AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Powers of the National Government

Foster v. Neilson, 27 U.S. 253 (1829)

The United States engaged in many border disputes during the nineteenth century. One particularly heated dispute was with Spain over the precise boundaries of the Louisiana Purchase. The United States claimed that Spain had ceded to France the territory from the Perdido River, which is on the border between what is now Georgia and Florida, and the Iberville River (now called the Bayou Manchac), which runs in what is now eastern Louisiana. The matter was finally settled by treaty in 1819. Before the treaty was signed, Spain had granted land within the disputed area to the plaintiff. The plaintiff claimed title on the grounds that Spain had a right to grant the land in 1804 and that the treaty between Spain and the United States was said to confirm land titles acquired before 1819.

The Marshall Court rejected both claims. Relying on what would later become known as the "political questions" doctrine, Chief Justice Marshall insisted that courts should not decide border disputes between the United States and other countries. The boundaries of the United States, he declared, were for elected officials to determine. Marshall then ruled that the treaty did not provide sufficient legal grounds for lawsuits based on Spanish grants. His opinion distinguished between self-executing and non–self-executing treatises, a distinction that has become central to American law. Self-executing treaties create legal obligations the instant they are ratified. As such, they are judicially enforceable in the absence of legislation. Non–self-executing treaties merely create obligations to pass conforming legislation. Courts may not constitutionally enforce a non–self-executing treaty until Congress has passed appropriate legislation. Foster could had no legal right to the land, in this case, because the Supreme Court ruled that the treat was non–self-executing.

Consider when you read the opinion whether the constitutional text supports the conclusion that justices should not determine the boundaries of the United States. Certainly nothing in Article III supports that limit on judicial power. Is this an inference from the total structure of the Constitution? Or did Marshall realize that, regardless of constitutional logics, judicial opinions on the boundaries of the United States are likely to be ignored and embarrass the national government. If Marshall was behaving strategically in the first part of Foster*, was the second part also strategic? Consider that four years later, in* United States v. Perchmann *(1833), the Supreme Court overruled* Foster *and held that the treaty with Spain was self-executing. Students interested in a good class paper might read* Perchmann *and some of the background to determine whether this rapid overruling was based on law or strategy.*

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This suit was brought by the plaintiffs in error in the court of the United States, for the eastern district of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant . . . of land, made by the Spanish governor, on the 2d of January 1804. . . . The defendant excepted to the petition of the plaintiffs, alleging . . . the land . . . been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. . . .

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

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In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think then, however individual judges might construe the treaty of St Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

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In April 1812, congress passed 'an act to enlarge the limits of the state of Louisiana.' This act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the state of Louisiana.

In May of the same year, another act was passed, annexing the residue of the country west of the Perdido to the Mississippi territory.

[The next paragraphs provide other instances of legislation assuming that the territory in question was part of the Louisiana Purchase.]

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. . . .

If the rights of the parties are in any degree changed, that change must be produced by the subsequent arrangements made between the two governments.

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The 8th article [of the treaty between Spain and United States signed on February 22, 1819] stipulates, that 'all the grants of land made before the 24th of January 1818 by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.'

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[Marshall then asserts that the justices disagree whether the treaty should be interpreted as recognizing titles granted by Spain from 1803 to 1818.]

Whatever difference may exist respecting the effect of the ratification, in whatever sense it may be understood, we think the sound construction of the eighth article will not enable this Court to apply its provisions to the present case. The words of the article are, that 'all the grants of land made before the 24th of January 1818, by his catholic majesty, &c. shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty.' Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms

of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

The article under consideration does not declare that all the grants made by his catholic majesty before the 24th of January 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject. . . .

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Congress has reserved to itself the supervision of the titles . . . [and] has passed no law, withdrawing grants generally for lands west of the Perdido from the operation of the 14th section of the act of 1804, or repealing that section.

We are of opinion then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs.

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