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# ANTI-TRUST LAWS AND PUBLIC CALLINGS: THE ASSOCIATED PRESS CASE

BENJAMIN F. SMALL\*

## I. INTRODUCTION

In the years following the renaissance of the law of public callings in this country beginning in 1876, and in the years following the passage of the Sherman Anti-Trust Act in 1890,<sup>1</sup> the two approaches to over-sized combinations and monopolies have begun to run along progressively convergent lines until now their opposition to each other in theory is often obscured by general language which is thought to apply to both equally as well. While both the Sherman Act and the new public calling law have a common background in the late nineteenth-century hue-and-cry for curtailment of business abuses which culminated in the Granger movement, their theories are diametrically opposed, as will be shown later.

After a period of relative disuse in this country, the law of public callings was brought into active use in the now monumental case of *Munn v. Illinois*.<sup>2</sup> Under the compulsion of the Grangers, the state of Illinois had incorporated into its constitution the provision that all grain elevators were public warehouses.<sup>3</sup> The legislature, acting under the new provision, then prescribed certain maximum rates to be charged by operators, provided for publication of rates in advance, and required a license for all those carrying on that business.<sup>4</sup> Upon a violation by defendants Munn and Scott, an appeal was taken to the United States Supreme Court; and the conviction was upheld, the court saying that the grain business had become so impressed with a public interest that it was not a violation of Due Process to regulate it as a public calling.

Although some portion of the old law of public callings had been sporadically employed in this country prior to *Munn v. Illinois*, it heralded the real beginning in the United States of any substantial control over "businesses affected with a public interest."<sup>5</sup>

While this new, and yet old, form of control was gaining impetus, the still persistent Grangers were not satisfied. Therefore, in 1890, the

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<sup>1</sup> 26 STAT. 209 (1890), 15 U. S. C. A. §1 (1941).

<sup>2</sup> 94 U. S. 113 (1876).

<sup>3</sup> ILL. CONST. (1870) Art. XIII, §1.

<sup>4</sup> ILL. LAWS 1872, 762, §§3, 15.

<sup>5</sup> WILLIS, CONSTITUTIONAL LAW (1936) 762.

Sherman Anti-Trust Act was entered on the statute books.<sup>6</sup> After a few years of successful "trust busting" under that form of remedy, the Supreme Court in 1934, again rejuvenated the ever-increasing scope of the public calling remedy when it decided the celebrated case of *Nebbia v. New York*,<sup>7</sup> enlarging the public calling remedy without enlarging the number of public callings. It admitted that the milk business was not within the scope of a conventional public calling,<sup>8</sup> but that, nevertheless, it was subject to regulation under the police power because an adequate milk supply in those emergency times required certain minimum prices. Then the court, growing bolder, quoted from *Munn v. Illinois*,<sup>9</sup> "Property has become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." This means, the court announced in the *Nebbia* case, that "... 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power.' ..."<sup>10</sup> Thus, the court reached the almost anomalous conclusion that the finding of a social interest, such as to warrant the use of the police power, is equivalent to the finding of a business affected with a public interest, and that such a finding is sufficient basis upon which to impose public calling duties even though it be already conceded that the milk business is not a public calling. This result had been hinted at several times before by the court,<sup>11</sup> but only in the *Nebbia* case did its position become clear.

With the assumption of that position in 1934, there has appeared an increasing amount of confusion in the lower federal courts, and in the Supreme Court itself in distinguishing between the combined public calling and police power method or remedy on the one hand, and the anti-trust remedies on the other. The culmination of the confusion appears in the recent case of *United States v. Associated Press*,<sup>12</sup> to be discussed in greater detail later.

It is to be hoped that when this case comes before the Supreme

<sup>6</sup> *Supra*, note 1.

<sup>7</sup> 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934); Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 Col. L. REV. 401; F. E. Horack and Cohen, *After the Nebbia Case: The Administration of Price Regulation* (1934) 8 U. OF CIN. L. REV. 219; Comment (1934) 8 TUL. L. REV. 442.

<sup>8</sup> *Id.* at 531, 54 Sup. Ct. at 513, 78 L. ed. at 954. "We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. . . . there is in this case, no suggestion of any monopoly or monopolistic practice."

<sup>9</sup> *Supra* note 2, at 126.

<sup>10</sup> *Supra* note 7, at 533.

<sup>11</sup> *Stephenson v. Binford*, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. ed. 288 (1932); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U. S. 251, 51 Sup. Ct. 130, 75 L. ed. 324 (1931); *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 50 Sup. Ct. 220, 74 L. ed. 524 (1930).

<sup>12</sup> 52 F. Supp. 362 (S. D. N. Y. 1943). This case is noted in 44 Col. L. REV. 256, 32 GEO. L. J. 102, 38 ILL. L. J. 221, and 92 U. OF PA. L. REV. 209.

Court, some of the mist enveloping these two remedies will be cleared. It is the purpose of this article to endeavor to point out their divergencies rather than their convergencies. In order to do that, it is necessary to consider the early common law development of public callings, and the common law of contracts and combinations in restraint of trade before the Sherman Act.

## II. PUBLIC CALLINGS

In medieval England, after the dangers of exclusions and unreasonable charges by tradesmen began to be menacing, the courts, when called upon to adjudicate a controversy involving such exclusions or overcharges, placed great emphasis on a mysterious distinction between private and public callings. If public, the law imposed on the promoter certain restrictions and obligations; *e.g.*, to perform satisfactorily a service once started; and to serve all who applied.<sup>13</sup>

This embryonic public utility regulation was imposed on all those who held themselves out as servants of the public in a field where the public needed protection. The existing law was thought to be sufficient protection against the ordinary laborer whose services were readily accessible; but, as against the men and groups of men engaged in the callings upon which the public's very existence depended, extraordinary protection was thought necessary to insure adequate public service.

Some conception can be gotten of the historical importance of the distinction from the famous *Anonymous* case in 1441,<sup>14</sup> involving a veterinary surgeon who allegedly allowed plaintiff's horse to die because of his negligent treatment of the animal. Paston, J., pointed out very carefully that unless plaintiff proved defendant was a *common* surgeon, mere negligence in caring for the horse was not actionable without a special *assumpsit*.

The more recent delictual and contractual remedies, slow in development, proved to be too slight a protection against those engaged in the fields of *public* enterprise, holding themselves out as *common* servants. As a part of the struggle for food, clothing and shelter came the policy of making that struggle easier, so the victualler,<sup>15</sup> the baker,<sup>16</sup> the

<sup>13</sup> WILLIS, *CONSTITUTIONAL LAW* (1936) 760; Burdick, *The Origin of the Peculiar Duties of Public Service Companies* (1911) 11 *COL. L. REV.* 514, 515, Arterburn, *The Origin and First Test of Public Callings* (1927) 75 *U. OF PA. L. REV.* 411.

<sup>14</sup> Y. B. 19 Hen. VI, f. 49, pl. 5.

<sup>15</sup> Anon., Y. B. 10 Hen. VII, f. 8, pl. 14 (1495); Anon., Y. B. 39 Hen. VI, f. 18, pl. 24 (1460).

<sup>16</sup> *Wilton v. Hardingham*, Hob. 129, 80 Eng. Rep. 278 (1617); 1 WYMAN, *PUB. SERV. CORP'S* (1911) 10: As late as 1841, some states in this country were still in accord. *Mayor & Aldermen of Mobile v. Yuille*, 3 Ala. 137 (1841).

mill<sup>17</sup>, the tailor,<sup>18</sup> and the innkeeper<sup>19</sup> were placed under the ever-increasing watchfulness of the judicial eye.

From the earliest dawn of English civilization, the innkeeper has stood as one of those most prominent in the so-called "public" field. No innkeeper could refuse admittance so long as he had rooms available,<sup>20</sup> and it is not at all difficult to comprehend the necessity for such regulation. A refusal to admit in the fifteenth century might mean death to the applicant at the hands of roving bandits; it most surely meant robbery at those same not-too-gentle hands.

Closely allied with the struggle for survival came the regulation of certain other fields which made up a part of that struggle. Surgeons enjoyed a monopoly in their indispensable profession. Therefore, it was felt that they should be subjected to the same regulation as one who held himself out as furnishing food, clothing or lodging. Indeed it might be said that medical attention was added to the list of necessities. At any rate, surgeons were small in number and because of their importance, their calling was classified as being public, whether they were in the habit of serving man or animal.<sup>21</sup>

A monopoly similar to that of surgeons was enjoyed by blacksmiths, whose importance was almost equally as great. Failure to attend a horse at the crucial moment might mean permanent disablement. In view of the tremendous necessity for horses in Plantagenet England, the same superior regulatory power exercised over the others was felt necessary to guarantee adequate attention to horses, so a heavy obligation was imposed on the smiths even without an *assumpsit*.<sup>22</sup> Likewise, it was held that an innkeeper was under duty to furnish attention to his guest's horses.<sup>23</sup>

As the struggle for survival became less primitive, other businesses enjoying a monopoly began to achieve such menacing proportions that regulation was felt to be necessary for them. The common carrier

<sup>17</sup> *Kemp v. Gord*, Style 421, 82 Eng. Rep. 829 (1645); *Hix v. Gardner*, 2 Bulst. 195, 80 Eng. Rep. 1062 (1614).

<sup>18</sup> *Anon.*, Y. B. 22 Edw. IV, f. 49, pl. 15 (1483) holding the tailor to a duty to serve, and giving him the right to keep the article until paid for his services.

<sup>19</sup> *Infra*, note 20.

<sup>20</sup> *Anon.*, Godb. 345, 78 Eng. Rep. 203 (1624); *Rex v. Collins*, Palm. 373, 81 Eng. Rep. 1130 (1624); *Anon.*, Godb. 42, 78 Eng. Rep. 26 (1586); *Anon.*, Y. B. 14 Hen. VII, f. 22, pl. 4 (1499); *Anon.*, Y. B. 10 Hen. VII, f. 8, pl. 14 (1495); *Anon.*, Y. B. 22 Hen. VI, f. 21, pl. 38 (1444); *Anon.*, Y. B. 11 Hen. IV, f. 45, pl. 18 (1409).

<sup>21</sup> *Anon.*, Y. B. 11 Edw. IV, f. 6, pl. 10 (1472); *Anon.*, Y. B. 9 Edw. IV, f. 32, pl. 4 (1470); *Anon.*, Y. B. 3 Hen. VI, f. 36, pl. 33 (1425); *Anon.*, Y. B. 43 Edw. III, f. 6, pl. 11 (1369).

<sup>22</sup> *Anon.*, Keil. f. 50, pl. 4, 72 Eng. Rep. 208 (1504).

<sup>23</sup> 17 HALSBURY, LAWS OF ENGLAND (1911) 307, citing cases. So important was a horse in 1704, that the court in one case held that one who had left his horse at an inn became himself a guest even though he himself had never entered the inn. *York v. Grindstone*, 1 Saulk. 338, 91 Eng. Rep. 337 (1704).

became one engaged in a public calling at a very early date,<sup>24</sup> and along with the carrier of course, came the ferryman.<sup>25</sup> After inclusion of land and water carriers, the next logical inclusion was the warehouseman and wharfinger.<sup>26</sup> Even though carriage was assured, no advantage was to be gained if warehousemen and wharfingers could arbitrarily refuse the goods after carriage, or charge preclusive rates. Hence, at an early date, it was felt that "... the duties [charges for crantage, wharfage, etc.] must be reasonable and moderate, for now the wharf and crane and other conveniences are affected with a public interest. . . ." <sup>27</sup> This often quoted observation of Lord Hale served to clarify the ambiguities of some of the earlier cases. Now it became clear that one engaged in a public calling must not only stand ready to serve all, but he must also do so at a reasonable charge.

Such was the state of the very early common law of public callings, the roots out of which grew the later body of law known as public utility law. It was a necessary state; necessary because life and business welfare depended upon it for protection. Those who held themselves out as servants of the public in the afore-mentioned fields had a virtual or absolute monopoly without any great amount of competition to safeguard the rights of the public. If one innkeeper or carrier refused service, or charged unreasonable rates, the applicant could not turn to another in the same field. He had to meet the conditions and the charges asked of him or do without the services he so badly needed. The resulting abuses and injustices were inevitable. Thus it became quite urgent that all those having a virtual monopoly over an indispensable service be brought within the bounds of some sort of regulatory device. Although many other enterprises were embraced within this regulatory scope later,<sup>28</sup> such inclusions were all on the basis of what the courts in these foregoing cases had announced as the fundamental guides. In the later inclusions, one can see only a repetition, and until the *Nebbia* case, only an occasional slight extension of the principles announced centuries before.

<sup>24</sup> *Jackson v. Rogers*, 2 Show. 327, 89 Eng. Rep. 968 (1683) holding that a carrier from London to Lymington could not refuse plaintiff's shipment of goods so long as space was available. The court likened the carrier to an innkeeper or smith. See also *Morse v. Slue*, 1 Vent. 190, 86 Eng. Rep. 129 (1672); *Nicholls v. More*, 1 Sid. 36, 82 Eng. Rep. 954 (1662); *Kenrig v. Eggleston*, Al. 93, 82 Eng. Rep. 932 (1649) ("And it was agreed by the counsel, and given in charge to the jury, that if a box with money in it be delivered to a carrier, he is bound to answer for it if he be robbed, although it was not told him what was in it."); *Rich v. Kneeland*, Hob. 17, 80 Eng. Rep. 168 (1614).

<sup>25</sup> *Anon.*, Y. B. 22 Lib. Ass. f. 94, pl. 41 (1348). See also *HALE, DE JURE MARIS*, 1 HARG., LAW TRACTS (1787) 6.

<sup>26</sup> *Allnutt v. Inglis*, 12 East. 527, 104 Eng. Rep. 206 (1810).

<sup>27</sup> *HALE, DE PORTIBUS MARIS*, 1 HARG., LAW TRACTS (1787) 78.

<sup>28</sup> For a more complete list of the early public callings, see *Adler, Business Jurisprudence* (1914) 28 HARV. L. REV. 135. For a detailed and accurate account of later developments, see 1 WYMAN, PUB. SERV. CORP'S (1911) chs. II-VI.

### III. CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE AT COMMON LAW

Since the Sherman Act was designed to redefine the common law and apply it to the more complex contracts, combinations and monopolies in restraint of late nineteenth-century trade,<sup>29</sup> it is essential to summarize briefly the common law on the same subject.

In the years immediately following the Great Plague, or Black Death, which struck England in 1348, the death rate was phenomenal. It has been estimated to have been from one-fifth to nine-tenths of the total population.<sup>30</sup> It is fairly certain that nearly half the population succumbed. The labor problem was desperately serious. Legislation was promptly enacted corresponding to the modern oft-discussed "labor draft." Employment was forced on those who did not care to work, and the terms of such employment were frozen; wages were fixed.<sup>31</sup> Yet with all these measures taken to combat the loss of labor, the situation remained quite critical until well into the next century. Therefore, it is not surprising that in 1415, an ancillary covenant on the part of a dyer not to use his art within a certain town for six months was held void.<sup>32</sup>

The court made no concessions for reasonableness; but denounced the practice of restrictive covenants vigorously, saying if defendant were there, "he should go to prison till he paid a fine to the king." So enthusiastic was the court that it prefixed this statement with an explosive "*per Dieu*" which needs no translation to reflect the policy of the judiciary at that time toward restrictive covenants generally. In addition to the great labor shortage resulting from the plague, the guilds acted as agents of further complication by extending the scope of their exclusive practices. A man trained to practice one art or trade was confined to that alone; it was all he was fitted or allowed to do. If he were permitted by contract, to exclude himself from that field, there would be no other art or trade open to him. At a time when labor was so desperately needed, the court's position of intolerance can well be understood. "In the formative period when a man could change occupations only with difficulty and when, if he changed towns, he was pointed at suspiciously by the new-village dames and sniffed at suspiciously by the new-village dogs, there was a decided policy against

<sup>29</sup> *Infra*, note 51.

<sup>30</sup> COL. UNIV. STUD. IN HIST. ECON. AND PUB. LAW (1908) 1; Holdsworth's estimate was nearly one-half. 2 HOLDSWORTH, HIST. OF ENG. LAW (1909) 383. See Arterburn, *The Origin and First Test of Public Callings* (1927) 75 U. OF PA. L. REV. 411, 421.

<sup>31</sup> STATUTE OF LABOURERS, 25 Edw. III, Stat. 1 (1351). See note in HANDLER, CASES ON TRADE REGULATION (1937) 102.

<sup>32</sup> Anon., "Dyer's Case," Y. B. 2 Hen. V, f. 5, pl. 26 (1415). *Accord*, Anon., Moore (K. B.) 115, 72 Eng. Rep. 477 (1578); *The Blacksmith's Case*, 3 Leo. 217, 74 Eng. Rep. 643 (1587).

upholding a covenant . . . not to engage in his accustomed business in his home town even if he was paid something for it.”<sup>33</sup> However, by 1711, the gild monopoly had declined greatly in strength, and England having recuperated from the plague, the court in *Mitchell v. Reynolds*<sup>34</sup> held a similar covenant to be permissible, upon the finding that it was partial and reasonable. Thus began the ever-troublesome “rule of reason” which still confounds students of anti-trust legislation.

The Industrial Revolution and *laissez-faire* philosophies of Adam Smith had made themselves felt by 1837, when the case of *Hitchcock v. Coker*<sup>35</sup> came before the Exchequer Chamber for adjudication. The court there followed, at least in word, the *Mitchell v. Reynolds* requirement of reasonableness; but seemed to slight the importance of the effect on the public in favor of consideration. The court said the covenant should not be broader than the interests of the parties required, but seemed to over-emphasize the matter of consideration in testing the interest. By 1904, *laissez faire's* rampant predominance is reflected in the English case of *Lamson Pneumatic Tube Co. v. Phillips*,<sup>36</sup> in which the court upheld as reasonable a restrictive covenant covering the entire eastern hemisphere of the world. Finally in 1933, the Supreme Court of Wisconsin, in *Milwaukee Linen Supply Co. v. Ring*,<sup>37</sup> feeling it necessary in the interests of common sense and plain decency to dispel all possible doubt on the question, returned with great force to the *Mitchell v. Reynolds* test of reasonableness as measured by the effect on the public generally. Of course, neither of these latter two cases can act as Sherman Act precedent since they were decided after the passage of that Act. The real common law on the subject springs from *Mitchell v. Reynolds*.

In analyzing that precedent, certain principles can be gleaned in regard to ancillary contracts in restraint of trade at common law. It seems that after the menacing labor crisis was relieved in England, these contracts were upheld if consideration had been given, if partial

<sup>33</sup> Breckenridge, *Restraint of Trade in North Carolina* (1929) 7 N. C. L. REV. 249. This is a comprehensive treatment not only of restraint of trade in North Carolina, as the title indicates, but also on the early English and American development of the concept “restraint of trade” and its somewhat confusing connotations.

<sup>34</sup> 1 P. Wms. 181, 24 Eng. Rep. 347 (1711). This case, *Dyer's Case*, and other early cases are treated fully in SANDERSON, *RESTRAINT OF TRADE IN ENGLISH LAW* (1926) pp. 7-25. See also KALES, *CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE* (1918) pp. 1-20; Eaton, *On Contracts in Restraint of Trade* (1890) 4 HARV. L. REV. 128.

<sup>35</sup> 6 A. & E. 438, 112 Eng. Rep. 167 (1837).

<sup>36</sup> 91 L. T. 363 (1904).

<sup>37</sup> 210 Wis. 467, 246 N. W. 567 (1933). *Accord*, *Swigert v. Tilden*, 121 Iowa 650, 97 N. W. 82 (1903); *Granger v. Craven*, 159 Minn. 296, 199 N. W. 10 (1924); *Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 212 (1896); *Horner v. Graves*, 7 Bing. 735, 131 Eng. Rep. 284 (1831). See Carpenter, *Validity of Contracts not to Compete* (1928) 76 U. OF PA. L. REV. 244.



as to time and space, not broader than the interests of the parties required, and if the effect on the public was not prejudicial—in short, if they were reasonable.

Although such agreements which are not ancillary to another valid contract are rarely upheld in the cases,<sup>38</sup> those courts which have sanctioned them seem likewise, to use the test of reasonableness as decisive.<sup>39</sup>

The common law of combinations in restraint of trade follows the same pattern. In 1758, a combination in the field of a necessity, salt, was held void *ipso facto* without any consideration as to reasonableness;<sup>40</sup> but in 1871, the Ontario court considered the effect on the public and the reasonableness of the plan, and upheld a combination dealing in salt.<sup>41</sup> The Illinois Supreme Court in 1875, reached an opposite result in the case of a grain monopoly,<sup>42</sup> but did consider the reasonableness of the plan and the effect on the public.

Thus, before the passage of the Sherman Act, even combinations dealing in necessities were upheld if they were fortunate enough to escape the label "unreasonable."

#### IV. ANTI-TRUST LEGISLATION

In colonial United States, the size of industrial enterprise was so inconsequential that *laissez-faire* philosophies were not at first dangerous to public welfare. The struggle of the colonies was one for livelihood and not for industrial monopoly. The Industrial Revolution did not strike America with full force until about 1840. By that time the west had been rediscovered; the steamboat and the locomotive were carrying families and supplies to places unknown a few years before. The wheels of American industry were forged and were slowly beginning to move. Under the stimulus of the Civil War and the great immigration to this country, both before and after the war, those wheels began to grind out a song of industrial empire.

Under Chief Justice Marshall's interpretation of the Contract Clause of the United States Constitution<sup>43</sup> in the *Dartmouth College* case,<sup>44</sup> and under the perpetuation by Supreme Court Justices Field, Fuller,

<sup>38</sup> *Shute v. Shute*, 176 N. C. 462, 97 S. E. 392 (1918); *Durbrow Commission Co. v. Donner*, 201 Wis. 175, 229 N. W. 635 (1930); *Vancouver Malt & Sake Brewing Co. v. Vancouver Breweries*, A. C. 181 (1934). See 3 WILLISTON, CONTRACTS (1920) §1636.

<sup>39</sup> *Robey v. Plain City Theater Co.*, 126 Ohio St. 473, 186 N. E. 1 (1933); *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 (1899); *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363 (1888); NOTES (1933) 47 HARV. L. REV. 140, (1934) 32 MICH. L. REV. 423.

<sup>40</sup> *King v. Norris*, 2 Ken. 300, 96 Eng. Rep. 1189 (1758).

<sup>41</sup> *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant's Ch. Rep. 540 (1871).

<sup>42</sup> *Craft v. McConoughy*, 79 Ill. 346 (1875).

<sup>43</sup> U. S. CONST. Art. I, §10.

<sup>44</sup> *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819).

and Peckham of a free policy toward business, the abuses of a growing industrialism seemed to be sanctioned by the judiciary. *Laissez faire* became more than a doctrine of the commercial world; it was a religion implicitly followed.<sup>45</sup>

Vast industrial enterprises were being combined with resultant strangulation to small competitors. The so-called trust system was in full flower. Railroad discriminations in the form of rebates, drawbacks, etc. were unbearable. The common law public calling remedy was questioned as inadequate. Under the steady insistence of the Grangers, legislative action was at length taken.<sup>46</sup>

Although the railroads were not the only interests abusing their privileges under *laissez faire*, the bitterness of the Grangers was focused largely upon them, and it was felt that if the railroads could be brought under a more powerful control than the public calling remedy offered, the other industrial evils might be remedied since they were indirectly related to and dependent upon the railroad discriminations. With that purpose in mind, and with a hesitancy to adopt what they thought was a new and dangerous policy of over-all business regulation, the Grangers were temporarily satisfied with the passage of the Interstate Commerce Act in 1887.<sup>47</sup> The Act created nothing new; it was considered merely as an extended application of the old public calling law to interstate carriers, and one in which the federal courts were given a more direct jurisdiction. However, the move to curb unfair competitive practices having once been started, the next move was not difficult. The famous Sherman Anti-Trust Act was passed in 1890.<sup>48</sup> It was followed some years later by the Federal Trade Commission Act,<sup>49</sup> the Clayton Act<sup>50</sup> and other minor acts and amendments.

Since 1890 the Supreme Court has led itself along a tangled path of construction. Senator Sherman had said in a floor speech in the Senate on March 21, 1890<sup>51</sup> concerning the purpose of his bill, that he did not intend a new proposal; that he was simply codifying the common law and giving the federal courts jurisdiction to hear anti-trust cases. He stated that the bill was aimed only at unlawful combinations, and was not intended to affect combinations in aid of production and

<sup>45</sup> For reading material on this phenomenal growth, see references cited in HANDLER, *CASES ON TRADE REGULATION* (1937) 208, 209, notes 7 and 8.

<sup>46</sup> For a detailed discussion of the work of the Grangers during this period, see BUCK, *THE GRANGER MOVEMENT* (1913).

<sup>47</sup> 24 STAT. 379 (1887), 49 U. S. C. A. §1 (1929).

<sup>48</sup> *Supra*, note 1.

<sup>49</sup> 38 STAT. 717 (1914), 15 U. S. C. A. §41 (1941).

<sup>50</sup> 38 STAT. 730 (1914), 15 U. S. C. A. §12 (1941).

<sup>51</sup> 21 CONG. REC. 2456, 2457. "It does not announce a new principle of law, but applies old and well-recognized principles of our common law to the complicated jurisdiction of our State and Federal government." 21 CONG. REC. 2456. Senator Sherman's speeches in the March twenty-first floor discussions are set out at greater length in HANDLER, *CASES ON TRADE REGULATION* (1937) pp. 212-217.

not interfering with free competition. Yet, despite that, the court in *United States v. Trans-Missouri Freight Ass'n*,<sup>52</sup> the first prosecution of a public utility under the Sherman Act,<sup>53</sup> pointed to the literal wording of the act, saying "Every contract, combination, . . . or conspiracy . . ." meant exactly what its words indicated—*every* one, and was not confined to the unreasonable ones. This position was reaffirmed the next year in *United States v. Joint Traffic Ass'n*.<sup>54</sup> Then in 1911, the rebirth of the common law "rule of reason" was witnessed in *Standard Oil Co. of N. J. v. United States*<sup>55</sup> and *United States v. American Tobacco Co.*,<sup>56</sup> both holding that the Act was intended to outlaw only those contracts, combinations, and conspiracies which were in *unreasonable* restraint of trade.<sup>57</sup> In the years preceding these two decisions, there was some agitation to expressly include the word unreasonable in the Sherman Act by amendment. It is interesting to note President Taft's reaction to this movement. In a message read to the House of Representatives on January 7, 1910, he stated: "I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the court a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."<sup>58</sup>

However, despite these objections addressed to Congress by the President, the court itself, by pure fiat assumed the burden for which they had "no precedent to enable them to carry," and continued to carry it until a new dilemma was added in the 1927 case of *United States v. Trenton Potteries Co.*,<sup>59</sup> holding that despite the rule of reason test

<sup>52</sup> 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007 (1897).

<sup>53</sup> This case was only the second tried under the Sherman Act, the first being *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. ed. 325 (1895). Hadley, *Public Utilities and the Anti-Trust Law* (1930) 10 BOSTON U. L. REV. 351.

<sup>54</sup> 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259 (1898).

<sup>55</sup> 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619 (1911).

<sup>56</sup> 221 U. S. 106, 31 Sup. Ct. 632, 55 L. ed. 663 (1911).

<sup>57</sup> Raymond, *The Standard Oil and Tobacco Cases* (1911) 25 HARV. L. REV. 31; Wilgus, *The Standard Oil Decision; the Rule of Reason* (1911) 9 MICH. L. REV. 643; Evans, *The Standard Oil and American Tobacco Cases* (1912) 60 U. OF PA. L. REV. 311.

<sup>58</sup> 45 CONG. REC. 382 (1910). In the same message, President Taft recommended federal incorporation and supervision as a remedy against the abuses of business. This has often been suggested; see SAEGER AND GULICK, *TRUST AND CORPORATION PROBLEMS* (1929) ch. XXVII, suggesting that many of the evil practices of public service companies could be remedied by legislation requiring federal incorporation for such companies operating in interstate commerce and being capitalized at \$10,000 or more, such incorporation being dependent upon the fulfillment of numerous conditions by the company.

<sup>59</sup> 273 U. S. 392, 47 Sup. Ct. 377, 71 L. ed. 700 (1927). See Jaffe and Tobriner, *The Legality of Price Fixing Agreements* (1932) 45 HARV. L. REV. 1164; NOTE (1927) 11 MARQ. L. REV. 163.

employed by the common law and reincarnated in the *Standard Oil* and *Tobacco* cases, the use of price-fixing devices in conjunction with an otherwise reasonable plan made it *ipso facto* illegal. This decision was difficult to reconcile with the common law and with the Supreme Court's earlier position, but in *Appalachian Coals, Inc. v. United States*<sup>60</sup> and again in *Sugar Institute, Inc. v. United States*,<sup>61</sup> the court attempted an escape from the *Trenton Potteries* case. In that case (*Trenton Potteries*) a direct price-fixing device was employed, and the court had said that it was illegal *per se*. In the *Appalachian Coals* and *Sugar Institute* cases, prices were to be affected only indirectly; thus, the court felt at liberty to disregard its rule as enunciated in *Trenton Potteries*, and apply the "rule of reason," taking into consideration the economic necessity for the measure and its prospective effect on the public.

Then in 1939 the much discussed case of *United States v. Sacony-Vacuum Oil Co.*<sup>62</sup> served to further vex those students of the law who take pride in logical and harmonious classification. The *Sacony-Vacuum* case seems to defy classification. The facts were much similar to those in the *Appalachian Coals* case; indeed, the amount of "distress" gasoline and competitive warfare apparent in the evidence in the *Sacony-Vacuum* case presented a much more serious problem than the distress coal in the *Appalachian Coals* case. The interest of the public did not seem seriously jeopardized in either case; yet the court had apparently changed its position with regard to indirect price-fixing. Instead of applying the rule of the *Appalachian Coals* case, it returned to the language of the *Trenton Potteries* case and extended it to mean *any* price-fixing, whether direct or indirect. In the words of the court, *per* Mr. Justice Douglas, "Any combination which tampers with price structures is engaged in an unlawful activity."<sup>63</sup>

To show that it still intended to follow the *Standard Oil* and *American Tobacco* cases insofar as no price-fixing was involved, the court

<sup>60</sup> 288 U. S. 344, 53 Sup. Ct. 471, 77 L. ed. 825 (1933); Comment (1933) 27 ILL. L. REV. 671; NOTE (1933) 31 MICH. L. REV. 837; NOTE (1933) 81 U. OF PA. L. REV. 1006.

<sup>61</sup> 297 U. S. 553, 56 Sup. Ct. 629, 80 L. ed. 859 (1936); Handler, *The Sugar Institute Case and the Present State of the Anti-Trust Laws* (1936) 36 COL. L. REV. 1 (commenting on the decision in the district court); Mermin, *Sugar: A Rugged Collectivist* (1936) 31 ILL. L. REV. 320; Donovan, *The Effect of the Decision in the Sugar Institute Case Upon Trade Association Activities* (1936) 84 U. OF PA. L. REV. 929; Fly, *The Sugar Institute Decisions and the Anti-Trust Laws* (1936) 46 YALE L. J. 228; NOTES (1936) 31 ILL. L. REV. 118, (1936) 34 MICH. L. REV. 1016.

<sup>62</sup> 310 U. S. 150, 60 Sup. Ct. 811, 84 L. ed. 1129 (1940); Peppin, *Price Fixing Agreements Under the Sherman Anti-Trust Law* (1940) 28 ILL. L. REV. 297; Comment (1940) 49 YALE L. J. 261; NOTES (1940) 34 ILL. L. REV. 619, (1941) 16 IND. L. J. 421.

<sup>63</sup> (*Italics ours.*) 310 U. S. 150 at 221, 60 Sup. Ct. 811 at 843, 84 L. ed. 1129 at 1167 (1940).

recently decided the case of *American Medical Ass'n v. United States*<sup>64</sup> on the basis of the unreasonableness found in the practices of the association. Similarly, *United States v. Associated Press*<sup>65</sup> was decided in the district court largely upon that basis.

### V. PROSPECTUS

After summing up the common law of public callings, and contracts and combinations in restraint of trade, and trying to unfathom part of the anti-trust maze, the future holds slight promise unless some rational scheme can be formulated for the disposition of future cases. Any of three alternatives might be suggested:

(1) Extend public calling regulation to all businesses in which the public has any substantial interest, disregarding the requirements of (a) a virtual monopoly over (b) an indispensable service. This was the alternative adopted in the *Nebbia* case.

(2) Extend the application of the Sherman Act and related legislation.

(3) Combine both (1) and (2) under a single heading.

The recent *Associated Press* case presents an interesting question on these matters, but offers no very satisfactory solution. For years Associated Press, hereinafter called AP, had enjoyed a comfortable exclusiveness gained partially through its by-laws which required, among others things, that before an applicant could be granted admission, he had to first make payments of money to his competitors in the same locality and time fields, and secure a majority vote of approval of the membership. These by-laws also forbade any member's transmitting news to non-members.<sup>66</sup>

AP had, in 1941, also bought all shares in Wide World Photos, Inc., and discontinued its service to non-members of AP, with only one exception. This formed the basis of a claim of violation of section 7 of the Clayton Act, which claim, however, was considered ill-founded by the court since competition was not substantially lessened under that Act.<sup>67</sup> Another claimed violation of the Sherman and Clayton Acts was an agreement between AP and a similar Canadian organization providing for exclusive exchanges of news services.

The court found defendant within the Sherman Act and held that an injunction should issue against any conditions to admission being imposed or dispensed with by members competing within the same "field" as the applicant, ordered non-enforcement of the provisions

<sup>64</sup> 317 U. S. 519, 63 Sup. Ct. 326, 87 L. ed. 434 (1943); NOTES (1943) 18 IND. L. J. 249, (1943) 29 VA. L. REV. 832.

<sup>65</sup> *Supra*, note 12.

<sup>66</sup> For a full account of the original by-laws, and their amelioration just before suit, see the court's discussion beginning 52 F. Supp. 362 at 364.

<sup>67</sup> U. S. v. Associated Press, 52 F. Supp. 362 at 374 (1943).

relative to the transferring of "spontaneous" or "spot" news to non-members, and ordered the by-laws amended so as to preclude, in passing on any application, the consideration of the applicant's ability to compete with other members. The court also enjoined performance of the cartel arrangement with the Canadian Press. However, expressing some doubt as to the accuracy of its holding, the court stayed the whole judgment for sixty days after its entrance, and conceded to extend that time if necessary, "... subsequently for the pendency of any appeal to the Supreme Court, if one is taken within that period."<sup>68</sup>

Justice Swan dissented from this holding,<sup>69</sup> first, on the ground that there was no monopoly in restraint of trade, citing INS and UP as powerful competitors. This contention seems particularly weak when viewed in the light of all the evidence of AP's magnitude. Yet aside from that, the presence of competition in a field has never been taken as a conclusive test of monopoly; even if it were, the fact that AP is not alone in the field does not constitute a perpetual guaranty that conditions will remain the same indefinitely. It is through the identical practices as were attempted that they might crowd their smaller competitors from the field if not curbed. "It has long . . . been characteristic of the English nation, and of our native born population in this country, when it foreseeth the evil, to prepare to throttle it. . . ."<sup>70</sup>

Justice Swan, having found no monopoly or tendency to create one, then went ahead to say that the majority, knowing no monopoly existed, tried to justify its decision on the theory that even though AP might not have a monopoly, it was because of its size, a public calling. If this were true, then Justice Swan would appear to be correct in his contention because one of the essential elements of a public calling has generally been considered a virtual monopoly;<sup>71</sup> without it there is no public calling susceptible of regulation.<sup>72</sup>

<sup>68</sup> *Id.* at 375. Appeal was taken. Docket Nos. 57-59, 13 U. S. L. WEEK 3003, 3004.

<sup>69</sup> *U. S. v. Associated Press*, 52 F. Supp. 362 at 375 (1943).

<sup>70</sup> Boston, *The Spirit Behind the Sherman Anti-Trust Law* (1912) 21 YALE L. J. 341, 351.

<sup>71</sup> This has been denied. See Burdick, *The Origin of the Peculiar Duties of Public Service Companies* (1911) 11 COL. L. REV. (three parts) 514, 616, 743. Professor Burdick believed that the ancient theory of public calling regulation was to be found in an *assumpsit* implied from the action of holding oneself out as ready to serve all. *Id.* at 515, 516. As to the more recent developments in public utility law, he thought they could be attributed to the exercise of public franchises or the receipt of financial aid from the state. *Id.* at 638. Another denial of the monopoly theory is found in Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 148. In answer to Professor Burdick's rationale of *assumpsit*, see POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 29, where he says, "We have established that the duties of public service companies are not contractual, as the nineteenth century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he is engaged and his consequent relation to the public."

<sup>72</sup> *Allnutt v. Inglis*, 12 East. 527, 104 Eng. Rep. 206 (1810). See *Munn v.*

Indeed, there seems to be some foundation for Justice Swan's accusation against the majority in the general language it uses in saying, in effect, that every enforcement of the Sherman Act perforce treats the enterprise against which it is enforced as one affected with a public interest. Thus the majority seems to hint at the conclusion that the Sherman Act remedy and the public calling remedy are one and the same; if an enterprise cannot be called a public calling, or a business affected with a public interest, then it cannot be brought within the Sherman Act, and that regulation under the Sherman Act is equivalent to a finding of such public calling or business affected with a public interest.<sup>73</sup>

This offers an attractive solution to the entire problem if it is workable. However, it is submitted that this sort of combination of public callings with Sherman Act enforcement is a *non sequitor* impossible of application.

The theory of public utility regulation has been to recognize the activity as a monopoly and control it as such,<sup>74</sup> while the theory of the Sherman Act and its common law precedent has been to break the monopoly and enforce competition.<sup>75</sup> While this distinction may have been somewhat obscure at first, it was made much more apparent after the Transportation Act of 1920,<sup>76</sup> which gave the Interstate Commerce Commission the power, free from the anti-trust laws, to authorize railroad consolidations and leases. *United States v. So. Pac. Co.*<sup>77</sup> was begun before the Transportation Act was enacted, so the

Illinois, cited *supra* note 2, at 131, "Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great states of the West' must pass on the way 'to four or five of the states on the seashore' may be a 'virtual monopoly' (*Italics ours.*). See also *New State Ice Co. v. Liebman*, 285 U. S. 262, 279, 52 Sup. Ct. 371, 76 L. ed. 747 (1932); *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 439, 50 Sup. Ct. 220, 74 L. ed. 524 (1930) ("Plaintiffs perform an indispensable service in the interstate commerce in live stock. They enjoy a *substantial monopoly* at the Omaha Stock Yards." (*Italics ours.*)); *Williams v. Standard Oil Co.*, 278 U. S. 235, 240, 49 Sup. Ct. 115, 73 L. ed. 287 (1928); *HALE, DE JURE MARIS*, 1 HARG. LAW TRACTS (1787) 78; *HALE, DE PORTIBUS MARIS*, *id.* at 6. For other authorities supporting the virtual monopoly theory, see BEAL AND WYMAN, RAILROAD RATE REGULATION (1906) ch. I; WILLIS, CONSTITUTIONAL LAW (1st ed. 1936) 765; 1 WYMAN, PUB. SERV. CORP'S (1st ed. 1911) §156 ("... any business is made out to be public in character where there is a virtual monopoly inherent in the nature of things."); Wyman, *The Law of Public Callings as a Solution to the Trust Problem* (1903) 17 HARV. L. REV. 156, 161.

<sup>73</sup> U. S. v. Associated Press, 52 F. Supp. 362 at 376 (1943).

<sup>74</sup> *Supra*, note 72; WILLIS, CONSTITUTIONAL LAW (1936) 355. For other theories on public utility regulation, see Robinson, *The Public Utility Concept* (1927) 41 HARV. L. REV. 277; Robinson, *The Public Utility: A Problem in Social Engineering* (1928) 14 CORN. L. Q. 1; Hardman, *Public Utilities* (1931) 37 W. VA. L. Q. 250.

<sup>75</sup> ROTTSHAEFER, CONSTITUTIONAL LAW (1939) 257; THORNTON, COMBINATIONS IN RESTRAINT OF TRADE (1928) 235. Senator Sherman's speech in the United States Senate, cited *supra* note 51 is strongly indicative of this policy.

<sup>76</sup> 41 STAT. 481 (1920), 49 U. S. C. A. §5 (1929).

<sup>77</sup> 259 U. S. 214, 42 Sup. Ct. 496, 66 L. ed. 907 (1922).

Supreme Court went ahead and heard the case, dissolving the combination. Later, the Interstate Commerce Commission authorized the identical consolidation, finding it to be reasonable and not injurious to the public interest. The case went back to the district court and the consolidation was upheld, the court saying the railroad was relieved from the operation of the Sherman Act "... insofar as may be necessary to enable them to do anything authorized or required by the Commission's said order of approval and authorization."<sup>78</sup>

What better proof could there be that the two are separate? It has been suggested that the Sherman Act should have expressly excluded all public utilities from its scope, and that failure to do so gave the government the appearance of riding two horses in opposite directions.<sup>79</sup> Indeed, it is surprising that the Supreme Court initially took jurisdiction over railroads under the Sherman Act because the Interstate Commerce Act of 1887<sup>80</sup> forbade certain predatory practices of the railroads, indicating an intention to provide for the railroads outside the Sherman Act.<sup>81</sup>

Another example of the separateness of the two remedies is found in the exclusions of physicians from the duties imposed upon those

<sup>78</sup> *United States v. Southern Pac. Co.*, 290 Fed. 443, 450 (D. C. Utah 1923). See Hadley, *Public Utilities and the Anti-Trust Law* (1930) 10 BOSTON U. L. REV. 351, cited *supra* note 53. The *Southern Pacific* decision illustrates the hesitancy of the judiciary to act under the anti-trust laws when such action pertains to a public utility already subject to administrative and judicial regulation as a utility. The same hesitancy is felt by attorneys for the government in instituting such proceedings. However, if the practices of the utility are particularly repugnant to the Sherman Act, action will be taken despite this hesitancy. The most recent example of this is found in the prosecution begun in the Lincoln Division of the Federal District Court for Nebraska. See Note, *Anti-Trust Complaint Against Railroads*, 13 U. S. L. WEEK 2110. The complaint in that case embraces associations of railroads, railroad executives, and two banking firms, and charges, among other things, discrimination in rates, conspiracy to retard railroad efficiency and service, and an attempted suppression of the trucking industry in the west. The complaint seeks dissolution of the associations and an injunction against continuation of the offenses charged.

<sup>79</sup> WILLIS, CONSTITUTIONAL LAW (1936) 355.

<sup>80</sup> *Supra*, note 47.

<sup>81</sup> WILLOUGHBY, CONSTITUTIONAL LAW (2nd Stud. ed. 1933) 344. For supplemental developments, see 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) chs. I, V. The original INTERSTATE COMMERCE ACT was augmented very materially later. The ELKINS ACT, 32 STAT. 847 (1903), 49 U. S. C. A. §41 (1929) was the first important amendment to the Act. It broadened the scope of prohibitions against discriminations in the form of rebates, etc. The HEPBURN ACT, 34 STAT. 584 (1906), 49 U. S. C. A. §1 (1-9) (1929) provided for maximum rates, adherence to published rates, and cessation of pass issuances to anyone but employees. The CARMACK AMENDMENT, 34 STAT. 593 (1906), 49 U. S. C. A. §20 (1929), 38 STAT. 1196 (1915), 49 U. S. C. A. §20 (11) (1929) imposed liability on initial carriers for loss on through shipments and forbade limitations of liability by contract. The POMERENE ACT, 39 STAT. 538 (1916), 49 U. S. C. A. §81 (1929) provided for the use of uniform bills of lading in interstate carriage of shipments. The TRANSPORTATION ACT OF 1920, cited *supra* note 76, provided for minimum rates, consolidations of railroads and express companies, recapture of excess profits, and inclusion of carriers by wire and wireless.



engaged in public callings<sup>82</sup> and their inclusion within anti-trust legislation in the recent *American Medical Association* case.<sup>83</sup>

There is another in *United States v. South Eastern Underwriters Ass'n*,<sup>84</sup> where a combination of fire insurance underwriters fixing fire insurance rates and imposing other non-competitive practices was held to violate the Sherman Act, although the same court had repeatedly held the fire insurance business to be affected with a public interest and subject to state regulation alone.

It is true, in the public utility cases courts have been prone to consider whether or not the business under consideration was *affected with a public interest*. It is also true that courts trying Sherman Act infringement have looked to the *effect on the public*, but not in the same sense or for the same reasons as in the former type of case. The "effect on the public" in anti-trust cases is no more than the ancient common law basis for testing the reasonableness of the plan, as required in the *Standard Oil* and *American Tobacco* cases. In public calling cases, the finding of a business "affected with a public interest" is an inflexible condition precedent to that type of regulation. It acts as a barrier beyond which the court cannot trespass. On the other hand, the "effect on the public," as spoken of in anti-trust cases, is only a test, a method, or means to determine reasonableness and consequent validity. It is not a bar, but rather, an economic weight to be measured with other elements on the anti-trust balance scale in order to arrive at the ultimate reasonable or unreasonable nature inherent in the make-up of the combination.

Since much of the dispute in the *Associated Press* case arose over the fancied necessity of finding a business affected with a public interest, and whether or not the news gathering business was so affected, it is to be hoped that the Supreme Court will redefine the concept and clarify the existing ambiguity as to the place the public interest shall henceforth occupy in each type of remedy.

The confusion can undoubtedly be attributed to the 1934 *Nebbia*

<sup>82</sup> *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058 (1901). A general practitioner in a small town was asked to attend one of his regular patients, and tendered his fee in advance. Although he was the only available physician in the locality and was not at the time occupied, he arbitrarily refused. Upon the patient's death, an action for damages was brought. *Held*, for defendant. The court said that defendant was under no duty to care for anyone who might ask for attention, and that "Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark."

<sup>83</sup> *Supra*, note 64.

<sup>84</sup> — U. S. —, 64 Sup. Ct. 1162, —L. ed. — (1944). The main point of this case of course, is its holding that insurance is commerce, thus overruling *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357 (U. S. 1868) and the cases following it. See Borchard, Willis, and Berke, *S. E. U. A.—and After* (a symposium) *INS. L. J.* July, 1944. Pp. 387-399.

case already referred to, applying public calling law to a business which the court admitted was not a public calling, but which was so clothed with a public interest as to warrant regulation of the public calling type. Technically, it is probably error to speak of the *Nebbia* variety of regulation as one in the public calling field. As Mr. Justice Roberts said in the *Nebbia* case, "the dairy business is not, in the accepted sense of the phrase, a public utility."<sup>85</sup> It would seem better to rationalize this peculiar type of regulation as being purely of the police power variety. It might be agreed that conventional public utility regulation by the federal government is likewise only an exercise of its specific police power. The matter has raised much confusion.<sup>86</sup> Technically, both the modern regulation of public utilities and regulation of the *Nebbia* variety are simply exercises of the police power in different ways. The police power is the over-all authority of both types.<sup>87</sup> However, while it is not error to speak of the two synonymously, it would seem better to distinguish them slightly, calling one public calling regulation, based upon a virtual monopoly and an indispensable service, and the other, police power regulation based only upon some social interest of sufficient magnitude to demand attention.

If this is true, then public calling, police power, and anti-trust regulation are all separate and distinct. True, they may all meet in any given case, but they are at least theoretically, and often actually separate remedial forms. Public calling regulation historically was confined to businesses affected with a public interest having a virtual monopoly over an indispensable service.<sup>88</sup> Police power regulation extended to where the general public had some substantial interest, sometimes called a "social interest," regardless of monopoly or indispensability. Under the *Nebbia* combination, the new hybrid variety of regulation extends to businesses enjoying a virtual monopoly over an indispensable service, *and* to businesses which have neither, but which are so impressed with a public or social interest that regulation is warranted.

The combination of those two remedies seems permissible and perhaps even advisable since both have in their essence a regulatory nature. The Sherman Act, however, is penal rather than regulatory. Its common law history attaches to a far different precedent than that of public callings. It lies in contracts and combinations in restraint of

<sup>85</sup> *Supra*, note 8.

<sup>86</sup> The general theories of public calling and police power regulation are discussed in BURDICK, *THE AMERICAN CONSTITUTION* (1922) 568; 2 COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927) 1300; FREUND, *THE POLICE POWER* (1904) 380; WILLOUGHBY, *CONSTITUTIONAL LAW* (2nd Stud. Ed. 1933) 752, 767.

<sup>87</sup> Mr. Justice Roberts, in the *Nebbia* case, 291 U. S. 502, at 533, 54 Sup. Ct. 502, at 514, 78 L. ed. 940, at 955 said, in referring to *Munn v. Illinois*, "... 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression."

<sup>88</sup> *Supra*, note 72.

trade, not in the cases dealing with innkeepers and common carriers. Sherman Act applications should be limited to the words of the statute: "Every contract, combination, . . . or conspiracy, in restraint of trade . . .," tested by the rule of reason. Monopoly, indispensability, and interest of the public are immaterial except as they relate to the reasonableness of the plan or the proposed plan of doing business. If such a classification were followed, a criminal prosecution under the Sherman Act would no longer evolve into an academic discussion of whether defendant in such prosecution was engaged in a public calling or in a business affected with a public interest, as it did in the *Associated Press* case.

In that case, the same result would probably have been reached on either line of approach. First, it would seem that the gathering and dispensing of news had by this time reached a place where it might very conveniently be placed within the public calling group. Although some of the original public callings have now been excluded because an increase in their numbers has effaced their monopoly or the indispensability of their service,<sup>89</sup> the trend has been toward a more and more comprehensive inclusion.<sup>90</sup> Indeed, one writer has recently gone as far as to say that *any* business can be made a public utility by the Supreme Court, depending upon what he calls the changing "climate of opinion."<sup>91</sup> At any rate, the concept of a public utility is not static. As said in *Munn v. Illinois*: "It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. . . . It presents, therefore, a case for the application of a well-known and well-established principle in social science, and this statute [regulating grain warehouses] simply extends the law so as to meet the new development of commercial progress."<sup>92</sup> As a result of rapid industrial growth and the acquisition of new monopolies, the telephone,<sup>93</sup> the telegraph<sup>94</sup> and the radio<sup>95</sup> were added many years

<sup>89</sup> *Supra*, note 72.

<sup>90</sup> *Supra*, note 28.

<sup>91</sup> O'Connell, *Any Business Can Be Made a Public Utility* (1944) 34 PUB. UTIL. FORTN. 3. See also Farrar, *Can Any Business Be Made a Public Utility?* (1944) 33 PUB. UTIL. FORTN. 345.

<sup>92</sup> 94 U. S. 113, at 133.

<sup>93</sup> *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 22 Sup. Ct. 881, 46 L. ed. 1144 (1902); *Cumberland Tel. & Tel. Co. v. Kelley*, 160 Fed. 316 (C. C. A. 6th, 1908); *State v. Bell Tel. Co.*, 23 Fed. 539 (E. D. Mo. 1885); *Central Union Tel. Co. v. State ex rel. Falley*, 118 Ind. 194, 19 N. E. 604 (1888); *McDaniels v. Faubush Tel. Co.*, 32 Ky. L. Rep. 572, 106 S. W. 825 (1908); *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684 (1902). Chief Justice Clark, of the North Carolina Supreme Court held in *Godwin v. Carolina Tel. & Tel. Co.*, 136 N. C. 158, 48 S. E. 636 (1904) that while a telephone company was under duty not to discriminate in its services, that duty applied only to applicants whose use would be lawful, and that where an applicant wanted a telephone installed in a house of prostitution, the company was justified in refusing since the business of bawdy-house operation was unlawful and likely to result in obscene messages being carried through the company's facilities.

<sup>94</sup> *Supra*, note 93. *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765 (1901).

<sup>95</sup> An excellent survey of the brief history of federal regulation of radio, in-

ago. It was said that the telephone and the telegraph were common carriers of news and information. Indeed, it was upon that theory that they were included in the Interstate Commerce Act amendment of 1920.<sup>96</sup>

This is rather a fantastic likeness, to be sure, but if it be true, no reason seems apparent for not including such news-gathering and distributing organizations as AP. Most of its news is gathered through the use of telegraphic principles, and its dissemination by teletype machine is certainly no more nor less than telegraphy. It would appear that AP has a virtual monopoly despite the presence of INS and UP; at least in any case of a complete "scoop" from those other agencies, then certainly a monopoly would exist. At any rate, AP has a much greater monopoly over its service than the present day hotel has over its services. Conceding a virtual monopoly, the indispensability of its service cannot be challenged. Thus, the case of a public calling is made out. Even if the existence of a monopoly be disputed, there is certainly a sufficient social interest to invoke the *Nebbia* case doctrine. Consequently, the public calling duties should be attached: (1) to serve all; (2) with reasonably adequate facilities; (3) without discrimination; and (4) for a reasonable compensation.<sup>97</sup>

The Illinois case of *Inter-Ocean Publishing Co. v. Associated Press*<sup>98</sup> might at first reading indicate that news gathering had already been included within the public calling field. However, as Justice Swan points out in his dissent in the AP case, the Associated Press in that case (a different organization than the present AP) had been given in its charter the power of eminent domain. The Supreme Court of Illinois later qualified its earlier holding as resting upon the presence of that power.<sup>99</sup> Missouri and New York have announced a rule contrary

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cluding statutes and cases is presented by Mr. Justice Frankfurter, writing the majority opinion in *National Broadcasting Co. v. United States*, 319 U. S. 190, 210, 63 Sup. Ct. 997, 87 L. ed. 1344 (1943).

<sup>96</sup> "The term 'common carrier' . . . shall include all . . . telegraph, telephone, and cable companies operating by wire or wireless. . . ." 41 STAT. 474 (1920), 49 U. S. C. A. §1(3) (1929). The same section defines "transmission" as the "transmission of intelligence . . . whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages."

<sup>97</sup> *Northern Pac. Ry. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735 (1915); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011 (1914); WILLIS, *CONSTITUTIONAL LAW* (1936) 767. See in general, Arterburn, *Origin and First Test of Public Callings* (1927) 75 U. of PA. L. Rev. 411. This is an extensive treatment both of the duties themselves and of their origins at common law.

<sup>98</sup> 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568 (1900).

<sup>99</sup> *People ex rel. Gaskill v. Forest Home Cemetery Co.*, 258 Ill. 36, 41, 101 N. E. 219 (1913).

to the *Illinois Inter-Ocean Publishing Co.* case.<sup>100</sup> Therefore, there seems no direct precedent of any binding effect in the cases to rely upon. However, six states by statute have imposed on all corporations engaged in furnishing news the public calling duty to serve all persons without discrimination.<sup>101</sup> Simply from the nature of the enterprise, it would seem that AP should become subject to either public calling regulation or police power regulation, or the combination of the two as in the *Nebbia* case. It has been suggested by some that the anti-trust legislation was a false start in the wrong direction, that the "public service" remedies should have been sufficient if they had been extended.<sup>102</sup>

If it should be declared a public calling, or so clothed with a public interest as to come within the *Nebbia* case, and the consequent public calling duties attached, some difficulty might be encountered in determining the meaning of the duty to serve *all* persons. It is difficult to fancy AP or a similar agency serving the individual members of the public directly. "All persons" so far as AP is concerned, would probably mean all newspapers and perhaps radio stations, acting as agents of the individual members of the public.

Similarly, AP would fall within the ambit of anti-trust legislation. It has already been established that AP is engaged in interstate commerce.<sup>103</sup> Therefore, if the plan involves an unreasonable restraint upon that interstate commerce, it would be illegal under the *Standard Oil* and *American Tobacco* cases. A plan excluding, or attempting to exclude outsiders from the field is illegal.<sup>104</sup> The same is true of an

<sup>100</sup> *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151 (1900); *Matthews v. Associated Press of New York*, 136 N. Y. 333, 32 N. E. 981 (1893).

<sup>101</sup> ARK. DIG. STAT. (Pope, 1937) §10358; KAN. GEN. STAT. (Corrick, 1935) §50201; KY. STAT. ANN. (Baldwin, 1942) §365.201; NEB. COMP. LAWS (Dorsey, 1929) §86-109; TENN. CODE ANN. (Michie, 1938) §6759; UTAH CODE ANN. (1943) §73-2-1.

<sup>102</sup> "A rational and courageous extension of this body of thought [public callings] and experience to business generally should contribute much to the solution of modern trade problems." Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 161. "If this law of public employment could be enforced against the trusts, it may be hoped, a solution would be found for the trust problem." Wyman, *The Law of Public Callings as a Solution to the Trust Problem* (1904) 17 HARV. L. REV. 217, 247. Frederiksen, *The Old Common Law and the New Trusts* (1904) 3 MICH. L. REV. 119.

<sup>103</sup> *Associated Press v. N. L. R. B.*, 301 U. S. 103, 57 Sup. Ct. 650, 81 L. ed. 953 (1937). As to what constitutes interstate and foreign commerce, see GAVIT, *THE COMMERCE CLAUSE* (1932) ch. V.

<sup>104</sup> *American Medical Ass'n v. United States*, *supra* note 64; *Fashion Originator's Guild v. Fed. Trade Comm.*, 312 U. S. 457, 61 Sup. Ct. 703, 85 L. ed. 949 (1941); *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. ed. 608 (1904); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. ed. 136 (1899).

attempted extension of existing monopoly,<sup>105</sup> and of the use of unreasonable means to effect a lawful purpose.<sup>106</sup>

The AP plan did exclude outsiders; it involved an attempt to extend its monopoly through its agreement with the Canadian Press; and, assuming without deciding, that the end in view might have been legitimate, the means toward that end seem at least questionable. True, a combination may not be an evil *per se*, but in determining validity or invalidity, the interests of the public must be weighed against the utility of the plan.<sup>107</sup> It is quite true that "Public policy is an unruly horse, and once you get astride of him, you never know where he will carry you."<sup>108</sup> But the interest of the public remains the chief test of reasonableness.<sup>109</sup> Reasonableness has often been found simply because of the desperate economic agonies of the enterprise.<sup>110</sup> On the other hand, associations have been held illegal even though they fixed no prices, and did not attempt complete exclusion, merely because the public interest in that particular field happened to be exceptionally great.<sup>111</sup>

At such a time as the present, it is inconceivable that anyone should deny the tremendous public interest in news gathering and reporting. Likewise, no one can deny the public interest surrounding the activities of AP, probably the greatest of all news gatherers. The plan itself seems particularly dangerous despite Justice Swan's comforting contention that no monopoly existed. The facts indicate that not only did a monopoly exist, but that it was on the verge of being extended

<sup>105</sup> *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 60 Sup. Ct. 618, 84 L. ed. 852 (1940); *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 59 Sup. Ct. 467, 83 L. ed. 610 (1939); *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. ed. 107 (1912).

<sup>106</sup> *Fashion Originator's Guild v. Fed. Trade Comm.*, *supra* note 104; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U. S. 37, 47 Sup. Ct. 522, 71 L. ed. 916 (1927); *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. ed. 349 (1921); *Loewe v. Lawler*, 208 U. S. 274, 28 Sup. Ct. 30, 52 L. ed. 488 (1908).

<sup>107</sup> *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 Sup. Ct. 982, 84 L. ed. 1311, 128 A. L. R. 1044 (1940); *Sugar Institute, Inc. v. United States*, *supra* note 61; *Appalachian Coals, Inc. v. United States*, *supra* note 60; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. ed. 300 (1898); *Matthews v. Associated Press of New York*, *supra* note 100.

<sup>108</sup> Justice Burrough, in *Richardson v. Mellish*, 2 Bing. 229, 130 Eng. Rep. 294 (1824).

<sup>109</sup> "Public policy . . . is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good." Lord Brougham, in *Egerton v. Brownlow*, 4 H. L. Cas. 196, 10 Eng. Rep. 359, 437 (1853).

<sup>110</sup> *Appalachian Coals, Inc. v. United States*, *supra* note 60; *National Ass'n of Window Glass Mfgs. v. United States*, 263 U. S. 403, 44 Sup. Ct. 148, 68 L. ed. 358 (1923).

<sup>111</sup> *Paramount Famous Laski Corp. v. United States*, 282 U. S. 30, 51 Sup. Ct. 42, 75 L. ed. 145 (1930); *United States v. First National Pictures*, 282 U. S. 44, 51 Sup. Ct. 45, 75 L. ed. 151 (1930); *Anderson v. Shipowners Ass'n*, 272 U. S. 359, 47 Sup. Ct. 125, 71 L. ed. 298 (1926).

to even greater extremes through the cartel agreements with the Canadian Press, and the agreement with Wide World Photos, Inc.

There is also something to be said in reply to Justice Swan's argument that bigness alone is inconsequential. It was said over thirty years ago that "Mere bigness . . . is in itself . . . a menace to the whole people, even though it may give cheaper prices, and prevent so-called ruinous competition. . . . It is pregnant with harm when it menaces the government, or puts into the hands of individuals the power of many to such an extent that the power may be used as a weapon to prevent the realization of the fundamental principles of the government and the fundamental hopes of its people and electorate, which are; the establishment of *justice*, domestic tranquility, the common defense, the general welfare, and the blessings of *liberty* for this generation and posterity. . . . Seldom is it possible to define precisely any dangerous line. In building, a margin of safety is always provided; in banking, a reserve. It is not unreasonable to provide by law a safe margin, within the danger line, which bigness cannot pass. In the anti-trust law, this was provided by the condemnation of the acts having the dangerous tendency which it was designed to prevent."<sup>112</sup> Of course, as Mr. Justice Sutherland said in *Tyson v. Banton*,<sup>113</sup> "A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance." However, he was there speaking of businesses *affected with a public interest*, or businesses which amounted to *public callings*, and not of those *subject to the provisions of the Sherman Act*. Again the difference must be noted.

As stressed before, it would seem that the Supreme Court could take either course it chooses in the AP case since it seems to be subject to both types of regulation. Either the old or the new public calling approach seems easily made out, while the anti-trust remedy offers slightly more difficulty since the district court has already found that no substantial competition was suppressed under the Clayton Act. If this is taken as true, it might indicate to the Supreme Court that no monopoly exists sufficient to warrant inquiry as to the restraint of trade under the Sherman Act. However, as pointed out previously, the purpose of the Sherman Act and related legislation is not to lock the door after the equine theft, but to "provide by law a safe margin, within the danger line, which bigness can not pass."<sup>114</sup> Section 2 of the Sherman Act itself answers all doubt in the words "*attempt to monopolize, . . . or conspire to monopolize any part of the trade, . . .*" (*Italics ours.*).

<sup>112</sup> Boston, *The Spirit Behind the Sherman Anti-Trust Law* (1912) 21 YALE L. J. 341, 359.

<sup>113</sup> 273 U. S. 418, 430, 47 Sup. Ct. 426, 428, 71 L. ed. 718, 722 (1927).

<sup>114</sup> Boston, *supra* note 112.

It is to be hoped that the court will concede these words their true meaning, and give the Sherman Act a preventative aspect rather than merely a curative one. This might be a bold stroke in other fields, but with a defendant who is engaged in one of the most vital services of today, it seems not only warranted, but necessary. The court should not, by refusal to act, license the prospective offender to continue to increase its power until forced to act; the court should, when the prospect of danger is so clear, act in advance.

If the court does attempt to utilize either the public calling or the anti-trust remedy, it will doubtlessly be confronted with the argument that freedom of the press under the first amendment of the Constitution has been infringed. However, since *National Broadcasting Co. v. United States*,<sup>115</sup> authorizing regulation by the Federal Communications Commission of certain monopolistic practices in the radio field, there seems to be no serious question on this point. As Justice L. Hand pointed out in the AP case, the First Amendment is designed to guarantee free dissemination of all news from all sources. "It presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection."<sup>116</sup> Certainly the type of regulation sought in that case would not violate, but would rather, support the purpose of that amendment. Neither can the First Amendment be asserted by the government in its favor because the terms of the amendment are directed against governmental action.<sup>117</sup>

At any rate, it is submitted that the Supreme Court should authorize regulation of news gathering and dissemination agencies on the one hand, through either the public calling theory, the combination "*Nebbia*" theory of public callings and police power, or on the other hand, via

<sup>115</sup> *Supra*, note 95. This case arose over an order of the Federal Communications Commission in 1941 restricting issuance of licenses to radio stations having certain kinds of contracts with networks. N.B.C. and C.B.S. sued to enjoin enforcement, but the district court dismissed for want of jurisdiction. *National Broadcasting Co. v. United States*, 44 F. Supp. 688 (S. D. N. Y. 1942). On appeal to the Supreme Court, the suit was held to have been properly brought, and it was remanded to the district court. *Columbia Broadcasting System v. United States*, 316 U. S. 407, 62 Sup. Ct. 1194, 86 L. ed. 1066 (1942). The suit of the National Broadcasting Company was disposed of in the same way. These cases were noted by the author in 18 IND. L. J. 127 (1943). On remand to the district court, the suits were tried and dismissed on their merits. *National Broadcasting Co. v. United States*, and *Columbia Broadcasting System v. United States*, 47 F. Supp. 940 (S. D. N. Y. 1942). Appeal was again taken and the Supreme Court affirmed the district court's dismissal on the ground that the Commission's regulatory power was not confined to merely technical and engineering aspects of radio. The court also decided that such regulation did not infringe the guaranty of free speech.

<sup>116</sup> 52 F. Supp. 362 at 372.

<sup>117</sup> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." (*Italics ours.*) U. S. CONST. AMEND. I.



the anti-trust theory, and that it should distinguish between these types. Since it is a Sherman Act prosecution, the case will probably be decided upon the anti-trust theory. If so, it is hoped that it will be upon that basis alone, unadulterated by any irrelevant and confusing injections of public calling or police power principles.