Federal Incorporation

Part I – Text

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NOTE: This material consists of a collection and statement of problems and arguments, advanced by the numerous writers on the subject of federal incorporation as well as those that suggest themselves. It consists of matters which are, in a sense, preliminary to considerations of the specific provisions of a federal incorporation law and charter restrictions.

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PROPOSALS FOR FEDERAL INCORPORATION

Legislative and Official Investigations and Recommendations

Recommendations and proposals for federal incorporation have been made by President Theodore Roosevelt and President Taft. The question was debated during the administration of President Wilson, but was put aside in favor of anti-trust legislation in the form of the Federal Trade Commission Act and the Clayton Act -- although, toward the end of his administration, President Wilson recommended a federal franchise or license system for corporations engaged in interstate commerce.

Between the years 1897 and 1933, some sixty measures for federal incorporation[1], federal licensing[2], or federal registration[3], of corporations engaged in interstate commerce have been introduced in Congress[4]. There is an extensive, though scattered, literature on the subject[5].

The following summaries of the various official recommendations and legislative investigation will disclose the nature, purposes and problems of federal incorporation.

UNITED STATES INDUSTRIAL COMMISSION, 1902

Proposals for federal licensing or federal incorporation of companies engaged in interstate commerce had been made during the closing years of the nineteenth century.[6]

In 1902 the United States Industrial Commission,[7] in recommending the correction of corporate abuses and monopoly through publicity and the amplification and enforcement of the antitrust laws,[8] recognized that amplification of the antitrust acts was an intermediate step in the development of regulation of corporations:

> "…If a method of regulation such as is suggested .. should prove inefficient, there would be no break in the continuity of legislation if later it should seem advisable for Congress to take the next step indicated under plan second, and provide for a system of Federal corporation laws, under which should be reorganized part or all of the corporations doing interstate business. Should that be done, these corporation laws should be sufficiently rigid, as regards methods of organization and promotion, as regards principles to be followed in fixing capitalization, as well as concerning the responsibility of promoters and directors; and an adequate degree of publicity should be given to the conditions of business …"[9]

The Advisory Counsel to the Commission submitted an opinion on federal incorporation, with special reference to the power of Congress and legal problems.[10] A statement was also submitted regarding "Constitutional Aspects of the Federal Control of Corporations" which included a discussion of federal incorporation laws.[11]

COMMISSIONER OF CORPORATIONS, 1904

The creation of the Department of Commerce and the Bureau of Corporations was advocated by President Theodore Roosevelt as a part of his program to secure regulation of corporations engaged in interstate commerce.[12] The first general report to Congress by the newly created Bureau of Corporations, which was not engaged in the enforcement of any legislation, stated that the attention of the Bureau had been given to an inquiry into the industrial and legal methods used by the agencies engaged in interstate and foreign commerce.[13] In connection with a study of the corporation laws of the nation, the Commissioner of Corporations said:

> "Substantially all the corporations of to-day are the creatures of the different States. *** The present situation of corporation law may be summed up roughly by saying that its diversity is such that in operation it amounts to anarchy.***
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> This situation, taken in connection with the principle of the comity of States, has had a singular and far-reaching effect on commercial conditions. This principle of comity has had the practical result of giving to the organizers of a proposed corporation the choice of all the corporation laws of the various states. Many such organizers represent one of the peculiar interests above referred to, namely, that of the financial or speculative type. Each State naturally desires, chiefly for the purpose of revenue, to attract incorporation to itself by lax corporation laws. The ground has been cut from under the feet of objectors to such laws by the unanswerable proposition that if incorporators or organizers were not accommodated in the given State they could incorporate in a more complacent State and easily come back to the first State to do business. The logical result has been an inevitable tendency of State legislation toward the lowest level of lax regulation and of extreme favor toward this special class of incorporators, regardless of the interests of the other classes properly concerned. ***
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> The net result of this State system is thoroughly vicious. In the bidding of State against State for corporation revenue, only one of the numerous interests involved in corporate business is regarded. The proper relation of the corporation to the State is almost wholly lost sight of in

> 'broad' corporation laws. Corporations themselves are hampered by the 'foreign corporation' relation which they must hold toward most of their business. Constant change and instability of law is inevitable, and finally, in the struggle for preferences, privileges, and discriminations, the two contestants to-wit, the corporation which seeks and the State which should withhold, are unequally balanced, and upon the wisdom and patriotism of a single State is placed the pressure of forces that are national in their power."[14]

The Commissioner of Corporations then examined possible types of remedial legislation, first pointing out that "the chief difficulty in the way of providing ample remedies has been the conflict between Federal and State authority as to jurisdiction over many of the acts of great industrial agencies, and the uncertainty of the extent of regulation exercised or to be exercised by the Federal Government over agencies engaged in both State and interstate commerce."[15] State regulation was said to be insufficient because "it is obviously impossible that forty-five different jurisdictions should agree on anything like a uniform system in so important a matter as corporation law", and "Congress has no power to divest itself of its constitutional powers or to delegate the same to any other legislative body" and "even supposing that this could be legally done, the results would be open to the same objections as have been referred to".[16] Federal incorporation -- "the passage by Congress of a complete corporation law with the compulsory requirement that all corporations engaged in interstate commerce shall be organized under such law" -- was set forth as one method of federal regulation.[17] The Commissioner of Corporations, however, favored a "federal franchise or license system", that is, "the imposition of all necessary requirements as to corporate organization and management as a condition precedent to the grant of such franchise or license."[18] Federal incorporation was said to involve "radical industrial and political changes by the centralization of power in the Federal Government" as well as "serious difficulties because of its effect upon the authority of the States over such corporations in matters of taxation and local regulation," whereas it was the opinion of the Commissioner that a federal

license or franchise "avoids the difficulties of national incorporation as well as the practical one of centralization of power, and gives the national Government direct regulation of the agencies of interstate and foreign commerce."[19] Federal incorporation was said to be "based upon a clean-cut legal theory" bringing "the entire matter of interstate commerce under one jurisdiction" and reducing "to a minimum the friction that must occur between Federal and State authorities", but was thought objectionable because of "the legal uncertainty," the drastic nature of the change", the obvious reduction of State revenue from incorporation," and "the tremendous change toward centralization." The system of federal franchise, on the other hand, was thought to afford "sufficient Federal control to allow of uniformity and necessary improvement of the present body of corporation law," "the legal nationalizing of a business system that is now commercially national," "the offering of inducements to corporations to take advantage of such a plan for the reason that such a system would afford stability, uniformity, and, to the extent of their Federal franchise, would render them except from State control," and "the preservation of the right of State corporate taxation." However, there were the following disadvantages of the license or franchise system: It would "have its foundation in State charters and therefore the operations of the Federal law for a given State would, to some extent, be confined within the limits of the incorporation laws of that State;" the system "also contemplates a division of responsibility for control of corporations between the Federal Government on the one hand and the State on the other;" there would "be a certain amount of centralization of forces in corporate matters"; "it might be necessary to place considerable discretionary power in the hands of the bureau charged with the enforcement of the law"; "a certain amount of interference with commerce and hindrance of the current of trade would inevitably result during the period of transition"; and "there would also be a number of difficulties of detail relating to the enforcement of the act, the

subjects to which it shall apply, the methods of gaining information without unduly annoying business interests, and the various practical questions that arise in the enforcement of any new and fundamental legislation."[20] The Commissioner of Corporations also reported on the power of Congress to create corporations and the scope of that power,[21] detailed consideration of the proposed federal franchise system,[22] a comparison of federal incorporation with federal licensing,[23] and the character of corporation franchises as necessary instrumentalities of interstate commerce and their insecure position under the system of state franchises.[24]

PRESIDENT THEODORE ROOSEVELT, 1901-1909

After the formation of the Department of Commerce and the Bureau of Corporations as a part of his program to secure regulation of corporations engaged in interstate commerce,[25] President Roosevelt, in his annual message sent to Congress December 6, 1904, stated that "the National Government alone can deal adequately with … great corporations."[26] After stressing the necessity of federal regulation in his messages of 1905 and 1906,[27] he stated in his annual message of December 3, 1907:

> "The Congress has the power to charter corporations to engage in interstate and foreign commerce, and a general law can be enacted under the provisions of which existing corporations could take out Federal charters and new Federal corporations could be created. An essential provision of such a law should be a method of predetermining by some Federal board or commission whether the applicant for a Federal charter was an association or combination with the restrictions of the Federal law. Provision should also be made for complete publicity in all matters affecting the public and complete protection to the investing public and the shareholders in the matter of issuing corporate securities. If an incorporation law is not deemed advisable, a license act for big interstate corporations might be enacted; or a combination of the two might be tried. The supervision established might be analagous to that now exercised over national banks. At least, the antitrust act should be supplemented by specific prohibitions of the methods which experience has shown to have been of most service in enabling monopolistic combinations to crush out competition. The real owners of a corporation should be compelled to do business in their own name. The right to hold stock in other corporations should hereafter be denied to interstate corporations, unless on approval by the _____ ment of all owners and stockholders, both by the corporation owning such stock and by the corporation in which such stock is owned."[28]

In his special message of January 31, 1908, he again pointed out the necessity of national control of corporations engaged in interstate commerce,[29] and in a special message, April 28, 1908, he said:

> "My personal belief is that ultimately we shall have to adopt a National incorporation law, though I am well aware that this may be impossible at present."[30]

Again, in his annual message, December 8, 1908, President Roosevelt dwelt upon the question of federal control of corporations:

> "As regards the great corporations engaged in interstate business, … I can only repeat what I have already again and again said in my messages to the Congress. I believe that under the interstate clause of the Constitution the United States has complete and paramount right to control all agencies of interstate commerce, and I believe that the National Government alone can exercise this right with wisdom and effectiveness so as to secure justice from, and to do justice to, the great corporations which are the most important factors in modern business."[31]

PRESIDENT TAFT, 1910-1913

In his inaugural address, President Taft pledged himself to continue the policies of President Roosevelt with reference to the regulation of interstate business.[32] On January 7, 1910, President Taft in a special message to Congress recommended "the enactment by Congress of a general law providing for the formation of corporations to engage in trade and commerce among the States and with foreign nations, protecting them from undue interference by the States and regulating their activities, so as to prevent the recurrence, under national auspices, of those abuses which have arisen under state control."[33] He recommended also that the law should give particular attention to stock issues, and that the holding company be prohibited. The purposes he sought to achieve were control of corporations in the antitrust sense and the simplification of corporation law. He closed his message with the announcement that Attorney General Wickersham had drafted legislation in accordance with his views.

The measure drafted by the Attorney General provided, among other things, for voluntary federal incorporation, a system of regulation by a Commissioner of Corporations with whom the articles of incorporation were to be filed, elaborate provisions were made to prevent stock watering, the holding company was abolished, and the Commissioner of Corporations was empowered to appoint receivers for insolvent corporations.[34]

The bill was introduced in both houses of Congress on February 7, 1910, and President Taft renewed his plan for a federal incorporation law in his annual message of December 6, 1910,[35] and again in his annual message of December 5, 1911,[36] and in his speech of acceptance of the nomination for the presidency, August 1, 1912.[37] The Attorney General advocated the law

in several addresses, stressing the fact that Congress had full power to enact such legislation[38] and the function of federal incorporation as a measure to supplement the antitrust laws.[39]

LEGISLATIVE HEARINGS AND REPORTS

During the years 1911-1914 legislative hearings were held before committees of both House and Senate on the various proposals for the regulation of corporations engaged in interstate commerce.[40] On July 26, 1911, the Senate Committee on Interstate Commerce was directed "to inquire into and report to the Senate .. what changes are necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce. …"[41] The various proposals were printed for consideration by the committee[42] and "the hearings began on the 15th day of November, 1911, and were continued from day to day for more than three months, during which time 103 men appeared before the committee, and their statements, together with the exhibits and documents submitted by them, fill 2,799 printed pages."[43] In 1913-1914 hearings were conducted before the Committee on the Judiciary of the House of Representatives, and further hearings were held by the Senate Committee in 1914. There is valuable and instructive material in these hearings bearing upon the question of federal licensing, federal registration, or federal incorporation:

Theory of federal incorporation: prevention and responsibility: Mr. Frederick H. Allen, a New York lawyer, after making a study of the laws of England and Germany, was impressed by the force with which these statutes sought to prevent, rather than to cure, corporate abuses.[44] Robert R. Reed, another New York lawyer, emphasized the need of legislation to secure corporate responsibility.[45]

Purposes of federal incorporation: Although attention during these hearings was centered upon antitrust legislation patterned after the Sherman Act and Interstate Commerce Act, the main objectives of federal incorporation were stated by some of the witnesses. Control of corporations

for antitrust purposes, many witnesses thought, could best be secured through a system of federal incorporation or licensing.[46] Other witnesses, however, were opposed to federal incorporation because it involved "bureaucratic" regulation,[47] because it could be evaded by doing business locally,[48] because "it is contrary to our constitutional habits"[49] because federal incorporation "merely shifts the difficulty to another field,"[50] though desirable it would not aid in solving the trust problem,[51] because "we are not in a position today where we can safely intrust, in the present state of our knowledge, … the licensing of these corporations,"[52] because it would give "Federal authorization" to the trust evil and great corporations would take "shelter under the wing of Federal control,"[53] and because it was unnecessary[54] since the Sherman Act and the Bureau of Corporations already had the matter in hand.[55] Simplification of corporation law: Although, as has been said, the solution of the trust problem was the particular interest of these committees, several witnesses testified to the advantage of federal incorporation as a device for simplifying, and securing uniformity in, corporation law and the conduct of national business.[56] On the other hand, several witnesses thought federal incorporation would result in a dangerous centralization of government activity.[57] Protection of stockholders, investors and creditors: Throughout the hearings there are frequent references to corporate charter abuses without, however, in most cases relating these to the question of federal incorporation.[58]

Federal licensing: As a matter of fact, four types of proposals appear from the testimony -- federal incorporation, federal registration, and two types of federal licensing. One type of licensing proposal is that no state-chartered corporation be admitted to engage in interstate commerce unless its state charter contains certain specified provisions; the other type of licensing contemplates the conferring upon state-chartered corporations, by the federal government, of the privilege or franchise to engage in interstate commerce upon specified

conditions. Federal license, rather than federal incorporation, was favored by certain witnesses in order to cut down costs,[59] or because of doubt of federal power to enact as incorporation law and because of possible interference with States rights,[60] to avoid problems of State powers and taxation,[61] or as a substitute for federal incorporation in order to study the latter,[62] or as a means of supplementing federal incorporation.[63] Others thought that licensing would be ineffective, or of little value.[64] Several witnesses advocated the plan to require state-chartered corporations to have certain provisions in their charters before being allowed to engage in interstate commerce.[65] Of this plan, it was said:

> "… The radical difference between this proposal and others that attempt to deal with monopoly as it now exists, is that this remedy makes possible the reform of existing conditions without resort to Federal incorporation or Federal license, and without the need of Federal regulation, without the creation of a single Federal bureau, office, or commission. It simply asserts the undoubted Federal power and duty to maintain the freedom of commerce from corporate abuses, to protect the rights of the individual from the abuse of powers of the State governments, rather than to extend the Federal power as a bureaucratic invader of individual rights."[66]

On the other hand, it was pointed out that:

> "If we have power under the Constitution to enact a Federal incorporation law, why not do that? If we have not that power, then why seek by indirection to compel the organization of a corporation within a State in a certain manner -- that is, if we have not the power to compel it to do it directly and exclude it from interstate commerce? Then it may be that the legislature of the State in which it is operating will not permit it to organize according to the manner prescribed by Congress."[67]

Federal registration: In 1908 hearings had been held on a proposal to register corporations and impose certain conditions upon them in return for immunities from the antitrust laws.[68] In the Senate hearings of 1911-1912, Senator Newlands submitted a bill for voluntary federal registration, its object being to secure certain information from companies which complied with the act and in turn such companies were to be known as "U.S. Registered".[69]

Optional federal incorporation: Witnesses testified that federal incorporation should be compulsory, because optional incorporation would be ineffective and costly and would merely set up "a very cumbersome system."[70] Others advocated voluntary incorporation,[71] and it was said that this would be preferable in order not to force existing companies to reorganize under federal charters which would be costly and would "punish a company before it has been convicted.[72] A third proposal was for voluntary incorporation and compulsory license.[73]

Power of Congress: In these hearings, proposals for federal incorporation were subject to particular scrutiny with reference to the power of Congress to grant charters of incorporation and with reference to the effect of such legislation upon State powers. Some witnesses gave their opinions, without study of the question, that there was doubt of the power of Congress to enact a federal incorporation law.[74] Others testified that Congress had the power to require federal licensing,[75] or federal incorporation of railroads and common carriers,[76] or to charter all corporations engaged in interstate commerce.[77]

Effect upon State powers: States Rights: As a matter of policy, many witnesses were apprehensive of invasion of state authority through federal incorporation.[78] On the other hand, changed conditions and a new necessity were noted,[79] and it was said "if the States are either powerless to act or can not act, or will not act, and you are up against a condition, as is the country on this trust problem …then action by the National Government follows as a necessary sequence." As it is, said the witness, we have a "condition where a corporation is created by law under the seal of a State" and yet indulges in the practices sought to be controlled or suppressed by the Federal Government in the field of interstate commerce.[80] It was pointed out that jurisdiction over federal corporations could be left to the state courts and other powers now exercised could be left to the states.[81]

Classification of corporations: It was pointed out that it was desirable "not to overwhelm the central government at the first step with a work so great that it will break it down," and accordingly proposals were made that corporations with $2,000,000 of assets or of paid-up capital, or of $5,000,000 of gross business, or of $100,000 capital or investment be included within federal incorporation or licensing legislation.[82]

Transition Problems: Problems incident to changing from state incorporation to federal incorporation concerned several of the witnesses, and it was proposed that in addition to federal incorporation "a license law would be an essential for existing companies" or that "in advance of any Federal license, corporations should be permitted to register and to proceed thereunder."[83]

Charter provisions: Much of the testimony in these hearings is taken up with corporate abuses and recommendations with regard to holding companies, stock issues and watered stock, the proxy machinery, capitalization, interlocking directorates and indirect control.

Recommendations by the legislative committees: As to federal incorporation, the Senate Committee on the basis of the 1911-1912 hearings reported on February 26, 1913, that "it is neither necessary nor desirable at this time to provide for the organization under act of Congress of industrial corporations which propose to engage in commerce among the States and with foreign nations." Instead, it was recommended that the present law (Sherman Act) stand as "the fundamental law … and that any supplemental legislation for more effectual control and regulation of interstate and foreign commerce should be in harmony with the purpose of the existing statute" but in addition there should be imposed upon persons, partnerships, associations and corporations "further conditions or regulations affecting both their organization and the conduct of their business."[84] Before the further Senate hearings of 1913-1914 were completed, the Senate committee reported in favor of a federal trade commission,[85] and the House

committee, reporting upon the basis of its hearings of 1913-1914 and also upon the basis of the Senate hearings of 1911-1912, advocated an interstate trade commission.[86] The House committee, however, pointed out that its recommendation was made with a view to further legislation. "No one can foretell," reads the report, "the extent to which the complex interstate business of a great country like the United States may require, alike for the benefit of the business man and for the protection of the public, new legislation in the form of Federal regulations, but such legislation should come by a sound process of evolution."[87]

THE TRUST LEGISLATION OF 1914 AND THE WILSON ADMINISTRATION

In the presidential campaign of 1912, President Taft continued to advocate his proposals for voluntary federal incorporation.[88] Amplification of the antitrust laws along the lines of the Sherman Act was advocated in the Democratic platform.[89] Before the congressional committees reported upon their investigations of 1913-1914, President Wilson in his first annual message to Congress, December 2, 1913, advocated that the Sherman Act be supplemented "by legislation which will not only clarify it, but also facilitate its administration and make it fairer to all concerned."[90] In a special message, January 20, 1914, he advocated the creation of an interstate trade commission.[91] Then the committees of both Senate and House reported in favor of such legislation. After the adoption of the Clayton Act and the Federal Trade Commission Act, President Wilson reported to Congress on December 8, 1914, that the "program of legislation with regard to the regulation of business is now virtually complete."[92]

On August 8, 1919 -- five years after the amplification of the antitrust legislation, and after the World War had begun and ended -- President Wilson again turned to the regulation of interstate commerce and, in a special address to Congress, advocated federal licensing:

> "We should formulate a law requiring a federal license of all corporations engaged in interstate commerce and embodying in the license, or in the conditions under which it is to be issued, specific regulations designed to secure competitive selling and prevent unconscionable profits in the methods of marketing. Such a law would afford a welcome opportunity to effect other much needed reforms in the business of interstate shipment and in the methods of corporations which are engaged in it…"[93]

On December 2, 1919, in his annual message, President Wilson repeated his recommendation for a system of federal licensing.[94]

RECOMMENDATION OF FEDERAL TRADE COMMISSIONER MYERS

In 1904 the first Commissioner of Corporations of the then newly created Bureau of Corporations in the Department of Commerce discussed, in his first report to Congress, proposals for federal incorporation and federal licensing.[95] These proposals, advocated by Presidents Roosevelt and Taft, were set aside in favor of amplification of the antitrust laws and the creation of the Federal Trade Commission, and the functions of the Bureau of Corporations were transferred to the Federal Trade Commission.[96] Twelve years after the Trade Commission was established, Commissioner Myers, in 1926, advocated the same measures and pointed out the same necessities as had the first Commissioner of Corporations:

> "The time is approaching when the country will be confronted with Federal control of corporations as an inescapable issue. … The great corporations today are, with few exceptions, owned by thousands of stock-holders big and little; and their securities are held in every State.
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> "The protection of the competitor of a corporation and the consumer of its products is still a matter of grave concern; the protection of the investor is becoming quite as important. …
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> "Public opinion will not long tolerate a condition under which a few States vie with one another creating corporations with unlimited capital and powers, without requirement that they engage in business in the States of their incorporation, and, without provisions looking to the disclosure of their operations or accounts, to transact business and market their securities in other States.
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> ". . . The inference is irresistible that the incorporation of companies is solicited by these States because of the license fees and other revenue derived from the business.
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> "The creation of corporations has lost its dignity as an exercise of the sovereign prerogative for the furtherance of commerce and in the interest of the people of the State. What was once regarded as the conferring of a great privilege, to be limited and circumscribed by all necessary provisions for the protection of the public, has become a bargain sale, and States are advertising and competing for the business. …

> ". . . Can it be that between the powers of the State and Federal Governments there exists an air pocket which leaves the citizens of a majority of the States without proper protection from the action or inaction of a few States? And is not Federal control made necessary by the practice of a small number of States in spawning corporations with unlimited powers to transact business and market their highly speculative securities in all of the States? …
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> "Nothing short of a Federal incorporation law for all concerns engaged in interstate commerce could achieve (the desirable) result. …"[97]

Since this pronouncement regarding corporate abuse and the remedy, there have been numerous comments in current literature to the same effect.[98]

THEORY AND PURPOSE OF FEDERAL INCORPORATION

A detailed analysis of the theory and of the purposes of federal incorporation together with a comparison of federal incorporation with alternative proposals for federal licensing or voluntary federal incorporation will supplement the history of proposals for federal incorporation, developed in another chapter of this study.

Federal control over national corporations: Before examining the objectives upon which federal incorporation is urged, it will be helpful to set forth briefly the operation and theory of federal incorporation as compared with the present system of regulation of interstate commerce. The power to create corporations includes the power to determine their powers, organization, financial structures, management, control and, in fact, the whole character of the corporation.[1] "The power to create being conceded, the power to regulate must necessarily follow."[2] "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[3] "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. * * * It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law."[4] Congress could reserve complete powers of regulation over the corporations it creates,[5] and of course it could reserve the right to alter, amend or repeal charters and dissolve corporations.[6]

The Theory of Federal Incorporation: But federal incorporation has, for its basic objective, something more than mere reservation of the right to regulate. Federal incorporation is a preventive measure, rather than a cure.[7] As between some form of federal licensing or incorporation, and the present system of regulation, it has been said that "the distinction is between keeping Pandora's box shut, on the one hand, and on the other hand, letting the cloud of spirits out. There are vast classes of acts which can be prevented only by standing at the threshold."[8] Through control of the issuance and terms of charters, federal incorporation will both prevent that which the policy-forming arms of government determine to be undesirable and will, at the same time, furnish a basis for continuing supervision and control of the corporations created. It is to be noted, moreover, that only through control of the granting of charters -- through federal incorporation or licensing -- can the federal government achieve certain desirable ends, such as the protection of stockholders and investors.

Corporate responsibility in internal affairs: Of even greater importance than the use of federal incorporation as a preventive measure, is the exclusive and compulsory granting of federal charters in order to render corporations engaged in interstate commerce responsible to some government in respect to their "internal affairs" where they have in the past been responsible to no government.[9] Under the present system, states create corporations, almost the entire business of which is ordinarily to be done in other states, and "illicit" charters are "sold" for purposes of raising revenue -- all without thought of responsibility.[10] Nor is the fault entirely that of the states for "in the case of a corporation engaged in interstate commerce, the state of its origin has a certain power of control, limited, however, by the absolute power resting in Congress to control the interstate commerce of such a corporation, while the state into which it enters to do business is powerless, except in so far as it may exercise certain police powers…"[11]

The result is apparent: "…When one jurisdiction -- a state -- creates and lays down rules of action for a corporation which may never maintain plant or office within its boundaries and which in almost every case will exercise its powers in remote states and countries it is deprived of real vital responsibility. It is giving birth to children which it does not expect to support or govern. There is no likelihood that this laxity will be overcome until the jurisdiction which can create corporations is confined exclusively to that one which will have responsibility for their actions in every place."[12] Of this escape from responsibility, a former Attorney General of the United States, who himself drew a federal incorporation bill, has warned:

> "Throughout the history of civilization the struggle between the power of individuals and groups of individuals, on the one hand, and the interest of the commonwealth, on the other, has been continuous. No state can long endire, which does not preserve its supremacy over private combinations, whether in the garb of corporations or otherwise."[13]

Interstate commerce cannot by regulated "readily and successfully without defining the powers of the agencies chiefly involved" through the granting of charters.[14]

Federal licensing of corporations: The various proposals for federal action "may be roughly classified as federal regulation, federal license, and federal incorporation."[15] The theory of federal licensing is that, before a corporation be admitted to do interstate business, it be required to comply with certain conditions, even to the extent of requiring certain charter provisions. The late W. J. Bryan[16] and James R. Garfield, Commissioner of Corporations, in 1904[17] suggested federal licensing.[18] Others have suggested federal licensing because of the doubt of federal power to create corporations; however, the power to create corporations is established, and in any event if Congress can license corporations there is no reason to distinguish its power to create them -- the resulting questions of policy will, also, remain.[19] There are, furthermore, certain objections to licensing as an alternative to federal incorporation.

Proposals for licensing take two forms -- either the state-chartered corporations are required to have certain provisions in their charters before they are eligible for a federal license, or a federal franchise or license is granted to engage in interstate commerce together with the imposition of certain conditions upon breach of which the license is to be revoked.[20] The first method is, in effect, an indirect method of controlling state corporation statutes and, furthermore, though it would be successful in requiring certain charter provisions, nevertheless the enforcement of those provisions would still be left to the States. The second type of licensing is, in effect, dual incorporation -- the conferring of a federal franchise upon a state franchise. It would be a further complication of the present system of regulation of interstate commerce, whereas one of the principal objectives of federal incorporation is the simplification of corporation law and regulation.[21] Federal licensing would be a half-measure, requiring as many statutory provisions and as large an administrative system as would federal incorporation.

Voluntary federal incorporation: Another suggestion is that federal incorporation be made voluntary or optional. This is often proposed because of doubts of the power to require federal incorporation,[22] but the question of power remains the same whether federal incorporation is made compulsory or optional. As an alternative or compromise, voluntary federal incorporation would, like federal licensing, be a half measure. Furthermore, voluntary federal incorporation would itself become a competitor of the states in the creation of corporation.[23] "The conclusive advantage of a compulsory federal statute is that it removes once and for all the fundamental cause of the evils now existing: the competitive selling of charters by half a hundred different authorities."[24]

THE OBJECTIVES OF FEDERAL INCORPORATION.

Federal incorporation was originally proposed as a measure for the solution of the anti-trust problem. Business and industry are more interested in the possibilities of federal incorporation as a measure for the simplification of corporation law and regulation -- as a measure for uniformity. Throughout the whole history of the matter the protection of stockholders and investors has been mentioned by some of the writers, but not stressed in the main body of the literature on the subject -- however, this latter purpose in very recent years has assumed major importance. The broad purposes of federal incorporation will, therefore, be treated under the headings of (1) control in the anti-trust sense, (2) uniformity and simplification of corporation law, and (3) protection of stockholders and investors. These, while not mutually exclusive, will serve for purposes of exposition and summary.

(1) Control in an anti-trust sense: When federal incorporation was first suggested, the principal purpose was to secure effective federal supervision or control of the so-called trusts.[25] As late as 1919, President Wilson recommended to Congress in a special message:

> We should formulate a law requiring a federal license of all corporations engaged in interstate commerce and embodying in the license, or in the conditions under which it is to be issued, specific regulations designed to secure competitive selling and prevent unconscionable profits in the method of marketing. Such a law would afford a welcome opportunity to effect other much needed reforms in the business of interstate shipment and in the methods of corporations which are engaged in it…[26]

(2) Uniformity and simplification of corporation law: A second objective, particularly attractive to business and industry, is the simplification of corporation law through the adoption of one uniform law for corporations engaged in interstate commerce instead of the present system of chartering interstate corporations by half a hundred different sovereignties with as many different corporation laws.[27] "The greater uniformity and simplicity of corporation law", it has been said, "and the ease of its administration both in the interest of the corporation itself and

of the public are alone sufficient advantages."[28] Many believe that certain vexatious state restrictions imposed upon "foreign" corporations should be removed through federal incorporation.[29] " * * * The diversity of the corporation laws of the several states; the practice which has grown up of forming corporations under the laws of certain states for the purpose of carrying on business principally, or wholly, in other states; the attempts of some of the states to increase their income from corporation fees and taxes, by inviting the formation of corporations under laws conferring wide powers and containing few restrictive regulations for the protection of the public; and the policy adopted by other states of imposing burdensome restrictions upon foreign corporations; -- all would furnish additional grounds for national legislation authorizing the formation of interstate trading corporations governed by uniform regulations with respect to their organization, their powers, and their management, and vested by Congress with the right to carry on their business throughout the United States."[30]

(3) Protection of stockholders, investors and creditors: Because of state competition in the granting of charters in order to secure revenues from incorporation fees, corporation law -- so far as it is applicable to the stockholder, investor or creditor -- has become more and more lax until charters have become grants of immunity without practical restriction.[31] While the consumer is protected to some extent by the present form of regulation of interstate commerce, the federal government affords no protection where the charter or "internal" workings of a national corporation are concerned. From the beginning, federal incorporation has been urged as the clear remedy for this situation. At the present time, the need for regulation and correction of this form of abuse of the corporate privilege is uppermost.[32] In the absence of federal control over charters and "with the almost total relaxation of adequate supervision by the states it has become the practice for the lawyers who draft charters for the promoters of new corporations to

include in the charters clauses which go far toward a total destruction of the responsibility and liability of directors."[33] Through federal incorporation "the public must be assured, by the mere fact of incorporation," that the corporation has been and is being supervised "by some responsible authority" for "under no other conditions can the ordinary man, counseling his own safety, become an owner of corporate securities; and it is to reach and protect him -- the ordinary would-be proprietor -- that the powers of government should be exercised."[34] It has been said that:

> "While we cannot protect people in all degrees against their own ignorance, government is bound, as far as possible, to give reliable character to proffers which its own action authorizes. It belongs to civil government to settle the general conditions under which these shall alone be made and so give some basis to credit. No more open field for fraud, on the one side, and credulity, on the other, could well be devised than the present method of forming corporations. Confidence, the life-blood of commerce, is flung like filthy water on the ground.
>
> "The Federal government can most readily secure that complete and constant publicity which is best corrective of fraudulent designs."[35]

Conclusion--federal incorporation and corporate reform: Federal incorporation may have other advantages.[36] However, its timeliness is to be gauged by its efficacy as an instrument of corporate reform. The growth of corporations and their all but universal use as instrumentalities of national business[37] has made corporation law a most important avenue of social control and business responsibility. The abuses prevalent through the use of the corporate privilege, under the present system,[38] make reform a necessity. State reform is impossible because, to be effective, it would require the concerted action of all the states -- for otherwise a single state could loose upon the nation any number of corporations desiring freedom from restraint and the remaining states could not prohibit these corporations from doing business within their borders so long as the corporations were doing an interstate business.[39] The present system has

> "the practical result of giving to the organizers of a proposed corporation the choice of all the corporation laws of the various states. * * * Each state, naturally desires, chiefly for the purpose of revenue, to attract incorporation to itself by lax corporation laws. The ground has been cut from under the feet of objectors to such laws by the unanswerable proposition that if incorporators or organizers were not accommodated in the given state they could incorporate in a more complacent state and easily come back to the first state to do business. The logical result has been an inevitable tendency of state legislation toward the lowest level of lax regulation and of extreme favor toward this special class of incorporators… The net result of this state system is thoroughly vicious.[40]

The practice of certain states to grant "illicit" charters in return for revenue is notorious[41] -- far from protesting this state of affairs, the States have actively entered into competition in the creation of corporations.[42]

POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

It has been suggested that Congress may effectively force corporations to take out federal charters through the exercise of the power to tax, the fiscal powers, and the powers over mails, waters, and patents.[1] However, the power of Congress to create corporations at all must be justified under the commerce clause for the purposes here under consideration.[2] Reference to other powers of Congress will be made later in connection with the exclusion of certain types of corporations from interstate commerce.[3]

Corporations other than Those Engaged in Business: This study includes only the power of Congress over business -- mercantile or trading -- corporations engaged in interstate commerce. It does not include the power of Congress to charter charitable or educational corporations and the like.[4]

I. CONSTITUTIONAL CONVENTION.

The necessity of establishing federal power over interstate and foreign commerce was, admittedly, one of the principal reasons which led to the calling of the constitutional convention.[5] The first suggestion along this line, it seems, came from Washington himself and led to the calling of the Annapolis Convention of 1786, by resolution of the Virginia legislature, "to take into consideration the trade of the United States to consider how far a uniform system in their commercial requirements may be necessary to their common interest and their permanent harmony."[6] Justice Story, writing in the first quarter of the nineteenth century, took the view that "it is most manifest that it never could have been contemplated by the convention, that Congress should, in no case, possess the power to erect a corporation."[7] There is evidence that some members of the convention thought Congress had been given power to create monopolies,[8] but it is also argued that nothing can be drawn from the proceedings in the convention.[9] The proposition to give Congress power to create corporations was presented to the convention but not reported by the committee to which it had been referred.[10] Jefferson states that it was "rejected, as was every other special power" to avoid criticism when the constitution was submitted to the states.[11] At the time, all corporations were disfavored as "monopolistic."[12]

However, it is significant that five states in their ratifying conventions suggested an amendment to the Constitution "that Congress erect no company of merchants to the exclusive advantage of commerce" and that unsuccessful attempts were also made during the first session of Congress to secure such an amendment.[13]

Again, the power to create a bank was considered a part of the general question of power to erect corporations. President Washington was advised that legislation for the incorporation of

a bank would be within the powers of the federal government, and he was also advised that such action was beyond the powers of Congress.[14] On this subject, Hamilton's opinion is classic:

> "It is conceded that implied powers are to be considered as delegated equally with express ones. Then it follows, that as a power of erecting a corporation may as well be implied as any other thing, it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage."[15]

Chief Justice Marshall followed Hamilton's views, a fact which is said to give "to Hamilton's argument an almost judicial authority, in addition to its intrinsic value as the best discussion of federal incorporation to be found in our political and juristic literature.[16] Marshall, in writing for the Supreme Court on the validity of the action of Congress incorporating the Bank of the United States said:

> "It has been truly said, that this can scarcely be considered an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. * * * * *
>
> The power now contested was exercised by the first congress elected under the present constitution. *The bill (*402) for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and

> being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the constitution." McCulloch v. Maryland, 4 Wheat, 316, 401-402.

At the very least, it may be said that the records of the constitutional; convention do not disclose an intention to withhold from Congress the power to create corporations. Indeed, it may be fairly said that there is some evidence that it was thought that power to create corporations could be implied under the commerce clause, and that specific mention of the power was avoided because of the unpopularity of corporations or "monopolies" and because it was desired to eliminate mention of all special powers in order to avoid criticism.

II. CONCLUSION OF LEGAL WRITERS

In the more or less unprepared discussions and opinions, such as are found, for example, in the hearings before legislative committees, the power of Congress to incorporate general mercantile or trading corporations engaged in interstate commerce is often questioned.[1] However, with a single exception, all who have studied the question and published the results of their investigations have come to the conclusion that Congress possesses such power. Many writers find that Congress has power to charter corporations engaged in interstate commerce,[2] and only one seems to deny the existence of such power.[3] The few writers who have condemned proposals for federal incorporation have done so on the basis of policy and have not questioned the power of Congress.[4]

III. CHARTERS CRAFTED BY CONGRESS

Congress has created a large number of corporations, the great majority of which are created expressly as District of Columbia corporations. Some of these appear from their titles to be federal or national but are, in fact, District of Columbia corporations.[1] A number, however, are federal corporations.[2]

IV. DECISIONS AND ARGUMENTS

The decisions of Chief Justice Marshall on the power of Congress to create corporations: The power of Congress to create corporations to engage in interstate commerce is clearly established under the commerce clause of the Constitution. Chief Justice Marshall, in the great case of McCulloch v. Maryland, pointed out that, although "among the enumerated powers (of Congress) we do not find that of …. creating a corporation," yet there is no phrase in the Constitution which "requires that everything granted shall be expressly and minutely described." This, he said, was necessarily so because "a constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."[1] The additional power given Congress to make "all laws which shall be necessary and proper for carrying into execution" the enumerated powers was, said the Chief Justice, placed

> "in a constitution intended to endure for ages to come, and consequently, to be adopted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." (McCulloch v. Maryland, 4 Wheat. 316, 415).

Having announced the doctrine of implied powers of Congress, upon which so much federal legislation has come to rest, Chief Justice Marshall pointed out that corporations were peculiarly pertinent and even necessary "means" or instrumentalities for carrying out the enumerated powers of Congress such as the power "to regulate commerce",[2] that the choice of the means of

executing the great powers of Congress was for Congress itself to determine since for the courts "to undertake …. to inquire into the degrees of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground" (McCulloch v. Maryland, above, p. 423), and finally, that the ready existence of state corporations of the same character as those sought to be created by Congress could not change the question, because:

> No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. (McCulloch v. Maryland, above, p. 414).

Having expounded the Constitution upon the broad question of power to create corporations in general, the Chief Justice found the power of congress ample to create corporations to engage in banking.[3] In Osborn v. United States Bank, 9 Wheat. 738, the question was again argued to the Supreme Court of the United States on the theory that "the corporation (had) been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object", and it was also argued that the corporations created were not "public institutions." Chief Justice Marshall again canvassed the question of the power of Congress to charter corporations, affirmed his prior position, and explained that while a corporation created by Congress "is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created …. for national purposes only", yet "it is, undoubtedly, capable of transacting private as well as public business." (pp. 859-860; 866-867).

Present applicability of the rule laid down in the early cases: Since these early cases were decided, the reasons why Congress should control the "instrumentalities" of interstate commerce which take the form of corporations have become much more apparent,[4] particularly in view of the fact that the states cannot control corporations engaged in interstate commerce,[5] and in view of the pressing necessity for corporate reform.[6] More than a hundred years ago Chief Justice Marshall stated, in discussing this very question of the power of Congress to create corporations, that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[7] If Congress now determines that it must create the corporations which engage in interstate commerce in order to facilitate, encourage and protect that commerce, the courts will not question the propriety of its decision as to the desirability or need for such measures.[8]

The prior inaction of Congress does not affect its power: The fact that Congress has not passed general incorporation laws for interstate commerce is productive of the feeling that Congress may not have the power to do so.[9] However, the most that can be said is that federal incorporation "is contrary to our constitutional habits, which is quite another thing from technical questions of constitutional law."[10] It must be remembered "that the Constitution had been in operation for almost a century before Congress deemed it desirable to exercise its authority to regulate, in an affirmative manner, commerce between the States."[11] Furthermore, "it is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction …. cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce …"[12] The development of the corporation from the status of an objectionable and rare form of business organization in colonial times to the status of the accepted and necessary means of interstate and foreign commerce is a fact which Congress may now recognize by the passage of federal incorporation laws,[13] though it may be noted that soon after the adoption of the Constitution, when corporations were few, Hamilton pointed out that "the fact that all the principal commercial nations have made use of trading corporations is a satisfactory proof that the establishment of them is an incident to the regulation of commerce."[14]

Judicial discussion since the opinions of Marshall: In 1865 Chief Justice Chase said, of the early cases, that they establish

> "That Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that these agencies may be organized by the voluntary association of individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence, and efficiency ….
>
> "Those decisions were the judgments of great men and great judges. They were pronounced by the most illustrious of their number, and are distinguished by his peculiar

> clearness and cogency of reasoning. For nearly half a century the principles vindicated by them have borne the keen scrutiny of an englightened profession, and the sharp criticism of able statesmen; and they remain unshaken. All the judges who concurred in them have descended, long since, into honored graves; but their judgments endure, and, gathering vigor from time and general consent, have acquired almost the force of constitutional sanctions."[15]

In general, however, since McCulloch v. Maryland and Caborn v. the Bank, the power of Congress to create corporations has received little discussion in the courts.

Congress has created corporations which have been sustained in the courts: In addition to the creation of corporations to engage in banking,[16] Congress has created corporations to build and operate railroads, has conferred franchises and charters upon state-created railroad corporations, and has authorized federally chartered railroads to merge with or acquire state-chartered railroads – and the courts have not denied the validity of this exercise of power. Similarly, Congress has created corporations to build interstate bridges and has legalized a bridge constructed under authorization of the state of Virginia – which legislation has stood the test of judicial scrutiny.[18] Congress has, likewise, created a corporation for a soldier's home, which has come before the federal courts.[19] While there is some language in at least one Supreme Court decision which seems to deny the power of Congress to create corporations,[20] and while a few state court decisions also deny the power of Congress to create corporations,[21] on the whole, the authorities support the proposition that Congress has power to create corporations in furtherance of any of its enumerated powers such as the power "to regulate commerce" – and the question seems settled.

Congress has granted other charters: Students of the question of federal incorporation point out that it has been the practice of Congress to grant charters.[22] Citation of some of the federal statutes creating corporations, it has been said, are "sufficient to establish the long

acquiescence in federal authority so to do."[23] Congress has created federal corporations,[24] other than those already mentioned,[25] to engage in mining,[26] in the insurance business,[27] in the manufacture of telegraphic devices,[28] in navigation,[29] to build a canal,[30] to hold a celebration and exposition in commemoration of American independence,[31] for patriotic, scientific, eleemosynary and religious purposes,[32] and Congress has enacted a general statute for the incorporation of national trade unions.[33] In 1866, Congress conferred interstate powers on all steam railroads.[34]

Other arguments: Other arguments, in the nature of tests of the soundness of the conclusions reached from considerations of the implied power of Congress and the nature of corporations as "means" or instrumentalities of interstate commerce, have been advanced by various students of the question or suggest themselves, as follows:

(1) The power of Congress "over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government * * * * *"[35] A corporation is a "grant of special privileges"[36] which can have no effect outside the territory of the sovereign which created it, and, therefore, the power to create corporations to engage in interstate commerce must reside in Congress.[37] Furthermore, "no State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent congress from exerting the power it possesses under the Constitution over interstate and international commerce" for to maintain otherwise "means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment."[38] The federal government need not rely upon the states for the creation of

corporations to engage in interstate commerce because otherwise there would result "a dependence of the government of the Union upon those of the states."[39]

(2) Since Congress can exclude state corporations from engaging in interstate commerce,[40] Congress must have power to create the corporations -- "means" or instrumentalities -- to carry on interstate commerce.[41]

(3) It is a rule of constitutional law that when "the powers remaining with the states may be so exercised as to come in conflict with those vested in congress", then "that which is not supreme must yield to that which is supreme." This rule is applied "to the often interfering powers of the general and state governments, as a vital principle of perpetual operation."[42] Accordingly, if state-chartered corporations become inefficient for the purposes of interstate commerce, it is argued that Congress under the "supreme law of the land" must have authority to create interstate corporations.[45]

(4) "If the several states should refuse or fail to provide adequate facilities for the formation of corporations to engage in interstate and international trade, the need of national legislation would become obvious …."[44] Chief Justice Marshall, in McCulloch v. Maryland, determined that the fact that state corporations of the same character as those sought to be created by Congress already existed could not deprive Congress of the power to create them itself because "no trade is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it" for "to impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the

constitution."[45] In this connection, it may be noted that Congress at one time was constrained to confer interstate powers on state-chartered carriers in order to avoid state-created monopoly.[46]

(5) Congress may confer powers upon state-chartered corporations.[47] And, when a state corporation is employed as a restraint upon interstate commerce, it may, in effect, be dissolved.[48]

(6) The power of Congress over interstate commerce is not confined to the tangible, physical acts of transportation. "Contracts to buy, sell or exchange goods to be transported among the several states" as well as "the transportation and its instrumentalities, and articles bought, sold or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated…"[49] Bills of lading are held to be "instrumentalities of interstate commerce."[50] The power of Congress is not to be "tested by the intrinsic existence of commerce in the particular subject dealt with" but instead "by the relation of that subject to commerce and its effect upon it."[51] The anti-trust acts are examples of federal authority over business organization, as distinguished from authority over the physical act of transportation over state lines. State-granted charters cannot stand in the way of federal regulation.[52] A corporation, the device for the organization of management and capital, is a means or instrumentality -- and has come to be a necessary instrumentality -- of interstate commerce.[53]

(7) It is sometimes urged that the power of Congress extends to the regulation of foreign as well as interstate commerce, and the former has always been regarded as most complete. But the former involves foreign relations while the latter touches the powers and rights of the constituent states.[54] It may be, therefore, that no clear assistance is to be found by comparing the power over foreign commerce with the power over interstate commerce.

(8) What Congress can do itself, it can create a private corporation to do. Congress can build bridges, and from this the courts have determined that Congress can create corporations to build bridges.[55] This argument was generalized by the Supreme Court in the Slaughter House Cases: "That whenever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of McCulloch v. The State of Maryland, in relation to the power of Congress to organize the Bank of the United States …."[56] Again, regulation of interstate commerce has been justified in the courts on the ground that what Congress can do itself, or through corporations created by it, it may regulate.[57]

(9) Finally, the various types of regulation of interstate commerce cover a field which already has included all but the granting of charters, and the power of Congress over interstate commerce has been said to extend to "direct supervision, control and management."[58] The Supreme Court has said that, in the regulation of corporations in interstate commerce, "the powers of the general government ….. are the same as if the corporation had been created by an act of Congress."[59] In respect to federal incorporation, it has been said that "the construction placed upon acts exerting other forms of regulation will not be so conclusive to our inquiry as the adjudication of the cases reviewed in the foregoing section, but by exhibiting the general trend of the judicial reasoning upon the subject of the commercial power it will provide us with a wider basis of judgment." From an examination of the various types of regulation, and the adjudicated cases, it is apparent "that there has been an expansion of the national regulating power fitting to the expansion of the national commerce and the widening of the markets. Our constitutional

system has on the whole proven itself capable of spontaneous adaptation to the economic growth of the nation …. This conclusion furnishes a basis for our judgment concerning the constitutional validity of a national incorporation law ….”[60]

Conclusion: In view of the history of corporations and their nature, the proceedings of the Constitutional Convention, the unanimous opinion of students of the question, the practice of Congress, and the various decisions and arguments, it seems clearly established that Congress is empowered to create corporations to engage in trade and commerce among the States and with foreign nations. Because of the contrary practice, however, the question of the power of Congress is always raised in discussion by those who have not investigated the matter. It is, therefore, important that this information be available.

WHAT CORPORATIONS ARE WITHIN THE FEDERAL POWER

– Scope of the Commerce Clause –

Having determined that the federal government may create corporations to engage in, and exclude all other corporations from, interstate commerce, it is necessary next to determine what corporations could or would be included in a federal incorporation law. More particularly, it will be necessary to determine, first, what corporations would be required to take out a federal charter, and secondly, what type of business could be carried on by a federal corporation. The two are not always the same -- for example, a state manufacturing corporation would not be required to come within the federal incorporation law but a state manufacturing corporation which also engaged in interstate distribution would be required to become a federal corporation, and on the other hand, a federal corporation might have the power to engage in manufacturing as an incident of its interstate business.

What businesses included: A federal incorporation law could include all businesses which, in the course of transaction, involve acts of transportation or transmission of persons, property, intelligence or communication across state lines, by carrier or by the mails.[1] Such a federal law could not include businesses which involve solely, for example, manufacturing,[2] mining,[3] construction,[4] production of other kinds,[5] insurance,[6] or transportation[7] within the confines of a single state.

Interstate and incidental business a unit: To understand the nature of the power of the federal government, two rules must be kept in mind. First, that the laws of the federal government are "the supreme law of the land" and supersede state powers,[8] and secondly, that acts or commerce within a single state done as an incident or as a part of interstate commerce are

themselves interstate commerce.[9] When it is necessary to regulate intra-state commerce in order to protect and promote interstate commerce, Congress may legislate respecting such intra-state acts. "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations." Hence, when a "State in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as they may be necessary for the purpose of enabling it to discharge its constitutional function." Furthermore, the determination of "the extent of the regulation necessary under existing conditions …. to conserve and promote the interests of interstate commerce" and "for the practical judgment of Congress."[10]

Manufacture and production: Upon the basis of these rules of constitutional law relating to the commerce clause, and in view of the nature and purposes of federal incorporation, it is believed that powers of manufacture and production, incidental to or a part of interstate commerce, may be conferred upon federal corporations engaged in interstate commerce. Otherwise, such corporations would be seriously crippled by preventing them from producing the articles they dealt with in interstate commerce. However, many writers point out that insurance, manufacture and production are held not to be interstate commerce,[11] and conclude that upon these cases holding certain businesses, per se, not to be interstate commerce that federal corporations engaged in interstate commerce could not be given the right to engage in manufacture or production,[12] while others believe that, because of the direct and even necessary connection between production and distribution that exists where the federal government creates

a corporation for the specific purpose of engaging in interstate commerce and producing the articles to be used in such commerce, federal interstate corporations could be given the power and the right to engage in manufacture and production.[13] Other writers have suggested that, to give federal corporations undoubted power (as distinguished from the right) to engage in manufacture or production, such corporations be made not only national corporations but also be given the character of District of Columbia corporations.[14] This suggestion to give federal corporations a dual character, however, is not desirable for two reasons: First, such a provision would be some admission of doubt of the power of Congress to give its corporations powers which they should have and which are necessary to interstate business; secondly, questions would arise as to whether the states could exclude such corporations in their capacity as District of Columbia corporations with attendant problems in the attempt to unravel the federal from the District of Columbia character and powers. That there is a direct connection between distribution by a federal corporation and the production of the articles of such distribution is obvious. Further, that the charter itself granted power to manufacture in connection with interstate commerce, would furnish "direct" connection with interstate commerce. Through federal incorporation Congress will, for the first time, enter this particular field of regulation. If, despite federal incorporation of interstate business, the courts stand upon the prior cases holding manufacture and production to be intrastate commerce, then the result will be the complete divorce of production and distribution on a national scale -- a result that seems to be neither contemplated by the constitution nor desirable. The cases, in which the rule that manufacture and production are not commerce is stated, and upon which the opinion of some that federal corporations cannot be given the power and right to engage in manufacture or production is based, are all directed at commodities rather than at corporations -- rather than at the means or

instrumentalities of commerce. The Knight Case and subsequent cases stating the rule that manufacture and production are not commerce have been held to apply only where the matters are strictly intrastate and which have not "directly embraced interstate or international commerce."[15] These cases have been held inapplicable where the manufacture and production affect interstate commerce. Thus, monopoly of manufacture or production is held to affect interstate commerce because "its effect upon commerce among the States is not accidental, secondary, remote or merely probable" and "therefore the case is not like United States v. E. C. Knight Co., 156 U. S. 1, where the subject matter …. was manufacture and the direct object monopoly of manufacture within a State." The situations "are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct."[16] So, too, production may be a part of interstate commerce and within federal powers in the case of a strike which affects such commerce.[17]

Conclusion: This problem is, of course, not foreclosed. However, in view of the sweeping nature of the change and reform sought through a federal incorporation statute, and in view of the wide discretion of Congress in selecting the subjects and incidents of regulation in interstate commerce -- which cannot be without profound effect upon the courts when called upon to determine constitutionality -- it would not be proper to say that Congress did not have the power to authorize federal corporations to engage in manufacture or production. Accordingly, upon the authorities, and in view of the nature and purposes of federal incorporation, it is our opinion that a federal incorporation statute should be drafted to give such corporations both the power and the right to engage in manufacture and production as well as interstate distribution and incidental intrastate distribution.

EXCLUSION OF STATE CORPORATIONS FROM INTERSTATE COMMERCE

Having determined that the federal government may itself create corporations to engage in interstate commerce, the question arises whether the national government, if it so desires, can exclude from interstate commerce corporations created by the states. In other words, "granting that federal incorporation would be an effective means of regulating the interstate commerce transacted by corporations, the question arises whether Congress could make this incorporation compulsory" and preempt the field of charter-granting so far as interstate commerce is concerned.[1]

The question presented: It may be noted that the question is not whether Congress can prohibit interstate commerce or prohibit the shipment of certain articles in interstate commerce,[2] but whether Congress can exclude certain business organizations from interstate commerce. Furthermore, the question is not whether Congress can exclude all corporations from interstate commerce, but whether -- after Congress has adopted national incorporation laws -- it can exclude corporate instrumentalities from interstate commerce when those instrumentalities are created by governments other than the federal government. In short, can the field of interstate commerce, so far as it is carried on through corporations, be limited to national corporations.

Source of power: In addition to the power of Congress under the commerce clause, it has been suggested that Congress may exclude state-chartered corporations from interstate commerce through the exercise of the federal power of taxation,[3] the power over the mails,[4] and other powers.[5]

The power of Congress to prohibit by taxation may be questioned,[6] and exclusion through the taxing power would probably be sustained only upon the ground that Congress could, in any

event, have excluded state chartered corporations by direct prohibition[7] -- in which case it would be a mere complication to frame prohibitory legislation in terms of taxation when simple, direct prohibition would be sufficient. Prohibition of the use of the mails should be inserted in legislation, in addition to direct prohibition; the power, in this respect, "possessed by Congress embraces the regulation of the entire postal system of the country" and "involves the right to determine what shall be excluded" -- not only has Congress complete power over the mails, but it seems that the exercise of this power seems to be beyond the review of the courts.[8] Similarly, exclusion of securities from interstate commerce and exclusion from the federal courts might be made in addition to direct prohibition of state-chartered corporations – these, like the mails, might be used to enforce the direct exclusion of state chartered corporations from interstate commerce. The question seems to resolve itself into the power of Congress to prohibit, directly, state-chartered corporations from engaging in interstate commerce.

Direct Prohibition of State-Chartered Corporations from the Field of Interstate Commerce: Students of the question of exclusion of state corporations from interstate commerce in order to make federal incorporation compulsory have generally concluded that Congress has the power to prohibit state-chartered corporations from engaging in interstate commerce.[9] The power of Congress seems clear from the following decisions and rules of constitutional law:

(1) The historical situation: Before the adoption of the Constitution, the individual states could prohibit the corporations, chartered in other states and engaged in commerce among the states, from entering their borders. But this power to prohibit corporations engaged in interstate commerce from entering their territory was taken from them by the commerce clause of the Constitution. In short, the power to exclude corporations was in the states prior to the adoption of the constitution, "but the power to 'regulate commerce,' conferred by the

Constitution upon Congress, is that which previously existed in the states"[10] and the power of Congress became "commensurate with the power of the States over the subject",[11] as that power existed in the states before the adoption of the Constitution. Now, the individual states cannot exclude or prohibit corporations engaged in interstate commerce.[12] It follows that the power of exclusion in interstate commerce must have been transferred to the federal government, for now "Congress possesses all the powers which existed in the states before the adoption of the national Constitution[13] .."

(2) Congressional supremacy in interstate commerce: In respect to the exercise of the power of Congress over interstate commerce, "its inaction on this subject … is equivalent to a declaration that inter-state commerce shall be free and untrammeled."[14] Although in some matters "the States may act within their respective jurisdictions until Congress sees fit to act," yet "when Congress does act, the exercise of its authority overrides all conflicting state legislation."[15] It is for Congress to say when the federal government should preempt the field. It is immaterial that, prior to Congressional action, the purposes were "being measurably attained through the remedial legislation of the several States" particularly where "that legislation has been far from uniform" since it rests "undoubtedly …. with Congress to determine whether a national law, operating uniformly in all the states …. would better subserve the needs of that commerce."[16] Furthermore, "Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."[17] Under these rules, it would seem clear that, while the field of interstate commerce is free to all

corporations in the absence of Congressional action, when Congress does occupy the field by the passage of federal incorporation laws, then all other corporations are excluded.

(3) Direct prohibition: A state may not "prohibit a foreign corporation … from coming into its borders" because "the matter is not within the province of state legislation, but within that of national legislation."[18] In short, the Supreme Court has determined that the power of direct prohibition of corporations from the field of interstate commerce belongs to the federal government.

EFFECT UPON STATE POWERS AND LEGISLATION

It is necessary, and desirable in order to meet objections, to examine carefully the effect of a federal incorporation statute upon State powers and State legislation. The purpose of the following section will be, simply, an examination into the necessary effects or consequences of federal incorporation upon State powers of legislation as they now exist.

States rights: In addition to the question of the power of Congress to provide for national incorporation laws, an even more important question from the standpoint of policy and political theory is the effect of such federal legislation on state powers and legislation -- the historic question of states rights. The kindred policy against centralization of governmental activity is also raised in opposition to proposals for legislation.[1] The few writers who oppose federal incorporation have done so on the ground of states rights.[2] Some of those who advocate federal incorporation justify legislation on the grounds of necessity or practicality.[3] However, neither of these views express the true situation. While it is true that a system of federal incorporation could and might seriously effect state powers and state legislation, such effect will be governed entirely by the type of federal legislation adopted. In short, Congress could invade the province of the states -- a possibility that is present in almost any federal legislative program -- nevertheless federal incorporation would not necessarily, and need not, mean encroachment upon the field of power now exercised by the states.[4] The advantages of federal incorporation may be secured without depriving the states of legitimately exercised power -- in fact, legislation may be so drafted as to give the states greater powers (certainly, greater protection) than they now have over corporations engaged in interstate commerce. To illustrate this, it will be necessary to treat separately state powers of taxation, state regulation, and social legislation, and the jurisdiction of

state courts. First, however, it will clarify consideration and discussion to set forth (1) the corporations affected by federal incorporation laws, (2) the present powers of the states over state-created corporations engaged in interstate commerce and (3) the legal status of federal corporations.

A. Corporations affected: First, however, it will clarify the inquiry to point out that, of three types of corporations in the present legal system, but one type will be affected – that is, for present purposes, corporations may be classified as follows: (1) State-chartered corporations doing business solely within the state which created them: These corporations are beyond the power of the national government and, accordingly, federal incorporation will not affect such corporations or the state powers over them. (2) State-chartered corporations, doing solely an intrastate business, but doing this business in states other than that state which created them:[5] These so-called "foreign" corporations in American law are quite as much subject to corporate abuse and charter irresponsibility as other corporations. They are, however, not subject to federal power over interstate commerce since they are engaged solely in intrastate business. It may be advisable to conduct an inquiry into the question of preventing one state from chartering corporations to do a local business in another state, but that is not within the scope of this study. (3) State-chartered corporations engaged in interstate commerce: These corporations are subject to the power of Congress under the commerce clause and are, at the same time, exempt to a certain extent from State legislation. It is the control of these corporations which is the subject of the present study.

B. Present state powers over state-chartered corporations engaged in interstate commerce: It is sometimes asserted that, instead of federal control, there might be "State control of state-created corporations";[6] but this is neither descriptive of any actual state of regulation in

our history nor is it possible, because state control of corporations engaged in interstate commerce is strictly limited by the Constitution which confers that power upon the federal government. It is also sometimes said that there is at present a system of divided control of corporations engaged in interstate commerce;[7] but this is, also, neither descriptive nor legally possible for the same reason. It is true that the states are in complete control of corporations which do business only within their borders -- which do not engage in interstate commerce -- and this authority of the states will not, and of course cannot, be taken from them by federal incorporation. The states, under the Constitution and the present system of regulation, cannot regulate commerce, as such, whether carried on through state-chartered corporations or otherwise.[8] The reason for this status is that the power to regulate commerce is exclusively vested in the federal government,-- for "when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do."[9] Within the last year the Supreme Court has said that "the States may not impose direct burdens upon interstate commerce, that is, they may not regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce."[10] The inaction of Congress is in some respects, tantamount to a declaration that the field of interstate commerce shall be free and unrestricted by the states. Corporations take advantage of this situation and become "organized under the laws of that State, whose legislation is most encouraging." This amounts to "a system of disqualifying State legislation", and "while effective for the purpose", it is true that this does "inevitably increase the

demand for Federal legislation authorizing the organization of corporations under national law for the conduct of interstate business."[11] The scope of state power as now existing will be illustrated in the following treatment of the status of federal corporations, exclusion, regulation, taxation and jurisdiction of courts.

C. The status of federal corporations: Before the effect of federal incorporation upon the various fields of state governmental activity can be determined, it is necessary to set forth the position or status of federal corporations in the legal system of the country.[12] In McCulloch v. Maryland, Chief Justice Marshall, in this connection, wrote that "the states have no power … to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government", and he pointed out that the enforcement of this rule "does not deprive the states of any resources which they originally possessed."[13] A corporation created by Congress to engage in banking is declared to be "an instrument employed by the government of the Union to carry its powers into execution,"[14] though at the same time "it is also trading with individuals for its own advantage."[15] Upon the basis of this declaration that corporations created to engage in banking are "instrumentalities", the view is sometimes stated that "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit."[16] But the extreme implications of this language do not appear to characterize the actual state of the law. The Supreme Court itself has said that "the doctrine has its foundation in the proposition that" the powers of the states may not be used "to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation."[17] The rule has been stated by Chief

Justice White, as follows: "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely avoid, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."[18] As one state supreme court has put it, "the restrictions on the power of the states … do not arise from the fact that (banks) are created corporations under an act of congress"--"the exemption of a corporation, created as one of the agencies of the federal government … is dependent, not upon the nature of the agent, nor upon the mode of its constitution, but upon the effect" of the state legislation as it may operate to deprive such corporations "of the power to serve the government as it was intended to serve it, or hinder the efficient exercise of its powers."[19] Similarly, the western railroads chartered by congress, though they are means by which Congress carries out its authority to regulate commerce, are, by virtue of that character, at least no less exempt from state powers than the corporations chartered by the federal government to engage in banking.[20] Government business: Though the language of the courts is sometimes similar in the use of the words "agencies" or "instrumentalities", the rule regarding the status of corporations created by the federal government is not to be confused with the different rules regarding the exclusive power and jurisdiction of the federal government over property of the federal government,[21] or property under the protection of the federal government,[22] or the commodities used by governmental agencies or officials in the performance of government duties,[23] or government business carried

on through government-owned corporations,[24] or through the territorial municipalities,[25] or government business carried on through private corporations[26]--for these "are not departments of the government."[27] Furthermore, just what are "agencies" or "instrumentalities" in this sense although exercising some powers, or performing some services, of government cannot be determined by precise rule.[28] Conclusion: It is apparent that the states could not control or interfere with corporations created by the federal government to engage in interstate commerce – just as the states may not now regulate interstate commerce. But, while in this connection such corporations may be federal "agencies" or "instrumentalities" in one sense, they are not "agencies" or "instrumentalities" in the same sense as are the arms of the government or the business of the government (carried on through corporations or otherwise), the latter being completely removed from the realm of state authority. The difference is that, while the latter are subject to no state power, some corporations created by the federal government are subject to legislation adopted by the states in the exercise of powers reserved to the states[29]-- such as the police power and the power of taxation. In short, the mere fact that a corporation is created by the federal government and is sometimes described as an "agency" or "instrumentality" of the federal government does not remove it from the operation of powers now commonly exercised by the states. This will appear more clearly from the following examination of the subjects of state exclusion, regulation, and taxation.

(1) Power of states to exclude corporations: One of the most far-reaching powers of the states over corporations is the power to exclude the corporations created by other states, or to admit them upon conditions.[30] It is most common for corporations created by one state to do business in other states. These corporations are of two kinds: (1) Those corporations created by one state and which do only a local or intrastate business may be excluded when they seek to do

such business within the territory of another state.[31] This power of the states would not be affected by federal incorporation. (2) However, corporations engaged in interstate commerce cannot be excluded by a state, whether created by itself or by other states, because to do so would be an unwarranted interference with the freedom of interstate commerce.[32] Nor may states require corporations engaged in interstate commerce to take out a license.[33] Just as the states cannot exclude state-chartered corporations engaged in interstate commerce, it seems clear that they could not exclude federal corporations engaged in interstate commerce.[34] Accordingly, federal incorporation would work no change in state powers in respect to the exclusion or admission of corporations. But federal incorporation would protect the states and remedy the situation arising from the silence of Congress and the "operation of the Federal Constitution" under which "a State is without power to exclude a corporation of another State, in so far as that corporation is engaged in inter-state commerce and the like. In other words, a given State is, in large measure, subject to the corporate policy, -- perhaps utterly hostile to its own,-- of any or all of the other States, unless Congress comes to the rescue. The air is full of complaints, on the part of certain States, of such intrusion by other States, and not only of intrusion, but of competing and conflicting intrusion. The power of an invading State in such case rests -- it is to be observed -- not upon any affirmative Constitutional or other provision, but upon the fact that the regulation of such commerce is exclusively for Congress; and that if Congress does not regulate it, it goes without regulation."[35]

(2) Power to regulate federal corporations: the police power: While, as has been seen, the states have no power to destroy or impair federal corporations engaged in interstate commerce, such corporations "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State then of the nation."[36] However, the power of

the states to regulate corporations engaged in interstate commerce is strictly limited[37] -- but, so far as corporations engaged in interstate commerce are now subject to regulation by the states, it appears that federal corporations would be subject to the same degree of regulation. In other words, the power of the states to regulate corporations engaged in interstate commerce is limited by the same rule of constitutional law, whether such corporations are chartered by the state that seeks to impose the regulation[38] or are chartered by another state or by the federal government. Furthermore, Congress can, whether corporations are chartered by itself or by the states to engage in interstate commerce, entirely preempt the field and wholly remove corporations engaged in interstate commerce from the control of the states.[39] It is apparent, therefore, that federal incorporation will not appreciably affect the present powers of the states over corporations engaged in interstate commerce.[40]

(3) Taxation of federal corporations: Speaking of federal corporations created to engage in banking, it has been held that "a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution" is invalid when sought to be imposed by the states, but this rule "does not extend to a tax paid by the real property…, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of (the state) may hold in (the) institution, in common with other property of the same description throughout the state."[41] Thus, while the states may not tax the "operation" of a federal corporation, they may tax the property, such as the shares of stock.[42] Similarly, the corporations created by Congress, or endowed by Congress with franchises, to build railroads are subject to state taxation upon their property,[43] but not upon their federally granted franchises.[44]

State taxation of state-chartered corporations engaged in interstate commerce: Just as the property of corporations created by Congress is subject to taxation, so the property of state-

chartered corporations engaged in interstate commerce is subject to taxation by the states in which the property is located.[45] But, on the other hand, just as the states may not interfere with a corporation chartered by Congress by taxing its operation in respect to state-chartered corporations[46] "no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business derived from carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."[47] Of course, those states which now charter corporations to engage in interstate commerce will lose the right to tax the franchise of such corporations[48] when chartered by the federal government; however, this is precisely the purpose of federal incorporation -- to prevent the "sale" of "illicit" charters and the imposition of irresponsible corporations upon the states of the Union -- and, so far as it may be desirable to tax the franchise of corporations created by Congress, this may be done either by the states with the permission of Congress or may be done by Congress and the proceeds apportioned among the States.

Comparison: We have seen that, assuming that a corporation created or endowed with licenses or franchises by the federal government "is a federal instrumentality, immune from taxation or other direct interference by the State, it does not follow that the property … is clothed with that immunity" and, furthermore, the exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other."[49] But, on the other hand, taxation may not operate upon interstate commerce, whether carried on by state-chartered corporations or otherwise, so as to burden or interfere with that commerce.[50] It does not appear, therefore, that the mere fact of federal incorporation will disturb present state powers

of taxation of corporations engaged in interstate commerce.[51] Power of Congress to withdraw federal corporations from state taxation: It may be noted that Congress can withdraw from the operation of state tax measures even the property of federal corporations,[52] but it is not necessary for Congress to do so in creating corporations[53] nor is such withdrawal the necessary effect of creating federal corporations.[54] Since federal incorporation, for the purposes of this study, is not a revenue measure, and since it is not proposed to impair the taxing power of the states,[55] it is unnecessary to examine into the power of Congress to exempt federal corporations from state taxation -- instead, for the sake of clarity, proposed legislation may well contain specific permission to the states to tax. [56]

(4) Jurisdiction of state courts: One of the objections made to federal incorporation is that it would deprive state courts of jurisdiction over cases involving these corporations.[57] This, however, is an unnecessary consequence of federal jurisdiction, and under the present laws would not result. The diversity of citizenship clause of the Constitution is immaterial, in this connection, because a federal corporation "is not a citizen of any state."[58] However, originally a suit against a federal corporation was one "arising under the laws of the United States" and therefore removable to the federal courts.[59] But in 1925[60] Congress provided that the federal courts should not "have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress."[61] Accordingly, federal corporations would not be removed, under the present state of the law, from the jurisdiction of state courts. Some believe that federal corporations might properly be made subject to the jurisdiction of only the federal courts,[62] but Congress has, and undoubtedly can,[63] leave this jurisdiction to the state courts. It does not appear, therefore, that federal incorporation need disturb state powers in this respect. "Internal" affairs: In matters affecting the "internal" affairs

of a corporation which does business on a national scale, however, the citizens and resident stockholders of a corporation have not enjoyed ready access to any tribunal unless they were resident in the state which had chartered the corporation. It has been said that, under the present conditions, the several states have no practical jurisdiction over the "internal" affairs of corporations chartered by other states. "The farther away (corporations) are from their corporation home often the better, (for the corporate managers) for the more secure they are from attack through the courts of the state or territory which gives them birth. *** If anyone has a grievance the courts of these distant states and territories may be open to them, but the prospect of a litigation three thousand miles from home is not alluring to the man who has rights to enforce."[64] In these mattesr, federal incorporation laws may bring jurisdiction within the territorial limits of the several states either by granting such jurisdiction to the State courts or by giving it to the federal courts located in the various states.

(5) Power to create corporations: In examining the power of the states to create corporations, it must be noted that there are three types of corporations to be considered: (1) The states now exercise the power to create corporations to do business wholly within their territory. This power of the states would be unaffected by federal incorporation.[65] (2) They also create corporations to do business wholly within some other state. When a state creates a corporation to engage in business wholly within some other state, the state in which the business is to be done may exclude the corporation or admit it upon whatever terms it chooses to impose.[66] These powers of the States to create and exclude corporations engaged wholly in interstate commerce would be unaffected by federal incorporation. (3) But, when a state creates a corporation to engage in interstate commerce, such a corporation cannot be excluded by other states,[67] though Congress may exclude it from the field of interstate commerce.[68] Compulsory

federal incorporation will deprive the states of the single bare power to create corporations to engage in interstate commerce. The inaction of Congress on this subject has made possible the situation whereby individual states may create irresponsible corporations to engage in interstate commerce -- and the other states are without power to exclude such corporations. The assumption of this power by Congress would simply substitute national corporations in the place of Delaware, New Jersey, or Nevada corporations in interstate commerce. "Congress by the adoption of such measure would not assume a power that has not been delegated to it, but by its failure to adopt some proper measure for incorporating companies engaged in interstate commerce, it has permitted the states to wield this national power against their sister states, to their detriment and the detriment of honest commerce between the states."[69] Of this situation, it has been said:

> "To a person unfamiliar with this country and its history, it would seem strange that corporations to do business throughout all the states should not be chartered by the Government which represents all the States, and which can with perfect ease regulate the operations of the corporation wherever conducted and which has the most vital interest in the operations of the corporations at all places. *** The intelligent stranger would perhaps find it equally strange that a State should charter corporations to do business in other States, when it had but slight interest in the manner in which the business was conducted in the other States, and was without inclination, power or ability to regulate the mode of its business in other States…."[70]

The inaction of Congress has, so far, left the field of interstate commerce free to corporations of every character and the states have been without power to protect themselves from such corporations. Federal incorporation will substitute a uniform law, drawn to secure corporate responsibility and to protect the citizens of the several states.

Conclusion: It does not appear, from the foregoing considerations of the powers of the states as now exercised over state-chartered corporations engaged in interstate commerce and the

powers of the states in the same respects over corporations chartered by the federal government to engage in interstate commerce, that the powers of the states as now exercised will be appreciably affected – except that the states will not have power to create corporations to do an interstate business beyond their borders. It may be desirable to leave state powers of regulation, taxation, and the like as they now exist, or it may be desirable for Congress to withdraw its corporations from state regulation in certain respects in order to achieve uniformity in legislation. These are questions of policy. It may well be that the policy of this legislation should be merely the removal of abuses in the granting of charters, and other state powers should remain undisturbed. The future may, on the one hand, see legislation by Congress in certain respects in order to achieve uniformity of regulation where needed, and, on the other hand, there may be respects in which the powers of the states to regulate should be increased through Congressional permission and definition.

EFFECT OF FEDERAL INCORPORATION UPON OTHER LEGISLATION AND ACTIVITIES OF THE FEDERAL GOVERNMENT

No difficulties, except possibly those of policy and draftsmanship, are involved in the relation of a federal incorporation law to other federal legislation and the activities of the central government. In many respects, as for example, in the collection of incormation, investigation and inspection, federal incorporation may assist the various officers of government -- because the power of the government is complete over the corporation of its own creation.

The antitrust laws: Fears that federal incorporation may shelter corporations from the operation of the antitrust laws are sometimes expressed.[1] It may be noted, however, that federal incorporation may, in fact, assist in the enforcement of the antitrust laws,[2] and a federal incorporation statute may be so drafted that there can be no doubt of the continued application of these laws to federal corporations.[3]

Other federal legislation: Similarly, other federal legislation may be expressly saved from impairment or repeal in drafting a federal incorporation act.[4]

Conclusion: A federal incorporation statute could, of course, be drawn to modify other fields of federal activity, as is always a possibility in connection with federal legislative programs. The policy of a federal incorporation act may, however, preclude any changes in other fields -- and the operation of this policy may be made certain in the drafting of the specific provisions of a federal incorporation law so as to leave other federal legislation unimpaired.

PROBLEMS INVOLVED IN TRANSITION

It is sometimes suggested, in connection with proposals for federal incorporation, that the change from state-chartered to federal-chartered entities would produce confusion and impair existing rights and liabilities. Whatever difficulties may be conceived, however, have been dispelled by the decisions under the national banking acts.[1]

The corporate entity continues with only a change of jurisdiction: The "change or conversion" of a state corporation into a federal corporation does not "close its business … nor destroy its identity or its corporate existence, but simply (results) in a continuation of the same body with the same officers and stockholders, the same property, assets, and …. business under a changed jurisdiction;" for such a corporation has "remained one and the same …. doing business uninterruptedly."[2] In other words, "it was a mere transition, a change of jurisdiction only"[3] and "its identity was not thereby destroyed" for "it remained substantially the same institution under another name" without disturbing "the relation of either the stockholders or officers of the corporation" or operating to "enlarge or diminish the assets of the institution – all these remained the same under the national as they were under the State organization" and it "neither lost any of its assets nor escaped any of its liabilities by the change."[4] Thus, the change in character or name is made "without affecting its identity, or its right to sue upon obligations or liabilities incurred to it by its former name",[5] the directors and officers continue to hold office,[6] the stockholders continue their relation with the institution,[7] in order to provide "an easy mode of affecting the change without materially interrupting the business" the property rights, claims and assets are unimpaired,[8] as well as the contract rights,[9] and liens,[10] and, on the other hand, is

subject to existing liabilities.[11] It is, furthermore, unnecessary that the State consent to the transfer of jurisdiction.[12]