Refusals To Deal by Vertically Integrating Newspaper Monopolists: Paschall v. Kansas City Star Co.

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REFUSALS TO DEAL BY VERTICALLY INTEGRATING NEWSPAPER MONOPOLISTS: PASCHALL V. KANSAS CITY STAR CO.

CHARLES R. ANDRES†

Ever since Congress passed the Sherman Antitrust Act in 1890, a debate has persisted over the proper goals and economic theories of the antitrust laws, which have had a profound effect on the structure of industry in America. Vertical integration by newspaper publishers into a once independent system of distribution has again raised fundamental questions regarding the proper goals and economic theories of antitrust. In Paschall v. Kansas City Star Co., the Eighth Circuit Court of Appeals confronted these questions.

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I. INTRODUCTION

As the breakup of American Telephone & Telegraph demonstrates, antitrust laws¹ have a significant impact on market struc-

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¹ The main provisions of the federal antitrust laws are found in the Sherman Act of 1890, 15 U.S.C. §§ 1-2 (1982) (prohibiting contracts or conspiracies to restrain trade, mo-
2. Market structure refers to those elements in a market that exercise strategic influence on competition and pricing. See generally J. BAIN, INDUSTRIAL ORGANIZATION chs. 5-8 (2d ed. 1968) (general discussion of market structure). The elements of market structure include “the number and size distribution of sellers and buyers, the breadth of the market and character of demand, the degree of product differentiation, and the conditions of entry.” Knox, Antitrust Exemptions for Newspapers: An Economic Analysis, 1971 LAW & SOC. ORDER 3, 13; see also J. BAIN, supra, at 7.

3. The federal antitrust laws operate primarily by prohibiting anticompetitive practices rather than prescribing market structure. See supra note 1. Although antitrust laws regulate conduct rather than structure, these laws can have a direct impact on market structure when courts order divestiture as a remedy for antitrust violations. Similarly, a preemptive divestiture may occur if the Justice Department fails to approve a proposed merger. See generally A. NEALE & D. GOYDER, supra note 1, at 403-07 (discussion of practical limits of divestiture decrees).

In contrast to market structure, market conduct consists of the policies and practices employed by a firm in adapting to its markets. Lee, Antitrust Enforcement, Freedom of the Press, and “Open Market”: The Supreme Court on the Structure and Conduct of Mass Media, 32 VAND. L. REV. 1249, 1253 (1979).

4. See Lee, supra note 3, at 1253.

5. Vertical restraints are restrictions on the use of products imposed by those at one stage of production (usually manufacturers) on those at another stage of production (usually distributors). Examples of vertical restraints include a manufacturer's requirements that distributors deal exclusively in the manufacturer's products, or that the distributor have an exclusive franchise within its area of distribution of the manufacturer's product. A. NEALE & D. GOYDER, supra note 1, at 249. The Supreme Court's most thorough discussion of vertical restraints is found in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (all vertical restrictions are not per se illegal, but particular applications of restrictions may be illegal under some circumstances).

Vertical restraints can be contrasted with horizontal restraints, such as agreements by competing firms operating at the same level concerning matters such as price-setting or market-sharing. A. NEALE & D. GOYDER, supra note 1, at 249. In general, horizontal restraints are more likely to be condemned by the antitrust laws than are vertical restraints. See Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 COLUM. L. REV. 422, 466 (1965) (horizontal size seen as "basic evil" by both conservative and liberal antitrust theorists).
market depends to a large extent on what practices are permissible under the antitrust laws. What is permissible under the antitrust laws depends on the goals and economic theories courts emphasize.

The newspaper industry offers a good example of the tension existing today over the proper goals and theories of the antitrust

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6. The Supreme Court has addressed the validity of a variety of vertical arrangements under the antitrust laws. See, e.g., GTE Sylvania, Inc., 433 U.S. 36 (territorial restraints not per se illegal); Albrecht v. Herald Co., 390 U.S. 145 (1968) (maximum resale price maintenance is per se illegal); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (exclusive supply contract not illegal if it did not substantially lessen competition in relevant market); United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (manufacturer's refusal to deal coupled with inducements by manufacturer to wholesalers to not join in price cutting violated Sherman Act); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (lease of land owned by Northern Pacific requiring lessee to use Northern Pacific's lines to ship all commodities produced on the leased land was an illegal tying contract in violation of the Sherman Act); Standard Oil Co. v. United States, 337 U.S. 293 (1949) (exclusive supply contract violated Clayton Act); United States v. Colgate & Co., 250 U.S. 300 (1919) (no violation of Sherman Act when manufacturer refused to deal with distributor who did not sell at manufacturer's suggested price); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (manufacturer cannot require distributor by contract to maintain prescribed retail prices).

7. The goals of the antitrust laws continue to be debated over 90 years after the first of these laws, the Sherman Act of 1890, was enacted. See infra notes 219-21 and accompanying text. Two views exist concerning the proper goals of the antitrust laws. One school advocates economic efficiency as the exclusive goal of the antitrust laws. See, e.g., I P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 103-04 (1978); R. BORK, THE ANTITRUST PARADOX 90-91 (1978); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4 (1976). These commentators believe the primary goal of the antitrust laws is to "maximize consumer economic welfare through efficiency in the use and allocation of scarce resources." I P. AREEDA & D. TURNER, supra, ¶ 103 (Areeda and Turner state that economic efficiency is achieved through "progressiveness in the development of new productive techniques and new products that put those resources to better use"). The size of a business alone should not offend the antitrust laws. Cf United States v. Swift & Co., 286 U.S. 106, 116 (1932) ("mere size ... is not an offense against the Sherman Act"); United States v. United States Steel Corp., 251 U.S. 417, 451 (1920) ("But we must adhere to the law, and the law does not make mere size an offense, or the existence of unexerted power an offense"); Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1910) (purpose of §§ 1 and 2 of Sherman Act was to "prevent undue restraints of every kind and nature"); United States v. Aluminum Co. of Am., 148 F.2d 416, 429-30 (2d Cir. 1948) (competitor, who by his "superior skill, foresight and industry" captures monopoly market has not violated Sherman Act: "The successful competitor, having been urged to compete, must not be turned upon when he wins"); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd, 347 U.S. 521 (1954) (per curiam).

The other school believes that efficiency goals should be supplemented and possibly overridden by nonefficiency goals. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 3-5 (1977); Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 67 (1982); Schwartz, "Justice" and other Non-economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979); see also infra notes 223-25 and accompanying text.

8. See infra notes 152-209 and accompanying text.
laws. Newspaper publishers have traditionally used independent distributors to deliver newspapers to customers. As a result of the Supreme Court's decision in *Albrecht v. Herald Co.*, however, in which the Court ruled that independent distributors have complete autonomy in setting retail prices, many publishers abandoned the traditional method of distribution in favor of self-distribution. This change in distribution methods caused many distributors to lose their businesses and caused many courts to re-evaluate their position on the goals and economic theories of the antitrust laws concerning vertical integration.

In *Paschall v. Kansas City Star Co.*, the Eighth Circuit had an opportunity to re-examine its position regarding vertical integration. A divided court held that a newspaper publisher did not violate section 2 of the Sherman Act by switching to self-distribution and refusing to deal with its former distributors. The division in the court was caused by disagreement over the basic goals and theories that should govern the legality of a vertical integration.

This Article examines *Paschall* and the tension in the antitrust laws generated by a newspaper's vertical integration and refusal to deal with former distributors. The author argues that the majority's choice of advancing economic efficiency and realistically examining the competitive effects of vertical integration by a newspaper monopolist was proper. The author first examines the

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9. See infra note 23 and accompanying text.

10. 390 U.S. 145 (1968); see infra notes 40-54 and accompanying text (analyzing *Albrecht* and its effect).

11. 390 U.S. at 152-53.

12. See infra notes 49-54 and accompanying text.

13. See infra notes 52-53 and accompanying text.

14. See infra note 52.


16. The Eighth Circuit considered *Paschall* both as a panel and en banc. See infra notes 82-84 and accompanying text. A majority of the panel decision ruled against the Star initially. *Paschall*, 695 F.2d 322. Judge Henley filed a strong dissent. *Id.* at 339 (Henley, J., dissenting). On rehearing en banc, however, the majority overruled the panel decision and adopted the viewpoint of the panel dissent. *Paschall*, 727 F.2d 692. Strong dissents were filed by the panel majority. *Id.* at 704 (Heaney, J., dissenting), 706 (Bright, J., dissenting). The Eighth Circuit, therefore, split into two factions over the outcome of *Paschall*. For simplicity, this Article will refer to the majority and dissenting opinions in the en banc decision as the two views of the court.

17. 15 U.S.C. § 2 (1982). Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." *Id.*
structure of the newspaper industry and how it was affected by Albrecht, and argues that Albrecht gave insufficient consideration to the competitive pressures in the industry. Second, the author discusses the Paschall decision, concluding that the harm done by Albrecht would be accentuated by a decision in favor of independent distributors. Finally, the author analyzes the economic theories and antitrust goals advanced in Paschall and discusses how these should be applied to the newspaper industry.

II. NEWSPAPER DISTRIBUTION SYSTEMS

A. Structure of the Newspaper Industry

Like all industries, the newspaper industry has developed methods for delivering its product to consumers. In the newspaper industry, distribution involves receiving and soliciting subscriptions, generating lists, hiring and supervising carriers, dealing with delivery problems, billing, and collecting payment. Traditionally, newspapers have hired independent distributors to distribute their papers. These distributors purchase the papers from publishers and pursue their own marketing and pricing strategies.

Most independent distributors share a number of common characteristics. The typical distributor operates within an exclusive territory without competition from other dealers. Territorial restrictions, which may be incorporated into the distributor’s contract with a paper, reflect the economies of scale in newspaper

18. See infra notes 21-85 and accompanying text.
19. See infra notes 86-147 and accompanying text.
20. See infra notes 148-235 and accompanying text.
22. P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 729.4b7 (Supp. 1982).
24. See Bioff & Paul, supra note 23, at 650. Publishers, however, often attempted to influence the prices at which distributors resold the papers. See infra note 41 and accompanying text.
25. See, e.g., Paschall, 727 F.2d at 694; Auburn News Co., 659 F.2d at 275; Newberry, 438 F. Supp. at 473.
26. In Paschall, 727 F.2d at 694-95, the exclusive territorial agreements were specified in the distributor’s contract with the publisher. In Newberry, 439 F. Supp. at 473, the
routes. Because the marginal cost of delivering an additional newspaper is small in relation to the fixed costs of establishing the route, a distributor may be able to deliver a large number of papers at approximately the same cost as he could deliver half the amount. Thus, delivery routes have characteristics of a natural monopoly.

Since distributors operate independently of the publisher, they have the power to set their own retail prices. Similarly, since distributors operate without competition in their exclusive territories, they can extract monopoly profits from their subscribers. As distributors bought papers from the publisher for resale in designated areas. The contracts contained no explicit prohibition against selling outside the area, but were designed to limit each distributor's sales to a designated area. In Auburn, 659 F.2d at 275, the territorial division was not an explicit condition of the relationship between the newspaper and the distributor, or among the distributors, but was respected by all. In McGuire v. Times Mirror Co., 405 F. Supp. 57 (C.D. Cal. 1975), the agreements between the publisher and the distributors specified the territories each distributor was obligated to serve, but did not specifically restrict any dealer to sales within the designated territory. Id. at 61.

The legality of exclusive territories under § 1 of the Sherman Act was questioned by the Supreme Court in Albrecht, 390 U.S. at 153-54. The Ninth Circuit Court of Appeals subsequently interpreted Albrecht as holding that exclusive territory arrangements between newspaper publishers and distributors are per se violations of § 1. Noble v. McClatchy Newspapers, 533 F.2d 1081, 1088 (9th Cir. 1975). After the Supreme Court adopted a more permissive view of vertical restraints in GTE Sylvania, Inc., 433 U.S. at 57-59, lower courts have upheld exclusive territory arrangements. See, e.g., Newberry, 438 F. Supp. at 475.

28. Id. at 453. The largest fixed costs of a delivery route (costs that a distributor must incur apart from the number of papers delivered) are the costs of delivery vehicles and wages for carriers. Id.
29. Id.
30. Id. at 452; see also Newberry, 438 F. Supp. at 474 (dealer territories had aspects of a natural monopoly since territories specified in dealer contracts were tailored for the most efficient delivery). A natural monopoly arises when, because of economies of scale, it is more efficient for a product or service to be provided by only one economic entity. C. FERGUSON & J. GOULD, MICROECONOMIC THEORY § 9.1.b (4th ed. 1975).
31. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), has been construed to prohibit manufacturers from requiring distributors by contract to maintain a prescribed retail price. Dr. Miles Medical Co., 220 U.S. 373. Of course, newspaper publishers have some control over retail rates by the wholesale rates they charge distributors.
32. See Hovenkamp, supra note 27, at 454. Monopoly profits represent the profit the monopolist obtains over that which he would obtain under competitive conditions. These "excess" profits are possible because a monopolist is able to increase its profits by lowering its output and increasing its price, a practice normally precluded by competitive pressures. Under monopoly conditions, therefore, prices for a product will be higher and volume will be lower than under competitive conditions. See Kamerschen, The Economic Effects of Monopoly: A Lawyer's Guide to Antitrust Economics, 27 MERCER L. REV. 1061, 1062 (1976), reprinted in T. CALVANI & J. SIEGFRIED, ECONOMIC ANALYSIS AND ANTITRUST LAW 20, 21 (1979).
a result, publishers have adopted various methods to pressure dealers to sell at the lowest possible price.33

Like distributors, newspapers often have monopoly characteristics. Many daily newspapers are the sole suppliers of daily printed media in a given area.34 Most newspapers, however, are only secondarily in the business of selling news to readers. Their primary business—and major source of profits—is the sale of newspaper space to advertisers.35 Although advertising rates vary, the rate is usually a function of circulation. The higher the circulation, the more the paper can charge for its advertising.36 Newspaper publishers thus have a strong incentive to increase their circulation.

Because of these considerations, publishers and distributors do not share the same circulation goals. The distributor, as a monopolist, seeks to increase its profits by pricing higher and reducing output.37 The publisher, however, finds it unprofitable to set a monopoly price for its newspaper, since the resulting reduction in volume38 decreases its advertising profits.39 These conflicting goals

33. See Albrecht, 390 U.S. at 149-50 (publisher suggested retail price and when plaintiff charged more than suggested price, publisher hired a firm to compete with plaintiff and later terminated plaintiff's distributorship); see also Newberry, 438 F. Supp. at 481 (newspaper raised its wholesale price to distributor after distributor raised his price to customers).

34. See, e.g., Paschall, 727 F.2d at 694-96 (the Star owns the only two major daily newspapers in the Kansas City area). The number of cities with competing newspapers has fallen from 689 in 1910 to 51 in 1983. Jones, Plight of Weaker Newspapers, N.Y. Times, Nov. 12, 1983, at 29, col. 3. See generally B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION ch. 2 (1972) (analyzing economic structure of the newspaper industry in the United States from the eighteenth century to the present); Comment, Individual and Chain Newspaper Conduct Versus the Antitrust Laws: What Boundaries Do The Traditional Means of Checking Economic Concentration Establish For the Newspaper Industry?, 14 GONZ. L. REV. 819 (1979) (analyzing the application and effectiveness of the federal antitrust laws to the newspaper industry). Congress has enacted legislation designed to assist failing newspapers. Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1982). This legislation has been criticized as protectionist towards existing publishers while creating barriers to entry for new newspapers. See Knox, supra note 2; Comment, The Newspaper Preservation Act, 32 U. PITT. L. REV. 347 (1971) (arguing that the Newspaper Preservation Act is anticompetitive in nature).

35. See, e.g., McGuire, 405 F. Supp. at 62 (dominant Los Angeles daily newspaper earns 85% of revenue from advertising, 15% from circulation); B. OWEN, supra note 34, at 35; Hovenkamp, supra note 27, at 455. In Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 610 (1952), the Court observed that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." Id.

36. See Paschall, 727 F.2d at 701; P. AREEDA & D. TURNER, supra note 22, at ¶ 729.7a; Hovenkamp, supra note 27, at 455-56; Knox, supra note 2, at 13; Roberts, Antitrust Problems in the Newspaper Industry, 82 HARV. L. REV. 319, 324 (1968).

37. See supra note 32 (discussion of monopoly pricing).

38. Volume will drop as a result of a price increase only if demand for newspapers is
have led to antitrust litigation between publishers and distributors.

**B. Albrecht v. Herald Co. and Its Fallout**

In *Albrecht v. Herald Co.*, the Supreme Court addressed the validity of a common practice employed by newspaper publishers to pressure distributors to keep subscription costs down: suggesting a retail price and threatening to compete with or terminate a distributor who charged more than that price. When the plaintiff, Albrecht, charged more than the suggested price, the Herald hired a firm to compete with the plaintiff and later fired the plaintiff after he initiated an antitrust action. The Supreme Court ruled that the Herald's actions constituted maximum resale price maintenance, and as such were per se illegal under section 1 of the Sherman Act.

The Supreme Court reasoned that maximum, like minimum, resale price fixing disrupts the market equilibrium by substituting the judgment of a seller for competitive market forces. The Court concluded that maximum resale price maintenance should be condemned by the same per se rule that condemns minimum resale price maintenance. Justice Harlan dissented, arguing that

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elastic. Studies have shown that the price elasticity of demand for newspapers is quite high. Hovenkamp, *supra* note 27, at 457 n.28; *see also* Paschall, 695 F.2d at 330 & n.10 (circulation decreased when paper raised price).

39. As noted by Justice Stewart in his dissent in *Albrecht*, "Because the major portion of the [publisher's] income derives from advertising rather than from sales to distributors, the [publisher's] self-interest is in keeping the retail price of the paper low in order to increase circulation and thereby increase advertising revenues." 390 U.S. at 169 n.2 (Stewart, J., dissenting); *see infra* notes 40-54 and accompanying text.


41. *Id.* at 147-48.

42. *Id.*

43. *Id.* at 153. Prior to *Albrecht*, a federal district court decided a case involving similar issues in a different manner. Graham v. Triangle Publications, Inc., 233 F. Supp. 825, 830 (E.D. Pa. 1964) (absent evidence of a combination or conspiracy, publisher's refusal to deal with newspaper distributors unless distributors would abide by publisher's price policy was no more than a unilateral refusal to deal and did not violate §§ 1 or 2 of the Sherman Act).

44. 390 U.S. at 152.

45. *Id.* at 151-53. The per se rule and the rule of reason are standards used by courts to evaluate alleged antitrust violations. Under the rule of reason, a court will evaluate the impact of alleged misconduct on competitive conditions. Only if the misconduct harms competition will an antitrust violation be found. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688-90 (1978). A per se rule operates to condemn certain practices without regard to the effect the practices have on competition. A per se rule will be invoked "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged con-
price ceilings differ from price floors and are ill-suited to a per se rule.\textsuperscript{46} He also argued that the Court had distorted the section 1 requirement of a combination or conspiracy by finding a combination in the Herald's essentially unilateral action.\textsuperscript{47} Justice Stewart, in a dissent joined by Justice Harlan, indicated that price ceilings may be appropriate where resellers are monopolists and are able to engage in supracompetitive pricing.\textsuperscript{48}

Justice Harlan concluded by stating, "Today's decision leaves [the Herald] with no alternative but to use its own trucks."\textsuperscript{49} Although prophecies of greater evil are standard fare among losing parties and dissenting judges,\textsuperscript{50} in this instance history proved the threat to be correct.\textsuperscript{51} Following \textit{Albrecht}, many publishers changed their distribution systems in order to gain more direct control over the retail price of their papers.\textsuperscript{52} These changes in-

\textsuperscript{46} 390 U.S. at 156-59 (Harlan, J., dissenting).
\textsuperscript{47} \textit{Id.} at 160-64.
\textsuperscript{48} \textit{Id.} at 168-69 (Stewart, J., dissenting).
\textsuperscript{49} \textit{Id.} at 168. The \textit{Albrecht} decision has been frequently criticized. \textit{See} Handler, \textit{Reforming the Antitrust Laws}, 82 COLUM. L. REV. 1287, 1301-07 (1982); Hovenkamp, supra note 27, at 461; \textit{The Supreme Court, 1967 Term}, 82 HARV. L. REV. 63, 257-58 (1968).
\textsuperscript{50} \textit{Cf.} Standard Oil Co. v. United States, 337 U.S. 293, 319-20 (1949) (Douglas, J., dissenting) (consequences of Court's prohibition of requirement contracts will be to encourage companies to adopt further measure of industrial concentration).
\textsuperscript{51} Most commentators at that time did not believe that publishers would move to self-distribution because of \textit{Albrecht}. \textit{See}, e.g., \textit{The Supreme Court, 1967 Term}, supra note 49, at 260 (suggesting that manufacturers were not likely to integrate forward to avoid \textit{Albrecht}'s prohibition against maximum resale price maintenance because of the practical barriers to forward integration). For a description of such barriers, \textit{see} Comanor, \textit{Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath}, 81 HARV. L. REV. 1419, 1435-36 (1968).

\text{The [Washington] Post shifted to the agency system largely as a result of the Supreme Court's ruling in \textit{Albrecht}, which cast doubt on the legality of systems of}
volved the forward integration of the publisher into the distribution level, coupled with a refusal to sell newspapers wholesale to independent distributors. 53 These refusals to deal have sparked a number of antitrust actions by terminated distributors. 54

C. Refusals to Deal: Liability Under the Sherman Act

Refusals to deal by forward integrating monopolists have been challenged under both sections 1 and 2 of the Sherman Act. 55 Encouraged by the broad definition of conspiracy in Albrecht, 56 and its holding that maximum resale price maintenance is per se unlawful, 57 many discharged distributors included section 1 claims in suits against vertically integrating newspapers. 58 In these cases, the discharged distributors claimed that the purpose of the distribution change was unlawfully to control resale prices. 59 Courts,

dealer distribution, such as the Post's, then employed by many newspapers across the country. After an unsuccessful effort by the industry to obtain relief from the Congress, the Post determined that a different method of distribution was desirable to avoid the business risks involved and to assure orderly pricing of its product. 60

Id.; see also Bioff & Paul, supra note 23, at 650-53.

53. See, e.g., Paschall, 695 F.2d at 325.

54. See supra note 52.

55. 15 U.S.C. §§ 1-2 (1982). Section 1 provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." Id.; see supra note 17 (text of § 2). The Supreme Court has ruled that refusals to deal, by themselves, do not violate the antitrust laws. United States v. Colgate & Co., 250 U.S. 300 (1919) (no antitrust violation in a manufacturer's refusal to sell to distributors who failed to charge manufacturer's suggested retail price and in terminating dealers who did not adhere to that price). The holding in Colgate has been limited by the Court but never overruled. See Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). Refusals to deal often occur when a company integrates vertically. See supra notes 52-53 and accompanying text. Vertical integration is judged by the same rule of reason standard as refusals to deal. See United States v. Columbia Steel Co., 334 U.S. 495, 525-26 (1948) (it is "clear . . . that vertical integration, as such without more, cannot be held violative of the Sherman Act. . . . [T]he extent of permissible integration must be governed, as other factors in Sherman Act violations, by the other circumstances of individual cases").

56. In Albrecht, the Court suggested that a § 1 combination could have been alleged between the publisher and the parties hired by the publisher to solicit in the plaintiff's area; between the publisher and other distributors who accepted the maximum price; and between the publisher and the plaintiff, "at least as of the day he unwillingly complied with the respondent's advertised price." 390 U.S. at 150 & n.6. In addition, the Court stated that a combination between the publisher and the plaintiff's customers would not be a frivolous contention. Id.

57. Id. at 151-53.


59. See, e.g., Naify, 599 F.2d at 336.
VERTICAL INTEGRATION

however, have unanimously rejected this argument.60

Displaced distributors have also alleged that newspaper publishers’ refusals to deal constitute monopolization or attempted monopolization under section 2 of the Sherman Act.61 The Supreme Court has identified two elements of a monopolization violation: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."62 The latter element demonstrates that monopolization is something more than just the possession of monopoly power. To monopolize means to exert some positive drive, apart from competitive skill, to control the market.63 To determine whether this positive force is present, courts must identify a firm’s intent.64

The intent requirement of a monopolization violation need not be proven by demonstrating a specific intent to monopolize.65 A firm’s intent may be inferred from a number of factors. These include the lack of legitimate business reasons for a course of action,66 conduct involving “dirty tricks,”67 or consequences that appear to be anticompetitive.

60. See supra note 58; see also Knutson, 548 F.2d at 805 (“a complete conversion is not an enforcement mechanism, but a choice of an alternative form of distribution”).

61. See supra note 52.

62. United States v. Grinnell Corp., 384 U.S. 563, 570 (1966). Monopoly power is defined as “the power to control prices or exclude competition.” Id. at 571 (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)). The relevant market consists of two parts: the relevant product market, id. at 571; and the relevant geographical market. Id. at 575-76.

63. A. NEALE & D. GOYDER, supra note 1, at 90-91; see supra note 7; cf. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979) (monopoly power must be coupled with intent to use power).

64. A. NEALE & D. GOYDER, supra note 1, at 92 (“The principal task of the courts under § 2 of the Sherman Act in seeking to isolate the element of positive drive which constitutes monopolizing is to identify the intent of the firm”).

65. United States v. Griffith, 334 U.S. 100, 105 (1948); see also A. NEALE & D. GOYDER, supra note 1, at 92-93 (“A firm’s intent may be made manifest by its particular acts or by its general course of action”).


67. See, e.g., Byars v. Bluff City News Co., 609 F.2d 843, 853-54 (6th Cir. 1979) (“dirty tricks” included removal and covering up plaintiff’s periodicals on sales racks, pricing below cost in magazines which competed with the plaintiff, and intimidation of plaintiff’s customers to purchase from defendant); see also P. AREEDA & D. TURNER, supra note 22, at ¶ 729.3.
It is this final area—the measuring of possible anticompetitive effects—that courts often focus on to determine whether vertical integration and a refusal to deal by a monopolist violate section 2.\textsuperscript{68} Courts and commentators have pointed to both positive and negative effects that may result from a monopolist's vertical integration. Positive effects include integration efficiencies,\textsuperscript{69} better service, and lower prices.\textsuperscript{70} Negative effects include an increased opportunity for price discrimination,\textsuperscript{71} increased barriers to entry at the first level,\textsuperscript{72} evasion of government regulation of first level monopoly profits,\textsuperscript{73} elimination of intrabrand price competition,\textsuperscript{74}

\begin{itemize}
  \item \textsuperscript{68} See Paschall, 727 F.2d at 698-704; Auburn News Co., 659 F.2d at 278; Byars, 609 F.2d at 861.
  \item \textsuperscript{69} See III P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 725d n.7 (1978). Integration efficiencies result when, because of technologically complementary production methods, it is less costly to produce the same output with one integrated operation than with separate operations. \textit{Id.}; Note, Refusal to Deal by Vertically Integrated Monopolists, 87 HARV. L. REV. 1720, 1730-31 (1974). For example, a newspaper that uses computers for word processing may also be able to use its computers to store subscription lists, keep track of billing, and other distribution operations. But "replacement of small, independent businesses with a single firm may conflict with the Sherman Act's concern for widespread dispersal of economic power." \textit{Id.} at 1730.
  \item \textsuperscript{70} The positive effects of vertical integration are particularly likely to result when vertical integration occurs between monopolists at different levels. The positive effects occur since there is only one monopoly profit that can be made from the sale of a product. This profit depends solely on the product's demand curve and the firm's production costs. See Note, supra note 69, at 1731. Where the stages below the monopolist are competitive, the monopolist is able to extract the full monopoly profit from the product at his level. Nevertheless, where, as in the newspaper industry, the stage below the monopolist is also a monopoly, the monopoly profit will have to be shared between the two monopolies. If because of misinformation or bargaining difficulties a rational agreement is not made, the result will likely be a price higher than the optimal monopoly price. This happens because both monopolists will be tempted to price high in order to maximize their shares of the monopoly profit, with the final price to the consumer higher than what would be charged if only one monopolist had set the price. Most courts and commentators agree, therefore, that vertical integration between monopolies benefits both producers and consumers. See, e.g., Byars, 609 F.2d at 861; III P. AREEDA & D. TURNER, supra note 69, at ¶ 725c; F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 300-01 (2d ed. 1980); Kessler & Stern, Competition, Contract, and Vertical Integration, 69 YALE L.J. 1, 15 n.62, 17 n.72 (1959); Note, supra note 69, at 1731.
  \item \textsuperscript{71} See, e.g., Paschall, 727 F.2d at 702; Byars, 609 F.2d at 861; P. AREEDA & D. TURNER, supra note 22, at ¶ 729.4b4; F. SCHERER, supra note 70, at 305 n.14; Note, supra note 69, at 1727-28.
  \item \textsuperscript{72} See, e.g., Paschall, 727 F.2d at 702; Byars, 609 F.2d at 861; P. AREEDA & D. TURNER, supra note 22, at ¶ 729.4b7; Kessler & Stern, supra note 70, at 16-21; Note, supra note 69, at 1728; cf. III P. AREEDA & D. TURNER, supra note 69, at ¶ 725h (adverse effects uncertain even with full integration of successive monopolies).
  \item \textsuperscript{73} See, e.g., Paschall, 727 F.2d at 702; Byars, 609 F.2d at 861.
  \item \textsuperscript{74} See P. AREEDA & D. TURNER, supra note 22, at ¶ 729.4b2. Of course, where dealers have not competed among themselves, as in the newspaper industry, this concern is misplaced.
\end{itemize}
and decreased incentive for innovation.\textsuperscript{75} Courts balance the positive and negative effects that result from integration with other evidence of intent, such as alleged business reasons for the move, to determine whether a monopolization violation has occurred.\textsuperscript{76}

Displaced distributors have also claimed that a newspaper's vertical integration constitutes an attempt to monopolize under section 2 of the Sherman Act.\textsuperscript{77} An attempt to monopolize consists of two elements: (1) a specific intent by the defendant to monopolize; and (2) a dangerous probability that a monopoly will result from the defendant's conduct.\textsuperscript{78} The specific intent requirement of the attempt offense, like the general intent requirement of the monopolization offense, must be inferred from conduct.\textsuperscript{79} The inference of intent, however, must be more obvious and less ambiguous in an attempt violation than in a monopolization violation.\textsuperscript{80}

Displaced distributors have yet to succeed under any of these

\begin{footnotesize}
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\item See F. Scherer, supra note 70, at 438. But see III P. Areeda & D. Turner, supra note 69, at ¶ 725g (significant adverse effects uncertain because monopolist can still increase profits by innovation).
\item See, e.g., Byars, 609 F.2d at 860-64. Problems exist in identifying situations where the vertical integration scheme is anticompetitive. Id. at 861. In Byars, a newspaper imposed a service charge on small retailers, claiming that it was too expensive to distribute through them. Id. at 847. The retailers claimed antitrust violations on the basis of the newspaper's refusal to deal with the retailers. See id. at 846. The court remanded the issue for further factfinding to determine whether the newspaper had violated § 1 by its refusal to deal. Id. at 864.
\item See, e.g., Auburn News Co., 659 F.2d 273 (small distributors challenged company's choice of direct distribution); Naify, 599 F.2d 335 (retailers terminated in favor of salaried employees); Knutson, 546 F.2d 795 (distributors challenged publisher's termination of independent distribution system); Neugebauer, 474 F. Supp. at 1061 (alleging that publisher's ability to control retail and wholesale prices created price squeeze eliminating wholesale market).
\item See, e.g., American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946) (characterizing monopolization as combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent); Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (intent essential to characterize an attempt as § 2 violation). This classic interpretation of the attempt offense has been often criticized. See P. Areeda & D. Turner, supra note 22, at ¶ 729.5d ("judicial discussions of intention are disappointing"); Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich. L. Rev. 373, 384-88 (1974); Hawk, Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine, 58 Cornell L. Rev. 1121, 1122 (1973) (historical background of judicial treatment of the Sherman Act).
\item See supra notes 65-67 and accompanying text.
\item Knutson, 548 F.2d at 813-15. In Knutson, the court held that intent under an attempt violation required: (1) specific intent, and (2) some illegal or predatory activity from which specific intent can be inferred. Id. at 814. "Where the conduct is justified by legitimate business reasons or merely exemplifies a healthy spirit of competition, an intent to monopolize is more difficult to support." Id.
\end{enumerate}
\end{footnotesize}
theories. In Paschall v. Kansas City Star Co., however, distributors received their most complete hearing to date, and nearly prevailed as a three-judge panel of the Eighth Circuit Court of Appeals ruled in their favor. Nevertheless, the independent distributors were denied victory because the Eighth Circuit agreed to rehear the case en banc and overruled the earlier panel opinion. Paschall fully presents the positions of both sides in the vertical integration debate, and illustrates the disputes among jurists about the goals of antitrust.

III. THE PASCHALL DECISION

The defendant Kansas City Star Company publishes the only daily metropolitan newspapers in the Kansas City, Missouri, and Kansas City, Kansas area. The Star's monopoly position, however, was obtained in part by predatory practices that led to its conviction for monopolization and attempted monopolization in 1957. For most of its history, the Star's newspapers were distributed by independent distributors who purchased newspapers wholesale from the Star and resold them to the public at varying retail prices. Each independent distributor served an exclusive area as defined by the distributor's contract with the Star. Although distributors did not compete against each other, the Star reserved the right to sell papers directly to anyone. The Star seldom exercised that right, but evidence illustrated that the news-

81. See supra note 52 (cases in which distributors have alleged antitrust violations).
83. 695 F.2d at 323.
84. 727 F.2d 692.
85. The positions in the Paschall opinions are frankly discussed because each side wrote dissenting opinions. See supra note 16.
87. Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957).
88. 727 F.2d at 694. The retail prices were established by the carriers even though the Star had, in the past, exerted some control over the retail prices set by the carriers. Id. at 694. The wholesale price was set by the Star. Id. Originally, the wholesale price was calculated as a percentage of each delivered wholesale copy. This was later changed to a percentage of the retail price charged by the carriers. Id.
90. Id. The contract reserved the Star's right "to sell newspapers to others anywhere along [a particular] route." Id.
91. The Star exercised its right to sell to other distributors on at least one occasion, but the practice was so rare that it had a de minimis impact on the distribution system.
paper's presence on the edge of the market had a retardant effect on prices.92

In 1974, the Star notified its distributors that it was considering altering its distribution methods.93 The plaintiff, Paschall, who had invested substantial sums in his route,94 initiated a lawsuit challenging the legality of a distribution change.95 In 1977, after a change in ownership, the Star announced that it would terminate all contracts with its independent carriers and replace them with delivery agents.96 The Star also announced that it would refuse to sell newspapers wholesale to anyone.97 The Star claimed that the new delivery system would allow it to set uniform prices for its papers and provide more responsive service.98 The Star offered all existing independent distributors the opportunity to become delivery agents, and promised that delivery agents would earn approximately the same amount as the contract carriers had earned.99

In response to the Star's actions, the plaintiff, along with 250 other independent distributors, obtained a preliminary injunction preventing the Star from implementing the new system.100 After a trial on the merits, the district court concluded that the Star's ver-

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92. 727 F.2d at 699. The district court found that the mere presence of the Star "as a potential competitor in the retail market produced a substantial retardant effect on the contract carriers' prices and gave the contract carriers a significant incentive to provide the best service possible." Id.

93. Id. at 695. The Star sent a letter to each carrier indicating it might change its method of distribution. Id. Thereafter, the Star required new carriers to sign a contract acknowledging that the carrier had read and understood the letter establishing the new policy. 695 F.2d at 325.

94. 727 F.2d at 695. The right to deliver papers on existing routes carried a significant market value. The court stated that:

When a contract carrier decided to leave the business, the contract carrier would 'sell' its route to its successor. If Star Co. approved, the route purchaser would then enter into a new contract with Star Co. and become that route's new contract carrier. Prices for routes sold in this manner ranged into the hundreds of thousands of dollars for the largest routes.

Id.

95. 695 F.2d at 325. The plaintiffs in Paschall moved for a temporary restraining order and a preliminary injunction. Id.

96. Id.

97. Id.

98. Paschall, 727 F.2d at 695.

99. Id.

100. Paschall, 441 F. Supp. 349.
tical integration into the distribution area, coupled with its refusal to deal with contract carriers, violated section 2 of the Sherman Act \(^\text{101}\) since the new system permitted the Star to extend its monopoly into the distribution market. \(^\text{102}\) The district court permanently enjoined the Star from refusing to deal with the contract carriers \(^\text{103}\) and awarded the plaintiffs $2.5 million in attorneys' fees. \(^\text{104}\)

On appeal, a divided three-judge panel of the Eighth Circuit affirmed the injunction. \(^\text{105}\) The majority stated that a section 2 violation consists of: (1) the possession of monopoly power in the relevant market; and (2) the use of that power to foreclose competition, gain a competitive advantage, or destroy a competitor. \(^\text{106}\) Since the Star conceded that it had monopoly power in the relevant market, \(^\text{107}\) the court turned its attention to the second element. \(^\text{108}\) The court stated that the second element of a section 2 violation would be established if it were shown that the Star's vertical integration resulted in "substantial anticompetitive effects that are not offset by production economies, savings in market transaction costs, or other competitive benefits." \(^\text{109}\) The court began by addressing the Star's claim that economic theory demonstrated that the vertical integration would not produce anticompetitive effects. \(^\text{110}\) The majority recognized that, according to the optimal monopoly pricing theory, \(^\text{111}\) a monopolist ca-

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\(^{101}\) 15 U.S.C. § 2 (1982); see supra note 17 (text of § 2).

\(^{102}\) 695 F.2d at 326.

\(^{103}\) Id.

\(^{104}\) Id. at 336.

\(^{105}\) Id. at 334-35. The court also reduced the award of attorneys' fees. Id. at 338.


\(^{107}\) Paschall, 695 F.2d at 326-27. The relevant market consisted of two parts: the product market, which the district court found to be metropolitan daily newspapers sold at wholesale; and the geographic market, which was found to be the seven county metropolitan area of Kansas City, Kansas, and Kansas City, Missouri. Id.

\(^{108}\) Id. at 327. Since monopolization under § 2 requires more than the possession of monopoly power, the court could not find the Star guilty of a § 2 violation simply because it possessed monopoly power. See United States v. Aluminum Co. of Am., 148 F.2d 416, 429-30 (2d Cir. 1944).

\(^{109}\) 695 F.2d at 327 (citing Auburn News Co., 659 F.2d at 278; Byars, 609 F.2d at 859-63).

\(^{110}\) Id. at 328. In addition to economic theory, the court considered factual evidence which contradicted the contention that the proposed integration would result in more efficient distribution, lower prices, and superior service. Id. at 328-29.

\(^{111}\) Id. at 328. The court described the theory as follows:
not extract a double monopoly profit by integrating forward.\textsuperscript{112} It also recognized, however, that certain anticompetitive effects can result from vertical integration.\textsuperscript{113} These included the opportunity for price and service discrimination, higher barriers to entry at the first level, evasion of government regulation of monopoly profits at the first level, and increased exploitation of the monopolist’s first level market power.\textsuperscript{114} The court also noted studies suggesting that a monopolist is less innovative or efficient than a firm motivated by economic pressures.\textsuperscript{115}

The court held that the Star’s vertical integration and refusal to deal would produce several anticompetitive effects. The court observed that, under the independent distributor system, the Star’s presence as a potential competitor had a retardant effect on prices and services offered by the independent carriers.\textsuperscript{116} Under the new system, however, this beneficial effect was eliminated by the loss of distributors, and this elimination contributed to increased prices.

Under any given cost and demand conditions, there is a single price which will maximize a monopolist’s profit. If the monopolist charges more than the ‘profit-maximizing’ price, its profit will be less than optimal because the decrease in revenue from reduced sales, due to the higher price, will exceed the increase in revenue from the higher price. Moreover, a monopolist can extract its maximum monopoly profit only once from the sale of any given end product. If a monopolist attempts to increase that profit by integrating forward and charging a higher retail price, it will be unsuccessful because, again, the decline in revenue from the decreased demand will exceed the increase from the higher price. Consequently, a monopolist cannot increase its profits by integrating forward unless it can directly distribute its product at a lower cost than the independent distributors.

\textit{Id.} (citing III P. AREEDA & D. TURNER, \textit{supra} note 69, at §§ 725-26; R. BORK, \textit{supra} note 7, at 242-43; R. POSNER, \textit{Antitrust Cases, Economic Notes and Other Materials} 704-08 (1974)).

\textsuperscript{112} \textit{Id.} at 328.

\textsuperscript{113} \textit{Id.; see Note, supra note 69, at 1727-30.}

\textsuperscript{114} 695 F.2d at 328; \textit{see Note, supra note 69, at 1727-30.}

\textsuperscript{115} 695 F.2d at 328 (citing Note, \textit{supra} note 69, at 1730 & n.62).

\textsuperscript{116} \textit{Id.} at 329. Both the panel opinion and the en banc opinion made use of the potential competitor doctrine. The en banc decision described the doctrine as follows:

It is said that a potential competitor, merely by its presence at the edge of the market, will have a retardant effect on price and will provide an incentive for better service among those already in the market. This is so because if the existing market competitors practice price gouging or provide inferior service, the potential competitor will enter the competitive fray with lower prices and better service, thereby capturing a substantial share of the market. To avoid the possibility of losing business to the potential competitor, the actual market competitors will maintain low prices and quality service. Thus, should the potential competitor merge with an existing market competitor, the market will lose the procompetitive effect of the presence of a potential competitor.

\textit{Paschall,} 727 F.2d at 699; \textit{see also} 695 F.2d at 329 (panel decision’s discussion of the potential competitor doctrine).
and lower service.\footnote{117} The court noted that prices had already risen\footnote{118} and service options had fallen\footnote{119} in areas where the Star had instituted the new system.

The court also relied on testimony and internal Star memorandum indicating that the Star did not believe it could deliver papers more efficiently under its new system.\footnote{120} Rather than more efficient delivery services, the Star’s motivation may have been to increase its profits by eliminating retailers’ profits.\footnote{121} Finally, the court indicated that the elimination of independent carriers would contravene the goal of antitrust “to promote competition through the protection of viable, small, locally owned businesses.”\footnote{122}

In his dissent, Judge Henley took issue with the majority’s refusal to give due weight to the finding by the district court that the Star was motivated by legitimate reasons.\footnote{123} Judge Henley also expressed concern over the majority’s finding that the Star’s vertical integration would produce anticompetitive effects.\footnote{124} Because the district court had not found that the Star’s vertical integration would allow price discrimination, first level entry barriers, or evasion of first level monopoly profits regulation,\footnote{125} Judge

\addcontentsline{toc}{section}{Notes and Citations}

\footnote{117} 695 F.2d at 329-31.
\footnote{118}  Id. at 330. The Star announced a uniform subscription price rate of $6.00 a month for a full subscription and $5.00 a month for split subscriptions.  Id. These rates were higher than those charged by most distributors, although some distributors did charge higher rates.  Id. The prior monthly rates ranged from $3.50 and $6.00 for a full subscription, and from $2.85 to $5.85 for a split subscription.  Id.
\footnote{119}  Id. at 330-31. Subscription, billing, and credit arrangements were more limited under the Star’s system than under the independent distributor system.  Id. In addition, the number of deliveries to certain country routes were decreased from twice a day under the independent distributor system to once a day under the agent system.  Id. at 331.
\footnote{120}  Id. at 331-32.
\footnote{121}  Id. Plaintiff’s expert testified that direct delivery would give the Star “maximum control of price,” and enable it to increase profits from advertising and subscriptions.  Id. at 332.
\footnote{122}  Id. (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962)).
\footnote{123}  Id. at 339-40 (Henley, J., dissenting). The district court found that:

   The new system would give the company control over pricing to the subscriber, thereby being able to advertise subscription prices, which is quite impossible where carriers largely determine the ultimate specific prices. It would permit the company to assure more rapid ‘starts’ for new subscribers, and would allow uniform policy regarding time of collection, manner of payment by customers, and methods of responding to customer complaints, all of which have been problems under the independent contract carrier system.  Id. at 331 n.12. While the majority did not find these findings inaccurate, it found that they did not fully represent the Star’s reasons for integrating forward.  Id.
\footnote{124}  Id. at 340.
\footnote{125}  Id. at 340-41. These three situations have been identified by the Sixth Circuit as situations where a monopolist may seek to vertically integrate even if integration would be less efficient than the system it replaced.  Byars, 609 F.2d at 860-61.
Henley did not believe that the change in delivery systems would lead to anticompetitive effects. Furthermore, no evidence of "dirty tricks," which other courts had used to find antitrust violations, had been found in the present case. Judge Henley emphasized that the burden was on the plaintiff to prove an antitrust violation and not on the defendant to disprove a violation.

Judge Henley also disagreed with the majority that the possibility of higher prices and fewer service options outweighed the benefits to customers of uniform prices and services. He noted that the Star's uniform price was within the range of what some distributors charged, and that the rise in prices may have been partially necessitated by general economic conditions. He also emphasized that numerous courts have allowed newspapers to move to self-distribution without imposing antitrust liability.

Finally, Judge Henley noted that the effect of the majority decision would be to "protect the market value of the independent carrier routes by prohibiting the Star from exercising its bargained-for contractual right of termination." Such a result, according to the dissent, was not intended by the Sherman Act.

On the Star's petition, the Eighth Circuit reconsidered the case en banc and overruled the panel decision. As in the panel opinions, the en banc court focused on whether the Star's vertical integration would lead to unreasonable anticompetitive effects. The court

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126. 695 F.2d at 342.
127. Id. at 341 (citing Knutson v. Daily Review, Inc., 548 F.2d 795, 803 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977)). Judge Henley claimed that by offering the independent distributors the opportunity to negotiate alternative contracts with comparable income, the Star was acting in good faith. Id.
128. Id. Judge Henley thought that the plaintiff had failed to meet his burden of proof in this case. Id.
129. Id. at 341-42. Judge Henley noted that the panel decision did not adequately discuss the options available to customers on various individual routes and the options offered by the Star. Id.
130. Id.
131. Id. at 342.
132. Id. at 343.
133. Id.
134. Paschall, 727 F.2d at 701-04. Unlike the panel opinion, the en banc court considered whether the Star was guilty of an attempt to monopolize under § 2. Id. at 695-701. The court stated that the Star could be found guilty of an attempted monopolization if it had a specific intent to monopolize. The court found that the Star's legitimate business reasons for integrating, see supra note 123, negated any liability based on specific intent. 727 F.2d at 696-98.
used both the optimal monopoly pricing theory\textsuperscript{135} and the potential competitor doctrine\textsuperscript{136} in evaluating the competitive effects of the integration. It concluded, however, that the negative effects of integration would not outweigh the positive effects.\textsuperscript{137} The majority followed the reasoning of Judge Henley in his panel dissent\textsuperscript{138} in holding that the plaintiff has the burden of proving an antitrust violation.\textsuperscript{139} The majority found that no price discrimination, increased first level entry barriers, or evasion of government regulation would result from the Star's vertical integration.\textsuperscript{140} It also found that other courts had upheld newspapers' forward integrations and refusals to deal.\textsuperscript{141} In addition, the court emphasized the important role of advertising on the Star's distribution policies. Because the Star's advertising revenues depended on its circulation, the Star would continue to have a strong incentive to maintain low prices and responsive service.\textsuperscript{142}

Two separate dissents emphasized the points made by the majority in the panel opinion. Judge Heaney pointed to the probable increase in price and decrease in service options under the new system as an important anticompetitive effect.\textsuperscript{143} He asserted that other cases in which discharged distributors had failed to prove antitrust violations against vertically integrating publishers were distinguishable from Paschall for two reasons. \textit{Paschall} was the only case where the publisher had been previously convicted of monopolization, and the distributors had proven that the new system would not be more efficient than the old.\textsuperscript{144} Judge Heaney and Judge Bright, in a separate dissent,\textsuperscript{145} both declared that the elimination of numerous independent distributors by vertical integration contradicted the antitrust objectives of decentralization and

\textsuperscript{135} 727 F.2d at 700-01; \textit{see supra} note 111 (en banc court's description of the optimal monopoly price theory).
\textsuperscript{136} 727 F.2d at 699-700; \textit{see supra} note 116 (discussion of the potential competitor doctrine).
\textsuperscript{137} 727 F.2d at 704.
\textsuperscript{138} 695 F.2d at 339 (Henley, J., dissenting).
\textsuperscript{139} 727 F.2d at 704.
\textsuperscript{140} \textit{Id.} at 702.
\textsuperscript{141} \textit{Id.} at 704. The court stated, "[W]e find it hard to ignore the fact that every other antitrust case brought against a newspaper publisher challenging the newspaper's decision to forwardly integrate into distribution has been resolved in favor of the newspaper." \textit{Id.} ( citations omitted).
\textsuperscript{142} \textit{Id.} at 701.
\textsuperscript{143} \textit{Id.} at 704-05 (Heaney, J., dissenting).
\textsuperscript{144} \textit{Id.} at 705.
\textsuperscript{145} \textit{Id.} at 706 (Bright, J., dissenting).
protection of small businesses. Judge Bright also asserted that the burden of proof should be shifted in this situation, so that a monopolist would only be allowed to integrate vertically by refusing to deal with its independent distributors if it could demonstrate that lower transaction costs or greater production economies would result.

IV. ANALYSIS OF THE PASCHALL DECISION

The Paschall court discussed a number of issues often raised in vertical integration cases. The court considered the extent of the Star's monopoly power, the economic theories of potential competition and optimal monopoly pricing, and the competitive effects of the Star's integration. In the context of these issues, both the majority and the dissents espoused their views concerning the goals of antitrust in vertical integration. The positions taken by the majority and dissents reveal a tension among the members of the court concerning the goals of antitrust. This tension, as well as the other differences in the opinions, are examined below.

A. The Star's Monopoly Power

Monopoly power has been defined as "the power to control prices or exclude competition." Although courts often infer monopoly power from a large share of the market, the correlation is not perfect. Producers with a predominant share of the market may not always be able to control the price of their goods. This

146. See id. at 706-07.
147. Id. at 706.
148. See infra notes 152-67 and accompanying text.
149. See infra notes 168-200 and accompanying text.
150. See infra notes 201-09 and accompanying text.
151. See infra notes 210-35 and accompanying text.
153. Id.
154. See Hovenkamp, supra note 27, at 457. Although large market share is not always a proxy for monopoly power, there may be concerns about a newspaper's possession of a large market share that are unrelated to the dangers of the power to control price. A fear commonly expressed is that increased concentration in the newspaper industry may inhibit the free exchange of ideas. See B. Compane, WHO OWNS THE MEDIA 42-46 (1979) (discussing argument that concentration in the newspaper industry produces inferior journalism); Roberts, supra note 36, at 322 (antitrust laws should be enforced in newspaper industry to promote both industrial efficiency and free speech); Note, Monopoly Newspapers: Troubles in Paradise, 7 SAN DIEGO L. REV. 268, 287 (1970) (powerful interests in newspaper industry have the potential to control free exchange of ideas).
155. See Hovenkamp, supra note 27, at 457.
was the case in *Paschall*.

A monopolist has the power to control price if its pricing policy revolves around its production costs and the demand for its goods, rather than around the prices set by its competitors. Under monopoly conditions, the monopolist is able to increase profits by pricing higher and reducing output. In competitive markets, however, producers must consider the prices charged by competitors when setting prices for their goods. If the market is competitive, competitive pressures force producers to increase output and decrease price more than in a monopoly market.

Although the Star had a predominant market share of the daily newspaper market, this was not the salient concern in determining whether the Star would actually charge a monopoly price. The Star's power over advertising must also be considered. As noted above, the Star sold a joint product, news copy and advertising space. Because the Star obtained a greater portion of its revenues from advertising than from the sale of papers, its pricing strategies were dictated more by the effect of those strategies on advertising revenues than on revenues from the sale of papers. Since advertising revenues tend to decrease as a newspaper raises its price, the Star had little incentive to exercise its monopoly power to raise prices.

This principle would hold true even if the Star had monopoly power in the advertising market as well as the copy market.

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156. See supra note 32 (definition of monopoly power).
157. Id.
158. Hovenkamp, supra note 27, at 454. A producer in a competitive market cannot afford to ignore the prices of his competitors; if he did, he would likely lose sales as customers switched to the less expensive product. Id.
159. See Kamerschen, *supra* note 32, at 1062.
160. *Paschall*, 695 F.2d at 326-27. The district court characterized the product market as metropolitan daily newspapers sold at wholesale, and concluded that other media such as suburban newspapers, shoppers, handbills, radio, and television differ in purpose, content, and technique, thus constituting separate markets. Id. at 326 n.4; cf. B. Owen, *supra* note 34, at 50-52. Owen suggests that electronic and suburban print media compete "at the fringes and between [the] layers" against large metropolitan newspapers thus providing these larger papers a degree of market discipline. Id. at 52.
161. See supra notes 35, 142 and accompanying text.
162. *Paschall*, 727 F.2d at 703.
163. See supra notes 35-36 and accompanying text.
164. Studies show that a newspaper's power in the advertising market depends on whether the advertiser is a national or local advertiser. National, brand-name advertisers usually compete in large geographic markets and are able to select among competing forms of media. Local advertisers, on the other hand, are often limited to the geographic markets where they can compete and to the types of media they will find cost effective.
Monopoly power in the advertising market would allow the Star to increase its profits by reducing its advertising volume below competitive levels. For the reasons mentioned above, however, the Star would have no incentive to raise the prices of newspapers. Since the majority of the Star's profits come from advertising, the incremental gain to the Star from setting a monopoly price in the copy market would be offset by the loss of advertising profits resulting from a lower copy volume. Thus, the ability of the Star to use its monopoly power in the copy market is questionable.

The dissents' focus on the increased price of the newspaper due to the Star's vertical integration is, therefore, misplaced. The Star would not want to increase its copy price even if it had a monopoly in both the copy and advertising markets. To do so would mean lower profits in its primary business of advertising and, therefore, lower profits overall.

B. Economic Theory in Paschall: Optimal Monopoly Pricing Theory v. Potential Competitor Doctrine

Both the majority and dissenting opinions in Paschall relied on an economic theory to support their views. The majority employed the optimal monopoly pricing theory, while the dissenters employed the potential competitor doctrine. Analysis of

Thus, newspapers will usually compete heavily with other media for national advertisers. Hovenkamp, supra note 27, at 458-59; see also Home Placement Serv., Inc. v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982) (no alternative is "reasonably interchangeable" with the daily newspaper for classified rental advertising).

Although it would seem that the lower demand elasticity for local business would allow the paper to charge higher rates to local advertisers than to national advertisers, the opposite is usually true. This is because local advertisers actually contribute to circulation—i.e., people buy papers for the rental listings, the grocery specials, the movie schedules, etc. Hovenkamp, supra note 27, at 458-59; see also Barber, Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy, 24 LA. L. REV. 503, 515 (1964) (New Orleans newspaper charges national advertisers a higher advertising rate).

165. See supra note 32.
166. See supra note 35 and accompanying text.
167. See supra note 39.
168. 727 F.2d at 700-03. The majority in the panel decision also employed the potential competitor doctrine. It affirmed the district court's conclusion that the independent distributors reasonably believed that the Star was a potential competitor, and that this had a retardant effect on retail prices. 695 F.2d at 392. The panel majority also found support for the district court's finding that the Star's refusal to sell to the independent distributors would eliminate the retardant effect. Id.; see supra note 111 (explanation of optimal monopoly pricing theory).
169. 727 F.2d at 704-05 (Heaney, J., dissenting), 706 (Bright, J., dissenting); see supra note 116 (explanation of potential competitor doctrine). Judge Bright believed that the majority decision permits "a monopolist to destroy hundreds of independent businesses."
these theories illustrates that the majority properly relied on the optimal monopoly pricing theory.

1. Optimal Monopoly Pricing Theory

The optimal monopoly pricing theory\(^{70}\) attempts to dispel the notion that a monopolist can increase his monopoly profits at the expense of consumers by integrating forward and monopolizing the next stage of production.\(^{71}\) The amount of monopoly profit a monopolist can acquire depends on the cost and demand curves for the product rather than on the number of monopolized stages of production.\(^{72}\) A monopolist, therefore, cannot extract an “extra” monopoly profit by integrating into the distribution level.\(^{73}\) Only one monopoly profit can be attained within the entire production and distribution scheme.\(^{74}\) Thus, assuming that customers were charged a monopoly price before the Star’s integration, the price should have remained the same, or decreased, after the integration.

The dissents in \textit{Paschall} were skeptical of this theory mainly because, contrary to what the theory predicts, average newspaper prices rose after the Star’s integration.\(^{75}\) Four explanations may be offered for this price increase. First, the increase may have resulted from misinformation or poor business judgment.\(^{76}\) If so, the market would discipline the Star, and the error would be self-correcting.\(^{77}\) Second, because the Star promised independent dis-

\(^{72}\)727 F.2d at 706 (Bright, J., dissenting). Judge Bright would have held that a monopolist “may not integrate vertically by refusing to deal further with its independent distributors unless [the monopolist] demonstrates that lower transaction costs or greater production economies will result.” \textit{Id.}

\(^{70}\)See supra note 111.

\(^{71}\)See supra note 70.

\(^{72}\)Although vertical integration will not increase the monopoly profit that a manufacturer can obtain from consumers, it may allow the manufacturer to obtain a greater percentage of the profits because the monopoly profit would no longer have to be shared with the monopolist at the lower level. \textit{See Note, supra note 69, at 1725-32.}

\(^{73}\)See supra note 70.

\(^{74}\)\textit{Id.}

\(^{75}\)See supra note 118 and accompanying text.

\(^{76}\)The fact that the Star had little experience in setting retail prices supports this view. Because the Star had recently entered the retail market, it may not have had sufficient information to set prices which would guarantee an optimal rate of return. It might be expected that the Star would experiment with its pricing before concluding what rate would produce the highest return. \textit{See Paschall, 727 F.2d at 703.}

\(^{77}\)The panel court noted that the Star’s price increases had already led to decreased circulation on some routes. \textit{Paschall, 695 F.2d at 330}. Lower circulation leads to both lower subscription and advertising profits. \textit{See supra} notes 34-36 and accompanying text.
tributors that they would earn approximately the same income as agents as they had earned as independent carriers, the integration probably did not produce savings that could be passed on to consumers.\footnote{178} The cost of instituting the new system, however, may have been passed on to consumers by way of a price increase. Third, it is possible that when production and distribution were separated the parties erroneously set prices too low to earn the full monopoly profit, and a price increase was necessary to correct this.\footnote{179} Finally, the price increase may have been due to factors unrelated to the vertical integration.\footnote{180}

Evidence in \textit{Paschall} also indicated a slight decrease in service options.\footnote{181} This evidence, however, was unclear. Although the options for some customers decreased, they increased for others.\footnote{182} Some service decreases may have been mandated by the decision to institute a uniform price. The decreased deliveries to country routes from twice daily to once daily\footnote{183} would have been justified if the new uniform subscription rate could not adequately cover the costs of two country deliveries.\footnote{184}

While the dissenters were skeptical about the optimal monopoly pricing theory, the majority properly applied it in this case. The initial increase in price after the Star implemented its uniform price was not due to the Star's monopoly power in the copy market. Lack of information, a promise to keep distributors' income at

These lower revenues would presumably prompt an effort to raise circulation by decreasing prices.

\footnote{178}{Because the Star probably experienced competitive pressures with respect to advertising, distributors were probably able to share with the Star a substantial portion of the Star's monopoly profits. This is indicated by the high market value of the routes. \textit{See supra} note 94. Although integration would be expected to give the Star the full monopoly profit, a large portion may remain with the distributors because of their frozen wages.}

\footnote{179}{This analysis assumes that the lower price was due to error rather than competitive pressure, and that the price would likely have risen even if the operations had remained separate.}

\footnote{180}{\textit{Paschall}, 727 F.2d at 703. \textit{But see id. at 705 (Heaney, J., dissenting) (no evidence in record that the price increase was due to a general increase in costs).}}

\footnote{181}{695 F.2d at 330-31. The panel majority stated that eliminating the independent distributors caused a decrease in services such as subscription options, billing, and credit arrangements. \textit{Id}.}

\footnote{182}{727 F.2d at 703-04.}

\footnote{183}{\textit{Id. at 703; 695 F.2d at 331. The Star's justification for decreasing its deliveries to country routes was that it could not economically deliver twice per day "on certain country routes at this particular time." 695 F.2d at 331.}}

\footnote{184}{It is arguable that consumers are worse off by not having the option of paying a higher rate and receiving two deliveries, but this criticism is more properly directed towards the merits of establishing uniform prices.}
a certain level, and factors unrelated to the integration could explain the increase in price of the newspaper. Similarly, the slight decrease in overall services was due to implementation of a uniform price rather than the Star's monopoly power.

2. Potential Competitor Doctrine

The Paschall court also applied the potential competitor doctrine in evaluating the effects of the Star's integration. The doctrine arose in the area of merger law, and has been used to determine whether mergers violate section 7 of the Clayton Act. The doctrine theorizes that the presence of a potential competitor, such as the Star, has the effect of keeping prices down. Independent distributors are forced to keep prices low to keep the potential competitor from entering the market. If the potential competitor merges with another competitor, however, the market loses the procompetitive effect created by the potential competitor. The panel majority held that the Star's integration would bring about anticompetitive effects that would outweigh any procompetitive benefits. The en banc majority disagreed.

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185. See supra note 116.
186. See 727 F.2d at 702, 704-06.
187. 15 U.S.C. § 18 (1982); see United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 531-37 (1973); FTC v. Proctor & Gamble Co., 386 U.S. 568, 599-602 (1967) (Harlan, J., concurring). The Paschall court explained the doctrine's relevance to Star's vertical integration by stating that the Star's actions were more like the acquisition of another business than an internal expansion. 727 F.2d at 700 n.7. The court stated, "Under Star Co.'s proposal, former contract carriers will simply sign new contracts. The contract carriers will continue to use their own trucks, personnel, and customer lists. Only the label and the ability to set retail prices have changed." Id.

If the Star had actually entered the market and competed against its distributors in response to a price increase, see supra notes 90-91 and accompanying text, it would have engaged in nearly the same conduct condemned by the Supreme Court in Albrecht. See supra notes 41-43 and accompanying text. The only difference between Albrecht and the one occasion when the Star competed with a distributor is that the Star competed directly, whereas in Albrecht the Herald hired another distributor to compete with the price-hiking distributor. Compare Paschall, 727 F.2d at 699 with Albrecht, 390 U.S. at 147. Given the Supreme Court's broad definition of a § 1 "conspiracy" in Albrecht, this difference would probably not be relevant. See supra note 56. Neither of the Paschall opinions suggested that the Star would be guilty of a § 1 violation by competing with distributors who charged high prices.

188. 727 F.2d at 699; see supra note 116.
189. 727 F.2d at 699. The majority explained the effect of a potential competitor by stating that existing businesses will attempt to "avoid the possibility of losing business to the potential competitor . . . [by] . . . maintain[ing] low prices and quality service." Id.
190. Id.
191. Paschall, 695 F.2d at 328-29. The court stated that:
However applicable the potential competitor doctrine may be in other areas,\textsuperscript{193} it is of little relevance when evaluating the effects of vertical integration by an upstream monopolist.\textsuperscript{194} If the Star had monopoly power,\textsuperscript{195} its status as a potential competitor to the distributors would not affect the existence of monopoly profits, but only the division of those profits. The Star’s presence on the edge of the distributor market forced carriers to price lower than they otherwise would; but assuming that both the Star and the independent distributors desired to price papers at a level where the optimal monopoly profit would be earned, the differential from a lower retail margin would be absorbed by the Star through wholesale rate increases rather than being passed on to consumers through lower prices.\textsuperscript{196}

Application of the potential competitor doctrine in this instance also fails to account for the Star’s desire to increase its circulation in order to raise its advertising revenues.\textsuperscript{197} The Star became a potential competitor, and probably took a loss in the process.\textsuperscript{198}

\bibitem{192} Id. 727 F.2d at 702.
\bibitem{193} The potential competitor doctrine has been criticized from several perspectives. \textcite{See R. POSNER, supra note 7, at 113-25; Brodley, Potential Competition Mergers: A Structural Synthesis, 87 YALE L.J. 1, 3-5 (1977).}
\bibitem{194} The terms “upstream” and “downstream” refer to the stages of production and distribution; for example, a manufacturer is “upstream” from a distributor.
\bibitem{195} \textcite{See supra notes 152-67 and accompanying text.}
\bibitem{196} To illustrate, consider a situation where, because of production costs and demand patterns, the Star can earn its maximum profit when it sells papers at $.25 a copy. Assuming that the Star’s marginal cost is $.10 per paper, the monopoly profit will be $.15 per paper. Before the Star begins to act as a potential competitor, the Star and the distributors divide this $.15 in some manner—perhaps $.05 for the Star and $.10 for the distributor. When the Star becomes a potential competitor, the distributor is forced to price his papers more competitively, reducing his margin from $.10 to $.08. This $.02 drop, however, will not go to consumers, but to the Star. Because the price providing optimal monopoly profit that can be obtained remains the same ($.25), the Star will simply raise its wholesale rate by $.02 to absorb the distributor’s cut. Thus the Star’s status as a potential competitor will affect only how the profit is divided, and not the end price of the papers. \textcite{But see Newberry v. Washington Post Co., 438 F. Supp. 470, 482 (D.D.C. 1977) (newspaper’s “retaliatory” price increase to distributor who raised retail subscription rates violates § 1 of the Sherman Act).}
\bibitem{197} \textcite{Paschall, 727 F.2d at 701.}
\bibitem{198} Insofar as any given distributorship has natural monopoly characteristics, \textcite{see supra notes 28-30 and accompanying text, it could not profitably support more than one distributor. If the newspaper takes away a portion of the carrier’s route:
primarily because it desired to keep subscription prices low and circulation high.\footnote{199} Even after the Star controlled the distribution system, the Star would have this incentive. Indeed, direct ownership provides the Star with a more efficient means of ensuring low prices.\footnote{200}

\section*{C. Evaluation of Competitive Effects}

The possibility of procompetitive and anticompetitive effects from the Star's integration was also discussed by the \textit{Paschall} court.\footnote{201} Procompetitive effects included efficiency gains in service and advertising.\footnote{202} Anticompetitive effects included higher prices, fewer service options, decreased innovation, increased opportunity for price discrimination, and increased entry barriers at the first

\begin{quote}
The carrier's costs remain nearly as high as before the entry of competition because the carrier still must travel the full route to make the remaining deliveries. As a result of the newspaper's entry, both the newspaper and the independent carrier are competing in a natural monopoly which, by definition, has room for only one.
\end{quote}

\footnote{199. \textit{See \textit{Paschall}, 727 F.2d at 701. Alternatively, the Star may have become a potential competitor because it wanted to increase its share of the monopoly profit. \textit{See \textit{Paschall}, 695 F.2d 331-32. The benefit of this action would go to the Star, however, not consumers. \textit{See supra} notes 195-96 and accompanying text.}}

\footnote{200. \textit{See supra} note 123.}

\footnote{201. 727 F.2d at 701-05; 695 F.2d at 330-31. Some commentators suggest that courts should not attempt to measure competitive effects of vertical integration because these commentators do not perceive the effects to be generally harmful and an attempt to measure the effects is difficult and time-consuming. \textit{See III P. AREEDA & D. TURNER, supra} note 69, at ¶ 726 ("intractable subjects for litigation"); Bork, \textit{Contrasts in Antitrust Theory: I}, 65 COLUM. L. REV. 401, 410 (1965); \textit{cf. R. POSNER, supra} note 7, at 113-25 (potential competitor doctrine should be abandoned because competitive effects cannot be adequately measured). These commentators view vertical integration as presumptively lawful, thus placing a heavy burden on those opposing the integration. Other commentators, who see a greater danger in vertical integration, would not abandon the attempt to measure competitive effects. \textit{See, e.g., Blake & Jones, supra} note 5, at 440-58. Courts continue to attempt to measure competitive effects in vertical integration cases. \textit{See, e.g.,} Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979); White Motor Co. v. United States, 372 U.S. 253 (1963); United States v. Columbia Steel Co., 334 U.S. 495, 527-30 (1948); \textit{Paschall}, 727 F.2d 692; Eiberger v. Sony Corp., 622 F.2d 1068 (2d Cir. 1980); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), \textit{cert. denied}, 444 U.S. 1093 (1980).}

\footnote{202. \textit{See \textit{Paschall}, 727 F.2d at 697. Under the delivery agent system, the Star could get an area-wide price and "thus facilitate 'in-paper advertising' " and simplify subscription collection. \textit{Id.} Also, the Star would be able to assure more "rapid starts for new subscribers" and possibly be more responsive to customer complaints. \textit{Id.; see also supra} note 70 (integration of bilateral monopolies may produce efficiencies).}
level.203

While the procompetitive effects appear certain, the anticompetitive effects are mostly speculative. Although the court dismissed the possibility of price discrimination because of the Star's new uniform subscription rates, a uniform rate is not necessarily inconsistent with price discrimination.204 The majority, however, found that the Star did not institute the uniform rate in order to discriminate.205 The district court found that the Star's vertical integration would not pose entry barriers at the publishing level.206 The argument that an integrated Star would be less innovative than the independent distributors can be discounted for two reasons. First, the distributors, because of their exclusive territories, faced few competitive pressures to innovate.207 Second, distributors probably had already developed most opportunities for innovations in delivery systems. While increased subscription costs provide the most direct evidence of an anticompetitive effect, it is possible to explain the increases for the reasons mentioned above.208 In addition, subscription increases were not exorbitant, the uniform rate being within the range charged by some carriers.209 The en banc majority, therefore, was correct in concluding that the anticompetitive effects of the Star's vertical integration and refusal to deal would not outweigh the procompetitive effects of these actions.

D. The Goals of Antitrust Law

The majority and dissenting opinions in Paschall illustrate the continuing debate among courts and commentators concerning

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203. Paschall, 727 F.2d at 701-04.
204. Hovenkamp, supra note 27, at 460 n.36. Assuming that the marginal cost of delivering papers varied with different geographic locations (an apartment complex compared to a farm route), a uniform price may be more discriminatory than a price that varied according to the route. Id.
205. 727 F.2d at 702-03. The Star probably instituted the uniform rate because of its utility for billing, record keeping, and advertising subscriptions. See supra note 123.
206. Paschall, 727 F.2d at 702. The delivery agent contracts expressly allowed distributors to deliver for other newspapers provided such deliveries did not interrupt the Star's deliveries. This allowed potential competitors to enter the market under an established delivery system, eliminating some of the entry barriers. The possibility of impeding new entry has been regarded by some commentators as the most serious danger of a monopolist's vertical integration. P. Areeda & D. Turner, supra note 22, at ¶ 729.4b7; Blake & Jones, supra note 5, at 441; see also Kessler & Stern, supra note 70, at 14-21.
207. See 727 F.2d at 695; P. Areeda & D. Turner, supra note 22, at ¶ 729.4b6.
208. See supra notes 175-80 and accompanying text.
209. See supra note 118 and accompanying text.
the goals of the antitrust laws. The en banc majority confined its discussion to the effects of the Star's integration on competition. These included effects on the competitive process and on the price that would be charged for the newspapers. The dissenters did not believe this inquiry adequately encompassed the concerns addressed by the Sherman Act. Judge Heaney, while also focusing on these competitive factors, considered further the effects of integration on the industry structure. Judge Heaney stated that the court should also have considered the impact of the Star's integration on small, locally owned businesses. Similarly, Judge Bright expressed concern for "the American ideal that permits every person on his or her own initiative to own and operate a small business," and declared that the burden of proof should be

210. 727 F.2d at 698-704.

211. Id. at 701-03. The en banc majority demonstrated its concern for the competitive process in its consideration of the potential competitor doctrine. The court gave some weight to the theory, stating that "[i]mplementation of the delivery agent system would leave only one 'competitor' in the market—Star Co. Thus, the retail market has lost the beneficial competitive interaction between business entities that the antitrust laws were enacted to preserve." Id. at 702.

212. Id. at 702-03. The majority found that consumers would not be harmed by the integration because the Star had strong incentives to keep prices low. Id. at 702. But see Paschall, 695 F.2d at 330 & n.10 (panel majority found the agent delivery scheme would increase consumer subscription prices).

Strictly speaking, a concern for low prices, insofar as the concern reflects a desire to prevent the enrichment of monopolists at the expense of consumers, is not an efficiency concern. "Allocative efficiency" refers to a state where resources are allocated to their best use in light of consumer wants and the cost of producing and distributing the goods. In such a state, a consumer's wants are satisfied with the fewest possible resources. When a monopolist extracts higher than competitive prices from consumers, the efficiency loss is not the transfer of surplus from consumer to the monopolist, but the waste of resources because the higher price forces consumers to purchase substitute goods that cost society more to make. See Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1160-61 (1981).

213. Paschall, 727 F.2d at 704-05 (Heaney, J., dissenting). The dissent found that the competitive process would be hindered by the elimination of a potential competitor and that consumers would be hurt by higher prices and fewer service options. Id.; see also 695 F.2d at 329-31.

214. 727 F.2d at 705-06.


It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

727 F.2d at 706 (quoting Brown Shoe, 370 U.S. at 344).

216. Id. at 706 (Bright, J., dissenting).
altered for vertically integrating monopolists.\textsuperscript{217} A monopolist, according to Judge Bright, should not be allowed to vertically integrate by refusing to deal with its independent distributors unless it can demonstrate that lower transaction costs or greater production economies will result.\textsuperscript{218}

The current debate over the goals of the antitrust laws pits those who advocate that economic efficiency\textsuperscript{219} should be the sole goal of antitrust against those who contend that noneconomic considerations should supplement or override efficiency goals.\textsuperscript{220} While the debate continues, a majority of commentators appear to agree that the legislative history of the antitrust laws suggests that Congress was not motivated solely by economic concerns.\textsuperscript{221} Among those

\textsuperscript{217} Id.
\textsuperscript{218} Id. Judge Bright stated, "Any proposed integration must be 'a good faith effort to do business in more efficient ways.' " Id. at 706-07 (citing Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 278 (1st Cir. 1981), cert. denied, 455 U.S. 921 (1982)).
\textsuperscript{219} R. Bork, supra note 7, at 90-91; R. Posner, supra note 7, at 4; see also I P. Areeda & D. Turner, supra note 7, at ¶ 103-04 (efficiency should be overriding if not only goal of antitrust). Those who advocate efficiency as the sole goal of antitrust may not agree on their definitions of efficiency. See Fox, supra note 212, at 1157-69 (distinguishing three approaches to economic efficiency: restriction of output, business autonomy, and competition as process).
\textsuperscript{220} See, e.g., L. Sullivan, supra note 7, at 3 ("[The efficiency theory] holds up the image of a comprehensive, rational way to predict the allocation effects of alternative ways in which markets are structured and alternative ways traders in the market may conduct themselves. But, like a mirage, the image fades upon close approach to it. The gravest difficulty is that the standard demonstration about the allocative efficiency of a competitive market over a monopolized one is subject to stringent theoretical conditions which are never fulfilled in the real world"); Blake & Jones, supra note 5, at 425-27; Fox, supra note 212, at 1178-79 ("If at all feasible, antitrust should reflect in a meaningful way all of its basic goals, including power dispersion, competitive opportunity, and long-run consumer satisfaction"); Lande, supra note 7, at 68 (Congress passed antitrust laws to further distributive economic objectives rather than efficiency objectives); Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051 (1979); Schwartz, supra note 7, at 1076 (justice should be consideration of antitrust laws).
\textsuperscript{221} Among the commentators on this subject, only Judge Bork has argued that the legislative history of the antitrust laws supports the position that antitrust should be concerned only with allocative efficiency. See Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. L. & Econ. 7, 11-14 (1966). Other commentators have argued that Congress was concerned with a number of goals, including allocative efficiency. Professor Hovenkamp summarizes:

There is considerable evidence that the historical antitrust movements displayed great concern for condemning bigness and aggregations of great wealth, for maintaining easy market entry and viability for small businesses, for preserving "competition" (without really defining it), and for providing consumers with low prices. The concept of new welfare loss was too technical to enter into the political debates over antitrust policy, and antitrust advocates generally believed that the goals listed above were consistent with each other.

Hovenkamp, Distributive Justice and the Antitrust Laws, 51 GEO. WASH. L. REV. 1, 16-17 (1982) (footnotes omitted); see also I P. Areeda & D. Turner, supra note 7, at ¶ 106; Fox,
who advocate supplementing the antitrust laws with noneconomic considerations, one often-emphasized goal is the preservation of the competitive process. Proponents of this goal advocate enforcing the antitrust laws to ensure that market conditions allow vigorous competition among rivals. Entry barriers must be kept low to allow fellow competitors, rather than the government, to discipline slacking businesses. An environment of vigorous competition in turn promotes efficiency and innovation.

Vertical integration by newspapers with large market shares, like the Star, can potentially raise entry barriers and thereby endanger the opportunity for competition. Entry barriers would be raised if competing publishers were precluded by the Star’s integration from using an existing distribution system and were forced to enter the market at both the publishing and distribution levels in order to compete with the existing paper. Commentators disagree about the anticompetitive impact exclusive distribution systems have on the newspaper industry. In Paschall this problem was avoided by a provision in the distributors’ contract which stated that they were free to deliver other newspapers provided

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supra note 212, at 1146-55; Lande, supra note 7, at 105-06; Pitošky, supra note 220, at 1060-65. The legislative history of the antitrust laws passed after the Sherman Act, see supra note 1, demonstrates a concern for non-efficiency values. Hovenkamp, supra, at 18-19 (“To ascribe to the legislative histories of the antitrust laws an exclusive concern with allocative efficiency is to take an extraordinarily narrow and unrealistic view of the political process in our congressional system”). Supreme Court opinions have also stated that the antitrust laws were intended to accomplish a variety of goals. See, e.g., Northern Pac. Rail Co. v. United States, 356 U.S. 1, 4 (1958) (The Sherman Act “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic social institutions”).

222. See Fox, supra note 212, at 1169, 1174-75. Fox states that “[preserving the competitive process] does not focus on consumer surplus, marginal cost, or welfare loss. It centers, rather, on the environment that is conducive to vigorous rivalry and in turn . . . to efficiency and progressiveness.” Id. at 1169.

223. Id.


225. Id.; Fox, supra note 212, at 1169; see also supra note 222.

226. See supra note 206; see also supra note 114 and accompanying text.

227. Compare Hovenkamp, supra note 27, at 465 n.55 (because entry into the distribution market does not require significant capital investment, exclusive distribution in the newspaper industry does not create high entry barriers) with B. Owen, supra note 34, at 55, and Roberts, supra note 36, at 326-27 (creation of separate newspaper distribution system requires additional capital and personnel and may take more time than a new entrant can afford).
such delivery did not disrupt delivery of the Star's papers.\footnote{228} This practice appears to preclude the dangers of vertical integration without inhibiting any of the legitimate benefits.\footnote{229}

The \textit{Paschall} dissents reflect a concern for individual entrepreneurship and preservation of small businesses.\footnote{230} The view that antitrust law should be used to decentralize economic power in spite of costs to consumers, however, has few advocates today.\footnote{231} Even advocates of noneconomic goals emphasize that smallness for its own sake or protectionist measures for small businesses are not proper antitrust objectives.\footnote{232} The dissenter appears to have adopted a protectionist stance toward small businesses that is inconsistent with other antitrust goals.\footnote{233}

The \textit{Paschall} majority, however, demonstrated a more proper

\footnote{228. 727 F.2d at 702; see supra note 206 and accompanying text.}
\footnote{229. Prohibiting exclusive distribution systems would probably cement the monopoly positions of newspaper distributors because a new newspaper entrant would not be likely to set up its own distribution system if an existing system were available. If the new entrant were prevented from using the existing distribution system, however, it would be forced to set up its own system that would compete with the existing distribution system. See Roberts, \textit{supra} note 36, at 326-27. Because of the natural monopoly characteristics of newspaper routes, it is questionable whether competing systems would be efficient. See \textit{supra} notes 25-30 and accompanying text.}
\footnote{230. 727 F.2d at 704 (Heaney, J., dissenting), 706 (Bright, J., dissenting).
231. Fox, \textit{supra} note 212, at 1142-43 & n.8. Chief Justice Warren and Justices Black and Douglas were particularly notable in stressing power dispersion as the primary goal of antitrust. See, e.g., \textit{Brown Shoe}, 370 U.S. at 344. This emphasis on deconcentration diminished in Supreme Court opinions in the 1970's. Fox, \textit{supra} note 212, at 1142-43 & n.8.
232. See Blake & Jones, \textit{supra} note 5, at 439 (improper to discriminate in favor of small businesses simply because they are small); Lande, \textit{supra} note 7, at 103-04 (assisting small businesses not a primary purpose of the Sherman Act); Pitofsky, \textit{supra} note 220, at 1058 (antitrust should not protect small businesses against the rigors of competition and should not give special rights to distributors “to continuing access to a supplier's products or services regardless of the efficiency of their distribution operation and the will of the supplier”).
233. See 727 F.2d at 704. To be fair to the dissenters, it should be noted that neither dissent characterized the issue as protecting small enterprises at the cost of efficiency gains for consumers, because neither dissent thought that the Star's integration would produce any efficiency benefits for consumers. While some evidence was ambiguous, however, it was not apparent, as the dissenters claimed, that no efficiency benefits would result. See \textit{supra} note 202.

The dissenter's protectionist stance is also demonstrated by Judge Bright's proposal to shift the burden to defendants to prove that efficiency benefits would result before allowing a monopolist to vertically integrate. 727 F.2d at 706-07 (Bright, J., dissenting). In an area where evidence is often ambiguous or speculative, a shift in the burden of proof could produce a major change in the outcome of antitrust cases and consequently in business practices. See Bork, \textit{supra} note 221, at 410 (placing burden on the firm seeking to vertically integrate "would stifle a wide variety of socially valuable transactions by placing the burden always upon the defendant to prove the existence of claimed efficiencies").
balancing of antitrust objectives. By exhibiting a sensitivity towards the competitive process and lower prices, the majority rejected the position that courts should be concerned only with allocative efficiency. The majority also avoided a bias towards smallness that would lead courts to prohibit efficient business practices. Although *Paschall* did not call for the reconciliation of all the goals claimed for the antitrust laws, it did require the court to consider two of the more extreme positions in this matter. By rejecting these extremes, the court was able to remain faithful to the central goals of the antitrust laws.

V. CONCLUSION

In *Paschall*, the court came close to "stand[ing] the Sherman Act on its head." Had it done so, distributors would have used laws designed to enhance competition to protect their own monopolies. *Paschall* signals an end to the misplaced principles concerning vertical integration by newspapers that began with *Albrecht*. By focusing on the role of advertising in the newspaper industry's revenue structure and properly employing the economic theory of optimal monopoly pricing, the Eighth Circuit recognized that the Star's integration could not have been undertaken to extract higher prices from consumers. The court also properly interpreted the antitrust laws as being designed to promote competitive processes rather than to protect small businesses. By demonstrating the proper sensitivity to economic theory, industry structure, and the goals of antitrust, the court presented a good example of how to apply antitrust law to a complex area.

234. *See supra* notes 211-12.

235. *See supra* note 212.

236. *Albrecht*, 390 U.S. at 170 (Stewart, J., dissenting) (footnote omitted).