**United States Vs. Joint Traffic Association**

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**Appeal No.** : 171 U.S. 505

**Appellant** : United States

**Respondent** : Joint Traffic Association

**Judgement** :

United States v. Joint Traffic Association - 171 U.S. 505 (1898)
U.S. Supreme Court United States v. Joint Traffic Association, 171 U.S. 505 (1898)

**United States v. Joint Traffic Association**

**No. 84**

**Argued February 24-25, 1898**

**Decided October 24, 1898**

**171 U.S. 505**

*APPEAL FROM THE CIRCUIT COURT*

*OF APPEALS FOR THE SECOND CIRCUIT*

## SYLLABUS

Thirty-one railroad companies, engaged in transportation between Chicago and the Atlantic coast, formed themselves into an association known as the Joint Traffic Association, by which they agreed that the association should have jurisdiction over competitive traffic, except as noted, passing through the western termini of the trunk lines and such other points as might be thereafter designated, and to fix the rates, fares and charges therefor, and from time to time change the same. No party to the agreement was to be permitted to deviate from or change those rates, fares, or charges, and its action in that respect was not to affect rates disapproved except to the extent of its interest therein over its own road. It was further agreed that the powers so conferred upon the managers should be so construed and exercised as not to permit violation of the Interstate Commerce Act, and that the managers should cooperate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges, etc. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which declined or failed to observe the established rates. Assessments were authorized in order to pay expenses, and the agreement was to take effect January 1, 1896, and to continue in existence for five years. The bill, filed on behalf of the United States, sought a judgment declaring that agreement void.

## HELD

(1) That ,upon comparing this agreement with the one set forth in *United States v. Trans-Missouri Freight Association,* 166 U. S. 290 , the similarity between them suggests that a similar result should be reached in the two cases, as the point now taken was urged in that case, and was then intentionally and necessarily decided.

(2) That, so far as the establishment of rates and fares is concerned, there is no substantial difference between this agreement and the one set forth in the *Trans-Missouri* case.

(3) That Congress, with regard to interstate commerce and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition.

The bill was filed in this case in the Circuit Court of the United States for the Southern District of New York for the purpose of obtaining an adjudication that an agreement

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entered into between some thirty-one different railroad companies was illegal, and enjoining its further execution.

These railroad companies formed most (but not all) of the lines engaged in the business of railroad transportation between Chicago and the Atlantic coast, and the object of the agreement, as expressed in its preamble, was to form an association of railroad companies

"to aid in fulfilling the purpose of the Interstate Commerce Act, to cooperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies, and the introduction of economics in the conduct of the freight and passenger service."

To accomplish these purposes, the railroad companies adopted articles of association by which they agreed that the affairs of the association should be administered by several different boards, and that it should have jurisdiction over all competitive traffic (with certain exceptions therein noted) which passed through the western termini of the trunk lines (naming them) and such other points as might be thereafter designated by the managers. The duly published schedules of rates, fares, and charges, and the rules applicable thereto, which were in force at the time of the execution of the agreement and authorized by the different companies and filed with the Interstate Commerce Commission, were reaffirmed

by the companies composing the association. From time to time, the managers were to recommend such changes in the rates, fares, charges, and rules as might be reasonable and just, and necessary for governing the traffic covered by the agreement and for protecting the interests of the parties to the agreement, and a failure to observe such recommendations by any of the parties to the agreement was to be deemed a violation of the agreement. No company which was a party to it was permitted in any way to deviate from or to change the rates, fares, charges, or rules set forth in the agreement or recommended by the managers except by a resolution of the board of directors of the company, and its action was not to affect the rates, etc., disapproved, except to the extent

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of its interest therein over its own road. A copy of such resolution of the board of any company authorizing a change of rates or fares, etc., was to be immediately forwarded by the company making the same to the managers of the association, and the change was not to become effective until thirty days after the receipt of such resolution by the managers. Upon the receipt of such resolution, the managers were "to act promptly upon the same, for the protection of the parties hereto." It was further stated in the agreement that

"the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall cooperate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established thereunder."

One provision of the agreement was to the effect that the managers were charged with the duty of securing to each company which was a party to the agreement equitable proportions of the competitive traffic covered by the agreement, so far as it could be legally done. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which might decline or fail to observe the rates, etc., established under

it, and the interests of parties injuriously affected by such action of the managers were to be accorded reasonable protection insofar as the managers could reasonably do so. When in the judgment of the managers it was necessary to the purposes of the agreement, they might determine the divisions of rates and fares between connecting companies who were parties to the agreement and connections not parties thereto, keeping in view uniformity and the equities involved.

Joint freight and passenger agencies might be organized by the managers, and, if established, were to be so arranged as to give proper representation to each company party to the agreement. Soliciting or contracting passenger or freight agencies were not to be maintained by the companies except

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with the approval of the managers, and no one that the managers decided to be objectionable was to be employed or continued in an agency. The officials and employees of any of the companies could be examined, and an investigation made, when in the judgment of the managers their information or any complaint might so warrant. Any violation of the agreement was to be followed by a forfeiture of the offending company in a sum to be determined by the managers, which should not exceed five thousand dollars, or, if the gross receipts of the transaction which violated the agreement should exceed five thousand dollars, the offending party should, in the discretion of the managers, forfeit a sum not exceeding such gross receipts. The sums thus collected were to go to the payment of the expenses of the association, except the offending company should not participate in the application of its own forfeiture.

The agreement also provided for assessments upon the companies in order to pay the expenses of the association, and also for the appointment of commissioners and arbitrators, who were to decide matters coming before them. No one retiring from the agreement before the time fixed for its final completion, except by the unanimous consent of the parties, should be entitled to any refund from the residue of the deposits remaining at the close of the agreement.

It was to take effect January 1, 1896, and to continue in existence five years, after which any company could retire upon giving ninety days' written notice of its desire to do so.

The bill filed by the government contained allegations showing that all the defendant railroad companies were common carriers duly incorporated by the several states through which they passed, and that they were engaged as such carriers in the transportation of freight and passengers, separately or in connection with each other, in trade and commerce continuously carried on among the several states of the Union and between the several states and the territories thereof. The bill also charged that the defendants, unlawfully intending to restrain commerce among the several states and to prevent competition among the railroads named in respect to all their

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interstate commerce, entered into the agreement referred to above, and it charged that the agreement was an unlawful one, and a combination and conspiracy, and that it was entered into in order to terminate all competition among the parties to is for freight and passenger traffic, and that the agreement unlawfully restrained trade and commerce among the several states and territories of the United States and unlawfully attempted to monopolize a part of such interstate trade and commerce. The bill ended with the allegation that the companies were preparing to put into full operation all the provisions of the agreement, and the relief sought was a judgment declaring the agreement void and enjoining the parties from operating their roads under the same. The defendant the Joint-Traffic Association filed an answer (the other defendants substantially adopting it) which admitted the making of the contract, but denied its invalidity or that it is or was intended to be an unlawful contract, combination, or conspiracy to restrain trade or commerce or that it was an attempt to monopolize the same, or that it was intended to restrain or prevent legitimate competition among the railroads which were parties to the agreement. The answer, in brief, denied all allegations of unlawful acts or of an unlawful intent, unless the making of the agreement itself was an unlawful act. The answer then set forth in quite lengthy terms a general history of the condition of

the railroad traffic among the various railroads which were parties to the agreement at the time it was entered into, and alleged the necessity of some such agreement in order to the harmonious operation of the different roads, and that it was necessary as well to the public as to the railroads themselves.

The case came on for hearing of bill and answer, and the circuit court, after a hearing, dismissed the bill, and upon appeal its decree was affirmed by the Circuit Court of Appeals for the Second Circuit, and the government has appealed here.

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MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

This case has been most ably argued by counsel both for the government and the railroad companies. The suit is brought to obtain a decree declaring null and void the agreement mentioned in the bill. Upon comparing that agreement with the one set forth in the case of *United States v. Trans-Missouri Freight Association,* 166 U. S. 290 , the great similarity between them suggests that a similar result should be reached in the two cases. The respondents, however, object to this, and give several reasons why this case should not be controlled by the other. It is, among other things, said that one of the questions sought to be raised in this case might have been, but was not, made in the other; that the point therein decided, after holding that the statute applied to

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railroad companies as common carriers, was simply that all contracts, whether in reasonable as well as in unreasonable restraint of trade, were included in the terms of the act, and the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided, while it is plainly raised in this.

Again it is asserted that there are differences between the provisions contained in the two agreements of such a material and fundamental nature that the decision in

the case referred to ought to form no precedent for the decision of the case now before the Court.

It is also objected that the statute, if construed as it has been construed in the *Trans-Missouri* case, is unconstitutional in that it unduly interferes with the liberty of the individual and takes away from him the right to make contracts regarding his own affairs, which is guarantied to him by the Fifth Amendment to the Constitution, which provides that

"[n]o person shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

This objection was not advanced in the arguments in the other case.

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention because, as is stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far-reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the antitrust statute has been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the *Trans-Missouri* case clearly shows not only that the point now taken was there urged upon the attention of the Court, but it was then intentionally and necessarily decided. The whole foundation of the case on the part of the government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and unlawful on that account. If

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the agreement did not in fact restrain trade, the government had no case.

If it did not in any degree restrain trade, it was immaterial whether the statute embraced all contracts in restraint of trade or only such as were in unreasonable

restraint thereof. There was no admission or concession in that case that the agreement did in fact restrain trade to a reasonable degree. Hence, it was necessary to determine the fact as to the character of the agreement before the case was made out on the part of the government.

The great stress of the argument on both sides was undoubtedly upon the question as to the proper construction of the statute, for that seemed to admit of the most doubt; but the other question was before the Court, was plainly raised, and was necessarily decided. The opinion shows this to be true. At page 166 U. S. 341 of the report, the opinion contains the following language:

"The conclusion which we have drawn from the examination above made of the question before us is that the Anti-Trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature. . . . Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local."

"To that end the association is formed, and a body created which is to adopt rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet, while in force, and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is

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to put a restraint upon trade or commerce as described in the act. For these reasons, the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary

effect of the agreement is to restrain trade, no matter what the intent was on the part of those who signed it."

The bill of the complainants in that case, while alleging an illegal and unlawful intent on the part of the railroad companies in entering into the agreement, also alleged that, by means of the agreement, the trade, traffic, and commerce in the region of country affected by the agreement had been and were monopolized and restrained, hindered, injured, and retarded. These allegations were denied by defendants.

There was thus a clear issue made by the pleadings as to the character of the agreement -- whether it was or was not one in restraint of trade.

The extract from the opinion of the Court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the Court and was consciously, purposely, and necessarily decided. It cannot, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was assumed that the agreement did to some reasonable extent restrain trade. In discussing the question as to the proper construction of the act, the Court did not touch upon the other aspect of the case, in regard to the nature of the agreement itself, but when the question of construction was finished, the opinion shows that the question as to the nature of the agreement was then entered upon and discussed as a fact necessary to be decided in the case, and that it in fact was decided. An unlawful intent in entering into the agreement was held

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immaterial, but only for the reason that the agreement did in fact and, by its terms, restrain trade.

Second. We have assumed that the agreements in the two cases were substantially alike. This the respondents by no means admit, and they assert that there are such material and substantial differences in the provisions of the two instruments as to necessitate a different result in this case from that arrived at in the other.

The expressed purpose of the agreement in this case is, among other things, "to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic." The companies agree that the schedule of rates and fares already duly published and in force, and authorized by the companies parties to the agreement, and filed, as to interstate traffic, with the Interstate Commerce Commission, shall be reaffirmed, and copies of all such schedules are to be filed with the managers constituted under the agreement within ten days after it becomes effective. The managers may, from time to time, recommend changes in the rates, etc., and a failure to observe the recommendations is deemed a violation of the agreement. No company can deviate from these rates except under a resolution of its board of directors, and such resolution can only take effect thirty days after such service of a copy thereof on the managers, who, upon receipt thereof, "shall act promptly for the protection of the parties hereto." For a violation of the agreement, the offending company forfeits to the association a sum to be determined by the managers thereof, not exceeding five thousand dollars, or more upon the contingency named in the rule.

So far as the establishment of rates and fares is concerned, we do not see any substantial difference between this agreement and the one set forth in the *Trans-Missouri* case. In that case, the rates were established by the agreement, and any company violating the schedule of rates as established under the agreement was liable to a penalty. A company could withdraw from the association on giving thirty days' notice, but while it continued, a member it was bound to charge the rates fixed, under a penalty for not doing so. In

this case, the companies are bound to charge the rates fixed upon originally in the agreement or subsequently recommended by the board of managers, and the failure to observe their recommendations is deemed a violation of the agreement. The only alternative is the adoption of a resolution by the board of directors of any company providing for a change of rates so far as that company is concerned, and the service of a copy thereof upon the board of managers, as already stated. This provision for changing rates by any one company is absent from the other agreement. It is this provision which is referred to by counsel as most material and important, and one which constitutes a material and important distinction between the two agreements. It is said to be designed solely to prevent secret and illegal competition in rates, while at the same time providing for and permitting open competition therein, and that, unless it can be regarded as restraining competition so as to restrain trade, there is not even an appearance of restraint of trade in the agreement. It is obvious, however, that if such deviation from rates by any company from those agreed upon be tolerated, the principal object of the association fails of accomplishment, because the purpose of its formation is the establishment and maintenance of reasonable and just rates, and a general uniformity therein. If one company is allowed, while remaining a member of the association, to fix its own rates and be guided by them, it is plain that, as to that company, the agreement might as well be rescinded. This result was never contemplated. In order, therefore, not only to prevent secret competition, but also to prevent any competition whatever among the companies parties to the agreements, the provision is therein made for the prompt action of the board of managers whenever it receives a copy of the resolution adopted by the board of directors of any one company for change of the rates as established under the agreement. By reason of this provision, the board undoubtedly has authority and power to enforce the uniformity of rates as against the offending company upon pain of an open, rigorous, and relentless war of competition against it on the part of the whole association.

A company desirous of deviating from the rates agreed upon, and which its associates desire to maintain, is at once confronted with this probability of a war between itself, on the one side, and the whole association, on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus, the power to commence such a war on the part of the managers would operated to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member. Counsel for the association themselves state that the agreement makes it the duty of the managers, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. By this course, the competition is open, but nonetheless sufficient on that account, and the desired and expected result is to be the yielding of the offending company, induced by the war which might otherwise be waged against it by the combined force of all the other parties to the agreement. Under these circumstances, the agreement, taken as a whole, prevents, and was evidently intended to prevent, not only secret, but any, competition. The abstract right of a single company to deviate from the rates becomes immaterial, and its exercise, to say the least, very inexpedient, in the face of this power of the managers to enlist the whole association in a war upon it. This is not all, however, for the agreement further provides that the managers are to have power to organize such joint freight and passenger agencies as they may deem desirable, and, if established, they are to be so arranged as to give proper representation to each company, and no soliciting or contracting passenger or freight agency can be maintained by any of the

companies except with the approval of the managers. They are also charged with the duty of securing to each company party to the agreement equitable proportions of the competitive traffic covered by the agreement, so far as can be legally done. The natural, direct, and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time of its existence. It is probably as effective in that way as would be a provision in the agreement prohibiting in terms any competition whatever.

It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us, the agreement starts out with rates fixed by each company for itself, and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. The distinction is unimportant. It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement, the board of managers is, in substance, and as a result thereof, placed in control of the business and rates of transportation, and its duty is to see to it that each company charges the rates agreed upon, and receives its equitable proportion of the traffic.

The natural and direct effect of the two agreements is the same, *viz.,* to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently important or material to call for different judgments in the two cases on any such ground. Indeed, counsel for one of the railroad companies, on this argument, in speaking of the agreement in the *Trans-Missouri* case, says of it that its terms, while substantially similar to those of the agreement here, were less explicit in making it just and reasonable.

Regarding the two agreements as alike in their main and material features, we are brought to an examination of the question of the constitutionality of the act, construed as it has

been in the *Trans-Missouri* case. It is worthy of remark that this question was never raised or hinted at upon the argument of that case, although, if the respondents' present contention be sound, it would have furnished a conclusive objection to the enforcement of the act as construed. The fact that not one of the many astute and able counsel for the transportation companies in that case raised an objection of so conclusive a character, if well founded, is strong evidence that the reasons showing the invalidity of the act as construed do not lie on the surface, and were not then apparent to those counsel.

The point not being raised, and the decision of that case having proceeded upon an assumption of the validity of the act under either construction, it can, of course, constitute no authority upon this question. Upon the constitutionality of the act, it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint to trade, and the effort to do this invalidates the act in question. It is urged that it is for the Court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree renders it injurious or prejudicial to the welfare or security of society, and if the Court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guaranties furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat

restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages, the formation of a corporation to carry on any particular line of business by those already engaged therein, a contract of partnership or of employment between two persons previously engaged in the same line of business, the appointment by two producers of the same person to sell their goods on commission, the purchase by one wholesale merchant of the product of two producers, the lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, the withdrawal from business of any farmer, merchant, or manufacturer, a sale of the goodwill of a business with an agreement not to destroy its value by engaging in similar business, and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the Court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of that term,

and the sale of a goodwill of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri* case as a contract not within the meaning of the act, and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have, in our judgment, little or no bearing upon the question under consideration. In *Hopkins v. United States,* decided at this term, *post,* 171 U. S. 578 , we have said that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that

"the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and, possibly, to restrain it."

To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned or by any other decision of this Court.

The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several states or otherwise, has the power to prohibit, as in restraint

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of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects, and, of course, is intended to affect, the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and, if such transportation be between states, it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and, if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If, in the absence of any contract or combination among the railroad companies, the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not Congress, with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

As counsel for the Traffic Association has truly said, the ordinary highways on land have generally been established and maintained by the public. When the matter of the building of railroads as highways arose, a question was presented whether the state should itself build them or permit others to do it. The state did not build them, and, as their building required, among other things, the appropriation of

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land, private individuals could not enforce such appropriation without a grant from the state.

The building and operation of a railroad thus required a public franchise. The state would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it, the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service -- that of transportation of passengers and freight -- is a part of trade and commerce, and when transported between states, such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several states.

Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

Although the franchise, when granted by the state, becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several states. This will be conceded by all, the only question being as to the extent of the power.

We think it extends at least to the prohibition of contracts relating to interstate commerce which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think that when the grantees of this public franchise are competing railroads seeking the business or transportation of men and goods from one state to another, that ordinary freedom of contract in the use and management of their property requires the right to combine

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as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so even though the rates provided for in the agreement may, for the time, be not more than are reasonable. They may easily and at any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.

The prohibition of such contracts may, in the judgment of Congress, be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

The cases cited by the respondents' counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of Congress to prohibit contracts of the nature involved in this case. The power to regulate commerce has no limitation other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution, or in any of the amendments to that instrument.

*Monongahela Navigation Co. v. United States,* 148 U. S. 312 , 148 U. S. 336 ; *Interstate Commerce Commission v. Brimson,* 154 U. S. 447 , 154 U. S. 479 .

Among these limitations and guaranties, counsel refer to those which provide that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant.

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As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when, by a general statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved.

The case of *Allgeyer v. Louisiana,* 165 U. S. 578 , is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty" as used in the Fourteenth Amendment to the Constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary, and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the Fifth, or any other, Amendment in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the Court meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful it is unnecessary here to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood

unlawful, and in regard to those, the citizen would have no right to contract to carry them on.

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie v. United States,* 157 U. S. 160 .

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se,* may yet be prohibited by the

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legislation of the states, or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof. The question is, for us, one of power only, and not of policy. We think the power exists in Congress, and that the statute is therefore valid.

Finally, we are asked to reconsider the question decided in the *Trans-Missouri* case, and to retrace the steps taken therein, because of the plain error contained in that decision, and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of a question but lately decided by this Court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the Court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet, in substance, it is the same thing. The Court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the Court, and the same arguments were addressed to us on both those occasions. The report of the

*Trans-Missouri* case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the Court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the Court. It was after a full discussion of the questions involved, and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the Court came to the conclusion it did. Soon after the decision, a petition for a rehearing of the case was made, supported by a printed argument in its favor and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case.

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This Court, with care and deliberation, and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the Court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now, for the third time, the same arguments are employed and the Court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the *Trans-Missouri* case.

The learned counsel, while making the application, frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly, and so forcibly presented in the dissenting opinion of MR. JUSTICE WHITE that it is hardly possible to add to it, nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this Court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the Court came to the conclusion it did.

It is not now alleged that the Court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the Court, notwithstanding the arguments for an opposite view, arrived at an erroneous result which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clear that the first necessity is to convince the Court that the decision was erroneous. It is scarcely to be assumed that such a result could be

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secured by the presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the Court.

We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the Court to again give to those arguments strict and respectful attention. It is not matter for surprise that we still are unable to see the error alleged to exist in our former decision or to change our opinion regarding the questions therein involved.

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it most have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads is a

question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree, and on a single point. They admit that, if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale, and in numerous forms, without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads -- whether they are favorable to the commerce in which the roads are engaged, or unfavorable, and in restraint of that commerce. Upon that question, it is contended that agreements between railroad companies of the

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nature of that now before us are promotive, instead of in restraint, of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After that, the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Commerce, it is said, thus finally becomes restrained by the effects of competition, while at the same time otherwise valuable railroad property is thereby destroyed or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached, by reason of the peculiar nature of railroad property, which must be operated, and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to not only compete among themselves for business but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus the indirect but final effect of competition is claimed to be the raising of rates and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome and general uniformity and reasonableness of rates securely established.

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The natural, direct, and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this play of competition restrains, instead of promoting, trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition is matter of very great uncertainty, depending upon many contingencies, and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may, and often do, continue in existence and engage in their lawful traffic at some profit, although they are competing railroads, and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible, but probable, that good sense and integrity of purpose would prevail among the managers, and, while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do in regard to the various questions herein discussed, we think it unnecessary to

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further allude to the other reasons which have been advanced for a reconsideration of the decision in the *Trans-Missouri* case.

*The judgments of the Circuit Court of the United States for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit are reversed, and the case remanded to the circuit court with directions to take such further proceedings therein as may be in conformity with this opinion.*

MR. JUSTICE GRAY, MR. JUSTICE SHIRAS, and MR. JUSTICE WHITE dissented. MR. JUSTICE Mc KENNA took no part in the decision of the case.