Newspaper Monopoly In New Orleans: The Lessons for Antitrust Policy

Richard J. Barber
NEwspaper monopoly in new orlEAns: the LESSONS FOR antitrust policy

Richard J. Barber*

Within the past fifty years the United States has witnessed the disappearance, primarily through consolidation, of more than 800 daily newspapers. As a result many cities no longer have a daily paper at all. And of those that do only about 4% (the comparable figure in 1910 was 43%) have as many as two competing publishers; New York, Washington, and Boston have three or more local newspaper contestants; another 55 cities, including Chicago, Los Angeles, Philadelphia, Detroit, Houston, and San Francisco, have just two publishers; and the rest live under the influence of a single voice, benevolent or otherwise. Whether this trend to newspaper monopoly at the local level will have the serious adverse long-run social implications that many foresee cannot now be determined, of course;
but there is a legitimate basis for concern. Although there are sources of information and ideas aside from the newspapers (thank goodness), mere day-to-day observation suggests that the other mass media are far from perfect substitutes either in the ways of propagandization or in the detailed reporting of public affairs, particularly of the provincial variety.\(^5\) Certainly there would appear to be distinct social advantage in preserving as many independent, competing newspapers as are economically viable — and perhaps more.

Since the decline of competition in the newspaper industry typically takes the form of outright combinations between competing publishers, one would think that antitrust intervention could play an important role in retarding the growth of monopoly. Within only the last few years publishers in Chicago, Detroit, Washington, Cincinnati, Milwaukee, and New Orleans have merged with or purchased a competing concern, in what appear to be essentially mergers for monopoly.\(^6\) To an intelligent observer this sort of conduct would seem made to order for antitrust action, fitting into numerous statutory slots, most notably section 7 of the Clayton Act. Yet examination of the record reveals that the federal enforcement agencies have been little concerned with the newspaper industry. The Department of Justice has initiated very few proceedings involving newspapers at all (the Federal Trade Commission has been mute); none have been brought under section 7 (although a number of mergers and acquisitions have taken place since the enactment of the Celler-Kefauver amendment of 1950), nor have any been commenced solely on the theory that a newspaper has monop-

---

5. Moreover, there is a substantial degree of cross-ownership between the media, especially between newspapers and radio-television. In 1958 a third of the country's television stations were affiliated with newspapers, most in the same market areas. Levin, Broadcast Regulation and Intermediate Competition, 45 VA. L. REV. 1104, 1136 (1959). Even if radio is taken into account the extent of common ownership is disturbingly large. A recent survey by the American Newspaper Publishers Association revealed that in 1960, of 1,461 cities with one or more daily papers, in 355 (almost 25%) there was only one independent “media voice,” N.Y. Times, March 15, 1963, p. 4, col. 1-3 (city ed.). Even in larger communities newspaper ownership of broadcasting media can greatly restrict free media access. In Dallas, for example, the city's two daily papers each control a local major network-affiliated radio-TV complex. For figures and references as of an earlier date on the problem, see Note, 59 YALE L.J. 1342 (1950).

NEWSPAPER MONOPOLY

olized in violation of section 2 of the Sherman Act.\(^7\) Rather the prosecutions undertaken have been devoted entirely to allegations of improper market conduct—to practices that are felt likely to permit one firm to enlarge its position unfairly at the expense of a rival. This emphasis on behavior as distinct from position is a hallmark of contemporary antitrust enforcement.\(^8\) Especially in the case of newspaper publication there prevails among enforcement authorities the implicit belief that if certain illicit exclusionary practices are ended, normal market forces will function in an acceptable fashion. In this view the real culprit is exclusionary conduct; if ended, workable competition will prevail—meaning, presumably, that most cities will have at least two contesting publishers. Whether this is true, however, remains open to serious question, for if newspaper monopoly is fundamentally the product of technological and market forces, focusing attention on specific practices can represent a waste of limited enforcement resources. Moreover, if the real cause is an imbalance between the economics of newspaper publication and the size of most of the markets, antitrust relief will then provide no real solution at all.

To assess rationally the role of antitrust policy in the newspaper industry we need a good deal more information about the functioning of local newspaper markets and the impact of past antitrust activity. For this purpose New Orleans provides

\(^7\) In addition to the *Times-Picayune* litigation, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), *reversing* United States *v. Times-Picayune Publishing Co.*, 105 F. Supp. 670 (E.D. La. 1952), the Department of Justice has initiated two other cases, one involving the *Kansas City Star*, the other the *Wichita Eagle*, on the theory that the use of forced combination rates (i.e., requiring advertisers to take space in the publisher's morning and afternoon papers) restrained trade and represented an attempt to monopolize. The *Kansas City Star*, after a long fight, lost its battle, the courts finding that the facts were distinguishable from those at issue in *Times-Picayune*. *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957), *cert. denied*, 354 U.S. 923 (1957). The *Wichita Eagle* consented to terminate the practice. *United States v. Wichita Eagle Publishing Co.*, 1959 Trade Cas. ¶ 69,400 (D. Kan. 1959) (consent decree). In three other cases the government alleged the use of overt exclusionary tactics: One was dismissed by the trial court, *United States v. Harte-Hanks Newspapers*, Inc., 170 F. Supp. 227 (N.D. Texas 1959); in another the defendant agreed to terminate the conduct which inspired the suit, *United States v. Mansfield Journal Co.*, 1959 Trade Cas. ¶ 67,210 (N.D. Ohio 1952) (consent decree); and in the third, involving the *Lorain* (Ohio) *Journal*, the Supreme Court affirmed a conviction, the facts revealing a manifestly abusive use of power: The *Journal*, the only paper in Lorain, systematically boycotted any advertiser who employed the services of a new radio station that had located in the city. Quite properly, this was found to violate the Sherman Act. *United States v. Lorain Journal Co.*, 92 F. Supp. 794 (N.D. Ohio 1950), *aff'd per curiam*, 342 U.S. 143 (1951).

the basis for an ideal case-study. Generally typical of newspaper publication elsewhere in the country, New Orleans has also been the setting for one of the few antitrust cases brought against a newspaper — resulting in a decision commonly viewed as one of the most important handed down by the Supreme Court in recent years. Not only does this render the New Orleans market an apt candidate for inspection, but the massive trial record assembled during the litigation makes publicly available detailed factual information of a kind that otherwise would be largely unobtainable (no industry more jealously guards the secrecy of its operations than newspapers). This article, therefore, purports (1) to review the principal structural and performance characteristics of newspaper publication in New Orleans; (2) to survey the nature of the relevant antitrust litigation; (3) to analyze the merit of the government's action, directed as it was exclusively to certain practices in which the city's leading newspaper engaged; and (4) to consider the role of antitrust policy generally in the newspaper industry. Most of the discussion deals with the period 1949 to 1958, with particular emphasis on the years 1949 and 1950 since they were at the heart of the pertinent antitrust litigation and exemplify the market's outstanding features over the past thirty years.

I. CHARACTERISTICS OF THE NEW ORLEANS NEWSPAPER MARKET

Most observers would probably characterize the New Orleans newspaper market during any of the past thirty years — if not over an even longer period of time — as unworkably competitive. The number of sellers has been few, product dif-

9. Recognizing that few industrial markets display the characteristics of pure or perfect competition, various commentators have endeavored to define criteria of acceptable or "workable" or "effective" competition. J. M. Clark was probably the first to use the term "workable competition." Toward a Concept of Workable Competition, 30 AMER. ECON. REV.: PAPERS AND PROCEEDINGS 241, 243 (1940). [The underlying notion, however, can be traced into classic economic theory. See Peterson, Antitrust and the Classic Model, 47 AMER. ECON. REV. 60 (1957).] During the last 20 years or so a number of other writers have elaborated on their own tests of acceptable competition. See, e.g., Stigler, The Extent and Bases of Monopoly, 32 AMER. ECON. REV.: PAPERS AND PROCEEDINGS 2-3 (1942); Edwards, Maintaining Competition 9, 10 (1949). The numerous approaches have been surveyed in Mason, The Current Status of the Monopoly Problem in the United States, 62 HARV. L. REV. 1265, 1266-71 (1949). As he sums it up, "workable competition is considered to require, principally, a fairly large number of sellers and buyers, no one of whom occupies a large share of the market, the absence of collusion among either group, and the possibility of market entry
ferentiation intense, entry effectively impeded. Particularly striking is the role of the Times-Picayune Company, the market's dominant participant, and today its only daily newspaper publisher; quite properly it is the center of attention, and will be so treated throughout the remainder of this article. A study of its behavior offers convincing evidence of its monopoly position; and an examination of its performance provides little in the way of mitigation: it has manifested substantial excess capacity, it has earned supernormal profits, and it has engaged in price behavior of the kind commonly associated with monopoly. For many purposes such a thumbnail sketch might be sufficient; but since the company was the target of the government's 1950 antitrust litigation (the topic of Part II) and since its behavior so well illustrates the economic attributes of newspaper publication generally, its traits, and those of the market in which it functioned, must be elaborated somewhat more fully.

The Market's Structural Development

Of the dozen or so English-language daily newspapers that began publication in New Orleans during the nineteenth century, the great majority—bearing names like the Chronicle, the Bulletin, the Republican, the Crescent, the Delta, the Tropic, and the Bee—have long since vanished from the scene. But the oldest of them, the Picayune, founded on January 25, 1837, remains to the present, though in diluted form. And some of the others can also be traced to more recent days, as with the Times (founded in 1863), the Democrat (1875), the Item (1877), and the States (1880).

by new firms.” *Id.* at 1268. Certainly the New Orleans market has long been distinguished by a very few sellers, two after 1933, one since 1958, and by extremely high barriers to entry (which no one has attempted to surmount for several decades). Regardless of the type of workable competition defined it would be difficult to place this market within its bounds.


11. During the nineteenth century, newspapers in New Orleans appear to have been started, or purchased, as much for political reasons as for traditional economic motives. In 1897, for instance, one Dominick O'Malley purchased the Item for the avowed purpose of raising "some hell." That he did. He published many libelous cartoons, some with skunks bearing the faces of his enemies; engaged in a number of gun fights with those who criticized his efforts; and uncovered several scandals. The paper's circulation rose enormously. O'Malley, it might be noted, had a history of colorful exploits. In 1895 he was arrested, along with a number of others, for the murder of the New Orleans police chief. All were placed on trial, and acquitted. Rumors that the jurors had been bribed spread; the townspeople became aroused, organized into a mob, found all of the defendants except O'Malley and proceeded to hang them. The imperturbable
In sharp contrast to the market's rapid development during the half-century beginning in the 1830's, the years since 1880 are marked by both the total absence of new entrants (a condition generally true throughout the country, though elsewhere the decline in entry did not become noticeable until the early 1900's) \(^{12}\) and the gradual consolidation of the older papers. The *Times* and the *Democrat* joined in 1881, and then in 1914 the resulting *Times-Democrat* merged with the *Picayune*. Nineteen years later the now *Times-Picayune* purchased the *States*—which it continued in circulation as its afternoon paper. Meanwhile, in 1924, the *Item* had commenced publication of a morning paper known as the *Tribune*;\(^ {13}\) this continued until 1940 when it was discontinued. After the demise of the *Tribune* the market's contours took the shape they presented until 1958, when the *Item* was purchased by the rival *Times-Picayune* Company. In the years 1940-1958 (the period of principal concern here, in large part because it encompasses the relevant antitrust litigation involving the *Times-Picayune* Company) New Orleans newspaper publication was thus in the hands of a duopoly: the *Item* Company published a daily afternoon paper and, from March 4, 1950, until 1958, a Sunday edition; the *Times-Picayune* Company published the city's only morning paper, the *Times-Picayune*, and the other of its two afternoon papers, the *States*, as well as a single Sunday edition. So sets the stage.

Of the three newspapers published in New Orleans between 1940 and 1958—namely, the *Item*, the *States*, and the *Times-Picayune*—clearly the *Times-Picayune* was dominant. While advertisers, who provide 70% or more of a newspaper's revenue,\(^ {14}\) treated the two afternoon papers, the *Item* and the

---

\(^{12}\) In the country as a whole the number of newspapers continued to swell until 1909, when 2,600 were being published. The nineteenth century, however, witnessed the beginnings of most of the daily papers: In 1800 there were but 24 dailies, by 1850 the number had increased to 254, and by 1899 to 2,226. As the New Orleans experience would suggest, the most rapid growth occurred between 1870 and the late 1880's. *Ernst*, ch. IV and exhibits A-F; *Lee; Mott*.

\(^{13}\) One attribute of newspaper publication, observable in the strategies of both the *Times-Picayune* (in buying and perpetuating the afternoon *States*) and the *Item* (starting the morning *Tribune*), is the desire of publishers to make fuller use of their available productive capacity by adding a second paper, circulated at another hour of the day. As well, a second paper represents one more non-price weapon in the arsenal of the oligopoly seller.

\(^{14}\) Advertisers, who typically provide 70% or more of a newspaper's revenue, are customarily divided into three categories: retail (e.g., a local department store), which in 1950 provided about 50% of the *Times-Picayune* Company's total linage; classified; and national or general (e.g., a cigarette manufacturer), which in 1950 amounted to about 15% of the company's linage. The implic-
States, as highly substitutable, they almost universally regarded the morning paper, because of its far greater circulation, as essential to successful merchandising in the metropolitan market. This explains why in 1949 the Times-Picayune, in spite of its significantly higher advertising rates, carried nearly as much advertising linage as the other two papers combined.\(^1\)

Possessing a great lead in circulation it was simply able to offer more readers per unit of advertising expenditure than either of the other papers; in 1949 its average daily circulation of 170,000 was almost equal to the total circulation of the afternoon papers, or in absolute terms exceeded each of them by more than 80,000. Even if allowance is made for the reader duplication that admittedly existed, the morning paper still provided a great many additional readers.

Thus for the typical advertiser, seeking the largest attainable audience, no other paper in New Orleans was an adequate substitute for the Times-Picayune. For some admittedly this was less true than others; to an advertiser, for example, interested chiefly in coverage within the city of New Orleans itself, the geographic pattern of the Times-Picayune circulation, with only 65% of its sales in the city zone as compared with 80% for either of the other papers,\(^1\) made it somewhat less attractive. Yet even allowing for this the Times-Picayune still reached far more people, whether within the city zone or in a larger area, than either the States or the Item. Moreover, it did so at a significantly lower advertising cost per reader; it is this feature, reflecting the interaction of advertising rates and circulation, that assumes major consequence in newspaper survival. Advertising charges tend generally to increase much

---

\(^{15}\) 88 Media Records 65 (1949). As a point of information, there are 300 agate lines per column, or 2,400 lines per page, in the usual full-size (e.g., New York Times) newspaper. In 1949 the daily issues of the Times-Picayune carried 23,149,021 lines of advertising of all types. Together the Item and the States carried 25,573,956 lines (of which the Item had 13,788,845). This condition subsisted until 1953, when the Times-Picayune began carrying more linage than the two afternoon papers. Ibid.; 104 Media Records 72 (1953).

\(^{16}\) The “City Zone” included all of Orleans Parish (coextensive with the city of New Orleans) and part of Jefferson and St. Bernard Parishes; its 1949
less rapidly than circulation, with the result that newspapers with greater sales usually are a far more attractive medium than newspapers with a smaller audience, in spite of absolute differences in their advertising charges.17

The Times-Picayune Company, fully aware that the Times-Picayune was, as it put it, "the backbone of any advertising effort in this market,"18 pursued a deliberate policy calculated to preserve its distinctiveness from the afternoon papers. In many unnecessary and expensive ways it operated the States and the Times-Picayune as separate entities. Each had its own news staff, acting under the direction of an independent editor.19 Different syndicated material was purchased for the two papers (Li’l Abner and Walter Winchell, for example, were carried only in the States, except on Sunday when they appeared in the Times-Picayune).20 Many kinds of news inherently of no great immediacy and which could just as well have been run in both papers without change, such as pictures of brides and the newly engaged, were handled separately.21 Although it could easily have combined its operation and published simply in the form of an "all-day" or "round-the-clock" paper, it chose not to do so.22 Rather the company consistently varied content and preserved largely sovereign editorial organizations for the primary

population was 540,030. A larger "Retail Trading Zone" encompassed a number of parishes adjacent to the city containing another 385,094 persons. Only about 65% of the Times-Picayune circulation fell within the city zone, as compared with 80% for the States and 82% for the Item. These data represent the circulation characteristics of all editions for each paper; if, however, specific press runs are considered, a different picture emerges, for some of the morning paper’s press runs were circulated largely within the city proper and some of the afternoon papers’ press runs were distributed in outlying areas. Calculated from data in Government Exhibit Nos. [hereinafter cited as GX] 146-48, 155-56, Records, 1494-1549, 1575-1622, United States v. Times-Picayune Publishing Co., 105 F. Supp. 670 (E.D. La. 1952) [hereinafter cited as Record].

18. GX 17, Record 1303.
19. Record 194, 1304. Some local reporters represented both papers, as in the case of those covering the courts and the sugar and coffee markets, id. at 613, but this was the exception rather than the rule. Editorially, though, the viewpoints of the two papers were coordinated; they supported “the same major movement, the same major political activities, and the same candidates.” Id. at 614.
20. GX 119, 122, Record 621-25.
21. GX 43, Record 1351-52. The States “published the pictures of brides and in many cases brides and grooms who were good wholesome citizens but not necessarily of the 400.” Ibid.
22. Technically, for a paper to qualify as an “all-day” publication “there must be no difference in editions which would enable anyone to distinguish between them being the editions of a morning or an evening paper (save by the insertion of later news).” Chapter C, II(f) of the By-Laws and Rules of the Audit Bureau of Circulation, Record 617.
purpose of presenting distinguishable papers. The States was tailored for the "great middle classes" while the Times-Picayune image was that of a less sensational, more comprehensive news journal. Or, as one of its advertising executives put it, the make-up of the two papers was "as different as the New York Times and the New York Journal-American." Unquestionably the city's three papers were distinct products from the readers' point of view, and among them the Times-Picayune was dominant, while as between the States and the Item there was considerable demand and cross-elasticity.

Excess Capacity and Production Cost Characteristics

One of the most common characteristics of newspaper publication, large excess capacity, is well typified by the Times-Picayune Company. In 1950 (and the point is still true) it printed both of its papers in the same six-story brick structure on Lafayette Square, and with the identical equipment, just as it had been doing since 1933 when it purchased the States. Its large excess capacity was traceable to the full array of printing equipment; but it is illustrated by the presses, which in the aggregate (and in terms of original cost, an admittedly unsatisfactory but still suggestive guide) made up about 61% of the total acquisition costs for all of the company's equipment. Four in number, one color and three black-and-white, the presses were rarely fully used — even during the actual printing of a given edition; indeed they were idle from 70-75% of the time. Only one of the three black-and-white presses was in general use, the other two being considered supplementary and operated only during peak demand periods; the one color press was used even less intensively — normally only in connection with the printing of the Sunday paper. And what was true of the Times-

23. GX 17, Record 1304.
25. GX 144, Record 1486.
26. Defendant's Exhibit No. [hereinafter cited as DX] 6, Record 1626. The composing room, with 35 linotype machines, made up another 16% of the company's original capital investment in equipment. No other single department represented more than 5% of the total.
27. Depending on their capacity, of course, a paper's presses seldom will be in operation for more than about two hours a day if only one paper is being published. Some material can be printed before the hour of circulation, but the late breaking news (e.g., the stockmarket quotations) must be composed and printed within a short time after its receipt. And in large measure the presses are designed so as to permit very rapid printing of such close-deadline items — a fact that dictates very large excess capacity.
Picayune Company was even more true of the Item Company, which had its own presses and other requisite equipment — used only in the printing of one paper a day as compared with the two being printed by its rival. Perhaps the best proof of the extent of the excess printing capacity is to be found in the fact that as each paper in New Orleans was swallowed by one of its adversaries, including the acquisition of the Item in 1958, the buyer sold the plant and equipment which had been purchased and merely transferred the production function to its own existing facilities.

Closely related to the question of excess capacity is the declining nature of the cost schedule over the relevant range, reflecting the comparatively small incremental expense incurred in the printing of an additional paper once unavoidable preliminary typographical operations have been performed. Before any newspaper (or other matter, of course) can be printed the copy must be set in type and the plates which are to be placed on the presses actually prepared. This is a costly process, particularly in terms of labor. In 1950, out of a total of 953 employees carried on the Times-Picayune Company's payroll, 172 were employed in the composing room alone — more than the total number on the editorial force. Typographical personnel pay scales were also high, amounting to an average of $2.25 per hour in 1949, the highest hourly compensation of any production workers (and higher on an hourly basis than the wages of most editorial employees). As a share of the company's operating costs, expenditures for the composing, stereotype, and photo engraving activities made up 13% of the total, or about the same as the share allocable to the editorial function. All told, expenses for typographical work and other duties that are largely unrelated to output made up an estimated 40% of total operating costs. Of those expenses which could be expected to vary with output, the most important was for newsprint — itself representing about 42% of the total.

Roughly speaking, therefore, about half of all operating costs varied directly with output, the other half remaining largely constant regardless of the number of newspapers print-

28. DX 5, Record 1626.
29. 1951 E&P YEAR BOOK 290.
30. GX 8, schedule 1, Record 1288C, 1292.
31. All of these data relate to 1948, with the respective dollar amounts being taken from GX 8, schedule 1, Record ibid. The percentages have been calculated.
ed. If the very large fixed costs, particularly those incurred for the purchase of capital equipment, were also taken into account, there would seem little doubt but that the average unit cost curve would descend sharply over a sizable output range and continue to decline beyond the output level attained by the Times-Picayune Company.

Price Behavior

The Times-Picayune Company's pricing behavior has long reflected its substantial power over price, and indeed is the strongest evidence of its preeminent market stature. Its price decisions have represented a shrewd evaluation of occasional variations in its market strength: as from time to time it became stronger it typically raised advertising rates, in an obvious quest for profit maximization; and when its status was directly questioned it took on the guise of a quasi-competitive seller, cutting prices (but hardly to the likely competitive level) and seeking to exert its influence in such a way as to frustrate the actual or anticipated challenge. In 1941, for example, when the Item's Sunday publication was suspended, thus giving the Times-Picayune Company an exclusive hold on that submarket, it promptly hiked advertising rates by nearly 8% in most categories; by comparison it made no change in the weekday rates, where the Item still presented direct competition. Again, in 1943, it repeated this action, raising Sunday rates but not weekday rates. Finally in 1958, when the company gained a solitary grip on the entire market through outright purchase of the Item, it immediately increased prices—this time by nearly 30%.

While the company clearly has reflected a strong monopolistic propensity to raise prices when it attained an unchallenged market position, at times it has also manifested a willingness to cut rates when its leadership was jeopardized. In 1950, for example, the Item, then under new ownership, announced that it would begin publication of a Sunday edition. This represented a challenge to the Times-Picayune's grip on the Sunday market

32. This conclusion is consistent with the findings of others who have studied the problem generally. See note 24 supra.
33. GX 88-89, Record 1404-05.
and one which it greeted with imminent distaste; immediately it adjusted its general advertising rates — seemingly in a way calculated to make use of its morning paper's strong position, but nevertheless amounting to a significant advertising rate concession. Previously the company had offered no combination rates for space taken in the Sunday paper and either its morning or its afternoon paper. For example, according to the rate schedule which had been placed in effect in July 1949, the open line rate on general advertising in the Sunday edition was 60¢; for comparison, the morning rate at the time was 40¢, the evening rate 24¢, and the optional morning-evening combine 56¢. But on February 1, 1950, just one month before the emergence of the new Sunday Item, the Times-Picayune Company inaugurated an optional combined rate on general advertising that encompassed the Sunday edition. If copy were inserted in the Sunday paper and in the States, the open line rate was now 78¢ (previously the total of the separate rates was 84¢); for insertion in the Sunday paper and in the morning Times-Picayune the rate became 94¢ per line as contrasted with the previous $1.00.

The threat of competition in the Sunday field thus led to prompt price reductions, a fact which itself is consistent with the postulates concerning likely monopoly price behavior. On the other hand, when the company possessed exclusive control in the Sunday field it no doubt priced higher than it would have even under imperfectly competitive circumstances. Yet the way in which it adjusted to the Item's entry reveals something else about the company's conduct: it was not only hostile to any further entry, but it sought to use the attraction — nay, power — of its morning paper as a device for perpetuating its dominance in the Sunday field and for maintaining position in the afternoon field. However, like any monopolist its power was not uniform in all sectors; it confronted not one demand schedule, but several — and it altered its pricing tactics accordingly.

35. When he learned of the Item's plan to reinstitute a Sunday edition one Times-Picayune Company executive said, "[T]here is no necessity for another Sunday paper in New Orleans and the plan of the Item to enter the Sunday field . . . is not economic from the standpoint of the reader and the advertiser, and we consider their doing so an infringement on a franchise which we believe belongs to us." Record 1348.
36. GX 29, Record 1325.
37. GX 34, Record 1340.
This ability to discriminate in price between buyers in accordance with their unequal demand elasticities is, of course, a well-recognized symptom of monopoly, and one clearly discernible in the behavior of the Times-Picayune Company. Here it is particularly noticeable in a comparison of the treatment accorded general (national) advertisers and retail advertisers. While there are some distinctions between them which might in part rationalize their dissimilar treatment along other lines, the basic explanation appears to lie in the slope of their demand schedules, with this inference tending to be confirmed by their actual response to price changes. Like all newspapers the Times-Picayune Company charged national advertisers substantially higher prices for the same physical product than retail advertisers. In 1950, 2,500 lines (roughly one full page) of basically identical advertising copy acclaiming the merits of a given product, for instance, cost from 25 to 40% less if placed by a local department store than if directly inserted by the manufacturer. Moreover, general advertisers, beginning in 1950, were subjected to the unit rule (i.e., were required to place copy in both the Times-Picayune and the States) while retail advertisers were not. This not only meant a loss in their freedom to choose from among the media, but, more importantly, represented a very large effective rate increase to the national advertiser wishing only to use the Times-Picayune. It provoked diverse protests; yet in spite of the unit rules invocation in 1950, the Times-Picayune carried 2,964,420 lines of general advertising, down only slightly from the 3,038,200 lines it carried in 1949.

Entry Factors

As has been noted earlier New Orleans daily newspaper publication has been distinguished by a dearth of entry for more than eighty years. Many explanations can be offered. Some stem from the technological characteristics of the relevant production process which indicate the presence of a declining cost schedule over the observed output range; others are traceable

---

40. In the Times-Picayune the cost per line of such an advertisement was 25¢ to retail advertisers, 40¢ to national advertisers; in the States the comparable charges were 17-1/2¢ and 24¢.
41. 92 MEDIA RECORDS 65 (1950).
to the propensity of advertisers, who provide the preponderance of a paper's revenue, to gain as many readers as possible per unit of outlay. These natural or market-induced forces will be considered further in Part III.

However, New Orleans newspaper publication also has involved certain artificial entry impediments that merit comment. For instance, when the Times-Picayune Company purchased the Item in 1958, it acquired and then immediately sold the seller's plant and equipment — the equipment being disposed of in such a way that it would be unavailable to any prospective local entrant. Moreover, the company also secured from the Item's former owner, and from the Item's principal editors, covenants that they would not reenter the business of newspaper publication in New Orleans for at least five years. While these two features of the 1958 sale did not necessarily prevent entry, they made it considerably more difficult by removing from the market both locally experienced managerial talent and, more importantly, used equipment of the necessary types. While new equipment was obtainable, the price barrier it presented was sufficiently high so as effectively to deter entry, especially in the light of all the other unfavorable circumstances.

A similar artificial barrier was erected in 1941 in respect to Sunday publication. In the spring of that year the Item, then publisher of the city's only other paper, was in debt to the International Paper Company in the amount of $100,000 — a sum accumulated over several depression years. When it was unable to meet a firm demand for payment, International took

42. EDITOR AND PUBLISHER, July 19, 1958, p. 9. Such restrictive trade covenants are a commonplace in the newspaper industry. In 1938, for example, when Paul Block, then publisher of the Toledo Blade, bought out his only rival, the Toledo News-Bee, the selling organization agreed that it would not resume publication of a paper in the city for ten years. The Toledo Blade Co. v. Commissioner of Internal Revenue, 11 T.C. 1073, 1083-84 (1948). Interestingly, of the $880,000 purchase price the contract of sale valued the covenant at $780,000. A similar situation prevailed in the sale of the San Diego Sun to the rival Union-Tribune in 1939. San Diego Sun Publishing Co. v. Commissioner of Internal Revenue, 2 T.C. 704, 800-02 (1943). The validity of this kind of ancillary covenant has never been questioned in a newspaper anti-trust proceeding, although, considering all of the circumstances, a question might fairly be raised as to its "reasonableness" — the criterion of evaluation under the common law restraint of trade doctrine. "A restraint of trade is unreasonable . . . if it . . . tends to create, or has for its purpose to create a monopoly." RESTATEMENT, CONTRACTS § 515 (1932). Further, such a covenant may be viewed as evidence of a Sherman Act violation. See United States v. American Tobacco Co., 221 U.S. 106, 165-66 (1911); United States v. Great Lakes Towing Co., 208 Fed. 733 (N.D. Ohio 1913). Another reported decision unmasks a non-ancillary contract in which the Richmond News-Leader agreed to pay a rival paper, the Times-Dispatch, $70,000 a year to terminate the publication of a competing afternoon paper. The contract
over the *Item* properties and sold them for a reported $400,000.\textsuperscript{43} As a condition of the sale the purchaser expressly agreed that he would publish no Sunday edition for ten years. While the Times-Picayune Company involvement is not apparent on the surface additional information suggests it had a role. On January 1, 1940, a year before the sale of the *Item* properties, the Times-Picayune Company, then the largest consumer of newsprint in New Orleans, terminated its newsprint requirements contract with International.\textsuperscript{44} Naturally disturbed by this action and anxious to renew their dealings International dispatched a vice president to New Orleans. In the spring of 1941 he had several discussions with the Times-Picayune Company's president; in one he announced the plan for reorganizing the *Item* and suspending its Sunday operation.\textsuperscript{45} A month after this was done the Times-Picayune Company entered into a new ten-year contract with International covering its entire newsprint requirements.\textsuperscript{46} Whether the contract amounted to a *quid pro quo* for the obliteration of the Sunday *Item* cannot be conclusively determined on the basis of the evidence available, partly because the documents that might further illuminate the negotiations were destroyed (under unexplained circumstances) sometime between 1941 and 1950. Perhaps the concurrence of events, though of great consequence to International and the Times-Picayune Company, was pure coincidence—but the inference of a tacit understanding is still very hard to rebut. In any case, whether the Times-Picayune Company was a party to the arrangement or not, competition in the Sunday market was eliminated. And since the *Item* had ceased publication of its morning paper, the *Tribune*, on January 13, 1941, a few months prior to the date of its sale to Ralph Nicholson, the company also had an unchallenged hold on the morning field. Under the conditions it was enabled to bolster these positions since, during the war years, it was virtually impossible for a new entrant into the newspaper business either to acquire essen-

\textsuperscript{43} Record 581-82, 586-88, 591. International Paper financed the entire transaction, advancing the $400,000 and holding all the *Item*'s common stock as security. It continued in this position until 1949 when David Stern bought the paper.

\textsuperscript{44} Id. at 578.

\textsuperscript{45} Id. at 584-85.

\textsuperscript{46} Id. at 589.
tial equipment or to obtain a supply of newsprint. Given the company's leading place in the market, the existence of intense product differentiation, and substantial economies of scale, these additional impediments made new entry totally improbable.\textsuperscript{47}

**Excess Profits**

Supernormal profits, in conjunction with other evidence, offer important if not conclusive evidence of the presence of monopoly. On this count, too, an accusing finger can be pointed squarely at the Times-Picayune Company. In the years 1947, 1948, and 1949 the company earned more than 20\% on equity, after the payment of all taxes. In more detail the figures are these:\textsuperscript{48}

<table>
<thead>
<tr>
<th>Year</th>
<th>Net Income (after taxes)</th>
<th>Net Worth</th>
<th>Net Income as % of Net Worth</th>
</tr>
</thead>
<tbody>
<tr>
<td>1947</td>
<td>$1,333,131</td>
<td>$5,572,337</td>
<td>23.9</td>
</tr>
<tr>
<td>1948</td>
<td>1,212,923</td>
<td>5,086,261</td>
<td>23.8</td>
</tr>
<tr>
<td>1949</td>
<td>1,353,510</td>
<td>6,738,770</td>
<td>20.1</td>
</tr>
</tbody>
</table>

While evidence for earlier years is unavailable, there is nothing to suggest that the firm's performance in any of these three years 1947-49 was out of the ordinary. In fact, 1949 was regarded by the company as unsatisfying, with a lower profit rate attributable to the increasingly vigorous competition of the *Item*; as the discussion in Part II will show, the relative decline of the *States* in the afternoon field in 1949 was one of the reasons for the inauguration of the unit rule in February 1950. In the years after 1950 there is again no evidence to suggest that the rate of return significantly declined. While the absence of data for a longer period compels a word of caution, it must be acknowledged that the Times-Picayune Company's 1947-1949 profit rates are strikingly high. An after-tax return of 20\% is equivalent to that earned by du Pont in the sale of cellophane, where it possessed substantial control over price.\textsuperscript{49} Moreover, such a profit rate is nearly three times that of all corporations

\textsuperscript{47} RAIN, INDUSTRIAL ORGANIZATION 173-76, 237-64 (1959).
\textsuperscript{48} The net income figures are taken from GX 6, Record 1286B, and GX 8, Record 1292. Net worth data (generally assets less liabilities and here equal to the sum of capital stock, surplus, and undivided profits) for 1947 and 1948 are derived from information in GX 7, Record 1288A; for 1949 the figure is estimated on the basis of data contained in GX 8, Record 1292 and in GX 7. The last column in the table is calculated from the other figures presented.
in 1949.\textsuperscript{50} Certainly it is consistent with monopolistic behavior, a judgment which tends to be substantiated by the other factors that have been noted — intense seller concentration, extreme product differentiation, monopolistic price behavior, and artificially impeded entry.

**Conclusion**

That the Times-Picayune Company in 1950, as today, possessed great market power which it exercised in the manner expected of a monopolist seems well established by the evidence. The New Orleans market itself was at all relevant times distinguished by a very small number of sellers, ranging from three in 1933 to two at the time the 1950 antitrust litigation began, to one since 1958. The morning paper, the *Times-Picayune*, has been dominant for many years, largely because of its strong appeal to advertisers. The company has priced like a monopolist, it has endeavored to increase the strength of its position through pricing tactics, and it has, on the basis of the evidence available, earned excessive profits.

However, surprising though it may seem and in spite of its apparent amenability to a charge of monopolization under section 2 of the Sherman Act, the Times-Picayune Company's market position was not the subject of the Antitrust Division's prosecution; rather it was the application of the so-called unit rule, or "forced combination" rate, to general advertising in February 1950, that triggered the government's ire. It is to this matter that we must turn.

**II. The New Orleans Times-Picayune Litigation**

The principal characteristics of New Orleans newspaper publication having been described, the details of the *Times-Picayune* antitrust litigation can now be meaningfully considered. In this section, after first reviewing the incidents and background of the relevant pricing tactics and outlining their interpretation by the enforcement officials and the courts, the actual market implications are examined over the full period from 1950 to the time of the *Item's* sale in 1958.

**The Alleged Exclusionary Tactics**

In the years before 1950 general advertisers (who provided
about 14% of the two paper's total advertising linage) could purchase space in either the States or the Times-Picayune without any form of restriction, though by placing identical advertising copy in both papers they received a combined rate ranging up to 20% less than the sum of the separate rates. From 1940 to 1950 even lower rates were made available to national advertisers who agreed to place more than 10,000 lines of identical copy in the two papers, morning and afternoon, during a single year; in this case the lowest attainable combined rate per line in 1940 for example, was 32¢, or 2¢ per line less than was otherwise available. But the simple fact remains: although they were offered considerable economic inducement to run their copy in both papers, national advertisers were not obligated to do so.

However, on December 1, 1949, the company announced that beginning February 1, 1950, it was imposing the unit rule on general advertising. This meant that space thereafter was available only in its morning and afternoon papers as a combination; copy could not be placed in either paper separately, at any price, so that where a general advertiser had been able to buy space at a per line rate of 40¢ in the Times-Picayune, or of 24¢ in the States or of 56¢ in both, under the unit rule copy had to be placed in both papers at the previously optional-combine price of 56¢ (or lower, depending on the quantity involved).

Considering the unit rule’s adoption naturally raises the question why the company decided to impose it at all and why it selected the precise time it did. That the unit rule could have been decreed at some earlier date is perfectly apparent; in fact, the forced combination rate had been applicable to classified advertising since 1935, and analysis of the trial record indicates that the advisability of adopting the forced combine policy for the general advertising category had been under discussion for many years. This is not surprising, for the practice had become an increasingly common one in the industry: in 1924, of 90 morning-evening newspaper combinations, 71 applied the unit rule; in 1934 the number had increased to 153 out of 173; and by 1948, of 175 such combinations, only eight, including the Times-Picayune, had not adopted the unit rule. In the spring

51. Record 249-51.
52. GX 34, Record 1340.
53. EDITOR & PUBLISHER, July 19, 1958, p. 10. Other material on the extent of the unit rule's use in newspaper publication as of 1949 may be found in Record 1258 (district court finding that as of that year "approximately 180
and summer of 1949 the company's major executives took up the question again, prompted in part by the fact that its milline rate for national advertising (that is, its per line rate per 1,000 circulation) had become noticeably higher than other principal newspapers. The Times-Picayune milline, for instance, was $2.14; but that for the New York Daily News was $1.18 and for the Kansas City Star (already using the unit rule) $1.25. To offset this apparent competitive disadvantage all that need be done, so the argument went, was to adopt the unit rule and link together the circulation of the States and the Times-Picayune; the accompanying reduction in the milline might well attract additional advertisers. Moreover, adoption of the unit rule afforded a seemingly easy way of increasing advertising revenue. What it amounted to was raising the price for advertising in the city's only morning paper (and its largest in terms of circulation), with the effect also of increasing the advertising carried in its afternoon paper, the States. All so simple, and so very obvious, that one wonders why it had not been done years before.

Yet if the possibility of cutting the milline and simultaneously enlarging revenue supplies such a logical explanation for the company's adoption of the unit rule, why was this action taken in the fall of 1949? The forces that precipitated the decision at that time seem fairly clear. With the sale of the Item to the Stern interests in July 1949, a more vigorous competitive struggle was foreseen, as was suggested by the rumor that the Item might establish a Sunday edition and break the Times-Picayune Company's exclusive grip on that large market. Certainly these prospects gave the company no cause for optimism; and some of its fears, were soon borne out. In September 1949, the Item gained 35,485 lines of general advertising while the States lost 3,152 lines, and over the first nine months of 1949 the States carried only 50.9% of the city's general advertising in the afternoon field, compared with 52.3% in 1948.
Executives of the company viewed these developments as "very disturbing"; on October 21, 1949, its General Advertising Manager wrote that "it is obvious that the States' leadership over the Item in general advertising is shrinking."55 In October the situation did not improve. Although both the States and the Item increased their general advertising linage during the month, the States added only about 19,000 lines (compared with the preceding month) while the Item picked up some 64,000 lines.

Faced with its deteriorating position in the afternoon field, officials of the company met frequently during the autumn of 1949 to discuss the situation. While the content of their deliberations is not known, the evidence at hand suggests strongly that the actual decision to invoke the unit rule was made at a meeting in November attended by the Times-Picayune Advertising Manager and its national advertising representatives.56

In reaching their decision to adopt the unit rule executives of the company gave primary attention to revenue and strategic factors, and did not make cost considerations explicit. The latter were implicitly involved, of course, for the rule, in operation, meant an increase in the volume of advertising that would permit more efficient utilization of existing excess capacity. More importantly, however, the forced combination principle called for no material increase in typographical costs; advertising copy that might previously have been prepared for the presses and run in one paper now would be run in both. Certain costs would rise as a result (for newsprint and ink, most notably), but the proportionately heavier costs associated with composition would not. Consequently the company could expect to move out, and down along a declining unit cost curve. Nonetheless, the company thought of the unit rule essentially as a device that would generate more revenue and concomitantly expand the States' share of the afternoon market, or at least moderate the increasingly intense competition of the Item. Noting the apparent increase in the States' linage that followed initiation of the unit rule in 1950, a company executive ex-

55. Id. at 1328.
56. Id. at 256-58. The company, however, insisted that the decision was made in July 1949. Brief for Petitioner, p. 20, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). Yet one of its witnesses could not even remember whether the forced combine rate had been discussed at the summer meeting. Record 88. Further, if the matter was considered at that time the rate card in which the unit rule was announced was not approved until November. Id. at 266.
plained that "that was because our morning edition carried quite a volume of business, and the advertisers using our morning edition, in adopting our afternoon edition, morning and evening combination, would necessarily give added business to the States." But the validity of that conclusion depended on the unwillingness of advertisers to shift from the States and the Times-Picayune to the Item as they easily could. The only reason they would not do so in the face of the company's large effective rate increase is attributable to the importance to them of the Times-Picayune — the city's only morning paper and its distinct leader in circulation. The Times-Picayune Company knew it held a strong weapon in the form of its morning paper and attempted to make use of it, as can normally be expected of any monopolist striving to expand and insulate its bastion.

Since the government centered its attention on the unit rule and its alleged consequences it has here received the principal emphasis. However, one of the other Times-Picayune pricing strategies deserves special mention. In the pricing of retail advertising, which accounted for over two-thirds of all advertising linage, the Times-Picayune Company, as previously noted, never invoked the unit rule. Hence retail advertisers were free to place copy in either the States or the Times-Picayune, though they were offered very substantial discounts based on the amount of their linage. For example, in 1950 the cost of retail advertising in the Times-Picayune was normally 26¢ per line; but if the advertiser agreed to place, say, 100,000 lines of copy in the paper during a year, the per line cost dropped to 19¢. In itself this does not seem likely to have had any adverse impact on the Item, which also made available similar, though relatively smaller, volume discounts. Nevertheless the Times-Picayune Company did have an important, though perhaps subtle, advantage. Most retail advertisers, particularly the larger accounts, regularly placed copy in the Times-Picayune. By entering into a contract with the company to provide a given amount of advertising during a twelve-month period an advertiser received an attractive discount rate which was also available for space taken in the States.

An example is in order. Suppose a department store held a 100,000 line contract with the company. Even though it might place 80% of its material in the morning paper, it was entitled

57. Id. at 76.
to put any quantity of advertising in the *States* at the rate applicable to one who might be putting 100,000 lines into this paper alone. If the store thus put a 2,500 line ad in the *States* (roughly one full page) the cost was 12\(\frac{1}{2}\)¢ per line as compared with the regular charge for this amount of space of 17\(\frac{1}{2}\)¢. Under these circumstances, and especially in view of the dominant position of the *Times-Picayune*, retail advertisers had a strong inducement to place copy in the *States* rather than the *Item*. While the latter also extended quantity discounts, rarely would an advertiser consume enough space in that paper alone to warrant a rate, as in the preceding example, as low as 12\(\frac{1}{2}\)¢.

By taking into account space taken in both of its papers the *Times Picayune* Company, on the other hand, was able to make advertisers a very attractive offer and one which worked to the advantage of the *States* in its struggle with the *Item*. Many observers, including those at high managerial levels in the *Item*, felt that this particular pricing strategy was far more harmful than the unit rule itself.

So described are the principal relevant pricing tactics of the *Times-Picayune* Company. How were they viewed by the Antitrust Division? And how were they interpreted by the courts?

*The Unit Rule as Viewed by the Antitrust Division and the Courts*

As the officials of the Antitrust Division eyed the diverse pricing tactics of the *Times-Picayune* Company, the real culprit was the unit rule. The other strategies the company employed, such as the use of retail advertising contracts that permitted copy to be placed in the *States* at markedly lower volume rates, were illuminated during the trial, but received scant emphasis. This may have been a serious error, in view of the overwhelming importance to newspapers of retail advertising. Be that as it may, neither the government prosecutors nor the courts gave any significant attention to anything besides the unit rule and thus it became the focal point of the case. In the government’s view the *Times-Picayune* Company was simply endeavoring to use its dominant position in the city’s morning field to enlarge its position in the afternoon field, to the manifest detri-

---

NEWSPAPER MONOPOLY

On June 14, 1950, it filed a complaint in the Federal District Court at New Orleans, alleging that the defendants (the company itself and four of its principal officers) had "combined and conspired" to restrain trade through the use of advertising charges and related policies, essentially the unit rule, and had similarly attempted to monopolize the New Orleans newspaper market in violation of the Sherman Act.

In the district court, Judge Christenberry, after a lengthy nonjury trial, concluded that the defendant had indeed violated the law, using its monopoly position "to force buyers of advertising space to purchase what they do not want, space in the States, in order to obtain what they require, space in the Times-Picayune." The result, in his view, was a restrictive effect, both on advertisers and on the Item. A section 1 Sherman Act violation was therefore made out on an analogy to the tying cases in which the seller of one product requires a buyer also to take from him some other product. Insofar as section 2 was concerned the district court also discerned a violation, with the imposition of the unit rule on general (and classified) ad-

59. More specifically the government argued that the Times-Picayune Company and those of its officers named as defendants, "with a monopoly in the morning newspaper field, 'command the entrance for' advertisements into that field, employ that monopoly power as a trade weapon against' their competition, and use their 'strategic monopoly position to sell' on a non-competitive basis in what would otherwise be [a] competitive situation." Brief for the United States, p. 24, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). (The internal quotations are from United States v. Griffith, 334 U.S. 100 (1948).) Moreover, argued the government, the unit rule reduces to nothing more than a tying arrangement, which in view of the company's dominant market position will restrain trade and tend to the elimination of competition. This particular aspect of the case is considered further at note 79 et seq., infra.

60. The individual defendants were accused of having conspired with one another in violation of the Sherman Act. The district court, in a debatable ruling, concluded that these allegations "were not urged, and must be considered as having been abandoned." United States v. Times-Picayune Publishing Co., 105 F. Supp. 670, 672 (E.D. La. 1952). In the remainder of the discussion in the text reference is made only to the defendant company.

61. Record 1-9. Inter alia, and in addition to the unit rule, the company was accused of "using the income from the Times-Picayune to offset the losses or reductions in profits of the States incident to arbitrarily low rates for advertising carried in the States" and "increasing the pages of the States at increased cost of publication without corresponding increased revenue for the purpose of inducing and forcing circulation and advertising from the Item to the States . . . ." Id. at 1, 8. The district court ruled that these allegations had not been proved. United States v. Times-Picayune Publishing Co., 105 F. Supp. 670, 677 (E.D. La. 1952).

62. The printed record of the trial runs to over 1,600 pages, including testimony and exhibits.

vertising found to reflect an attempt to monopolize "that segment of the afternoon-newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not because of budgetary limitations or financial inability purchase space in both afternoon papers."

An appeal was taken directly to the Supreme Court and on May 25, 1953, it reversed the lower court's ruling, thus completely absolving the defendants from the antitrust charges which had been prosecuted below. Justice Clark, writing for the five-man majority, believed that the case presented no tying arrangement at all; here, he argued, there really were not two distinct products, the morning and the afternoon papers, but only one, namely the "city's newspaper readers" who he felt were regarded by advertisers simply as "fungible customer potential." Having so disposed of the tying argument, the Court's majority turned to a broader consideration of the case and concluded that the facts revealed no unreasonable restraint of trade. In their estimation the Times-Picayune did not occupy a "dominant" position in the city's newspaper advertising market since its share of general and classified linage over the years only "hovered around 40%." As well, adoption of the unit rule was found to be motivated by the defendant's "legitimate business aims," and resulted in no harm to the Item. In fact, said the majority, "the Item flourishes."

64. Id. at 681. On this issue the district court made no explicit finding as to the presence of a specific intent to monopolize, in fact deemphasizing the role of intent in reliance on Judge Learned Hand's Alcoa opinion. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). However, Alcoa involved the completed offense of monopolization instead of simply an attempt to monopolize and Judge Hand clearly indicated that a finding of specific intent was still vital in an attempt situation. Id. at 431-32. When the Times-Picayune case reached the Supreme Court it set aside the trial court's finding of a section 2 violation on the ground that the company's adoption of the unit rule was "predominantly motivated by legitimate business aims" and therefore did not satisfy the specific intent requirement. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 627 (1953). This conclusion of the Supreme Court is challenged. See notes 83-84 infra and accompanying text.


66. Id. at 613.

67. Id. at 611-12. Of course, as other writers have pointed out, even if the company had had a complete monopoly, and all advertising was on the unit rule, the morning paper's share of total linage could not have exceeded 50% of all advertising linage. DIRLAM & KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 107 (1954) [hereinafter cited as DIRLAM & KAHN].

ties Black, Douglas, and Minton), contended that the district court's factual judgment was supported by the evidence, and should therefore be affirmed, not being "clearly erroneous" within the meaning of rule 52(a) of the Federal Rules of Civil Procedure. The minority clearly felt that the three papers were separate products and concluded that the defendant, as charged, had employed its "distinct, conceded and complete monopoly of access to the morning newspaper readers in the New Orleans area . . . to restrain unreasonably the competition between its evening newspaper, the New Orleans States, and the independent New Orleans Item, in the competitive field of evening newspaper advertising."

In the subsequent analysis two major issues are considered, both of obvious relevance to the Supreme Court decision. First, was the Item harmed by its rival's adoption of the unit rule as the government contended? Second, was the Item's eventual death in 1958 substantially attributable to this 1950 market tactic of the Times-Picayune Company?

Consequences of the Unit Rule

First of all, a warning is in order to anyone who has read (or will read) the Supreme Court's opinion in the Times-Picayune case, for the facts later to be developed here will indeed seem strange and inconsistent. The reason stems from the kind of proof offered by the government in support of its principal contention that the unit rule had an adverse effect on the Item. This evidence, which compared the linage carried by the two publishers in certain months of 1949 with the same months of 1950, and which was summarized in a series of tabular exhibits (reproduced in the Court's majority opinion), on its face did tend to confirm the government theory. For example, comparing the months of November 1949 and 1950, one table indicated that the Item's share of general advertising had declined from 47.5% to 38.7%. Close inspection, however, reveals that this type of evidence was gravely misleading, for in fact the underlying data were not comparable at all. As will be recalled, effective March 4, 1950, the Item commenced publication of a Sunday paper and ceased publication of its regular Saturday edition. Linage appearing in six weekday editions for

---

69. Id. at 628.
70. Id. at 618 n.39; Record 1450.
1949 was thus being compared with that for five weekday editions in 1950 (after March). Obviously the weekday linage for the Item would decline under such circumstances, without reference to the unit rule at all. Realistic evaluation requires considerable recomputation and in the paragraphs that follow the results are discussed.

In analyzing the consequences of the unit rule, one fact is readily apparent: there was a highly uneven impact on general advertisers. Some simply did not want to advertise at all in an afternoon paper. Others, especially noticeable in the case of food product manufacturers, preferred the Item to the States since they believed it did not duplicate Times-Picayune readership to as great a degree. A few advertisers actually altered their advertising policies, shifting their advertising from the Times-Picayune Company papers to other media. Kaiser-Frazer, for one, was receptive to the notion of switching entirely to the Item and supplementing that coverage with radio advertising. However, the record does demonstrate that most advertisers continued to use the Times-Picayune in spite of the unit rule. This meant that the number of advertising accounts in the States increased sharply in 1950 (the number using just two papers, the Times-Picayune and the States, rising from 249 to 387). But, interestingly, the number of general advertising accounts represented in the Item during 1950 as compared with 1949 declined only slightly. Some advertisers continued to use the Item along with the city's two other papers, and a few simply abandoned the Times-Picayune and States for the Item.

In assessing the impact of the unit rule the crucial index, however, is the division of the market in terms of linage between the Item and the Times-Picayune Company, leaving particular papers and editions aside. Did the Item lose ground and the Times-Picayune/States gain? Taking this approach one finds that in 1950 the Item Company's share of general advertising linage in the New Orleans dailies went up, not down, from about 23% to 26.5%. This was also true in each of the three advertising categories, with the result that the Item's share of linage of all types (retail, classified, and general) rose

71. Record 285, 357, 393-94.
72. GX 48, Record 1363.
73. GX 100B, 110B, Record 1453-54.
74. The comparisons that follow are based on data taken from Media Records for the years 1949 to date. This is the authoritative source of information for newspaper advertising linage.
from 22% to 25%.\textsuperscript{75} If the unit rule, therefore, had any noticeable market impact, it appears actually to have helped the Item Company, at least in 1950. What about over the longer run? By 1957, the last full year of its operation, the Item Company's share of all advertising linage placed in New Orleans daily newspapers had declined to slightly over 21%, off considerably from the 25% share it held in 1950.\textsuperscript{76} Although the largest percentage decline took place in classified advertising (the Item's share fell from 21% in 1950 to 13% in 1957),\textsuperscript{77} the most important setback was in the retail advertising category since this represents about two-thirds of all linage; here the Item's 26.5% share in 1950 rose to 29.5% in 1952 and then declined to 27% in 1956 and 24.5% in 1957. Over the full period from 1949 to 1957 the Item's share of general linage fell from 26.5% (1950) to 24%; this amounted only to a decline of about 400,000 lines on a base of over 14 million lines in all categories for 1957.

While the division of the market in terms of retail, classified, and general advertising linage between the two companies without regard to any particular editions is seemingly the best criterion in assessing the consequences of the Times-Picayune pricing strategies, attention should also be directed specifically to the afternoon field since this is where the unit rule might be expected to have had its sharpest impact. In this respect it must be recalled that the Item published only five daily issues during most of 1950 instead of six as in 1949; this necessarily prevents any very exact comparisons. Nevertheless, and in spite of its fewer weekday editions, the evidence shows that the Item carried only about 17,000 less lines of general advertising in its weekday editions in 1950 than in 1949. The corresponding linage

\textsuperscript{75} In 1949 the Item carried 13.8 million lines of advertising as compared with 44.9 million for its rival. But in 1950 the Item handled 16.6 million lines, while the Times-Picayune and the States together carried 46.7 million lines. \textit{88 Media Records} 65 (1949); \textit{92 Media Records} 65 (1950).

\textsuperscript{76} Of a total of 72 million lines of advertising appearing in the city's newspapers during 1957 the Item carried 16.1 million lines. \textit{120 Media Records} 69 (1957). Thus it had lost position in the market both absolutely and relatively as compared with 1950. The States' linage meanwhile had increased slightly. But it was the Times-Picayune and the Sunday Times-Picayune/States that had made the greatest gains during the seven-year period — more than ten million lines.

\textsuperscript{77} Probably the major explanation for this pronounced decline in the Item's share of classified linage rests in its disproportionately higher rates. In 1956, for example, the Item charged 45¢ per line of classified advertising; a line of advertising in the Times-Picayune/States (on the unit rule) cost 73¢. But in terms of circulation the Item was badly out of line; at a price only 62% greater its rival provided nearly three times its circulation. \textit{Newspaper Rates and Data} 285-87 (Jan. 15, 1957).
of the *States* went up sharply, of course, by more than 600,000 lines, as it picked up all of the national advertising carried in the *Times-Picayune* under the unit rule. It warrants reemphasis, however, that if the overall performance of the two publishers is taken into account, disregarding any particular editions (morning, afternoon, Sunday) the *Item* fared much better in 1950 than in 1949, carrying an additional 2.8 million lines of advertising in all categories as contrasted with a similar gain of 1.8 million lines for the *Times-Picayune* Company. Within the afternoon field though the *Item* clearly lost some ground, not only in 1950 but over the succeeding seven years as well. Where in 1950 the *Item* carried 32.5% of the city's afternoon classified linage, by 1951 this had slipped to 27% and by 1957 it was down to less than 19%. A similar though less pronounced pattern also prevailed in the case of general advertising carried in the afternoon papers, with the *Item's* share declining from 42% in 1950 to 35% in 1957. By contrast, the *Item* continued to hold its share of retail advertising. Although the total amount of retail advertising placed in both afternoon papers fell in 1957, the *Item* still accounted for 67% of linage in this category as compared with 66% in 1950. What is far more important in this respect, however, is the fact that in 1957 the weekday *Item* carried 500,000 fewer lines of retail advertising copy than in 1956; the *States* also suffered a loss, but of only 100,000 lines.

Looking at the Sunday market, where the *Times-Picayune/States* directly confronted the *Item*, we find that the *Item* was not faring badly in 1958 when it sold out, relative to its 1950 performance, though its position had begun to deteriorate slightly in the later years. In 1951, the *Item's* first full year with a Sunday edition, it carried about 25% of all Sunday advertising linage. In 1952 this climbed to 30%, and by 1957 its share was still about 27%. Perhaps most striking, however, were changes in the *Item's* Sunday retail linage. In 1954 the *Item* carried more than 36% of this type of advertising; but then it gradually began to lose position, so that by 1957 its share was 27%.

So far the findings fail to make allowance for actual changes in advertising rates that were placed in effect in the years after 1950. This can best be done by comparing the two publishers' milline rates (the rate per line per 1,000 circulation) for the
full period with their respective market shares.\textsuperscript{78} Taking total daily (morning and afternoon) general advertising as an index, it has been noted that the Item's overall share fell from 25\% in 1950 and 24\% in 1951 to 21\% in 1957. Significantly, during this seven-year period the Item's milline for national advertising was rising a great deal more steeply than that of the Times-Picayune. In 1950 the Item's milline was about $2.65, the Times-Picayune's $1.95 (reflecting the combined circulation of the Times-Picayune and the States). This absolute dollars and cents differential gradually widened so that where in 1955 the Item's milline was $3.50 and the Times-Picayune's $2.40, by 1956, as the result of a relatively large rate increase and a decline in circulation, the Item's milline rose to almost $4.00. The final account for 1957 showed an Item milline of $4.10 as compared with the Times-Picayune's $2.55. Rather obviously the Times-Picayune Company offerings became relatively much more attractive over the years, tending to dissipate whatever adverse market reaction may have been generated by the 1950 extension of the unit rule to general advertising.

The Case Reconsidered

Although the Times-Picayune Company apparently hoped that the application of the unit rule to general advertising would "slow up" the Item and reduce its share of the market, it did not have this effect; in fact, as a result, the Item may actually have picked up some advertising from those sources that were unwilling to meet the effectively higher price imposed by its adversary. In this sense, then, the unit rule failed of its purpose. To the modest extent, however, that the tactic was thought of as a way of providing the States with some shelter — keeping its position from deteriorating any further — and of enlarging aggregate advertising revenue, it was successful. In 1950, in spite of the large effective rate increase which the unit rule meant to national advertisers that had previously used only one of the two combined papers or that had employed the Times-Picayune and the Item, the Times-Picayune Company carried nearly a million more lines of general advertising than in 1949; while it lost some linage in the Times-Picayune itself (about 74,000 lines in 1950), it more than offset this with increased

\textsuperscript{78} The millines are calculated on the basis of the prevailing open general advertising rates and the ABC-certified daily circulation for the papers in each of the years indicated.
linage in the States (amounting to some 600,000 lines and presumably the direct outcome of the unit rule) and in the Sunday edition (where a gain of 400,000 lines was reported in 1950). The Item also gained general linage in 1950, carrying some 682,000 more lines than in 1949, with this improvement largely attributable to the inauguration of the Sunday paper. But the Times-Picayune Company clearly gained more, at higher rates than in 1949, and accordingly found its economic fortunes greatly improved.

What then can be said of the Supreme Court decision itself? First of all, its handling of the tying clause aspect of the case deserves special mention, especially in the light of the Court's 1958 Northern Pacific decision. As the law was interpreted there a tying arrangement, defined as a situation in which a seller conditions the sale of one product on the buyer's purchase of a different (or "tied") product, is unlawful per se so long as the seller "has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." At first glance the analogy of such a rule to the facts in the Times-Picayune litigation may seem perfectly obvious: the company was tying the sale of national (and classified) advertising in the States to the dominant Times-Picayune. The matter cannot, however, be so easily disposed of. In the usual tying case there are two distinct products — for instance, salt tablets and the machines which deposit the tablets in canned goods — which are entirely unrelated to one another from the standpoint of manufacture. In the Times-Picayune situation, by contrast, the advertising copy appearing in the morning and evening papers was identical, printed from the same plates on the same presses even though it appeared at different hours of the day in distinguishable papers. To make the issue more vivid, suppose that the Times-Picayune Company had simply begun in 1950 to publish just one paper (bearing the banner Times-Picayune and States) in various editions "around-the-clock" and accepted advertising only in the "day's" paper. Did not the actual case amount to the same thing? Although two papers were involved, the physical ingredient in issue — printed advertising — was a unity, a single product, and not comparable to the standing tying situation in which the

80. Id. at 6.
commodities are produced separately. So considered there simply was no tying case presented at all because there were no distinguishable goods, one being tied to the other.

If, however, the facts are felt to present the ingredients of a tying case, present judicial interpretation would appear to condemn the behavior as a per se offense, just as it would price fixing, on the theory that the competitive freedom of other sellers of the tied product is necessarily restricted. In this view tying agreements serve "hardly any purpose beyond the suppression of competition." Applying the Northern Pacific logic to the Times-Picayune litigation, and denoting national advertising in the States as the tied product and the same kind of advertising in the Times-Picayune as the tying product, and recognizing that the morning paper was dominant in the market, the result would seem to follow that the unit rule in and of itself unreasonably restrained trade in violation of the Sherman Act. This disposition of the case, let it be emphasized, would be made without any analysis of the actual market effects. Yet the foregoing discussion indicates that the purported tie in the case had little, if any, adverse impact on the Item, the alleged victim. This certainly suggests that the prevailing approach to tying arrangements deserves considerable refinement, certainly to the extent it is premised on the belief that a tie inevitably impairs the competitive opportunities of rival sellers of the tied product.

All factors considered, in its treatment of those aspects of the Times-Picayune case pertaining to section 1 of the Sherman Act the Supreme Court majority came to a result that is consistent with the evidence. The facts simply do not support

---

81. Dirlam and Kahn, to the contrary, argue that a tying arrangement was involved; the unit rule did not present "an inevitable, 'natural' single package . . . . Many advertisers obviously did not consider the package a single product until they were forced to do so . . . ." Dirlam & Kahn 105. Both assertions are open to serious dispute: First, why was this any less "natural" than for a fountain pen manufacturer, say, to require buyers to purchase both a cap and a functional pen in one unit? Second, does not the fact that virtually all other publishers of morning and evening papers imposed the unit rule suggest this was indeed a "natural" policy? Third, if buyers formerly were allowed to purchase trousers and coats separately, and now are required either to take both together or nothing, thus being compelled to view the package as a single product, could it nevertheless fairly be said that a tie existed? For a more wary interpretation of the Times-Picayune facts, intimating that a tie may not in fact have been involved, see Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958), and Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957).

82. Standard Oil Co. of California v. United States, 337 U.S. 293, 305 (1949).
a conclusion that in using the unit rule the Times-Picayune Company had restrained trade. But this is not to say that the reasons given in Justice Clark’s majority opinion are themselves sound. (To cite one major flaw, he found that the Times-Picayune was not dominant when nothing in fact could be further from the truth; indeed such a conclusion must have come as a shocking revelation to New Orleans advertisers and executives of the Times-Picayune Company.) What rationalizes the result reached by the Court’s majority is that while the unit rule worked to the advantage of the Times-Picayune Company by expanding its advertising linage, it did not work to the disadvantage of the Item and since the section 1 aspects of the government’s case were premised principally on that supposition, exoneration on this count was in order.

When, however, we turn to section 2 of the Sherman Act the Court’s finding of innocence seems erroneous. In this respect the government had charged that the company had attempted to monopolize advertising in the New Orleans market and the district court had found such a violation, deeming the adoption of the unit rule adequate evidence in support of its determination. On appeal the Supreme Court took the highly questionable position that in invoking the unit rule the company was “predominantly motivated by legitimate business aims.”83 This conclusion is inconsistent with a fair reading of the record, for while business considerations clearly played a role, it is evident, given the timing of the action and the circumstances then prevailing, that the company was largely prompted by a desire to “slow the Item down.”84 That in taking the step it was not entirely successful does not alter the fact that the company attempted to exert its considerable strength to bolster its own market position at the expense of its rival. Accordingly a correct outcome would have called for affirming the lower court’s ruling that the company had violated section 2 of the Sherman Act by attempting to monopolize the relevant market.

_Demise of the Item_

In 1958 the Times-Picayune Company purchased the Item for a reported $3.4 million and thus became the sole daily news-

paper publisher in New Orleans. The evidence shows that at least as early as 1957 the Item became a marginal business enterprise. For the first five months of 1956 it had realized a net profit of $134,861; but this declined to $43,524 for the same period of 1957; and from January through May of 1958 the Item incurred a loss of $70,473. At this point the sale negotiations began.

But what explains the Item's post-1956 financial difficulties? Many forces obviously were at work. David Stern, the paper's publisher, blames higher costs — specifically for newsprint (its cost had increased by 34% from 1949 to 1958) and labor. He also attributes some of the responsibility to the unit rule; but if the preceding discussion is substantially accurate the imposition of the unit rule on general advertising in 1950 had little significant adverse impact on the Item. The basic cause, rather, appears to lie in a decline of 1.3 million lines of advertising that took place in 1957, stemming largely from a drop in retail department store advertising. In 1956 the Item had carried 17,446,452 lines of advertising, including 10,643,743 lines of retail advertising (of which 4,431,695 lines originated with the city's department stores). But in 1957 its total linage dropped to 16,102,793 lines, with 68% of the contraction coming in the department store category. The States, its afternoon competitor, suffered an even larger relative decline in the same advertising category; but it was able to offset most of the loss with increases in other kinds of retail copy. Moreover, the Times-Picayune gained more than 581,000 lines of retail advertising in 1957, and this, in addition to a similar substantial gain in its Sunday edition, meant that where the Item Company lost over 900,000 lines of retail advertising its competitor, primarily due to the strength of its morning paper, gained some 770,000 lines of retail advertising in addition to 130,000 lines in other classifications. It was the decline in retail advertising in 1956 that broke the Item's back. Looking to the latter months of 1956 it is apparent that even then the Item was close to the precipice. And with the

85. Editor and Publisher, July 19, 1958, p. 9.
86. Id. at 9, 52. The Item had a union shop while the Times-Picayune Company does not. Although the two papers paid approximately the same wages, fringe benefits were higher for the Item. Moreover, and of inestimable value, the Times-Picayune Company was unhampered by certain work-rule restrictions that were applicable to the typographical operations of the Item (and other organized shops).
87. Stern also was motivated to sell the Item, excellent authority has it, by the sociopolitical atmosphere in New Orleans. A northerner, he favored
sharp decline in retail advertising that occurred in 1957, and accompanying losses in operating revenue that were not offset by cost reductions, operating deficits began showing up in 1957.

For its $3.4 million the Times-Picayune Company received the Item's plant and printing equipment, along with covenants from David Stern, the owner, and its principal editors that they would not re-enter the business of daily newspaper publication in New Orleans for at least five years. The Times-Picayune did not receive the Item's current assets; nor did it intend to make use of the plant and equipment it acquired, planning rather to continue publication of a combined afternoon States-Item in its own ample facilities. What it really got for its money, therefore, was a monopoly plus the erection of an artificial entry barrier. For this it paid a large price, far more than the Item was worth as a going concern.5

In buying the Item the Times-Picayune Company sought the prior assurance of the Antitrust Division that it would not bring suit; in its behalf the company argued that under the "failing firm" doctrine there could be no adverse competitive consequences because the seller was in extremis. The Division acquiesced in the sale provided that the buyer, following its formal purchase of the Item, would lease the paper back to its former owner for a period of 60 days during which time any purchaser might come forward and acquire the property for the "upset price" of $3.4 million. The government also insisted that the Times-Picayune Company dispose of its New Orleans radio station and agree to abandon the unit rule on national advertising for ten years.88 With all of these conditions the Times-Picayune Company compiled, and when no buyer offered to match the

integration of the schools and felt that he would be obliged to take such a strong stand on the issue that circulation might further decline, sending the paper even deeper into the red. In this connection it is interesting to note A. J. Liebling's report that in 1959 the Times-Picayune and States supported the White Supremacy candidate for Governor of Louisiana and opposed the more moderate figures. LIEBLING, THE PRESS 64 (1961).

88. Cruel justice, too, for in 1949 the Times-Picayune Company reportedly could have purchased the Item for a mere $1 million (the price paid by Stern). At that time it declined to do so because it would have been "too monopolistic." Record 610. Another account indicated that it might also have bought the Item in 1941 for $400,000. Id. at 590.

89. The unit rule remains applicable to classified advertising, and the company may still make available discounts to those advertisers placing their copy in both the States and the Times-Picayune. Currently the open line rate for national advertising in both papers taken as a combination is $1.05; in the Times-Picayune alone the rate is 80¢ and in the States 70¢: 1963 E&P YEAR BOOK 116. It should not be startling to learn, therefore, that more than 98% of all national advertising carried in the morning is carried over into the States.
high price it was willing to pay, it gained absolute control of the Item, promptly consolidating its publication with the States on September 15, 1958.\textsuperscript{90}

The most recent development of consequence occurred in June 1962, when Samuel I. Newhouse, then the owner of a chain of sixteen newspapers located in various parts of the country (including, among others, the St. Louis Globe-Democrat, the Newark Star-Ledger, and the Birmingham News),\textsuperscript{91} acquired the Times-Picayune Company for a price of $42 million. In making his offer public Newhouse revealed that in 1961 the company had after tax net income of $2,482,907, affording a return of 18.4\% on net worth of $13,588,400.\textsuperscript{92} This compares favorably with the 20\% rate of return earned in 1949 (the last prior year for which financial information has been made public) and well characterizes the firm’s monopoly position in New Orleans daily newspaper publication.

III. THE POLICY IMPLICATIONS

The New Orleans experience offers many lessons as to the possible role of antitrust policy in retarding the general decline of newspaper competition in the United States. For one important thing it reinforces the serious doubts that have been frequently expressed over the wisdom and sufficiency of confining antitrust enforcement to the suppression of supposedly detrimental forms of market conduct.\textsuperscript{93} In the Times-Picayune litigation neither did the allegedly exclusionary pricing tactics have the claimed effect in the short-run nor were they causally con-

\textsuperscript{90} Editor and Publisher, Sept. 20, 1958, p. 15.
\textsuperscript{92} Newhouse paid $150 per share for the 280,000 outstanding shares of the Times-Picayune Company. Book value per share was $48.53, which equals net worth of $13,588,400. The company’s 1961 after-tax profit was $2,482,907. New Orleans States-Item, May 29, 1962, p. 1, col. 1; Wall St. Journal, June 4, 1962, p. 15, col. 4. The Nicholson family held 21\% of the outstanding shares. When the Newhouse offer was first made they urged the other shareholders not to sell. But their pleas were rejected and finally they, too, sold out. N.Y. Times, June 5, 1962, p. 67, col. 1 (city ed.)
\textsuperscript{93} What explains this marked emphasis on conduct (or behavior, or practices) as distinct from position (or structure) is not entirely clear. To a degree it may simply reflect enforcement predilection; antitrust officials feel that it’s easier to win a case involving questionable conduct than one where the focus is on, say, a seller’s dominant position. Mason, \textit{The Current Status of the Monopoly Problem in the United States}, 62 Harv. L. Rev. 1205, 1284-85 (1949). But the cases themselves also reflect overriding concern with questions of be-
nected with the financial difficulties experienced by the *Item* beginning in 1957. Even if the unit rule had been suppressed it is extremely doubtful whether the present complexion of the market would be significantly different than it is. With the city's only morning paper, a large aggregate circulation nearly three times that of its competitor, and the savings stemming from the ability to reproduce copy in both of its papers at declining unit costs, the Times-Picayune Company could simply offer advertisers substantially more favorable terms than the *Item*.

At the core of the entire problem was the company's dominant market position. This was the real subject of concern. Yet the Justice Department limited its attention to practices that not only were without adverse competitive impact, but, in any case, depended for their market effect on the strength, specifically, of the Times-Picayune; in short, the government had flailed at what it thought were shadows instead of facing up to the substance of the matter. Perhaps it recognized this in 1958 when it was confronted with a virtual *fait accompli*, the *Item* then in dire financial straits and about to be purchased by its stronger rival; the contours of monopoly were then perfectly apparent, as they should also have been eight years earlier. Looking back it is clear that so long as the *Item* had to sustain the entire costs

---

havior. Why? Two authors give this reason: "At least until more recent years, the courts were hard on practices which historically had been viewed with disfavor; they were comparatively gentle with practices or with situations which had never been thought immoral, and whose ill effects could be appreciated only on the basis of economic analysis of a more refined and less well-known sort than was commonly a party of the courts’ intellectual equipment . . . . [C]ourts are simply not comfortable with economic issues . . . .” Kayser & Turner, Antitrust Policy: An Economic and Legal Analysis 240 (1959). See also Levi, A Two-Level Anti-Monopoly Law, 47 NW. U.L. Rev. 567 (1952), and Director & Levi, Law and the Future: Trade Regulation, 51 NW. U.L. Rev. 281 (1956). Regardless of the reason, the fact is that the courts and the enforcement authorities have accorded conduct most of their attention; actually, though, the maintenance and restoration of competitive markets frequently requires basic structural reorganization. Kayser & Turner, supra ch. VIII.

94. Even without the unit rule the company could have seriously disadvantaged the *Item* by simply having offered national advertisers optional combination rates representing substantial discounts—perhaps 20 to 25% below the sum of the separate rates for the two papers it published. (It pursued exactly such a policy in the case of retail advertising, where the effect on the *Item* was regarded as particularly serious by *Item* executives even though no ingredient of compulsion was present.) While this probably would not have been as profitable from the company's standpoint, it would have induced many advertisers to place their afternoon copy in the States rather than the *Item*. That this technique—offering large discounts on an optional basis—might have greatly aided the company in any struggle with a rival, see note 89 supra. Its joint printing operations afforded the company great power, which it could have exercised even without the unit rule.
of its own publication, including the operation of its printing facilities, it could not survive unless the multiple economic advantages possessed by the Times-Picayune were sharply reduced.

To consider further the practicability of having sought to achieve conditions that might have permitted competition to continue in New Orleans requires, initially, a brief review of the basic economic characteristics of contemporary newspaper publication in the United States. In this survey three principal attributes deserve emphasis. First, the bulk of newspaper revenue comes from advertising and as a consequence it is a newspaper's appeal to advertisers, only secondarily to readers, that is crucial. And most advertisers are primarily attracted by the number of readers (or viewers) they can obtain per unit of expenditure. Due to this propensity a marked differential in the milline rate (the advertising rate adjusted for circulation) between competing papers can mean, not just more advertising in one than the other, but the death of the less popular organ; it succumbs from economic starvation. Second, from the production standpoint a very large proportion of a newspaper's costs are incurred in getting copy ready to be printed — i.e., the typographical and composition operations. Once plates are ready for the press it makes little difference whether, say, 50,000 copies are printed or 100,000. Some incremental costs do arise, of course, for newsprint, ink, and press time, but these are not great. Accordingly, as a paper's output increases total costs rise but not nearly so rapidly as circulation; reflecting this, advertising charges increase with circulation but not proportionately so with the result that the rate adjusted for circulation is usually much lower for a paper of large distribution than another paper of smaller circulation. The New Orleans experience is illustrative. During the 1950-1958 period the difference in the milline rates between the Item and the Times-Picayune/States gradually widened and eventually became so great that the former perished from a lack of advertising revenue. Obviously, then, the relevant technological and economic factors present one of the

95. Currently a "medium city daily newspaper" obtains 75% of its revenue from advertising, with most of this in the retail category (which supplies 54% of such a paper's total revenue). Editor & Publisher, Apr. 6, 1963, p. 15. As a result, not surprisingly, advertising accounts for most of a newspaper's space, about 60% (in 1940 the comparable figure was only 40%). Not all of the rest of an average paper consists of news. Much of what passes for "news" is prepackaged filler. “[R]eal news occupies an average of only 38 per cent of non-advertising space in big city dailies, or 15 per cent of the whole paper. In some papers hard news is only one page in 24.” Bagdikian, Why Dailies Die, The New Republic, April 16, 1962, p. 17, at p. 23.
most serious impediments to the survival of newspaper competition, particularly where the participants are so heavily dependent on advertising as a source of revenue. Third, for most newspapers circulation is largely confined to the immediate metropolitan region. The chances of expanding sales by broadening the area of distribution are generally not favorable, both because of the parochial content of the typical paper and because of assorted transportation problems. Hence a newspaper’s potential circulation is basically a factor of the population of the community in which it is located (with perhaps some adjustment for the varying propensity of people to read newspapers, a factor which changes from country to country and, less so, from city to city).

With a summary of the relevant economic characteristics before us we can turn to an examination of the circumstances of newspaper publication in major American cities. This can give us a clue as to whether it was reasonable to expect newspaper competition in New Orleans at all and, if so, what degree of competition and under what conditions. Table 1 presents some of the more pertinent information for the nation’s 35 largest cities. Not surprisingly, it suggests a strong correlation between the size of the local market, expressed in terms of population, and the presence of more than a single publisher. Although the 11 largest cities each have at least two independent papers, as population declines monopolistic publication becomes increasingly common. To cite data which are not entirely reflected in the tables, of the 16 cities with a population between 500,000 and 1 million, 12 have two or more local publishers; but of the 21 cities with a population of 300,000-500,000, only eight are competitive; and of the 19 in the 200,000-300,000 category only four have two publishers. As population declines still further the chances of competition fall sharply: of 69 cities with

96. The New York Times does a highly commendable job of circulating its paper around the country. The New York early edition is, for example, available for morning delivery on the day of publication in Dallas. However, rapid, widespread distribution of this sort is feasible only in large cities with direct air connections to the point of publication. More importantly, few papers have the broad national and international orientation that makes substantial sale in a number of cities reasonable. How many people in New Orleans, for example, would be interested in reading a Boston or Detroit or San Francisco paper; or vice versa. For most, though not quite all, newspapers the potential market is close to home.

97. All of this information is based on an analysis of the 1963 E&P Year Book, with appropriate cross references to the United States Dep’t Commerce, 1963 Statistical Abstract (84th ed.).
population of 100,000 - 200,000, all but 13 are monopolized by a single publisher and of the 633 cities in the 25,000 - 100,000 category, in only 14 do you find more than one independently published daily paper. Likewise, even if the scale of the respective metropolitan areas is considered, rather than just that of the core city itself, 24 of the 58 competitive communities are found to lie within the largest 35 standard metropolitan regions.

While a precise line cannot be drawn, it is evident from a careful look at Table 2 that as the population of a metropolitan area falls below approximately 650,000, newspaper competition is so rare as to be regarded as accidental or the product of unique forces (e.g., owners who for the sake of maintaining editorial independence, forego the economic advantages of sale or consolidation). Beneath this mark, potential circulation seems insufficient to support two publishers, at least if each must own and operate its printing plant. It does appear, however, that if two competing publishers can share one plant, dividing the investment and realizing the considerable benefits involved in not having to set identical copy twice (just as if the two papers were under a single ownership advertisements, in this situation, for example, can be readied for the press and run in each paper without further typographical effort), competition can be perpetuated in cities otherwise too small. Of the 18 cities with a population ranging from 100,000 to 350,000 that have two independent daily papers, in 10 there is some sort of joint printing arrangement with one plant serving both publications. This is even true of a few cities whose metropolitan areas contain less than 300,000 residents, as with Lincoln, Nebraska (with a 1960 metropolitan area population of 155,272); Evansville, Indiana (199,313); Fort Wayne, Indiana (232,196); and Shreveport, Louisiana (281,481). Based on such other infor-

98. There are two common types of joint printing arrangements. In some cases, as in Pittsburgh or Birmingham, one paper simply performs the function for the other under contract. In a number of cities, like Fort Wayne and Shreveport, the printing (and usually also some related operations, such as distribution, and frequently the whole range of business chores) is done by a separate corporation in which the competing papers hold stock, commonly on a 50-50 basis. These two forms account for virtually all of the joint printing situations. A further problem should be noted. Where the two papers have such an arrangement and work together closely in conducting their business affairs they may, in fact, lose their editorial independence; i.e., though on the face of it they are sovereign, in actuality they are not. One suspects that this is often the case, but to justify such a conclusion would require access to information which is not publicly available.

99. Among other joint printing cities are St. Louis, Pittsburgh, Tulsa, El Paso, Salt Lake City, Nashville, and Chattanooga.
mation as is available it is most improbable that these cities could sustain two papers if it were not for cooperative printing.

With or without a joint printing arrangement a city’s population basically determines whether newspaper competition can exist. Where a metropolitan area has fewer than 650,000 residents, or thereabouts, the chances of finding a monopolized press are greatly magnified. To appreciate the matter fully, however, another factor must be taken into account for it is not just population that is important but the division of circulation between rival papers (more accurately, their publishers). If one publisher gains a sufficiently large lead in circulation, the underlying economics of the situation normally cause so marked a diversion of advertising to the stronger paper that the other’s lifeblood, advertising revenue, is choked off. Where this point occurs cannot be exactly determined, but columns 7 and 8 of Table 1 indicate that it is rare for the bigger paper in a city to have more than twice its competitor’s circulation. There are a few exceptions, but they present special situations. The Phoenix Journal, first published in 1962, closed down in January 1963 when the government seized its plant for nonpayment of a tax lien, but reopened on August 21, 1963, under a new publisher; its chances of survival are problematical. In Fort Worth and Indianapolis the weaker dailies are felt within the trade merely to be tolerated, preserved as symbols of competition by far more powerful opponents; perhaps one further reason for their survival is that they are links in the Scripps-Howard chain, possibly, therefore, having somewhat lower overhead costs and, in any case, probably receiving a de facto subsidy from the parent organization. Rather than represent a deviation from the principle suggested, the New York City experience may illustrate its operation. On October 16, 1963, the Mirror ceased publication, in spite of its 835,000 circulation, the second largest in the country. Why? Probably because the advertising fraternity viewed the Mirror and the Daily News, both tabloids, as in a category of their own, and one, it should be noted, in which the

100. Laurence Scott of the Manchester Guardian says that “the minimum viable circulation of any newspaper” is “at least half the sale (circulation) of its most successful direct competitor.” Economist, Sept. 8, 1962, p. 877. In most cases this will mean the city’s other paper. In cities where there are three or more papers a question can be raised as to the accuracy of Mr. Scott’s rule of thumb; here a paper may be able to survive if it doesn’t slip too far behind the group’s average circulation (see Table 1).
News circulation had reached a point where it was more than double that of the deceased.\footnote{101}

While, in summary, these comments do not necessarily explain each of the deviant situations, generally it appears that in market areas with a population of less than 650,000 local daily newspaper competition cannot be expected unless the publishers agree upon some sort of joint printing arrangement, in which case the mark can be shoved down, perhaps as low as 200,000. Above the 650,000 line competition can exist, at least so long as one publisher does not gain a circulation too much greater—roughly double—than that of his protagonist. And as a city's population increases three or more publishers may survive, subject to the same qualification concerning the need for approximate equality of circulation.

The implications of this analysis for the New Orleans situation should by now be manifest. Although the city, with a metropolitan population in 1960 of 868,000, would appear to be large enough to sustain two competing publishers, it could not do so where (as of 1958) the Times-Picayune Company had achieved a total daily circulation of nearly 300,000, three times that of the Item. With such a commanding lead (without equivalent at the moment, as columns 7 and 8 of Table 1 indicate, except in cities where the weaker paper is generally acknowledged to be on thin ice or is specially situated, as in Phoenix), the Item's demise should not have been surprising. It was inevitable—unless, that is, steps had been taken to achieve fundamental structural modification. Accorded the right treatment it seems possible that two separately edited and published, but not necessarily independently printed, daily newspapers could have subsisted in New Orleans.

Before considering what might have been done to render the New Orleans environment more conducive to newspaper com-

\footnote{101. And as the Mirror lost circulation ground to the News its advertising linage also declined. For the period April through September 1963 as compared with the same period in 1962 the Mirror's advertising linage fell by more than 641,000 lines (equal to almost 10% of its linage in 1962). Reflecting the impact of the protracted New York City strike the News also lost linage, but an amount equal to only about 5% of its 1962 figure. N.Y. Times, Oct. 16, 1963, p. 1, col. 2, and p. 31, col. 1 (city ed.); N.Y. Times, Oct. 17, 1963, p. 34, col. 6 (city ed.). Also see Paneth, \textit{What Killed 'The Mirror,'} 197 \textit{The Nation} 291 (Nov. 9, 1963). A related case is presented by the sale of the Houston \textit{Press}, a tabloid, to the rival \textit{Chronicle} in March 1964. Both evening papers, the \textit{Press}' circulation had fallen to 87,000 (as of September 30, 1963), or less than half that of the \textit{Chronicle}'s 207,000.}
petition, it is well to reemphasize that the Times-Picayune Company had come to occupy its “bottleneck” position through affirmative action. While by 1958 it had secured a monopoly of the city’s newspaper publication, this had not been “thrust upon” it. In his now classic opinion in the Alcoa case Judge Learned Hand noted that there may be instances in which someone gains a monopoly “merely by virtue of his superior skill, foresight and industry.” However, after scrutinizing the facts Judge Hand concluded that Alcoa was not “the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces,” but rather had embraced each new opportunity to bolster its dominant position. The same interpretation was taken by Judge Wyzanski in his United Shoe Machinery opinion, where he found that the defendant had gained and perpetuated its control through the erection of artificial barriers to competition. The Times-Picayune situation fits neatly into this pattern. To a considerable extent the decline of newspaper competition noticeable in the city over the last half century stemmed from inherent economic forces over which the company had no control. But its survival is not entirely the product of external circumstances. Its purchase of the States in 1933, its tacit understanding with International Paper concerning the closing of the Sunday Item in 1941, and its attempt to “slow down” the Item in 1950 through adoption of the unit rule (however unsuccessful this tactic turned out to be, it represented an effort to use the power it held to disadvantage a lone rival), all constitute evidence of the Times-Picayune Company’s efforts to secure a monopoly. To attribute its position solely to inexorable market forces is to be ignorant of its history. Quite conceivably monopoly may be thrust upon a newspaper; but this company cannot fairly claim that justification.

102. United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).
103. Id. at 430. One of the reasons given by the court for reaching this conclusion was its finding that Alcoa had constantly anticipated increases in the demand for its product and confronted every newcomer with news capacity already geared into its firmly-entrenched organization. An analogy can be drawn to the Times-Picayune situation.
104. United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 344 (D. Mass. 1953). Although acknowledging United Shoe’s considerable “skill, foresight and industry,” Judge Wyzanski added that the company’s control “does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United’s own business policies.” Id. at 344.
105. For illustrations see United States v. Harte-Hanks Newspapers, Inc., 170 F. Supp. 227, 229 (N.D. Tex. 1959); Union Leader Corp. v. Newspapers of
On the assumption that an antitrust violation could, and should, have been found in the New Orleans case, a relief prescription had to be written that would loosen the grip of the Times-Picayune and give competition a chance to succeed. Several remedies could be mentioned. Dissolution, for one, could have been decreed, but under the circumstances this was inappropriate. The company's conduct was not so tainted with wrong or so deeply rooted in illicit motivation as to warrant its destruction. Instead the formulation of relief called for a more refined approach. Essentially it required recognition that, given the Times-Picayune Company's substantial circulation, no other publisher could survive if he had to operate a fully integrated operation. This fact suggests, then, that the economically most efficient answer lay in compelling the company to share its printing facilities with a competing paper. Of necessity this would also have demanded a division of the hours of operation; the Times-Picayune might have been allowed to keep its solitary grasp on the morning field with the afternoon segment being consigned to another publisher who would carry out his editorial function on a completely separate basis but contribute to the costs of the common printing facility.\textsuperscript{106}

While initial reaction to this plan might characterize it as radical, in fact it has respectable judicial precedent. In 1912, as a prime example, the Supreme Court required the Terminal Railroad Association of St. Louis to permit non-member railroads to use its facilities after finding that they provided the only access to the city's main terminal.\textsuperscript{107} Later, in 1945, the Court approved a decree which had the effect of compelling the Associated Press to admit as members newspapers which were

---

\textsuperscript{106} The details of such an undertaking would have to be worked out, naturally; but models are readily at hand for precisely this sort of arrangement, in which one paper prints a competitor's paper. An arrangement like this is in use in several cities of substantial size (Pittsburgh, St. Louis, and Birmingham, to mention three). Either the Times-Picayune Company could have printed the Item's editions under a contract whose terms would have been subject to court approval, or the printing and associated activities could have been placed in a separate company whose ownership the two papers could have shared. In either case the Item, over a period of time, could have been required to make a capital contribution to the Times-Picayune Company sufficient to offset a portion of the investment involved.

\textsuperscript{107} United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
in competition with established papers.\textsuperscript{108} Other decisions, coming in the wake of the 1948\textit{Griffith} decision,\textsuperscript{109} also demonstrate the courts' willingness to pry open bottleneck positions where this is economically necessary if competition is to prevail.\textsuperscript{110} Thus there is nothing particularly revolutionary about the suggestion advanced here concerning the New Orleans case. Court-decreed joint printing was both legally and economically feasible and would have created conditions distinctly favorable to the preservation of newspaper competition by curtailing the\textit{Times-Picayune}'s position and accomplishing a sharing of costs that would have been advantageous to both papers. Under these circumstances the probabilities that another publisher might have taken over the\textit{Item} and been able to keep it alive were most encouraging. Given the vital social significance of newspapers—after all, we are not dealing here with sausage factories—every effort should have been exerted to attain a competitive market in New Orleans, even if it meant only the addition of a single publisher. The value of a second paper is substantial whether it takes a sharply contrasting point of view on major public issues or whether it only reflects a modestly different selection of news and expression of opinion. "The real danger" in newspaper monopoly, as the 1962 British Royal Report on the Press put it, does "not lie in the active propagation of one-sided views, but in the conscious or unconscious suppression of shades of opinion which ought to have a voice."\textsuperscript{111}

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{108}] Associated Press v. United States, 326 U.S. 1 (1945).
  \item[\textsuperscript{109}] United States v. Griffith, 334 U.S. 100 (1948).
  \item[\textsuperscript{110}] In one case a court found that a trade association, which controlled tobacco warehouse sales in the Danville, Virginia, area, had violated the Sherman Act by denying the plaintiff membership in the association. The plaintiff was given both injunctive relief (which effectively meant that it had to be admitted to the association) and damages. American Federation of Tobacco Growers v. Neal, 183 F.2d 869 (4th Cir. 1950). For a comparable case decided by the Federal Trade Commission, see Marlboro Tobacco Board of Trade, 48 F.T.C. 269 (1951). See also Gameco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir. 1952).
  \item[\textsuperscript{111}] REPORT OF THE ROYAL COMMISSION ON THE PRESS 19 (1962) (hereinafter cited as 1962 BRITISH PRESS REPORT). The Report recognized that "there is a special public interest involved in the Press that is not present in industry at large. In amalgamations in most other industries no question normally arises of any power to influence public manners or political opinions." \textit{Id.} at 21. Commenting on the sale of the New York\textit{Mirror} (note \textsuperscript{101} supra) former Vice President Nixon said, "this is something that is not just an economic problem. It is a problem of vital concern to the public. The public should think about what it means if we have . . . only one morning paper and one evening paper in big cities." N.Y. Times, Oct. 18, 1963, p. 19, col. 5 (city ed.). A. J. Liebling has put the matter crisply: "A city with one newspaper, or with a morning and evening paper under one ownership, is like a man with one eye, and often the eye is glass." \textit{LIEBLING, THE PRESS} 29 (1961).
\end{itemize}
\end{footnotesize}
Imaginatively and vigorously implemented, the antitrust laws can help to maintain, or restore, newspaper competition in a number of major American cities that are sufficiently large to support at least two independent publishers. New Orleans is merely one example. In bigger cities, where more than two publishers can subsist, there is likewise no good reason to tolerate consolidations that needlessly remove an autonomous voice from the community. Cities like Chicago and Detroit are sizable enough to sustain three or four publishers, certainly if joint printing arrangements are put into effect like those which are in use in such other cities as St. Louis and Pittsburgh. Regrettably, however, a review of recent experience shows that the government failed to act to block amalgamations of such papers as the Detroit News and the Times, the Chicago Tribune and the American, and the Chicago Daily News and the Sun-Times. In each of these instances where it was asserted the Justice Department accepted the contention of the acquiring concern that the seller was in “failing” circumstances and that, therefore, sale was unavoidable. Whether this claim was true

---

112. In each instance mentioned in the text the purchaser paid a whopping price for a competing paper that supposedly was on the verge of bankruptcy (if so, why not let it fail?) and whose physical assets were usually unappealing and unwanted (the plant formerly occupied by the Item stood vacant for four years before it was finally sold to a hotel). In each case the buyer’s most valuable acquisition was negative in character, namely the effective elimination of a competitor and the creation of circumstances that made entry by a new publisher virtually impossible. With the deceased paper’s plant owned by the buyer (whether it stood idle or, in a rare instance, was put to use), with the old printing equipment sold piecemeal or for scrap, and with experienced newspaper executives from the purchased paper covered by restrictive covenants (see note 42 supra), the probabilities that a new publisher can enter are nil. For this assurance the buyer pays a very high price. In Detroit, for example, the News reportedly paid $10 million for the Times. And in New Orleans the Times-Picayune Company paid $3.4 million for physical assets it did not need. In both instances, and in other similar cases, one is entitled to conclude that the amounts paid went for an intangible not explicitly incorporated in the agreement of sale: monopoly or the acquisition of a dominant market position.

113. The “failing firm” defense is usually said to shield a purchaser that acquires a competing firm “with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure...” International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 302 (1930). Several aspects of the defense, however, remain to be defined. First, is it available where an arrangement could have been worked out, with an appropriate change in conditions, that might reasonably have enabled the “failing” firm to have survived? This point was raised but not resolved in the International Shoe decision. Id. at 301 (on the record before it the Court dismissed the possibility of recovery as “speculative”). Second, the Court clearly stated that the defense is not available where the acquisition is made “with a purpose to lessen competition.” Id. at 302. Although there has been no amplification of this issue, seemingly it would cover a case in which a publisher buys out a “failing” rival and pays such a high price that an intention to gain a monopoly, or to bolster a position, may fairly be inferred (see note 112 supra). Third, if another buyer might be found (or is available) and sale of the property to such a purchaser
or not\textsuperscript{114} is beside the point; action should still have been taken to prevent consummation of the mergers indicated. This might have induced (or forced) the publishers involved to have devised some form of joint printing scheme that would have enabled both to continue in business as truly independent concerns.\textsuperscript{115} It was entirely possible in Chicago, for example, that the \textit{Tribune} and \textit{American}, and the \textit{Daily News} and \textit{Sun-Times}, could, respectively, have agreed to share a common printing plant without also consolidating under single ownerships their entire publishing and editorial operations. In Detroit the problem presented by the 1960 merger of the \textit{News} and the \textit{Times} was more difficult since both were competing evening papers and accordingly could not share one plant. However, if the government had indicated it would object the \textit{Times} might, for instance, have been able to agree on an arrangement with the \textit{Free Press}, the city's (and Michigan's) only morning paper, in which the latter would have printed the \textit{Times} under contract (as is done now in a number of other cities), permitting the two papers to share the economies of joint publication. While there can be no absolute assurance that in the cases mentioned (and in others like them) antitrust intervention would have preserved

\textsuperscript{114} This question has distinct relevance to the newspaper situation. Commonly a competing paper is willing to pay far more for a rival paper (in order to remove it from the market) than would someone interested in continuing the paper in operation. Sale to the latter would not reduce competition, whereas sale to the former would. From a policy standpoint it would make sense to deny the defense to the former and in this way induce sale to the one who would keep the paper going, even though the seller would receive less money as a result. See United States v. Diebold, 369 U.S. 654 (1962). On the "failing firm" defense generally, see Bok, \textit{Section 7 of the Clayton Act and the Merging of Law and Economics}, 74 HARV. L. REV. 226, 339-47 (1960).

\textsuperscript{115} At the time the Detroit News bought the \textit{Times} in 1960 the seller claimed that its paper had lost $10 million during the preceding five years. Union negotiators, however, say that in 1958 the \textit{Times} management cited figures showing that the paper made a profit at least through 1957. UAW SOLIDARITY, Nov. 18, 1960, p. 6. The opportunities for withdrawing liquid assets or juggling books are so great that it can be extremely difficult to tell whether a newspaper has actually been losing money. Indeed there are people in New Orleans who had been associated with the Item who claim that it was not really sustaining a deficit at the time of sale, even though this was the impression given to the public. It should be borne in mind that the seller may be quite anxious to complete the transaction; the purchase price is usually high and any gain realized is taxable at favorable capital gains rates; under these conditions the public interest in preserving competition is likely to be forgotten.

\textsuperscript{115} Since a legitimate question can be raised as to the applicability of these cases of the "failing firm" defense (see note 113 supra) the assurance of government action to block the merger might well have caused the parties, in each of the cases mentioned, to have devised an acceptable cooperative printing arrangement. Or the buyer might suddenly have found that failure was not as imminent as it had been represented to be.
an independent competitor, the probabilities are great that the loss of several papers could have been prevented, surely an ample reward. Yet at the time many major newspaper mergers were announced in recent years the government chose not to act. In doing so it was unwise. But it can still act—and it should, wherever constructive relief can still be obtained.\footnote{116} Furthermore, in the future it should be ready to intervene promptly in similar merger situations; for, if judiciously and imaginatively enforced, the antitrust laws can serve a useful function in preserving, and in expanding, the limited competition that exists in newspaper publication in our largest cities.

In saying that the federal antitrust laws can play a beneficial role in safeguarding local newspaper competition in the United States, one should not overlook their obvious limitations. However diligently enforced they cannot reach all the cases that are worthy of attention for without any improper conduct on the part of a competitor and without any form of amalgamation, a newspaper may simply cease publication and leave its city with a monopoly publisher. In most cities this can be expected to happen, if it has not already taken place; only a very few communities are big enough, given present conditions, to support more than one paper, and of those that can sustain competition, in most this will mean just two publishers. Under these circumstances antitrust intervention can help only occasionally (though the importance of these instances cannot be underestimated).\footnote{117} Thus if local newspaper competition is desirable, a

\footnote{116} As the General Motors-du Pont experience demonstrates, the government may bring a section 7 case at any time after a merger has been consummated. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957). The more difficult question is whether effective relief can be achieved in view of the passage of time. In many of the newspaper cases an affirmative answer is indicated. In Chicago, for example, the Sun-Times and the Daily News, and the Tribune and the American, each employ one printing plant. All that would be required here would be to divide each combine into two pieces, ending up with four independently owned, edited, and published newspapers printed in two plants. Of course, in all these cases it would be necessary to find a publisher or publishers to take over the newly freed papers. But given the fact that the new owner would not have to make an initial investment in printing equipment and could, under court guidance, acquire the property on an installment-purchase plan, the venture would be an attractive one to many investors.

\footnote{117} Consideration might well be given to legislation which would apply a special and more rigorous standard to newspaper mergers than to most other forms of business consolidation. The 1962 \textit{British Press Report} (note 111), for instance, recommended that all future acquisitions of newspapers by concerns having aggregate weekly circulations exceeding three million copies, either before or after the purchase, "should be submitted to the jurisdiction of a (proposed) Press Amalgamations Court; and that the Court should consent only if it is established by means of statutory criteria that the transaction is not contrary to the public interest." \textit{Id.} at 103-11 and appendix XV.
<table>
<thead>
<tr>
<th>City</th>
<th>Rank of City</th>
<th>Population</th>
<th>Rank of Area</th>
<th>Population</th>
<th>Number of Daily Papers</th>
<th>Number of Publishers</th>
<th>Highest for One Publisher in City</th>
<th>Lowest for One Publisher in City</th>
<th>Mean Circulation If Over Two Publishers in City</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>1</td>
<td>7,782</td>
<td>1</td>
<td>10,695</td>
<td>6</td>
<td>6</td>
<td>2,055</td>
<td>328</td>
<td>898</td>
</tr>
<tr>
<td>Chicago</td>
<td>2</td>
<td>3,550</td>
<td>3</td>
<td>6,221</td>
<td>4</td>
<td>2</td>
<td>1,285</td>
<td>1,048</td>
<td></td>
</tr>
<tr>
<td>Los Angeles</td>
<td>3</td>
<td>2,479</td>
<td>2</td>
<td>6,743</td>
<td>2h</td>
<td>2</td>
<td>757</td>
<td>695</td>
<td></td>
</tr>
<tr>
<td>Philadelphia</td>
<td>4</td>
<td>2,003</td>
<td>4</td>
<td>4,343</td>
<td>3</td>
<td>2</td>
<td>924</td>
<td>710</td>
<td></td>
</tr>
<tr>
<td>Detroit</td>
<td>5</td>
<td>1,670</td>
<td>5</td>
<td>3,762</td>
<td>2</td>
<td>2</td>
<td>703</td>
<td>509</td>
<td></td>
</tr>
<tr>
<td>Baltimore</td>
<td>6</td>
<td>939</td>
<td>12</td>
<td>1,727</td>
<td>2</td>
<td>2</td>
<td>219</td>
<td>183</td>
<td></td>
</tr>
<tr>
<td>Houston</td>
<td>7</td>
<td>938</td>
<td>16</td>
<td>1,243</td>
<td>2</td>
<td>2</td>
<td>220</td>
<td>207</td>
<td></td>
</tr>
<tr>
<td>Cleveland</td>
<td>8</td>
<td>876</td>
<td>11</td>
<td>1,797</td>
<td>2</td>
<td>2</td>
<td>377</td>
<td>336</td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>9</td>
<td>764</td>
<td>10</td>
<td>2,002</td>
<td>3</td>
<td>3</td>
<td>409</td>
<td>193</td>
<td>314</td>
</tr>
<tr>
<td>St. Louis</td>
<td>10</td>
<td>750</td>
<td>9</td>
<td>2,060</td>
<td>2</td>
<td>2</td>
<td>348</td>
<td>301</td>
<td></td>
</tr>
<tr>
<td>San Francisco</td>
<td>11</td>
<td>743</td>
<td>6</td>
<td>2,783</td>
<td>3g</td>
<td>2</td>
<td>490</td>
<td>315</td>
<td></td>
</tr>
<tr>
<td>Milwaukee</td>
<td>12</td>
<td>741</td>
<td>17</td>
<td>1,194</td>
<td>2</td>
<td>1</td>
<td>535</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boston</td>
<td>13</td>
<td>697</td>
<td>7</td>
<td>2,589</td>
<td>4</td>
<td>3</td>
<td>452</td>
<td>343</td>
<td>379</td>
</tr>
<tr>
<td>City</td>
<td>Papers</td>
<td>Publishers</td>
<td>Circulation</td>
<td>Rank</td>
<td>Circulation</td>
<td>Population</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------</td>
<td>--------</td>
<td>------------</td>
<td>-------------</td>
<td>------</td>
<td>-------------</td>
<td>------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dallas</td>
<td>14</td>
<td>19</td>
<td>1,084</td>
<td>2</td>
<td>228</td>
<td>196</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Orleans</td>
<td>15</td>
<td>26</td>
<td>866</td>
<td>2</td>
<td>351</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pittsburgh</td>
<td>16</td>
<td>8</td>
<td>2,405</td>
<td>2</td>
<td>356</td>
<td>253</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>San Antonio</td>
<td>17</td>
<td>33</td>
<td>687</td>
<td>3</td>
<td>141</td>
<td>110</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>San Diego</td>
<td>18</td>
<td>22</td>
<td>1,033</td>
<td>2</td>
<td>226</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Seattle</td>
<td>19</td>
<td>18</td>
<td>1,101</td>
<td>2</td>
<td>230</td>
<td>204</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Buffalo</td>
<td>20</td>
<td>15</td>
<td>1,307</td>
<td>2</td>
<td>283</td>
<td>167</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cincinnati</td>
<td>21</td>
<td>20</td>
<td>1,072</td>
<td>2</td>
<td>450</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Memphis</td>
<td>22</td>
<td>33</td>
<td>627</td>
<td>2</td>
<td>357</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Denver</td>
<td>23</td>
<td>25</td>
<td>929</td>
<td>2</td>
<td>250</td>
<td>190</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Atlanta</td>
<td>24</td>
<td>28</td>
<td>1,017</td>
<td>2</td>
<td>462</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minneapolis</td>
<td>25</td>
<td>14</td>
<td>1,482</td>
<td>2</td>
<td>496</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indianapolis</td>
<td>26</td>
<td>31</td>
<td>698</td>
<td>3</td>
<td>385</td>
<td>88</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kansas City</td>
<td>27</td>
<td>21</td>
<td>1,039</td>
<td>2</td>
<td>669</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Columbus</td>
<td>28</td>
<td>34</td>
<td>683</td>
<td>2</td>
<td>209</td>
<td>109</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Phoenix</td>
<td>29</td>
<td>35</td>
<td>664</td>
<td>2</td>
<td>205</td>
<td>509</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Newark</td>
<td>30</td>
<td>13</td>
<td>1,689</td>
<td>2</td>
<td>272</td>
<td>221</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Louisville</td>
<td>31</td>
<td>30</td>
<td>725</td>
<td>2</td>
<td>393</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Portland, Ore.</td>
<td>32</td>
<td>27</td>
<td>822</td>
<td>3</td>
<td>345</td>
<td>55</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oakland</td>
<td>33</td>
<td>6</td>
<td>2,783</td>
<td>1</td>
<td>198</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fort Worth</td>
<td>34</td>
<td>43</td>
<td>573</td>
<td>2</td>
<td>241</td>
<td>54</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Long Beach</td>
<td>35</td>
<td>2</td>
<td>6,743</td>
<td>2</td>
<td>158</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*aThe data concerning population and city and standard metropolitan area rank are for 1960.
*bThe cities are listed in the order of their size, according to the 1960 Census.
*cThe numbers indicate the rank of the indicated standard metropolitan areas which incorporate the city listed in column 1. The data are for 1960.
*dOnly English-language daily newspapers of general circulation are included.
*eThe circulation figures are for weekday editions only, as of September 30, 1962. Most are ABC-certified, though some are taken from publishers' postal statements or from other sources.
*fSince Oakland has a daily paper of its own, and since it lies within the San Francisco metropolitan area, the number of papers published within the area is four rather than three, as indicated in column 5.
*gLong Beach likewise has a paper of its own and thus increases the number of dailies published in the Los Angeles metropolitan area to three.
*hThe circulation figure given is that claimed by the Phoenix Journal for its first issue on February 14, 1962. The paper ceased publication in January 1963 and again resumed publication on August 21, 1963.
+jData allow for the fact that the Houston Press was acquired by the rival Chronicle and closed down in March 1964.
+kTabulated information allow for the fact that the Portland Reporter, set up in 1959 during a strike and since subsidized by labor unions, was shut down in March 1964.
### Table 2. Circumstances of Daily Newspaper Publication in Standard Metropolitan Areas With 1960 Population of 300,000 - 1,000,000

<table>
<thead>
<tr>
<th>Standard Metropolitan Area</th>
<th>S. M. A. Rank</th>
<th>S. M. A. Population (in thousands)</th>
<th>Number of Daily Newspaper Publishers in Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Miami</td>
<td>24</td>
<td>935</td>
<td>2</td>
</tr>
<tr>
<td>Denver</td>
<td>25</td>
<td>929</td>
<td>2</td>
</tr>
<tr>
<td>New Orleans</td>
<td>26</td>
<td>868</td>
<td>1</td>
</tr>
<tr>
<td>Portland, Ore.</td>
<td>27</td>
<td>822</td>
<td>1</td>
</tr>
<tr>
<td>Providence</td>
<td>28</td>
<td>816</td>
<td>1</td>
</tr>
<tr>
<td>Tampa - St. Petersburg</td>
<td>29</td>
<td>772</td>
<td>2(^b)</td>
</tr>
<tr>
<td>Louisville</td>
<td>30</td>
<td>725</td>
<td>1</td>
</tr>
<tr>
<td>Indianapolis</td>
<td>31</td>
<td>698</td>
<td>2</td>
</tr>
<tr>
<td>Dayton</td>
<td>32</td>
<td>694</td>
<td>1</td>
</tr>
<tr>
<td>San Antonio</td>
<td>33</td>
<td>687</td>
<td>2</td>
</tr>
<tr>
<td>Columbus</td>
<td>34</td>
<td>683</td>
<td>2</td>
</tr>
<tr>
<td>Phoenix</td>
<td>35</td>
<td>664</td>
<td>1</td>
</tr>
<tr>
<td>Albany - Schenectady - Troy</td>
<td>36</td>
<td>658</td>
<td>4(^c)</td>
</tr>
<tr>
<td>San Jose</td>
<td>37</td>
<td>642</td>
<td>1</td>
</tr>
<tr>
<td>Memphis</td>
<td>38</td>
<td>627</td>
<td>1</td>
</tr>
<tr>
<td>Jersey City</td>
<td>39</td>
<td>611</td>
<td>1</td>
</tr>
<tr>
<td>Rochester, N. Y.</td>
<td>40</td>
<td>586</td>
<td>1</td>
</tr>
<tr>
<td>Norfolk</td>
<td>41</td>
<td>579</td>
<td>1</td>
</tr>
<tr>
<td>Gary</td>
<td>42</td>
<td>574</td>
<td>1</td>
</tr>
<tr>
<td>Fort Worth</td>
<td>43</td>
<td>573</td>
<td>2</td>
</tr>
<tr>
<td>Syracuse</td>
<td>44</td>
<td>564</td>
<td>1</td>
</tr>
<tr>
<td>Akron</td>
<td>45</td>
<td>516</td>
<td>1</td>
</tr>
<tr>
<td>Oklahoma City</td>
<td>46</td>
<td>512</td>
<td>1</td>
</tr>
<tr>
<td>Youngstown</td>
<td>47</td>
<td>509</td>
<td>1</td>
</tr>
<tr>
<td>Sacramento</td>
<td>48</td>
<td>503</td>
<td>2</td>
</tr>
<tr>
<td>Allentown</td>
<td>49</td>
<td>492</td>
<td>1</td>
</tr>
<tr>
<td>Springfield, Mass.</td>
<td>50</td>
<td>479</td>
<td>2(^d)</td>
</tr>
<tr>
<td>Omaha</td>
<td>51</td>
<td>458</td>
<td>1</td>
</tr>
<tr>
<td>Toledo</td>
<td>52</td>
<td>457</td>
<td>1</td>
</tr>
<tr>
<td>Jacksonville</td>
<td>53</td>
<td>455</td>
<td>1</td>
</tr>
<tr>
<td>Nashville</td>
<td>54</td>
<td>400</td>
<td>2</td>
</tr>
<tr>
<td>Flint</td>
<td>55</td>
<td>374</td>
<td>1</td>
</tr>
</tbody>
</table>

\(^a\)The figure in this column indicates the number of firms which publish a daily newspaper of general circulation within the given metropolitan area.

\(^b\)Two daily papers are published in St. Petersburg (by the same owner since 1962), one in Tampa. Both cities fall within the same standard metropolitan area. The papers tend to confine their coverage to the affairs of their respective cities.

\(^c\)Albany and Troy each have a single local publisher; Schenectady has two. The three cities form a single metropolitan area.

\(^d\)Springfield and Holyoke each have a daily paper. Along with Chicopee they compose a single metropolitan area.
broader-based, more flexible approach to the entire problem is needed. Specifically, techniques must be devised that will lessen the impact of the present heavy reliance on advertising as a source of revenue (conceivably this might be done with progressive tax levies on advertising revenue that would tend to reduce sharply the advantages now held by papers of large circulation)\footnote{Various notions of this sort were considered in the 1962 \textit{British Press Report}, \textit{id.} at 91-99. One called for a statutory restriction on the proportion of space that could be devoted to advertising; another proposed a levy on advertising revenue which would be imposed at a percentage rate which would rise with the newspaper's circulation; a third called for an excise duty on any newspaper's advertising revenue where this exceeded a stated figure (two million pounds) a year. For a further expression by a member of the Royal Commission, see Reddaway, \textit{The Economics of Newspapers}, 73 \textit{Economic Journal} 201 (1963).} and that will generate new sources of financial support (perhaps taking the form, not merely of higher prices charged subscribers, but of assistance provided by foundations, diverse economic interest groups, political parties, and maybe even the government).

Admittedly, some of these ideas are highly unique within the context of American political and economic thought, but unless steps of this sort are taken promptly the powerful economic forces at work in the industry are certain to retard competition still more. At best we may soon find ourselves with a few nationally-distributed and nationally and internationally-oriented newspapers, backstopped by a thoroughly monopolized local

<table>
<thead>
<tr>
<th>City</th>
<th>Rank</th>
<th>Circulation</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Knoxville</td>
<td>56</td>
<td>368</td>
<td>1</td>
</tr>
<tr>
<td>Wilmington</td>
<td>57</td>
<td>366</td>
<td>1</td>
</tr>
<tr>
<td>Fresno</td>
<td>58</td>
<td>366</td>
<td>1</td>
</tr>
<tr>
<td>Grand Rapids</td>
<td>59</td>
<td>363</td>
<td>1</td>
</tr>
<tr>
<td>Wilkes-Barre</td>
<td>60</td>
<td>347</td>
<td>1</td>
</tr>
<tr>
<td>Wichita</td>
<td>61</td>
<td>343</td>
<td>1</td>
</tr>
<tr>
<td>Canton</td>
<td>62</td>
<td>340</td>
<td>1</td>
</tr>
<tr>
<td>Bridgeport</td>
<td>63</td>
<td>335</td>
<td>1</td>
</tr>
<tr>
<td>Utica - Rome</td>
<td>64</td>
<td>331</td>
<td>2\footnote{Utica and Rome have dailies of their own, and together form a common metropolitan area.}</td>
</tr>
<tr>
<td>Worcester</td>
<td>65</td>
<td>323</td>
<td>1</td>
</tr>
<tr>
<td>Tacoma</td>
<td>66</td>
<td>322</td>
<td>1</td>
</tr>
<tr>
<td>Mobile</td>
<td>67</td>
<td>314</td>
<td>1</td>
</tr>
<tr>
<td>El Paso</td>
<td>68</td>
<td>314</td>
<td>1</td>
</tr>
<tr>
<td>New Haven</td>
<td>69</td>
<td>312</td>
<td>1</td>
</tr>
</tbody>
</table>

*NOTE*: Between them tables 1 and 2 contain information on the country's 69 largest standard metropolitan areas, with the single exception of Paterson-Clifton-Passaic, New Jersey.

Sources: Table 1; Editor & Publisher, 1963 International Year Book; Statistical Abstract of the United States, 1965, at 13-18.
press.\textsuperscript{119} Even if residents of most of the country's larger cities ultimately were able to buy the New York Times or any of a number of other high-quality papers on the day of publication as easily as their local daily, in some ways an appealing thought, it is undesirable and unwise to acquiesce in a situation which increasingly places responsibility for informing the people as to municipal and regional affairs in the hands of monopolistic publishers. Some significant degree of local newspaper competition is attainable if we are prepared now to take the appropriate corrective measures.

\textsuperscript{119.} Some may regard even this as an overly optimistic prognostication, in view of the recent experience with the western editions of the New York Times. With much of the copy transmitted by wire from New York the Times published a western edition at Los Angeles from October 1, 1962 until January 24, 1964, when the operation was discontinued. The paper's management reported heavy losses due to high costs and a failure of advertising to develop in the necessary volume. N.Y. Times, Jan. 17, 1964, p. 1, col. 1 (city ed.) (For additional background on the western edition, see Tebbel, \textit{The New York Times Goes West}, Saturday Review, Nov. 11, 1961, p. 69.) However, the success achieved by the Wall Street Journal with its publication of a number of regional editions suggests that the Times' experience need not be controlling. The odds still are great that at least one truly comprehensive, nationally-oriented daily paper will at some future date be printed and distributed simultaneously from several printing plants located throughout the country. Technologically there is no problem, given the ease of transmission of copy by wire and the marvels of automatic typesetting. See Severo, \textit{Automation and the News Strike}, The Reporter, March 14, 1963, p. 29.