Spectrum Set-Asides as Content-Neutral Metric: Creating a Practical Balance Between Media Access and Market Power

Michael M. Epstein
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I. INTRODUCTION

This Article explores the practicality and desirability of a public access system for digital broadcasters. While the repeal of the Fairness Doctrine and the Supreme Court's decision in Miami Herald Publishing Co. v. Tornillo have put a damper on the longstanding efforts of access advocates, the time is ripe to recognize that the new technologies of digital multiplexing and spatial zoning not only make a robust public access system legally feasible, but potentially desirable for government regulators, broadcasters and the public.

In a recent article, I proposed a theory of public access based on the contractual principle of bargained-for exchange, or quid pro quo. This theory is predicated on the idea that broadcasters would agree to provide access to the public in return for increased market power that broadcasters are eager to secure from Congress. This Article looks less at the theories that would justify an application of quid pro quo to speech, and more to the law and policy considerations that would relate

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3. Id. at 44-45.
to placing a voluntary access-for-market-power system into practice. If devised well, such a system has the potential to address many of the objectives of the now-defunct Fairness Doctrine, which broadcasters actively opposed, and which proved to be ineffective as a right of broadcast access for citizens.4

II. AVOIDING THE PROBLEMS OF THE FAIRNESS DOCTRINE

The biggest obstacle to the Fairness Doctrine was not the legality of its provisions—Red Lion Broadcasting Co. v. FCC established its constitutionality5—but, persistent opposition from broadcasters that culminated in an abandonment of the policy by the FCC.6 Although there is abundant evidence to show that the Fairness Doctrine works well as a right of reply to a personal attack,7 there was simply no incentive for broadcasters to be cooperative in other instances in which the doctrine was being invoked. Because the Fairness Doctrine, as a general matter, mandated that airtime be made available to speakers and issues in response to aired content,8 broadcasters argued that the burden on their speech rights was too high. In their arguments before the FCC, broadcasters chafed at the idea that coverage of a particular controversy, or comments directed toward an individual or political issue, would result in an obligation to air speech that they otherwise would not advocate.9 For broadcasters, the Fairness Doctrine also failed because this obligation to air content allegedly was bad for news, and bad for business. The broadcast lobby also raised the specter of a chilling effect in the television newsroom, since the decision to cover an issue of controversial public importance or take a stand on an issue would act as a trigger of the access obligation.10 From a business standpoint, the doctrine was also disruptive. Time used to meet a broadcaster’s Fairness Doctrine obligation was time that would have otherwise been used to air content that viewers wanted to see, and advertisers wanted to buy. Some broadcasters believed that the more controversial a station’s coverage

7. See, e.g., Patricia Aufderheide, After the Fairness Doctrine: Controversial Programming and the Public Interest, 40 J. COMM. 47 (1990).
8. See Fairness Doctrine Obligations, supra note 4, at 146.
9. Id. at 147, 164-65.
10. Id. at 162.
was, the greater the risk that the government would require the station to
cede time for speech it did not favor or control.\textsuperscript{11}

Despite some successes, the Fairness Doctrine was rejected by
broadcasters and the FCC because it purported to offer both a right of
reply and a right of access for citizens.\textsuperscript{12} Professor Barron, in an article
written to commemorate the twentieth anniversary of \textit{Miami Herald},
distinguishes a right of access from a right of reply on the basis of the
former’s content-neutrality.\textsuperscript{13} As a practical matter, the Fairness
Doctrine really was neither. The best that can be said about the Fairness
Doctrine is that it was a content-triggered opportunity for limited access
by a select few. With the exception of the Personal Attack provisions of
the Fairness Doctrine, which did allow a right to reply to attacked
individuals, the Fairness Doctrine did not give the public a right to reply
to a broadcaster.\textsuperscript{14} Instead, the broadcaster was obliged to give the public
only a “reasonable opportunity” to access its airwaves.\textsuperscript{15} In most
instances, the broadcaster determined who the appropriate respondent to
their speech could be, and there was no obligation that the views of other
complainants would be aired.\textsuperscript{16} For groups or individuals that wanted to
be heard on a specific issue, correct an inaccuracy, or lodge a complaint,
the Fairness Doctrine was not a reliable, obstacle-free avenue to access.
Even the rarely invoked first prong of the Doctrine, which obligated a
broadcaster to cover controversial issues of public importance, was not
understood to give the public a right to access a television or radio
station; the goal of this prong, largely unfulfilled, was to permit
complaints against broadcasters who were not acting in the public
interest.\textsuperscript{17}

While the goals of the Fairness Doctrine are laudable, especially if
one believes, as the Supreme Court did in 1969, that the burdens on
broadcaster’s speech are outweighed by the public’s speech interests,\textsuperscript{18}
the reality is that, without action in Congress, fairness obligations will
not be unilaterally imposed on broadcasters. In recent months, there has
been a flurry of activity over the prospect of reviving some form of the

\textsuperscript{11} \textit{Id.} at 160-61.
\textsuperscript{12} \textit{Id.} at 147.
\textsuperscript{13} \textit{See} Jerome A. Barron, \textit{The Right of Reply to the Media in the United States—Resistance
\textsuperscript{14} \textit{See} Fairness Doctrine Obligations, \textit{supra} note 4, at 225.
\textsuperscript{15} \textit{See id.} at 146.
\textsuperscript{16} \textit{Id.} at 160-61.
\textsuperscript{17} \textit{See id.} at 160 (discussing a broadcaster’s obligation to “give coverage to an issue found to
be of critical importance to its particular community”).
Fairness Doctrine, both for and against, in Congress. Still, even if Congress were to act, opposition from broadcasters, in litigation and in practice, would limit the doctrine’s effectiveness. Imposing fairness obligations on reluctant broadcasters may indeed be in the public’s interest; but unless Congress or the FCC devises a system that broadcasters can embrace, either as a complement or as an alternative to fairness obligations, the goal of providing citizens with a robust right of access to broadcasting will not be reached in the United States.

In many respects, the debate over public access to the airwaves is not new. In 1973, the Supreme Court visited the issue in *Columbia Broadcasting System, Inc. v. Democratic National Committee.* In the *CBS* decision, the court determined that no right of access existed under the Constitution or the Communications Act. In rejecting the petitioner’s attempt to expand the Fairness Doctrine to include mandatory access for editorial advertisements, the Court ruled that preventing licensees from exercising discretion would pose a “substantial danger [to the] effective operation of that doctrine.” At first blush, the *CBS* decision seems to close the door on a right of access scheme. But it is important to note that the Supreme Court’s rejection of non-discretionary access is made specifically in relation to its impact on the effectiveness of the Fairness Doctrine. And while the opinion rejects access as an entitlement, it explicitly leaves open the possibility for a non-discretionary program for public access, stating that “[c]onceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable.” Indeed, in 1974, a group known as the Committee for Open Media petitioned the FCC to consider an optional access program called “Free Speech Messages” (“FSM”) as a potential alternative to the Fairness Doctrine. Under the program, participating broadcasters would have been required to designate announcement spots at different times of the day for public access. While half of the spots would be given to “representative

21. Id. at 124.
22. Id. at 131.
spokespersons” in the community, the other half of the spots would have been available on a first-come, first-served basis to the general public. In 1976, the FCC rejected the FSM proposal, citing the Supreme Court’s concerns in the CBS case. The FCC determined that the proposal was “neither perfected nor ready for adoption” as a substitute for the Fairness Doctrine. At the same time, however, the FCC left open the possibility that such a plan might help broadcasters meet their fairness obligations, stating that a system of public access “has the potential to offer a format which acts consistently and complementarily with the purposes of the doctrine.” Perhaps the time is ripe for the FCC to reconsider their position on non-discretionary access as a practical way for broadcasters to meet their fairness obligations, whether or not the fairness doctrine is revived.

III. THE PROMISE OF DIGITAL MULTICASTING

For a public access system to be practical for all interested parties, it must meet several criteria. First, it cannot be a right of reply or even a triggered opportunity for access. To avoid an arguable chilling effect to both broadcasters and citizens, the access system must be content-neutral in its selection of speakers. It must also be easy to implement, be free or low-cost for the public to use, and not disruptive to the needs of broadcasters to program airtime. Such a combination of factors is hard to achieve when a broadcaster has only a single window for programming. With digital spectrum, however, broadcasters have the option to multicast into several programming windows simultaneously. Multicasting—sometimes also referred to as “multiplexing”—permits broadcasters to allocate portions of their assigned bandwidth to lower definition programming streams, all of which are easily accessible to the public as sub-channels on a digital television receiver. By allowing multicasting, Congress has provided incumbent licensees with a lucrative alternative to High Definition Television. Instead of airing a single program in high-definition, a broadcaster can now be a multichannel programmer—in effect, acting as if it were a cable multi system operator (“MSO”) in miniature. In 2007, broadcasters are touting the roll-out of high-definition programming as a milestone in

26. Id.
27. Id.
television programming. But despite the hoopla, such a milestone, in an age of proliferating entertainment sources and niche markets, may be too costly for broadcasters if they wish to stay economically competitive. High-definition programs may still air, but either with less resolution so that one or two additional streams can transmit, or at certain times of day such as prime time (or both). While one can question the wisdom of Congress in giving broadcasters an incentive not to broadcast in high-definition, even in these relatively early days of digital broadcasting, the practice of signal multicasting among licensees is already clear.

At the beginning of 2007, the National Association of Broadcasters ("NAB") reports that 1,625 channels are broadcasting in digital.\(^{28}\) According to multicasting.com, a website controlled by the NAB, nearly 600 broadcasters are dividing their high-definition spectrum bandwidth as of this writing.\(^{29}\) The popularity of multicasting among broadcasters is such that eighty-five percent of stations currently multicast, or plan to in the immediate future.\(^{30}\) The fifteen percent who do not plan to multicast are not against signal division—they either do not have specific plans in the works or are non-respondents.\(^{31}\) It is no wonder that the broadcast industry is quickly turning to multicast technology—the opportunities to use spectrum in new and different ways is tempting for stations that are eager to stem audience erosion to cable and Internet. For broadcasters used to programming for the lowest common denominator, the prospect of simultaneously streaming to different audiences and different demographics holds the potential for a boom in an increasingly fragmented, and fickle, entertainment market.

In 2006, the FCC’s media bureau sought public comments on the practice of multicasting among digital broadcasters, as part of its ongoing digital television docket.\(^{32}\) While the FCC is not necessarily concerned about the practice, it is interested in gathering information on the number of programming streams multicast, the frequency of multicasting, and the nature of the multicast programming. According to the NAB’s comments, twenty stations were apportioning their full

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31. Id.
spectrum into one additional programming stream. Of these, thirteen stations used their secondary "sub-channel" to broadcast a twenty-four hour weather or news service, such as NBC Weather Plus and ABC World News Now, which each network makes available to its respective affiliates. In at least four cases, stations are using a secondary programming stream to air a fledgling network that would otherwise not be represented on the local broadcast dial. The biggest recipient of this practice is the CW network, the successor to UPN and the WB, which has gained access to the Madison, WI, Roanoke, VA, and Austin, TX broadcast markets. The Austin station used a second "sub-channel" to offer Rupert Murdoch's now-discontinued English-language telenovela service, My Network TV, and stations in Ohio, Indiana and New York similarly allocate an additional sub-channel to Telemundo or other Spanish-language programming. These stations are among the eight that have divided their signals into two or more streams, and most of these stations include not only ethnic programming from Latin America or Asia, but also locally-originated news and entertainment.

Of the eight multiple streamers, two stand out as the early adopters of the new multicast business model: NBC's flagship owned and operated ("O & O") station in New York City, WNBC-DT and WDBJ-DT in Roanoke. WNBC currently transmits its main channel and four additional programming streams devoted to Telemundo, local affairs, NBC Weather Plus, and an Independent producer showcase that invites viewers to submit content for airing. Roanoke's WDBJ similarly transmits the CW network, real-time weather, and local programming not otherwise available in the market on three sub-channels. Of course, it is not a coincidence that the number one adopter of multicasting is the flagship NBC-owned station. WNBC's programming represents one of the great attractions of multicasting for media companies that produce content: more conduits for distribution of that content. In the case of the

34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
40. NAB June 13 Letter, supra note 33.
41. NAB Letter to FCC, supra note 30.
NBC-owned station, all of the sub-channels air content that is owned by the network, which provides NBC with a double benefit. NBC provides more content to its local station, and builds a greater national following—and higher ad revenue—for its national programming services, like NBC Weather Plus and Telemundo. At this point, Weather Plus has been launched in ninety local markets, and reaches seventy-five percent of the country. In response, CBS and ABC have introduced their own local weather and news sub-channels in dozens of markets. As of May 22, 2006, ABC had begun to multicast the Accuweather service in sixteen markets. CBS plans to launch CBS 2 on its twenty-one owned stations, offering a mix of news, weather and local programming, as well as entertainment to complement its primary network. After the FCC-mandated transition from analog to digital broadcasting, when virtually 100 percent of viewers will be able to receive multicast signals, content producers will have the option of moving a channel that is currently distributed over cable to a multicast sub-channel. NBC could decide, for example, that it is more profitable to place its MSNBC cable service on all of part of a broadcast sub-channel, ending the need to negotiate with cable MSOs for channel space or license fees. O & O stations can also broadcast another company’s programming service, but one wonders why they would want to do that when the FCC permits them to own and syndicate the content they distribute.

Network affiliates and independent stations, especially those owned by a station group with multiple licenses, can also develop their own proprietary content to distribute on their stations, or strike exclusive distribution deals with other independent producers, effectively allowing them to become a mini-network. Tribune Broadcasting airs “The Tube,” a twenty-four hour music video programming service, in major markets like New York and Los Angeles. In the near future, “The Tube” will air on twenty-six Tribune-owned stations reaching thirty percent of total United States households, including those in nine of the top ten

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42. Id.


One independent producer, Ion Media Networks, is syndicating a twenty-four hour health channel called “I-Health,” which will air the type of advertiser-supported medical programming one would see on a specialized cable channel. Promoted as a “value-added sponsor service at no cost to consumers,” Ion’s deals with local broadcasters will enable it to reach sixty-nine million homes. Ion is working in tandem with NBC Universal to create an advertiser-supported twenty-four hour children’s network. Such a plan puts this new sub-channel in direct competition with basic cable channels such as Nickelodeon and Noggin. Even the Public Broadcasting Service (“PBS”), which distributes independently produced programming to non-commercial member stations, has announced the development of four new multicasting channels: a service for older children, a Spanish-language service, a non-fiction service, and a lifestyle service. This is all in addition to their existing “how-to” channel, “Create,” which boasts carriage on local stations reaching nearly sixty-two percent of United States television households, including stations in sixteen of the top twenty-five markets. PBS’s ambitious multicast roll-out means viewers will have a commercial-free alternative to cable staples like The History Channel, The Learning Channel, and ABC Family, which cable subscribers currently have to pay a monthly fee to receive.

Although many have predicted that continued audience erosion to cable would eventually supplant broadcasting, multicasting will likely reverse the flow back to broadcast. With freely available broadcast copies of MTV, CNN, The Weather Channel, and other basic tier offerings on television, viewers in the country’s largest markets might balk at paying a monthly subscriber bill to a cable company. While it is currently not possible to divide digital spectrum into 500 channels, the prospect of each licensee in a local market splitting spectrum into six sub-channels means that broadcast audiences will have as many as six times the number of channels available for viewing than they did before
the transition to digital. Assuming that in the Los Angeles market alone, viewers of broadcast may have access to nearly thirty VHF and UHF stations—digital viewers could use their television antennae to tune in roughly 180 channels, without paying a cent for cable—or satellite—service. Viewers in smaller markets, where fewer stations air, may be less likely to move away from cable or satellite subscriptions, at least at present compression rates, but it may be that they won’t need to because of digital must carry. Although the FCC, after years of deadlock recently ruled that cable systems are required to retransmit only one programming stream, this decision will be reviewed and, as I have argued elsewhere, is likely to be reversed by the courts. With digital must carry in place, broadcasters would not have to supplant cable or satellite as a conduit, and all those multicast streams would make broadcasters much more competitive as content providers on the cable dial.

For those viewers interested in premium channels such as HBO, Showtime or pay-per-view, cable and satellite providers will continue to have an advantage over broadcasters—at least for the foreseeable future. Subscriber services, unlike broadcasters, can offer a large number of specialized premium channels, and they have the technology to impede access to premium content that subscribers do not opt to receive. Historically, analog broadcasters have been unable to tap into this lucrative market segment, a consequence of reception limitations and customer resistance to encrypted signals that required special equipment for reception. With digital spectrum, however, the problems of signal reception and encryption are easily overcome. Since digital signals use frequencies to transmit binary code, the televisions that receive the code will display audiovisual content of uniform clarity, despite distance or weather conditions. Digital televisions can also be programmed to receive encrypted code so that programming—and even data—can be transmitted only to those viewers who choose to subscribe to that content.

Moreover, Congress has given broadcasters the option of allocating a portion of their spectrum to paid subscriber services. Licensees who

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51. See NAB Letter to FCC, supra note 30.
52. For a complete list of television stations in the Los Angeles market, see Radio Station World, http://radiostationworld.com/Locations/United_States_of_America/California/tv.asp?m=los (last visited Sept. 12, 2007).
choose to use their signals for content other than freely accessible over-the-air television need only pay a penalty equaling five percent of the revenue generated by the subscriber service. All of this seems to be a small price to pay for a broadcaster interested in offering a premium movie channel—or creating a new one—on a multicast sub-channel. At the time of this writing, no local station is using a multicast sub-channel to air subscription television, although one of the largest owners of station licenses, Sinclair Broadcasting, is reportedly interested in exploring the concept. National Datacast, a private, commercial subsidiary of PBS, has entered into an agreement with a subscription video-on-demand distribution service that was launched in 2006 by Disney. The service, known as MovieBeam, uses another company’s proprietary compression technology called DotCast to transmit a revolving selection of current releases to set-top boxes over the analog bandwidth of local PBS stations. While MovieBeam does not currently use digital spectrum, Disney’s business model fits perfectly into the multicast environment. Once the service transitions to digital, MovieBeam could use PBS station bandwidth without using DotCast technology, or even remove PBS from the deal altogether by moving carriage to Disney-owned ABC stations.

IV. UNMEDIATED ACCESS AS A NEW PARADIGM FOR DIVERSITY AND LOCALISM

So will the digital broadcast environment of the future look like the cable channel line-up of today? If so, then the prospect of real diversity may still be elusive. Indeed, what constitutes real diversity, and how to measure it, has been the subject of ongoing debate both at the FCC and in the scholarly community. The FCC has placed a number of different types of diversity under its mandate: viewpoint diversity, outlet diversity, program diversity, source diversity, and diversity of ownership

by race or gender. In addressing the issue, the FCC has defined viewpoint diversity as setting limits on ownership so that there exist multiple voices in news and public affairs programming, and outlet diversity is about assuring independent ownership in local markets to foster viewpoint diversity. Source diversity refers to a multiplicity of content producers, and programming diversity is defined as a variety of program formats and content that can best be achieved by "competition among delivery systems rather than by government regulation." 

In 2003, the FCC, under then-chairman Michael Powell, formed a Federal Advisory Committee of Diversity in Communications in the Digital Age. But the focus of that Committee appears to have been mainly on discrimination against minorities and women in the license application process, and the contentious issue of whether there is a nexus between the race of a licensee and programming content. While both these issues merit further consideration, the FCC and the Committee have missed an opportunity to address the other types of diversity in a way that would effectively bring a multiplicity of sources and content to the public airwaves. The reason for this missed opportunity is that the FCC, under Powell's leadership, consistently focused on market competition in its conception of program diversity, and the proliferation of Internet content providers as a means to ensure source diversity.

The problem with relying on market competition to promote programming diversity is that the range of the diversity is confined to the limits of what is profitable—or at least potentially so—in the marketplace. For broadcasting, this has generally meant programs designed to attract the largest audience, or a targeted demographic, in order to maximize advertising revenue. Even non-commercial stations, faced with mounting operating costs, present programs that are attractive to corporate sponsors, foundations, and viewers like you, in order to

58. Id. at 13,627, 13,632.
59. Id. at 13,632.
62. See Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 228-29 (1997) (Breyer, J., concurring) (recognizing that broadcasters’ survival is based upon access to the public in order to maximize profits).
cover their costs. The result is that there is surprisingly little programming diversity on the public’s airwaves. Whether it is procedural crime drama, a reality program, or a situation comedy, the programs one sees on television use formulas that are tired and derivative, and the messages contained therein represent the values and objectives of studios, networks, and licensees—a select group of speakers increasingly owned or controlled by large corporations. While the FCC recognizes—albeit reluctantly—that there is a connection between consolidation of station ownership and viewpoint diversity, it fails to address programming diversity that transcends the bounds of a corporate agenda. For some, including most in the media, “transcendent” programs are programs for which there is no market, but the lack of a market is not the same as not having any following. And even if a message has no following, such an approach prevents its proponents from using the public airwaves to promote its agenda in an effort to inform or persuade.

To address this lack of grassroots access to broadcast media, the FCC has pushed the notion that new media sources such as the Internet, are providing the public with a variety of content that accomplish source diversity. And to some extent that is true. Bloggers today are beginning to exercise a degree of power in news and public affairs because of their independence from corporatized media agendas. But, as the Third Circuit acknowledged in Prometheus Radio Project v. FCC, the “abundance” of media on the Internet does not translate to programming diversity in broadcasting. And even if it did, the fact that non market-based messages can be located on an obscure website does not have the same power—measured by its potential reach to audience—as a message broadcast to homes that enjoy universal service protected by the government.

The lack of citizen access to broadcast media undermines localism of content and speaker. Localism, like diversity, is an objective set forth by Congress in the Communications Act of 1934. And as with diversity, the FCC has missed an opportunity to foster localism in broadcasting. Although the FCC has studied the issue under the auspices

65. Prometheus Radio Project, 373 F.3d at 402.
66. Of course, potential audience reach does not necessarily mean that mass audience will tune into citizen access programs. See infra Part VII.
of its Localism Task Force, the FCC's view that abundant media and competitive markets will lead to greater localism is misplaced. As the Task Force itself learned when it conducted field meetings, market forces have led to vertical and horizontal consolidation, to the detriment of localism. In radio, which was deregulated, consolidation of station ownership by two companies, CBS Radio and Clearchannel, has resulted in complaints that local musicians cannot get their music played on local radio stations, since those stations are programmed elsewhere by a consolidated company without regard to the specific needs or interests of a community. Similarly, complaints about local news and weather coverage, especially in times of crisis, have increased, as consolidated companies close down local news operations to benefit from the synergies of satellite feeds.

In television, the FCC, as far back as the 1930s, has protected locally produced programs over those distributed nationally through the Chain Broadcasting Rules—regulations that are still in place, despite the Commission's deregulation philosophy. The must-carry rules, passed by Congress in 1992 and upheld by the Supreme Court in 1997, reflected the legislature's specific concern for the continued survival of local broadcast stations in the face of competition from cable. And while the Turner cases do not define what it means to be a "local program," the Court upholds Congress's effort to promote localism as content neutral, and Justice Breyer, in his concurrence in Turner II goes as far as to state that local programs are worthy of protection.

Despite these various efforts to promote localism, there is no clear definition of it. Is a local program a program that is produced locally? Is it a program that addresses an issue of local concern? Does it address an issue that is present in the local community? Or is it some combination of these considerations? If a locally created program is sufficient for localism, then those of us in Los Angeles, where most entertainment

72. See Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 634 (1994) (recognizing that Congress determined that without a must-carry provision "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized") (internal quotations omitted).
programs are produced, enjoy the fruits of localism. Yet these programs are created for national consumption and say little about the Los Angeles community. (Indeed, it was nationally distributed entertainment programming like this that originally led the FCC to enact the Chain Broadcasting Rules.)\textsuperscript{74} The FCC ran into a similar problem in the 1970s when it enacted the Prime Time Access Rule ("PTAR"). The PTAR prevented networks from distributing programs in early fringe so that local stations would be able to program as they wished.\textsuperscript{75} The result, however, was not locally produced programming, nor programming addressing local issues; instead, local stations chose to air syndicated game shows, off-net reruns and tabloid shows.\textsuperscript{76} Today, few programs on broadcast television are locally produced and locally oriented. Even the nightly local news has become increasingly non-local, relying on syndicated features and sister station or network correspondent coverage of non-local stories.\textsuperscript{77}

If there is any lesson to be learned by the FCC’s approaches to both diversity and localism, it is that these concepts are elusive when the message is created or distributed by a media company that programs to the public, instead of by the public itself. Stefaan G. Verhulst, of the Markle Foundation, has written that policymakers must consider the roles of intermediaries in our understanding of diversity—an approach that would apply equally to localism. In a conference statement entitled \textit{Mediation, Mediators, and New Intermediaries}, Verhulst notes that media outlets and owners act as mediators of message and context to audience, shaping the way citizens construct meaning.\textsuperscript{78} If mediators are too few in number, then media companies have too much power to

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determine the political and cultural worldview of the general public.\textsuperscript{79} While Verhulst's focus is on the number of mediators and new forms of automated mediation on the Internet, his understanding of mediative function offers a powerful argument for public access to broadcasting. The power "to dictate political, cultural and civic life" of the public exists, whether there are too few mediators, or whether there are many.\textsuperscript{80} Concerns about media's undue influence in setting agendas or defining debates would continue to be voiced by the public even if broadcast ownership were diversely held by independent companies.\textsuperscript{81} A multiplicity of broadcast owners would continue to mediate meaning for the public, perhaps, as Verhulst seems to suggest, with less impact, but with impact nonetheless.\textsuperscript{82}

All of which brings us back to the question of public access. Public access offers a benefit to the public irrespective of consolidated media ownership. Put simply, it makes good policy sense to divorce considerations of diversity and localism from the issue of ownership and consolidation. With an effective public access system in place, the government can achieve diversity and localism at a grassroots level—without having to rely on metrics of ownership, source and programming that ultimately quell diversity and overlook localism.\textsuperscript{83} At the same time, the government can promote free market ideology by allowing for increased consolidation of ownership.\textsuperscript{84} How much consolidation would be permitted would be a question for Congress to decide, but if a system can be developed whereby media companies would have an incentive to offer more access in return for more market power, then virtually all parties—broadcasters, government and the public—could structure a system of mutual benefit.

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} See Daniel Brenner, \textit{Cable Television and the Freedom of Expression}, 1988 Duke L.J. 329, 342 n.50 (1988) ("Public access to cable TV is the most valuable means remaining today to implement the First Amendment. It's the last opportunity citizens have for reaching a mass audience at an affordable cost.").
\textsuperscript{84} This is not to suggest that free market ideology leads to a desirable policy for free speech and diversity, but an acknowledgment that increased consolidation has been the result of those in power who favor ownership deregulation.
V. MAKING PUBLIC ACCESS WORK FOR GOVERNMENT, BROADCASTERS AND CITIZENS

In an article recently published in the *Federal Communications Law Journal*, I set forth a formula for a quid pro quo bargain between government and broadcasters. In that article, I proposed that Congress has the legal justification for setting up a public access system using digital bandwidth, time, or a combination of each. The formula, which presents a metric between increased market power and access units, forms the basis for this proposed Congressional initiative. Such a formula, which to this author represents an ideal, is only one way to address the issue of public access to digital broadcasting. In many respects, a government sponsored quid pro quo system—one that would potentially incentivize conglomerates to trade newspaper access for increased broadcast market power—is an attractive proposition for the public, who, as I stated earlier, currently has no access rights to broadcasting. But will it be attractive for broadcasters and government, the two active participants in the bargained-for exchange?

From the standpoint of policymaking, it may make better sense to frame the quid pro quo not in terms of a formula, or even a metric, but in terms of what needs to be in place for this system to work in a way that maximizes the access benefit to the public. To maximize the public's benefit, both government and broadcasters must see that the benefits of the bargain to each far outweigh the costs. For government, it means underscoring that the benefits of digital broadcasting to licensees, as set forth earlier in this Article, are potentially enormous, and not to be taken for granted. For broadcasters, it means recognizing that apportioning spectrum to public access is a small price to pay in order to enjoy the windfall that digital technology will bring.

For broadcasters, accepting a voluntary public access system, linked to relaxed ownership limits, is an immediate advantage for the industry. Under the right political conditions, Congress could unilaterally introduce legislation requiring broadcasters to set aside public access spectrum, just as it does for cable and satellite providers. Until now, Congress has not even considered a general right of access, probably because it was not technologically possible with analog signals to segregate program streams. With one analog channel, the government's only options would be to implement a time-based access

87. See *infra* notes 82-95 and accompanying text.
regime, which licensees would likely argue would be too burdensome, or to require broadcasters to offer a data-driven ancillary service over unused bandwidth, much like the DotCast technology used by MovieBeam. At best, broadcasters would argue that a time-based regime would be unmanageable in practice, as the Fairness Doctrine was viewed; at worst, they would argue that earmarking minutes or hours per week on a single channel would place too great a burden on their speech rights. On this latter point, they would probably lose, as the Communications Act expressly states that licensees do not have any property rights in their spectrum—even so, they would be sure to make the argument. The second option, using ancillary bandwidth to carry a compressed data stream would require viewers to buy set-top receiving equipment, an expense and hassle that the public would likely not want to accept.

But with digital signals, segregating a portion of spectrum for public access is easy—broadcasters of course are already doing this for their own content—and the burden on licensees is quite low. Dedicating spectrum to citizen access will not necessarily disrupt programming or cost revenue. While licensees could certainly argue that opening any amount of digital spectrum to the public burdens their speech rights, is it unduly burdensome when you measure that burden against the huge benefit that multicasting will provide to local stations? If one assesses burden in the context of all the revenue streams that will be pouring into the coffers of licensees, granting public access to a sliver of bandwidth is really not too much to ask of broadcasters, even if it were to overlook the fact that broadcasters are exploiting a public resource for private profit. If Congress and broadcasters look prospectively at the question of burden, it should be easy to conclude that broadcasters will come out

89. 47 U.S.C. § 301 (2000); id. § 304.
90. Subscribers might be willing to buy a decoder for MovieBeam's video on demand service, but not for access channels. Beginning in the 1960s, the FCC experimented with Subscription Television (STV), a Pay TV service which sent scrambled signals over the airwaves, but consumers were not willing to commit to the technology. Museum of Broadcast Communications, Pay Television, http://www.museum.tv/archives/etv/P/htmlP/paytelevision/paytelevision.htm (last visited Aug. 31, 2007).
way ahead, even in the near future. Earmarking one programming stream, for example, out of six or eight, is a small price to pay when the broadcaster can program its several other sub-channels as if it were a cable MSO.

In many respects, the type of access set-aside proposed here is not altogether different from the public access channel set-asides that Congress has already mandated for Direct Broadcast Satellite ("DBS") providers, and the local public access channels that local communities exact from their cable system franchisees. When a local MSO agrees to a public access set-aside, it enters into that agreement freely, knowing that in the final analysis, the benefit of the franchise will exceed its costs. So, too, with a bandwidth set-aside for digital broadcasters. Congress, in essence, is the franchisor, furnishing licensees with the windfall profits of multicasting. Congress could also condition the use of broadcast spectrum multicasting on an up-front commitment by licensees to set-aside public access conduit, just as it currently does with DBS operators. Indeed, Congress determined that requiring satellite systems to designate channels for public use was not too burdensome on operators, a position that was upheld as constitutional in the D.C. Circuit. The DBS set-asides, imposed by Congress on operators as a public interest obligation, offers a close parallel for broadcast set-asides, as both media use public spectrum and both do not involve third-party franchisors.

While a sine qua non approach—trading access for the right to multicast—sounds like a fair deal, it is unlikely to happen at this point. For one thing, Congress, in the 1990s, granted digital broadcasters its permission to multicast. No conditions were placed on this specific spectrum use, although some public interests advocates argued at the time that licensees should be required to take on greater public interest obligations in return. Congress, in its effort to make the transition from analog to digital as attractive as possible for incumbent broadcasters, simply gave multicasting away, just as it gave broadcasters dibs on digital spectrum, which would have otherwise fetched billions at

93. Id. § 532.
Moreover, even if Congress fails to act, there is the question of whether the FCC, acting on its own authority to promote the public interest, could impose access rules on multicasters. On that score, the FCC issued a Notice of Inquiry in 1999 to seek comment on the public interest obligations of digital broadcasters, the results of which are still pending. Perhaps Congress, with the wisdom of hindsight, could revisit the issue of conditioning multicast use of spectrum on access set-asides. Perhaps a more activist FCC could permit digital broadcasters to provide access in fulfillment of their public interest obligations. Either way, broadcasters would likely mount stiff resistance to a change-of-heart curtailment of spectrum use through its lobby and in the courts.

Fair or not, such a stick approach for broadcasters is unnecessary when there is a carrot that broadcasters find irresistible—increasing ownership caps. Although the FCC has been willing to consider an increase in the percentage of national audience that any one company’s broadcast stations can reach in the aggregate, Congress has been moving slowly on the issue. In 2003, when the FCC proposed increasing ownership caps from thirty-five to forty-five percent of national audience, Congress effectively preempted the agency by increasing the cap to thirty-nine percent of national audience. Despite pressure from the broadcasting lobby, the 107th Congress did not move ownership caps higher, and with both the House and Senate controlled by Democrats, such an increase appears less likely today. For broadcasters, however, higher ownership caps remain the holy grail of industry deregulation. Would CBS or FOX, eager to amass more stations, be willing to trade free candidate access to its television stations in return for relaxed ownership limits? Even if broadcasters were to say yes to such a bargain, an incremental increase in caps in return for limited access for politicians does not give a big enough benefit to the public. It may be a step in the right direction, but it is little more than a small step in the march toward public access. Citizens who are not candidates


would still have no access to stations, and broadcasters would receive only a small amount of the deregulated market power they seek.

What this Article examines is a deal between government and broadcasters that ups the ante. Under this deal, a broadcast company may be able to get everything it wants when it comes to ownership caps, including permission to broadcast to up to 100 percent of the national audience. And the public gets a right of direct access to a portion of that company's digital spectrum, in the form of one or more programming streams. How much access for how much increased market penetration—that is a question of metric that the FCC could determine in tandem with broadcasters as part of its rule-making procedure. Congress could also examine this issue of metric through hearings with representatives of industry and the public. With the possibility of 100 percent market penetration on the table, broadcasters would likely have interest in exploring a quid pro quo arrangement with the government.

VI. METRICS

There are a number of ways that the relationship between increased market penetration and bandwidth set-aside can be structured. The simplest approach would be for Congress to offer a specified increase in the ownership cap that would depend upon the amount of bandwidth set aside by the broadcaster. Under this approach, Congress could raise an individual broadcast company's limit by, let's say, a flat ten percent if a broadcaster commits to some minimum amount of set-aside, such as a single programming stream, or a single programming stream on certain days or at certain hours. If the broadcaster participates in the program, the broadcaster gets the increased market power. While simple to implement, such an all-or-nothing approach may present problems for broadcasters that would need to be addressed. Broadcast companies who cannot afford to increase their holdings to meet a minimum, or do not choose to, would not be able to participate, and thus lose their incentive to granting access. At the same time, broadcasters who meet the threshold to participate in the program have no incentive to increase their access set-aside beyond the minimum proscribed by Congress. These problems also would be present in any system which prescribes specific tiers of market penetration in return for access. Once above the threshold for a new tier, some broadcasters might want to game the system so that they can amass as much market penetration as they can without incurring an increase in access responsibility.
A better approach for broadcasters and the public would be a scaled access metric. Under this approach, Congress or the FCC can devise a formula for access that would trade incremental units of increased market power for incremental units of bandwidth set-aside. The relative values of an access unit to a market power unit would need to be determined by the parties, but, if the proper equivalency can be reached, broadcasters would have more flexibility to fine-tune their licensee acquisitions without regard to crossing a percentage threshold that could mean a large step-up in access responsibility. Another advantage of increments is that they could be treated as fungible—much like air rights or pollution rights can be transferred among companies, it might be possible to transfer some of a broadcast company’s access units from “access mature” markets to bandwidth in markets where participation in the access for market power bargain is low. Scaled access also leaves open the possibility that different rates of exchange could apply in different markets, and rates can be adjusted progressively—like income tax brackets—to increase or decrease access equivalency depending on a broadcaster’s accumulated audience reach.

While a scaled access metric could max out at a specified percentage of national audience, it would be a more effective generator of access for the public if Congress permitted broadcasters 100 percent market penetration in return for some maximum amount of bandwidth set-aside. How much access bandwidth is worth 100 percent of the national audience for a broadcast company is an open question for the parties to determine. Still, considering that Fox Television Broadcasting alone made $2.3 billion in 2005 revenue from thirty-seven stations covering thirty-nine percent of national audience, it would not be unreasonable to expect a very high set-aside.\(^\text{101}\) Even if doubling the stations’ audience reach would result in less than an additional $2.3 billion in revenue—Fox’s licensees are already in top markets—the revenue from these additional acquisitions would be huge. And Fox’s 2005 figures do not take into account the windfall in revenue that, as discussed above, will result as multicasting technology becomes more widely used by digital Fox-owned stations.\(^\text{102}\) Would Rupert Murdoch be willing to provide enough bandwidth on his Fox stations to permit two streams of public access operating simultaneously in order for his


\(^{102}\) Currently, most broadcasters are utilizing only one to two multicast streams. See NAB Letter to FCC, supra note 30.
company to have access to that additional revenue? That, of course, remains to be seen.

VII. OPPORTUNITIES, OBSTACLES, AND COMPLICATIONS

As tantalizing as the prospect of increased market power would be, there are a number of details to work out, and potential problems to iron out, before broadcasters would commit to bandwidth set-asides. One concern broadcasters may have is how the quid pro quo would be monitored for compliance. Whether Congress provides broadcasters with a threshold, tiered or scaled relaxation of ownership caps, how can the public be assured that it is getting the access that it is entitled to? Who will provide the review necessary to ensure compliance? One of the drawbacks of the system is that it may require a significant degree of oversight given the number of stations that may participate, and the varying levels of participation by broadcast companies. To address this problem, system could be set up so that members of the public can verify the amount of access that is available to them on any local station, either through an automated web-accessible database, or through an inquiry at the FCC. Presumably, local advocates for public access, including public interest and community groups, could keep track of the access granted, and file a complaint with the FCC for non-compliance. The system could also place a notice requirement on broadcasters, so that viewers would be aware of how much access time is being offered to them.

Penalties for non-compliance would also have to be determined carefully. On the one hand, if the penalty is too lenient, then broadcasters may be inattentive to compliance. On the other hand, the prospect of a significant penalty could lead broadcasters to balk at participating in the system. At a minimum, it would appear that a forfeiture schedule would make sense. Imposing fines for non-compliance allows the government to recoup some of the loss of the public’s access entitlement. In cases of egregious, repeated, or deliberate non-compliance, higher fines could be levied and/or license suspension or revocation applied. Whatever the penalties, enforcement of the system would be consistent with the FCC’s existing authority under the Communications Act, and subject to judicial review.

Oversight may also be an issue with respect to selection criteria for public access. Who selects the speakers, and on what basis are they selected? For a system of public access to work on a large scale, broadcasters must be free to grant access on a content neutral basis. Whether selection is made by lottery, first-come, or some other process,
it is important for a number of reasons that broadcasters remain disengaged from the content. First, if broadcasters determine access based on content, then they are asserting a measure of editorial control—and functioning as mediators of content—when the goal should be to let the public set its own agenda. Second, broadcasters are rightly wary of trying to be a gatekeeper of citizen content that they do not control. Citizens who are unhappy or offended with public access content would be more likely to hold a local station accountable if they thought the station made an editorial decision to air it, and those excluded from access would similarly have cause to complain. With content neutrality, broadcasters could be given immunity from liability for the content that airs on its access bandwidth. Congress provides immunity from defamation when broadcasters are compelled to give candidates "equal time" under section 315(a) of the Communications Act;\(^\text{103}\) so, too, could they grant broadcasters blanket immunity from public access content.

It is important, however, to emphasize that content-neutral selection criteria may involve a measure of discretion on the part of the broadcaster. This discretion may be necessary if Congress wants to use this public access system to address the historically elusive issue of localism. In order to promote localism, Congress may want to empower broadcasters to select speakers who are local residents or who seek to speak on a topic of local interest. If Congress decides that it wants to give a selection advantage for local-oriented content, such an initiative might very well be viewed as content neutral by the courts. In *Turner II*, after all, the Court did say that a statute designed to promote local programming could be content neutral.\(^\text{104}\) Irrespective of constitutional issues, broadcasters should refrain from making decisions based on viewpoint—at best they should do no more than apply a template of localism to all who apply for access.

To the extent that it wants, Congress can give broadcasters the option of allowing for national access, as well as local access. National access would enable a citizen applicant to distribute its message over all of a broadcaster's access channels, potentially extending that message's reach to the aggregate national audience of the broadcaster. A national access option would allow local perspectives to be exchanged in different parts of the country—or at least in different markets. To do this, Congress could simply require, or allow, broadcasters to set aside

two windows—by time or bandwidth—for local and national reach. In this respect, the windows are not unlike the Chain Broadcasting Regulations, which designate different dayparts for locally and nationally distributed programming. One of the drawbacks of doing this is that there would be far fewer slots available for the public in a locality, since the resources are being shared across the entire station group’s holdings. One way to address any bottlenecks would be for local stations to timeshift out-of-area content to hours in less demand. A speaker local to New York might be able to secure a “prime-time” access slot on WNYW-DT’s access stream, but viewers of Los Angeles’s Fox station would see the New York message overnight, or on a Saturday morning.

Because content placed on the access set-aside would be unmediated, indecency may also be a concern for Congress and segments of the public. While it is a simple matter to immunize a broadcaster from indecent content transmitted over the access set-aside, those concerned about children’s access to indecency would still want to have some mechanism in place to protect young viewers from seeing inappropriate content. To protect children, and help concerned parents, government has two options. First, broadcasters can be required to have supervisory systems in place so that indecent programming can be filtered outside of safe harbor hours. This community-based supervisory system is what is currently in use to monitor content on cable providers’ public access channels. The FCC has recognized that this community involvement has reduced the likelihood that children would be exposed to indecency on cable access channels, and so has a plurality of the Supreme Court. If Congress were to decide that broadcasters could be held liable for indecency on public access, then it could implement a certification process to protect broadcasters. Used currently by cable providers, this process would protect broadcasters from indecency liability if a supervisory community group certifies that the content is appropriate.

Broadcasters, and the public, would be better served if Congress adopted spatial zoning to protect children from accessing indecency. This approach, proposed by Justice O’Connor in Reno v. ACLU as a way to combat Internet indecency, would call for the creation of “adult zones” where children could be barred from access. For O’Connor, spatial zoning laws are permissible if they do not “unduly restrict adult

access to the material" 106 and if "minors have no First Amendment right to read or view the banned material." 107 Although O'Connor acknowledges that anonymous use of the Internet makes it difficult to prevent children from entering adult zones unless barriers are constructed to identify users, this difficulty is not an issue for digital broadcast spectrum. For broadcasters, spatial zoning would simply mean segregating indecent content on a specially "zoned" portion of the access bandwidth. Adults who wish to, can restrict children's access to this segregated sub-channel by blocking this sub-channel on their digital televisions. Unlike the V-Chip, a household could block out access to the entire channel. And unlike current indecency regulations, there is no need to "channel" indecent speech into an overnight "safe harbor." With spatial zoning, the channeling is spectrum-based, not time-based—if indecent content, as defined by the government, is segregated onto this special channel, then broadcasters would be safe from liability. Indecency could thus be available to adults, who have a First Amendment right to access it, at any time of day. At times when there is no indecent content to air on public access, the broadcaster can reapportion the spectrum to other uses such as adding another program stream, or improving the resolution quality of its main signal. Such are the special benefits of multicasting technology.

Another concern that broadcasters might have with this public access system is infrastructure and staffing. Should the government require local stations to designate studio space for public use? Communities have exacted studio commitments from cable providers as a condition for a local franchise, but should broadcasters bear the costs of a system that might be in constant use by citizens? If the cost turns out to be too big for broadcasters to absorb, Congress could explore ways to reduce this burden. One way would be for broadcasters to charge a fee for studio use. Citizens would not have to use the station's facilities, but if they opted to, they would pay a nominal or modest amount to cover the station's costs. Another approach would be for stations to pool their resources by providing one access studio for use by all participating stations in that local market. This economy of scale would make sense, however, only if the number of people electing to use studio facilities remained relatively small.

Perhaps the best approach would be to shift the burden of production squarely on viewers themselves or on communities. In this

106. Id. at 888.
107. Id.
age of YouTube and ubiquitous cell phones camcorders, it is nearly cost-
free for citizens to make their own audio-visual content for public
access. Those who are willing or able to edit, can use computer software
to make their contributions look more professional or artistic. But
professional product is not the goal for public access—getting the
message out is. To that extent, if people of modest means do not have
access to video equipment, public libraries or other community
institutions could make cameras and microphones available for “pro
bono” use. Of course, one of the drawbacks of citizen-made video is that
it will not be intelligible or audible. That is a price that viewers may
have to pay.

For the system to be economical, broadcasters need to be able to
keep access staff to a minimum. Still, it would likely be necessary for a
broadcaster to have screeners of content, or at least staff to work as liaisons with community monitors, so that localized content can be
favored, and indecency segregated. Moreover, since some citizens may
want—or need—to contribute content in languages other than English,
broadcasters may need to hire special services on a contract basis.
Ultimately, for the access plan to work, broadcasters would need to view
these costs as de minimus in light of the revenue windfall of increased
market penetration. If a broadcaster thinks the costs are too high, then it
simply can decide not to participate in the quid pro quo.

Indeed, a number of broadcasters will not participate in the access
for market power bargain. Independently owned stations, small station
groups, or any company not seeking to increase market penetration
would continue to operate without access set-asides, as they currently
do. Over time, if more companies vie for the additional market share
available under the quid pro quo system, there will be a reduction in the
number of independently owned stations in local markets. At first blush,
a scarcity of locally owned stations may appear bad for diversity. But
diversity would not be harmed if the disappearing independent station is
being replaced by a conglomerate-owned station with local citizen
access. While increased concentration of ownership might mean less
opportunity for women or minorities to acquire licenses to operate
stations, unmediated broadcast access would give these under-
represented groups the opportunity to transmit content in a manner not
beholden to the homogenizing reality of the marketplace. Since citizen
access would offer viewers unmediated exposure to locally originated
content, one could argue that diversity—and localism—would be
enhanced by the entrance of additional access spectrum into the
community. As it is, much of the commercial programming that airs
today on local stations is syndicated fare such as off-net sitcoms, game shows, and movies. To the extent that a local station has found it profitable to air local news and public affairs programming, the station’s new owners could continue to air those shows—in addition to the access bandwidth.

For those who are interested in using broadcast spectrum to attract mass audiences to their messages, a scheme of unmediated access likely would not address their needs. One of the challenges of a diverse and fragmented system of access bandwidth streams is the content will attract only a trickle of viewers, the majority of whom would remain tuned in to the commercial content available on the broadcaster’s primary channels. As a result, instituting a public access system would perpetuate an inequitable relationship between incumbent broadcasters with audience reach and the rest of the public, with little or no reach. The best that can be said for unmediated access is that it may provide an opportunity for broadcasters and the public to ease, if not remedy, the inequality between the audience “haves” and “have-nots.” A formula based on both bandwidth and time would allow broadcasters, if the incentive were high enough, to accept a system that would include access, based on time, on their “primary” bandwidth. But even if access to primary bandwidth were put in place, it would likely not change the status quo for audience reach. The future of television viewing in the age of digital viewing recorders is that many people will likely use technology to pinpoint the content they want to view, or filter the material they want to avoid. Does that mean that there would be no audience watching the public access program? Well, to some extent, that may indeed be the case. Perhaps a citizen with a redundant or incoherent message will attract few or none to his access program. But, at the same time, speakers with an interesting message or strong production values may have an opportunity to build a mass audience. In this respect, this is how the Internet has worked for independent filmmakers and bloggers. With the Internet, true mass market success would occur only when the purveyors of Internet content make the jump to a mass audience medium such as television or cinema. With unmediated broadcast access, one can continue to build a mass audience without transitioning to a commercial programming service—unless he or she wants to.

VIII. CONCLUSION

If broadcast conglomerates accept that providing viewer access to their spectrum is a price they are willing to pay for market penetration, it
may be possible to extend the reach of access to non-broadcast holdings of the conglomerate. What this means is that broadcasters who own newspapers could voluntarily set aside space in their newspapers in return for increased broadcast ownership caps. The equation here would be the same for broadcasters: they get the chance to buy more television stations; the only difference is that the access metric would be applied to newsprint space instead of digital spectrum. Why should the conglomerate care if the access provided is in a different medium? Applying the logic of the quid pro quo bargain to newspapers, would not run afoul of *Miami Herald v. Tornillo* since the newsprint access would be voluntary on the part of the publisher. Moreover, since the access system would select speakers without regard to content, it would be hard to argue that the government incentive program would interfere with editorial discretion, which was the major concern voiced in *Tornillo*.

If a quid pro quo access for market penetration model can be made to work, the benefits to the public would be immense. Citizens can use the airwaves not merely to respond to the mediated agenda of a broadcaster; they can create and distribute their own agendas. In many respects, dedicated public broadcast access would bring the type of unfiltered diversity and localism that Congress and the FCC envisioned for broadcasting before the rise of the networks as national programmers. As with the Internet, citizens would be able to post and view scripted narratives, v-blogs, original music performances, or political rants. And while it may be that many people will tune out public access content, the possibility that people will use the airwaves to air fresh, unmediated messages is exciting.