Paper read on March 28, 1940 by Lawrence S. Lesser at the First Session of a Symposium on Constitutional Law held under the auspices of The George Washington University and the Federal Bar Association at the United States Chamber of Commerce, Washington, D. C.

I was somewhat surprised this evening when I saw that the program had me scheduled to speak on the constitutional powers of the Securities and Exchange Commission over public utility holding companies. That covers a lot more territory than I had understood was to be the subject of my discussion this evening. It was my understanding that I was to undertake the affirmative of the following question:

> "May the statutory power of the Securities and Exchange Commission to require that each registered holding company 'shall take such steps as the Commission shall find necessary to limit the operations of the holding company system of which such company is a part to a single integrated public utility system' - be constitutionally applied to require a registered holding company to sell or otherwise dispose of a subsidiary company."

In short - is Section 11 (b)(1) of the Public Utility Holding Company Act constitutional?

Whether I was under a misapprehension or whether the program is in error I can't say. But that is immaterial for I must out of necessity confine myself to the narrower subject.

But be that as it may, let us at the outset consider the statute which is to be the subject of our discussion this evening - the statute of which Section 11 (b)(1) is an integral part - the setting in which Sectionn 11(b)(1) is to be found. To whom does it apply? What does it prohibit? What does it require? What are its sanctions? What are the ends to be achieved - what are the means that have been chosen to accomplish them?

The Public Utility Holding Company Act of 1935 applies primarily, and Section 11(b)(1), which is the particular subject of our discussion this evening, applies exclusively to what are termed "registered"holding companies and their subsidiaries. A registered holding company is one that has registered under Section 5 (a) of the Act. That section provides that any holding company, as that term is defined in Section 2 (a)(7) of the Act, may register and thus become a registered holding company by filing certain documents with the Securities and Exchange Commission.

And as was pointed out in *Lawless* v. *The Securities and Exchange Commission* 1/ the regulatory provisions of the Act do not take effect unless and until the holding company has registered.

But Section 5(a) of the Act does not require registration. It is entirely permissive. Why then should a holding company register? That answer is found in Section 4 (a) of the Act which almost alone of all the sections of the Act applies to unregistered holding companies. That section makes it unlawful (and section 29 makes it a crime) for any unregistered holding company either directly or through a subsidiary to do any one of five things.

1/ 105 Fed. (2d), 574, (C.C.A. 1st, 1939)

In sum, unregistered holding companies are forbidden either directly or through subsidiaries (1) to sell, transmit or distribute gas or electric energy in interstate commerce; (2) by the use of the mails or any means or instrumentality of interstate commerce negotiate, to enter into or take any step in the performance of any service, sales or construction contract with any public utility company or holding company; (3) by the use of the mails or any means or instrumentality of interstate commerce to distribute or make any public offering of any of its securities or those of any subsidiary or affiliate or of any holding company or public utility company; (4) by the use of the mails or any means or instrumentality of interstate commerce to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary, affiliate or of any public utility company or holding company; and (5) to engage in any business in interstate commerce.

As Judge Bingham pointed out in the *Lawless* case the Act thus makes registration a condition precedent to the lawful use by a holding company or its subsidiaries of the channels of interstate commerce or the mails. In the *Electic Bond and Share* case 2/ the Supreme Court, two years ago today, held that the imposition of such a condition precedent to the use of the mails and the instrumentalities of interstate commerce was a constitutional exercise of the power of Congress over interstate commerce and the postal establishment.

The decision in the *Electric Bond and Share* case, however, is doubly significant. In the first place it lays to rest any contention that the business of a public utility holding company in operating, managing and servicing subsidiaries in different states does not constitute interstate commerce. In the second place, the decision in the *Bond and Share* case establishes that the pursuit of interstate commerce by a subsidiary constitutes an engagement in interstate commerce by the holding company. Thus Mr. Chief Justice Hughes said:

> "That *** [the holding companies] conducted such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power. It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test. The constitutional authority confided to Congress could not be maintained if it were deemed to depend upon the mere modal arrangements of those seeking to escape its exercise."

Moreover, since the decision of the Supreme Court in *Consolidated Edison Company* v. *The National Labor Relations Board* 3/ there is little room to doubt that the business of a public utility company even though its lines do not cross the boundaries of any State is so intertwined with and necessary to interstate commerce that its business is to be considered, for some purposes at any rate, a part thereof.

But let us return to the statute itself.

Substantively, the Public Utility Holding Company Act of 1935 may be divided, roughly speaking, into three parts. The first part - which I have already adverted to - consists of those sections of the Act which

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2/ 303 U.S. 419 (1938).

3/ 305 U.S. 188 (1938).

require the filing of registration statements, and supplementary reports as conditions precedent to the use of the mails, the instrumentalities of interstate commerce, and any engagement in such commerce. This phase of the Act was obviously designed, in part, to throw the white light of publicity on the activities of public utility holding companies and their subsidiaries with the thought, perhaps, that publicity might act as a deterrent to the continuation of many of the unhappy practices which have from time to time prevailed.

The second part of the Act is its regulatory phase. By this portion of the Act Congress has undertaken through the Securities and Exchange Commission to regulate many of the activities of registered public utility holding companies and their subsidiaries. Thus, for example, the issuance of securities, the performance of service contracts, the payment of dividends, the making of loans and the sale of assets - all fall within the regulatory jurisdiction of the Commission. This regulation was obviously intended to supplement and not supplant regulation by the states, for wherever effective state regulation exists the Act provides no federal regulation or affords exemptions.

That state regulation in the utilities field required supplementing was effectively disclosed by the detailed and extended investigations conducted by the Federal Trade Commission pursuant to the Walsh resolution. That investigation revealed that a major portion of the electric and gas industry of the country was controlled by holding companies that were not subject to effective state regulation. It demonstrated that the proper regulation of public utility companies by the states was well nigh impossible because of the inability of the states to regulate or even investigate the activities of foreign holding companies which had taken over the active management of the utilities - leaving the local "managers" but mere figureheads. Thus the states which had granted regional monopolies to the industry were without power to effectively exercise that control which is necessary to curb the monopolistic tendency to overreach.

I have no intention of repeating here the sordid details of the more-than-twice-told tale of the abuses that gave rise to this legislation. It suffices to recall that the wreckage of state regulation of public utility holding companies and their subsidiaries was clearly reflected in such adjudications as *New Hampshire Gas and Electric Company* v. *Morse* 4/ where a three judge court held that a state commission was without power to subpoena the records of a foreign holding company so as to determine the nature and extent of its transactions with wholly owned domestic public utility subsidiaries and *Federal Trade Commission* v. *Smith* 5/ which held that public utility holding companies, were for the most part engaged in interstate commerce, with the inevitable consequence of putting beyond the regulatory power of the states one of the most vital aspects of effective public utility regulation.

Thus the state regulation of operating companies was caught between the Scylla of the fictional absence of foreign corporations and the Charybdis of the immunity of interstate commerce from state regulation. The second

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4/ 42 Fed. (2d) 490 (D.N.H. 1930)

5/ 1 Fed. Supp. 247 (S.D.N.Y. 1932)

phase of the Act - its regulatory phase - was intended to fill this breach and supplement state regulation where because of our federal system of government and the interstate and even national character of holding companies, state regulation had proven unavailing.

But our discussion this evening is concerned with neither of these phases of the Act. The problem raised is the constitutionality of the third phase - that which is encompassed by Section 11 (b)(1). This section reads:

> "It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
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> "To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system;"

Then follows a proviso that under certain specified conditions in the public interest, the Commission shall permit a registered holding company to retain one or more additional integrated systems if that course would prevent a loss of economies.

The phrase integrated public-utility system is defined so far as electric companies are concerned (and since the principles involved with respect to gas companies are the same, let us limit ourselves for convenience sake to electric companies) in Section 2 (a)(29) to mean:

> "*** a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area of region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation***".

Note carefully the words "*not so large as to impair the advantages of localized management, efficient operation, and the effectiveness of regulation*" for these are the ultimate goal.

As Chairman Frank recently said 6/ the enforcement of Section 11 "will not be applying a death sentence to the utility industry." On the contrary, as he made clear, the enforcement of that section will "be carrying out the carefully planned congressional purpose of rejuvenating local utility management." Moreover, as he pointed out, the enforcement of Section 11 will have its effect on the work of the Commission. In his words:

6/ Address before The American Management Association, January 25, 1940.

"Progressively as we carry out the provisions of the statute and thereby revitalize local control of local operating companies, our review of management - with real localized management - will dwindle to the vanishing point."

And therein lies the answer to those who contend that the Act violates States' rights, that the Act is an assertion of national power to destroy the freedom of the States. The States never did and never could effectively regulate nation-wide holding companies and they never did and they never could effectively regulate operating subsidiaries of foreign holding companies. The effect of Section 11 will be to limit the activities of holding companies in such a way as to restore effective local management with the result that they and their subsidiaries will be subject to more effective state regulation.

And thus is the national power used not to destroy or usurp the powers of the States, but to recreate in the States the power effectively to regulate the industry. But as long as public utility holding companies are of national scope and character the Federal Government must undertake to regulate holding companies, for the 74th Congress in 1935 finally realized the truth of what Theodore Roosevelt said to the 59th Congress in 1906:

"Experience has shown conclusively that it is useless to try to get any adequate regulation and supervision of these great corporations by state action. Such regulation and supervision can only be effectively exercised by a sovereign whose jurisdiction is coextensive with the field of work of the corporations - that is by the National Government."

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May the powers of the Commission under Section 11 (b) be constitutionally applied to require a registered holding company to sell or otherwise dispose of a subsidiary company or its assets? That is the question before us this evening. My answer is yes and in the remainder of the time allotted to me I hope to outline my reasons.

The power of Congress to enact Section 11 of the Act as well as every other section of the Act must be found primarily in the postal power or the commerce power of Congress. These are granted to the Congress by Section 8 of Article I of the Constitution which in pertinent part reads:

"The Congress shall have power *** to regulate commerce with foreign nations and among the several states and with the Indian tribes; *** [and] to establish post offices and post roads; *** [and] to make all laws which shall be necessary and proper for the carrying into execution the foregoing powers."

Let us for the moment limit ourselves to a consideration of the power of the Congress under the commerce clause.

The power of Congress over interstate commerce has been recognized from the days of Chief Justice Marshall as a "power to regulate, that is to prescribe the rule by which commerce is to be governed." "This power" Marshall

wrote in *Gibbons* v. *Ogden* 7/ "like all others vested in Congress is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution."

"These," Marshall continued, "are expressed in plain terms ***. If, as has always been understood, the sovereignty of Congress though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress," the Chief Justice continued, "*** and the influence which their constituents possess at elections are in this as in many other instances *** the sole restraints on which they have relied to secure them from its abuse."

Thus over a century ago, when economically there was much less reason for so holding than there is now, Marshall said unequivocally that Congress was sovereign over interstate commerce and that that sovereignty was as full and complete as though this were not a federal nation but a single nation.

Marshall had anticipated his opinion in *Gibbons* V. *Ogden* when three years earlier, in *Cohens* v. *Virginia* 8/ he assimilated the national power over interstate commerce to the national power to declare war and make peace.

> "In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the Government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character, they have no other. America has chosen to be in many respects, and to many purposes, a nation; and for all those purposes, her government is complete; to all those objects it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can then, in effecting these objects legitimately control all individuals *** within the American territory."

Some four decades later the sovereignty of Congress over interstate commerce was again proclaimed when the Supreme Court in *Gillman* v. *Philadelphia* 9/ speaking through Mr. Justice Swayne maintained that so far as interstate commerce was concerned

> "Congress possesses all the powers which existed in the States before the adoption of the national Constitution and which have always existed in the parliament in England."

7/ 9 Wheat. 1, 196 (1824).

8/ 6 Wheat. 264, 412 (1820).

9/ 3 Wall 713, 725 (1865).

Nor is the basic pronouncement of Marshall in *Gibbons* v. *Ogden* to be discounted as mere rhetoric inspired by the political exigencies of the day. Eighty years later in *Champion* v. *Ames* 10/ Mr. Justice Harlan and 113 years later in the *Kentucky Whip and Collar* case 11/ Mr. Chief Justice Hughes quoted them with approval and reaffirmed them as stating fundamental constitutional principle.

That Congress is equally sovereign over the mails there can be no doubt. The power to establish a postal system is vested in Congress and in Congress alone. And as Marshall proclaimed in *Gibbons* v. *Ogden*, the sovereign powers vested in Congress although limited to specified objects are plenary as to those objects and may be exercised to their utmost extent.

But to say that Congress is sovereign over interstate commerce and the mails is not to say that Congress is absolute sovereign. Marshall was careful to point out in *Gibbons* v. *Ogden* that the sovereignty of Congress is subject to the limitations prescribed in the constitution - that is to the limitations of Section 9 of Article I and those of the Bill of Rights. Thus, for example, the power of Congress over interstate commerce is subject to the restraint of the due process clause of the Fifth Amendment and the sovereignty of Congress over the mails is limited as the Supreme Court pointed out in *Ex Parte Jackson* 12/ by the unreasonable search and seizure provisions of the Fourth Amendment.

However that may be, the Supreme Court held in the *Electric Bond and Share* case, as we have already seen, that a requirement of registration as a condition precedent to the use of the mails or engagement in interstate commerce by a public utility holding company is a proper exercise of the national power. Thus it is established that the power to regulate interstate commerce and the mails includes not only the power to inflict penalties for the violation of such regulations as Congress may adopt for the use of the mails and the channels of interstate commerce, but the power as well to close the mails and interstate commerce to those who do not perform such conditions precedent as Congress may impose upon their use.

But the holding of the Supreme Court in the *Bond and Share* case that Congress might impose conditions precedent upon any use of the mails or engagement in interstate commerce must rest upon the premise that Congress has the power to prohibit the use of the mails or the channels of interstate commerce in connection with such matters as Congress might deem necessary for the protection of the people of the United States - a power recognized in such cases as the *Lotteries* case, 13/ the *Commodities Clause* case, 14/ the *Prison Goods* case, 15/ the *Lottery Tickets* case, 16/ the

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10/ 188 U.S. 321, 347, 352 (1902)

11/ 279 U.S. 334, 345 (1936)

12/ 96 U.S. 727, (1877).

13/ *Champion* v. *Ames*, 188 U.S. 321 (1902)

14/ *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366 (1919)

15/ *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U.S. 334 (1937)

16/ *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904).

Seditious Matter case, 17/ the *Mail Fraud* case. 18/

This power to prohibit interstate commerce was described by Mr. Chief Justice Taft in *Brooks* v. *United States*:19/

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."

The power of Congress to close the mails was upheld by Mr. Justice Holmes in *Badders* v. *United States* 20/ when he said:

> "The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. Whatever the limit to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy whether it can forbid the scheme or not."

The prohibition of the use of interstate commerce and the mails contained in the Public Utility Holding Company Act of 1935 is precisely of this nature. It is designed to prevent the use of the mails and interstate commerce as agencies to promote the spread of the evils that Congress has found to result from holding companies to the purchasers of their securities and to the consumers served by the public utility companies which they control. This legislation was intended to close the federal avenues to acts done in furtherance of a scheme that Congress after full inquiry into the facts has come to regard as contrary to public policy. And the often repeated argument that the police power of Congress over the mails and interstate commerce extends only to articles intrinsically harmful has been fully answered by the decision in the *Electric Bond and Share* case if indeed it had not been refuted long before.

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It may be that the concept of a national "police power" may jar upon some. Yet there can be no mistaking Chief Justice Taft when in the *Brooks* case he referred to the "exercise of the police power for the benefit of the public within the field of interstate commerce." Indeed, two years earlier in *Chicago Board of Trade* v. *Olsen* 21/ the Chief Justice had referred to and sustained the existance of such a power. But whether the phrase "police power" is used or not is immaterial. It is firmly established that, acting within the scope of its authority, Congress has the same full

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17/ *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407 (1921).

18/ *Badders* v. *United States*, 240 U.S. 391 (1916).

19/ 267 U.S. 437 (1924).

20/ 240 U.S. 391, 393 (1915).

21/ 262 U.S. 1, 41 (1922).

power that the states have to employ any regulatory device which is reasonably adapted to the public welfare. Thus, while in *Hamilton* v. *Kentucky Distillers Warehouse Company* 22/ Mr. Justice Brandeis expressed the opinion that there was no national police power, he was careful to point out that it was

> "*** none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attended the exercise by a State of its police power or that it may tend to accomplish a similar purpose."

Perhaps Mr. Justice Roberts in *Nebbis* v. *New York* 23/ best stated the proposition when without referring to the "police power" in so many words he said:

> "This Court from the early days [has] affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the States in their sovereign capacity touching all subjects, jurisdiction of which is not surrendered to the federal government ***."

And it has long been held that this "police power" - or power to legislate for the general welfare - includes as Mr. Justice Roberts said in *Atlantic & Pacific Tea Company* v. *Grosjean* 24/ the power to forbid, "as inimical to the public welfare, the prosecution of a particular type of business [and to] *** regulate a business in such manner as to abate evils deemed to arise from its pursuit." In recognizing this power in the states, however, the Supreme Court has more than once held that the power of a state to regulate or forbid a business does not extend to those engaged in interstate commerce. 25/ The reason usually given is that such a course would constitute a usurpation of the powers of Congress. Thus in *Crutcher* v. *Kentucky*, 26/ Mr. Justice Bradley said:

> "*** Would any one pretend that a state legislature could prohibit a foreign corporation, - an English or a French transportation company, for example, - from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation.***"

22/ 251 U.S. 146, 156, (1919).

23/ 291 U.S. 502, 524, (1933).

24/ 301 U.S. 412, 425, 426, (1936).

25/ *Crutcher* v. *Kentucky*, 141 U.S. 47 (1890); *Leisy* v. *Farmers' Grain Co.*, 258 U.S. 50 (1921).

26/ 141 U.S. 47, 57 (1890).

> **** The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the government of the several States; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. ***"

Thus the prerogative, the responsibility and the duty of providing for the security of the citizens of the United States in their relations to corporations engaged in interstate commerce belongs to Congress. And in exercising that prerogative and performing that duty Congress has the responsibility of enacting such legislation for the regulation of persons engaged in interstate commerce as will abade such evils as are deemed to exist and provide for the security of those citizens of the United States who are affected by that commerce.

And it would seem that, subject to the restrictions of the Bill of Rights, the means of regulation open to Congress are as numerous and varied as the evils to be abated and as extensive as the security of the people of the United States requires. As Mr. Justice Hughes, as he then was, said in the *Minnesota Rate* case: 27/

> "The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on."

That authority, moreover, as Mr. Justice Field said in *Welton* v. *Missouri* 28/ may be exercised by the Congress:

> "To prescribe rules by which *** [interstate commerce] shall be governed, - that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled and how far it shall be burdened by duties and imposts, and how far it shall be prohibited."

The power of the Congress to regulate interstate commerce includes then the power to determine how far it shall be free, how far it shall be burdened, and how far it shall be prohibited. This power, moreover, as Mr. Justice Field said in *Sherlock* v. *Alling*: 29/

> "***authorizes legislation with respect to all the subjects of *** interstate commerce, the persons engaged in it, and the instruments by which it is carried on."

27/ 230 U.S. 352, 399 (1912).

28/ 91 U.S. 275, 279 (1875).

29/ 93 U.S. 99, 103 (1876).

A corporation doing business in interstate commerce is, of course, both a person engaged in such commerce and an instrument by which it is carried on.

Now, the question is, may Congress require a corporation engaged in interstate commerce to divest itself of a subsidiary company - that is may Congress by legislation regulate or prohibit the ownership of stock in other corporations by a company engaged in interstate commerce? I think there is ample authority to say that Congress has that power.

Stock ownership by corporations was unknown at common law; in some states it is not permitted today. In the case of corporations organized in the District of Columbia, which are created by federal authority, Congress has adhered to the common law rule. The code of the District provides that:30/

> "It shall not be lawful for any company to use any of their funds in the purchase of any stock in any other corporation."

Moreover, in exercising their power to regulate domestic commerce, the states may, as the Supreme Court held in *Orient Insurance Co. v. Daggs*, 31/ subject foreign corporations engaged in that commerce to the limitations which they impose upon corporations of their own creation. Thus the states may, and some have, prohibited foreign corporations engaged in their domestic commerce from holding stock in other corporations. 32/

The power to effect such regulation is, of course, based upon the right of a state to exclude foreign corporations from engaging in its domestic commerce. But, the National Government has the same power as to the engagement of any corporation in interstate commerce.

That such power resides in the National Government is not only to be inferred from the oft exercised and recognized power of Congress to prohibit interstate commerce, but also from the less frequently exercised but equally recognized power of Congress to charter corporations to engage in interstate commerce.

Thus shortly after the adoption of the Constitution Alexander Hamilton wrote: 33/

> "The fact that all the principal commercial nations have made use of *** corporations is a satisfactory proof that the establishment of them is an incident to the regulation of commerce."

30/ Chap. 9, Sec. 276.

31/ 172 U.S. 557, 566 (1899).

32/ *Coler v. Takoma Railway & Power Co.*, 65 N.J. Eq. 347, 54 Atl. 413 (1904); cf. *Williams v. Gaylord*, 186 U.S. 157 (1901); *Looper v. California*, 155 U.S. 648, 655 (1894).

33/ Opinion on Constitutionality of *the Bank of the Unites States*, The Federalist (Ford's Ed. 1898) Henry Holt & Co., 677.

He concluded therefore that Congress might properly create corporations to trade: 34/

> "With foreign countries or *** between the states or with the Indian tribes because it is the province of the Federal Government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage."

and Congress has from time to time granted charters to companies to engage in interstate commerce and the Supreme Court has sustained that course as a proper exercise of congressional powers under the Commerce Clause. 35/

For the most part, however, the power of Congress to create corporations to engage in interstate commerce has remained dormant. The states have, therefore, been the creators of most such corporations. It is, however, well grounded constitutional doctrines that while the Congress and the states may exercise a coordinate jurisdiction over many matters entrusted to the Congress by the Constitution, so long as Congress does not act, 36/ nevertheless there always remains with Congress the power to preempt the field and to prohibit state action. 37/

On this basis eminent constitutional lawyers have concluded that Congress may constitutionally withhold the privilege of doing business as a corporation in interstate commerce unless a Federal charter or license has been secured. 38/

34/ Id. 657, et seq.

35/ *Union Pacific Railway Co.* v. *Myers*, 115 U.S. 1 (1885); *California* V. *Pacific Railroad Companies*, 127 U.S. 1 (1887); *Luxton* v. *North River Bridge Co.*, 153 U.S. 525 (1894).

36/ *Wilson* v. *The Blackbird Creek Marsh Co.*, 2 Pet. 250 (1829).

37/ *Veazie Bank* v. *Fenno*, 75 U.S. 533, 549 (1868).

38/ George W. Wickersham, *State Control of Foreign Corporations*, 19 Yale L. J. 1; Frank B. Kellogg, *Federal Incorporation and Control*, 20 Yale L.J. 177; Victor Morawetz, *The Power of Congress to Enact Federal Incorporation Laws and to Regulate Corporations*, 26 Harv. L. 667. See also William W. Cooke, *Federal Railroad Incorporation*, 23 Yale L. J. 207; Charles W. Bunn, *Federal Incorporation of Railway Companies*, 30 Harv. L. Rev. 589; Milo W. Watkins, *Federal Incorporation*, 17 Mich. L. Rev. 64, 145, 238.

If Congress, then, can close the channels of interstate commerce to corporations not chartered by it, Congress may subject non-federally chartered corporations engaged in that commerce to the limitations it could impose upon corporations of its own creation - just as the states may impose such conditions on foreign corporations engaged in their domestic commerce.

Thus thirty years ago Frank B. Kellogg, later Secretary of State in the Coolidge administration, made an exhaustive study of the subject and came to the conclusion that: 38a/

> "Within its power of regulation *** [Congress] may prescribe what corporations may *** engage in *** [interstate] commerce. It may prohibit corporations organized under foreign governments from engaging therein, or prescribe the regulations under which they may so engage. It may equally prohibit State corporations from so engaging or as a condition prescribe the regulations under which they may engage."

Consequently, Congress might well have adopted the policy of prohibiting corporations engaged in interstate commerce from owning stock of other corporations, just as the states have prohibited corporations engaged in domestic commerce from so doing.

Congress, however, has not gone that far in the Public Utility Holding Company Act. Having found that the operation by one holding company in interstate commerce of scattered public utilities and other businesses bearing little or no relationship to each other adversely affects the interests of investors and consumers, Congress has merely provided that unless substantial economies will otherwise result, every interstate holding company shall be limited in its operations to a single integrated public utility system and to such other businesses as are reasonably incidental or economically necessary or appropriate thereto.

And whether we base our conclusion upon the concept of a national police power in the field of interstate commerce, or upon the analogy to the power of the states over corporations engaged in domestic commerce, we must agree with Secretary Kellogg when he said some thirty years ago 39/ that Congress might properly condition corporate engagement in interstate commerce so as to

> "insure the solvency of such corporations, to the end that their securities may be safe investments for the people, and that they may be able to perform their obligations as instrumentalities of commerce."

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Of course, in enforcing the Act, some - perhaps many - holding companies may be required, if they are to continue in interstate commerce, to sell or otherwise dispose of one or more subsidiary companies whose properties may not be included in the integrated utility system to be retained or which do not engage in a business reasonably incidental or economically necessary or

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38a/ 20 Yale Journal 177, 188.

39/ Id.

appropriate thereto. But congress might have refused the right of engaging in interstate commerce to any corporation owning stock in any other corporation or having any subsidiaries at all!

There is no denying that the limitations of Section 11 cut down the right of a corporation engaging in interstate commerce to exercise the powers vested in it by its state-given charter. But no valid constitutional objection can be based on that circumstance.

Thus when the point was raised in *Northern Securities Company* v. *United States* 40/ that the Anti-Trust Act was unconstitutional because it limited the Company in exercising the powers vested in it by the State of New Jersey to acquire and own securities, Mr. Justice Harlan replied:

> "We cannot conceive how it is possible for any one to seriously contend for such a proposition. It seems nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the states when exerting their power to create corporations. No such view can be entertained for a moment."

Similarly Mr. Justice White in *United States* v. *Delaware & Hudson Company* 41/ in sustaining the constitutionality of the Commodities Clause of the Hepburn Act dismissed the contention that that Act was unconstitutional because it deprived a corporation of the right to do what its State-given charter provided it might do. In so holding he said:

> "*** The power to regulate commerce possessed by Congres is in the nature of things ever enduring, and therefore the right to exert it today, tomorrow and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by State laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate."

The doctrine that neither private nor State given rights will be allowed to impair the sovereign power of Congress over the fields assigned to it by the Constitution was more recently reiterated in *Norman* v. *Baltimore & Ohio Railroad* 42/ where the power of Congress to abrogate the gold clauses in private contracts was sustained. Mr. Chief Justice Hughes said:

> "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

40/ 193 U.S. 197, 345 (1903).

41/ 213 U.S. 366, 405 (1908).

42/ 294 U.S. 240 (1935).

Therefore whether we consider a corporate charter a law or hearken back to the *Dartmouth College* case and consider it a contract, in either event the powers granted by it are affected with a congenital infirmity: In short, if a corporation created by a state seeks to engage in interstate commerce it subjects itself to the dominant constitutional power of Congress and must forego the privilege of exercising any State-given power that Congress, acting under the Commerce Clause, forbids to instrumentalities of interstate commerce.

The problem can also be considered from another angle. No state can create a corporation with the legal right to exercise its franchise in another state. 43/ When a corporation does exercise its corporate powers within a state other than that which created it, it does so either by sufferance 44/or, if it engages in interstate commerce, because the state has no power to interfere with it, the power to regulate interstate commerce being vested in Congress alone.45/ The right of any state-chartered corporation to engage in interstate commerce within the confines of any state other than that under whose laws it was organized derives solely from the national power. 46/ Consequently Congress, which alone has the power to regulate interstate commerce, may limit the right of such a corporation to engage in interstate commerce. Thus in 1913 Victor Morawitz, a well-recognized authority on corporate law wrote: 47/

> "No state can confer a legal right or franchise to act in a corporate capacity in other states, and Congress alone is vested by the Constitution with the power to legislate for the regulation of interstate and international commerce. The organization, powers, and financial condition of a *** corporation may have a direct and important relation to the transaction of interstate and international commerce, and may be of such a character as to render the commercial operations of the corporation a menace to the security and welfare of the people of all the states. A statute prohibiting the transaction of interstate commerce by means of a corporate organization which is a menace to the security of the public would seem justifiable as an exercise of the police power over interstate commerce and as a regulation of such commerce within the meaning of the Constitution."

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The conclusion is inevitable that Congress may prescribe the conditions under which corporate business may be transacted in interstate commerce. That is all that Congress has done in the Public Utility Holding

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43/ *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588 (1839).

44/ Id. 589, 590.

45/ *International Text Book Co.* v. *Pigg*, 217 U.S. 91 (1909); *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1 (1909).

46/ *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1890).

47/ 26 Harvard Law Review, 890

Company Act of 1935.

It might be urged, however, that while Section 11 (b) (1) might be a proper limitation as to subsidiaries acquired after the enactment of the Public Utility Holding Company Act, nevertheless, because of the restrictions of the Fifth Amendment it cannot constitutionally be applied to require the divestment of a subsidiary acquired before its adoption. Such a contention, however, would seem untenable.

Congress may prescribe the conditions under which corporate business may be transacted in interstate commerce and in so doing it may and has required the dissolution of existing corporations and the divestment of property where such dissolution or divestment is reasonably necessary to bring about desired conditions in the field of interstate commerce. 48/ And it makes no difference whether the property was acquired or the corporation organized before or after Congress enacted the applicable regulation.

Thus in *United States* v. *Reading Co.* 49/ the railroad properties and the coal properties of the Reading Company dated in association from about 1883. The corporate structure of the Reading Company - the railroad properties in one subsidiary and the coal properties in another - dated from 1896. The Commodities Clause of the Hepburn Act was enacted in 1906. In holding the Commodities Clause applicable to the Reading Company and its subsidiaries Mr. Justice Clarke said:

> "The case falls clearly within the scope of the Act, and for the violation of the Commodity Clause *** the combination between the Reading Railway Company and the Reading Coal Company must be dissolved."

So too in *United States* v. *Southern Pacific Company* 50/ the Southern Pacific Company was required under the Sherman Act of 1890 to give up a lease of the Central Pacific Railway originally signed in 1885 for a period of ninety-nine years. Again in *Louisville & Nashville Railroad* v. *Mottley* 51/ the Congressional regulation of the free pass evil was held properly to cut off the plaintiff's rights under contract to issue annual passes to him for life entered into prior to the adoption of the Act.

No right to continue in interstate commerce upon the terms and conditions previously permitted can accrue to cut down or limit the power of Congress to regulate interstate commerce. Congress may at any time enact new or different regulations and forbid further engagement in interstate commerce except upon such new terms and conditions as it may deem necessary for the proper regulation thereof. 52/ This is so even though the effect of the new

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48/ Cf. *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

49/ 253 U.S. 26 (1919).

50/ 259 U.S. 214 (1922).

51/ 219 U.S. 467 (1911).

52/ Cf. *Manchester Fire Insurance Co.* v. *Herriott*, 91 Fed. 711 (C.C. S.D. Ia. 1899).

regulation is to offer a corporation the choice of retiring from interstate commerce or divesting itself of property which Congress has said it shall not own if it is to continue in such commerce.

Thus the Panama Canal Act, adopted in 1912, made it unlawful for any railroad company engaged in interstate commerce to have any interest in (by stock ownership or otherwise) any common carrier by water with which such railroad company may compete for traffic. The Panama Canal Act further provided that under specified conditions in the public interest the Interstate Commerce Commission might allow such ownership to continue. This is precisely the technique of Section 11 (b)(1) of the Public Utility Holding Company Act of 1935. And the constitutionality of the Panama Canal Act has never been successfully assailed. 53/

It cannot be said that Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 constitutes a taking of private property without just compensation or the deprivation of it without due process of law. As the Supreme Court pointed out in the *Legal Tender* cases 54/ and reaffirmed in the *Gold Clause* case, 55/ those provisions of the Fifth Amendment refer only to direct appropriation:

> "A new tariff, an embargo or a war, might bring upon individuals great losses, might, indeed, render valuable property almost valueless, - might destroy the worth of contracts. But whoever supposed that because of this, a tariff could not be changed or a non-intercourse act, or embargo be enacted or a war be declared."

Chief Justice Hughes uttered those words in 1934 and they carry with them a re-affirmation of the principles laid down by Chief Justice Marshall in *Cohens* v. *Virginia* in 1820 and in *Gibbons* v. *Ogden* in 1824 that in its enumerated powers to coin money, to regulate commerce, to make war and restore peace America is not a federation but a nation and Congress is in those theatres sovereign.

There is, however, another phase of the Fifth Amendment to consider. Mr. Justice Roberts pointed out in *Nebbia* v. *New York* 56/ that:

> "The Fifth Amendment, in the field of federal activity, and the fourteenth, as respects state action *** demands *** that the law shall not be unreasonable, arbitrary or capricious and the means selected shall have a real and substantial relation to the object sought to be attained."

Does Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 meet this requirement? Of course, as Thomas Reed Powell somewhere

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53/ See *Lehigh Valley Railroad Company* v. *United States*, 243 U.S. 412, 1916.

54/ 12 Wall. 545 (1870).

55/ 294 U.S. 240, 305 (1935).

56/ 291 U.S. 502, 525 (1933).

said, this phase of the Fifth Amendment requires that Congress act like a gentleman. And opinions as to what constitutes gentlemanly conduct vary with the personalities involved.

I do believe, however, that no one who has examined the reports of the Federal Trade Commission's investigation under the Walsh Resolution can retain any doubts concerning the evils that grew out of the nation-wide and interstate operation and control by holding companies of public utilities and the indiscriminate mixing of public utility operation with commercial enterprises of all sorts and descriptions. The evils arising from that situation are set out briefly in Section 1 of the Act. A consideration of them leaves to my mind no doubt that confining the operations of public utility holding companies to integrated public utility systems in single areas or regions and to such other businesses as may be reasonably incidental or economically necessary thereto is neither capricious, unreasonable or arbitrary but a proper attempt on the part of Congress to abate known and flagrant evils made possible and fostered by the instrumentalities of interstate commerce and the mails, and to recreate active local management and thus to return to the states the power to effectively regulate the public utility companies upon whom their citizens must rely for many of their most vital needs.