

RATIONING THE INFINITE

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MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS. By C. Edwin Baker. New York: Cambridge University Press. 2007. Pp. xiii, 256. Cloth, \$68; paper, \$23.99.

INTRODUCTION

While in the course of reading the book reviewed here, I wandered into a local coffee shop to supplement my morning dose of caffeine. I put the book down so I could fish some money from my pocket. The young man behind the counter tapped the cover with his finger and said, “Hey, great book.” This sort of remark captures a reviewer’s attention, and so I asked, “Why do you think so?” His initial deer-in-the-headlights expression gradually gave way to something like self-confidence; he furrowed his brow and tightened his lips and then responded, “The guy has lots of ideas.”

And so he does. Over the past two decades, C. Edwin Baker¹ has closely considered the various forces that threaten the independence of the press and its unique contribution to a free and democratic society. In *Human Liberty and Freedom of Speech*,² he discussed how abuses and excesses of governmental power threaten freedom of expression and of the press. In *Advertising and a Democratic Press*,³ he explored how the press’s dependence on advertising weakens the performance of the institution and distorts the content of its publications. In *Media, Markets, and Democracy*,⁴ he investigated the relationship between media economics and democratic theory. Now, in his most recent book, *Media Concentration and Democracy: Why Ownership Matters*, Baker considers how media ownership—particularly the concentration of ownership—affects the ability of the press to fulfill its charge under the First Amendment.

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2. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).
3. C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994).
4. C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002).

Media Concentration and Democracy is divided into five chapters. In the first chapter, Baker sets forth three arguments for the proposition that the increasing concentration of media ownership compromises the role of a free press within a democratic society and, therefore, requires a regulatory response. Part I of this Review describes those three arguments and contends that, although they offer some inventive reconceptualizations of the relationship between media and democracy, they ultimately lack the theoretical rigor and empirical substantiation necessary to justify significant changes in media-ownership policy. In short, Part I maintains that Baker bears a burden of proof and does not carry it.

In the next three chapters, Baker considers objections that might be raised to his arguments. Part II of this Review questions whether Baker fairly frames those rebuttal arguments and whether he offers sufficient support for his rejection of them. In particular, Part II challenges Baker's fairly dismissive view of the impact that new media, especially as conveyed through the internet, may have on the very issue his book seeks to address.

In his final chapter, Baker proposes possible policy responses to the problems created by media concentration. Part III of this Review explores the various shortcomings of these proposals. Part III focuses on some apparent inconsistencies within Baker's arguments and highlights the absence of the practical details needed to effect—or even evaluate—the changes he proposes.

As this summary suggests, this Review raises a number of objections to Baker's arguments and proposals. Furthermore, this Review raises the fundamental question of whether Baker's central operating assumption—that media is a scarce resource that should be fairly distributed—remains timely in light of the far-reaching and fast-paced changes wrought by the internet. Nevertheless, this Review also recognizes that, as with Baker's prior works, *Media Concentration and Democracy* makes a serious contribution to the discussion of the political, social, and economic dynamics that challenge the existence of a strong and independent media. *Media Concentration and Democracy* does a better job of raising questions than of answering them, but this does not prevent it from adding meaningfully to the debate surrounding these issues.

I. BAKER'S THREE REASONS FOR OPPOSING MEDIA OWNERSHIP CONCENTRATION: ARGUING FROM POWER, PROCESS, AND PREDICTION

In Chapter One, Baker describes what he sees as “the three main reasons for opposing ownership concentration.”⁵ His first reason rests on a “normative conception of democracy” in which political power is equally distributed (p. 6). Baker invokes the “one-person/one-vote institutional

5. P. 6. Baker identifies a number of other reasons as well. For example, he argues that conglomerates are particularly vulnerable to outside pressures and internal conflicts of interest. Pp. 37–41. This Review focuses on the three arguments Baker identifies as central to his claims about ownership concentration.

principle” as a familiar expression of this concept, and suggests that communicative power should be distributed in a similarly egalitarian manner.⁶ His second argument contends that media dispersal is necessary to check governmental authority and protect society from its abuse (pp. 16–19). His third reason is that evenly dispersed media ownership produces higher quality journalism (pp. 28–37). Although Baker’s rationales merit consideration, I believe he does an inadequate job of defending them, both theoretically and empirically.

A. Baker’s Three Reasons

Baker’s first argument for promoting media distribution is based in a concept of normative democracy and what Baker calls “communicative power;” by which he means the power to convey preferences, views, and visions and thereby shape public opinion (p. 7). Baker argues that, “[a]s applied to media ownership, this [democratic distribution principle for communicative power] can be plausibly interpreted structurally as requiring . . . a maximum dispersal of media ownership” (p. 7). Baker concedes that this argument finds its support not in empirical evidence but in normative appeal (p. 8). But this does not trouble him because he believes that the normative force of this principle makes it a free-standing basis to oppose ownership concentration: “the democratic distribution principle is always a proper, whether or not a conclusive, reason to oppose concentration and favor media ownership dispersal” (p. 10).

Baker alternatively frames the “democratic distribution principle” as an “inclusionary goal” (p. 11). He contends that “[o]wnership should be distributed in a manner that results in no one feeling that discourses of groups with which she identifies are neglected or subordinated” (p. 11). He maintains that “all groups should have a real share and no one group or individual should have too inordinate a share of media power” (p. 11). And he posits that “[t]his goal is typically furthered by maximum dispersal of ownership” (p. 11).

Baker’s second argument is that dispersal of media ownership prevents the exercise of “enormous, unequal and hence undemocratic, largely unchecked, potentially irresponsible power” (p. 16). He notes that our constitutional structure establishes a separation of powers to reduce the risk of abuses by the government (p. 16). He argues the same considerations apply with respect to the structure of the fourth estate: “[t]he widest possible dispersal of media power reduces the risk of the abuse of communicative power in choosing or controlling the government.”⁷ As with his egalitarian distribution argument, he describes the significance of this

6. P. 6. Baker acknowledges that conception and reality differ, and that many factors result in the unequal distribution of political power. P. 6.

7. P. 16. Baker compares this normative impulse supporting media dispersal with that supporting campaign finance reform, arguing that in both cases the goal is “to prevent one person or a small group from being able to use the power of wealth to dominate the (electoral) public sphere.” P. 17.

approach by reference to process, “independent of any commodity that the media produces and distributes on a day-to-day basis” (p. 16). And, as with his egalitarian distribution argument, he does not rely upon empirical evidence but rather declares that the danger he describes “is a simple matter of logic.”⁸

Baker’s third argument is that large media conglomerates, particularly publicly traded ones, are inclined both to focus on profit making, and to do so at the expense of investment in “news and other cultural media content that people want and citizens need” (p. 29). In other words, he claims that ownership concentration results in a decline in content quality. Baker bases this claim on what he calls “sociologically and structurally based predictions” (p. 29).

One such prediction is that executives at large media companies will seek to maximize profits because that is the primary basis on which they are rewarded (p. 33). Baker argues this is particularly true when those running media corporations are not themselves journalists (p. 33). Baker contrasts these executives with the heads or owners of smaller entities, who he says are “likely to identify more often with the quality of their firm’s journalistic efforts and the paper or station’s service to their communities” (p. 34).

Another prediction is that corporations that acquire other businesses will seek to maximize profits in order to cover the debt created by the purchase and to make the merger decision appear wise (p. 35). Baker believes some empirical evidence supports these predictions, though he candidly describes it as “limited and messy” (p. 35). “Still,” he maintains, “the most obvious plot line is: publicly traded companies fire journalists, degrade quality, and increase profits” (p. 36).

Baker’s reasons for opposing media ownership thus share two related characteristics: they rest on arguments from theory and logic, and they discount the significance of empirical data. This approach causes problems for Baker. Readers may not share his dismissive view of the relevancy of empirical evidence to the questions at hand. And, perhaps more importantly, Baker’s approach shifts the burden of his argument to his theoretical constructs, which do not hold up particularly well under close scrutiny.

B. *A Critique of Pure Reasons: Failings of Theory and Evidence*

Baker’s first argument, regarding normative democratic values, has some appeal, but it is not adequately developed or defended. Surely most people would agree that inclusion represents a democratic value. But, as Baker notes, so does the familiar principle that our democracy should foster free competition within the marketplace of ideas.⁹ Baker aptly

8. P. 19. Although Baker does not base his argument on empirical data, he does cite instances in German and Italian history where the conglomeration of media power significantly aided the ascendancy of a favored political figure. P. 18.

9. The model of the marketplace of ideas, in which truth and falsity are allowed to compete with the expectation that the former will ordinarily prevail, has a distinguished intellectual history. The theme is reflected in JOHN MILTON, *AREOPAGITICA* (London, 1644), JOHN LOCKE, *A LETTER*

describes the driving rationale (or, as he labels it, the “epistemological hope”) behind the marketplace of ideas model: “those speakers with better arguments will prevail over those without,” a notion that “presumably requires that these better arguments ultimately gather larger audiences” (p. 11). Of course, this value of free competition within the marketplace conflicts with the value of inclusion—at least insofar as the former will result in the marginalization, if not the elimination, of some views and opinions. If, as Baker seems to believe, the value of inclusion trumps the value of a free-wheeling and largely unregulated market, then he needs to adequately explain why and to what extent this is so.

Baker makes an effort to offer such an explanation in his second chapter. His argument rests largely on the rejection of the marketplace of ideas model as naïve and misguided. He contends that “[t]he view that the unregulated marketplace of ideas can be expected to arrive at anything reasonably treated as ‘truth’ is simply implausible unless the result, whatever it is, is simply defined as ‘truth’ by fiat—that is, because it resulted from this process” (pp. 84–85). He argues that “[o]nly misguided premises concerning the objectivity of truth, combined with extreme assumptions about the extent of human rationality, would justify a belief in the routine superiority of an unregulated marketplace of ideas for the purposes of reaching truth” (p. 85).

I share some of Baker’s skepticism about the marketplace of ideas model. Still, this part of Baker’s argument seems to build up a straw man just to knock it down. Certainly, the marketplace of ideas model depends upon a broadly descriptive and necessarily imprecise metaphor. And, certainly, it is easy to think of instances where the marketplace has failed us and bad ideas have prevailed over better ones. But these shortcomings pale in comparison to the mischief wrought by conceptual models that have allowed for governmental regulation of ideas and their expression. The question, therefore, is not whether the marketplace of ideas model is perfect and consistently right; rather, the question is whether that model is less imperfect than models that allow for greater governmental power over the media. Baker does not frame the question correctly, and his answer suffers accordingly.

Furthermore, Baker’s opposition to the marketplace of ideas model depends upon a shift in orientation that is easy to miss but deeply problematic. In rejecting the marketplace of ideas, Baker uses language with a heavily egalitarian sensibility, which naturally evokes sympathy. He repeatedly alludes to the interest in having “all people,” “all groups,” and “any part of society” heard (p. 11). He notes that “[u]seful challenges” to the accepted wisdom “usually come from the margins” (p. 11). But his argument evokes less sympathy, indeed seems patently flawed, if we turn the focus away from

CONCERNING TOLERATION (London, Awnsham Churchill 1689), and JOHN STUART MILL, ON LIBERTY (London, J.W. Parker & Son 1859). Its most famous expression in American law comes in Justice Holmes’s dissent in *Abrams v. United States*, where he declared that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a general history of the model, see T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA* 38–43 (10th ed. 2008). For a close and critical analysis of the shortcomings of the model, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 19–30 (1982).

people and back to *ideas*. Some ideas—such as Holocaust denial, slavery, the inherent weakness of women, and the inferiority of racial minorities—have been pushed to the margins by informed public discourse, and we do not mourn this development as a form of disenfranchisement. A marketplace of ideas that embraces everything and results in the marginalization of nothing offers little promise of progress.

But, even if we accept Baker's focus on people rather than ideas, his argument comes up wanting because he does not explain how his conclusion follows from his premise. Media-ownership dispersal may result in the inclusion of voices that would otherwise be excluded; or it may not. Ownership dispersal and the inclusion of diverse voices are in fact logically distinct, and while numerically increased distribution and inclusion are not unrelated, the latter certainly does not necessarily follow from the former.¹⁰

Whether ownership dispersal creates inclusion depends on an array of factual considerations with which Baker declines to engage in any depth. For example, economic and other barriers to entry may prevent certain groups from participating in ownership even if ownership is dispersed. Baker appears to admit as much when he acknowledges that dispersal does not "guarantee" the "experience of inclusion" (p. 12). Still, Baker thinks it sufficient that dispersal will "more likely" have this result than concentration; the policy, he observes, thus stands on an "expectation" (p. 12). It seems far from obvious, however, that dispersal justifies even something as limited as an expectation. After all, if barriers to entry prohibit or limit the participation of certain groups in ownership—and there are good reasons to believe this is the case—then dispersal will in and of itself do nothing to remove those barriers. A group excluded by economic barriers will find little solace in the availability of *more* media outlets they cannot afford to purchase.¹¹

Furthermore, even if we accept Baker's conclusion—that dispersal of ownership will make a "probable contribution . . . to inclusion" (p. 12)—this leaves open the question of whether that salutary effect justifies the price exacted. This seems unanswerable in the abstract, which is where Baker wishes to address the issue. Granted, a "probable contribution" may suffice to tip the scales if one subscribes to the principle that in all (or most) cases a prohibition of media-ownership concentration will impose little or no burden on democratic values. But reasonable people can reject such a principle or, at least, demand empirical data to substantiate it. For example, a reasonable person might believe that a given concentration of media ownership

10. An analogy helps make this clear. Assume, for example, that a highly competitive university graduate program receives 10,000 applications for one hundred spots. Even if the university were to increase the number of available spots by several hundred percent, doing so would not necessarily assure the inclusion of all the various groups the university would like to see represented in its class. Certainly, an increase in the number of spots will result in a larger class; but, as a result of significant differences in the pool sizes of various applicant groups, it may also result in a collection of students that looks virtually identical to the smaller class.

11. Whether this holds true depends, of course, on the groups at issue and the factors that allow them to participate or preclude them from participating in ownership. Curiously, however, Baker maintains that his argument allows him to sidestep this complex collection of questions. P. 12.

would preserve or promote foreign bureaus, investigative-reporting teams, and other resource-intensive activities.¹²

Baker acknowledges that ownership dispersal may not lead to a diversity of content and viewpoint (p. 15). But he dismisses this concern as reflecting a “commodity-oriented perspective” that “miss[es] the point about why democracy requires diversity” (p. 15). Democracy, he argues, is invested in a notion of process that allows for egalitarian participation; “[it] does not, however, require that speakers provide or listeners choose a maximum (or any particular, high level of) diversity in commodity content” (p. 16).

At this point, however, Baker’s argument for wider ownership distribution *for the sake of wider ownership distribution* seems to take on more weight than it can possibly bear. As noted above, wider ownership distribution—and the corresponding possibility of more diverse participation—may be worth something. But if we do not believe that such distribution will actually result in the participation of marginalized groups, or in the expression of diverse perspectives, then its value seems extraordinarily limited. Indeed, a critic could accuse such a celebration of wider ownership distribution as the worst kind of capitalist hypocrisy, on one hand exclaiming the virtues of inclusion and on the other hand disclaiming any likelihood of achieving the kinds of inclusion that matter.

Baker’s argument might survive these criticisms if he described the goal of inclusion as a salient consideration and made limited claims for it. Instead, he identifies this as “possibly the single most important[] reason to favor [ownership] dispersal” (p. 12). And he argues that “this democratic distributive value, without any need for complicated empirical investigations or controversial economic analyses, provides an entirely proper reason to oppose *any* particular media merger or to favor *any* policy designed to increase the number or diversity of separate owners of media entities” (p. 13). This is an ambitious claim indeed for a value that conflicts with other recognized democratic values (such as liberty and selection within the marketplace of ideas) and that, as a factual matter, may or may not be served by an antagonism toward media-ownership concentration.¹³

Baker’s second argument, which contends that media dispersal helps guard democracy and prevent the abuse of governmental power (p. 16), again requires us to think about this issue without engaging in any searches—or, as he sees it, “*misguided* search[es]”—“for empirical evidence” (p. 20; emphasis added). Baker grudgingly concedes that “sometimes” empirical information is relevant,¹⁴ but he argues for a very

12. Indeed, Baker himself seems to acknowledge such possibilities later in his book. See p. 179.

13. Oddly, Baker seems to retreat from this argument as soon as he makes it. He goes on to say, “The important caveat . . . is that countervailing considerations can contextually provide a basis to override this normative reason for dispersal.” P. 13. If that is so, however, then what does it mean to say that this normative principle provides a basis to oppose *all* concentrations and support *all* dispersals?

14. P. 20. Baker outlines “six cautions about the use of positivist social science research.” P. 20. These are essentially warnings about the ways in which efforts to determine empirically the

narrow understanding of the possible utility of such information with respect to this issue.

Baker contends that “some issues are centrally a matter of values” and that “[w]hen this is the case [then] the relevance of factual information is limited” (p. 20). Here, he returns to his comparison of the value of ownership dispersal with the value of one-person/one-vote, noting that the “the basic issues, the basic controversies” with respect to the latter, “were normative, not factual” (pp. 20–21). In my view, however, this simply demonstrates one of the principal problems with relying on this comparison. After all, we do not start from an assumption that elections are a free-wheeling marketplace in which some people will accumulate the power to cast more votes than other people. The principle of one-person/one-vote therefore does not exist in tension with a competing democratic value.

On the other hand, we do commonly start from an assumption that freedom of expression is a largely unregulated enterprise where some voices will accumulate more authority than others. Indeed, without such power and acceptance, good ideas could not prevail over bad ones, and speech could not check the power of the government. As noted above, limiting a speaker’s ability to accumulate power within the marketplace would be in serious tension with this value. Baker solves this difficulty by concluding that one value simply trumps the other. But another, and perhaps more coherent, way of solving it is to try to determine the respective costs and benefits and to make a judgment based on the weight of the evidence. The great weight of historical evidence militates against allowing governmental control over the media—this is, after all, the stuff of such constitutionally obnoxious practices as licensing of the press. A strong presumption therefore exists against efforts to impose such control, and those who advocate for such control bear the heavy burden of coming forward with persuasive empirical evidence to justify departing from the norm. Baker does not just fail to offer such evidence; he denies any need for it.

Baker’s last argument, that media dispersal enhances media quality (pp. 28–37), also suffers from several difficulties, one of which is perhaps most striking. Baker seems here to assume that the predicted compromise in quality clearly rises to a level that justifies the prevention of the activity that caused it.¹⁵ This may hold true, or it may not. A marginal sacrifice in quality that results in a robust enterprise able to weather economic downturns may not strike us as an undesirable tradeoff. So citing a degradation of quality—even if true—raises a question about the balance of interests but does not

effects of media concentration can go astray. Ultimately, however, Baker acknowledges that “[t]hese six cautions should not be read as a basis for rejecting the relevance of empirical evidence.” P. 26. Rather, these considerations simply “counsel caution” about the use of empirical evidence in this context. P. 26.

15. Pp. 36–37. At the risk of stating the obvious, this argument must focus on the question of quality. After all, profit maximization is not inherently undesirable—or, at least, Baker has not shown it to be so.

answer it.¹⁶ As discussed above, this conceptual mistake recurs throughout Baker's first chapter.

II. REBUTTING THE REBUTTAL: A CRITIQUE OF BAKER'S ANSWERS TO ANTICIPATED OBJECTIONS

Some have argued that concentration of media ownership offers important benefits, such as efficiencies that allow for cheaper prices or more consumer choice, higher capacity to remain independent and resist outside pressures, greater resources to finance expensive investigative reporting and litigation, and so on (pp. 49–53). Baker expresses doubt about these arguments but acknowledges that they ultimately turn on empirical determinations and so cannot be dismissed out of hand (pp. 52–53). Baker instead chooses to spend most of his energies on arguments holding that media concentration does not pose a threat requiring a solution.

Baker therefore engages with arguments that media concentration is overstated and largely ignores arguments that the benefits of such concentration outweigh the costs. This approach results in two serious problems for his thesis. First, Baker's failure to contend with the facially credible counterargument that significant benefits may flow from ownership concentration necessarily renders his own argument incomplete. Second, by focusing his energies in this way, he shifts the burden of his argument to his contention that concentration of media ownership is a serious problem demanding a serious remedy. Among other things, this means that Baker must offer a convincing explanation as to why the existence of new media does not fundamentally change the way we should think about communicative power and its concentration. In my view, he does not.

A. Negative Critique Without Positive Counterargument

The first argument Baker addresses holds that the media industry is highly competitive and not unduly concentrated, a position championed by economist Benjamin Compaine (p. 54). Baker makes some useful points about this argument, particularly regarding the importance of appropriately defining "the media" before attempting to evaluate its concentration. Still, Baker's critique ultimately seems ungrounded and academic.

Baker notes that the data supporting media concentration relate to "the *media as a whole*," improperly combining "content producers, content delivery companies, content packagers, and retailers" as one "market."¹⁷ In addition, he points out that this argument defines undue concentration by reference to Chicago School antitrust standards (p. 59). He contends that

16. As noted, this is only one issue that might be raised in response to Baker's argument. Others plainly exist, such as exploring the difficulties inherent in defining quality with respect to speech.

17. Pp. 58–59. As Baker observed, "[o]bviously, the broader the market, the less likely that objectionable concentration will be found." P. 59; *see also* pp. 60–64.

those standards, which focus on whether a merger results in an entity with the power to control price and whether a merger serves economic efficiency, do not suffice as a substitute for a rich and complex analysis of the political and social values at stake here.¹⁸ And he maintains that even a broader understanding of antitrust law and economics would still fail to capture the unique considerations at issue in the media context.¹⁹ With respect to the last two points, Baker returns to the theme that a commodity-oriented approach to the question of media concentration (such as an approach based on anti-trust economics) ignores the most salient considerations at issue—including the three non-commodity-oriented reasons for opposing such concentration that he champions earlier in his book (p. 75).

Baker makes his points forcefully, and I share his skepticism about economics as a proxy for normative policy making. Still, the impulse to evaluate the effects of media concentration by reference to settled and measurable standards—while acknowledging that they may fail to account for some softer values we would ideally incorporate into our analysis—has some allure. Indeed, Baker inadvertently makes just this point when he lists the types of questions he says antitrust analysis fails to address, such as “[i]s media’s communicative power distributed in ways that are democratically fair?” and “[i]s it distributed in ways likely to lead to better and safer political and social processes . . . ?” (p. 75). Readers may agree with Baker that the Chicago School approach seems unsatisfactorily crabbed and simplistic, but they may also conclude that his own approach seems hopelessly vague and abstract.

Furthermore, readers may believe that Baker has contented himself with doing the easy work of launching a negative critique without doing the hard work of offering positive proof. If Baker believes that significant and dangerous media concentration exists, then he must prove it. Of course, this would require him to engage in the preliminary project of appropriately defining the media, just as he requires of Compaine. Such an undertaking, however, would compel Baker to acknowledge the place of new media in the current distribution of communicative power. Rather than contending with this challenge, offering his own definition of media, and then marshaling data to show that media ownership concentration exists, Baker limits himself to an attack on Compaine’s model. This may strike readers as an evasion. And this is particularly true for readers who harbor the suspicion that the existence of new media undercuts Baker’s scarcity-based arguments in ways he either does not understand or prefers to avoid discussing. Regrettably, Baker’s next point reinforces this suspicion.

B. *Contending with New Media*

Baker next addresses the argument that media concentration does not, indeed cannot, result in disproportionate power because of the internet (p.

18. P. 59; *see also* pp. 65–72.

19. P. 59; *see also* pp. 72–76.

97). Some scholars have maintained that the internet has lowered or eliminated economic barriers to the expansive distribution of information and to competition in the media marketplace.²⁰ Baker acknowledges that “[t]he internet undoubtedly has transformative effects on the public sphere that potentially—or already—have great political and democratic significance” (p. 98). Still, he suggests that “these particular developments have no bearing on any debate about the dangers or objections to media ownership concentration” (p. 99), and he raises both empirical and theoretical arguments in support of his position.

Baker argues that the evidence does not support the conclusion that the internet has meaningfully increased competition within media. He maintains that “traditional news and cultural media continue to dominate . . . in performing (even if inadequately) their traditional roles” (p. 100). Further, he notes that “[m]ost of the most heavily used news sites turn out to be owned by offline brands and seldom add significant new journalistic resources” (p. 112). And he contends that high levels of audience concentration continue to occur—and continue to increase—within the universe of nontraditional internet content providers, such as blogs. In other words, despite the vast choices offered by the internet, most people gravitate toward a fairly limited number of sites (pp. 106–11).

The difficulty with Baker’s empirical analysis is one he acknowledges and for which he cannot be faulted: things change quickly in the online world. Thus, after reciting some data about blogging, Baker observes that his numbers will surely be out of date by time they are read (p. 106). And after explaining why the evidence suggests that the internet actually concentrates public attention on communications provided by a few owners, Baker concedes that, “[o]f course, all this could change” (p. 113). The fragility of the existing empirical data prompts Baker to put aside the question of whether the internet decreases or increases concentration and to ask instead whether it alleviates “the *reasons* to be concerned about concentration” (p. 113). Baker concludes it does not.

Baker ingeniously—some might maintain *too* ingeniously—argues that the success of online news providers may actually exacerbate the problems inherent in media concentration. Baker points out that if internet news sites generate less revenue than traditional media, then a consumer shift to online news would reduce the resources available to support “serious commercial journalism” (p. 116). Furthermore, Baker contends, “there is little reason to think that in the near term . . . the new noncommercial, volunteer-supported online news ventures will provide an adequate substitute for traditional professional journalism” (p. 119). Finally, Baker argues that “despite the changes wrought by the internet, a small handful of companies may continue to supply most of the financial resources for journalism (or cultural creation) and to control most of the audience attention” (p. 121). Baker thus finds that the existence of the internet does not eliminate the evils he sees in

20. See, e.g., BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY (3d ed. 2000).

media-ownership concentration—an undemocratic imbalance of expressive power and a decline in quality reporting—are not eliminated (or even meaningfully reduced). He therefore dismisses the “misguided invocation of the internet as a total solution to . . . the problem of concentration” as faddish and intellectually sloppy (p. 123).

At this point, however, a number of tensions seem to emerge within Baker’s text. The book begins by invoking the importance of the democratic distribution of communicative power, but Baker’s discussion of the most powerfully democratizing distribution system in the history of the planet has a decidedly, almost absurdly, dismissive quality. The book rejects antitrust analysis and all other brands of “commodity” thinking about speech, but Baker’s embrace of traditional journalistic quality may strike the reader as elitist and heavily commodity oriented. The book acknowledges the empirical uncertainty about the current effects and future impact of the internet, but Baker seems to express his conclusions in a much more strident and confident manner than such a context would suggest is appropriate. Baker also has a larger problem: most readers of this book will have some familiarity with the anguish newspaper publishers have expressed over their declining circulation numbers and loss of audience to the internet. It seems early in the day to predict what all this means, but it seems late in the day to maintain that nontraditional internet content does not pose a serious competitive challenge to traditional media.

It is at this point that I believe Baker’s book loses a great deal of its persuasive force and credibility. Baker’s entire argument necessarily rests on the proposition that a problem exists that is sufficiently definable, significant, and persistent to warrant a substantial change in policy. But the internet and the new modes of communication that flow through it put all of this into play. In the current situation, even the basic task of defining the media poses profound challenges. Assessing the existence and significance of concentration becomes a daunting, perhaps impossible, task. And attempting to formulate policy aimed at such a rapidly moving target seems quixotic and ill-advised. The reader may be left with the impression that Baker’s book either comes too late, because the scarcity-based media model he employs has become a quaint memory, or too early, because we do not yet understand the impact of the internet on the issue of media-ownership concentration. In either event, readers are likely to conclude that the time is out of joint for Baker’s thesis.

C. Regulation in the Interest of Freedom

In the fourth chapter of his book, Baker seeks to rebut claims that the regulation of media ownership conflicts with the constitutional protection afforded freedom of speech. He bases his rebuttal on two main points: (1) that the ultimate beneficiary of press freedom should be the general public, not media owners, and (2) that governmental restrictions on media owner-

ship facilitate, rather than undermine, the aims of the First Amendment.²¹ But Baker's arguments do not withstand analysis. Courts do not draw a clear dividing line between First Amendment protection for media owners and protection for others, nor should they. Furthermore, it seems odd to suggest that allowing the government a greater hand in restricting the media will somehow facilitate media freedom—particularly the freedom to criticize the government. In advancing his theory of the First Amendment, Baker asks the reader to join him in a collection of views and assumptions that seem debatable at best.

1. *Media Owners as Beneficiaries of First Amendment Protection*

Baker first argues that, while constitutional rights are commonly understood as existing to benefit the individual rights holder, the appeal of this approach breaks down in the case of media entities (pp. 130–31). He contends that “[i]t is a logical mistake . . . to treat [a] press entity—the overt rights holder—as [we would treat] an individual” because “[a]ttributing ultimate or inherent moral significance to legal structures—to institutions—is, at best, perverse” (p. 131). Baker maintains that it makes no sense to restrain ourselves from making policy choices that “further the collective welfare” in order to benefit “legally created institutions whose significance presumably lies in the service of society” (p. 131).

To support his argument, Baker distinguishes individual freedom from press freedom. In Baker's view, the former seeks to benefit the individual rights holder by providing her or him with a sphere of expressive liberty inviolate from governmental interference. This freedom is an end in itself (pp. 130, 133). The latter, in contrast, seek to preserve the media's instrumental and structural role as the fourth estate—the institution within our democracy that persuades, struggles against, and exposes the “other branches” (p. 132). This freedom is a means to other ends. As such, he argues, press freedom should be subject to regulation (such as ownership restrictions) that facilitates its functional role (pp. 131–38).

Baker's argument is interesting but unsatisfying for several reasons. First, the bright line Baker attempts to draw between individual and press freedom does not map to reality. Baker classifies individuals as those with moral significance and press entities as those without. But the speech of media entities, like the speech of individuals, reflects exercises of moral judgment.²²

Indeed, media entities commonly take positions regarding, and wield immense influence concerning, the critical moral issues of our day. Casting these voices as impersonal abstractions certainly makes regulation seem

21. Pp. 127–28. Baker further maintains that this second premise makes sense only in connection with a third, i.e., that judges should be active in reviewing and second guessing political judgments about the proper structure of the media industry.

22. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), can be read to support this proposition. Baker argues that the Court's decision in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), repudiates any such interpretation. Pp. 135–37.

more palatable—an instinct Baker feeds by alluding to telephone companies, cable systems, and expansive media entities like Time Warner, News Corporation, and Clear Channel (p. 130). But his approach seems less appealing if we think instead of the *New Yorker*, the *National Review*, *Commentary*, the *Christian Century*, the publications of the Sierra Club and the Audubon Society, or the editorial pages of the *New York Times* and the *Wall Street Journal*.

In this respect, Baker's approach may remind the reader of the stubborn but largely unworkable distinction between commercial and non-commercial speech. The Supreme Court's attempt to separate speech into these two categories, and to assign differing values to those categories, has resulted in a jurisprudence of conspicuous incoherence. Baker's effort to divide *speakers* into two categories, and to assign them distinctive roles and differing protections based on that categorization, appears no better able to accommodate the inconvenient messiness of how the world actually works.

Even if we accept the distinction, problems remain. After all, the press has the ability to check governmental power—that is, to serve its instrumental and structural role—primarily because of its independence and freedom. Yet Baker argues for greater governmental control over the media—indeed, over nothing less than the critical issue of ownership. And, perhaps even more curiously, Baker contends that the government would exercise this control by fostering policies that would better position the media to struggle against and expose the government's own failings. It seems at least as plausible that the goal of media independence from government would be best served by media independence from government.

2. *Government Regulation of Media Owners and the First Amendment*

Baker next turns to his argument that restricting media ownership does not undermine the aims of the First Amendment. Returning to his earlier themes, Baker again discounts what he describes as the commodity-oriented metaphor of the marketplace of ideas, where the aim of the First Amendment is to avoid laws that “reduce the quantity, quality, and diversity of speech” (p. 143). This metaphor, Baker reiterates, “simply does not engage the democratic values underlying press freedom” (p. 145).

This leads Baker into a consideration of various theories of democracy (pp. 146–47), each of which, he acknowledges, “has different implications for the democratic rationale for press freedom and for the constitutionality or desirability of restricting ownership concentration” (p. 147). Without much discussion, Baker embraces what he labels as a theory of “complex democracy,”²³ which he says cannot resolve “on principle” questions “about

23. Baker defines “complex democracy” to mean democracy that “involves a complex mixture of republican and liberal discourses.” P. 146. His concept of complex democracy also “emphasizes the importance of subgroups’ cultural, self-definitional discourses, as well as strategic discourses *internal* to subgroups.” P. 147.

the ideal amount and content of regulation”²⁴ of media concentration. He maintains that because these questions are heavily empirical, and thus “no clear abstract (constitutional) principle[.]” can determine which policies are best, courts should leave them to legislative judgments (p. 148). Baker thus seems to argue that the First Amendment has nothing to say about limitations on press ownership.

I respect the ambitious breadth of Baker’s vision, but I think he asks a great deal of the reader here. As I understand it, the analytic steps proceed as follows:

We must accept the proposition that the Constitution guarantees press freedom in order to achieve structural and instrumental aims—but is indifferent to the “quantity, quality, and diversity of speech” (p. 143). This poses two challenges. First, we must think it is necessary to choose between these two sets of values rather than embracing them both. Second, we must reject a marketplace of ideas model that has a long tradition, intuitive appeal, and at least some support in precedent.²⁵

Next, we must favor a model of complex democracy over all others—and we must do so on the strength of two pages of analysis of the competing visions. And then we must accept the proposition that, because the chosen democratic model does not yield a principle that dictates “the ideal amount and content of regulation” (p. 148), concentration of media ownership does not raise a question of constitutional significance and should be left to legislative judgments. The last step, which appears to imply that when the Constitution cannot speak precisely it does not speak at all, may strike the reader as particularly puzzling.

Baker’s book has considerable richness and density here. His argument is challenging, and I readily acknowledge I may have failed to follow it successfully. Still, it seems fair to observe that Baker demands more of his audience than his argument requires. It would appear that all Baker really needs to establish is that the sorts of ownership regulations he thinks advisable do not raise constitutional concerns. That, of course, requires him to offer a set of specific policy recommendations, which leads us to his final chapters.

24. P. 148. In Chapter Five of his book, Baker states that “[C]hapter 4 emphasizes a theory of complex democracy that had been only marginally discussed in [C]hapter 1.” P. 163. Baker’s designation of complex democracy as a linchpin of his argument seems peculiar in light of the fact that his discussion of it occupies only four paragraphs. Pp. 146–47. Readers might reasonably expect a deeper and more robust discussion of why this theory, which plays such a central role in the argument, deserves our allegiance.

25. This includes recent precedent. Consider, for example, the Court’s decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In that case, the Court endorsed the principle that a university has a compelling interest in admitting a diverse student body and can therefore consider the race of an applicant as one of many factors in making admissions decisions. Although the case arose in a Fourteenth Amendment context, the Court’s analysis of the compelling interest in question turns on the model of the First Amendment that Baker seems to reject—a model that aims to achieve a marketplace of ideas rich in quantity, quality, and diversity.

III. BAKER'S PROPOSED SOLUTIONS

In the final section of his book, Baker advances seven policy proposals, which vary in their breadth and novelty (p. 163). In my view, this is the least effective section of Baker's book, for two fundamental reasons. First, this section assumes that Baker has established the existence of a serious problem requiring serious solutions. For the reasons discussed above, however, I do not believe he has done so. Certainly, the book fails to make the case empirically. Likewise, his theoretical arguments suffer from too many faults. Second, if we assume that he has established the existence of such a problem, then it is reasonable for us to expect that he will propose solutions that will possess certain characteristics—for example, that they will be realistic, that they will be specific enough to understand and evaluate, and that they will be consistent with his diagnosis of the problem and with each other. Unfortunately, Baker's proposed solutions do not meet these standards.

Baker begins by proposing a “somewhat different and more muscular enforcement” of antitrust laws (p. 171). This seems an odd out-of-the-blocks suggestion. After all, earlier in his book Baker argues that antitrust law does not take account of the most significant issues raised by media-ownership concentration—including his three non-commodity-oriented reasons for opposing it. It is difficult to understand how the “more muscular” use of such an allegedly ill-fitting legislative scheme would do much good or make such sense. His joint call for a “somewhat different” approach to antitrust law might compensate for this if it offered more specifics, but his argument here amounts to a fairly vague urging of “media-specific regulation” (p. 172). Baker's candor in acknowledging that antitrust laws constitute an “insufficient response” (p. 173) makes the text somewhat more consistent, but it does little to mitigate the sense that this is a strange place for him to start.

Baker's second proposal seems just as peculiar. Baker suggests “[r]equiring pre-merger review, combined with media-specific conditions or presumptions against approval, possibly carried out by two different agencies using different criteria” (p. 174). He observes that in the United States the Hart-Scott-Rodino Act²⁶ already requires governmental pre-merger review of most large combinations (p. 173), and that some foreign countries “impose a special, stricter review process or . . . apply different analyses in the media context” (p. 174).

Still, Baker notes that these pre-merger laws have accomplished little—by which he means they have precluded very few ownership changes (p. 174). He suggests that the reason may be that these laws tend to leave considerable discretion in the hands of governmental officials, and exercises of discretion are subject to manipulation (pp. 174–75). He therefore raises the possibility that the adoption of “clear standards that embody a strong presumption against mergers could increase the chances of obtaining meaningful results” (p. 174).

26. 15 U.S.C. § 18(a) (2006).

This proposal does not do much for Baker's argument. It seems vague and speculative: it alludes to unarticulated "clear standards" and hypothesizes about what "could" follow from them if adopted. It also seems halfhearted: the tone and word choice of this section of the book suggest that Baker harbors considerable skepticism about the efficacy of this proposal.²⁷ Again, it will probably strike many readers as odd that Baker would choose so ambiguous and tenuous a proposal as one of his "up front" policy recommendations.

Baker's third proposal offers what he describes as an "ideal media merger policy" (p. 178). He suggests that such a policy would be driven by two principles: (1) media entities could be sold only to buyers who after the sale would own no more media properties than the seller did before the sale, and (2) any for-profit media entity buyer would have to receive the majority of its post-purchase revenue from its media business (p. 178). This third proposal seems much more consistent with Baker's arguments than the first two. It moves away from antitrust law and economics. And it moves toward an absolute ban on any merger that would increase concentration of media ownership or that would place media entities in the hands of non-media corporations.

But Baker cannot quite bring himself to stake out this extreme a position. He therefore acknowledges—grudgingly and skeptically—that such a stringent rule might preclude some mergers that would "produce benefits for the communications order and for the public" (p. 179). This leaves room for the possibility that "an alternative might be to allow waivers . . . when the applying purchaser can show clearly and concretely why allowing the purchase would benefit the public" (p. 179). Baker deserves credit for recognizing that the specific facts of individual cases can play havoc with bright-line rules. Nevertheless, his concession may trouble readers who believe that waivers are subject to the same discretionary abuses Baker identified in discussing his second proposal.²⁸

Baker's fourth proposal is that Congress should adopt a law that allows the purchase of a media entity only if the continuing editorial independence of that entity is guaranteed (p. 181). Baker here borrows an idea from the Newspaper Preservation Act,²⁹ under which newspapers that consolidate their business operations must keep their editorial functions separate. And he extends this principle—perhaps to the breaking point—by urging that the proposed law should protect journalistic employees from dismissal except for cause and should provide them with the power to veto dismissal of their editor under most circumstances (p. 181).

27. For example, Baker cautions that "[t]he British and German experiences . . . warn against expecting too much." P. 174.

28. Indeed, some readers may wonder whether Baker's argument has a kind of circularity to it: we can embrace clear standards and bright-line rules because they will be subject to reasonable exceptions; but we need not fear those exceptions because in applying them we will refer to clear standards and bright-line rules.

29. 15 U.S.C. §§ 1801–1804.

Some will think this proposal does not go far enough. There is something to this: the principle of editorial independence does not, in and of itself, prevent many activities that may work against the democratic distribution of communicative power.³⁰ Others will think his proposal goes too far. There is something to this as well: the legal and empirical support for this approach seems thin, and Baker's invocation of such authorities as the Norwegian Press Association Code of Ethics does little to bolster his claim that his suggestion is "not . . . unprecedented" (p. 181). Still others will object that this proposal goes in the wrong direction—at least by Baker's own reckoning. And there is something to this, too: it seems odd for Baker to rely so heavily on a principle—editorial independence—that relates so closely to such commodity-oriented notions as the quantity, quality, and diversity of the voices that enter the marketplace of ideas.

Baker's fifth proposal is that "mergers or ownership changes could be conditioned on approval by the journalistic, creative, and editorial employees . . . of a media entity" (p. 182). He argues that, because such employees would typically "oppose mergeres [sic] that they believe would degrade the entities' journalistic or creative roles," the sales they approve would tend to have positive, or at least neutral, effects on "the media order" (p. 182). Baker acknowledges the objection that such a rule would take from the owners and give to the employees "a potentially valuable right generally connected with ownership" (p. 182). But Baker responds by pointing out that this redistribution of power serves egalitarian ends as well as the interest in preserving media quality (p. 183).

Baker certainly casts his drama with starkly drawn actors. In this play, owners care single-mindedly about profit margins and give no thought to quality, while journalists deeply value their "creative roles" and would not use their newly granted veto power to exact concessions that serve their personal interests rather than those of "the media order" (pp. 177–78). Readers may wonder whether these convenient bad-guy/good-guy role descriptions have much to do with reality. I have represented media entities and journalists for more than twenty years and, in my experience, reality is considerably more complicated.

Perhaps Baker is right—or at least right on average—or perhaps not. What is certain is that he proposes to place an extraordinary burden on media entities: he would deprive them of a common right of ownership and he would impose on them a cost of doing business (a tax, if you will) that other businesses do not bear. Curiously, he would do all this as a consequence of the *favored* status of the media under our Constitution. Such extraordinary measures call for extraordinarily powerful arguments and extraordinarily compelling evidence. Readers may reasonably question whether Baker has provided them. My own view is that he has not.

Baker's sixth and seventh proposals are his most vague. His sixth advances the idea of subsidizing smaller media. He begins by noting that the

30. For example, editorial independence would not prevent one media entity from acquiring another simply in order to shutter it and eliminate the competition.

government subsidizes the media in a wide variety of ways, from granting special postal rates to holding press conferences. He then argues that “democratic theory clearly suggests the merits of considering tax benefits or actual subsidies to support ownership diversity” (p. 185). Baker notes in passing the potential for “greater estate tax exemptions [that] could favor continuance of the remaining family media enterprises” (p. 186), and even alludes to the possibility of “the government [providing] operating funds to financially weaker [news]papers” (p. 186), but offers nothing more specific.

His seventh proposal advances the idea of imposing special responsibilities on large media firms. Again, he avoids specifics: “Special obligations might be imposed on papers with market penetration levels above a certain level” (p. 187). He mentions the possibility of “[r]equiring nondiscriminatory access to advertising space for views on matters of public importance” (p. 188), but otherwise does not flesh out what he has in mind. In sum, Baker’s sixth and seventh proposals raises provocative ideas, but do so in such a general manner that readers may conclude they do not have a firm grasp on what he is proposing, let alone whether it makes any sense.

Baker describes his proposals as “gutsy,” (p. 202) but readers may not share this assessment. They are more likely to find some of his proposals modest, some vague, and some ambitious and intriguing but insufficiently supported. To Baker’s credit, they are also likely to find many of his proposals interesting invitations into further contemplation. In my opinion, however, truly gutsy proposals would offer greater detail and would marshal greater empirical support. Of course, that would make them more vulnerable to questioning and counterargument, but then that’s where the guts come in.

The inconsistencies, ambiguities, and uncertainties that haunt this section of the book are regrettable because they detract from the force of some of the points that Baker makes earlier. Even those who accept Baker’s argument that media concentration exists and requires a remedy may feel disappointed by his suggestions about how to address the problem. To borrow a phrase from T.S. Eliot, this section ends the book not with a bang but with a whimper, which disserves the provocative thinking that precedes it.

CONCLUSION

In this Review, I have raised numerous objections, varying in their scope and significance, to the arguments set forth in Baker’s book. In my view, however, the greatest failing of *Media Concentration and Democracy* is that it does not engage broadly and deeply with the question of whether the development of new media has fundamentally changed the vehicles for the communication of information—and thereby largely disposed of the very problem Baker seeks to address. To the contrary, his treatment of new media seems superficial, dismissive, and disconnected from the current realities of communications dynamics.

This is such an important failing because so many of Baker’s arguments rest on explicit or implicit scarcity rationales. Indeed, a fair summary of his central thesis would be that there are only so many media to go around, and

we must therefore make sure they go around fairly. The universe of new media—incompletely understood, explored, or even imagined—makes this thesis seem dated. Indeed, the pervasive influence of new media will leave some readers with the impression that Baker has set about the confused task of attempting to ration an infinite resource. I think Baker's book never quite recovers from this stumble. That is unfortunate, because in many other respects *Media Concentration and Democracy* is an intriguing and thought-provoking book.

In another intriguing and thought-provoking book,³¹ Robert McChesney raises arguments that are in some respects similar to those raised by Baker in *Media Concentration and Democracy*. And, in a review of McChesney's book, Carlin Romano voices some of the same objections articulated here.³² Still, Romano concludes his review by citing a passage from McChesney's book and observing, "Over the top, sure, but it makes you think."³³

Baker's book deserves a rather similar assessment. At various moments *Media Concentration and Democracy* is expansive, incremental, radical, modest, straightforward, ambiguous, thoughtful, hopelessly abstract, deep, superficial, under the radar, and over the top. Sure, but it makes you think. Or, as the collegiate coffee-slinger so aptly put it, "The guy has a lot of ideas." Some readers will find that enough. Others may wish for a good deal more.

31. ROBERT MCCHESENEY, *COMMUNICATION REVOLUTION: CRITICAL JUNCTURES AND THE FUTURE OF MEDIA* (2007).

32. Carlin Romano, *Big Fish and Small Fry*, COLUM. JOURNALISM REV., Jan.-Feb. 2008, at 47 (reviewing ROBERT MCCHESENEY, *COMMUNICATION REVOLUTION: CRITICAL JUNCTURES AND THE FUTURE OF MEDIA* (2007)).

33. *Id.* at 50.