Michigan Law Review

Volume 17 | Issue 1

1918

Federal Incorporation

Myron W. Watkins
University of Missouri

FEDERAL INCORPORATION

I

SINCE the beginning of our national history the Constitution, which is essentially the source of the law rather than its framework, has with more or less promptitude fulfilled the function of sanctioning new rules of action which will permit a fairly symmetrical institutional development in the face of the changing conditions of the environment in which the people live and think and act. Always the habits of the people are changing, always the situation facts are being modified, and the Constitution in its widest and truest meaning but provides the means whereby thru this flux the body of the people may crystallize its thought and usage into the forms of sanctioned law. It is only by such continual adaptation that the growth of a people becomes not abortive but wholesome and the interrelationship of its parts is kept from perversion.

It is because business has risen to a national scale and geographical markets have come to include several states in most industries and all states in many industries that there has come a demand for more direct national regulation[1] of those who engage in business on this scale. It is asserted that uniform rules of organization and conduct should obtain[2] for those dealing in a single market. It is declared that 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.[3] 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[4] for their actions in every place.

---

[1] The Federal Trade Commission Act and the Clayton Anti-Trust Act while clarifying the situation and indicating undoubtedly the conviction of the public upon the proper policy to be henceforth pursued do not, it would seem, constitute a final and unalterable code of conduct for interstate businesses or lay down a mode of control which may not need modification. This is the view expressed by W. Z. Ripley in "Trusts, Pools and Corporations" (1917 ed.) p. xxxii.

[2] Commissioner Garfield—First Report of Comm'r of Corporations, House Doc., Vol. 51, No. 165.

[3] H. L. Wilgus: "Should there be a Federal Incorporation Law for Commercial Corporations?" p. 17.

[4] This point is emphasized by President Taft in his Special Message to Congress, Jan. 7, 1910, recommending national incorporation law. See pp. 17-20.

Is the remedy which is suggested[5] of compulsory federal incorporation for all businesses engaged in interstate commerce a constitutionally valid one? That is the question upon which we shall seek to render an opinion. We shall limit our inquiry strictly to the legal problems involved. For instance, although there may be a considerable historical interest in working out the manner and extent of the influence of Hamilton's Federalist papers upon Marshall's train of thought[6] in the early and important decisions affecting this question such studies can have little or no legal significance. Nor shall we indulge in carping criticism of the arguments of the court. We are interested in constitutional interpretation: are there reasonable grounds upon which the Supreme Court might be expected, in conformity with its traditions, to sustain an act of Congress requiring that all trading bodies engaged in transacting business in interstate commerce be federally incorporated? To attempt to solve this problem by pointing out the mistakes the court has made and interpreting the constitutional powers of Congress as we think they ought to be interpreted logically would be of no avail even if it were not positively ridiculous. The only way to arrive at a worth-while answer to this question is to determine the actual construction put upon constitutional grants and inhibitions in previous decisions, and their significance, as they stand, for our problem.

The first great legal land-mark which bears upon our inquiry is the case of *McCulloch* v. *Maryland*.[7] The state of Maryland had attempted to tax a branch of the second Bank of the United States located within its jurisdictional limits. The issues raised by the bank's refusal to pay the assessment were substantially two: (1) Had the federal government any power to create a corporation? (2) Could a state government tax a bank federally incorporated? The court was led in the decision of the first issue to deliberate upon the nature of the power to incorporate. It decided in unmistakable terms: "The power of creating a corporation, tho appertaining to sovereignty, is not, like the power of making war or levying taxes or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised but a means by which other objects are accomplished. No contributions are made to charity for the sake of

[5] Bills providing for federal incorporation have been twice introduced in Congress. One upon Nov. 9, 1903; another Feb. 7, 1910.

[6] See upon this point an excellent discussion by S. D. M. Hudson: "Federal Incorporation, 26 Pol. Sc. Quar., 863.

an incorporation, but a corporation is created to administer the charity. * * * The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."

Such being the view of the court in regard to the nature of the power to incorporate and the constitutional justification for its exercise by Congress there can be little doubt that it addressed its argument toward validating incorporation of administrative arms of the government. Thus if we may suppose the Interstate Commerce Commission to have been organized in corporate form by Congress for carrying into execution its regulatory power over interstate commerce,[8] it would have been a case parallel to that presented and there seems no doubt but that the court would have upheld the authority vested in such a body. But the court is not concerned with the question nor does it go out of its way to answer it whether the power extends further to the erection of corporations for engaging in a field of activity over which Congress is admittedly empowered to exercise exclusive control. It is true the court declares the exercise of the power of incorporation to be contingent upon this: "If it be a *direct* mode of executing them," *i. e.*, the substantive and independent powers.

In regard to what constitutes "a direct mode" of carrying into effect the powers expressly granted, the court adopts no binding and restrictive rule, but leaves a wide latitude of construction to Congress. It is very evident from the context and vital arrangement of the steps in the argument that the court is disposed to regard as "a direct mode of executing" these powers any laws which are "necessary and proper" in the words of the constitution itself. For the examination of that important clause follows immediately the passage just quoted. In the clause[9] establishing this grant the court finds ample authority for the exercise of the power of incorporation in the circumstances of this case, and the construction put upon the constitutional grant of the powers of Congress certainly does not, to say the least, inveigh against a resort to like means in the execution of its express powers under the importunate conditions of latter-day interstate commerce. For the court states in memorable

[7] 4 Wheaton 316.

[8] As a matter of fact the Supreme Court has held the Interstate Commerce Commission to be a "body corporate." *Texas & Pacific R. R.* v. *I. C. C.*, 162 U. S. 197. In both form and substance however it differs radically from business corporations.

[9] Constit. Art. I, Sect. 8.

words that: "It must have been the intention of those who gave these (the "substantive and independent") powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs." And finally comes the famous declaration: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

It is worthy of note that the Chief Justice in his opinion was unwilling to go so far as had Mr. Pinckney in his brief for the defendant and rest his decision upon the argument that the bank was an arm of the United States government employed by it to carry into effect the measures of its fiscal policy. Mr. Pinckney had thought to make his case secure and impregnable by asserting and emphasizing this aspect of the bank's constitution. He had even declared in his brief: "The Bank of the United States is as much an instrument of the government for fiscal purposes as the courts are its instruments for judicial purposes." Insofar as the right of a state to tax a body is concerned, it cannot be denied there is much cogency to this reasoning. But as a complete statement of the function of the bank the comparison with a court of law falls far short of the mark. The court has no private interests to advance. The bank was established for the primary purpose of engaging in productive enterprises and gaining private profit. Its fiscal operations for the government were always secondary to this original and vital object. The Chief Justice observed great caution for these reasons not to overstate the case, not to overemphasize the character of the bank as an administrative organ of the government, for he recognized that it bore no such intimate relation to the general government as did, for instance, the courts.

In the case of *Osborne* v. the *Second Bank of the United States*[10] this identical question was again brought up for consideration. The court did not shun the task of again establishing its position in reason and law. On the other hand the Chief Justice devoted his opinion to an exhaustive review of all the arguments brought forward by counsel. The conclusions reached in the *McCulloch* case were

[10] 9 Wheat. 738.

reaffirmed. But the bearing of this decision upon the federal power of incorporation has long been misconstrued. In order to assign the precise significance to the train of thought of Chief Justice MARSHALL which the words of the opinion convey, it is necessary to revert to the briefs presented to the court.

The basis of Mr. Hammond's argument against the constitutionality of the bank is clearly that it was a private business organized for private gain, whereas it could be constitutional only if it were an agency or an instrumentality incorporated by Congress in order to carry out some one of its granted or implied powers. That this is the essence of his argument is plain from the following excerpt: "Deriving great advantage from its trade, anxious to extend it into other states, and to be relieved from the embarrassments incident to a joint stock company not incorporated, the corporation applies to the Congress of the United States for an act of incorporation. But this Congress cannot confer, unless the association can be employed by the national government in the execution of some of the power with which it is invested by the constitution,"—*i. e.*, unless the association have a 'political connection' with the government. The argument proceeds: "The fact that an individual employs his private means in the service of the government, attaches to them no immunity whatever. It is only in this character that the Bank is in public employ. The business it transacts for the government originates in contract. It receives the public treasure upon deposit, and pays it out upon the checks of the proper officer. This is an individual business transacted for the government precisely as if it were an individual concern * * * It is one department of its trade by which it makes individual profit."

Now this was the essence of the argument that John Marshall answered, and it is submitted that he cannot be considered to have used the words 'political connection' in any other sense than as they would be plainly understood in answering Mr. Hammond's argument. That he was addressing his reasoning to Mr. Hammond's argument cannot well be doubted considering the form in which the Chief Justice stated the case.[11] And as to this argument, what does the court decide? It is this: "The argument supposes the corporation to have 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. If these premises were true, the conclusion drawn from them would be inevitable." But what was the conclusion drawn? Sim-

[11] *Ibid.*, page 859.

ply that the Bank was taxable by the state government. It was not an argument addressed to the *existence* of the bank. They were not talking about the right of Congress to erect a corporation. In short, they were not talking about the constitutionality of federal incorporation, but only about the constitutionality of *state taxation* of federal corporations *of a certain kind.*[12]

The court says: "This mere private corporation, engaged in its own business, with its own views, would certainly be subject to taxation power of the state, as any individual would be;" * * * "But the premises are not true. The Bank is not considered as a private corporation, * * * but as a public corporation, created for public and national purposes." And the Chief Justice continues in these words: "It was not created for its own sake or private purposes. It has never been supposed that Congress could create such a corporation." Now what is the proper meaning of this last phrase? This is the decisive question. It seems to me that, considering the context, it can only be understood to mean: that Congress could not create a corporation for private purposes *which would be exempt from state taxation.* This question was certainly the only one the court had to decide, and consequently was in all probability the only one they had in mind. There was no other point involved.

When the Chief Justice goes on to consider: "Why is it that Congress can incorporate or create a bank?" it should be borne in mind that he is not taking up the justification for any act of federal incorporation whatsoever, but only of a corporation *which should be exempt from state taxation.* One may fairly conclude that there were no lurking doubts in the minds of the court about the power of Congress to incorporate an ordinary corporation; or even that such an ordinary business corporation, federally chartered, might be taxed by a state government. The only point admissible to controversy was: Why is it that Congress can incorporate or create a *Bank* —*i. e.,* a private enterprise yet so constituted by its "political connection" with the federal government *as to be exempt from state taxation.* And the substance of the argument that follows is that because "it is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government," it is, despite its organization for private profit, exempt from state taxation. That this is in fact the whole trend of the argument becomes so apparent as scarcely to admit of a doubt when at the conclusion there occurs

[12] This is why all the hair-splitting argument over the phrase "political connection" is beside the point. Goodnow: "Social Reform and the Constitution," Chap. III. Hudson: "Federal Incorporation," Pol. Sc. Quar. (1911) p. 75 et seq.

this remark: "To tax its faculties, its trades, and occupation, is to tax the bank itself. To destroy or preserve the one is to destroy or preserve the other."

The charter of the second Bank of the United States, however, expired by limitation in 1834 and was not renewed. But the financial exigencies of the Civil War again brought about a demand for a national banking system. After some impractical experimentation the law of June 3rd, 1864, was passed, which provided the framework for our national banking system for half a century. Under it banks might be organized under a federal charter, and provision was made for note-issue upon the basis of United States bonds deposited with a bureau of the federal government.

A leading case which arose under this law was that of *Farmers and Mechanics Bank* v. *Dearing*.[13] The facts were that a promissory note had been discounted by the plaintiff bank at the rate of ten per centum per annum. The maximum rate legally chargeable in that jurisdiction (New York) was seven per centum per annum. The Act of Congress had provided that "charging a greater rate of interest than the legal should be held and adjudged a forfeiture of the entire interest which the note carries with it," whereas by the New York rule the penalty was a forfeiture of the entire principal of the note. In this case, then, we are again confronted with a state regulation of a corporation which is chartered by, and an agency of, the federal government. The regulation is of a different character but the power brought in question is identical. Can Congress create a corporation which not only may not be taxed by a state government but which may not be subject to state regulations of civil liability? The court said: "The constitutionality of the act of 1864 is not in question. It rests on the same principle as the act creating the second Bank of the United States. * * * The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. * * * The power to create carries with it the power to preserve. The latter is a corollary from the former. The principle announced in the authority cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence of the General Government, otherwise it would be liable, in the discharge of its most important trusts to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would fol-

[13] 91 U. S. 29.

low. The government would be reduced to a pitiable condition of weakness."

Here again it is affirmed that the states may not "by taxation or otherwise. * * * burthen or in any manner control" a corporation, federally chartered, which exercises the powers of an agent of the central government in the execution of any of the powers vested in it. Over such class of federal corporations the laws of the states are ineffectual, save in those respects upon which Congress is silent and in which the application of the state law is not inconsistent[14] with the express or implied will of Congress. But again we should remind ourselves that the case in no way impinges the latent power to create federal corporations which are not "instruments designed to be used to aid the government in the administration of an important branch of the public service" as the court describes the national banks in this case. For this other class of federal corporations may be subject to state control in greater degree; but at least there is no argument here as to their constitutionality.

Now the contribution this line of bank cases makes to constitutional interpretation in respect of the power of Congress under the interstate commerce clause to create federal corporations is mainly negative but partly positive. It is positive insofar as it established beyond dispute the power of Congress to erect corporations at all. There is no express constitutional grant of power to incorporate, but by this line of cases that power has been definitely settled, so far at least as this: that it may be used to carry out a constitutional power. The remaining question is: in how far may the exercise of this power be limited by the requirement of its employment only as an agency for the execution of an express power? In short, may it be used as an indirect as well as a direct agency? The negative contribution of these bank cases, providing the validity of the foregoing analysis be accepted, is that the power is *not* expressly limited to a creation of arms of the government. It is not confined to the grant of a corporate form to governmental bureaus, commissions and offices charged with the administration of a particular function of the federal government. Nor if this position can be supported by subsequent developments is this negative contribution to be considered lightly and as of small significance. On the contrary it is because the legal profession has failed to see in this line of cases any other principle than a direct denial of the power of Congress to erect business and manufacturing corporations that they have been skeptical of its constitutionality.

[14] See 91 U. S. 34-35.

Accordingly our next step will be to seek to determine whether and how far the assertion of this power of incorporation in other directions is, according to judicial determination, consistent with the view expressed above. Have subsequent decisions involving this power of Congress interpreted it as extending beyond the rigid limits of such bodies as have a "political connection" with the central government? And if so, does the direction of such interpretation lend cogency to the argument that Congress by virtue of its exhaustive control over interstate commerce may require all business groups and bodies, other than individual citizens, engaging therein to be chartered by the federal government?

The second direction, in point both of time and of importance, in which Congress has exercised its power to create corporations was the chartering of the Pacific railroads. This use of the power to incorporate like that in connection with the national banking system came out of the pressing emergencies of the Civil War. It was a period of national peril and of constitutional turmoil. Nevertheless the steps taken then cannot be retraced; and they have exercised a profound influence upon our constitutional development in many ways.

The question has sometimes been raised whether the Pacific railroads were actually federal corporations or merely state corporations to whom were granted certain federal franchises. But there can be no doubt, in view of the wording of the statutes, that Congress did by the act of July 1, 1862, and by the provisions of the act of July 2, 1864, authorize federal incorporation. Subsequently in 1880, acting in reliance upon Section 16[15] of each of those acts a consolidation was effected between the Union Pacific Railroad Company (which was already wholly a federal company) and the Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company. This consolidation was named The Union Pacific Railway Company, and in the case of *Ames* v. *Kansas*,[16] it was held to accede to full capacities of the original company having a specific grant of charter, and to have legally absorbed the constituent state and territorial corporations. And in *California* v. *Central Pacific Rail-*

[15] July 1, 1862, Section 16—"That at any time after the passage of this act all of the railroad companies named herein, and assenting thereto, or any two or more of them, have authority to form themselves into one consolidated company; notice of such consolidation in writing shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act."

[16] 111 U. S. 449.

road Company[17] the court again recognized that the grant of certain valuable franchises to a state corporation coupled with its acceptance of the same and registration in the Department of Interior, constituted it a federal corporation. In this latter case the court states: "Thus without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the acts of 1862 and the subsequent Acts to construct a railroad from the Pacific Ocean across the state of California and the federal territories, until it should meet the Union Pacific; which it did meet at Ogden, in the terirtory of Utah. This important grant, tho in part collateral to, was independent of, that made to the corporation by the State of California, and has ever since been possessed and enjoyed. * * * If, therefore, the Central Pacific Railroad Company is not a federal corporation its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Congress." And as evidence that the change was considered as a change of the source of their charter, the Kansas Pacific Railway Company as a part of Union Pacific Railroad Company reënacted its by-laws and reëlected its officers.

In this same case appears the well-considered opinion that the power of Congress over interstate commerce includes the power to erect corporations to transact interstate business, and that its power in this direction is full and exhaustive. The passage is important and I quote at length: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct or to authorize individuals or corporations to construct national highways and bridges from state to state, is essential to the complete control of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. * * * But, since in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. * * * (This) power was very freely exer-

[17] 127 U. S. 41.

cised and much to the general satisfaction in the creation of the vast system of railroad connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations."

It will be noticed here that there was maintained a carefully constructed barrier behind which future decisions might hedge if occasion demanded. In spite of such phrases as "complete control," and "plenary power" the opinion constantly bears on the fact that in this case it is dealing with a transportation agency as such, and even refers to the Cumberland Road, presumably for the purpose of drawing the parallel to highways which from time immemorial have been regarded as peculiarly under the care of the government. Nevertheless this identification cannot be admitted as complete. There are important differences between private railroads, though common carriers, and public highways.

But the point is that there is a step forward from the position reached in the bank cases, in that common carriers are not administrative organs of the general government in any sense. Their incorporation, moreover, is not a direct but an indirect means of regulating interstate commerce. First, it is decided that Congress may incorporate bodies serving as administrative arms of the government. Second, it is decided that Congress may incorporate public service businesses engaged in the actual transfer of goods,[18] persons, intelligence, etc., in interstate commerce. Third, it remains to be determined whether Congress may incorporate ordinary mercantile and manufacturing bodies transacting business across state boundaries. Fourth, it further remains to be determined whether Congress may make federal incorporation for firms so engaged compulsory.

The distinction between the second and third classes of business is well recognized, the familiar legal characterization of it is that the former are "affected with a public interest" and for that reason bear "a special relation" to the governing authority. But the distinction between the first and second classes of organization is no less marked. In upholding the power exercised in the creation of the Pacific railroad corporations the court made a signal advance over the stage of constitutional interpretation in this direction reached by the line of bank cases. Moreover, we should remember that the distinction between the agent conducting the transportation

[18] A short but incisive review of the authorities upon this point is contained in an article in 30 Harvard Law Review, 589 by C. W. Bunn. The author seems inclined to minimize the difficulties that will be encountered, however.

in interstate commerce and the business whose property is moved in interstate commerce has never been employed in any decisive way in any case up to the present time; as has the distinction between manufacturing and commerce. Hence the gap to be bridged in extending the power of incorporation to the third class of business would seem no more difficult to negotiate than the step taken from the first to the second class.

To continue, the principal point in the above case of *California* v. *Pacific Railroad Company*[19] is whether or not a state may tax a corporation, as such, which derives its franchise from the federal government. The court follows the same rule in regard to transportation corporations that it had already laid down in respect of banking corporations. The court said: They (the franchises) were granted to the company for national purposes and to subserve national ends. It seems very clear that the state of California can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the state. This is a different thing. But can it tax franchises which are the grant of the United States? In our judgment it cannot." The court goes on to define a franchise which it says is: "a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security."

It should be evident that the court means by "public agents," the railroad companies themselves and not such administrative bodies over the railroads as the Interstate Commerce Commission was subsequently constituted. For this reason in the application of the term "public agents" a wide latitude may be sanctioned, since it is clear that the decision in each one of these western railway cases is based on the Congressional control over interstate commerce and not on the postal or military power. Consequently it would seem that the essential elements constituting these bodies "public agents" is the grant of a franchise to conduct an interstate transportation business in the public interest, but for private profit. It may be answered that Congress created these transportation systems under special circumstances and exigencies to facilitate interstate commerce. But even so, is not Congress the judge of the degree of

[19] 127 U. S. 40.

necessity which exists to warrant the facilitation of interstate commerce by requiring uniform federal incorporation? Once admitted that the power rests in Congress to erect corporations for facilitating interstate commerce, in determining the conditions which justify its exercise and the extent of its exercise, the court will not review the wisdom[20] of the legislative policy.

The view of the status of these western railroads which has been taken above is fully confirmed by the decisions in the two following cases, in both of which this point was adjudicated: *Railroad Company* v. *Peniston*[21] and the *United States* v. *The Union Pacific Railroad Company.*[22] In the latter case the court stated: "The proposition is that the United States, as the grantor of the franchises of the company, the author of its charter, and the donor of lands, rights, and privileges of immense value, and as *parens patriae,* is a trustee, invested with power to enforce the proper use of the property and franchises granted for the benefit of the public. * * * But in answer to this it must be said that, after all, it is but a railroad company, *with the ordinary powers of such corporations.*[23] Under its contract with the government, the latter has taken good care of itself; and its rights may be judicially enforced without the aid of this trust relation. They may be aided by the general legislative powers of Congress (those of any sovereign over the corporations which it creates), and by those reserved in the charter.

That the court did not at this period consider that it was justified in "going the whole length," however, (as this passage might intimate) and validating this exercise of the power of incorporation upon the broad ground that it was competent for Congress, by virtue of its full and exclusive power over interstate commerce, to incorporate all commercial bodies engaged in that commerce is evident from the subsequent decision in the Pacific Removal cases.[24] There the issue turned upon a jurisdictional matter and does not concern us, but the principle contained in the following statement is significant in regard to the court's view of the status of these corporations. "The Union Pacific Railroad Company * * * was strictly a corporation of the United States * * * The facts that the last-named company is one of the constituent elements of the consolidated company, and that the entire system of roads now in its possession and

[20] *Marbury* v. *Madison,* 1 Cranch 137; *Charles River Bridge* v. *Warren Bridge,* 11 Peters 420; *McCray* v. *United States,* 195 U. S. 27.

[21] 18 Wall. 5.

[22] 98 U. S. 569, 617-619.

[23] Italics mine.

[24] 115 U. S. 1, 15.

under its charge and control constitutes one of the most comprehensive and important mediums of interstate commerce in the country, and that in all its transactions it is subject to the supervision and control of the Government of the United States are sufficient, it seems to us, to bring the Kansas cases, as well as the other cases, fairly within the principle of *Osborn* v. *The Bank.*" The railroads are, thus, a "medium" of interstate commerce and not merely a trading body engaged in that commerce. They are technological instruments for the interstate distribution of goods—sharply distinguished from the commodities which pass along these channels.[25]

We may conclude that the following principles are confirmed or established by these western railroad cases: first, Congress may charter corporations for certain purposes; second, Congress may create railroad corporations to engage in interstate transportation, *i. e.*, corporations endowed with a public interest but organized and conducted by private parties strictly for profit; third, it is a sufficient basis for the exercise of this power that in the judgment of Congress the erection of such corporations will "tend to facilitate" interstate commerce. It is not for the courts to decide upon the expediency of employing this means of "facilitating commerce"—that is left to the discretion of Congress. A fourth point is found in the fact that while the decisions certainly do not affirm that any more extensive power to incorporate resides with Congress, yet they do not deny either expressly or by strong implication that ordinary trading bodies engaged in interstate commerce may be so incorporated. Accordingly it remains to inquire whether upon any subsequent occasions in which Congress may have directly exercised its power to incorporate the court has modified this position, either by restricting the power to administrative arms of the government and public-service or "national-service" industries, or by extending it to ordinary private business concerns.

The next direction in which Congress saw fit to exercise its power to incorporate was in the creation of a bridge company.[26] Some difficulty having arisen in regard to the acquisition of land at convenient points in the states of New Jersey and New York, and the right to bridge the navigable waters of the Hudson River, a charter

[25] See *Johnson* v. *So. Pac. Co.*, 196 U. S. 1.

[26] It has been a general rule even where state corporations wished to construct a bridge across navigable streams to apply for the approval of Congress. See *Southern Illinois and Missouri Bridge Co.* v. *Stone*, 174 Mo. 1; and *Williamette Bridge Co.* v. *Hatch*, 125 U. S. 12, and cases cited. And in one such instance the right of eminent domain was granted by Congress. *Stockton* v. *Baltimore & N. Y. R. R.*, 32 Fed. 9.

was granted for the purpose upon application to Congress.[27] The Act of Congress of July 11, 1890, incorporating the company, after providing specifically for the usual corporate powers, further provides that: "And generally and specially for the fully carrying out of the provisions of this act, the said North River Bridge Company and its successors shall have and possess all such right and power to enter upon lands, and for the purchase, acquisition, condemnation, * * * and use of real estate and other property, and for the location, construction, operation and maintenance of said bridge with its approaches, terminals and appurtenances as are possessed by the railroad or bridge companies in the States of New York and New Jersey, respectively."

On the problem of the objects for which Congress may create corporations this case throws no new light. One sentence will indicate this: "Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States or a railroad corporation for the *purpose of promoting commerce*[28] among the states." And the court continues: "The power of Congress, by its own legislation, to confer original authority to erect bridges over navigable streams whenever Congress considers it necessary to do so to meet the demands of the interstate commerce by land is so clearly demonstrated, as to render further discussion of the subject superfluous." It should be evident, therefore, that the principle of this case does not extend beyond that of the western railroad cases, though it certainly confirms and fortifies it.[29] But it does open the way very clearly to an extension of the position then arrived at; for in the opinion, delivered by Justice GRAY, great emphasis is placed upon the broad doctrine that this was a means "to facilitate commerce" approved by Congress. Now if this be the test of the extent of the power in Congress to incorporate it certainly provides an "open door" for upholding a compulsory national incorporation law. To require uniform rules of liability, of stock-issue, of dividend-declaration, of the accountability of directors—to place all national business within one legal juris-

[27] *Luxton* v. *North River Bridge Co.*, 153 U. S. 525.

[28] Italics by the present writer. The great disparity in the nature of the two purposes should not escape attention.

[29] In this case altho the act of incorporation mentions the motives of provision for post-roads and military equipment in addition to the promotion of interstate commerce, yet it is clear that the bridge was intended primarily for the improvement of the mediums of interstate commerce. The time element no less than the place consideration supports this view. See also the words of Mr. Justice Miller in *U. S.* v. *Union Pacific Railroad Co.*, 98 U. S. 618-619.

diction—surely this would "facilitate interstate commerce" more than many North River bridges. The added security and stability would increase the volume of interstate dealing considerably and hence augment the national income. And what means could be more "appropriate," more suitable, more equitable, more politic than to require federal incorporation of companies doing an interstate business? Indeed what other means is available that does not directly impose limitations[30] upon the sovereign action of the states; and lead to enormous wastes in jurisdictional litigation? However we must remember that the *North River Bridge* case itself does no more than open the way for the general application of this broad test to the constitutionality of acts of Congress involving this power. For actually in this case as in the western railroad cases the court was dealing with a class of corporations which have always borne a peculiar place in our polity. They were all public utilities. Three were common carriers and one was the operator of a public toll bridge. All were bound to serve the public. They were authorized to exercise the power of eminent domain. Nevertheless the broad ground upon which the court did base its decision in the North River Bridge case has a considerable significance as we have indicated.

Congress has exercised the power of incorporation in a national way in still another class of cases, the constitutionality of which has never been questioned before the Supreme Court. Congress has erected corporations to provide and maintain homes for disabled soldiers and for other charitable purposes. The construction put upon this power by the Ohio Supreme Court in the case of *Overholser* v. *National Home for Disabled Soldiers*[31] is interesting as manifesting the attitude taken by the states. The officers of the corporation were sued in tort and the court considered the question of whether these officers were in effect agents of the United States and the United States itself the real party in interest. The court decided that: "A suit against a public corporation, having no other powers than the performance of a function of the government and accomplishing no other object is plainly a suit against the government." And it remarked in a passage construing the character of the corporation: "that it is performing an appropriate and constitutional function of the general government nobody doubts, for at this time it is too late to question the power of Congress to create

[30] In regard to infringement upon reserve powers of the states, see Wilgus, op. cit., pp. 37-47. Hendrick: "Power to Regulate Corporations . . ." does not think this objection would be vital, pp. 267-270.

[31] 67 N. E. 487.

corporations for such purposes." Evidently the court was under the impression that all the instances in which this power had so far been exercised by Congress fell within that category, for the latest case of *Luxton* v. *North River Bridge Company* was cited in support of the conclusion. As we have seen, however, such a construction of the western railroad cases, at least, is too narrow in view of all the facts.

MYRON W. WATKINS.

University of Missouri.

(TO BE CONTINUED.)