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I start with six propositions.

First, we have the best system of broadcasting in the world because of—not in spite of—Federal Communications Commission (FCC) rules that have limited the size and reach of broadcasting and cable companies.

Second, as Justice Brandeis taught us, free speech is not just an end unto itself, or simply a freedom from Government meddling; it is also a necessary means of democratic self-governance.[1] In crafting the First Amendment, James Madison sought to ensure political equality, especially in the face of economic inequalities. In the twentieth century, Congress and the FCC have preserved Madison's vision by ensuring that broadcasting helps promote free and open political deliberation.

Third, broadcasters are, quite literally, an integral component of the electoral process. We trust them to decide how to provide equal time at

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1. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) ("[T]he greatest menace to freedom is an inert people; . . . public discussion is a political duty; and . . . should be a fundamental principle of the American government.").

equal rates to all political candidates.[2] We count on them to share their monopoly access to publicly owned spectrum with federal candidates, but we permit them to refuse unreasonable requests.[3]

Fourth, over-the-air broadcasting is and will remain for many years to come the single most important influence on how we vote, especially at the local level. For the time being, the Internet is not a substitute for local newspapers and local broadcast news. For example, the Internet does not help the large number of citizens decide for whom to vote in a city council election.

Fifth, broadcasting, especially television, teaches us about each other. Those of us fortunate enough to ride taxicabs and dine in fine restaurants know much less about the people who drive those cabs and bus the tables than vice versa. "We" need TV to show us about all segments of American society more than "they" do.

Sixth, we're needlessly endangering this wonderful but deceptively fragile system.

The policy problem is generic. It really is not about CBS and Viacom. They are businesses playing the angles. The issues posed by a Viacom-CBS merger could have been raised by an NBC-USA Networks merger. In fact, Viacom has in the past worked closely with my organization to promote diversity and open entry in programming markets and to keep huge telephone companies, or at least one huge telephone company, from taking over a huge cable company precisely because it threatened to squelch program diversity and competition.[4] We have supported Mr. Karmazin's vigorous defense of his right to make money by distributing material that is offensive to some but constitutionally protected for all.[5]

But the fact remains that Congress and the FCC have permitted a massive expansion of broadcasters' national and local audience reach first in radio and now in TV. CBS and Viacom have moved to the front of the line, and their merger, if approved, legitimates all the smaller ones already announced or that will soon follow. FCC approval for the mergers of SBC and Pacific Television was employed as precedent for subsequent mergers of Bell Atlantic and NYNEX, then SBC and Ameritech and then GTE and Bell Atlantic. Similarly, the TCI-AT&T merger has been used to justify

2. *See* 47 U.S.C. § 315(a)-(d) (1994).

3. *See* 47 U.S.C. § 312(a)(7) (Supp. III 1997).

4. *See Examining the Effects of Megamergers in the Telecommunications Industry: Hearings Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 103d Cong. (1995).

5. *See, e.g.*, Action for Childrens Television v. FCC, 827 F. Supp. 4 (D.D.C. 1993), *aff'd*, 59 F.3d 1249 (1995), *cert. denied*, 516 U.S. 1072 (1996).

proposals to merge AT&T and MediaOne and America Online (AOL) and Time Warner.

The size and complexity of these transactions is overwhelming. I cannot deal with every First Amendment and diversity problem they present in the space available. Thus, I will address one seemingly small aspect of the CBS business—local radio news.

Nationally, in addition to distributing CBS radio and TV news, CBS has made multimillion dollar trade-out deals to bludgeon its way toward becoming a leading news supplier for high end Internet sites.[6] CBS's Country Music Television and The Nashville Network provide some national news as well. Although Viacom's TV stations have disgraced themselves by having little or no locally originated programming, the company provides news on MTV and some syndicated TV shows.

CBS has maintained a large national market share by distributing high quality product. CBS can and will use its national footprint to cross-promote and cross-sell against local competitors lacking national distribution.

But there is much more. The combined Viacom-CBS operation will control as many as eight radio stations and two TV stations in many markets. To simplify things, I will overlook subsidiaries and affiliations and lump together various related companies that have, among other things, one attribute in common: CBS's President Mel Karmazin now controls or manages them.[7]

Public radio aside, CBS was, for at least six decades, the undisputed leader in quality and depth of its radio news. Westinghouse, generally regarded as second in quality, merged with CBS a few years ago. When Mr. Karmazin's Infinity and Westwood One operations were placed under common control, he brought along the old Mutual News and the name, if nothing else, of NBC Radio news.

Here's the part that is less well understood: Westwood One owned what used to be called Shadow Traffic but had been renamed Shadow Broadcasting Services. In 1998, Westwood One acquired a company formerly named Metro Traffic but now called Metro Networks.

We all know about the broadcast traffic services, which intelligently and efficiently permit radio and TV stations to share resources in reporting on rush-hour traffic. But these two companies changed their names because

6. The relentless cross-promotion of CBS Internet sports and financial news during NFL telecasts is just part of that effort.

7. *See generally* TV AND CABLE FACTBOOK (1999).

they have branched out into what appears to be a much more expansive business—radio and, more recently, television newscasts.

These services do a lot more than feed a few taped "actualities" for clients to mix into their own newscasts. In most cases, Metro provides a complete turnkey newscast operation. The entire newscast is prepared by Metro or Shadow personnel in their studios. All client stations in the market use the same reports, even if delivered by different announcers, many of whom appear on several stations using different names to match the format of the station of the moment.

Metro has lately gone even further, by using an "outsourcing" model. That "morning zoo" co-host you listen to is now in many cases an employee of Metro—that is, Mr. Karmazin—and not the broadcaster who purportedly operates the station and supposedly provides source diversity to the marketplace of ideas.

I cannot give you accurate figures in any particular market because Mr. Karmazin's companies do not disclose them.

But here's what I can tell you. Metro Networks alone is—by far—the largest producer of radio news in the country.[8] Although its name is never mentioned on the air, Metro provides newscasts to some one hundred fifty-five TV stations and seventeen hundred radio stations. Its *average* market penetration is twenty-three affiliates per market. Metro says that it provides news services in sixty-seven of the top seventy-five markets, and that its newscasts are heard by one hundred million people every day. It brags to advertisers that it offers them "the opportunity to reach a broad-based local, regional[,] or national audience, through a single purchase of commercial airtime inventory" by Metro.[9]

In a large market like Baltimore, which has about forty radio stations and twelve TV stations, I believe Metro provides all or most of the news to about twenty-five radio stations—well over half—and two TV stations.

So much for diversity. There is now, at most, one reporter covering City Hall for all those stations. There is no one to bring a different perspective, to provide the safety valve for a lazy, or even corrupt reporter willing to overlook a story for the wrong reason.

I'm not describing a trend. I'm describing the market as it exists today. Democracy and the First Amendment deserve better, but it is only going to get worse.

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8. *See* Metro Network, Inc., SEC filing 10-K, Mar. 31, 1999, *available at* (visited Mar. 24, 2000) <http://www.sec.gov/Archives/edgar/data/1016718/0000950129-99-001302.txt>.

9. *Id.*

The CBS-Viacom combination is also profoundly anticompetitive. Small entrepreneurs are particularly threatened by the way in which broadcasters have restructured advertising markets by cross-selling, "format squeezes," tie-ins, and similar arrangements. As Mr. Karmazin told Barron's Magazine:

> It used to be that [stations] competed, that media buyers would play [them] off against each other. Now we have the [CBS stations'] ad sales managers talk to each other every morning. That adds up to higher prices and better margins.[10]

Even substantial TV groups can now be targeted and squeezed, as NBC did in San Francisco.[11] These stations, which traditionally put more resources into locally originated news and public-affairs programming, will have to cut back to survive.

The impact is no less dangerous in national program markets. About six years ago, over the opposition of Viacom and Paramount, as well as public interest groups, the FCC permitted TV networks to produce their own prime-time programming.[12] Over the last several years, a trend has become a pattern: networks are showing creatively inferior self-produced programming reflecting mainstream, rather than more diverse casts.[13]

I do not exaggerate when I say that these changes also threaten the very structure of self-governance. Because we depend on broadcasting as the most important source of voter information, the sacrifice of program budgets and editorial independence ought to trouble us all. The networks are now managed by owners who often view serious journalism (as opposed to large blocks of soft self-promotion and celebrity gossip passed off as news) as a burden.

Examples abound. Recently, the *New York Times* reported that the Chair of the Consumer Product Safety Commission lost her status as a

10. DEAN ALGER, MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY (1998); *CBS Eye Looms Larger with ARS Deal*, MEDIA WEEK, Oct. 6, 1997, at 20.

11. *See* Steve McClellan & John M. Higgins, *Battle by the Bay*, BRDCST. & CABLE, Oct. 18, 1999, at 6. "NBC President Bob Wright sent a letter . . . executives describe as a thinly veiled threat that any buyer other than NBC will face significant changes in KRON-TV's affiliation with NBC—possibly even termination. . . . [T]he executive said, 'they're going to lower the value of the television station to a point which they're willing to pay for it.'" *Id.*

12. *See* Evaluation of the Syndication & Financial Interest Rules, 8 F.C.C.R. 3282, 72 Rad. Reg.2d (P & F) 1044 (1993), *aff'd sub. nom.* Capital Cities/ABC v. FCC, 29 F.3d 309, 75 Rad. Reg.2d (P & F) 985 (7th Cir. 1996).

13. The latest example of this phenomenon was the confrontation between *NYPD Blue* producer Steven Bochco and ABC over its desire to keep a struggling ABC-produced program in *NYPD's* coveted Tuesday night time slot. *See* Bernard Weinraub, *The Media Business: Co-Creditor of 'NYPD Blue' Says ABC Time Slot to Change*, N.Y. TIMES, Oct. 14, 1999, at C1.

Today Show regular guest and was relegated to ABC's *Good Morning America* when she wished to announce a recall of GE-manufactured dishwashers.[14]

I am not saying that we should return to the days when William Paley said "You guys cover the news; I've got Jack Benny to make money for me." But I am saying that broadcast consolidation presses even the best broadcasters to cut costs and reduce standards. When informing the public becomes a nuisance, not a duty, we are all the worse for it.

14. *See Morning Programs Bare Teeth in Maneuvering to Schedule Guests*, N.Y. TIMES, Oct. 25, 1999, at D1.