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FEDERAL LICENSE OR NATIONAL INCORPORATION

THE message of President Roosevelt and the Report of Mr. Garfield as Commissioner of Corporations, if we are not mistaken, have done, or will do, more than all the discussion of the past several years to clear the vision of the people as to what is necessary and possible to do in the way of meeting and overcoming our industrial and commercial corporation difficulties.

The President with characteristic vigor says: "When we come to deal with great corporations the need for the government to act directly is far greater than in the case of labor, because great corporations can become such only by engaging in interstate commerce, and interstate commerce is peculiarly the field of the general government. It is an absurdity to expect to eliminate the abuses in great corporations by state action. * * * The National government alone can deal adequately with these great corporations. * * * Great corporations are necessary. * * * But these corporations should be managed with due regard to the interests of the public as a whole."

Mr. Garfield after stating concisely the work of the Bureau of Corporations for the year, says: "Under present industrial conditions; secrecy and dishonesty in promotion, over-capitalization, unfair and predatory competition, secrecy of corporate administration, and misleading or dishonest financial statements are generally recognized as the principal evils. * * * The immediate work is, hence, not to prove the existence and difficulties, but to find possible remedies for them. * * * The concentration of business that has resulted from the use of the corporate form has produced entities that are almost equal in power to the state itself; that can meet the state on equal terms and influence it accordingly." Remedies, he says, must be provided to protect: "(a) rights in corporations held by those now unable to protect themselves by

reason of lack of information or power; (b) those dealing with corporations as employees, creditors, or consumers; (c) the public from the abuse of great economic power coupled with little personal responsibility; (d) the government itself from the pressure of great commercial and financial powers directed upon it for the attainment of purely private ends."

"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. * * * As to the vast majority of business done, the corporation doing it is a foreign corporation. * * * The net result of this state system is thoroughly vicious." As to the Federal power the Report says: "It may be considered as established that Congress may: (1) Create corporations as a means of regulating interstate commerce. (2) Give to such corporations the power to engage in interstate or foreign commerce. (3) Prohibit any other corporations or individuals from engaging in the same. (4) As a condition precedent to the grant of such corporate powers, lay any restrictions it chooses upon the organization, conduct, or management of such corporations. (5) Tax interstate commerce at will and the instrumentalities and corporations engaged therein. (6) Provide regulations for carrying on of interstate commerce generally and in such local affairs as are left to the states in the 'silence of Congress,' and may use any and all means 'which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution.'"

The Report says there are two practical methods of regulation,—by Federal license, or by Federal incorporation; Mr. Garfield favors the former, but he states what he considers the principal features of, advantages of, and objections to, each; these may be thus summarized:

Federal License:

(a) The granting of a Federal license to engage in interstate commerce, imposing all necessary requirements as to corporate organization, management, and report, as a condition precedent, and fixing the conditions under which their business should be done, with the right to refuse or withdraw such license in case of violation of law.

Federal Incorporation:

(a) The creation by Congress of corporations with power to engage in interstate commerce.

(b) The prohibition of all corporations and corporate agencies from engaging in interstate commerce without such Federal license.

(c) The full protection of the grantees of such license who obey the laws applicable thereto.

(b) The prohibition upon all other corporations from engaging in such commerce.

(c) The granting to such Federal corporations the right to *manufacture* and *produce* within the several states.

Advantages:

(a) No fundamental legal difficulty.

(b) Preservation of state incorporation fees.

(c) Preservation of state corporate taxation.

(a) Clean-cut legal theory.

(b) Entire matter under one jurisdiction.

(c) Reduces to a minimum the friction between Federal and state authorities.

Several other advantages of the license plan are enumerated as follows: sufficiency of Federal control; legal nationalization of business that has become commercially national; the inducement to comply arising from stability and uniformity. Obviously all of these would be much more pronounced and emphatic under Federal incorporation. In fact it is difficult to see how there can be much uniformity or stability in a license plan the substratum of which is the conflicting and changing corporation laws of the forty-five states; even where state laws are worded precisely the same, their legal effect is frequently very different under the decisions of the courts.

Objections:

(a) Foundation in state charters, and therefore the operations of the Federal law would be confined within the varying limits of the state incorporation laws.

(b) Division of responsibility for corporate control between the Federal and state governments.

(a) Legal uncertainty as to the Federal *franchise to produce*.

(b) The drastic nature of compulsory Federal incorporation.

(c) Centralization of forces in corporate matters, and transferring the pressure now on state legislatures to Congress.

(d) Placing considerable discretionary power in the hands of a Bureau charged with the enforcement of the law.

(c) Intense opposition to placing Federal corporations in entire control of the most important part of commerce.

(d) Reduction of state revenue from incorporation fees.

(e) Interference with states' power of taxation over corporations.

(f) Tremendous centralization such a system would produce,—this is the weightiest objection.

And as objections to both there are stated: possibility of evasion; interference with the current of trade during the period of transition; defining interstate commerce; numerous difficulties of details in the administration of the law. As to these, it may be fairly suggested that Federal incorporation being simpler than Federal license, the balance would probably be in favor of the incorporation plan.

It seems an ungenerous task to criticise a document which shows in every part of it such careful study, such conscientious consideration, such fairness of statement, such strength of argument, and with so much of which we agree, as does this Report; it, however, concludes in favor of Federal license, while we favor Federal incorporation, and for this reason we venture to point out wherein we believe the Report is defective or the argument incorrect. In order to get a fair idea of the comparative value of the two plans, it is necessary to ascertain whether all our difficulties have been noted, and, if possible, the relative weights of the various advantages and objections.

It will be noticed that, if the foregoing enumeration of advantages and objections is correct, the advantages of Federal incorporation are of a most positive and substantial kind, if legal, as compared with the incidental character of those of the license plan; that the advantages of the incorporation plan obviate all the objections, except (c), of the license plan; that the advantages (b) and (c) of the license plan are objections (d) and (e) of the incorporation plan; that objection (c) to the license plan, and (c) and (f) of the incorporation plan are of the same general nature; from this, it would seem that the balance is strongly in favor of the incorporation plan,—its advantages being superior to, and obviating the difficulties of, the license plan,—unless objections (a), (b), and (f)

are vastly greater than exist in the license plan; and further, if the enumerated advantages of the license plan can be shown to be unreal, or incorrect, and objections (c) and (d) to the same plan to be as serious as objections (b), (c) and (f) of the incorporation plan, the balance is still greater in favor of incorporation; and again, if the license plan fails to meet one of our most troublesome difficulties, or meets it only in a cumbersome, uncertain, and inadequate way, while the incorporation plan can meet it in a simple and direct way, the balance is still more in favor of the incorporation plan; and further if we can show the incorporation plan is in direct accord with our theory of government, and the license plan contrary thereto, then still greater is the reason in favor of the incorporation plan. We hope to show all these, but for convenience the following order will be observed: (1) Preliminary presumption; (2) Legal defect in the license plan; (3) Incorporation fees and corporation taxation; (4) Legal uncertainty of the incorporation plan; (5) Federal franchise to produce; (6) Drastic and centralizing character of compulsory Federal incorporation; (7) Policy.

1. To start with, Mr. Justice Bradley has said that: "The power of Congress is supreme over the whole subject [interstate and foreign commerce], unembarrassed by state lines or state laws; in this matter the country is one, and the work to be accomplished is national; state interests, state jealousies and state prejudices do not need to be consulted."¹ This was said in a case where it was necessary to decide the point. If this is correct, and we do not understand it has ever since been denied, then *prima facie* it seems impossible to deny that, for business that has become national in fact, it is better for the business itself, for its management, for its control, for the investor, for the creditor, and for the public generally, to make these subject to simple, uniform, adequate, efficient, direct national regulation, than to leave them even partially to the "diversity that amounts to anarchy." This is so manifest that unless some other equally, or sufficiently, effective plan can be devised,—or unless there is some overwhelming weight of reason or policy against it, it should be adopted. The Report admits that the license plan would not be equally effective, for dual responsibility is always inefficient. Mr. Garfield, however, believes the license plan would be sufficiently effective, and he says there is no fundamental legal objection to it. This brings us to:

2. Legal defect in the license plan. We believe this plan would be inefficient, if not wholly abortive, because of fundamental legal defects. In the enumeration above of the admitted evils, nothing is

¹ *Stockton v. R. R. Co.*, 32 Fed. R. 9, 17.

said of the unrestricted evil of the holding company, and the interholding of corporate shares,—and yet everybody knows our most dangerous combinations are built up in this way,—the Sugar trust, the Coal trust, the U. S. Steel Corporation, the Northern Securities Co.,—are all of this character,—and their ways are more inscrutable than those of Providence, yet all are based upon state charter provisions authorizing them. Any plan that does not reach these is a worthless remedy. The license plan, since this subject is not mentioned, apparently proposes to let it alone. If the license plan were adopted it must either allow the holding of shares as now, or forbid it. If the license so allows, then we are left in our present predicament, and further it is proposed by the license to give protection and *legality*, instead of comity, to this New Jersey policy in each of the other states, *nolens volens*, or to speak more correctly, to make legal the conglomerate corporate policy of all the other states in this respect, in each particular state. If the license forbids the interholdings of shares, then either, (1) it makes such corporations so constituted illegal until they give up their shares, or (2) allows them to operate under a license forbidding, and a charter authorizing, such holding of shares, or (3) repeals the state law *pro tanto*, or (4) requires the state law to be amended, or (5) requires the corporation to reorganize under some other *state* law. Here are more undecided and uncertain legal questions than can be disposed of in a generation, and they are of such a character as would have to be disposed of. It is impossible to know what the legal result would be; but as to (2) any attempt to comply with a Federal license, and an existing New Jersey charter, would fail as completely as did the historic attempt to serve two other masters, of whom we read. And in any one of the cases, except (2) perhaps, such prohibition under the license plan would be as *drastic* as the same would be under the incorporation plan, and in addition would raise all these legal questions; and further it would stop present business methods, make them illegal, and provide no law for reorganization. The incorporation plan would stop the business but provide a law under which to reorganize,—one not based on state idiosyncrasies, but rather one as a part of a complete system to meet the whole situation. The preliminary legal question,—whether the Federal government could forbid corporations holding shares in, or whose shares are held by, other corporations from engaging in interstate commerce,—is the same in both; if settled in the affirmative, in the incorporation plan the field would be left clear of further legal difficulties, but in the license plan it would lead directly into the legal labyrinth above noted. And further the

same difficulties would arise as to any other point of corporate organization or policy; hundreds of legal questions would arise in each state, and forty-five times as many in all the states,—the license plan instead of avoiding legal difficulties leads directly into those of a most fundamental, unusual, unforeseeable kind, that have never yet to any extent been discussed or considered. And still further the avenues of escape from effective regulation, the labor of administration, the litigation, the uncertainty, the official discretion, the probability and necessity of variation in the licenses due to different laws, with all the pressure, legitimate and otherwise, necessary to secure such variation, would be correspondingly increased. The legal defects and difficulties inherent in the license plan seem to us so great as to forbid its adoption except as a last resort.

3. As to incorporation fees, it must be admitted that, like Othello's, New Jersey's occupation would be gone, not because that state would be deprived of any *right* to grant interstate commerce charters, but because the offensive character of its charters would be confined to its own territory; any effective license plan would have to prevent the trickery possible and usual under New Jersey laws, or similar ones, and would, therefore, have the same effect on the incorporation fees of states having such laws; the bidding by states for the privilege "of creating on easy terms corporations which are never operated within the state creating them," is one of the evils to be stopped, and doing so is not a valid objection to either the license or incorporation plan; and if not done by the license plan, we should consider that a defect. The Federal charter would undoubtedly be preferable, and therefore not so many state charters would be granted, and the fees would fall off. The license plan proposes to grant and enforce valuable Federal privileges to state corporations for a mere pittance,—a continuation of the same vicious policy of granting valuable special privileges without pay, that has so long characterized the grant of state and municipal franchises. We submit that common sense, past experience, good business, and the public welfare all require that the Federal government should not give away, but should charge a fair fee for, its valuable Franchises. Further there is no more reason to object to a Federal incorporation law, because it shifts fees from the states to the Federal government, than there is to object to a National bankrupt law, because it displaces the fees arising from state insolvent laws. All the fees come from the people, and the essential point is not to which government they go, but which can give the best service for the least money.

As to taxation, the license plan proposes to leave things as they

now are,—subject to all the inequalities and absurdities of state taxation. Iowa taxes its own insurance companies one per cent on their premiums; corporations of sister states it taxes two per cent, and foreign corporations three and one-half per cent.² This is a sample of the policy of the states; no greater, more vexatious, or more unjust burden can be placed upon the interstate business of the country than is put upon it by the state laws taxing foreign corporations, and it seems to be legally possible for each state, in the form of a license fee, to tax such corporations upon the face value of their whole capital stock.³ There is, or need be, no serious difficulty in providing a just system of taxation of Federal corporations. While the matter is within the Federal control, yet a slight modification of the method of taxing National banks or the Pacific railroads,—the states to tax the tangible real and personal property within their borders, and the Federal government to tax the Federal corporate franchise, the shares to be exempt,—would be just, easily provided for and enforced. A Federal incorporation law, fair and equitable on the subject would be a boon to the business of the country. If then, what has been said is correct, the special enumerated advantages of, become objections to, the license plan.

4. The first enumerated objection to the Federal incorporation plan is stated to be the legal uncertainty of the Federal franchise to *produce*. The validity of this objection depends on (a) the necessity of such a franchise, and (b) the degree of the legal uncertainty.

As to (a) the Report takes the view that in order to regulate commerce, Federal corporations would require the power to *produce* within the states. We do not admit that there is any *legal* or *actual* necessity for such power, or that interstate commerce could not be effectively controlled without it. Federal commercial corporations would be created either to transport persons or things, to transmit intelligence, or to trade, or all three of these, across state lines, for these are strictly commercial powers. There is certainly no legal necessity that a corporation with any or all of these powers should engage in the *production* of the things transported or bought and sold. A power to regulate commerce by incorporating a company to carry passengers from state to state would not include the right to breed and raise the passengers. The power to *produce* legally includes the power to sell the product, because the product becomes *property*, which includes the right to own, use, and dispose of it; but the right to haul property has no *legal* connection with the right to

² Manchester Fire Ins. Co. v. Herriott, 91 Fed. R. 711.

³ People v. Horn Silver Mining Co., 105 N. Y. 76, 143 U. S. 305.

produce; neither has the right to buy, nor the right to sell. All these rights take for granted that the property already exists to be hauled, bought, or sold. The most that can fairly be said is that it would often be convenient for one who has the right to haul, buy or sell things to have the additional power to produce them,—but there is no *legal* necessity therefor.

Neither is there an *actual* necessity, unless we are mistaken, in order to regulate commerce, although we readily grant that in many cases such power might be both legally and economically convenient. However, it has been cogently, and we believe, correctly argued that many of the producing interests are now so connected through 'community of interest' with the transportation agencies as to make it practically impossible to prevent railroad discriminations without rigidly divorcing them; and if the *interstate* trading interests were entirely divorced from the producing and transporting interests, most of our serious predatory competition and monopolistic combinations would be destroyed or harmless. If each of the sugar manufacturing plants of the American Sugar Refining Company could be prevented from selling across state lines to any one except Federal buying and selling companies entirely unconnected with the producing companies, and subject to strict Federal control, it would be possible to remodel Mr. Havemeyer's 'devil take the hindmost' monopoly.

As to (b),—the degree of legal uncertainty. This is only that no case has yet been decided. We believe that the Federal government can give *capacity* (but not a legally enforceable right in the states without their consent) to *produce* within the states with their consent. While no case has so held so far as we know, yet the Pacific railroads are permitted to haul *intra*-state, as well as inter-state freight; the National banks are allowed to do a local loan and discount business, and in *Osborn v. United States Bank*,⁴ after full argument Chief Justice Marshall held that possession of similar powers did not prevent the United States Bank from being a public governmental institution, nor make it a purely private business corporation; but further it has been, and is, the universal practice of the states to give *capacities* to be exercised in other states, but which can be so exercised only with such states' consent. This matter is more fully developed below.

Mr. Garfield, however, as to this point after extended argument, concludes that the Federal government can confer upon its own corporations not merely the corporate capacity to *produce* in the states with their consent, but the full *legal right* to do so without their

⁴ *Osborn v. U. S. Bank*, 9 Wheat. 738.

consent. We think he is mistaken as to this, and we consider the matter further below. But in any event if either view is correct, the legal uncertainty of the incorporation plan is not a formidable objection.

5. We have just stated the conclusion of the Report as to the Federal franchise to produce, and how we differ from the view taken. Inasmuch as the conclusion of the Report and the argument supporting it make the Federal incorporation plan appear to be much more drastic and centralizing than we think it really is, it is necessary to examine the matter in detail; we will first state the argument of the Report; then our objections to it; and then try to show that if the argument of the Report is correct, the license plan is more drastic and offensively centralizing than the incorporation plan.

The argument is: Congress can give an interstate commerce corporation the right (not merely capacity) to *produce* within the states, in order to regulate interstate commerce because such power is (1) an *appropriate incidental*, and (2) an *absolutely essential*, means of properly regulating such commerce. As to (1), Chief Justice Marshall is quoted, "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 consistent with the letter and spirit of the Constitution are constitutional," and it is then said: (a) because the regulation of interstate commerce is the legitimate and constitutional end, the means, that is, *the power to produce*, comes clearly within all the other specifications; further, (b) a Federal trading corporation chartered as a means of regulating interstate commerce, would be given the power to buy and sell the subjects of commerce; it is a *natural* and *usual* power of a corporation that sells, also to produce the thing sold,—a separation of these powers would be unusual and inexpedient; hence, the *power to produce* is an appropriate *incidental* to the power to sell. We have already touched upon this matter above, and do not agree with either (a) or (b). As to (a), would any one say that the power to lay taxes to pay debts would include the power to *produce* things to be taxed? Yet there would be a legitimate and constitutional end, and the means,—making something to be taxed,—would be as appropriate and necessary as, and no more prohibited than, in the other case. By this method of reasoning the *power to produce* could be derived as incidental to nearly any one of the enumerated powers of Congress. Again as to (b) the power to *sell*, usually accompanies the power to *produce*, and very properly so, but strictly as an incidental right of owner-

ship; so, too, while a corporation, organized to *buy* and *sell*, is often, though by no means always, given the power to *produce* the thing bought or sold, yet I know of no decision to the effect that a charter power to a corporation to carry on a wholesale grocery business, would carry as incidental thereto a power to buy a farm and raise potatoes to be sold; neither would a corporation organized to buy and sell dry goods, have as incident to such power, the additional power to raise sheep and cotton, and manufacture the dry goods it sells; every rule of interpretation is the other way; a power to make things, includes as incidental thereto the power to sell them, but not the general power of buying and selling as a business; and still less does the power to *buy and sell*, include the power to produce.

But further as to (2) it is argued: (a) Congress can create a corporation with power to *carry on* interstate commerce; (b) it must therefore, be able to give such corporation power to *produce* the subjects of commerce, otherwise the first power would be useless; for let it be assumed: (c) that such a corporation is created; (d) that the states can and do prohibit it from *producing* within the states; (e) that the states *do* prohibit all *domestic producers* from selling to such corporation; (f) that, in retaliation, the Federal government prohibits all state corporations from carrying on interstate commerce; then there would be a deadlock, and neither government could regulate commerce; but Congress *has* the power to do so; therefore the state's power must yield, and Congress must have the power to confer the *right to produce* in a state without the states' consent,—that is, supposition (d) is invalid. We believe there are errors in (a), (b) and (e), which invalidate the whole argument. Congress is given the power to *regulate interstate and foreign commerce*, and the ordinary sense of such words is that such power exists if there is any such commerce to regulate; if not, there is nothing to regulate, and no need of regulation. The term used in (a) is '*carry on*,' and in (b) this is used in the sense of giving the 'right to continue to carry it on,'—even though there is nothing *produced* by any one else to be the subject of such commerce. We do not think 'to carry' freight would include '*to make*' the freight to be carried: '*to regulate*' a thing presupposes the thing to exist, and does not include bringing the thing into existence in order to regulate it; Congress has power 'to regulate,' and if 'to regulate' includes '*to produce* in order to regulate,' then Congress can regulate sowing and reaping, seed time and harvest, marrying and giving in marriage, because they are all connected with producing the subjects of interstate commerce. So we think (a) and (b) are incorrect.

Again, the chain of reasoning from (c) on, can be no stronger

than its weakest link, and the whole matter depends on the validity of (e); for if a Federal corporation can *purchase anywhere* the subjects of commerce, then the power to *produce* is not absolutely essential to the power to *carry on* interstate commerce. The Report anticipates this, and says: (g) "The power to *purchase* from *state* producers stands in the same legal relation to the power of the state as does the proposed power to *produce*. The transaction of *purchase* and *sale* between a state vendor and an interstate commerce corporation purchaser is purely a domestic transaction,"—and therefore, if the power to *produce* can be forbidden, the power to *purchase* can also, and the deadlock again results; but the power to *purchase* cannot be forbidden, hence the power to *produce* cannot. We believe (e) is invalid, (1) because, such Federal corporation could *purchase* abroad instead of within any state, and (2) because the reasoning in (g) is unsound.

Chief Justice Fuller in the *Knight* case,⁵ stated what has always been the doctrine of the Supreme Court, "*Contracts to buy, sell or exchange goods to be transported among the several states, 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, because they form part of interstate trade or commerce.*" It is difficult to see why a purchase by Federal corporation A, located in State X, of goods of B, located in State Y, to be sent to A in State X is not a transaction of interstate commerce. Every *sale* is either domestic, interstate, or foreign, commerce; if it is one, it is neither of the others; if it is domestic, it is not interstate, or *vice versa*. But unless the foregoing is an interstate transaction, there can be none. The only reason given in the Report that such is a purely domestic transaction, is that the article purchased "might be used in domestic commerce," and, according to the *Knight* case, it is said neither the intent to use nor the probability that an article will be used in interstate commerce makes it the subject of such commerce. This was said about *making*, not *selling*, sugar, and the court held that making sugar in one state, intending to sell it when made in other states did not make the *making* of it, commerce; and Chief Justice Fuller used the language quoted above to show that '*commerce*' did not include '*manufacture*.'

The only other reason, perhaps implied, but not explicitly relied on in the Report, why a sale across state lines to a Federal corporation would not be interstate commerce, is that such corporation "is not a *foreign corporation* as to the soil of any state nor does its

⁵ U. S. v. E. C. Knight Co., 156 U. S. 1, 13, 36.

status there depend upon the comity of states"; while this may be true (so far as there is an attempt by a state to tax it as a *foreign* corporation)⁶ a Federal corporation has a local habitation or place of business in some state, just as much as if incorporated in that state, and its purchases from, and sales to, persons in other states, of goods to be sent across state lines are not domestic, but interstate, transactions, just as a bill of exchange by a national bank in one state upon a national bank in another state to be paid there is not an inland, but an interstate bill of exchange.

But further, we live under a dual government. We have privileges and immunities as citizens of the several states, and privileges and immunities as citizens of the United States; our right to *make* things within a state is a civil right held under state laws; so is our right to engage in domestic commerce; these are beyond Federal, and exclusively within state, control, except so far as protected by the 'due process,' and 'equal protection' clauses of the fourteenth amendment. The right to travel from state to state, or to engage in interstate or foreign commerce, is a right privilege or immunity as a citizen of the United States, held under the Federal constitution and laws, and which "no state shall pass any law to abridge." Neither state nor Federal corporations merely as such are citizens within this provision, and the government that creates the corporation could, at its creation, undoubtedly prohibit it from engaging in either domestic, interstate or foreign commerce. No state, however, could forbid a Federal corporation, with the charter power, nor a corporation of another state with charter power and a Federal license, to engage in interstate commerce because the subject matter is outside state control; neither could a state forbid its citizen from an interstate buying or selling to such corporations because his right to do either is his right as a citizen of the United States; but any state could forbid any alien, or any corporation, Federal or state, to which it had not granted the power, to *produce* within the state, because such have no rights as citizens of the United States.⁷ The same is true as to its own citizens within the states,—their right to *produce* is a right as a citizen of the state, and can be prohibited, if at all, only by the state wherein the attempt is made; the state's right to *prohibit*, however, is greatly limited by the provisions of the 14th amendment that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person

⁶ Commonwealth v. Texas & P. R. R. Co., 98 Pa. St. 90.

⁷ There perhaps would be an exception to this in case a corporation was chartered by the Federal government strictly to manufacture supplies for the government, as armor plate, ammunition, &c.

within its jurisdiction the equal protection of the laws. One's rights as a Federal citizen cannot be abridged by the states, nor can his rights as a state citizen be abridged by the Federal government. We understand these to be the settled doctrines of the Supreme Court ever since the *Slaughter House* and *Civil Rights* cases.⁸

If the foregoing is correct, then there is no incidental power under the 'commerce clause,' for the Federal government to give by charter to its own corporation, or by license to a state corporation the general *right to produce* within a state without that state's consent, although there is a clear authority to give such a *right* to either a Federal or state corporation to carry on interstate and foreign commerce,—i. e., *buy and sell across state lines*,—without any state's consent. If this is true then there is no *legal necessity* of a Federal corporation having the right to produce the subjects of commerce within a state without its consent in order to prevent a deadlock.

While we hold that the Federal government under its power to regulate commerce can not give its own corporation, or one of any state, the legal right to *produce* within any state without its consent, yet we believe the Federal government can give to its own corporation the corporate capacity to produce, if the state where production is undertaken does not object. This is not because it has any direct jurisdiction over *production* as such, but because it has authority to mould its own corporation as it pleases. This has been the universally accepted corporate doctrine and practice. No state can give its corporation a *right to produce* in any other state; it can only give it capacity to do so in any state that does not object. The reasons are: Every corporation, as such, is subject to the control of the government creating it; the business it does is subject to the control of the government having jurisdiction over the business done. Each state has exclusive jurisdiction over the *production* within its borders, by whomsoever done; the Federal government has exclusive jurisdiction over *interstate commerce*, by whomsoever done. Any state can create a *producing* corporation, and prescribe the terms upon which it will allow it to engage in interstate commerce,—not because it has any jurisdiction over such commerce, but because it has complete authority over its own corporation; to allow, or to forbid it to engage in such commerce is not regulating commerce in the *legal* sense, and such permission is subject to the paramount authority of the Federal government to regulate such commerce. On the other hand the Federal government may create a

⁸ *Slaughter House Cases*, 16 Wall. 36; *Hall v. De Cuir*, 95 U. S. 485; *Civil Rights Cases*, 109 U. S. 3; *Crutcher v. Kentucky*, 141 U. S. 47; *Reid v. Colorado*, 187 U. S. 137, 151.

corporation to engage in *interstate commerce*, and may prescribe the terms upon which it will *allow* such corporations to *produce* within the states; it may forbid or allow this, not because it has any jurisdiction over production within the states, but because it has jurisdiction over its own corporation as such; to forbid or to allow it to engage in production is not *regulating* production within the states,—that is still subject to the paramount control of the state where done. The control of the *producing corporation* that engages in interstate commerce, by the state creating it, is not directly, but only incidentally controlling such commerce; so the control of a *trading corporation* that *produces* within the states, by the Federal government that creates it, is not directly, but only incidentally, controlling production within the states. The former does not violate Federal power, and the latter does not infringe state authority. Even if the Federal government should forbid state *producing* corporations from engaging in *interstate commerce*, and all the states should forbid Federal trading corporations from *producing* within the states, there could be no deadlock, for under the 'due process' constitutional provision, neither the state nor Federal governments can wholly prevent individual production and domestic commerce in the states; and if A and B in state X can buy of, and sell to, one another, C in state Y has the same right to buy of or sell to either A or B in state X, because the citizens of one state are entitled to all the privileges and immunities of citizens of the several states; and if such a transaction took the form of interstate commerce it would, for that reason, be beyond state control. The only peculiar result would be that the products of state corporations would have to be sold to individuals within the states, or directly to Federal trading corporations. Of course there is no likelihood of such an absurd legal situation, as all, or any great number, of the states, undertaking to control Federal trading corporations in this way, although something of the kind did occur in 1816-'20 as to the Second United States bank. There is no direct legal authority upon the theory here advanced, but what incidental consideration it has received points to the conclusion we have given.⁹

6. Drastic and centralizing character of compulsory Federal incorporation. We have entered into the foregoing extremely technical legal discussion, in order to clear up as well as we could, what we think are mistaken ideas concerning the drastic and centralizing character of Federal incorporation. So far as we have observed the supposed drastic and centralizing tendencies of the Federal

⁹ *Reagan v. Mercantile & T. Co.*, 154 U. S. 413; *Central Pacific R. R. Co. v. California*, 162 U. S. 91; *Smythe v. Ames*, 169 U. S. 466, 516-22.

incorporation plan have been stated to be: (a) Prohibition of state corporations from engaging in interstate commerce without reorganizing under the Federal law,—we have already considered this and concluded the *license* plan, to be efficient, would be even more drastic; (b) shifting of incorporation fees and taxes, which we have also considered; (c) shifting litigation from state to Federal courts,—this we have also mentioned as likely to be worse under the license plan; and (d) finally, bringing all *production* under direct Federal control. We have just considered this and concluded that the Federal incorporation plan, rightly considered, contemplates nothing of the kind, but on the other hand strictly preserves the power of the states over such matters, and is only designed to prevent the arrogant overriding of the just powers of the states by force, fraud, evasion, bribery and other devious ways through intricate combinations impossible to unravel—*though legal by the law of some state*.

If, however, our view is incorrect, and the view taken in the Report is correct, and the Federal government has the power to give the *right* to its own or to a state corporation to *produce* within a state without its consent, and this is done, then there is undoubtedly centralization, so it is necessary to consider what would be the effect under the license plan also. If the power to regulate commerce among the states includes the power to regulate production, directly, within the states the result would be, as said by Mr. Justice Lamar in *Kidd v. Pearson*,¹⁰ that "Congress would be invested, to the exclusion of the states with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining,—in short every branch of human industry.* * * A situation more paralyzing to the state governments and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." This would be justly chargeable against Federal incorporation if such a power is necessary to, and enforceable under, that plan. We have however shown that it is not necessary, and if desirable, it is subject to state control. How about the license plan? The U. S. Steel Corporation's New Jersey Charter authorizes it to mine, manufacture, transport, buy, sell, exchange nearly anything anywhere; the license plan proposes to guarantee protection to the state corporation having the Federal license, in the exercise of all its corporate powers throughout the country, except such as are inconsistent with the license. Nothing could be more to the liking of these industrial combinations than to have their present charter powers validated by a Federal license against present possible state and Federal assault. As Mr. Justice Bradley said

¹⁰ 128 U. S. 1, 20.

in *Stockton v. B. & C. R. R. Co.*¹¹ "in the pursuit of a business authorized by the government of the United States, the corporations of other states cannot be prohibited or obstructed by any state." This was said in regard to building an interstate bridge by an interstate railroad, and nothing else, and was clearly correct for such was an instrument of interstate commerce; if the argument in the Report is correct,—that commerce includes production,—then the Federal license carries the charter power of every state corporation to produce, into every other state; in other words manufacturing and producing within Michigan remains no longer subject to Michigan laws, but becomes subject, not merely to Federal control, but also is subjected, or may be, through the Federal power, to the manufacturing policy of New Jersey—or even New Zealand. Under this view the license plan would be not drastic merely but an unendurable abomination. We do not believe, notwithstanding the Report, that any such power exists in the Federal government under either an incorporation or a license plan; hence this bugbear disappears, and the balance remains in favor of incorporation. But even if we are mistaken, subjecting state production to one uniform Federal law, would be preferable to subjecting it to the non-uniform laws of the forty-five states. The first would be reasonable and effective centralization; the latter extreme, unreasonable, unjust and inefficient centralization.

Wherein is the incorporation plan otherwise more centralizing? To create a corporation is simply to give to a changing body of persons the status of a single person in carrying on the business designated; the main difference between it and a license is to give complete jurisdiction over the *person* created, instead of merely over the license granted; the license plan may enable the Federal government to dehorn the bull, but leaves him yet at large with the same instincts and capacity to invade or imperil the china shop; the Federal incorporation plan enables the government to convert the offending animal into mincemeat or extract of beef, without delay.

7. Policy. As things now are, commerce is carried on by corporations that owe no Federal but only state allegiance; the license plan proposes to continue this; the life of the *individual* who disobeys Federal law may be taken if the law so provides,—but the life of the state-created corporation can not be, except by the state that creates it. We do not believe in this discrimination. Let the corporation that carries on interstate commerce owe as direct and positive allegiance to the Federal government as the individual citizen who engages in such commerce. This is not offensive centralization; it

¹¹ 32 Fed. R. 9, 14.

is only justice and fairness; it is the "square deal" all around; besides, it goes back to first principles,—the government that undertakes to control should operate *directly* on the persons, natural or artificial, to be controlled, and only the government that has adequate power should undertake it. Two ideas dominated the Federal constitutional convention, viz.: that the Federal powers should operate directly upon all persons everywhere, without consulting state laws or state prejudices, and that the government should have adequate powers to accomplish the duties with which it was charged. Five different times the convention resolved unanimously that Congress should be given power "*to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.*" These were the directions given and observed in formulating the express powers of Congress; these were the ends to be accomplished; the powers given were given to accomplish these ends. The occasion has now arisen for their application to our commercial affairs. To apply them directly and in the simplest way is in accord with our political principles: to give to the township, the county, the city, the state, the Nation that power which each can best use for the best interests of those directly affected, and by the direct operation of the powers given, on the things to be regulated, has been the dominant political idea of our life from Plymouth Rock to Appomattox, if not from the *Germania* of Tacitus to the *American Political Ideas* of John Fiske. The government under the Confederation was not constructed on this plan,—and failed; the National government is so constructed. Federal incorporation is the National stage; Federal license is the Confederation stage; the Confederation plan did not work. The National plan will.

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