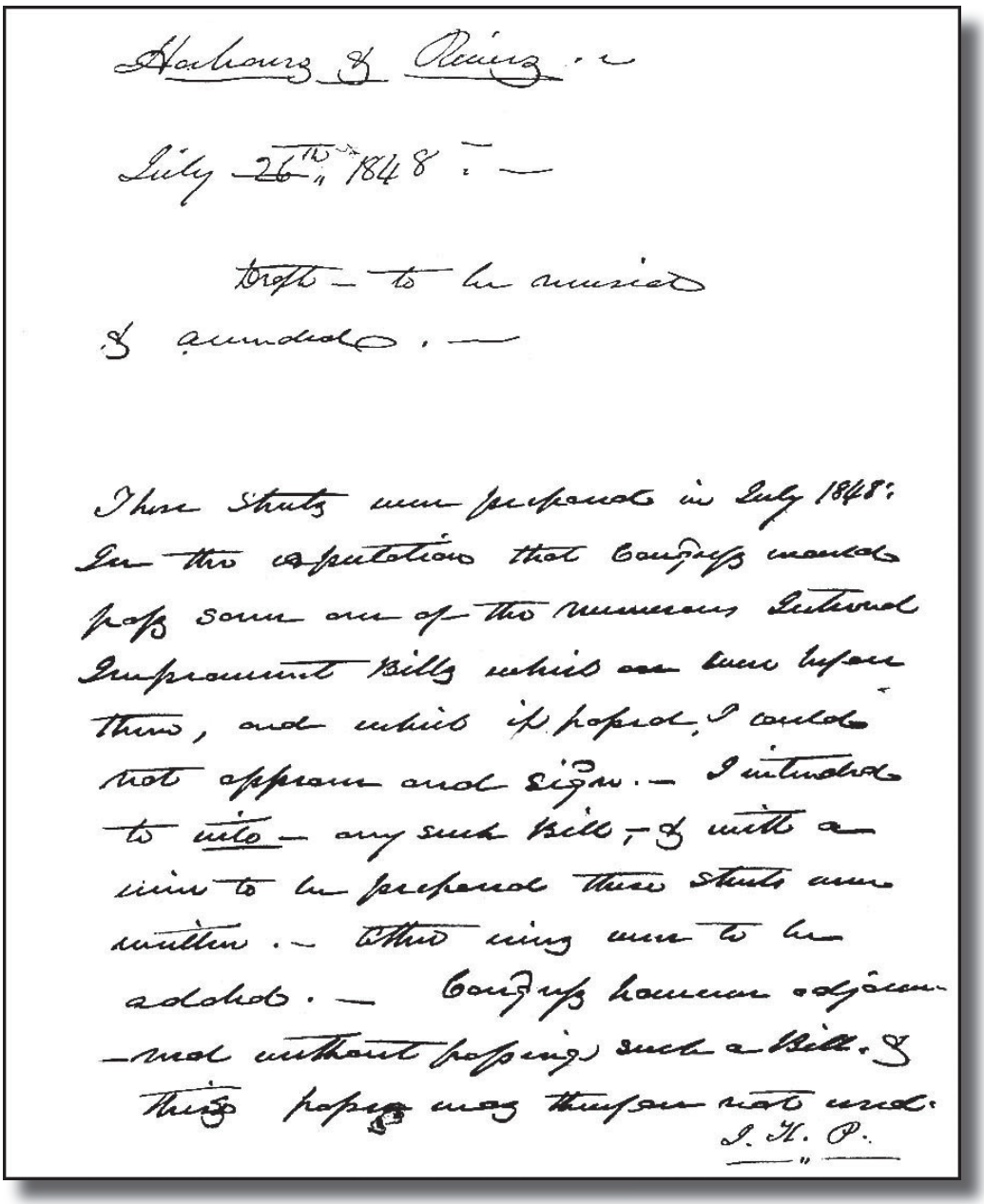

Harbours & Rivers.

July 26th, 1848.

Draft — to be amended & amended. —

These Vetos were prepared in July 1848: In the expectation that Congress would pass some one of the numerous Internal Improvement Bills which were then before them, and which if passed, I could not approve and sign. — I intended to veto — any such Bill, & with a view to be prepared these Vetos were written. — Other wise were to be adopted. — Congress however adjourned without passing such a Bill. & these papers were therefore not used.

J. K. P.

Harbours & Rivers

July 26th, 1848
Revised in October 1848
Draft – to be revised & amended.

These sheets were prepared in July 1848, in the expectation that Congress would pass some one of the numerous internal improvement bills which were before them, and which if passed I could not approve and sign. I intended to veto any such Bill, and with a view to be prepared these sheets were written. Other views were to be added. Congress however adjourned without passing such a bill, and this paper was therefore not used.

J.K.P.

Location of the Permanent Seat of Government in 1789

In my message to the House of Representatives of the 15th of December last,[1] *I expressed the settled conviction that the power to appropriate money from the Treasury for the improvement of rivers and harbours, or to construct other works of improvement, had not been conferred on the Federal Government by the Constitution. The Constitution itself is silent on the subject. It is not pretended that there is any express grant of this power in its provisions. Nor is there anything in the actions or expressed opinions of its framers and early expounders to warrant the assumption and exercise of such a power. … [S]upported by the high authority of Presidents Jefferson and Madison, who had in messages to Congress … denied the existence of such a power,*[2] *I came to the conclusion that the assumption of such a power by the general Government was of modern invention [and] a dangerous and unwarrantable interpolation upon the Constitution … .*

One [item of proof] only I deem it necessary to add to what was said in that message. The first Congress met at New York in 1789. Some of its most distinguished members had

The message begins with the policy argument that the country could not afford a general program of internal improvements, which would increase the already burdensome national debt. But Polk quickly moved on to constitutional arguments, declaring that his objections to the hypothesized bill "rest on higher grounds than the inexpediency of the system, however strong and convincing these may be. …"

1 See 4 Richardson at 610.

2 See, e.g., Jefferson's sixth Annual Message, 1 Richardson at 405, 409–10 (Dec 2, 1806); Madison's veto of the Bonus Bill, id at 584 (Mar 3, 1817).

been members of the general Convention and had aided in penning the Constitution, and must be presumed to have understood its true intent and meaning. These proceedings afford evidence, both positive and negative, that not a member of that body conceived that they possessed any such power. This evidence is found in their proceedings relating to the establishment of the "permanent seat of Government" of the United States.

It was deemed important that the permanent seat of Government should be "fixed" "at some convenient place, as near the center of wealth, population, and extent of territory, as may be consistent with convenience to the navigation of the Atlantic Ocean, and having due regard to the particular situation of the Western country,"[3] *and a resolution to this effect was passed by the House of Representatives. A long discussion took place on the relative advantages of the Susquehanna and the Potomac Rivers, in the facilities which they respectively afforded for communication with the Atlantic on the one hand, and with the Western territory on the other. A majority of the House of Representatives evinced a preference for the Susquehanna River in the State of Pennsylvania. A bill was [accordingly] ordered to be brought in … to establish "the permanent seat of the Government of the U.S. at some convenient place on the Banks of the River Susquehanna in the State of Pennsylvania."*[4] *An amendment was moved, providing that "this law should not be carried into effect until the States of Pennsylvania and Maryland shall pass acts providing for the removing of the obstructions" from the River Susquehanna, below the proposed site.*[5] *A discussion ensued which shows as clearly as language can show that Congress did not then consider themselves authorized to improve a river, even for the important purpose of opening the navigation between the seat of Government and the ocean.*

Mr Hartley opposed the amendment because he believed the river already navigable, and because

> *the Legislature of the State of Pennsylvania had declared the Susquehanna a highway; consequently it was in the power of companies formed and forming to remove every impediment to the navigation. If there was no doubt of the practicability of the navigation, and he assured the committee there was none, of what use was it to adopt the clause?*[6]

Mr Madison, among other things, said:

> *Whatever diversity of opinion may exist, with respect to the merits of the main question (the proper point of location of*

3 See 1 Annals of Congress 815 (Aug 27, 1789).

4 Id at 919–20 (Sep 7, 1789).

5 Id at 929 (Sep 17, 1789) (Maryland Rep. George Gale). In quoting this proposal Polk (perhaps inadvertently) omitted a parenthetical clause that would have strengthened his case. What Gale said was that the law should not take effect until Pennsylvania and Maryland should pass legislation "(not including any expense to the said States,)" for removal of the obstructions.

6 Id at 930. Thomas Hartley, a Colonel during the Revolution, was a Federalist from Pennsylvania. He served in the House from 1789 until his death in 1800.

> *the seat of Government), I trust we shall all agree that our decision ought to be as much in favour of the United States as we have in our power to make it; and this will be done by securing a communication with the Atlantic navigation. The gentleman tells us that there is no doubt of the practicability of opening the navigation of the Susquehanna; if so ought we not to make it a condition of our fixing on that river? ... It is possible the State of Pennsylvania may refuse her concurrence; this would defeat our object, if the practicability was ever so apparent; it is certainly prudent in the United States to guard against such a contingency. If Pennsylvania will agree, we do no injury to her by making it a condition; if she would not agree, would it not argue a great inattention, and want of prudence in us, to put our best interest so much in her power? ...*[7]

Mr Jackson

> *inquired whether the State of Pennsylvania had not the power to repeal that law, which declared the Susquehanna to be a public highway? If they had it, and he did not doubt but what they possessed it, what would become of Congress when they are fixed upon the banks of that river, secluded from the world and totally cut off from a water communication with the Atlantic? He asked whether it would be prudent for the General Government to subject itself to such inconveniences, when they had it in their power to make their own terms?*[8]

The amendment making it a condition that the States of Pennsylvania and Maryland should provide for the removal of the obstructions to the navigation of the Susquehanna ... was adopted and became a part of the bill.[9] *... The bill as thus amended was passed by the House of Representatives by a vote of 31 to 17,*[10] *but was lost by being postponed in the Senate "to the next Session of Congress."*[11]

The consideration and discussion of this bill proves conclusively that no member of Congress, being the first that ever met under the Constitution, intimated or expressed an opinion that under the grant of power "to regulate commerce," or any other grant, Congress had the power to provide for the removal of the obstructions in the Susquehanna by its own legislation. On the contrary, every member either expressly or silently conceded that the power rested entirely and exclusively with the States, and that the highest interests of the United States would be at their mercy, unless removed by an express stipulation, such as was incorporated in the bill as it passed the House of Representatives. The idea now so extensively

7 Id. Yes, this was indeed the Father of the Constitution, who spent the years from 1789 to 1797 as a Representative from Virginia.

8 Id at 931. James Jackson, a Georgia Republican, served one term in the House and was twice elected to the Senate, as well as serving for three years as Governor of Georgia.

9 Id at 932.

10 Id at 946 (Sep 22, 1789).

11 Id at 95 (Sep 28, 1789).

entertained that in "regulating commerce among the States" Congress might assume the power and seize upon and exercise jurisdiction over the harbours and rivers of the States had not then occurred to the most latitudinarian constructionist.

It is not to be conceived, if the First Congress [had] entertained the opinion that the General Government possessed the power to remove obstructions in rivers, that this provision requiring the States within whose limits the Susquehanna run[s] to do it, would have been proposed and inserted in this bill. ...

Light Houses, Beacons, Buoys & Public Piers

But it has been said that the first Congress which sat under the Constitution, and subsequent Congresses, have made appropriations for the erection and support of light houses, beacons, buoys and piers, in our navigable waters on the sea-coast and in our lakes, and that this is an exercise of the power to make internal improvements, and is not distinguishable from the exercise of the power to make roads, cut canals, and improve rivers and harbours.

If this position were true, it would be wholly inconsistent with the acts and declared opinions of the First and many subsequent Congresses which negatived all claim or pretence of claim to this power, or any authority or jurisdiction over rivers, or other works of improvement within the States, for any purpose whatsoever. Such an inference is plainly and palpably contradicted by the uncontroverted facts as they are known to exist.

The first Congress passed "An act for the establishment and support of Light Houses, Beacons, Buoys and Public Piers." This act appears to have passed without discussion or opposition in either House of Congress, and, in connection with other similar acts subsequently passed, must be considered as a contemporaneous exposition of the Constitution. But how far do these acts go? The act passed by the First Congress expressly provides in its first section that "such light-houses, beacons, buoys and public piers shall be ceded to and vested in the United States, by the State or States respectively in which the same may be, together with the lands and tenements thereunto belonging, and together with the jurisdiction of the same"; and it provides in its second section "that a light-house shall be erected near the entrance of the Chesapeake Bay, at such place, when ceded to the United States in manner aforesaid,

as the President of the United States shall direct."[12]

This act only proves that the First Congress deemed it constitutional to erect and support light-houses, beacons, buoys and public piers after the title to the land and the jurisdiction over it, on which the same were to be "erected, placed or sunk," was ceded to the United States, by the State or States in which the same may be. So far from proving that in the contemplation of the First Congress the United States might constitutionally enter upon the soil of a State and assume jurisdiction for the purpose of building light-houses or piers, or placing buoys or beacons, this act proves exactly the reverse. It proves that Congress did not then feel at liberty to exercise these powers over any territory but its own, over places where not only the right of soil but the jurisdiction over it had been ceded to the United States.

Similar provisions requiring a cession of jurisdiction are contained in all the subsequent acts making appropriations for like purposes which were passed from 1789 to 1819.[13] *In the act of the 3rd of March of the latter year this provision appears to have been omitted, probably by inadvertence.*[14] *The act of the 15th of May 1820, which is still in force, makes a general provision that "no lighthouse, beacon, nor landmark shall be built or erected on any site, previous to the cession of jurisdiction over the same being made to the United States."*[15] *A like cession of jurisdiction has been required over sites upon which it was proposed to erect "piers." The act of the 3rd of March 1821, making appropriations for the erection of a "pier" "in the harbour of Portsmouth in the State of New Hampshire," provides that "no money shall be expended in erecting the pier aforesaid, until the jurisdiction of the site thereof shall be ceded by the State of New Hampshire to the United States."*[16] *The act of the 7th of May 1822, making an appropriation for a survey with a view to the erection in the Delaware Bay of "two piers of sufficient dimensions to be a harbour or shelter for vessels from ice," provides that "the jurisdiction of the site where such piers may be erected shall be first ceded to the United States, according to the conditions in such case, by law provided."*[17]

It thus appears from the history of the legislation of Congress on the subject that the principle upon which appropriations have been made for the "establishment and support of light-houses buoys and public piers" is widely different from that which is now claimed, for the United States to enter upon the soil and invade the jurisdiction of the States by making internal improvements within their limits. The former has been

12 1 Stat 53–54, §§ 1–2 (Aug 7, 1789).

13 E.g., 1 Stat 251 (Apr 12, 1792); 1 Stat 607 (Jul 16, 1798); 2 Stat 476, § 1 (Mar 17, 1808); 3 Stat 360 (Mar 3, 1817).

14 3 Stat 534.

15 3 Stat 598, 600, § 7.

16 3 Stat 643, 644, § 4.

17 3 Stat 698, 699, § 6.

exercised from the adoption of the Constitution. The latter had its origin more than a third of a century afterwards.[18] *The former required the previous cession from the States of the lands and of the jurisdiction over the same, on which the light-houses, beacons, buoys and public piers were to be erected or placed. The latter proposes to excavate harbours, improve the navigation of Rivers, cut canals and make roads, without possessing a title to the lands, and without obtaining from the States a cession of jurisdiction over them.*

18 See 4 Stat 32–33, §§ 1–2 (May 24, 1824) (rivers); 4 Stat 175 (May 20, 1826) (rivers and harbors).

It does not appear that the First Congress deduced the power to "erect light-houses, beacons, buoys and public piers," from the grant [of authority] to "regulate commerce." In tracing the legislative history of such appropriations for a long series of years after the adoption of the Constitution, … the authority to make them … seems to have been based upon the provision in the Constitution which confers on the General Government the power to "exercise exclusive legislation" over the District, which, by the cession of particular States, might become the seat of the Government of the United States and "over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings."[19]

19 US Const, Art I, § 8, cl 17.

But from whatever grant of power in the Constitution the First Congress deduced the right to construct "light-houses, beacons, buoys and public piers" on their own soil, they would doubtless have been much surprised had they been told that the power thus exercised was identical with the power to improve harbours, remove obstructions from rivers, dig canals and make roads upon the soil of the States, without the grant of either the title to the land on which these improvements were made, or the cession of jurisdiction over it. They would have been astonished, if they had been told that their provision for directing a light-house to be erected "near the entrance of the Chesapeake Bay, at such place, when ceded to the United States, in manner aforesaid, as the President of the United States shall direct," was based on a principle which would justify them in assuming authority over the Susquehanna river, and improving its navigation, and that, without a cession of either title to the land, or jurisdiction from the States through which it runs. Yet some of their descendants, evidently differing from them in their views, seem to have discovered that to erect a light-house at the entrance of a harbour, after the cession of the title and jurisdiction by

a state, is of the same constitutional character as improving its rivers without the cession of either.

It may be useful to consider what power Congress obtains by these cessions from the States. It is exclusive jurisdiction: the right to "exercise exclusive legislation" over them being the same authority which is granted to Congress over the District of Columbia. Not only is the jurisdiction exclusive, but the United States become the owners of the soil. They acquire not only the rights of a sovereign but those of a proprietor of the soil, and may make such use of their property, not inconsistent with the Constitution, as any other sovereign or proprietor may. Surely the case is very different when the United States are neither sovereign nor proprietor. Because they may erect and maintain a light-house on their own land, it does not follow that they can erect even that "useful building," on lands belonging to the citizen of the State, subject to State jurisdiction and over which, without a previous cession by the State, the United States can exercise no jurisdiction. Much less has such an exercise of power any analogy to the improvement of rivers, when both the ownership of the soil and the jurisdiction over it are vested in the State. When we consider the character of our federal compact, and the necessity which must exist for the power that makes improvements to assume jurisdiction over them for the purpose of executing them, and protecting them from injury or destruction, and that, when this is done by the United States without a previous cession of the right by the States, it must be in derogation of State authority, it is itself a conclusive argument against the existence of such a power in the General Government, because its existence in the General Government would be incompatible with the whole spirit and plan of the compact itself.

The True Meaning of the Terms "to Regulate Commerce"

... It was shown in my message of Dec 15th 1847 that in 1826 the power to improve rivers was for the first time assumed and interpolated upon the Constitution; and this interpolation has since that time been attempted to be confirmed by a latitudinous and unwarranted construction of the language employed in the grants of power to the Federal Government contained in the Constitution, and especially of that clause which grants the power to "regulate commerce with foreign nations,

among the several States, and with the Indian tribes."[20]

In that message I endeavored to show the true meaning of the terms employed in that grant. I showed from the import of the terms themselves as well as from the authority of our most distinguished statesmen that upon no fair construction could they convey by implication the enormous, corrupting and dangerous power now claimed.

Upon this point I deem it only necessary to add to what was there said, that if the power to "regulate commerce among the States" conveys as an incidental or implied power the right to facilitate commerce by excavating the channels of rivers or harbours, digging canals or making roads within the jurisdiction of the States, then it must follow as an incident to that incidental or implied power that this Government has not only the ... right to appropriate money but to employ workmen to execute the proposed improvement, and as an incident to that again to protect their workmen by their own laws from the interference of State jurisdiction over them; and, if a criminal offense be committed by them or by citizens of the State against them, to try and punish the offender in the federal courts, to the exclusion of the jurisdiction and rightful authority of the States over them.

What a mighty power is thus attempted to be fixed upon the Constitution by this system of constructive or implied powers! An unwarrantable inferential power is drawn from the plain and simple words to "regulate commerce"; another inferential power is derived from that incident; until incident is piled on incident, engulfing in the general Government powers which were reserved to the States and totally sweeping down and destroying all State power and jurisdiction over all such rivers, harbours and other places where the U.S. choose to direct improvements to be made. ...

To say that the power to "regulate commerce among the States" conveys the power to enter upon their rivers and harbours, and break up their soil, by roads and canals, is as inaccurate as to say that the power to "regulate commerce with foreign nations" conveys to our Congress the power to improve the Thames, or deepen the harbour of Liverpool, or make roads and canals in Germany ... . The power to "regulate commerce with foreign nations, and among the several States," is found in the same clause in the Constitution, is identical in its nature, and if in one case it carries with it the power to create or facilitate commerce, by improving harbours and rivers and making roads and canals, it must do so in the other. ... This

20 Id, Art I, § 8, cl 3.

latitude of construction would bring within the scope of the power of our Congress the improvement of all the harbours and rivers on the Globe. …

Tonnage Duties

In my message of the 15th of December last, already referred to, … [i]t was shown that no sooner was the Government organized under the Constitution, than Congress proceeded to "regulate commerce with foreign nations, among the several States, and with the Indian tribes," but in no act passed for that purpose for more than thirty years was there any provision for deepening a harbour or clearing out obstructions to the navigation of a River. …

It was equally well established that the right to levy tonnage duties with the consent of Congress[21] *was reserved to the States by the Constitution for the express purpose, among other things, of aiding them in improving their own harbours. It was shown that this right had been repeatedly exercised by the States with the consent of Congress. … Among the instances which were enumerated it was shown that the State of Rhode Island in January 1790 passed a law levying tonnage duties on vessels arriving in the Port of Providence "for the purpose of clearing and deepening the channel of Providence River and making the same more navigable." This was followed by many acts of other States for similar purposes: of Massachusetts for improving the navigation of the Kennebunk River "by rendering the passage in and out of said river less difficult and dangerous"; of Pennsylvania "to remove the obstructions to the navigation of the River Delaware below the city of Philadelphia"; of Virginia "for improving the navigation of James River"; of North Carolina "for the purpose of opening an inlet at the lower end of Albemarle Sound with its branches"; of Georgia for the purpose of "clearing the Savannah River of wrecks and other obstructions to the navigation"; of Maryland for the improvement "of the harbour and port of Baltimore and the River Patapsco."*[22] *…*

These and many other acts of a similar nature establish beyond the possibility of a doubt the contemporaneous construction of the Constitution on this point. While for more than thirty years after the adoption of the Constitution Congresses were "regulating commerce," by a species of legislation altogether different, the States were opening and improving the channels of commerce within their limits by their own means,

21 Id, Art I, § 10.

22 For congressional consent to the imposition of such duties see, e.g., 1 Stat 189 (Aug 11, 1790) (Rhode Island, Maryland, and Georgia); 1 Stat 546 (Mar 27, 1798) (Massachusetts); 2 Stat 269 (Mar 16, 1804) (Virginia); 2 Stat 353 (Feb 28, 1806) (Pennsylvania); 4 Stat 573 (Jul 13, 1832) (North Carolina).

and among these by the tonnage duties which many of them levied with the consent of Congress. …

[But i]t has been asserted that "an insuperable objection exists to the exercise of this power … upon vessels navigating the navigable waters leading into the Mississippi and St Lawrence rivers." The "insuperable objection" urged is that the right to levy such duties … has been taken away from the States lying upon and including these streams by the "ordinance of 1787 for the Government of the territory of the United States North West of the River Ohio." … If this objection be well founded, then the States composed of the portions of the North Western Territory have not been admitted into the Union "upon an equal footing" with the old States; and the Constitution itself must be subordinate to, and controlled by the ordinance. …

[The ordinance] was passed by the Congress under the Articles of Confederation on the 13th of July 1787, nearly two years before the present Constitution of the United States was adopted and the Government under it put into operation.[23] *It was nothing more than an act of legislation passed by the Congress of the Confederation. … Like any other act of Congress, this ordinance might have been modified, changed or repealed by the Congress that passed it, at any time before the new territory was erected into States … .*

23 32 J Cont Cong 334, 1 Stat 51–53 n.(a).

What does this ordinance provide? … [T]he enacting clause of the fourth section … is as follows … :

> *It is hereby ordained … that the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable unless by common consent. …*[24]

24 32 J Cont Cong at 339–40, 1 Stat at 52 n.(a).

[The fourth of these articles provides that]

> *the navigable waters leading into the Mississippi and St Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other states, that may be admitted into the Confederacy, without any tax, impost or duty therefor.*[25]

25 32 J Cont Cong at 341, 1 Stat at 52 n.(a).

That many of the provisions of this ordinance have long since been superseded and abrogated, some of them by the adoption of the Constitution of the U.S., some of them by the constitutions of the States carved out of the North Western Territory and admitted into the Union, and others by the

laws of these States, is admitted; but it is insisted that the particular provision quoted in regard to the navigation of the Mississippi and St Lawrence Rivers is still in force … and secured by the sixth article of the Constitution. That article provides that "all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation." Was this ordinance one of those engagements "against the United States"? If so it was an "engagement" against the Government "under the Confederation." But it was in truth, as has been shown, but an ordinary act of legislation when adopted. There was but one party to it, as to other ordinances of the old and acts of the present Congress. It was subject to be repealed by any subsequent Congress, as in all other cases. It was therefore no "engagement" against the United States "under the Confederation," which has been guaranteed by the present Constitution.

But the ordinance of 1787 was preceded by a compact of undoubted validity. It was the compact between Virginia and the United States dated March 1st 1784, by which the former made a cession of the "territory North-Westward of the River Ohio" to the United States and defined the conditions on which the cession was made.[26] *To this compact there were two contracting parties, and when made it became binding on both. One of the conditions of this compact was that Virginia in ceding the Territory to the United States stipulated, and the United States accepted the stipulation, that it should be laid off into states, and "that the States so formed shall be distinct republican States, and admitted as members of the Federal Union, having the same rights of sovereignty, freedom and independence, as the other States." This compact made no provision in relation to the navigation of the Western rivers, and if the subsequent ordinance passed by the Congress of 1787 took from these future new states any right which was possessed by "other States," it was incompatible with this "compact" and the Constitution which confirmed it. Virginia and all the "other States" had themselves and at the adoption of the present Constitution retained the power to levy tonnage duties with the consent of Congress, and of course this was one of the powers which, by the compact between Virginia and the United States, was guaranteed to the new States to be formed out of the North Western Territory.*

But it is unnecessary to enter further into the consideration of the validity or obligatory force of the ordinance of

26 11 Va Stat 571, 574 (Mar 1, 1784); 26 J Cont Cong 112–17.

1787 as restricting the constitutional powers of the Western States, because, admitting the competency of the Congress of the Confederation to make that supposed compact, still the question remains whether they intended to make or did in fact make a compact of absolute and total exemption of the Western waters from any tax, impost or duty … .

The same ordinance of 1787 which contains the restrictions in relation to the "navigable waters leading into the Mississippi and St Lawrence," in the 5th article of compact, provides that "there shall be formed in the said territory not less than three nor more than five States," and that "whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates, into the Congress of the United States on an equal footing with the original States, in all respects whatever."[27] *At the time when this ordinance of 1787 was passed … [t]here were no States North West of the Ohio. They were in embryo. Suppose they had sprung into existence under the Articles of Confederation, and before the present Constitution was adopted, would they not have been sovereign and independent States? Would they not, of right, have possessed the power of regulating their commerce and of levying tonnage duties and impost duties, in the same measure and to the same extent that the other states, could do the same things? …*

27 32 J Cont Cong at 342, 1 Stat at 53 n.(a).

Besides, the same 4th article of the ordinance of 1787 which contains the restriction in regard to the navigation of Western waters contains also the provision that "the said territory and the States which may be formed therein shall forever remain a part of this confederacy of the United States of America subject to the Articles of Confederation and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in Congress assembled, conformable thereto."[28] *If this territory and the States to be formed therein were to be subject to the Articles of Confederation and to all "alterations" therein constitutionally made, it is impossible to conceive that they have not become subject to the Constitution of the United States in all its provisions and consequences. That Constitution altered and superseded the Articles of Confederation. One of its provisions authorizes the States to lay tonnage duties with the consent of Congress, and applies to all the States alike.*

28 32 J Cont Cong at 341, 1 Stat at 52 n.(a).

Instead therefore of the ordinance of 1787 restricting or controlling the Constitution of the United States, it is sub-

ordinate to it and is altered and controlled by it. To the Constitution of the United States in all its provisions every citizen and every state within the limits of its authority are legally presumed to have assented. … The condition … that the articles of compact should "forever remain unalterable unless by common consent" was fully complied with when the Constitution was subsequently adopted, and the arrangement of the power of Government effected by that instrument cannot in any respect be restricted or modified by these articles. If one of the Western States shall lay a tonnage duty on vessels navigating the "waters leading into the Mississippi and the St Lawrence," and Congress shall give its "consent" to that law of the State, the "common consent" of the ordinance of 1787, by which the articles of compact might be altered, is obtained … . Both the State and the United States have consented, and there is therefore no legal impediment to collecting tonnage duties by the Western States for the improvement of their own rivers and harbours.

It would be strange if it were otherwise and the Western States should be in a different condition in this respect from the other States of the Union. On being admitted into the Union, a new State becomes entitled to all the rights, privileges and powers of the old States. The equality of the States, as separate communities and distinct sovereignties, is one of the corner stones of our political fabric, and it is not in the power of Congress to make the Constitution of the United States a different thing for the new States from what it is for the old. … The new States, in the language of the compact with Virginia, must have the "same right of sovereignty, freedom and independence," or, in the language of the Ordinance of 1787 itself, they must come into the Union "on an equal footing with the original States, in all respects whatever."

It has been argued that "insuperable obstacles" exist to any imposition of tonnage duties by the new States of Louisiana, Mississippi, Missouri, Arkansas, Iowa, and Wisconsin, on vessels navigating "the Mississippi and the navigable rivers and waters heading into the same and into the Gulf of Mexico," because of restrictions imposed on these States, by the acts for their admission into the Union.[29] *This objection, like that heard on the similar restriction in the ordinance of 1787, … will be found on examination to be without any just foundation.*

The power to lay tonnage duties … with the consent of Congress is granted to every State in express terms by the

29 See, e.g., 2 Stat 701, 703, § 1 (Apr 8, 1812) (Louisiana):

> *Provided*, that it shall be taken as a condition upon which the said state is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of other states and the territories of the United States, without any tax, duty, impost or toll therefor, imposed by the said state … .

Constitution. … The objection advanced is that Congress, upon the admission of these States into the Union, demanded of them the unqualified and total surrender of this sovereign power which belonged to all other States, as the indispensable condition of their admission; that they accepted these terms and came in, under a compact of irretrievable surrender of this power of Government … .

It is not possible that such could have been the meaning either of Congress or of these States on their admission into the Union. … In the first place, Congress had no power to exact or to make any valid contract upon their admission into the Union, which would deprive them of any of the essential attributes of State sovereignty under the Constitution which was possessed by all the other States; and in the second place the States could not divest themselves by contract of these essential constitutional powers … . These public acts for the admission of these States into the Union have no other effect than that of imposing upon the rivers and waters within their limits the character of navigable waters, as if they were arms of the sea … ; and the constitutional powers of the Federal Government on the one hand, and of the State Governments on the other, are neither curtailed or affected by them. …

But if it were otherwise, the restrictions imposed by the acts of admission of these States into the Union exist only by virtue of a compact between the United States and the new States severally, which is subject to be rescinded and annulled by the contracting parties whenever both shall concur. If therefore one of these States upon which the restriction is imposed should pass a law laying a tonnage duty, and Congress should pass an act giving its consent to it, the restriction would by that act … be removed, and the new State would stand "on an equal footing with the original States." …

But the objection to the levying of tonnage duties by the new States proceeds upon the broad assumption of the absolute and total immunity of the Western Territory by compact from any tax, impost or duty under any authority, national, state or both combined.

If the objection be a sound one, … then those States themselves are prohibited from improving their own rivers and "the carrying places between the same" and of charging any toll or tax for the use of such improvements, because these rivers and portages or "carrying places" between them are declared by these compacts to be "common highways and forever free," and not subject to any "tax, impost, or duty" for their use. … This

is not the view of their own powers which has been taken by these States. They have, at their own cost, constructed and authorized the construction of extensive works of improvement on many of the "waters leading into the Mississippi" and the "carrying places between the same" by removing obstructions from the channels of the rivers [and] by constructing canals and roads and have imposed and collected a toll or tax for the use of these improvements ... .

These States had the right to do this. ... This is the settled construction and the practice under it by these States; and it has been sanctioned and confirmed by the highest judicial tribunal of the State of Ohio, and by the Circuit Court of the United States for the same State. In the opinion of the latter Court, both the Circuit and District Judges concurring, it is declared:

> *The provisions of the ordinance had reference to the navigable rivers and carrying places as they then were. And in that state they were to remain free without tax ... . [I]t would seem to be no violation of the compact if the Legislature should exact a toll, not for the navigation of the rivers in their natural state but for the increased facilities established by the finances of the State. ... [I]f the Legislature ... should construct a canal, a turnpike road or rail-road, connecting the navigable parts of these rivers, it could be no violation of the ordinance to exact a toll for the use of these ways. This would not impair any right given by the compact, but would require a compensation for a benefit conferred. ... [N]avigable rivers, and the carrying places between them, are placed on the same footing by the compact; and the only difference between them is, the rivers have established channels, whilst the carrying places are unmarked. They are both in their natural condition, and the State, it would seem, is no more prohibited from improving the navigation of the rivers than the carrying places between them. And if a toll may be charged for the increased facilities in the one case, for the same reason it may in the other. ...*[30]

30 Spooner v McConnell, 22 F Cas 939, 944–45 (No 13,245) (CCD Ohio 1838).

If the ordinance of 1787 prohibits the levy of tonnage duties by the States on vessels navigating these rivers, it must prohibit also tonnage duties by the U.S. on all vessels arriving from foreign countries at the ports established on these rivers. ... This would be the unintended and unavoidable consequence of the unwarrantable construction of the ordinance of 1787 which [is] now contended for.

If the Legislatures of these States can "with the funds of the States" make these improvements, and impose a "tax, im-

post or duty" for their use, there can be nothing to restrain or prevent them from "laying a tonnage duty," with the consent of Congress, on vessels which use them, to aid the State in defraying the cost of making the improvements. … They may not wish to exercise their undoubted right to lay a tax by means of tonnage duties, but they cannot be deprived of that right, if they choose to exercise it, and Congress shall give its consent, as provided by the Constitution. …

General Welfare Amendment of the Constitution

But admitting the constitutional power of the States to lay and collect tonnage duties, and to apply the revenue derived from this source in aid of their other means, in making their own improvements, … it is insisted that because the Mississippi and a few other long rivers water the territories of several States, and … it would be attended with inconvenience and practical difficulty for the states to apply their means to their improvement, therefore Congress may assume and exercise the general power of improving not only these long rivers, but all the other rivers, long or short, and all the bays, inlets and harbours, on the ocean and on the lakes, throughout the length and breadth of our extended and vast territorial possessions.

Arguments in favour of enlarging the powers of the Federal Government which are derived not from the constitution itself but from considerations of convenience and expediency are not only of alarming and dangerous tendency, but if they shall prevail, must soon convert the Government into one of absolute and unlimited powers. If such considerations are to determine the functions and powers of the Federal Government, then the general clause to "provide for the … general welfare"[31] must sweep down, abrogate and render nugatory all the limitations of power by which the federal Government is fenced in and restricted by the Constitution itself. …

31 US Const, Art I, § 8, cl 1.

The Government formed by the Constitution is one of definite, enumerated and specified powers. … If it be established that the power over internal improvements has not been granted by the Constitution, all arguments to prove its utility are vain, and the only remedy for any defect of power which may exist is an amendment of the Constitution. …

This is the remedy which has been recommended by several of the ablest and wisest of my predecessors, who have denied

the power of the General Government to exercise the power of making internal improvements.[32] *It may be useful to refer to their opinions and recommendations on the subject, more particularly than was done in a former message. …*

32 See, e.g., the messages of Presidents Jefferson and Madison cited in note 18. See also President Monroe's first Annual Message, 2 Richardson at 11, 17–18 (Dec 2, 1817).

Here, as Toscanini said in conducting the unfinished final act of Puccini's opera *Turandot*, the Maestro laid down his pen. Both Jefferson and Madison, Polk was about to remind us, had urged that the Constitution be amended to authorize Congress to make internal improvements, but without success; Congress had no greater power in the premises in 1848 than it had possessed in 1789.