AND NOW, A WORD FROM OUR SPONSOR

ADVERTISING AND A DEMOCRATIC PRESS. By C. Edwin Baker.[1] Princeton: Princeton University Press. 1994. Pp. xii, 203. $24.95.

Might advertising be responsible for the collapse of competition among newspapers, pervasive censorship, the decline of partisan political culture, and anemic political participation among the poor? In his latest work, Professor C. Edwin Baker claims to identify the problem, and a few solutions as well. Though provocative, *Advertising and a Democratic Press* is as likely to distort as to assist a reader's understanding of the manner in which the economic structure of the media determines the diversity of media content. Baker's account, combining anecdotal evidence with inferences from historical data, fails to answer a competing account posed by media economists. Baker's goals of empowering consumers to determine media content and of promoting the kind of content that a democracy requires appear to be mutually exclusive. Finally, Baker's centerpiece policy proposal may backfire, reducing both the quantity and variety of media content.

Baker begins by sketching a scenario to illustrate how advertising could have the effect of eliminating competing newspapers, reducing the diversity of newspapers and thus of press content. A newspaper favored by advertisers can use its extra revenue both to "produc[e] a better paper, and to reduce its price" (p. 10). These changes siphon readers from other newspapers which, to cover the revenue shortfall, "are likely either to reduce drastically the quality of their content or to increase their cover price, with either reaction's leading to a spiral of further loss of readers and new declines in content" (pp. 10–11). Meanwhile, the favored newspaper's readership gains make it yet more attractive to advertisers, fueling the "declining-circulation/declining-quality spiral" (p. 11) of the other papers and culminating in their demise.

Baker marshals a variety of "historical observations" that "conform to the broad outline" of this scenario (p. 14). He recounts how the historical decline in newspaper competition followed an "increased reliance on advertising revenue" (pp. 14–16) and repudiates alternative explanations for the decline (pp. 17–30). To demonstrate how advertisers subvert editorial content, he gathers anecdotes from all media: culprits he uncovers include the tobacco industry (pp. 51–53), the cosmetics industry (pp. 54–55), Procter & Gamble (pp. 54–55) and Coca-Cola (pp. 48, 63). Writers and journalists attest to self-censorship in the face of advertisers (pp. 47–56); advertisers, in turn, are careful to avoid content that might provoke consumer boycotts (pp. 56–62) or simply disrupt the "buying mood" (pp. 62–66).

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The less affluent, Baker argues, suffer both economically and politically from the effects of advertising. Baker characterizes advertising as a "subsidy" that lowers the cost and increases the availability of media products preferred by the affluent, "magnif[ying] the normal inequality whereby the poor have less money to pay for media products than the wealthy" (p. 26). Therefore, to the extent that "media usage promotes political involvement, . . . the advertising-supported media should stimulate political participation primarily among the comparatively affluent" while "depress[ing] the comparative political participation of the poor" (p. 69). Because it rewards increased circulation, advertising will also induce newspapers to produce not differentiated content, even if differentiation would attract readers willing to pay a higher price, but rather content that is attractive to the greatest number of affluent readers (p. 27). Baker suggests that this incentive to homogenize played "a significant role" (p. 29) in the decline of press partisanship and the rise of "objectivity" in journalism (pp. 27–30, 41–43); these developments, in turn, "could be related" to sagging voter turnout (pp. 41–43). "[P]roduct differentiation that fosters a revival of partisanship," he concludes, "could contribute to a renewal of politics and political participation" (p. 42).

Baker offers a number of policy proposals aimed at combatting the effects of advertising on the media. Chief among these is his "Tax-Advertising/Subsidize-Readers" ("TA-SR") proposal (pp. 85–91). The proposal would tax advertising revenues and "redistribute this money back as a subsidy" in proportion to circulation revenues (p. 85). By focusing newspapers on what readers, not advertisers, are willing to pay, argues Baker, the proposal would "benefit the popular daily rather than the elite paper," "help publications that serve small groups of readers unwanted by advertisers," reduce the cost of alienating advertisers or their consumers, and generally "promote greater pluralism and diversity in media content" (p. 89). Other proposals include barring advertisers from intentionally influencing nonadvertising content unless they identify their influence (pp. 101–07), limiting advertiser control over "ad placement" in broadcasting (pp. 107–11), and taxing advertising to fund public broadcasting (pp. 111–15).

Finally, Baker defends the constitutionality of such policies (pp. 118–36). He identifies two opposing readings of the First Amendment Press Clause: a "neutrality" reading would prohibit "any differential treatment" of the press, while a "bad-purpose" reading "would only prohibit special governmental treatment of the press that has some specific, objectionable aspect" (p. 119). Documenting past government interventions in the press, Baker concludes that the bad-purpose reading more accurately describes existing law (pp. 123–30). Because this reading "is premised on the view that both private and public restrictions of press freedom can be serious problems" (p. 122), corrective intervention of the sort he proposes to remedy private abuse should be constitutional.

In setting up as the straw man for his economic analysis the "doctrinaire claim" of "free marketeers [who] assert that an unregulated market . . . leads to optimal outcomes" (p. 71), Baker fails to answer the more serious challenge of economists who attribute the decline in newspaper competition to an interaction of economies of scale and vertically integrated monopolies.[2] While acknowledging that "the decline of local newspaper competition could be the natural result of tremendous economies of scale," he claims that this account "does not explain why, historically, newspaper competition was the norm in this country" (p. 22). Baker attributes the decline to the effects of advertising: by "reduc[ing] the *proportionate* contribution to total newspaper revenue of the amount that the reader will pay for a differentiated product" (p. 24), advertising reduces the incentive of newspapers to differentiate themselves, "a prerequisite for successful competition" in the face of scale economies (p. 23).

Economists such as Bruce Owen interpret the historical data quite differently.[3] During the Revolutionary period, printshops were relatively inexpensive operations which, for a variety of reasons, generally experienced excess capacity, permitting them to turn out a variety of newspapers in addition to other products.[4] Those who were not printers did not acquire printshops in order to publish their views but rather had access to this excess capacity.[5] At the same time, publishers "found it much more profitable to seek specialized audiences by

[2] *See* BRUCE M. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 3–85 (1975). An economy of scale exists if a newspaper can reduce its costs per unit of output by increasing output. *See, e.g.*, RICHARD G. LIPSEY, PETER O. STEINER & DOUGLAS D. PURVIS, ECONOMICS 194, 253–55 (8th ed. 1987); OWEN, *supra*, at 16–18 (identifying economies of scale in the media). For instance, with respect to the physical size of a newspaper, "it costs less to go from 34 pages to 36 than from 32 to 34, other things equal." *Id.* at 36. Vertical integration is "simply the union, within a single organization, of two or more successive stages of production." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 481 (2d ed. 1977). Therefore, a vertically integrated newspaper — one that encompasses the creation, editing, and transmission of content — will enjoy a natural monopoly at least with respect to the printing, or transmission, of content. *See* OWEN, *supra*, at 13–16 (discussing vertical integration of media content production).

[3] *See* OWEN, *supra* note 2, at 33–59. Though the account given here is taken from Owen's monograph, Owen appears to enjoy the support of other economists cited by Baker for support at various points. For instance, it is James Rosse's "widely accepted analysis" (p. 22) of newspaper economies of scale which Baker claims fails to explain the decline in newspaper competition. However, Owen, a former colleague of Rosse at Stanford University, credits his discussion of newspapers to Rosse's research, published and unpublished. *See* OWEN, *supra* note 2, at 33. Roger Noll, another economist cited by Baker (p. 111 nn.97–98) and former Owen colleague, suggests that Baker's ideas can be refuted by a close reading of Owen. Telephone Interview with Roger G. Noll, Professor of Economics and the Chair of the Public Policy Program, Stanford University (Sept. 1, 1994). Finally, Baker himself cites Owen on several occasions (pp. 17 n.37, 76 nn.8–9, 111 n.99).

[4] *See* OWEN, *supra* note 2, at 40–41, 43.

[5] *See id.* at 41, 43.

publishing relatively specialized content and trying to attract nonreaders" than to attempt "to be more general in order to attract readers of other newspapers."[6] However, beginning in the late nineteenth century, saturation of the market for newspapers resulted in a "zero sum game in circulation."[7] Zero-sum competition demanded that successful publishers "take advantage of scale economies with respect to the physical size of the newspaper," both by including specialized content that might formerly have distinguished newspapers and by avoiding partisanship that might alienate potential readers.[8] In response to the demands of increased circulation, press technology became increasingly advanced and expensive, and the excess capacity of an earlier era came to an end, choking off the access of independent editors and creators — the backbone of the partisan press — to the means of transmission.[9] Newspapers today are vertically integrated, encompassing the means of transmission for their own exclusive use.[10]

Even if one adopts Baker's version of events, his "TA-SR" proposal suffers from several difficulties. Inasmuch as readers sought by advertisers — "relatively affluent readers" (p. 26) — gravitate toward certain types of newspapers — for example, the *Washington Post* or the *Los Angeles Times* — those newspapers will suffer, while others with a lower proportion of advertising to circulation revenue will benefit at their expense. However, content aimed at the affluent presumably shares substantive characteristics, both in the choice of subjects covered and perhaps in ideological slant — else its appeal to affluent readers would be no greater than to others. If so, the proposal may have the effect of discriminating against certain content, thus raising constitutional questions.[11]

The proposal also raises an empirical question: exactly which newspapers will benefit? Baker suggests only that it will be "the popular daily rather than the elite paper" (p. 89). A methodical comparison of newspapers is beyond the scope of this Book Note. Nevertheless, as

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[6] *Id.* at 46.

[7] *Id.*

[8] *Id.* at 47.

[9] *See id.* at 47–48.

[10] *See id.* at 14–16 (suggesting reasons for this vertical integration).

[11] The proposal raises at least two broad questions. First, to what extent will the law identify an audience (or speaker) with certain content? *Cf.* Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (finding that the granting of tax subsidies to veterans' groups but not to other organizations does not "suppress any ideas" or "ha[ve] that effect"); Schneider v. State, 308 U.S. 147, 164 (1939) (striking down anti-handbill ordinances as affording police authorities power to decide "who may impart the information"). Second, what level of constitutional scrutiny should a law with not necessarily the purpose but the *effect* of content discrimination receive? *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 977–86 (2d ed. 1988) (discussing government action which "does not *aim*" at content but has "the *indirect* result" of doing so); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48–54 (1987) (identifying levels of scrutiny for facially content-neutral restrictions).

an example, the *National Enquirer* boasts on its masthead that it has the "LARGEST CIRCULATION OF ANY PAPER IN AMERICA."[12] The reader is invited to conduct an unscientific comparison of an issue of the *National Enquirer* with one of the *Washington Post* or *Los Angeles Times*, noting cover price and the relative proportions of advertising to editorial content and speculating as to the relative cost of advertising in each.[13]

Baker cannot claim indifference to the consequences of such a redistribution. He makes clear, first, that certain kinds of content are more useful to a democracy than others and, second, that there is a tension between the kind of content that people may desire and that which a democracy requires. Markets, he argues, are "inappropriate for determining the media content that people need in order to properly develop values and preferences" because they "aim at satisfying . . . existing preferences" (pp. 80–81). This leaves Baker in an awkward position: the "abstract principle embodied in the TA-SR proposal" — "supporting reader rather than advertiser preferences" — is "hard to reject" (p. 89), yet so long as the media behave as economic producers that respond not to a vision of the public good but to consumer demand, and consumers do not demand what they "ought to want" (p. 81), Baker cannot hope to promote the content people "ought to want" without overriding their demonstrated preferences.

The mechanics of the proposal are likewise flawed. Though Baker asserts that the TA-SR proposal "leav[es] the advertising revenue within the media system" and thereby "avoids reducing the total media product available to readers" (p. 94), the proposal may in fact trigger a vicious cycle of increasing prices to consumers and shrinking advertising revenues. Baker deduces that papers with a high proportion of advertising content will raise prices to cover the shortfall resulting from the tax (pp. 87–88, 139–40). So long as some fraction of readers will be dissuaded by price increases (p. 86), these papers will lose read-

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12 *See, e.g.*, NAT'L ENQUIRER, Sept. 6, 1994, at 1.

13 *Compare, e.g.*, NAT'L ENQUIRER, Sept. 6, 1994 *with* WASH. POST, Sept. 2, 1994. The *National Enquirer* in question contains 48 pages, each measuring approximately 10 inches by 12 inches, for a total surface area of 5760 square inches. Of this, approximately 1844 square inches, or 32%, consists of advertising. The *Washington Post*, including the "Weekend" supplement, contains 144 pages; the "A" section, not including the "World News" supplement, contains 24 pages, each measuring approximately 23.5 inches by 14 inches, for a total surface area of 7,896 square inches. Of this, approximately 5455.5 square inches, or 69%, consists of advertising. Advertisers in the *National Enquirer* include Merit cigarettes at page 9; "1,001 Home Health Remedies" at page 28; and La Toya Jackson's Authentic Psychic Network at page 30. Advertisers in the *Washington Post* include Woodward & Lothrop at pages A5–7, A9; Neiman-Marcus at page A8; and Hecht's at pages A3, A14–17, A19, A24. The *National Enquirer* sells for $1.25, the *Washington Post* for $0.25. The *Washington Post* has an average weekday circulation of 855,171. Telephone Interview with Switchboard Operator, The Washington Post Co. (Sept. 28, 1994). The *National Enquirer*, published weekly, has a circulation of 3 to 3.5 million. *See* David Margolick, The Enquirer: *Required Reading in Simpson Case*, N.Y. TIMES, Oct. 24, 1994, at A12.

ers. However, to the extent that high-advertising papers increase their prices in order to collect more revenue but shed readers in the process, those papers become less valuable to advertisers, who would advertise less as a result. At the same time, papers have less incentive to keep prices down, retain circulation, and hang on to advertisers if, instead, they can compete with other newspapers on the basis of circulation revenue for a share of the subsidy pool. In effect, those high-advertising papers responsible for contributing the most revenue to the pool may find themselves in a race to the bottom, slashing their contributions to the pool in their efforts to extract a greater share of it.

It is not immediately clear at what point this process would bottom out, reaching some new equilibrium in which the pool would be so diminished that papers would no longer benefit by substituting pool revenue for advertising revenue. Nonetheless, it should at least be clear that the overall quantity of advertising revenue could easily decrease, *reducing* the total media available to readers: the cost to consumers of media content would increase while quality would deteriorate; people would buy fewer newspapers; fewer newspapers would exist. Even if taxes levied on other forms of advertising were used to bolster the subsidy pool (p. 90), advertisers who could no longer reach the same audience by newspaper and could not reconnect with lost readers by substituting other media would simply advertise less, again with the effect of reducing total advertising revenue.

A more effective structural remedy might focus not on the incentives generated by advertising but on the position of the media as oligopoly suppliers. If the economic structure of the mass media has indeed concentrated power over content in the hands of a few, that power would seem to rest more with the media professionals responsible for creating and editing content — the "gatekeepers" of speech[14] — than with advertisers, whose interest is a secondary and selective one. So long as vertically integrated monopolies restrict access to the media on the basis of ownership, the fewer gatekeepers there will be and the greater the power they will wield as such. A reshaping of antitrust law, by enhancing competition at the level of content creation, might better enhance content diversity as well.[15]

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[14] Gatekeepers are those "involved in the processing or control of messages disseminated through mass media to the public," such as reporters and editors. JOHN R. BITTNER, MASS COMMUNICATION 10 (1977). They necessarily possess "the ability to limit," "expand," and "reorganize or reinterpret" "information we receive from the mass media." *Id.* at 10, 11 (emphasis omitted).

[15] *See* OWEN, *supra* note 2, at 52–59 (proposing antitrust reform in the newspaper industry); *id.* at 183–89 (setting forth a "policy shopping list" for all media).