



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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OXFORD
 UNIVERSITY PRESS

Supplementary Material

Chapter 4: The Early National Era – Powers of the National Government

Senate Debate on the Louisiana Purchase (1803)¹

The Louisiana Purchase offered the first chance for the United States to acquire additional territory since the Treaty of Paris (1783) ended the American Revolution. The United States emerged from the Revolution with large territorial holdings, and the federal government's role grew when the states agreed to cede control over western lands to the federal government after independence. By the time of the Louisiana Purchase, the territories in the southwest had already become the states of Kentucky and Tennessee, and the Northwest Territories had just produced the state of Ohio. Americans had long anticipated further territorial expansion. But the direction and the means by which this would occur had not always been clear. Unfortunately, the Constitution did not explicitly provide for the acquisition of new territories.

Control over the Mississippi River had been a longtime concern. It was well recognized that the river, and the port of New Orleans, would be important instruments of commerce in the coming decades and that American economic growth would be severely hampered if access to the river were to be blocked by hostile European powers. Moreover, there was often unrest among the settlers in the west, who complained that the distant government on the Atlantic seaboard did not understand or care about their interests. They sometimes threatened to leave the Union and seek better terms from the English or the French.

American envoys in France, hoping to purchase New Orleans, were stunned when Napoleon offered to sell for \$15 million all French possessions in North America. The American delegation quickly agreed. The treaty they negotiated provided that the current inhabitants of the territory would be guaranteed all the rights and liberties of American citizens, and the territory would be "incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution." President Jefferson had serious constitutional doubts about what his envoys had negotiated, however. "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union." The executive had "done an act beyond the Constitution." He considered proposing a narrowly drawn constitutional amendment that would explicitly authorize the treaty. Doing so would have the dual benefit of winning public confirmation for what they had done and of clarifying the terms of the Constitution.² The president was advised, however, that Napoleon was already getting cold feet about the deal and would use the constitutional tangle to renege on the agreement. Others in the administration assured the president that there were no constitutional problems with the deal in any case. Jefferson gave in. He submitted the treaty for Senate ratification without any mention of his constitutional doubts.

The treaty was quickly and easily ratified. When it came time to pass legislation implementing the terms of the treaty, however, the Federalists in New England raised constitutional objections. They were convinced that western expansion would reduce the economic and political clout of New England within the union. Even if the federal government could legitimately purchase new territory, they argued, it should hold those lands in perpetual territorial status. Further, new states could not be added to the union from that "foreign" territory without the consent of every other state. The Republicans had the numbers in Congress, however, and overrode the Federalist objections.

Jefferson saw the Louisiana Purchase as not only securing commercial access to the Mississippi River and protecting the American flank from hostile powers. It also, he believed, opened a vast new home to independent

¹ Excerpt taken from *Annals of Congress*, 8th Cong., 1st Sess. (November 3, 1803), 49.

² Thomas Jefferson, "To John Breckenridge, August 12, 1802," in *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 8 (New York: G.P. Putnam's Sons, 1897), 244.



farmers and could reduce the political obstacles to ending slavery. By diffusing the population of slaves across a wider area, some hoped that the South would then look more like the mid-Atlantic states and move toward gradual emancipation. Republicans believed the Federalists constitutional objections were mistaken. The constitutional power to acquire territory, in their view, was inherent in the power to make war and negotiate treaties. The Louisiana Purchase radically expanded the geographic size of the country, and it laid the foundations for a new era of American politics. As those lands were settled, whether opened or closed for slavery, they were also partitioned into states, to be admitted into the union as soon as possible by majority vote. These states would have equal political rights to the states that had fought the American Revolution.

The Constitution provided few clear rules to guide governing officials. Article IV, Section 3 declares, “New States may be admitted by the Congress into this Union.” Article IV, Section 4 declares, “The Congress shall have the Power to dispose of and make all needful Rules and Regulations of the Territory or other Property of the United States.” Neither provision mentions any federal power to purchase additional territory beyond what the United States already possessed at the time of the founding. Section 3 does not state explicitly whether Congress may require people in a territory to agree to certain conditions before being allowed to become a state. Section 4 does not state explicitly whether that provision authorizes the United States to establish territorial governments.

Was President Jefferson overly cautious in this case, or were his supporters too quick to dismiss the constitutional concerns given their strict constructionist philosophy? Should Jefferson have submitted the treaty to the Senate given his views on the Constitution? Did the Federalists adopt the Jeffersonian position, or did they develop a distinctive position of their own for restricting national power in this case? What might be the implications of the Federalist argument for other sorts of cases? Are there implications for secession—or for national decisions about citizenship and suffrage? Imagine a proposal today to admit the territory and citizens of Canada and Mexico into the United States. How would that alter the current political balance of the United States? Would such a proposal raise constitutional concerns?

How helpful is the familiar framework of strict and broad construction of constitutional powers in this context? What new issues are raised when thinking about the power of adding territory and citizens to a republic? Is the power to acquire new territory, omitted from the Constitution, an essential attribute of a sovereign government or implied by one or more of the enumerated powers?

Mr. John TAYLOR (Republican, Virginia):

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Before a confederation, each State in the Union possessed a right, as attached to sovereignty, of acquiring territory, by war, purchase, or treaty. This right must be either still possessed, or forbidden both to each State and to the General Government, or transferred to the General Government. It is not possessed by the States separately because war and compacts with foreign Powers and with each other are prohibited to a separate State; and no other means of acquiring territory exist. By depriving every State of the means of exercising the right of acquiring territory, the Constitution has deprived each separate State of the right itself. Neither the means nor the right of acquiring territory are forbidden to the United States. . . . The means of acquiring territory consist of war and compact; both are expressly surrendered to Congress and forbidden to the several States. . . . The means of acquiring and the right of holding territory, being both given to the United States, and prohibited to each State, it follows that these attributes of sovereignty once held by each State are thus transferred to the United States. . . .

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To prove the treaty unconstitutional, a member from Massachusetts, [Mr. Pickering,] has quoted from the sixth article of the Constitution these words: “This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;” and he has reasoned upon the ground, that the words “in pursuance thereof,” referred to treaties as well as to laws. But the difference between the phraseology in relation to laws and to treaties, is plain and remarkable; laws were to be made “in pursuance of the Constitution;” treaties “under the authority of the United States.” This difference, probably, arises from the following consideration. The objects of the Legislative power could be foreseen and defined; therefore laws are limited to be made “in pursuance of” the definitions of the objects of Legislative power in the Constitution. But the objects of the treaty-making power could not be



foreseen, and are not defined. . . . But if the words, "under the authority of the United States," are considered as being applied to treaties, in place of these "in pursuance of the Constitution," which are applied to laws; because the objects of treaties are not defined; then the treaty-making power retains all the political attributes belonging to it, not inconsistent with the principle of agency or subordination interwoven with our policy in all its parts-- Among these is the right or attribute of acquiring territory. And it was probably the absence of a definition as to the objects of the treaty-making power, which suggested the precaution of checking it by two-thirds of the Senate; thus subjecting it, in this body, to the same restraint imposed upon amendments to the Constitution. . . .

Mr. Uriah TRACY (Federalist, Connecticut):

Mr. President: I shall vote against this bill, and will give some of the reasons which govern my vote in this case. It is well known that this bill is introduced to carry into effect the treaty between the United States and France, which has been lately ratified. If that treaty be an unconstitutional compact, such a one as the President and Senate had no rightful authority to make, the conclusion is easy, that it creates no obligation on any branch or member of the Government to vote for this bill, or any other, which is calculated to carry into effect such unconstitutional compact.

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It is well known that in Europe, any part of a country may be ceded by treaty, and the transfer is considered valid, without the consent of the inhabitants of the part thus transferred. Will it be said that the President and Senate can transfer Connecticut by treaty to France or to any other country? I know that a nation may be in war, and reduced to such necessitous circumstances, as that giving up a part or half the territory to save the remainder, may be inevitable: the United States may be in this condition; but necessity knows no law nor constitution either; such a case might be the result of extreme necessity, but it would never make it constitutional; it is a state of things which cannot, in its own nature, be governed by law or constitution. But if the President and Senate should, in ordinary peaceable times, transfer Connecticut, against her consent, would the Government be bound to make laws to carry such a treaty into effect? . . .

A number of States, or independent sovereignties, entered into a voluntary association, or, to familiarize the subject, it may be called a partnership, and the Constitution was agreed to as the measure of power delegated by them to the Federal Government, reserving to themselves every other power not by them delegated. In this Constitution they have restricted the powers of Congress, or the Federal Government, in a number of instances. In all these, I think the treaty-making power is clearly restricted, as much as if it had been mentioned in the restriction. For instance, Congress can lay no tax or duty on articles exported from any State. If this restriction should be violated by treaty, could it be thought valid?

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It is agreed, by the friends to the treaty, that the President and Senate cannot transfer a State. Let us examine the power of introducing a State. Suppose Louisiana contain ten millions of inhabitants; or, for the sake of argument, let it be supposed that we had a President inclined to monarchical principles, and he lived in the northern part of the Union, say in Connecticut or Massachusetts, and that two-thirds of the Senate were with him in sentiment, and that the four northern provinces of Great Britain contained ten millions of inhabitants, and were all determined monarchists, would the parties of the Union say it was competent and Constitutional for the President and Senate to introduce these ten millions of monarchists, who could at once out vote us all; and even give fifteen millions of dollars for the benefit of having them?

The principles of our Government, the original ideas and rights of the partners to the compact, forbid such a measure; and without the consent of all the partners, no such thing can be done.

The principle of admission, in the case of Louisiana, is the same as if it contained ten millions of inhabitants; and the principles of these people are probably as hostile to our Government, in its true construction, as they can be, and the relative strength which this admission gives to a Southern and Western interest, is contradictory to the principles of our original Union, as any can be, however strongly stated.

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I shall be asked, sir, what can be done? To this question I have two answers: one is, that nothing unconstitutional can or ought to be done; and if it be ever so desirable that we acquire foreign States, and the navigation of the Mississippi, etc., no excuse can be formed for violating the Constitution; and if all those desirable effects cannot take place without violating it, they must be given up. But another and more satisfactory answer can be given. I have no doubt but we can obtain territory either by conquest or compact, and hold it, even all Louisiana, and a thousand times more, if you please, without violating the Constitution. We can hold territory; but to admit the inhabitants into the Union, to make citizens of them, and States, by treaty, we cannot constitutionally do; and no subsequent act of legislation, or even ordinary amendment to our Constitution, can legalize such measures. If done at all, they must be done by universal consent of all the States or partners to our political association. And this universal consent I am positive can never be obtained to such a pernicious measure as the admission of Louisiana, of a world, and such a world, into our Union. This would be absorbing the Northern States, and rendering them as insignificant in the Union as they ought to be, if by their own consent, the measure should be accepted.