THE ASSOCIATED PRESS DECISION—AN EXTENSION OF THE SHERMAN ACT?

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THE recent application of the Sherman Act to the restrictions on membership by newspapers in the Associated Press¹ constituted a *cause célèbre* primarily because of the prevailing public interest in the subject matter of the litigation. The case may well retain that status for some time to come for another reason as well, namely, implications contained in the majority opinion of the Supreme Court—suggestions which seem to extend the reach of both substantive sections² of the statute as hitherto understood by antitrust lawyers. A full appreciation of the facts involved should cause no surprise as to the result of the case. The activities of the Associated Press, which were finally condemned, can so readily be fitted into the pattern of illegal restraints fashioned by former decisions that the marvel would seem to be that they could have escaped with immunity so long and that their dispatch should have involved such travail and contrariety of view by the judges who passed upon them.³ The

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¹ *United States v. Associated Press*, 326 U.S. 1 (1945). The opinions of the three-judge district court are reported in 52 F. Supp. 362 (N.Y., 1943).

² 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1-2 (1941). Section 1 provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." Section 2 provides, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." The Government's bill of complaint for an injunction filed under section 4 of the Sherman Act attacked the practices of the Associated Press under both sections of the Sherman Act, as a conspiracy to restrain trade in news and to monopolize a part of it. Apparently the injunction was issued and approved on both grounds.

³ The case was argued in the Supreme Court December 5 and 6, 1944, but not decided until June 18, 1945. Of the eight Justices who heard the case, only four concurred in the majority opinion of Mr. Justice Black. One of these, Mr. Justice Douglas, also filed a concurring opinion. Mr. Justice Frankfurter in a separate opinion concurred in the result for the reasons set forth by the district court. Justices Roberts and Murphy filed dissenting opinions, the Chief Justice joining in the dissent of Mr. Justice Roberts. In the district court Circuit Judge Swan dissented from the opinion of the court, which was written by Circuit Judge Learned Hand and concurred in by Circuit Judge Augustus N. Hand. In 1915 Attorney General Gregory gave the by-laws of AP his official blessing. He held that a provision thereof which bound AP members not to subscribe to competing "antagonistic" news services should be abrogated as in restraint of trade, but approved the right of such a group to select their associates as they saw fit, provided they acquired no unlawful monopoly.

grounds of decision, while not set forth with extreme clarity, provide arresting suggestions, particularly with regard to the meaning of monopoly and the bearing of the "rule of reason"⁴ upon monopoly and upon one of the most familiar types of restraints of trade, namely, boycotts. Although the Sherman Act is fifty-five years old, it was not until 1940 that it was made certain that there is no justification for group tampering with the interstate market-price structure.⁵ Also, while there have been strong intimations that secondary boycotts are similarly illegal per se,⁶ a direct holding to that effect has never been articulated, and still less has the authoritative position of primary boycotts in that regard been defined.⁷ Again, the definition of the term "monopoly" has remained confused. How far a commodity or service must be unique, in the sense that there are no practical duplicates of them, before one who corners their distribution or rendition may be regarded a monopolist, has been a troublesome question. Contributions toward the solution of these questions emerge from a comparison of Judge Learned Hand's opinion below in the *Associated Press* case with the opinion of Mr. Justice Black on appeal.⁸

Both opinions contain recitations of the most salient facts, but a some-

⁴ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁵ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); see *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

⁶ See *Fashion Originators' Guild v. Federal Trade Com'n*, 312 U.S. 457 (1941); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936), and more particularly in the court below, 15 F. Supp. 817, 899 (D.C.N.Y., 1934); *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), and more particularly in the court below, 110 F. 2d 703 (App. D.C., 1940). The definition of a secondary boycott, where economic pressure is exerted against third parties to force them to withhold patronage from the object of the boycott, is set forth in *Duplex Printing Co. v. Deering*, 254 U.S. 443 (1921).

⁷ Compare *United States v. American Livestock Commission Co.*, 279 U.S. 435 (1929), with *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), and with the holding in *American Medical Ass'n v. United States*, 130 F. 2d 233 (App. D.C., 1942) upon which point certiorari was denied by the Supreme Court, though granted on other grounds, 317 U.S. 613 (1942).

⁸ The case invited, but did not receive, a discussion of the bearing of the "single trader" doctrine. The *Associated Press*, as we shall see, could not be regarded as a single trader; but was the form of its organization controlling? Would the restraints it imposed have been similarly condemned if exerted by an individual corporation? While the right of the individual trader, holding no monopoly and acting alone, to deal with whom he pleases and to practice discrimination freely has been decided and recently reaffirmed, *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Federal Trade Com'n v. Raymond*, 263 U.S. 565 (1924), both cited with approval in *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), the doctrine seems technical, the product of a different economic era, and hence not wholly beyond question on its merits. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), the Court held that one having a private monopoly could not discriminate; cf. *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (Minn., 1945).

what more extended re-survey of them may not be unprofitable before a comparison of the respective rationes decidendi is attempted. We are on clear ground with regard to the facts, because all of them, and even most of the factual ultimate conclusions to be drawn from them, were matters of record and freely admitted by the Associated Press itself. With the exception of two factual conclusions, found to be nonessential to decision,⁹ the contest between the parties was confined to the appropriateness of the application of the Sherman law to the admitted situation.

The Associated Press constitutes a group of some 1200 American newspapers, located in every state of the Union, whose reporting activities taken together blanket the country—each a separate, independent, profit-seeking business enterprise. Since 1900 it has taken the form of a cooperative membership corporation, its by-laws expressly constituting an identical contract between the members themselves and between each member and the corporation. Severe penalties—expulsion, suspension, or fines—are provided for breach of this contract. The corporation itself does not make or retain any profit from its operations or pay dividends, but the avails of the undertaking are passed on to the members in the form of service. The entire cost of this service, which amounts to nearly \$12,000,000 annually, is defrayed by assessments levied upon the members, generally in proportion to the populations of the territories served by their respective newspapers. Of the 1200-odd members at the time of the suit, less than 600 were original charter members. The rest had joined the organization from time to time since 1900, some quite recently.¹⁰ But presumably each member at the dissolution of the corporation, regardless of the length of its association with the enterprise, would be entitled to an equal proportionate share of the corporate net assets. The corporate af-

⁹ The case was disposed of on the Government's motion for summary judgment (Federal Rules of Civil Procedure, Rule 56), the court being satisfied that there was no substantial dispute as to any essential fact. So little were the material facts in dispute in the view of the defendants themselves that they assigned error to the lower court's refusal to grant summary judgment in favor of AP. The lower court denied to itself on the motion consideration of two issues which, while held relevant, were not thought necessary to be decided: (1) the precise extent of AP's superiority over the principal competing news services, United Press and International News Service, and (2) whether AP's observance of its by-laws in the past had actually restrained the competition which excluded newspapers afforded AP members. In view of the admitted basic facts relating to these questions summarized in this paper, the soundness of the rulings that the inferences which the Government drew therefrom were not compelling, and that the ultimate meaning of these facts remained in substantial dispute seems overcautious and highly questionable.

¹⁰ During the history of the corporation approximately 1900 newspapers in addition to the 603 charter members have been admitted but many of them have ceased publication or for some other reason have relinquished membership. Only six have been admitted over the objection of their respective AP competitors, and the admission of all these can be accounted for by unusual circumstances which surrounded their applications.

fairs are managed by a board of directors which exercises large plenary powers.¹¹

The AP newspapers have associated themselves to gather, pool, and share, for their mutual benefit, the news of the world, in recognition of the fact that it is practically impossible, because of the great cost and organization required, for any one newspaper acting alone to provide itself with world-wide coverage. The members gather and contribute to AP the news of happenings in their respective localities; AP as their common agent, by its bureaus and full-time and part-time reporters and through contracts which it has with certain foreign news agencies,¹² covers the rest of the world and supplements the reports of domestic news received from members. The news, news pictures, and features, when thus assembled in the hands of AP, are edited by AP, and by it constantly dispensed in interstate commerce over leased wires to the members in the form of telegraphic day and night news reports of over a million words. The AP reports conform to the highest standards of accurate, non-partisan, and comprehensive reporting. The thoroughness, efficiency, and excellence of this group news-coverage and service is beyond question. So fine and complete is it that AP without question constitutes the largest and most important news agency in existence and the principal single source of material for American newspapers. With complete justification, AP claims

¹¹ AP's internal affairs are not characterized by the same democracy usually associated with true cooperatives. The members do not enjoy equal voting rights in the selection of directors, but their selection is controlled by the voting rights attached to bonds of AP held by certain members in unequal amounts. Between 1900 and 1928 these bonds were held by certain charter members only. In 1928 the privilege of subscribing to bonds in proportion to their respective assessments was extended to all members. These bondholders have one vote for each \$25 face amount of bonds (up to a maximum of \$1,000), but only ninety-nine members—the largest newspapers—hold bonds in the amount of \$1,000 each with the accompanying forty votes, and these ninety-nine members, out of the 1200 total members, own a majority of the outstanding bonds. Forty-two per cent of the members hold no bonds at all. The bondholder vote cast is often ten or more times as great as the membership vote and completely controls the selection of the directors. The result is to make the AP Board of Directors practically self-perpetuating. For example, the average term of service of the directors elected in 1942 (apart from the token representation on the board of the smaller papers) was fourteen years, or eighteen years if a father-son succession in office is regarded as continuous. On the same basis, the directors elected in 1902 served average terms of seventeen years. Only twenty-six men have served on the executive committee since 1900. Of more than 200 cases in which a retiring director has been renominated, in only five cases has he failed of re-election (and in one such case he was elected the following year).

¹² Until about 1934, AP had, by various treaties or cartels with Reuters, Ltd., Press Association, Ltd., Agence Havas and its subsidiaries, Wolff's Telegraphisches Buro, Stefani (Italian), Tass (Russian), and Domei (Japanese), the exclusive American rights to their news. It has exclusive rights to the product of its subsidiaries, such as the Associated Press of Great Britain, La Prensa Asociada, and Press Association, Inc. It has continued to this day its exclusive agreement with the Canadian Press, the legality of which was one of the separate issues in the instant antitrust suit resolved against the Government.

that it is the "greatest clearing house for news in the world" and that its principal office is "the news center of the world." While the service is not indispensable to the success of all newspapers, its extreme desirability from a business standpoint is attested by its great popularity. When the suit was instituted, the members of AP were 81 per cent in number and had 96 per cent of the circulation of the daily morning newspapers, and were 59 per cent in number and had 77 per cent in circulation of the daily evening newspapers published in the nation. That is, in 1941, of the 373 daily morning newspapers of the country published in English with a total circulation of 16,519,010, some 304, with a total circulation of 15,849,132, enjoyed AP service, and of the 1480 such daily evening newspapers with a total circulation of 25,561,381, some 887, with a total circulation of 19,616,674, were likewise so fortunately situated. Judged by newspaper acceptance, AP news is even more important to the larger papers. For example, of the sixty-five dailies in the morning field having average daily circulations in excess of 50,000, all but one held AP membership. This one exception was the *Chicago Sun*, with a daily circulation of 327,000, which sought AP service but had been excluded therefrom because of the opposition of the AP members competitive with it, chief of which was the *Chicago Tribune*.

There are only two news agencies in addition to AP which undertake to supply multiple American newspapers with complete coverage of world events. They are United Press Association and International News Service, a department of King Features Syndicate, Inc., both selling intelligence to the press for profit. So indispensable are such services, because of the fundamental economics of the newspaper business, that only seven small morning newspapers and seventy-seven small evening newspapers are without the product of one or more of these three agencies. The business can be performed efficiently and economically only by a few such organizations; there are other smaller news suppliers, but they serve only a limited number of newspapers or confine themselves to particular types of news, features, and the like.

The district court, while recognizing that AP is "the chief single source of news for the American press," and that "of the three news agencies, AP ranks in the forefront in public reputation and esteem," refused, on the motion for summary judgment, to adjudicate AP's primacy on all counts, by reason of certain conclusions set forth in opposition affidavits and because of the fact that a relatively small number of newspapers, most of them in the evening field, have prospered without AP service. It is submitted that, while it was not necessary for AP's relative position to be

established, the court, in view of admissions in the record, might well have recognized AP's superiority. If the issue were important, it is difficult to see how it could have been resolved against the Government or regarded as inconclusive even within the limits of the summary judgment procedure. The evidence showed beyond question that AP surpassed each of the other two services, not only in newspaper preference, but in resources, expenditures, facilities, bureaus, staffs, distribution of news sources, and volume of dispatches. AP's broader access to local news followed as a matter of course from its exclusive rights to the news gathered by its regular members.

The Associated Press, while boasting that its product appears in virtually every paper of the world outside the United States, has never held itself out to serve all American newspapers. Under the terms of the compact set forth in its by-laws, its regular members¹³ are under obligation to furnish their local news exclusively to the group and AP service is dispensed only to AP members. Membership in AP is, therefore, a prerequisite to the right of an American newspaper to buy any of the news assembled by the group.

The suit attacked two provisions of the AP by-laws as joint and several violations of the Sherman Act. The first was the provision for *exclusivity*, which by contract tied the hands of each regular member as to its sale or other disposition of its own local news.¹⁴ This contractual denial of a member's freedom to deal with whom it might please in the disposal of its own product, standing alone, undoubtedly restrained trade in news and, in the view of the Government, constituted a concerted primary boycott of non-member newspapers and the other news agencies. The Government argued that, even if this boycott might not be illicit per se, it was, in any event, clearly unreasonable, since good motives and pure self-seeking on the part of those who restrain trade have long been held not to be matters of justification.¹⁵

¹³ AP has approximately a dozen "associate" members which have no vote in the management of its affairs but, in turn, unlike regular members, are free to furnish the local news which they gather to others. Members are required to furnish only local news which is "spontaneous," i.e., reports of objective events as distinguished from feature stories of situations initiated or developed by the newspaper itself.

¹⁴ The by-laws read as follows: "Each member shall . . . promptly furnish to the Corporation . . . all the news of such member's district, the area of which shall be determined by the Board of Directors. . . . No member shall furnish . . . to any person who is not a member, the news of the Corporation in advance of publication. . . . No member shall furnish, or permit anyone to furnish to anyone not a member of this Corporation, the news which he or it is required by the By-Laws to supply to this Corporation or which he or it obtains from the Corporation or from any other member by virtue of his membership. . . ."

¹⁵ See *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 599 (1936); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43 (1930); *Anderson v. Shipowners Ass'n*, 272

The other restraints, those upon competition offered by non-members which could be excluded from AP service by their AP competitors, were far more serious. This second offensive by-law contained the *exclusionary* provisions whereby each AP member was given powers having the practical effect of a veto over the admission of its individual competitors, for competitive reasons alone, and whereby other serious barriers were erected against the admission of such applicants for the same reasons.¹⁶

Under the by-laws in effect from 1900 to 1942, the Board of Directors was free to elect to membership any newspaper desiring AP service, provided it did not offer competition with existing members in the same territory and field (i.e., morning, evening, or Sunday). No standards whatever were set up to limit this plenary power of the directors. The directors freely used this power. It was easy for such applicants to be elected. They were taken in almost as a matter of course. Why this should be so is apparent. Their election benefited AP by giving it additional sources of revenue from dues and, what was in the view of the directors just as valuable, additional sources of local news. The more the merrier.

But under the by-laws there was a sharp difference as to the treatment of applicants who offered competition to any existing member. In such case the existing member affected had a "right of protest." If it exercised this right of protest, the directors were powerless to elect the applicant and had to refer the application to the vote of the entire membership at the next annual meeting. Then the applicant could be elected only if it could obtain the favorable vote of four-fifths of all the members. In contrast to the chances of non-competitors, the competitor then had almost no chance to gain entrance. The protesting member could campaign against such applicant, and the matter became an affair of mutual back-scratching. Each AP newspaper, faced with the possibility that an aspirant in its territory could improve its competitive position by gaining

U.S. 359, 363 (1926); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 613 (1914); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912).

¹⁶ Until amended April 20, 1942, the pertinent provisions of the exclusionary by-law were as follows: "Members may be elected by the affirmative vote of not less than four-fifths of all the members of the Corporation. . . . Members may also be elected by the Board of Directors . . . provided that whenever any member of the Corporation is entitled . . . to protest against election of any member of the Board of Directors, the Board shall have no power to elect any such new member unless it shall have received a waiver in writing of such right of protest from all members entitled thereto. . . . The right of protest . . . shall empower the member holding it to demand a vote of the members of the Corporation on all applications for the admission of new members within the district for which it is conferred. . . . If a member having a right of protest makes a waiver subject to specified conditions, such waiver shall be effective only as stated herein." Until 1931 the right of protest was enjoyed by certain charter members, but in 1931 such right was extended to all newspapers which had been regular members of AP for a period of more than five years.

AP service, could say to its associates, "You vote against my competitor now and I'll vote against your competitor when you are threatened with the same situation."¹⁷ Thus, the interest of AP in gaining new paying members and new sources of news was subordinated in each case to the private individual advantage of one or two constituents. On this question of corporate policy AP abdicated in favor of its individual members.

For example, in 1941 the *Chicago Sun* began publication and thereafter attained a substantial circulation. As its circulation grew, the circulation of its rival, the *Chicago Tribune*, declined proportionately. This is competition which hurts, because, until the *Chicago Sun* appeared, the *Chicago Tribune* was the only morning newspaper published in Chicago. The *Sun* had purchased the services of United Press, but, as in the case of many other newspapers,¹⁸ it also felt the need of the different and often superior services of AP. It applied for membership. The *Chicago Tribune* immediately exercised its protest right. The directors of AP, although many of them were favorable to the *Sun*, thereby automatically lost the power to elect it. The application had to be referred to the meeting of the membership in April, 1942. The *Tribune* then actively campaigned against the *Sun*. It solicited votes against the application by correspondence and by personal interviews with at least 755 AP members. The *Chicago Herald-American*, an afternoon paper with a Sunday morning edition competitive with the Sunday edition of the *Chicago Sun*, likewise campaigned against it. At the membership meeting the *Tribune* frankly based its opposition to the applicant on the more effective competition which its admission would afford, and the AP members, by a large majority vote, rejected the *Sun's* application.

The *Washington Times-Herald*, which publishes both morning and evening editions in the national capital, received similar treatment. Its rivals, the *Washington Post* and the *Evening Star*, exercised their protest rights, and addressed the membership meeting in opposition to election. The members voted against admitting the competitor to membership.

¹⁷ The situation was aptly stated by Judge Learned Hand: "Although . . . only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. Each will know that the time may come when he will himself be faced with the application of a competitor. . . . Unless he supports those who now object to the admission of their competitor, he will not in the future be likely to get their support against his own." 52 F. Supp. 362, 370 (N.Y., 1943).

¹⁸ Most of the larger papers, as well as many smaller ones, find it good business to subscribe to more than one news service. Three hundred and forty-two subscribers to the news service of United Press and 164 subscribers to International News Service were also members of AP. Many newspapers, to insure full coverage and the widest reader-appeal, have all three services.

Complaints from these two excluded newspapers to the Department of Justice brought the Government into action. Thereupon, on April 20, 1942, before the suit was instituted, the Associated Press amended its by-laws relating to the admission of members. But in doing so it merely made matters worse. These amendments abolished the term "right of protest" and reduced the vote necessary for admitting competing newspapers from four-fifths of the membership to a bare majority of those voting at any meeting. This looked like a step in the right direction but was illusory, for the amendments also introduced new hurdles. The competing applicant, even if it were fortunate enough to obtain a favorable majority vote, could not even then become a member, unless and until it paid a substantial sum of money, not to the corporation, but to its protesting competitors in AP. The applicant was also compelled to make available to its AP competitors any exclusive news source which it might enjoy.¹⁹ The money exaction was well-nigh prohibitive in and of itself. For example, under the 1942

¹⁹ The by-laws relating to admissions, as amended in 1942 and 1943 read as follows: "Art. III. Sec. 1. An owner of a newspaper . . . may be elected to membership by the affirmative vote of not less than the majority of the regular members of the Corporation voting on the application, in person or by proxy, at any regular meeting of the members of the Corporation, or at a special meeting called for that purpose, but where there are one or more existing memberships in the field (morning, evening, or Sunday) in the city in which an applicant has been so elected, he or it shall not be admitted to membership or become a member until he or it shall have complied with the requirements of the next succeeding section of this article. . . .

"Sec. 2. An applicant for membership elected, as provided in Section 1 hereof, shall not be admitted to membership or become a member, where there are one or more existing memberships in the field (morning, evening, or Sunday) in the city in which the applicant has been elected, until

"(a) The applicant shall pay to this Corporation a sum equal to ten (10%) per cent of the total amount of the regular assessments received by the Corporation from members in the field (morning, evening, or Sunday) in the city in which the applicant has been elected to membership, during the period from October 1, 1900, to the first day of the month preceding the date of the election of the applicant . . . and,

"(b) The applicant shall relinquish any exclusive right that he or it may have, by contract or otherwise, to any news or news picture services that are being made available to the applicant at the time of the filing of his application for membership, by any other person, firm or corporation, and, when requested to do so by any member or members in the field in the city in which the applicant has been elected to membership, the applicant shall require the said news or news picture services or any of them, to be furnished to such member or members, upon the same terms as they are made available to the applicant.

"The moneys payable to the Corporation by an applicant for membership, as herein provided shall be paid over by the Treasurer of the Corporation to the member in the field in the city in which the applicant is elected, and where there is more than one member in such field, the moneys so paid shall be distributed among such members in proportion to the regular assessments paid by them over the period from October 1, 1900. The member or members entitled to receive the moneys so payable, or a portion thereof, may waive, individually, the payment of such moneys, or portion thereof, in which event the amount payable by the applicant, as hereinbefore provided, shall be reduced by the amount of the payment so waived.

"Sec. 3. Applicants for membership may also be elected by the Board of Directors, when no meeting of the members of the Corporation is in session, in a field in a city where there is no existing membership at the time the application is filed. . . ."

amendment, even if the *Chicago Sun* had been able to get a favorable majority vote, it would have had to pay the *Chicago Tribune* and the *Chicago Herald-American* over \$400,000. A morning newspaper in New York, if lucky enough to obtain admission, would have to pay its AP competitors nearly a million and a half dollars.²⁰ The other requirement might also raise an equally insuperable obstacle, because it would often be beyond the power of such an applicant to require a supplier to patronize the AP member. These amendments not only aggravated the restraints by imposing additional barriers; they had the effect of underlining them by placing a large minimum monetary value upon each member's privilege of having the group exclude its rivals. Such exactions constitute AP's own appraisals of the pecuniary worth to each member of the competitive advantages its collective action had created and engrossed.²¹

Rather halfheartedly, AP contended that such exclusionary powers were granted in the interest of the group undertaking. It asserted that without such powers a member's loyalty to AP would be impaired. It claimed that, for the welfare of AP's service, it was necessary for the members to "choose their associates" and thereby to keep out undesirables who might injure AP's prestige, objectiveness, and efficiency. Such contention was not only legally immaterial if true; it was clearly unsupported. Its fallacy is shown by the by-law²² which automatically conferred admission upon any paper with the opportunity and resources to buy its way into AP by purchasing an existing franchise. In such case any purchaser, regardless of its character or desirability or of the effect of its admission upon the Associated Press, could join the organization. The unsoundness of the choice-of-associates theory was also demonstrated by the liberality with

²⁰ No like payment, not even an initiation fee to the organization itself, had ever been required before. Members admitted just prior to 1942 had an equal claim upon AP's service, to which its accumulated assets of several million dollars contributed, but paid nothing for it in addition to their regular dues. Noncompeting newspapers before and after the amendment succeeded to the same rights on admittance, for which no toll was exacted. Furthermore, the sums required of competing applicants had no relationship to, and were not calculated in accordance with, the value of their proportionate share of AP's assets.

²¹ The pecuniary value of AP memberships, attaching to them solely from the exclusionary power they conferred, was evidenced also by the large prices obtained in sales of the AP franchises. This exclusionary right, bought and sold like any other asset, had in one instance commanded a price in excess of a million dollars. Some AP members carried the AP franchise on their books at hundreds of thousands of dollars. These amounts represented nothing less than capitalizations of illegal restraints of trade.

²² The by-law provision regarding transfers of the AP franchise reads, "Such retiring owner may, however . . . assign his or its certificate of membership to the succeeding owner of such newspapers, and each succeeding owner shall thereupon become a member of the same class as the predecessor upon signing the roll of members, and assenting to the By-Laws. . . ." At the time the suit was brought thirty-five AP members had acquired memberships under this provision.

which noncompetitors of existing members, regardless of character, could be and were welcomed into the organization.

Illumination upon the purpose and intent of these exclusionary provisions is also gained by the historical facts surrounding AP's formation in 1900. In that year the Associated Press became the successor of a former Illinois corporation of the same name. All members of the predecessor corporation were required to furnish to it exclusively all news which they obtained in their respective districts, and one class of members enjoyed an absolute veto power over the admission of newspapers competing with them. In addition, the members were forbidden access to the services of rival news suppliers. One member sought to enjoin AP of Illinois from expelling it for breach of this latter restriction and was held entitled to an injunction by the Supreme Court of Illinois.²³ That court further decided that AP of Illinois was so impressed with a public interest that its by-laws restrained trade and that it must serve all comers without discrimination. The members, confronted with that decision, resolved to evade it by retreating from the jurisdiction of Illinois and by re-forming under the Membership Corporations Law of the State of New York. Avowedly in order to carry on the same "alliance, offensive and defensive" in different guise, the founders of the present Associated Press expressly admitted "all members of the old corporation with rights and privileges as nearly as practicable exactly the same as those" which the court of Illinois had found to be illegal. The unqualified veto-power over the admittance of competitors was qualified by the substitution of the equally effective "right of protest" and the consequent requirement of a four-fifths vote to override it described above. AP's lawyers warned that "this was the extreme limit to which an embodiment of the old veto power could be safely attempted in the new organization." Over 90 per cent of the members of AP of Illinois became members of the present Associated Press in 1900, 278 of them obtaining at once this qualified veto-power. Certain of them became the holders of bonds of AP carrying controlling voting rights for the selection of the directors.

The record of the case contained an abundance of uncontroverted evidence, not only that the AP group possessed the power to keep competing newspapers at a disadvantage and intended by the force of its exclusionary by-laws to do so, but that AP's practices in the past had had that very result. AP's answer formally admitted that membership therein confers a

²³ *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N.E. 822 (1900). The court pointed out that among other things the corporation held a public franchise to operate telegraph and telephone lines, but this franchise had never been used.

competitive advantage over outsiders. It went further and represented that AP's service was so desirable that, if the barriers to admittance were stricken down, the rival news agencies might be compelled to fold up and leave the field completely to AP. A necessary corollary of these propositions must be that the newspapers which have been excluded by reason of the by-laws have suffered competitive handicaps. And no contradiction was offered to the evidence of such exclusions. During AP's history, 103 applications for membership had been submitted to the vote of the members because subject to protest rights. Only six of them had obtained the requisite four-fifths vote for admission, and these six succeeded only by reason of special circumstances. All six were located in cities other than those in which the papers of the protesting members were published. Of the ninety-seven aspirants as to which the vetoes were upheld, sixty-three have never been admitted, twenty-five were later taken in by action of the directors after waivers of protests had been given by the AP members competing with them, two gained admittance after the 1942 change in the by-laws, and seven later obtained membership through acquisition of or merger with an existing member. Many of these who finally succeeded had to wait for more than twenty years, one as long as forty-one years. Strange to relate, the district court abstained from considering all this admitted evidence as to the past effect of the exclusionary provisions upon the business opportunities of these newspapers.

The district court, closing its eyes to the adverse effect which AP's by-laws had actually exerted in the past upon the competitive opportunities of those left out (on the assumption that that issue was still a matter of controversy), passed upon the lawfulness of both by-laws challenged by the government in the light of their express terms—of course in connection with their setting in the admitted facts and with the conclusions which they necessarily compelled. It determined at once that the provisions for the exclusive rendition of local news by the members to AP, as well as those imposing barriers upon the admission of competing newspapers, were restraints of trade in news. Individual freedom of action to trade therein had been limited by group compact. It found both power and purpose on the part of the combining parties to restrain trade and, as to the exclusionary provisions, drew the logical inference that they would necessarily tend adversely to affect the competitive opportunity of others. The court, however, refused to regard either of these provisions as *ipso facto* illegal, apparently believing that the field of restraints illegal *per se* is reserved for market price arrangements, certain types of monopolizing, and possibly certain kinds of boycotts. But it felt that both of AP's re-

straints must be judged only after the rule of reason had been applied to them.

The rule of reason, the court decided, required it to weigh the advantages to the combining parties flowing from their restraints against the conflicting interests of the public in freedom of opportunity and action. Although the task of balancing these interests was normally a legislative function, the Sherman Act, construed to embody common law standards, had delegated this task in antitrust cases to the courts. So appraised, the court felt that the contrary public interest far outweighed the advantages to AP members derived from their power to exclude newspapers solely in order to hamper the competition they did or might offer. The exclusionary provisions, therefore, were adjudged unreasonable in fact and held to be unlawful restraints. The operation of AP's by-laws was enjoined, unless and until AP should amend its admission requirements to remove all consideration of the effect of admittance or exclusion upon the applicant's competitive position. The preponderance in favor of the public interest flowed from the size and importance of the combination but, more particularly, from the nature of AP's business. The public interest in the matter was for "full illumination," the same kind of need which gave rise to the First Amendment to the Constitution. AP's argument that constitutional rights to freedom of the press would be abridged by governmental interference with its concerted restrictions upon such freedom was thus neatly turned against it. Another way of saying, in this balancing process, that the concern of the public was superior was to declare that AP's undertaking was so extensive, important, and necessary as to be "clothed with a public interest." In saying this the court was not thereby conferring public utility status and obligations upon the press association. Affirmative regulation of businesses falling within that category was of course still for the legislative branch, but, in passing the anti-trust laws, Congress had already acted and had left it to the judiciary to say when as a matter of fact a group of businesses which exclude rivals from the commerce created and enjoyed by their collective action has taken on such character as to fall under the statute's prohibitions.²⁴

The contracts of the AP members to furnish their local news exclusively to the group and to confine AP dispatches to the circle did not meet the same fate. As to this, in the balancing-of-interests process, the scales were tipped in favor of the reasonableness of such exclusivity. The court

²⁴ Mr. Justice Roberts' conclusion that the district court failed to find an intent on the part of the defendants to hamper competition and so was forced judicially to legislate for AP public utility requirements in order to forbid the exercise of the exclusionary by-laws seems to be unsupported by anything contained in the lower court's opinion.

drew upon the analogy of limited restraints held reasonable at the common law which are ancillary to the transfer of a business or property and necessary for its protection. It pointed out that the AP members would lose all benefit of expenses incurred in the collection of this news unless they themselves could retain priority in its publication. So this provision of the by-laws with regard to the members' local news was held reasonable and lawful, standing alone, and was only condemned as a part of the exclusionary program, and then only until the restraints upon the admittance of competitors should be abrogated.

The extent to which the Associated Press could be regarded as a monopolist, or the extent to which the members had conspired or attempted to monopolize, was one of the most interesting legal issues in the case. Factually it is clear that AP does not prevent or hinder nonmember newspapers from obtaining access to domestic or foreign happenings and events. Anyone may freely make his own peculiar observation and account of them. It does not monopolize or seek to monopolize access to these original sources of news, or the facilities for gathering and disseminating all accounts of them, or the furnishing to newspapers of all versions. Nevertheless, AP has affirmatively sought to achieve, and has achieved, complete domination over a particular type of news and news reports. The AP group keeps for itself alone, by excluding-tactics, AP news and AP reports. Of course such are not all the news of world events available to newspapers. Substitutes, at least for evening newspapers and smaller newspapers in the morning field, many of them excellent substitutes, abound.²⁵ The news reports which are created by AP alone and kept solely to its members are, however, unique in character. Duplicates of them, as in the case of fungible goods, are not available to others. AP reports alone are the product of AP's peculiar opportunity for observance, the observance which it alone makes, its exclusive sources, its writing and editing, and of its particular group of newspapers' thoroughgoing and extensive local coverage. As such, these accounts necessarily differ materially and radically from, and are not interchangeable with, the observances and reports of others.²⁶ If they were copyrighted, no one would question

²⁵ In at least twenty-six cities, however, a newspaper excluded from AP could not turn to UP or INS without paying a substantial monetary toll to the subscribers of those services, by reason of so-called "asset value" contracts which UP and INS have entered into with subscribers, providing that if another newspaper wishes to obtain their news it must pay the existing subscriber the stipulated "asset value." Thus AP restrictions contributed to the setting up and protecting of local newspaper monopolies.

²⁶ The lower court expressly found as a fact: "There are differences between the respective news reports sent out by AP, UP and INS since the facilities and opportunities of the news agencies for collecting news and transmitting it speedily differ. Personal choices are involved

their monopoly character. Monopoly in fact, not of all news by whomsoever acquired and presented, but of a particular, distinct type of news report, undoubtedly exists. The district court seemed to be satisfied that the engrossing of such a limited but unique commodity or service, out of many other types of news reports available of the same general character, constituted the kind of monopoly at which section 2 of the Sherman Act, forbidding the monopolization of any part of trade or commerce, was aimed. In the opinion, the court said:

But monopoly is a relative word. If one means by it the possession of some absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose. . . . And yet that advantage alone may make a monopoly unlawful. . . . And so, even if this were a case of the ordinary kind: the production of fungible goods, like steel, machinery, clothes or the like, it would be a nice question whether the handicap upon those excluded from the combination, should prevail over the claims of the members to enjoy the fruits of their foresight, industry and sagacity. But in that event the only interest we should have to weigh against that of the members would be the interest of the excluded newspapers. However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible.²⁷

in selecting events for news coverage and in preparing and editing accounts of the same event." 52 F. Supp. 362 (N.Y., 1943). In its opinion the lower court also said: "In the production of news every step involves the conscious intervention of some news gatherer, and two accounts of the same event will never be the same. Those who make up the first record—the reporters on the spot—are themselves seldom first hand witnesses; they must take the stories of others as their raw material, checking their veracity, eliminating their irrelevancies, finally producing an ordered version which will evoke and retain the reader's attention and convince him of its truth. And the report so prepared, when sent to his superiors, they in turn 'edit,' before they send it out to the members; a process similar to the first. A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable. So much for those items which actually appear in all the larger news services, and which include all events of major interest. But these are not all: the same personal choice which must figure in preparing a dispatch operates in deciding what events are important enough to appear at all; and about that men will differ widely; as we often find, when one service 'carries' what others have thought too trivial; or may indeed have missed altogether.

"For these reasons it is impossible to treat two news services as interchangeable, and to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have; it is only by crosslights from varying directions that full illumination can be secured." *Ibid.*, at 372.

²⁷ *Ibid.*, at 371-72. Judge Learned Hand, who wrote the opinion, has been the chief source of learning in the difficult problem of the meaning to be ascribed to monopolization. In his opinion in *Fashion Originators' Guild v. Federal Trade Com'n*, 114 F. 2d 80 (C.C.A. 2d, 1940), he said with regard to the Guild's exclusive domination of women's dresses patterned on particular designs: "Finally, it is of no consequence that the Guild does not supply the whole

But, having painstakingly found that AP had monopolized within the meaning of section 2 of the Sherman Act, is it not strange that the district court still felt that the rule of reason must be applied to AP's achievement of monopoly? In one breath it held that "If a combination effectively excludes, or tries to exclude, outsiders from the business altogether, it is a monopoly or an incipient monopoly and it is unconditionally unlawful,"²⁸ but in the next insisted on weighing and balancing conflicting claims, for the purpose of determining whether AP's monopolization could be justified. The key to the reconciliation of the apparent conflict may lie in the word "altogether," but newspapers not admitted to AP were excluded altogether from its services. In the cases cited the objects of the boycotts were not prevented from engaging in all business, but only in the business monopolized. Thus, the lower court's treatment of the monopolization which it found to exist was strangely at odds with its holding that the rule of reason had to be applied and then determined to be satisfied or not by additional criteria. Instead of employing the monopolization as ground for holding the restraints unreasonable *per se* and for refusing to entertain and decide any question of justification, the court merely regarded this characteristic as an additional circumstance militating against the reasonableness in fact of AP's conduct.

The Supreme Court affirmed, without modification, the decree of the district court, "interpreting the decree to mean that AP news is to be furnished to competitors of old members without discrimination through By-Laws controlling members, or otherwise."²⁹ It may be argued, of course,

market for women's dresses; it aims at a monopoly however small its share of total sales. The reason is as follows. Although all dresses made after one design are fungibles, the different designs themselves are not fungibles. Each has its own attraction for buyers; each is unique, however trifling the basis for preferring it may be. Hence to attempt to gather to oneself all possible reproductions of a given design is to attempt to create a monopoly, as at once appears from the fact that a copyright for it—and a fortiori a design patent upon it—would be ranked as a monopoly. It is true that the sanction of that monopoly may be very weak; it depends upon the design's attractions above other designs, often not a very important margin of advantage. But the same is true of nearly all monopolies, for there are substitutes for most goods. . . . For these reasons the combination was unlawful *per se*. . . ." *Ibid.*, at 85. See Judge Hand's opinions in *United States v. Corn Products Refining Co.*, 234 Fed. 964, 976 (D.C.N.Y., 1916), and in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 425-26 (C.C.A. 2d, 1945); see also *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (Minn., 1945).

²⁸ 52 F. Supp. 362, 369 (N.Y., 1943). The court cited *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Fashion Originators' Guild v. Federal Trade Com'n*, 312 U.S. 457, 466 (1941); *American Medical Ass'n v. United States*, 317 U.S. 519 (1943); see also *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *Standard Oil Co. v. United States*, 221 U.S. 1, 60, 61 (1911); *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 598 (1936); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 427-28 (C.C.A. 2d, 1945).

²⁹ The Supreme Court denied AP's petition for reargument of the case on October 9, 1945, 66 Sup. Ct. 6 (1945). On November 28, 1945, at a special meeting of the members, AP's by-

that it adopted sub silentio the reasoning of the lower court as well. But Mr. Justice Black's opinion for the majority certainly seems to voice a stricter view of the propriety of an effort of this scope to exclude competitors from the benefits of collective action. Although the majority does not talk in terms of boycott, principal reliance is placed upon the cases relating to boycotts theretofore condemned. The Court distinguished *Board of Trade v. Christie Grain & Stock Co.*,³⁰ *Moore v. New York Cotton Exchange*,³¹ and *Hunt v. New York Cotton Exchange*³² as embodying no decision that "such restrictive arrangements as appear in the instant case would not constitute unreasonable restraints of trade." May not one conclude from this opinion that this type of boycott by a dominant group is now adjudged ipso facto illegal? The opinion spends no time on the judicial balancing of conflicting interests. Such balancing is assumed to have taken place in the legislative halls before Congress expressed its will in the statute, and the terms of the Sherman Act alone appear to be taken as the measure of right and wrong.³³ Mr. Justice Frankfurter must have felt that this was the rationale of his brethren, for, although he agreed with the result, he felt compelled to issue a separate opinion, adopting Judge Hand's view that AP's exclusionary restraints should be enjoined only after being found wanting in the light of the rule of reason. Quite evidently Mr. Justice Roberts and the Chief Justice likewise so interpreted the prevailing opinion, because they argued that it goes so far as to reinstate the strict literal construction of the Sherman Act adopted in *United States v. Trans-Missouri Freight Ass'n*³⁴ and *United States v. Joint Traffic Ass'n*.³⁵ If powerful, not necessarily dominant, interests have combined to prevent others from obtaining a valuable, though not essential, service for the purpose of limiting competition, injury to the public is conclusively presumed. The spokesman for the Court appears to be willing to invoke the rule of reason only for the purpose of sanctioning lesser arrangements, such as a single reporter's contract to deliver his news reports exclusively to a single newspaper, or an exclusive agreement as to news between two newspapers in different cities, provided they are not utilized as essential features of a

laws were reformed to comply with the requirements of the decree; and four newspapers, including the *Chicago Sun* and the *Washington Times-Herald*, were admitted, amid threats from certain members that immunizing legislation will be sought.

³⁰ 198 U.S. 236 (1905).

³¹ 270 U.S. 593 (1926).

³² 205 U.S. 322 (1907).

³³ See *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912).

³⁴ 166 U.S. 290 (1897).

³⁵ 171 U.S. 505 (1898).

program to hamper or destroy competition. Size and comprehensiveness of the program, rather than the nature of the business affected, would seem to be the criterion of legal unreasonableness. That AP's comprehensive program to achieve that result is held not admitting of justification would seem to follow, not only from the omission of the Court to weigh such matters, but from the following excerpts from the majority opinion:

... the restrictive arrangements which appellants admitted, were sufficient to justify summary action by the court at that stage of the case.

... the court below found, and we think correctly, that the By-Laws on their face, and without regard to their past effect, constitute restraints of trade. . . .

Trade restraints of this character, aimed at the destruction of competition, tend to . . . frustrate the free enterprise system which it was the purpose of the Sherman Act to protect.

... the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act.

The restraints on trade in news here were no less than those held to fall within the ban of the Sherman Act with reference to combinations to restrain trade outlets in the sale of tiles, . . . or enameled iron ware, . . . or lumber, . . . or women's clothes, . . . or motion pictures. . . .³⁶

The Court's further statement that "the Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete"³⁷ appears to carry this branch of the antitrust laws to the farthest point yet reached by the decided cases.

Separate questions in the case, germane however to those already considered, concerned the validity under the antitrust laws of the respective undertakings of AP and the Canadian Press in a mutually exclusive cartel subsisting between them since 1935. The Canadian Press, with a membership composed of eighty-six Canadian newspapers out of a total of approximately ninety-three, occupied the same position in that country that AP enjoys in the United States. It operated under by-laws similar to AP's. By force of the agreement, seven Canadian newspapers could have no access to AP news; and United Press, International News Service, and non-AP newspapers here were denied the news imported into this country from the Canadian association and its members. The holdings of the district court, not passed upon by the Supreme Court, were that the restraints effected in Canada on the use there of AP's exports were no concern of our law, and that the Sherman Act was not intended to reach

³⁶ 326 U.S. 1, 12-19 (1945).

³⁷ *Ibid.*, at 15.

them; that the restraints on the use of the news imported from the Canadian Press had no different significance than those imposed on local news gathered by AP members exclusively for the AP group. The one was therefore adjudged innocent; and the other was offensive only in connection with AP's exclusion of competing newspapers.

If the holding with regard to AP's exclusive right to its members' local news is sound, the Court's disposition of the similar restraints on the imported Canadian news can be accepted. But the view that the Sherman Act does not apply to restraints contracted for here because the effect of them is felt abroad seems more questionable. It certainly deserved less cavalier discussion—what with the paucity of authorities on the extra-territorial application of our antitrust laws. The Sherman Act by its terms applies just as fully to restraints in foreign commerce as to interstate ones. True, the Court's treatment of this leg of AP's cartel with the Canadian Press is supported by *American Banana Co. v. United Fruit Co.*,³⁸ but it had been thought that the doctrine of that case had been impaired by later decisions.³⁹

³⁸ 213 U.S. 347 (1909).

³⁹ See *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Branch v. Federal Trade Com'n*, 141 F. 2d 31 (C.C.A. 7th, 1944). Note also the specific statutory exceptions contained in the Webb-Pomerene Act, 40 Stat. 516 (1918), 15 U.S.C.A. §§ 61-65 (1941), a later interlacing statute, relevant, however, upon the construction to be placed on the Sherman Act. See *United States v. Hutcheson*, 312 U.S. 219 (1941).