

# The Role of Theory and Evidence in Media Regulation and Law: A Response to Baker and a Defense of Empirical Legal Studies

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We thank Neal Ubriani for outstanding research assistance, and David Owens, Erica Ross, Tim Shapiro, and especially Mark Kelman for thoughtful comments. This work was supported by the National Science Foundation (SES 07-51834).

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## I. INTRODUCTION

We are grateful for Professor C. Edwin Baker's lively response to our article<sup>1</sup> and for the opportunity to clarify the important issues he raises, chiefly about the relationship between theory and evidence in media regulation specifically and law generally. We appreciate in particular his praise of our article's "innovative statistical techniques,"<sup>2</sup> given that our primary aim was to provide a new approach to empirically measure substantive viewpoint diversity. Our empirical measures and methods help to address long-standing questions about whether media consolidation leads to convergence in viewpoints (the "convergence hypothesis"). We are glad that Baker agrees that the article makes progress in the empirical understanding of the media and that it is "far superior methodologically to most empirical studies that [he] ha[s] seen."<sup>3</sup>

At the same time, Baker "denies the policy relevance"<sup>4</sup> of our article. At heart, Baker asserts that empirical evidence about viewpoint diversity is "entirely irrelevant"<sup>5</sup> to media regulation.<sup>6</sup> In the place of empirical

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1. See C. Edwin Baker, *Viewpoint Diversity and Media Ownership*, 61 FED. COMM. L.J. 651 (2009), responding to Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781 (2009).

2. *Id.* at 651.

3. *Id.* at 666.

4. *Id.* at 662.

5. *Id.* at 652 (emphasis omitted).

6. See also C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 19-20 (2007) (describing the "search for empirical evidence" as "misguided," claiming that "[o]ften positivist statistical evidence is simply irrelevant to the basic policy issues concerning media concentration," and asserting that "neither a Ph.D. nor

inquiry, we should conduct “value-based inquir[ies]”<sup>7</sup> (for example, in the form of the theory he espouses) and, he argues, “anecdotal tales of seriously objectionable past abuses by media moguls could be much more informative”<sup>8</sup> than statistical inquiry. As a result, Baker argues that the FCC should aim to maximize the *number of media owners* (“source diversity”), as opposed to “viewpoint diversity.”<sup>9</sup>

We write here to defend the role of empirical research in law, as well as the conclusions of our article. As we explain below, Baker’s view suffers from deep ambiguity and internal inconsistency, ignores the empirical turn in communications law, and adopts the extreme position that normative theory should displace what he calls “law schools’ recent romance with statistical empiricism [and] welfare economics,” which Baker views as “malignant” to the “hermeneutic discipline[]” of law.<sup>10</sup>

To clarify any confusion, Part I provides an overview of the contributions of our work and what we understand to be Baker’s position. Part II discusses points of agreement with Baker. Although our aim is not to address Baker’s unique normative theory, Part III briefly discusses some of its palpable vulnerabilities. Part IV demonstrates why viewpoint diversity matters from the perspective of the FCC and appellate case law, and discusses the irrefutable broader empirical turn in the law. We show that the categorical distinction, espoused by Baker, between “source diversity” and “viewpoint diversity” is nowhere recognized and is expressly rejected by current law. Part V shows the dangers of anecdotalism: Baker’s own reliance on “anecdotal tales”<sup>11</sup> refutes the position that empirical evidence is “entirely irrelevant”<sup>12</sup> and systematically undermines his criticisms of our article. Part VI addresses issues of how to reliably measure viewpoint diversity and the specific methodological critiques Baker raises. Part VII deals with the misreading of our normative prescriptions and ad hominem claims.

Most disconcerting is Baker’s call for anecdotal tales and normative theory to take the place of—and preclude any role for—empirical scholarship (as well as positive and economic theory) in law. We therefore conclude in Part VIII with broader implications for what we instead view as fruitful, synergistic, and interdisciplinary interplay between theoretical and empirical inquiry in law. Our original article was entirely in that

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an expensive study is needed to determine whether media mergers increase or decrease media ownership dispersal”).

7. Baker, *supra* note 1, at 671.

8. BAKER, *supra* note 6, at 21.

9. Baker, *supra* note 1, at 666.

10. *Id.* at 671.

11. BAKER, *supra* note 6, at 21.

12. Baker, *supra* note 1, at 652 (emphasis omitted).

pluralistic spirit, invoking legal analysis and social science, qualitative and quantitative evidence, and drawing positive and normative inferences. Empirical inquiry has the potential to resolve parts of public policy problems that would be irresolvable on normative grounds alone. Its promise is not endless—a point we expressly highlight in our article—but it surely is not “entirely irrelevant.”

## II. CLARIFYING THE MUDDLE

### A. *Our Contribution*

Our *Stanford Law Review* article<sup>13</sup> makes four contributions to the broad question of federal regulation of media ownership.

First, we document a trend that the FCC and numerous commentators have noted, namely the sharp empirical turn that the law on structural media ownership regulations has taken over the past twenty years.<sup>14</sup> The Telecommunications Act of 1996 (1996 Act) requires that the FCC periodically “determine whether any of such [ownership] rules are necessary in the public interest as the result of competition.”<sup>15</sup> Under arbitrary and capricious review (review as a matter of administrative—*not* constitutional—law), the courts have increasingly required the FCC to provide evidence of the convergence hypothesis, and the FCC responded in 2002 by commissioning an unprecedented number of empirical studies on the connection between ownership and viewpoint diversity.

Second, our article surveys existing work and highlights serious limitations to extant measures of viewpoint diversity.<sup>16</sup> For example, editorial endorsements of Democratic presidential candidates result in little variation between media outlets in a two-party system.<sup>17</sup> Alternatively, conventional reading and coding of “bias” of news articles (content analysis) can be fraught with lack of transparency and replicability,<sup>18</sup> as is widely acknowledged (indeed by Baker himself<sup>19</sup>).

Third, given limitations of existing empirical approaches, our major contribution is to provide a new, transparent, and replicable measure of editorial viewpoint diversity by capitalizing on rapid advances in statistical

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13. Ho & Quinn, *supra* note 1.

14. *See id.* at 789-98. We also documented the pressing need in media scholarship of measurement of substantive viewpoint diversity. *Id.* at 794-98.

15. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112.

16. *See* Ho & Quinn, *supra* note 1, at 798-810.

17. *See id.* at 809-10.

18. *See id.* at 803-05.

19. *See* BAKER, *supra* note 6, at 14 & 207 n.30.

measurement methodology.<sup>20</sup> Much like the concept of “intelligence,” the idea of a “viewpoint” is complex and cannot be readily observed in a direct fashion. Nonetheless, intelligence and viewpoints do have observable implications. In educational testing, the measurement of intelligence is commonly dealt with through standardized testing—most importantly, the administration of *common questions* to place students on a common scale. Our approach capitalizes on that insight to look for instances where newspapers opine on *common issues*, namely Supreme Court decisions. For over a year, with the help of a research team of fourteen Harvard and Stanford undergraduate and law students, we engaged in exhaustive data collection to collect every editorial written on Supreme Court decisions across twenty-five newspapers from 1988-2004, personally reading over 1,600 editorial positions in the process. Adapting finely-tuned statistical methods (to account for differences across Justices, outlets, questions, and time) allows us to scale the newspapers on a substantively meaningful dimension of the Supreme Court Justices and to examine the evolution of editorial viewpoints during mergers and acquisitions.

Our results show stability in viewpoints for three conglomerate acquisitions, convergence for the case of the merger of the *Atlanta Journal* and the *Atlanta Constitution* to form the *Atlanta Journal-Constitution*, and divergence for the *New York Times*'s acquisition of the *Boston Globe*.<sup>21</sup> In short, consolidation does not inexorably lead to convergence or divergence. Our article purposely adopts a broad view of empirical inquiry as encompassing both quantitative and qualitative research. Indeed, we devote an entire section of the article to an in-depth view of these two cases, drawing on a range of qualitative (e.g., detailed reading of editorials and phone calls with editors from every newspaper in our dataset) and quantitative (e.g., subscriber databases and census data) sources to complement our measures of viewpoint diversity and draw out complexities of these cases.<sup>22</sup>

Fourth, we provide brief, but specific, policy implications based on the difficulty of empirical inquiry. Appellate interpretation of the 1996 Act holds that, unless the FCC finds that an ownership regulation continues to serve the public interest (typically involving evidence of convergence), the FCC shall repeal or modify it. Our results point to a deep tension in this statutory reading between empirical justification and deregulation—the call for empirical verification subject to a high evidentiary standard may be tantamount to wholesale deregulation. Instead, *incremental* modification of

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20. See Ho & Quinn, *supra* note 1, at 810-24, 865-68; see also Daniel E. Ho & Kevin M. Quinn, *Measuring Explicit Political Positions of Media*, 3 Q. J. POL. SCI. 353 (2008).

21. See Ho & Quinn, *supra* note 1, at 833-41.

22. See *id.* at 841-60.

ownership regulations may better facilitate empirical evaluation while heeding appellate interpretation. We propose that the FCC collaborate with researchers to incorporate policy evaluation into regulation.<sup>23</sup> Lastly, our case studies also highlight the crucial roles of editorial policies, editorial board organizational structure, and critical distinctions between mergers and acquisitions.<sup>24</sup>

### B. Baker's Position

Baker's response comes in two sections. In the first (Part II), he restates in a substantially similar form to previous writings<sup>25</sup> his normative theory of media consolidation: "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 . . . ."<sup>26</sup>

The democratic distribution value posits that everyone should have an "equal voice" in the same fashion of the one person, one vote requirement familiar from election law. Under Baker's view this "lead[s] *inexorably* to the recommendation of a maximum dispersal of media power . . . . represented ultimately by ownership" so that "everyone [is] able to experience some media as her own."<sup>27</sup> "[I]ncreasing ownership dispersal *always* works in the direction of equalizing the distribution of media power among groups."<sup>28</sup>

The democratic safeguard value posits that ownership dispersal guards against the "danger of demagogic power."<sup>29</sup> Baker relies on a number of illustrations, largely from his other writings,<sup>30</sup> of the problems

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23. The argument has been cogently made as well in the philanthropic context. See PAUL BREST & HAL HARVEY, *MONEY WELL-SPENT: A STRATEGIC GUIDE TO SMART PHILANTHROPY* (2008).

24. See Ho & Quinn, *supra* note 1, at 860-64.

25. See BAKER, *supra* note 6; C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733 (2005).

26. Baker, *supra* note 1, at 653 (emphasis added).

27. *Id.* at 654 (emphasis added).

28. *Id.* (emphasis added and original emphasis omitted).

29. *Id.* at 655.

30. See BAKER, *supra* note 6, at 42 ("James Hamilton found that during November 1999, ABC's popular quiz show, *Who Wants to Be a Millionaire*, was mentioned in 80.2% of the local news programs on ABC affiliates. This compared with zero mentions on NBC network affiliates.") (internal quotations omitted); *id.* at 175 ("Reportedly, Knight-Ridder directed its cartoonists at both its *Miami Herald* and *Detroit Free Press* not to lampoon Attorney General Edwin Meese during the period before Meese exercised his discretionary authority to allow or disallow the *Free Press*'s proposed joint operating agreement with another Detroit paper."); *id.* at 38 ("President Nixon, wanting to retaliate against the *Washington Post* for breaking the Watergate story, famously planned difficulties for the Post's renewals of its broadcast licenses."); Baker, *supra* note 25, at 736 ("German

of media concentration: the support of a media conglomerate for Adolf Hitler; mentioning by news programs of an affiliate quiz show (*Who Wants to Be A Millionaire?*); pharmaceutical threats against the *New York Times* for exposés in affiliated magazines; Knight-Ridder's muting of *Miami Herald* editorial criticism of Edwin Meese due to pending approval of a joint operating agreement; Atlantic Richfield influencing editorial policy at the British *Observer*; and Richard Nixon's White House conversation about possible retaliation against the *Washington Post* via its broadcast licenses. Despite these illustrations, he concludes that "empirical measurement of the effect of interest conflicts is predictably uninformative"<sup>31</sup> as it would be difficult to observe such conflicts:

Any informed sense of the degree of danger will likely reflect a structural examination of the possibilities of and incentive 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.<sup>32</sup>

The media quality value stems from Baker's belief that "most conglomerates focus almost exclusively on the bottom line,"<sup>33</sup> which, he argues, uniformly undermines quality journalism. Since positive externalities of democratic deliberation and accountability flow from healthy media, Baker favors the following policy to promote 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.<sup>34</sup>

Because these three values (democratic distribution, democratic safeguard, and media quality) are, evidently, sufficient reasons "to oppose media concentration,"<sup>35</sup> Baker concludes that our empirical assessment of whether media consolidation reduces viewpoint diversity is entirely irrelevant.

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democracy did not benefit from Alfred Hugenberg's ability to use Germany's first media conglomerate to substantially contribute to Hitler's rise to power."); C. Edwin Baker, *Advertising and a Free Democratic Press*, 140 U. PA. L. REV. 2097, 2140 n.142 (1992) ("After the *New York Times*, which seldom carries medical advertising, ran a series of articles on medical malpractice that antagonized pharmaceutical firms, these firms threatened to withdraw 260 pages of ads from a medical magazine owned by the *Times*.").

31. Baker, *supra* note 1, at 658.

32. *Id.*

33. *Id.*

34. *Id.* at 661.

35. *Id.* at 669.

The second section of Baker's response (Part III) more directly addresses our article. First, Baker points to limitations in our study, namely that (a) news reporting "may be more significant for democratic discourse than [] editorial positions"<sup>36</sup>; (b) our study focuses only on the top twenty-five newspapers; (c) our study only contains "a sample of five mergers"<sup>37</sup>; and (d) "the relevant diversity should be qualitative, not simply quantitative."<sup>38</sup> He hypothesizes that in theory some local newspapers may see convergence in news, but divergence in editorial positions, upon merging.

Second, Baker argues that "[t]he democratic quality of discourse is not measured by the *amount* of diversity actually occurring"<sup>39</sup> but by three other factors: (1) that views are not suppressed, (2) that views are not subject to suppression, and (3) "that there are meaningful efforts to develop relevant information and perspective."<sup>40</sup>

Lastly, Baker argues that the "problem" with our article "lies in its potentially misdirecting policy discussion by purporting to give an empirical but actually irrelevant basis for deregulation."<sup>41</sup> He ruminates at great length as to whether our "error of not considering the real reasons to oppose concentration . . . is explicable."<sup>42</sup> He hypothesizes: (1) that we were "misled" by "the confusion of other scholars and of the FCC itself,"<sup>43</sup> (2) that we are "anti-regulatory advocates[] strategic[ally], . . . pick[ing] up on the term 'diversity'" and "then interpret[ing it] in commodified terms" in order to move the discussion to "a battleground on which [we] have the greatest chance to win,"<sup>44</sup> and/or (3) that our error reflects "economists' occupational inclination to see value in what can be purchased in markets . . . and a corresponding bias in [our] resulting political recommendations."<sup>45</sup>

Most broadly, he argues that "[l]aw 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"<sup>46</sup> and that our major methodological error may stem from, amongst other reasons, "a false

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36. *Id.* at 662.

37. *Id.* at 664. To be precise, we examined all mergers and acquisitions in the time period and in the sample of twenty-five newspapers, including three classes of transactions (not five mergers): mergers, direct acquisitions by other newspapers, and acquisitions by a conglomerate group. We address the false claim about sample size below.

38. *Id.*

39. *Id.* at 665.

40. *Id.*

41. *Id.* at 666.

42. *Id.*

43. *Id.*

44. *Id.* at 668-69.

45. *Id.* at 669.

46. *Id.* at 670.

image of science, an ingrained fearful desire of originally untenured academics to steer clear of controversy,” or “an immature craving to escape uncertainty and indeterminacy.”<sup>47</sup> His conclusion is sweeping:

[T]he Court’s recent call for empirical evidence while avoiding explanations of how or why it is relevant . . . and many law schools’ recent romance with statistical empiricism, following up on the Court’s earlier affair with welfare economics, reflects these impulses [to avoid value judgments]. These hopes of interpretive 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.<sup>48</sup>

Given these provocative arguments, which indict the entirety of welfare economics and empirical legal studies in a few brushstrokes, we are compelled to respond.

### III. WHERE WE AGREE

Notwithstanding the colorful rhetoric—relegating economics and empiricism as “only [] handmaidens” to legal scholarly inquiry—we share at least three key agreements with Baker.

First, what Baker terms the “democratic safeguard value” is an important and relevant underlying consideration in media regulation. As we squarely acknowledged in our article, the media plays an important role in the functioning of a healthy democracy.<sup>49</sup> Yet one primary way the FCC has incorporated this concern is precisely via viewpoint diversity: diverse viewpoints foster democratic deliberation and, at least in theory, ultimately, accountability.<sup>50</sup> We agree that policymakers should carefully evaluate the

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47. *Id.*

48. *Id.* at 671.

49. Baker charges that our citation of his article “is a non-starter.” *Id.* at 668. While he does not view ownership regulations as a means to foster viewpoint diversity, we cited to his work for the emphasis on “broad democratic goals of an informed citizenry, deliberation, and accountability.” Ho & Quinn, *supra* note 1, at 788. In any case, this point is a red herring, as Baker plainly misreads the law in asserting that source diversity is recognized as an independent objective to the exclusion of viewpoint diversity. *See infra* notes 60-73 and accompanying text.

50. *See, e.g.,* 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, para. 16 (2003) [hereinafter *2002 Biennial Order*] (animating analysis of viewpoint diversity by the fact that a “diverse and robust marketplace of ideas is the foundation of our democracy”). Even though he dissented from the FCC’s decision, Commissioner Adelstein argued in his dissent:

It violates every tenet of a free democratic society to let a handful of powerful companies control our media. The public has a right to be informed by a *diversity*

risk to democracy posed by potential changes of federal communications law. Nonetheless, our more modest aim was to respond to the recent empirical demands of media law and scholarship. Further, as we elaborate below, most such careful risk evaluations will likely contain an important empirical component.

Second, many aspects of media output beyond editorial positions of the top twenty-five newspapers are relevant. None of these are new concerns that Baker raises. Our article was entirely clear about these limitations and sought to *improve* on existing empirical work. We explained: “because we only examine major newspapers, our measures may ignore the types of newspapers whose viewpoints are most threatened by media consolidation” and “our focus on editorial positions ignores news reporting.”<sup>51</sup> Of course, convergence in the top newspapers is still of interest—indeed, three of Baker’s illustrations of democratic safeguards revolve around top newspapers (each in our dataset): the *New York Times*, the *Washington Post*, the *Detroit Free Press*, and the *Miami Herald*.<sup>52</sup> As to news, methods similar to ours may be adapted to study news reporting, and we show below—and in other work—that editorial viewpoints are strongly correlated with news slant.<sup>53</sup> Our focus on editorial viewpoint diversity is a direct response to the fact that both scholars and the Commission have pointed out editorials as relevant.<sup>54</sup>

Third, we agree with a weak version of Baker’s concern, namely that we must recognize the limitations of empirical inference. Our article went on at great length to highlight the difficulties of direct policy evaluation of the ownership rules. Given that there is little variation in ownership regulations, it is extremely difficult to directly assess the causal effect of

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*of viewpoints*, so they can make up their own minds. Without a diverse, independent media, citizen access to information crumbles, along with political and social participation. For the sake of our democracy, we should encourage the widest possible dissemination of free expression through the public airwaves.

2002 Biennial Regulatory Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Statement of Comm’r Jonathan S. Adelstein, Dissenting*, 2003 WL 21251887, at \*5 (June 2, 2003) (emphasis added) [hereinafter *Adelstein 2002 Biennial Order Dissent*].

51. Ho & Quinn, *supra* note 1, at 827.

52. See Baker, *supra* note 1, at 656-57.

53. See *infra* Part VII.C; Ho & Quinn, *supra* note 20.

54. See, e.g., Ho & Quinn, *supra* note 1, at 811-12 n.128 (documenting FCC orders invoking editorial viewpoint diversity); see also BEN H. BAGDIKIAN, THE NEW MEDIA MONOPOLY 139-40, 197, 201-02 (2004); ROBERT M. ENTMAN, DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS 198 n.6 (1989); Alexander Halavais, *Convergence of Newspaper Election Coverage: 1992 to 2000*, in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 97 (Philip M. Napoli ed., 2008); Philip J. Weiser, *The Ghost of Telecommunications Past*, 103 MICH. L. REV. 101, 120 n.50 (2006).

these regulations.<sup>55</sup> Yet the fact that empirical inquiry is limited does not mean that it is worthless. To the contrary, across disciplinary fields, empirical inquiry has advanced scholarship and produced tremendous knowledge, which surely explains in part the enthusiasm—not shared by Baker—about empirical legal studies.<sup>56</sup>

While we agree on these three major points, Baker's response goes astray in numerous directions.

#### IV. A VULNERABLE THEORY

The first part of Baker's response, which rehashes in substantially identical form (and with the same examples) the theory already spelled out in his book and another article,<sup>57</sup> is entirely outside the scope of our work. He views his unique normative theory as the *sufficient* reason to oppose media consolidation. Since the theory, at least according to Baker, has no observable implications, and cannot be proven wrong with data, we do not dwell on it here.

We merely note that it is difficult to have a complete theoretical answer in an empirical vacuum. One could easily question the theoretical grounds: does the theory provide any way to draw the tradeoff between benefits and costs of ownership regulations when his theory provides only reasons to *oppose* media consolidation? Does the theory provide any sense of when ownership regulations may be too great when federal law could mandate, for example, that every single individual should own a broadcast station? How does the democratic distribution analogy to one person, one vote operate when social choice theory highlights the difficulties of preference aggregation, which could similarly plague aggregation of voices

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55. See John J. Donohue III & Daniel E. Ho, *The Impact of Damage Caps on Malpractice Claims: Randomization Inference with Difference-in-Differences*, 4 J. EMPIRICAL LEGAL STUD. 69 (2007); John J. Donohue III & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Daniel E. Ho, et al., *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANAL. 199 (2007); Paul W. Holland, *Statistics and Causal Inference*, 81 J. AM. STAT. ASS'N 945 (1986); Jeff Strnad, *Should Legal Empiricists Go Bayesian?*, 9 AM. L. ECON. REV. 195 (2007).

56. See, e.g., Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983); Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741 (2004); Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807 (1999); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students To Fail the Bar*, 114 YALE L.J. 1997 (2005); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989); see also IAN AYRES, *SUPER CRUNCHERS* (2007).

57. See Baker, *supra* note 25.

by media outlets?<sup>58</sup> Moreover, why doesn't the analogy to election law undercut the notion that empirical evidence is "irrelevant" when election law commonly deals with evidence of vote dilution, fraud, and the effects of electoral rules?<sup>59</sup> How are the value of democratic distribution and the policy implication of maximum dispersal of media power not a matter of tautology when valuing equal voices "inexorably" leads to more owners of media? It is one matter to state values and another to see how to achieve them—how does Baker's view avoid conflating ends and means?

Although the theory may not be vulnerable to empirical verification, it is vulnerable to each of these deep theoretical ambiguities. We leave it for others to resolve the persuasiveness of these claims.

Our article sought to examine what empirical evidence exists for the convergence hypothesis with a reliable and valid measure of editorial viewpoints, responding directly to the empirical turn in the law and scholarship. We thereby address why systematic empirical inquiry into viewpoint diversity matters and respond to Baker's specific assertions about our article.

## V. WHY VIEWPOINT DIVERSITY MATTERS

### A. *The FCC and the Courts*

One of the fundamental misconceptions, Baker argues, is our focus on substantive viewpoint diversity. Instead, he argues, "[m]any 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."<sup>60</sup> By source diversity, Baker means the number of owners.<sup>61</sup> In focusing on

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58. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970); Richard D. McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 *ECONOMETRICA* 1085 (1979); Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 *J. ECON. THEORY* 472 (1976).

59. See, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1063-68 (rev. 2d ed. 2002); GARY KING, *A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM* 7-17 (1997); Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 *HARV. L. REV.* 1737 (2008); James D. Greiner, *Ecological Inference in Voting Rights Act Disputes: Where are We Now, and Where do We Want to Be?*, 47 *JURIMETRICS* 115 (2007); Daniel E. Ho & Kosuke Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: California Alphabet Lottery, 1978-2002*, 72 *PUB. OPIN. Q.* 216 (2008); Spencer Overton, *Voter Identification*, 105 *MICH. L. REV.* 631 (2007); Daniel L. Rubinfeld, *Statistical and Demographic Issues Underlying Voting Rights Cases*, 15 *EVALUATION REV.* 659 (1991).

60. Baker, *supra* note 1, at 666 (emphasis added).

61. See BAKER, *supra* note 6, at 15 (defining source diversity as "effectively ownership dispersal").

viewpoint diversity, he argues, we “overread[]” sources and are “misled” by “the confusion of other scholars and of the FCC itself.”<sup>62</sup>

As support for the idea that source diversity is not a means to viewpoint diversity, he cites to a 1970 FCC Multiple Ownership Order<sup>63</sup> (despite the “confusion of . . . the FCC”) and the Supreme Court’s 1978 decision in *FCC v. National Citizens Committee for Broadcasting (NCCB)*.<sup>64</sup>

This view suffers from two fatal flaws.

First, neither the 1970 Multiple Ownership Order nor the *NCCB* case support the idea that source diversity is to be valued independently—or to the exclusion—of viewpoint diversity. From the 1970 Multiple Ownership Order, Baker selectively quotes the FCC (and omits the last portion of the sentence, relevant since it highlights what was at least perceived as a natural limit in broadcast spectrum): “A proper objective is the maximum diversity of ownership that technology permits in each area.”<sup>65</sup> Although that language might suggest source diversity, the same order goes on to say the following:

Although the *principal purpose of the proposed rules is to promote diversity of viewpoints* in the same area, and it is on this ground that our above discussion is primarily based, we think it clear that promoting diversity of ownership also promotes competition . . . .

. . . . Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership *in order to maximize diversification of program and service viewpoints* as well as to prevent any undue concentration of economic power contrary to the public interest.<sup>66</sup>

From the *NCCB* case, Baker admits that the Supreme Court highlighted viewpoint diversity, but argues that the Court also recognized source diversity when it noted the interest in “preventing undue concentration of economic power.”<sup>67</sup> This language itself is vague and does not necessarily implicate source diversity, but more telling is Justice Marshall’s discussion for the majority, which at each juncture connects ownership with viewpoint diversity:

[The FCC’s] policy judgment was certainly not irrational and indeed was founded on the very same assumption that underpinned the

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62. Baker, *supra* note 1, at 666.

63. Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *First Report and Order*, 22 F.C.C.2d 306 (1970) [hereinafter *1970 Multiple Ownership Order*].

64. 436 U.S. 775 (1978).

65. *1970 Multiple Ownership Order*, *supra* note 63, at para. 21.

66. *Id.* at paras. 25, 28 (emphases added).

67. See Baker, *supra* note 1, at 667 (quoting *FCC v. NCCB*, 436 U.S. at 780).

diversification policy itself and the prospective rules upheld by the Court of Appeals and now by this Court—that the greater number of owners in a market, the greater the possibility of *achieving diversity of program and service viewpoints*.<sup>68</sup>

Second, even disregarding the 1970 Multiple Ownership Order and *NCCB*, what is most telling is that Baker fails to discuss any authority within the last twenty years for the primacy of source diversity. Indeed, that would be difficult, as the courts and FCC could not be clearer. In its 2002 Biennial Order, the FCC states:

The Commission has sought, therefore, to diffuse ownership of media outlets among multiple firms in order *to diversify the viewpoints* available to the public . . . .

. . . .

. . . We therefore continue to believe that broadcast ownership limits are necessary *to preserve and promote viewpoint diversity*.

. . . .

“Source diversity” refers to the availability of media content from a variety of content producers. The *Notice* explained that *source diversity can contribute to our ‘retail’ goals of viewpoint diversity and program diversity*. . . .

The record before us does not support a conclusion that source diversity should be an objective of our broadcast ownership policies.

. . . .

The Commission adopted the newspaper/broadcast cross-ownership rule because it believed that diversification of ownership would promote diversification of viewpoint.<sup>69</sup>

In short, the FCC explicitly rejected Baker’s position that source diversity is an independent objective.

As we stated in our article, the conventional justification for the ownership regulations is as “a *means* to the ultimate *end* of furthering substantive viewpoint diversity.”<sup>70</sup> Similarly, the D.C. Circuit noted in a series of cases:

The only support the Commission offered for regulation based on this possibility was the idea that every additional chance for a programmer to secure access *would enhance diversity*.<sup>71</sup>

The stated purpose of the seven-station rule was ‘to promote diversification of ownership *in order to maximize diversification of*

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68. *FCC v. NCCB*, 436 U.S. at 814 (emphasis added).

69. 2002 *Biennial Order*, *supra* note 50, at paras. 20, 27, 42-43, 355 (all emphases added).

70. Ho & Quinn, *supra* note 1, at 788.

71. *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (emphasis added).

*program and service viewpoints*' and 'to prevent any undue concentration of economic power.'<sup>72</sup>

The only recent evidence Baker alludes to is from comments filed by the public in the 2002 Biennial Review, which he conjectures may have been animated by concerns about source diversity. Of course, what was in the mind of each of some 500,000 plus parties filing comments is a matter of pure speculation. Suffice it to say that Commissioner Adelstein, who dissented from the 2002 Biennial Order and highlighted the comments, notes the importance of viewpoint diversity when stating that "[t]he public has a right to be informed by a *diversity of viewpoints* so they can make up their own minds."<sup>73</sup>

Baker's sharp separation of source and viewpoint diversity is an artifact of his own normative theory and has no basis in current law.

### B. *The Empirical Turn of the Law*

Beyond asserting the irrelevance of viewpoint diversity, Baker argues that our statement that "[c]ourts and in turn the Commission have increasingly mandated some form of empirical evidence"<sup>74</sup> is a claim with "unfortunate lack of citation" that may "represent[] a willingness merely to assume a nonexistent legal mandate that . . . would require [our] expertise."<sup>75</sup> Indeed, he concludes, "I can find no specific support for their claim that 'measuring viewpoint diversity is . . . mandated by law.'"<sup>76</sup>

Such a charge is severe. But it plainly misreads the thrust of our article, which had an entire section devoted to the empirical turn in the law of media, documented by dozens of references with copious discussion of the case law.<sup>77</sup> We showed that starting with cases such as *Schurz Communications, Inc. v. FCC*,<sup>78</sup> *Time Warner Entertainment Co. v. FCC*,<sup>79</sup>

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72. *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1034 (D.C. Cir. 2002) (emphasis added).

73. *Adelstein 2002 Biennial Order Dissent*, *supra* note 50, at \*5 (emphasis added).

74. *Ho & Quinn*, *supra* note 1, at 790.

75. *Baker*, *supra* note 1, at 667.

76. *Id.*

77. *See Ho & Quinn*, *supra* note 1, at 789-94.

78. 982 F.2d 1043, 1054-55 (7th Cir. 1992) (faulting the FCC for making "no attempt to explain how" "restrictions on network participation in programming . . . promote diversity").

79. 240 F.3d 1126 (D.C. Cir. 2001). In this case, the court noted:

The interests asserted in support of the horizontal and vertical limits are the same interrelated interests that we found sufficient to support the statutory scheme in *Time Warner I*: the promotion of diversity in ideas and speech and the preservation of competition. After a review of the legislative history, we concluded that Congress had drawn reasonable inferences, based upon substantial evidence, that increases in the concentration of cable operators threatened diversity and competition in the cable industry. But the FCC must still justify the

*Fox TV Stations, Inc. v. FCC*,<sup>80</sup> *Sinclair Broadcast Group, Inc. v. FCC*,<sup>81</sup> and culminating in the *2002 Biennial Order*,<sup>82</sup> courts and the FCC have increasingly required evidence to sustain the convergence hypothesis, instead of deferring as the *NCCB* court did several decades earlier.<sup>83</sup>

Little else would account for why the FCC, in an unprecedented fashion, commissioned twelve empirical studies on localism and diversity in its 2002 biennial review, specifically seeking comment on “whether th[e] longstanding presumed link between ownership and viewpoint could be established empirically,”<sup>84</sup> and affirmatively stating in that context that “[t]o fulfill our biennial review obligation, we will first define our goals

limits that it has chosen as not burdening substantially more speech than necessary. In addition, in demonstrating that the recited harms are real, not merely conjectural, the FCC must show a record that validates the *regulations*, not just the abstract statutory authority.

*Id.* at 1130 (internal quotations and citations omitted).

80. 280 F.3d 1027 (D.C. Cir. 2002). In this case, the court noted:

In the 1984 Report, however, the Commission said it had no evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionally more of their revenues on local programming. . . .

. . . Although we agree with the Commission that protecting diversity is a permissible policy, the Commission did not provide an adequate basis for believing the Rule would in fact further that cause. . . .

. . .

. . . [W]e cannot say with confidence that the Rule is likely irredeemable because the Commission failed to set forth the reasons – either analytical or empirical – for which it no longer adheres to the conclusions in its *1984 Report*.

*Id.* at 1043-44, 1048 (internal quotations omitted).

81. 284 F.3d 148, 163-64 (D.C. Cir. 2002) (reviewing empirical evidence from Roper survey and Commission’s annual report and finding arbitrary and capricious the Commission’s exclusion of non-broadcast media even “in the absence of definitive empirical studies quantifying” substitutability of media in local markets); *cf. id.* at 169-70 (Sentelle, J., concurring and dissenting in part) (“Purporting to promote diversity does not give the agency a free pass. . . . As Commissioner Furchtgott-Roth argued in dissent . . . the amorphously-defined goal of diversity, and the assumption upon which it rests, have not been clearly articulated or supported by empirical facts.”) (internal quotations omitted).

82. *2002 Biennial Order*, *supra* note 50, at para. 364 (“In order to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias.”).

83. *FCC v. NCCB* is the only case Baker discusses, *see Baker*, *supra* note 1, at 667-68, but of course the very point of our article was to show that the law has changed considerably since the Court’s deference to the FCC, with the precise contours of evidence required of course depending on the case. *See Ho & Quinn*, *supra* note 1, at 790 (“While the *NCCB* court’s deference to the Commission’s expertise was par for the course for the better half of the lifespan of ownership regulations, the tide has turned over the past two decades.”). It is also not the case that the shift has not been animated by the Supreme Court. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65, 667-68 (1994); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 187, 200-03, 207-08, 213 (1997); *see also Prometheus Radio Project v. FCC*, 373 F.3d 372, 398-400 (3d Cir. 2004).

84. *2002 Biennial Order*, *supra* note 50, at para. 21.

and the ways we will *measure* them.”<sup>85</sup> Moreover, it would be a strange position for the courts and the FCC *not* to mandate at least some evidence. After all, the public interest determination under the 1996 Act has to be made every few years. If we are to rely exclusively on normative theory, as Baker desires, what could possibly change every few years about the values (and not evidence) of media quality and democratic distribution and safeguards? When the Commission makes a policy determination to rescind the newspaper/broadcast cross-ownership rule—adopted initially “because it believed that diversification of ownership would promote diversification of viewpoint”<sup>86</sup>—some record evidence must sustain the policy determination under standard administrative law principles.<sup>87</sup>

Indeed, our description of the empirical turn in the law would be hard to refute. Describing none other than Baker’s position, Christopher Terry and Professors David Pritchard and Paul Brewer note that “[s]ome advocates of strict limits on media cross-ownership argue that this kind of empirical evidence is ‘simply irrelevant’ to media ownership policy, but even they acknowledge that *the FCC and the courts require such evidence*.”<sup>88</sup> They, in turn, refer to the following passage by Baker: “Recently in the media context, some courts and some policy makers *routinely ask for empirical evidence* to support governmental policies. . . . [The] request for more evidence emboldened some lower courts to strike down sensible media laws and regulations for *lack of the empirical support* that some individual judges wrongly believed relevant to *constitutional legitimacy*.”<sup>89</sup> This language may also reveal where Baker misconceives the case law: evidence is not required as a matter of constitutional (First Amendment) law, but rather as a matter of administrative law: namely, the Court’s application of arbitrary and capricious review.<sup>90</sup>

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85. *Id.* at para. 17 (emphases added).

86. *Id.* at para. 355.

87. See *Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto. Co.*, 463 U.S. 29 (1983); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

88. David Pritchard, Christopher Terry & Paul R. Brewer, *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*, 13 COMM. L. POL’Y 1, 23 (2008) (emphasis added) (citing BAKER, *supra* note 6, at 19-20).

89. BAKER, *supra* note 6, at 19-20 (emphasis added).

90. Alternatively, Baker may simply be drawing a semantic difference of whether the courts “mandate,” “require,” or “ask” for such evidence. See Baker, *supra* note 1, at 666-67. There are at least three problems with this view. First, nothing turns on this difference: our point in the article was about the broader empirical turn of communications law, which no one disputes. One could substitute “require” for “mandate” and nothing substantive would change. Second, the public interest determination under the 1996 Act is not precatory. While one could say that the Congress “asked” the FCC to make a public interest determination, such a determination is “required” or “mandated” by law. Third, one can argue that appellate courts haven’t mandated evidence *per se*, since the FCC can invoke theory alone (and be reversed). But the thrust of arbitrary and capricious review is that the FCC must

Lastly, Baker does not appear to distinguish between types of evidence (e.g., qualitative and quantitative empirical evidence). The Supreme Court in *Turner* remanded for more development of evidence *per se*,<sup>91</sup> and Baker equates this with “empirical evidence.”<sup>92</sup>

Whether the empirical turn is normatively desirable is a different matter—a tension explicitly addressed in our discussion of policy implications—but Baker misunderstands our *positive* description of the empirical turn in the law, one which is resoundingly echoed in assessments by media scholars (and, strangely, by Baker himself elsewhere).<sup>93</sup>

## VI. THE DANGERS OF ANECDOTALISM

Given that evidence as to viewpoint diversity plays a central role in media regulation, how do we know what inference the evidence sustains? The key is that the process of gathering evidence has to be articulated. Such formalization of the research process is a chief virtue of well-conducted empirical studies. Our article, for example, articulated each step of the research process, making it transparent how the data was acquired, how observations were chosen, and thereby what inferences could be drawn.<sup>94</sup>

By contrast, Baker’s selective use of a handful of “anecdotal tales,” which he argues are more informative than statistical inquiry,<sup>95</sup> violates basic rules of inference and fails the fundamental research standard of replicability. Key questions go unanswered about the case he provides to illustrate the democratic safeguard concern: what’s the population of units to which he is drawing inferences? How were the cases chosen? By what process were they observed? How could his theory be falsified?

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draw reasonable inferences from the facts in the record. Saying that courts don’t mandate evidence *per se* is akin to saying that courts don’t mandate that you don’t steal *per se*, since you can steal and incur a penalty.

91. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-65, 667-68 (1994).

92. See BAKER, *supra* note 6, at 19 & 208 n. 43 (describing *Turner Broadcast Systems, Inc.* as “ask[ing] for empirical evidence”).

93. See, e.g., Mark Cooper, *When Law and Social Science Go Hand in Glove: Usage and Importance of Local and National News Sources—Critical Questions and Answers for Media Market Analysis*, in MEDIA DIVERSITY AND LOCALISM, *supra* note 54 (describing *Sinclair Broadcasting* as “demand[ing] that the [FCC] close an empirical gap in its analysis of media markets”); Robert Horwitz, *On Media Concentration and the Diversity Question*, in MEDIA DIVERSITY AND LOCALISM, *supra* note 54 (describing how the D.C. Circuit in a series of cases required “the FCC . . . to defend its rules with evidence”); Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 378-79 (2006) (“The courts reinforced Congress’ mandate by refusing to allow rules to stand absent an administrative record containing unambiguous, convincing evidence, not just theory, that a rule is needed.”).

94. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

95. BAKER, *supra* note 6, at 21.

We recognize that Baker, on one level, does not aspire to put forth a falsifiable theory. However, the deep tension is that his normative theory is laden with empirical propositions for which Baker offers only single cases as illustrations. Baker dismisses empirical studies for the following reasons:

Caution . . . 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 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.<sup>96</sup>

Each of these methodological challenges presents a valid concern, but applies *a fortiori* to the selective use of empirical examples by unarticulated criteria. When drawing a reliable inference from evidence it is no defense to say that the evidence is qualitative: basic rules of inference apply.<sup>97</sup> To illustrate these points, we discuss several of Baker's cases and show the danger of drawing inferences from anecdotal tales alone.

#### A. *Who Wants to Be A Millionaire?*

To illustrate how conglomerate ownership concentration can undermine journalistic integrity, Baker points to a study by economics Professor James Hamilton that ABC's affiliates mentioned the show *Who Wants to Be a Millionaire?* in over 80 percent of local news programs while no NBC affiliate found the ABC program newsworthy.<sup>98</sup>

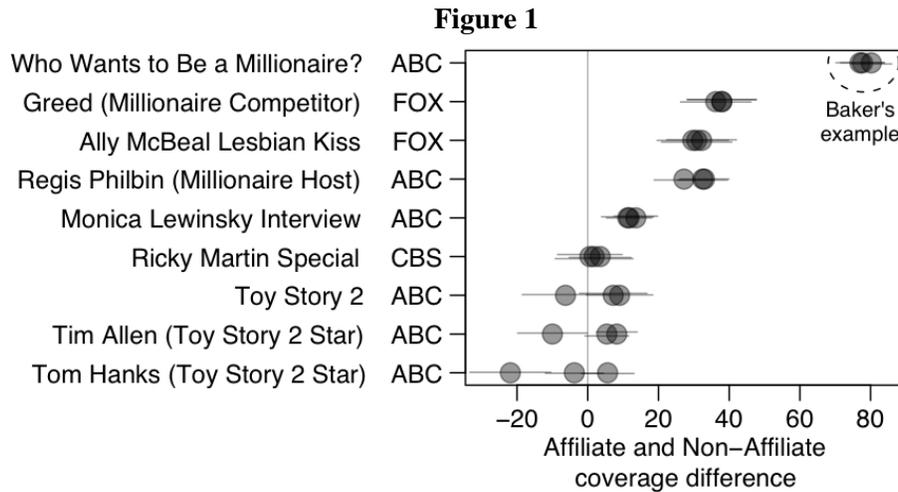
While this case appears indicative of network self-promotion, Baker—unlike Hamilton—tells us nothing about how he chose this case. Hamilton actually examined several instances of soft news, such as the reporting by network affiliates of *Toy Story 2*, an episode involving a lesbian kiss on *Ally McBeal*, and an interview by Barbara Walters of Monica Lewinsky promoting her book. Figure 1 shows all of the data that Hamilton gathered in this analysis, with each dot representing the difference between proportions of times an entertainment or celebrity story was mentioned on an affiliate versus a non-affiliate station. The figure demonstrates that Baker singled out the extreme outlier that happened to be consistent with his views.

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96. Baker, *supra* note 1, at 666.

97. See GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY* (1994).

98. See JAMES T. HAMILTON, *ALL THE NEWS THAT'S FIT TO SELL* 145-49 (2004).



**Figure 1:** Difference in the proportion of news programs mentioning various entertainment and celebrity stories between network affiliate and non-network affiliate. For example, the dots on the top right, which Baker discusses, represent the fact that the ABC quiz show, *Who Wants to Be a Millionaire?*, was mentioned in 80% of local news programs on ABC affiliates compared to 0% on non-affiliates. Horizontal lines represent 95% confidence intervals. The vertical line depicts the origin. This figure shows that Baker picks the largest outlier amongst given cases, which happens not to involve conglomerate promotion. In contrast, the case of conglomerate promotion, namely ABC's mentioning of Disney's *Toy Story 2* and its stars, Tim Allen and Tom Hanks, is not distinguishable from non-affiliate news mentions.

Worse, Baker has not articulated how *Millionaire* is even relevant to his theory of democratic safeguards and how it exemplifies that conglomerate ownership undermines journalistic integrity. First, only one of the cases studied by Hamilton—*Toy Story 2*—is about conglomerate ownership (involving Disney and ABC), and that case does not support the claim that conglomerate ownership influences soft news coverage. The observations are centered around the origin, indicating indistinguishable coverage rates by affiliates and non-affiliates of *Toy Story 2* or its stars, Tim Allen and Tom Hanks. (Note that these cases are not independent—three involve *Millionaire* and three involve *Toy Story 2*—so there is much less information than there may seem to be in Figure 1.)

Second, is network self-promotion about *Millionaire* or Ally McBeal's kiss truly relevant to the grave concerns about democratic deliberation and legitimacy? As we argued, one of the major benefits of empirical measurement is that it forces scholars to conceptualize more concretely what is meant by complex concepts, such as viewpoint diversity

and distortion of journalism. Reasonable people may disagree as to whether the evening news lead-in (e.g., “Coming up next: *Millionaire*”) is innocuous, but measurement itself clarifies what we mean by quality of journalism. Lastly, if they are relevant, that comes into tension with the position that the costs to concentration cannot be measured.<sup>99</sup>

*B. Conglomerate Support of Fascism*

To illustrate how the “existence of . . . concentrated power within the public sphere creates a real danger of abuse,”<sup>100</sup> Baker points to a sobering example of the first German media conglomerate’s support of Adolf Hitler. “No democracy should accept that risk” of “abuse of the concentrated power implicit in conglomerate media ownership,”<sup>101</sup> and ownership regulations, he argues, would guard against such atrocious outcomes of fascism. As we stated, we agree with the underlying concern of democratic safeguards. Yet Baker also appears to make an empirically falsifiable claim when he states that “at least since the first major German media conglomerate supported the rise of Hitler, various countries . . . have experienced demographic abuse of the concentrated power implicit in conglomerate media ownership,” namely that conglomerate media outlets are more likely to support the abuse of power or fascism.<sup>102</sup>

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99. See Baker, *supra* note 1, at 658.

100. *Id.* at 655.

101. *Id.* (original emphasis omitted).

102. *Id.*

Table 1

	Media Outlet	Circulation	Conglomerate	Supported Hitler
Baker's case	Hugenberg outlets	Millions	Yes	Yes
Other cases	<i>Leipziger Neueste Nachrichten</i>	170,000	No	Yes
	<i>Deutsche Allgemeine Zeitung</i>	< 100,000	No	Yes

**Table 1:** Illustration of case selection for Baker's conglomerate-fascism hypothesis. Baker's case is that of Hugenberg's media conglomerate supporting Hitler. Two other cases might suggest that support for Hitler is unrelated to conglomerate status or, alternatively, circulation. This table illustrates the key principle that case selection criteria must be articulated to draw an inference.<sup>103</sup>

Unfortunately, we are given little information about the single example he provides (what sources he consulted, what other cases he considered, etc.). What if the only example provided was one of a small, non-conglomerate newspaper supporting Hitler? Would that support the contrary theory? A cursory examination of German media history reveals much more evidence by which one can assess the validity of this conglomerate-fascism connection, as many more newspapers existed. The fact that the *only* conglomerate supported Hitler may be due to pure chance alone, especially if newspaper support of Hitler was widespread. Table 1 shows that two non-conglomerate German newspapers, the *Leipziger Neueste Nachrichten* and the *Deutsche Allgemeine Zeitung*, also supported Hitler. This might weaken the inference that conglomerate status affected fascist support. Of course, drawing an inference about conglomerates when only one exists is fraught with peril.

The fascism theory may have another observable implication: if concentration matters, perhaps circulation should be associated with support of Hitler. Table 1 shows that across three newspapers with small, medium, and large circulation, the lack of correlation remains the same. Of course, we have not said anything about how these cases were chosen. And that is precisely the point. With more data, representative of a population, we might be able to examine the validity of Baker's hypothesis. The Hugenberg case illustrates the failure to heed basic principles of inference:

103. See 1 ANTONIO GRAMSCI, PRISON NOTEBOOKS 275 (Joseph A. Buttigieg ed., Joseph A. Buttigieg & Antonio Callari trans., Columbia University Press 1992) (1975); DANIEL C. HALLIN AND PAOLO MANCINI, COMPARING MEDIA SYSTEMS: THREE MODELS OF MEDIA AND POLITICS 155 (2004); EBERHARD KOLB, THE WEIMAR REPUBLIC 95 (Paul Stephen Falla trans., 2d ed. 1992); ROBERT G.L. WAITE, THE PSYCHOPATHIC GOD: ADOLF HITLER 317 (1977).

articulate how observations were gathered, collect as much information as possible, and extract all possible observable implications of the theory.

*C. The New York Times, Pharmaceuticals, the Washington Post, and Nixon*

Baker discusses two more cases to illustrate the “abuse of the concentrated power implicit in conglomerate media ownership.”<sup>104</sup> In 1976, the *New York Times* published several articles on medical malpractice that evidently angered the medical industry. Medicine-related advertisers threatened to withdraw advertisements from *Times*-owned medical magazines, which were later sold, arguably in consideration of the threat.<sup>105</sup> Baker argues that the advertising threat demonstrates the danger of conglomerates.

Two problems present themselves in connection with the first case. First, the relationship between medical magazines and the *New York Times* has nothing to do with extant cross-ownership rules. This is, of course, acceptable if it might inform us more generally about the impact of common ownership. More importantly, the *New York Times* did, in fact, run this exposé of medical malpractice, which may cut against Baker’s strong assumption that conglomerates favor profits over journalism. Indeed, one of the major arguments about the benefits of consolidation is that news resources can be pooled to engage in more investigative journalism.

The second case involves a single conversation in the White House between Richard Nixon, H.R. Haldeman, and John Dean in 1972. Upset over the *Washington Post*’s Watergate coverage, Nixon inquired whether the Post company had any broadcast licenses up for renewal. In contrast to the *New York Times* case, the ownership structure of the Post entails cross-ownership with licenses under the jurisdiction of the FCC, so the case may be more telling in that respect. On the other hand, the extent of what happened was a conversation:

*President:* The main thing is the *Post* is going to have damnable, damnable problems out of this one. They have a television station . . . and they’re going to have to get it renewed.

*Haldeman:* They’ve got a radio station, too.

*President:* Does that come up, too? The point is, when does it come up?

*Dean:* I don’t know. But the practice of non-licensees filing on top of licensees has certainly gotten more . . . active in . . . this area.

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104. Baker, *supra* note 1, at 655.

105. See BAGDIKIAN, *supra* note 54, at 245; Ben Bagdikian, *Newspaper Mergers*, COLUM. JOURNALISM REV., Mar./Apr. 1977, at 19-20.

*President:* And it's going to be Goddamn active here.

*Dean:* (Laughter) (Silence)

*President:* Well, the game has to be played awfully rough.<sup>106</sup>

Because nothing ever came of this, and because the Nixon White House may be unique in its flagrant obstruction of justice, it remains unclear to what degree we can draw inferences from this conversation. And again, the case involves a conglomerate newspaper conducting one of the most important pieces of investigative journalism of the modern era.

More generally, recall Baker's supposition:

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.<sup>107</sup>

These assertions appear inconsistent with the *New York Times* and the *Washington Post* examples. Worse, one strains for how to interpret this statement. Does statement (a) mean that smaller owners are more likely to "take identity" from their journalistic product than larger owners? Or is the statement simply true by tautology (i.e., owners "most likely to favor journalism over profits" are "owners who take identity . . . from the journalistic product they create" and "workers who take professional pride in the quality of their product")? Can we define this in a falsifiable way? It is no defense that the theory isn't offered for positive scholarship—for policy purposes the implementation of Baker's rule would require decisionmakers to operationalize these categories.

Decidedly lacking from this statement are citations to vast amounts of empirical work on the topic of conglomerate and chain ownership of newspapers.<sup>108</sup> The Watergate example suggests that a relevant outcome is

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106. LUCAS A. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 131-32 (1987); see also Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasting*, 64 N.Y.U. L. REV. 990, 1050-51 (1989).

107. Baker, *supra* note 1, at 661.

108. See, e.g., Roya Akhavan-Majid et al., *Chain Ownership and Editorial Independence: A Case Study of Gannett Newspapers*, 68 JOURNALISM Q. 59 (1991); Peter J. Alexander & Brendan M. Cunningham, *Diversity in Broadcast Television: An Empirical Study of Local News*, 6 INT'L J. MEDIA MGMT. 176 (2004); Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q.J. ECON. 1009 (2001); Cecilie Gaziano, *Chain Newspaper Homogeneity and Presidential Endorsements, 1972-1988*, 66 JOURNALISM Q. 836 (1989); Lisa George, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets*, 19 INFO. ECON. POL'Y 285 (2007); Gerald L. Grotta, *Consolidation of Newspapers: What Happens to the Consumer?*, 48 JOURNALISM Q. 245 (1971); David D. Haddock & Daniel D. Polsby, *Bright Lines, the Federal Communications Commission's Duopoly Rule, and the Diversity of Voices*, 42 FED. COMM. L.J. 331 (1990); F. Dennis Hale, *Editorial Diversity and Concentration*, in PRESS CONCENTRATION AND MONOPOLY: NEW PERSPECTIVES ON

coverage of political scandals, and we might consult this literature to see whether smaller newspapers are generally more likely to cover political scandals. Examining coverage of thirty-five scandals by 200 newspapers, one recent study finds the exact opposite, namely, “[o]verall coverage of scandals is significantly higher for newspapers with higher circulation” and “[n]ewspapers with higher circulation systematically devote more coverage to political scandals, at least in the news section.”<sup>109</sup> Of course, we have not done a formal examination of all empirical works on this question (meta-analysis<sup>110</sup>), and one may quibble with the exact design and how closely it tracks Baker’s conjecture—but that is precisely the virtue of empirical work in helping to clarify theory.

#### D. *The Rules of Inference*

Our examination of these cases is not to suggest that case studies are not worthwhile. To the contrary, well-chosen case studies can be tremendously illuminating. Indeed, recall that our article entailed a lengthy exposition of two case studies. The lesson from Baker’s cases is that one must be careful about research design, principles of inference, and the dangers of anecdotalism.

In the end, for all the rhetoric about empirical studies being “irrelevant,” there is a deep, unanswered tension in Baker’s position. He suggests that ethnographic surveys and journalist self-reports (i.e., empirical studies) may be probative evidence of the corruption of concentrated media (and relies on one example from Hamilton’s book chock full of empirical results), but dismisses other empirical studies as irrelevant. Further, he says:

I am a great admirer of empirical research. At places where I make empirical predictions—for example, that mergers typically reduce the quality of media performance—I have *looked to see if empirical studies support . . . my claim*, in this case finding that, although evidence is meager, *apparently* mergers did have this negative effect.<sup>111</sup>

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NEWSPAPER OWNERSHIP AND OPERATION 161 (Robert G. Picard et al. eds., 1988); Ronald G. Hicks & James S. Featherstone, *Duplication of Newspaper Content in Contrasting Ownership Situations*, 55 JOURNALISM Q. 549 (1978); Stephen Lacy, *Effects of Group Ownership on Daily Newspaper Content*, 4 J. MEDIA ECON. 35 (1991); Ralph R. Thrift Jr., *How Chain Ownership Affects Editorial Vigor of Newspapers*, 54 JOURNALISM Q. 327 (1977).

109. RICCARDO PUGLISI & JAMES M. SNYDER, MEDIA COVERAGE OF POLITICAL SCANDALS 21, 27 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1117716](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117716).

110. See JOACHIM HARTUNG, GUIDO KNAPP & BIMAL K. SINHA, STATISTICAL META-ANALYSIS WITH APPLICATIONS (2008).

111. Baker, *supra* note 1, at 665-66 (emphasis added). An earlier version of Baker’s response stated: “I have looked to see if empirical studies support my claim.” Quite

Such a statement gets it exactly wrong. Social scientists are not advocates scouring for empirical studies that happen to support the favored position. To the contrary, social scientists look for every reason to *falsify* their theory, so as to ascertain the truth of the matter. The very study that Baker looked to for support of his claim contains distinct findings that *contradict* his view on ownership. That study concludes: “The data offer some evidence to support the argument *favoring* cross ownership.”<sup>112</sup> To draw an inference from scholarly literature, one cannot selectively choose results by unarticulated criteria. One should look for all evidence that may be inconsistent with one’s theory. Only after such vetting can a researcher (or reader) be persuaded that some rival explanation does not account for observed phenomena.

Anecdotalism is unlikely to take us far. Systematic measurement is crucial.

## VII. SYSTEMATIC MEASUREMENT

### A. *The Importance of Empirical Evidence with Calamitous Risks*

It is precisely because the media plays an important role that empirical inquiry is warranted. Baker argues that evidence is entirely irrelevant due to the strength of his normative theory. Moreover, “empirical measurement . . . is predictably uninformative”<sup>113</sup> and the “search for empirical evidence” is “misguided.”<sup>114</sup> The danger to democracy is so strong that “[e]ven 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.”<sup>115</sup>

The example of nuclear power is telling. If anything, it contradicts Baker’s privileged and exclusive role for normative theory. While we may not observe many calamitous results of nuclear failure, observable indicators of structural design exist, such as the robustness of the containment structure, shutdown margins, and other operational controls.<sup>116</sup> How else would we discover what “good structural design” entails, or

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tellingly, only later did the response note “I have looked to see if empirical studies support *or challenge* my claim.”

112. PROJECT FOR EXCELLENCE IN JOURNALISM, DOES OWNERSHIP MATTER IN LOCAL TELEVISION NEWS: A FIVE-YEAR STUDY OF OWNERSHIP AND QUALITY 5 (2003) (emphasis added), available at <http://www.journalism.org/files/ownership.pdf>.

113. Baker, *supra* note 1, at 658.

114. BAKER, *supra* note 6, at 19-20.

115. Baker, *supra* note 1, at 655 (emphasis added).

116. See U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF PUBLIC AFFAIRS, BACKGROUNDER ON CHERNOBYL NUCLEAR POWER PLANT ACCIDENT (2006).

whether a design imposes “unnecessary risk”? It cannot be the case that empirical evidence is “simply irrelevant” for these determinations. Evidence, science, and expertise should and do inform the design of nuclear power plants. The analogy is further illuminating because nuclear power presents a kind of “dread risk” feared by the public, but this perception diverges significantly from expert assessments of nuclear risk.<sup>117</sup> Divergence between popular and expert assessments may well be present in the media context as well.

Figure 2

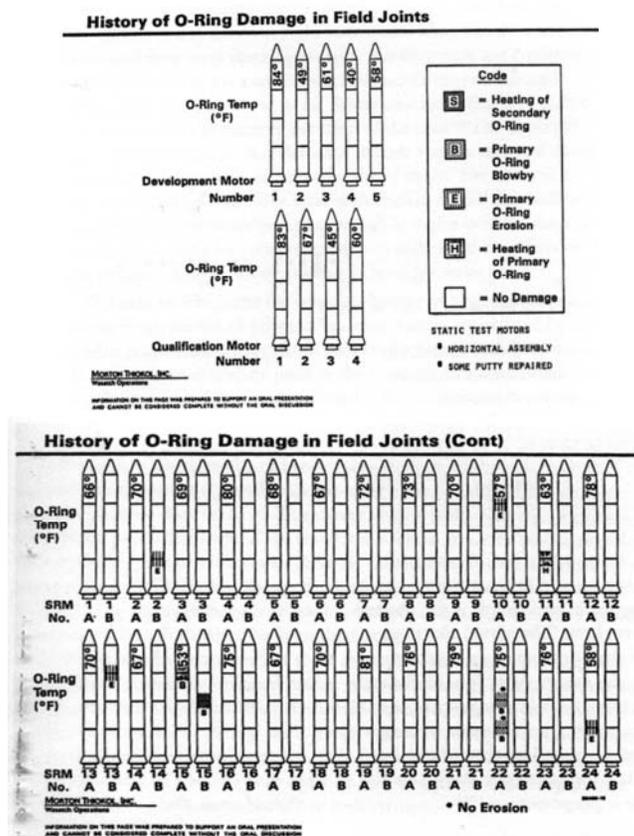


Figure 2: Bad data presentation of O-ring failure of previous shuttle flights. Cryptic icons and chronological organization obscure relevant relationships between temperature and O-ring failure.

117. See James Flynn, Paul Slovic & C.K. Mertz, *Decidedly Different: Expert and Public Views of Risks from a Radioactive Waste Repository*, 13 RISK ANALYSIS 643 (1993); Lennart Sjoberg, *Risk Perception by the Public and Experts: A Dilemma in Risk Management*, 6 HUMAN ECOLOGY REV. 1 (1999); Paul Slovic, *Perception of Risk*, 236 SCI. 280 (1987).

Calamitous disasters are not impervious to empirical scrutiny. One luminary of data visualization, Professor Edward Tufte, cogently argued that the reticence to appropriately examine data may well have contributed to the Challenger space shuttle disaster. While NASA was in possession of compelling evidence that low temperatures were associated with O-ring erosion (the cause of the shuttle explosion), it failed to examine the data in a sufficiently clear form to set off alarm.<sup>118</sup>

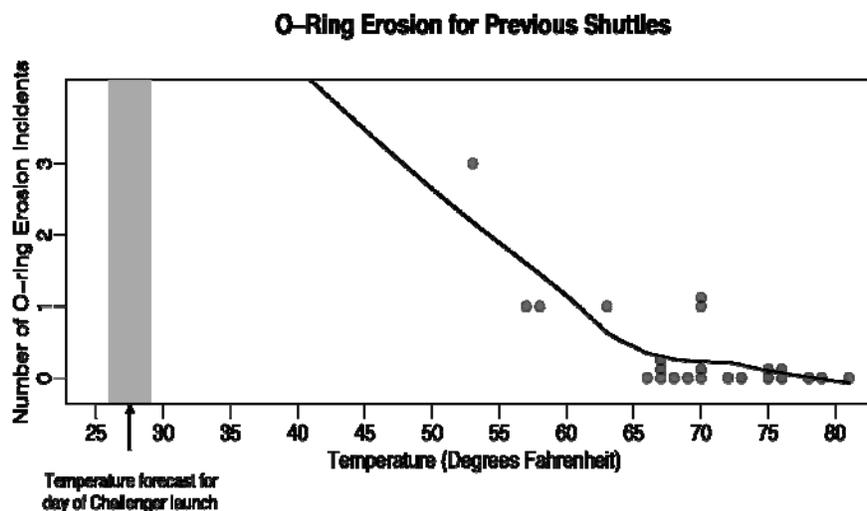
To illustrate, Figure 2 shows how the data from previous shuttle flights were presented to the presidential commission investigating the disaster. As Tufte argued, irrelevant icons of side rocket boosters, inscrutable legends of damage, and chronological organization of shuttles distort the relevant relationship in the data between temperature and O-ring failure. In contrast, Figure 3 plots the same data with temperature on the *x*-axis and the number of O-ring erosion incidents on the *y*-axis. The data exhibit a sharp pattern: O-ring erosion on previous shuttle flights occurred overwhelmingly at lower temperatures. Every shuttle below sixty-six degrees experienced erosion. No failures occurred above seventy degrees. The only instance with three erosions occurred at the lowest observed temperature of fifty-three degrees. And the temperature forecast for the day of the Challenger takeoff was some twenty degrees lower than any previous shuttle flight. Regardless of the exact relationship, extrapolating the pattern should have set off alarm bells.

The risk of “calamitous results” warrants *more* examination—subject to principles of inference—of evidence, not less.

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118. See EDWARD R. TUFTE, VISUAL EXPLANATIONS: IMAGES AND QUANTITIES, EVIDENCE AND NARRATIVE 39-53, 52 (1997) (“Had the correct scatterplot or data table been constructed, no one would have dared to risk the Challenger in such cold weather.”).

Figure 3



**Figure 3:** Plot of temperature on  $x$ -axis and number of O-ring failures on  $y$ -axis for same data of prior shuttle flights. This data shows the clear pattern that O-ring failures were much more likely at lower temperatures and that the temperature forecast for the day of Challenger launch was far below any of the previous flights. Data points are stacked for visibility at ties. The smoothed (loess) curve and 95% confidence interval show the clear trend that when extrapolated to the temperature, the forecast spells disaster.

### B. *The Enterprise of Measurement*

The purpose of systematic measurement is to overcome the speculative nature of anecdotal tales. Yet Baker argues that “the relevant diversity should be qualitative, not simply quantitative.”<sup>119</sup> “The democratic quality of discourse is not measured by the *amount* of diversity,”<sup>120</sup> but by (1) the fact that views are not subject to or actually suppressed, and by (2) meaningful efforts to develop relevant information and perspective. He argues that our measures of viewpoint diversity are “commodified,” and thereby we commit a basic error: since consumers value commodities (such as viewpoints) on the market, we miss “non-commodified” democratic values.

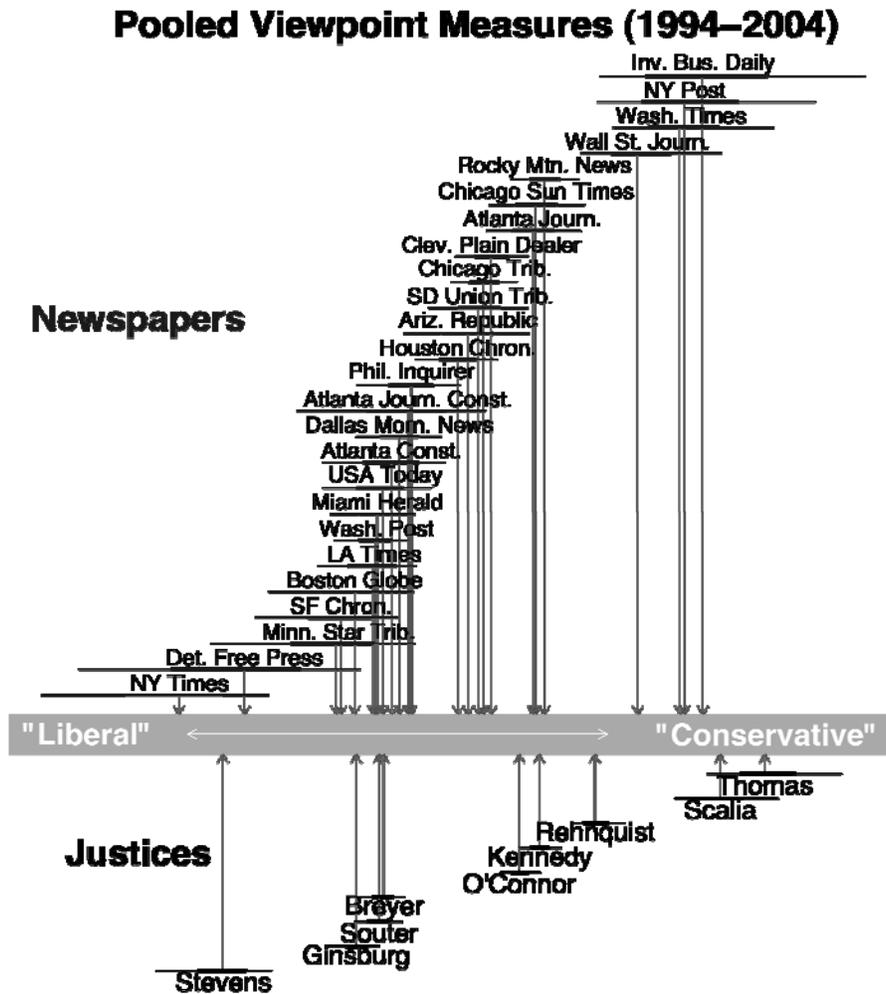
We agree that there are other relevant media outputs that may be affected by media consolidation. But Baker’s charge that viewpoints are

119. Baker, *supra* note 1, at 664.

120. *Id.* at 665.

irrelevant because they are “commodified” misunderstands the enterprise of measurement.

Figure 4



**Figure 4:** Editorial viewpoints and judicial ideal points from pooled analysis of 1994-2004 data. The Justices are presented below the grey horizontal axis and newspapers are presented above the axis. The horizontal lines represent 60% and 95% intervals, and labels are centered around the posterior median. This figure demonstrates that our results quantify viewpoint with much more reliability and precision than conventional conceptions of liberal and conservative papers.

First, the enterprise of measurement is to capture meaningful outcomes. Prior to our research, indirect and inadequate proxies for substantive viewpoints were used. Statements about whether the *Los Angeles Times* became more “conservative” upon acquisition by the Tribune Company (or Baker’s characterization of the *Wall Street Journal* as having a “reactionary”<sup>121</sup> editorial stance) were hence difficult to evaluate. Our approach provides a transparent and neutral way to do this, addressing Baker’s charge prior to our work that “the claims of content variation are bedeviled by intrinsic methodological measurement problems that cannot be solved in a value-neutral way.”<sup>122</sup> We disagree, and take it that Baker also retreats from the prior conclusion that measurement cannot be solved when he says that our study is “far superior methodologically.”<sup>123</sup>

Essentially, our measure recovers what a reasonable person would infer about the viewpoint of a newspaper if she read all editorials about the Supreme Court and learned about all votes cast by the Justices for a ten-year period. Figure 4 shows how we can clearly distinguish newspapers on a substantive scale. The latent scale represents the “distance” between the Justices based on voting patterns and analogous differences between newspapers based on “phantom” votes on Supreme Court cases, and can be interpreted as running from “liberal” to “conservative.” For example, the *New York Times* exhibits a phantom jurisprudence just to the left of Justice Stevens, and the *Investor’s Business Daily* is closest in opinion to Justice Scalia. Moreover, the intervals capture the uncertainty in distinguishing newspapers: the *San Francisco Chronicle* and the *Boston Globe* are indistinguishable from each other (and closest to Justice Ginsburg). Our measurement approach thereby turned what was likely a subjective assessment into something transparent.

Second, the fact that quality matters does not mean that quality cannot be measured. If observable, it is by definition measurable.<sup>124</sup> In addition, Baker mistakenly assumes that “media quality” cannot be measured in quantitative terms. It may be more challenging, but addressing that challenge was precisely what our measurement approach achieved. While our estimated measure is quantitative, the underlying data is qualitative as to whether a newspaper editorialized in favor of each Supreme Court decision or not. As Edward Lee Thorndike, a founder of educational psychology, stated:

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121. Baker, *supra* note 1, at 662.

122. BAKER, *supra* note 6, at 207 n.30.

123. Baker, *supra* note 1, at 666.

124. See 10 OXFORD ENGLISH DICTIONARY 660 (1989) (defining “observable” as a “quantity that can (in principle) be measured”).

Our ideals may be as lofty and as subtle as you please, but if they are real ideals, they are ideals for achieving something; and if anything real is ever achieved, it can be measured. Not perhaps now, and not perhaps fifty years from now; but if a thing exists, it exists in some amount; and if it exists in some amount, it can be measured.<sup>125</sup>

Third, Baker's assertions—that our measure is market-based and that as “market apologists, [we] then interpret diversity in commodified terms”—obfuscate rather than clarify.<sup>126</sup> Our measures are not “market measures” in any classical sense (such as measures from contingent or hedonic valuation studies<sup>127</sup>). The issue is not one of “commodification,” but of measurement. This becomes clear when he argues “[t]ypical 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.”<sup>128</sup> It is unclear what he means by “market measures,” but both bicameralism<sup>129</sup> and separation of powers<sup>130</sup> have been studied voluminously by social scientists, including measures precisely relevant to broad concerns of liberty and deliberation, including effects on political accountability, judicial and congressional

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125. See Paul E. Meehl, *Appraising and Amending Theories: The Strategy of Lakatosian Defense and Two Principles that Warrant It*, 1 PSYCH. INQUIRY 108, 179 (1990) (quoting from memory Edward Lee Thorndike, a “fertile thinker and investigator”).

126. Baker, *supra* note 1, at 669.

127. See, e.g., Peter A. Diamond & Jerry A. Hausman, *Contingent Valuation: Is Some Number Better Than No Number?*, 8 J. ECON. PERSP. 45 (1994); Sherwin Rosen, *Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition*, 82 J. POL. ECON. 34 (1974).

128. Baker, *supra* note 1, at 670.

129. See, e.g., GEORGE TSEBELIS & JEANNETTE MONEY, BICAMERALISM (1997) (studying how bicameralism fundamentally shapes policy outcomes); James N. Druckman & Michael F. Thies, *The Importance of Concurrence: The Impact of Bicameralism on Government Formation and Duration*, 46 AM. J. POL. SCI. 760 (2002) (finding that bicameralism affects the duration of governments); William B. Heller, *Bicameralism and Budget Deficits: The Effect of Parliamentary Structure on Government Spending*, 22 LEG. STUD. Q. 485 (1997) (examining effects of bicameralism on government deficits); Abhinay Muthoo & Kenneth A. Shepsle, *The Constitutional Choice of Bicameralism*, in INSTITUTIONS AND ECONOMIC PERFORMANCE 294 (Elhanan Helpman ed., 2008) (providing formal analysis of institutional choice of bicameralism and integrating concerns of majoritarian tyranny, deliberation, and delay).

130. See, e.g., Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361 (2001) (studying how Senators anticipate the judiciary's eventual response to legislation); David C. Nixon, *Separation of Powers and Appointee Ideology*, 20 J.L. ECON. & ORG. 438 (2004) (studying the effect of Congressional ideology on the political leanings of executive agency appointees); Torsten Perrson, et al., *Separation of Powers and Political Accountability*, 112 Q. J. ECON. 1163 (1997) (examining how checks and balances work to the voter's advantage, requiring the executive and the legislature to reach compromises); Brian R. Sala & James E. Spriggs III, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197 (2004) (attempting to identify instances when the Supreme Court Justices are constrained by separation of powers concerns).

decision-making, executive appointments, government duration, fiscal deficits, majoritarian tyranny, policy stability, length of legislative bargaining, and the cohesion of a ruling coalition.<sup>131</sup> To say that this thriving research—studying and measuring the various dimensions of separation of powers and bicameralism—is irrelevant because it uses “market measures” (perhaps because a formal theoretic or quantitative empirical approach is adopted?) is misinformed. The incantation of an arguably ill-defined concept of “commodification” is not talismanic.<sup>132</sup> If media quality has observable outcomes, they are measurable. Indeed, Baker implicitly measures quality every time he invokes an illustration of the effects of concentration on media. Our methods empower such measurement.

Fourth, our measure plausibly incorporates certain elements of Baker’s media quality (notwithstanding the fact that it remains loosely articulated). Viewpoint suppression, such as Tribune-company influence over the *Los Angeles Times* editorial board, would be captured, at least in part, by changes in substantive editorial viewpoints.<sup>133</sup> And few other items on the pages of a newspaper are as relevant to the notion of “perspective” as editorializing.

Baker’s argument effectively reduces to: you’ve missed something, yet I won’t tell you exactly what it is, because it’s not measurable. Indeed, it is ironic that he faults the courts for calling for empirical evidence “while avoiding explanations of how or why it is relevant.”<sup>134</sup> Yet clarification is precisely a major benefit of formal measurement: it forces the researcher to concretize concepts that are diffuse in the abstract and to refine what exactly it is that we mean by elusive terms such as “viewpoint diversity” and “quality.” For example, one might argue that Supreme Court editorials miss “local diversity.” Thinking about how to measure local diversity forces one to conceptualize “diversity,” when, for example, each newspaper might endorse candidates in completely different local races. Does the lack of editorial opposition to candidates in given local races still

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131. See sources cited *supra* notes 129-130.

132. Baker appears to argue that because consumers value viewpoints when making purchasing decisions, viewpoints are commodified and therefore irrelevant to the justification of media regulation. See Baker, *supra* note 1, at 669. Yet the fact that consumers may value viewpoints does not mean that there is not some market failure. Moreover, this reasoning utterly fails to delineate what counts as “commodification.” If anything that is observable and subject to transaction is “commodified,” there may be little left of Baker’s notion of media quality.

133. See MARA EINSTEIN, *MEDIA DIVERSITY: ECONOMICS, OWNERSHIP, AND THE FCC* 36 (2004) (“Under [the convergence] hypothesis, the concentration of the industry into the hands of a few vertically and horizontally integrated multinational corporations would lead to homogenous media content.”).

134. Baker, *supra* note 1, at 671.

mean diversity (perhaps temporally or across subscription areas)? Measurement serves to clarify concepts and crystallize theory.

### C. *The Role of Editorials and News*

Baker validly points out that our focus on editorials does not capture news reporting. Yet he goes further in arguing that “news may be more significant for democratic discourse than . . . editorial positions”<sup>135</sup> and that “[c]ritics 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 considerations—in not covering certain stories.”<sup>136</sup>

While we agree that news should be independently examined (which is possible—albeit with some complications—by adapting measurement methods similar to ours), we take issue with Baker’s slapdash dismissal of the relevance of studying editorial viewpoint diversity.

First, whether or not news reporting is “more significant” than editorializing is speculation. (Baker admits as much in stating that news “*may* be more significant for democratic discourse.”<sup>137</sup>) Our contribution was to study editorial viewpoints, which serve a crucial role in the development of perspectives on public policy issues. Recall that one of Baker’s indicators of “quality” is “meaningful efforts to develop relevant information and *perspective*.”<sup>138</sup> Editorials are at least one crucial output of such efforts to develop relevant perspective.

Second, Baker’s own illustrations demonstrate that editorials play a central role. Knight-Ridder’s reported influence over *Miami Herald*’s criticism of Edwin Meese manifested itself precisely through editorials.<sup>139</sup> And although Baker discusses Atlantic Richfield in the context of incentives to “*report favorably*,”<sup>140</sup> at least according to the only source

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135. Baker, *supra* note 1, at 662 (original emphasis omitted).

136. *Id.* at 663.

137. *Id.* at 662 (emphasis added).

138. *Id.* at 665 (emphasis added).

139. See JAMES D. SQUIRES, READ ALL ABOUT IT 121-23 (1993). As the former editor of the *Chicago Tribune* recalled:

According to the *Tribune*’s logic, it was better to embarrass me and the editorial board and silence one of the oldest and loudest voices in the press against government regulation of business than to adhere to principles that might reduce corporate profits . . .

. . . At one point editorial cartoonists at both newspapers were told by their editors that Meese cartoons were prohibited until after he ruled on the JOA.

*Id.* at 122-23.

140. Baker, *supra* note 1, at 657 (emphasis added).

Baker cites, the company intervened in the writing of editorial columns.<sup>141</sup> Moreover, Baker's example of a media conglomerate's "abuse of . . . concentrated power"<sup>142</sup> is that of Alfred Hugenberg's support of Hitler, but again, one major channel of influence was via editorial policy and newspaper endorsements of Hitler.<sup>143</sup> The very illustrations that Baker invokes are inconsistent with the notion that critics "seldom bemoan a paper's editorial position."<sup>144</sup>

Third, even ignoring Baker's own inconsistency, it is simply untrue that critics seldom focus on editorial positions. None other than Ben Bagdikian, the "dean of American media critics," laments the homogenization of content due to media concentration. He discusses editorials on the fairness doctrine, the uniformity of editorial endorsements of political candidates, and instances of executive pressure influencing editorial endorsement decisions<sup>145</sup>—something we expressly discussed in our article.<sup>146</sup> And of course, as we have already noted, the FCC and existing scholarship consider editorial viewpoints important.<sup>147</sup>

Fourth, Baker's conjecture that consolidation amongst local newspapers might cause convergence in news and divergence in editorials is intriguing, but a red herring. Baker offers not a shred of evidence upon which to assess its validity. One might conjecture the exact opposite: that upon acquisition, local newspapers fire the editorial board and run wire editorials (thereby converging in editorial viewpoints), while devoting resources to local news (thereby diverging in news reporting). The *Palo Alto Daily News*, which is owned by the Bay Area News Group, for example, follows pretty much this practice of wire op-eds and local news.<sup>148</sup> Since we have provided exactly one more data point than Baker has, one might even argue that our conjecture is more plausible than his. Yet such conjectures become verifiable only with a measure of editorial viewpoint diversity—such as in the approach we have provided—and more systematic empirical investigation beyond anecdotes.

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141. See JAMES CURRAN & JEAN SEATON, *POWER WITHOUT RESPONSIBILITY* 94, 99 (4th ed., 1991) ("This integration of the press into finance and industry . . . also resulted sometimes in newspapers' editorial columns being misused to promote the commercial interests of other companies in the same group.").

142. Baker, *supra* note 1, at 655.

143. See WAITE, *supra* note 103, at 317.

144. Baker, *supra* note 1, at 663. Other channels of influence may exist, but the key is that influence manifests itself in editorials.

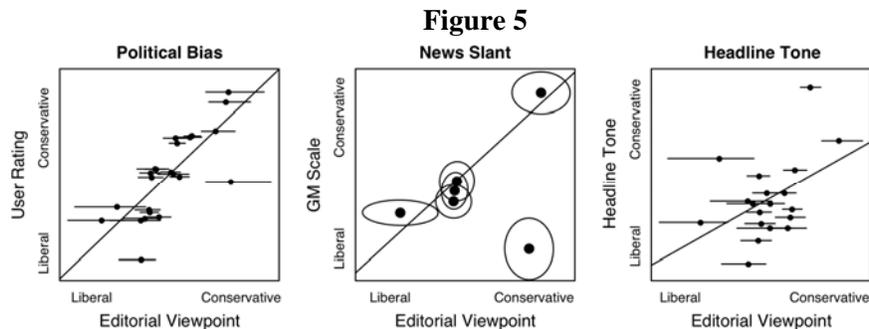
145. See BAGDIKIAN, *supra* note 54, at 139-40, 197, 201-02.

146. See Ho & Quinn, *supra* note 1, at 795 & nn.66-67.

147. See *supra* note 54, and sources cited therein.

148. See, e.g., Patty Fisher, *Palo Alto Police Chief Says Goodbye*, PALO ALTO DAILY NEWS, Dec. 19, 2008, at 1; Paul Krugman, *Living in a Madoff Economy*, PALO ALTO DAILY NEWS, Dec. 19, 2008, at 8.

Lastly, our measures of editorial viewpoint diversity in fact offer considerable insight into news reporting, as they are highly correlated with news output. Figure 5 plots the correlation of our viewpoint scores on the *x*-axis with three measures of news output on the *y*-axis: reader ratings of the political bias of newspapers,<sup>149</sup> a news-slant measure based on think tank citations attributable to Professors Groseclose and Milyo,<sup>150</sup> and a measure of headline tone attributable to Professor Peake.<sup>151</sup> (The lines and ellipses represent statistical uncertainty.) As the figure shows, the measures are highly correlated, with the exception of the *Wall Street Journal*, which is known to have a conservative editorial desk and a liberal news desk. Of course, one might argue about the precise measurements, but this is strong facial evidence that our measures may tell much about news reporting as well.



**Figure 5:** Comparison of editorial viewpoint measures on *x*-axis with user ratings of political bias (left panel), news slant as measured by think tank citations (middle panel), and headline tone (right panel) on *y*-axes. Lines and ellipses represent 95% credible intervals. The left panel randomly jitters five user ratings categories on the *y*-axis for visibility. The positive slopes on each of these lines suggest strong correlation with news reporting.

In the end, Baker is right to point to news as important, but his arguments that editorials are seldom at issue are internally inconsistent and unsupported. Conjecture cannot replace the hard work of developing a method of measuring editorial viewpoint diversity that is transparent,

149. See Mondo Times, <http://www.mondotimes.com/> (last visited May. 21, 2009); see also Daniel E. Ho & Kevin M. Quinn, *Improving the Presentation and Interpretation of Online Ratings Data with Model-based Figures*, 62 AM. STAT. 279, 279-80, 281-84 (2008) (describing and analyzing Mondo Times media quality ratings).

150. See Timothy Groseclose & Jeffrey Milyo, *A Measure of Media Bias*, 120 Q. J. ECON. 1191 (2005).

151. See Jeffrey S. Peake, *Presidents and Front-Page News: How America's Newspapers Cover the Bush Administration*, HARV. INT'L J. PRESS/POL. (Oct. 2007), at 52.

replicable, substantively interpretable, accounts for measurement uncertainty, and is, in principle, adaptable for the study of news diversity.

#### D. *Information Versus Sample Size*

A remaining deficiency of our measurement approach, according to Baker, is that it has “a sample size of five.”<sup>152</sup> This is plainly wrong. Our data consisted of 10,598 votes by 13 Justices and 1,618 editorial positions by 25 newspapers across 1,186 cases from 1988 to 2004. While there are five mergers and acquisitions, these represent *every* one that occurred in the sample for this observation period, providing comparisons between some eleven newspapers before and after the transaction.<sup>153</sup>

Moreover, we collected large amounts of information about each newspaper pre- and post-transaction and augmented this data with evidence from county-level circulation statistics, detailed studies of editorial board composition, and qualitative study of the editorials themselves. By Baker’s count, studying the effect of the collapse of the Soviet Union on mass political attitudes by conducting pre- and post-surveys of hundreds of respondents would count as a sample size of one.

Fixation on effective sample size is misguided. A sample size of one individual can be greatly informative when mapping the human genome, while a sample size of one million can be irrelevant when the causal factor of interest does not vary. Similarly, a sample of twenty randomly selected individuals with randomly assigned treatment can be far more informative than a non-random sample of 5,000 individuals who have self-selected into treatment.<sup>154</sup> The purpose of research design is not to maximize the number of observations, but to maximize leverage over quantities of interest so that we can meaningfully learn about the world.

### VIII. THE NORMATIVE AND THE PERSONAL

While we greatly appreciate the lively response, it is oddly consumed with dissecting our personal motivations and presumed normative pre-commitments.

Baker charges that as “anti-regulatory advocates,”<sup>155</sup> we “purport[] to give an empirical . . . basis for deregulation.”<sup>156</sup> Nowhere do we do so.

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152. Baker, *supra* note 1, at 652 n.3.

153. These are the *New York Times* Company’s acquisition of the *Boston Globe*, the merger of the *Atlanta Journal* and *Atlanta Constitution* into the *Atlanta Journal Constitution*, the *Chicago Tribune* Company’s acquisition of the *Los Angeles Times*, Gannett’s purchase of the *Arizona Republic* (compared to Gannett’s *USA Today*), and Hearst’s acquisition of the *San Francisco Chronicle* (compared to the *Houston Chronicle*).

154. See Ho et al., *supra* note 55, at 205-07.

155. Baker, *supra* note 1, at 669.

156. *Id.* at 666.

First, we did not start from a normative pre-commitment. To the contrary, at the outset of this research, we had no preconception as to what to expect about the evolution of viewpoints before and after mergers and acquisitions.<sup>157</sup> And our results do not lend themselves to ready simplification of favoring regulation or deregulation, as we find evidence for convergence, divergence, and stability in light of newspaper consolidation.

Second, nowhere did our policy implications endorse deregulation and, if anything, made exactly the opposite point. We showed that “repealing the rules would exacerbate the already profound difficulties of empirical justification about the effects of a rule.”<sup>158</sup> Further, we highlighted an implicit tension between the mandates of the 1996 Act for the FCC to (1) make a public interest determination (wrought by the difficulties of empirical evaluation), and (2) repeal or modify ownership regulations if they no longer serve the public interest. We expressly argued that the difficulties of empirical inference militate in favor of *incremental modification*, rather than wholesale deregulation, which would accord with federal law when strong evidence sustaining the convergence hypothesis is lacking.<sup>159</sup> To overcome the difficulties of the public interest determination, we suggested the FCC collaborate with research groups to design program evaluation and field experiments to facilitate such evaluation.

Nowhere did we “*purport*” to give an empirical . . . basis for deregulation.”<sup>160</sup> Baker oddly imputes implications where they do not exist.

Most strangely, Baker’s response makes a number of ad hominem claims and conjectures as to why we were personally “misled” and our “inexcusable” errors of failing to articulate his preferred theory.<sup>161</sup> As answers, he charges us with “making the same mistake” as scholars “driven by free-market ideology,”<sup>162</sup> and argues that we suffer of “economists’ occupational inclination to see value in what can be purchased in

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157. When designing empirical research, one guideline we offer students is to ask a question to which you genuinely don’t know the answer. If the answer is already known, why do the research?

158. Ho & Quinn, *supra* note 1, at 862.

159. One could argue that the D.C. Circuit’s *Fox* case, prohibiting the FCC from adopting a “wait-and-see” approach when there is no evidence for convergence is wrong as a normative matter. *See Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002). That is precisely the tension we point to in our article. Our implication for incremental modification does not require overturning the *Fox* case, while meaningfully permitting the call for empirical evaluation. If Baker wants to overturn D.C. Circuit law, that remains a separate discussion beyond the scope of our article and this exchange.

160. Baker, *supra* note 1, at 666 (emphasis added).

161. *Id.*

162. *Id.* at 668.

markets”<sup>163</sup> and “a corresponding bias in [our] resulting political recommendations.”<sup>164</sup>

In addition, with what he admits to be “intentionally inflammatory”<sup>165</sup> rhetoric, he charges that our empirical measure fails to capture the media reporting about the connection between Saddam Hussein and Osama Bin Laden and argues that we miss the fact that the rise of Hitler had some association with conglomerate media ownership. And (as if that were not enough), our work may suffer from the “ingrained fearful desire of originally untenured academics to steer clear of controversy, [and] an immature craving to escape uncertainty and indeterminacy.”<sup>166</sup>

Most disturbing about these charges and this rhetoric is that they miss a fundamental point about scholarly research: *ad hominem attacks have no role in scholarship*. (Not to mention the fact that these accusations are each factually incorrect—neither of us is an economist, nor does welfare economics share the same intellectual history of statistics, nor do welfare economics and statistics have a corresponding political bias, nor could anyone accurately describe us as “anti-regulatory advocates,” nor do we (hopefully) have an immature craving to escape uncertainty.<sup>167</sup>) The merits of an empirical investigation stand apart from the author. Scholarly exchange is not about individuals—who are not “advocates” looking to confirm their favored theories, and are, rather, researchers seeking knowledge of the world—but about the research.

Our article started from the empirical turn that scholarship and the law have taken over the course of the past twenty years. Far from shying away from questioning that turn, our policy implications flowed from what we highlighted as the difficulties of empirical evaluation. Without having engaged in that inquiry, it would be impossible to ascertain the limits of empirical evaluation.

## IX. CONCLUSION: THE VIBRANT ROLE OF EMPIRICAL LEGAL STUDIES

In the end, we agree with Baker on the central contribution of our article: that our study moves forward the empirical literature on the media. Moreover, we appreciate the opportunity Baker has provided to address basic concerns over the role of theory—normative and positive—and empirics in law.

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163. *Id.* at 669.

164. *Id.*

165. *Id.* at 665.

166. *Id.* at 670.

167. Statistics, if anything, embraces the logic of uncertainty.

Our conclusion is much more limited than Baker's sweeping indictment of welfare economics and empirical legal studies as "malignant" tendencies and as "only [] handmaidens" within the legal academy. While we recognize the limits of empirical inquiry, we see a fruitful role for empirical investigation (and positive theory) as complementary to, and synergistic with, value-based inquiry in law. If policy decisions are to be made solely on normative theoretical grounds, as Baker desires, we may give up opportunities to forge consensus on contentious issues based on growing evidence.

Empirical evidence can inform value-laden decisions, particularly in administrative law and regulation where the factual issues become complex. Evidence that airbags save lives surely is useful for safety standards administered by the National Highway Traffic Safety Administration.<sup>168</sup> Evidence that tailpipe emissions contribute to global warming surely is useful for the setting of motor vehicle standards by the Environmental Protection Agency.<sup>169</sup> And, similarly, evidence of whether viewpoints converge with media consolidation surely is relevant for the regulations administered by the FCC, as recognized by the FCC, appellate courts, and a large number of scholars.

In the end, our most basic disagreement is with the notion that empirical evidence is "entirely irrelevant." Value judgments are crucial to legal decisionmaking, but that does not mean we should operate in affirmative isolation of evidence.

Baker charges that the empiricist is "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."<sup>170</sup> That may characterize *some* empirical research. But, to extend the analogy, the aim of our work was to capitalize on statistical methods to build new light poles to conduct new inquiries for where the keys may, in fact, lie. That is the crucial role of statistical methodology in a discipline where experiments simply cannot be run to obtain policy-relevant knowledge. Legal scholars cannot, and should not, shut their eyes to evidence that can be brought to bear on policy questions of interest. Tools that have been first crafted outside of law, such as the methods we adapt from psychometrics and political science, can powerfully help to address policy questions and resolve disagreement that otherwise would be left to pure theory.

The deep irony in Baker's view—one that espouses pure normative, value-based theory that cannot be falsified—is that, in the end, it amounts

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168. *See, e.g.,* Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Co., 463 U.S. 29 (1983).

169. *See, e.g.,* Mass. v. Env't Protection Agency, 549 U.S. 497 (2007).

170. Baker, *supra* note 1, at 663.

to little more than “trust me.” For all the rhetoric about democratic values (and diversity), Baker prefers a mode of legal scholarship for philosopher kings to the exclusion of all empirical (and positive) inquiry. The burgeoning field of empirical legal studies plays in many ways the opposite role: by providing transparent, widely-accepted rules of inference. Science and empirical inquiry *democratize* the accumulation of knowledge. One need not be a philosopher king to contribute to knowledge about the legal world, and *anyone* can be proven wrong by data. The democratization of knowledge about the law, the accumulation of wisdom about how it operates on the ground, and no one’s exclusive claim to being right are what we view as progress.

