FEDERAL INCORPORATION

To my mind it is inconceivable that in granting the power to regulate interstate and foreign commerce it lay within the thought of the people of the States to delegate to the new entity being created by them the authority to organize corporations that might enter those States without state permission to do, not governmental business, but private business without reference to the State's regulation and control.

A power to regulate is not the power to produce, nor is it, by any fair construction, the power to create agencies of production.

* * * * * * *

The Constitution, sir, is not a dead thing to be kicked with contempt from our pathway or trodden with ruthless roughness into the dust beneath our feet. It is a living thing, a vital organism, the shield of our past, with its passion and power; the shelter of our present, with its prayer and its praise; the sheet anchor of our future, with its dread and its dreams. Let us "the true faith and allegiance keep" unto its letter and its spirit, the great faith we owe to all that is and all that is to be.

SPEECH OF

HON. FINIS J. GARRETT

OF TENNESSEE

IN THE

HOUSE OF REPRESENTATIVES

FEBRUARY 7, 1910

WASHINGTON
1910

26382—8706

SPEECH

OF

HON. FINIS J. GARRETT.

The House being in Committee of the Whole House on the state of the Union for the further consideration of the diplomatic and consular appropriation bill—

Mr. GARRETT said:

Mr. CHAIRMAN: The President of the United States, in his special message transmitted to the Congress on January 10, 1910, recommended the enactment of a general law providing for the granting by the Federal Government of charters creating corporations to engage in interstate and foreign commerce.

It will be borne in mind that he does not recommend making it compulsory upon corporations to take out federal charters in order to engage in interstate and foreign commerce, but proposes to leave it to their own election.

If the policy recommended by the President be adopted, the Federal Government will have gone far beyond any point heretofore reached or seriously sought to be reached by it. It is a policy so sweeping in its character and so far-reaching in its intendment that the Congress surely will pause and give it exhaustive consideration before entering upon it. I beg the indulgence of the House to submit a brief review of some phases of the question in advance of the coming before us of bills from the committees having the recommendations in charge.

The President in his message has anticipated and sought to answer certain objections that would be urged to the scheme, saying:

> Such a national incorporation law will be opposed, first, by those who believe that trusts should be completely broken up and their property destroyed. It will be opposed, second, by those who doubt the constitutionality of such federal incorporation, and, even if it is valid, object to it as too great federal centralization. It will be opposed, third, by those who will insist that a merely voluntary incorporation like this will not attract to its acceptance the worst of the offenders against the antitrust statute and who will therefore propose instead of it a system of compulsory licenses for all federal corporations engaged in interstate commerce. (President's Message, Jan. 10, 1910.)

And he then proceeds to consider those objections in the order stated by him.

THE CONSTITUTIONAL QUESTION FIRST.

It seems to me, Mr. Chairman, that the second objection suggested by the President as likely to arise, or at least the first portion of it—the question of the constitutionality of it—deserves first consideration, because that is a question of principle; the others may be classed as questions of policy. If such an act be unconstitutional, of course that is the end of it; if not, then we may consider the other phases and effects as matters of policy upon their respective merits.

Let us then turn to this, and let us bear strictly in mind just what is proposed. It is that Congress pass a general law authorizing the granting of charters of incorporation to private business associations desiring to carry on interstate commerce; it is not to authorize the creation of corporations that are to perform some governmental function, as, for instance, a bank with authority to issue currency, or a public highway, such as a railroad or canal, but purely private business concerns engaged wholly in private business for private profit, performing no public service, exercising no governmental function whatsoever.

Let us remember just here that there is a distinction as wide as the poles between this proposition and that which has been much agitated of a system of federal licenses or federal registry of associations engaged in interstate and foreign commerce. While I grant that much may be said upon each side of the latter proposition, still it is wholly different in its constitutional aspects from the former. The President proposes that the Federal Government be clothed with authority to create a new entity, a new commercial agency; in the other it is a form of regulation of those already in existence or hereafter to be created by the sovereign States.

Let us also remember that the corporations to be created under the proposed policy will be entirely different in character from those created under authority of Congress in the District of Columbia and in the Territories. These corporations, though created by federal authority, bear the same relations to all others and to the governments, state and federal, as those created by the States. They are "citizens" of the District or of the Territory, as the case may be. Those created under the President's policy will be federal corporations. They will not be citizens of any State or Territory or of the District of Columbia. They will have a legal status wholly different from individuals or joint-stock companies or partnerships engaged in similar activities; wholly different from State corporations engaged in precisely similar work. They will have legal rights, immunities, and privileges which individuals acting as individuals can never attain.

Mr. Chairman, the second section of the sixth article of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

If, therefore, such federal corporations as the President advocates can be created, they will, under this section, as it has again and again been interpreted and applied by the courts, be supreme above state regulation and law. They can enter a State without so much as saying "by your leave," and carry on their business, their agents snapping their fingers contemptuously at state law and rules. The States can have no authority, can exercise no control, can impose no terms save such as the discretion and grace of the Federal Government allow them. "If it please you, O Federal Government," the States must say, "we would do this or that, make this regulation or that for your creatures, your corporations that have been given life by

your law; if it please you not, however, why, not our will, nor our wisdom, but yours be exercised." How vast the sweep of the proposed policy! How tremendous the change which will be wrought if it be consummated!

A corporation may be formed having its place of business in the State of Massachusetts but desiring to cross the border and do business in New Hampshire. By taking a federal charter it will escape any regulation of New Hampshire, except such as the discretion of the Congress of the United States may permit that State to have. The judgment of representatives from Tennessee and Georgia, from California and Oregon, from 44 other States must be substituted for that of the citizens of New Hampshire.

In passing, let me say, Mr. Chairman, that if we are to have any such incorporation I quite agree that it should be under a general law, and only under a general law. There should be no special acts of Congress granting charters to particular associations for special purposes. Gentlemen may remember that during my brief service here I have frequently protested against the passage of special bills granting charters of incorporation to District associations, simply on the ground that we ought not to pass such special acts. I am glad to see that we have fewer of these than formerly. If we are to have this general policy, by all means let it be under a general law, but let us consider well before we have it at all.

VOLUNTARY FEATURE MAKES NO CHANGE IN CONSTITUTIONAL ASPECT.

One other matter to bear in mind in considering the constitutionality of the question is that leaving it optional with an association whether it will take a federal charter or receive its life from a State, has no bearing whatsoever.

Where the Federal Government may go, the Federal Government can go, so far as the Constitution is concerned. In other respects the voluntary feature of the proposition is a matter of great moment, but the constitutional question is unaffected by it.

If the Federal Government may constitutionally pass an act permitting a charter at the election of an association, I apprehend it could further and say that, in order to engage in interstate commerce at all, the association, if it be a corporation, must be a federal corporation, must have a federal charter. If it can go that far, could it not go still further and say, if Congress, in its discretion should determine to do so, that only incorporations should have the right to engage in interstate trade?

At any rate, in my view of the matter, the voluntary feature does not affect the fundamental legal phase. But whether it does or not, I shall undertake to maintain that the proposed legislation lies beyond the limit of federal authority.

The President, in answer to the constitutional objection which he anticipated would be urged, says:

> Second. There are those who doubt the constitutionality of such federal incorporation. The regulation of interstate and foreign commerce is certainly conferred in the fullest measure upon Congress; and if, for the purpose of securing in the most thorough manner that kind of regulation, Congress shall insist that it may provide and authorize agencies to carry on that commerce, it would seem to be within its power. This has been distinctly affirmed with respect to railroad companies doing an interstate business and interstate bridges. Why,

then, with respect to any other form of interstate commerce, like the sale of goods across state boundaries and into foreign commerce, may the same power not be asserted?

The President might have added that, in the exercise of another power, the Congress created a corporation to engage in the banking business, becoming a partner in the concern, and this was sustained by the courts after what was probably the greatest legal battle in the history of the Republic.

But, Mr. Chairman, there is a vast difference, a difference which all lawyers and most laymen must appreciate, between the nature and functions of an institution which issues currency or a substitute for currency for use in exchanging commodities and values, and one which manufactures commodities to be exchanged. And there is an equal difference between the nature and functions of a railroad or canal or bridge—a public highway constructed for the transportation and passage of persons and things—and a trading company engaged in private commerce for private gain.

The fact that the motive of those who engage in banking activities or in the construction and operation of railroads is precisely the same as the motive actuating those who sell groceries or weave the cotton fiber into clothing—that is, to make money—does not change the essential character of the businesses themselves. The test is the nature of the work in which the corporation is to engage, as that work is related to the public service or the exercise of some governmental function, and not the motives of the individuals who compose the association.

To determine whether the Federal Government has power to create a corporation we must look to the business in which that corporation is to engage. If it is to be an agency created as a matter of convenience to carry on some activity which the Government itself might engage in directly in the exercise of some one of its delegated powers, then, under the well-settled and often-reiterated decisions of the courts the Federal Government is empowered to create it; but if it is to be a private business concern carrying on no governmental work, exercising purely private functions, then, sir, there is no precedent for the Federal Government creating such an one, and it will be violative of the Constitution for it to do so.

SOME LEAVES FROM HISTORY.

In the convention which framed the Constitution Mr. Madison, of Virginia, often referred to as the "Father of the Constitution," and Mr. Pinckney, of South Carolina, on August 20, 1787, each submitted to the convention a proposal that the Congress be clothed with the power to create corporations. The proposition of Mr. Madison was in the following words:

> Congress shall have power to grant charters of corporation in cases where the public good may require them and the authority of a single State may be incompetent.

The proposition of Mr. Pinckney was simply—

> Congress shall have power to grant charters of incorporation.

These proposals were first referred to the committee on detail (see the Madison papers) and were never heard of in that form again, so far as any records of the convention show. Other proposals made by these gentlemen at the same time and referred to that committee were favorably acted upon by the com-

mittee and by the convention, and are in the Constitution today. This was rejected.

Three days before the convention adjourned, however, Mr. Madison brought forward another proposition which I shall undertake to show was much more restricted than his first proposal. Dr. Benjamin Franklin on that day, September 14, 1787, as the Constitution was being whipped into final shape, moved to add, after the words "post-roads," section 8 of Article I (that being the section granting to Congress the power to establish post-roads), a power "to provide for cutting canals where deemed necessary," and Mr. Madison then suggested an enlargement of the motion into a power "to grant charters of incorporation where the interest of the United States might require, and the legislative provisions of individual States may be incompetent."

Gentlemen will observe the wide difference in the two propositions submitted by Mr. Madison. In the first it was proposed to authorize Congress to create corporations where the public good might require, and in the last where the interest of the United States might require. It is quite clear to my mind that had his first proposition prevailed, Congress might, in its discretion, have incorporated even trading companies, and it is equally clear that in the last Mr. Madison meant the Government of the United States. It was so regarded at the time in the convention, as the debate on it, to be found in the Madison papers, show. It was suggested by some one that Congress already had the power, meaning, of course, the power to grant a charter of incorporation to a company which was exercising some function of the United States Government. Others denied this, and Mr. Madison himself, in the first constitutional debate had in the Congress after the Government was formed, took the position that it had not. No one ever suggested in convention, so far as the records show, that the Congress had any such power as would have been granted by Mr. Madison's first proposal.

But, Mr. Chairman, even his last proposal to grant the power to create a corporation for governmental purposes failed. The motion was so modified as to permit a vote upon the canal proposition alone, and the vote was 8 States against to 3 in favor, and the Madison amendment, of course, failed with the original. The matter was not again brought before the convention, and the Constitution, without this power to create corporations even for governmental purposes being expressly granted, went to the States for the ratification or rejection of their people.

I have searched the records of the debates in the various state conventions held for the purpose of passing upon the ratification of the instrument with such diligence as I could to find if any discussion was there had of this specific matter, and strange to say, I find nothing bearing upon it or that tends to throw any light upon the question of how it was viewed in those assemblies.

It seems rather remarkable that this matter was not touched upon in some of those searching and luminous discussions, but we must bear in mind that at that time corporations, as we now understand them, scarcely existed.

According to an article appearing some seven or eight years ago as one of a series of "Yale Bicentennial Publications" there were during the days of colonial government but six corporations in all the colonies that were of strictly American origin. There were, of course, a number in existence as monopolies granted by the English crown. The first corporation of a business character owing its franchise purely to American sovereignty was the bank established through the efforts of Robert Morris, to aid in financing the Revolutionary war. From 1775, when the Confederation was formed, to the time of the adoption of the Constitution there were just 20 business corporations organized by the several States, and 11 of these were navigation companies. A very great prejudice existed in all the States against the granting of charters of incorporation. Even in New York the powerful genius of Hamilton, reinforced by the sagacity of Livingston, could not overcome it.

It is interesting to note that the State of North Carolina took the first advanced step and "gave the modern world an object-lesson in political science." In 1795 she offered incorporation for business purposes freely on equal terms to any who desired it. It was the first time that a sovereign power had done this since the beginning of the Roman Empire. Her offer was confined first to the construction of canals. Prior to this time the charters granted by sovereign powers had been almost exclusively in the nature of monopolies and had been granted by special acts of legislative bodies or by the crowns. The general laws had been restricted to the formation of charitable, religious, or literary corporations.

Is it conceivable, Mr. Chairman, that the people of the sovereign States ever intended to delegate to the new Government a power which they had scarcely exercised through their own state governments—the charter of trading companies?

At any rate, sir, the Constitution was ratified without this power being expressly given, without it having ever been proposed, save as proposed by Madison and Pinckney.

THE BANK A GOVERNMENTAL AGENCY.

Mr. HITCHCOCK. Will the gentleman permit an inquiry there?

Mr. GARRETT. Certainly.

Mr. HITCHCOCK. Do the debates of those days reveal whether Madison proposed to give the Congress the power to require corporations doing interstate-commerce business to take out charters of that sort or was there any consideration of the voluntary feature as proposed in the President's message?

Mr. GARRETT. None whatever.

I need not enter here upon a review of the debates in regard to the establishment of the national bank. Gentlemen are familiar with the outcome. The bank was established, ran its course, and was later rechartered. Under this second charter the question of constitutional power was brought before the Supreme Court of the United States, and the result was the great opinion in the case of McCulloch *v.* Maryland, in which the power was sustained. But I beg gentlemen to remember that it was upheld wholly because the bank was to exercise a governmental function, was to be an agent of the Government and do for it what the Government might have itself done

directly. Certainly it will not be insisted that that great decision with all its wealth of learning goes further than this. Congress did not create the bank in order to regulate it, but in order that it might perform a governmental duty. In the power to create a bank, then, the advocates of a federal corporation law for private trading companies can find no support.

PUBLIC HIGHWAYS.

Coming to the incorporation of interstate highway companies, canal companies, and bridge companies, let us examine briefly the history of this and try to find the principle upon which the action rests.

I believe the first railway company to be created as a federal corporation—of course there were some created as corporations of the District of Columbia earlier—was the Union Pacific. Gentlemen who will take the trouble to investigate the original act passed July 1, 1862, will find that it was not created as an interstate corporation but as an interterritorial one. So far as the Union Pacific Company was concerned, it was only given the right to build from a point in the then Territory of Nebraska, through other Territories, to the western line of the Territory of Nevada. The act then authorized the Leavenworth, Pawnee and Northern Railroad Company, a corporation of the State of Kansas, to build to the beginning end of the line, and authorized the Central Pacific Company, a corporation of the State of California, to join to the Union Pacific line at the western line of the Territory of Nevada and make the road continuous through to San Francisco.

As the bill originally was proposed, it was to authorize the construction through the States of Kansas and California, but even in that bitter hour, amid the awful throes of the war of secession, when the expression "states rights" was about the most unpleasant which could fall upon the ears of the statesmen then controlling the destinies of the Union, the Congress would not invade the States to build even an interstate highway, notwithstanding the military and postal necessities, and under the lead of Senator Trumbull, of Illinois, the bill was amended so as to confine the authority of the corporation being created to the territory of the United States out of which no States had been created. (Acts 37th Cong., pp. 493–494.)

In 1864, by act of July 2, the Northern Pacific Railroad Company was chartered as a federal incorporation. It authorized the construction of a railroad and telegraph line from some point on Lake Superior in Minnesota or Wisconsin, to a point on Puget Sound. Gentlemen who will take the trouble to examine that act will find that section 18 of it provides expressly that the said company should obtain from the States through which it was to run permission before entering them to build. (Acts 38th Cong., p. 372.)

An examination of the act of July 27, 1866, chartering the Atlantic and Pacific Railroad Company, will disclose that the same condition as to securing the consent of those States through which it was run was imposed, and that the consent was had from California and Missouri through legislative acts. Texas was then under military government. The same is true as to the Texas and Pacific Railroad Company, chartered by act of Congress as a federal incorporation March 3, 1871.

So far as the interstate railways are concerned, the authority of the States has been always recognized.

It was not until 1875, in the case of Kohl *v.* United States (97 U. S., p. 367), that the right of the eminent domain was held to belong to the Federal Government. When the Pacific railroads were chartered by Congress this power had never been exercised. They were chartered as territorial corporations and sent to the States to obtain state permission under state terms to cross their bounds.

These so-called "Pacific railroads" are, I believe, the only ones that have been chartered as federal incorporations by the Congress.

It would seem, therefore, that the President, distinguished jurist though he has been and learned lawyer though he is, is not wholly fortunate in citing these as precedents to justify the federal incorporation of trading companies, even if there were not an intrinsic and inherent difference in the character of a corporation engaged in building public highways and one engaged in manufacturing soap or selling sewing machines.

BRIDGES AND CANALS.

This brings us to the interstate bridge companies and perhaps the canal companies, among others the Lake Erie and Ohio River Canal Company, fathered by the Fifty-ninth Congress at its first session, my distinguished friend, the gentleman from Pennsylvania [Mr. DALZELL], being chief sponsor at its birth.

It is true that since the power of eminent domain was held to belong to the Federal Government in the Kohl case, which I have cited, decided in 1875, the Congress has authorized the construction of bridges over navigable waters within state territory and across interstate streams, granting the power of eminent domain, and in at least one instance has granted a charter of incorporation for that purpose, and the Supreme Court of the United States, in the case of Luxton *v.* North River Bridge Company (155 U. S., 524), has upheld the right.

It is also true that at least one canal company, the one already referred to, has been chartered as a federal incorporation. I believe it has not yet gotten into the courts.

Assuming for the purposes of this argument that the grant of power to the canal company was constitutional and that, under the decision in the Luxton case, the Federal Government might go further than it ever went in the railroad-incorporation bills, and might charter them and give them authority to enter States without State permission, let us turn to the principle upon which such can be upheld and see if there be any difference between these and trading companies engaged in private business and doing no public service.

Mr. Chairman, in every civilized country in history the construction and maintenance of highways for the use of citizens has been a governmental function, and it is true in our own. We have many kinds in this country, but they may be roughly divided into four classes: First and most common, the ordinary public roads of the country and streets of the towns and cities; second, the streams and bodies of water that are capable of being navigated; third, the artificial waterways which we call canals; and, fourth and most modern, the railways.

The ordinary public roads in the States belong to the States or counties or other political subdivisions, being held in trust by them for the use of the public. In establishing and maintaining these it has been of most frequent occurrence for them to be given in charge to corporations created by the State. I suppose all the older States and many of the new ones have had and may still have turnpike companies. These companies are corporations created by the State, charged with fixed duties of public service, and clothed with authority to charge certain tolls for the passage of persons and things.

States and counties, too, have leased ferriage rights across navigable waters.

The same is true as to canal companies.

Such corporations created for the performance of public service have been under direct and immediate governmental control—a control more searching and intimate than in any case of a corporation organized to conduct private business, because their duties and nature and relation to the public are essentially different. In the one case, the corporation is to exercise governmental functions for private gain. In the other, the corporation is to conduct private business, perform purely private functions for private gain.

As for the streams naturally navigable, they belong, so far as their navigable qualities are concerned, to the governments, state and federal, as trustees for the public. It is not necessary to enter now into the refinements and intricacies of the respective jurisdiction of state and federation since a reminder of the general principle is sufficient to indicate the point I am seeking to make clear. The governments may improve these directly or they may authorize individuals to do so or they may create corporations to do so.

RAILWAYS AND BRIDGES PUBLIC HIGHWAYS.

Now, the railway and the bridge are public highways, technical in character, it is true; but simply highways as are the country roads, the city streets, the navigable waters, and the railway with its freight and passenger rates is precisely the same so far as its fundamental legal character is concerned as the turnpike company with its tollgates. The State, in the exercise of its sovereign power, may construct and maintain them unless something in its constitution prevents, or it may create a corporation to do so.

The State, however, can not go beyond its own borders.

The Federal Government was given the power to establish and maintain post-roads by express delegation, and it has the right to establish avenues for the transportation and movement of its military forces and stores. It may establish them directly or it may create corporations to do it since those corporations are to do governmental work.

The debates on the bills creating the railroad companies as federal incorporations, Mr. Chairman, were bottomed wholly on the post-roads clause, the military necessities, and the right of the Government to grant concessions through its own territory over which it held absolute sovereignty for all purposes. Gentlemen will find the commerce clause scarcely referred to there. The interstate bridges and canals may be sustained upon precisely the same basis.

Such corporations are public; they perform public work, exercise governmental functions.

THUS FAR, BUT NO FURTHER.

We are all agreed that thus far the Federal Government may go under the express powers given it together with the necessary implications arising, but further than this it has not gone, nor can it, in my opinion, constitutionally go.

The Federal Government has never created a federal corporation to do anything, to conduct any business, to perform any service, which the Government itself might not have done directly, nor may it do so.

The States have and the States may. Why? Because the creation of corporations is an act of sovereignty. Sovereignty rests not in the States, not in the United States, but in the people. The people created the federal entity as the agency for the execution of certain sovereign powers. To the States, the governmental forces already in existence, they retained all powers and rights and duties not delegated. The States possessed the power to create corporations before the Constitution was even a dream. This power was not delegated. Certain specific powers were and for the execution of those powers the Federal Government may create a corporation, if that corporation is to perform functions which the Federal Government itself might perform directly. That is the limit of its authority, the terminus of its constitutional power.

Surely the doctrine in McCulloch *v.* Maryland extends no further than this. Surely all the subsequent decisions as to railways and bridges and canals do not carry the law beyond this point. Surely the most liberal constructionist of the Constitution must pause before going further.

If this principle is correct, if the Federal Government may not create a corporation to engage in any activity in which the Government itself may not engage, then let us apply it to the policy proposed by the President, and what is the conclusion?

I take it that no man here or elsewhere would insist for a moment that under our Constitution the Federal Government could enter into, say, the wholesale grocery business, buying and selling in the marts of the States and the world for commercial gain. A suggestion that it attempt to do so under the present Constitution would be set down as preposterous and make its author the laughing stock of the Republic.

Would anyone say that under the power to regulate commerce the Federal Government could engage in the manufacture and sale of farming implements, of engines, of clothing? To ask the question is to answer it. If it can not, then can it, being a government of delegated powers, create a corporation and clothe it with authority to do that which it may not do itself?

The States may, of course. But the States are not governments of delegated powers. They can create trading corporations; they can clothe them with power to engage in activities in which the State may not be able to engage; they can impose the conditions upon which the corporations of other States may do business in their borders. But they did not by express terms delegate this authority to the federal organism.

To my mind it is inconceivable that in granting the power to regulate interstate and foreign commerce it lay within the

thought of the people of the States to delegate to the new entity being created by them the authority to organize corporations that might enter those States without state permission to do, not governmental business, but private business without reference to the State's regulation and control.

A power to regulate is not the power to produce, nor is it, by any fair construction, the power to create agencies of production.

Gentlemen must not forget that the courts have held that manufacture is not commerce. A long line of consistent decisions of the Supreme Court sustains this assertion again and again. The case of Kidd *v.* Pierson (128 U. S., 1), the Knight case (156 U. S., 1), the case of Coe *v.* Errol (116 U. S., 571), the Addystone Pipe and Steel Company case (211 U. S., 246), and others will prove of interest to gentlemen who care to go further into this question.

The President's proposition, then, is not to regulate commerce, but to regulate those engaged in commerce in so far as they happen to be corporations. It is at least one degree removed from the commerce clause of the Constitution. If the Supreme Court has been correct in its long unbroken line of decisions that manufacture is not commerce, how, then, can the Federal Government regulate manufacture or manufacturers? There is no delegation of authority to do that. It lies beyond the domain of constitutional action. The Federal Government is one not of excepted but of delegated powers. Some gentlemen seem to act upon the theory that it may do anything not denied; it can, in fact, do only those things that are allowed it in the chart.

Creating corporations as federal creatures that may enter sovereign States in disregard of state wish or regulation and do private business is not one of the delegated powers.

Mr. Chairman, for the Members of the Congress individually and collectively I entertain the greatest respect. Differing, as I do, radically from many of them upon governmental questions, great and small, I know their ability, their character, and concede them, in the main, proper conceptions of justice. I do not doubt that future Congresses will maintain the high order of those past and present, but, sir, as one Representative of my State, and speaking for those of its people who have honored me, I can not for them agree that the discretion of any Congress shall be substituted for their own as to the terms and conditions upon which corporations may enter her sovereign confines and do business with her citizens.

I do not ask to aid in fixing conditions for other States. I protest against them being fixed by outsiders for my own.

To the extent of such ability as I have, therefore, I shall oppose the proposed policy of the President.

Mr. SIMS. Mr. Chairman, will the gentleman allow me a question?

Mr. GARRETT. Certainly.

Mr. SIMS. If Congress has the power to charter railroad corporations doing interstate business, would not Congress have the power to tax the railroads doing similar business not having a national charter and thereby impose a coercive tax similar to that imposed upon the state banks?

Mr. GARRETT. That may be true. I am inclined to think it would, but my colleague sees the point I am trying to make. I

concede the power of Congress to create interstate railroad corporations. I concede that power for the purposes of this argument, but would prefer not to go into collateral details such as the question of my colleague suggests, because of the time limit under which I am speaking.

Mr. COOPER of Wisconsin. I would like to ask the gentleman one question. I was exceedingly interested in the gentleman's argument, and here is one question which has occurred to me: In relating the case of McCullough against Maryland and the United States Bank the gentleman stated that McCullough against Maryland sustained the bank charter upon the ground they chartered the bank for governmental purposes and to perform a governmental function. Did not that bank have the power to discount notes?

Mr. GARRETT. It did.

Mr. COOPER of Wisconsin. That is not a government function.

Mr. GARRETT. But the main power of that bank was a governmental function.

Mr. COOPER of Wisconsin. But it did a private business, notwithstanding.

Mr. GARRETT. Yes; it did a private business to some extent, but that was not the main purpose of the bank; and I think what I have said will be borne out by a rereading of the opinion in that case.

Mr. COOPER of Wisconsin. The gentleman's argument, then, is that the charter having been granted for functions purely governmental, the merely incidental fact that bills were discounted by the bank did not invalidate the charter.

Mr. GARRETT. The court held not.

Mr. Chairman, I have devoted my efforts to-day almost exclusively to the constitutional question involved, deeming that, as I said in the beginning, of first importance. On some future day I may again ask the indulgence of the House to discuss some of the other phases of the policy. A wide field is opened here for our investigation—questions that loom so large as to challenge most solemn consideration before action is had. The opportunities that will be offered under the President's plan for consolidation—why, sir, it seems to be almost a proposition to undo all that the courts have done in monopoly repression; the jurisdiction of the courts over federal incorporations; the respective merits of state and federal control and of the joint system of control as against the single system which is proposed by the President—all these and other phases must be thoroughly thrashed out and scrutinized with exceeding great care ere we proceed.

But for the present I wish to emphasize but one other thought—that which was stated a few moments ago. This is not a proposition to regulate commerce; it is a proposition to regulate a specific class of the many classes of agencies engaged in commerce. It proposes to use the commerce clause as a means to reach an end which can not be reached directly. That, I take it, everyone will concede. It is a proposition to use the commerce clause to reach another business related to but not itself coming within the scope of that clause. It is a proposition to use a subterfuge, to evade, by a stretching of the commerce clause of the Constitution, the tenth amendment, which

the people in their zeal for protecting state power demanded, the amendment which put into direct expression the principle:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

It is the age-old cry for power; the age-old spirit which has moved men and nations to cunning, to revolution, to bloodletting. It is the power lust which the fathers sought to curb.

Mr. Chairman, I know quite well that almost all men are inclined to be more liberal in their construction of the Constitution of these United States than most men were in the earlier days of the Republic. Many who then were deemed liberal would now be classed as strict constructionists. This spirit has in a large measure permeated the people. It is due, of course, mainly to the result of the war of secession. The moral effects of that result went far beyond the immediate question which was at stake in the contest—that of the right of a State to secede—and ever since it was ended there has been a growing tendency to intensify and centralize federal power by ingenious and farfetched activities, by legislative manipulation, and judicial construction.

Mr. FLOYD of Arkansas. Will the gentleman yield?

Mr. GARRETT. I yield to the gentleman from Arkansas.

Mr. FLOYD of Arkansas. Right in that connection I want to ask you if it is not proposed to create this agency, in addition to regulation?

Mr. GARRETT. It is to authorize the creation in order to regulate them.

Sir, it will be said that if this policy prevails in Congress, notwithstanding that it is not a proposition in fact to regulate commerce but to regulate those engaged in commerce, yet being based upon the commerce clause the courts, under the well-settled rule that they can not inquire into the motives of the legislative body, may sustain it.

Even if that be true, sir, I submit to gentlemen that we legislators have a responsibility to the Constitution of our own, a responsibility sealed by our solemn oaths to support it and defend it, to "bear true faith and allegiance to the same." We must examine our motives, and if, in our judgment, a proposition violate the organic law in letter or in spirit we dare not yield it our support.

The war of secession modified the Constitution indeed, but it did not destroy it nor release its binding force and obligations. It stands to-day as potent, as forceful, and as binding as when it came fresh from the hands of the fathers, wrought by their lively genius, sanctified by their labors and their loves.

The Constitution, sir, is not a dead thing to be kicked with contempt from our pathway or trodden with ruthless roughness into the dust beneath our feet. It is a living thing, a vital organism, the shield of our past, with its passion and power; the shelter of our present, with its prayer and its praise; the sheet anchor of our future, with its dread and its dreams. Let us "the true faith and allegiance keep" unto its letter and its spirit, the great faith we owe to all that is and all that is to be. [Loud general applause.]