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## THE IMPACT OF ESTATE TAXES ON INDEPENDENT DAILY NEWSPAPERS: AN ILLINOIS CASE STUDY

Steven Helle\*

Of Illinois' eighty-three daily newspapers, only twenty remain unaffiliated with any other daily newspaper.<sup>1</sup> If tax laws are biased heavily in favor of newspaper merger and concentration, as two analysts recently concluded,<sup>2</sup> then the independent newspaper as a species in Illinois may be near the same extinction it faces in other states. In California, for example, about seventy of 110 newspapers are group owned<sup>3</sup> and in Florida only five independent newspapers remain out of forty-seven.<sup>4</sup>

A recent survey of Illinois newspaper owners indicates that they have varying levels of awareness and concern for the estate tax problem that will confront their heirs if the owners have not sold before death. Other topics covered in this survey included whether they objected to special legislation benefitting only newspapers, whether any interest had been expressed in buying their property, whether they were inclined to remain independent, and, if so, what measures they were taking to achieve that goal. The answers elicited illuminate some of the flawed assumptions underlying proposed legislation and suggest how best to revise the tax code to preserve the status of the remaining independent dailies, if that is the desired goal of public policy.

The issue of the advantages or drawbacks of continued concentration of ownership in the newspaper industry was beyond the scope of this study.<sup>5</sup> The intent was to assess the nature and causes of the trend toward concentration of newspaper ownership from the vantage of the independent owner and to obtain first-hand impressions of the estate planning inclinations of those who are most affected, but had never before been questioned. The

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1. The 20 are the Alton Telegraph, the Belvidere Daily Republican, the Benton News, the Casey Daily Reporter, the Champaign-Urbana News-Gazette, the Du Quoin Call, the Daily Clay County Advocate Press, the Galesburg Register Mail, the Harrisburg Register, the LaSalle News Tribune, the Litchfield News-Herald, the Paris Beacon News, the Paxton Daily Record, the Peoria Journal Star, the Pontiac Daily Leader, the Rock Island Argus, the Shelbyville Daily Union, the Southtown Economist, the Sterling Daily Gazette, and the Taylorville Daily Breeze-Courier.

2. J. Dertouzos & K. Thorpe, *Newspaper Groups: Economies of Scale, Tax Laws, and Merger Incentives* (Rand Corp. study prepared for the U.S. Small Business Administration, 1982) (unpublished).

3. Korda, *Vanishing species: The Independent Newspaper*, 12 CALIF. J. 326, 326 (1981).

4. *Group Ownership Trend Continues*, EDITOR & PUBLISHER, Jan. 1, 1983, at 34.

5. See generally B. BAGDIKIAN, *THE MEDIA MONOPOLY* (1983) (discussing the impact of concentrated control of the media); B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION* (1975) (discussing the effect of mass media economic structure and public policy on freedom of speech and press); Proceedings of the Symposium on Media Concentration 1-2 (Federal Trade Comm'n 1979).

survey was not scientific in that efforts were made to contact every independent owner in this state rather than to obtain a sample that may have been more representative of owners across the country. The cross-section, however, covers everything from the Paxton Daily Record with the lowest circulation figure of any Illinois daily (1,470), to the Peoria Journal Star, one of the largest independent dailies remaining in the nation (circulation 101,474).<sup>6</sup>

This article will begin with a discussion of the philosophy that prompts concern over continued concentration in the newspaper industry. Next, the impact of taxes on both buyers and sellers will be examined. Finally, some of the proposals that have been offered in Congress and elsewhere and the views of the owners themselves are presented. It is not the purpose of this article to take a stand one way or another on whether the trend away from independent newspaper ownership is a good one. The article does attempt to document this trend, to explore the reasons for the trend, and to discuss alternative solutions to the problems facing the independent newspaper owner.

#### I. THE "MARKETPLACE"—IDEAS AND ECONOMICS

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strenth. Let her and Falshood grapple; who ever knew Truth put to the wors, *in a free and open encounter?*<sup>7</sup>

John Milton may have been most interested in extolling the virtues of divorce so that he could extricate himself from his own marital vows when he wrote that ode to free expression,<sup>8</sup> but the principle of a "free and open encounter" has become the bedrock of free-speech theory. The "power of reason as applied through public discussion"<sup>9</sup> is integral to the principle.<sup>10</sup>

6. 1983 EDITOR & PUBLISHER INT'L Y.B., at I-94. At 19 of the state's 20 dailies that are unassociated with any other daily, an owner or person affiliated with the owner and in a position to know the owner's estate plan participated in the survey, either by telephone or by letter. Also contacted were William Fay, who at the time was selling the Jacksonville Journal-Courier to Thomson Newspapers, Larry H. Lewis, owner of the Robinson Daily News and Lawrenceville Daily Record, T.A. Oakley, publisher of the Quincy Herald-Whig and part owner of Quincy Newspapers, which also owns a daily in New Jersey, and Merrill Lindsay, former shareholder in the Lindsay-Schaub chain before it was sold to Lee Enterprises. John W. Potter of the Rock Island Argus did not respond.

7. J. MILTON, *AREOPAGITICA* 74-75 (Eng. rep. 1972).

8. See Fackler & Christians, *John Milton's Place in Journalism History: Champion or Turncoat?*, 57 JOURNALISM Q. 563, 563 (1980). The authors note that after Milton published a series of tracts on divorce, the "Westminster divines" lobbied for stricter licensing to prevent such tracts from being published. In response, Milton wrote the *Areopagitica*. *Id.*

9. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

10. See J.S. MILL, *ON LIBERTY* 64 (C.V. Shields ed. 1956) (first published in 1859) (freedom of expression of opinion is necessary to the "mental well-being of mankind"); see also Letter from Thomas Jefferson to Judge John Tyler, *reprinted in* 11 THE WRITINGS OF THOMAS JEFFERSON 32-34 (A. Bergh ed. 1905) (June 28, 1804) ("I hold it, therefore, certain, that to open the doors of truth and to fortify the habit of testing everything by reason, are the most effec-

Those who advocate a "marketplace of ideas" argue that if individuals exercise their liberty of speech and press, then the participants in this "wide-open, uninhibited and robust debate,"<sup>11</sup> being themselves rational, will be able to identify Truth. Likewise, they assume that freedom from governmental interference is sufficient to engender this competition of ideas,<sup>12</sup> and that all ideas would have entree to the competition regardless of their popularity.<sup>13</sup>

Libertarians viewed this competition of ideas seemingly as an end in itself because of a curious paradox of libertarian theory. Even though rational people supposedly could ascertain Truth, apparent falsehood could not be suppressed for fear it was actually Truth or contained elements of Truth.<sup>14</sup> Libertarians further posited that the competition had to be maintained because even if Truth could be determined, its continual testing ensures its vitality.<sup>15</sup> Because they believed that the product of this process could never be evaluated definitively, libertarians placed blind faith in the existence and efficacy of the "free and open encounter" as the means of ascertaining Truth. In effect, the competition was more crucial than the result.

This uncritical endorsement of the free and open encounter principle was noted by Justice Oliver Wendell Holmes in one of the first cases in which the U.S. Supreme Court considered a first amendment claim.<sup>16</sup> Belief in the benefits of diversity of expression "is an experiment, as all life is an experiment," he wrote. "Every year if not every day we have to wager our salvation upon some prophecy based on imperfect knowledge."<sup>17</sup> Holmes's philosophical description of the "prophecy" yielded the ubiquitous "marketplace of ideas" metaphor:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations

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tual manacles we can rivet on the hands of our successors to prevent their manacling the people with their own consent.").

11. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

12. See Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 5-9.

13. See *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); Peterson, *The Social Responsibility Theory of the Press*, in *FOUR THEORIES OF THE PRESS* 99 (F. Siebert, T. Peterson & W. Schramm eds. 1956).

14. J.S. MILL, *supra* note 10, at 21. Mill wrote, "We can never be sure that the opinion we are endeavouring to stifle is a false one; and if we were sure, it would be an evil still." *Id.*

15. *Id.* at 43. According to Mill:

However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.

*Id.*

16. The first case was *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

17. *Abrams v. United States*, 250 U.S. 616, 630 (1919). The opinion was a dissent, albeit "one of the most famous of his celebrated dissents." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576 (1978).

of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>18</sup>

Approval of the marketplace model has been echoed by, among others,<sup>19</sup> Judge Learned Hand,<sup>20</sup> and Justices Brandeis,<sup>21</sup> Black,<sup>22</sup> Douglas,<sup>23</sup> Brennan<sup>24</sup> and White.<sup>25</sup>

Indeed, the marketplace of ideas notion has served so long and so well as a means of protecting unpopular speech brought before the courts<sup>26</sup> that the doctrine may have distorted reality. It may be that the cases not being brought before courts reflect the true nature of the marketplace.<sup>27</sup> As pointed out by Professor Vincent Blasi, the first amendment cases of the last two decades have involved primarily the rights of powerful institutions rather than the claims of the dispossessed trying to get a fair shake in the marketplace.<sup>28</sup> The current first amendment advocates more often may be urging the courts to reinforce or facilitate their role in the marketplace, taking

18. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). With his usual perspicacity, Dean Jerome Barron observed with regard to Holmes's metaphor:

It is interesting, perhaps anomalous, that the same Justice who reminded his brethren in *Lochner v. New York* that the Constitution was not "intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*," nevertheless rather uncritically accepted the view that constitutional status should be given to a free market theory in the realm of ideas.

Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967) (emphasis in original) (footnote omitted).

19. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 968-74 (1978) (discussing judicial adoption of Holmes's free marketplace theory).

20. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

21. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (developing Holmes's theory of a free marketplace).

22. *United States v. Associated Press*, 326 U.S. 1 (1945).

23. *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) (full and free discussion as the means to expose false ideas).

24. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

25. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259-60 (1974) (White, J., concurring) (even non-comprehensive debate is preferable to governmental control of the press).

26. See Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 631 n.21 (1982). In suggesting an approach to the first amendment that focused on the symbolic aspect of tolerating the speech of others, Bollinger noted that "it is really at the outer edges of the exercise of speech, at the perimeters, that the general capacity of tolerance is tested and the lessons sought to be conveyed and learned are highlighted." *Id.* at 630; see also Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983) (addressing the relevance of the first amendment to the intellectual make-up and character of society).

27. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 524-25.

28. *Id.*

for granted the right to participate that had been sought and acquired by the earlier "poor and puny anonymites."<sup>29</sup>

Of course, one could argue that the nature of the court docket only represents that the rights of the dispossessed have already been litigated and guaranteed. But, on the other hand, it may indicate that the ineffectual fringe elements of society have been made only more ineffectual over time as they have been shut out of the modern marketplace. The intellectual marketplace may have succumbed to the same tendencies toward monopolies and concentration of control that characterize the economic marketplace, in no small part because the two overlap.

Or, at least, so argue those who posit that the libertarian marketplace model has outlived its usefulness. Libertarians argue that the wide-open libertarian marketplace would be realized, if only government stayed as far away as possible.<sup>30</sup> In response, it is argued that this position has been proven wrong by the development of mass media controlled by a relative few. Some suggest that the content of the mass media "is twisted by the emphasis on firstness, on the novel and sensational; by the personal interests of owners; and by pressure groups,"<sup>31</sup> while others say the libertarian marketplace model has failed because, in fact, the "controllers of media have no ideology."<sup>32</sup> As Dean Jerome Barron observed:

[T]he communications industry is operated on the whole with an intellectual neutrality consistent with V.O. Key's theory that the commercial nature of mass communications makes it "bad business" to espouse the heterodox or the controversial.

. . . [I]t is not that the mass communication industry is pushing certain ideas and rejecting others but rather it is using the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their expression. What happens of course is that the opinion vacuum is filled with the least controversial and bland ideas. . . .<sup>33</sup>

Neo-liberals argue that active governmental intervention is necessary to ensure that the freedom of expression of all can not only be protected, but actually enjoyed and exercised.<sup>34</sup> Only in that way can a lively, robust marketplace be restored.

It may be, however, that the marketplace is working as is. That all ideas

29. *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

30. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248-50 (1974) (access to print restricted because of concentration of power); COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* 17-19, 37-68 (1947) (advocating self-regulation by the press, but combined with public accountability) [hereinafter cited as *A FREE AND RESPONSIBLE PRESS*]; B. OWEN, *supra* note 5, at 6 (1975) (implicit assumption of the first amendment is that free and unfettered competition is conducive to political freedom); 2 Proceedings of the Symposium on Media Concentration 7 (Federal Trade Comm'n 1979) (statement of Ben Bagdikian).

31. *A FREE AND RESPONSIBLE PRESS*, *supra* note 30, at 68.

32. Barron, *supra* note 18, at 1646.

33. *Id.*

34. *Id.* at 1666-78.

may not be fully or fairly presented in the mass media does not preclude dissemination of an idea in other media more representative of the actual audience acceptance.<sup>35</sup> Regulation of the marketplace is unnecessary if the marketplace is perceived as encompassing all media, without any one medium or entity being considered a marketplace of ideas. Furthermore, those subscribing to libertarian precepts might suggest that criticism of the marketplace model is a facade behind which hide those whose ideas have not found favor and who endorse "equal time" as a means of furthering their self-interest. If nothing else, these views on the nature of the current intellectual marketplace demonstrate that the perception of its continued vitality is in the best interests of those who object to government intervention.<sup>36</sup> In the words of the Commission on Freedom of the Press,

When an instrument of prime importance to all the people is available to a small minority of the people only, and when it is employed by that small minority in such a way as not to supply the people with the service they require, the freedom of the minority in the employment of that instrument is in danger.<sup>37</sup>

If the freedom of the mass media is imperiled by a perception that their increasing concentration presents a threat to the marketplace model, it would be useful first to inquire into the nature of the concentration and its origins.

## II. DEMISE OF DIVERSITY?

The Commission on Freedom of the Press observed with alarm that the total number of daily newspapers in the United States had dropped from 2,600 to 1,750 in forty years and that only 117 cities had competing daily newspapers.<sup>38</sup> Those figures, though, are forty years old. One wonders how much more alarmed the Commission might have been if it had to confront the situation in 1983 when, while the total number of dailies has remained stable, the number of cities with competing dailies dropped to twenty-eight.<sup>39</sup>

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35. Bezanson, Herbert v. Lando, *Editorial Judgment, and Freedom of the Press: An Essay*, 1978 U. ILL. L.F. 605, 611-22 (repudiating Barron's restricted access theory); see Whitehead, *Direct Mail: The Underground Press of the '80's*, COLUM. JOURNALISM REV., Jan./Feb. 1983, at 44 (use of the mail to express political views); Jones, *Media Concentration Rapped*, The Washington Post, Dec. 15, 1978, at C1, col. 3 (quoting statement of George Reedy) (newsletters, company publications, college lectures, word of mouth).

36. See Comment, *Antitrust Malaise in the Newspaper Industry: The Chains Continue to Grow*, 8 ST. MARY'S L.J. 160, 173 (1976) (concluding that increased control by chains is as stifling of first amendment values as government control) [hereinafter cited as Comment, *Antitrust Malaise*].

37. A FREE AND RESPONSIBLE PRESS, *supra* note 30, at 1-2.

38. *Id.* at 37-38.

39. *29 Cities Left Where Dailies Totally Compete*, EDITOR & PUBLISHER, Sept. 18, 1982, at 13, col. 3. The Buffalo (N.Y.) Courier-Express closed after this article was written, reducing the number of cities cited in the article to 28. See EDITOR & PUBLISHER, Sept. 25, 1982, at 11, 28.

The following table<sup>40</sup> shows the clear trend regarding the number of competing newspapers:

DECLINE IN MULTIPLE NEWSPAPER CITIES IN THE UNITED STATES, 1923-1980			
Year	Total Cities with Newspapers	Cities Having More than One Paper	
		Number	% of Total
1923	1297	502	38.7
1933	1426	243	17.0
1943	1416	137	19.7
1948	1392	109	7.8
1953	1453	91	6.3
1958	1447	70	4.8
1963	1476	51	3.5
1968	1493	43	2.9
1973	1519	37	2.4
1978	1536	35	2.3
1980	1539	35	2.2

Although the decreasing number of cities with competing dailies appears to have leveled off since 1973, the demise or merger of several papers, including the Buffalo Courier-Express, the Philadelphia Bulletin, and the Cleveland Press, during the past three years has reduced the number by one-fifth.

Market factors seem primarily responsible for curtailing the competition. Newspapers by their localized nature have limited markets, and mass advertising rewards the dominant publication in an area. A newspaper that reaches a saturation point in circulation will attract more advertising and will be able to charge higher rates. Media observer Ben H. Bagdikian noted that "[a]dvertisers are primarily interested in getting their message before the largest possible audience at the smallest cost per thousand, and it is cheaper for them to support one newspaper plant reaching all consumers than two plants in which each reaches half."<sup>41</sup>

Because it is most difficult to saturate a larger market, competition survives best in metropolitan areas, as demonstrated by the following table:<sup>42</sup>

40. J. Dertouzos & K. Thorpe, *supra* note 2, at 97.

41. B. BAGDIKIAN, *THE INFORMATION MACHINES* 127 (1971).

42. J. Dertouzos & K. Thorpe, *supra* note 2, at 99.



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 POPULATION OF CITIES BY NUMBER OF COMPETING FIRMS,  
 1948-1980
 

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Year	Mean Population of Cities		Total Population of Cities (millions)	
	With Monopoly Firms	With Competing Firms	With Monopoly Firms	With Competing Firms
1948	25,847	352,472	33.2	38.4
1958	35,937	513,797	49.5	35.9
1968	45,711	691,475	66.3	29.7
1978	47,159	725,369	70.8	26.1
1980	48,944	713,820	73.7	24.3

 PERCENT U.S. POPULATION LIVING  
 IN MULTI-PAPER CITIES

1948	26
1958	21
1968	15
1978	12
1980	11

Curiously, the newspapers that have folded most recently have been in the larger cities, rather than in the smaller cities with competing papers such as Cookeville, Tenn., Slidell, La., and York, Pa.<sup>43</sup> In any event, it appears that competitive daily newspapers are an endangered species.<sup>44</sup> The implications for the marketplace envisioned by libertarians are obvious,<sup>45</sup> especially

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43. *College Town Newspapers Slug it Out*, Wall St. J., March 2, 1983, at 31, col. 3.

44. J. Dertouzos & K. Thorpe, *supra* note 2, at 100.

45. See B. OWEN, *supra* note 5, at 4, 20-21. Owen observed that monopoly media power impinges on the freedom of expression of other message producers as well as of the potential audience. *Id.* at 25-28. He concludes:

The critical point about monopoly power in the media is that it gives the media owner some power to decide what people shall see and hear, and what they shall not. The diversity of sources of information is constricted, and there is no source of marketplace relief for egregious behavior, such as entry of new firms. . . .

. . . [T]he monopoly media owner has power in the discretionary use of his excess profits, and he can afford to spend these profits in ways which further the economic, political, or social interests of his class. He can simply exclude even those who can afford to pay for access. He can choose to behave uneconomically to the extent permitted by the barriers to entry in his market and by the structure of control of his firm. He can defy the discipline of the market system, which works hand in hand with the system of freedom of expression. That he often fears and respects his power and seeks to act responsibly is of little moment. Why should

if monopoly newspapers devote less space to local coverage, which is expensive to generate, than do competing newspapers.<sup>46</sup>

Apart from vigorous antitrust enforcement, however, there seems to be little that can be done outright to reverse the trend.<sup>47</sup> Indeed, when the government has intervened, as it did when it passed the Newspaper Preservation Act (NPA),<sup>48</sup> for example, otherwise illegal anticompetitive practices have been allowed and competition actually has lessened. The NPA allows owners of competing dailies to enter into "joint operating agreements." Ostensibly, this permits a failing newspaper to join forces with its stronger competitor and thereby assure the preservation of both. The effect of such an agreement, however, is to prevent outside competitors from entering the market.<sup>49</sup> This is accomplished by allowing the newly affiliated newspapers to engage in price-fixing, profit-pooling, and market control that would violate the Sherman Anti-Trust Act in any other context.<sup>50</sup> The attractions of such an arrangement are so great that one commentator characterized the NPA as encouraging "failure."<sup>51</sup>

The fact that the newspaper product lends itself to "natural monopoly"<sup>52</sup>

we be content with a "responsible" monopolist? Competitive media owners, whatever their class, do not have this power if they are to survive in the marketplace.

*Id.* at 28.

46. See Rarick & Hartman, *The Effects of Competition on One Daily Newspaper's Content*, 43 JOURNALISM Q. 459, 461 (1966). The authors conducted a case study of the Tri-City Herald, which served the cities of Kennewick, Pasco, and Richland, Washington. The study showed that before there was a competing daily, 40.8% of the Herald's non-advertising space was devoted to local content. In contrast, during a period of intense daily competition, 50.6% of the Herald's non-advertising space was devoted to local content. *Id.*

47. See *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (newspaper monopoly violated antitrust law). In response to *Citizen Publishing*, Congress passed the Newspaper Preservation Act, 15 U.S.C. § 1801 (1976), which allows joint operation of newspapers upon a showing of economic distress. See also *Times Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (agreement for joint classified sections not an antitrust violation); Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968) (urging strict antitrust enforcement as a means of maintaining newspaper competition).

But, as one commentator noted, even "antitrust cannot in any event preserve same city head-on competition among newspapers." B. OWEN, *supra* note 5, at 53. Another commentator has suggested an investment tax credit for investors seeking access into the daily newspaper business. Coulson, *Antitrust Law and the Media: Making the Newspapers Safe for Democracy*, 57 JOURNALISM Q. 79, 84 (1980).

48. Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1976).

49. Comment, *Antitrust Malaise*, *supra* note 36, at 166; Barnett, *Monopoly Games—Where Failures Win Big*, COLUM. JOURNALISM REV., May/June 1980, at 40. Of course, introducing a new newspaper into an already existing monopoly situation would be a struggle under the best of circumstances. See B. BAGDIKIAN, *supra* note 41, at 127-28; Comment, *Antitrust Malaise*, *supra* note 36, at 161-63.

50. Comment, *Antitrust Malaise*, *supra* note 36, at 165-66 (criticizing Newspaper Preservation Act).

51. Barnett, *supra* note 49, at 40, 45-47.

52. See *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960) (combination of newspapers' resources due to economic necessity not an antitrust violation); *United States v. Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227, 228 (N.D. Tex. 1959) (competition between newspapers leading to takeover not an antitrust violation).

in a given area, largely because of its localized nature, indirectly raises another potential problem with first amendment dimensions. Once a market reaches the practical saturation point, the newspaper owner has no economic incentive to invest profits in large-scale expansion of that newspaper, other than the negative incentive of reducing taxable income. If the owner wants to avoid taxes as well as invest in activities that will reap larger profits, the owner must look elsewhere. It is here that the tax code plays a more affirmative role in structuring investment decisions.

#### A. *Incentives to Buy Independent Newspapers*

The distribution of corporate dividends allows the Internal Revenue Service to tax profits twice, once as income to the corporation and once as income to each shareholder. If a corporation does not distribute profits in excess of \$250,000 to shareholders, it must pay a heavy penalty beyond the amount already assessed for taxes on the undistributed profits.<sup>53</sup> A corporation can accumulate profits, however, without being penalized if the money is earmarked for "reasonable business needs."<sup>54</sup> One of the definitions of a reasonable business need is the acquisition of another business enterprise.<sup>55</sup>

The incentive to devote profits to formation of newspaper chains is compelling.<sup>56</sup> Courts have further encouraged acquisition of other newspapers by ruling<sup>57</sup> that newspaper corporations need not comply with treasury regulations requiring "specific, definite and feasible plans" for spending accumulated profits.<sup>58</sup> Because it is impossible to predict when investment opportunities will arise, newspaper corporations can retain earnings without anticipating the purchase of any particular newspaper. Because of the unpredictability of the market, the competitive bidding by chains, and the steadily decreasing number of properties potentially available, newspaper corporations are allowed to amass huge sums for acquisition purposes. Gannett Company, for example, recently had more than one-half billion dollars in retained earnings.<sup>59</sup>

Morris Udall once noted that the tax code has "an unintentional bias toward centralization and conglomeration."<sup>60</sup> With the aid of a favorable

53. I.R.C. §§ 531-537.

54. *Id.*

55. I.R.C. § 537(a)(1) defines reasonable business needs as the "reasonably anticipated needs of the business." A reasonably anticipated need of the business is defined, by way of example, as including the acquisition of "a business enterprise through purchasing stock or assets." Treas. Reg. § 1.537-2(b) (1983).

56. *Freedom Newspapers, Inc. v. Commissioner*, 24 T.C.M. (CCH) 1327, 1335 (1965); see Bagdikian, *Newspaper Mergers—The Final Phase*, COLUM. JOURNALISM REV., March/April 1977, at 17, 22 [hereinafter cited as Bagdikian, *Newspaper Mergers*].

57. *Freedom Newspapers, Inc. v. Commissioner*, 24 T.C.M. (CCH) 1327, 1336 (1965).

58. Treas. Reg. § 1.537-1(b)(1) (1983).

59. See J. Dertouzos & K. Thorpe, *supra* note 2, at 63.

60. M. UDALL, PUBLISHING IN AMERICA, INC. 8, 10 (1977); see ANPA Tax Law Task Force, Report and Recommendations to the ANPA Government Affairs Committee and Board of Directors 3 (Jan. 18, 1979) [hereinafter cited as ANPA Task Force].

interpretation of the "reasonable business needs" provision, 155 newspaper groups have sprung up, thus lending credence to this characterization of the tax code.<sup>61</sup> A breakdown of those corporations, the number of newspapers each owns, and the total circulation is provided in the Appendix to this article. All told, chains control about two-thirds of the country's 1,730 daily newspapers<sup>62</sup> and seventy-two percent of the nationwide weekday circulation.<sup>63</sup> To continue to realize the tax advantages of investment, chains will be forced to buy other chains.<sup>64</sup> "Within two decades, virtually all daily newspapers in America will be owned by perhaps fewer than two dozen major communications conglomerates," Udall observed.<sup>65</sup>

Additional tax advantages for chains to buy up their competition are detailed in an insightful study prepared by James N. Dertouzas and Kenneth E. Thorpe. Such advantages include favorable capital gains and losses treatment, depreciation allowances, and investment tax credits.<sup>66</sup> The acquisition of a newspaper, they conclude, is worth an average tax savings of almost \$4 million, plus about twenty-five cents for every dollar paid.<sup>67</sup> The tax laws at issue were meant to spur investments that add to the aggregate capital stock,<sup>68</sup> but the authors point out that if they "do not truly stimulate any real investment activity and merely encourage mergers, they deserve review."<sup>68</sup>

#### B. Incentives to Sell Independent Newspapers

The tax incentives to buy newspapers may enable chains to offer artificially high prices for new acquisitions, as much as sixty times annual earnings.<sup>70</sup> This does not fully explain, however, why independent newspapers have sold out at an average rate of fifty per year (see table)<sup>71</sup> for the past seven years.

61. SPECIAL REPORT: *Morning Circulation Tops P.M. Total for 155 Groups*, EDITOR & PUBLISHER, Oct. 3, 1981, at 12. The article defines a newspaper group as two or more dailies in different cities under the same ownership. *Id.*

62. Letter from the publisher, 1982 Editor & Publisher International Yearbook, at 5.

63. SPECIAL REPORT: *Morning Circulation Tops P.M. Total for 155 Groups*, EDITOR & PUBLISHER, Oct. 3, 1981, at 12. This figure is based on circulation of all dailies as shown in the 1981 *Editor & Publisher International Yearbook*. *Id.*

64. See Bagdikian, *supra* note 56, at 17.

65. Coulson, *supra* note 47, at 81 (quoting *Newspaper Chains—How Big is Big?*, 173 *TYPOGRAPHICAL J.* 1 (August 1978)).

66. J. Dertouzos & K. Thorpe, *supra* note 2, at 61-64, 75, 86.

67. *Id.* at 70. *But see* Good, *Fugitives from a Chain Gang*, *WASH. JOURNALISM REV.*, May 1982, at 34, 37, cols. 2-3.

68. J. Dertouzos & K. Thorpe, *supra* note 2, at 75.

69. *Id.* at 72.

70. *Additional Estate and Gift Tax Issues: Hearings on S. 1487 Before the Subcomm. on Estate and Gift Taxation of the Senate Comm. on Finance*, 97th Cong., 1st Sess. 417 (1981) (statement of Sen. Symms) [hereinafter cited as *Additional Issues*]; *id.* at 457 (statement of Morris J. Levin); Miles, *Get Bigger or Get Out*, *FORBES*, June 7, 1982, at 161, 161; *Bidding Sends Prices Higher in Newspaper Acquisition Binge*, *L.A. Times*, Jan. 9, 1977, pt. VI, at 1.

71. *Group Ownership Trend Continues*, EDITOR & PUBLISHER, Jan. 1 1983, at 34. Newspaper sales have dropped off in the past few years due to "the economy and decreasing pool of

	Unit sales	Into groups
1976	72	62
1977	50	47
1978	53	46
1979	53	48
1980	52	48
1981	38	30
1982	36	32

Since the independent papers are primarily family-owned,<sup>72</sup> some with many generations of ownership,<sup>73</sup> it would seem that there would be countervailing pressures to retain family ownership. Again, analysis of the tax code may demonstrate incentives to sell as well as incentives to buy.

First of all, accumulation of profits to pay estate taxes is not a "reasonable business need" under the Code. A corporation, however, may accumulate profits without penalty during the year of the principal shareholder's death, if those profits are earmarked for redeeming the stock of a deceased shareholder.<sup>74</sup> Thus, if the principal owner of an independent newspaper owns eighty percent of the stock, upon that owner's death the accumulated profits of the corporation may be used to redeem that stock from the estate. The effect of this is to infuse the estate with cash to pay the estate taxes, thereby obviating the need to sell the newspaper to a chain.

However, the ability of a corporation to accumulate profits to redeem the principal owner's stock does not really solve the problem. Such an accumulation of profits is only permitted beginning in the taxable year in which it is reasonably anticipated that the owner will die.<sup>75</sup> This requirement severely limits the estate planning options of a young, healthy owner. Moreover, if the owner does not in fact die during the taxable year as anticipated, the

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available properties." *Id.* Bagdikian noted that most of the remaining independent dailies have "less than 10,000 circulation, a size that has cash flow too small to attract major chain operators." Bagdikian, *Newspaper Mergers*, *supra* note 56, at 17, 19. Ellen Gibbs, a media investment analyst for Goldman, Sachs, observed: "I think to some extent newspaper consolidation has probably come to something of a halt in that so many of the . . . individual properties are part of groups and the prices have become so high that many of the public companies just won't bid on them anymore." Transcript No. 1251 of Wall Street Week with Louis Rukeyser, June 17, 1983, at 13.

72. See B. BAGDIKIAN, *supra* note 41, at 127; J. Dertouzos & K. Thorpe, *supra* note 2, at 55.

73. *Additional Issues*, *supra* note 70, at 543 (testimony of Len R. Small).

74. I.R.C. § 537(a)(2), (b)(1) (1983). Because the estate tax return may be filed at any time within nine months after death and the stock redemption must be made within 90 days after the three-year period for payment of the tax, the redemption period may run up to approximately four years. [1984] 4 STAND. FED. TAX REP. (CCH) ¶ 2319.01 (construing I.R.C. § 303(b)(1)(A)).

75. I.R.C. § 537(b)(1) (1983).

corporation runs the risk that the accumulation of profits will be viewed as unreasonable.<sup>76</sup>

Other problems exist with corporate redemption, even assuming the corporation accumulates sufficient profits to redeem the stock of the principal owner and avoids the penalty. The effect of a redemption of shares is to distribute corporate control among the former minority shareholders. It is implicit that an owner must have divested some degree of ownership for a corporate redemption to occur, which an owner may be unwilling to do. The owner may prefer to pass property by will, if for no other reason than because distributions can be altered without the expense of a forced buy-out of a minority owner.

Moreover, stock redemption by the corporation does nothing to maintain the newspaper in the family if the minority shareholders are not members of the deceased owner's family. Consequently, if the principal owner wants to avoid a transfer of ownership to the minority shareholders, the principal owner might determine that a preferable solution would be to sell a chain during the owner's lifetime. Structuring the corporation so that minority ownership is in the hands of faithful employees or family members is a possibility, but it is not as flexible or reliable an option as testate succession. The option of accumulating corporate profits during the year of a principal owner's death is therefore of limited utility. The necessity of creating minority ownership may be unappealing and restrictive as well as more conducive in some cases to selling to chains to forestall control by minority owners.

If the tax code were structured in such a way as to allow the corporation to accumulate profits to pay the principal owner's estate taxes directly, control of the newspaper could stay within the family, whose members might be more likely to effectuate the desires of the deceased owner and to maintain the independence of the newspaper. In contrast, under the current tax

76. See Treas. Reg. § 1.537-1(e) (1984).

[T]he corporation must have specific, definite, and feasible plans for the use of such accumulation. Such an accumulation need not be used immediately, . . . provided that such accumulation will be used within a reasonable time depending upon all the facts and circumstances relating to the future needs of the business. Where the future needs of the business are uncertain or vague, where the plans for future use of an accumulation are not specific, definite, and feasible, or where the execution of such a plan is postponed indefinitely, an accumulation cannot be justified on the grounds of reasonably anticipated needs of a business.

*Id.* § 1.537-1(b). Accumulation of earnings as a "reasonable business need" to fund stock redemptions is generally disfavored by the IRS, particularly in the case of a majority owner in a closely held corporation, because the redemption is viewed as benefitting the shareholder rather than the business. [1984] 5 STAND. FED. TAX REP. (CCH) ¶ 3321.0152. "The redemption seems even more vulnerable if it is not an unavoidable response to a business problem, but is required by a shareholder agreement to retire the shares of any party thereto upon his death or retirement." B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 8.07, at 8-30 (4th ed. 1979).

code, the principal owner's heirs must sell the shares to pay the estate taxes, either to the corporation through a redemption or to an outside buyer. Current law thus places independent newspaper owners in a double bind: it encourages chains to buy by allowing accumulation of profits for that purpose as a reasonable business need; and it encourages independents to sell by not deeming accumulation of profits to pay estate taxes a reasonable business need.

A second and more fundamental incentive to sell involves the method by which the estate tax is calculated. Before a newspaper can pass by will to the beneficiaries, an estate tax of as much as seventy percent<sup>77</sup> of the fair market value of the paper must be paid.<sup>78</sup> Further, the fair market value is determined by how much the paper is worth to a buyer, not how much it is worth to the owners as a "going business concern."<sup>79</sup> Because chains can use tax breaks to push prices skyward, the estate taxes, as a factor of those prices, become artificially high as well. This phenomenon was explained to the Senate Subcommittee on Estate and Gift Taxation:

[W]hile an independent newspaper owner may consider value to be 10 to 15 times earnings (which is also the price/earnings ratio of publicly traded chains), the IRS must look to the amount a chain would pay for an independent, i.e., 40 to 60 times earnings. For example, if a newspaper were earning \$250,000 per year, its value to a chain might be as high as \$12.5 million. The estate tax, now at 70 percent, would be over \$8.5 million. Should the heir to a newspaper seek to borrow such sums to pay estate taxes, the annual cost of interest on the loan would be more than three times the newspaper's earnings. . . . Is it any wonder that the heirs must sell, or that an owner sells prior to death to put his estate in order? There are no other options.<sup>80</sup>

A final tax consideration for newspaper owners is the advantage of a tax-free stock exchange. If the owners sell their shares in the newspaper to a chain in exchange for shares of the chain, there are no problems with valuation at death and capital gains taxes are deferred until the stock is sold.<sup>81</sup> An owner considering estate plans cannot help but notice that stock is much more manageable than real property.

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77. Seventy percent was the maximum estate tax rate for decedents dying before Jan. 1, 1982. The Economic Recovery Tax Act of 1981 (ERTA) reduced the maximum estate tax rate from 70% to 50% in 5 percent reductions over a four-year period beginning with decedents dying in 1982. I.R.C. § 2001(c) (West Supp. 1981).

78. I.R.C. § 2001 (West Supp. 1981).

79. See *Additional Issues*, *supra* note 70, at 417 (statement of Sen. Symms).

80. *Id.* at 458-59 (statement of Morris J. Levin). Or, to quote an economist, "[S]elling prices of comparable newspaper firms are taken to be a major indication of the value of the property in question. If such methods overstate the value of the business to current owners, estate tax liabilities will create dominant incentives to sell." J. Dertouzos & K. Thorpe, *supra* note 2, at 57.

81. Stock redemptions to pay death taxes can receive capital gains treatment only if the value of closely held stock being redeemed is at least 35% of the decedent's adjusted gross estate. I.R.C. § 303 (1983).

## III. PRESERVING THE MARKETPLACE—OPTIONS AND APPRAISALS

Little wonder that independent newspaper owners, with the tax code stacked against them, commonly sell when chains come knocking. It is not a conspiracy, nor do the chains have perfidious motives. Rather, it is an amalgam of numerous individual decisions based on economic imperatives that are influenced, perhaps unintentionally, by the bias of the tax code. The code, of course, applies to all businesses and individuals, and its biases are evident beyond the newspaper industry.<sup>82</sup> One recommendation made by the 1980 White House Conference on Small Businesses was to “[r]evise estate tax laws to ease the burden on family-owned businesses and encourage the continuity of family ownership.”<sup>83</sup>

If tax laws that enable, or even encourage, chains to bid top dollar for newspapers were revised, such revisions would have far-ranging implications in other contexts as well. After all, laws providing for retention of earnings for business needs, capital gains treatment, depreciation allowances, and investment credits were enacted to address other perceived problems, and their consequences for the newspaper industry are a by-product. Those owners who indeed desire to sell their newspaper property are benefitted by the laws because they are the beneficiaries of the artificially high prices. One might question whether it would be fair to these owners to restructure the tax laws and regulations to reduce the prices offered by chains.

Furthermore, any overt governmental tinkering with the marketplace of ideas, even if only structural, should be scrutinized carefully. After inquiring into a similar situation in Canada, the 1981 Royal Commission on Newspapers recommended a prohibition on further concentration and forced divestiture in some cases. The Commission trod even more controversial ground by advocating tax credits, surcharges, and matching grants to “improve” news content and services.<sup>84</sup>

The argument has been made that an increase in newspaper concentration and consequential increases in newspaper owners’ economic power and political influence are desirable to offset the growing concentration and power of government.<sup>85</sup> Any governmental efforts to “save” the marketplace of ideas must be looked upon warily,<sup>86</sup> especially if chain ownership does not affect adversely the performance of newspapers purchased,<sup>87</sup> and as long

82. See Schriber, *The Death Tax*, FORBES, June 22, 1981, at 122.

83. *Major Estate and Gift Tax Issues: Hearings Before the Subcomm. on Estate and Gift Taxation of the Senate Comm. on Finance, 97th Cong., 1st Sess.* 405 (May 1, 1981) (testimony of Len. R. Small).

84. See J. Dertouzos & K. Thorpe, *supra* note 2, at 86 n.2. The authors described the recommendations as “quite misguided.” *Id.*

85. See B. OWEN, *supra* note 5, at 7-8. Owen ultimately rejects the argument. *Id.* at 8.

86. J. Dertouzos & K. Thorpe, *supra* note 2, at 58-61, 85.

87. Much to their credit, the American Newspaper Publishers Association and the National Newspaper Association have taken a stand consistent with the suggested approach of seeking tax relief for all small, family-owned businesses rather than just for newspaper owners. ANPA



as no one chain or small group of chains dominates.<sup>88</sup>

As it is, the Economic Recovery Tax Act of 1981 (ERTA) provided major reductions in estate and gift taxes and alleviated estate tax liquidity problems. In particular, the Act will lower the maximum estate tax rate from seventy percent to fifty percent by 1985.<sup>89</sup> Thus, if the owner of the Jackson (Mississippi) Clarion-Ledger, which was sold in 1982 for an estimated \$110 million,<sup>90</sup> had died before ERTA took effect, the heirs would have had to pay an estate tax of seventy percent, or \$77 million. Assuming the same fair market value, if the owner had died in 1985 after ERTA had been implemented fully, the heirs would owe the government \$55 million in estate taxes, or fifty percent of the fair market value. Representative Dan Rosten-

Task Force, *supra* note 60, at 3-4, 6; *Miscellaneous Tax Bills IV: Hearings on S. 555 Before the Subcomm. on Taxation and Debt Management Generally of the Senate Finance Comm.*, 96th Cong., 1st Sess. 487-88 (Oct. 31, 1979) (testimony of K. Prescott Low). Of course, this attitude probably has impeded passage of several bills that have proposed relief for independent newspapers only.

88. J. Dertouzos & K. Thorpe, *supra* note 2, at 102-04. The authors presented the following table to demonstrate the lack of dominance by any one chain:

Group	Number of dailies (a)	% of U.S. Total	Daily Circulation (thousands)	% of U.S. Total
Knight-Ridder	34	1.9	3681	6.0
Newhouse	29	1.6	3204	5.3
Tribune	6	.3	3099	5.1
Gannett	73	4.1	2772	4.5
Scripps-Howard	17	1.0	1895	3.1
Times-Mirror	4	.2	1880	3.1
Dow-Jones (b)	14	.8	1783	2.9
Hearst	7	.4	1436	2.4
Cox	17	1.0	1179	1.9
New York Times	10	.6	975	1.6
Capital Cities	4	.2	950	1.6
Thomson	57	3.2	935	1.5
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Total 12 groups	272	15.0	23.9 million	39.0
155 other groups	775	44.0	19.7 million	32.0
All groups	1047	59.0	43.6 million	71.0

(a) For these data, a single establishment publishing both a morning and evening edition is counted as two "dailies."

(b) Includes Wall Street Journal

*Id.* at 102.

89. ERTA, I.R.C. § 2001(c) (West Supp. 1981). The decrease is to take place in 5 percent annual increments beginning in 1982.

90. *Group Ownership Trend Continues*, EDITOR & PUBLISHER, Jan. 1, 1983, at 36. The hypothetical in the text assumes only one owner when, in fact, the Clarion-Ledger was owned by the Hederman family. *Id.*

kowski (D-Ill.), chairman of the House Ways and Means Committee, proposed on February 8, 1983, that those reductions be frozen at their 1983 levels of sixty percent.<sup>91</sup> If Rostenkowski's proposal had been accepted, the heirs would have owed \$66 million, or sixty percent of the fair market value.

ERTA also would allow a unified tax credit of up to \$600,000 for the cumulative value of gifts made during the decedent's lifetime to be deducted from the amount of tax owed.<sup>92</sup> Consequently, if the Clarion-Ledger's owner had made gifts of \$600,000 between 1982 and 1985, the estate tax on the newspaper in 1985 would be reduced to \$54.4 million. Moreover, the entire newspaper (or any property) can be transferred to a surviving spouse to avoid estate taxes entirely on the transferred property under ERTA.<sup>93</sup> Qualifications for installment payment of taxes after death were also loosened under ERTA; now the value of a closely-held business need only exceed thirty-five percent of the adjusted gross estate, rather than the sixty-five percent figure under prior law.<sup>94</sup> Assuming again a fair market value of \$110 million for the newspaper, prior to ERTA, the balance of the owner's adjusted gross estate could be only about \$60 million for the heirs to be entitled to pay the estate tax in installments. Now, the other estate assets can be as high as about \$204 million and still allow the heirs to pay the estate taxes in installments.

When interviewed, several independent Illinois newspaper owners volunteered that ERTA had eased their estate planning. Still, many noted that continued family ownership in their firm was uncertain. For example, the installment plan for estate tax payments includes a five-year grace period before payments must begin,<sup>95</sup> yet a newspaper's annual profits generally will not cover the interest that accumulates annually on the estate tax bill, much less the payments during the ensuing ten-year period. Annual profits, for example, do not even begin to cover the estate tax bill when a newspaper on which estate taxes must be paid may be valued at thirty times annual profits—a modest inflation by newspaper industry standards.<sup>96</sup>

To illustrate,<sup>97</sup> assume a newspaper had an annual income of \$7 million, and the owner died on March 31, 1982. Assume after-tax profits of ten percent, or \$700,000. The value of the paper, calculated at thirty times the annual profits, would be \$21 million. The estate tax on this figure, calculated

91. TAX NOTES, Feb. 14, 1983, at 650-51.

92. ERTA, I.R.C. §§ 2010, 2505 (West Supp. 1981). The estate tax credit would increase from \$175,625 in 1981 to \$225,000 in 1982, to \$275,000 in 1983, to \$325,000 in 1984, to \$400,000 in 1985, to \$500,000 in 1986, to \$600,000 in 1987 and thereafter. *Id.* Chairman Rostenkowski also has suggested that this credit be frozen at its 1983 level. TAX NOTES, Feb. 14, 1983, at 650-51.

93. ERTA, I.R.C. § 2001 (West Supp. 1981).

94. *Id.* § 6166(a)(1).

95. *Id.* § 6166(a)(3).

96. See *supra* note 70 and accompanying text.

97. This hypothetical was adapted from the one offered by Joseph Iannucci, a Washington, D.C., tax lawyer, in Miles, *Get Bigger or Get Out*, FORBES, June 7, 1982, at 161, 161.

at sixty-five percent,<sup>98</sup> would be about \$13.6 million. If the heirs opted to pay the tax on the installment plan, the interest alone would have amounted to almost \$2 million.<sup>99</sup> The hardest of estate planners would despair at the prospect of having to pay \$2 million in interest out of \$700,000 in net earnings.

Only six owners of independent Illinois newspapers, or their representatives, favored relief from this tax burden if it were to apply only to newspapers.<sup>100</sup> Nevertheless, some of these owners had reservations. Larry H. Lewis, sole owner of the Robinson and Lawrenceville papers, preferred tax relief that applied equally to all small, independently owned businesses, but stated "you have to start somewhere."<sup>101</sup> George Frazier, publisher and co-owner of the Shelbyville Daily Union, was more enthusiastic: "Government very definitely is forcing publishers to sell to chains. Any legislation that would ease that would be a definite step in the right direction. I'd worry about the constitutionality of special legislation for newspaper, but otherwise I'm all in favor of it."<sup>102</sup>

Hoxie Smith, executive vice-president and son of the publisher of the Du Quoin Call, said the press can be singled out because the press has a unique function among industries, and special interest legislation such as favorable postal rates<sup>103</sup> has already taken that into account. James A. Pearre, assistant publisher and one of eight shareholders in the Pontiac Daily Leader, disagreed:

98. The estate tax rate of 65% would be applicable in 1982. ERTA, I.R.C. § 2001(c) (West Supp. 1981).

99. Interest rates are redetermined twice a year on the basis of the average adjusted prime rate charged by commercial banks during the six-month period ending Sept. 30 (effective Jan. 1 of succeeding calendar year), and March 31 (effective July 1 of same calendar year), with the redetermination beginning after Dec. 31, 1982. I.R.C. § 6621 (West Supp. 1981). That rate was 20% from Feb. 1, 1982, to Dec. 31, 1982. [1983] 8 STAND. FED. TAX REP. (CCH) ¶ 5519K.01. It was 16% from January 1, 1983, to July 1, 1983. *Id.* For the six-month period thereafter, it was 11%. 10 *Id.* ¶ 8773G. Interest on amounts (including interest) accruing after Dec. 31, 1982, will be compounded daily. I.R.C. § 6622 (West Supp. 1981). Factors for computing compound daily interest have been established by the IRS. [1983] 10 STAND. FED. TAX REP. (CCH) ¶ 6390.01. That factor for the first six months (181 days) of 1983 would have been .087935195. *Id.* at ¶ 6391 (.087935195 X \$13,650,000 = \$1,196,315). That factor for the second six months (184 days) would have been .057009254. *Id.* at ¶ 6388 (.057009254 X \$13,650,000 = \$778,176). \$1,196,315 plus \$778,176 equals \$1,974,491.

100. Telephone interview with Hoxie Smith, executive vice president of Call Publishing, owner of Du Quoin Call; telephone interview with Rose Gill, half-owner of Daily Clay County Advocate Press; telephone interview with Larry H. Lewis, sole owner of Robinson Daily News and Lawrenceville Daily Record; telephone interview with John Hanafin, publisher of Litchfield News-Herald; telephone interview with George Frazier, publisher and a principal owner of Shelbyville Daily Union; telephone interview with David Grandon, publisher and shareholder of Sterling Daily Gazette.

101. Telephone interview with Larry H. Lewis, sole owner of Robinson Daily News and Lawrenceville Daily Record.

102. Telephone interview with George Frazier, publisher and a principal owner of Shelbyville Daily Union.

103. See also *Additional Issues*, *supra* note 70, at 461 (statement of Morris J. Levin).

Newspaper owners have to be very leery of inviting legislation like that. The public is becoming very cynical about the media in general. When we fancy ourselves watchdogs of government and we take other groups to task for going after special legislation, like the trucking industry, it compromises our position. Politicians are watched very carefully to make sure they are not using their political power to better their private interests. Anytime something is to the significant detriment of the public interest, newspapers should be able to point that out, and not with some anguish about being hypocritical.<sup>104</sup>

Robert Cooper, whose father and aunt own the Taylorville Daily Breeze-Courier, added, "We're always crying in our editorial columns for fair and equal treatment."<sup>105</sup> Ron Isbell, sole owner of the Casey Daily Reporter, noted that it might be more fair to treat all similarly situated businesses similarly.<sup>106</sup> Isbell was referring to service businesses such as insurance and real estate businesses that, like newspapers, do not have much inventory to liquidate to pay estate taxes. His point about equal treatment might apply to any closely-held business put at a disadvantage by government tax policies that promote merger with, or sale to, conglomerates.

Although they do not actively oppose bills singling out newspaper owners for tax relief, the American Newspaper Publishers Association (ANPA) and the National Newspaper Association (NNA) have taken the more moderate approach of favoring broad-based relief for all family-owned businesses. The ANPA established a Tax Law Task Force in December of 1977 to investigate reformation of the estate tax laws to neutralize their effect in ownership decisions.<sup>107</sup> Although the task force conducted no surveys, it was composed primarily of independent owners, according to Martin Casey, ANPA government affairs manager.<sup>108</sup> The task force focused its efforts initially on the Independent Local Newspaper Act that was introduced in the House during the 95th Congress by Representative Morris Udall (D-Ariz.).<sup>109</sup> That bill would have permitted accumulations of funds in trusts to pay death taxes for independent newspaper owners. Four provisions in the Udall bill, found nowhere else in the tax code, were designed to encourage investment in the trust: an allowance for income tax deductions for the corporation for contributions to the trust; exclusion of those contributions (which otherwise would be considered dividends by the IRS) from the owners' taxable income; exemption of trust earnings from income; and exclusion of the trust from the owners' estates. In the 96th Congress, a recapture provision was added to an otherwise identical bill so that some of the taxes that had been

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104. Telephone interview with James A. Pearre, assistant publisher of Pontiac Daily Leader.

105. Telephone interview with Robert Cooper, corporate secretary to Breeze Printing Co. and business manager of Taylorville Daily Breeze-Courier.

106. Telephone interview with Ron Isbell, sole owner of Casey Daily Reporter.

107. ANPA Task Force, *supra* note 60, at 1.

108. Telephone interview with Martin Casey, ANPA government affairs manager.

109. *Miscellaneous Tax Bills: Hearings on H.R. 12395 Before the Subcomm. on Miscellaneous Revenue Measures of the House Ways and Means Comm.*, 95th Cong., 2d Sess. 29-38 (August 11, 1978) (statement of Rep. Udall).

avoided would be recouped if an heir sold the newspaper within fifteen years after the death of the owner.<sup>110</sup>

In its January 1979 report, the task force concluded that the bill certainly would help independent newspaper owners, but it objected to the preferential treatment and the "disproportionately large" tax benefits that emphasized the "special interest" aspect.<sup>111</sup> The task force then recommended, among other things, that businesses be valued for estate taxes as going concerns rather than at fair market value, that all closely-held companies be able to accumulate profits to pay death taxes as a reasonable business need, that the qualifications for installment payment of estate taxes be liberalized, that double taxation of dividends be eliminated, and that the purchase of special life insurance solely for payment of estate taxes be permitted.<sup>112</sup>

The task force then disbanded, the NNA endorsed the report, and a joint ANPA-NNA Tax Law Action Group was formed to implement the recommendations. Although no action has been taken to date by either Congress or the Tax Law Action Group,<sup>113</sup> the group has explored the possibility of changing the valuation method.<sup>114</sup> In addition, a bill dealing with profit accumulation and installment payments is currently before a Senate committee.<sup>115</sup> Also introduced in the 97th Congress were bills that paralleled the earlier Udall bills in encouraging use of tax-free trusts to build up a fund for payment of estate taxes before the owner's death.<sup>116</sup> Independent Illinois newspaper owners were asked to comment on these proposals and their estate planning generally.

Many of the owners agreed with T.A. Oakley, part owner and publisher of the Quincy Herald-Whig, who noted that the impact of estate taxes on privately held corporations was "immense."<sup>117</sup> But preparation for that impact ranged from Ron Isbell, thirty-three, of the Casey Daily Reporter, whose oldest son is five and who doesn't want to plan his estate now,<sup>118</sup> to Paris Beacon-News co-owner Ed Jenison who has been "wrestling with it without

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110. *Installment Sales, Subtitle F Simplifications and Miscellaneous Tax Measures: Hearings on H.R. 2770 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 175-86 (July 27, 1979) [hereinafter cited as *Installment Sales*]; see also *THE NEWS MEDIA AND THE LAW*, Dec. 1977, at 12.

111. ANPA Task Force, *supra* note 60, at 4-5.

112. *Id.* at 6-11; see *Installment Sales*, *supra* note 110, at 109-21 (testimony of K. Prescott Low).

113. See Memorandum of Jan. 25, 1983, from Martin Casey to Tax Law Action Group chairman on Status of Tax Law Task Force Recommendations (unpublished document).

114. See *infra* note 133 and accompanying text.

115. The Family Business Preservation Act, S. 594, 98th Cong., 1st Sess. (1983). Sen. David Durenberger (R-Minn.), along with Senators Thurmond and Boren, introduced the bill, which was much the same bill he had introduced in the previous session. See S. 2141, 97th Cong., 2d Sess. (1982). They differed only in that the current bill allows 35 shareholders in the corporation before a principal owner can make installment payments, while S. 2141 allowed only 25 shareholders.

116. See H.R. 4164, 97th Cong., 1st Sess. (1981); *Additional Issues*, *supra* note 70, at 383.

117. Telephone interview with T.A. Oakley of Quincy Herald-Whig.

118. Telephone interview, *supra* note 106.

resolving it,"<sup>119</sup> to Steve Cousley of the Alton Telegraph whose "family has been working on that for ten to fifteen years, basically by moving stock between family members."<sup>120</sup> "Taxes more than anything else are causing the sale of independent newspapers," noted Peter Miller, sixty-four, a major shareholder in the LaSalle News-Tribune. "With the tax rates the way they are, it's very difficult to die and do very well."<sup>121</sup>

The conviction that independent owners should be able to keep their property within the family and not have to sell to chains was evident throughout the sample. "Fred Shappert is the boss and come hell or high water won't make him sell," said Shappert, eighty-one, principal owner of the Belvidere Daily Republican. "When a chain calls up, I don't even listen. I just talk brusquely like I'm talking to you now, and hang up the phone." Shappert knew that his estate plan involves splitting up the shares among family members, but he lets the "best law firm in Chicago handle the details."<sup>122</sup>

Likewise, George Frazier, who owns the Shelbyville Daily Union with his sister, would prefer to pass the paper on to his children rather than sell. His experience with the IRS when he inherited his father's share of the paper in 1974 causes him to doubt that the paper will remain in the family. "The estate tax situation weighs very heavily on my mind," he said. "If one of us were to die right now, we would have to sell. If Uncle Sam were to come in again and place a factor of ten on the gross or a factor of forty on the net, we would end up with some pretty outrageous valuations, just outlandish."<sup>123</sup> Should Frazier decide to sell, he would have little trouble. "My last offer was last Thursday, and I had another inquiry the next day," he said. Other owners also have tales to tell about numerous eager buyers. John Hanafin, thirty-four, publisher of the Litchfield News-Herald, told how his first offer came in a back room at his father's wake.<sup>124</sup> Henry P. Slane, principal owner of the Peoria Journal Star, described how a broker asked for just a few minutes of his time, and then told him that if Slane would give him the keys to the front door, he would give Slane a check for \$20 million.<sup>125</sup> "And that was twenty years ago, so there's no relation to the ridiculous offers I'm getting now," he added.<sup>126</sup>

Larry H. Lewis was offered \$2.5 million for the Robinson Daily News, which he characterized as two times the gross and thirty-five times annual profits.<sup>127</sup> James Choisser, fifty-eight, who owns the Benton News along with

119. Telephone interview with Ed Jenison, publisher and co-owner of the Paris Beacon News.

120. Telephone interview with Steve Cousley, editor and assistant to the publisher of the Alton Telegraph.

121. Telephone interview with Peter Miller, publisher of the LaSalle News-Tribune.

122. Telephone interview with Fred Shappert, principal owner of the Belvidere Daily Republican.

123. Telephone interview, *supra* note 100.

124. *Id.*

125. Telephone interview with Henry P. Slane, principal owner of the Peoria Journal-Star (Feb. 28, 1983).

126. *Id.*

127. Telephone interview, *supra* note 100.

his sister and seventy-nine-year-old mother, said his highest offer was \$3.5 million on \$50,000 annual profits, or seventy times profits. "We've made some arrangements, but not enough," Choisser said. "My two sons aren't interested, and I expect we will have to sell sooner or later."<sup>128</sup>

Similarly, John Richard Small, editor and a minority owner of the Harrisburg Register, was amazed at the size of the bids he received. He noted his concern for the fate of the paper when Daisy Seright, ninety-seven, who owns eighty-five percent of the shares, passes away. "There was one offer of \$2.5 million," he said. "I can't understand why they would offer that much—the figures just don't justify it. I couldn't go out and borrow that much and make a go of it. There are going to be a lot of taxes to pay when the time comes."<sup>129</sup>

Several owners singled out the IRS's valuation method as the primary culprit in forcing the sale of newspapers. "That's the principal place where the rub is," said T.A. Oakley of the Quincy paper. "The IRS wants the highest valuation and the owners always want the lowest. Invariably that turns out to be the argument."<sup>130</sup>

Pearre of the Pontiac Daily Leader noted that his family had to revise its estate planning almost annually before the 1981 tax act. His father and mother own seventy-five percent of the stock, and one other family member besides James is a shareholder. The prospect of a very high estate valuation for taxation purposes induced the Pearre family to buy a great deal of life insurance as a hedge against the death of the principals. Because the estate tax rate has decreased, they now buy less life insurance.<sup>131</sup>

The uncertainty of estate valuation may leave the owner with no viable alternative to sale. For example, before the Lindsay-Schaub chain was sold to Lee Enterprises in 1979, the shareholders might have taken life insurance even more literally: "Nobody could have afforded to die with his major asset being Lindsay-Schaub stock," said Merrill Lindsay, seventy-three, of Decatur. "The whole problem is that you have no idea what the estate valuation is going to be on the stock. It's impossible to plan when you don't know what you're planning. The IRS has never come up with any formula to determine the worth ahead of time."<sup>132</sup>

After Lindsay's father died in 1972, it took five years to reach agreement with the IRS on a valuation. Lindsay explained that the dispute became quite tiring before Lindsay-Schaub threw in the towel. After the settlement, they faced the further problem of coming up with the money to pay the tax. "Even the negotiated price was pretty high," Lindsay said. "Uncle Sam

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128. Telephone interview with James Choisser, general manager and editor of the Benton News.

129. Telephone interview with John Richard Small, editor and minority owner of the Harrisburg Register.

130. Telephone interview, *supra* note 117.

131. Telephone interview, *supra* note 104.

132. Telephone interview with Merrill Lindsay, former shareholder in the former Lindsay-Schaub chain.

wanted his money right away so we had to go to the bank and then pay the bank for the next five years. My mother was going to inherit the stock, but if she hadn't had other income, she would have been very hungry for ten years."

Lindsay described the installment plan for payment of estate taxes as "not worth a damn." He was intrigued by the notion of accumulating funds ahead of time, but he pointed out that shareholders have no idea how much to put away because of the uncertainties in valuation. According to Lindsay:

There are so many imponderables on what something is worth. How much money did you take in, and then how much did you make? Well, if you run the business badly, then they'll say you should have run it better. I'm not anti-IRS. They have a job to do. It's just that the deceased's estate can be left in a hell of a mess because of the problem with valuation.

The ANPA-NNA Tax Law Action Group consulted with Senator Boschwitz (R-Minn.), who was interested in using "book value." The group concluded, however, that they could no more define "book value" than "going concern value." "It became clear that work in this area demands tax and accounting expertise not now readily available," wrote ANPA government affairs manager Martin Casey in a January 25, 1983, memo to the group.<sup>133</sup> Their findings seem to bear out the preference of Bruce Sagan, fifty-four, publisher and majority owner of the Southtown Economist, for a fair market value. "It gets too complicated otherwise," he noted.<sup>134</sup>

If a change in the valuation method poses too many problems, and if changes in the tax incentives to buy and drive up the prices of independent newspapers are unlikely, then perhaps the problem can be approached by facilitating payment of estate taxes, even if the sums are artificially large. One means of doing that is to increase the number of shareholders in closely held corporations who can arrange for installment payment of estate taxes after death.

Currently, installment plans under section 6166 of the Internal Revenue Code are available only to businesses with fifteen or fewer shareholders. In a bill currently before the Senate Finance Committee, Senator David Durenberger (R-Minn.) has proposed amending section 6166 to allow shareholders in firms with up to thirty-five shareholders to take advantage of this payment method. Durenberger observed that when businesses, such as newspapers, are passed through many generations, they often have more than fifteen shareholders.<sup>135</sup>

That clearly is the case of the Quincy Herald-Whig, which has about forty shareholders, according to publisher T.A. Oakley. Quincy Newspapers is the family-owned corporation that owns the Herald-Whig, as well as a New Jersey

133. Memorandum of Jan. 25, 1983, from Martin Casey to Tax Law Action Group chairman on Status of Tax Law Task Force Recommendations (unpublished).

134. Telephone interview with Bruce Sagan, publisher and majority owner of the Southtown Economist.

135. S. 2141, 97th Cong., 2d Sess. (1982); see also *supra* note 109.



paper and several broadcasting outlets. "We're essentially descendants of several families as a result of the 1926 merger between the Quincy Herald and the Quincy Whig," Oakley said. "My grandfather who was the principal owner at the time of the merger split five ways with his children and those children split with theirs, so you can see how we end up with so many shareholders. I am fourth generation and my children are fifth generation owners."<sup>136</sup>

Ironically, even if Durenberger's bill applied to a firm with forty shareholders, no single shareholder in Quincy Newspapers could take advantage of installment payment of estate taxes. Section 6166 also requires that the interest of the deceased constitute at least twenty percent of the business.<sup>137</sup> The most any one shareholder in Quincy Newspapers owns is seven percent. The more shareholders in a firm, the more likely they are to run afoul of the minimum share provision of section 6166.

Durenberger's amendment would seem to have limited application in still another respect. According to the survey, only one other independent newspaper in Illinois, the Galesburg Register Mail, has more than fifteen shareholders.<sup>138</sup> Thus, almost all the independent newspaper shareholders in Illinois already can take advantage of section 6166, if they are so inclined. Increasing the shareholder maximum under section 6166 would seem to have a minimal effect on maintaining independent ownership.

Of course, as suggested earlier,<sup>139</sup> annual profits may be insufficient to service even the interest due on a newspaper owner's estate tax debt, much less cover installment payments on the principal. Unless owners put aside money in advance of death, or have sources of wealth apart from the newspaper, section 6166 may not provide a feasible option. The Udall bill addressed accumulation of assets in advance by proposing a special trust. Similarly, the Durenberger bill would have enabled any corporation to allocate funds for payment of estate taxes as a "reasonable business need."

Aside from the questionable wisdom of special interest legislation such as the Udall bill, many of the newspaper owners interviewed expressed interest in prepayment of estate taxes. They also expressed a common reservation. For example, Sagan of the Southtown Economist noted that "[t]he question would be what you would pay it with. That's the problem that arises as much before you die as after. There's always going to be a problem with liquidity."<sup>140</sup>

Rose Gill, thirty-six, half-owner of the Daily Clay County Advocate-Press, agreed: "We probably wouldn't be able to do it for quite a while. If the law were passed tomorrow, we couldn't run out and start putting money in trust. We're still paying this paper off. Down the road it might be a

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136. Telephone interview, *supra* note 117.

137. I.R.C. § 6166(c) (West Supp. 1981).

138. Telephone interview with John Pritchard, publisher of the Galesburg Register-Mail.

139. See *supra* notes 97-99 and accompanying text.

140. Telephone interview, *supra* note 134.

different story, though."<sup>141</sup> Ed Jenison of the Paris Beacon News pointed out that marginal operations in particular could not afford prepayment, and many newspapers have been operating marginally because of the need for extensive investment in new technology for editing and printing. "That's made it attractive to sell to chains," he said.<sup>142</sup>

Indeed, the staggering cost of updating equipment at the Jacksonville Journal-Courier was the major reason that paper was sold to Thomson Newspapers in 1982. William L. and Robert Fay each owned thirty-five percent of the stock and the balance was split evenly between other members of their respective families. "Fifty-fifty ownership was kind of awkward, kind of a stalemate," William observed.<sup>143</sup> The Journal-Courier was printed on a letterpress. Introducing the newer offset technology would have required an investment of \$1.5 to \$2 million, according to William Fay. "We didn't have that kind of money, and you can't very well borrow it these days," he added. "We weren't very happy about selling it to a chain, but that is the only market you have anymore. We hated to give it up since we have had it in the family since before the Civil War. Estate taxes really didn't play a part in our decision to sell, though."

It may be that for every instance in which estate taxes were pivotal in adding to the roster of chain newspapers, another instance can be cited in which the owners simply could no longer afford to stay in business or they had no offspring willing or able to take control. A survey of former owners or their heirs might yield a more definitive conclusion. This survey of current owners, however, has indicated the scope of the problem. It is clear that no single solution exists. Loosening the qualifications that allow for payment of estate taxes in installments would probably not lead to a solution because almost all owners surveyed already qualify. Bringing corporations with a greater number of shareholders within the ambit of section 6166 would not be effective because the greater the number of shareholders, the less likely each will own a percentage significant enough to qualify for installment payments.

Changing the valuation method to produce a figure less than the fair market value would lessen the estate tax burden. Serious questions seem to exist, however, as to the feasibility of any such method. Moreover, it is not at all certain that changing the valuation method would do anything more than grant newspaper owners a "tax holiday" without effectively slowing the trend toward concentration of ownership.<sup>144</sup>

141. Telephone interview, *supra* note 100.

142. Telephone interview, *supra* note 119.

143. Telephone interview with William Fay, former principal owner of the Jacksonville Journal-Courier.

144. In testimony on the Independent Local Newspaper Act of 1981, a Treasury Department representative stated that special estate tax valuation for farmland under I.R.C. § 2032A has had no effect in preventing further concentration in ownership of farmland, according to an extensive General Accounting Office study. *Additional Issues, supra* note 70, at 434 (statement of David G. Glickman).

A method of prepayment of estate taxes seems preferable. By a two-to-one margin, the owners surveyed thought any such method should be applied across the board to all businesses and not just to newspapers. Although prepayment is attractive in theory, it may be less successful in practice. Many newspaper owners are not likely to set aside the millions of dollars necessary to pay estate taxes. The younger owners surveyed, who have the greatest opportunity to plan, were the least concerned with the impact of estate taxes. Especially if owners tend to wait until the estate tax burden appears imminent, it would seem that a system for prepayment of taxes would be largely underutilized and ineffective. As Merrill Lindsay noted, "Odds are you will put in too little rather than too much." A combination of partial prepayment and installment payments on the balance after death, however, might provide the margin necessary to keep an independent newspaper from becoming a group-owned paper.

If Durenberger's characterization of such prepayments as "reasonable business needs" were accepted, the accumulated assets of corporations would still be taxed, although the tax penalty would be nullified. Udall's trust method, with all of its deviations from general principles of the tax code, could have a profound effect on the national treasury, especially if it were applied to all businesses. In addition, setting aside vast sums for the sole purpose of paying a future tax diverts resources that might have been invested in the business and thus might have accrued more directly and immediately to the public good. Consideration, therefore, must be given to the wisdom of encouraging independent newspaper owners to do so. Any possible drawbacks to prepayment would have to be assessed carefully to determine if the disadvantages of chain ownership pose a still greater concern.

Newspaper owners are using a variety of methods now to deal with the estate tax problem and to avoid chain ownership. For example, the majority shareholders in the Litchfield News-Herald and the Du Quoin Call are trusts,<sup>145</sup> and Marajen Stevick Chinigo, sole owner of the Champaign-Urbana News-Gazette, plans to put her newspaper into a trust upon her death.<sup>146</sup> A few owners are relying on life insurance policies on the principal owners

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145. Telephone interview, *supra* note 100.

146. Letter from John C. Hirschfield, legal counsel to the Champaign-Urbana News-Gazette, to author (Dec. 1, 1982). Mr. Hirschfield wrote:

Mrs. [Marajen Stevick] Chinigo may well be in a better position than some of the other independent owners from an estate tax point of view, since she does not have any close family, and . . . the objects of her bounty are basically charitable. At her death, therefore, presuming she maintained an estate plan with primary beneficiaries being charities, she would have no estate tax impact whatsoever. I think it fair to say, therefore, that estate taxes have not been taken into account in Mrs. Chinigo's decision to maintain the independence of her newspaper and see its continuance long after her death. This is possible under the laws of the State of Illinois by implementing the proper type of trusts to carry on the newspaper's operation if Mrs. Chinigo maintains that belief up to and including the time of her death.

to get them past the estate tax hurdle;<sup>147</sup> others are planning far ahead by transferring small amounts of stock to younger members of the family on a yearly basis.<sup>148</sup> Almost all the owners are making crucial assumptions about the timing of their death. As LaSalle News Tribune publisher Peter Miller put it, "The first thing I have to do is live a few years so I get the lower estate tax rate."<sup>149</sup> As Litchfield News-Herald publisher John Hanafin, thirty-four, observed, "Most small newspaper owners, like most people, just do not plan on dying."<sup>150</sup>

The options discussed with independent newspaper owners all involved attempts to reduce the incentives to sell. That may be futile, however, as long as the prices for newspaper companies remain so high. If Dertouzos and Thorpe are correct, those prices will remain high as long as the tax code erects incentives to buy. Eliminating such incentives as favorable capital gains treatment, investment credits, and depreciation allowances, clearly would take a much more comprehensive and involved revision of the tax code than anything proposed thus far. Assuming that such a revision is unlikely, the other clear option would be to reduce the estate tax still further. This also appears improbable, given the existing political pressures to eliminate the cuts already legislated. A system of prepayment of estate taxes therefore seems to be the legislative option that offers the most realistic hope of stemming the trend toward chain ownership.

#### IV. WHAT THREE ILLINOIS PUBLISHERS HAVE DONE TO AVOID CHAIN OWNERSHIP

Ideally, legislation would remedy a dilemma for which legislation largely is responsible. Nevertheless, three Illinois publishers have forgone lobbying to take more direct methods of ensuring that their businesses do not fall into the hands of chains. Their various methods, open to any publisher, are admittedly drastic and thus are not likely to be emulated widely. Each case is offered only to show that the desire of independent newspaper owners to avoid group ownership is quite real and can lead them to take rather extreme measures.

For example, Henry P. Slane, president and majority owner of the Peoria Journal Star, considers chain ownership in general a "tragedy." Because he controls about fifty-eight percent of the corporate shares, he could prevent any sale to a chain during his lifetime, but he wanted to prevent any such sale after his death as well. The first step in his plan involved preventing the current minority owners from gaining a majority interest and voting control of the stock upon his death. "I can't think of anything worse than having the fourteen members of my immediate family and my first cousin's

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147. Telephone interview, *supra* note 104; telephone interview, *supra* note 121.

148. Telephone interview, *supra* note 120; telephone interview, *supra* note 122.

149. Telephone interview, *supra* note 121.

150. Telephone interview, *supra* note 100.

family locked in a struggle among themselves and ending up selling the paper for nothing to some idiot and splitting the money among them," Slane said. "I'm not suggesting there are such problems now, but these things tend to happen. I've seen at least ten cases where newspapers have been totally destroyed by in-fighting."<sup>151</sup>

Slane thought the people who could do the best job of running the paper, and those most likely to share his sentiments regarding chain ownership, were the employees of the newspaper. He decided, therefore, to allow the employees to purchase the controlling interest. Federal law enables companies to establish stock ownership plans for employees, the basis of which is a trust that will hold the company's stock for the employees' benefit.<sup>152</sup> Since the legislation was approved in 1974, only about five percent of the 5000 employee stock ownership plans that have been set up have involved controlling interests.<sup>153</sup> More commonly, only limited employee ownership is contemplated by the owner. That, in itself, makes Slane's plan unusual, but it is almost unheard of in the newspaper world.

Under the plan that Slane described as "very successful," employees of the Milwaukee Journal have been involved in the ownership of that newspaper since 1937 and have had a controlling interest since 1947.<sup>154</sup> No other sizable newspaper in the United States is run by its employees. Slane characterized as a "notable failure" the sale of the Kansas City Star to its employees in 1926. The employees sold their interest to the Capital Cities Communication chain in 1977.<sup>155</sup> "We think the primary problem with Kansas City was that the shares were an outright gift," Slane said. "We think you have to have some money up front to make it work."

A second Illinois publisher, who is also concerned about the willingness of heirs to sell to a chain, has established a secret contract with a single editor who will buy the paper. In a letter to the author of this article, that editor wrote that the publisher is

well aware that the heirs would have the newspaper on the block before [the publisher] was cold in the grave and would go through the money about as fast. Accordingly, I presented [the publisher] with a plan that would save the estate considerable cash and still guarantee the paper would remain in local hands. I am sure you are aware that control stock is valued much higher for estate tax purposes than minority stock. With this in mind, [the publisher] sold me sufficient stock to guarantee that I would have control of the newspaper on the consideration that I would dole out the purchase price monthly to the heirs over a 20-year period and not pre-pay it unless in my considered judgment their financial need was such that a lump sum payment was essential.

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151. Telephone interview, *supra* note 125.

152. 26 U.S.C. § 401 (1976).

153. Peoria Journal Star, July 18, 1983, at A-1, cols. 2-3.

154. *Id.* at A-3, col. 1.

155. Telephone interview with Linda Moon, assistant librarian at Kansas City Star & Times (Sept. 9, 1983).

A third Illinois publisher has an even more radical plan to keep his newspaper from becoming part of a chain. Herb Stevens, who owns the Paxton Daily Record together with his mother, favors some form of community ownership over group ownership or independent ownership by a single individual with capitalist designs.<sup>156</sup> Stevens explained:

I'm a major shareholder in Gannett and they ought to wear bandanas—they are all thieves. The small independent newspaper owner and chains are much the same, though, and the former in some ways is worse. Anybody who thinks independent newspaper owners are starting a brave new world is crazy. They just represent the other business interests, such as the banker, the grocer and the like.

The Daily Record has been in Stevens's family for 121 years, but he is not intent on maintaining the tradition. "It's not important to be able to pass the paper on within my family," he said. "Some form of community ownership is preferable. I'm not sure how to accomplish that; it may not be a possibility. I might turn it over to a left-wing labor organization."

#### V. CONCLUSION

Herb Stevens may be right when he observes that many independent owners are little, if any, better than group owners. Still, an overriding impression from interviewing this sample of independent owners is the diversity of opinions, attitudes, and concerns—a diversity that potentially is endangered as the number of independent newspapers dwindles. No two independent owners were alike. Several prided themselves on being "renegades" among publishers. Their only area of agreement was the idea that chain ownership, although acceptable in some cases, was wrong for their paper. Some of them saw no alternative to sale and grudgingly rationalized the prospect. Others took rather extreme measures to avoid the possibility. Most seemed to be hoping that the day would never come when the reins to their papers would pass to another—any other. This view, in itself, may be the biggest obstacle to attempts to save the independent newspaper as a species.

Too often owners may not have explored their options sufficiently or planned far enough ahead to avoid selling to a chain. If they do take steps to preclude chain ownership, however, it may be at considerable personal financial loss. Who is to say that these owners should put the fate of independent newspapers in this country ahead of the windfall that the estate tax system in essence has provided them and their families? The estate tax is structured undeniably, if unintentionally, in favor of concentration. It may be asking too much of most owners to take upon themselves the burden of resisting the temptation of such a windfall. Likewise, the chains themselves are not at fault because they are only responding to inducements within the tax code. Fault, if it must be assigned, can only be ascribed to an imper-

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156. Telephone interview with Herb Stevens, publisher and co-owner Paxton Daily Record.

sonal body of tax laws that may well have a greater impact on the nature of freedom of the press in this country than the volumes that have been written on the first amendment. While first amendment theory adopts as its premise the marketplace of ideas, and works toward that objective on a case-by-case basis, the tax code interposes substantial and pervasive impediments seemingly beyond constitutional scrutiny. The ideals of first amendment theory are imperiled as long as they are at cross purposes with life's only certainties: death and taxes.<sup>157</sup>

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157. "But in this world nothing can be said to be certain except death and taxes." Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 218 (3d ed. 1979).

## APPENDIX

GROUP OWNERSHIP OF DAILY NEWSPAPERS  
IN THE UNITED STATES\*

Group	No. of papers	Circulation			Total	Sun.	No. of papers
		A.M.	P.M.	A.D.			
Albion	2		7,252		7,252		
Allbritton	5	93,489	22,910		116,399		
American	8	19,182	23,874		43,056		
Alford	2	24,468	6,294		30,672	25,009	1
Anniston	2	11,492	31,577		43,069	31,965	1
Attaway	3	17,456	12,059		29,515	30,507	3
Barnes	7		38,875		38,875		
Belo	7	286,955	36,698		323,653	396,898	6
Biddle	2	7,413	11,919		19,332		
Bliss	3		51,997		51,997		
Block	4	180,772	230,304		411,076	293,445	3
Boone	9	20,933	65,440		86,373	88,305	8
Bryan	2	15,548			15,548	17,492	2
Buchheit	7	40,852	68,587		109,439	70,494	2
Buckner	6	35,144	38,428		73,572	7,856	1
Byrd	2	28,556	19,054		47,610		
Calkins	5	92,652	106,841		199,493	191,004	4
Cap Cities	9	395,805	532,294	51,916	980,015	744,838	4
Central	7	487,261	276,818		764,079	764,106	3
Chronicle	2	560,853			560,853	708,665	2
Clay	3	21,542	67,365		88,907	33,889	1
Conine	2	5,028	5,650		10,668		
Conland	2		19,769		19,769		
Copley	10	258,706	368,896		627,602	619,109	6
Cowles	10	604,451	371,091		975,542	1,360,958	7
Cox	18	641,164	554,824		1,195,988	1,239,869	11
Daughtry	4	19,749	5,174		24,923		
Dear	4	14,280	26,451		40,731	39,899	3
Delphos	2		6,753		6,753		
Dix	8		148,172		148,172	34,240	2
Donrey	39	94,355	371,544		465,899	452,423	33
Dow Jones	21	1,994,964	341,888		2,336,852	289,168	7
Drukker	2		86,178		86,178	72,720	2
Dwelle	2		8,956		8,956	5,670	1
Emmerich	2		20,266		20,266	20,445	2
Enterprise	3		10,158		10,158		
Evening News	5		51,710	629,598	681,308	829,240	1
Evening Post	5	69,062	33,421		102,483	100,700	1
Fackelman	3		17,195		17,195	5,490	1
Fargo Forum	2		16,541	58,048	74,589	62,111	1
Florida Pub.	3	150,658	56,437		207,095	195,912	1
Fournier	3	38,587			38,587	38,587	3
Freedom	31	92,894	458,515	235,909	787,318	703,227	18
Freeman	3	3,198	26,567		29,765	26,980	2
Gadsden	3		41,577		41,577	33,803	2
Galvin	6		42,710		42,710		
Guy Gannett	4	101,540	30,245		131,785	118,298	1
Grimes	3		19,545		19,545	6,660	1
Gannett	86	1,680,750	2,014,855	40,972	3,736,577	3,575,091	56



Group	No. of papers	Circulation			Total	Sun.	No. of papers
		A.M.	P.M.	A.D.			
Hagadone	6	58,290	91,833		150,123	62,114	2
Hammell	2		16,376		16,376	10,138	2
Harris	2		10,455		10,455		
J.P. Harris	9	19,658	87,627	44,090	151,375	137,935	5
Harte-Hanks	27	280,909	262,830		543,739	573,495	20
Hartman	2	4,508	53,670		58,178	56,845	1
Haskell	2		26,109		26,109	27,891	2
Hearst	15	496,298	832,303		1,328,601	586,379	9
Hederman	3	63,521	64,255		127,776	114,693	1
Home News	3		41,346		41,346		
Horvitz	5		188,141		188,141	85,538	2
Howard	15	108,330	201,977		310,307	211,785	7
Huckle	2	7,012			7,012		
Independent	4	26,165	49,949		76,114	51,638	1
Ingersoll	21	171,395	272,186		443,581	125,607	5
Jeff. Pilot	7	131,564	35,983		167,547	163,182	5
Johnson	2		58,858		58,858		
Carl Jones	3	4,169	29,973		34,142	28,569	1
John Jones	3		35,483		35,483	12,226	1
Joy	2		26,076		26,076	18,809	
Knight-Rider	34	2,423,622	1,051,191	308,257	3,783,070	4,320,004	22
Landmark	12	300,910	241,967		542,877	433,558	3
Kuser	4		34,488		34,488	13,294	1
Lavine	4		30,773		30,773		
Lee	19	292,991	224,268	64,308	581,567	581,615	11
Lehman	3		39,401		39,401		
Leshner	6	141,185	56,751		197,936	168,360	4
Lewis	2		13,229		13,229		
Livermore	2		13,455		13,455	13,455	2
Lorain	2	16,614	37,492		54,106	37,774	1
Lynett	3	9,140	62,888		72,028	48,409	1
McClatchy	5	424,869	39,417		464,286	489,669	4
McClelland	3	27,558	40,706		62,264	14,096	1
McCraken	6	32,796	11,649		44,445	27,737	2
McGiffin	4	12,800	19,023		31,823	12,800	1
McNaughton	4		55,908		55,908	16,209	1
Mayborn	2	25,977	14,224		40,201	44,487	2
Mead	3	37,056	50,427		87,483	93,833	2
Media Gen'l	6	395,167	175,982		571,149	541,453	3
Mendocino	2	8,778	6,497		15,275	8,778	1
Mid America	5		19,256		19,256		
Miller	4	31,638	28,124		59,762		
Moffitt			19,553		19,553		
Morris Coms	10	218,578	102,239		320,817	323,162	5
Morris News	7	6,629	44,983	12,207	63,819	32,794	3
Murdoch	3	79,901	75,340	639,604	794,845	181,921	1
Murphy	4	8,253	40,668		48,921	26,028	2
Multimedia	13	181,077	139,539		320,616	320,762	7
Mystic	3		15,931		15,931		
N.Y. Times	12	998,250	115,138		1,113,388	1,634,639	7
Newhouse	28	1,570,212	1,308,343	285,448	3,164,003	3,559,603	21
New England	4		62,734		62,734		
News-Observer	3	128,244	41,002		169,246	164,057	1
Nixon	9		64,028		64,028		

1984] *ESTATE TAXES ON INDEPENDENT NEWSPAPERS* 355

Group	No. of papers	Circulation			Total	Sun.	No. of papers
		A.M.	P.M.	A.D.			
Nowata	2		7,110		7,110	4,127	1
Opubco	3	210,519	82,868		293,387	322,008	2
Ogden	15	76,761	153,458		230,219	118,347	3
Palmer	8	125,584	15,536		141,120	149,930	2
Park	19		181,381		181,381	91,493	9
Patrick	2		33,384		33,384	9,805	1
Pioneer	17	7,200	135,231		142,431	86,900	6
Post	4		83,443		83,443	60,198	1
Press Ent	2	19,776			19,776		
Pulitzer	2	68,099	236,769		304,978	558,156	2
Red Wing	2		14,842		14,842		
Rowley	5	2,037	29,518	21,178	52,733	46,127	1
Rutland	2	21,633	12,519		34,152	30,505	2
Sandusky	6		44,863	42,000	86,863	71,143	2
Sault News	2		13,251		13,251		
Scaife	2	44,459	29,138		73,597	99,434	2
Schurz	8	19,085	197,687		216,772	178,475	3
Scripps Howard	15	699,510	799,415		1,498,925	1,441,582	6
J.P. Scripps	7		176,434		176,434	61,787	2
Scripps League	21	7,163	211,469		218,632	16,245	2
Seaton	7	3,176	51,428		54,604		
Shaw	5		41,943		41,943		
Shearman	3	39,261	13,489		52,750	53,759	2
Small	7		157,724		157,724	73,081	2
Smith	3	5,790	18,814		24,604		
Sowers	2		12,473		12,473		
Sparks	3	33,418	43,912		77,330	78,429	3
State-Record	4	130,749	67,454		198,203	187,162	3
Stauffer	18	27,817	149,345	83,914	261,076	113,969	3
Swift	3		50,384		50,384	41,179	2
Taylor	5		29,241		29,241	20,741	3
Taylor (D.S.)	2	73,134	35,803		108,937	77,143	1
Terry-Hawley	2	8,148	30,853		39,001	31,037	1
Thomson	75	74,511	1,092,907		1,167,418	671,829	32
Times Mirror	8	1,211,209	845,516	249,890	2,306,615	2,528,016	5
Tribune (Chi)	8	1,816,159	191,306	979,941	2,987,406	3,962,377	6
United	2		53,124		53,124	31,372	1
Walls	25	33,610	172,211		205,821	131,447	2
Wash. Post	3	584,500	128,298		712,798	898,245	2
Waters	2	3,699	17,872		21,571	20,245	2
Western Coms	3		29,093		29,093		
Western News	4		37,355		37,355	33,465	2
Western Pub	2	34,860			34,860	35,948	2
Wick	9	6,137	64,897		71,034	32,573	3
Winsor	3		19,981		19,981		
Witwer	2		12,648		12,648		
Woodson	4		32,444		32,444	35,290	4
Worrell	23	56,570	231,215		287,945	172,061	8
Worcester	4	55,954	98,365		154,319	108,555	1
Yellowstone	2		7,974		7,974		
<b>Totals</b>	<b>1,136</b>	<b>22,354,351</b>	<b>19,687,293</b>	<b>3,747,280</b>	<b>45,781,724</b>	<b>41,262,609</b>	<b>514</b>
<b>All U.S. dailies</b>		<b>29,414,036</b>	<b>32,787,804</b>		<b>62,201,840</b>	<b>54,676,173</b>	

\*EDITOR AND PUBLISHER, Oct. 3, 1981, at 13-14.

