Broadcast Technology as Diversity Opportunity: Exchanging Market Power for Multiplexed Signal Set-Asides

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I. INTRODUCTION: PUBLIC ACCESS IN EXCHANGE FOR MARKET POWER: TWO APPROACHES BASED ON QUID PRO QUO

This Article proposes that Congress revisit the concept of a public right of access to broadcast media and enact legislation so that those who do not have market power in the media can have access to local stations in order to air local views or content. As increased bandwidth, digital compression, and alternate content sources make it possible for companies to own more media outlets, policymakers need to look beyond the scarcity of broadcast frequencies[1] if they want to foster a true marketplace of ideas. Courts and policymakers must look at market power and public access in order to find a viable solution to the lack of diverse programming content. The debate is not about whether a regional corporation should be permitted to compete against a conglomerate in the broadcast marketplace, but whether broadcast media with market power, in return for the access granted to them by the government, have an obligation to air both local and nationally diverse views on the public's airwaves.

The access regime advocated in this Article is based on a theory of *quid pro quo*:[2] a bargained-for exchange in which broadcasters would trade media access for market power. Under this quid pro quo approach, the FCC would administer a scaled metric whereby the greater a conglomerate's

1. *See infra* Part II.B.1.

2. "An action or thing that is exchanged for another action or thing of more or less equal value; a substitute . . ." *Quid pro quo*, BLACK'S LAW DICTIONARY 1282 (8th ed. 2004). "Lat. 'what for what' or 'something for something.' The concept of getting something of value in return for giving something of value. For a contract to be binding, it usually must involve the exchange of something of value." *Quid pro quo*, THE 'LECTRIC LAW LIBRARY'S LEXICON, http://www.lectlaw.com/def2/q003.htm (last visited Nov. 9, 2006).

audience reach,[3] the more access that conglomerate must provide to citizens with diverse and/or local content. In an analog broadcasting context, one possible application of the quid pro quo theory would be to look to a time-based right of access that is accepted voluntarily by media companies in exchange for the government granting increased electronic media ownership caps.

While this Article advocates a specific quid pro quo metric, which is defined below, there are two distinctively different approaches that would legally permit the government to trade market power for access even if the courts abandon the scarcity justifications for access validated by the Supreme Court in the 1969 case of *Red Lion Broadcasting Co. v. FCC*.[4] An expansive approach to quid pro quo follows existing jurisprudence relating to contractual waiver of constitutional rights and implements the licensee as public trustee justification that is also proffered in *Red Lion*, albeit with less notoriety. Building upon existing Supreme Court contracts cases and applied in a media context in *Erie Telecommunications v. City of Erie*, 853 F.2d 1084 (3d Cir. 1988), this contractual quid pro quo approach allows the government to enact content regulations not subject to strict scrutiny.[5] Such an approach arguably would permit an activist Congress or the FCC to revive the Fairness Doctrine[6] or impose even greater speech burdens upon broadcasters irrespective of scarcity and without scrutiny.

In addition, there is a narrower form of quid pro quo that would validate "zone-based"[7] access as structural broadcast regulation. This narrow approach subjects zone-based public access to the same type of intermediate scrutiny used by the Supreme Court to validate structural cable regulation in *Turner Broadcast System, Inc. v. FCC*.[8] In this second

3. The FCC aggregates Nielsen local market data to determine national audience reach. In 2003, Congress enacted a cap on broadcast ownership that prevents a company from controlling television stations that reach more than 39% of the national audience. In January 2004, while the petitions to review the Order were pending in this Court, Congress amended the 1996 Act by increasing from 35% to 39% the national television ownership rule's audience reach cap in § 202(c). Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004); Prometheus Radio Project v. FCC, 373 F.3d 372, 389 (3d Cir. 2004).

4. The Supreme Court, in the 1969 *Red Lion* decision, validated the constitutionality of a limited right of access for broadcast media. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969). The FCC and some courts question the continued validity of that decision because the Court based its right of access largely on the issue of scarcity. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984); *see also* Radio-Television News Directors Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000).

5. *See Erie*, 853 F.2d at 1094–96.

6. *See infra* note 37.

7. An access zone is based on a metric that calculates signal bandwidth and/or broadcast time. *See infra* Part IV.B.

8. *See* Turner Brdcst. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 197 (1997); *infra* notes 126–27.

approach, the quid pro quo is not contractual, but rather is present in the manner in which a court would evaluate the speech burden incidental to the structural regulation. As part of a content-neutral structural regulation, the quid pro quo would be a value added for broadcasters, since, with respect to digital broadcasting, Congress would have the authority to set aside multiplexed signal streams for public access, just as it currently does with cable and DBS channels.[9]

Moreover, even if the speech burden were deemed to be greater on broadcasters than it would be in other media outlets, the quid pro quo would act to mitigate that burden by providing broadcasters with a benefit to which they would not otherwise be entitled: increased audience reach. Although the contractual waiver quid pro quo would legally validate the structural access regulation envisioned herein, its implications on broadcasting may be too great for Congress to bear in the current political climate, since it could be used to justify content-intrusive regulation in the absence of scarcity. Still, politics aside, either approach would validate a public right of access to broadcast stations and could arguably extend the reach of access regulation to conglomerate-owned newspapers that would otherwise be prohibited under the Supreme Court's ruling in *Miami Herald v. Tornillo*.[10] Indeed, the possibility that market power quid pro quo would make public access to certain print properties achievable makes these approaches especially valuable as access regulation.

II. IDENTIFYING THE PROBLEMS: LACK OF ACCESS, LACK OF DIVERSITY

A. The Current State of Access Rights

The United States, unlike many developed countries, offers no general right of access to any type of media. Still, as a constitutional matter, it is important to distinguish between a right of reply and a right of access. A right of reply arises from a speaker's content. This would encompass the individual right to respond to a personal attack, as in *Red Lion*,[11] or the right to air an opposing view in a public controversy. A right of access, on the other hand, arises for reasons wholly unrelated to speech content, including the nature of a media technology or the status of the

9. Signal multiplexing allows digital broadcasters to air content on different programming streams simultaneously. On digital television tuners, these streams appear as different "channels." *See infra* Part IV.A.

10. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (citing the First Amendment to strike down a Florida statute that gave a local candidate a right to publish a reply to an editorial in a print publication).

11. *See generally* Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

initial speaker.[12] The difference is important under U.S. Constitutional law, as rights of access may be devised as content-neutral structural regulations, while rights of reply are necessarily content regulations. In the aftermath of the FCC's repeal of the Fairness Doctrine, there is currently no right of reply or access available to the American public.[13] A limited right of access exists for qualified candidates for federal office, and a content-triggered general right of reply is available to all legally qualified candidates, but these statutory provisions do not apply to the general public, or indeed to anyone but opposing candidates.[14]

For print media, the Supreme Court ruled that the First Amendment forbids the government from legislating rights of reply to newspapers. In *Tornillo*, the Court struck down a Florida statute that would have given a candidate the right to respond to a newspaper editorial attacking him.[15] The Court determined that requiring rights of reply was tantamount to government interference in the editorial discretion of a free press, notwithstanding the economic obstacles to the candidate making an effective response to the newspaper's personal attack. The Justices were specifically concerned with the chilling effect a right of reply statute would have on robust debate since editors would have an incentive to avoid news coverage of controversies.[16] *Tornillo*'s First Amendment analysis, premised on the theory that anyone can be a publisher, suggests that if the courts were to determine that broadcasting, as a subset of proliferating electronic media is not scarce,[17] then a right of reply such as the Fairness Doctrine would no longer be constitutional for the airwaves, even if Congress were to enact it.[18] While it is clear that *Tornillo* prohibits rights of reply to nonscarce media technologies like newspapers, whether it effectively bans all rights of access to media is a matter open to debate. With the exception of advertisements that discriminate on the basis of gender,[19] the Supreme Court has not validated any rights of access for print media. Thus, in articulating a workable right of access to government-owned media technology, it is important to address the First Amendment

12. *See*, *e.g.*, Jerome Barron, *The Right of Reply to the Media in the United States—Resistance and Resurgence*, 15 HASTINGS COMM. & ENT. L.J. 1, 2 (1992).

13. *See* Nat.'l Brdcst. Co. v. United States, 319 U.S. 190, 224–27 (1943).

14. 47 U.S.C. § 315 (2002); 47 U.S.C. § 312 (2004).

15. *Tornillo*, 418 U.S. 241. Without reference to its earlier *Red Lion* decision, the Supreme Court struck down a state's right of reply statute, again choosing to focus on scarcity—or the lack of it—as the pivotal First Amendment issue in its review of the newspaper industry. *Id.* at 256–57.

16. *Id.* at 257.

17. *See infra* Part II.B.2.

18. *See Nat.'l Brdcst. Co.*, 319 U.S. at 224–27.

19. *See* Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 387–88 (1973).

concerns articulated in *Tornillo*.

Tornillo must not be read broadly as a bar to all rights of access to media. Justice Brennan, in his concurring opinion, suggests as much when he questions the scope of the principal opinion's broad ruling.[20] Still, even if the Supreme Court were to hold that the First Amendment strictly prohibits government-mandated access to newspapers, broadcasting is a different medium, with different characteristics, even in the absence of scarcity.[21] To some extent, courts have already recognized that medium-specific differences can act to limit *Tornillo*'s application to nonscarce media access. Instructive on this point is the willingness of courts to uphold the constitutionality of public access rights to cable television systems, even in the absence of allocational or numerical scarcity.[22]

B. Connecting Access, Diversity, and Ownership: An Evolving Debate

United States broadcast regulation over the last eight decades has been built upon three interrelated issues: access, diversity, and ownership of scarce broadcast frequencies. The problem is that these three issues have proven to have little bearing on each other. Licensing, for example, the only way the government currently regulates access, has evolved into a system in which only well-capitalized corporations or the wealthy have a voice. This is true not only for license transfers, which can be sold at market rates to third parties, but also of new frequency allocations, which are auctioned off to the highest bidder. Community groups, individuals of modest means, and even local companies no longer have a realistic opportunity to get a license to broadcast in the United States.

1. Scarcity as a Justification for Diversity and Localism

In large measure, the Communications Act of 1934 ("FCA") and its less comprehensive predecessor, the Federal Radio Act of 1927, were passed to address a void in technology management in the 1920s that had led to a "wild west" atmosphere in broadcasting, as fledgling commercial radio stations overpopulated the airwaves, and radio receiver manufacturers

20. *Tornillo*, 418 U.S. at 258–59 (Brennan, J., concurring).

21. In Mt. Mansfield TV, Inc. v. FCC, for example, the Second Circuit alludes to incumbent broadcasters' market dominance as "the fruit of a preferred position conferred by the Government," stating that "[l]ong experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage . . . ." 442 F.2d 470, 477 (2d Cir. 1971) (citing Red Lion Brdcst. Co. v. FCC, 395 U.S. 367, 400 (1969)).

22. *See*, *e.g.*, Time Warner Entm't Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996); *see infra* notes 174–76 and accompanying discussion.

developed incompatible transmission formats.[23] Under the FCA, the FCC was given a broad mandate to manage broadcast technology, a mandate including frequency allocations designed to clear signal interference, ensuring compatible formats and equipment, developing infrastructure such as transmission towers and signal relays, and administering a licensing regime whereby the FCC would choose who could become a broadcaster.[24] Radio broadcasters of the time, both independent and those affiliated with fledgling networks, largely viewed the FCC's role as akin to a police officer assuring the smooth operation of traffic on a public right of way. Under this "traffic cop" approach, the FCC could regulate the number of users of the airwaves and even require those users to use the technology in a particular way, but the Agency could not regulate the nontechnological aspects of a station's operations or regulate the broadcaster's substantive speech.[25]

With the advent of the "Chain Broadcasting Regulations" in the late 1930s, the FCC used its public interest mandate to curb the power of national programming networks, advancing a policy that promoted local and diverse licensees and programming.[26] In passing the FCA, Congress contemplated that licensees would operate in local communities, airing local programming; nowhere did the Act envision the primacy of national

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23. *See generally* Federal Radio Act of 1927, Pub. L. 632, 47 U.S.C. § 81–83 (1927) (repealed 1934).

24. *See generally* Nat'l Brdcst. Co. v. United States, 319 U.S. 190, 214 (1943) (noting that the FCC's purpose under the FCA was to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."); United States v. Sw. Cable Co., 392 U.S. 157, 177 (1968) (noting the Commission's "broad responsibilities for the orderly development of an appropriate system of local television broadcasting"); James S. Rivers, Inc. v. FCC, 351 F.2d 194 (D.C. Cir. 1965) (holding that a denial of a request to operate a radio station at night as well as during the daytime is not abuse of discretion).

25. *See Nat'l Brdcst.*, 319 U.S. at 215–16. The Court stated:

> The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

Id.

26. How to measure diversity in broadcasting has been a subject of considerable debate. *See, e.g.*, MEDIA DIVERSITY AND LOCALISM: MEANING, METRICS, AND THE PUBLIC INTEREST (Donald McGannon Communication Research Center, Fordham University) (2003). *See also* PHILIP M. NAPOLI & NANCY GILLIS, MEDIA OWNERSHIP AND THE DIVERSITY INDEX: A SOCIAL SCIENCE RESEARCH AGENDA IN MEDIA OWNERSHIP: RESEARCH AND REGULATION (Ronald E. Rice ed., Hampton Press (forthcoming 2007)).

programming distribution in American broadcasting.[27] To prevent network owners such as NBC and CBS from using the leverage of their highly popular national radio programs—the "must-hear" programs of the golden age of radio—to control the programming of local stations around the country, the FCC greatly curtailed the ability of networks to enter into affiliation agreements with its licensees. Licensees, for example, were required to retain the final say on the programs they aired, to limit network programming to specific times of the day, and to avoid long-term affiliations.[28]

By the spring of 1943, the networks' challenge to FCC authority was

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27. *See* 47 U.S.C. § 521 (2005). The statute says:

> The purposes of this subchapter are to . . . (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; . . . (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public; . . . (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Id. *See also* Congressional Findings and Policy: Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 2(a)(16), (21), 106 Stat. 1460, 1462–63 (1992) (stating that:

> The Congress finds and declares the following: . . . (16) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized. . . . (21) Cable systems should be encouraged to carry low-power television stations licensed to the communities served by those systems where the low-power station creates and broadcasts, as a substantial part of its programming day, local programming.

See also Nat'l Brdcst., 319 U.S. at 217 ("The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States.").

28. *See* 47 U.S.C. § 311 (2005); § 153(9) (defines chain broadcasting as the "simultaneous broadcasting of an identical program by two or more connected stations."). *See also Nat'l Brdcst.*, 319 U.S. at 218. The Court found:

> In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices" (citation omitted).

Id.

before the United States Supreme Court. The case, *National Broadcasting Co. v. United States*,[29] is a landmark in American broadcasting. In a five to two decision, the Court upheld the authority of the FCC to regulate broadcast licensees, and by extension, networks, in the public interest.[30] Justice Felix Frankfurter, writing for the majority, sided with the FCC on both statutory and constitutional grounds. In assessing the FCC's authority under the Communications Act, Justice Frankfurter expressly rejected the networks' "traffic cop" characterization. According to the Court, because the FCC is burdened to determine the traffic itself, the Act requires the Agency to exercise subjective judgments.[31] The opinion also determined that the "Chain Broadcasting Regulations" were consistent with the public interest objectives of the FCA, providing the FCC with statutory authority to promote local and diverse broadcasting.[32]

At a constitutional level, however, the Court's decision in *National Broadcasting* established precedent that reverberates to this day. Rejecting the contention that the FCA itself infringed on broadcasters' First Amendment rights, the Court held that the FCC's policy of denying licenses or renewals to broadcasters did not amount to a denial of free speech.[33] The First Amendment was not implicated, according to Justice Frankfurter, because "[t]here is a fixed natural limitation upon the number of stations that can operate without interfering with one another."[34] The Supreme Court thus introduced the concept of scarcity: because there are more applicants for licenses than available frequencies, Congress and the FCC can justifiably impose special obligations on those fortunate enough to receive a license.[35] This type of scarcity, based on the limited allocation of a renewable but finite natural resource—the frequencies contained in the electromagnetic spectrum—embodies what today would be called allocational scarcity.[36]

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29. 319 U.S. 190.

30. *Id.* at 190, 227 ("Mr. Justice Black and Mr. Justice Rutledge took no part in the consideration or decision of these cases.").

31. *Id*. at 224–27.

32. *Id*. These rules, which were upheld by the Supreme Court in 1943, still appear in the Code of Federal Regulations verbatim, despite uneven enforcement by the FCC. *See* Affiliation Agreements and Network Program Practices; Territorial Exclusivity in Non-Network Program Arrangements, 47 C.F.R. § 73.658 (2001).

33. *Nat'l Brdcst.*, 319 U.S. at 226–27.

34. *Id.* at 213 (citation omitted).

35. A license for an available frequency is essentially a license to use a publicly owned resource; therefore, it is not just scarcity per se, but scarcity of something that belongs to the public. As a result of public ownership, there are social implications to allocation of available frequencies.

36. Allocational scarcity is a function of the limited number of frequencies available in the electromagnetic spectrum. Since there are not enough frequencies for all those who seek

In the aftermath of the *National Broadcasting* decision, Congress and the FCC used allocational scarcity to justify a series of structural and content regulations that applied only to broadcast media, including special rules for access by political candidates, indecency restrictions, community program responsibilities, and, perhaps most controversially, a general right of public access known as the Fairness Doctrine.[37] Enforced by the FCC from 1949 to 1987, the Fairness Doctrine imposed two distinct access obligations on broadcasters. The first, an affirmative responsibility to air controversial issues of significant public importance,[38] was rarely invoked, the most notable case involving a group that petitioned a television station to engage a controversy over strip-mining.[39] The second part of the doctrine required broadcasters to give members of the public a reasonable opportunity to respond to specific broadcasts, including political editorials

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to use them, allocational scarcity remains unaffected by the development of new media technologies and alternatives to broadcast programming.

37. *See* Editorialization by Broadcast Licensees, *Report of the Commission*, 13 F.C.C.R. 1246 (1949) [hereinafter *Editorialization Report*]. The Fairness Doctrine is a former FCC rule that required the broadcast media owner to furnish a reasonable opportunity for discussion of conflicting views on issues of public importance. The FCC abandoned the Fairness Doctrine in 1987. *See also* 47 U.S.C. § 315(a) (2005) (Fairness Doctrine as embodied in this statute is described as "Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities"); § 312(a)(7) (stating:

> The Commission may revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.)

38. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367, 369 (1969). See also Times-Mirror Brdcst. Co., 24 Rad. Reg. (P&F) 404 (1962).

39. Representative Patsy Mink, *Memorandum Opinion and Order*, 59 F.C.C.2d 987, para. 29 (1976) [hereinafter *Patsy Mink Order*]. The *Opinion and Order* stated:

> It is our belief, as stated in the *Fairness Report*, *supra*, that the licensee could not reasonably fail to cover an issue which has tremendous impact within the local service area—that such failure would violate the fairness doctrine. We now reaffirm that principle. Where, as in the present case, an issue has significant and possibly unique impact on the licensee's service area, it will not be sufficient for the licensee as an indication of compliance with the fairness doctrine to show that it may have broadcast an unknown amount of news touching on a general topic related to the issue cited in a complaint. Rather it must be shown that there has been some attempt to inform the public of the nature of the controversy, not only that such a controversy exists.

Id. See also Editorialization Report, *supra* note 37, at para. 6 (stating:

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station.)

and personal attacks.[40] Broadcasters, and especially television journalists, were strongly opposed to the Fairness Doctrine in any context, since it created a chilling effect on the airing of certain content and, when enforced, effectively allowed the government to make editorial judgments on behalf of broadcasters.[41] By the mid-1960s, the Radio and Television News Directors Association ("RTNDA") was ready to mount a legal challenge to the doctrine, in tandem with the complaint of a rural Pennsylvania radio station that had aired a preacher's personal attack against a writer.[42]

In 1969, the Supreme Court combined the RTNDA challenge and the radio station complaint and delivered a decision in *Red Lion Broadcasting v. FCC*.[43] While the specific controversy involved the validity of the Fairness Doctrine, the more general principle of scarcity as a justification for a variety of special broadcast content regulations was the key issue at stake. The Supreme Court again ruled for the FCC, despite the fact that in the quarter century since the *National Broadcasting* case, radio and television broadcasters had become more plentiful both nationally and locally.[44] Justice White, writing for the Court, makes it clear that because there are not enough frequencies available to grant licenses to all applicants, broadcasters do not enjoy the same First Amendment rights of nonbroadcasters.[45] Justice White adds that, because of this inherent scarcity, the First Amendment rights of the public take precedence over the broadcasters' speech rights.[46] In addition to reaffirming the scarcity concept, the Court posited a second justification for government regulation in the public interest: because licensees operate over airwaves that belong to the people, broadcasters have a fiduciary duty to act on behalf of the public.[47]

2. Questioning Allocational Scarcity in a World of Abundant Media

While little attention—perhaps too little—has been given to the public trustee theory for broadcast regulation in the years since *Red Lion*, challenges to the scarcity justification remained very much in the forefront.

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40. See 47 C.F.R. § 73.123 (1981) (repealed 1982). *See also Editorialization Report*, *supra* note 37, at paras. 6–7.

41. *See* Nat'l Brdcst. Co. v. FCC, 516 F.2d 1101 (D.C. Cir. 1974); Columbia Brdcst. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 164 (1973).

42. Radio-TV News Dirs. Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968); Red Lion Brdcst. Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967).

43. *Red Lion*, 395 U.S. 367.

44. *Id.*

45. *Id.* at 386–89.

46. *Id.* at 386–87.

47. *Id.* at 389.

In many respects, the *Red Lion* case represented the zenith for the scarcity justification. With the advent of proliferating electronic channels of discourse in the 1970s and 1980s, including those carried over cable, satellite, and microwave relays, broadcasters and some in government began to question whether broadcast frequencies could still be characterized as "scarce," while conveniently ignoring the public trustee component of the *Red Lion* argument.[48]

Cable and satellite reception in homes meant that, for the first time since the dawn of radio, an alternative to over-the-air broadcast programming was available to the American public. Television broadcasters, who had enjoyed dominant market power for decades because of their access to a government resource, saw their audience and their market power begin to erode, a trend that continues to this day. By the early 1980s, Mark Fowler, the FCC chairman during the Reagan Administration, was calling for the deregulation of broadcasting, recasting scarcity in terms of numbers of channels, as opposed to allocated technology. Under this "numerical scarcity" approach, Fowler and other deregulatory advocates essentially argued that, since electronic media were no longer scarce, a free market would promote competition and foster diversity both in terms of license ownership and programming.[49] While the Supreme Court has acknowledged the debate over the continued saliency of scarcity, it has not abandoned its holding in *Red Lion*.[50] The same cannot

48. *See* FCC v. League of Women Voters, 468 U.S. 364, 376–77 n.11. *See also* Radio-TV News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000).

49. *See*, *e.g.*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221–26 (1982).

50. Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 638–39 (1994). The Court explained:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

Id. *See also* Action for Children's TV v. FCC, 58 F.3d 654, 674 n.8 (D.C. Cir. 1995). The court explained:

> Interestingly, in responding to Government's argument that cable and broadcast are alike in that they both are beset by market dysfunction, the *TBS* Court stated that "the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence." (citations omitted). Apparently, the Court is now prepared to abandon the *economic* scarcity theory.

Id.

be said for the Fairness Doctrine, which the Court permitted the FCC to abandon in 1987 for reasons unrelated to scarcity.[51]

In recent years, Congress and the FCC have continued to deregulate electronic media, citing many of the same arguments from the 1980s. In the mid-1990s, for example, Congress lifted caps on radio station license ownership, relaxed limits on broadcast ownership, and deregulated cable.[52] In 2003, the FCC proposed a sweeping review of all remaining ownership regulations for television.[53] Chairman Michael Powell, a long-time advocate of marketplace diversity, argued forcefully that new technologies like the Internet make the scarcity rationale obsolete. Breathing new life into the numerical scarcity approach, Powell believes that Americans live in a world where there is an "abundance of media," and, in a literal sense, he is right.[54] Compared to the 1970s, there are many more channels—broadcast, cable, satellite, Internet—competing for consumers of content.

While the Rehnquist Court voiced support for the allocational scarcity arguments of *Red Lion* in three of its decisions,[55] if the FCC and many broadcasters have their way, it may only be a matter of time before the "abundance of media" argument gains ground in the reconstituted Roberts

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51. *See* Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). *See also* Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

52. *See generally* Telecommunications Act of 1996, Pub. L. 104-104, § 202, 110 Stat. 56, 110 (codified at scattered sections of 47 U.S.C.) (1996). *See also id*. at § 202(a) ("The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally."); *id.* at § 202(c) (instructing the Commission to eliminate "the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide . . . " and to increase the "national audience reach limitation for television stations to 35 percent."); *id*. at § 202(f) ("The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.").

53. *See* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, *Further Notice of Proposed Rule Making*, 11 F.C.C.R. 19895 (1996) [hereinafter *Review of Attribution Regulations*].

54. *See* Larry Shaughnessy, *FCC: Media Rules Will Change*, CNN.COM, June 2, 2003, http://www.cnn.com/2003/BUSINESS/06/02/fcc.media/index.html (discussing the merits of proposed rules which would allow:

> a single media company [to] own enough television stations to reach as much as 45 percent of the U.S. television market, up from the current ceiling of 35 percent. Companies would be allowed to own both television stations and newspapers in all but the smallest markets, and in large markets, individual companies could own several radio and television stations as well as the newspaper and cable outlet.)

(last visited Nov. 12, 2006).

55. *See generally Turner II*, 520 U.S. 180 (1997); Reno v. ACLU, 521 U.S. 844 (1997); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

Court.[56] And if, as a result, content regulations are deemed unconstitutional, then the implications on rights of access to broadcasting may be significant.

3. Free Markets, Diversity, and Localism

Media channels, in fact, may have become more numerically abundant, but are they more diverse? In trying to answer that question, advocates of greater government intervention have focused on the issue of media ownership from an antitrust perspective. In the context of broadcast ownership, a free market system does not bring about diversity, either in terms of the multiplicity of sources or programming content. Indeed, the lesson of broadcast deregulation is that market power left unchecked leads to three distinct concerns that curb both source and programming diversity: concentration, conglomeration, and the "corporatization" of media. For broadcasting, concentration of ownership has meant fewer companies now own more licenses.[57] The result, a reduction in the numbers of independently owned and community-managed stations, has increased profits for broadcasters even as it hurts diversity.[58]

Conglomeration refers to the advent of large companies who, in the wake of market deregulation, have amassed sizable holdings in a variety of different media, such as broadcast, cable, satellite, and Internet, and in the companies, studios, and networks, that produce and distribute the content carried on those media. Again, the result, while profitable, harms diversity as the conglomerate consolidates previously independent media outlets to

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56. *See*, *e.g.*, Fox TV Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002) (holding that

> contrary to the implication of the networks' argument, this court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense. The Supreme Court has already heard the empirical case against that rationale and still 'declined to question its continuing validity.');

Century Comm. Corp. v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987) (holding that "[w]ire-carried media like cable, of course, have no such limitations, and thus we found the 'scarcity rationale' that the Supreme Court has used to justify broadcast television regulations to offer no succor to those seeking to establish the constitutional validity of cable television regulations.") (citation omitted).

57. *See* Free Press, Who Owns the Media, http://www.freepress.net/content/ownership (last visited Nov. 12, 2006).

58. In broadcast radio, for example, station ownership declined by 25 percent, from 5,100 owners prior to the 1996 Telecommunications Act to a mere 3,800 owners by the end of 2001. Anastasia Bednarski, Note, *From Diversity to Duplication: Mega-Mergers and the Failure of the Marketplace Model Under the Telecommunications Act of 1996*, 55 FED. COMM. L.J. 273, 287 (2003). As a result of consolidation in the radio market, there has been a rapid increase in syndicated programming. Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 491 (2000).

reduce operational redundancies and cross-promote its businesses.[59] "Corporatization" of broadcasting is what happens when the free market drives up the costs of licenses to the point that only corporations can afford to be broadcasters. In the private marketplace, this type of price inflation is desirable, as sellers should be able to profit from the capital appreciation of their assets. But broadcasting is not a private marketplace, and diversity suffers qualitatively when only one segment of society—corporate America—controls what gets seen and heard on the public's airwaves.

In 2004, a group of re-regulation advocates, led by public interest law firm Media Access Project, successfully challenged the FCC's proposals to relax or eliminate ownership restrictions in the courts by emphasizing the impact of this deregulation on source diversity and program diversity, especially in news coverage.[60] While this challenge, heard in the Third Circuit Court of Appeals, may have slowed the deregulation juggernaut at the FCC, it is unclear whether the more influential D.C. Circuit Court of Appeals, known for opinions advocating deregulation, will agree with the concerns espoused by the Third Circuit. Whether it does or does not, the issue of numerical scarcity in light of an Internet-fueled "abundance of media" will likely wind its way into the Supreme Court by the end of the decade.

Throughout all this, Congress has remained largely acquiescent to the political power of media conglomerates, even though they have proven to be less willing to accommodate industry interests than the FCC on key issues such as broadcast television ownership caps,[61] children's

59. *See* Charles Layton, *News Blackout*, AM. JOURNALISM REV., Dec. 2003–Jan. 2004, 18, 18–19, *available at* http://www.ajr.org/article.asp?id=3500. *See also* Robert Philpot, *Evil Empires?*, FT. WORTH STAR TELEGRAM, April 25, 2004, at D.

60. Prometheus Radio Project v. FCC (*Prometheus*), 373 F.3d 372, 385–86 (3rd Cir. 2004). Large companies that implement consolidation and synergy techniques are dropping original independent newscasts because they do not maximize corporate profits, opting instead for national syndicated newscasts. Michael S. Schneider, *Local Newscasts Fall Victim To Cost Cuts*, VARIETY, Jan. 28, 2002–Feb. 3, 2002, at 21; Dan Trigoboff, *CBS Drops News In Detroit,* BRDCST. & CABLE, Nov. 25, 2002, at 12. As a result of increased acquisition of owned and operated stations by networks and fewer affiliate stations, affiliates are unable to exercise their right to preempt under network/affiliate rules. Preemption is a valuable right, since it allows a local affiliate to reject network programming. 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620 (2003) [hereinafter *2002 Biennial Review*]. Due to their increased power, networks are able to decline special news presentations, such as presidential debates. Paul B. Matey, *Abundant Media, Viewer Scarcity: A Marketplace Alternative to First Amendment Broadcast Rights and the Regulation of Televised Presidential Debates*, 36 IND. L. REV. 101, 127 (2003). Networks have also taken advantage of their consolidated market position to cut costs of coverage by pooling their resources, resulting in erroneous results and one-sided newscasts. Robert H. Lande*, Consumer Choice as the Ultimate Goal of Antitrust,* 62 U. PITT. L. REV. 503, 519 (2001).

61. Congress has repeatedly thwarted FCC initiatives to relax television ownership

television,[62] indecency,[63] and vertical and horizontal channel ownership limitations for cable systems.[64] In enacting cable caps, Congress recognized that unregulated market power would lead to continued consolidation of cable system ownership and control of channel programming in an industry that is already dominated by Time Warner and Comcast.[65] At the same time, Congress has also been willing to enact structural regulation to protect broadcast licensees from the more dominant market power of cable, giving broadcasters the option of requiring local cable systems to retransmit station signals at no cost.[66] These "must-carry"

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restrictions: in 1984, when Congress enacted a 25 percent ownership limitation, effectively overruling then FCC chairman Mark Fowler's attempt to sunset station ownership caps altogether; in 1996, when Congress maintained an increased ownership cap of 35 percent for television after deregulating radio ownership; and in 2003, by enacting legislation to raise the cap to 39 percent, despite an FCC effort to institute a 45 percent cap. *See* Amendment of Section 73.3555, *Report and Order*, 100 F.C.C.2d 17 (1984) (Congress imposes 25 percent cap in 1984); Telecommunications Act, 47 U.S.C. § 202 (1996) (Congress maintains 35 percent cap for TV); *2002 Biennial Review*, *supra* note 60, at para. 499 (FCC sets cap at 45 percent); *Prometheus*, 373 F.3d 372 (responding to 45 percent cap); Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629(1), 118 Stat. 3, 99 (2004) (Congress sets cap at 39 percent while *Prometheus* is still pending).

62. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990).

63. *See generally* Broadcasting Obscene Language, 18 U.S.C. § 1464 (1994); FCC v. Pacifica Found., 438 U.S. 726 (1978). *See also* Enforcement of 18 U.S.C. 1464, 47 C.F.R. 73.3999 (1995).

64. *See generally* Comm'ns Cable Horizontal and Vertical Ownership Limits, *Second Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 9374 (May 2005); Cable Television Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

65. *See* Time Warner Entm't Co. v. FCC, 56 F.3d 151, 179 (D.C. Cir. 1995) (The court stated:

> Experience under the 1984 Cable Act's deregulatory regime led Congress to enact the 1992 Cable Act . . . . In 1992, Congress found that the deregulated cable industry had become the 'dominant nation-wide video medium,' serving 'over 60 percent of the households with televisions.' The legislative record also showed that the industry was 'highly concentrated.' In addition, Congress found that 'most cable television subscribers have no opportunity to select between competing cable systems,' and that '[t]he result is undue market power for the cable operator as compared to that of consumers.' Congress also found that the average monthly cable rate had increased 'almost 3 times as much as the Consumer Price Index since rate deregulation.' . . . Congress concluded that rate reregulation was necessary to ensure that cable operators would not exercise 'undue market power vis-a-vis video programmers and consumers.')

(quoting *1992 Cable Act*, Pub. L. 102-385 § 2) (internal citations omitted). *See also Turner II*, 520 U.S. 180, 197 (1997) ("Evidence indicated the structure of the cable industry would give cable operators increasing ability and incentive to drop local broadcast stations from their systems, or reposition them to a less-viewed channel.").

66. Carriage of Local Commercial Television Signals, 47 U.S.C. § 534 (2000); Carriage of Noncommercial Educational Television, 47 U.S.C. § 535 (2000). Congress enacted the Cable Television Consumer Protection Act of 1992 on October 5, 1992. This Act contains two provisions that require cable operators to carry local broadcast station signals without charge at the broadcaster's election. These provisions, sections 614 and 615 of the *1992 Cable Act*, apply to the signals of commercial and noncommercial educational stations

rules, upheld as constitutional by the Supreme Court in 1997,[67] were designed not only to address market competition, but also to promote programming diversity in broadcasting, which Congress specifically found to be at risk by the early 1990s.[68] At least with respect to cable regulation, Congress has recognized a nexus between program diversity and consolidated ownership.[69]

Still, when it comes to broadcasting, Congress evidently agrees with the FCC that allowing concentrated ownership of broadcast licenses will keep over-the-air broadcasting viable and relevant in a market growing increasingly competitive with cable, satellite, and Internet.[70] The same can be said of Congress's failure to overrule the FCC's repeal of the Financial Interest and Syndication ("Fin-Syn") Rules in 1996, which, since 1970, had prevented broadcast networks from vertically consolidating with studios to produce and syndicate programming.[71] These deregulatory positions, consistent with the free market mandate of numerical scarcity advocates, may possibly help bolster broadcasting in the marketplace. Broadcast networks, although still powerful, no longer attract the huge audience shares of the 1960s, and the synergy of owning both stations and studios has allowed broadcasters—or at least the conglomerates that own them—to cut programming costs and participate in the hugely profitable syndication environment.

What Congress and the FCC have failed to take into account is the substantial negative impact on programming caused by the easing of structural broadcast regulation. Government policymakers need to recognize that numerical scarcity reduces not only diversity of ownership, but also the diversity of the programming aired by those owners, especially when the "abundance" of media outlets are controlled by a few powerful corporations. Local musicians already complain that they cannot get airtime on radio stations unless they have a business relationship with Clear Channel or CBS Corp., the two conglomerates that now dominate radio in

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respectively. Together, these sections are known as the "must-carry" rules. *See id*.

67. *Turner II*, 520 U.S. at 224–25 (holding that must-carry regulations were content-neutral and narrowly tailored to advance Congress' interests in preserving the benefits of free, over-the-air local broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming).

68. *See 1992 Cable Act*, Pub. L. 102-385 § 2(a)(4) ("The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers."). *Id.* at § 2(a)(6) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.").

69. *See 1992 Cable Act*, Pub. L. 102-385 § 2 (1992).

70. *See id.*

71. Prime Time Rules, 47 C.F.R. § 73.658 (j)(ii) (1994) (*Fin-Syn Rules*).

the wake of its deregulation in 1996.[72] In the decade since the "Fin-Syn" Rules were repealed, every major independent producer of television entertainment in Hollywood, save one, has either gone out of business or been absorbed into a conglomerate.[73] Indeed, from a programming diversity standpoint, consolidation of radio and television ownership has meant consolidation of programming decisions, as corporate owners combine once independent news operations, remove station management from the localities they purport to serve, and adopt more risk-averse rules to rein in controversial or edgy programming that might negatively affect shareholder return. This is precisely the type of programming that would be fostered in a public access system in which licensees do not have the discretion to make programming decisions based on market considerations.

C. Revisiting the Public Trustee Theory

If one accepts the premise that scarcity cannot exist when media are numerically abundant, then it becomes difficult to justify regulating television and radio broadcasting any differently than other media. Except for antitrust issues relating to abuse of market power—laws that in recent years have been relaxed across industries—there is little that diversity advocates can do to stop the current trend toward consolidation and merger among broadcasters. But this premise need not be accepted. In fact, the better argument is that the numerical abundance of electronic media channels justifies greater regulation of broadcast ownership and programming diversity. Since broadcasting is now a significantly smaller piece of the media pie, the use of public airwaves to distribute program content should be less important to these conglomerates. Yet, the large media companies continue to lobby for the opportunity to increase their broadcast holdings and pay millions to acquire new licenses despite the fact that broadcasting may be subject to content regulations á la *Red Lion*.

Why do these companies refuse to rid themselves of the specter of

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72. *See*, *e.g.*, Ben Bagdikian, *Grand Theft: The Conglomeratization of Media and the Degradation of Culture*, MULTINATIONAL MONITOR, Jan./Feb. 2005, *available at* http://www.multinationalmonitor.org/mm2005/012005/bagdikian.html:

> For 25 years, a handful of large corporations that specialize in every mass medium of any consequence has dominated what the majority of people in the United States see about the world beyond their personal experience. These giant media firms, unlike any in the past, thanks to the hands-off attitude of the Federal Communications Commission (FCC) majority, are unhampered by laws and regulation. In the process, they have been major agents of change in the social values and politics of the United States.

73. *See Hey Bud, Cut Us a Slice*, FIN. TIMES REPORTS, Feb. 25, 2002, at 20; The Museum Of Broadcast Communications, Independent Production Companies, http://www.museum.tv/archives/etv/I/htmlI/independentp/independentp.htm (last visited on Nov. 12, 2006).

intrusive regulation by simply migrating their distribution operations to cable or the Internet? The answer lies in a reality that numerical scarcity advocates seem unwilling to recognize: numerical abundance fails to account for qualitative disparities among media outlets. Put simply, not all media channels are the same. The difference comes down to market power. Conglomerates are eager for more broadcast stations precisely because broadcasting gets special treatment from the government; regulations have essentially privileged broadcasting in the marketplace for decades, and continue to do so. In addition to protective structural regulations such as the "must-carry" rules, broadcasting is the only medium with universal access—all televisions, for example, are capable of receiving broadcast signals. The conglomerates who own incumbent broadcasters are keenly aware of the competitive advantages of the broadcast medium. As the market has become more competitive, companies with diverse media holdings have become increasingly willing to leverage their incumbency as broadcasters to extend their audience reach through cross-promotion on nonbroadcast outlets and by requiring affiliates to carry strategically significant programming.[74]

In an abundant media marketplace, the owners of a transmission conduit should be completely free to impose whatever conditions they

74. The synergy that results from internal production, initial distribution, syndication, and repurposing allows these consolidated "media giants to gain carriage on cable systems . . . enabl[ing] the parent corporations of the broadcasters to capture a large share of the non-broadcast video market." *Media Ownership: Hearing Before the S. Subcomm. on Commerce, Sci. and Transp.*, 108th Cong. (2003) (testimony of Mark Cooper, President, Consumer Federation of America), *available at* http://commerce.senate.gov/hearings/testimony.cfm?id=950&wit_id=2679. For example, the General Electric merger permitted profitable cross-promotion across the new company's extensive cable and broadcast networks, allowing the company to use its broadcast and cable properties to promote company business interests, rather than the goals of localism and diversity. *See* Press Release, GE, General Electric and Vivendi Universal Sign Agreement to Merge NBC and Vivendi Universal Entertainment (Oct. 8, 2003), *available at* http://www.ge.com/pr/display.php?highlight=true&id=1443&keyword=. The vast consolidation of these media outlets results in efforts of cross-promotion, synergy, and cost-saving techniques, which fail to promote the Commission's goals of localism and diversity. For example, independent local news stations are being acquired by conglomerates and managed by their local affiliates, effectively removing any independent local news coverage. *See* Bill Moyers, *On Big Media*, TRUTHOUT, Oct. 10, 2003, *available at* http://globalpolicy.org/socecon/tncs/mergers/2003/1010bigmedia.htm. Original programming has given way to syndicated programming, which is also increasingly owned by the conglomerate that controls the licensee. Edward D. Cavanagh, *De-Regulation of the Air Waves: Is Antitrust Enough?*, 17 ST. JOHN'S J. LEGAL COMMENT 67, 74–75 (2003) (citing Polly Higgins, *Tucson Radio Making Waves: Corporate Radio Moves In*, TUCSON CITIZEN, May 3, 2002, at A1). Additionally, vertical integration allows conglomerates to own much of the content they air, making it more likely for them to exclude local content, in which they do not have a financial stake. *See Broadcast Localism: Hearing Before the FCC* (2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attatchmatch/DOC-242307A1.pdf.

choose on those seeking to make use of that conduit's market power. Moreover, since the U.S. government "owns" the airwaves in public trust for the people, Congress and the FCC thus have the right to impose conditions that may be quite onerous on a broadcaster's speech rights without trampling upon the First Amendment.[75] Congress affirmed this right on behalf of government expressly in the FCA itself, providing "for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and period of the license."[76] If a conglomerate does not like the condition, media abundance means that it can take its programming elsewhere.[77]

The theory of broadcaster as public trustee is such that it should stand alone as a justification for broadcast access regulation, divorced from the imperiled scarcity justification of *Red Lion*.[78] Although one could argue that the scarcity arguments of *Red Lion* no longer apply due to the proliferation of new electronic media, that same proliferation actually strengthens the case for using a quid pro quo justification. In an expansive media market, speakers who do not wish to accept the conditions that attach to the government-granted benefit of a broadcast license now have viable alternatives such as cable, satellite, and Internet.

To a great extent, the major media conglomerates have already become dominant owners in these media alternatives, partly in an effort to provide programming not subject to the lowest common denominator of the highly regulated broadcast market, but mainly as part of a strategy to promote increased viewership of the conglomerate's flagship broadcast

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75. To some extent, Congress has exercised that right using the scarcity argument, but not the public fiduciary argument, to justify specific burdens on broadcasters in the Children's Television Act, indecency legislation, and the repeated imposition of ownership caps. *See supra* notes 71–74.

76. 47 U.S.C. § 301 (2000).

77. Some deregulation advocates contend that onerous government regulation of broadcasters amounts to an unconstitutional taking of private property. *See*, *e.g.*, Satellite Brdcst. and Comm. Ass'n v. FCC, 275 F.3d 337 (4th Cir. 2001). Such a position is not supportable under the FCA, which requires licensees to waive any claim to a property interest in the broadcast spectrum. 47 U.S.C. § 304 (2000). Stating:

> No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

See also FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

78. 395 U.S. 367, 400–01 (1968).

outlet.[79] For example, Fox will use its Fox Sports Net and FX cable stations to air Major League Baseball games with limited appeal, or even minor playoff games, when a game with greater audience appeal is scheduled to air on the Fox Broadcast Network, but the World Series games always air on the Fox Broadcast Network, just as the Superbowl always airs on a broadcast station. The fact that major television events air on licensed broadcast properties establishes that the government benefit conferred upon broadcasters—market power—remains just as strong, if not stronger, in an era of rapidly expanding multichannel video programming distribution ("MVPD") alternatives.

Media conglomerates recognize that they are receiving this government benefit when they choose to continue to operate broadcast licenses, when they produce original news and entertainment programs for broadcast, and when they buy or sell broadcast licenses for millions of dollars. Conglomerates may not thank the government for the benefits bestowed upon them by the grant of a broadcast license, but the marketplace speaks for itself. After all, if broadcasting were a bad bargain, licenses would presumably be plentiful and inexpensive.

While many, including the FCC, cite the proliferation of media channels as a justification for abandoning broadcast regulation altogether,[80]

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79. *See* Shaughnessy, *supra* note 54.

80. *See* Syracuse Peace Council v. WTVH, *Memorandum Opinion and Order*, 2 F.C.C.R. 5043, para. 64 (1987). The Commission determined that the "comprehensive study of the telecommunications market in the *1985 Fairness Report* has convinced us [the Commission] that [the scarcity] rationale that supported the doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today." *Id. See also* Press Release, FCC, FCC Commissioner Michael Powell Advises Investment Analysts to Look for Evidence of Regulators Promoting Innovation and Competition (Mar. 13, 1998), *available at* http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1998/nrmc8024.html:

> Quoting Albert Einstein, Powell said, 'The unleashed power of the atom has changed everything save our modes of thinking and we thus drift toward unparalleled catastrophe.' Reflecting on where [sic] the country is in the communications revolution, Powell remarked 'I often think of Einstein's warning,' and questioned whether the industry is 'truly changing enough, and quickly enough to accommodate' the transformation to a pro-competitive, deregulatory communications regime. Powell set forth several tenets of 'new regulatory thinking' that should guide policy leaders in light of the pro-competitive, de-regulatory environment and the immense power and potential of communications technology unleashed:
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> 1) Faith in competition, and courage to cede control to the marketplace;
>
> 2) Focus on innovation when dealing with network industries that are driven by technology;
>
> 3) Prepare for the regulatory implosion of traditionally distinct technologies and services;
>
> 4) Strive for regulatory efficiency. In this regard, regulatory agencies must make timely decisions, be sensitive to business realities and capital markets, and shift their efforts to enforcement.

the issue is not as much about scarcity as it is about the government doling out a public benefit of market power to private parties. Indeed, if broadcasters, irrespective of numerical or even allocational scarcity, are recipients of a government benefit, they should offer something of value in exchange for that market advantage. Under either the expansive contractual waiver of rights quid pro quo or the narrower structural regulation quid pro quo examined in this Article, all parties come out ahead. Broadcasters can acquire more licenses, the public gets access to broadcast channels heretofore unavailable to them, and the government achieves the goals of diversity and localism through access regulations that have proven elusive through its regulation of ownership.

III. APPLYING THE QUID PRO QUO ARGUMENT TO ELECTRONIC MEDIA

A. Quid Pro Quo in Lieu of Scrutiny

1. *Erie*'s Contractual Quid Pro Quo Approach

Some courts have employed a more expansive approach to quid pro quo, arguing that as a matter of contract, a company can waive constitutional rights,[81] including fundamental First Amendment rights that would otherwise be subject to a level of constitutional scrutiny. With respect to First Amendment rights, the expansive quid pro quo argument first appears in Justice Rehnquist's dissent in *First National Bank of Boston v. Bellotti*.[82] While the Court held that Massachusetts could not proscribe the political speech rights of corporations created under state charter, Justice Rehnquist disagreed on the principle that corporations, as persons created pursuant to state law, can have additional regulations placed upon them, even at the cost of rights that would otherwise be available to natural persons.[83] For Justice Rehnquist, the bargained-for exchange is implicit in the creation of the commercial entity under state law. Since a state "confers special privileges or immunities different from those of natural persons" when it creates a commercial entity such as a corporation, the entity "would be subject to like regulation . . . ."[84]

In *Erie*, the Third Circuit also used an expansive quid pro quo approach to uphold an agreement between the City of Erie and its cable franchisee that imposed fees and public access requirements that would

81. *See* Erie Telecomms., Inc. v. The City of Erie, 853 F.2d 1084, 1096 (1988).
82. *See* 435 U.S. 765, 822–28 (1978) (Rehnquist, J., dissenting).
83. *Id.* at 827.
84. *Id.*

otherwise have been subject to constitutional scrutiny as a content regulation.[85] Although the court does not refer to Justice Rehnquist's implied social contract reasoning, the rationale for waiver, as in Justice Rehnquist's *Bellotti* dissent, is rooted in contract principles.[86] After reviewing a long line of Supreme Court precedents that permit waiver of constitutional rights in general, the Third Circuit articulates a broad rule that First Amendment rights may be bargained away when "the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver."[87]

In arriving at this holding, the Third Circuit reviews two prior Supreme Court cases in which a contracting party alleged that the other party waived fundamental constitutional rights. In the first Supreme Court case, *D.H. Overmyer Co. v. Frick Co*., 405 U.S. 174 (1972), the Court held that a warehousing company waived procedural due process rights of notice and counsel when it entered into, and subsequently breached, an installation contract with a refrigerator manufacturer.[88] In the second case, *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Justices ruled that a consumer who purchased household goods did not waive due process rights in a dispute with a retailer, despite the fact that an adhesion contract[89] stipulated such a waiver.[90]

The distinction between the two cases is set forth in a passage from *Fuentes* that is cited in the *Erie* opinion. In *Fuentes*, the Court explains that the two cases are distinguishable because of the parties' relative bargaining ability and actual knowledge of waiver.[91] Although the Supreme Court in *Fuentes* makes reference to unequal bargaining power, the Court focuses on the limited context of adhesion contracts.[92] The more fundamental issue, as it turns out, is whether the waiving party was "'aware of the significance' of the waiver provision."[93] Indeed, under the specific facts of *Fuentes*, the Court determines that the appellant homemaker did not waive her constitutional rights since the consumer product manufacturer "made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of

85. *See generally Erie*, 853 F.2d 1084.

86. *Id.* at 1090 (recognizing a party's freedom to contract).

87. *Id.* at 1096.

88. 405 U.S. at 187–88.

89. An adhesion contract is "[a] standard-form contract prepared by one party, to be signed by the party in a weaker position, usu. a consumer, who adheres to the contract with little choice about the terms." BLACK'S LAW DICTIONARY 342 (8th ed. 2004).

90. 407 U.S. at 95–96.

91. *Erie*, 853 F.2d at 1096 (citing *Fuentes*, 407 U.S. at 95).

92. *See Fuentes*, 407 U.S. at 95.

93. *Erie*, 853 F.2d at 1096 (citing *Fuentes*, 407 U.S. at 95).

constitutional rights."[94]

For the *Erie* court, this reliance on actual awareness as a condition to waiver provides specific guidance into what the Supreme Court would require for a valid contractual waiver in the context of constitutional free speech rights.[95] The principal focus for the Third Circuit is on whether the waiving party did so with "volition and understanding," which the court explains is deemed to be present "where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations."[96]

Although the court does not say it in so many words, ultimately it comes down to a question of whether the party is sophisticated and well-advised. If so, the Third Circuit will deem that the party entered into the contract with the volition and understanding necessary to make a waiver of constitutional rights valid.[97] Fuentes, an individual who was purchasing goods and services for her home, entered into a contract with fine print. *Overmyer*, on the other hand, concerned a corporation who had both received representation by counsel and negotiated a deal in a business context.[98] While the focus on negotiation and bargaining equality might have proven to be a problem when a government dictates terms to a private business entity in exchange for media rights or licenses, the *Erie* court, by focusing on sophistication and legal counsel, applies the Supreme Court's prior jurisprudence on contractual waivers of rights to the case of a cable company suing over content regulations imposed by a city government.[99]

Interestingly, the circuit court affirmed the lower court's summary judgment decision. Its decision to apply a quid pro quo analysis as an alternative to constitutional scrutiny represented a deliberate departure from the trial judge's approach.[100] Although the district court found for the City of Erie, it was not on the basis of contractual waiver.[101] In concluding that the city's access requirements were constitutional, the district court rejected the applicability of a waiver rationale because the cable company "lacked knowledge of its rights."[102] The court went on to explain that "in

94. *Fuentes*, 407 U.S. at 95.
95. *See Erie*, 853 F.2d at 1096.
96. *Id.*
97. *Id.* at 1097.
98. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186 (1972).
99. *See Erie*, 853 F.2d at 1096.
100. *Id.* at 1096–97 (noting that although contractual waiver issues were not raised in the lower court, the failure to raise those issues should not have any bearing on determining whether or not a party waived its constitutional rights).
101. *See* Erie Telecomms., Inc. v. Erie, 659 F. Supp. 580, 605 (W.D. Pa. 1987).
102. *Id.* at 586.

light of the ambiguity and uncertainty" of the law with respect to cable companies' First Amendment rights at the time of the contract, Erie Telecommunications, Inc. could not have waived a right of which it was not actually aware.[103] The fact that the appellate court dispenses with a requirement of actual knowledge in favor of deemed volition and understanding is significant, since under the Third Circuit's reasoning, a sophisticated, well-advised party may be deemed to have waived rights even if the right had not fully emerged as a matter of law, or if the party was unaware that the right, in fact, existed.[104]

2. Contractual Approach to Quid Pro Quo after *Erie*

Erie is still good law in the Third Circuit, but it remains the only case to expressly apply a contractual waiver of First Amendment rights in a dispute involving media access.[105] While the Seventh Circuit refers to *Erie* in *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540 (7th Cir. 1989), a case that also examines the validity of local cable ordinances, the *Chicago Cable* court's reference to contractual waiver is limited to an introductory footnote in which the court determines that it will not decide the issue "since neither party advanced the argument here or in the district court."[106] Even so, the footnote contains enough analysis to offer readers some sense of how the Seventh Circuit panel would have considered the issue had they ruled it justiciable.[107] In the first part of the footnote, the panel raises the waiver issue as "conceivabl(e)," and focuses on the fact that *Erie*'s contract was a consent decree to prior litigation, as opposed to an initial franchising agreement between the government and a cable company, which was at issue in *Chicago Cable*.[108] The difference in the type of contract turns out to be a "significant distinction" for the court, since the footnote adds that "serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights."[109]

103. *Id.* at 585. Because he views lack of actual knowledge as a bar to waiver, Judge Mencer relies instead on the *O'Brien* test of intermediate scrutiny to determine whether the access requirements were constitutional noncontent regulation. In turning to *O'Brien*, the district court engages the First Amendment implications of government access requirements in a manner that has, in the years since the *Erie* case, become the more typical approach of courts. *See also* United States v. O'Brien, 391 U.S. 367 (1968).

104. *Erie*, 853 F.2d at 1095–96 (citing *Fuentes* and *Overmyer*).

105. *See id.* at 1084.

106. *Chicago Cable*, 879 F.2d at 1548 n.6.

107. *See id.*

108. *Id.*

109. *Id.*

Without reading too much into a single footnote, the Seventh Circuit's brief treatment of the waiver issue suggests that its view conflicts with the Third Circuit's holding in *Erie*. In emphasizing "virtual monopoly" power[110] on the part of the city, the *Chicago Cable* court seems to be suggesting that the two parties to a cable franchising agreement have unequal bargaining power.[111] Although the court does not say so expressly, the connection to the Supreme Court's contractual waiver precedent is evident.[112] As the Third Circuit points out, the difference between *Overmyer* and *Fuentes* was that Fuentes signed an adhesion contract as a condition to a consumer purchase,[113] whereas Overmyer's contract was a negotiated business transaction between parties with equal bargaining power.[114] While it is true that some contracts involving monopolistic power may involve unequal bargaining power, the Seventh Circuit panel is at odds with the Third Circuit if it suggests that such unequal bargaining power would be present in franchise agreements merely because the government controls access.[115]

3. Contractual Quid Pro Quo and the Nature of Cable Franchise Agreements

First, the reality of a cable franchise agreement is that it is a contract that effectively grants monopoly power to a cable company.[116] Since local rights of way and other access benefits belong to the government, the government is not using unequal bargaining power to condition access; it is merely retaining some of the power it would otherwise have the right to reserve for its own use or could bargain away freely to another party. In granting a benefit that is not available to everyone, the government should be permitted to condition its grant on a waiver of rights that the cable company would otherwise not have.

In addition, prohibiting the government from placing conditions on its

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110. *Id.*

111. *See id.* at 1550.

112. *Id.* at 1550–51.

113. Fuentes v. Shevin, 407 U.S. 67 (1972).

114. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 186 (1972).

115. *Compare* Chicago Cable Comm. v. Chicago Cable Comm'n, 879 F.2d 1540, 1548 n.6 (7th Cir. 1989), *with* Erie Telecomms., Inc. v. The City of Erie, 853 F.2d 1084, 1101 (1988).

116. Although the 1996 Telecommunications Act prohibits exclusive franchising by municipalities, permitting alternative cable providers to "overbuild" rights of way, such overbuilding is rare on account of cost and market saturation. Efforts to overbuild even in large markets, such as New York, Boston, Washington, D.C., and other cities have failed to make an alternative cable provider competitive in those markets. K.C. Neel, *Fresh Start for RCN: A Rocky Road Leads the MSO to Smoother Terrain,* MULTICHANNEL NEWS, Apr 18, 2005, at 29.

grant of a monopoly would significantly reduce a municipality's power to negotiate on behalf of its citizens. Cities would effectively be limited to an all or nothing approach to bargaining.[117] Government would either have to give up all of its access rights without limitation or refrain from entering into these franchise agreements altogether, since cities are not required to contract with cable companies. The result would be less bargaining power for both sides, since there would be virtually no room for negotiation on the issue.

Moreover, a franchise agreement between a city and a cable provider is not an adhesion contract. Unlike a household consumer, a cable company is expected to be aware of the rights it is giving up in exchange for the benefits it will receive under a franchise agreement. This is not a question of an unsophisticated party not reading the fine print of a form contract. In every instance, cable companies seeking to enter into a franchise agreement are familiar with the issues, can conduct negotiations, and are advised by competent counsel.[118] Indeed, this is precisely why the Third Circuit deemed volition and understanding to encompass a totality of circumstances that included bargaining equality, the presence of actual negotiation, and the availability of counsel, and why the *Erie* court held that Erie Telecommunications, Inc. had acted with volition and understanding when it entered into a contract that required it to waive certain First Amendment rights.[119]

While the decision in *Erie*, that volition and understanding includes consideration of the totality of the circumstances, is based on a fair reading of the Supreme Court's decisions in *Fuentes* and *Overmyer*,[120] other circuits, including the Seventh, remain free to develop their own approach to these precedents. Unfortunately, the *Chicago Cable* court does not address either of these cases, choosing instead to list, without elaboration, older Supreme Court cases with less relevance to contractual waiver jurisprudence.[121] However, even if another circuit were to reject *Erie*'s

117. As this Article goes to press, in 2006, the U.S. Senate is considering the *Ensign Bill*, which would preempt municipalities from entering into these negotiations by making cable franchising a matter of federal law. In the event that the *Ensign Bill* becomes law, the federal government would be responsible for negotiating quid pro quos with cable providers. By placing cable franchising under federal control, the relationship between cable companies and the government would be more like the relationship between broadcasters and the government, which has always been governed exclusively by federal law. *See* Broadband Investment and Consumer Choice Act, S. 1504, 109th Cong. (2005).

118. *See*, *e.g.*, *Erie*, 853 F.2d at 1101.

119. *Id.* at 1096.

120. *See Erie* 853 F.2d at 1096 (citing Fuentes v. Shevin, 407 U.S. 67 (1972); D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972)).

121. Chicago Cable Comm. v. Chicago Cable Comm'n, 879 F.2d 1540, 1548 (7th Cir. 1989).

concept of volition and understanding, the court would have to undertake the same type of thorough analysis of *Fuentes* and *Overmyer* that the Third Circuit undertook.[122] In analyzing these two cases, a court would have to discuss why the Supreme Court decided for waiver in *Overmyer* but against waiver in *Fuentes*. Since *Fuentes* expressly embraces lack of "awareness of the significance" of the waiver as its standard for invalidating contractual waiver, merely demonstrating that the parties had unequal bargaining power would therefore not be consistent with the Supreme Court's treatment of the issue.[123]

Some might complain that a content-based right of access places too great a burden on broadcasters' speech rights; however, the reality is that there is no burden under the First Amendment, only a conditional government benefit at stake. If a particular speaker does not want to accept the speech limitations required by government as a quid pro quo for receiving this benefit, that speaker can still exercise its free speech rights. Put simply, there is no burden whatsoever. The speaker has merely chosen not to accept a government benefit on which the government has a right to place restrictions. The plausibility of this argument is suggested in *Red Lion* itself, not in the scarcity rationale, but in the opinion's less controversial broadcaster-as-public-fiduciary analysis.[124] Since broadcasters are receiving an exclusive benefit that is owned by the public, government is free to impose conditions and responsibilities upon them. Broadcasters are like private companies hired to manage a public housing project, or concessionaires in a public park—the government does not deny rights by imposing conditions on those seeking to profit from government-owned resources.[125]

B. *The Scrutiny Alternative: Quid Pro Quo under the* O'Brien *Test*

In cases involving structural cable regulation, including cable access cases, courts have addressed quid pro quo arguments through an application of the *O'Brien* test of intermediate scrutiny. Under the *O'Brien* test, a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."[126] In those cases, the quid

122. *Erie*, 853 F.2d at 1095–97.

123. *Fuentes*, 407 U.S. at 95.

124. Red Lion Brdcst. v. FCC, 395 U.S. 367, 389 (1969).

125. *See* Rust v. Sullivan, 500 U.S. 173, 193–98 (1991) (holding that the government could impose conditions on recipients of a government benefit without violating the recipients' First Amendment rights).

126. *Turner II*, 520 U.S. 180, 189 (1997) (citing *O'Brien*, 391 U.S. 367, 377 (1968)). *See*

pro quo argument is used more narrowly in order to address the issue of burden under the *O'Brien* test's fourth prong.[127]

Although quid pro quo is no longer applied expressly in the context of contractual bargaining, courts employ a quid pro quo analysis within the framework of *O'Brien*'s scrutiny of substantial governmental interest and, more importantly, narrow tailoring.[128] The end result is that subsequent courts have justified government regulations because, first, the government has a substantial interest in regulating rights of a private party that would not have existed but for the government's decision to grant a special benefit not available to everyone, and second, the burden on cable's speech rights is low since it benefits from a government monopoly.[129]

In *Chicago Cable*, the Seventh Circuit adopted the intermediate scrutiny approach to quid pro quo by applying the *O'Brien* test to the city's cable access regulations.[130] The court characterizes its decision to use *O'Brien* as a "novel question," since the Supreme Court, at least as of 1989, had not yet determined "the applicable standard for review" for a First Amendment challenge to municipal cable regulations.[131] The Court's choice in applying the *O'Brien* test is significant since it presages the approach to constitutional scrutiny that the Supreme Court later applies to structural cable regulation, impacting cable speech rights in *Turner II*.[132]

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also O'Brien, 391 U.S. at 376–77:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

127. The fourth prong of the *O'Brien* test requires that the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The *Turner II* court found that the must-carry provisions met the fourth prong of the *O'Brien* test "[b]ecause the burden imposed by must-carry is congruent to the benefits it affords . . . [and]. . . must-carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable." 520 U.S. at 215–16. In applying the fourth prong, the *Turner II* court considered earlier precedent. *Id.* at 216 ("'[T]he essence of narrow tailoring' is 'focus[ing] on the source of the evils the [Government] seeks to eliminate [without] significantly restricting a substantial quantity of speech that does not create the same evils.'") (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 n.7 (1989)).

128. *See Turner II*, 520 U.S. at 215–16 ("Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must-carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable."). *See also* Chicago Cable Comm. v. Chicago Cable Comm'n, 879 F.2d 1540, 1549 (1989).

129. *See generally Turner II*, 520 U.S. at 180 (upholding a city's "must-carry" provisions explaining that the ordinances did not violate the First Amendment).

130. *Chicago Cable*, 879 F.2d at 1549.

131. *Id.* at 1548.

132. *Compare id.* at 1548–49, *with Turner I*, 512 U.S. 622 (1994), *and Turner II*, 520

Chicago Cable applied the *O'Brien* test to a city regulation requiring locally originated programming and focused on the economic scarcity of cable as a medium under the fourth prong of the *O'Brien* test, which, as interpreted in *Fox* and *Clark*,[133] requires that the "means must be narrowly tailored but not necessarily the least restrictive alternative."[134] While the case cites *Red Lion* as an example of justified government regulation of television and distinguishes *Red Lion* from *Tornillo*, the opinion makes an economic scarcity argument quite different from the allocational scarcity justification offered for access under the Fairness Doctrine.[135] It is an argument about market power that applies to all electronic media in which access is controlled: "Cable programming, like other forms of the electronic media, is an economically scarce medium. Unlike the traditional forms of print media, a cable programmer enjoys a virtual monopoly over its area, without the threat of an alternative provider."[136]

What is most significant about *Chicago Cable* is its willingness expressly to engage a quid pro quo argument to justify content-neutral regulation as narrowly tailored under the *O'Brien* test.[137] As the court explains it, the government "is duty-bound to recognize the effects of 'medium scarcity' by ensuring that the few programmers who are granted a franchise make optimum use of it."[138] Therefore, because the government has granted the cable system economic rights that are not available to all, the government can require the cable entity to give up some of its speech rights on behalf of cable customers.[139]Although the *Chicago Cable* opinion focuses on a single franchise with monopoly power over access, *Turner II* expands the economic scarcity argument to encompass restricted competition.[140]

In *Turner II*, the Supreme Court held, five to four, that federal legislation requiring cable systems to retransmit local broadcast signals did

U.S. at 189.

133. Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989); Clark v. Cmty. for Creative Non-violence, 468 U.S. 288 (1984).

134. *Chicago Cable*, 879 F.2d at 1550.

135. *Compare id*., 879 F.2d at 1550, *with* Red Lion Brdcst. v. FCC, 395 U.S. 367, 400–01 (1969).

136. *Chicago Cable*, 879 F.2d at 1550.

137. *See id*.

138. *Id*. (citation omitted). *See also* Cmty. Comm. Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981); Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 986–87 (D.R.I. 1983).

139. *See Chicago Cable*, 879 F.2d at 1550 (holding that the city's ordinance requiring time for local programming was valid because of the "virtual monopoly" over television media); *Turner II*, 520 U.S. at 215–16 (holding that the "must-carry" provisions were valid because the burden imposed was proportionate to the benefit afforded).

140. *Compare Chicago Cable*, 879 F.2d at 1550, *with Turner II*, 520 U.S. at 197.

not violate the First Amendment rights of cable interests.[141] In validating these so-called "must-carry" rules, five justices determined that regulations designed to foster diversity, localism, and certain types of programming were content-neutral regulations subject to a highly deferential application of intermediate scrutiny under the *O'Brien* test.[142] While the *Turner II* case settled the narrow question of whether the government could mandate broadcaster access to cable systems, the implications of both Justice Kennedy's principal opinion and Justice Breyer's concurrence may be far reaching with respect to a different type of access: access by the public to media owned or dominated by an increasingly small number of corporate conglomerates.

Justice Breyer determined that speech burden can be mitigated under the fourth prong of the *O'Brien* test of intermediate scrutiny when media entities have benefited from a grant of monopoly power from government.[143] In a concurrence that provided the pivotal fifth majority vote in the case, Justice Breyer recognizes that governmental regulations suppressing cable speech rights are justified since cable systems "face[] little competition" and, therefore, act as a "bottleneck that controls the range of viewer choice . . . ."[144] The same logic would apply to broadcast licensees since they also face little economic competition and control what viewers can see in a medium with great market power. If a local cable system can be required to give the public access to its conduit, so too should broadcasters be required to provide the general public with a right of access to the conglomerate's media holdings in exchange for the government permitting the conglomerate to increase its financial interest in media properties that receive a government benefit, such as a license or infrastructure rights of way.

Turner II is also instructive since the Supreme Court determined that the 1992 Cable Act's "must-carry" rules were narrowly tailored because they scaled the burden in accordance with an Multiple Service Operator's ("MSO's") channel capacity.[145] In Sections 614 and 615 of the Communications Act of 1934, Congress very specifically set forth an escalating must-carry obligation: systems with fewer than 12 channels have a low burden, systems with 12–36 channels have an intermediate burden, and systems with more than 36 channels have the greatest burden.[146] The Act also exempts the smallest systems—those with fewer than 300

141. 520 U.S. 180.
142. *Id*.. *See also O'Brien*, 391 U.S. 367 (1968).
143. *Turner II,* 520 U.S. at 227–28 (Breyer, J., concurring).
144. *Id.*
145. *Id*. at 215–16.
146. *See* 47 U.S.C. § 534 (2000).

subscribers—from the rules entirely.[147] This scaling scheme, absent in previous codifications of the must-carry rules, was key to the *Turner II* Court's determination that the 1992 rules were narrowly tailored.[148] Indeed, in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), the D.C. Circuit struck down must-carry rules precisely because they applied to all MSOs equally, and thus were too burdensome on the smallest cable systems.[149]

Like the "must-carry" rules upheld in *Turner II*,[150] any speech burden on broadcasters is mitigated by the fact that the amount of access to be provided can be linked proportionately to market power granted, just as the scaled "must-carry" regime under the 1992 Cable Act mitigated the burden on cable speech interests.[151] Moreover, any burden is further reduced by current technological innovations, such as digital compression and signal multiplexing, because public access could be limited to one programming stream, permitting broadcasters to control content on the remaining streams of their signal bandwidth.[152]

In a quid pro quo access system, scaling a court-determined burden is relatively easy to accomplish. Since the amount of time or space devoted to public access is scaled to the amount of additional market power from which the conglomerate is seeking to benefit, any burden would be mitigated for media companies with smaller market reach. In that respect, public access would operate in a manner similar to the 1992 Cable Act's narrowly tailored "must-carry" rules. In any event, this narrow tailoring analysis would only be necessary if the courts determine that a quid pro quo access system is a content-neutral structural regulation that burdens the conglomerate's speech rights, a proposition that would not be easy to make because the quid pro quo is voluntarily entered into. Thus, even if courts were to determine that a market power quid pro quo would impose a real

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147. *Id.*

148. *Turner II*, 520 U.S. at 215–16 (citations omitted):

> Because the burden imposed by must-carry is congruent to the benefits it affords, we conclude must-carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable. . . . Congress took steps to confine the breadth and burden of the regulatory scheme. For example . . . Congress exempted systems of 12 or fewer channels, and limited the must-carry obligation of larger systems to one-third of capacity, allowed cable operators discretion in choosing which competing and qualified signals would be carried, and permitted operators to carry public stations on unused public, educational, and governmental channels in some circumstances.

149. *Quincy Cable*, 768 F.2d 1434.

150. *Turner II*, 520 U.S. at 185.

151. 47 U.S.C. § 534 (2000); *see Turner II*, 520 U.S. at 215–16 (concluding that the must-carry provisions were narrowly tailored). *See also infra* note 173 and accompanying discussion.

152. *See infra* notes 177–80 and accompanying discussion.

speech burden on media conglomerates that choose to enter into the bargain, the government could make a strong argument that any burden would be narrowly tailored under the *O'Brien* test.

Structural regulation also has the additional benefit of being content-neutral. In its analysis of burden, *Chicago Cable* focuses on the fact that the regulation is minimally burdensome because it does not require the cable system to air any specific program or editorial viewpoint.[153] *Turner II*, as explained above, similarly extends the content-neutrality analysis to types of programming, including local and diverse.[154] The idea here is that while the government cannot require specific content to be aired, it can require that cable companies air types of programs that further governmental interests without sacrificing content-neutrality.[155] This would surely encompass regulations requiring electronic media—including broadcasting—to give access to local or diverse content.

Finally, with respect to both quid pro quo approaches, the diversity justifications for regulation of the cable medium would apply even more directly to broadcasting, since the reasons for the legislation relate to the protection of government-owned airwaves. Putting aside the now controversial scarcity justifications of the *Red Lion* case,[156] the diversity and localism considerations that justified structural regulation of cable in *Turner II*[157] make even more sense in the context of broadcasting. Broadcast frequencies, unlike cable transmissions, are a medium that by their very nature belong to the public. Broadcasters, of course, operate on these frequencies only to the extent that Congress permits them, through licensing and regulatory oversight.[158] As such, requiring broadcasters to give up rights of access—even content-based ones—as a quid pro quo for receipt or continuance of an operating license is quite reasonable. The *Chicago Cable* and the *Turner II* decisions thus effectively open the door to a regulatory approach that, with government action, would overcome constitutional concerns that heretofore prevented or hindered Congress

153. Chicago Cable Comm. v. Chicago Cable Comm'n, 879 F.2d 1540 , 1551 (1989).

154. *See Turner II*, 520 U.S. at 186.

155. *Id.* at 213.

156. Red Lion Brdcst. v. FCC, 395 U.S. 367, 400–01 (1969).

157. *Turner II*, 520 U.S. at 226–27 (In justifying the First Amendment "price" suffered by cable operators and some viewers in implementing the must-carry rules, the court refers to the regulatory scheme's benefits, such as "prevent[ing] too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public," and explains, "[t]his purpose reflects what 'has long been a basic tenet of national communications policy,' namely, that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'") (citations omitted).

158. *See* FCC, How to Apply for a Broadcast Station, http://www.fcc.gov/mb/audio/how toapply.html (last visited Nov. 13, 2006).

from enacting, and the FCC from enforcing, a general right of access to media.

IV. MULTIPLEXING AS ACCESS OPPORTUNITY

A. *Multiplexing as an Additional Government Benefit*

In the 1990s, Congress enacted a transition to digital broadcasting in what was originally described as an effort to bring high-definition television ("HDTV") to American households.[159] To facilitate this transition, Congress gave each incumbent licensee an amount of bandwidth set aside for digital transmission that was equal to the amount it used for analog broadcasting. Since digital signals can transmit data much more efficiently than analog, broadcasters would be able to use their new digital spectrum to carry an HDTV signal.[160] As it turned out, this increased signal efficiency gave broadcasters an unanticipated economic benefit. Instead of using the entire digital signal to air data-intensive HDTV video, broadcasters can divide and compress their bandwidth into as many as five, six, and possibly more signal streams airing programming in standard definition DTV.[161] Known generally as "multiplexing," the ability to split their bandwidth has enabled local stations to air different programs simultaneously as if they were separate channels on the digital televisions currently being sold in the U.S.[162]

Although licensees today consider it their right to multiplex, and nearly all of them do,[163] this added benefit was conferred upon them by the

159. *See* Advanced Television Systems, *First Report and Order*, 5 F.C.C.R. 5627, at para. 8 (1990) [hereinafter Advanced Television Systems].

160. HDTV refers to a television signal that is transmitted in a high resolution. "Resolution is the amount of detail that can be seen in an image. . . . [and] can be expressed in terms of the number of horizontal lines of picture elements . . ." ("pixels") contained in a television picture. CHARLES D. FERRIS & FRANK W. LLOYD, TELECOMMUNICATIONS REGULATION: CABLE, BROADCASTING, SATELLITE, AND THE INTERNET, 23B–6 n.1 (2002). Since 1940, the U.S. has used the National Television System Committee ("NTSC") standard of 525 lines per screen with an aspect ratio of 4 to 3. The 4:3 aspect ratio, which corresponds to the shape of an ordinary analog television screen, is the reason most TV programs have traditionally been created, or in the case of film, modified, to appear in a roughly square frame. While not all HDTV signals are digital, current HDTV standards for DTV can more than double the number of screen lines available in an NTSC signal (1000–1200 as opposed to 525) with an aspect ratio of 16:9 (1.78:1). The result is a widescreen television image that approximates the height and width of a theatrical motion picture and the resolution of 35mm film. *Id*. at 23B–7.

161. Standard definition DTV offers resolution and audio reproduction that is superior to the NTSC analog signal. *See*, *e.g.*, Advanced Television Systems, *supra* note 159, at paras. 40–42.

162. 47 U.S.C. § 534(b)(3)(A) (2000).

163. *See*, *e.g.*, R. Thomas Umstead & Linda Moss, *Much Ado about Multicasting: Broadcasters Getting New Nets Off Ground*, MULTICHANNEL NEWS, Dec. 12, 2005, at 6.

government. Concerned that the costs of transitioning from one NTSC signal to one HDTV signal would not lead to a "satisfactory return on investment,"[164] broadcasters lobbied hard for permission to split their signals, and the FCC was largely sympathetic. FCC Chairman Alfred Sikes acknowledged the practical benefit of digital multiplexing when he stated in 1992 that "there are 'political, economic and legal reasons why' the transition must be from one 6 mhz channel to one 6 mhz channel."[165] That same year, in a concurrence to an FCC opinion and comment solicitation on Advanced Television ("ATV"), Commissioner Sherrie Marshall apparently realized that multiplexing, and not HDTV, would be the real benefit of digital broadcasting: "I am becoming increasingly convinced, however, that the real key to broadcasters' continued competitiveness lies not so much in ATV as a crisp picture, but in its potential for spectrum-efficient multiplexing. In my view, broadcasters must become multichannel providers to continue to flourish in the long run."[166]

The National Association of Broadcasters and other industry representatives took the issue of "digital spectrum flexibility" before Congress in late 1993.[167] Broadcasters evidently waited until Chairman Sikes, who insisted that DTV be high-definition, was succeeded by Clinton Administration appointee Reed Hundt, who favored spectrum flexibility over mandatory HDTV.[168] In Senate hearings, public interest advocates argued that broadcast multiplexing would give broadcasters a benefit not originally envisioned. Congress, nonetheless, gave broadcasters everything they wanted.[169] With spectrum flexibility, digital broadcasters can vary the number of programming streams available at any time, airing one signal in HDTV or many in standard definition depending on their programming needs.[170] Under the 1996 Act, broadcasters can also make multiplexed program streams available for uses other than advertiser-supported free broadcasting, including leased access and subscription services.[171]

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164. MICHEL DUPAGNE & PETER B. SEEL, HIGH-DEFINITION TELEVISION: A GLOBAL PERSPECTIVE 25 (1998) (.

165. Peter Lambert, *FCC and Broadcasters Battle Toward Flexible HDTV Conversion,* BRDCST. & CABLE, Oct. 5, 1992, at 14.

166. Certain ATV Issues Resolved; Further Comment Sought on Other Issues, *Action*, Docket No. 87-268, 1992 FCC LEXIS 5434, at *7 (Sept. 17, 1992).

167. JOEL BRINKLEY, DEFINING VISION: THE BATTLE FOR THE FUTURE OF TELEVISION 307–08 (1997).

168. *Id.* at 309.

169. *Title VII, The Communications Act of 1994: Hearing on S. 1822 Before the S. Comm. on Commerce, Science, and Transportation*, 103rd Cong. (1994) (testimony of Andrew Jay Schwartzman, Executive Director, Media Access Project)

170. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

171. *Id*. *See also id*. at § 201(b).

B. Scaled Bandwidth/Time-Based Access Formula

One formula, noted below in Figure One, would be to scale the amount of access; in this case, time and/or bandwidth as a function of the percentage of national audience a broadcaster's licenses reach, as measured by the FCC. Thus, a conglomerate with 50 percent of national reach could be responsible for setting aside bandwidth that would enable the public access to one programming stream, one day a week. A greater or lesser amount of time and/or bandwidth could also be achieved by adjusting the conversion factor up or down. Setting a value for the conversion factor would be a matter for Congress or the FCC to determine. Congress could presumably develop more complicated formulae that could account for characteristics of the speakers granted access. For example, Congress could adjust the conversion factor based on the degree of diversity or localism among the users. Access could be based on the status of a petitioner as "local," and possibly even the local nature of the speech itself, since *Turner II* held that laws that promote locally based programming and quality programming were not impermissible content regulations.[172]

The formula for scaled zone-based access:

$$z = \frac{p}{f}(u)$$

z=zone of access based on bandwidth and/or time
p=market reach, as measured by FCC
f=factor of conversion to be determined by Congress
u=unit of time or space measurement (e.g. minutes or sq. inches)

Figure One.
Formula for Zone-Based Access

In the context of the digital broadcast television, the access component of time could be supplanted by bandwidth. On digital television sets, multiplexed broadcast signals appear as subchannels that can easily be accessed by viewers.[173] Since multiplexing would essentially permit

172. *Turner II*, 520 U.S. 180 (1997). "[I]ncreasing the number of outlets for community self-expression" represents a "long-established regulatory goa[l] in the field of television broadcasting." *Id.* at 192, quoting United States v. Midwest Video Corp., 406 U.S. 649, 667-68. Congress identified a specific interest in "ensuring [the] continuation" of "the local origination of [broadcast] programming." *Turner II*, 520 U.S. at 193, citing *Turner I*, 512 U.S. at 652.

173. *See* Searchnetworking.com, Modulation: Multiplexing, http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212586,00.html (last visited on Nov. 13, 2006). *See also*

licensees to transmit programming seamlessly to a number of subchannels simultaneously, the bandwidth access formula would account for proportionate access by requiring a broadcaster to dedicate all or part of a subchannel, or perhaps even more than one subchannel, to public access, depending on the amount of additional market power granted to the broadcaster.[174] From a policy standpoint, requiring licensees to "give back" some of the benefit of increased programming capacity now possible with digital transmissions makes sense. In this respect, setting aside one or two programming streams out of a multiplexed broadcast signal for public access is not that much different than the public access set-asides already in place for cable[175] and direct broadcast satellite[176] systems under the 1992 Cable Act. Those set-asides, which scale the number of public access channels proportionally to a system's total channel capacity, were upheld as constitutional structural regulation by the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*.[177] Broadcast set-asides would also be consistent with the position of the Gore Commission, which in the late 1990s recommended that digital broadcasters be required to dedicate some of their more efficient bandwidth to public interest programming.[178]

Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1 (2004); 47 U.S.C. § 534(b)(3)(A); TV Stereophonic Aural and Multiplex Subcarrier Operation, 47 C.F.R. § 73.669(b) (2005); Carriage of Transmissions of Digital TV Brdcst. Stations, *Notice of Proposed Rulemaking*, 13 F.C.C.R. 15092, at para. 71 (1998).

174. *See* Varona, *supra* note 173, at 89.

175. § 532(b)(1) of the 1992 Cable Act scales channel set-asides into four tiers, as follows:

> (A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels . . . not otherwise required for use . . . . (B) An operator of any cable system with 55 or more (but not more that 100) activated channels shall designate 15 percent of such channels . . . not otherwise required for use . . . . (C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels. (D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

Id.

176. 47 U.S.C. § 335(b)(1) (2000). Although the statute does not expressly scale the DBS set-aside obligation, Congress intended that the percentage of capacity to be allocated to noncommercial educational or informational programming should be considered in light of the total channel capacity of the DBS system in question, with larger capacity systems required to reserve a higher percentage of capacity than smaller DBS systems. *See* S. REP. No. 102-92 at 92 (1991).

177. Time Warner Entm't Co., v. FCC, 93 F.3d 957 (D.C. Cir. 1996).

178. *See* NTIA, CHARTING THE DIGITAL BROADCAST FUTURE: FINAL REPORT OF ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS (1998), *available at* http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf.

Moreover, the notion that digital broadcasters can earmark a multiplexed channel for transmissions not related to their over-the-air broadcasting service has already been recognized by the FCC in its regulations governing digital television. Section 73.624(g) of the Code of Federal Regulations allows licensees effectively to sublease a multiplexed subchannel to themselves or third parties for private use, provided that the licensee tenders an annual fee representing five percent of the revenue received from these ancillary services.[179] Permitting digital broadcasters to privatize public airwaves in return for a fee seems very different from requiring broadcasters to dedicate a programming stream to public access in return for market power, but the logic is the same. In both cases, the licensee would essentially be "spinning-off" a portion of its bandwidth to operations not related to its use of the airwaves for broadcast programming. The only difference is that in a zoned-access regime, the beneficiary would be the public, and the content transmitted on any dedicated subchannel would not be subject to the licensee's control or gate keeping.

Additionally, such a system would be relatively easy to measure and monitor since it essentially creates a relationship between the market power given and the time or bandwidth yielded. Since the government gives broadcasters measurable market power in granting a broadcast license, such a scaled right of access would be constitutional as a structural regulation, so long as access were determined through content-neutral means such as a lottery, first come, first served basis, or random selection rather than through a content-driven selection process.[180]

V. EXTENDING THE QUID PRO QUO TO ALL CONGLOMERATE-OWNED MEDIA

Given that a broadcast license grants a great government benefit of market power to a broadcaster, the question remains, what should the

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See also JAMES M. BURGER & TODD GRAY, THE GORE COMMISSION REPORT ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL BROADCASTERS (1999), *available at* http://www.digitaltelevision.com/law/law199.shtml; The Media Institute, The Gore Commission, http://www.mediainstitute.org/gore/gc1.html (last visited Nov. 13, 2006).

179. 47 C.F.R. § 73.624(g) (2005) ("Commercial and noncommercial DTV licensees must annually remit a fee of five percent of the gross revenues derived from all ancillary or supplementary services, as defined by paragraph (b) of this section . . . .").

180. "First Come, First Served" is the process of filling applications on a first come, first served basis. "Random Selection" is the process of placing applications meeting specifications in a random order, usually by a computer program, and then filling the applications in that random order. Judge Spatt, *Court Declines to Enjoin Cable TV Operator's Changes to Public Access Channel Time Slots*, N.Y.L.J., Apr. 13, 2005, at 24. *Accord* Morrone v. CSC Holdings Corp., 363 F. Supp. 2d 552 (E.D.N.Y. 2005). "Lottery" is the process of distributing tickets to all applicants and then granting applications to those who hold the winning number(s), which are drawn at random. BLACK'S LAW DICTIONARY 966 (8th ed. 2004).

government require in exchange for this benefit of market power? The answer is simple—diversity and localism.[181] The government should require a broadcaster to provide access to the general public in order to ensure local and diverse content. Based on the expansive contractual quid pro quo theory outlined above, a content-based approach such as the Fairness Doctrine—independent of scarcity justifications—would be constitutionally permissible. If the government were to bargain with broadcasters over market power, it might be possible to extend broadcast access regulations to non broadcast media owned by broadcasters.

A. Waiving First Amendment Rights or Exchanging Speech Burden for Access

The fundamental question here is not whether the First Amendment rights of nonscarce print publishers would be infringed upon, but rather whether the quid pro quo can be sufficiently broad to include a waiver of the publisher's free speech rights for nonbroadcast media. Again, under the Supreme Court's reasoning in the contractual quid pro quo cases, a party to contract can waive constitutional rights as a condition for receiving the benefit offered in the bargain.[182] Thus, just as the government can impose conditions on the grant of a broadcast license, it follows that the government can broaden the condition to address market power even to print. *Tornillo* would not be implicated by such a broadly constructed condition agreed to by a conglomerate as part of a voluntary contract.[183] As was the case with cable owners, the owners of print publications are not required by the government to give up a portion of their publication, here measured as space and location, as opposed to time; the conglomerates remain free to exercise their full First Amendment rights by choosing not to accept the additional broadcast market power being offered to them.

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181. *See*, *e.g.*, FCC v. Nat'l Citizens Comm. for Brdcst. ("*Nat'l Citizens"*), 436 U.S. 773, 777 (1978) ("the FCC made a rational judgment in concluding that the need for diversification was especially great in cases of local monopoly." The Supreme Court held that the challenged regulations, which were designed to promote diversification of the mass media as a whole, were properly based on the "public interest" standard). *See also id.* at 780 ("In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.") (citations omitted).

182. *See*, *e.g.*, Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084 (3d Cir. 1998).

183. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974). In 1974, the Court held a Florida statute requiring newspapers to provide right of reply for political candidates unconstitutional because newspapers are not a scarce resource. However, due to consolidation of media outlets in recent years and the scarcity of major newspapers even in big cities, it is conceivable that the court *would* include a conglomerate's newspaper entities, in addition to its broadcast and cable outlets, as part of an entire corporate media package from which the conglomerate is reaping a benefit. *See id.*

While the contractual waiver approach could result in a host of content regulations in which a conglomerate's ownership of broadcast properties could be leveraged against the acceptance of content regulations affecting their non broadcast properties, such a revolutionary approach would be unprecedented and, in light of current law, unnecessary. Under the narrow *O'Brien* quid pro quo approach, the market-power-for-zoned-access quid pro quo also could effectively provide the public with structural access to newspapers and other publications owned by broadcast conglomerates.[184] In addition to being more politically palatable, such a regulation, in which the government would require a content-neutral unit-based approach to media access, makes sense for four reasons.

First, requiring media conglomerates to accept a structural regulation in return for market power avoids the enforcement problems that plagued the Fairness Doctrine, including concerns over the definition of controversial issues and the chilling effect on broadcaster speech.[185] Second, a structural regulation that grants local and diverse access without regard to content helps foster diversity without making content judgments that might overlook similar but not identical views, or views clearly out of the mainstream. Third, it also takes the broadcaster out of the gate keeping process, removing any question of editorial favoritism or bias based on political or social agenda.

Fourth, as important as the aforementioned benefits are, what makes structural regulation as a quid pro quo for media market power especially attractive is its potential application to non broadcast media such as cable—where *Turner II* and the *O'Brien* test already apply—and in some cases, even to print media, *Tornillo* notwithstanding. Unlike scarcity, which reaches only to a company's broadcast frequencies, but not to other media properties owned by that same company, a structural market-power quid pro quo model offers at least the potential to be applied across different

184. United States v. O'Brien, 391 U.S. 367, 382 (1968) (holding that where a regulation furthers a substantial government interest, provided that it is narrowly tailored, the limitation on speech is constitutional).

185. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367, 392–93 (1969) (In upholding the Fairness Doctrine, the *Red Lion* Court stated, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed." Additionally, the Court agreed with station owners' arguments:

> [I]f political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective.

Id.

media, when different media properties are owned by the same entity.

This broader scope of regulation would be constitutional under *O'Brien*, as applied in *Turner II*, because the broadcasters can effectively be required to give up their First Amendment rights in return for a government benefit of being a broadcaster.[186] As was the case with the contractual approach, the only question would be whether the government could extend the burden it is already permitted to exact against a broadcaster to First Amendment rights that would otherwise be beyond the government's ability to regulate, absent a compelling interest. In that sense, it is not much different from content-neutral, market-based logic that led the Supreme Court to validate broadcast cross-ownership regulations in 1978.[187] Cross-ownership rules, though not currently in favor at the FCC, require companies who own different media properties to divest nonbroadcast properties in local markets with excessive ownership concentration.[188]

This proposed quid pro quo approach, while consistent with Justice Marshall's thinking in *National Citizens*, would be far less burdensome (if at all) on broadcasters than cross-ownership regulations.[189] Here, if broadcasters want access to licenses with greater market reach, they must give back some of that power by providing time-based diverse and local access, not only on their broadcast stations, but also on their cable channels. As is often the case in contract law, the broadcaster does not have to accept the government's offer.[190] These broadcasters may be permitted to broadcast, but they would not be permitted to amass the type of media ownership that many media conglomerates seek today. Moreover, they may not be permitted to own other non broadcast properties in markets where cross-ownership rules are needed to guard against local concentration.

B. Content-Neutral Right of Access and Editorial Discretion

Constructing the public's right not as a right of reply but rather as a content-neutral right of access, makes it possible to overcome *Tornillo*'s concern that the government must not intrude into the discretion of the editorial boardroom. The government is not forcing the print publication to

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186. *Id.* at 400 (recognizing the advantages of viewer loyalty and network affiliation as the "fruit of a preferred position conferred [to the broadcasters] by the Government.").

187. FCC v. Nat'l Citizens Comm. for Brdcst., 436 U.S. 773, 801–02 (1978).

188. *Id.* at 779, 783–84.

189. *See id*.

190. *See generally* Offer and Acceptance in Formation of Contract, U.C.C. § 2-206 (2003).

print anything. The corporate ownership, choosing to avail itself of a government incentive, would be the one to make the business decision to provide an access corner or access page in the publication. Government censors or gatekeepers would not be asserting their editorial judgment in determining the content of the speech or who would get access. A governmental system can simply be designed to permit structural access based on the type of content—local and diverse—just as a majority of the Supreme Court did in *Turner II* when it determined that the 1992 Cable Act's "must-carry" rules were not a content regulation, even though they promoted diverse and local programming over other types of programming.[191]

By making the access decisions nondiscretionary for editors, the quid pro quo system would be the type of non editorial structural access that the Supreme Court upheld as constitutional in *Pittsburgh Press v. Pittsburgh Commission on Human Relations*.[192] In *Pittsburgh Press*, the Court held that a government regulation requiring gender equal access to classified job listings did not infringe upon the First Amendment rights of newspapers.[193] In that case, the Court reasoned that the compelled access did not infringe on speech rights because it lay outside the editorial sphere.[194] Critical to the Court's finding was that advertising staff were charged with making the access decisions for classified listings, not editors. Decisions on how to apportion access to public speech zones would be even further outside the editorial sphere, as they would be business decisions made in the board room of the publication's corporate parent, and not by the staff of the newspaper. All the staff of the newspaper would need to do would be to implement a corporate policy that would provide access to local and diverse sources without regard to specific content.[195] Making access a

191. *Turner II*, 520 U.S. 180 (1997).

192. 413 U.S. 376 (1973).

193. *Id*.

194. *Id*. at 386 ("Under some circumstances, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of the advertisement and, in those cases, the scope of the newspaper's First Amendment protection may be affected by the content of the advertisement."). *See also id*. at 391:

> we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press.

195. *Id.* at 386:

> The Commission made a finding of fact that Pittsburgh Press defers in every case to the advertiser's wishes regarding the column in which a want ad should be placed. It is nonetheless true, however, that the newspaper does make a judgment whether or not to allow the advertiser to select the column. We must therefore consider whether this degree of judgmental discretion by the newspaper with

business decision implemented by noneditorial staff also addresses the *Tornillo* Court's concern that permitting government to mandate access would have a chilling effect on journalists, since they would avoid controversial topics or criticism.[196] This fear of a chilling effect is also a principal objection lodged against the Fairness Doctrine, and, to some extent, was borne out during the twenty-five years that the doctrine was enforced by the FCC.[197] The beauty of a structural access zone approach is that it has virtually no editorial impact on journalists. To the extent, for example, that a corporate parent decides that it will trade market power for space or time, such a decision is essentially no different from the Tribune Company determining how many pages of a publication would be devoted to advertising in the *Los Angeles Times* or General Electric deciding how many commercials it will sell during prime time on its NBC television network. In each case, these decisions are made by business executives who are removed from the creative or journalistic decisionmaking. Unlike the Florida reply statute found unconstitutional in *Tornillo*, and unlike the no longer enforced Fairness Doctrine, access is not triggered by specific content or lack of it.[198] Access is merely granted in proportion to the

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> respect to a purely commercial advertisement is distinguishable, for the purposes of First Amendment analysis, from the content of the advertisement itself.

196. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy.").

197. Inquiry into Section 73.1910 of the Comm'n's Rules and Regs. Concerning the General Fairness Doctrine Obligations, 102 F.C.C.2d 142 (1986) [hereinafter Fairness Doctrine Obligations]:

> On basis of a comprehensive record, Commission determined the fairness doctrine in operation thwarts [the] laudatory purpose it is designed to promote. Instead of furthering discussion of public issues, Commission found the doctrine inhibits [broadcasters] from airing controversial issue programming. In addition, Commission expressed concern that administration of fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.

198. *Id.* at para. 3, stating:

> The fairness doctrine, as developed by the Commission, imposes upon broadcasters a two-pronged obligation. Broadcast licensees are required to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.

(citations omitted); *Tornillo*, 418 U.S. at 258

> (The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed).

market power granted by government.

Finally, it is important to emphasize that companies owning broadcast licenses with little market power would not be covered by the proposed zone access system. Independent, "mom and pop" operations would have no reason to enter into the quid pro quo bargained-for exchange, unless, of course, they were interested in strengthening their market power through horizontal acquisitions in broadcast television and radio. The same is true for independent newspapers and magazines. Without concentrated broadcast ownership, the government benefit essential to a quid pro quo analysis is absent. In such a case, print publications, even ones owned by powerful corporations, would not be subject to any type of government-sponsored public access system, in accordance with the holding in *Tornillo*.

VI. CONCLUSION

If Congress, the FCC, and the courts accept the idea that broadcasters can be required to give up some of their speech rights in return for market power based on a government grant of access, the contentious discussions about the nexus of ownership and programming content, market-based content preferences, and multiplicity of sources become moot.[199] Debates over compulsory speech and chilling effect would no longer exist, as timed access would not be tied to any particular speech content and would not require broadcasters to air particular viewpoints. If content regulation under *Red Lion* and ownership caps no longer prove viable, this proposal allows Congress and the courts to promote diversity and localism as structural broadcast regulation, with obligations predicated on the public interest mandate of the Communications Act and consistent with the reasoning of the Supreme Court in *Turner II*.

Moreover, even if such an access system were ultimately determined to be a content regulation, Congress and the FCC may nonetheless be able to avoid constitutional challenges by extending to broadcasting the same quid pro quo theory used by courts in cable access cases. It may also be worth considering whether the government has the right to condition its access to frequencies on broadcasters' agreement to waive certain rights contractually—including speech rights—as a quid pro quo for receipt of a government benefit, such as a broadcast license and relaxed ownership caps—to which they otherwise would have no right.[200] Such an approach

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199. *See* Chicago Cable Comm. v. Chicago Cable Comm'n, 879 F.2d 1540, 1550 (1989) (holding that the city's ordinance requiring time for local programming was valid because of the "virtual monopoly" over television media); *Turner II*, 520 U.S. 180, 215–16 (1997) (holding that the "must-carry" provisions were valid because the burden imposed was proportionate to the benefit afforded).

200. *See* Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1097 (3d Cir. 1998)

would not only provide constitutional justification for intrusive content regulations, but may also provide a constitutional means for extending access rights to print properties owned by media conglomerates, notwithstanding *Tornillo*.

In the end, media ownership is not a right; it is a government—i.e., public benefit. Thus, media companies can be induced to give up rights or accept burdens in order to access this benefit. And while it may place some burden on speech, the burden would be insignificantly low because media abundance means that licensees have more non broadcast speech alternatives. Such a plan meets the FCC's public interest mandate by providing a benefit both to society and to the broadcasters[201] while fulfilling a common goal: increasing localism and diversity. Increasing access to the public is a small price for media conglomerates to pay in exchange for increased power in the market. Indeed, whether the scaled quid pro quo metric is justified as a contractual waiver of rights or as content-neutral structural regulation, it is a system that offers something for everybody.

Media conglomerates will be able to increase their broadcast holdings above the present 39 percent cap. Those without the means to afford an auctioned or transferred license, and those who have no interest in assuming responsibility for owning or managing a licensee would then have the opportunity to access stations without regard to content. Licensees and broadcast news staffs would not suffer the chilling effect of an ambiguously drafted content regulation such as the Fairness Doctrine, since access would not be discretionary to the licensee. And because of increased access, programming would truly be more diverse, just as blogging has transformed the Internet into a more diverse source of information and creativity. As with the Internet, market forces may still be in play with respect to who tunes in, but, at a minimum, the system would also remedy the problem of corporate gate keeping and homogeneity. Finally, the system would properly address the issue of localism, a programming concept that has proven elusive to Congress and the FCC. Local activists, artists, schools, and community groups can use these set-aside programming streams to air locally produced or appreciated content in a manner that seems to be with what Congress originally had in mind when it passed the Communications Act.

(holding the cable company's waiver of its free speech rights was valid because the party was advised by counsel and the parent cable company had engaged in numerous other transactions).

201. *See* FCC, Localism Task Force Mission Statement, http://www.fcc.gov/localism/ (last visited on Nov. 13, 2006).