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COMMERCE REGULATION BEFORE *GIBBONS V. OGDEN*: INTERSTATE TRANSPORTATION FACILITIES

ALBERT S. ABEL*

It is one thing to accede to the proposition of Mr. Chief Justice Hughes that "the Constitution is what the judges say it is"¹ and to his other observation, addressed specifically to the Commerce Clause, that "It is to Marshall that we turn for the description of the power confided to Congress and its scope."² It is quite another to believe that the clause was authored by Mr. Chief Justice Marshall in 1824 in Washington. Nor, despite recent scholarly squintings in that direction,³ does it seem wholly safe to trust to Marshall's exposition as an embodiment of prior popular or professional understanding of the law. However greatly deserved may be the eulogies of his statesmanship and prevision, there is little basis for ascribing to him pre-eminence in the qualities either of legal erudition or of nice responsiveness to the mind and temper of his time.

Between 1787, when the Constitution was drafted, and 1824, when *Gibbons v. Ogden*⁴ was decided, no Supreme Court decision and comparatively few⁵ state or lower federal court cases had adverted to the Commerce Clause; yet it would be fantastic to say that there was, for

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¹ HUGHES, ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES (2d. ed. 1916) 185.

² HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 143.

³ See, e.g., Stern, *The Commerce Clause and the National Economy* (1946) 59 HARV. L. REV. 648.

⁴ 9 Wheat. 1 (U. S. 1824).

⁵ At a comparatively late period there was the numerous family of cases, all growing out of the controversy disposed of by *Gibbons v. Ogden*, comprising *Gibbons v. Ogden*, 6 Wheat. 448 (U. S. 1821); *Sullivan v. Fulton Steam Boat Co.*, 6 Wheat. 450 (U. S. 1821) (both disposed of on procedural grounds); *Gibbons v. Ogden*, 6 N. J. Law 285 (1822); *Gibbons v. Livingston*, 6 N. J. Law 236 (1822); *Gibbons v. Ogden*, 17 Johns. 488 (N. Y. 1820); *Ogden v. Gibbons*, 4 Johns. Ch. 174 (N. Y. 1819); *Ogden v. Gibbons*, 4 Johns. Ch. 150 (N. Y. 1819); *Livingston v. Gibbons*, 4 Johns. Ch. 94 (N. Y. 1819); *In the Matter of Vanderbilt*, 4 Johns. Ch. 57 (N. Y. 1819); *Livingston v. Ogden*, 4 Johns. Ch. 48 (N. Y. 1819). Aside from these, there were only seven cases reported which involved a discussion of the Commerce Clause; namely, *Elkinson v. Delieessline*, 8 Fed. Cas. 493, No. 4, 366 (Dist. S. C. 1823); *The Wilson v. U. S.*, 30 Fed. Cas. 239, No. 17,846 (Dist. Va. 1820); *U. S. v. The Brigantine William*, 28 Fed. Cas. 614, No. 16,700 (Dist. Mass. 1808); *State v. New Orleans Navigation Co.*, 11 Mart. 309 (La. 1822); *Livingston v. Van Ingen*, 9 Johns. 507 (N. Y. 1812); *City Council of Charleston v. Rogers*, 2 McCord 495, 13 Am. D. 751 (S. C. 1823); *Ex parte Pool*, 2 Va. Cas. 276 (1821).

that considerable portion of our nation's history, no law as to the appropriate or permissible areas of state and federal action, respectively, in regulating economic enterprise. After all, the words were there in the Constitution. By presumption, the fathers must have contemplated that their inclusion made some law; and, by demonstration, it can be established with tolerable precision what they thought that law was.⁶ A strong argument can be and has been made against resorting to such contemporary materials or to those of the period immediately following adoption to aid in present-day application of the Constitution.⁷ Others may find more congenial the approach of Mr. Justice McLean's *obiter* an even half century after the Constitutional Convention that "A uniform course of action, involving the right to the exercise of an important power by the state governments, for half a century; and this almost without question; is no unsatisfactory evidence that the power is rightfully exercised."⁸ More cautious spirits, with whom the writer enlists *pro hac vice* and without prejudice, may feel that, regardless of whether the judicial cat should or should not jump in the direction indicated by prior governmental action of the other branches and by public discussion and granting that the direction in which it does jump determines the position of the law when the leap is completed, before it stirs to action the law is what the most authoritative and numerous evidences of it then existing indicate. Even Supreme Court doctrines, it is now clear, are not immortal; yet they are law while they last. So, one may venture to suppose, legislative and executive action, even if less in dignity and not to be regarded by the Court when it makes its choice,⁹ is better as a guide to the Constitution's contemporary content than the late-begotten definitions and deductions of even the strongest justices.

Upon that assumption this study has been made. It is a simple effort to learn what the content of the commerce clause was at the earliest stage of the republic's existence and expresses no judgment as to what the law should now be. Its method is largely archaeological—an endeavor to pierce through that rich mosaic of rhetoric, the Marshall opinion in *Gibbons v. Ogden*, to reach and sift the dusty deposits of early statute law buried beneath it.¹⁰ Each reader may draw his own

⁶ The question is fully discussed in Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment* (1941) 25 MINN. L. REV. 432. But cf. HAMILTON AND ADAIR, *THE POWER TO GOVERN* (1937).

⁷ Ten Broek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction* (1938) 26 CALIF. L. REV. 287, 437, 664; (1939) 27 CALIF. L. REV. 157, 399.

⁸ See *Briscoe v. The Bank of Kentucky*, 11 Pet. 257, 318 (U. S. 1837).

⁹ Indications exist, however, that statutes may be attaining a more considerable status as a source of law; see, e.g., *United States v. Hutcheson*, 312 U. S. 219 (1941); Stone, *The Common Law in the United States* (1936) 50 HARV. L. REV. 4.

¹⁰ For federal legislation, the materials used are derived from an examination and digest of the contents of the first three volumes of the Statutes at Large, comprising the public laws for the period 1789-1823, also of the private laws for the

conclusions as to the significance of the materials found for present purposes in the light of his personal notions of continuity and change.

A decent regard for the limits on the space of the *North Carolina Law Review* and for the limits on the time of its readers forbids an over-all treatment. The exemplar selected, regulation of interstate transportation facilities, is reasonably representative. Under this head it is proposed to discuss the establishment, disestablishment, and co-ordination of interstate transportation routes, their construction, maintenance, and repair, condition and character, the adjustment of competing claims of patrons to their use, the equipment and manner of operation of the

same period, reprinted in the sixth volume. The various state laws serving as a basis of discussion do not cover a precisely identical period because of variations in dates of publication. While completeness of reference would have required examination of all session laws throughout the period covered, the writer has been content to rely on codes or digests of the statutes published at approximately the date of *Gibbons v. Ogden*; some of these appeared slightly before and others slightly after that decision, thus occasioning the variations referred to, but no materials later than the end of that decade have been used. It is believed that this gives a substantially accurate picture of the state of the law at the time. Where the information was disclosed in the source consulted, the date of original enactment is made to appear parenthetically in connection with each statute cited. In most cases, statutes merely continuing or altering in unimportant particulars the prior basic statutes are not cited, the same being true as to federal legislation, with a very occasional exception where extraordinary intervening circumstances, such as the adoption of the United States Constitution or admission of a territory to statehood, seemed to afford a special reason why particular notice should be taken of the continuing life of the statute. Private acts have not been exhaustively referred to, only such representative instances being cited as would suffice to show the prevalence of state regulation of a particular subject or in a particular manner. Where no digest or code of the period in question was available, the materials have been drawn from session laws either wholly or for such time as would bring the statutes down to 1825. Specifically, the following sources have been examined and digested: TOULMIN DIG. LAWS ALA. (1823); PUB. STAT. CONN. 1824; REV. STAT. DEL. 1829; PRINCE'S DIG. LAWS GA. (1819); FOSTER DIG. LAWS GA. 1820-1829; SESS. LAWS ILL. TERR. 1812, 1813, 1814, 1816-7, 1817-8; ILL. LAWS 1819, 1820-1, 1822-3, 1824; LAWS INDIANA TERR. (ed. Philbrick) 1801-9; LAWS INDIANA TERR. (ed. Ewbank & Piker) 1809-16; INDIANA ACTS 1817-8; LAWS IND. 1818-9, 1819, 1821, 1822, 1823 (special acts only), 1825; MOORHEAD & BROWN, DIG. STAT. LAWS KY. 1834 (only materials to 1824 used); DIG. LA. ACTS 1804-27; REV. LAWS ME. 1821; LAWS MD. 1692-1839 (ed. Dorsey) (only materials to 1826 used); MASS. LAWS 1780-1807; MASS. LAWS 1807-16; SESS. LAWS MASS. May 1816, May 1817, Jan. 1818, Jan. 1819, May 1819, Jan. 1820, Jan. 1822; REV. CODE MISS. 1824; LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.), volume 1, 1804-24; COMP. LAWS N. H. 1830; REV. LAWS N. J. 1820; COMP. PUB. LAWS N. J. 1833 (only materials to 1829 used); REV. STAT. N. Y. 1827-8; N. C. REV. LAWS 1821; *id.* TAYLOR'S REVISAL 1821-5; LAWS OHIO 1820, 1822; SESS. ACTS OHIO (general acts) 1822, 1825, 1826, 1827 (local acts) 1822, 1824, 1825, 1826, 1827; PA. LAWS 1700-1825; R. I. REV. LAWS 1822; BREVARD DIG. PUB. STAT. LAWS S. C.; 6 MCCORD STATUTES AT LARGE S. C.; LAWS TENN. (ed. Scott) 1820; COMP. LAWS VT. 1824; REV. CODE VA. 1819; REV. CODE VA. SUPP. 1833 (only materials to 1829 used). As regards exhaustiveness of citation, an attempt has been made to refer to every sort of state action in the field, disclosed by the authorities consulted; but where a given type of act recurred in the statute books of many of the states and often recurred frequently in the same state, the writer has exercised a prerogative of selection and has only cited illustrative examples of what was being done. Little would be gained by listing every instance in which the states, for example, declared a particular stream navigable. In general, the more conspicuous the interstate aspect of the regulation, the greater has been the reluctance to exclude.

vehicles and vessels of common and contract carriers, and incidental provisions with reference to ownership of and encumbrances on such vehicles and vessels—several of these items being, as the reader will have observed, among the major problems nowadays confided to the Interstate Commerce Commission.

1. LOCATION AND ESTABLISHMENT OF LAND ROUTES

The states engaged actively in the project of affording facilities for land transportation. In a more advanced state of development, when the existence of a network of highways virtually linking every community in the nation with every other was taken for granted, local interests were to cease agitating for mere roads and were to clamor instead for rail connections with the world outside; but the prototype of the late nineteenth-century urge to be a railhead was the early nineteenth-century wish to be a "roadhead." The problems surrounding the establishment and discontinuance of rail service and rail connections are modernized descendants of a pioneer forebear, the question of the routes and termini of highways. It is against this institutional perspective that the early attitudes and practices as to the establishment and location of highways are to be viewed.¹¹

The same circumstantial variations were present, of course, in this early proliferation of highways as were thereafter manifested in connection with the extension of the rail system. The bulk of the legislative effort was devoted to the establishment of interior roads from one point to another within the same state; and, while no doubt many even of these facilitated communication with exterior points, it would be perhaps impossible and certainly not worth the effort involved at this late date to explore their place in the larger pattern of the evolving highway system. Again, general highway statutes were adopted in many states¹² containing a prescription of procedures for laying out and erecting public roads. These would seem to comprehend, yet they did not focus distinctly upon, road projects not limited to purely local and internal objects; and, accordingly, they need only be noted in pass-

¹¹ Road, bridge, and ferry legislation seems to have constituted one of the most considerable tasks of the state legislatures in the period under consideration. See *e.g.*, BREVARD'S DIG. PUB. STAT. LAWS S. C., where Title 19, on *Roads, Ferries, and Bridges* is the longest in the whole digest, occupying 163 pages and comprising 793 sections. The situation in other states seems to have been similar. Under the circumstances the statutory citations in this connection do not profess to be exhaustive but merely to give a fair sampling of legislative activity on the subject.

¹² *E.g.*, TOULMIN'S DIG. LAWS ALA. (1823) 391 (Dec. 21, 1820); PRINCE'S DIG. LAWS GA. (1820-9) 294 (Dec. 4, 1799); LAWS INDIANA TERR. 1801-9 (ed. Philbrick) 427 (Sept. 17, 1807); MOREHEAD & BROWN DIG. STAT. LAWS KY., title 154 (Feb. 25, 1797); 2 REV. LAWS ME. (1821) 509; 1 LAWS MD. 1692-1839 (ed. Dorsey) 4 (1704); REV. CODE MISS. (1824) 350; 1 N. C. REV. LAWS (1821) 515 (1784); OHIO LAWS (1820) 193; 3 PA. LAWS (1791-1802) 512 (April 6, 1802); 1 LAWS TENN. 1820 (ed. Scott) 568 (April 20, 1796); *id.*, 656 (Oct. 26, 1799); COMP. LAWS VT. (1824) 427 (Mar. 3, 1797).

ing, as inferentially supporting the conclusions as to state power in the field to be drawn from still a third class of statutes.

That class consisted of those whose terms, alone or in the light of an elementary knowledge of geography, had reference to an artery of interstate or international communication. Sometimes they provided for laying out or establishing public highways to points on the state line¹³ or to seaports or other centers of water transportation on the borders of the state¹⁴ or between such points.¹⁵ Sometimes they looked to the establishment of important feeder roads within the state intersecting already existing interstate trunk roads¹⁶ or connecting with interstate

¹³ TOULMIN'S DIG. LAWS ALA. (1823) 390 (Georgia line, Dec. 4, 1819); FOSTER'S DIG. LAWS GA. (1820-9) 294 (from the Altamaha to the Florida line, Dec. 23, 1822); Ill. Laws 1822-3, p. 123 (from interior Illinois points to points on the Wabash and the Mississippi rivers); Ind. Laws 1819, p. 96; Ind. Laws 1821, p. 152; Ind. Laws 1825, p. 82 (from Terre Haute to the Illinois line in the direction of Vandalia); 2 N. C. REV. LAWS (1821) 1497 (Waynesville to the southern line of the state, 1819); *id.*, 1544 (Tennessee line, 1820); TAYLOR'S REVISAL N. C. LAWS (1821-5) 80 (same, 1822); Ohio Sess. Acts, 1st Sess. 1821, p. 68 (interior points to Marietta); *id.* p. 158 (to Indiana line); Ohio Local Acts, 1st Sess. 1822, p. 54 (schedule of numerous roads, some running to the state line); Ohio Local Acts, 1st Sess. 1824, p. 80 (interior points to East (?) Liverpool); Ohio Local Acts 1st Sess. 1826, p. 89 (schedule of numerous roads, some running to the state line); 2 PA. LAWS (1780-91) 442 (from the mouth of the Tioga River to the New York State line, Mar. 28, 1788); 3 PA. LAWS (1791-1802) 24, April 13, 1791; *id.* 375 (interior points to New York line, April 8, 1799); 4 PA. LAWS (1802-8) 532 (interior points to Ohio line, Mar. 28, 1808); 5 PA. LAWS (1809-12) 35 (interior points to Maryland line, Mar. 22, 1809); *id.* 183 (from Washington to the Virginia line in the direction of Wheeling, Mar. 20, 1810); 1 LAWS TENN. 1820 (ed. Scott) 827 (road to Georgia, Aug. 4, 1804); *cf.* 1 MASS. LAWS (1780-1807) 97 (repair of highway leading to New Hampshire, June 16, 1783); TAYLOR'S REVISAL N. C. LAWS (1821-5) 118 (repair of highway leading to the Virginia line, 1823); 8 PA. LAWS (1822-5) 42 (interior point to Ohio line, Feb. 27, 1823); 2 COMP. LAWS VT. (1807) 215 (Mar. 8, 1784); 1 LAWS TENN. 1820 (ed. Scott) 967 (specifying a number of roads, including one from an interior Tennessee point to the neighborhood of Muscle Shoals) and statutes cited *infra* note 14.

¹⁴ TOULMIN'S DIG. LAWS ALA. (1823) 410 (from interior Alabama points to Pensacola, Dec. 17, 1821); Ill. Laws 1824, p. 22 (interior Illinois points to interstate ferry across the Mississippi River); Ohio Local Acts, 1st Sess. 1824 (interior town to Cincinnati); Ohio Local Acts, 1st Sess. 1825, p. 89 (interior points to Ohio River opposite Wheeling); 3 BREVARD DIG. PUB. STAT. LAWS S. C. 362 (road to Savannah River ferry, 1784); *id.* 368 (Edisto to the ferry landing opposite Augusta, Georgia, 1786); *id.* 385 (interior points to Savannah River bridge, 1792); *id.* 392 (same to Savannah River ferry, 1795); *cf.* *id.* 348 (repairs, interior points to Savannah River ferry landing opposite Augusta, Georgia, 1770); *id.* 353 (repairs, interior point to Savannah River, 1777).

¹⁵ TOULMIN'S DIG. LAWS ALA. (1823) 441 (Mobile to the Mississippi state line, Dec. 31, 1822); Ohio Local Acts, 1st Sess. 1825, p. 24 (Cleveland to the Pennsylvania line).

¹⁶ TOULMIN'S DIG. LAWS ALA. (1823) 388 (between the falls of the Tuscaloosa and the great military road from Columbia, Tennessee, to Madisonville, Louisiana, Dec. 16, 1819); 2 N. C. REV. LAWS (1821) 1546 (from Burke County through Asheville to the through road to the south line of the state, 1820); Ohio Local Acts, 1st Sess. 1826, p. 33 (Steubenville to the National, or Cumberland, Road); *cf.* Ohio Local Acts, 1st Sess. 1827, p. 48 (law for laying out a number of specified roads, including some on canals connecting with exterior waterways); 1 TENN. LAWS 1820 (ed. Scott) 967 (specifying a number of local roads, including one to intersect "the Georgia road," Sept. 13, 1806).

waterways flowing through the state.¹⁷ Sometimes it was specifically noted that such roads, on reaching the state line, would there connect with a like road established by the adjoining state on the other side of the line.¹⁸

Nor was the state's power limited to or exhausted by the initial erection of a highway communication between an interior and an exterior point. Leaving the termini unaffected, legislation might provide for changes in the intermediate routing so as to result in the elimination of circuitry or similar interferences to ready intercourse between them.¹⁹ Moreover, the state legislatures, when they thought fit, in view of superior alternative routes or on other considerations, vacated highways communicating with other states.²⁰

Occasionally it would appear two states participated in the establishment of a public highway project to serve as a line of communication between them.²¹

At this period, the furnishing of the transportation service involved in the construction and maintenance of highway facilities was not conceived of as peculiarly or especially a governmental enterprise. It still remained a fruitful field for private investment and development. The numerous state railroad franchises of a later era were anticipated by the frequent turnpike franchises in the period under consideration. The same variety of particulars was to be found among these private transportation systems as has already been noted in connection with the public highways. There was the same interspersion, among franchises relating exclusively to interior turnpikes and general laws applying indifferently to those and others,²² of franchises for turnpikes extending to state lines²³ (where, it was sometimes specifically noted in the statute,

¹⁷ 2 DIG. LA. ACTS (1804-27) 322 (from roads in the parish of West Baton Rouge to the Mississippi River, Feb. 19, 1825).

¹⁸ 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 419 (joining an interior road with the public road from Rockingham, North Carolina, at the state border, 1796); *cf.* 1 LAWS TENN. 1820 (ed. Scott) 827 (Aug. 4, 1804).

¹⁹ See TOULMIN'S DIG. LAWS ALA. (1823) 422 (commissioners appointed to lay out a road "in such a manner as to shorten the distance to the settlements in Georgia," Dec. 3, 1821); REV. STAT. DEL. (1829) 649 (straightening a road between a shore point in Delaware and the Maryland line, Feb. 2, 1793); Ohio Local Acts, 1st Sess. 1827, p. 5 (altering a state road leading from Portsmouth, Ohio, to Vanceburgh, Kentucky); *cf.* 2 REV. LAWS ME. (1821) 509 (alteration provisions in general road laws); 2 N. C. REV. LAWS (1821) 1545 (appointing commissioners to review part of a state road in Ashe County, 1820); Ohio Local Acts, 1st Sess. 1825, p. 31 (authorizing Hamilton County to alter and amend a state road from an interior point to Cincinnati).

²⁰ For typical examples from one state, see REV. STAT. DEL. (1829) 652 (Jan. 29, 1801, Jan. 20, 1815, Jan. 15, 1818).

²¹ 1 LAWS TENN. 1820 (ed. Scott) 827 (authorizing the marking of a road "between this state and Georgia agreeably to treaty," Aug. 4, 1804).

²² See, *e.g.*, PUB. STAT. CONN. (1824) 427; 2 REV. LAWS ME. (1821) 599; 3 MASS. LAWS (1780-1807) 285 (Mar. 16, 1805).

²³ TOULMIN'S DIG. LAWS ALA. (1823) 426 (Dec. 30, 1822); REV. STAT. DEL. (1829) 520 (Feb. 1, 1808); *id.* 530 (Jan. 21, 1811); *id.* 531 (Jan. 23, 1811); *id.*

they were to join a like improvement constructed within and under authority from the contiguous state),²⁴ for turnpikes intersecting within the state established interstate arteries of land travel,²⁵ connecting with ferry landings on the banks of boundary rivers,²⁶ or connecting interior points with seaports or shipping centers.²⁷

Toward the end of the period, there were occasional grants, analogous to those just mentioned, for the construction of a new and improved facility, the railroad.²⁸

On occasion, those licensed by a neighboring state to construct a turnpike extending up to the state line were even authorized to project their road across the state line so as to reach a community located within the enacting state²⁹ or a company was granted the privilege of establishing a road to run between points in two different states,³⁰ in which case, it would seem, the assent of the other state was requisite to the full establishment of the project.³¹

536 (Jan. 1, 1813); *id.* 537 (Jan. 28, 1813); *id.* 538 (April 14, 1813); III. LAWS 1819, p. 116; III. LAWS 1824, p. 88; 2 MASS. LAWS (1780-1807) 928 (Mar. 4, 1800); TAYLOR'S REVISAL N. C. REV. LAWS (1821-5) 111 (1823); *id.* 149 (1824); 4 PA. LAWS (1802-8) 7 (Feb. 11, 1803); *id.* 141 Mar. 5, 1804; *id.* 340 (Mar. 28, 1806); *id.* 359 (road crossing the state from the New Jersey line to the New York line, Jan. 26, 1807); *id.* 388 (Mar. 31, 1807); *id.* 395 (April 7, 1807); *id.* 405 (same date); *id.* 491 (Feb. 22, 1808); 5 PA. LAWS (1809-12) 280 (Jan. 17, 1812); 1 TENN. LAWS 1820 (ed. Scott) 882 (Nov. 2, 1805); 2 *id.* 121 (Oct. 28, 1813); 2 *id.* 225 (1815); *cf.* 1 TENN. LAWS 1820 (ed. Scott) 865 (segments within the state of the road leading from North Carolina and Virginia to Kentucky, Nov. 2, 1805); 2 COMP. LAWS VT. (1807) 247 (Oct. 27, 1795).

²⁴ REV. STAT. DEL. (1829) 520 (connecting with Pennsylvania road at state line, Feb. 1, 1808).

²⁵ TOULMIN'S DIG. LAWS ALA. (1823) 435 (intersecting the road from Nashville to New Orleans, Dec. 26, 1822).

²⁶ III. LAWS 1820-21, p. 94; 4 PA. LAWS (1802-8) 27 (Mar. 24, 1803); *cf.* 2 PA. LAWS (1780-91) 332 (Sept. 6, 1785).

²⁷ 5 LITT. (KY.) 519 (Lexington to Louisville, 1817); Ky. Sess. Acts 1818, p. 493 (Portland to Louisville); *ibid.* (Shippingport to Louisville); 1 DIG. LA. ACTS (1804-27) 275 (Lake Pontchartrain to the Mississippi River); 3 MASS. LAWS (1780-1807) 102 (Augusta to Wiscasset, Feb. 22, 1803); *id.* 201 (Taunton to New Bedford, Mar. 3, 1804); *id.* 365 (Taunton to South Boston, June 23, 1806); 3 PA. LAWS (1791-1802) 82 (Lancaster to Philadelphia, April 9, 1792); 4 PA. LAWS (1802-8) 124 (Waterford to Erie, Feb. 13, 1804); *cf.* 1 DIG. LA. ACTS (1804-27) 258 (from the center of New Orleans to the banks of the Mississippi River, Feb. 19, 1825); 4 MASS. LAWS (1807-16) 113 (turnpike across Boston Neck, Mar. 3, 1810).

²⁸ REV. LAWS N. J. (1820) 813 (listing in a schedule of private acts the incorporation on Feb. 6, 1815, of a railroad from Trenton to New Brunswick); 8 PA. LAWS (1822-5) 152 (Mar. 31, 1823). It should be remembered that these were not the familiar steam railroads which have since become a major factor in transportation. However, it does seem to have been contemplated that the same company which furnished the improved highway should also furnish the transportation service and perhaps the vehicles; thus, the Pennsylvania statute provided that all transportation should be under the direction of a designated person connected with the enterprise.

²⁹ 3 MASS. LAWS (1780-1807) 29 (June 18, 1801); TAYLOR'S REVISAL N. C. LAWS (1821-5) 156 (1824).

³⁰ 3 MASS. LAWS (1780-1807) 295 (Effingham, New Hampshire, to Saco, Mar. 16, 1805).

³¹ See TAYLOR'S REVISAL N. C. LAWS (1821-5) 156 (assenting to Tennessee turnpike act, 1824).

As with public highways³² so with turnpikes, the state's control was not confined to their establishment but extended as well to authorizing their discontinuance, even though under the circumstances the result should be to sever the communication between a place within the state and an extrastate community.³³

Parallel activity to that of the states, in granting turnpike construction privileges, was exercised by Congress as a legislature for the District of Columbia, all such grants being strictly limited to roads within the territorial limits of the District.³⁴ Another technique employed by Congress was to authorize the turnpike corporations of adjoining states to extend their projects through and across the District, on the same conditions and subject to the same tolls as those provided by the state legislation for the portion within the creator state.³⁵

Not that Congress was wholly silent on the matter of highways in its capacity as legislature for the Union. The first instance of its activity in this connection was legislation directing the postmaster general, in the event a road designated as a post road was obstructed or not kept in good repair, to report the matter to Congress, with such information as might enable it to designate some alternative route in the same direction.³⁶ Somewhat earlier, however, in the enabling act for the admission of Ohio to statehood, a proviso had been inserted reserving a proportion of the proceeds of the sale of public lands within its borders to lay out and make public roads between the watershed of the Atlantic Ocean and the Ohio River system³⁷ and this was later followed up by the act for the establishment of the Cumberland Road,³⁸ to which the fund arising under the earlier act was directed to be applied. Both of these acts directed any action in execution of their terms upon the seeking and obtaining consent of the states through whose limits the road might run.³⁹ Later legislation provided for extension of this National Highway beyond its originally destined terminus at Wheeling to the Illinois bank of the Mississippi.⁴⁰ Moreover, the laying out of roads through the territories of the United States not included in the boundaries of any state was from time to time provided for by Congress.⁴¹ By an extension of this practice, provision was also made for

³² See statutes *supra* notes 19 and 20.

³³ Mass. Sess. Laws, May 1819, p. 294 (authorizing abandonment of a portion of a turnpike east of New Lebanon, New York, and west of Lee, Massachusetts).

³⁴ See 2 STAT. 539 (1809); *id.* 570 (1810); 3 STAT. 5 (1813); 3 *id.* 12 (1813).

³⁵ 2 STAT. 808 (1813); 3 STAT. 391 (1817); *id.* 482 (1819) (all dealing with Maryland corporations).

³⁶ 2 STAT. 275 (1804).

³⁷ 2 STAT. 173 (1802).

³⁸ 2 STAT. 357 (1806).

³⁹ 2 STAT. 175 (1802); *id.* 357 (1806).

⁴⁰ 3 STAT. 604 (1820).

⁴¹ See 2 STAT. 396 (1806) (authorizing the laying out of roads from the frontiers of Georgia en route from Athens to New Orleans; and from the Mississippi to the Ohio in Illinois); 3 STAT. 318 (1816) (road in Illinois territory).

the laying out of roads which, while passing for the most part through the territories, had also one terminus within the limits of a state⁴² as well as for the erection of roads within the state of Ohio from interior points to the exterior limits agreeably to the terms of treaties theretofore entered into with the Indian tribes.⁴³ Where Congress had authorized the establishment of a road through a territory admitted to statehood pending completion of the road, the federal legislature on occasion retained its jurisdiction over the road to the extent at least of continuing to pass the necessary legislation for its completion.⁴⁴

However, the states not only looked after the upkeep and repair of the roads constructed under their own auspices. It also seems to have been thought a part of their functions to keep in repair the interstate trunk highways established and constructed by the Federal Government or, at any rate, some of them certainly did assume jurisdiction in that regard.⁴⁵ On other occasions, Congress provided for the repair of such roads, appropriating money for the purpose and providing that the repairs be effected under the personal supervision of a superintendent to be appointed by the President.⁴⁶ In providing for the repair and improvement of post roads, however, the practice was for Congress to confine its legislation to so much of such roads as lay across Indian lands and not to undertake to legislate as to those parts lying outside such reservations, within the several states.⁴⁷ State assent was expressed when post road repairs were undertaken by the Federal Government.⁴⁸ The very fact of consent would seem to imply a want of power in Congress to act independently without it in the improvement or maintenance of the highway system, even though the action was connected with the express grant respecting "post roads"⁴⁹ in the Constitution. That implication is confirmed by the style of the assenting legislation, speaking in terms of "vesting powers" in Congress⁵⁰ and even more by

⁴² 2 STAT. 396 (1806) (authorizing the establishment of a road from Nashville in the state of Tennessee to Natchez in Mississippi Territory); 3 STAT. 315 (1816) (roads from Tennessee to Louisiana, and from Georgia to a point in the territories to the westward); *id.* 377 (1817) (road from Tennessee to Mississippi Territory, under the supervision of the Secretary of War, to run through the Chickasaw Nation); *id.* 412 (1818) (road from Georgia point to a point in Alabama Territory).

⁴³ A few instances may be observed in 2 STAT. 668 (1811); *id.* 670 (1812); 3 STAT. 727 (1823).

⁴⁴ See 3 STAT. 412 (1818) (appropriation to complete the Mississippi portion of a road from Louisiana to Tennessee).

⁴⁵ *Cf.* 2 DIG. LA. ACTS (1804-27) 325 (Feb. 26, 1822), 326 (Mar. 18, 1823 and Feb. 7, 1824) (all dealing with the repair of the "great National Road" from Nashville, Tennessee, to Madisonville, Louisiana).

⁴⁶ 3 STAT. 728 (1823) (Cumberland Road).

⁴⁷ 3 STAT. 773 (1823) (public road from Nashville to New Orleans).

⁴⁸ 1 LAWS MD. 1692-1839 (ed. Dorsey) 482 (Nov. 1802).

⁴⁹ U. S. CONST. Art. 1, §8, cl. 7 ("The Congress shall have power . . . 7. To establish post-offices and post-roads").

⁵⁰ 1 LAWS MD. 1692-1839 (ed. Dorsey) 482 (Nov. 1802).

conditions annexed to the consent, as that Congress should not authorize changes in location or take materials for repairs without the consent of the owners⁵¹ (even though state officials in making repairs were commonly given the power to take such materials)⁵² and that no title in or to the soil should be taken by the Federal Government.⁵³ Such propositions can scarcely be reconciled with any notion that Congress possessed power to act in the premises as a matter of constitutional grant.

So, too, the states assented to the location and establishment by Congress of trunk roads running between states, so far as segments of such roads lay within their respective limits,⁵⁴ reciting in doing so that "the consent of the state [is] necessary to the opening of the same"⁵⁵ and conditioning their assent by a declaration of the manner in which the Federal Government should conduct itself in establishing the road authorized.⁵⁶ In connection with such consent, states further expressly conferred on the United States the right to do certain things necessarily incidental to the construction of the road, such as to obtain materials for it.⁵⁷

The states not only co-operated by giving their consents to the federal undertakings; they spurred Congress on to carry into execution the program outlined in legislation.⁵⁸ Sometimes state activity was prophetic of what has since become a popular legislative pastime, consisting as it did in urging the state's senators and representatives to endeavor to secure federal funds for the construction of the projected improvement⁵⁹ or in memorializing Congress in favor of its speedy completion.⁶⁰ But there was no regular course of legislative abdication by the states and, as to uncompleted portions of the route marked out by federal authority, they regarded themselves as competent to proceed to open and improve them without let or hindrance, upon their own judgment as to the expediency of action.⁶¹ Sometimes in establishing a public road

⁵¹ *Ibid.*

⁵² See, for example, 1 N. C. REV. LAWS (1821) 551 (1786).

⁵³ 1 LAWS MD. 1692-1839 (ed. Dorsey) 482 (Nov. 1802).

⁵⁴ 1 LAWS MD. 1692-1839 (ed. Dorsey) 547 (Nov. 1806) (Cumberland Road); Ohio Local Acts, 1st Sess. 1824, p. 87 (same); 4 PA. LAWS (1802-8) 408 (April 9, 1807) (same).

⁵⁵ 1 LAWS MD. 1692-1839 (ed. Dorsey) 547 (Nov. 1806).

⁵⁶ See 4 PA. LAWS (1802-8) 408 (April 9, 1807) (Federal Government to pay for materials taken on the same basis as the commonwealth in its road construction programs).

⁵⁷ *Ibid.* (taking of materials in like manner as state road officials).

⁵⁸ See Ill. Laws 1824, p. 214 (resolution instructing Illinois' Senators and Representatives to request the prompt permanent marking of the proposed United States road from Wheeling to the Mississippi); Ind. Laws 1822, p. 152 (resolution directing Indiana congressmen to work for the same road).

⁵⁹ Ind. Laws 1822, p. 152 (National Road from Wheeling to the Mississippi).

⁶⁰ See Ind. Special Acts 1823, p. 110.

⁶¹ See Ill. Laws 1824, p. 214 (resolution urging prompt marking of the National Road to the Mississippi "so as to enable the states through which it may pass to have an opportunity of opening and improving the same, provided they may deem it expedient").

within the borders of a state, Congress turned over the actual execution of the enterprise to the state, granting it tracts of public land adjacent to the road to aid in defraying expenses, and authorizing construction as directed by the state legislature, subject to the approval of the President.⁶² Congress would seem to have acquiesced in the notion that this matter was one falling within the jurisdiction of the states, by legislation granting to turnpike road and bridge corporations tracts of land out of the places ceded to the United States by the states,⁶³ authorizing state turnpike companies to build bridges across coastal creeks lying across their projected routes in such places,⁶⁴ and particularly by empowering state licensees to extend their roads through and across the District of Columbia, subject to the same conditions and tolls as prevailed in the connecting portions of the highway lying within state borders.⁶⁵

2. DEVELOPMENT OF INLAND WATERWAYS

Provisions declaring particular streams or parts of streams to be public highways, or navigable streams, were common.⁶⁶ Mostly the rivers so designated were streams which, although flowing to the sea-coast or tributary to an interstate stream, lay wholly within the enacting state. In some cases, however, they were themselves interstate streams in which case it was customary to limit the declaration to that part of the river lying within the state's borders.⁶⁷ Such a declaration

⁶² 3 STAT. 727 (1823).

⁶³ See 2 STAT. 199 (1803) (authorizing the sale of part of Charlestown Navy Yard grounds to proprietors of franchise for turnpike and bridge over coastal river); 6 STAT. 161 (1816) (confirming to the Navigation Company of New Orleans the use and possession of a lot in said city, vesting the right and claim of the United States therein).

⁶⁴ See 2 STAT. 330 (1805) (bridge in the Brooklyn Navy Yard).

⁶⁵ 2 STAT. 808 (1813); 3 STAT. 391 (1817); *id.* 482 (1819).

⁶⁶ TOULMIN'S DIG. LAWS ALA. (1823) 75 (Conecuh and Sepulgah rivers, Dec. 13, 1821); LAWS ILL. TERR. 1817-18, p. 38 (Big Muddy River); ILL. LAWS 1819, p. 25 (Kaskaskia River); *id.* 69 (Cash River); ILL. LAWS 1822-23, p. 81 (Sangamon River); LAWS INDIANA TERR. 1809-16 (ed. Ewbank & Piker) 298 (Whitewater, Feb. 16, 1813); IND. LAWS 1819, p. 58; IND. SPECIAL ACTS 1823, p. 46 (Blue River); LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 1003 (Cuivre River, Dec. 17, 1822); 3 REV. STAT. N. Y. (1827-8) 248 (naming a number of streams, including several interstate rivers, April 2, 1813); *id.* 263 (Delaware River, April 12, 1822); 2 N. C. REV. LAWS (1821) 1248 (Roanoke River, 1812); *id.* 1259 (Neuse River, 1812); *id.* 1336 (Cape Fear River, 1815); *id.* 1370 (Tar River, 1816); *id.* 1375 (Catawba River, 1816); *id.* 1384 (Yadkin River); 1 PA. LAWS (1700-1780) 322 (Delaware and Lehigh rivers, Mar. 9, 1771); *id.* 324 (Susquehanna, Juniata, and several other rivers, Mar. 9, 1771); 2 PA. LAWS (1780-91) 311 (Susquehanna River, Mar. 31, 1785); 3 PA. LAWS (1791-1802) 127 (Conococheague Creek, April 8, 1794); *id.* 278 (Cohocksink Creek, Feb. 27, 1797); 5 PA. LAWS (1809-12) 83 (French Creek, Feb. 12, 1810); 1 TENN. LAWS 1820 (ed. Scott) 835 (North Fork of Holston River, Aug. 4, 1804); *cf.* REV. STAT. DEL. (1829) 83 (similar declaration with respect to proposed Chesapeake & Delaware Canal, Jan. 29, 1801, Jan. 18, 1811); 1 N. C. REV. LAWS (1821) 635 (same, Pasquotank River & Elizabeth River canal, Dec. 15, 1790); 2 TENN. LAWS 1820 (ed. Scott) 106 (Oct. 11, 1813).

⁶⁷ LAWS INDIANA TERR. 1809-16 (ed. Ewbank & Piker) 298 (Whitewater to

was more than a mere flourish of legislative rhetoric. It imputed to the stream certain attributes of practical significance for purposes of travel and transit—the right of the public to pass freely up and down it, a prohibition against riparian owners erecting or maintaining in it obstructions, such as dams, which they might lawfully maintain in non-navigable streams, the applicability to it of the general statutes for the removal or penalizing the creation of obstructions to navigation. The purpose of such legislation was clearly revealed in the occasional statutory recitals of an object to permit the egress of particular classes of commodities from the state⁶⁸ or declarations of the enactment as being at the instance of the legislature of a sister state whose citizens wished to use the stream for navigation.⁶⁹

Just as the states retained power to abandon their land highways and to authorize abandonment of turnpikes, so they might disestablish a stream's status as a public highway, thus withdrawing it from service as a channel of interstate intercourse.⁷⁰

Little else beyond the formal legislative declaration was needed as to streams or parts of streams which in their natural condition were adequate for the purposes of such water-borne traffic as had occasion to use them. Occasional prohibition prospectively of the erection of dams and obstructions in or bridges over such streams, authorizing removal thereof by anyone at will without prejudice to the maintenance of existing structures, seems to represent the sum of such additional legislation with reference to waterways of that character.⁷¹ It is worthy of note, however, that such prohibition was not confined to the interior waterways of the several states but that on occasion jurisdiction was assumed to forbid such conduct as to boundary rivers, the enacting state then prescribing the manner in which permission to make such an alteration should be obtained.⁷²

the Ohio line, Feb. 16, 1813); 3 REV. STAT. N. Y. (1827-28) 263 (Delaware River, April 12, 1822); 2 N. C. REV. LAWS (1821) (Roanoke River to the Virginia line, 1812); *id.* 1375 (Catawba River to the South Carolina line, 1816); *id.* 1384 (Yadkin River to the South Carolina line, 1816); 2 PA. LAWS (1780-91) 311 (Susquehanna River to the Maryland line, Mar. 31, 1785); 3 PA. LAWS (1791-1802) 127 (Conococheague Creek from Chambersburg to the Maryland line, April 22, 1794).

⁶⁸ See 2 PA. LAWS (1780-91) 311 (Susquehanna River declared a public river to the Maryland line so as to permit the rafting of timber to Chesapeake Bay, Mar. 31, 1785).

⁶⁹ 1 TENN. LAWS 1820 (ed. Scott) 835 (Aug. 4, 1804).

⁷⁰ *Cf.* Ohio Sess. Acts, 1st Sess. 1822, p. 25 (Stillwater branch of the Miami River); 2 TENN. LAWS 1820 (ed. Scott) 82 (repealing an act forbidding obstructions in the Red River between Port Royal and the Kentucky line, Oct. 8, 1812).

⁷¹ REV. LAWS N. J. (1820) 22 (dams and obstructions, 1755); 1 PA. LAWS (1700-1780) 168 (bridges, Aug. 14, 1725); 2 TENN. LAWS 1820 (ed. Scott) 106 (mills and fish-dams, Oct. 11, 1813); *cf.* 1 N. Y. REV. STAT. (1827-28) 686 (presence of weirs, posts and other obstructions in the Hudson River, New York Bay, and other named waters prohibited under penalty).

⁷² REV. LAWS N. J. (1820) 708 (Delaware River between Pennsylvania and New Jersey, Mar. 1, 1820).

Where the stream in question required dredging, widening, straightening, or similar improvements in order to be a useful artery of travel, more was needed however than a simple legislative declaration of navigable character. If the potential route was to serve efficiently as a means of ingress to and egress from the communities bordering it, works had to be undertaken not essentially unlike the construction of artificial land highways to inland points. The modes chosen by the states in handling the highway problem were accordingly those employed in the artificial development of existing waterways. Public road legislation and turnpike legislation had their respective parallels in statutes providing for the improvement of waterways under public auspices⁷³ and private franchises.⁷⁴

⁷³ TOULMIN'S DIG. LAWS ALA. (1823) 702 (Mar. 1, 1808); *id.* 703 (Nov. 27, 1810) (both general statutes, conferring authority on county courts); PRINCE'S DIG. LAWS GA. (1819) 203 (named rivers, including some interstate boundary rivers); FOSTER'S DIG. LAWS GA. (1820-29) 129 (named water courses); *id.* 131 (Dec. 26, 1826); LAWS INDIANA TERR. 1809-16 (ed. Ewbank & Piker) 298 (White-water to the Ohio line, Feb. 16, 1813); 1 DIG. LA. ACTS (1804-27) 558 (Pearl and Red rivers, Mar. 12, 1822); 3 MASS. LAWS (1780-1807) 50 (Connecticut River, Feb. 25, 1802); 1 N. C. REV. LAWS (1821) 536 (1785); 2 N. C. REV. LAWS (1821) 1547 (Broad River to the South Carolina line, 1820); 1 PA. LAWS (1700-80) 235 (Schuylkill River, Mar. 14, 1761); *id.* 322 (Delaware and Lehigh rivers, Mar. 9, 1771); *id.* 324 (Susquehanna, Juniata, and other named rivers, Mar. 9, 1771); 3 PA. LAWS (1791-1802) 24 (April 13, 1791); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 254 (Black River, 1784); *id.* 255 (Pedee River, 1785); *id.* 277 (Savannah River to Augusta, Georgia, 1795); 6 MCCORD STAT. AT LARGE S. C. 124 (Savannah River, Dec. 18, 1819); 1 TENN. LAWS 1820 (ed. Scott) 835 (North Fork of Holston River, Aug. 4, 1804); REV. CODE VA. SUPP. (1833) 420 (James River, Feb. 17, 1820); *cf.* 3 STAT. 583 (1820) (charter of Washington, city authorized to preserve the navigation of the Potomac and Anacostia rivers adjoining the city); MOORHEAD & BROWN DIG. STAT. LAWS KY., title 125 (county courts empowered to appoint inspectors of navigable streams with authority to clear out ripples and cut away trees and bushes on river banks, with powers and duties parallel to those of road overseers); REV. CODE MISS. (1824) 630 (Natchez harbor master authorized to direct removal of nuisances and obstructions from the river); LAWS DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 967 (charter of St. Louis, authorizing the city "to improve and preserve the navigation of the Mississippi within the city," Dec. 9, 1822); REV. LAWS N. J. (1820) 664 (charter of Jersey City, authorizing the city to regulate obstructions to the navigation of the river); 1 N. C. REV. LAWS (1821) 515 (county courts authorized to clear inland rivers and creeks, 1784); 2 N. C. REV. LAWS (1821) 815 (amendment of foregoing act, 1796); 4 PA. LAWS (1802-08) 244 (removal of sandbar from Delaware River, April 1, 1805).

⁷⁴ TOULMIN'S DIG. LAWS ALA. (1823) 709 (Flint River, Dec. 20, 1820); *id.* 710 (Indian Creek, Dec. 21, 1810); *id.* 715 (Murder Creek, Dec. 15, 1821); REV. STAT. DEL. (1829) 587 (Christiana Creek, Jan. 29, 1821); *id.* 622 (Mispillion Creek, Feb. 1, 1827); *id.* 624 (Murderkill Creek, Jan. 22, 1810); LAWS ILL. TERR. 1817-8, p. 4 (Little Wabash River); 2 LITT. (Ky.) 448 (Kentucky River, 1801); 2 MASS. LAWS (1780-1807) 527 (Connecticut River, Feb. 25, 1792); *id.* 553 (Merimack River, June 27, 1792); Sess. Laws Mass. May 1816, p. 222 (same); *id.* 448 (Penobscot River); Sess. Laws Mass., Jan. 1818, p. 536 (Kennebec River); 1 N. C. REV. LAWS (1821) 694 (Cape Fear River, 1792); *id.* 729 (same, 1793); 2 N. C. REV. LAWS (1821) 818 (Cape Fear, Deep, and Haw rivers, 1796); *id.* 1248 (Roanoke River, 1812); *id.* 1259 (Neuse River, 1812); *id.* 1136 (Cape Fear River, 1815); *id.* 1370 (Tar River, 1816); *id.* 1375 (Catawba River, 1816); *id.* 1384 (Yadkin River, 1816); *id.* 1548 (New River, 1820); 3 FA. LAWS (1791-1802) 311 (Lehigh River, Feb. 27, 1798); 4 PA. LAWS (1802-08) 6 (Conococheague Creek, Feb. 7, 1803); 8 PA. LAWS (1822-25) 429 (Lackawaxen River, April 1,

In a fairly immediate sense, every such improvement had to do with a channel of at least potential interstate and international communication, since every stream either flowed immediately to the Atlantic, the Gulf of Mexico, or the Great Lakes, or was tributary to a river system which did and which in its course might pass through or alongside other states. Of particular interest perhaps in indicating the extent of the states' supposed jurisdiction in this connection are those instances where the improvement of navigation had to do with a boundary river.⁷⁶ The legislators were not unconscious of the interstate importance of some of these projects. They realized that they would affect interests in the states on both sides of the stream and might require outlays for their successful completion in excess of the resources of either state singly. The magnitude of the undertaking and its multi-state significance led them to think in terms not of state paralysis but of state co-operation. Accordingly, machinery was set in motion in such cases to secure the participation of all interested states in the projected improvement of the navigation.⁷⁶ Even in such instances, however, there was no feeling that the consent of the other interested state or states was prerequisite to the initiation of action; instead, the individual states moved independently to appropriate for and proceed with the project⁷⁷ or to issue charters for navigation improvements,⁷⁸ in all respects similar to those where the factor of multi-states concern was not injected into the legislation,

1825); see PRINCE'S DIG. LAWS GA. (1819) 577 (schedule of local and private acts, listing four navigation companies); cf. 1 DIG. LA. ACTS (1804-27) 561 (grant of exclusive steamboat privilege for limited term to individual undertaking to effect the improvement of the navigation of the Red River); 3 MASS. LAWS (1780-1807) 103 (construction of canal around the falls of the Saco River, Feb. 22, 1803); 2 REV. CODE VA. (1819) c. 235, §§22, 23 (no dams to be erected in waters subject to franchise for improvement of navigation without consent of company, and all dams to be held subject to commonwealth's right to grant franchise for such improvements and for making locks in dams, without provision for compensation, 1815).

⁷⁶ PRINCE'S DIG. LAWS GA. (1819) 203 (Dec. 19, 1817); FOSTER'S DIG. LAWS GA. (1820-29) 134 (Dec. 20, 1826) (both having to do with the Savannah River); LAWS Ill. Terr. 1817-8, p. 57 ("the waters near the mouth of the Ohio River"); Ill. LAWS 1824, p. 96 (Wabash River); Ind. Special Acts 1823, p. 82 (same); 1 DIG. LA. ACTS (1804-27) 558 (Pearl River, Mar. 12, 1822); 3 PA. LAWS (1791-1802) 23 (Delaware River, April 13, 1791); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 277 (Savannah River to Augusta, Georgia, 1795).

⁷⁶ See Ill. LAWS 1822-3, p. 72 (suggesting to Indiana common action in improvement of Wabash, each state to appoint commissioners to survey obstructions "and report a program for improvement" of the navigation); Ind. LAWS 1821, p. 46 (similar action as to same subject, but proposing concurrent action by commissioners from the two states); Ind. Special Acts 1823, p. 78 (same); 1 DIG. LA. ACTS (1804-27) 558 (for opening navigation of the Pearl River, reciting that contributions for the purpose were also being made by Mississippi, Mar. 12, 1822); 6 McCORD STAT. AT LARGE S. C. 127 (commissioners appointed to act in conjunction with Georgia commissioners in improving navigation of the Savannah River, Dec. 18, 1819).

⁷⁷ Ind. Special Acts 1823, p. 82 (Wabash River).

⁷⁸ Ill. LAWS 1824, p. 96 (Wabash Navigation Company erected, reserving to Indiana a right to join in the benefits).

except that they provided for the admission of the others to the benefits to accrue, should they desire to join in the act.

Much the same technique for co-operation was employed as to rivers crossing state lines, with the upper riparian state resorting to the device of requesting the lower riparian to improve so much of the stream as lay within its borders, where improvement throughout the whole length was desired;⁷⁹ or accepting conditional legislation by the latter in chartering a company to clear the navigation throughout the river's entire extent and to mesh it with a proposed canal into an integrated system of waterways involving action by several states;⁸⁰ or appointing commissioners to investigate into the best mode of improving the navigation of the river, with the proviso that they should work in conjunction with similar officials chosen by other interested states in the event those states should take such action.⁸¹ Again, there may be found legislation by an upper riparian state providing, at the request of the lower riparian, for the removal of obstructions to the navigation which were seriously burdening the latter's citizens desirous of using the river as a travel route.⁸²

In connection with the merger of a local navigation improvement company with a canal company of an adjoining state, both waterways opening into a boundary river, the canal company acquiring the privilege of improving the navigation was subjected to the conditions stated in its predecessor navigation company's original grant of authority and was ordered to provide a passage for watercraft using the boundary river, without charge and without delay.⁸³ Where an adjoining state co-operated with the initiating state in a scheme of canal and inland navigation development, the initiating state sometimes undertook in return for such co-operation to relieve any goods introduced from the other state from any charges or restrictions on their introduction.⁸⁴

When the Federal Government wished to make improvements in the channels of interstate rivers, the procedure employed was to apply for and obtain the legislative assent of the states particularly affected to such

⁷⁹ See LAWS INDIANA TERR. 1809-16 (ed. Ewbank & Piker) 390 (joint resolution requesting Ohio legislature to cause to be opened and made navigable so much of the Whitewater as lay within that state, adopted practically contemporaneously with an Indiana law for the improvement of the Whitewater within Indiana, Feb. 18, 1813).

⁸⁰ 3 PA. LAWS (1791-1802) 462 (in response to a Maryland act for construction of a canal from the Chesapeake Bay to the Delaware River, and the improvement of the navigation of the Susquehanna River, Feb. 19, 1801).

⁸¹ 4 PA. LAWS (1802-08) 220 (navigation of the Ohio River, co-operation of Kentucky and Virginia suggested, Mar. 7, 1805).

⁸² 1 TENN. LAWS 1820 (ed. Scott) 835 (improvement in the North Fork of the Holston River at the request of the Virginia legislature, Aug. 4, 1804).

⁸³ 8 PA. LAWS (1822-25) 429 (April 1, 1825).

⁸⁴ 1 BREVARD'S DIG. PUB. STAT. LAWS S. C. 415 (goods from North Carolina travelling into the state over rivers and canals managed by the Catawba Navigation Company, 1795).

proposed federal action.⁸⁵ Conversely, state legislation was occasionally enacted to take effect only when consent thereto by the United States should be given,⁸⁶ but this seems to have been done only where the navigation or harbor improvement was to be financed by a tonnage tax and the assent desired was clearly the assent constitutionally required⁸⁷ for the imposition of such a tax, the assumption evidently being that aside from that special situation there was nothing in the federal Constitution to impede state action.

The most ambitious type of waterway project was the canal. Canals were the internal improvements *par excellence* of the era. Their facilities, artificially created at great expense, constituted the nearest approach to those which were later to be afforded by the railroad system. It took more than a petty local traffic between interior points to justify and support such large scale undertakings. It is manifest from an examination of the canal legislation of the time that here was something designed peculiarly to serve as a route for intercourse and traffic extending beyond the bounds of any single state. Yet with these pre-eminently interstate trade arteries as with all the other highways and waterways which have been examined, we find a regime of state regulations. Two very notable canal enterprises, linking the Hudson River with Lake Erie and with Lake Champlain, were completed by New York as state undertakings.⁸⁸ Besides these, the construction of important canal projects as state works was authorized by various of the states—by Indiana near the falls of the Ohio River,⁸⁹ by Ohio under a general law⁹⁰—and preliminary steps were taken which never came to fruition looking to state construction of important canal systems.⁹¹

Ordinarily, however, the states did not themselves propose to con-

⁸⁵ N. H. COMP. LAWS (1830) 41 (consenting to removal by the United States of rocks in the channel of the Piscataqua River, June 29, 1825).

⁸⁶ See 4 PA. LAWS (1802-08) 244 (April 1, 1805); 5 PA. LAWS (1809-12) 213 (Mar. 20, 1811).

⁸⁷ U. S. CONST., Art. 1, §10, cl. 3 ("No State shall, without the consent of Congress, lay any duty of tonnage . . .").

⁸⁸ See 1 REV. STAT. N. Y. (1827-28) 217, describing these projects as completed, in listing the navigable waterways of the state.

⁸⁹ Ind. Special Acts 1823, p. 78. This legislation had been preceded by grants of franchises for the same purpose to incorporators on two different occasions, but they apparently had not proceeded in the manner requisite for retention of their franchises.

⁹⁰ Ohio Sess. Acts, 1st Sess. 1825, p. 50.

⁹¹ See Ill. Laws 1822-23, p. 151 (commissioners appointed to survey and report on possible canal route between Lake Michigan and the Illinois River); Ohio Laws 1820, p. 147 (similar action as to canal between Lake Erie and the Ohio River); Ohio Laws 1820, 2nd Sess., p. 24 (same); 8 PA. LAWS (1822-25) 478 (commissioners appointed for "the establishment of a communication between the Eastern and the Western waters of this state, and the lakes," April 11, 1825); 6 McCORD STAT. AT LARGE S. C. 124 (board of public works set up with power, *inter alia*, to see to the establishment of canal communications between the Savannah River and various South Carolina coastal rivers, Dec. 18, 1819); REV. CODE VA. 1833 SUPP. 420 (action for uniting the eastern and the western waters by the James and the Kanawha rivers, Feb. 17, 1820).

struct the canals but rather, following the analogy of turnpike roads and navigation improvement companies, chartered companies for the purpose of building them between designated termini. Sometimes the entire course of the canal lay within the territory of the incorporating state, that course being so specified as to connect interior watercourses⁹² or communities within the state⁹³ with the ocean or with a state boundary stream or lake, to form a more convenient passage between boundary watercourses⁹⁴ or interior watercourses,⁹⁵ or, in the Great Lakes states, to join those important bodies of water with important interior watercourses communicating with other states.⁹⁶ Again, only one of the termini—and hence only a part of the route—lay within the borders of the chartering state⁹⁷ or the canal was described as joining with one authorized by another state up to the state line so as to form a continuous communication between points in the two states.⁹⁸

When other states were interested in promoting such an interstate canal, because for instance of their lying on a boundary river which would constitute one of the termini of the canal, a method sometimes employed by such states as an appropriate one for bringing about the improvement was to solicit the concurrent action of the legislatures of the states through which it would run.⁹⁹ Furthermore, where the mag-

⁹² See FOSTER'S DIG. LAWS GA. (1820-29) 135 (Dec. 26, 1826); 2 DIG. LA. ACTS (1804-27) 88 (July 3, 1805); 1 MASS. LAWS (1780-1807) 510 (June 17, 1791); *id.* 536 (Connecticut River to Boston; a principal incorporator was Henry Knox, then serving as Secretary of War in Washington's cabinet, Mar. 10, 1792); 4 MASS. LAWS (1807-16) 237 (June 21, 1811); COMP. PUB. LAWS N. J. (1833) 161 (Jan. 26, 1828); Ohio Sess. Acts, 1st Sess. 1827, p. 92 (Milan to Lake Erie); 5 PA. LAWS (1809-12) 266 (April 2, 1811).

⁹³ See Ill. Laws 1819, p. 121; 2 MASS. LAWS (1780-1807) 563 (Mar. 9, 1793); *id.* 723 (Feb. 26, 1796); Mass. Sess. Laws, May 1819, p. 273; *cf.* REV. LAWS N. J. (1820) 114 (Nov. 22, 1791); 1 N. C. REV. LAWS (1821) 769 (1795); 3 PA. LAWS 1791-1802) 114 (April 10, 1793); 8 PA. LAWS (1822-25) 177 (April 1, 1823).

⁹⁴ See LAWS Ill. Terr. 1817-8, p. 57 (canal to facilitate passage of boats from the Ohio to the Mississippi); LAWS INDIANA TERR. 1801-09 (ed. Philbrick) 154 (cut-off canal at the falls of the Ohio; the project is especially interesting because of the identity of some of the incorporators, who included, *inter alia*, Aaron Burr, George Rogers Clark, and Jonathan Dayton, one of the delegates to the Constitutional Convention, Aug. 24, 1805); Ind. Private Acts 1817-18 (same project); Ky. Sess. Acts 1818, p. 419 (Ohio River); 3 Lrrt. (Ky.) 221 (same, 1804); Mass. Sess. Laws, Jan. 1818, p. 560 (Cape Cod Bay and Buzzards' Bay); Mass. Sess. Laws, Jan. 1822, p. 671 (canal at Gloucester to short cut navigation around Cape Ann); COMP. PUB. LAWS N. J. (1833) 91 (canal between Raritan and Delaware rivers, Dec. 30, 1824); *id.* 92 (canal between Passaic and Delaware rivers, Dec. 31, 1824).

⁹⁵ 2 N. C. REV. LAWS (1821) 1390 (Yadkin and Cape Fear rivers, 1816).

⁹⁶ Ill. Laws 1824, p. 160 (Lake Michigan and the Illinois River).

⁹⁷ See REV. STAT. DEL. (1829) 83 (canal between Delaware River and Chesapeake Bay, Jan. 29, 1801, Jan. 18, 1811); 1 N. C. REV. LAWS (1821) 635 (connecting Pasquotank River in North Carolina with Elizabeth River in Virginia, Dec. 25, 1790); *id.* 699 (amending the foregoing, 1792); Ohio Sess. Acts, 1st Sess. 1827, p. 1 (interior Ohio point to Pittsburgh).

⁹⁸ See 3 PA. LAWS (1791-1802) 114 (to connect the water of Brandywine Creek with a Delaware canal passing through that state to Christiana Creek, April 10, 1793).

⁹⁹ Ill. Laws 1822-23, p. 151 (inviting preliminary action by the Ohio and In-

nitude of the project and the substantial character of another state's share in the intercourse to be generated by it led the state within whose borders the canal would be constructed to suppose that such other state would be willing to assist, the legislature, in authorizing the undertaking, might solicit the co-operation of such other interested state and offer it a share in the improvement as a joint venture of the two states.¹⁰⁰ Should the project appeal to the latter, it then adopted legislation auxiliary to that of the state initiating the action, in aid of corporations set up by the latter to carry out the undertaking.¹⁰¹ Similarly the co-operation of the Federal Government in the construction of the canal might be solicited, if the waterway were felt to be of national significance, although even in such cases it would seem to have been contemplated that the state commissioners should draw up the plans for the project, leaving as the federal role largely that of supplying the finances.¹⁰²

Of independent Congressional legislation on canals, there is very little to be found and that in all cases related to independent specific constitutional grants of power other than the commerce clause. In an act providing fortifications and defenses for the country's seaports and harbors, Congress did include provision for deepening a canal in the neighborhood of New Orleans, so as to admit of the passage of gunboats, and for extending it to the Mississippi River if, in the President's opinion, that would conduce to the more effectual defense of the city.¹⁰³ It also granted the usual privileges to a company for the construction of a canal within the limits of the District of Columbia.¹⁰⁴ Where a state-projected canal lay for part of the distance through public lands reserved to the United States, the latter's consent to the construction of the canal by the state was given, saving to the Federal Government, however, the right to pass along it without payment of tolls or charges.¹⁰⁵

diana legislatures looking to the construction of a canal from the Maumee River to the Wabash River); 3 PA. LAWS (1791-1802) 462 (accepting and conforming with a Maryland law for the construction of a canal between the Delaware River and Chesapeake Bay, Feb. 19, 1801).

¹⁰⁰ See Ind. Special Acts 1823, p. 80 (application to Ohio to join in construction of canal at the Falls of the Ohio River).

¹⁰¹ 2 N. C. REV. LAWS (1821) 1532 (auxiliary to a Virginia act setting up a company to establish communications between the Roanoke River, the tributaries of the Chowan River, and any watercourses lying between them and the Potomac River, 1820); TAYLOR'S REVISAL N. C. LAWS (1821-25) 186 (assenting to a Virginia act conferring power on the Dismal Swamp Canal Company to open a navigable communication between that canal and the nearest point in the Northwest (Ohio?) River, 1825); 8 PA. LAWS (1822-25) 431 (consenting to a New Jersey act establishing the Delaware and Raritan Canal insofar as that involved use of the waters of the Delaware River, April 9, 1825); cf. *id.* 429 (vesting the privilege of improvement of the Lackawaxen River in a New York company established to build a canal between the Delaware and the Hudson, subject to various qualifications stated, April 1, 1825).

¹⁰² Cf. Ohio Laws 1820, p. 147.

¹⁰³ 2 STAT. 516 (1809).

¹⁰⁴ 2 STAT. 517 (1809).

¹⁰⁵ 3 STAT. 659 (1820) (Illinois canal between Lake Michigan and the Illinois River).

3. BRIDGES AND FERRIES

All that the carrier or traveler, whose journey involved movement either wholly over a highway or wholly along a stream, needed to have provided for him was a usable artery of traffic adapted to his vehicle or vessel; he could himself do everything else requisite. But the problem was complicated when a road was interrupted by a stream. Here some special facilities had to be provided for the land traveler if he were to get across and be on his way on the other side of the water. Two solutions were available. Either there might be a fixed extension of the highway across the stream; *i.e.*, a bridge, in which case the traveler needed only, as before, to have the facility provided and he could do the rest; or there might be a moving projection of the highway; *i.e.*, a ferry boat, in which case, while superficially it would appear that for a part of the time vehicle and motive power as well as highway were being furnished the traveler, in effect what he was getting was a floating bridge. Either bridge or ferry might be of moment to interstate traffic by land in so far as they linked, within a state, segments of a highway which itself was a channel of communication with other states. Furthermore a bridge across a navigable stream was also of interest to interstate traffic by water because of its potential hindrance to such traffic.

The consolidated general laws displayed a tendency to remit the establishment and regulation of bridges and ferries to local authorities, who were given the discretion to grant ferry licenses¹⁰⁶ and to provide for the building of bridges¹⁰⁷ or in other jurisdictions were flatly directed to establish and maintain ferries¹⁰⁸ or bridges.¹⁰⁹ Still another alternative adopted was to entrust the function of establishing ferries to municipalities as a discretionary matter.¹¹⁰ This was the manner in

¹⁰⁶ TOULMIN'S DIG. LAWS ALA. (1823) 391 (Dec. 21, 1820); PRINCE'S DIG. LAWS GA. (1819) 400 (Dec. 6, 1805); LAWS INDIANA TERR. 1801-1809 (ed. Philbrick) 352 (Sept. 17, 1807); Ind. Acts 1817-18, p. 292; MOORHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 79 (Dec. 22, 1800); 2 REV. LAWS ME. (1821) 768; 1 LAWS MD. 1692-1839 (ed. Dorsey) 175 (May 1781); *id.* 425 (Nov. 1799); 1 LAWS DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 80 (July 9, 1806); *id.* 699 (Dec. 8, 1820); 1 REV. STAT. N. Y. (1827-28) 526; 1 N. C. REV. LAWS (1821) 515 (1784); Ohio Laws 1820, p. 171; 1 LAWS TENN. 1820 (ed. Scott) 656 (Oct. 26, 1799); COMP. LAWS VT. (1824) 477 (Mar. 3, 1797); *cf.* REV. CODE MISS. (1824) 350.

¹⁰⁷ PRINCE'S DIG. LAWS GA. (1819) 399 (Dec. 4, 1799); *id.* 400 (Dec. 6, 1805); REV. CODE MISS. (1824) 350; 1 N. C. REV. LAWS (1821) 515 (1784); COMP. LAWS VT. (1824) 432 (Mar. 3, 1797); *cf.* 2 DIG. LA. ACTS (1804-27) 312 (Mar. 12, 1818).

¹⁰⁸ PUB. STAT. CONN. (1824) 166; 2 MASS. LAWS (1780-1807) 749 (Feb. 14, 1797).

¹⁰⁹ PUB. STAT. CONN. (1824) 220.

¹¹⁰ REV. CODE MISS. (1824) 636 (Natchez, Feb. 5, 1818); REV. LAWS N. J. (1820) 66 (Perth Amboy charter, Dec. 21, 1784); *id.* 73 (Burlington charter, Dec. 21, 1784); Ohio Sess. Laws, 1st Sess. 1827, p. 46 (Cincinnati charter); *cf.* 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 137 (charter of Georgetown, authorization to regulate ferries on the Charleston road and on the road leading to North Carolina, 1791).

which Congress chose to deal with the subject in legislating for the District of Columbia.¹¹¹ Occasionally the statutes were so worded as to make it clear that the authority was not confined to ferries over interior rivers but extended as well to interstate ferry franchises over boundary streams.¹¹²

This way of handling the matter was by no means universal, however. Examples are plentiful where the legislature itself granted licenses directly to petitioners for the operation of ferries at designated localities,¹¹³ including ferries across interstate boundary waters,¹¹⁴ and where it authorized the construction and maintenance of specified bridges across coastal rivers,¹¹⁵ or streams flowing to or from,¹¹⁶ or forming a

¹¹¹ 2 STAT. 195 (1802) (charter of Washington, empowering the municipal authorities to erect and repair bridges).

¹¹² LAWS INDIANA TERR. 1809-16 (ed. Ewbank & Piker) 649 (Ohio River, Dec. 26, 1815); MOORHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 79 (Dec. 22, 1806); REV. CODE MISS. (1824) 636 (city of Natchez authorized to regulate and lease ferry between there and Louisiana, Feb. 5, 1818); Ohio Laws 1820, p. 171 ("ferry on or across any of the waters running through or bounding this state"); Ohio Sess. Acts, 1st Sess. 1827, p. 46 (charter of Cincinnati, authorizing city to regulate ferries across the Ohio River).

¹¹³ See REV. STAT. DEL. (1829) 606 (Jan. 27, 1808); PRINCE'S DIG. LAWS GA. (1819) 417 (schedule of special ferry franchises); REV. LAWS N. J. (1820) 810 (same); 2 PA. LAWS (1780-91) 332 (Sept. 6, 1785); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 358 (ferry on the Charleston to North Carolina road, 1779); cf. 1 LAWS MD. 1692-1839 (ed. Dorsey) 425 (validating act for ferries *de facto* established, Nov. 1799).

¹¹⁴ REV. STAT. DEL. (1829) 602 (ferry across the Delaware River at Newcastle, Jan. 21, 1803); PRINCE'S DIG. LAWS GA. (1819) 417 (fourteen ferries over the Savannah River listed in schedule of ferry franchises); Ill. Laws 1819, p. 104 (Mississippi River); Ill. Laws 1824, p. 79 (same); *id.* 114 (Ohio River); Ind. Laws 1821, p. 146 (same); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 347 (1769); *ibid.* (1770); *id.* 354 (1778); *id.* 362 (1784); *id.* 367 (1786); *id.* 384 (1789); *id.* 399 (1796); *id.* 436 (1807) (all involving ferries over the Savannah River); 2 REV. CODE VA. (1819) 23 (Potomac River, Jan. 30, 1819); *ibid.* (Ohio River, Jan. 30, 1819); cf. Ill. Laws 1822-23, p. 142 (Shawneetown empowered to maintain a ferry over the Ohio River).

¹¹⁵ REV. STAT. DEL. (1829) 566 (Jan. 16, 1798); *ibid.* (Feb. 2, 1802); *id.* 567 (Jan. 30, 1813); *id.* 568 (Feb. 2, 1793); *id.* 569 (Nov. 6, 1773); *id.* 574 (Feb. 5, 1802); *id.* 578 (Feb. 3, 1813); *id.* 581 (Jan. 20, 1807); 1 MASS. LAWS (1780-1807) 226 (Mar. 9, 1785); *id.* 544 (Mar. 9, 1792); 2 MASS. LAWS (1780-1807) 616 (Feb. 25, 1794); *id.* 635 (Feb. 27, 1794); *id.* 698 (Feb. 8, 1796); *id.* 741 (June 17, 1796); *id.* 796 (June 22, 1797); 3 MASS. LAWS (1780-1807) 29 (June 19, 1801); *id.* 324 (Mar. 3, 1806); 4 MASS. LAWS (1807-16) 483 (June 13, 1815); Mass. Sess. Laws, Jan. 1818, p. 605; Mass. Sess. Laws, Jan. 1819, p. 185; cf. 2 MASS. LAWS (1780-1807) 572 (Mar. 26, 1793); 3 MASS. LAWS (1780-1807) 315 (bridge across estuary, Feb. 24, 1806); 4 MASS. LAWS (1807-16) 1 (bridge in Boston harbor from island to mainland, June 19, 1807); Mass. Sess. Laws 1816, p. 228 (same).

¹¹⁶ Ind. Laws 1822, p. 97 (White Water); 2 MASS. LAWS (1780-1807) 723 (Androscoggin River, Feb. 26, 1796); *id.* 742 (Connecticut River, June 18, 1796); *id.* 796 (Androscoggin River, June 22, 1797); 4 MASS. LAWS (1807-16) 343 (same, Feb. 27, 1813); 3 PA. LAWS (1791-1802) 436 (Youghiogheny River, Mar. 15, 1800); 5 PA. LAWS (1809-12) 114 (Monongahela River at Pittsburgh, Mar. 19, 1810); *id.* 159 (Allegheny River at Pittsburgh, Mar. 20, 1810); 2 LAWS TENN. 1820 (ed. Scott) 78 (Cinch River, 1812); cf. Laws Ill. Terr. 1817-18, p. 36 (Kaskaskia River); Ill. Laws 1819, p. 103 (Little Wabash River); *id.* 364 (Kaskaskia River); Ill. Laws 1820-21, p. 145 (same); *id.* 156 (four named rivers); Ill. Laws 1822-23, p. 200 (Cahokia Creek); 1 DIG. LA. ACTS (1804-27) 134 (Bayou Lafourche); 3 PA. LAWS (1791-1802) 274 (Lehigh River, April 4, 1796); *id.* 290 (same, Mar. 28, 1797); *id.* 312 (Schuylkill River, Mar. 16, 1798); 4 PA. LAWS (1802-08) 297 (same, Mar. 10, 1806).

boundary with,¹¹⁷ other states—at least some of such bridges being adjuncts to highways which were avenues of interstate intercourse.¹¹⁸ Congress, as a legislature for the District of Columbia, in this manner authorized construction of bridges over the Potomac River within the District.¹¹⁹

Where a bridge was to cross an interstate boundary river, a standard procedure was for both the riparian states to grant the privilege of erection and maintenance of the bridge to the same group of applicants¹²⁰ or to appoint commissioners to act in conjunction for the establishment of the bridge.¹²¹ The state initiating action would in such cases recognize the interest of the other state by expressly conditioning the operation of the act on the adoption of similar legislation there.¹²²

The heavy capital investment required for the construction of a turnpike or a canal was in itself ordinarily an adequate guaranty that an established route would not be substantially duplicated by another entrepreneur; and of course overlapping improvement of a navigable channel was a physically impossible phenomenon. But there was no equivalent financial or physical assurance that a bridge or ferry would not be subject to the risk of establishment of competing facilities close at hand. The installation cost of such a service was not in itself high enough to insure that the first ferryman or bridge in a locality which had proved to be profitable would be allowed to maintain the initial monopoly. Faced with this condition, legislatures commonly gave some assurance

¹¹⁷ 2 MASS. LAWS (1780-1807) 568 (Piscataqua River; the licensee was John Langdon, one of the New Hampshire delegates to the Constitutional Convention, Mar. 22, 1793); Mass. Sess. Laws, Jan. 1820, p. 421 (Piscataqua River bridge between Portsmouth, New Hampshire and Kittery); 3 PA. LAWS (1791-1802) 200 (Delaware River bridge at Easton, Mar. 13, 1795); *id.* 336 (Delaware River bridge at Trenton, April 4, 1798); 4 PA. LAWS (1802-08) 156 (Delaware River bridge at Milford, Mar. 12, 1804); 5 PA. LAWS (1809-12) 111 (Delaware River bridge in Bucks County, Mar. 19, 1810); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 419 (Savannah River bridge, 1801); *id.* 476 (same, at Augusta, Georgia, 1813).

¹¹⁸ REV. STAT. DEL. (1829) 574 (Wilmington-Philadelphia road, Jan. 20, 1801); Laws Ill. Terr. 1817-18, p. 36 (road from Vincennes to Belleville or St. Louis); Ill. Laws 1819, p. 44 (Vincennes-St. Louis road); Ind. Laws 1822, p. 97 (road from the Ohio line to Indianapolis); 2 MASS. LAWS (1780-1807) 567 (Merrimack River bridge on Andover-Methuen road to New Hampshire, Mar. 19, 1793); Ohio Local Acts, 1st Sess. 1824, p. 116 (bridge on road between Zanesville and Wheeling); 2 PA. LAWS (1780-91) 332 (bridge on road between Philadelphia and Trenton, Sept. 6, 1785); 2 LAWS TENN. 1820 (ed. Scott) 78 (Kentucky road, 1812); *cf.* 1 MASS. LAWS (1780-1807) 97 (repair of public bridges on roads leading to New Hampshire authorized, Jan. 16, 1783); REV. LAWS N. J. (1820) 708 (forbidding construction of bridge across Delaware River between New Jersey and Pennsylvania save after examination and approval of three freeholders, Mar. 1, 1820).

¹¹⁹ 2 STAT. 457 (1808) (private corporation); 3 STAT. 583 (1820) (charter of Washington, empowering the city "to erect and repair bridges").

¹²⁰ See statutes *supra* note 118.

¹²¹ See 5 PA. LAWS (1809-12) 216 (acquiescing in New Jersey legislation for erection of Delaware River bridge, Mar. 23, 1811).

¹²² See 3 PA. LAWS (1791-1802) 200 (Mar. 13, 1795); *id.* 336 (April 4, 1798); 4 PA. LAWS (1802-08) 156 (Mar. 12, 1804); 5 PA. LAWS 1809-12) 111 (Mar. 19, 1810).

of protection to persons furnishing such facilities by expressly providing, in general ferry laws¹²³ and in statutes granting specific ferry franchises¹²⁴ on defined lines of interstate traffic or across boundary waters, that no competing service should be set up or maintained within a stated distance (ordinarily one or two miles) on either side of the licensed enterprise. Occasionally the legislative judgment as to the adequacy of the limited facilities thus afforded was stated in the operative statutes.¹²⁵ Intrusion on or interference with the monopoly position thus created was declared to be an offense and sanctions were provided.¹²⁶ The sporadic express exemption of postriders, permitting them to keep boats for crossing rivers to avoid detention at ferries, with the qualification that they should not transport any passengers across at public ferries other than those who were traveling by stage¹²⁷ would seem to suggest that this type of traffic was included under the general laws and hence needed to be expressly mentioned if it were to receive special treatment.

Here and there attempts to mesh the ferry legislation of jurisdictions facing each other across a boundary river were articulated. To preserve the interests of inhabitants of the enacting state, the mandate against issuing ferry licenses for points within a stated minimum distance of established ferries was declared inapplicable to points across the river from an established ferry location in the adjoining state,¹²⁸ while the latter's co-ordinate authority was recognized by according its franchises equal validity with those of the enacting state under statutes penalizing unauthorized ferrying.¹²⁹

The judgment embodied in the monopoly provisions of bridge and ferry franchises was not merely a method of protecting property interests. The rights and conduct of travelers were also involved. To the extent that such provisions restricted opportunity for exercise of a free

¹²³ TOULMIN'S DIG. LAWS ALA. (1823) 391 (Dec. 21, 1820); LAWS ILL. TERR. 1812, p. 40; IND. ACTS, 1817-18, p. 292; MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 79 (Dec. 22, 1806); *ibid.* (Feb. 14, 1820); 1 DIG. LA. ACTS (1804-27) 474 (April 19, 1805); R. I. REV. LAWS (1822) 410; *cf.* 2 REV. LAWS ME. (1821) 768; 1 LAWS MD. 1692-1839 (ed. Dorsey) 425 (Nov. 1799); LAWS DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 80 (July 9, 1806); *id.* 699 (Dec. 8, 1820); OHIO LAWS 1820, p. 171 (all prescribing penalty for keeping ferry and demanding pay without authority).

¹²⁴ ILL. LAWS 1819, p. 105 (Mississippi River ferry); ILL. LAWS 1824, p. 79 (same); *cf.* 1 DIG. LA. ACTS (1804-27) 264 (exclusive ferry privilege across the Mississippi at New Orleans, Mar. 18, 1820).

¹²⁵ See, *e.g.*, preamble to LAWS ILL. TERR. 1812, p. 40 ("Whereas . . . at no one point on either of those streams the Ohio and Mississippi is the crossing so frequent as to warrant more than one ferry . . .").

¹²⁶ TOULMIN'S DIG. LA. ACTS (1823) 417 (Dec. 12, 1820); MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 79 (Jan. 16, 1813); COMP. LAWS VT. (1824) 477 (Mar. 3, 1797); *cf.* 2 MASS. LAWS (1780-1807) 749 (Feb. 14, 1797); 1 N. C. REV. LAWS (1821) 222 (penalizing false pretense of ferry privilege).

¹²⁷ 1 N. C. REV. LAWS (1821) 569 (1787).

¹²⁸ MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 79 (Dec. 22, 1806).

¹²⁹ MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 79 (Jan. 16, 1813).

choice between alternative services in crossing a river intersecting a highway, they plainly constituted legislative intervention in the conditions under which traffic moved along the highway. True, they were based on the premise that by and large its movement would be promoted by inducing greater alacrity in establishing such facilities and by eliminating ruinous competition tending to the discontinuance or lackadaisical maintenance of established facilities. Without disputing the soundness of the legislative choice of policy, one may nevertheless note that the election to grant exclusive franchises necessarily involved a regulation of traffic and travel, including that between states. Insofar as special considerations at particular places called for a different treatment, the regulations were adapted to them by the incorporation of provisos.¹³⁰ If existing arrangements did not seem adequately to care for the needs of the traveling public, the legislatures reserved the right to repeal the limitation in question¹³¹ despite the consequences of such repealer upon the fortunes of existing ferries engaged in the business of furnishing interstate communication.

In one particularly interesting case, the construction privilege was granted to the proprietors of a line of stages between a city in the enacting state and one in an adjoining state and construction of a road, bridge, and ferry constituting a substantial part of the route between such cities by such company was authorized, so far as such route lay within the enacting state.¹³²

4. PROVISIONS OF COASTAL AND HARBOR IMPROVEMENTS

Ports and harbors constituted another item in the physical plant of the nation's transportation system. Their location, like that of natural watercourses, was fixed by the accidents of geology and not by legislative response to practically articulate economic demands. But, again like natural watercourses, their utility for purposes of navigation could be either enhanced or diminished according to what was done to them. A well-ordered system of waterfront improvements could materially benefit shipping, while haphazard or accidental building could seriously harm it. In undertaking the regulation of ports and harbors, then, the state legislatures were acting with reference to a matter generically like others which have already been considered.

¹³⁰ See Laws Ill. Terr. 1812, p. 41 (saving clause as to re-establishment of named ferry at St. Louis, and continuance of established ferries authorized by Indiana Territory, in statute prescribing generally the distance between ferries on the Ohio and the Mississippi rivers); MOREHEAD & BROWN, DIG. STAT. LAWS KY. (1834) title 79 (towns excepted from provision for minimum distance between ferry locations, Dec. 22, 1806, Feb. 14, 1820).

¹³¹ Cf. Laws Ill. Terr. 1814, p. 50 (repealing two-miles-apart limitation provided for ferries across the Ohio and Mississippi rivers).

¹³² 2 PA. LAWS (1780-91) 332 (proprietors of Trenton-Philadelphia stages authorized to build road between Philadelphia and Bristol, Pennsylvania, Sept. 6, 1785).

Sometimes legislatures handled each case as one calling for independent determination, conferring the power to erect particular docks or wharves at named harbors on the littoral proprietors,¹³³ on designated officials,¹³⁴ or on harbor improvement companies constituted for the particular ports;¹³⁵ and local authorities were empowered to establish buoys and channel markers.¹³⁶ The provision of monuments and landmarks on islands and rocks off the coast was occasionally confided to local semi-official organizations connected with navigation.¹³⁷ Other legislatures refrained from exercising control over the erection of wharves, the establishment of harbor lines, and the repair of docks directly, entrusting the regulation of such matters to the local authorities of the principal seaport towns instead¹³⁸—an indication that it was viewed by and large as a matter of municipal administration; and this was the method which commended itself to Congress in legislating for the District of Columbia.¹³⁹ When negative rather than affirmative measures for harbor improvement were needed, the states were more likely to handle the matter directly, by providing for the clearance of obstructions from the port or harbor¹⁴⁰ or by condemning their erection or maintenance.¹⁴¹

The provision of harbor facilities seems not to have been deemed a matter peculiarly and exclusively of state, as contrasted with federal, competence, however, in the manner most of the matters heretofore con-

¹³³ See 3 MASS. LAWS (1780-1807) 371 (June 23, 1806); *cf.* 4 PA. LAWS (1802-08) 405 (specification of character of wharves allowable in Southwark, directing manner of permissible construction and alteration of existing piers to conform to legislation, April 7, 1807).

¹³⁴ 2 PA. LAWS (1780-91) 24 (borough of Southwark, Sept. 20, 1782); 4 PA. LAWS (1802-08) 244 (Delaware River waterfront of Philadelphia, April 1, 1805).

¹³⁵ 2 MASS. LAWS (1780-1807) 553 (June 27, 1792); *id.* 800 (Feb. 2, 1796); 3 MASS. LAWS (1780-1807) 306 (June 14, 1805); 4 MASS. LAWS (1807-16) 27 (Mar. 8, 1808); *id.* 88 (June 17, 1809); *id.* 111 (Mar. 1, 1810); *id.* 197 (Feb. 25, 1811); *id.* 388 (Feb. 22, 1814); Ohio Local Acts, 1st Sess. 1824, p. 45.

¹³⁶ 1 BREVARD'S DIG. PUB. STAT. LAWS S. C. 414 (1791).

¹³⁷ 3 MASS. LAWS (1780-1807) 392 (Marine Society of Marblehead, Feb. 25, 1807).

¹³⁸ See REV. STAT. DEL. (1829) 682 (charter of Wilmington, June 13, 1772); REV. CODE MISS. (1824) 628 (Natchez, Jan. 26, 1821); LAWS DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 967 (charter of St. Louis, Dec. 9, 1822); REV. LAWS N. J. (1820) 66 (charter of Perth Amboy, Dec. 21, 1784); *id.* 73 (charter of Burlington, Dec. 21, 1784); Ohio Local Acts, 1st Sess. 1825, p. 59 (charter of Marietta); R. I. REV. LAWS (1822) 484 (Providence); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 21 (charter of Beaufort, 1803); *id.* 36 (charter of Charleston, 1783); *id.* 140 (charter of Georgetown, 1805); *cf.* Ohio Sess. Laws, 1st Sess. 1827, p. 40 (charter of Cincinnati, authorizing city to construct wharves and docks); 4 PA. LAWS (1802-08) 67 (Board of Wardens for the Port of Philadelphia given supervision of extension of wharves, Mar. 29, 1803); *id.* 232 (licensing of building of wharves and fences in the Schuylkill River to be by the Port Wardens, Mar. 15, 1805).

¹³⁹ 2 STAT. 332 (1805) (charter of Georgetown); 3 STAT. 583 (1820) (charter of Washington).

¹⁴⁰ 2 N. C. REV. LAWS (1821) 1395 (port of Washington, 1816); 8 PA. LAWS (1822-25) 145 (harbor of Presque Isle, Mar. 21, 1823).

¹⁴¹ 1 N. Y. REV. STAT. (1827-28) 686 (New York Bay).

sidered appear to have been regarded, for there were instances of cessions of public piers and sites for the erection of public piers by the state legislatures to Congress.¹⁴² Congressional provision was made for the erection of piers in coastal rivers but conditioned on obtaining a cession of sovereignty to the United States by the state.¹⁴³ Protection of such federally installed harbor improvements would seem on the other hand to have been looked upon as a matter to be handled by the states.¹⁴⁴

There was one class of works intimately connected with the carrying trade, the control of which the states virtually abdicated in favor of the central government. That was the lighthouse system. Prior to the adoption of the Constitution in 1787, a number of lighthouses were being maintained by states but, starting almost contemporaneously with the new government, these were ceded to the United States¹⁴⁵ and so also from time to time thereafter were sites for the erection of additional lighthouses.¹⁴⁶ This series of cessions was matched by a corresponding series of acceptances expressed in Congressional statutes. Indeed, one of the earliest acts of the first Congress had been for the establishment of lighthouses, beacons, buoys, and public piers.¹⁴⁷ Thereafter there were frequent manifestations of federal activity in this field, with Congressional enactments as to designated localities for the installation within or adjacent to the territorial waters and harbors of the several states of buoys,¹⁴⁸ beacons,¹⁴⁹ and lighthouses.¹⁵⁰ However, the cessions by the states were not the absolute relinquishments that might have been expected had the grantors regarded themselves as deprived of power in the premises by the adoption of the Constitution or the enactment of federal statutes. Instead they were conditioned on the allowance of equivalent compensation to that accorded to other states thereafter for similar grants, should compensation in any case be allowed,¹⁵¹ and furthermore by provision for reversion to the state if the United States should in the future fail to keep the ceded lighthouses properly repaired and lighted,¹⁵² a provision rather clearly indicating a conviction that the

¹⁴² See, *e.g.*, REV. STAT. DEL. (1829) 672, 673 (Jan. 29, 1791; Jan. 11, 1803; Feb. 1, 1827).

¹⁴³ 2 STAT. 150 (1802) (Delaware River).

¹⁴⁴ Cf. R. I. REV. LAWS (1822) 423 (prescribing penalties for fastening vessels to or running them against stakes or buoys set out in the waters of the state by the United States).

¹⁴⁵ REV. STAT. DEL. (1829) 672 (Jan. 29, 1791); 1 MASS. LAWS (1780-1807) 494 (June 10, 1790).

¹⁴⁶ See, *e.g.*, TOULMIN'S DIG. LAWS ALA. (1823) 862 (Dec. 20, 1820).

¹⁴⁷ 1 STAT. 53 (1789).

¹⁴⁸ 1 STAT. 353 (1794); *id.* 516 (1797); *id.* 540 (1798); *id.* 553 (same); 2 STAT. 270 (1804); *id.* 476 (1808); 3 STAT. 534 (1819).

¹⁴⁹ 1 STAT. 730 (1799); 2 STAT. 476 (1808); 3 STAT. 534 (1819).

¹⁵⁰ 1 STAT. 540 (1798); *id.* 553 (same); 2 STAT. 150 (1802); *id.* 270 (1804); *id.* 476 (1808); 3 STAT. 534 (1819).

¹⁵¹ 1 MASS. LAWS (1780-1807) 494 (June 10, 1790).

¹⁵² *Ibid.*

states regarded the subject as one still within their competence should they deem it necessary or desirable to resume its superintendence.

The inlets, coves, and petty tributary streams along the seacoast formed part of the navigable waters; and sometimes as to these the states acted in much the same manner as they did with regard to navigable interior watercourses beyond tidewater—providing for survey of the coasts and erection of beacons,¹⁵³ directing the staking of channels between particular places along the seacoast,¹⁵⁴ and making provision for removal of obstructions from such waters in the same manner as from interior watercourses¹⁵⁵ or incorporating companies for navigation improvement at such places.¹⁵⁶

Nevertheless the states felt no compulsion to refrain from interfering with natural conditions in this connection for the benefit of those at sea to the prejudice of those on land. Occasionally a generalized procedure was established by statute for the reclamation and development of lands bordering the sea, by the draining and ditching of lowlands and marshes and the damming of streams.¹⁵⁷ A compromise between the competing interests in navigation and in reclamation was effected by distinguishing between those creeks which might and those which might not be shut up, on the basis of their capacity for accommodating or permitting the passage of watercraft of a prescribed character.¹⁵⁸ Again privileges for coastal improvements, including the construction and maintenance of requisite dams, were individually granted;¹⁵⁹ and permission was given to build milldams in tidal creeks in harbors.¹⁶⁰ Routes for intercourse primarily interstate or international in character were accorded no necessary primacy over those devoted almost exclusively to the movement of the internal traffic of the state.

¹⁵³ 1 N. C. REV. LAWS (1821) 527 (1785).

¹⁵⁴ *Ibid.* (Beaufort to the Neuse River).

¹⁵⁵ See 1 DIG. LA. ACTS (1804-27) 542 (Bayou Plaquemine, Mar. 7, 1820); 1 N. C. REV. LAWS (1821) 348 (Currituck Inlet, 1777); *id.* 487 (Bogue Inlet, 1784); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 1240 (1738).

¹⁵⁶ 2 N. C. REV. LAWS (1821) 1526 (Ocracoke Inlet, 1820); TAYLOR'S REVISAL, N. C. REV. LAWS (1821-25) 12 (deepening channel in Pamlico Sound, 1821).

¹⁵⁷ PUB. STAT. CONN. (1824) 365; 2 MASS. LAWS (1780-1807) 721 (Feb. 26, 1796); REV. LAWS N. J. (1820) 82 (Nov. 29, 1788); *id.* 128 (Nov. 24, 1792); *cf.* 1 PA. LAWS (1700-80) 168 (proviso permitting erection of such structures, in general law forbidding obstructions in streams, Aug. 14, 1725).

¹⁵⁸ See REV. LAWS N. J. (1820) 82 (navigability for shallops carrying eight cords of wood, Nov. 29, 1788).

¹⁵⁹ 1 MASS. LAWS (1780-1807) 463 (Feb. 17, 1789); *cf.* REV. LAWS N. J. (1820) 811 (listing private acts authorizing and regulating the construction and maintenance of dams, banks, and sluices); TAYLOR'S REVISAL, N. C. REV. LAWS (1821-25) 26 (incorporating Roanoke Inlet Company with authority to make embankments across Roanoke and Croatan sounds and to stop up the navigation through Croatan Sound, 1821); 1 PA. LAWS (1700-80) 227 (April 12, 1760); 3 PA. LAWS (1791-1802) 206 (Mar. 31, 1795); *id.* 279 (Mar. 4, 1797); 4 PA. LAWS (1802-08) 159 (Mar. 19, 1804) (all authorizing the damming of marshland streams communicating with the Delaware River).

¹⁶⁰ 3 MASS. LAWS (1780-1807) 123 (Mar. 7, 1803).

Thus, in granting authority to construct the Cape Cod Canal, Massachusetts conditioned her permission on the erection of toll bridges to connect the neighborhood highways on the Cape.¹⁶¹

5. INTERSTATE TELEGRAPH LINES

The sense of anomaly which today's reader experiences in finding the problem of government control of railroads¹⁶² bruited while signers of the Constitution were still alive will be matched, perhaps exceeded, by contemporary appearance of the question of interstate communication by telegraph. Tantalizingly brief and ambiguous, the references may well be quoted in full and followed by one or two cautious observations. They consist of materials from two sources, one the proceedings of Congress, the other the statutes of Pennsylvania.

The earlier materials, from the federal House of Representatives, open with the following episode of December 22, 1807.¹⁶³

Mr. Crowninshield said it would be acknowledged by all that the prompt communication of information along the coast, to different parts of the country would be extremely advantageous at any time; perhaps it was more proper to be considered at this moment, than at any time since the conclusion of the Treaty of Peace, which established our Independence. It was true that the United States had a mail running from each extreme of the continent to the other; but information could not, through the medium of the mail, be conveyed with the expedition which a telegraph would afford to important intelligence. This had been acknowledged by almost all Governments; and in France, Spain, and England they had been found of great utility. There had been a telegraph in this country, from the Vineyard to Boston, a distance of about seventy miles; and communications could be made by it between those places in one hour. Calculating from this act, information might be communicated from Norfolk to the Seat of Government in two hours, and from Washington to New York or Boston in three or four hours. To bring this subject before the House, he should offer the following resolution: "Resolved, that it is expedient to authorize the President of the United States to establish such telegraphs, along the coasts and in other situations in the United States as he may deem proper." Mr. C. said as this was a subject which might require some discussion, being so little known, he should not now press its decision, but moved that the resolution be referred to a Committee of the Whole tomorrow. After some conversation on the propriety of a reference to a Committee of

¹⁶¹ Mass. Sess. Laws, Jan. 1818, p. 560.

¹⁶² *Supra* note 28.

¹⁶³ 17 ANNALS OF CONGRESS 1223, 1224 (1882).

the Whole in preference to a select committee, the reference proposed by the mover of the resolution was agreed to.

The matter was reopened after the Christmas recess in the following manner on January 4, 1808:¹⁶⁴

Mr. Crowninshield presented to the House a memorial and petition of Jonathan Grout, of the State of Massachusetts, stating that he is the inventor of the art of communicating intelligence by telegraph, to a much greater extent, than has heretofore been known or practised in any part of the world; and praying that some person may be authorized on behalf of the United States to contract with him for the establishment of such line or lines of telegraphs, for the purpose of conveying intelligence of public or Governmental concern; or that such other contract on behalf of the public may be made with your petitioner, as may seem meet and proper.

Thereupon the petition was referred to a select committee of the House,¹⁶⁵ and on March 30th¹⁶⁶

The committee to whom was referred the memorial of Jonathan Grout, relative to telegraphs, was discharged from the further consideration of the subject, and it was referred to the Secretary of the Treasury, to report thereon to the next session of Congress.

What, if any, recommendations were made does not appear. At any rate, no Congressional action in aid of Mr. Grout is revealed anywhere in the pages of the Statutes at Large. However that may be, he apparently obtained funds or an assurance of funds adequate to buoy his hopes from some quarter for, turning now to state materials, the following statute quoted *in toto* with its preamble, was adopted on March 24, 1809, by the Pennsylvania legislature:¹⁶⁷

Whereas Jonathan Grout has erected a line of telegraphs from Philadelphia to Port Penn, in the state of Delaware, for the purpose of transmitting the earliest possible intelligence from the Delaware Bay to Philadelphia, and vice versa, and has petitioned this legislature, stating that the south half of Reedy Island at the head of the Delaware Bay in said state, owned by this Commonwealth, is so situated that if a telegraph were erected thereon its position would ensure an earlier conveyance of intelligence through such line than could be effected from any other place in that vicinity, that it will conduce to the extension of such line to the Capes of the Delaware Bay, which is laudable and promotive of public good: Therefore, Section 1., Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General

¹⁶⁴ *Id.* 1271.

¹⁶⁵ *Id.* 1272.

¹⁶⁶ 18 ANNALS OF CONGRESS 1874 (1882).

¹⁶⁷ 5 PA. LAWS (1809-12) 39.

Assembly met, and it is hereby enacted by the authority of the same, That the use of all that part of Reedy Island, the property of this Commonwealth, be, and hereby is granted unto Jonathan Grout, his heirs and assigns, being citizens of the United States, as a telegraphic station until otherwise directed by law.

There the matter rests. The next emergence of the telegraph in American history is associated with the name of Morse, not with that of Grout, and with the nomination of Polk rather than with the administration of Jefferson. The chief constitutional significance of the Congressional proceedings quoted is the intimate linking of the subject of telegraphs with that of the mails, and the utter absence of any language remotely allusive to the commerce clause in the course of the discussion; also the reference of the subject to a select committee and not to the already well established standing Committee on Commerce and Manufactures, thus implying elements of constitutional or other novelty and making manifest a total lack of consciousness of relationship between telegraphic communication and interstate commerce as then understood. The Pennsylvania legislation, while making it crystal clear that the enterprise involved the transmission of interstate messages, is blurred in its implications by the fact that the direct object was a cession of state property and hence peculiarly a matter of state concern under any view of the distribution of legislative competence between the states and the United States. But the reservation of power to alter the conditions of the grant may conceivably, by a perhaps somewhat strained construction, suggest an uncomplicated assumption of state power freely to control interstate communication enterprises.

6. CONDITION OF, AND STANDARDS FOR, TRANSPORTATION CHANNELS

It was not alone in connection with the establishment or authorization of the land and water routes that governmental action was called for. The adequacy as well as the existence of the transportation plant was a matter of concern. This involved a definition of the qualitative aspects of transportation facilities, implemented by protective legislation to discourage conduct injurious to them. A review of the legislation in this respect discloses a pattern strikingly similar to that heretofore noted in connection with the establishment of the plant.

The width of the highways was often specified.¹⁶⁸ Detailed rules

¹⁶⁸ TOULMIN'S DIG. LAWS ALA. (1823) 391 (Dec. 21, 1820); REV. STAT. DEL. (1829) 465 (Feb. 10, 1829); *id.* 647 (Nov. 2, 1762); PRINCE'S DIG. LAWS GA. (1819) 399 (Dec. 4, 1799); III. LAWS 1819, p. 119; III. LAWS 1822-23, p. 88; LAWS INDIANA TERR. 1809-16 (ed. Ewbank & Piker) 248 (Dec. 17, 1811); Ind. Acts 1817-18, p. 274; Ind. LAWS 1819, p. 110; Ind. LAWS 1821, p. 167; MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 154 (Dec. 11, 1801); 2 DIG. LA. ACTS (1804-27) 314 (Mar. 12, 1818); 2 MASS. LAWS (1780-1807) 745 (Nov. 25, 1796);

regarding construction in other respects, including grade, crown, foundation, and surfacing, were set forth for public highways¹⁶⁹ and turnpike roads.¹⁷⁰ These specifications, ranging from comparatively excellent to exceptionally crude,¹⁷¹ may be taken as reflecting the legislative judgment as to what, in view of the resources available for construction and the nature and amount of the potential traffic, was an appropriate provision for the accommodation of carriers and travelers. If turnpikes were suffered to fall into disrepair, the proprietors, during the continuance of that condition, were forbidden to demand tolls.¹⁷² Tentative efforts towards uniformity may be found occasionally, as in legislation providing that when one of the contiguous states should prescribe the building of a road of a stipulated width up to the state line, connecting roads within the enacting state should be widened to correspond.¹⁷³ For the guidance of the traveler, provisions with respect to the marking of the roads with mileposts and intersection guide signs were common.¹⁷⁴

3 MASS. LAWS (1780-1807) 285 (Mar. 16, 1805); REV. CODE MISS. (1824) 357; LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 323 (Jan. 18, 1814); *id.* 952 (Dec. 3, 1822); REV. LAWS N. J. (1820) 615 (Feb. 9, 1818); 1 REV. STAT. N. Y. (1827-8) 517; *id.* 582; 1 N. C. REV. LAWS (1821) 515 (1784); OHIO LAWS 1820, 2nd Part, 284 (Jan. 7, 1811); 3 PA. LAWS (1791-1802) 82 (April 9, 1792); *id.* 232 (April 17, 1795); *id.* 512 (April 6, 1802); 4 PA. LAWS (1802-08) 141 (Mar. 5, 1804); *id.* 532 (Mar. 28, 1808); 5 PA. LAWS (1809-12) 280 (Jan. 17, 1812); 6 MCCORD STAT. AT LARGE S. C. 310 (Dec. 18, 1827); 1 LAWS TENN. 1820 (ed. Scott) 819 (Aug. 4, 1804); 2 LAWS TENN. 1820 (ed. Scott) 78 (Nov. 20, 1811); *id.* 242 (Nov. 14, 1815); 2 VA. REV. CODE (1819) 211 (Feb. 7, 1817).

¹⁶⁹ PRINCE'S DIG. LAWS GA. (1819) 399 (Dec. 4, 1799); Ind. Laws 1821, p. 167; LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 323 (Jan. 18, 1814); 1 LAWS TENN. 1820 (ed. Scott) 819 (Aug. 4, 1804).

¹⁷⁰ Ill. Laws 1819, p. 119; Ill. Laws 1824, p. 88; 1 REV. STAT. N. Y. (1827-28) 582; OHIO LAWS 1820, 2nd Part, 284 (Jan. 7, 1811); 3 PA. LAWS (1791-1802) 82 (April 9, 1792); 4 PA. LAWS (1802-08) 27 (Mar. 24, 1803); *id.* 141 (Mar. 5, 1804); 5 PA. LAWS (1809-12) 280 (Jan. 17, 1812); 6 MCCORD STAT. AT LARGE S. C. 310 (Dec. 18, 1827); 2 REV. CODE VA. (1819) 211 (Feb. 7, 1817).

¹⁷¹ Compare Ill. Laws 1819, p. 119 ("twenty-eight feet of which shall be based . . . with stone or other hard substance, well compacted together, and of sufficient depth to secure a good foundation . . . and faced with gravel or broken stone, of a depth not less than nine inches . . . rising in the middle by a gradual arch") with LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 343 ("such limbs of trees as may incommode horsemen shall be cut away and no stump shall exceed twelve inches in height") and Ind. Laws 1821, p. 167. It is to be noted that, quite consistently, requirements were stricter as to turnpikes than as to public highways.

¹⁷² 2 REV. CODE VA. (1819) 211 (Feb. 7, 1817).

¹⁷³ LAWS INDIANA TERR. 1809-16 (ed. Ewbank & Piker) 687 (road at Ohio line, width of twenty-five feet, Dec. 18, 1815).

¹⁷⁴ TOULMIN'S DIG. LAWS ALA. (1823) 391 (Dec. 21, 1820); PUB. STAT. CONN. (1824) 332; PRINCE'S DIG. LAWS GA. (1819) 401 (Dec. 19, 1818); Ill. Laws 1819, p. 120; LAWS INDIANA TERR. 1801-09 (ed. Philbrick) 427 (Sept. 17, 1807); Ind. Acts 1817-18, p. 282; Ind. Laws 1821, p. 167; MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 154 (Feb. 25, 1797); 2 REV. LAWS ME. (1821) 526; 2 MASS. LAWS (1780-1807) 669 (Feb. 28, 1795); REV. CODE MISS. (1824) 350; 1 LAWS DIST. N. TERR. LA. and TERR. & STATE MO. (1832 ed.) 548 (Feb. 1, 1817); COMP. LAWS N. H. (1830) 584 (Dec. 16, 1792); REV. LAWS N. J. (1820) 615 (Feb. 9, 1818); 1 REV. STAT. N. Y. (1827-28) 503; *id.* 582; 1 N. C. REV. LAWS (1821) 515 (1784); LAWS OHIO, 2nd Part (1820) 207; *id.* 286 (Jan. 7, 1811); 3 PA. LAWS (1791-1802) 82 (April 9, 1792); 4 PA. LAWS (1802-08) 7 (Feb. 11, 1803);

Where the Federal Government undertook the establishment of roads, it directed the details of their construction as to dimensions, specifications, and the like¹⁷⁵ but, where it authorized the extension of state turnpikes through the District of Columbia, it was apt to incorporate by reference the specifications and conditions laid down by the chartering state for the portion of the turnpike within its borders.¹⁷⁶

Comparable provisions were inserted in canal legislation. Waterways of that character were required to be of stipulated dimensions,¹⁷⁷ which were sometimes defined by reference to the character of the traffic which it was anticipated might use the canal.¹⁷⁸

There was rather less occasion for governmental supervision of the character and condition of harbors and navigable waterways, since navigability itself was a standard of some definiteness. Nevertheless the states freely undertook the exercise of whatever control was necessary in this connection. It was they who granted the privilege of erecting dams in indisputably navigable interstate waterways, although in so doing it was customary to condition the grant upon the requirement that the dam should not interfere with the navigation.¹⁷⁹ The condition itself probably demonstrates the then navigable character of the stream affected, perhaps even its actual contemporary use for purposes of navi-

id. 27 (Mar. 24, 1803); 5 PA. LAWS (1809-12) 280 (Jan. 17, 1812); R. I. REV. LAWS (1882) 439 (1798); 1 LAWS TENN. 1820 (ed. Scott) 821 (Aug. 4, 1804); 2 REV. CODE VA. (1819) 211 (Feb. 7, 1817).

¹⁷⁵ 2 STAT. 357 (1806); 3 STAT. 5 (1813); *id.* 12 (same).

¹⁷⁶ 2 STAT. 808 (1813); 3 STAT. 391 (1817); *id.* 482 (1819).

¹⁷⁷ Ill. Laws 1824, p. 160; Ind. Special Acts 1823, p. 81.

¹⁷⁸ See Ind. Special Acts 1823, p. 81 ("of a sufficient width to admit the passage of steamboats").

¹⁷⁹ TOULMIN'S DIG. LAWS ALA. (1823) 713 (Tennessee River, Dec. 3, 1821); Ill. Laws 1819, p. 202 (Kaskaskia River); *id.* 296 (Cash River); 3 MASS. LAWS (1780-1807) 365 (Quincy Town River, June 23, 1806); 4 MASS. LAWS (1807-16) 360 (Taunton River, June 14, 1813); 3 REV. STAT. N. Y. (1827-28) (Delaware River, 1828); *id.* 274 (Harlem River, 1813); *id.* 275 (Hudson River, 1804); *id.* 276, 277 (Susquehanna River, 1809, 1811, 1822); *id.* 279 (Newtown Creek, 1806); 3 PA. LAWS (1791-1802) 201 (Juniata River, Mar. 13, 1795); 4 PA. LAWS (1802-08) 20 (general authorizing act, Mar. 23, 1803); *cf.* Laws Ill. Terr. 1817-18, p. 25 (Kaskaskia River); Ind. Laws 1822, p. 15 (White River, manner of construction prescribed); Ind. Special Acts 1823, p. 46 (declaring Blue River a navigable stream and requiring all dams therein to be built or altered so as to admit the passage of boats); MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 123 (general statute, county courts in authorizing construction of mill dams to impose on applicants such conditions as they see fit to prevent obstruction of navigation, Feb. 22, 1797); 1 MASS. LAWS (1780-1807) 455 (log boom across Androscoggin River, Feb. 17, 1789); *id.* 487 (same, across Merrimack River, Feb. 22, 1790); 3 MASS. LAWS (1780-1807) 50 (same, across Saco River, Feb. 26, 1802); *id.* 265 (same, Mar. 11, 1805); Mass. Sess. Laws, May 1818, p. 49 (same, across Penobscot River); 1 PA. LAWS (1700-80) 235 (navigation commissioners of Schuylkill River authorized, *inter alia*, to construct dams to improve the navigation, Mar. 14, 1761); *id.* 322 (same as to Delaware and Lehigh rivers, Mar. 9, 1771); *id.* 324 (same as to Susquehanna, Juniata, and other named rivers, Mar. 9, 1771); 3 PA. LAWS (1791-1802) 127 (reserving right to maintain dams on interstate stream declared a public highway on condition they be so constructed as not to interfere with the navigation, April 8, 1794).

gation. The initiation or completion of levee projects along navigable rivers was prohibited unless consent thereto was first obtained from the proper authorities.¹⁸⁰ Except for structures connected with the working of machines or engines useful to the public, every dam, weir, or other obstruction placed in navigable streams which might interfere with free navigation was abatable as a nuisance¹⁸¹ and the person erecting or maintaining it was subject to fine.¹⁸² Again, it was provided that any one making any work tending to alter the course or increase the rapidity of navigable streams or to make their navigation more difficult or to embarrass public use, by works constructed on their banks, should be subjected to fine.¹⁸³ The unreasonable detention of logs by owners of booms in the rivers of the state, including interstate rivers, was dealt with in like manner.¹⁸⁴ Supervision of the cleaning of docks and of regulations respecting the use of wharves was frequently vested in local authorities under municipal charters or local laws,¹⁸⁵ including those provided by Congress for the government of the District of Columbia,¹⁸⁶ and fences or buildings on established public landing places were declared public nuisances subject to abatement.¹⁸⁷

A bridge, while a highway improvement, is almost unavoidably a waterway obstruction or, at least, an alteration of natural conditions potentially capable of adversely affecting navigation along the stream, should there then or thereafter be any navigation. By the simple admonition that a bridge whose construction was authorized should be so built as not to obstruct the navigation, the legislatures sometimes shifted the burden of initial determination to the licensee.¹⁸⁸ In other instances they were not satisfied with this glib evasion of the difficulty. Failing the use of some such formula, however, a legislature before authorizing a bridge was faced with the necessity of deciding, presumably in the light of the stream's actual or probable use for navigation, what were the limits within which the interests of those engaged in navigation

¹⁸⁰ 1 DIG. LA. ACTS (1804-27) 651 (Feb. 15, 1808).

¹⁸¹ See, *e.g.*, MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 123 (Feb. 22, 1797); 1 LAWS MD. 1692-1839 (ed. Dorsey) 80 (Mar. 1734); *id.* 85 (May 1747); *id.* 116 (Potomac River, May 1768); *cf.* 2 REV. CODE VA. (1819) 235 (1815).

¹⁸² MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 125 (Feb. 10, 1816).

¹⁸³ 1 DIG. LA. ACTS (1804-27) 651 (Feb. 15, 1808).

¹⁸⁴ 2 REV. LAWS ME. (1821) 749.

¹⁸⁵ REV. STAT. DEL. (1829) 675 (charter of Wilmington, Jan. 31, 1809); 3 PA. LAWS (1791-1802) 274 (county commissioners authorized to regulate landings and wharves in Northern Liberties, April 4, 1796); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 14 (charter of Georgetown, 1805).

¹⁸⁶ 3 STAT. 583 (1820) (charter of Washington).

¹⁸⁷ 1 REV. LAWS ME. (1821) 107.

¹⁸⁸ See III. LAWS 1819, p. 44; *id.* 365; III. LAWS 1820-21, p. 145; III. LAWS 1822-23, p. 200; 2 DIG. LA. ACTS (1804-27) 314 (Mar. 12, 1818); 3 PA. LAWS (1791-1802) 274 (April 4, 1796); *id.* 290 (April 28, 1797); *id.* 312 (Mar. 16, 1798); *cf.* 1 PA. LAWS (1700-80) 168 (Aug. 14, 1725); 3 PA. LAWS (1791-1802) 436 (Mar. 15, 1800).

should be recognized and protected. Every measure for the building of a bridge over a navigable stream, if it did not take refuge in the vaguely general proviso, rested upon a preliminary determination that the potential degree was to be in some degree hindered or excluded.¹⁸⁹ Where, in the light of changes in the extent and character of the water traffic using a stream, the draws originally provided proved insufficient, the state might direct that they be enlarged to accommodate the vessels sailing those waters, specifying the requirements to be satisfied;¹⁹⁰ and conversely it might, if it deemed proper, dispense with the need for maintaining a drawbridge and authorize the erection of a simple fixed bridge of stationary construction.¹⁹¹

The width of the channel was a factor in navigability and this the legislatures could and quite commonly did care for in the legislative authorization of particular bridges by prescribing the minimum permissible span from pier to pier. Another factor was that of height; here, too, the device of a legislative prescription of a minimum clearance was available and was often employed.¹⁹² As to this, however, an alternative was available which gave even further recognition to the interests of water carriers—indeed literally made the sky the limit; this was to stipulate for the erection of a drawbridge, a method of handling the problem which was in frequent use.¹⁹³ But this solution meant that those who wished to travel along the highway could not do so when the bridge was up nor those desirous of travelling along the stream when it was down. Reconciliation of their conflicting demands was treated as an appropriate area for state legislation which, on occasion, went so far in the interests of highway traffic as to forbid the raising of the bridge at certain hours,¹⁹⁴ thus effectively barring river travel for the time. Persons having charge of bridges who should leave their draws open for longer than a fixed time, except when actually necessary for the

¹⁸⁹ Compare REV. STAT. DEL. (1829) 566 (bridge to be constructed to permit the passage of scows and similar boats without masts. Jan. 16, 1798) with *id.* 581 (authorizing construction of drawbridge to permit the entrance of masted vessels, Jan. 20, 1807); *cf.* 2 PA. LAWS (1780-91) 332 (bridge to be so built that boats and shallops might pass without delay, Sept. 6, 1785).

¹⁹⁰ See COMP. PUB. LAWS N. J. (1833) 186 (enlargement of bridge draws of bridges over Hackensack River below tidewater, Mar. 3, 1828); 3 PA. LAWS (1791-1802) 278 (reserving right to maintain present drawbridge over a stream declared a public highway, until another should be erected, but authorizing those interested in the navigation to enlarge the draw to a stated maximum, Feb. 27, 1797).

¹⁹¹ See 1 PA. LAWS (1700-80) 466 (reconstruction of bridge at Chester, Sept. 3, 1778).

¹⁹² See, *e.g.*, REV. STAT. DEL. (1829) 566 (Feb. 2, 1802); PRINCE'S DIG. LAWS GA. (1819) 399 (Dec. 4, 1799); 1 PA. LAWS (1700-80) 466 (Sept. 3, 1778); 4 PA. LAWS (1802-08) 297 (Mar. 10, 1806).

¹⁹³ See, *e.g.*, REV. STAT. DEL. (1829) 567 (Jan. 30, 1813); *id.* 569 (Nov. 6, 1773); 1 DIG. LA. ACTS (1804-27) 134 (Feb. 18, 1817).

¹⁹⁴ PUB. STAT. CONN. (1824) 222 (Connecticut River bridge at Hartford to be closed from five a.m. to eight a.m.).

passage of vessels, were to be fined.¹⁹⁵ On notification by a ship of its desire to pass, the draw on the bridge was to be opened promptly.¹⁹⁶ It was made the duty of bridge proprietors to see to the removal of driftwood and other obstructions to navigation collecting at the base of the bridge.¹⁹⁷

As an accommodation to the Federal Government, when it was interested for naval or other reasons in the navigability of a particular stream, a state might assent to the application of the United States to make a draw in a bridge spanning the stream but, in doing so, prescribe the character of the draw which was to be made.¹⁹⁸ A state which joined with another in authorizing a toll bridge over a boundary river yet seems to have retained the power to prescribe independently details as to the construction and character of the bridge as a condition to its assent, a point illustrated by the requirement in one case by one participating state that bridge lamps be provided.¹⁹⁹

There might also be a conflict of interests between land travelers and water traffic at established ferries, since the method of their operation in some cases was to have the ferry boats towed over by ropes from one bank to the other. Accordingly as to some rivers, it was provided by state legislation that masted vessels sailing along them should be so constructed that their masts could be lowered on coming to a ferry and that such action should be taken²⁰⁰ or, if a boat or raft were so loaded that it could not pass under the ropes, notice of its approach should be given the ferry keeper in sufficient time to care for the raising or lowering of the ropes so as to permit the passage of the watercraft.²⁰¹

Only as to bridges in the District of Columbia²⁰² did Congress undertake to lay down rules with respect to their construction, maintenance, and operation, in matters affecting river traffic.

Except for the provisions entrusting the regulation of ferries to the same local authorities who had charge of their licensing, adopted by a few states,²⁰³ prescriptions of the character and condition of ferry service tended to follow a stereotyped pattern. Customarily it was required that a suitable boat be provided; that competent ferrymen be in charge;

¹⁹⁵ REV. LAWS N. J. (1820) (maximum of fifteen minutes, bridges over Hackensack River or English Creek, Mar. 16, 1796).

¹⁹⁶ 4 PA. LAWS (1802-08) 347 (Mar. 31, 1806).

¹⁹⁷ 1 DIG. LA. ACTS (1804-27) 134 (Feb. 18, 1817).

¹⁹⁸ Mass. Sess. Laws, May 1817, p. 443 (Charles River bridge).

¹⁹⁹ Mass. Sess. Laws, Jan. 1820, p. 421.

²⁰⁰ 1 PA. LAWS (1700-80) 266 (Feb. 8, 1766).

²⁰¹ 1 PA. LAWS (1700-80) 266 (Feb. 8, 1766); 4 PA. LAWS (1802-08) 347 (signal by horn, Mar. 31, 1806).

²⁰² Cf. 2 STAT. 457 (1808).

²⁰³ MOREHEAD & BROWN DIG. STAT. LAWS KY. (1834) title 79 (Dec. 22, 1806); 2 REV. LAWS ME. (1821) 768; 1 LAWS MD. 1692-1839 (ed. Dorsey) 175 (May 1781); REV. LAWS N. J. (1820) 66 (charter of Perth Amboy, Dec. 21, 1784); *id.* 73 (charter of Burlington, Dec. 31, 1784); Ohio Sess. Acts, 1st Sess. 1827, p. 46 (charter of Cincinnati); COMP. LAWS VT. (1824) 477 (Mar. 3, 1797).

and that they be in attendance to transport travelers at stated (or at reasonable) hours.²⁰⁴ Increased facilities were required where special considerations relative to the probable needs of the traffic to be served indicated that that be done.²⁰⁵ The grant of the ferry privilege might be conditioned upon the use of stipulated kinds of motive power in the operation of the projected ferry.²⁰⁶ The wharf, or ferry slip, and landing place must be maintained in good order.²⁰⁷ A pre-Revolutionary enactment requiring public bridge or ferry keepers to take out licenses as taverners²⁰⁸ was not duplicated in any subsequent legislation, perhaps because conditions had so changed that it was no longer necessary that taverns be maintained as an adjunct to such facilities, perhaps because, in case there was a genuine need for a combination of the services, the persons having bridge or ferry franchises provided it without statutory compulsion. Passengers unreasonably delayed might recover a penalty from the keeper of the ferry.²⁰⁹ The provision occasionally adopted as to ferries over state boundary rivers that ferry keepers might take up passengers on either side of the stream is an extreme example of state regulation.²¹⁰

Occasionally criminal legislation aimed at securing navigation or transportation facilities from harm was cast in broad and inclusive terms, penalizing, for example, the destruction or injury of turnpike fixtures or navigation works.²¹¹ This was not typical, however. Ordinarily, in lieu of or in addition to such sweeping language, the legislative thunderbolt was directed toward narrower, more specific offenses. The

²⁰⁴ See PUB. STAT. CONN. (1824) 166; REV. STAT. DEL. (1829) 602 (Jan. 21, 1803); ILL. LAWS 1819, p. 28; LAWS INDIANA TERR. 1801-09 (ed. Philbrick) 354 (Sept. 17, 1807); IND. ACTS 1817-18, p. 294; 2 REV. LAWS ME. (1821) 768; 2 MASS. LAWS (1780-1807) 749 (Feb. 14, 1797); LAWS OF DIST. & TERR. LA. and TERR. & STAT. MO. (1842 ed.) 80 (July 9, 1806); *id.* 699 (Dec. 8, 1820); REV. LAWS N. J. (1820) 408 (Feb. 6, 1799); LAWS OHIO (1820) 171; R. I. REV. LAWS (1822) 410; 2 REV. CODE VA. (1819) 237 (Jan. 30, 1819); *cf.* 1 MD. LAWS 1692-1839 (ed. Dorsey) 175 (hours of attendance at various seasons prescribed, May 1781); COMP. LAWS N. H. (1830) 181 (ferryman to keep good boats, Feb. 28, 1783).

²⁰⁵ See PUB. STAT. CONN. (1824) 166 (two boats required to be maintained at Saybrook, Middletown, and New London); PUB. STAT. LAWS CONN. (1826) 493 (horse boat may be substituted at Saybrook if, in judgment of commissioners, it affords service equivalent to two ferry boats); 1 LAWS MD. 1692-1839 (ed. Dorsey) 251 (ferryman licensed to cross Chesapeake Bay to have anchor, cable, and row-boat aboard, Nov. 1788).

²⁰⁶ See, *e.g.*, ILL. LAWS 1819, p. 104 (steam or animal power only to be used); ILL. LAWS 1824, p. 79 (license for horse ferry boat).

²⁰⁷ REV. STAT. DEL. (1829) 602 (Jan. 21, 1803); REV. LAWS N. J. (1820) 408 (Feb. 6, 1799); *cf.* 1 DIG. LA. ACTS (1804-27) 495 (Mar. 16, 1827); 1 LAWS TENN. 1820 (ed. Scott) 568 (April 20, 1796).

²⁰⁸ 1 N. C. REV. LAWS (1821) 234 (1767).

²⁰⁹ REV. STAT. DEL. (1829) 602 (Jan. 21, 1803); *cf.* LAWS OF DIST. & TERR. LA. and TERR. & STATE MO. (1842 ed.) 495 (penalty for wilful refusal by ferryman to carry passenger tendering lawful compensation, Jan. 13, 1817).

²¹⁰ See, *e.g.*, 2 REV. CODE VA. (1819) 241 (Jan. 20, 1819).

²¹¹ PRINCE'S DIG. LAWS GA. (1819) 369 (Dec. 20, 1817).

obstruction or injury of toll gates, toll bridges, and cross ways was forbidden, under penalty.²¹² So was the defacing or destruction of mile-stones or guide posts.²¹³ Trespass to bridges by the removal of materials forming part of the structure was made subject to a fine.²¹⁴ Impairment of the navigation of harbors or interior waterways by casting rubbish or ballast or by felling trees, into them, was prohibited;²¹⁵ and the manner and conditions of grazing and herding livestock along the sea coast were regulated by the state with a view to the preservation of harbors.²¹⁶ A penalty was imposed on the obstruction of wharves, with the proviso that it should not apply to the deposit of merchandise to be shipped, provided a sufficient passway were left clear.²¹⁷ The removal or destruction of beacons, buoys, and channel markers was capable of occasioning very serious damage to navigation and corresponding severity was shown in the legislation designed to curb it.²¹⁸ Placing obstructions on the towpaths of canals, or trespassing thereon with animals to the potential hindrance of the navigation, was forbidden.²¹⁹

7. VEHICLES AND VESSELS

The physical facilities characteristic of a transportation enterprise consist primarily of its fixed plant, the land or water channels over which the traffic is to flow, and of the conveyances which are to accommodate its freight or passenger load. The former represent financially much the greater share of the investment and their predominance was reflected in the correspondingly greater bulk of the legislative grist which dealt with them and which has already been discussed in some detail; but

²¹² TOULMIN'S DIG. LAWS ALA. (1823) 416 (toll bridges and cross ways, Dec. 15, 1821); PUB. STAT. CONN. (1824) 106 (destruction of toll gates and toll bridges riotously or while disguised or at night); 2 REV. LAWS ME. (1821) 601 (toll gates); 3 MASS. LAWS (1780-1807) 285 (same, Mar. 16, 1805).

²¹³ PUB. STAT. CONN. (1824) 424; 1 REV. LAWS ME. (1821) 124; 2 REV. LAWS ME. (1821) 526; LAWS OHIO (1820) 207; 3 PA. LAWS (1791-1802) 470 (Feb. 25, 1801); 4 PA. LAWS (1802-08) 7 (Feb. 11, 1803); *id.* 27 (Mar. 24, 1803); COMP. LAWS VT. (1824) 161 (Nov. 3, 1815).

²¹⁴ PUB. STAT. CONN. (1824) 424.

²¹⁵ PRINCE'S DIG. LAWS GA. (1819) 201 (April 7, 1763); REV. CODE MISS. (1824) 361; COMP. LAWS N. H. (1830) 281 (June 16, 1792); 1 BREVARD'S DIG. PUB. STAT. LAWS S. C. 414 (1726); 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 254 (1785); 2 REV. CODE VA. (1819) 235 (1748); *cf.* 1 LAWS MD. 1692-1839 (ed. Dorsey) 101 (placing earth or stone in Patapsco River or Baltimore harbor, Oct. 1753); 1 LAWS TENN. 1820 (ed. Scott) 569 (April 23, 1796); COMP. LAWS VT. (1824) 281 (Nov. 5, 1801).

²¹⁶ 1 MASS. LAWS (1780-1807) 328 (Cape Cod, June 26, 1786); 3 MASS. LAWS (1780-1807) 30 (Wellfleet harbor, June 19, 1801); 3 REV. STAT. N. Y. (1827-28) 474 (Southampton Inlet, Nov. 23, 1824).

²¹⁷ 4 PA. LAWS (1802-08) 67 (Mar. 29, 1803).

²¹⁸ PRINCE'S DIG. LAWS GA. (1819) 368 (Dec. 20, 1817); 1 LAWS MD. 1692-1839 (ed. Dorsey) 657 (Dec. 1817); 1 N. C. REV. LAWS (1821) 348 (beacons in Currituck Inlet, 1777); 7 PA. LAWS 197 (Mar. 27, 1819); 1 BREVARD'S DIG. PUB. STAT. LAWS S. C. 414 (1791); *cf.* R. I. REV. LAWS (1822) 423 (fastening vessels to or running them against buoys or stakes in navigable water penalized).

²¹⁹ 1 REV. STAT. N. Y. (1827-28) 246, 249; Ohio Sess. Acts, 1st Sess. 1826, p. 47.

legislation respecting the mobile facilities of transportation, the carriages and watercraft in which goods or persons were carried, was not wholly lacking. It is proposed here to note so much of that legislation as had to do with (1) describing what persons or classes of persons might possess or operate vehicles or vessels as carriers for hire and (2) establishing provisions as to the character and equipment of vehicles and vessels.

Vehicular traffic was almost universally a free field for any one who chose to engage in it, so far as the legislation of the period discloses.²²⁰ True, there were instances of municipal charters granting to local authorities the power to regulate the licensing of cabs and drays²²¹ or to regulate wagons and carts²²² but probably the only operations affected were those of vehicles employed within the area of the municipality and its immediate environs. It seems unlikely that the resultant regulations dealt, or had any occasion to deal, with vehicles crossing or in unbroken connection with a carrying service which had crossed state lines in an integrated course of transit, since very probably local services of the character described were not as yet operated commonly by interstate carriers.

That state abstention from legislation in this connection must be attributed rather to the absence of felt need for it than to doubts as to power seems to be the necessary conclusion from *Perrin v. Sikes*.²²³ There the Supreme Court of Errors of Connecticut affirmed a judgment assessing a penalty for running a stage over part of a route comprehended in a legislative grant of an exclusive privilege to run a stage "on the post road leading to Boston as far as the Massachusetts line" and to carry passengers thereon. No constitutional objection apparently occurred to court or counsel, for none was mentioned by either. What makes the silence on this score particularly significant is that the interstate elements in the facts involved were not confined to the character of the road. Additionally to this factor, both of the stage lines involved were actually engaged in the business of interstate transportation.²²⁴ Here, then, a state was taking charge of the issuance of a certificate of convenience and necessity (to use a more modern expression) to an

²²⁰ But cf. PRINCE'S DIG. LAWS GA. (1819) 580 (listing, in schedule of private and local acts, twelve franchises for the operation of stage carriages); 8 PA. LAWS (1822-25) 152 (all transportation over a railroad authorized to be built to be under the direction of a person connected with the road, Mar. 31, 1823).

²²¹ See, e.g., TOULMIN'S DIG. LAWS ALA. (1823) 786 (Dec. 17, 1819).

²²² See, e.g., 3 BREVARD'S DIG. PUB. STAT. LAWS S. C. 21 (1803); *id.* 27 (1791); *id.* 36 (1783).

²²³ 1 Day 19 (Conn. 1802).

²²⁴ Both lines ran from Hartford through Windsor and Suffield in Connecticut; after that, as shown in the argument of counsel for plaintiff in error, 1 Day 21 (Conn. 1802), his client "had set up a stage to run to Westfield (Massachusetts) and Albany (New York)" whereas the grant to defendant in error "contemplated only a stage going to Boston."

interstate common carrier for so much of the interstate journey as lay within its limits; yet the matter was so far afield from what was understood by "commerce between the States" that not even counsel who were seeking reversal of the conviction raised any constitutional issue as to the validity of the franchise.

Statutes against traveling the highways with naked scythes exposed²²⁵ represent apparently a pioneer form of legislation on the equipment of vehicles, another instance of which is to be found in legislation reprobating the chaining of wheels of vehicles traveling along turnpikes without providing an iron shoe under them.²²⁶ Ordinarily load weight limitations were not made mandatory;²²⁷ but substantially the same type of regulation was involved in, and the same practical consequences were perhaps expected from, provisions authorizing turnpikes to demand multiple tolls of vehicles in excess of a designated weight whose wheel construction did not satisfy legislatively prescribed standards²²⁸ and from vehicles loaded with blocks of marble and drawn by more than five horses.²²⁹ To implement such legislation, it was provided that drivers might be required to give a true account of the weight of their loads.²³⁰ Similar legislation was enacted by Congress as to the turnpike roads whose construction it authorized within the District of Columbia.²³¹ Legislative prescription of the dimensions of vehicles using the public highways also is traceable back to state activity in this period.²³²

The equipment of vessels engaged in operating as carriers for hire on interstate waters was occasionally specified in detail by a state.²³³ Small boats used for landing passengers on, and taking them from, steamboats were required to be equipped with oars and with a horn;²³⁴ and the

²²⁵ 2 REV. LAWS ME. (1821) 554.

²²⁶ 2 REV. LAWS ME. (1821) 605; 4 MASS. LAWS (1807-16) 392 (Feb. 24, 1814).

²²⁷ But see 3 PA. LAWS (1791-1802) 82 (description and burden of carriages authorized to travel over named turnpike in specified seasons, April 9, 1792); 4 PA. LAWS (1802-08) 27 (same, Mar. 4, 1803); *id.* 141 (same, Mar. 5, 1804); 2 REV. CODE VA. (1819) 216 (width of wheels and weight of load passing over turnpikes prescribed, Feb. 7, 1817).

²²⁸ 2 REV. LAWS ME. (1821) 604 (treble tolls for vehicles in excess of 4500 pounds gross weight whose fellies were less than three and a half inches wide); 4 MASS. LAWS (1807-16) 392 (same, Feb. 24, 1814); *cf.* 3 MASS. LAWS (1780-1807) 285 (half tolls only from vehicles with fellies over six inches wide, Mar. 16, 1805); 1 REV. STAT. N. Y. (1827-28) 585 (graded reductions in tolls based on increased width of wheels); 6 MCCORD STAT. AT LARGE S. C. 310 (reduction of tolls for vehicles having tires four inches or more in width, Dec. 18, 1827).

²²⁹ 4 PA. LAWS (1802-08) 319 (Mar. 17, 1806).

²³⁰ 2 REV. LAWS ME. (1821) 604; 4 MASS. LAWS (1807-16) 392 (Feb. 24, 1814); *cf.* 2 REV. CODE VA. (1819) 217 (turnpike companies authorized to weigh vehicles to determine legality of load, but not to delay vehicles, Feb. 7, 1817).

²³¹ 3 STAT. 5, 12 (1813).

²³² See REV. LAWS N. J. (1820) 79 (minimum width for carriages fixed, May 30, 1787); 3 PA. LAWS (1791-1802) 82 (April 9, 1792).

²³³ See 2 REV. CODE VA. (1819) 246 (boats on Potomac River, Dec. 9, 1793).

²³⁴ 1 REV. STAT. N. Y. (1827-28) 684.

equipment of boats using state constructed and maintained canals was prescribed with considerable particularity.²³⁵ In addition to the not infrequent requirement of similar content as to vessels using canals and improved navigable highways charging toll,²³⁶ there was early legislation in some states requiring every boat, having greater than a specified draft, used on the rivers of the state, to have painted on the sternpost the vessel's draft and her owner's name and residence.²³⁷

As a part of the general system of laws forbidding slaves to own property, it was provided in some of the Southern states that slaves might not own or possess boats²³⁸ and that, if they did, the boats kept or claimed by them should be forfeit.

Vessels propelled by steam were as yet novel and in a measure experimental. Their introduction entailed considerable expense, with no assurance of recoupment in the absence of experience as to the extent to which their services would be employed. These considerations of heavy initial investment and uncertain volume of shipper and passenger demand were the same as those which underlay the grant of turnpike and canal franchises to private corporations. In tempting private enterprise to assume the outlay for internal improvements, the franchise device had proven effective. In this analogous case of the introduction of a new type of conveyance, it was natural that state legislatures, confident of their jurisdiction over the subject of transportation facilities, should recur to the familiar method of enlisting private investment. Accordingly, in state after state, legislative licenses for the operation of steamboats were granted to speculative projectors.²³⁹ In a number of states, the legislature did not stop with the mere grant of the privilege but proceeded further to confer on the licensees the exclusive privilege of using this method of navigation on the waters of the state²⁴⁰ or on certain of them particularly described by the statute.²⁴¹ An especially in-

²³⁵ See, e.g., 1 REV. STAT. N. Y. (1827-28) 160, 161 (setting shafts tipped with metal forbidden; decked boats to have knife at bow to cut interfering tow rope).

²³⁶ See 1 REV. STAT. N. Y. (1827-28) 240; 3 PA. LAWS (1791-1802) 311 (Feb. 27, 1798); 8 PA. LAWS (1822-25) 177 (April 1, 1823).

²³⁷ 1 BREVARD'S DIG. PUB. STAT. LAWS S. C. 88 (1738).

²³⁸ PRINCE'S DIG. LAWS GA. (1819) 446 (May 10, 1770); 1 DIG. LA. ACTS (1804-27) 110 (June 7, 1806); 2 BREVARD'S DIG. PUB. STAT. LAWS S. C. 238 (1740).

²³⁹ TOULMIN'S DIG. LAWS ALA. (1823) 404 (steam ferry boat between Mobile and Blakeley, Dec. 10, 1820); LAWS INDIANA TERR. (ed. Ewbank & Piker) 144 (Ohio River navigation, New York incorporators including Livingston, Fulton, Clinton, Tompkins, and Roosevelt, Dec. 15, 1810); 5 LITT. (Ky.) 343 (Ohio River, 1816); La. Sess. Acts 1817, p. 198; 4 MASS. LAWS (1807-16) 237 (Merrimack River, June 21, 1811).

²⁴⁰ PRINCE'S DIG. LAWS GA. (1819) 49 (Dec. 19, 1817); La. Sess. Acts 1811, p. 112 (grant to Livingston and Fulton).

²⁴¹ 1 DIG. LA. ACTS (1804-27) 251 (coastal waters between a Gulf parish and New Orleans, Feb. 16, 1821); *id.* 561 (Red River from Natchitoches to the upper limit of the state); 2 DIG. LA. ACTS (1804-27) 532 (steam ferry boats in front of New Orleans and suburbs, Feb. 7, 1827); 4 MASS. LAWS (1807-16) 448 (Connecticut River, Feb. 7, 1815); Mass. Sess. Laws, Jan. 1819, p. 98 (extending duration of preceding act).

teresting variant of such legislation was that purporting to grant a license for exclusive steam navigation between a port or landing in the enacting state and a port or landing in another state.²⁴² This steamboat monopoly legislation occasioned almost the only retaliatory statutes enacted by the states in the early days of the nation's history and so presents a striking contrast with the prevalent reciprocity and co-ordination of action which was found generally in connection with the development of transportation facilities. Particularly where states were connected by boundary waters, there was ill feeling. Sometimes a whole series of statutes would result in response to continuing efforts to assure the favored monopolists the use of the waters in question,²⁴³ culminating in provisions looking to prohibition of navigation by steam from the neighboring to the enacting state.²⁴⁴

The only Congressional legislation on the subject of steamboats dealt with the question of enrollment as a vessel of the United States, putting resident aliens on a plane with citizens as far as the right to enroll vessels engaged wholly in the interior rivers and bays of the United States was concerned.²⁴⁵

8. SOME NON-STATUTORY MISCELLANY

The major, indeed almost the exclusive, preoccupation of the discussion to this point has been with the statutory materials, which alone exist in ample abundance and variety to afford a systematic framework for examining the prevalent understanding as to appropriate areas of state and federal action and so to illustrate the received view of the content of the commerce clause. Random fragmentary materials of divers sorts do exist, however, which corroborate the conclusions to be derived from the statutes.

²⁴² 1 BREVARD'S DIG. PUB. STAT. LAWS S. C. 88 (between Charleston and Savannah, 1811).

²⁴³ Cf. REV. STAT. N. J. (1820) 547 (New Jersey citizen whose steamboat had been condemned by New York authorities may seize and have forfeited to him any New York steamboat he can find in New Jersey waters, subject to any rights arising under United States patent laws, Jan. 25, 1811); *id.* 564 (further implementation of judicial remedies available to aggrieved citizen, passed in response to intermediately enacted New York legislation, Feb. 12, 1813); *id.* 689 (damages and treble costs recoverable by New Jersey citizens whose steamboat had been condemned under New York statutes; and, if New York has enjoined his operation of a steamboat in its waters, he may have steamboat transportation from New York to New Jersey enjoined, Feb. 15, 1820); COMP. PUB. LAWS N. J. (1833) 7 (declaring effect in New Jersey of New York judgments under steamboat monopoly laws, subjecting them to defense based on New Jersey statutes, Nov. 4, 1821); also Ohio Sess. Acts, 1st Sess. 1822, p. 29 (forbidding persons operating under New York steamboat monopoly from navigating the waters of Ohio); Ohio Sess. Acts, 2nd Sess. 1822, p. 5 (prohibiting New York citizens operating under the New York steamboat monopoly from navigating Ohio waters on Lake Erie or elsewhere, unless Ohio citizens were accorded equal privileges of navigation in New York).

²⁴⁴ See REV. LAWS N. J. (1820) 689 (authorizing injunction against steam transportation from New York to New Jersey, Feb. 15, 1820) and the Ohio statutes cited in the preceding note.

²⁴⁵ 2 STAT. 694 (1812).

Superstatutory in character were the constitutions of the several states. Revisions or amendments to the constitutions of the original thirteen when they dealt, as occasionally they did,²⁴⁶ with the provision of transportation facilities indicated a concurrence of the delegates to the constitutional convention and the public whose ratification was required in the propriety of state activity in that connection. To these was added, in the case of new states seeking admission, the authority of Congress, whose approval of the proposed state constitution was requisite to the state's admission. In two almost identical and nearly contemporaneous provisions,²⁴⁷ the establishment of an adequate system of land and water communications was solemnly recognized as an obligation of the states; and in one other,²⁴⁸ reference was made specifically to the navigation of that conspicuously interstate waterway, the Mississippi River, in terms apparently aimed at forestalling restrictions upon its navigation which it was apprehended the state authorities might impose in the absence of constitutional restriction.²⁴⁹

The debates in Congress as well as the laws it adopts reveal the notions of the lawmakers.²⁵⁰ Mention has already been made of this source in connection with the subject of interstate telegraph lines;²⁵¹ and it will be recalled that provision of interstate telegraph lines was analogized to action under the postal power, with no allusion to the commerce power. A similar approach was consistently manifested whenever the provision of other interstate transportation facilities presented itself for consideration.

Congress was importuned to provide or to assist in the provision of both land routes and waterways, particularly in instances where an especially large scale project was contemplated. Once indeed in connection with the Military Road through the southwestern Indian country, now

²⁴⁶ See GA. CONST. (1798) Art. 1, §26; N. Y. CONST. (1821) Art. VII, §10.

²⁴⁷ ALA. CONST. (1819) Art. VI, §21 ("The general assembly shall make provisions by law for obtaining correct knowledge of the several objects proper for improvement in relation to the navigable waters, and to the roads in this state, and for making a systematic and economical application of the means appropriated to those objects"); MO. CONST. (1820) Art. VII ("Internal improvement shall forever be encouraged by the government of this State, and it shall be the duty of the general assembly, as soon as may be, to make provision by law for ascertaining the most proper objects of improvement in relation both to roads and navigable waters; and it shall also be their duty to provide by law for a systematic and economical application of the funds appropriated to those objects").

²⁴⁸ TENN. CONST. (1796) Art. XI, §29 ("That an equal participation of the free navigation of the Mississippi is one of the inherent rights of the citizens of this state; it cannot, therefore, be conceded to any prince, potentate, power, person, or persons whatever").

²⁴⁹ On the maxim, *expressio unius est exclusio alterius*, the express limitation of action as regards the Mississippi may arguably be regarded as a recognition of state power to restrict navigation of the Tennessee, the Cumberland, and other navigable interstate waterways located in part in Tennessee.

²⁵⁰ Comparable materials for the state legislatures were, regrettably, as unavailable for 1790-1825 as they are for 1946.

²⁵¹ See page 000 *supra*.

Alabama and Mississippi, attention was directed to the commercial importance of the proposed road;²⁵² again, in the discussion of federal subscription to the Chesapeake and Delaware Canal, the suggestion was even ventured that the commerce clause might afford a basis for federal action.²⁵³ In the first case, however, which involved a segment of road wholly outside the limits of any state, the argument was clearly directed to the issue of policy, not to that of power; and, in the second, the senator urging it hastened to disclaim an intention to rely on this radical and venturesome proposition as the true source of federal power. Nor does either of the two instances²⁵⁴ where language was used, reminiscent of the original latitudinarian Randolph draft of the Constitution,²⁵⁵ regarding the incompetence of the states to undertake the provision of a communications system, seem to have had other than a hortatory purpose.

The provision of lighthouses, it is true, was accepted almost from the beginning of the Union as a matter of Congressional cognizance under the commerce power²⁵⁶ and so, after initial grave doubts,²⁵⁷ was

²⁵² 14 ANNALS OF CONG. 1185, 1186 (1882) (noting, in connection with a discussion in the House of Representatives, on February 7, 1805, that "Mr. G. W. Campbell observed that . . . the second object for which we wish this road opened, viz. for commercial purposes, is still more important to our citizens (than improved postal facilities); and is essential for the prosperity of our country. The only mode by which the people of that country can, at this time, convey their produce to market, is by boating it down the river Tennessee into the Ohio, then along that to the Mississippi, and down that river to New Orleans. Our boatmen employed in this trade are obliged to return by land, as the same boats that carry produce down those rivers, cannot ascend them, and there is but little navigation yet, in boats of any kind, up those waters into the State of Tennessee. . . . The only route by which those boatmen can now return from New Orleans, is that already stated, on which the mail is conveyed, being between four and five hundred miles more than they would have to travel by the proposed route. . . . It is therefore hoped that this House will feel disposed to encourage the farming interests of our infant country by removing those obstacles to its progress that the State authority is incompetent to effect, and that prove so materially injurious to the interests of our citizens").

²⁵³ 16 ANNALS OF CONG. 59 (1882) (remarks of Bayard in the Senate on February 7, 1807: ". . . It has never been contended that no power exists which has not been expressly delegated . . . (but) Having a power to provide for the safety of commerce and the defence of the nation, we may fairly infer a power to cut a canal a measure unquestionably proper with a view of either object . . .").

²⁵⁴ 5 ANNALS OF CONG. 314 (1882) (Baldwin in the House of Representatives, February 11, 1796); 14 ANNALS OF CONG. 1186 (1882) (Campbell, in the House, February 7, 1805).

²⁵⁵ For an account of this draft and its fate in the Convention of 1787, see Abel, *supra* note 6, at 433-436.

²⁵⁶ 1 ANNALS OF CONG. 176 (1882) (Madison in House of Representatives, April 21, 1789); 2 *id.* 1917 (Jackson of Georgia, *arguendo*, in House of Representatives, Feb. 4, 1791); *cf.* 11 *id.* 1124 (Giles of Virginia, *arguendo*, in House of Representatives, Mar. 31, 1802).

²⁵⁷ See 2 ANNALS OF CONG. 1450 (1882) (where a proposal, on Mar. 15, 1790, to include in the appropriation bill a sum "for removing the wrecks and obstructions in Savannah river, from that city to the sea" was objected to "as involving a principle pregnant with innumerable difficulties. . . . Should this be granted, every member in this House will come forward with proposals for clearing rivers and opening canals to the sources of rivers," the proponent replying "that the principle is already established in the bill by the provision made for Delaware river. He said that the revenue of the United States is to be derived from navi-

the matter of harbor improvements used and useful in connection with foreign commerce;²⁵⁸ but, aside from facilities peculiar to maritime enterprise, no measure contemplating Congressional action for the provision of, or in aid of, transportation facilities was rested upon the commerce power. Indeed, aside from the scattered instances noted above, that power was not mentioned as even a makeweight argument. The silence did not flow from a lack of occasion to advance the claim. Land transportation routes first attracted the attention of Congress and early steps were taken to provide extensive interstate systems, at first, however, grounded explicitly and exclusively upon the granted power over post roads,²⁵⁹ to which, starting with the proposal for the Cumberland road, the Congressional power over the disposition of the property of the United States²⁶⁰ was later joined as a source of authority.²⁶¹ The question of federal participation in interstate waterway projects, such as canal and navigation improvement enterprises, did not arise until after land routes had been considered; but, when it did arise, the pattern of thought and discussion was comparable in its avoidance of reliance on the commerce power. The first notable discussion called in question the very power of Congress to authorize a structure in the bed of the Potomac within the limits of the District of Columbia. While the determination was recognized as fraught with important consequences for upstream shippers by virtue of its potential effect on the

gation and commerce; excepting the obstructions in our rivers and harbors are removed, commerce will be embarrassed and our revenue will be lessened and destroyed"; following this argument, the proposal was voted down by the House, whether upon the constitutional grounds mentioned in the discussion or for other reasons not mentioned it is of course impossible to know).

²⁵⁸ 5 ANNALS OF CONG. 1203 (1882) (resolution to investigate "what further measures are necessary to secure, protect, and preserve the vessels of the United States in their entrance to any of the ports of the United States," arising out of discussion of propriety of Congressional upkeep of piers in Delaware River referred, on April 27, 1796, to Committee of Commerce and Manufactures of House of Representatives); see 2 *id.* 1917 (remarks of Jackson of Georgia in House of Representatives on Feb. 4, 1791).

²⁵⁹ 4 ANNALS OF CONG. 1063 (1882) (motion in House of Representatives on Jan. 7, 1795, by Fitzsimons of Pennsylvania, a delegate to the Constitutional Convention in 1787, to apply postal surplus "for the making of a Post Road . . . between the Southern and Eastern States"); *id.* 1083 (motion referred to committee); 5 *id.* 314 (motion in House of Representatives by Madison to survey "the shortest route between Portland, Maine, and Georgia" as a post road, supported by Baldwin of Georgia, a delegate to the Constitutional Convention in 1787); see 14 *id.* 1185, 1186 (mention of postal power and others by Campbell of Tennessee in House of Representatives in discussing southwestern Military Road on Feb. 7, 1805); *cf.* 3 *id.* 303 (Jan. 3, 1792).

²⁶⁰ U. S. CONST. ART. IV, §3, cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . .")

²⁶¹ *Cf.* 11 ANNALS OF CONG. 1125 (1882) (Cumberland Road, Giles of Virginia in House of Representatives, Mar. 31, 1802); 19 *id.* 1170 (Jan. 24, 1809); *id.* 1559 (remarks of Stanford in House of Representatives, Mar. 3, 1809, speaking of the Cumberland road as "having commenced with the proceeds of the public lands").

navigability of the river,²⁶² not a syllable was breathed suggesting the existence of Congressional power under the commerce clause. Instead the terms of the acts of cession by Virginia and Maryland and the constitutional grant of exclusive jurisdiction over the District²⁶³ were extensively discussed²⁶⁴ and the bill passed accordingly²⁶⁵ as an exercise of the special Congressional powers over the District. In the next instance involving waterways, Bayard's allusion to the commerce clause has already been noted;²⁶⁶ but he made parallel reference to the Congressional power respecting national defense and then expressly abandoned both suggestions, stating as the true basis of federal action in the premises the grant of authority over the property of the United States²⁶⁷ and leaving his commerce and defense remarks to stand as senatorial *obiter dicta*. Without further reported discussion, the grant of public lands to the Canal proprietors was approved in the Senate some two years later.²⁶⁸ When it came for consideration to the House, March 3, 1809, objection was made that a grave constitutional question was presented which should not be summarily disposed of at the end of the life of the House; proponents replied that the constitutional issues had been settled at the time of the Cumberland Road act and called attention to two Congressional powers—that over the property of the United States and that over national defense—as a basis for federal authority²⁶⁹ but made no mention whatever of the commerce power. The bill was postponed indefinitely, the reasons of course not appearing.

It will thus be observed that, in the course of their deliberations on the provision of transportation facilities by land or by water, congressmen advanced a great variety of constitutional grants to support federal power to act, notably the grants of power over post roads, over the property of the United States, and over the District of Columbia, while commerce and the national defense were mentioned only occasionally and more or less as afterthoughts without great stress placed on them.

²⁶² 12 ANNALS OF CONG. 795 (1882) (noting that in the discussion, in the House of Representatives on December 11, 1804, "Mr. Lewis . . . felt particularly solicitous for the erection of this dam, as it regards the interests of the citizens in the western parts of the States of Virginia, Maryland, and Pennsylvania; for if no steps are taken to improve the navigation below Georgetown, the navigation will soon become so shallow as not to permit sea-vessels to come to Georgetown to carry off the produce which may descend by the Potomac and its improved canals. The destruction of Georgetown will follow the loss of the navigation and the western farmers will lose a choice of two rival markets").

²⁶³ U. S. CONST. ART. I, §8 ("The Congress shall have power . . . 17. To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of Government of the United States . . .").

²⁶⁴ 14 ANNALS OF CONG. 711-721 (1882); *id.* 791-807.

²⁶⁵ *Id.* at 811 (Dec. 13, 1804).

²⁶⁶ *Supra* note 253.

²⁶⁷ 16 ANNALS OF CONG. 59 (1882) (Bayard in the Senate, Feb. 7, 1807).

²⁶⁸ 19 ANNALS OF CONG. 341 (1882) (Feb. 3, 1809).

²⁶⁹ *Id.* at 1558, 1559.

Confirmation of the conclusion that Congress did not regard the matter as involving commerce regulation is found in the disposition made of portions of Jefferson's presidential message of November 1808. Parts of it had related to furthering domestic manufactures, other parts to disposing of surplus revenues to aid in the improvement of roads, canals, and rivers, for which the President thought a constitutional amendment requisite. The former were referred by the House to its Committee on Commerce and Manufactures but the latter were not; instead they were referred to a select committee²⁷⁰ and, in like manner, specific petitions for federal transportation in land and water transportation projects were referred not to the standing Committee on Commerce and Manufactures but to a select committee,²⁷¹ a procedure inconsistent with the supposition that the matters were regarded as coming within the purview of the standing committee.

The evidences thus disclose serious Congressional doubt as to the existence and source of federal authority relative to transportation facilities; conversely they show very little doubt of the existence of state power. One early and rather obscure instance there is, indeed, of adjoining states petitioning for Congressional authorization "to open an internal navigation between those states"²⁷² but it is probable that the need for Congressional assent to imposition of a tonnage tax in turn needed for financing the project was at the bottom of the request.²⁷³ But there is no uncertainty in the vigorous assertion by a member of the House that

The States have jurisdiction over all the navigable waters within their bounds; and where two States are separated by a river or bay, it would then be easy for a negotiation between those two States to provide security to their citizens from injury on such waters. Let not the General Government intermeddle with the States' policy.²⁷⁴

This postulate of the plenitude of state power over the waterways was never more clearly disclosed than in the discussions incident to the establishment of the permanent seat of government, in the first session of the first Congress. A possibility then existing that it might be located upstream on an interstate river running through Pennsylvania and Maryland, there was general agreement that the consent of those states was necessary and should be obtained from their legislatures before ob-

²⁷⁰ *Id.* at 483.

²⁷¹ *Id.* at 485 (involving grant of lands to Catawba and Wateree River Navigation Company) and at 1170 (involving federal subscription to Susquehanna and Tioga Turnpike Road Company).

²⁷² 2 ANNALS OF CONG. 718 (1882) (Virginia and North Carolina, Aug. 5, 1790. "Considerable debate ensued respecting the propriety of Congress interfering in a business of this kind; a committee was appointed to bring in a bill . . .").

²⁷³ This seems to have been the canal project provided for in 1 N. C. REV. LAWS (1821) 635 (1790) which may be consulted for the financial arrangements.

²⁷⁴ 6 ANNALS OF CONG. 1734 (1882) (Dec. 29, 1796).

structions to the navigation could be removed, even at federal expense.²⁷⁵ As to land routes also the sentiment found expression that, even though there might be a proper head of Congressional power under which the Federal Government could act, as, for instance, that over property of the United States, nevertheless no road could be laid out by virtue of it until the states through which it would run should give their consent.²⁷⁶ The competence of the states and the incompetence of Congress to deal with such matters as "what weights shall be carried on . . . roads and at what seasons of year," the establishment of ferries, and the grant of stage monopolies were stated in debate as if they were fixed datum posts too clear for any to dispute.²⁷⁷

The executive, it would seem, was in full accord with the views entertained by the legislators. In view of Jefferson's traditional role as an apostle of strict construction, it is perhaps no surprise that his presidential recommendations to consider devoting federal funds to the establishment of transportation facilities in the way of roads, canals, and river navigation should postulate a lack of constitutional power to take action for that purpose and the need of a constitutional amendment as a basis of authority.²⁷⁸ No one, however, can suppose Hamilton to have been unfriendly to an extended interpretation of federal authority; yet he, too, in his celebrated Report on Manufactures, made by him as Washington's Secretary of the Treasury, seriously questioned the power of the United States under its constitutional grants to pursue the desirable objective of providing a transportation plant.²⁷⁹ Clear indeed must have

²⁷⁵ 1 ANNALS OF CONG. 895, 896 (1882) (note particularly the remarks of Madison, Sept. 17, 1789, that "it is possible the State of Pennsylvania may refuse her concurrence; this would defeat our object, if the practicability was ever so certain; 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?").

²⁷⁶ 15 ANNALS OF CONG. 836 (1882) (Leib discussing Cumberland Road bill in the House of Representatives).

²⁷⁷ 3 ANNALS OF CONG. 303-311 (1882) (Gerry, however, maintained that the state grants of stage coach monopolies were avoided by adoption of the Constitution although not contesting the other instances, debate in the House of Representatives, Jan. 3 and Jan. 5, 1792).

²⁷⁸ 14 ANNALS OF CONG. 78 (1882) (second inaugural address); 16 *id.* 14, 15 (express declaration of lack of constitutional power); 19 *id.* 15.

²⁷⁹ 5 ANNALS OF CONG. 1015, 1016 ("XI. The facilitating of the transportation of commodities. Improvements favoring this object intimately concern all the domestic interests of a community; but they may, without impropriety, be mentioned as having an important relation to manufactures. There is perhaps, scarcely anything which has been better calculated to assist the manufactures of Great Britain than the ameliorations of the public roads of that Kingdom and the great progress which has been of late made in opening canals. Of the former the United States stand much in need, for they present uncommon facilities. The symptoms of attention to the improvement of inland navigation, which have lately appeared in some quarters, must fill with pleasure every breast warmed with a true zeal for the prosperity of the country. These examples, it is to be hoped, will stimulate the exertions of the Government and citizens of every State. There can certainly be no object more worthy of the cares of the local administrations; and it were

been the consensus for these two distinguished protagonists of opposing views on most matters governmental and constitutional to have entertained such harmonious opinions in this connection.

The judiciary had little occasion to pronounce its views on the matter before Marshall's landmark opinion. Of the scattering of commerce clause cases²⁸⁰ prior to the controversy in *Gibbons v. Ogden*, only two had to do with issues affecting transportation facilities. The earlier of these, *Livingston v. Van Ingen*,²⁸¹ was a precursor of *Gibbons v. Ogden* in the sense that it involved a determination of the validity of the New York steamboat monopoly. The statute was sustained but the circumstances that the contemplated operation of the unlicensed vessel was between New York City and Albany, wholly in New York waters, and that there was no showing of any federal coasting license afford a clear basis for distinguishing the cases. However, in its assigned grounds of decision, the earlier opinion is clearly repugnant to the later authoritative pronouncement. At the trial the chancellor had refused to enjoin the operation of the unlicensed steamboat on the grounds that the grant of a monopoly invalidly infringed the common right of the people of New York in the waters of the state and the further ground of the privileges and immunities clause of the federal Constitution; the commerce clause was quoted but not discussed and the chancellor concluded that the state had an "unquestioned" right of "appropriating, regulating, and improving the navigable waters of the state of every description for public beneficial purposes, as for accommodation of commerce or navigation."²⁸² On appeal, counsel for both parties, comprising some of the then most eminent members of the New York bar,²⁸³ while they did not neglect to argue the commerce regulation issue, devoted vastly the greater share of their attention to the proposition of the state's power in view of the constitutional clause authorizing Congress to grant patents for inventions.²⁸⁴ The judges likewise were not especially im-

to be wished that there was no doubt of the power of the National Government to lend its direct aid, on a comprehensive plan. This is one of those improvements which could be prosecuted with more efficacy by the whole, than by any part or parts of the Union. There are cases in which the general interest will be in danger to be sacrificed to the collision of some supposed local interests. . . . Specimens of a spirit similar to that which governed the countries here spoken of, present themselves too frequently to the eye of an impartial observer, and render it a wish of patriotism that the body in this country, in whose councils a local or partial spirit is least likely to predominate, were at liberty to pursue and promote the general interest, in those instances in which there might be danger of the interference of such a spirit.").

²⁸⁰ *Supra* note 5.

²⁸¹ 9 Johns. 507 (N. Y. 1812).

²⁸² *Id.* at 516.

²⁸³ For appellant, Hoffman, Colden, Riggs, and Emmet; for appellee, Wells, Henry, and Van Vechten.

²⁸⁴ As abstracted in the report, the allocation of space between the commerce clause and the patent issues is, in the case of appellant, in the ratio of approximately one to five, in the case of appellee in the ratio of approximately one to six.

pressed by the thought that there was an unauthorized regulation of commerce. Only the opinions of Justice Thompson²⁸⁵ and Chancellor Kent gave extended consideration to the commerce clause argument. The former, while expressing the view that if commerce were involved at all it was only internal commerce within the state as to which New York was free to act, further unequivocally declared:

To deny to the legislature this right would be at once striking from our statute books grants almost innumerable of a similar nature; all our turnpike roads, tollbridges, canals, ferries, and the like, more or less concern commerce or the intercourse between different parts of the state and must depend on the same principles with the privileges granted to the appellants. *The truth, however, is that none of them relate to commerce within the sense and meaning of the term as used in the constitution*; they are mere municipal regulations with which congress can have no concern.²⁸⁶

Kent was similarly inclined to take it as axiomatic that the turnpike, canal, ferry, and like legislation was well within the state's capacity;²⁸⁷ the Hudson River, he thought, was subject to unrestrained regulation by New York²⁸⁸ which might even forbid the entry in that stream of steam vessels from abroad engaged in foreign commerce.²⁸⁹ He called attention to the fact that the steamboat legislation had its inception in the administration of, and met the approval of, John Jay, later the first Chief Justice and ever careful on constitutional points.²⁹⁰ In "the uniform practical construction of this [the commerce] power" he found the test of its limits and briefly listed the varied content of state legislation in connections conceivably bearing on commerce to indicate the range of objects which it was intended to leave with the states and not to convey to the Federal Government through the commerce power.²⁹¹

In *State v. New Orleans Navigation Company*,²⁹² Louisiana unsuccessfully called in question through a *scire facias* proceeding, the authority of a chartered navigation improvement company to levy tolls, as

²⁸⁵ Smith Thompson, later Justice of the United States Supreme Court to which he was appointed Dec. 9, 1823, and took the oath Feb. 10, 1824, not participating in any cases argued before that time. Such cases included *Gibbons v. Ogden*, argued Feb. 4-6, 1824. In view of Mr. Justice Thompson's relative independence of the dominance exercised by Chief Justice Marshall, as shown, e.g., by his dissenting in *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827), it is interesting to speculate whether *Gibbons v. Ogden* had a unanimous court behind it at the time of rendition.

²⁸⁶ 9 Johns. 507, 568 (N. Y. 1812). Italics supplied.

²⁸⁷ *Id.* at 580.

²⁸⁸ *Id.* at 579 ("Hudson river is the property of the people of this state, and the legislature have the same jurisdiction over it that they have over the land or over any of our public highways, or over the waters of any of our rivers or lakes. They may in their sound discretion regulate and control, enlarge or abridge the use of its waters . . .").

²⁸⁹ *Id.* at 580.

²⁹¹ *Id.* at 580.

²⁹⁰ *Id.* at 573.

²⁹² 11 Mart. 309 (La. 1822).

authorized by state statute, for passage along improved waterways on which, both before and after the improvements, vessels engaged in both interstate and foreign commerce were borne. The real constitutional battle raged over whether an unauthorized tonnage tax was being charged; but the commerce regulation issue was briefly argued²⁹³ by counsel and briefly disposed of by the court. In a repeated course of state legislation approved by Congress, Judge Martin, speaking for the court, found

conclusive evidence of the early, deliberate and continued opinion of the national legislature and of that of many of the most important members of the union . . . that the navigation of water-courses may be improved, and the necessary funds procured or reimbursed by a duty raised on vessels navigating it, commensurate with the object, *with the assent of congress*, without violating any of the parts of the constitution of the united states.²⁹⁴

In the instant case Congressional assent did not appear; but, having regard to the intimations of constitutional propriety thus believed to be deducible from legislative practice, the statute (and with it the toll) was given a clean constitutional bill of health. Special attention is called to the approach of both the New York and the Louisiana courts in turning to the established legislative practice as affording the precedents helpful in this constitutional interpretation.

As to land travel and the provision of facilities therefor, there are no holdings except the disposition *sub silentio* in *Perrin v. Sikes*. The references to the subject *arguendo*²⁹⁵ by appellant's counsel in *Livingston v. Van Ingen* assume that the status of state legislation in that connection is too secure to be disputed and that it possesses value as an intrinsically unassailable exercise of state power, of great persuasive force as an analogy; and Chancellor Kent, listing from "the code of our statute laws (o)ur turnpike roads, our tollbridges, the exclusive grant to run stage-waggons" appears to regard these, although "affecting as well the intercourse between citizens of this and other states as between our own citizens"²⁹⁶ to be so plainly within state cognizance unimpaired by radiations from the commerce clause that no lawyer would dream of attacking them. Indeed that must have been the case in order for the silence of court and counsel in *Perrin v. Sikes* to be at all intelligible. Received professional opinion of bench and bar alike seemingly was that the subject of transportation facilities on land—even more than water-

²⁹³ Out of approximately sixty-three pages of reported argument, the state's attorney devoted approximately one page to the commerce regulation issue; out of some eighty-six pages of oral argument by the company's attorney, approximately two thirds of a page dealt with that issue.

²⁹⁴ 11 Mart. 309, 318 (La. 1822). Italics in original opinion.

²⁹⁵ See 9 Johns. 528 (N. Y. 1812).

²⁹⁶ *Id.* at 580.

ways—was beyond question a matter remaining within state power; while, even as to the weaker case of waterways, the control of the states was clear enough to be sustained by both of the two courts to which it was presented, each of which, by strange coincidence, happened currently to be headed by an exceptionally strong and able judge.

Finally, the legal treatises of the day remain to be examined. Oddly enough, of the two then extant on constitutional law, one²⁹⁷ does not mention interstate commerce, except in quoting the text of the Constitution, confining its whole discussion of the commerce clause to issues of foreign commerce and commerce with the Indian tribes²⁹⁸—surely a speaking silence. The other, Sergeant on *Constitutional Law*, the first full scale work dealing exclusively with the American constitution, published at Philadelphia in 1822, affirms, on the authority of *Livingston v. Van Ingen* “the power of a state to grant an exclusive privilege . . . for the navigation of steam boats in its waters” and, without citation of authority, declares that “the navigable waters within the territory of a State are subject to its municipal regulations and the State may regulate their use, in the same manner as it makes laws respecting turnpike roads, toll bridges, canals [and] ferries. . . .”²⁹⁹ The power of the Federal Government to provide internal improvements is recognized with primary attribution to the granted power respecting post roads,³⁰⁰ to some extent re-enforced by half-a-dozen other powers dismissed with a serial listing, among which the commerce power appears. The doctrinal writing of the time is thus seen to have been in full accord with officials in all branches and levels of government in concluding that the states possessed full regulatory power over all the facilities of interstate transportation, undisturbed by anything in the federal commerce power, which was taken to have at most a casual relevance in the field.

9. SUMMARY AND CONCLUSIONS

The tale is told. It is a tale which is singularly coherent. The action of the legislatures, state and federal, the language of courts, textwriters, executive officials, counsel at the bar, and congressmen on the floor of the House testify to a common understanding of the respective spheres for state and federal action in relation to the interstate channels of land and water communication.

The decades before *Gibbons v. Ogden* were a time neither of legislative inaction nor of constitutional confusion. There is a too prevalent tendency to believe that that case was the first because primitive conditions and want of concern with interstate carriage before that time

²⁹⁷ 1 TUCKER'S BLACKSTONE, APPENDIX (1803).

²⁹⁸ The discussion is to be found at pp. 247-253 inclusive.

²⁹⁹ SERGEANT, CONSTITUTIONAL LAW 292 (1822).

³⁰⁰ *Id.* at 311.

dispensed with any considerable degree of activity and hence with any occasion for passing on what we have since come to regard as commerce clause issues. This review of a part of the legislation of that remote time should at least dispel that notion. The matter was not presented sooner because, almost without exception, Marshall's contemporaries in the infancy of the republic did not regard the questions involved as presenting commerce clause issues.

There was throughout a vigorous proliferation of action by the state governments—establishment of highways, of canals, of navigable watercourses, of telegraph systems and railroads, control of harbors and coastal rivers, of vessels and vehicles, of conditions of the highway, of equipment and weight loads of vehicle. It will be remembered that the instances cited have in large part been selected because they peculiarly and in some cases expressly impinged on interstate intercourse. Where conflicting interests of the states pressed for co-ordination, the situation was recognized and was cared for by conjoint action of the states affected or otherwise.

Over these same matters, Congress exercised appropriate jurisdiction as a territorial legislature for the District of Columbia, imitating and thus approving the usual types of state legislation. Beyond that, it undertook improvements by virtue of authority over the post roads and over the property of the United States. But in doing so it was scrupulous to obtain the consent of the states to works within their borders while they, on the other hand, boldly maintained their independence of action and their right to control except as limited in special cases; *e.g.*, by the need of Congressional consent to tonnage taxes. For lighthouses and to a degree for harbor improvement, the commerce clause was thought to confer authority on Congress; but beyond that, none.

This is a story of a constitutional system that is dead. Perhaps (although it did function to the apparent satisfaction of those affected) it might not function today. Before *Gibbons v. Ogden*, there was regulation of interstate transportation facilities in nearly as great variety and profusion as there is now; but it was not properly commerce regulation because that subject was not really commerce until Chief Justice Marshall made it so. With the three words, "commerce is intercourse"³⁰¹ more than three decades of highly elaborated developments of controls of the media of land and water transportation, representing the constitutional understanding of the early federal era, entered the long path to oblivion.

³⁰¹ See *Gibbons v. Ogden*, 9 Wheat. at 189 (U. S. 1824).