyright law has been responsive to developing countries' needs relating to materials relevant for educational development purposes. See WILDMAN & SIWEK, *supra* note 6, at 143. However, the primary effort in this respect, the proposed 1976 Stockholm Protocol Regarding Developing Nations, which included low cost compulsory licenses in appropriate cases, was rejected after opposition by many industrialized nations. See SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 593-623 (1987); Sunny Handa, *A Review of Canada's International Copyright Obligations*, 42 MCGILL L.J. 961, 966-67 (1997); Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 235, 277-78 (1998). Netanel persuasively argues that developing countries' democratic and educational needs require currently unlikely modifications of the existing international copyright regime. See Netanel, *supra*, at 327-28.

142. Ignoring First Amendment norms that they otherwise like to invoke, some free trade advocates argue that subsidies should focus on content and should be available equally to domestic and foreign producers. In contrast to this recommendation, the proposed structural rule not only is reasonably responsive to the concern justifying subsidies, but also is so without creating the evils of partisan ideological manipulation by dominate elites or government bureaucrats facilitated by content discrimination.

country. Each cultural subgroup has an interest in media content that is especially salient to its own heritage, identity, and politics. Kymlicka's claim, however, is equally relevant in the international trade context. This egalitarian weighting, that is, the concern to support all cultures, justifies trade restrictions on products from those countries with comparative advantages in order to support local production of media goods specially designed for comparatively smaller cultural markets. Thus, for most countries of the world, particularly countries that are net media importers, the competitive damage done to domestic media by the influx of imports, primarily from the United States,¹⁴³ suggests the legitimacy of some restrictions.

The nature of appropriate trade restrictions is another matter. Kymlicka based the liberal argument for minority rights on the value of such cultural communities as contexts for choice, not their value as particular historical cultural content.¹⁴⁴ He thematizes what I call a "discourse," not a "museum," conception of culture.¹⁴⁵ The idea of culture as discourse emphasizes change as well as continuity. No

143. According to a statistical report by the Organization for Economic Co-operation and Development, of the 14 countries listed, only the United States and Britain consistently had positive nets for film export/import income, see OECD, *supra* note 6, at 108–10, tbl. A.21, and Britain has since become a net importer of television and film programming, see Chris Barrie, *World Faces British TV Onslaught*, THE GUARDIAN (London), Jan. 21, 1999, at 22. Using 1984 UNESCO data covering 92 countries, Wildman and Siwek report that the United States was the top supplier of imported films in 56 countries, followed by the USSR as top supplier in 10 countries and India as the top supplier in 6 countries. See WILDMAN & SIWEK, *supra* note 6, at 16.

It should be noted that reports of data on revenue from film and related export income give quite varying numbers. The OECD report lists the United States in 1993 as having received \$1.742 billion in export earnings for film rentals and having paid \$83 million (the most since 1984) for imports. See OECD, *supra* note 6, at 108, tbl. A.21. These export figures may be low, however. Screen International, a London-based organization, reported U.S. movie exports to Europe in 1995 of more than \$5 billion, and the *Los Angeles Times* concluded that American world wide entertainment exports topped \$10 billion that year. See James Flanigan, *Today's Trade Figures Don't Tell Story of Future*, L.A. TIMES, Dec. 15, 1996, at D1. Looking at 1984, the OECD report lists the U.S. export earnings for film rentals as \$519 million. See OECD, *supra* note 6, at 108, tbl. A.21. For 1984, Wildman and Siwek, relying on different sources, report total revenue for the U.S. motion picture industry in foreign markets as \$1.685 billion, of which \$1.1 billion was from theater rentals. See WILDMAN & SIWEK, *supra* note 6, at 31. Using a different source, Wildman and Siwek report export rental revenue of the major U.S. film distributors in 1984 as \$654 million. See *id.* at 32.

144. See KYMLICKA, *supra* note 19, at 168–69, 196–97. Habermas emphasizes the same point. Calling for cultures to become "reflexive," he strenuously rejects "preservation of species by administrative means," observing that "to guarantee survival [of a cultural heritage] would necessarily rob the members of the freedom to say yes or no." HABERMAS, *supra* note 133, at 222.

145. See generally *supra* Part I (discussing the cultural side of the free trade debate).

cultural group or nation-state can rightfully impose a particular historical form of its culture on its members. Members always contest interpretations of their culture. Moreover, culture is always subject to change by the cultural community's members. This cultural change is unavoidable, continual, and proper. Therefore, the liberal must reject the futile attempt to protect any particular historical community from challenge and change. Just as for Kymlicka protection from change did not provide an appropriate way to protect minority rights, such preservation does not provide a legitimate basis for restricting imports.

The cultural claim must be that a net media importing community, whether a minority within a nation or a smaller or poorer country within the international arena, has an interest in assuring the vibrancy of its own culture as a context of choice. Its culture should receive adequate nourishment and must not be swamped by outside forces. Given the huge comparative market advantage that the public good aspect of media products gives dominant (primarily U.S.) media products, both the need for nourishment and the danger of being swamped are real. In addition to domestic subsidies, coherent ways to respond to these concerns include duties, discriminatory taxes, and quotas that mandate a minimum percentage of film screenings or television time be devoted to domestic media. On the other hand, censorship is improper. It seems aimed only at restricting local choice and preserving past cultural and political settlements. Of course, censorship can take various forms. Prohibitions on imports or on imports with particular content are obvious examples. In addition, quotas that limit the absolute number of outside (American) films or television programs that can be imported would be perverse. Such a rule would merely add to the tendency of blockbuster products to dominate.

D. Methodological Comment on the Economic Literature

Economic analyses do not confront directly the most important problems facing the legal order today—problems that involve questions of value, meaning, collective self-definition, subgroup rights, intergroup understanding, and hearing and responding to differences. These larger issues are matters of interpretation, identity, ethics, and morals, not of efficiency. Their exploration requires other methodologies. Of course, economic analysis has valuable uses. When used, however, its partisan premises should not be ignored, and its inquiry should not be cut short.

This Essay concludes that economic analysis shows that

unrestricted free trade in media products is likely to hurt audiences, especially, but not exclusively, audiences outside the United States—although both empirical and value issues mean that this theoretical conclusion cannot be taken as certain. Given that economic argument fills the American legal literature on international trade in media products, the relative absence of similar conclusions is curious. What explains the absence? One answer is that my conclusion is wrong. Another is that treatments in this literature often represent bad economics.¹⁴⁶ But some treatments are quite good,¹⁴⁷ so why does my analysis come out so differently? Although speculative, I want to offer a hypothesis.

Commercial interests, in addition to muddling through by using trial and error combined with intuition,¹⁴⁸ often utilize intelligent economic analysis to help determine how to become more profitable. In addition, they sometimes resort to economic analysis to inform their lobbying efforts by helping to determine which potential public policies will advance their interests. These uses make sense—and happily supply employment for economists. Of course, these uses also make profitability the focus of attention. But that should be fine, should it not? Profitability comes from being efficient, and efficiency is what we should want. After all, it advances the public welfare! As long as certain means are not used—illegal or monopolistic means—we are taught that becoming more profitable serves the social good. In fact, the discipline of market competition is the dynamic factor that requires “efficiency” and enforces a profit orientation.¹⁴⁹ These thoughts readily lead to the conclusion that restraints on free trade are bad for the same reason that monopoly is bad: both limit competition that ultimately serves the consumer. Little more needs to be considered on the issue of international trade, although economists sometimes add to their assault on protectionism the observation that trade restraints unfairly reduce profits for those (American) firms that otherwise would be able to compete fully and freely.¹⁵⁰

146. Discretion suggests that I include no cites here.

147. See, e.g., WILDMAN & SIWEK, *supra* note 6; Shao, *supra* note 2.

148. This combination is routinely described as “business judgment,” which, when executives are lucky, results in plentiful stock options in their annual bonuses.

149. See *supra* note 125 (discussing the effects of market forces).

150. One of Noam’s chief complaints about European public broadcasting is that it gave the public broadcasters monopsony power, which they used to obtain a “subsidy from the despised Hollywood.” NOAM, *supra* note 18, at 20. In effect, he accuses European public broadcasters of unfairly cheating Hollywood out of their appropriate profits. See *id.* at 15–17.

The primary error of this complacent economics arises from treating firms' orientation toward profits as equivalent to an orientation toward efficiency. The commonsense notion of "efficiency" is instrumental effectiveness at achieving some goal. In the economic realm, the goal might be maximization of something called "utility" or happiness. But even a frictionless, perfectly functioning market cannot be expected to maximize utility. To do so, the system would have to respond properly to interpersonal differences in utility, which presumably would require at least that distributional concerns be appropriately taken into account.¹⁵¹ Instead, the goal might be described cynically as effectively achieving whatever a perfectly functioning market achieves. But this characterization sells the notion of efficiency somewhat short. In economic analysis, efficiency normally refers to maximally serving preferences weighted not by their interpersonal strength but by their expression within a market that perfectly and costlessly responds to people's willingness and ability to pay.¹⁵² This conception of efficiency defines the goal. Given this conception, because selling to the person who will pay the most is both efficient and most profitable, the two are often thoughtlessly equated. This equation is wrong.

Each of this Essay's three economic critiques of free trade has focused on the satisfaction of people's preferences. But these critiques are largely irrelevant to the needs of a firm operating in the market. Firms trying to maximize profits can or must ignore some consumer preferences or some aspects of those preferences that relate to the firms' practices. Obviously, a critique of willingness and ability to pay as a measure of preferences (the third critique) is simply pointless for a firm only interested in what people will pay. The same is true for externalities (the second critique). For the firm, even if externalities reflect real preferences that people theoretically are willing to pay to satisfy, as long as they are externalities—that is, as long as the firm cannot figure out how to internalize positive externalities or can continue to avoid internalizing negative externalities—these preferences are not brought to bear on the firm's

151. See C. Edwin Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39, 40-48 (1974).

152. Eventually recognizing the disconnect between efficiency and utility, Posner once explained that the real normative concern was not with utility (or happiness) but with "wealth," which he defined in terms of what would be paid in a perfectly functioning market. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). But cf. C. Edwin Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 948-53 (1980) (critiquing Posner's analysis).

decisions, usually because of transaction costs or collective action problems. Externalities are irrelevant because they fall into neither the firm's expense nor revenue column.¹⁵³ Finally, factors determining who will win within monopolistic competition need to be understood by market-based firms. For example, there is a tendency toward monopoly when firms sell unique but similar goods that have significant public good features. However, the question of whether the winner will be most "efficient" (the first critique)—that is, whether the surplus the winner will produce will be greater than the surplus that would have been produced by firms whose failure the winner causes—is irrelevant from this firm-based perspective.¹⁵⁴

Forceful criticisms of any assumed identity of profitability and preference satisfaction or efficiency are common. For example, critics observe that the market gives corporations an incentive to spend money either to increase productivity or to weaken the power of unions so that the firms can pay workers less. The latter increases profits not by creating wealth, by satisfying preferences, or by being efficient, but by transferring wealth from workers to the firm. A profit-oriented firm, however, ignores the distinction. Profit maximization requires that it engage in both as long as the marginal gain to the firm from each expenditure is greater than its cost to the firm.¹⁵⁵

Despite their importance, such critiques are not my concern here. Rather, my concern is sociological. My hypothesis is that economic reasoning often ignores these issues by ending too early and that it does so because analysts have become too accustomed to adopting intuitively the profit perspective of firms. The problem is the common assumption, noted above, that profitability and efficiency are equivalent. That fallacy blocks any consciousness of cutting short the analysis.

Free trade does promote profitability, at least for those media

153. This claim is somewhat of an overstatement. A firm has an incentive to devote some resources to finding ways of capturing or internalizing positive externalities, that is, to find a way to get payments from those who benefit. Likewise, the firm has an incentive to use resources to find ways to foist costs onto others, thereby increasing negative externalities, and to resist attempts to enforce internalization. Externalizing costs and avoiding internalization are major incentives and explain many corporate political and lobbying activities that, when this is their goal, hardly advance the public good, although these political activities can be very profitable investments of corporate resources.

154. I once asked a major academic economist about the lost consumer surplus created by monopolistic competition. His reply was, roughly, that it is wrong to consider consumer surplus because it cannot be measured by the market, and the market is the only objective source of information about what people want.

155. See *supra* note 14.

firms that happen to have a "comparative advantage," such as many dominant, American film and television program providers. Probably the best economic treatment of international trade in media products, Wildman and Siwek's *International Trade in Films and Television Programs*, was written explicitly from the perspective of "creating the policy alternatives necessary to enhance the international competitiveness of American services."¹⁵⁶ In the context of bemoaning that "consumer welfare alone has rarely proven to be a persuasive argument in trade negotiations,"¹⁵⁷ Wildman and Siwek state as basically uncontroversial that "[i]t is true that consumers in countries that restrict the importation of foreign films . . . would be better off if these restrictions were eased."¹⁵⁸ Similar remarks fill the academic literature.

The virtually universal assumption that consumers would get more of what they want from free trade profitability seems relatively unproblematic only from the perspective of a corporate, profit-oriented economics that ignores the consumer-oriented, social welfare economics emphasized in this Essay. This Essay's "academic" economics is simply irrelevant for corporations' responses to market opportunities. Once implicitly adopting the corporate perspective, the typical article merely asks whether free trade, which it identifies with both economic efficiency and consumer welfare, should be compromised on the basis of some other value, such as culture. Often the commentator suggests that this cultural interest is essentially elitist and anti-egalitarian. If more generous, the author recognizes this cultural interest as real, but usually still proceeds to belittle rather than to explore it.

In contrast, from a consumer-oriented, social welfare perspective, reasons to doubt the merits of unimpeded free trade

156. Claude E. Barfield, *Editor's Foreword*, in WILDMAN & SIWEK, *supra* note 6, at xiii.

157. WILDMAN & SIWEK, *supra* note 6, at 158.

158. *Id.* at 157. They state in passing that foreign "audiences are the obvious losers" from import restrictions with the only analysis being that this conclusion is shown by the audiences' purchasing or viewing habits. *Id.* at 121.

Sometimes their readiness to associate free trade with all things good seems to blind them to their own careful economic analysis. For example, Wildman and Siwek carefully demonstrate that free trade would reduce the total number of films produced internationally, *see id.* at 74, and possibly would "eliminate all film production in smaller countries," *id.* at 75. They then casually comment that restrictions on trade "limit both the quantity and the variety of the films and television programming from which an audience can choose." *Id.* at 121. In fact, properly designed trade restrictions that burden but do not bar imports could help to assure that a nation's audiences receive both domestic and foreign films, which would seem to increase variety and, possibly, quantity.

cannot be systematically ignored. Although empirical issues make any conclusion uncertain, the possibility that policy alternatives could improve on unregulated trade becomes evident. Thus, my methodological plea is that those who invoke economic analysis should do so not merely from the perspective of the firm. Rather, they should recognize the normative concerns on which economics claims to be founded: people's welfare and preference satisfaction. Free traders rightly emphasize the liberal value of access to new and outside views. But liberals also should recognize the value of each nation, and even of each group within a nation, being able to participate in creating and having its own media. Even when people are willing to pay dearly for this media, monopolistic competition, externalities, and market criteria themselves may cause markets to fail to identify and to measure accurately preferences for this outcome. When people as both consumers and citizens value these media sources, efficiency itself may require restraints on free trade.

E. An International Public Sphere?

A reader might suspect that I am skeptical of international trade specifically and globalization more generally. Indeed I am. Nevertheless, all the arguments in this Essay have been media specific. They have related to special, identifiable aspects of media products that could justify restraints even if international free trade principles generally are approved. Still, critics may argue that my analysis is antiquated. Many astute observers conclude that globalization—the code word of the 1990s—is inevitable. If so, a quite plausible, *media-specific*, non-economic argument may favor free trade.

The argument is:¹⁵⁹

(1) Economic globalization is already a fact and is rapidly expanding. The major economic players today are multinational corporations that produce tremendous wealth and tremendous profits. With more revenue than most nation-states' domestic products, these multinational corporations are owned and operated internationally.

159. This argument generally follows analysis offered by Habermas. See HABERMAS, *supra* note 133, at 105–61 (discussing the future of the nation-state). Interestingly, I have not seen this argument for free trade clearly articulated in the U.S. scholarship favoring free trade in media products. The argument may be too visionary and too dependent on speculative developments for the purportedly pragmatic American authors who write on free trade. Still, intuitive belief in the argument might influence some people's thinking on the subject. Thus, addressing it explicitly seems warranted.

(2) Just as the United States discovered a century ago with respect to domestic corporate giants and trusts, unregulated corporations often turn lawless. Even when they do not, they often exercise power in socially disastrous ways, ranging from their treatment of labor to their effect on the environment (as well as their corruption of democratic politics).

(3) Therefore, only legal regulation coming from government—presumably a democratic and populous government—can limit these disasters and channel corporate power into more benign uses.

(4) These corporations' power and their capacity to exploit the opportunities of international markets have nevertheless left traditional nation-states with increasingly little room to maneuver or even to perform traditional welfare-state roles. In many respects, these corporations are the world's new sovereigns.

(5) Given their power, enhanced by the mobility of capital, to evade nation-states' regulations and to make most attempts to regulate disastrous for the regulating country, the world today vitally needs global governmental bodies with the reach and power to monitor, regulate, and control global corporations and global capital. To some extent these global bodies are already taking shape, albeit usually as bodies of experts with little democratic or popular control.

(6) This non-democratic aspect of evolving global bodies is troubling. A partial solution might be greater transparency, but transparency is hardly enough if bodies, such as the World Bank, the International Monetary Fund, or the World Trade Organization, feel free to do as they wish despite public exposure. Any believer in democracy and self-government must favor global political structures that are more democratically responsive.

(7) Just as public spheres are absolutely crucial for nation-state democracies, a global public sphere where public opinion is developed and brought to bear on "democratic will formation"¹⁶⁰ is absolutely essential for any global democracy.¹⁶¹

(8) The need for such global public spheres suggests the

160. *Id.* at 153, 160.

161. *See id.* at 124, 127, 153, 160–61. Unfortunately, these assertions, usually concluding Habermas's analysis, do not discuss in detail the appropriate form of these public spheres.

need for global media. Therefore, as compared with other trade restraints, restrictions on trade and other international operations of the media are especially objectionable.

There is force to this argument. To begin, I find unassailable the points about the extent and dangers of global capitalism and the need to subject it to democratic political control. Nevertheless, I want to note two vulnerabilities in this argument that should lead to rejecting its final conclusion. My first criticism relates to the fourth and fifth points about the inadequacy of traditional governments and the necessity, as well as possibility, of global, democratic bodies. The second criticism questions whether even the goal of global democratic bodies served by appropriate public sphere(s) implies the eighth point, regarding the desirability of avoiding national restraints on trade in media products.

Certainly, a democrat can be sensibly pessimistic about the near-term prospects for an effective and democratic world government. Although working to improve the long-term chances of such a government is surely a possible goal, given the reasonable pessimism about if and when these efforts will bear fruit, a more immediate strategy may be to work to maintain and increase the power of nation-states to control multinational corporations, especially as these corporations operate in or affect that nation-state. Although the structural position of multinational corporations may inevitably limit national power, the room for nation-states to maneuver may depend significantly on political will within the state. Of course, this political will is also often blunted by multinational corporations' domestic political power, the bases of which range from general ideological dominance to huge campaign contributions and to the capacity to threaten to move capital and jobs. Still, multinational corporations' political power is unlikely to be any less influential within currently possible international bodies. Rather, the more democratic structure of nation-states should make resistance easier there. Opposition to misbehavior by and to greater political hegemony of multinational corporations can be a crucial part of partisan domestic politics. This politics should aim at slowing down the evisceration of national sovereignty, except when the reduction serves democratic principles, such as grants of power to international bodies to protect human rights, or when it serves other democratically determined interests. This strategy suggests selective opposition to trade agreements, a position that many progressives in the United States and Canada have taken over the last decade in their reservations about or opposition to

NAFTA or the Multilateral Agreement Investment.¹⁶² More generally, even if many functions of local democracy eventually will be replaced by global democratic institutions, the best current strategy requires opposition to any changes that weaken currently existing domestic democracy. Importantly, this approach means avoiding any policy that would weaken domestic public spheres and the media on which they depend. Of course, a major claim, developed in both the cultural and the economic sections of this Essay, is that free trade in media products is such a policy.

Second, accepting the democratic aspiration for global democratic governmental bodies and recognizing their dependence on appropriate public spheres do not lead automatically to the eighth point, that this goal is furthered best by international free trade in media products. It may not even imply the seventh point, that the most needed public spheres, other than that of the "strong" public sphere within the global parliament itself, are themselves global in dimension. Without a doubt, global democracy requires global circulation of information. Circulation may be adequately served by limitations on censorship, as required by basic human rights norms, and by technological developments as illustrated by the Internet. In comparison with global media, strong domestic media may do as well or better in promoting public awareness and discussion of globally relevant information. Certainly, global democracy and global public spheres do not require the leveling of cultural differences or the merging of cultures any more than national public spheres require this leveling within the multiethnic nation-state.¹⁶³ As repeatedly shown, unadorned reliance on markets has been inadequate for the public spheres democratically required by traditional nation-states.¹⁶⁴ Democracy within a country is better served by appropriate

162. One of the major political defeats of President Clinton's second term related to his request in 1997 for fast-track authority relating primarily to the planned Multilateral Agreement Investment. The effective opposition—especially of labor, but also environmentalist and other activist groups—stemmed not from general opposition to international trade but rather from objections regarding the undemocratic manner in which they saw it being structured. See, e.g., David Moberg, *Global Economy Needs Regulating*, *NEWSDAY* (Bay Shore, N.Y.), Dec. 9, 1997, at A41, available in 1997 WL 2721469. For those conscious of this battle, the 1999 demonstrations and workshops in Seattle should not have been a surprise. See *supra* note 7 (noting the struggle).

163. Habermas's critique of identifying the nation-state with a mythical ethnic people rather than with democratically legitimized law involves a similar rejection of the necessity of leveling cultural differences, something that many critics of a European democratic government thought would be necessary but impossible. See HABERMAS, *supra* note 133, at 105–61.

164. See, e.g., Baker, *supra* note 35, at 383–408.

government interventions in the media order. This is likely to be equally true for any global democracy. This conclusion, of course, leaves open the question of whether a global democratic government itself (when such an entity exists¹⁶⁵) or smaller political units, specifically, nation-states (as long as they continue to exist) will best be able to formulate appropriate interventions. In any event, instinctive reliance on free trade hardly seems appropriate.

Both the type of needed interventions and the level of government best able to design and implement these interventions can be informed by a consideration of the nature of the public sphere(s) that would best serve a global democracy. Obviously, no global discourse could meaningfully involve all individuals within a single discourse. The physical capacity of the Internet, or any other version of a global public sphere, has little to do with the limited number of people who can meaningfully participate in an actual single discussion. Meaningful democratic discourse within a single state—whether multicultural state or a state divided by class, gender, race, or religion requires that subgroups be able to engage in internal discourses to formulate their own visions. Subgroups must then be able to present those visions powerfully in negotiations with other groups who have different visions as well as in discourses of self-understanding and justice with governing bodies and the rest of society. The same should be true within a global democracy. Any absence of well-developed group discourses leaves the overarching public sphere open to easy domination by elites, whether corporate, technical, or governmental elites. Within nation-state democracies, a major defect of the market is its empirical failure to provide adequate media for the discourse and political functions of the otherwise marginalized subgroups of society—failure to provide for what Nancy Fraser calls “subaltern counterpublics.”¹⁶⁶

It is likely to be the same or worse on the global stage. Even groups that have not been marginalized domestically often will be marginalized globally. Thus, for a global democracy to represent anything other than domination by powerful elites requires similar protection and nourishment of counterpublics and subpublics. The composition of these subpublics will be diverse, encompassing both

165. To the extent that the United Nations can be considered a prototype, the United States's rather rabid opposition to UNESCO's attempt to formulate a non-censorious media policy during the debate over the New World Information and Communication Order (NWICO) illustrates a greater ideological commitment to free trade than to either local or global democracy. See *infra* notes 182–84 and accompanying text.

166. Fraser, *supra* note 46, at 123 (emphasis omitted).

subaltern groups within an individual country and labor, social movement, and ethnic groups that cross national boundaries. A major focus, however, will be on nourishing general public spheres of smaller *political* entities, especially of the smaller or developing nation-states.¹⁶⁷ In other words, global democracy requires national capacity to restrain and supplement free trade precisely in the ways otherwise called for in this Essay—interventions designed to assure vigorous domestic media serving national, cultural, and political discourse functions.

III. POLICY SUMMARY

This Essay argues that free trade will not provide the media products that people in various countries desire. As a consequence, governments will need to intervene in ways that violate free trade principles. This conclusion by itself does not indicate what type of interventions are needed. Moreover, because trade does provide access to valuable media content, some forms of protectionism surely could be worse than free trade. The goal here is to identify the types of interventions that would be appropriate and how the international legal order could increase the chances that these, rather than objectionable forms of protectionism, would prevail.

In thinking about this issue, Oliver Goodenough makes a useful distinction. He contrasts "strong protection," which has an exclusionary goal, with "weak protection," which is designed to promote choice by keeping domestic products in existence.¹⁶⁸ When he eventually condemns cultural protectionism, he clearly means strong protectionism, as evidenced by his continued defense of the propriety of weak protection, such as subsidies intended to preserve

167. This concern with the impact of trade on the cultural industries of weaker economies is quite pronounced internationally. Representative are views such as those of Mia Bottley, Minister of Education, Youth, and Culture from Barbados, who suggests that larger countries "lack sensitivity to the particular needs of small island states," FINAL REPORT, *supra* note 34, at 16, and Abdelbaki Hermassi, Cultural Minister of Tunisia, who argues that international trade agreements pose a much greater threat to countries in the South, where they could have a "devastating effect," *id.* at 17. See *id.* at 16-17; cf. *supra* note 141 (noting the rejection of the Stockholm Protocol).

168. Goodenough, *supra* note 13, at 211 (emphasis omitted). Goodenough includes "economic subsidies and affirmative quotas for Canadian production" as examples of weak protectionism and "flat prohibitions, negative quotas, and other significant barriers on imports" as illustrating strong protectionism. *Id.* In this latter category he includes minimum quotas for Canadian content in Canadian broadcasting and the import prohibitions and excise taxes on split-run magazines invalidated by the WTO decision, see *id.* at 212-14, although it is not clear why some of these, such as the minimum quota for Canadian content, are not better characterized as "affirmative quotas" or subsidies.

choice.¹⁶⁹

In both its culture and economic Parts, this Essay parallels Goodenough in condemning strong protection while recognizing a useful role for weak protection. Weak protectionism can serve culture when culture is conceived of as a context of choice. In contrast, strong protectionism counteracts this reason for valuing culture. Only the museum conception of culture justifies the exclusions required by strong protection. An economic focus on providing consumers with what they want can hardly justify strong protectionism's exclusion of media products that consumers wish to receive. It can, however, justify weak protectionism's concern with properly pricing imports and with the continued availability of valued local cultural materials. Each economic subsection of this Essay has observed that sometimes markets fail to maximally provide people with the media products that they want. The obvious policy recommendation is to provide the desired products—hence the propriety of subsidies. Still, other, more complex policies may be equally useful. Sometimes, consumers might be better off, on balance, with fewer imported media products than free trade would provide if the result is that they get more of those products that they value more but otherwise would not obtain. Policies can also produce net benefits if they burden media products with significantly more negative than positive externalities or if they restrict the competitive success of media goods that undermine the financial viability or reach of more valued materials. Still, neither subsidies nor these limited impact restrictions are designed to be exclusionary, and they are unlikely to be so in practice. These policies attempt to expand or empower choice and, thus, do not fit the notion of strong protection. In fact, given that only weak protectionism seems justifiable, it might be surprising if a democracy ever attempts anything else.

Thus, Goodenough's categories are fine. The difficulty comes with their interpretation and implementation. For example, Goodenough treats many Canadian policies as involving strong protectionism, especially the Canadian Tariff's flat prohibition on importing split-run magazines¹⁷⁰ and the 80% tax on Canadian

169. *See id.* at 252. Goodenough is quite clear that subsidies have important and defensible uses. *See id.* at 235–36.

170. Tariff Code 9958 prohibited importation of “a split run or a regional edition[] that contained an advertisement that was primarily directed to a market in Canada, and that did not appear in identical form in all editions . . . distributed in [the periodical's] country of origin.” Customs Tariff, ch. 49, sched. VII, code 9958, 1987 S.C. 3308, 3310 (Can.); *see also* Goodenough, *supra* note 13, at 213 n.44 (quoting Tariff Code 9958).

advertising in split-run magazines printed in Canada.¹⁷¹ Like most American commentators, Goodenough seems ready to sign on to the 1997 decision by the WTO declaring that Canada's provisions violated GATT.¹⁷²

This characterization of the tariff prohibition and the advertising tax is wrong. Canada did not try to exclude any foreign magazines, that is, magazines printed and sold outside Canada. Imports were welcomed. Rather, the tariff only required that when magazines come in, the magazines have basically the same advertising that they had when sold in other national markets or, more precisely, that the magazines not have different advertisements "directed to a market in Canada."¹⁷³ This requirement is hardly an attempt to keep out foreign ideas or foreign magazines. Instead, its obvious purpose was "to ensure that Canadian [and Canadian-oriented] advertising expenditures support Canadian magazines."¹⁷⁴ In that sense, the tariff was a legal arrangement designed to get Canadians, specifically Canadian businesses that advertise, to subsidize Canadian magazines—a clear example of weak protectionism.

These measures to get Canadian advertisers to subsidize Canadian magazines could be vital to the survival of Canadian magazines. Advertising provides about 60% of Canadian magazine revenue.¹⁷⁵ Canadian magazines' operating profit is 2.5% of revenues (compared to 12% for American magazines).¹⁷⁶ The Canadian Magazines Publishers Association has "estimated that the entire magazine industry's profits could be wiped out completely with only a [3%] shift in [Canadian advertising] dollars to American publications."¹⁷⁷ According to a Canadian government task force, allowing the U.S. split-run magazines to include advertising directed

171. Bill C-103 closed a possible loophole: printing the Canadian edition in Canada and thereby not engaging in importation the bill imposed an 80% excise tax on the Canadian advertising of such a locally produced split-run publication. See Goodenough, *supra* note 13, at 214.

172. Although much about the WTO decision's legal analysis can be criticized, and although it seemed to adopt much too much of a commodity orientation in its notion of comparable goods and its analysis of "directly competitive or substitutable products," WTO Report, *supra* note 7, a critique of the legal reasoning is not needed for the purposes of this Essay. For an effective legal critique of the decision, see Matheny, *supra* note 13, *passim*.

173. Customs Tariff, ch. 49, sched. VII, code 9958, 1987 S.C. at 3310.

174. Magder, *supra* note 5, at 5. As Magder correctly observes, "[n]one of the Canadian measures [struck down by the WTO decision] were designed to block the entry into Canada of foreign magazines with foreign content." *Id.* at 49.

175. See *id.* at 49.

176. See *id.* at 28.

177. Van Harpen, *supra* note 10, at 173-74 (citation omitted).

at their Canadian readers could reduce advertising revenue for Canadian magazines by almost 40%.¹⁷⁸ This predicted decline is similar to the 40% of total Canadian magazine advertising revenue captured by Canadian editions of American magazines around 1960 before the adoption of protectionist measures.¹⁷⁹ Small wonder that observers suggest that implementing the WTO decision is likely to be devastating for Canadian magazines. At various times in the past, without protection, American magazines have held roughly 80% of the Canadian market.¹⁸⁰ In 1992, after the Canadian government introduced measures aimed not at keeping American magazines out but at keeping them from taking advertising away from Canadian magazines, Canadian magazines increased to more than two-thirds of the Canadian circulation.¹⁸¹

Canadian magazines potentially can make crucial contributions specifically to the Canadian political order and more generally to Canadian discourses of identity. These magazines potentially represent precisely the type of cultural media that this Essay has argued may fail competitively even though they produce positive externalities and even though they may be more valued by consumers than the imports that replace them. These magazines will fail, but not because Canadian audiences will not purchase them if American magazines are available; they will lose competitively because of price. If American magazines receive the subsidy provided by Canadian advertising dollars, then the Canadian magazines would be priced too high, relative to the American ones, for the Canadian magazines to succeed. Canada's attempt to ensure that Canadian advertising goes to Canadian magazines does not exclude foreign imports. Rather, it attempts to subsidize Canadian magazines. This subsidy is justifiable weak protectionism, and Goodenough should have recognized it as such. Canada's view that its advertisers are a resource that should support Canadian media products is hardly unreasonable. Nevertheless, not only did the panel and appellate body of the WTO find that the Canadian effort violates GATT provisions, but Goodenough also concluded that it is exclusionary. Why did they all go wrong?

178. See Magder, *supra* note 5, at 28–29.

179. See *id.* at 10.

180. Although the quality of the data is unclear, U.S. magazines reportedly held more than 80% of the Canadian market in the 1920s, see *id.* at 7, and by the late 1960s roughly 130 million out of 160 million copies of magazines (81%) sold in Canada were American, see *id.* at 12–13.

181. See *id.* at 13.

This question points to my final suggestion. The professional orientation of practitioners of trade law is likely to tilt toward more commodified analyses. After all, commodification is the premise of trade. Given this orientation, these practitioners are likely to see exclusion even in regulations that cultural supporters would identify as weak protectionism. Likewise, trade-law practitioners are likely to attribute unacceptably protectionist purposes to regulatory policies even when important, legitimate justifications exist for such policies. Predictably, trade-law practitioners will misapply even properly designed trade rules to make them more restrictive of national sovereignty in the media context than is desirable, just as Goodenough misapplied his useful notion of strong protectionism. If this bias is a regular feature of a trade-law regime, the question is whether there is any way for the legal order to do better. Despite the evils of strong protectionism, possibly the best hope of most often getting justifiable results is to leave all decisions related to media products solely to national discretion—that is, to exempt cultural materials from all free trade agreements. In practice, application of trade rules is likely to prevent democratic countries from adopting economically justified regulatory programs more often than it would thwart objectionably strong protectionism.

An even better option would be to develop international law principles that allow domestic regulation of trade in media products but could still block at least the worst cases of strong protectionism. As noted, strong protectionism has little legitimacy despite its allure for undemocratic traditionalist elites. The international norms that strong protectionism most obviously violates, however, are not economic ones, but rather are human rights principles concerning freedom of information. In fact, because the exclusionary goal of protectionism usually is to silence “impure” communication inputs, often it will be pursued through content-based censorship that applies equally to domestic and foreign media goods, thereby evading offense to free trade principles. If this characterization is right, the global community should use international human rights law, not trade law, to identify impermissible national burdens or restraints on imported media products.

Admittedly, this strategy creates serious dangers. Corporate media interests might pervert human rights law to serve their own purposes. History suggests such an attempt will occur. During the late 1970s and early 1980s, UNESCO studied national and world media structures from the perspective of serving the legitimate interests of all nations. This effort culminated in the MacBride

Commission Report,¹⁸² written under the leadership of Sean MacBride, an Irish diplomat, a Nobel Peace Prize winner and, as the American press regularly noted, a Lenin Peace Prize winner. An accurate summary description of the MacBride Commission Report, given in a law review comment, is that it "advocated the elimination of governmental interference and censorship, the decentralization of the mass media, high standards of professionalism for journalists, and a better balance in the contents and coverage of mass media reporting."¹⁸³

Look at that summary again. Surely, such a report should delight anyone committed to a free press and a sound communications order. So what did the author of this summary conclude? Without reference to any language in the report, he concluded that a "proposal based on the MacBride Report's recommendations conflicts with both the First Amendment and international standards because a major component of such a proposal involves governmental control over the flow of information and ideas."¹⁸⁴ This misguided evaluation might be merely the assessment of a confused law student. But it is not. Also without textual reference to anything within the Report, Leonard J. Theberge, Chair of the American Bar Association Section of International Law's Committee on International Communications, described the Third World view purportedly represented by the report as one in which "the state has a duty . . . to censor incoming and outgoing news."¹⁸⁵ He accused the MacBride Commission and UNESCO of "deviat[ing] from earlier international legal precepts based on protecting individual rather than governmental rights."¹⁸⁶ An article

182. INTERNATIONAL COMM'N FOR THE STUDY OF COMMUNICATION PROBLEMS, MANY VOICES, ONE WORLD (1980) [hereinafter the MACBRIDE COMMISSION REPORT].

183. Michael J. Farley, Comment, *Conflicts over Government Control of Information—the United States and UNESCO*, 59 TUL. L. REV. 1071, 1076 (1985).

184. *Id.* at 1088.

185. Leonard J. Theberge, U.N.E.S.C.O.'s "New World Information Order": *Colliding with First Amendment Values*, 67 A.B.A. J. 714, 715–16 (1981); cf. Wolfgang Kleinwachter, *Three Waves of the Debate*, in THE GLOBAL MEDIA DEBATE: ITS RISE, FALL, AND RENEWAL, *supra* note 4, at 13, 16 ("[N]ot a single paragraph in all the NWICO resolutions included restrictions or censorship for Western mass media, and . . . both the Mass Media Declaration and the resolution of the MacBride Report reaffirmed the principle of freedom of information as a basic human right . . ."); A.H. Raskin, *U.S. News Coverage of the Belgrade UNESCO Conference*, J. COMM., Autumn 1981, at 164, 171 (quoting the observation of John G. Massee, a staff member of the MacBride Commission, that "nothing coming out of the MacBride Report or UNESCO . . . suggests a curtailment of news flow").

186. Theberge, *supra* note 185, at 718. To prove his point about earlier precepts from which the MacBride Report deviates, Theberge quotes language, which he approves, from Article 19 of the Universal Declaration of Human Rights. See *id.* He inexplicably fails to

prepared under the direction of Sarah Goddard Power, a deputy assistant secretary in the State Department, echoed Theberge's points and emphasized that the United States "strongly oppose[s]" some of the eighty-two recommendations.¹⁸⁷ Elsewhere, James Buckley, Under Secretary of State for Security Assistance, Science, and Technology is described as seeing "NWICO [New World Information and Communication Order] as a serious threat to First Amendment values."¹⁸⁸ Newspapers in the United States exhibited the same hostility. The National News Council found that American newspaper coverage of the six-week Belgrade UNESCO conference that considered the MacBride Commission Report completely ignored the conference's extensive work in a vast array of areas. The newspapers did, however, contain 173 news stories and 181 editorials on the debate over communications policy. All the editorials expressed apprehension, with 158 being strongly hostile and the other 23 critical but moderate in tone, with the news reports generally edited to reinforce the editorial perspective.¹⁸⁹

This vilification and misreporting might be hard to understand if First Amendment values, which the Report largely embodied, were the critics' real concern. The American objection, however, may have had little to do with censorship. Apparently more troubling to the critics was the MacBride Commission's conclusion that in many parts of the world, governments would need to play a significant role in promoting a better communications order. Curiously, none of these critics appear to note that this is precisely what the United States did in the late eighteenth and nineteenth centuries by using the postal

note that the language he quotes is virtually identical to language in the third conclusion of the MacBride Report. See FEW VOICES, MANY WORLDS 46 (Michael Traber & Kaarle Nordenstreng eds., 1992) (reprinting the "Conclusions and Recommendations" of the MACBRIDE COMMISSION REPORT, *supra* note 182). Conclusion 3 asserts that "communication is a basic individual right" and that "[f]reedom of information—and, more specifically the right to seek, receive and impart information—is a fundamental human right." *Id.*

187. *The U.S. View of Belgrade*, J. COMM., Autumn 1981, at 142, 143 (reprinting an excerpt from Assessment of Information and Communications Issues, 21st General Conference of UNESCO, Sept. 23–Oct. 28, 1980).

188. William Fitzmaurice, Note, *The New World Information and Communication Order: Is the International Programme for the Development of Communication the Answer?*, 15 N.Y.U. J. INT'L L. & POL. 953, 979 n.87 (1983).

189. See Raskin, *supra* note 185, at 166–67; see also George Gerbner, *Unesco in the U.S. Press*, in THE GLOBAL MEDIA DEBATE: ITS RISE, FALL, AND RENEWAL, *supra* note 4, at 111, 117–20 (providing a similar characterization of the news reporting surrounding the MacBride Report). Interestingly, Raskin can hardly be seen as some anti-press radical; rather, he is a former assistant editor of the *New York Times* editorial page and Associate Director of the National News Council. See Raskin, *supra* note 185, at 164.

service to provide major subsidies to newspapers, with the subsidies designed to help structure the industry in a manner that purposefully favored certain types of newspapers and, thereby, certain types of content.¹⁹⁰ Indeed, the United States and virtually all democratic countries continue to enhance the communications order, although in some cases, such as public broadcasting, these involvements have been subject to increasing assault through pressure on their governmental funding and, especially in Western Europe, competition from commercial broadcasters.¹⁹¹ American commentators found the recommendation that “‘in expanding communication systems, preference should be given to non-commercial forms of mass communication’” and suggesting that “‘public funds might be made available for this purpose’” as they are for education to be particularly objectionable.¹⁹² Of course, this recommendation looks little different than a national policy in Britain to expand the British communications system by creating the British Broadcasting Corporation or little different than tax exemptions given in the United States. Although neither this recommendation nor any other portion of the MacBride Commission Report suggested any limitations on the freedom of privately owned media, American Bar Association representative Leonard Theberge condemned the Report for having a “clear bias against private sector involvement in communications.”¹⁹³ The United States Department of State

190. See, e.g., RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860s* (1989); RICHARD BURKET KIELBOWICZ, *ORIGINS OF THE SECOND-CLASS MAIL CATEGORY AND THE BUSINESS OF POLICYMAKING, 1863-1879 passim* (Journalism Monographs No. 96, Apr. 1986).

191. The eventual consequence of the increasing presence of private commercial television, authorized over the last 20 years in liberal democracies outside the United States, is still unsettled. James Curran, for example, has challenged Elihu Katz's view that this development will erode public support for continued large government subsidies for and viewership of public broadcasting, with a consequent splintering of the audience and a weakening of the public sphere required for liberal democracy. Compare Elihu Katz, *And Deliver Us from Segmentation*, 546 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 22 (1996) (arguing that with public television broadcasting giving way to commercial broadcasting, “[w]e have all but lost television as the medium of national political integration”), with James Curran, *Crisis of Public Communication: A Reappraisal*, in *MEDIA, RITUAL AND IDENTITY*, *supra* note 38, at 174 (taking issue with Katz's position and arguing that “only by opening up [broadcasting] to more voices will it be possible to strengthen public identification with the broadcasting system”).

192. Fitzmaurice, *supra* note 188, at 980 n.97 (quoting MACBRIDE COMMISSION REPORT, *supra* note 182, at 260, Recommendation 31).

193. Theberge, *supra* note 185, at 716. As evidence of this bias, Theberge quoted a statement by UNESCO Director General M'Bow, who commented that “‘an increasing concentration of media in the hands of a few private or public enterprises’ is a major issue.” *Id.* (quoting UNESCO Director General M'Bow); cf. Power, *supra* note 187, at

considered a "major troublesome aspect of the [UNESCO] Director-General's comments" to be his suggestion that "more work needs to be done on such questions as . . . 'an increasing concentration of media in the hands of a few private or public enterprises.'" ¹⁹⁴ I assume it is troublesome because United States policy apparently favors concentration, ¹⁹⁵ despite its undemocratic nature and its conflict with First Amendment principles. ¹⁹⁶ The State Department's Sarah Goddard Power called further attempts to decentralize the media simply "unacceptable to the U.S." ¹⁹⁷

What happened? Probably the best assessment is that the United States's response to NWICO was totally captured by a combination of corporate interests and cold war fears. The United States seemed to equate corporate interests—free trade and commercial dominance—with the meaning of the First Amendment and international human rights. It opposed the possibility that non-commercial media would receive substantial support or that commercial media would be restricted by, for example, antitrust-like principles. Similar attempts to characterize human rights as pro-market or pro-corporate are likely to reoccur. Attempts, however, do not mean success. In the past, American commercial media interests argued unsuccessfully that applying labor laws or antitrust laws to the media violates the First Amendment. ¹⁹⁸ They regularly made similar claims in litigation against media-specific structural regulation in the United States, but those arguments routinely failed before the Supreme Court. ¹⁹⁹ Although commercial interests undoubtedly would similarly invoke international human rights law as the basis to oppose trade restrictions designed to support local media, the challenge is likely to fare no better than it did when based on the First Amendment in the Supreme Court. On the other hand, when national legislation is really exclusionary and censorious, human rights law is the proper field of dispute. Challenges to the legislation

144 (stating that the "MacBride Report . . . exhibits a clear bias against the involvement of the private sector in communications").

194. Power, *supra* note 187, at 144 (quoting UNESCO Director General M'Bow).

195. This preference for concentration more recently has been the quite explicit policy of the Commerce Department, at least when considering international trade. See NATIONAL TELECOMM. & INFO. ADMIN., U.S. DEPT OF COMMERCE, SPECIAL PUB. NO. 93-290, GLOBALIZATION OF THE MASS MEDIA 123-98 (1993).

196. See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

197. Power, *supra* note 187, at 144.

198. See *Associated Press*, 326 U.S. at 19-20 (upholding the application of antitrust laws to the press); *Associated Press v. NLRB*, 301 U.S. 103, 130-33 (1937) (upholding the application of labor laws to the press).

199. See Baker, *supra* note 81, at 93-114.

should prevail, although the success of these challenges may require considerable development of the effective force and reach on international human rights law.

Thus, my suggestion is that human rights law, unlike trade law, provides a legal context likely to lead interpreters to be sensitive both to countries' need to nourish their own media and to the human rights mandate that countries not isolate their citizens from diverse viewpoints and troublesome ideas. Reliance on human rights law might even have a positive side effect. Given the prospect of multinational media corporations operating on the world stage, it would be desirable for the structure of the legal order to make corporate interests dependent on further development of international human rights law rather than on further invocations of trade law that simply enlarge the rule of multinational capital.

CONCLUSION

The United States's willingness to stand up for principle in the new global order is good. And though free trade in media products obviously provides great benefits for American media businesses, most American advocates of free trade see their position as based on the principled goal of giving media consumers access to the communication and cultural products they desire. On closer inspection, Part II of this Essay concludes that this essentially economic argument is wrong in its economics. Applying free trade principles to international trade in media products often will thwart the preferences of consumers and citizens—both those around the globe and those in the United States. Part I suggests that the American position also blindly attributes to foreign advocates of protectionist measures a commodified rather than a discourse conception of culture, improperly portraying these foreign advocates as elitist rather than democratic. In conclusion, Part III suggests that, in this area, principle calls not for strict free trade, but rather for limited forms of protectionism and for support of a different body of principles—those of international human rights law—to address concerns about censorship. In contrast, continued American insistence on strict free trade rules in the area of cultural products would make the United States into an international bully, not the world leader in the realm of rights of expression.

