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Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on its Head

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NOTE

APPLICATION OF THE ANTITRUST LAWS TO NEWSPAPER DISTRIBUTION SYSTEMS: THE SHERMAN ACT TURNED ON ITS HEAD*

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For want of a dime, the Sherman Antitrust Act[1] has been turned on its head.[2] In 1961, a newspaper carrier in Kirkwood, Missouri, charged his customers an extra dime per month for the *St. Louis Globe-Democrat.*[3] The newspaper tried to prevent the price increase, but its efforts were blocked by the U.S. Supreme Court.[4] The Court applied the Sherman Act's prohibition against any

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1. 15 U.S.C. §§ 1-7 (1982). The Sherman Act outlaws "every contract, combination . . . or conspiracy in restraint of trade or commerce . . . ." *Id.* The scope and meaning of this broad language was left to the courts. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 165 (1977). The Supreme Court long ago acknowledged that the language of the Sherman Act cannot be applied literally. In Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918), Justice Brandeis wrote: "Every agreement concerning trade, every regulation of trade, restrains . . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.*

2. *See* Albrecht v. Herald Co., 390 U.S. 145, 170 (1968) (Stewart, J., dissenting) ("The Court today stands the Sherman Act on its head."); *see also* Blair & Kaserman, *The Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461, 482 (1981) (*Albrecht* turns the Sherman Act on its head and should be reconsidered); Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1297 (1982) ("The mischief of *Albrecht* continues; the time for correction is long overdue."); Harrison, *Price Fixing, the Professions and Ancillary Restraints: Coping with* Maricopa County, 1982 U. ILL. L. REV. 925, 927 ("dubious wizardry of *Albrecht*").

3. Albrecht v. Herald Co., 390 U.S. 145, 147 & n.2 (1968).

4. *Id.* at 148-49.

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agreement between seller and buyer that fixes the price at which the buyer may resell the product.[5] However, the Court's application of this prohibition to newspaper publishing, an industry with a unique economic structure,[6] spawned a body of law that defeats the goals and purposes of the Sherman Act.

Although antitrust laws theoretically protect consumers,[7] courts have protected independent newspaper distributors who overcharge their customers.[8] Despite Congress' intention that antitrust laws should preserve competition,[9] applying the Sherman Act to newspaper distribution systems has impeded the operations of an industry where competition is nearly extinct at the producer level and never has existed at the distributor level.[10] Ironically, although federal antitrust laws were designed to preserve small, independent businesses,[11] courts have fostered the elimination of hundreds of independent newspaper distributors.[12] Because courts have prohibited newspapers from fixing prices among distributors, newspapers are prompted to hold prices down by switching to a system of complete ownership of distribution.

In a series of decisions[13] that began with the *Globe-Democrat* case, federal courts allowed newspapers to gain a monopoly over distribution. On the other hand, by declaring price ceilings placed on distributors illegal, these courts

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5. Dr. Miles Medical Co. v. Park & Sons, 220 U.S. 373 (1911); *see also* L. SULLIVAN, *supra* note 1, at 377-78.

6. *See generally* S. OPPENHEIM & C. SHIELDS, NEWSPAPERS AND THE ANTITRUST LAWS ch. 1 (1981) [hereinafter cited as NEWSPAPERS AND ANTITRUST] (discussing the unique structural and behavioral characteristics of the newspaper business); *see also infra* notes 30-50 and accompanying text.

7. R. BORK, THE ANTITRUST PARADOX 50-89 (1978) (arguing that consumer welfare is the sole legitimate goal of the antitrust laws); E. SULLIVAN & H. HOVENKAMP, ANTITRUST LAW POLICY AND PROCEDURE 1, 3 (1984) (current antitrust analysis suggests courts interpret the law to maximize consumer welfare).

8. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968).

9. Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958) ("Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition.").

10. NEWSPAPERS AND ANTITRUST, *supra* note 6, at 2-3; Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 IOWA L. REV. 451, 452-54 (1984).

11. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses.").

12. *See, e.g.*, White v. Hearst Corp., 669 F.2d 14 (1st Cir. 1982); Paschall v. Kansas City Star, 695 F.2d 322 (8th Cir. 1982), *rev'd*, 727 F.2d 692 (8th Cir.), *cert. denied*, 105 S. Ct. 222 (1984); Auburn News Co. v. Providence Journal Co., 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); Naify v. McClatchy Newspapers, 599 F.2d 335 (9th Cir. 1979); Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), *on remand*, 468 F. Supp. 226 (N.D. Cal. 1979); Blankenship v. Hearst Corp., 519 F.2d 418 (9th Cir. 1975); Grill v. Reno Newspapers, 6 Media L. Rep. (BNA) 1818 (D. Nev. 1980); Neugebauer v. A.S. Abell Co., 474 F. Supp. 1053 (D. Md. 1979); Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977); Hardin v. Houston Chronicle Publishing Co., 434 F. Supp. 54 (S.D. Tex. 1977), *aff'd per curiam*, 572 F.2d 1106 (5th Cir. 1978); McGuire v. Times Mirror Co., 405 F. Supp. 57 (C.D. Cal. 1975); Lamarca v. Miami Herald Publishing Co., 395 F. Supp. 324 (S.D. Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975).

13. *See* cases cited *supra* note 12.

eliminated a less restrictive alternative that would keep newspaper prices low.[14] This occurred because the courts decided newspaper distribution cases under the per se doctrine.

The per se doctrine renders any business practice to which it applies unlawful regardless of the reasons for the practice and without inquiry into its effects.[15] Under antitrust law, the per se rule is applied to resale price restrictions because they inhibit price competition among dealers.[16] Ordinarily, a manufacturer has no compelling interest in a price restriction that would interfere with the buyers' ability to resell at prices set by competitive market conditions.[17] In most industries, a manufacturer is subject to market competition which prevents other dealers from increasing retail prices to earn additional profits.[18] The newspaper industry is unique, however, because there is no competition between dealers,[19] and the publisher has a strong interest in ensuring the price of each copy remains low.[20] Thus, in this particular industry, the publisher's interest in resale price restrictions is coterminous with the consumer's interest. Both groups want to keep the price of newspapers as low as possible.

This note argues that the unique economic structure of the newspaper industry[21] eliminates many of the harms inherent in resale price ceilings reflected

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14. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968) and cases cited *supra* note 12; *see also* Knutson v. Daily Review, Inc., 548 F.2d 795, 805 n.10 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (tracing this "double standard" all the way back to Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911), and recognizing the paradox that contractual integration is treated far more harshly than ownership integration).

15. The court merely decides whether the restraint falls into a category that has previously been determined per se illegal. If it does, the defendant is guilty. Other evidentiary matters become irrelevant, and the defendant cannot offer an affirmative defense. E. SULLIVAN & H. HOVENKAMP, *supra* note 7, at 124-25; L. SULLIVAN, *supra* note 1, at 153. The Supreme Court's classic rationale for the per se rule is found in Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958):

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged "economic investigation" into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable - an inquiry so often wholly fruitless when undertaken.

Id. at 5. However, characterizing the restraint to determine whether the per se rule applies can be time-consuming and complex. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984); Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982); Broadcast Music Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).

16. L. SULLIVAN, *supra* note 1, at 379-80.

17. *Id.* at 377; *see also* P. AREEDA, ANTITRUST ANALYSIS 644 (1981).

18. P. AREEDA, *supra* note 17, at 644-45. If a manufacturer's product is distributed through a small number of dealers, the retail price would be higher unless the manufacturer also sells at retail or has the power to fix maximum resale prices. *Id.*

19. Newspaper carriers are themselves monopolists who serve exclusive territories. *See infra* notes 51, 254-55 and accompanying text.

20. *See infra* notes 30-50 and accompanying text.

21. *See infra* notes 47-66 and accompanying text.

in other industries.[22] Because the per se rule prevents an extended inquiry into an industry, courts have not considered the economics of newspaper publishing. This note proposes that courts should shift newspaper distribution cases to rule of reason analysis, which calls for a broad inquiry into the nature, purpose and effect of any challenged business practice before a decision is made about its legality under antitrust laws.[23] Under this analysis, a court would examine a newspaper's reasons for preventing price increases, consider the effects of a price ceiling imposed on independent carriers, and explore the ramifications of the rule against price ceilings. This note suggests that courts have forced newspapers to become their own distributors.[24] Consequently, these decisions created barriers to entry in an industry where competition is nearly extinct.[25] This note also suggests that once courts consider the benefits of price ceilings[26] in light of the newspaper industry's economic structure, courts will learn that preserving the carrier's independence permits the carrier to raise prices with impunity.[27]

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22. These harms include promoting horizontal cartels, Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 407-08 (1911), and reducing competition not only between sellers of the affected product but also between that product and competing brands. Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977). They also include substituting the perhaps mistaken judgment of the manufacturer for competitive market forces, channeling distribution through a few large dealers, and allowing the maximum to become the minimum price. Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968). *See generally* E. SULLIVAN & H. HOVENKAMP, *supra* note 7, at 1-3; L. SULLIVAN, *supra* note 1, at 1-14; *see also* Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958) (observing that the Sherman Act rests on the premise that competition will yield "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions").

23. L. SULLIVAN, *supra* note 1, at 153. Under the rule of reason, an arrangement that does not obviously stifle competition but may adversely affect it must be analyzed to gauge its purpose and effect. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); *see also* Albrecht v. Herald Co., 390 U.S. 145, 154 (1968) (Douglas, J., concurring) (joining the decision but adding that this is a rule of reason case). Justice Douglas viewed *Albrecht* as similar to White Motor Co. v. United States, 372 U.S. 253 (1963), a case which was remanded for findings on the actual impact on competition of the challenged arrangement. Albrecht v. Herald Co., 390 U.S. 145, 156 (1968).

24. *See* Albrecht v. Herald Co., 367 F.2d 517, 522 (8th Cir. 1966) (noting the *Globe-Democrat*'s only alternative would be to terminate all its independent carriers and make home deliveries with its own employees); Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 n.26 (1977) (recognizing that if a per se rule prevents manufacturers from achieving efficiencies it perceives as important to its successful operation, the rule will create an incentive for vertical integration).

25. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 603 (1953) (decision which prompted the passage of the Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-04 (1982)).

26. *See* Albrecht v. Herald Co., 390 U.S. 145, 156-59 (1968) (Harlan, J., dissenting) (describing "redeeming virtues" of resale price ceilings which include driving prices toward the level that would be set by competition and protecting consumers from exploitation by distributors); Brief of the Justice Department as Amicus Curiae at 21-23, Spray-Rite Serv. Corp. v. Monsanto. Co., 465 U.S. 752 (1984) (listing potential procompetitive benefits of resale price maintenance); Blair & Kaserman, *supra* note 2, at 475 (prohibiting resale price ceilings harms consumers by producing higher prices and smaller quantities of goods and services).

27. Newspaper carriers are insulated from market forces because they serve exclusive territories. *See infra* note 51.

Allowing the newspaper to set maximum prices would provide the same check on pricing excesses that a competitive market system normally provides.[28]

I. Why Newspapers are Different From Other Industries

The newspaper industry has unique structural and behavioral characteristics which distinguish it from other industries. These differences become critical in newspaper antitrust cases because each case arising under the Sherman Act must be decided on the particular facts disclosed by the record.[29] However, because courts decide newspaper distribution cases by applying the per se rule against resale price maintenance, courts have not analyzed the newspaper industry's economic structure. A thorough analysis reveals that newspaper publishing is different from other industries for several reasons.

First, a newspaper does not make its profits from selling papers. The price of a newspaper rarely covers the total cost of production.[30] The average daily newspaper obtains about seventy-five percent of its revenues from advertising.[31] Advertising rates are tied to circulation.[32] Thus, a newspaper that increases its circulation can expect to raise its advertising rates, and a newspaper whose circulation declines can expect advertising revenues to decline.[33]

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28. Albrecht v. Herald Co., 390 U.S. 145, 167 (1968) (Harlan, J., dissenting); Blair & Kaserman, *supra* note 2, at 477.

29. Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579 (1925).

30. *See* C. Sterling & T. Haight, The Mass Media: Aspen Institute Guide to Communication Industry Trends 166 (1978). In 1976, a "typical" (but anonymous) newspaper obtained about $7 million from its 250,000 circulation while it spent more than $9 million for newsprint and ink. *Id.*; *see also* McGuire v. Times Mirror Co., 405 F. Supp. 57, 62 (C.D. Cal. 1975) (noting the *Times* subscription price was less than it paid for its newsprint); Brief of the American Newspaper Publishers Association as Amicus Curiae at 4, Albrecht v. Herald Co., 390 U.S. 145 (1968) ("A typical daily newspaper in the 240,000 circulation range spent in 1966 $4,411,283.05 on newsprint and ink, while it received only $2,948,318.24 in total circulation income.").

31. Newspapers and Antitrust, *supra* note 6, at 4; C. Sterling & T. Haight, *supra* note 30, at 166; Hovenkamp, *supra* note 10, at 455; *see also* McGuire v. Times Mirror Co., 405 F. Supp. 57, 62 (C.D. Cal. 1975) (noting that the *Times* received 85% of its revenue from advertising and 15% from subscriptions); Brief of American Newspaper Publishers Association as Amicus Curiae at 4, Albrecht v. Herald Co., 390 U.S. 145 (1968) (stating that in 1967 ANPA member newspapers derived about 75% of their revenues from advertising and 25% from circulation); Brief of Defendants-Appellees at 5, Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (noting the *Daily Review* obtained 88% of its revenues from ads and 12% from newspaper sales).

32. Brief of American Newspaper Publishers Association as Amicus Curiae at 5, Albrecht v. Herald Co., 390 U.S. 145 (1968) ("Advertisers view newspaper rates from a 'per inch per thousand circulation' basis, and all newspapers reflect circulation in their rate structures. Thus, the average line rate for a newspaper of 50,000 is 22.1 cents; for a newspaper of 100,000, 34.8 cents; for one of 200,000, 56.1 cents; and for 500,000, $1.69."); *see also* Knutson v. Daily Review, Inc., 383 F. Supp. 1346, 1363 (N.D. Cal. 1974) (correlation between price and circulation determines the factor of greatest concern to advertisers: the cost per relevant exposure to potential buyers).

33. Hovenkamp, *supra* note 10, at 456; B. Compaine, The Newspaper Industry in the 1980s: An Assessment of Economics and Technology 70 (1980). A survey by the American Newspaper Publishers Association of 335 newspapers that raised subscription prices in 1966 showed 42% lost circulation. Many of the papers that managed to hold their own conducted aggressive promotion campaigns, started well in advance of the increase. Brief of American Newspaper Pub-

The interdependence of circulation and advertising rates protects consumers by assuring that the retail price of each newspaper remains low enough to attract as many readers as possible. Therefore, the rationale that the rule against resale price maintenance protects consumers from excessive pricing has no practical application within the newspaper industry. Unfortunately, courts do not always comprehend the relationship between circulation and advertising revenues.[34]

Second, the newspaper industry lacks a basic similarity of interest between manufacturer and dealer, which usually exists in the common goal of maximizing sales revenue.[35] The number of subscribers is more important to a newspaper than its sales revenues. While a newspaper would prefer to sell five hundred newspapers for ten cents each, a carrier would make the same profit, with less effort, by selling fifty newspapers for one dollar each. A newspaper is more willing than an independent dealer to ensure availability of the paper in areas that entail high distribution costs.[36] At the same time, the newspaper faces the brunt of customer dissatisfaction about a price increase because most subscribers do not understand that the carrier who has raised his price is not a newspaper employee.[37]

Third, a newspaper should not be viewed as a manufactured commodity, sold merely for its physical embodiments in paper, ink and type. A newspaper is a package of services in a printed medium.[38] Therefore, a newspaper publishing company's primary "product" is advertising, not the newspaper deliv-

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lishers Association as Amicus Curiae at 6-7, Albrecht v. Herald Co., 390 U.S. 145 (1968). Price decreases can have equally powerful effects. In 1898, *The New York Times* lowered its price from three cents to a penny and reportedly tripled its circulation. A. LEE, THE DAILY NEWSPAPER IN AMERICA 272 (1937).

34. *See, e.g.*, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (concluding that an increase in subscription and advertising rates had not decreased circulation or advertising revenues). *But see* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 604 (1953) ("[a]dvertising is the economic mainstay of the newspaper business").

35. Brief of American Newspaper Publishers Association as Amicus Curiae at 7, 12, Albrecht v. Herald Co., 390 U.S. 145 (1968).

36. Laidlaw & Haley, *Newspaper Distribution Systems and Changes in Methods of Distribution*, in ANTITRUST, THE MEDIA AND THE NEW TECHNOLOGY 183, 187 (1981). For example, a route with widely scattered homes may have high distribution costs. NEWSPAPERS AND ANTITRUST, *supra* note 6, at 73; *see also* McGuire v. Times Mirror Co., 405 F. Supp. 57, 61 (C.D. Cal. 1975) (carrier whose route is relatively flat and compact does not pay the same wholesale rate as a carrier whose route covers hilly terrain).

37. Universally, publishers state the price of the newspaper in each issue. The single-copy price is on the front-page, almost always in the upper right-hand corner. Home delivery subscription rates are listed in a box, usually on the second page. NEWSPAPERS AND ANTITRUST, *supra* note 6, at 84; *cf.* Paschall v. Kansas City Star, 695 F.2d 322, 329 (8th Cir. 1982), *rev'd*, 727 F.2d 692 (8th Cir.), *cert. denied*, 469 U.S. 872 (1984) (the *Star* published a "note to our readers" to inform them that home delivery rates were increased by the independent carriers and not the newspaper).

38. NEWSPAPERS AND ANTITRUST, *supra* note 6, at 4; B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 34 (1975). *Contra*, McGuire v. Times Mirror Co., 405 F. Supp. 57, 60 (C.D. Cal. 1975); Bowen v. New York News, Inc., 366 F. Supp. 651 (S.D.N.Y. 1973), *aff'd in part and rev'd in part*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) (both classifying newspapers as "commodities").

ered by the carrier.[39] Viewed as such, the economic rationales underlying the application of the antitrust laws to conventional industrial markets have little relevance in the context of the newspaper industry.

Fourth, a newspaper is an extremely perishable product. An undelivered newspaper, after several hours have passed, is good only for starting fires or lining garbage pails.[40] Because newspapers cannot be stockpiled for later sale, speedy, orderly and efficient marketing is essential to a newspaper's economic survival.[41] Deadlines and daily press runs add extra costs, unique burdens, and greater risks to publishing a daily newspaper. These costs, burdens and risks require modification of conventional economic theory normally applied to industrial commodity markets.[42]

Fifth, every daily newspaper, whether in a small town or a metropolitan area, serves its community by emphasizing local news, local issues and local advertising. Thus, a daily newspaper reflects community needs and requirements.[43] This peculiarly local market means that competition in the newspaper industry is almost extinct.[44] Statistics reveal that only 28 of the 1,533 communities where daily newspapers are published have two or more competing, independent dailies.[45] Another 101 communities have two or more newspapers owned by the same company or involved in a joint operating agreement.[46] Competition has dwindled steadily since the 1920s.[47] Since the end of World War II, no new daily has been successful in a metropolitan area with existing competition.[48] Natural forces cause this trend because in all but the largest

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39. Brief of American Newspaper Publishers Association as Amicus Curiae at 5, Albrecht v. Herald Co., 390 U.S. 145 (1968).

40. Lon Hocker, on behalf of respondent Herald Co., in oral argument of Albrecht v. Herald Co., 390 U.S. 145 (1968), before the Supreme Court, Nov. 9, 1967, in 22 ANTITRUST LAW: MAJOR BRIEFS AND ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 602 (1979).

41. NEWSPAPERS AND ANTITRUST, *supra* note 6, at 71.

42. *Id.* at 5.

43. *Id.* at 3.

44. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 603 (1953).

45. Thirty communities had competing newspapers at the end of 1985. AMERICAN NEWSPAPER PUBLISHERS ASS'N, FACTS ABOUT NEWSPAPERS '86, at 21 [hereinafter cited as NEWSPAPERS '86]. In 1986, two cities became non-competitive. A joint operating agreement (JOA) has been proposed for Detroit's two competing dailies. N.Y. Times, Apr. 15, 1986, at 29, col. 4, 6 (nat'l ed.). When the proposal was announced, the *Detroit News* had a daily circulation of 645,016 and the *Detroit Free Press* had 634,466. The Justice Department must approve the JOA under the Newspaper Preservation Act. Competing suburban newspapers will probably challenge the proposed merger on the ground that the resulting "mega-daily" would be an economic monopoly that would thwart suburban competition. *Id.* And on May 27, the *Baltimore News-American* published its last edition. N.Y. Times, May 28, 1986, at 7, col. 2 (nat'l ed.). The afternoon paper, which had been publishing since 1773, lost $8 million in 1985 and had tried in vain since fall of 1985 to find a buyer. Its circulation was about 101,000, compared to 152,000 for *The Evening Sun* and 205,000 for *The Sun*, a morning paper. One company owns both *The Sun* and *The Evening Sun*. *Id.*

46. NEWSPAPERS '86, *supra* note 45, at 21.

47. Competition in the newspaper industry peaked about twenty years after the Sherman Act became law. In 1910, 689 cities had competing newspapers. NEWSPAPERS '86, *supra* note 45, at 2; Nixon, *Trends in Daily Newspaper Ownership Since 1945*, 31 JOURN. Q. 3, 7 (1954).

48. N.Y. Times, Apr. 15, 1986, at 29, col. 6 (nat'l ed.) (quoting Morris J. Levin, a Washington lawyer who specializes in newspaper antitrust matters).

cities, the population simply cannot support two independent, competing newspapers.[49]

Sixth, due to the interrelation of quality, circulation, and advertising funds, newspapers face a threat of a rapid loss in revenues that can be triggered by a small price change.[50]

Because of these factors, a newspaper retains an exceptional interest in the ultimate price of its service to the customer. This interest in price-containment also means the potential harms which the antitrust laws are intended to prevent are almost nonexistent in the newspaper industry.

Another characteristic of newspaper publishing also has a direct impact on the application of antitrust laws to this industry. In evaluating newspaper pricing practices, courts should consider independent carriers as monopolists because they have exclusive routes granted by the newspaper. The exclusive routes give them the power to raise prices and reduce output without competition from other carriers.[51] More importantly, carriers also have the motivation to take such action, while the newspaper does not.[52] The application of a per se rule, however, has precluded courts from considering the effects of the carriers' monopoly powers.[53] As a result, courts now give legal protection to the pricing activities of a monopolist while ignoring the consequences for consumers.

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49. NEWSPAPERS AND ANTITRUST, *supra* note 6, at 2; B. COMPAINE, WHO OWNS THE MEDIA? 71 (1982) (economies of scale are the primary reason for one-newspaper towns); *Why FTC is Stepping Away from Media Probes*, ADVERTISING AGE, Jan. 28, 1980, at 14 (describing a FTC staff report which concludes the Commission can do "relatively little" about the increasing numbers of one-newspaper towns because economies of scale are the primary reason they exist). *But see* Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968) (contending newspapers' anticompetitive practices are the primary deterrents to new entrants into the industry).

50. A federal district court described this behavioral feature in United States v. Citizen Publishing Co., 280 F. Supp. 978, 985 (D. Ariz. 1968):

> Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation.

See also Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), *on remand*, 468 F. Supp. 226 (N.D. Cal. 1979).

51. Hovenkamp, *supra* note 10, at 453 n.17. A newspaper delivery route is a natural monopoly. Like many other business routes, newspaper routes generally involve economies of scale. The biggest costs involved are buying and operating a delivery truck and the driver's wages (or profits). The marginal cost of throwing one more paper is very small. A carrier, on a particular route, can distribute 100 newspapers almost as cheaply as 50. It would be far more expensive for two drivers to deliver 50 papers each. *Id.* And if carriers could sell newspapers all over a city, the cost of service would increase and reliability and promptness of delivery would decline. Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 25 (1978).

52. *See supra* note 35 and accompanying text.

53. *See, e.g.*, Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). The newspaper asserted the monopoly power of its carriers as a defense, but the

II. The Backdrop of the Rule Against Resale Price Ceilings

Newspapers cannot prevent price increases by independent carriers because most courts apply a per se rule against price restrictions imposed by a manufacturer on its distributors.[54] Nevertheless, the per se rule rests on an unsteady foundation.[55] The rule has its origins in *Dr. Miles Medical Co. v. Park & Sons Co.*[56] However, the *Dr. Miles* court did not explicitly state a per se rule, and the language of the opinion allows an inquiry into the procompetitive effects of resale price maintenance.[57] The elaborate system of contracts between Dr. Miles Medical Company, its wholesalers and its retailers, fixed resale prices for medicines and amounted to a cartel.[58] This arrangement offered no benefits to consumers and, therefore, should have been declared unlawful under horizontal price-fixing precedent.[59] Dr. Miles offered two defenses which included no consumer-welfare arguments.[60] Thus, a sweeping condemnation of the restraints on competition was warranted and a consideration of possible consumer benefits would have been superfluous. Even so, the Court's denunciation of Dr. Miles' practices was narrow enough to indicate the Court would accept meritorious consumer-welfare arguments from future defendants.[61] The Court

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Ninth Circuit rejected the argument because Albrecht v. Herald Co., 390 U.S. 145 (1968), established a per se rule which precludes inquiry into the economic rationale for the practice. Knutson v. Daily Review, Inc., 548 F.2d 795, 806 n.12 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

54. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968).

55. *See* Brief of the United States as Amicus Curiae at 6, 24, Spray-Rite Serv. Corp. v. Monsanto Co., 465 U.S. 752 (1984); Comment, *A Functional Rule-of-Reason Analysis for the Law of Resale Price Maintenance and its Application to* Spray-Rite v. Monsanto, 1984 Wis. L. Rev. 1205, 1230-36; *see also infra* notes 56-66 and accompanying text.

56. 220 U.S. 373 (1911). Park & Sons, a wholesaler, obtained Dr. Miles medicine from its distributors at prices below list and resold them below the fixed retail price. *Id.* at 374. Dr. Miles sued Park & Sons for tortious interference with its contracts. *Id.* at 375. Park & Sons defended on grounds that the contracts were illegal. *Id.* at 373. Both the trial court and the appellate court held for Park & Sons. *Id.* at 383. The Supreme Court affirmed. *Id.* at 409; *see also* R. Bork, *supra* note 7, at 280; Levi, *The* Parke, Davis-Colgate *Doctrine: The Ban on Resale Price Maintenance* in Hoffman's Antitrust Law and Techniques 527, 527, 537 (1963); Pitofsky, *supra* note 51, at 5.

57. 220 U.S. at 406-07. The Court said:

> [R]estraints of trade and interference with individual liberty may be justified by the special circumstance of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restraint is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public . . . .

Id.

58. *Id.* at 407-08. A cartel is a concerted agreement by many competitors to fix prices or restrict output. E. Sullivan & H. Hovenkamp, *supra* note 7, at 123.

59. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

60. 220 U.S. at 402, 404.

61. The Court said:

> If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions,

correctly focused on the economic consequences of the vertical restraint, but erred in determining those consequences. The Court equated the effect of the vertical restraints with the effect of a horizontal agreement among dealers, which was exactly how the contracts worked in *Dr. Miles*.[62] Nevertheless, the Court's opinion allows restraints that do not have the effect of a cartel, although this analysis has been overlooked by later courts.[63] The Court concluded: "[A]greements or combinations between dealers, having for their *sole purpose* the destruction of competition and the fixing of prices, are injurious to the public interest and void."[64]

The Court's opinion and the meaning of "sole purpose" is better understood when considered in light of future Chief Justice Taft's[65] decision in *United States v. Addyston Pipe & Steel Co.*[66] His antitrust analysis recognized that any contract entered into solely to restrain trade was illegal. An agreement that restrained trade was lawful, however, if it was ancillary to another legitimate transaction and necessary to make that transaction effective.[67] Taft's ancillary restraints doctrine distinguishes those restraints that are created to lessen competition from those that are necessary to support an otherwise lawful purpose. Taft recognized that vertical restrictions could be ancillary,[68] and this view has been accepted by modern scholars.[69] The ancillary restraints doctrine faded into the background

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and thus to achieve the same result, by agreement with each other.

Id. at 407-08.

62. *Id.* at 407; *see also* Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 VA. L. REV. 1457, 1464 (1981).

63. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968); Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

64. *Dr. Miles*, 220 U.S. at 408 (emphasis added).

65. William Howard Taft served as a federal circuit judge from 1892-1900. After his term as President, he was appointed Chief Justice of the United States in 1921 and served until 1930. J. KANE, FACTS ABOUT THE PRESIDENTS 291 (1964).

66. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). The Supreme Court explicitly adopted the opinion of Circuit Judge Taft as its own. 175 U.S. at 226, 235. The *Dr. Miles* Court also cited *Addyston* to support the statement quoted *supra* text accompanying note 64. *Dr. Miles*, 220 U.S. at 408. The *Dr. Miles* opinion also should be viewed in context with two other cases simultaneously before the Supreme Court, which introduced the rule of reason to antitrust analysis. Standard Oil Co. v. United States, 221 U.S. 1 (1911) (argued in March 1910, reargued in January 1911 and decided May 15, 1911); United States v. American Tobacco Co., 221 U.S. 106 (1911) (argued in January 1910, reargued in January 1911 and decided May 29, 1911). *Dr. Miles* was argued in January 1911 and decided April 3, 1911. *Dr. Miles*, 220 U.S. at 373. The Court would thus probably not, without any explanation, apply a per se rule to a restraint it had never seen before. The Court probably viewed the restraint in *Dr. Miles* as horizontal and did not intend to apply a per se rule to all forms of resale price maintenance; *see also* Broadcast Music Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 9, 10 n.33, 22 n.40 (1979) (emphasizing the need for "considerable" experience with a practice before per se condemnation).

67. *Addyston*, 85 F. at 282-84; *see also* Anonymous, Y.B. 2 Hen. 5, f.5, pl.26 (1414) (Dyer's Case) (ancillary restraints of trade are permitted if they are reasonable); *cf.* Eastern Scientific Co. v. Wild Heerbrugg Instruments Inc., 572 F.2d 883, 885-86 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978) (contending resale price-fixing is not unlawful, even under the rule of *Albrecht*, when used as an ancillary device to implement territorial allocations).

68. *See* Chicago, St. L. & N.O. R.R. v. Pullman Car Co., 139 U.S. 79 (1891).

69. *See, e.g.*, Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373, 403-04 (1966). Bork defines an arrangement as vertical when "a firm

as the rule of reason[70] became the prevailing standard of antitrust analysis.[71] But the emergence of the per se rules[72] under the Warren Court left open the question of whether a rule of reason analysis would apply to a per se restraint if the restraint was ancillary to a valid purpose.[73]

As the underpinning for the per se rule against price ceilings, *Dr. Miles* is a shaky foundation.[74] While the decision itself did not consider consumer benefits, it has been transformed into an inflexible rule that bars consideration of the economic reality that a price ceiling might be beneficial to consumers. In the context of the newspaper industry, the rule becomes even shakier because it is being applied to a class of independent monopolists whose power to raise prices is uncontrolled.[75]

More than thirty years passed before the Court explicitly struck down a resale price maintenance scheme with a per se rule,[76] although the court considered at least four resale pricing cases in the interim.[77] All those cases looked like horizontal dealer conspiracies, and apparently led the Court to assume that the result of all vertical price-fixing schemes is the same as all horizontal price-fixing schemes.[78] The per se rule against resale price maintenance did not develop through a carefully weighed policy consideration of the effects of the

operating at one level of an industry places a restriction upon competition at another level of that industry *for the firm's own benefit.*" *Id.* at 397 (emphasis added). This definition excludes restraints which appear vertical but actually result from a horizontal cartel at any level of the industry.

70. *See supra* note 23.

71. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

72. *See* Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958).

73. Harrison, *supra* note 2, at 932; Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music?, 66 VA. L. REV. 879, 881-93 (1980).

74. *See* Baker, *supra* note 62, at 1465 ("Although one of the most venerable antitrust precedents, *Dr. Miles* is now one of the most untenable."); Pitofsky, *supra* note 51, at 16 n.59 (rationale of *Dr. Miles* is somewhat obscure).

75. The freedom of newspaper carriers to raise home delivery prices is limited only by the price a subscriber would have to pay if he walked to the corner and bought a paper from a rack. In *Albrecht*, the home delivery price was $1.60 a month. Albrecht v. Herald Co., 367 F.2d 517, 519 n.2 (1966), *rev'd and remanded*, 390 U.S. 145 (1968). Based on a single copy price of 10 cents for dailies and 25 cents for the Sunday edition, buying a single copy each day from a rack would cost a reader about $3.60 (in a 30-day month with 4 Sundays). Albrecht had raised his price only 10 cents per month and conceivably could have gone quite close to the $3.60 level before his customers would forego having a newspaper delivered to their homes and choose to go out and buy one each day.

76. United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).

77. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922) (defendant found guilty of unfair competition through an elaborate resale pricing scheme); Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921) (Sherman Act violation found); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920) (violation found); United States v. Colgate & Co., 250 U.S. 300 (1919) (no violation).

78. *See* cases cited *supra* note 63; *see also* Brief of the Unites States as Amicus Curiae at 21-23, Spray-Rite Serv. Corp. v Monsanto Co., 465 U.S. 752 (1984) (discussing the courts' assumption that since *Dr. Miles'* resale price maintenance is so unfailingly anticompetitive, per se condemnation is justified). *Dr. Miles* is often applied to cases where no dealer cartel could result. *See generally*, Baker, *supra* note 62, at 1464 n.34. The effects of horizontal and vertical price-fixing are not likely to be identical in all cases. *See e.g.*, Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282,

practice. Instead, it evolved by default because the early cases involved restraints with no apparent benefits to consumers.[79] The Court's assumptions, however, have blocked the way for later defendants to show that resale price restrictions can benefit consumers by ensuring low prices.[80]

III. THE COURT BATTLE OVER NEWSPAPER PRICES

The Supreme Court's first consideration of newspaper distribution systems under antitrust laws in 1968 demonstrated the mischief of the Court's assumption about vertical price restrictions. In *Albrecht v. Herald Co.*,[81] the Court extended the per se rule to include vertical agreements aimed at fixing maximum resale prices.[82] The Court also extended section 1 of the Sherman Act to unilateral conduct by stretching the concept of a combination beyond the breaking point.[83] The Herald Company, which publishes the *St. Louis Globe-Democrat*, sold its papers to independent carriers for distribution.[84] In 1961, one of the carriers, Lester Albrecht, raised his price ten cents per month over the suggested maximum price.[85] After repeated warnings, the newspaper contacted Albrecht's customers by mail, telephone, and through a solicitation agent, Milne. The newspaper offered to deliver the paper to Albrecht's customers at the lower, published price.[86] Those who accepted were transferred to another carrier, Kroner, who was told the customers would be returned to Albrecht if Albrecht lowered his price.[87] When Albrecht brought his treble damage action, the newspaper responded with a 60-day termination notice.[88] Albrecht then sold his route for less than he would have received had he retained all his original customers.[89]

283-85 (1975); Note, *Restricted Channels of Distribution under the Sherman Act*, 75 HARV. L. REV. 795, 800 (1962).

79. *See* cases cited *supra* note 77; *see also* Levi, *supra* note 56, at 612 (law on resale price maintenance lacks "a meaningful structure of theory").

80. *See supra* note 53.

81. 390 U.S. 145, *reh. denied*, 390 U.S. 1018 (1968); *see also* Herald Co. v. Harper, 293 F. Supp. 1101 (E.D. Mo. 1968), *aff'd*, 410 F.2d 125 (8th Cir. 1969) (another chapter in the litigation between Lester J. Albrecht and Herald Co.). The newspaper's claim that the treble damages provision of the antitrust laws is unconstitutional was held "plainly insubstantial." *Id.*

82. *Albrecht*, 390 U.S. at 150. The Court cited four cases — but not *Dr. Miles* — as support for the long-accepted rule "that resale price fixing is a per se violation." *Id.* at 145. United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (a horizontal price-fixing case); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (also a horizontal price-fixing case); Kiefer-Stewart Co. v. Joseph Seagram & Sons, 340 U.S. 211 (1951); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956). Of these cases, only *Trenton Potteries* cited *Dr. Miles* as authority. United States v. Trenton Potteries Co., 273 U.S. 392, 399 (1927). However, *Trenton Potteries* also allows inquiry into potential benefits of the alleged restraint. *Id.* at 397.

83. *Albrecht*, 390 U.S. at 150.

84. *Id.* at 147; *see also* Handler, *supra* note 2, at 1299.

85. *Albrecht*, 390 U.S. at 147 n.2.

86. *Id.* at 147.

87. *Id.* at 147-48.

88. *Id.* at 148.

89. *Id.* Albrecht sold his route for $12,000, which was $1,000 more than he had paid for it. However, by the time he sold the route, he had 900 customers instead of the 1,200 he had when the dispute with the newspaper began. Kroner testified at trial that he sold the customers he served on the route for $3,600. *Id.*

The trial court found for the Herald Company and the Eighth Circuit affirmed.[90] The Supreme Court, however, reversed,[91] finding an illegal conspiracy to enforce the resale price ceiling between the Herald Company, Milne, and Kroner.[92] The conspiracy was based on the premise that Milne and Kroner knew the newspaper sought to force Albrecht to lower his price.[93] The Court, however, disregarded the fact that by hiring Milne, the newspaper was creating competition rather than reducing it.[94]

The *Albrecht* Court's economic analysis is faulty for several reasons.[95] The Court asserted that maximum price agreements substitute "the perhaps erroneous judgment of the seller for the forces of the competitive market" and thus reduce "the ability of buyers to compete and survive in that market."[96] This rationale ignores the economics of newspaper distribution, which is performed by carriers who are assigned to exclusive territories and are insulated from market forces. Carriers do not compete with each other, and newspapers generally do not allow competition between carriers because that would produce higher prices.[97]

The carriers' independent business judgment is also limited in many ways. To maintain quality services, newspapers can demand that papers be delivered no later than a certain time and even that they be placed in plastic bags on rainy days. Instead of dispensing with the fiction that merely forbidding resale price ceilings preserves the carrier's independent business judgment, the Court accepted this fiction as fact.[98] The Court's reasoning is grounded on the idea that sellers may err in establishing a price. However, this is irrelevant to antitrust policy and antithetical to the notion of competition.[99] For sellers to com-

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90. *Id.* at 146.

91. Albrecht ultimately recovered $84,243 plus $50,000 for attorney's fees. Albrecht v. Herald Co., 321 F. Supp. 99 (E.D. Mo. 1970), *aff'd in part, rev'd in part*, 452 F.2d 124 (8th Cir. 1971).

92. *Albrecht*, 390 U.S. at 150. *But see* Knutson v. Daily Review, Inc., 548 F.2d 795, 801-03 (9th Cir. 1976) (suggesting that parent and subsidiary corporations which published a group of newspapers were incapable of conspiracy, without even mentioning *Albrecht*), *cert. denied*, 433 U.S. 910 (1977).

93. *Albrecht*, 390 U.S. at 150; *see also* NEWSPAPERS AND ANTITRUST, *supra* note 6, at 86 (describing the Court's expansion of the combination concept as "the most disturbing element" of the *Albrecht* decision).

94. *See* NEWSPAPERS AND ANTITRUST, *supra* note 6, at 88.

95. The Court is not solely to blame for this faulty economic analysis. The Court declined to accept the newspaper's claim that its resale price ceilings were necessary, because the newspaper failed to offer evidence of the existence of exclusive territories, their reasonableness or the economic power over price they placed in the hands of the distributors. *Albrecht*, 390 U.S. at 153. Instead, the newspaper's defense consisted of challenging the Sherman Act as unconstitutional, alleging procedural problems with plaintiff's claim for relief, and contending that plaintiff had failed to prove the existence of a combination. *See* Brief for Respondent, *Albrecht*, 390 U.S. 145.

96. *Albrecht*, 390 U.S. at 152.

97. *See supra* note 51; *see also* Albrecht v. Herald Co., 367 F.2d 517, 523 (8th Cir. 1966), *rev'd*, 390 U.S. 145 (1968). When one of the witnesses was asked how long the *Globe-Democrat* had used a system of exclusive routes, he replied, "Forever." *Albrecht*, 367 F.2d at 523.

98. *See* Blair & Kaserman, *supra* note 2, at 478 n.68.

99. *See* Handler, *supra* note 2, at 1306; Brief of the United States as Amicus Curiae at 26-27, Spray-Rite Serv. Corp. v. Monsanto Co., 465 U.S. 752 (1984).

pete, they must be free to make mistakes, which should result in lower profits, not in treble damage actions. Because the market penalizes errors, firms eventually will correct their mistakes or else suffer economic consequences.[100] Although this correction may take longer with some monopolies, a newspaper, with its uniquely intense interest in selling as many papers as possible, will focus on pricing errors which reduce circulation.[101] Because many newspapers cost more to produce than the reader pays for a copy,[102] the possibility of an excessive price is reduced to the point that it disappears.

The *Albrecht* Court also was concerned that the newspaper's price ceiling would aid market concentration and might serve as a minimum price.[103] The Court failed to understand that prohibiting price ceilings aids market concentration by forcing newspapers to terminate the independent carriers and to take over distribution of the newspaper.[104] The Court also overlooked the fact that newspaper prices are so low that consumers would not be harmed if the maximum price did become the minimum.[105] Even if it did, the problem could be treated as horizontal price-fixing among the carriers.[106] The *Albrecht* Court's argument also reflects sympathy for competitors, as distinct from competition. This is contrary to the Court's oft-quoted principle that the Sherman Act "protects competition, not competitors."[107]

The rationale of *Albrecht*, the idea that price ceilings "cripple the freedom of traders,"[108] has since been repudiated by the Court.[109] In *Continental T.V., Inc. v. GTE Sylvania Inc.*,[110] the Court rejected any analysis that makes antitrust

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100. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 889 (1981).

101. *See supra* notes 30-33, 50 and accompanying text.

102. *See supra* note 30.

103. *Albrecht*, 390 U.S. at 152.

104. *See* Hovenkamp, *supra* note 10, at 462; *see also* Albrecht v. Herald Co., 367 F.2d 517 (8th Cir. 1966) (noting the *Globe-Democrat's* only alternative would be to terminate all its independent carriers and make home deliveries with its own employee), *rev'd*, 390 U.S. 145 (1968); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 n.26 (1977) (recognizing that if a per se rule prevents manufacturers from achieving efficiencies important to successful operation, the rule will create an incentive for vertical integration).

105. *See supra* note 30 and accompanying text.

106. Harrison, *supra* note 2, at 928.

107. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

108. *Albrecht*, 390 U.S. at 152 (quoting Kiefer-Stewart Co. v. Joseph Seagram & Sons, 340 U.S. 211, 213 (1951)).

109. *Albrecht's* "freedom of traders" language recalls the Court's assertion in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1977), that restricted distribution practices limit "the retailer's freedom as to where and to whom it will resell the products," *id.* at 378, and so "violate the ancient rule against restraints on alienation." *Id.* at 380. *Schwinn* was overruled by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), and the Supreme Court now judges vertical territorial and customer restraints under the rule of reason. *Id.*; *see also* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 12 (1977) (*Sylvania* demolished *Albrecht*). Even some commentators who are generally suspicious of vertical restraints appreciate the harmful impact of the *Albrecht* rule. *See, e.g.*, Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and* Sylvania, 64 IOWA L. REV. 461, 519-21 (1979); Pitofsky, *supra* note 51, at 16 n.59 ("for both theoretical and practical reasons, there is considerable merit to the argument that the theory and result in *Sylvania* has [sic] undermined *Albrecht*").

110. 433 U.S. 36 (1977).

cases turn on the "autonomy of independent businessmen."[111] *Sylvania* removed vertical non-price restraints from the per se category,[112] a ruling which has virtually demolished *Albrecht.*[113] If exclusive territories are permitted, under the *Sylvania* decision a manufacturer should be allowed to prevent its distributors from extracting unfair and excessive profits from their intrabrand monopoly.[114] Without the right to establish a maximum price, a newspaper is powerless to prevent a carrier from exploiting his exclusive territory. Interestingly, this reasoning was adopted by the Eighth Circuit in *Albrecht.*[115] The Supreme Court, however, rejected this argument because it was unconvinced that allowing one form of illegal restraint (price-fixing) would blunt the effect of another illegal activity (market division).[116] Now that exclusive territories are no longer per se illegal, the validity of the Eighth Circuit's position in *Albrecht* is rekindled.[117]

Another newspaper distribution case, *Newberry v. Washington Post Co.*,[118] wrestles with this problem in the wake of *Sylvania*. The *Post* distributed its newspapers through two channels; one group of carriers provided home delivery while a second group delivered papers to newsstands and vending machines.[119] The home delivery carriers were assigned to territories but were not prohibited from selling outside those areas.[120] The *Post* and the carriers had not agreed on what price should be charged, but the suggested price to subscribers was printed in each edition of the newspaper and on the recommended billing forms given to carriers.[121]

When the *Post* tried to change its distribution system to avoid the *Albrecht* decision, fourteen carriers filed a lawsuit charging that the distribution system illegally divided the market and fixed the price.[122] Relying on *Sylvania* and applying the rule of reason,[123] the D.C. Circuit held the territorial allocation was legal because of its economic and administrative efficiencies.[124] The purpose of the restraint was to promote prompt, efficient deliveries to as many readers as possible. The *Post's* distribution system accomplished this goal at a reasonable

111. *Id.* at 53 n.21.

112. *Id.* at 59. However, the *Sylvania* Court upheld per se treatment of vertical price restraints. It ignored *Dr. Miles'* reliance on the analogy to horizontal price fixing and instead reasoned that vertical price restrictions reduce competition not only between sellers of the affected products but also between that product and competing brands. *Id.* at 51 n.18.

113. *See* Posner, *supra* note 109, at 12; *see also* Stewart & Roberts, *Viability of the Antitrust Per Se Illegality Rule:* Schwinn *Down, How Many To Go?*, 58 WASH. U.L.Q. 727, 745 (1980) (*Sylvania* leaves *Albrecht* rule "in serious doubt").

114. *See generally*, Pitofsky, *supra* note 51; *see also* 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 734c (1978). Newspapers are trying to do precisely this. *See supra* text accompanying note 35.

115. 367 F.2d 517, 523 (1966), *rev'd*, 390 U.S. 145 (1968).

116. *Albrecht*, 390 U.S. at 154 ("The assertion that illegal price-fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive.").

117. Stewart & Roberts, *supra* note 113, at 727.

118. 438 F. Supp. 470 (D.D.C. 1977).

119. *Id.* at 473.

120. *Id.* at 473-74.

121. *Id.* at 477.

122. *Id.* at 473.

123. *Id.* at 474 (citing *Sylvania*, 433 U.S. at 47-59).

124. *Id.* at 475.

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price.[125] But in its analysis of the price-fixing allegation, the court took a convoluted route[126] around the *Sylvania* holding that vertical price-fixing is illegal. Instead of recognizing that the newspaper had valid business reasons for preventing carriers from exploiting their territories, the court relied on the absence of any agreement establishing the carriers' prices and on a lack of coercion by the *Post*.[127]

The court ruled against the carriers as a group,[128] but one distributor, Albert Newberry, prevailed.[129] Newberry charged his customers twenty-five cents per month more than the suggested price. The *Post* retaliated by raising Newberry's wholesale rates by an equivalent amount.[130] The court held that the *Post* forfeited its sheltered position by retaliating against Newberry to enforce the suggested retail price.[131] By holding in favor of Newberry but against the other carriers who claimed the *Post* coerced them to follow the suggested price, the decision leaves significant questions unanswered.[132] For example, should a person's legal rights depend on his or her willingness to fight a one-sided battle? More importantly, should a newspaper be allowed to minimize distribution costs and prevent its carriers from exploiting consumers?

These questions, along with the lower courts' difficulties in reconciling *Sylvania* with *Albrecht*, demonstrate that the time is ripe for the Supreme Court to recognize that a newspaper's price ceiling can be justified. In the words of Justice Brandeis, the test of illegality is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[133] Every antitrust case necessarily raises this question, yet the *Albrecht* court failed to consider it.[134]

Albrecht, and its progeny, have narrowed the means by which a newspaper can protect itself and its readers from price-gouging carriers who are insulated from price competition because of their exclusive territories.[135] The only option left by *Albrecht* is for the newspaper to integrate vertically and deliver the papers with its own employees.[136] This creates a greater problem for small newspapers because they are less able to finance a direct distribution system than are larger, more financially secure, newspapers.[137] Even for newspapers that can afford it, switching to self-delivery has spawned new antitrust issues.

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125. *Id.; see also* Knutson v. Daily Review, Inc., 468 F. Supp. 226, 232 n.7 (N.D. Cal. 1979).

126. *Id.* at 476-80; *see also* Stewart & Roberts, *supra* note 113, at 743.

127. *Newberry*, 438 F. Supp. at 477. The court noted that the *Post* had never taken any action against a dealer who departed from the suggested price and added, "[t]he suggestion that these staunch plaintiff dealers were afraid to act in their own independent best interest is not worthy of belief." *Id.* at 479.

128. *Id.*

129. *Id.* at 482.

130. *Id.* at 481.

131. *Id.*

132. Stewart & Roberts, *supra* note 113, at 745.

133. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1948).

134. *See* M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 767 (1973).

135. *See supra* note 51.

136. *See supra* text accompanying note 104.

137. About 85% of the newspapers published in the United States have daily circulations of

IV. Out of the Frying Pan and Into the Fire

Newspapers trying to avoid the *Albrecht* decision by switching to self-delivery soon found themselves facing lawsuits filed by independent carriers who charged illegal monopolization over the delivery process.[138] The *Kansas City Star*'s attempted switch to self-delivery in 1977[139] produced a courtroom fight that was influenced by the *Albrecht* Court's misconception of the economics of the newspaper industry. *Paschall v. Kansas City Star*[140] was brought by independent carriers when the *Star* announced a plan to switch to self-delivery and terminate all contracts with independent carriers. The carriers argued that the *Star's* action would constitute illegal monopolization.[141] Although the suit did not allege resale price maintenance, the dispute between the newspaper and its carriers was triggered by the carriers' control of subscription prices.[142] The *Star's* plan for switching to self-delivery included a uniform subscription price[143] to replace the carrier-determined prices.[144]

Upon first hearing, the Eighth Circuit found illegal monopolization.[145] The court characterized the *Star* as a potential competitor whose presence helped keep retail prices down. The court also declared that a switch to self-delivery would reduce competition in the distribution market.[146] The court embraced *Albrecht*'s misunderstanding of newspaper industry economics, yet ignored its holding that the newspaper cannot compete with the carrier by offering to deliver the paper at a price that undercuts the carrier.[147] By switching to self-delivery, the *Star* had hoped to eliminate monopoly pricing by its carriers while avoiding the consequences of *Albrecht*.[148] The *Star*, however, ironically found itself faced with a court ruling that recommended and approved what the Herald Company had been condemned for doing in *Albrecht*.[149]

50,000 or less. NEWSPAPERS '86, *supra* note 45, at 4. The typical American daily is smaller than most people think. The average circulation is 38,000 and the median circulation is 12,000. THE BUYING AND SELLING OF AMERICA'S NEWSPAPERS xi (Ghiglione ed. 1984); *see also* McGuire v. Times Mirror Co., 405 F. Supp. 57, 65 (C.D. Cal. 1975). The *Times*' switch to self-delivery in 1976 cost $1.3 million for equipment and other out-of-pocket expenses, "several million" in increased payroll and $3 million paid to independent carriers whose contracts were terminated. *Id.*

138. *See* cases cited *supra* note 12. Newspapers continue to face suits alleging price-fixing. On April 25, 1986, three carriers filed a class action lawsuit against the *Pensacola News Journal* in federal district court. Associated Press report, Apr. 30, 1986.

139. Paschall v. Kansas City Star, 695 F.2d 322 (8th Cir. 1982), *rev'd*, 727 F.2d 692 (8th Cir. 1984).

140. 695 F.2d 322 (8th Cir. 1982), *rev'd*, 727 F.2d 692 (8th Cir. 1984).

141. *Id.* at 325.

142. *Id.* at 330-32.

143. *Id.* at 330.

144. *Id.* at 330 n.10.

145. *Id.* at 333-34.

146. *Id.* at 329. *But see* P. AREEDA & D. TURNER, *supra* note 114, at ¶ 729c (labeling the potential competitor theory as an internal contradiction and offering four detailed criticisms).

147. *Albrecht*, 390 U.S. at 149.

148. Hovenkamp, *supra* note 10, at 460.

149. *Id.* at 463.

Two years later, the court reheard[150] *Paschall* and ruled that a switch to self-delivery was not, by itself, illegal monopolization.[151] The court's decision, however, appeared somewhat reluctant because it was limited to the particular facts of the case.[152] The decision also provided a listing of possible misuses of monopoly power that would subject a newspaper to antitrust liability.[153] The court stood by its earlier finding that the *Star* was a monopolist.[154] This determination also shows how the court misunderstood the economics of the newspaper industry. This misconception occurred because the court never considered how a newspaper goes about monopolizing. It also failed to distinguish the market for newspaper advertising from the market for newspaper sales.[155]

The term "monopolist" means a seller who has the power to obtain a higher price for its product by reducing output.[156] Because power over price is difficult to measure directly, courts frequently use large market share as an indication of power over price.[157] Generally, the correlation between power over price and

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150. The *Star* petitioned for a rehearing and the Eighth Circuit agreed to reconsider the case en banc. *Paschall*, 727 F.2d at 692.

151. *Id.* at 699. However, a newspaper that has a monopoly — virtually all newspapers in the United States today — still faces potential antitrust liability if plaintiffs can show either (1) a specific intention to monopolize or (2) anticompetitive effects that result from its actions. United States v. Columbia Steel Co., 334 U.S. 495, 531-32 (1948); United States v. Griffith, 334 U.S. 100, 106 (1948). These are the Court's landmark decisions on § 2 Sherman Act violations. *Paschall*, 727 F.2d at 696.

152. *Id.* at 704.

153. *Id.* at 701-04.

154. *Id.* at 696. Possession of monopoly power is the first step in finding a violation of § 2 of the Sherman Act, which makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" any part of interstate commerce. The other necessary element is "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); *see also supra* note 49 and accompanying text.

155. Hovenkamp, *supra* note 10, at 456. For a rather dated, but still essentially valid, explanation of newspaper monopoly practices, see Corden, *The Maximisation of Profit by a Newspaper*, 20 REV. ECON. STUD. 181 (1953).

156. L. SULLIVAN, *supra* note 1, at 30-33.

157. *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 54 U.S.L.W. 4531 (U.S. June 2, 1986); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); Auburn News Co. v. Providence Journal Co., 504 F. Supp. 292, 302-03 (D.R.I. 1980), *rev'd on other grounds and remanded*, 659 F.2d 273 (1st Cir. 1981). The *Auburn News* court found monopoly power from the *Journal's* 90% share of the market for newspapers of general circulation in the State of Rhode Island. That market would include the *Journal*, two Boston papers and three New York papers. AMERICAN NEWSPAPER MARKETS, INC., CIRCULATION '85-86: CIRCULATION AND PENETRATION ANALYSIS OF PRINT MEDIA 627 (24th ed. 1986). In 1980, five other dailies were published in Rhode Island, all with less than 35,000 daily circulation. EDITOR & PUBLISHER CO., 1981 EDITOR & PUBLISHERS INTERNATIONAL YEARBOOK at I-243-45 (1981). However, the district court eliminated these newspapers from the relevant market because they did not circulate statewide and were more "parochial," concentrating on local news. Had the market been defined as all daily newspapers in Rhode Island, the *Journal*'s share would have been about 65%. Auburn News Co. v. Providence Journal Co., 504 F. Supp. 292, 303 (D.R.I. 1980), *rev'd on other grounds and remanded*, 659 F.2d 273 (1st Cir. 1981). A 65% share is lower than that usually held to establish monopoly power. United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (doubtful that 60% or 64% of the relevant market is a monopoly); *see also* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87%); International

market power is very high. However, it is not a perfect correlation. Some producers of one hundred percent of a certain product have no market power[158] while some producers of a low percentage of a particular market may have substantial power over price.[159] Therefore, a court's use of market share to determine whether a seller is a monopolist often leads to the wrong conclusion.[160]

Because of the peculiarly local nature of American newspapers, most of them are monopolists in the market for newspaper sales.[161] This is irrelevant to a newspaper's decision to switch to self-delivery, however, because a newspaper cannot increase its profits by raising the price of its papers or by reducing its circulation.[162] A newspaper's switch to self-delivery might be an attempt to eliminate monopoly profits of its carriers rather than an exercise of its own monopoly power. Or it could be prompted by a decision that it can distribute its newspapers more efficiently than its independent carriers. In either case, the change would be in the best interest of customers, who benefit when newspaper circulation is maximized.[163] A newspaper's switch to self-delivery produces the same economic bottom-line as setting a resale price ceiling. Economically equivalent business practices, therefore, should receive equal antitrust treatment. The

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Boxing Club, Inc. v. United States, 358 U.S. 242 (1959) (81%). Other courts have offered much broader definitions of a newspaper's relevant market. Knutson v. Daily Review, Inc., 548 F.2d 795, 804 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (suburban newspapers should be considered, as well as newspapers from other cities that circulate in any of the towns served by the Daily Review and its sister papers); Neugebauer v. A.S. Abell Co., 474 F. Supp. 1053, 1059-61 (D. Md. 1979) (other newspapers available in Baltimore should be considered along with radio and television stations).

158. *See* P. AREEDA & D. TURNER, *supra* note 114, at ¶ 500, 507-11; Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947-49 (1981).

159. *See, e.g.*, Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 530-31 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

160. L. SULLIVAN, *supra* note 1, at 30-33.

161. Hovenkamp, *supra* note 10, at 457.

162. *See supra* note 30 and accompanying text. One possible exception to this general rule could occur where the market is saturated and the price elasticity of demand for newspapers is low. A newspaper in this situation may find it profitable to maximize circulation because the impact of advertising would be small. An extreme example is presented if every person in town is already a subscriber and they all think the newspaper is worth five dollars a month or more. A newspaper charging three dollars a month could raise its subscription price without losing any advertising revenue. No advertising revenue is lost because no circulation is lost. Hovenkamp, *supra* note 10, at 457 n.28. However, the demand for newspapers at current delivery prices has proven to be quite elastic. Most newspapers attempting to increase subscription prices are immediately faced with declining circulation. B. COMPAINE, THE NEWSPAPER INDUSTRY IN THE 1980s: AN ASSESSMENT OF ECONOMICS AND TECHNOLOGY 32 (1980). In *Paschall*, circulation decreased when the *Kansas City Star* tried to raise prices. 695 F.2d at 330; *see also* Knutson v. Daily Review, Inc., 383 F. Supp. 1346, 1382 (N.D. Cal. 1974), *aff'd in part, rev'd in part, and remanded*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (circulation decreased when an independent carrier raised the subscription price over the newspaper's objection).

163. For example, if the monopolist carrier is making 20% monopoly return, by switching to self-delivery the newspaper can retain 20% profit (and perhaps improve the quality of the paper) or it could lower the delivery price and increase circulation. Even if the newspaper is a monopolist in the circulation market—that is, if it can increase profits by reducing circulation—its vertical integration with a second monopolist yields a lower price. 3 P. AREEDA & D. TURNER, *supra* note 114, at ¶ 725c.

current antitrust law's different treatment of business practices that produce the same economic result raises questions of whether forcing vertical integration should be the intent of public policy and whether unnecessary reorganization of a distribution system is proper.[164]

Although most newspapers could switch to self-delivery today,[165] there are valid business reasons for using independent carriers.[166] These advantages, however, are available under present law only at great cost to the newspaper and to its readers.[167] This means that switching to self-delivery is not a viable option for smaller newspapers.[168] More importantly, a newspaper's switch to self-delivery eliminates hundreds of independent businesses for purposes of preserving competition in an industry where competition is nearly extinct. For the benefit of society, changes are needed in the law that makes the more restrictive alternative (complete ownership of distribution) per se legal, while the less restrictive alternative (a ceiling on the prices charged by the independent distributors) is per se illegal.

V. Blurring the Bright Lines

Although historically the per se rule against price fixing has been the brightest of the bright line tests in antitrust,[169] the U.S. Supreme Court has blurred

164. Blair & Kaserman, *supra* note 2, at 479 n.73.

165. *See* cases cited *supra* note 12. Although the newspapers eventually won all these cases, *Paschall*, 727 F.2d 692, 704 (8th Cir. 1984), the number of cases, the time they spent in the courts and the varied grounds on which the courts relied suggest that newspapers may face frequent and protracted legal battles.

166. In addition to the legal considerations, a newspaper must analyze the practical advantages and disadvantages of the various distribution systems before deciding to switch to self-delivery. The benefits of an independent dealership arrangement include the fact that independent dealers will not unionize and the newspaper will not have to deal with all the attendant risks and costs of dealing with a union. However, distribution through an independent dealer can mean that the customers can face high prices and poor service — or even no service at all. An employee system gives the newspaper complete control over the price, time and manner of delivery and it may make a centralized and direct billing system much easier to implement and control. But employees may unionize and an employee system will entail substantial administrative costs. Laidlaw & Haley, *supra* note 36, at 187. Beyond the scope of this note are other laws which a newspaper should consider before deciding to switch to self-delivery. These include: federal labor law, federal and state franchise and distributorship laws, federal and state wage and hour laws, federal and state unfair business practices laws, federal income tax laws, federal pension discrimination laws, state antitrust laws, state contract law including the Uniform Commercial Code, and state laws governing tortious interference with business relations. Another factor that should be considered is the risk of liability for actions in the four years preceding a switch, so a newspaper should carefully review its files and past practices to make sure no adequate basis exists that would support a price-fixing claim. *Id.* at 192.

167. The *Kansas City Star* settled the dispute that triggered *Paschall* at a cost of almost $26 million after a legal battle that lasted nearly ten years. The 263 independent carriers who challenged the newspaper's decision to switch to a direct delivery system received slightly less than $100,000 each in the settlement which took effect Sept. 3, 1985. International Circulation Managers Association, ICMA Update, Oct. 1986, at 4.

168. Newspapers and Antitrust, *supra* note 6, at 93; *see also supra* note 137.

169. L. Sullivan, *supra* note 1, at 198.

the line in recent years.[170] In *Broadcast Music, Inc. v. Columbia Broadcasting System,*[171] the Supreme Court recognized the ancillary restraints doctrine and applied it to support a rule of reason analysis of price-fixing. The Court noted that what appeared to be horizontal price-fixing was necessary "to market the product at all"[172] and therefore ancillary to a valid purpose.[173] The Court recognized that while the "per se rule is a valid and useful tool of antitrust policy and enforcement . . . easy labels do not always supply easy answers."[174] The question is whether the particular practice is "plainly anticompetitive" and "without redeeming virtue."[175]

The Court's most recent resale price maintentance decision, *Spray-Rite Service Corp. v. Monsanto Co.,*[176] indicates that the rule of reason may be applied in future cases. The Court referred to the per se rule as only the "present law" governing resale price maintenance.[177] The Court also recognized that the Department of Justice in its amicus brief,[178] several commentators and Justice White in an earlier concurrence[179] had argued that the economic effect of vertical price restrictions is indistinguishable from vertical non-price restrictions.[180] Contrary authority was absent from the Court's opinion. Finally, no other justice joined Justice Brennan's concurrence emphasizing that *Dr. Miles* had not been overruled and that the Court should not overrule it in the face of Congressional inaction.[181]

The Court recently blurred its bright lines further by using a rule of reason analysis in *FTC v. Indiana Federation of Dentists.*[182] Even though group boycotts had been considered per se illegal longer than resale price ceilings,[183] the Court unanimously declined to "forc[e] the Federation's policy into the 'boycott' pi-

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170. Harrison, *supra* note 2, at 925. While the Court has condemned price ceilings, it has approved many other business practices which could be banned as price-fixing. Mergers, joint ventures and partnerships internally suppress price competition to organize production through other means. Easterbrook, *supra* note 100, at 887.

171. 441 U.S. 1 (1979).

172. *Id.* at 23.

173. *Id.* at 21-25.

174. *Id.* at 8.

175. *Id.* at 9.

176. 465 U.S. 752 (1984).

177. *Id.* at 763.

178. Brief of the United States as Amicus Curiae at 21-22, Spray-Rite Serv. Corp. v Monsanto Co., 465 U.S. 752 (1984). However, the Supreme Court did not reach the question because neither party argued that the rule of reason should apply to a vertical price-fixing conspiracy. 465 U.S. at 784 n.7.

179. *Sylvania,* 433 U.S. at 69-70 (White, J., concurring in the judgment).

180. 465 U.S. at 761.

181. *Id.* at 769. "Congressional inaction" seems a curious way to describe the situation. A week before the Court heard arguments in *Spray-Rite,* President Reagan signed Pub. L. 98-166, an appropriations bill which included a provision banning the Justice Department from using any of its funds to attempt to overturn or alter the per se rule against resale price maintenance. CONGRESSIONAL QUARTERLY INC., 1983 ALMANAC 477-78.

182. 106 S. Ct. 2009 (1986).

183. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Resale price ceilings were not held to be per se illegal until 1968 in *Albrecht,* 390 U.S. 145.

geonhole and invok[e] the per se rule."[184] The FTC had not defined the relevant market, established that the Federation had market power, or determined whether the restraint at issue raised costs to consumers and insurers.[185] Nevertheless, the Court found a violation of the Sherman Act despite the FTC's shortcomings.[186] The Court noted that it has been slow to apply per se rules to "business relationships where the economic impact of certain practices is not immediately obvious."[187] The impact of newspaper pricing practices was not immediately obvious to the Court, which misunderstood the economic structure of the newspaper industry. The Court also failed to comprehend that its decision in *Albrecht* had a far greater impact than the resale price ceilings themselves.

Today, "price-fixing" is merely a label given to arrangements found to be unlawful per se. An arrangement's probable effects, however, must be examined before this fatal label is attached.[188] In recent years, the Supreme Court has been more willing to conduct examinations to determine which arrangements are beneficial to consumers.[189] If *Albrecht* were to reach the Court today, the newspaper's pricing practices could not be declared "plainly anticompetitive" and "without redeeming virtue."[190] Rather, price ceilings advance consumer welfare by preventing the carriers from reaping monopoly prices.[191]

VI. The Trump Card of Antitrust Law

Many scholars are now challenging the economic rationality of the per se rule against resale price maintenance, particularly price ceilings.[192] The rule against resale price ceilings has developed without thorough study[193] even though the Court has emphasized repeatedly that per se rules should be used only after a conclusion that almost every instance of a particular practice is harmful. Thus, there is no point in trying to separate the harmful instances from the harmless or beneficial ones in case after case.[194] However, if the Court incorrectly analyzes

184. 106 S. Ct. at 2018.

185. *Id.* at 2018-19.

186. *Id.* The Court noted, with little elaboration, that the agreement impaired the ability of the market to advance social welfare by ensuring that goods and services can be provided to consumers at a price approximating the marginal cost of providing them. *Id.* at 2020-21.

187. *Id* at 2018.

188. *Sylvania*, 433 U.S. at 58-59 ("[W]e do make clear that departure from the 'rule-of-reason' standard must be based on demonstrable effect rather than . . . formalistic line drawing.").

189. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 8-9, 19-20 (1979); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688-92 (1978); *Sylvania*, 433 U.S. at 53 n.21 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

190. *See supra* notes 35-50 and accompanying text.

191. *See supra* notes 35-36 and accompanying text.

192. *See, e.g.*, Easterbrook, *supra* note 100; Handler, *supra* note 2, at 1301-07; Hankin, *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 257-58 (1968); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981).

193. *See supra* note 77-79 and accompanying text.

194. *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649 (1980) (per se rule applies if "a particular concerted activity entails an obvious risk of anticompetitive impact with no apparently . . . redeeming value"); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S.

the effects of a practice upon its initial encounter, or if the first defendant fails to present the facts necessary for a proper analysis, a per se rule will automatically be applied in future cases without further consideration of the practice's effects. The *Albrecht* rule illustrates the harshness of such a practice because it barricades the door to correcting the Court's misconceptions about the newspaper industry's economics. As one federal district court described it, "[t]he per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score."[195] Instead, courts should consider the economic reality that price ceilings in the newspaper industry protect the ultimate consumer from being overcharged, a primary goal of antitrust laws.[196] Allowing a newspaper to set a price ceiling prevents carriers, who are themselves monopolists, from exploiting their customers. Because it is lawful[197] to grant exclusive territories, it should also be lawful to place further conditions on the grant, such as price restraints which are likely to aid consumers.[198]

The per se rule proponents argue that interests in judicial convenience, efficient enforcement of the antitrust laws and clear guidance to the business community justify treating as illegal those arrangements which upon full review might be found to be procompetitive.[199] This view is inconsistent with the original description of the per se rule as applying to business practices which lack any redeeming value.[200] The view, however, is in harmony with the more subtle formulation of *Sylvania*, which recognizes that exceptional cases will arise but "are not sufficiently common or important to justify the time and expense necessary to identify them."[201] Newspaper distribution systems may be the exceptional case, but a limited exception is justified because newspapers are an easily identifiable class. In addition, they play an important role in the functioning of American democracy because of their role in the dissemination of vital information.[202] Because so many newspaper distribution cases have reached

1, 9-10, 19 n.33, 22 n.40 (1979) (emphasizing need for "considerable" experience with a practice before per se condemnation and remarking on the role of output reduction as the trigger for a per se rule); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692-93 (1978) (per se rule applies only to agreements "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed"); *Sylvania*, 433 U.S. at 50 n.16 (1977) (in establishing per se rules, "[t]he probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences . . . [A] per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.").

195. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980).

196. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (legislative history of the Sherman Act "suggest[s] that Congress designed [it] . . . as a 'consumer welfare prescription.' ") (quoting R. Bork, The Antitrust Paradox 66 (1978)).

197. After *Sylvania*, exclusive territories are judged under the rule of reason. The *Sylvania* restraints were found lawful.

198. *See* Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883, 885-86 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978) (holding that resale price-fixing is not unlawful, even under *Albrecht*, when used as an ancillary device to implement territorial allocations).

199. Pitofsky, *supra* note 51, at 13.

200. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

201. 433 U.S. at 50 n.16.

202. The framers of the U.S. Constitution recognized the importance of newspapers and made

the courts in the past decade, the interests of judicial economy will be better served by developing a sensible rule for their resolution.

The per se rule also has been defended on grounds that resale price ceilings limit pricing and therefore prevent new competitors from entering a market.[203] This analysis focuses on a market in which the businesses conspire to keep prices low enough to discourage potential entrants. However, the horizontal conspiracy presents an antitrust problem independent of vertical price restrictions. This analysis also overlooks the economic reality that collusion is not necessary because one firm could reduce its price to the entry-deterring level and force others to follow suit.[204] Others argue that the *Albrecht* rule helps maintain the vitality of the per se rule against minimum price-fixing.[205] Without the rule against price ceilings, cartel-like activities would be more difficult to prohibit. A limited exception for newspapers, however, would promote consumer welfare without undercutting the rule against minimum price-fixing.

Some commentators have proposed a rule of per se legality.[206] They argue that if a manufacturer desires the most efficient distribution of its products, it will not impose any restraint that will reduce the quantity demanded by consumers.[207] This argument applies to all price restrictions, but is especially forceful when applied to the newspaper industry because a newspaper's economic survival depends on distributing its papers to as many customers as possible. However, a rule of reason approach would allow sufficient consideration of the economic structure of the newspaper industry, while per se legality could place undesirable power in the hands of monopoly newspapers.[208] Resale price ceilings should not be deemed per se legal because there may be situations where the anticompetitive consequences imagined by Justice White in *Albrecht*[209] are present without the redeeming virtues outlined by Justice Harlan.[210]

VII. Playing the Trump Card in Other Business Contexts

The per se rule against resale price maintentance can be justified in a variety of business situations that can be distinguished from the newspaper industry. In competitive markets, vertical price restrictions present many dangers that outweigh the interests of manufacturers who seek to control resale prices.[211] In

them the only constitutionally protected industry. U.S. Const. amend. I. However, applying the antitrust laws to newspapers does not violate the constitutional guarantee of a free press. Associated Press v. United States, 326 U.S. 1, 19-20 (1945).

203. L. Sullivan, *supra* note 1, at 211-12.

204. Blair & Kaserman, *supra* note 2, at 465-66.

205. Harrison, *supra* note 2, at 946.

206. *See, e.g.*, Posner, *supra* note 192.

207. *Id.* at 23.

208. An example would be exploiting the carriers by setting a price ceiling so low (i.e., so close to the wholesale price) that they could not make a reasonable profit. *Cf.* L. Sullivan, *supra* note 1, at 391.

209. *Albrecht*, 390 U.S. at 152-54.

210. *Id.* at 156-58.

211. L. Sullivan, *supra* note 1, at 385-86; *see also* Jinkinson & Foster, *Per Se Rules Against Vertical Restraints: Down But Not Out*, 58 Wash. U.L.Q. 795, 797 (1980) ("per se rules are critical to both the preservation of the private antitrust lawsuit and the general economic welfare").

many business situations, alternatives other than controlling resale prices are available to manufacturers who want to ensure high sales volume, encourage dealers to offer services beyond the sale of product, facilitate advertising, or protect the manufacturer's good will and prestige.[212]

Resale price maintenance generally destroys effective, pro-consumer, intrabrand competition.[213] If retailers can set their own prices, market forces will determine which type of distribution is most attractive to consumers and thus maximizes sales.[214] Intrabrand price competition assures that prices[215] will continue to be a reference point for consumers to use in making their decision on the value offered them by competing businesses.

Even when competing brands of a product are on the market, resale price competition may nevertheless be reduced significantly.[216] This can occur when the manufacturer cultivates a prestige image for its product.[217] For example, a whiskey manufacturer advertises that its product must be good because it costs so much. This manufacturer is selling more than a tangible product; buyers are also paying for a mystique. A manufacturer using this marketing strategy may see resale price fixing as beneficial[218] because price reductions by some dealers could damage the whiskey's prestige by indicating that it is not worth the usual price or is not purchased by fashionable consumers.[219] However, the whiskey manufacturer can achieve its goals by less restrictive means.[220] The manufacturer's wholesale price usually serves as a minimum resale price.[221] Some dealers may be able to shave the retail price, perhaps by selling the prestige whiskey as a "loss leader" that will attract customers who then buy other items,[222] but this slight difference will not be enough to defeat the whiskey's prestige image.[223] Resale price restrictions cannot be justified in this situation because the public interest in protecting marketing mystiques is questionable[224] and certainly does not outweigh the public benefits that result from price competition among dealers.[225]

Vertical price restrictions may help establish price-fixing conspiracies among

212. Lifland, Pitofsky & Popofsky, *Advising Clients on Vertical Restraints*, 51 ANTITRUST L.J. 50, 52-53 (1982); *see also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (supporting the holding that the challenged restraint was per se illegal by suggesting an alternative and less restrictive means of accomplishing the same ends).

213. L. SULLIVAN, *supra* note 1, at 379.

214. P. AREEDA, *supra* note 17, at 8-9.

215. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). *Accord*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 23 (1979); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

216. L. SULLIVAN, *supra* note 1, at 379; *see also Sylvania*, 433 U.S. at 51 n.18 (resale price maintenance reduces competition between competing brands).

217. L. SULLIVAN, *supra* note 1, at 386.

218. R. POSNER, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS 234-37 (1981).

219. P. AREEDA, *supra* note 17, at 645.

220. *Id.*; L. SULLIVAN, *supra* note 1, at 386.

221. P. AREEDA, *supra* note 17, at 645.

222. *Id.* at 645-46.

223. L. SULLIVAN, *supra* note 1, at 386.

224. P. AREEDA, *supra* note 17, at 645.

225. L. SULLIVAN, *supra* note 1, at 379.

dealers and manufacturers.[226] If such restrictions are lawful when used for a manufacturer's individual ends, many conspiracies to fix prices will go undetected because they will be easily camouflaged. Furthermore, resale price maintenance can stabilize price-fixing conspiracies.[227] Each conspirator has an incentive to cheat because a single retailer selling below the fixed cost has a competitive advantage. Resale price maintenance makes cheating easier to detect and reinforces price-fixing conspiracies.[228] The Supreme Court has recognized the procompetitive benefits when participants in price-fixing arrangements undercut the fixed price. The Court has also condemned mechanisms which help price-fixers detect and shut off business practices that undercut the price fixed by the conspirators.[229]

Most of the goals which manufacturers seek to achieve through resale price maintenance can be reached in other ways.[230] Through contracts, manufacturers impose upon dealers objective standards relating to sales volume, service, advertising and promotion, goodwill and prestige by which dealers' performance will be judged, and their contracts either renewed or terminated.[231] Manufacturers can adopt a distribution program based on agency or consignment.[232] Manufacturers also can deal directly with the marketing concerns which are often advanced as justifications for resale price maintenance. A manufacturer can undertake service, promotion and advertising itself, or it can reimburse retailers for their expenses in those activities.[233]

The per se rule against resale price maintenance encourages the development of innovative forms of retail competition.[234] Catalog, outlet, and off-price stores are recent examples of innovative retail enterprises. Many of these originate as small businesses and would be barred from competition, unless given the chance to demonstrate they can operate efficiently. Foreclosing these retailers from

226. *See, e.g.*, R. BORK, *supra* note 7, at 292-95; L. SULLIVAN, *supra* note 1, at 383-84; Anderson, *The Antitrust Consequences of Manufacturer-Suggested Retail Prices: The Case for Presumptive Illegality*, 54 WASH. L. REV. 763, 785 (1979); Comanor, *Vertical Territorial and Customer Restrictions*: White Motor *and its Aftermath*, 81 HARV. L. REV. 1419, 1426 (1968); Levmore, *Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information*, 67 IOWA L. REV. 981, 986 (1982).

227. Pitofsky, *supra* note 51, at 15-16; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 294 (1975).

228. P. AREEDA & D. TURNER, *supra* note 114, at ¶ 828d (one objection to resale price maintenance is that oligopolistic manufacturers may use it to facilitate parallel pricing).

229. United States v. Parke, Davis & Co., 362 U.S. 29, 43-48 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 456 (1922).

230. *See* L. SULLIVAN, *supra* note 1, at 388, 389 (detailing the methods by which a manufacturer could legally further such a relationship).

231. L. SULLIVAN, *supra* note 1, at 386.

232. *See* United States v. General Elec. Co., 272 U.S. 476, 488 (1926) (genuine contracts of agency do not violate the antitrust laws). *But see* Simpson v. Union Oil Co., 377 U.S. 13, 24 (1964) ("To allow Union Oil to achieve price fixing . . . through this 'consignment' device would be to make legality for antitrust purposes turn on clever draftsmanship.").

233. Anderson, *supra* note 226, at 788; Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints*, 1981 DUKE L.J. 417, 433; Levmore, *supra* note 226, at 983, 987.

234. *See, e.g.*, L. SULLIVAN, *supra* note 1, at 381.

competing in price, using manufacturers' leading brands, effectively chokes off their business opportunities.

The per se rule also protects consumers in several ways. For example, although a neighborhood store charges a higher price for television sets, a consumer may choose to shop there because of the convenience or the availability of service from a store near home. Another consumer may choose to travel to a higher-volume, more efficient dealer who charges a lower price. In this situation, the consumer's freedom of choice in the marketplace is protected by the rule against resale price maintenance.[235] The rule also protects consumers by ensuring that retailers have the freedom to set prices in response to the competitive demands of their individual markets. Resale prices set by a distant manufacturer are inherently less responsive to the immediate demands of local markets than prices determined by businesses whose existence and livelihood depend upon price flexibility to meet those demands.[236]

Finally, there is a significant non-economic interest in facilitating dealer independence.[237] The Sherman Act is based on capitalistic (free-market) tenets that unrestrained competition in the marketplace will produce the lowest prices, the highest quality and the best use of this country's resources.[238]

VIII. A Proposal

The ancillary restraints doctrine[239] should be applied to bring newspaper distribution cases under rule of reason scrutiny. The Supreme Court has already applied the doctrine to bring several horizontal price-fixing arrangements under the rule of reason. The Court has done this even though horizontal price-fixing presents greater anticompetitive dangers than resale price ceilings.[240] The unique economic structure of the newspaper industry minimizes, if not eliminates, the potential harm of a resale price ceiling.[241] A rule of reason approach would allow the survival of hundreds of small, independent businesses while protecting the consumer by limiting the monopoly pricing power of independent carriers.

235. *See, e.g.*, Anderson, *supra* note 226, at 788; Comanor, *supra* note 226, at 1430; Gerhart, *supra* note 233, at 435.

236. *See, e.g.*, L. Sullivan, *supra* note 1, at 377, 382, 387, 388 (1977); Anderson, *supra* note 226, at 788; *see also* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951) (vertical price-fixing agreements, whether they set minimum or maximum prices, "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment").

237. L. Sullivan, *supra* note 1, at 385-86.

238. Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958). In the words of Senator Sherman, "[i]t is the right of every man to work, labor and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges." 21 Cong. Rec. 2457 (1890).

239. *See supra* notes 55-56 and accompanying text.

240. Arizona v. Maricopa County Medical Soc'y, 457 U.S. at 348 n.18 (noting that horizontal pricing agreements are generally regarded as more objectionable than vertical pricing restraints); *see also* L. Sullivan, *supra* note 1, at 197-202.

241. *See supra* notes 30-50 and accompanying text.

At the same time, this approach would limit the newspapers' ability to use their own monopoly power.[242]

The rule of reason is often considered objectionable because it opens the courtroom doors to anything the parties wish to bring up.[243] Thus a rule of reason trial involves inquiry into the market power of the defendant, the motives and effects of the conduct, and the economics of the entire industry involved.[244] The social expense of such a trial, including court costs, attorney's fees, and the expense of expert testimony by economists, has resulted in the per se exception to the rule of reason.[245] Other proponents of the per se rule argue that the rule of reason has little deterrent effect and often undermines antitrust enforcement.[246] However, these objections can be limited by using Justice Taft's ancillary analysis as modified by recent Supreme Court decisions, which inquire only into the facts unique to the business, the history of the restraint, and the reasons why it was imposed.[247] Under this formulation, the rule of reason can be applied through a three-step analysis.

A. *Is the Restraint Ancillary to a Valid Purpose?*

The first step in this framework is to determine whether the restraint's purpose is to inhibit competition or whether it is ancillary to an arrangement that benefits consumers. For example, a newspaper has a valid purpose in establishing uniform home delivery subscription rates. Home delivery generally makes up the largest percentage and most stable element of a daily newspaper's readership.[248] Any price increase may result in a loss of circulation and trigger the downward spiral that can quickly destroy a newspaper.[249] Newspapers will be able to present sufficient evidence of benefits to their subscribers to survive this step.[250]

B. *Is the Restraint Necessary to Accomplish That Purpose?*

The second step in the analysis is to determine the function of the restraint.

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242. *See supra* note 208.

243. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The Court described rule of reason analysis as:

> [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be achieved, are all relevant facts.

Id.

244. *Id.*

245. *Sylvania*, 433 U.S. at 36.

246. Pitofsky, *supra* note 51, at 2, 13, 33 (rule of reason treatment is "largely an effort to measure the immeasurable").

247. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691-95 (1978).

248. NEWSPAPERS AND ANTITRUST, *supra* note 6, at 89.

249. *See id.* at 3.

250. *See supra* note 163 and accompanying text.

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The newspaper defendant will demonstrate that a price ceiling is a necessary condition in granting an exclusive territory to a carrier. The lack of competition among carriers, which is inherent in exclusive territories, insulates carriers from price competition.[251] Exclusive routes are economically necessary because newspaper delivery routes are most efficient when one person delivers the newspapers to all subscribers within a specific territory. As a result, newspaper routes are natural monopolies.[252]

C. *Is the Restraint No More Than Necessary?*

The third step in the analysis is to determine whether there is a less restrictive alternative. The newspaper can demonstrate that its only viable alternative to a resale price ceiling is vertical integration and complete ownership of distribution, a far more restrictive alternative.[253] Newspapers have tried to find alternatives to vertical integration, but none have proved both economically and legally sound. Other methods of controlling monopolistic practices of distributors, workable in other industries, are not viable in the newspaper industry because of its unique economic structure. The following is a list of these methods.

> (1) One possibility is placing more than one newspaper carrier in the same distribution area. This possibility would technically increase competition, but it also would produce higher costs and higher prices than permitting a monopolist carrier to charge his profit-maximizing price.[254] This practice is non-existent in the newspaper industry.[255]
>
> (2) A second possibility is exercising control over its carriers by offering contestable delivery routes.[256] Prospective carriers would bid for routes, and the publisher would award each route to the bidder who promises to deliver the paper at the lowest price. By reopening the routes for competitive bidding each time a contract expires, the newpaper could ensure that its papers were delivered at a competitive price, even though the carrier was a monopolist for the duration of his contract. However, this entry bidding, in which one term of the contract is the delivery price of the newspaper, has been held to be illegal resale price main-

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251. *See supra* note 51.

252. A price ceiling raises no question of fairness to the carriers, who routinely are told of the newspaper's suggested maximum price when they begin delivering newspapers. Therefore, they could not legitimately claim to have made an investment based upon the belief that they would be free to charge whatever price they chose. Blair & Kaserman, *supra* note 2, at 476.

253. *See Albrecht*, 390 U.S. 145, and cases cited *supra* note 12.

254. *See supra* note 51 and accompanying text.

255. Interview with Philip K. Hanna, vice president of The New York Times Regional Newspaper Group, in Holmes Beach, Fla., May 15, 1986 [hereinafter cited as Hanna Interview].

256. Hovenkamp, *supra* note 10, at 461-62. Under the theory of contestable markets, an unregulated natural monopoly can be made to behave as competitively as a market with dozens of incumbents, if entry costs into the market are low and exit costs are nonexistent or very low. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1 (1982). In general, the lower the start-up costs and the exit price, the more a contestable natural monopoly will approximate competitive behavior. Demsetz, *Why Regulate Utilities?*, 11 J. L. & ECON. 55, 56-61 (1968).

tenance under *Albrecht*. Most courts have interpreted *Albrecht* to mean that a newspaper cannot control, by bidding or otherwise, the maximum price that an independent carrier charges its customers.[257] The contestable route concept would also prove unwieldy and unworkable because a turnover rate among carriers of one hundred percent or more a year is considered routine.[258]

(3) Another possibility would be terminating those carriers who charge above the suggested retail price. This possibility may violate section 1 of the Sherman Act when used as a signal to other dealers that such conduct will not be tolerated.[259]

(4) A final alternative might be one used by the *Washington Post* in its attempt to fight a carrier's price increase by raising the price it charged the carrier by the same amount.[260] The district court held the retaliatory action to be an illegal restraint of trade.[261] However, a similar pricing system used by *The New York Post* was approved by a federal district court because it was applied to all carriers.[262] The distributors were required to pay the newspaper sixty percent of the proceeds obtained by charging more than the newspaper's suggested retail price.[263] Although this may appear to be a viable, less restrictive alternative, it presents several problems. First, it does not achieve the economic and administrative efficiencies of a uniform price charged to all subscribers.[264] Second, it makes the newspaper appear to encourage higher prices, which may prompt greater numbers of carriers to raise prices.[265] Finally, it might further confuse the courts by defusing the newspaper industry's strongest argument in favor of price ceilings, that is, its need to keep prices low to attract as many subscribers as possible.[266]

As a practical matter, a newspaper might protect itself from antitrust suits by keeping its carrier routes small enough to ensure that no individual carrier has a large enough monetary stake to pursue an action against the newspaper.[267] However, it would be difficult to limit the number of subscribers solicited by an ambitious carrier because the newspaper could be charged with coercive

257. *See, e.g.*, Auburn News Co. v. Providence Journal Co., 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

258. Hanna Interview, *supra* note 255. "Good" routes — those with stable subscriber lists and easy delivery — are, of course, more stable than routes where new customers must constantly be solicited and collections or deliveries are difficult. *Id.*

259. Knutson v. Daily Review, Inc., 548 F.2d 795, 804-05 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). However, terminating all the independent dealers merely for the purpose of implementing a new distribution system will not support a price-fixing allegation. *Id.* at 805; *see also* Lamarca v. Miami Herald Co., 395 F. Supp. 324, 327 (S.D. Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975).

260. *Newberry*, 438 F. Supp. 470. *See supra* notes 111-25 and accompanying text.

261. *Newberry*, 438 F. Supp. at 480-82.

262. Martindell v. News Group Publications, Inc., 580 F. Supp. 330 (E.D.N.Y. 1984). The Court distinguished *Newberry* on grounds that *The Washington Post* had made an example of Newberry rather than applying a pricing schedule equally to all distributors. *Id.* at 333.

263. *Id.* at 331.

264. *See supra* note 166.

265. Hanna Interview, *supra* note 255.

266. *See supra* note 30-33 and accompanying text.

267. Hanna Interview, *supra* note 255.

action or it could lose the carrier. Limiting the potential profits from a route also limits the number and type of people who would be interested in the job. The routes would also have to be very small, because in private actions filed under the Sherman Act, damages are trebled.[268] A newspaper's only protection against price increases, thus, are management techniques that encourage carrier cooperation[269] and the carriers' ignorance of their own power to raise prices.

IX. Conclusion

Prevailing antitrust law has the perverse effect of diminishing consumer welfare rather than promoting it when applied to the newspaper publishing industry. Preserving the carrier's independence permits him to raise prices with impunity. On the other hand, permitting a newspaper to set maximum prices provides the same check on pricing excesses that a competitive market structure normally provides. Therefore, the application of per se rules to newspaper price ceilings is inappropriate and inefficient. The per se rule forces newspapers into the more restrictive alternative of vertical integration into distribution. Using the ancillary restraints doctrine to apply the rule of reason to newspaper distribution cases would not be a dramatic shift in the law of resale price maintenance. The original rule of reason and the decision in *Dr. Miles* were based upon it. The resale pricing cases that followed *Dr. Miles* might have been decided the same way with the ancillary approach. It also coincides with the Supreme Court's most recent antitrust decisions. The ancillary restraints doctrine and the rule of reason provide the most principled method of solving the legal conundrum that confronts the newspaper industry today. This solution benefits both newspapers and consumers, whose interests in low prices coincide. It also benefits the independent businessmen who deliver the newspapers because unless newspapers can legally prevent price increases by carriers, more and newspapers will switch to self-delivery and eliminate hundreds of independent businesses.

Jacqueline Dowd

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268. 15 U.S.C.A. § 15 (Supp. 1986).

269. Knutson v. Daily Review, Inc., 548 F.2d 795, 806 n.13 (9th Cir. 1976) (newspaper's efforts to convince the carriers that "increased circulation is good for everybody"), *cert. denied*, 433 U.S. 910 (1977).