

Cambridge University Press

978-0-521-68788-1 - Media Concentration and Democracy: Why Ownership Matters

C. Edwin Baker

Frontmatter

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## Media Concentration and Democracy

### Why Ownership Matters

Objections to concentrated ownership of the mass media are widespread. Often, however, critics merely point to the fact of huge and growing media conglomerates without explaining precisely why this is bad. This book fills the gap in the critique of concentration. Firmly rooting its argument in democratic and economic theory, the book argues that a more democratic distribution of communicative power within the public sphere and a structure that provides safeguards against abuse of media power provide two of three primary arguments for ownership dispersal. It also shows that dispersal is likely to result in more owners who will reasonably pursue socially valuable journalistic or creative objectives rather than a socially dysfunctional focus on the “bottom line.” The middle chapters answer those, including the current Federal Communication Commission, who favor “deregulation” and who argue that existing or foreseeable ownership concentration is not a problem. The final chapter evaluates the constitutionality and desirability of various policy responses to concentration, including strict limits on media mergers.

C. Edwin Baker is the Nicholas F. Gallicchio Professor of Law at the University of Pennsylvania Law School and has been on the faculty at Penn since 1981. He has also taught at NYU, Chicago, Cornell, Texas, Oregon, and Toledo law schools and at Harvard’s Kennedy School of Government, and he was a staff attorney for the ACLU. He is the author of three earlier books: *Media, Markets, and Democracy* (2002), which won the 2002 McGannon Communications Policy Research Award; *Advertising and a Democratic Press* (1994); and *Human Liberty and Freedom of Speech* (1989). He has written more than fifty academic articles about free speech, equality, property, law and economics, jurisprudence, and the mass media, in addition to occasional popular commentary.

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Politics and relations among individuals in societies across the world are being transformed by new technologies for targeting individuals and sophisticated methods for shaping personalized messages. The new technologies challenge boundaries of many kinds – among news, information, entertainment, and advertising; among media, with the arrival of the World Wide Web; and even among nations. *Communication, Society and Politics* probes the political and social impacts of these new communication systems in national, comparative, and global perspective.

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*University of Pennsylvania Law School*



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for Char  
*with many smiles*

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## Preface

In 1989, having published my basic views on the First Amendment in *Human Liberty and Freedom of Speech* (1989), it seemed time to move to a different, even if related, topic. In that first book, I describe a view that sees the First Amendment prohibitions against abridgment of freedom of speech and freedom of the press as embodying different concerns. Freedom of speech seems fundamentally to be about respect for individual liberty, a value of autonomy that a government committed to being able to justify its legal order must respect. On the other hand, the press is essentially an institution or, as Justice Potter Stewart put it, is the only business explicitly protected by the First Amendment. Constitutional protection of the press seems necessarily related to instrumental values. In particular, as commentators beginning in the eighteenth century have recognized, the reason to protect the press from government abridgment lies in its contribution to democracy or, more broadly, to a free society. It provides a source of information and vision independent of government.

I had already argued almost ten years earlier<sup>1</sup> that press freedom and its capacity to serve its democratic role could be threatened from two directions: from abuse of government power or from private power and the dynamics of the market. Though my earlier work had emphasized the need for strong constitutional protection from government threats, I now turned to the other side of the equation and considered how the press needs government protection from private forces that could otherwise undermine its performance. At first I assumed the danger of private power lay primarily in media owners' potential abuse of power over the press – over the entities' freedom and performance. I discovered, however, that a different threat may be greater and, in any event, provided an easier target: the threat to press performance and to distortion of its content resulting from the press's dependence on advertising support. Thus,

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I put the issue of ownership on hold until after I published *Advertising and a Democratic Press* (1994). Then I discovered that I could not sensibly identify problems with ownership until I considered what appeared to be a more fundamental problem: distortions created by the market. I also could not do so until I considered what light a commitment to democracy provided on the question of the type of press that a society needs. These issues led me into an investigation of media economics and democratic theory, which I published as *Media, Markets, and Democracy* (2002).

Finally, ownership was the aspect of private power left to be considered. At this point, Fritz Kubler invited me to present a description of American views on ownership at a conference to be held in Germany in September 2001. I wrote a paper for that conference. But a week before I was to leave, I felt the need to participate in political efforts to oppose what I feared would be an American military response to the criminal acts of September 11, so I stayed in New York. Fritz presented my paper in my absence. That paper,<sup>2</sup> and a subsequent much modified law review article based on it,<sup>3</sup> became the foundation of this book.

A number of people have contributed greatly to this book, by reading portions of the manuscript and giving comments or by providing sounding boards for discussion, references, inspiration, or, in some cases, all of the above. Two people, Fritz Kubler and Michael Madow, fit in that final category and to them I give special thanks. I especially appreciate the great support and critical comments that I received from the series editor, Robert Entman. Donald Conklin and Gabrielle Levin provided excellent assistance. I also need to thank Ann Bartow, Yochai Benkler, Mark Cooper, Harry First, Eleanor Fox, Charlotte Gross, Carlin Meyer, Rudolph Peritz, Margaret Jane Radin, Christopher Yoo, and two anonymous readers from Cambridge University Press. The book would have many more errors and would have been much shallower without their insights – and, I am sure, would have been much better if I had been capable of incorporating more of their wisdom. I also need to thank the Grey Dog and Patisserie Claude for providing good coffee and an appealing place to do much of the work on the book.

Finally, I have benefited from comments when presenting portions of the argument in various venues: Conference: Penn Film and Media Pioneers (Philadelphia, 2005); Penn Law School Faculty Retreat (Philadelphia, 2005); Conference: Not from Concentrate, Media Regulation at the Turn of the Millennium, University of Michigan Law School (Ann Arbor, 2005); Testimony: Media Ownership and the Third



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Circuit, Senate Commerce Committee (Washington, D.C., 2004); American Sociological Association Annual Conference (San Francisco, 2004); Faculty Workshop, Penn State Law School (Carlisle, 2004); Conference on Federal Regulation and the Cultural Landscape, Vanderbilt Law School (Nashville, 2004); interview on *Odyssey*, WBEZ (2003); New America Foundation's Breakfast Senate Briefing (Senate Office Building, Washington, D.C., 2003); and the New York City Bar Committee on Communications and Media Law (New York, 2003).