

Viewpoint Diversity and Media Ownership

C. Edwin Baker*

| | | |
|------|--|-----|
| I. | INTRODUCTION..... | 651 |
| II. | RATIONALES FOR OWNERSHIP DISPERSAL | 653 |
| | A. <i>Democratic Distribution or Dispersal</i> | 653 |
| | B. <i>Democratic Safeguards</i> | 655 |
| | C. <i>Media Quality or the Undesirable Bottom-Line Focus</i> ... | 658 |
| III. | EMPIRICAL STUDY OF VIEWPOINT DIVERSITY | 662 |
| | A. <i>The Study</i> | 662 |
| | B. <i>Value of Viewpoint Diversity</i> | 664 |
| | C. <i>Reasons for Error</i> | 665 |

I. INTRODUCTION

The premise of Professors Daniel Ho and Kevin Quinn’s “Viewpoint Diversity and Media Consolidation: An Empirical Study” is a repeated assertion. They believe that the claim that media consolidation reduces viewpoint diversity (the “convergence hypothesis”) “forms the empirical bedrock” of federal regulation for restricting media consolidation¹ (presumably beyond what would be independently required by antitrust law). The FCC’s ownership rules, they say, “[a]t heart . . . rest on . . . the ‘convergence’ assumption.”² Given this premise, they apply innovative statistical techniques to a sample of five cases to show that mergers do not

* Nicholas F. Gallicchio Professor of Law and Professor of Communication, University of Pennsylvania Law School.

1. Daniel Ho & Kevin Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 789 (2009).

2. *Id.* at 784.

correlate with reductions of viewpoint diversity.³ On this basis of having “challenge[d] long-held assumptions about viewpoint diversity,”⁴ they conclude that their findings justify cautious relaxation of existing ownership restrictions.⁵ Specifically, Ho and Quinn use statistical techniques to categorize editorial positions on Supreme Court opinions as liberal or conservative.⁶ They then analyze editorial positions about these Court decisions taken by papers before and after five mergers—for example, the merger of *New York Times* and the *Boston Globe*—and find no systematic reduction of viewpoint diversity.

Their study is subject to a number of obvious methodological criticisms, some of which Part III.A addresses. The primary problem, however, is that they are simply wrong in their basic assumption that the “convergence” hypothesis provides the main policy basis for ownership restraints. Three other concerns, which I have presented elsewhere⁷ and summarize in Part II, provide the primary grounds to oppose media mergers. Their empirical study, consequently, is *entirely irrelevant* to appropriate reasons to oppose media concentration. Proper attention paid to the three most relevant concerns shows that any reliance on Ho and Quinn’s study in policy debates would simply be *perniciousness*. To drive this point home, Part III.B explains why the *quantitative* amount of viewpoint diversity, which they purport to measure, is *not even to be valued* in itself—though how diversity or similarity of viewpoints develops is a proper policy concern relevant to why source (but not viewpoint) diversity matters. Part III.C concludes by speculating about causes of Ho and Quinn’s mistake of focusing on viewpoint diversity—comments

3. Only “correlate” because the authors do not claim to show any causal relation. Based on their more qualitative investigation, they suggest that whether convergence or increased divergence of viewpoint occurred after consolidation appeared to be caused by exogenous factors, in particular the “personalities, leadership and organizational structure of the editorial board.” *Id.* at 860. In any event, a correlation based on a sample size of five that do not point the same direction meets few standards of statistical significance, a problem exacerbated by lack of controls or attempts to hold alternative factors constant.

4. *Id.* at 786.

5. *Id.* at 858-59.

6. *Id.* at 812-22.

7. See, e.g., C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007). In less structured form, these three arguments are often found in policy debates, though one complaint about the huge number of people on both the right and left who have opposed relaxation of merger policy is that they often have been comparatively inarticulate about their objections—with the thought that merely pointing to the size of media conglomerates suffices as an argument. I presented the arguments made in Part I in roughly the form offered here in testimony to the FCC (June 2007), in an informal dinner presentation to a Committee of the British House of Lords (Sept. 2007), and in testimony before the Senate Commerce Committee (Sept. 2004).

intended as a cautionary tale about the use and abuse of positivist empirical analyses.

II. RATIONALES FOR OWNERSHIP DISPERSAL

The three major reasons to oppose media concentration in general, and mergers in particular, can be labeled: (i) the democratic distribution value; (ii) the democratic safeguard value; and (iii) the media quality value, cashed out as an objection to a bottom-line focus. The first two reasons, I suspect, represented the primary—but usually unarticulated—concerns of the public when nearly two million people wrote to oppose the FCC’s recent relaxation of concentration restraints,⁸ while the third often finds expression, with various levels of articulation, among editors, journalists, artists and others in the media professions. I describe the logic of each in turn.

A. *Democratic Distribution or Dispersal*

A central premise of most normative theories of democracy is that democracy should constitute a wide, roughly egalitarian, sharing of political power. With a dire reference to the “unanimity of the graveyard,” the Court asserts that here “[a]uthority . . . is to be controlled by public opinion, not public opinion by authority.”⁹ This basic democratic premise leads to the formal equality embodied in the Court’s “One Person, One Vote” requirement¹⁰ Judicial resistance to a constitutional claim that political equality should be substantive and not merely formal does not reject the normative claim. Rather, the Court correctly recognizes that, because the proper form of substantive equality is democratically contestable, because substantive equality can never be fully realized, because moves in that direction necessarily involve institutionally complex trade-offs, and because some of the ways used to advance this value themselves create constitutional problems,¹¹ the claim should not have constitutional status.¹²

8. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 386 (3d Cir. 2004).

9. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

10. *Reynolds v. Sims*, 377 U.S. 533 (1964).

11. *Buckley v. Valeo*, 424 U.S. 1 (1976). Courts take contrasting views on the permissibility of restricting corporate power. Compare *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), with *McConnell v. FEC*, 540 U.S. 93 (2003). This is not the place for me to take up the vexed issue of campaign finance, but see C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L.REV. 1 (1998).

12. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986); see also C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1072-84 (1980).

The egalitarian premise that justifies the formal one person, one vote requirement also applies to voice within the public sphere. Voice, more than vote, creates public opinion and provides the possibility of deliberation. It is likewise clear that the media is the central *institution* of a democratic public sphere. These observations lead inexorably to the recommendation of a maximum dispersal of media power,¹³ power represented ultimately by ownership.¹⁴

Various caveats to this “equal voice” goal exist—and I note three crucial ones. First, not everyone has the same ability or, possibly more important, the same desire to engage in significant, regular public communication. Moreover, media would not be “mass” without specialization in “voice.” We would simply have babble—everyone talking ineffectively. Thus, the democratic distribution value of maximum dispersal must not overwhelm the competing value of allowing effective speakers to amass large audiences. Still, the significance of allowing effective media speech does not, in any way, require that a single owner should own multiple media entities. Rather, it only recommends against legal limits on any individual entity’s appealing to—and obtaining—an audience of great size. The practical goal should be to assure a dispersal of ownership that leaves everyone able to experience some media as her own—as speaking for her or to her concerns—and thus able to view herself and her views as fairly included in public discourse.

Second, increasing ownership dispersal always works *in the direction* of equalizing the distribution of media power among groups. Nevertheless, reasonably advancing this aim often requires other policy measures. The market *might* result in all or, more likely, many of the inherently limited number of people who control media entities being people with similar values, experiences, and perspectives. Therefore, with demographic commonalities often serving as rough markers, government policy should aim to disperse ownership among those coming from different groups that are salient in public life.¹⁵

13. The reply that appropriate dispersion of power exists because the market responds to consumer demands might be advanced. The reasons to reject this suggestion take this comment far afield. *But see* C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002) (describing primary ways that the market, even if generally effective at responding to consumer preferences, systematically fails to give audiences the media content they want). Still, most people intuitively recognize not only that the market criterion of “one-dollar/one-vote” differs from the democratic ideal of “one-person/one-vote.” They also recognize that, even though any effective speaker—including media speakers—cannot totally ignore their addressees, the media are still left with huge discretion as to what to say.

14. I put aside good policy arguments for an alternative or additional response: a partial legal separation of ownership and editorial control that is required by some European democracies. *See* BAKER, *supra* note 13, at 180-81.

15. *Cf. Metro Brdcast. v. FCC*, 497 U.S. 547 (1990).

Third, on “republican” or deliberative democracy premises, some media may usefully aim to embody society-wide discourses.¹⁶ Thus, legal efforts to assure that different voices are represented within each of these broadly aimed media entities may be appropriate.¹⁷ Still, despite the caveats, a central reason to favor media ownership dispersal is to broaden the distribution of voice within the democratic public sphere.

B. *Democratic Safeguards*

Possibly most obvious among the benefits of ownership dispersal are the various safeguards it creates for democracy. Four are noted here.

First, dispersal helps avoid the danger of demagogic power—the “Berlusconi effect.”¹⁸ Although the primarily economic interests behind most media conglomerates often work against concentrated media power being leveraged into demagogic political power, the existence of this concentrated power within the public sphere creates a real danger of abuse. *No democracy should accept that risk.* Even if, in the past, the risk had never led to bad results (which would make the danger hard to measure by normal statistical techniques), good institutional design—like good structural design of nuclear power plants—should not unnecessarily risk calamitous results. In fact, at least since the first major German media conglomerate supported the rise of Hitler,¹⁹ various countries and, often, communities in countries that have both important local media and politically significant local or state governments, have experienced demographic abuse of the concentrated power implicit in conglomerate media ownership.

Second, dispersal simply results in more people with power to set directions and determine the energy that a media entity puts into being a watchdog, exposing both the incompetence and malfeasance of the

16. From a British perspective, James Curran recommends this role for public broadcasting. James Curran, *Rethinking Media and Democracy*, in *MASS MEDIA AND SOCIETY* 120-54 (James Curran & Michael Gurevitch, eds., 3d ed., 2000).

17. BAKER, *supra* note 13, at 143-53 (describing the need of “complex” democracy for both media that perform a “republican” societal-wide discourse role and media that provide for a “liberal” pluralist role with different media relating to different societal groups). Jerome Barron proposed improving the fairness of societal-wide discourse when recommending an access right. Jerome Barron, *Access to the Press – A First Amendment Right*, 80 HARV. L. REV. 1641 (1967). A plausible policy is to impose access obligations solely on media entities that reach a certain level of dominance within a locale or as a condition for allowing mergers. See BAKER, *supra* note 13, at 180-81, 186-87.

18. BAKER, *supra* note 13, at 18.

19. DANIEL C. HALLIN & PAOLO MANCINI, *COMPARING MEDIA SYSTEMS: THREE MODELS OF MEDIA AND POLITICS* 155 (2004) (describing support for Nazis from Alfred Hugenberg’s conglomerate).

powerful.²⁰ More people with this authority can translate into greater watchfulness from a broader range of perspectives which can offer different insights into potential problems. As the FCC explained in 1970,

A proper objective is the *maximum diversity of ownership* We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. . . . If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of *sources for ideas* is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis.²¹

Third, simply by increasing the number of people over whom a potential corrupter of the media must exercise power or influence, greater dispersal of ownership predictably reduces the risk of effective external corruption.

Fourth, media concentration exacerbates the ubiquitous conflicts of interest problems that can undermine journalistic integrity. Basically, responsible media entities try to maintain “church and state separations”—where business interests do not compromise journalistic integrity. A concentrated ownership structure can greatly and, since dispersal of ownership is a possibility, unnecessarily increase incentives to breach this wall. Mergers add to these conflicts in two scenarios: where media entities combine (a) with other media companies, and (b) with multi-industry conglomerates. They create two problems: (i) incentives to distort journalism and independent content due directly to the owner’s promotion of its other interests, and (ii) vulnerability to outside pressure (or internal incentives to leverage media power to influence outsiders’ decisions). A two-by-two matrix could diagram these possibilities. Here, I merely note a few examples.

James Hamilton reports that during November 1999, ABC’s affiliates mentioned ABC’s popular quiz show, *Who Wants To Be a Millionaire*, in 80.2% of their local news programs, while no NBC affiliate found the ABC program newsworthy²² (scenario illustrating a-i from the above matrix). Often, in contrast, media maintain the wall—but sometimes at a high cost. The *New York Times* began an exposé series on the pharmaceutical industry

20. Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSP. 133 (2008) (discussing empirical and conceptual reasons to expect benefits from increased numbers of watchdogs).

21. Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard FM and TV Broadcast Stations, *First Report and Order*, 22 F.C.C.2d 306, para. 21, 18 Rad. Reg. 2d (P & F) 1735 (1979) (emphasis added) [hereinafter *Multiple Ownership Report and Order*]. This standard of maximum dispersal is a far cry from the FCC’s recent discussions of whether or not eight independent voices are necessary.

22. JAMES T. HAMILTON, ALL THE NEWS THAT’S FIT TO SELL 145, 148 (2004).

at a time when few prescription drugs were advertised directly in the *New York Times*.²³ Unfortunately, the *New York Times* also owned medical magazines.²⁴ Apparently, pharmaceutical companies threatened to withdraw ads from these medical magazines if the series continued.²⁵ Though in this case, the *New York Times* resisted the intimidation, their prudent decision to sell the medical magazines arguably illustrates the intensity of the conflict (scenario illustrating a-ii). How often individual media entities temper criticism of politicians not merely in order to gain access or privileges but also to gain advantage for their other media properties—or how often politicians exploit this vulnerability—is unknown. The *Miami Herald*, then owned by Knight-Ridder, would have been unlikely to mute criticism of Attorney General Ed Meese if not for wanting his approval of a Joint Operating Agreement between Knight-Ridder's Detroit paper and another Detroit paper.²⁶ From the other side, conglomerate ownership allowed Nixon to try to retaliate against the *Washington Post* by making trouble for its renewal of broadcast licenses²⁷—behavior which could induce future caution by vulnerable media conglomerates.

Likewise, incentives surely exist for a news broadcaster, say NBC, if owned by an industrial conglomerate, say General Electric, to report favorably on that owner's other economic interests—say, nuclear power or weaponry. Or Atlantic Richfield, an oil company that explicitly aims at “generat[ing] profits” but that recognizes that it “cannot expect to operate freely or advantageously without public approval,”²⁸ might find it useful to own the British *Observer* during the period when it was seeking North Sea oil leases (scenarios illustrating b-i). As a final example illustrating b-ii, Greece sought—though was stopped (I believe unwisely) by the European Community on the basis of its free trade laws—to statutorily prohibit firms that contracted with the government, for example, for government

23. *Id.*

24. BEN BAGDIKIAN, *THE MEDIA MONOPOLY* 164-65 (1983).

25. HAMILTON, *supra* note 22, at 145, 148 (2004).

26. JAMES D. SQUIRES, *READ ALL ABOUT IT!: THE CORPORATE TAKEOVER OF AMERICA'S NEWSPAPERS* 123 (1993).

27. *See* LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 130-33 (1987); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasting*, 64 *N.Y.U. L. REV.* 990, 1050-51 (1989).

28. JAMES CURRAN & JEAN SEATON, *POWER WITHOUT RESPONSIBILITY: THE PRESS AND BROADCASTING IN BRITAIN* 84 (5th ed., 1997) (quoting the Chairman of Atlantic Richfield). Curran describes numerous examples of large media owners intervening into their paper's editorial stance in order to advance their other corporate (and political) interests. *Id.* at 71-108.

construction projects, from owning media entities.²⁹ An obvious rationale of such a law is that the combination gives the conglomerate leverage to obtain contracts that the public interest requires go elsewhere or makes the watchdog vulnerable to being muzzled by a fear of loss of government contracts.

Many more illustrations could be found. Nonetheless, empirical measurement of the effect of interest conflicts is predictably uninformative. Any informed sense of the degree of danger will likely reflect a structural examination of the possibilities of and incentives for this “corruption” combined with qualitative or ethnographic investigations and, possibly, quantitative surveys of editors’ and journalists’ self-reports, though with recognition that ingrained, unconscious practices will often be the repositories of the corrupting incentives. Admittedly, courageous professional resistance—maintenance of strong church and state lines by people committed to the integrity of their journalism—often occurs. Positivist study of the effectiveness of this courage will be unable to measure the costs and stability of this journalistic culture under historically changing conditions. As well as being an unreliable solution, requiring editors and journalists potentially to sacrifice jobs or advancement is unfair when better structures could avoid (or reduce) the problem at the source. Partial solutions, including Greece’s structural proposal, are possible. Reducing conflicts, however, clearly provides a reason to favor ownership dispersal.

C. *Media Quality or the Undesirable Bottom-Line Focus*

The two-part claim is simple. First, the public benefits when media entities forgo the maximization of profits in favor of spending money on (that is, subsidizing) quality journalism, quality cultural products, or greater circulation. Second, many small media entities have been willing to do this, but for predictable reasons, most conglomerates focus almost exclusively on the bottom line, cutting both journalists and journalistic quality. Though simple in form, the logic of this claim requires consideration of economic, normative, sociological, and psychological theory only briefly noted here.

Even if markets—as their fans hope—generally lead to efficient or otherwise socially desirable results, this is predictably not true in the media context.³⁰ The mass media generally, and their creative and journalistic inputs in particular, regularly produce huge positive or negative

29. Interview with Stylianos Papathanassopoulos, Author (June 2005). Papathanassopoulos is the author of a Greek-language book, *TELEVISION IN THE 21ST CENTURY* (Kastaniotis Editions, 2005).

30. The economic claims in this and the next paragraph are developed in BAKER, *supra* note 13.

externalities that can be catalogued. A market orientation systematically generates inadequate incentives to produce socially desirable amounts of media products creating positive externalities—with the converse point applying to the overproduction of content (or use of practices) having negative externalities. Particularly of note here are the potential positive externalities related to the democratic process. As an example, consider that Mary, who does not read the newspaper or watch the news, benefits when Joe does and himself becomes a more informed or adequately motivated voter. This is because Mary also benefits from good government and loses due to bad government. (This proposition about the benefits of accurate, relevant knowledge can be accepted even by those who disagree about when government is good or not.) Mary also benefits when the media uncovers and reports malfeasance or non-performance that leads to corrective governmental (or corporate) action.³¹ And she benefits when the media's reputation for quality journalism and effective investigative reporting deters malfeasance or non-performance even though this reputation and deterrence dyad results in the media entity not even having a story to sell in the market.

Any good editor will correctly assert that with more journalistic resources, she can offer better journalism—more significant, more accurate and more complete reporting and exposés. Though costly, the public often benefits (the positive externalities noted above) more from the editor having these resources than the media entity loses from its bottom line.

Before moving to a policy conclusion, one other important fact about the media must be noted. The media—in particular, broadcasting and newspapers—have historically been and largely continue to be very profitable, at least on an operating basis. (Recently, newspaper profits have plummeted not only as they always do due to withdrawal of advertising during a recession, but also more problematically in the long term as advertisers flee to online sites. Most daily newspapers, however, can still be very profitable on an *operating* basis, with the industry's gravest problem in relation to the entities' *net* profits being that the most recent purchaser must use operating profits to pay huge debts generated by its high purchase bid.³²) Reasons for this high profitability are multiple, but

31. DAVID L. PROTESS ET AL., *THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BURNING IN AMERICA* (1991) (ethnographic study of how investigative journalism generates corrective responses).

32. Though older data clearly support the claim of great profitability, this claim might seem naïve today. Some newspapers, no longer able to make debt payments, are declaring bankruptcy. A few major dailies have closed or are ending their print editions (e.g., Rocky Mountain News and Seattle Post-Intelligencer). Lay-offs are rampant and accelerating, with many newspapers over the last few years reducing their newsroom count from 30% to 50%. C. Edwin Baker, *Shoptalk: Where Credit is Due*, EDITOR & PUBLISHER, Mar. 1, 2009. Given the reduction in the quality of the news product due to less journalistic inputs, a decline in

readership might be expected—and is often claimed (and blamed on young people) as paper circulation has declined. *See also* PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA (2008), <http://www.stateofthenewsmedia.com/2008/>.

Actually, however, readership is apparently up, reaching 77% of adults, including 65% of those between 18 and 24 in a given week but with a much greater portion of these online where they provide newspapers about 5% of advertising revenue per reader as do print edition readers. Richard Perez-Pena, *Paper Cuts – An Industry Imperiled by Falling Profits and Shrinking Ads*, N.Y. TIMES, Feb. 7, 2008, at C-1; *see also* NEWSPAPERS ASS'N OF AM., WHY NEWSPAPERS? THEY ADD VALUE FOR ADVERTISERS (2008), available at <http://www.naa.org/docs/TrendsandNumbers/Why%20Newspapers%202008%20FINAL.pdf>; NEWSPAPERS ASS'N OF AM., NEWSPAPER FOOTPRINT (2007), <http://www.naa.org/docs/TrendsandNumbers/NAANewspaperFootprint.pdf>. Papers apparently even now know how to maintain print circulation, *see* Philip Meyer, *The Influence Model and Newspaper Business*, 25 NEWSPAPER RESEARCH J. 66 (2004), but mostly find the expenditures in quality do not produce enough revenue to be profitable.

Even in crisis, however, most papers continue to generate the profits that owners who did not recently incur huge debt to buy the paper could use to spend on quality journalism. Admittedly, profits are down in newspapers everywhere and in individual cases may not even be generating operating profits. *See* PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA: NEWSPAPERS (2009), available at http://www.stateofthenewsmedia.org/2009/narrative_newspapers_intro.php?media=4 (“operating margins are dropping and now [in 2008] average in the mid to low teens”). Still, as for now, and as for the last one hundred years, an obituary primarily applies only for papers in dwindling number of cities that had maintained competing dailies or other special cases—non-dominate national papers like the *Christian Science Monitor* without a local base. That is, most actual closures are in two newspaper cities where papers have been closing and competition has been unsustainable for the last 100 years. *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994). Most bankruptcies reflect not lack of operating profits but excess debt created by overly-optimistic recent purchasers. Thus, in a world economy where few businesses have double-digit operating profit rates, evidence suggests newspapers in general remain profitable—just not as profitable as before or profitable enough to pay the debt created by recent purchases made under more optimistic predictions and not with the increasing earnings that would support stock prices with high earning multiples.

For example, when the *New York Times* headlined *Gannett to Cut 10% of Workers as Its Profits Slip*, N.Y. TIMES, Oct. 29, 2008, at B11, Gannett's third quarter report had just reported major declines in profitability—but continuing great operating profitability. In publishing its newspaper division, revenues had gone down to \$1.36 billion with operating expenses of \$1.18 billion, leaving operating profits of \$180 million or 13% margin (with operating cash flow, which management asserts provides a better showing of operations, at 17% of revenues), down from a 21% operating margin the year before. *Gannett Co., Inc. Reports Third Quarter Results*, BUS. WIRE, Oct. 24, 2008, available at http://findarticles.com/p/articles/mi_m0EIN/is_2008_Oct_24/ai_n30932911/.

Another large chain, McClatchy's third quarter operating profit rate was down to 9 percent, though most of this was then eaten up in interest, largely reflecting its recent acquisition of Knight-Ridder. Press Release, The McClatchy Company, McClatchy Reports Third Quarter Results (Oct. 21, 2008) (available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/10-21-2008/0004908224&EDA%20TE=>).

The Tribune Company, although reporting huge billion dollar losses (reflecting write downs from recent purchases), and though its 2008 second quarter revenues from continuing operations declined 11% to \$701 million and its operating cash flow declined 4% to \$114 million, still maintained an operating profit margin of over 16%. Press Release, Tribune Company, Tribune Reports 2008 Second Quarter Results (Aug. 13, 2008) (available

mostly reflect the nature of monopolistic competition in industries that sell a product that has very high first copy costs and very low or zero costs for subsequent copies. Once the profit capacity is granted and combined with the externality point, the policy conclusion should be obvious. The goal should be to keep or get ownership into the hands of those who do not aim to maximize profits, but rather are committed to spending at least some of the potential profits on quality journalism.

The owners who are most likely to favor journalism over profits include several predictable types: (a) smaller, usually local, owners who take identity from their firms' contributions to their community or from the journalistic product they create; (b) workers who take professional pride in the quality of their product; (c) non-profit entities whose goals include service to their community. Each category justifies policy moves to increase its ranks.

More relevant here is a category of people especially unlikely to sacrifice profit maximization—executives of conglomerate, especially publicly traded, companies without dominant family or in-group ownership.³³ Both socio-psychological and structural reasons support this prediction. These executives are particularly likely to be rewarded (or fired) on the basis of their ability or inability to increase the bottom line. They also often take aspects of their identity from the same profit-making achievements. These bottom-line concerns are likely encouraged by day-to-day interactions, not with the people of a community that they serve, but with other executives who also value higher profits.

There are two structural reasons that make these owners not only less inclined, but also less free to make the socially preferable choice of sacrificing profits for journalism. First, an executive of a publicly traded company faces fiduciary obligations and sometimes intense shareholder

at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/08-13-2008/0004867052&EDAT%20E=>).

Conclusion? Crisis, yes! But highly profitable, also mostly yes. Nevertheless, the pain is real as exhibited by continued lay-offs, reduced wages, and the situation is fluid as I write. And this crisis, represented by huge losses of advertising revenue, partly due to the current recession (as it is optimistically called), which always causes sharp declines in advertising revenues, and more seriously long term, the movement of advertising to non-newspaper online sites, and the modern end to the major newspaper subsidies from the federal government that sustained them during the first 150 years of the country's history, will not go away. As noted above, this leaves a bleak future that requires a thoughtful response. See Posting of C. Edwin Baker to Balkanization, <http://balkin.blogspot.com/2009/01/future-of-news-part-one-problem.html> (Jan. 21, 2009, 6:35 EST) (The Future of News, Part 1 -- The Problem); Posting of C. Edwin Baker to Balkanization, <http://balkin.blogspot.com/2009/01/future-of-news-part-two-solutions.html> (Jan. 22, 2009, 6:35 EST) (The Future of News, Part 2 -- The Solution).

33. GILBERT CRANBERG, RANDALL BEZANSON & JOHN SOLOSKI, *TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY* (2001).

pressure to serve the bottom line. Second, and especially important for merger policy, if a corporate parent recently purchased the media entity, this parent was presumably the high bidder. Its bid, based on its calculation of the property's *potential* future profits, now locks the company into producing those profits to pay the debt created by (or otherwise to justify) the purchase. That is, the purchase—the merger itself—*forces* the socially undesirable focus on the bottom line.

III. EMPIRICAL STUDY OF VIEWPOINT DIVERSITY

Part II describes reasons unrelated to the convergence assumption that explain restrictions on media ownership concentration. It thereby denies the policy relevance of a study of the convergence hypothesis. Here, I pursue three further matters. First, *assuming* some policy relevance of consolidation's impact on diversity, how persuasive are Ho and Quinn's findings? Second, to what extent is viewpoint (or content) diversity, even if not the primary policy concern, still a secondary policy value? Third, if Ho and Quinn erred in identifying the relevant issues, can anything be learned from their error?

A. *The Study*

Ho and Quinn admirably note the limitations of their study, describing seven "caveats."³⁴ Anyone who accepts their premise about the justification of media ownership policy must carefully evaluate all seven. Here, I highlight two of the caveats that they note and also note two more which they ignore.

The ways in which news media slant their choice, tonal presentation, and placement of *news* may be more significant for democratic discourse than the editorial positions. Many liberals have long read the *Wall Street Journal*, not out of interest in its typically reactionary editorial line, but because of its news reporting. While defending their focus on *editorial* diversity, Ho and Quinn note that news reporting might be a more important policy concern. They do not, however, give any real attention to the reasons related to democratic discourse for why diversity in the news might be more central than editorial diversity.³⁵ They also ignore economic reasons—the advantage of redeploying the same, expensive-to-gather news while creating product differentiation with cheaply written editorial positions—to fear that here is where consolidation creates the strongest push towards convergence.

34. Ho & Quinn, *supra* note 1, at 826-28.

35. *Id.* at 827.

Critics of the media seldom bemoan a paper's editorial position. Rather, their chorus alleges slanted news presentation and, even more importantly, misguided choices—whether due to ideological bias or structural economic considerations³⁶—in not covering certain stories. Project Censored's annual identification of twenty-five major stories largely missed by the mainstream media highlights precisely this point.³⁷ The quality-related fear, that mergers lead to layoffs of journalists as the combined operation tries to maximize the bottom line by using the same journalistic resources on multiple platforms, supports a plausible thesis that a side effect of mergers will be convergence—that is, more duplicative content in news reports even if product differentiation occurs through contrasting editorial content. One wonders whether empiricists' frequent choice to focus on editorial position is driven simply by the greater ease and objectivity of coding whether an editorial favors or disfavors a policy, candidate, or, in Ho and Quinn's study, a Supreme Court decision, as opposed to the difficulty of coding new-presentation slant or the viewpoint implicit in a story's absence. The common joke about empiricists describes a person on hands and knees looking for her keys under the street light despite her belief that she lost them on a dark stretch further down the street. Policy is misled if it relies on what is easy to measure rather than what is important.

Second, Ho and Quinn note possible limitations due to their focus on *major* newspapers.³⁸ This, however, may not have been the key category problem. Economic theory, which commonly predicts that the effects of consolidation will be contextually variable—a prediction that Ho and Quinn's findings support—warns against quick generalization from any narrow band of cases. Though democratic distribution values and some democratic safeguard concerns could find mergers among major papers *especially* disturbing, economics predicts that causal consequences related to content will be more common for mergers among media entities within a single market. Specifically, a common economic prediction is that these local mergers, represented by only one of Ho and Quinn's five cases (the Atlanta papers), would be particularly supportive of a challenge to convergence hypothesis. These mergers could produce real incentives for product differentiation so that the combined company does not compete against itself. This prediction, as noted above, is hardly certain. Alternatively, an incentive to reap rewards of expertise or sunk costs could

36. In their classic critique, these structural causes are emphasized by EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* 1-35 (1988).

37. *See, e.g.*, PROJECT CENSORED & PETER PHILIPS, *CENSORED 2008: THE TOP 25 CENSORED STORIES OF 2006-07* (2008).

38. Ho & Quinn, *supra* note 1, at 826 (discussing caveats 1 & 3).

lead to a convergence of content now presented on dual platforms. A quite plausible, but substantively unwelcome, scenario would be one in which both incentives operate. The combined local media entities may make dual use of reporting or other news inputs, creating convergence in news, while offering divergence in editorial lines that appeal to audiences with different political preferences. If, however, the merger ultimately eliminates one media entity and then offers a single source, economics predicts that, in the absence of a competitive need for product differentiation, pressures to maximize audience will now push viewpoint toward the center—or to a presentation of both perspectives.³⁹ Though this troubling scenario is emphatically not crucial given the policy reasons advanced in Part II, its occurrence is not factually ruled out by Ho and Quinn and in fact receives some empirical support from their study of the Atlanta papers.

Two other limits of their study, one methodological and one substantive, I merely note here. First, a sample of five mergers is a peculiarly small basis from which to generalize. Ho and Quinn's study should be unconvincing for anyone except those, like me, who already predict what they purport to find.⁴⁰ Second, even if media policymaking should be concerned with viewpoint diversity, surely the relevant diversity should be qualitative, not simply quantitative. One reason for dissatisfaction with blogs is not that they lack diversity, but the fear that they lack the resources for qualitative development of either information or argument. Part II emphasized the typically detrimental effect on quality as its third reason to oppose media consolidation mergers. The parallel prediction is that whatever the mergers' effect on the *quantity* of diversity, they will often cause the more important factor, the *quality* dimension of diversity, to decline. This difficult-to-evaluate qualitative issue was not investigated by Ho and Quinn. Failure to investigate this more important aspect of diversity should marginalize any potential policy relevance of the study.

B. *Value of Viewpoint Diversity*

No matter what a person thinks of the reasons to oppose media consolidation presented in Part II, she might argue that the impact on viewpoint diversity surely supplies one proper policy concern. That conclusion, however, comes too quickly. Sometimes lack of viewpoint diversity is not only not a major concern, but is not even to be regretted. John Stuart Mill, while arguing for complete expressive freedom, wrote that "the well-being of mankind may almost be measured by the number

39. These effects are explored in C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 7-43 (1994).

40. *See infra*, notes 53 & 54, and accompanying text.

and gravity of the truths which have reached the point of being uncontested.”⁴¹ We are not worse off if, at a meeting of scientists, no one pushes the flat-earth thesis. As a country, we would not have been worse off, I suspect, if the media “converged” before our invasion of Iraq in correctly reporting the lack of a connection between Saddam Hussein and Osama bin Laden.⁴²

The last intentionally inflammatory example points to both the diversity that does matter and to a grain of truth in the concern with viewpoint diversity—but a grain which provides reasoned support for dispersing media ownership. The democratic quality of discourse is not measured by the *amount* of diversity actually occurring—which is what Ho and Quinn try to identify—but by (at least) three other factors: first, that views actually held are not suppressed; second, that these views are not subject to suppression; and third, that there are meaningful efforts to develop relevant information and perspective. That is, what matters is the cause and quality, not the extent, of the diversity or lack of diversity that exists. Although these three factors were not even identified as relevant by Ho and Quinn, the first directly relates to the democratic distribution value, the second to the democratic safeguard value, and the third to favoring quality journalism over the bottom line—the three factors discussed in Part II. To return to my inflammatory example, democracy requires that, if anyone believed the factual claims about the relation between Hussein and bin Laden pushed by elements of the Bush administration, this view and any facts supporting it should be presented. (Of course, if this view received dominant play primarily because of the economics of journalist routines or exercises of public or private power, then the play would be problematic.) In sum, the real concerns relating to viewpoint diversity—its quality and its actual and potential suppression—can only be empirically investigated in a much more complex study than Ho and Quinn offered. In fact, it can probably be better understood through informed ethnographic study combined with economic and politic reflection on structure than by statistically based empiricism. In any event, these three concerns with diversity argue strongly against concentrated media ownership.⁴³

C. *Reasons for Error*

I am a great admirer of empirical research. At places where I make empirical predictions—for example, that mergers typically reduce the

41. JOHN STUART MILL, ON LIBERTY 53 (Bobbs-Merrill 1956) (1859).

42. Steven Kull, Clay Ramsay & Evan Lewis, *Misperceptions, the Media, and the Iraq War*, 118 POL. SCI. Q. 569 (2004).

43. See, e.g., ERIC KLINEBERG, *FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA'S MEDIA* (2007).

quality of media performance—I have looked to see if empirical studies support or challenge my claim, in this case finding that, although evidence is meager, *apparently* mergers did have this negative effect.⁴⁴ Caution, however, dictates consideration of whether these empirical studies reflect not only particular historical but potentially changeable circumstances. It also dictates a consideration of whether they adequately conceptualize the issue under examination, remove the effects of (hold constant) potentially competing, alternative, or additional causes, properly treat any indeterminacy in the findings, consider alternative explanations of the data, and so forth. No empiricist properly believes that facts speak for themselves! In any event, Ho and Quinn's article is far superior methodologically to most empirical studies that I have seen. Its problem lies in its potentially misdirecting policy discussion by purporting to give an empirical but actually irrelevant basis for deregulation. If this objection is correct, the error of not considering the real reasons to oppose concentration might be criticized as inexcusable, but more interesting here is whether the error is explicable. I am uncertain, but offer four hypotheses, the last two of which may find telling parallels in other policy contexts.

First, maybe the confusion of other scholars and of the FCC itself, along with inconsistent, inconclusive discussions of diversity simply misled Ho and Quinn. Since the 1980s, and especially during the last decade, as the D.C. Circuit has become more conservative and as the FCC under Republican leadership became more and more enamored with the market, their statements increasingly suggest that other diversities—for example, source diversity—are valuable only instrumentally for their ultimate contribution to content diversity or its subcategory, viewpoint diversity. Nevertheless, Ho and Quinn's consistent overreading of their sources belies this benign explanation.

Many FCC policies are most explicable if based on a concern for source diversity without the requirement of any degree of actual content or viewpoint diversity.⁴⁵ Still, Ho and Quinn would be justified in empirically

44. BAKER, *supra* note 7, at 35-37 (citing PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS (2003), <http://www.journalism.org/node/243>) (referring to various empirical studies); Stephen Lacy & Alan Blanchard, *The Impact of Public Ownership, Profits, and Competition on Number of Newsroom Employees and Starting Salaries in Mid-sized Daily Newspapers*, 80 JOURNALISM & MASS COMM. Q. 949 (2003).

45. See, e.g., *Multiple Ownership Report and Order*, *supra* note 21, at para. 21. Though the concern with minority ownership might be viewed as related to the evidence that it produces more programming aimed at minority audiences and that this produces important political effects, such as greater minority participation in the electoral process, see Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities*, 10 ADVANCES IN APPLIED MICROECONOMICS 73 (2001); Felix Oberholzer-Gee & Joel Waldfogel, *Media Markets and*

investigating viewpoint diversity if, as they assert, the law “mandated empirical verification of convergence.”⁴⁶ Their unfortunate lack of citation for this claim is significant if it represents a willingness merely to assume a nonexistent legal mandate that, if it did exist, would require their expertise. Though various judicial statements, especially by the D.C. Circuit, and the courts’ general turn toward expecting more careful, often empirical justification of FCC regulatory policies are congenial to their characterization of the law, I can find no specific support for their claim that “measuring viewpoint diversity is . . . mandated by law.”⁴⁷

Likewise, their initial evidence for the legal and scholarly recognition that furthering viewpoint diversity is the “central animating assumption” or the “ultimate *end*” is a citation to a Supreme Court case and one of my articles.⁴⁸ The Court *did* invoke the concern with viewpoint diversity “as well as [an interest in] preventing undue concentration of economic power,” which in context should be read as related specifically to economic power in the media sphere.⁴⁹ But Ho and Quinn ignored the Court’s implicit approval of the FCC’s description of the public interest that did not mention viewpoint, but only source diversity—a concern with “diverse and *antagonistic sources*” and “the *power*” “ownership [gives] . . . to select [and] to edit,”⁵⁰—precisely the concerns with sources raised by the democratic distribution and safeguards values discussed in Part II. The Court even implied that source diversity might be integral to the proper *meaning* of diversity when it agreed that the FCC could reasonably

Localism: Does Local News en Español Boost Hispanic Voter Turnout? AM.ECON.REV (forthcoming 2009); Joel Waldfoegel, *Minority-Targeted Local Media and Voter Turnout: A Summary*, in PUBLIC CHOICE: FROM MEDIA MARKETS TO POLICYMAKING (forthcoming 2009). This point is more immediately a matter of fairness, related directly to the “democratic distribution value” described *supra*, Part II. Typical arguments for minority ownership make no presumption that actual diversity increases. This is because no consideration is given to whether the stations for which the minority stations are an alternative, (1) would duplicate the viewpoints or content of existing stations or (2) would, like minority-owned stations, diverge from other stations in the area although in ways that differ from the minority stations. The lack of concern with *this question* shows that the issue was more the normative issue of fairness than the descriptive matter of measurable diversity.

46. Ho & Quinn, *supra* note 1, at 794.

47. *Id.* at 800.

48. *Id.* at 788 (citing FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775 (1978); and C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733 (2005)).

49. FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. at 780 (emphasis added); *see also id.* at 784 (referring to both source and viewpoint diversity).

50. *Id.* at 785 (emphasis added) (internal quotations omitted). Curiously, when in relation to policy Ho and Quinn used the phrase, “diverse and antagonistic,” they transformed it to modify viewpoints, not *sources* as in the Court’s usage. *See* Ho & Quinn, *supra* note 1, at 784.

conclude that “it is unrealistic to expect *true* diversity from a commonly owned station-newspaper combination.”⁵¹ It continued with the observation that “[t]he divergency of their viewpoints cannot be expected to be *the same* as if they were antagonistically run.”⁵² Thus, although Ho and Quinn would be correct to say that the Court treated viewpoint diversity as relevant,⁵³ the Court equally noted other rationales and implicitly questioned whether common ownership was consistent with the idea of true diversity. Only someone already accepting their hypothesized rationale for ownership policy would be lead to find it “underpinning,” or at the heart of, the Court’s reasoning.

As for an emphasis on viewpoint diversity among scholarly advocates of regulation, their citation of my article is a non-starter. There, I criticized an excellent article, driven by free-market ideology, by Professor Christopher Yoo, for making the same mistake made by Ho and Quinn. The reason to oppose media concentration is *not* any predicted effect on reducing diverse content.⁵⁴ And despite Ho and Quinn’s belief that their findings “defy extant accounts,”⁵⁵ I noted that no theorist of whom I was aware believes that dispersal of ownership will always promote the availability of diverse content.⁵⁶ Certainly, evidence is weak for their attribution of such a belief in the convergence hypothesis to scholarly critics of media concentration.⁵⁷

In contrast to the benign explanation, a cynic might claim that increased emphasis on content or viewpoint diversity has paralleled the increased power of conservatives within policy and judicial circles and might suspect that this emphasis reflects the anti-regulatory advocates’

51. Nat’l Citizens Comm. for Broad., 436 U.S. at 797 (emphasis added) (quoting Amendment of Sections 73.34, 73.240, and 73.636 of the Comm.’s Rules Relating to Multiple Ownership of Standard, FM, and TV Broad. Stations, *Second Report and Order*, 50 F.C.C.2d 1046, para. 111 (1975)).

52. *Id.* at 797 (internal quotes and citations omitted) (emphasis added). That is, even if the total amount of viewpoint diversity stayed constant, the content of that diversity may change for the worse.

53. *Id.* at 786. However, perhaps the strongest statement supporting Ho and Quinn’s reading is found in *id.* at 814.

54. Baker, *supra* note 48, at 735; *see also*, BAKER, *supra* note 7, at 15-16.

55. Ho & Quinn, *supra* note 1, at 786, 860.

56. Baker, *supra* note 48, at 735.

57. In addition to citing my article for that belief, they later cite other scholars as invoking the convergence hypothesis, especially Stephen Wildman and Ben Bagdikian. Ho & Quinn, *supra* note 1, at 795. Wildman certainly understands the serious limitations of any convergence hypothesis. *See generally* BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (1992). Furthermore, Bagdikian’s book, even at the pages cited by Ho and Quinn, can be most accurately read to consistently advance versions of the points made in Part I above rather than relying on the convergence assumption as presented by Ho and Quinn. *See* BEN BAGDIKIAN, THE NEW MEDIA MONOPOLY (2004); *supra* Part II.

strategic choice of a battleground on which they have the greatest chance to win. They pick up on the term “diversity,”⁵⁸ popular among liberals ever since Justice Powell invoked the concept to replace equality or fairness as the only basis on which to defend affirmative action.⁵⁹ As would be fitting for market apologists, they then interpret diversity in commodified terms. Their choice is strategically wise since economic theory predicts, contrary to the assumption they *impute* to their (consequently misguided) pro-regulatory opponents, that ownership concentration often increases diversity in commodities. Unsurprisingly, the anti-regulatory advocates thereby win the argument on the grounds that they selected—at least once they persuade others (or, maybe merely the courts or the FCC) that more choice among commodities is the ultimate concern.

Nevertheless, I suspect that neither the benign nor the cynical explanation, even if each of them contains a grain of truth, tells the full story. I suspect that the mistake of focusing on viewpoint (or content) rather than source diversity—the latter being a more directly distributional value—primarily reflects economists’ occupational inclination to see value in what can be purchased in markets. That is, conceptually, economists tend to subscribe value primarily to subject/object or possessory relations. Commonly, value is measured by how much a person would pay for something in a real or hypothetical market—which leads to the fantasy that perfectly working markets provide what people want. This commodified-value focus is emphatically not logically required by the tools of economics. Still, I suspect a study would show that welfare economists having both a constant tendency in this direction and a corresponding bias in their resulting political recommendations—recommendations less concerned with distribution, with process, or even with shared expenditures on public goods (and, hence, recommendations often opposed to greater taxation) than would alternative orientations more connected to the humanistic and ethnographic disciplines. But this valuation focus is objectively misguided. Contrary to the (hypothesized) methodological view common among economists, much of what people value in life is subject/subject relations appropriate processes, fairness, non-commodified relations and publicly available and sharable aspects of their community.

Looking back at the three central reasons to oppose media concentration—democratic distribution, democratic safeguards, and quality media content—each reflects, in one way or another, values that are related

58. As Ho and Quinn note, diversity of some sort along with competition and localism have long been invoked by the FCC to guide its ownership policy, but they quickly put the other two concerns aside in emphasizing their particular interpretation of diversity as a “central animating assumption” behind FCC ownership policy. See Ho & Quinn, *supra* note 1, at 788.

59. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

more to people's life together than to the opportunity for efficient purchases in a market. A more egalitarian distribution of voice represents fairness in relations, not something sold in a market. Democratic safeguards—concern with risk or with conflicts of interest that corrupt deliberation—are similar process values. Consider the separation of power theme implicit in the “fourth estate” characterization of the press. Typical market measures provide no direct way to measure purported contributions of separation of powers and legislative bicameralism to improving democratic deliberations and to reducing risks to liberty. Though insurance sometimes provides an individualistic way to “monetize” some risks, intelligent structural design often offers a more appropriate procedure for responding to and reducing risk. Market-based, individually purchased insurance against the risk of the “public bad” of corrupted democratic processes is another non-starter. Focusing on individual purchases of media content is an overtly inept standard for whether that content—or the *process* of producing it—gives the community the right amount and the right type of protection against risks to the political order. Finally, arguments against a bottom-line, profit-maximizing focus and for policies directed at getting media in the hands of people who will not be ruled by it—arguments opaque to the simplistic focus on content or viewpoint diversity—follow only from recognizing the public goods, not simply commodity goods, produced by media content, that is, public goods that reflect our relations with each other.

An even deeper methodological matter may exist for which Ho and Quinn bear no responsibility. Public policies pursue values that are themselves based on reasons that are often contested. Interpretations of constitutions—my usual topic—or of values and their weight, even of facts, are always multiple. Determining the best interpretations—determining the issues at stake—inevitably depends on usually contestable values and reasons. Law aspires to legitimacy, which in turn ultimately is a matter of values and reasons, not a matter of deductive logic or fact or mere instrumental rationality. Scholarly attempts to avoid reliance on values, as opposed to descriptions and facts, are ubiquitous. Motivations for these attempts include a false image of science, an ingrained fearful desire of originally untenured academics to steer clear of controversy, an immature craving to escape uncertainty and indeterminacy,⁶⁰ or, I believe too often, a usually unconscious realization that one's own preferred outcomes are

60. I have been plausibly accused of this one. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). Though the critique has force, I gave reasons for my approach in C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985). On the importance of distinguishing uncertainty from indeterminacy, see RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (forthcoming 2009).

simply unsupportable in normative terms. If a person wishes to avoid these value arenas, the likely hope, even if it is analytically false in obscuring real issues, is for an escape to a haven of answer-determining facts or “objectivity” or instrumental logic. Hope, constitutionally, would lie in “original intent” rather than in owning up to a responsibility for defending exercises of power with reasons. Methodologically, constitutional law could place hope in “tests” that appear to turn on instrumental rationality rather than evaluations of the acceptability of government’s purposes. Policy analysts could place hope in public choice simplifications or in a criterion of efficiency that purportedly could give guidance, a fantasy pursued until dashed with the realization that efficiency is conceptually indeterminate.⁶¹

My suspicion is that the Court’s recent call for empirical evidence while avoiding explanations of how or why it is relevant,⁶² an avoidance which Ho and Quinn merely follow, and many law schools’ recent romance with statistical empiricism, following up on the Court’s earlier affair with welfare economics, reflects these impulses. These hopes of interpretative value avoidance and tendencies toward instrumentalist reductionism are malignant. Economics and empiricism are the easy parts of legal scholarship, appropriate only as handmaidens to its real vocation. Legal scholarship and inquiry, like all hermeneutic disciplines, though clearly in need of knowledge of the world, have traditionally been at their best when they understood themselves as value-based inquiries.

61. Cf. C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975).

62. *Turner Brdcst. Sys., Inc. v. FCC*, 512 U.S. 622 (1994). Cf. *id.* at 669 (Stevens, J. concurring in part and concurring in the judgment); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (1995).

