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The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase

Robert Knowles

Valparaiso University School of Law

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The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase

*Robert Knowles**

ABSTRACT: This Article challenges the conventional wisdom about the Louisiana Treaty and argues that it was unconstitutional. As many students of history know, President Jefferson had serious misgivings about its constitutionality, which scholars have dismissed as driven by an overly strict construction of the Constitution. The Article concludes that Jefferson's concerns were in fact motivated primarily by respect for federalism principles.

This Article identifies and discusses the underlying conflict between two radically different visions of federalism. While Jefferson's Republicans believed that the incorporation of new states in the West would merely expand the Constitution's form of government to more territory, creating an "empire of liberty," the Federalists argued that it would destroy the delicate regional balance of power preserved by the Constitution. The author concludes that, given the federalism principles at stake, Jefferson ought to have given more weight to the "balance of forces" view and carried out his plan for presenting a constitutional amendment.

This Article also contends that the consequences of Jefferson's failure are more serious than scholars have admitted. States' rights claims based on the "empire of liberty" theory implicit in the Louisiana Treaty made the spread of slavery inevitable. The failure to require an amendment triggered a decline in the use of the Article Five amendment process and set the stage for a further weakening of states' rights. Finally, with potential threats to state sovereignty on the horizon, the Article concludes that a narrow view of the treaty power, consistent with the Supreme Court's recent revival of federalism, would best preserve the constitutional principles weakened by the Louisiana Purchase.

* J.D., Northwestern, 2001. Law clerk to the Honorable M. Margaret McKeown, United States Court of Appeals for the Ninth Circuit. Special thanks to Steven Calabresi, Robert Bennett, Curtis Bradley, Hillary Krantz, Lee Howard, and the staff of the Iowa Law Review.

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I. INTRODUCTION

In grade school, many of us learned that President Thomas Jefferson purchased the Louisiana Territory from Emperor Napoleon of France for approximately eleven million dollars.¹ We also learned that the Louisiana Purchase effectively doubled the size of the country, accelerating westward expansion as vast new spaces opened for settlement on the western side of the Mississippi River.² As a political maneuver, the purchase was an elegant solution to all of Jefferson's major foreign policy headaches. In one fell swoop, the United States gained permanent control of the Mississippi River and its tributaries and banished France—a European power with whom the U.S. had just fought an undeclared war—from North America for good.³ Jefferson was surely happy.

But what most of us learned later, or never at all, is that Jefferson

1. Students like me who did not always pay attention in school could still learn about such things from watching Saturday morning cartoons during the 1970s courtesy of "Schoolhouse Rock." "Elbow Room," about westward expansion, conveyed the basic facts:

The President was Thomas Jefferson,
 He made a deal with Napoleon,
 "How'd you like to sell a mile or two (or three or a hundred or a thousand?)"
 And so in 1803 the Louisiana Territory
 Was sold to us without a fuss
 And gave us lots of elbow room.

The full lyrics are available at http://www.apocalypse.org/pub/u/gilly/Schoolhouse_Rock/HTML/history/elbow.html (last visited on Jan. 1, 2002) (on file with the Iowa Law Review).

2. See DUMAS MALONE, *JEFFERSON THE PRESIDENT, FIRST TERM, 1801–1805*, at 260 (1970). From a legal perspective, Professor Malone's multi-volume biography contains the best in-depth description of the circumstances surrounding the Louisiana Purchase and Jefferson's conflicting views about it. See also 1 HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON* 227–392 (Charles Scribner's Sons 1917) (1889); 4 IRVING BRANT, *JAMES MADISON: SECRETARY OF STATE 1800–1809*, at 98–159, (1953); FORREST McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 71 (1976). For a more streamlined account, see MARSHALL SMELSER, *THE DEMOCRATIC REPUBLIC, 1801–1815*, at 83–103 (1968). The details of the negotiations with Napoleon, and the court intrigue involved, are recounted in ALEXANDER DECONDE, *THIS AFFAIR OF LOUISIANA* (1976).

The most thorough examination of the constitutional issues remains EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE* (1920). Like others, I am in debt to Professor Brown's even-handed depiction of the debates on the Louisiana Treaty in Congress and within the Jefferson Administration. Brown appears agnostic regarding the ultimate constitutional issues, although it is my opinion that Professor Brown thought the treaty constitutional. See *infra* notes 303–05 and accompanying text; see also *Downes v. Bidwell*, 182 U.S. 244, 251–55 (1901) (Brown, J.) (one of the so-called "Insular Cases"). For more recent analyses, see PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 73–75 (3d ed. 1992); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 95–114 (2001); DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 85–112 (1994). For discussion of these analyses, see *infra* Part IV.D.2.

3. MALONE, *supra* note 2, at 268.

privately brooded over the Louisiana Treaty because he doubted its constitutionality. "Our peculiar security is in possession of a written Constitution," he wrote at the time to his close friend William Cary Nicholas. "Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is, then we have no Constitution."⁴ Jefferson's concerns about exercises of the treaty power echoed the sentiments that drove Anti-Federalist opposition to it during the state ratifying conventions.⁵ In their view, the treaty power, even more than the domestic federal powers enumerated in the Constitution, eluded precise definition and presented a special danger for believers in a federal government of limited powers.⁶

Jefferson proposed to ease his troubled mind by calling for a constitutional amendment to ratify the Louisiana Treaty, but he never followed through with his plans.⁷ While historians of the nineteenth century criticized him for this failure, twentieth century historians concluded that an amendment was either unnecessary or impractical, or both.⁸ In this Article, I take Jefferson's doubts seriously, re-examine the Louisiana Treaty, and conclude that it was indeed an unconstitutional exercise of the treaty power.

In letters to friends and colleagues, Jefferson expressed fears that the Louisiana Treaty violated principles of strict construction: no provision in the Constitution's text granted the federal government power to acquire territory and to incorporate states into the Union. In Jefferson's time, this omission was, in itself, sufficient to raise serious concern.⁹ But the landscape of constitutional interpretation has changed so drastically since 1803 that today's conventional wisdom is, as Professor Martin Flaherty observed, that "no constitutional dispute was more important at the time, nor seemingly more beside the point now, than the Louisiana Purchase."¹⁰

4. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 THE WRITINGS OF THOMAS JEFFERSON 247-48 (Paul Leicester Ford ed., 1899) [hereinafter JEFFERSON WRITINGS]. Jefferson's concerns are discussed in depth in Part IV.C and IV.D.2.

5. See *infra* notes 39-63 and accompanying text.

6. For a discussion of early fears about the treaty power, see *infra* Part II.B.

7. For a discussion of Jefferson's proposed constitutional amendments, see *infra* Part IV.D.

8. See *infra* Part IV.D.

9. See *id.* One historian referred to the Jeffersonian view of the Constitution's powers as "remarkably cramped." CURRIE, *supra* note 2, at 105; see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 189 n.* (2d ed. 1996) (arguing that Jefferson's strict views would leave "little room for treaties"). But see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 416 (1998). Jefferson's early views on the treaty power were expressed in his *Manual on Parliamentary Procedure*, written when he was Vice President. See *infra* notes 98-103 and accompanying text.

10. Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1094 (2001) (reviewing DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001)). No one is arguing, it's safe to say, that South Dakota ought to be returned to France. Nor are the precise constitutional issues confronting Jefferson—whether territory outside the original

This Article explains why the conventional wisdom is wrong. More was at stake in arguments about the Louisiana Purchase than resolving disagreements between advocates of a very strict construction of the Constitution and advocates of a more flexible one. As Jefferson's Federalist opponents warned at the time, the treaty threatened the constitutional principle that inspired Jefferson's belief in strict construction—states' rights. When Jefferson announced the Louisiana Treaty, a note of dissent rang out from New England.¹¹ The Federalists understood that, with vast new territory would come new states, and that these new states, in the South and West, would in all likelihood be slave states.¹² The Reverend Manasseh Cutler declared to a friend that the treaty was a "flagrant violation of the principles of the Constitution."¹³ The admission into the Union of new states formed from this territory would tilt the balance of political power to the South and "lay the foundation for the separation of the States."¹⁴

The heart of the conflict between the Federalists and the newly ascendant Republicans was a disagreement about the nature of the Constitution itself. Both camps believed in federalism—that the states and the national government possessed sovereignty.¹⁵ The Federalist

bounds of the United States may be acquired and incorporated by treaty to double the size of the country—likely to recur any time soon. There are no concrete plans (that this author is aware of) either to acquire territory or incorporate territory through a treaty. But one never knows. See John Ellis, *Let's Buy Siberia: Don't Laugh, It's a Great Idea*, BOSTON GLOBE, Oct. 8, 1998, at A27 (arguing that Clinton could have avoided impeachment by doing something as popular as the Louisiana Purchase—buying Siberia). At any rate, changes in the nature of the union which threaten state sovereignty crop up as the United States participates in comprehensive international agreements. See *infra* Part VI. Finally, a look at the issues raised by the geographical expansion of the nation are worthwhile alone for what they reveal about the Constitution and our government. See Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 251–57 (2000); Gary Lawson & Guy Seidman, *Our Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581 (2001) (discussing the case of *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1854), which involved the legality of the American military government in California between May 30, 1848, when the United States acquired the territory, and Sept. 9, 1850, when California was admitted as a state).

11. See FORREST McDONALD, STATES' RIGHTS AND THE UNION 60 (2000).

12. See, e.g., Letter from Rufus King to Timothy Pickering (Nov. 4, 1803), in 4 LIFE AND CORRESPONDENCE OF RUFUS KING 324–325 (Charles King ed., 1900), reprinted in BROWN, *supra* note 2, at 43 ("As by the Louisiana Treaty, the ceded territory must be formed into States . . . [and] will not the present inequality, arising from the Representation of Slaves, be increased?") [hereinafter KING].

13. 2 WILLIAM PARKER CUTLER & JULIA PERKINS CUTLER, JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER 138 (1888).

14. *Id.*

15. See THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (noting the States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."); *Alden v. Maine*, 527 U.S. 706, 713 (1999):

[A]s the Constitution's structure, its history, and the authoritative interpretations

interpretation—which I call the *balance of forces* theory—viewed the U.S. Constitution as a means of maintaining equilibrium among competing powers within society, and particularly among the geographical sections of the United States.¹⁶ Although the *balance of forces* view had its roots in the English Constitution, during the American Revolution the Patriots made it their own, believing that “the very idea of liberty was bound up with the preservation of this balance of forces.”¹⁷ The introduction of new states in the west threatened to upset the equilibrium that the Federalists felt was necessary to maintain liberty.

In contrast, the Republicans, rejecting what they saw as an outmoded European balance-of-powers model, instead imagined a much more idealized Constitution, the principles of which should be applicable to a nation of great size and diversity so long as equality among the discrete states was maintained. The admission of new states in the West would merely expand the republican form of government to more territory, creating an “Empire of Liberty.”¹⁸

Consideration of the battle between these two competing visions of states’ rights has been the crucial element missing from analyses of the Louisiana Treaty’s constitutionality.¹⁹ While early doubts expressed by scholars were soon drowned in a chorus of approbation at the tremendous benefit the treaty brought to the United States, little attention has been paid to the adverse consequences for the federalism principles embedded in the

by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

16. See JAMES M. BANNER, JR., *TO THE HARTFORD CONVENTION* 27 (1970). For further discussion of the *balance of forces* view, see *infra* Parts II.B and IV.B.

17. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 76 (Enlarged ed., 1992).

18. Jefferson first used the expression “Empire of liberty” in a letter to George Rogers Clark. See Letter from Thomas Jefferson to George Rogers Clark, Dec. 25, 1780, in 2 JEFFERSON WRITINGS, *supra* note 4, at 390; see also PETER S. ONUF, *JEFFERSON’S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* 65–70 (2000) [hereinafter ONUF, *EMPIRE*]; ROBERT W. TUCKER & DAVID C. HENDRICKSON, *EMPIRE OF LIBERTY: THE STATECRAFT OF THOMAS JEFFERSON* (1990). Professor Onuf highlights the difference between these two views of states’ rights but sees the *balance of forces* view as reflecting older, European conceptions of the world, and the *empire of liberty* view as reflecting a newer, American conception. The names are my own. See Peter S. Onuf, *The Expanding Union*, in *DEVISING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC* 79 (David Thomas Konig ed., 1995) [hereinafter Onuf, *Expanding Union*]. For more discussion of Onuf’s views, see *infra* text accompanying notes 339–53.

19. Even the earliest commentators, critical of Jefferson for abandoning his strict construction of the Constitution, did not mention states’ rights as a concern. See *infra* notes 285–91 and accompanying text. While Professor Onuf calls attention to the two competing theories of federalism, he does not address the constitutionality of the Louisiana Purchase. See *supra* note 18.

Constitution and dear to the heart of Jefferson.²⁰ In this Article, I contend that Jefferson and the Republicans' *empire of liberty* undermined federalism itself. Under the structure of the Constitution, it is insufficient to guarantee each state that it will exist on an equal footing with the others. In order to respect the sovereignty of the states as well as the national government, the states' approval must be sought through the constitutional amendment process—in which the states themselves share equal power in re-interpreting the Constitution—whenever profound changes in the nature of the union may diminish the ability of existing states to have their interests represented in the national government.

I make a historical argument for the importance of this view based on the consequences of the Louisiana Purchase. Slavery frustrated the Republicans' *empire of liberty* vision by demonstrating the growing strength of sectional interests. The recognition of the Federalists' *balance of forces* principles would have been critical for avoiding the Civil War. Instead, the effort to contain slavery based on a *balance of forces* view ran head-on into the popular sovereignty claims of Stephen Douglas and others, who merely applied Jefferson's abstract *empire of liberty* federalism principles to the new states in the West. As the *empire of liberty* triumphed, so did slavery. The Louisiana Purchase marked the substitution of one kind of federalism for another, resulting in a vastly diminished role for states in effectuating constitutional change.

But more than bringing some much-needed balance to our view of Jefferson's actions and their results, a fresh look at the Louisiana Purchase may shed light on the current debate raging in the academy about federalism and the Treaty Clause.²¹ As globalization and international agreements regulate more pervasively in areas traditionally governed by domestic law,²² efforts are being made to square the Supreme Court's recent

20. Twentieth-century historians have been far more forgiving of Jefferson than their nineteenth-century counterparts. See *infra* Part IV.D.

21. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); Martin S. Flaherty, *Are We To Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Gerald L. Neuman, *The Nationalization of Civil Liberties*, 99 COLUM. L. REV. 1630, 1645–47 (1999) [hereinafter Neuman, *Liberties*]; Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 46–49 (1997) [hereinafter Neuman, *RFRA*]; Carlos Manuel Vazquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1337–43 (1999); Thomas Healy, Note, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998); Robert Knowles, Comment, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 NW. U. L. REV. 735 (2001).

22. See generally Lawrence J. Auerbach, *Federalism In the Global Marketplace*, 26 URB. LAW. 235 (1994); Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441. See Bradley, *supra* note 9, at 396–409; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1967–75 (1999); Knowles, *supra* note 21, at 749–54.

revival of federalism with its decision in *Missouri v. Holland*—generally believed to hold the treaty power immune from states' rights limitations.²³ Amid today's proliferation of treaties,²⁴ the Louisiana Purchase provides a warning that even the most beneficial exercises of national power can disrupt the federal-state balance in unintended ways.

Part II supplies some necessary background. I introduce the two distinct views of federalism that formed the backdrop for the framers' design, the *balance of forces* and the *empire of liberty*. The Louisiana Purchase is an early,

23. 252 U.S. 416 (1920). In *Holland*, the Supreme Court upheld the Migratory Bird Treaty, Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 29 Stat. 1702. Justice Holmes rejected Missouri's argument that the treaty power was limited in the same ways by federalism as the commerce power: "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could. . . ." *Holland*, 252 U.S. at 433. The Treaty did not "contravene any prohibitory words" in the Constitution, and no "invisible radiation . . . of the Tenth Amendment" limited the scope of the treaty power. *Id.* at 433-34.

The Court has yet to overrule *Holland*, but it has in recent years strengthened states' rights vis-à-vis other national powers. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (prohibiting suits in federal courts for violence on the basis of gender because Congress cannot create such a cause of action pursuant to the Commerce Clause); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Maine state probation officers could not sue the state in Maine courts for alleged violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et. seq.*); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting Congress's power to enact civil rights legislation under Section 5 of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating a statute commandeering state executive officials); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that the Commerce Clause does not give Congress the power to override states' Eleventh Amendment immunity from suit in federal court); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a portion of the Gun Free Schools Act as exceeding Congress's power under the Commerce Clause).

In light of this jurisprudence, some scholars have argued that *Holland* should be overturned, or that its holding should be limited. *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 274 ("If a particular law violates the Tenth Amendment . . . by placing an undue burden on state governments, then it is questionable why the same action would be constitutional if undertaken through a treaty."); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 850 (2d ed. 1998); Bradley, *supra* note 9, at 456-61; Knowles, *supra* note 21, at 763. However, most scholars believe the treaty power exception is justifiable. *See* HENKIN, *supra* note 9, at 442 n.2; Lori Fidler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 530-31 (1991); Healy, *supra* note 21, at 1731; *cf.* Golove, *supra* note 21 (concluding from a historical study that few subject matter limitations apply to the treaty power, although state sovereignty limits probably do apply).

24. *See, e.g.*, International Covenant on Civil and Political Rights, arts. 6-27, S. Exec. Doc. No. 95-2 (1978) (defining political rights); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 3, S. Exec. Doc. No. D. 95-2 (1978), 993 U.N.T.S. 3 (guaranteeing rights of equal treatment in economic and social spheres); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 4, S. Exec. Doc. C, 95-2 (1978), at 1, 3-4, 660 U.N.T.S. 195, 218-20 (entered into force Jan. 4, 1969) (outlawing hate speech); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note to Part VII, at 144 (1987) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS] ("[H]ow a state treats individual human beings, including its own citizens, in respect of their human rights, is not the state's own business alone.").

but relatively unexplored, chapter in the long struggle between proponents of broad and narrow interpretations of the Treaty Clause, waged in the halls of Congress and in the academy, that continues today. But the purchase prominently brought to the surface this deep conflict within federalism. From the beginning, Anti-Federalists, and their Republican successors, had expressed concern that the treaty power could be wielded by a rogue executive and an aristocratic Senate to interfere with individual rights as well as state laws and institutions. The principal fear, however, was that the treaty power could upset the *balance of forces* by bargaining away southern states' access to the Mississippi River.²⁵ The Treaty Clause was sold to the state ratifying conventions with assurances that it would preserve, not destroy, intersectional parity. By the time of the Louisiana Purchase, the two camps had reversed roles: While the Anti-Federalist's nightmares imagined the treaty power as a tool for short-circuiting the federal structure of the Constitution, sweeping aside states' rights in the name of national foreign policy prerogative, it was their successors, Jefferson's Republicans, who made the boldest use of this tool during the Louisiana Purchase.

Part III provides an explanation for why this Article focuses so much on Jefferson's conflict with himself. This unusual approach is justified because Jefferson's influence was so strong that, during the Louisiana Purchase, the strongest checks and balances were his constitutional principles.

With this backdrop, in Part IV, I analyze the constitutionality of the Louisiana Treaty by examining Federalist objections to it, Jefferson's concerns about it, and the congressional debates over it. I begin by explaining why the Louisiana Treaty clearly required the incorporation of new states from foreign territory.²⁶ I then examine the Federalist opposition in New England.²⁷

As for the constitutionality of the treaty itself, while the acquisition of territory inheres in the foreign policy powers of a sovereign state, and is thus a permissible use of the treaty power, the authority to incorporate the territory into the Union is essentially a domestic power that has the potential to profoundly alter the relationship between the states and the federal government. The Louisiana Treaty infringed on fundamentally domestic matters that ought to lie beyond the scope of the treaty power. The Federalists' constitutional objections, however motivated by politics or

25. The conventional wisdom is that a treaty could not give away state territory. *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (Field, J.) (dictum) ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."); see also HENKIN, *supra* note 9, at 193–94; Bradley, *supra* note 9, at 426 n.209. *But see* Vasani Kesavan, *The Treaty-Making Power and American Federalism: An Originalist Proof for Missouri v. Holland* (tentative title) (unpublished manuscript, on file with author).

26. See *infra* Part IV.A.

27. See *infra* Part IV.B.

jealousy, were correct, and Jefferson should have followed through with his plan to seek a constitutional amendment.

In Part V, I examine the consequences of the failure to ratify the treaty with a constitutional amendment. First, the government's ability to control the spread of slavery into the new territory proved inadequate in the face of states' rights claims based on the *empire of liberty* theory implicit in the Louisiana Treaty.²⁸ Second, the failure to seek an amendment for such an important constitutional change led to a decline in the use of the Article Five amendment process, which gives the states an equal voice with the federal government in constitutional changes.²⁹ Instead, the Louisiana Purchase set the stage for subsequent transformations outside of Article Five, transformations in which the national government reconstructed the constitutional regime in its own favor. Finally, in the Conclusion, I briefly address why the lessons of the Louisiana Purchase should cast doubt on the now-dominant "nationalist" view of the treaty power.

II. TWO THEORIES OF FEDERALISM AND THE TREATY CLAUSE

Article II of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."³⁰ A device neither for lawmaking nor merely diplomacy, the power to bind the nation in contract with foreign states has both executive and legislative aspects.³¹ It is a strange beast. In an age of globalization, where treaties and other kinds of international agreements continue to grow in their importance and impact, scholars struggling to define the scope of the treaty power confront a dilemma. On the one hand, treaties regulate the nation's dealings with other countries, and therefore, as in other foreign affairs matters, the federal government needs wide latitude.³² On the other hand, if treaties can

28. See *infra* Part V.A.

29. See *infra* Part V.B.

30. U.S. CONST. art. II, § 2, cl. 2.

31. See THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 15, at 451 ("The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1282 (Boston, Hilliard, Gray & Co. 1833) ("The treaty-making power, therefore, seems to form a distinct department, and to belong, properly, neither to the legislature, nor the executive, though it may be said to partake of qualities common to each."); *Id.* § 1513; Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 808 (1995) ("The Founders established a very complex law-making machine: one system for constitutional amendment, another for treaty-making, a third for statute-making.").

32. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."). However, *Curtiss-Wright* has been subject to withering criticism. See Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barre or Curtis-Wright?*, 13

regulate anything, the federal government may, in effect, legislate domestically by treaty without being bound by the limits of its Article I powers.³³

This dilemma is not new. In fact, the same debate about the scope of the treaty power has been waged, with varying intensity, from the time the Constitution was ratified. The system of government contemplated by the Constitution was unprecedented.³⁴ For the first time in history, a national government shared sovereignty with the states.³⁵ But then, as now, this federal system ceases to function if the national government can use the treaty power as a trump card. In the first subpart, I introduce two theories about how the Constitution protects the States from the national government—which I refer to as the *balance of forces* and the *empire of liberty*. As I discuss in the second subpart, the Framers had to account for both views while drafting the Treaty Clause and seeking to ensure that the Constitution would be ratified.

A. THE BALANCE OF FORCES AND THE EMPIRE OF LIBERTY

Because fears of a tyrannical national government reflected concerns about states wielding authority over one another, the Framers designed the national government to minimize the danger that it could become a proxy for the interests of any state or group of states.³⁶ The structure of the

YALE J. INTL. L. 5 (1988); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, *United States v. Curtis-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973).

33. See Bradley, *supra* note 9, at 425–26 (arguing that federalism limitations on Congress's powers should be applied with equal force to the treaty power); Knowles, *supra* note 21, at 754 (reaching the same conclusion in light of the Supreme Court's revival of federalism and globalization's impact on areas of law traditionally governed by the states).

34. James Madison told the Virginia Ratifying Convention that the Constitution's federal structure "is in a manner unprecedented: We cannot find one express example in the experience of the world:—It stands by itself." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 162 (1996); see also MCDONALD, *supra* note 11, at 9 (observing that the new Constitution's federal system was "undreamed of in political philosophy"). To European political philosophers, sovereignty was indivisible, and dividing it was the self-contradictory concept of *imperium in imperio*. *Id.* at 1. Blackstone had declared that "sovereignty and legislature are indeed convertible terms" and "there is and must be" in every state "a supreme irresistible, uncontrolled authority, in which . . . the rights of sovereignty reside." 1 WILLIAM BLACKSTONE, COMMENTARIES *44 (12th ed.).

35. See *Alden v. Maine*, 527 U.S. 706, 751 (1999) ("By splitting the atom of sovereignty, the founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." (internal quotation marks and citations omitted)); *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Constitution . . . , leaves to the several States a residuary and inviolable sovereignty . . . reserved explicitly to the States by the Tenth Amendment." (quoting THE FEDERALIST NO. 39 (James Madison) *supra* note 15, at 245) (internal quotation marks and citation omitted)).

36. Madison identified balancing the "interfering pretensions" of different "combinations of states" as one of the three major categories of "difficulties inherent in the very nature of the

Constitution sought to ensure that this would not happen through two federalism safeguards: the composition of the branches of the national government would protect a range of state interests, but if these “political safeguards” failed, the powers of the national government would be constrained, at least to the extent that they could encroach on state sovereignty.³⁷

Nevertheless, this balancing of states’ interests was even more complicated than it initially appeared. The States, when considered in the abstract, were political entities, each with (more or less) defined borders and representative governments. From this perspective, the only salient difference between Virginia and Rhode Island was population. Thus the compositions of the House and Senate reflected the need to satisfy the interests of states with, respectively, large and small populations.³⁸ Beyond this difference in representation, the States were guaranteed protections designed to ensure that the playing field among them remained level. Some were explicit: Congress cannot favor the port of one state over another and must guarantee to each a Republican form of government.³⁹ The implied limits on Congress’s powers also protect each state from encroachment on its sovereignty. With the exception of population size, all states would be treated the same. This was *empire of liberty* federalism.

But the Framers were reminded, as the Philadelphia Convention wore on, that States were more than mere political entities; they were, even in 1789, demi-Republics with unique institutions and folkways, comprising a wide range of geographies, climates, and economic interests that resulted in deep, often intractable, differences among them. In order to succeed, the new Constitution would have to take these differences into account, to balance these shifting forces so that none could assume unfettered authority. This was *balance of forces* federalism. Reconciling it with the abstract *empire of liberty* federalism would not be easy.

As James Madison came to recognize at the Convention, the most significant cultural difference between the States was slavery. Madison’s earlier efforts at the Convention had emphasized building compromises into

undertaking referred to the convention.” THE FEDERALIST NO. 37, at 267, 270–71 (James Madison) (Benjamin Fletcher Wright ed., 1961).

37. See *supra* note 23. In Federalist 39, Madison described the complex ways that representation in the new government under the Constitution ranges from national, to state-based, to mixed. See THE FEDERALIST No. 39 (James Madison), *supra* note 36 at 280–86. For theory that the political safeguards are the sole federalism protections afforded by the Constitution, see Jesse H. Choper, *the Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For trenchant criticism of the “political safeguards” theory, see Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

38. RAKOVE, *supra* note 34, at 68.

39. See U.S. CONST. art. IV., § 4; U.S. CONST. art. I, § 9, cl. 5.

the Constitution that balanced states' interests in the abstract, but he became aware that it would not be enough. Madison broached the issue of sectionalism, contending that the most material difference causing divisions among the states resulted

partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interest in the U. States. It did not lie between the large and small States: it lay between the Northern and Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests. He was so strongly impressed with this important truth that he had been casting about in his' mind for some expedient that would answer the purpose.⁴⁰

Other compromises would be necessary. The most important was the addition of the Three-Fifths Clause, which counted slaves as three-fifths of a person for the purposes of determining representation in the House.⁴¹ As the historian Jack Rakove points out, this revelation unmasked the tensions in Madison's own theory of federalism. Which vision was correct? Was it, when considered in the abstract, an *empire of liberty*—a “society embracing a ‘multiplicity of interests’” defined “in terms of the attributes of individuals”? Or was it a nation depending for its stability on a *balance of forces*, “a nation divisible into two great and potentially antagonistic factions, either of which could readily imagine how shifts in population and influence might threaten its prosperity, institutions, and values alike?”⁴² At the Convention, however, neither Madison nor any of the Framers could afford to choose between the *balance of forces* and the *empire of liberty*. The success of their enterprise depended on ensuring that every exercise of national power would take both theories of federalism into account.

The Treaty Power was no exception. In fact, the Anti-Federalists' efforts to rewrite the Treaty Clause were rebuffed, and the Constitution was approved, only with the understanding that the treaty power would preserve, not disturb, both kinds of state interests.⁴³ Although the requirement that treaties be approved by two-thirds of those Senators present protected the interests of the states in the abstract, *empire of liberty* sense, opponents of the Constitution claimed that, despite this procedural protection, the Treaty Clause would permit the national government to upset the *balance of forces*. The concerns raised at the Constitution's origin foreshadow the subsequent debate over the Louisiana Purchase. Just as the Anti-Federalists of the ratification debates feared that the President and the Senate could violate state sovereignty by bargaining away by treaty their territory and access to

40. RAKOVE, *supra* note 34, at 69.

41. *Id.*

42. *Id.* at 77–78.

43. See *supra* notes 71–75 and accompanying text.

important resources, the Federalists feared the Louisiana Treaty would diminish state sovereignty by diluting the ability of the original states to advocate for their interests in Congress. Thus the two opposing sides voiced, at different times, the same concern: that the treaty power would be used by the national government to upset a delicate regional balance of power between North and South. In the next subpart, I examine more closely the ways these concerns were initially assuaged.

*B. THE TREATY POWER, THE BALANCE OF FORCES,
AND THE BATTLE FOR RATIFICATION*

From the very beginning, Anti-Federalists warned that the Treaty Clause delivered sweeping power to the national government that could overwhelm the rights of individuals and states. These fears were rooted in the American Revolution itself, which can be understood “as a defense of the rights of popularly elected assemblies to enact internal legislation, free from the dictates of a foreign affairs power exercised by a central government.”⁴⁴ Patriot leaders argued that the “Crown granted the colonists the right to regulate themselves in all internal matters, just as Parliament” regulated the internal matters of Great Britain.⁴⁵ The colonies operated under a de facto system of divided sovereignty, with Parliament governing matters of trade and commerce and the colonial legislatures governing matters such as taxation.⁴⁶ The Declaration of Independence itself suggests that Jefferson and the other Founders understood the relationship between the colonies, which it now called “states,” and Great Britain to be essentially a “federal” one, and thus governed by treaty.⁴⁷

Naturally, those who distrusted a strong national government focused their attention on the treaty power. Moreover, the ways in which they sought to limit it reveal the salience of *balance of forces* federalism. While the records of the Convention and the Federalist papers contain little discussion of the scope of the treaty power,⁴⁸ a late effort at the Convention to modify the Treaty Clause shows that genuine concern existed among the delegates that the treaty power would be abused. Governor Morris introduced an amendment that “no Treaty shall be binding on the U.S. which is not

44. Yoo, *supra* note 22, at 2004.

45. Yoo, *supra* note 22, at 2008; see JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE 68–74, 113–25 (1991).

46. MCDONALD, *supra* note 11, at 2.

47. See ONUF, EMPIRE, *supra* note 18, at 56.

48. Bradley, *supra* note 9, at 410; see also Shackelford Miller, *The Treaty Making Power*, 41 AM. L. REV. 527, 529 (1907) (“At no time . . . did the convention discuss the scope or extent of the power; it merely considered the question as to where the power should be lodged—who should exercise it. The same is true as to the ‘Federalist’ . . .”).

ratified by a law."⁴⁹ One of the purposes of the amendment, its supporters claimed, was to guard against states using the treaty power to strike bargains that would harm the interests of the minority of states. Wilson warned that "under the clause, without the [Morris] amendment, the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port."⁵⁰ While Morris's amendment obviously did not prevail, it indicated support for the view expressed earlier by George Mason, that "the Senate . . . could already sell the whole Country by means of Treaties."⁵¹

The scope of the treaty power did not emerge as a critical issue, however, until the ratification debates.⁵² Anti-Federalists launched a broad attack on the Treaty Clause under the proposed constitution. They warned that it gave the national government potentially limitless power. The influential Federal Farmer observed that "[t]his power in the president and the senate is absolute, and the judges will be bound to allow full force to whatever rule, Article, or thing the president and senate shall establish by treaty"⁵³ In Pennsylvania, Anti-Federalists used the unbounded nature of the treaty power to support their proposal for a Bill of Rights.⁵⁴ "An Old Whig" argued that "the president and two thirds of the senate have power to make laws in the form of treaties, independent of the legislature itself" and could enter into a treaty "upon terms which would be inconsistent with the liberties of the people and destructive of the very being of a Republic," and yet the Treaty and Supremacy Clauses "will give such a treaty the validity of a law."⁵⁵ Patrick Henry delivered perhaps the most forceful and persuasive arguments against the Treaty Clause during the Virginia Ratifying Convention.⁵⁶ He said, "[t]he Senate, by making treaties may destroy your liberty and laws for want of responsibility."⁵⁷ The dangers of the treaty power were thought to be wide-ranging.

49. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 392–93 (Max Farrand ed., rev. ed. 1937) [hereinafter CONVENTION RECORDS].

50. *Id.* at 393.

51. *Id.* at 297.

52. It was discussed by nearly all of the leading delegates, and the debates on the treaty-making power fill fifty pages of volume 3 of *Elliot's Debates*, or ten percent of the recorded debates of the ratifying convention. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 311–13, 316, 325–26, 331–66, 499–516, 609–10 (Jonathan Elliot ed., 1888) [hereinafter ELLIOT'S DEBATES]; Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 297 (1934).

53. Letter IV from the Federal Farmer (Oct. 12, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 43–44 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter DOCUMENTARY HISTORY].

54. Yoo, *supra* note 22, at 2044.

55. An Old Whig III (*Phila. Indep. Gazetteer*, Oct. 20, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 53, at 26.

56. Yoo, *supra* note 22, at 2067.

57. 9 DOCUMENTARY HISTORY, *supra* note 53, at 965.

In response, amendments were proposed to limit the force and effect of treaties vis-à-vis other laws. A Pennsylvania amendment provided that “no treaties which shall be directly opposed to the existing laws of the United States in Congress assembled shall be valid until such laws shall be repealed or made conformable to such treaties,” and that treaties would not be valid if “contradictory to the Constitution of the United States, or the constitutions of the individual states.”⁵⁸ Importantly, according to the New York resolution of ratification, New York ratified the Constitution with the understanding that “no treaty ought to operate so as to alter the constitution of any state; nor ought any commercial treaty to operate so as to abrogate any law of the United States.”⁵⁹ The ratification debates also focused on the process by which treaties might be approved, and what kinds of checks should be placed on its exercise by the other branches.⁶⁰ Among other things, the Anti-Federalists insisted that there must be a formal role in the treaty-making process for the House of Representatives.⁶¹

However, Anti-Federalist concerns about the treaty power were grounded in the need to preserve the *balance of forces*: their deepest fears arose from the possibility that the President and the Senate would pursue the interests of one section at the expense of another.⁶² The development of the West was thought to benefit the South because many of the settlers were from southern families, the southern states would serve as a conduit for western goods, and new western states would presumably share the South’s

58. 2 DOCUMENTARY HISTORY, *supra* note 53, at 598.

59. 2 ELLIOT’S DEBATES, *supra* note 52, at 409 (amendment proposed July 7, 1788).

60. *See* Yoo, *supra* note 22, at 2047–74.

61. *Id.* at 2025. Professor John Yoo argues that the Framers intended that treaties would not take effect without implementing legislation approved by the House of Representatives. *See generally* Yoo, *supra* note 22.

62. While concerns over the Mississippi River seemed to have aroused more resistance to the Constitution, the northern states had a parallel interest in preserving their access to the Newfoundland fisheries. *See* 3 ELLIOT’S DEBATES, *supra*, at 343 (remarks of William Grayson):

It is well known that the Newfoundland fisheries and the Mississippi are balances for one another; that the possession of one tends to the preservation of the other. This accounts for the eastern policy. They thought that, if the Mississippi was given up, the Southern States would give up the right of the fishery, on which their very existence depends. It is not extraordinary, therefore, . . . that they should wish to preserve this great counterbalance.

Id.; 4 ELLIOT’S DEBATES, *supra* note 52, at 135 (remarks of Mr. Bloodworth at North Carolina ratifying convention) (stating treaties will reflect the “jarring interests of the Eastern, Southern, and the Middle States” which “are different in soil, climate, customs, produce, and every thing”); Golove, *supra* note 21, at 1134 n.161; Warren, *supra* note 52, at 297; *see also* 2 CONVENTION RECORDS, *supra* note 49, at 548 (remarks of Gouverneur Morris) (referring to “Fisheries or the Mississippi” as “the two great objects of the Union”); THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 15, at 88 (referring to fisheries, Great Lakes, and Mississippi River as “rights of great moment to the trade of America which are rights of the Union”).

agricultural interests against the more industrial North.⁶³ Yet, if the U.S. failed to gain navigation rights to the Mississippi River, the western lands would be closed off to development by the southern states because the farmers in the West depended on the river to move their goods.⁶⁴ William Grayson, a former president of the Continental Congress and leading Anti-Federalist lawyer, summarized the thinking of many: “[I]f the Mississippi was yielded to Spain, the migration to the Western country would be stopped, and the Northern States would not only retain their inhabitants, but preserve their superiority and influence over that of the Southern.”⁶⁵ Since the new Constitution required only two thirds of the Senators present approve a treaty, should any Southern senators not be present, the Northern senators and the President could push through a commercial treaty ceding to Spain the navigation rights on the Mississippi. During a long critique of the Constitution in the Virginia House of Delegates that lasted for two days, Patrick Henry noted this risk, discussing at great length the mathematical possibilities: “While the consent of nine States is necessary to the cession of territory you are safe,” he said, but “if it be put in the power of a less number,” as with the Constitution, “you will most infallibly lose the Mississippi.”⁶⁶ Even the procedural protections provided by the two-thirds Senate majority requirement could not keep state interests safe.

Attacks on the treaty power and concerns surrounding the Mississippi question started to turn the tide in Virginia against ratification.⁶⁷ An amendment proposed by delegates in both Virginia and North Carolina frankly stated the *balance of forces* concerns that drove this rebellion:

no treaty, ceding, contracting, restraining or suspending the

63. See Lance Banning, *Virginia: Sectionalism and the General Good*, in *RATIFYING THE CONSTITUTION* 265 (Michael A. Gillespie & Michael Lienesch eds., 1989).

64. Yoo, *supra* note 22, at 2061–62.

65. Speech by William Grayson to the Virginia Convention (June 12, 1788), *reprinted in* 10 *DOCUMENTARY HISTORY*, *supra* note 53, at 1192; *see also* 3 *ELLIOT'S DEBATES*, *supra* note 52, at 365 (remarks of William Grayson):

I look upon this as a contest for empire. Our country is equally affected with Kentucky. The Southern States are deeply interested in this subject. If the Mississippi be shut up, emigrations will be stopped entirely. There will be no new states formed on the western waters. This will be a government of seven states. This contest of the Mississippi involves this great national contest; that is, whether one part of the continent shall govern the other. The Northern States have the majority, and will endeavor to retain it. This is, therefore, a contest for dominion— for empire.

Id.; *id.* at 501 (remarks of William Grayson) (“The prevention of emigrations to the westward, and consequent superiority of the southern power and influence, would be a powerful motive to impel [the Northern States] to relinquish that river.”).

66. 9 *DOCUMENTARY HISTORY*, *supra* note 53, at 1039 (Statement of Patrick Henry, June 7, 1788).

67. Yoo, *supra* note 22, at 2063.

territorial rights or claims of the United States, or any of them, or their, or any of their rights or claims to fishing in the American seas, or navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity, nor shall any such treaty be ratified without the concurrence of three-fourths of the whole number of the members of both houses respectively.⁶⁸

These complaints and proposals did not fall on deaf ears. As the battle for ratification continued, the Federalists sought to assure the opposition that their fears were unfounded. In response to Patrick Henry's claim that the "Constitutions of these States may be most flagrantly violated without remedy," Edmund Randolph rose and responded that, "neither the life, nor property of any citizen, nor the particular right of any State, can be affected by a treaty."⁶⁹ Even when considering a Constitution without a Bill of Rights, James Iredell admitted to the North Carolina convention that the "power to make treaties can never be supposed to include a right to establish a foreign religion among ourselves, though it might authorize a toleration of others."⁷⁰ Such assurances proved critical, tipping the balance in favor of ratification in key states.

Madison led the effort to change the minds of delegates in his home state of Virginia. He advanced several arguments, including the observation that the President, who represented the interests of the entire nation, gave treaty-making a republican character.⁷¹ But Madison also assured the delegates that "[t]he exercise of the [treaty] power must be consistent with the object of the delegation" and that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external."⁷² Madison then explained that the new Constitution would better protect the rights of the larger states, such as Virginia, which relied on open access to the Mississippi, than the existing Articles.⁷³ Recognizing that the House had the more republican character, Madison stressed that the House would need to pass implementing legislation before any such treaty would take effect.⁷⁴ Finally, addressing a point that concerned the delegates a great deal, Madison, Edmund Randolph, and Wilson Nicholas assured opponents, at

68. 2 THE DEBATE ON THE CONSTITUTION 562 (Bernard Bailyn ed., 1993) [hereinafter DEBATE ON THE CONSTITUTION].

69. 10 DOCUMENTARY HISTORY, *supra* note 53, at 1384–85 (statements of Patrick Henry and Edmund Randolph).

70. 2 DEBATE ON THE CONSTITUTION, *supra* note 68, at 904–05.

71. Yoo, *supra* note 22, at 2064.

72. 10 DOCUMENTARY HISTORY, *supra* note 53, at 1396.

73. Yoo, *supra* note 22, at 2065.

74. See Letter from James Madison to George Nicholas (May 17, 1788), in 2 DEBATE ON THE CONSTITUTION, *supra* note 68, at 443, 448.

different points in the Virginia debates, that the law of nations forbade a treaty that ceded state territory.⁷⁵

In the end, Madison and his allies prevailed. The great achievement of Madison and the other Federalists was in persuading enough delegates at the Virginia Ratifying Convention to adopt the proposed Constitution, without requiring additional procedural or substantive limits on the treaty power, assuring them that *balance of forces* federalism had already been taken into account.⁷⁶ These promises proved fleeting. *Balance of forces* federalism would be seriously undermined by the Louisiana Treaty.

III. JEFFERSON'S CONSTITUTION

This Article places a great deal of weight on the constitutional thought of a single person, Thomas Jefferson. This may at first appear problematic. Jefferson was not present at the Constitutional Convention; he was not one of the Framers, and many historians and legal scholars seem to hold that against him. Professor Joseph Ellis summed up this view in a recent Jefferson biography: when it came to the document he had no hand in writing, Jefferson very often “didn’t know what he was talking about.”⁷⁷ This may be in some sense true, and I will not here tackle that issue, but during the Louisiana Purchase, Jefferson became the most important interpreter of the Constitution by virtue of his power. Despite the closeness of the 1800

75. See 3 ELLIOT'S DEBATES, *supra* note 52, at 345 (remarks of James Madison); *id.* at 357 (remarks of Wilson Nicholas); *id.* at 362 (remarks of Edmund Randolph) (noting that “[i]t will . . . be contrary to the laws of nations to relinquish territorial rights”). As Vasan Kesavan argues, however, this does not mean that, under certain circumstances, a treaty could not cede state territory. See Kesavan, *supra* note 25. Still, such a situation was virtually unthinkable: as Madison said to the delegates, “the legislative authority to dismember the empire . . . ought not to be given, but by the necessity that would force the assent from every man.” 3 ELLIOT'S DEBATES, *supra* note 52, at 501. In such circumstances, one assumes that a constitutional amendment could be obtained to approve something which could not be done through the treaty power.

76. 3 ELLIOT'S DEBATES, *supra* note 52, at 352. Even their opponents acknowledged that this was the goal: Patrick Henry declared that “[t]o preserve the balance of American power [between the Northern and Southern States], it is essentially necessary that the right of the Mississippi should be secured.”

77. JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 330 (Vintage ed. 1998) (paraphrasing a statement by Dolly Madison); see also MERRILL PETERSON, JEFFERSON AND MADISON AND THE MAKING OF THE CONSTITUTION 1–2 (1987); Golove, *supra* note 21, at 1188 n.352. Jefferson was serving as Ambassador to France, but he did correspond frequently with Madison and Monroe during the Philadelphia Convention (even sending the Constitution's primary architect a trunkful of philosophy books) and during the ratification debates. See ELLIS, *supra*, at 114–25. Madison also approvingly quoted Jefferson's “Notes on the State of Virginia” when stressing the importance of the Constitution's separation of power in avoiding tyranny. See FEDERALIST NO. 48 (James Madison), *supra* note 15, at 278–79. The special relationship between Jefferson and Madison formed a personal system of “checks and balances,” and they influenced one another at key moments. ELLIS, *supra*, at 144–45. Jefferson's views on the Constitution were either vague or complex, depending on your point of view. For an in-depth treatment, see generally MAYER, *supra* note 2.

presidential election in terms of the electoral vote, Jefferson entered office on a Republican tidal wave that drowned Federalist opposition throughout the United States.⁷⁸ And once in office, Jefferson “was a stronger president than either of his predecessors tried to be.”⁷⁹ According to biographer Dumas Malone, Jefferson’s influence in Congress remained unmatched until the Wilson administration, and Congress passed “virtually no bills of any significance” without Jefferson’s approval.⁸⁰

Moreover, despite the Supreme Court’s bold move in *Marbury v. Madison* earlier that year, the Jefferson administration negotiated and pushed the Louisiana Treaty through Congress without even mentioning the prospect of the Supreme Court placing limits on executive or legislative power. Regardless of what others said at the time and afterward, to a remarkable degree, Jefferson’s conclusions about what the Constitution did or did not permit largely determined future practice.⁸¹

Federalism was, for Jefferson, the most important canon of Constitutional interpretation.⁸² “The best general key for the solution of questions of power between our governments,” he wrote, is that “every foreign and federal power is given to the federal government, and to the States every power purely domestic.”⁸³ Similarly, he wrote that “[w]henver a doubt arises to which of these branches [state or federal] a power belongs, I try it by this test.”⁸⁴ Jefferson understood federalism as the overall purpose and design of the Constitution.⁸⁵ A necessary corollary to Jefferson’s federalism was the strict interpretation of delegated federal powers, which should be construed “according to the plain and ordinary meaning of its [sic] language, to the common intendment of the time, and of those who framed it.”⁸⁶ Strict construction was above all a means of protecting states’ rights.

78. See LANCE BANNING, *THE JEFFERSONIAN PERSUASION* 278 n.15 (1978).

79. *Id.* at 280.

80. MALONE, *supra* note 2, at 110. See also CURRIE, *supra* note 2, at 9; MALONE, *supra* note 2, at xv (Jefferson “exercised influence on legislation which has been rarely matched in presidential history”).

81. Jefferson was aware of this as much as anyone. See Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 247–48 (“I think it important, in the present case, to set an example against broad construction.”).

82. MAYER, *supra* note 2, at 188–89.

83. Letter from Thomas Jefferson to Robert J. Garnett (Feb. 14, 1824), in 10 JEFFERSON WRITINGS, *supra* note 4, at 295.

84. Letter from Thomas Jefferson to Edward Livingston (Apr. 4, 1824), in 10 JEFFERSON WRITINGS, *supra* note 4, at 300.

85. MAYER, *supra* note 2, at 189. Jefferson called the Tenth Amendment the “foundation of the Constitution.” MCDONALD, *supra* note 11, at 24; U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

86. Letter from Thomas Jefferson to James Madison (Dec. 24, 1825), in 10 JEFFERSON WRITINGS, *supra* note 4, at 352.

Jefferson did relax principles of strict construction once he was certain the matter did not touch on states' rights. Professor David Mayer points out that Jefferson could "espouse a fairly liberal theory of interpretation embracing even implied powers. This was especially so in the realm of foreign affairs, which he regarded as an exclusive responsibility of the national government since the time of the Articles of Confederation."⁸⁷ Jefferson felt free to use executive authority when acting overseas.⁸⁸

But Jefferson did not view treaties as just any exercise of foreign affairs powers. Like the early Anti-Federalists, he knew that the scope of the Treaty Power was potentially vast, and that treaties could implicate domestic matters. This became apparent during the nationwide controversy over the Jay Treaty with Great Britain. Negotiated by the high Federalist John Jay, the treaty contained many provisions objectionable to the Republicans, including a clause permitting British citizens owning lands in the U.S. to devise or sell them without forfeiture.⁸⁹ Throughout the country, Jay was burned in effigy and a flood of articles condemning the treaty were published in newspapers.⁹⁰

Thomas Jefferson and James Madison, both of whom violently opposed the treaty, engineered the fight against it in Congress.⁹¹ Jefferson viewed the Jay Treaty as a partisan attempt by the pro-British faction to entrench themselves in power in defiance of public opinion and popular sovereignty.⁹² While other Republicans charged that the treaty was unconstitutional because it violated the rights of states by interfering with their property laws, Madison, for the most part, stuck to the position he had taken during the ratification debates—all those provisions normally requiring the assent of both houses of Congress would require the approval of the House to take effect.⁹³ The Federalists insisted that the treaty was self-executing.⁹⁴ In any event, the issue became academic once the House voted

87. MAYER, *supra* note 2, at 215.

88. ELLIS, *supra* note 77, at 240–41. Ironically, Jefferson used the navy he had opposed as Secretary of State to pursue the Barbary Pirates when he became President. *Id.* at 241. Jefferson aggressively pursued commercial treaties with other nations, and sought to limit state interference with them, under the Articles of Confederation, and later on in his presidency. Golove, *supra* note 21, at 1130.

89. The Jay Treaty, Nov. 19, 1794, U.S.-Gr. Brit., in 2 TREATIES, AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 245, 253–54 (1931).

90. See Golove, *supra* note 21, at 1164.

91. *Id.* at 1178.

92. *Id.* at 1155.

93. See, e.g., James Madison, Jay's Treaty, Speech in the House of Representatives (Mar. 7, 1796), in 16 THE PAPERS OF JAMES MADISON 141, 254 (J.C.A. Stagg et al. eds., 1989) [hereinafter MADISON PAPERS]; Golove, *supra* note 21, at 1183.

94. Golove, *supra* note 21, at 1126.

51 to 48 to carry the treaty into effect amid fears that failure would lead to the collapse of the government.⁹⁵

Jefferson expressed himself more forcefully than Madison when it came to the treaty power.⁹⁶ He demonstrated legendary contempt for it, writing to Madison: "I see no harm in rendering [the House's] sanction necessary, and not much harm in annihilating the whole treaty making power."⁹⁷ Later, when he became Vice President, and thus President of the Senate, Jefferson published his views on the treaty power in the Senate's Manual of Parliamentary Practice.⁹⁸ First, he pointed out that a treaty "must concern the foreign nation, party to the contract, or it would be a mere nullity."⁹⁹ Second, he wrote that treaties can only be used on "objects which are usually regulated by treaty," and, even then, only when those objects "cannot be otherwise regulated."¹⁰⁰ Third, treaties cannot cover "those subjects of legislation in which [the Constitution] gave a participation to the House of Representatives."¹⁰¹ He added, "This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others."¹⁰² Finally, turning to states' rights, Jefferson concluded that the Constitution "must have meant to except out of these the rights reserved to the States; for surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way."¹⁰³

95. *Id.* at 1156; JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUNDS OF THE FOUNDING FATHERS 179-87* (1970).

96. Professor Golove concludes that Jefferson's views during the early 1790s changed from a broader to a narrower interpretation. *See Golove, supra* note 21, at 1178-79. One possible explanation, other than simple political considerations, was that Jefferson began to see the ways that treaties could infringe on domestic, and state, prerogatives. The Jay Treaty, if it did not confirm his existing views completely, in all likelihood pushed him further toward the view that the treaty power should be as limited as practicable.

97. Letter from Thomas Jefferson to James Madison (Mar. 27, 1796), in 16 *MADISON PAPERS, supra* note 93, at 280.

98. Thomas Jefferson, *A Manual of Parliamentary Practice* § 52, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 335, 441 (Albert Ellery Bergh ed., 1907).

99. *Id.* at 442.

100. *Id.*

101. *Id.*

102. *Id.*

103. Jefferson, *supra*, note 98, at 335. While Jefferson's summary in the Handbook certainly reflects a stricter view of the treaty power than that of his Federalist opponents, it is not at all clear that his views were out of the mainstream. *See Bradley, supra* note 9, at 416 ("Both the subject matter and federalism limitations he suggested [in his Manual of Parliamentary Practice] appear to have been consistent with the prevailing views of the time."). Jefferson insisted that he did not differ from Madison or other Republicans. *MAYER, supra* note 2, at 233-34. Professor David Golove believes that Jefferson's views were idiosyncratic and were largely an attempt to rankle the Federalists in the wake of the Jay Treaty controversy. *See Golove, supra* note 21, at 1188. But nothing that transpired during the Jay Treaty controversy actually proved Jefferson's views to be in error. The House did finally agree to implement even the

Jefferson believed that it was dangerous for the national government to exercise the foreign policy powers in a way that might give it a domestic advantage over the States. This was particularly true with regard to expanding the size of the United States. In fact, this is the topic that first inspired him to articulate the *empire of liberty* theory of federalism. How could the rights of the states be protected? Any new territory should enter the Union as a state, or not at all. He feared that large expanses of federally controlled territory would lead to the aggrandizement of the national government at the expense of the states. A group of colonies or client states in the West could be wielded against the original members of the Union.¹⁰⁴ Jefferson wrote that, “[c]ontrary to the principle of Montesquieu, it will be seen that the larger the extent of country, the more firm its republican structure, if founded, not on conquest, but in principles of compact and equality.”¹⁰⁵ Those two principles were key. The formal ability of “states to engage in the compact was the essential condition for creating a true union.”¹⁰⁶ But he meant the ability of *new* states to join the compact on an even footing with the old. Jefferson’s *empire of liberty* theory was born.

Finally, Jefferson believed that states’ rights could be protected by the frequent use of Article V, which ensured that States retained an important role in the process of changing the Constitution. This went hand-in-hand with the principles of strict construction. Jefferson strongly believed that the people should participate as much as possible in resolving constitutional questions.¹⁰⁷ The English Whig political philosophers, whom Jefferson studied and admired, criticized the English constitution because it lacked a method for ensuring that the sovereign voice of the people would be heard.¹⁰⁸ James Burgh wrote in his *Political Disquisitions* that “the people ought to provide against their own annihilation. They ought to establish a regular and constitutional method of acting by and from themselves, without, or even in opposition, to their representatives, if necessary.”¹⁰⁹ For Jefferson, Article Five—the constitutional convention provision in particular—presented a good answer, and this persuaded him to support the Constitution. Article Five was, he wrote, a means by which “the people might recurr [sic] to first principles in a Regular Way, without hazarding a

controversial provisions, and so there was no opportunity to test Jefferson’s claims in the Handbook. And, if we accept the Handbook as a true guide to Jefferson’s views on the treaty power, it explains why the Louisiana Purchase seemed to trouble him so much.

104. ONUF, *EMPIRE*, *supra* note 18, at 39.

105. *Id.* at 118.

106. *Id.*

107. MAYER, *supra* note 2, at 314.

108. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 323 (1969).

109. *Id.* (quoting James Burgh).

Revolution in the Government.”¹¹⁰ Article Five thus brought Whig theory to the world of practical political reality, and for Jefferson, this important safety valve ensured that the Constitution remained relevant to the concerns of the day.¹¹¹

A quick survey of Jefferson’s constitutional interpretation would not be complete without a caveat. The man who believed that the Constitution should be narrowly interpreted also developed an exception that made strict construction possible. Jefferson, in a letter to a friend in 1810, articulated a constitutional necessity defense for higher officials “when the safety of the nation, or some of its very high interests, are at stake.”¹¹² He then outlined some of the situations in which this doctrine of executive prerogative had been applicable.¹¹³ This way, when criticizing overreaching by the national government, Jefferson could continue to advocate forcefully the principles of federalism and strict construction while justifying his own and others’ departure from them when it suited the interests of the nation.¹¹⁴ The burning question, as far as the Louisiana Purchase is concerned, is whether Jefferson’s exception effectively swallowed the rule.

IV. THE CONSTITUTIONALITY OF THE LOUISIANA TREATY

Under the Louisiana Treaty, the United States engaged in two unprecedented activities—it acquired territory from another nation and incorporated that territory as states. Neither of these powers are explicit in the text of the Constitution. As to the first activity, it now seems obvious that while the acquisition of territory raised concerns among Federalists and troubled Jefferson, it was so inextricably intertwined with the foreign policy powers of the nation that even strict constructionists of the time could reasonably believe that the treaty power encompassed it.

However, America’s system of government was also unprecedented.¹¹⁵ This is why the incorporation of states into the Union by treaty raised troubling questions never before addressed.¹¹⁶ The U.S. Constitution

110. MAYER, *supra* note 2, at 299.

111. *Id.*

112. Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 421–22 (Andrew A. Lipscomb and Albert Ellergy Bergh eds., 1904) [hereinafter JEFFERSON WRITINGS (LIPSCOMB)].

113. *See id.*

114. *See* ELLIS, *supra* note 77, at 192 (contrasting the views of Jefferson and Madison). Ellis concluded that Jefferson’s remarks concerning the Jay Treaty demonstrated “greater willingness to bend constitutional arguments to serve what he saw as a higher purpose. . . . Upsetting delicate constitutional balances or setting dangerous precedents did not trouble him in such moments.” *Id.*

115. *See supra* note 34 and accompanying text.

116. Given the unprecedented nature of the federal system established by the Constitution, it is clearly not sufficient to argue that the national government has the power to incorporate new territory as states merely because the European monarchs had the power to acquire

established a federal system in which the national government shared sovereignty with the states.¹¹⁷ How would the existing states' sovereignty be affected if the national government introduced new states into the Union?

The Federalists and the Republicans offered different answers to this question, and the answers shaped their reactions to the Louisiana Treaty. Under the Republicans' abstract *empire of liberty* view of federalism, the admission of new states merely meant expanding the federal system to new geographical areas. In contrast, the Federalists' *balance of forces* view held that the introduction of new states could upset the balance among competing interests, which the Constitution had been designed to preserve, and upon which individual freedom and prosperity depended. As I argue in the second Part, and in the rest of the Article, the successful expansion of the United States depended on the ability and willingness of those in power to take both views into account.

This Part proceeds in four subparts. The first provides the backdrop: what did the Louisiana Treaty actually do? The policy of the United States government since before the Constitution had been to enshrine statehood as the inevitable status of all territory. Because Jefferson and his administration believed firmly in this policy and wished to avoid permanent colonial fiefdoms, I conclude that the Louisiana Treaty required that the acquired territory would eventually be incorporated as new states. The second part describes the public opposition to the Louisiana Treaty in New England, where Federalists declared the Purchase unconstitutional on *balance of forces* federalism grounds. The third part examines a threshold issue: whether the national government, under the Treaty or the New States Clauses, actually had the power to acquire the territory in the first place. Finally, the fourth part discusses the thornier question: at what point does the incorporation of new states threaten the rights of the existing states?

A. THE LOUISIANA TREATY AND THE ADMISSION OF NEW STATES

The Louisiana Purchase was the surprise ending to a foreign policy crisis that began when Jefferson tried to address the perennial concern of

territory. Nonetheless, this argument was advanced by Republicans during the debate over the treaty. See, e.g., 13 ANNALS OF CONG. 448–49 (Oct. 1803) (statement of Rep. Elliott) (arguing that the Treaty Clause should be read as providing the same powers possessed under the law of nations, citing Vattel, Grotius, and Puffendorf, as well as others to establish the right to acquire territory by treaty).

117. See *Alden v. Maine*, 527 U.S. 706, 751 (1999) (“By splitting the atom of sovereignty, the founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.” (internal quotation marks and citations omitted)); *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Constitution . . . leaves to the several States a residuary and inviolable sovereignty . . . reserved explicitly to the States by the Tenth Amendment.” (quoting THE FEDERALIST NO. 39 (James Madison), *supra* note 15, at 245) (internal quotation marks and citation omitted)).

the southern and western states—preserving free navigation on the Mississippi River.¹¹⁸ Events moved so swiftly, and the opportunity was presented to Jefferson so suddenly, that he had relatively little time to consider the appropriate steps under the Constitution to carry out such a significant change in the composition of the United States.

In 1795, the United States signed the Treaty of San Lorenzo with Spain, which owned Louisiana and the Floridas, securing free navigation on the Mississippi.¹¹⁹ American merchants could sail the length and breadth of the river and deposit their goods in New Orleans pending export without paying custom duties; in a few years they came to believe these were their rights.¹²⁰ But in 1800, Spain secretly agreed to cede the province of Louisiana back to France. While Spanish officials had granted Americans even more access than the treaty called for, France was considered to be a much harsher neighbor, the most “rapacious” and “aggressive” of the great powers.¹²¹ News of the secret agreement slowly leaked out during 1800. Making matters worse, in a move considered by other Spanish officials in the New World to be a violation of the Treaty of San Lorenzo, the Spanish Intendent in New Orleans closed the deposit in 1802, leaving Americans without a place to store their goods. This precipitated a political crisis in America, which called for an immediate response from the Jefferson administration.¹²² Rufus King believed that France had obtained Louisiana in an effort to weaken the Union because it was “the opinion of influential persons in France that there was a natural line of separation between the American people on the two sides of the mountains.”¹²³

Jefferson, for whom an important and growing base of his political support lay in the West, moved quickly to resolve the crisis. He appointed Robert Livingston and James Monroe to negotiate with France to secure the rights of Americans to navigate the Mississippi.¹²⁴ The instructions called for making the river the boundary between the United States and Louisiana and for acquiring New Orleans and the Floridas for the United States.¹²⁵ The House voted to appropriate two million dollars for the task.¹²⁶ Senator Ross of Pennsylvania introduced a resolution urging the President to seize the same territory by force.¹²⁷ Only four months later, Livingston and Monroe

118. For a discussion of these concerns, see *supra* notes 62–66 and accompanying text.

119. MALONE, *supra* note 2, at 239.

120. *Id.*

121. *Id.* at 240.

122. *Id.*

123. *Id.* at 249.

124. BROWN, *supra* note 2, at 9.

125. *Id.* The details of the negotiations with Napoleon, and the court intrigue involved, are recounted in DECONDE, *supra* note 2.

126. MCDONALD, *supra* note 2, at 66.

127. *Id.* at 95–96.

wrote from Paris, announcing that France had offered to sell the U.S. the entire province of Louisiana.¹²⁸

Jefferson responded speedily to this happy surprise. He and Madison wrote back to approve the deal, which called for a payment to France of \$11,250,000 in six per cent stock and the assumption of claims of American citizens against France totaling \$3,750,000.¹²⁹ Although the precise boundaries of the territory were unknown, Jefferson knew that the treaty would give the United States control over the Mississippi and its tributaries.¹³⁰

But the portion of the treaty that would arouse the most interest, and the most controversy, was Article III, which seemed to require that the territory of Louisiana be admitted into the Union as a state or states:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.¹³¹

Despite the seeming clarity of the words "incorporated" and "admitted," evidently some confusion existed about the legal effect of the provision. One contemporary writer suggested that there were three possibilities regarding the Louisiana territory's status: it could enter the Union immediately as a state or states; it could be considered a territory like the Indiana and Mississippi Territories, which were part of the original United States, but not yet states themselves; or, it could be a colonial "fiefdom" of the U.S., similar to Canada and Jamaica in relation to England.¹³²

However, an examination of the longstanding federal government policy with regard to the open lands in the West, and Jefferson's own views on the status of territory, strongly indicate that Article III meant precisely what it said. Since the very beginning of the Republic, it was widely assumed that territories could look forward with certainty to statehood and admission to the union.¹³³ There was very little doubt that this would hold true for the

128. BROWN, *supra* note 2, at 13.

129. MALONE, *supra* note 2, at 302.

130. *Id.* at 303.

131. Treaty for the Cession of Louisiana, Apr. 30, 1803, art. III, U.S.-Fr., 8 Stat. 200, 202.

132. ALLAN B. MAGRUDER, *ESQUIRE POLITICAL, COMMERCIAL AND MORAL REFLECTIONS, ON THE LATE CESSION OF LOUISIANA, TO THE UNITED STATES* 95 (1803).

133. PETER S. ONUF, *STATEHOOD AND UNION* 108 (1987). This is no longer true. In the *Insular Cases*, the Supreme Court distinguished between "incorporated" and "unincorporated" territories. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (plurality opinion) (holding that Puerto Rico is "unincorporated" and thus Article I, § 8, cl. 1, requiring "uniform duties throughout the United States," does not apply to it, meaning Congress has the power to

Louisiana Territory as it had for the already-existing territories.

When Congress began serious planning for the future of the West in early 1784, Jefferson headed the committee and drafted a charter for temporary government of the western territories.¹³⁴ This plan, the "1784 ordinance," set the boundaries for sixteen new states in the area north of the Ohio River and in the western regions of original states that would cede some of their territory.¹³⁵ The ordinance promised the new states admission to the union when their respective populations became equal to that of the smallest existing state.¹³⁶ What is striking about the ordinance is that it links statehood and settlement so closely together; Jefferson essentially felt that statehood was simultaneous with the process of settlement.¹³⁷ Jefferson wanted to avoid at all costs the establishment of a colonial regime in the West, which he believed would be a source of power for the national government. Thus the existence of states was taken for granted.¹³⁸

Congress grew concerned with the disappointing results, however, and a committee, headed by James Monroe, was appointed to revise the ordinance. One concern was that the high degree of autonomy granted settlers under the 1784 ordinance was stifling growth through lack of law, order, or the clarity of land titles.¹³⁹ In addition, the ordinance's plan for a large number of small states alarmed Easterners who, already fearing that their influence in Congress would decline in favor of the Republicans and western interests, planned to raise the population requirement for statehood

regulate territorial tariffs in a way it could not if Puerto Rico were a state). Under this dual regime, incorporated territories could look forward to eventual statehood, while unincorporated territories could not. *See* Levinson, *supra* note 10, at 246. The conclusions reached in the Insular Cases have shaky foundations. *See id.*:

But no one can plausibly believe that *Downes* was decided as a detached, dispassionate exegesis of prior opinions. The doctrine of "unincorporated territories" . . . was the product . . . of the perceived exigencies of the moment, which made Puerto Rico and the Philippines at once highly desirable as possessions of the United States yet, it was thought, unsuitable for genuine membership in the American Union.

For further criticism of the Insular Cases and the limbo status of territories such as Puerto Rico, the U.S. Virgin Islands, and Guam, see JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985). There is very little evidence that the concept of unincorporated territories had much support at the time the Louisiana Treaty was negotiated. Certainly, Jefferson would have hated the idea. *See infra* notes 134–38 and accompanying text.

134. ONUF, *supra* note 133, at 46.

135. *Id.* at 46–47.

136. *Id.* at 46.

137. *Id.* at 54.

138. *Id.* at 51.

139. ONUF, *supra* note 133, at 50.

to an impossibly high number.¹⁴⁰ Without enough population, then, these inchoate states might remain at territorial status indefinitely.

The result of Monroe's efforts, the Northwest Ordinance of 1787, established territorial governments but nonetheless retained the promise of statehood from the original 1784 ordinance. It also set forth the boundaries of potential states. The final section of the Ordinance announced, "The following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent" The Fifth Article provided that "[t]here shall be formed in the said territory, not less than three, nor more than five States"¹⁴¹ Monroe assured Jefferson, who was then serving in Paris as Ambassador to France, that establishing temporary territorial governments would actually facilitate Jefferson's principles because it would speed up population growth and ensure the quick attainment of statehood.¹⁴² Edward Carrington wrote to Jefferson that the main purposes of the Northwest Ordinance were to establish "a Temporary Government" in the West and provide "for its more easy passage into permanent State Governments."¹⁴³

Although the Northwest Ordinance separated the concept of statehood from settlement, it nonetheless enshrined statehood as the preferred, indeed inevitable, status of any territory held by the federal government. Moreover, unlike Jefferson's 1784 ordinance, which required the assent of nine of the existing states for admission, the Northwest Ordinance would simply conjure new states into existence when the population reached the sixty thousand threshold.¹⁴⁴ The Ordinance also seemed to bind the national government in a way that earlier plans had not. The Compact section of the Ordinance, in particular, indicated that its writers intended for it to have "constitutional" effect in the sense recognized at the time of the Revolution—that it was a compact between the United States and the sovereign settlers in the territories.¹⁴⁵ A territorial delegate, Paul Fearing, told Congress in 1802 that the Ordinance "compact is the Supreme Law of

140. Letter from James Monroe to Thomas Jefferson (July 16, 1786), in 8 LETTERS OF THE MEMBERS OF THE CONTINENTAL CONGRESS 390–94 (Edmund C. Burnett ed., 1921–36) [hereinafter CONGRESS LETTERS].

141. Northwest Ordinance of 1787, 1 Stat. 52–53 (amended 1789); Letter from James Monroe to Thomas Jefferson (July 16, 1786), in 8 CONGRESS LETTERS, *supra* note 140, at 390–94; ONUF, STATEHOOD, *supra* note 133, at 52.

142. Letter from James Monroe to Thomas Jefferson (May 11, 1786), in 8 CONGRESS LETTERS, *supra* note 140, at 359–60.

143. Letter from Edward Carrington to Thomas Jefferson (Oct. 23, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 252–57 (Boyd et. al. eds., 1950–) [hereinafter JEFFERSON PAPERS].

144. ONUF, *supra* note 133, at 59.

145. *Id.* at xviii. For the concept that the revolutionaries considered constitutions to be "compacts" or "treaties," see WOOD, *supra* note 108, at 259–305; Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, PUBLIUS, Fall 1980, at 101–30.

the land, and is in the nature of a treaty."¹⁴⁶ As late as the 1820s, commentators such as William Rawle assumed that the Ordinance bound the United States to recognize a territory's right to gain admission to the Union when it met the stipulated conditions.¹⁴⁷

The understanding of the Northwest Ordinance as a constitutionally binding document collapsed by 1850—when the U.S. Supreme Court declared that it had been “superceded” by the Constitution, and that it had no legal force.¹⁴⁸ Nonetheless, it articulated settled government policy toward the territories at the time Monroe and Livingston negotiated the Louisiana treaty's terms in Paris. If anything, the new Republican administration favored the admission of new states at a faster rate than required by the Ordinance.¹⁴⁹

This policy was reflected in the instructions Monroe and Livingston received from the Jefferson administration. Madison wrote in the proposed treaty that “to incorporate the inhabitants of the hereby ceded territory with the citizens of the United States on an equal footing . . . it is to be expected, from the character and policy of the United States, that such incorporation will take place without unnecessary delay.”¹⁵⁰ In explaining this provision, Madison wrote in the instructions that the only reason for not immediately incorporating the inhabitants of any ceded territory was that they may be entitled to “consent to the act of cession,” which he fully expected them to do.¹⁵¹

With the policies of the Northwest Ordinance as a backdrop, it is clear that Article III of the Louisiana Treaty bound the United States to incorporate Louisiana into the union. The Louisiana Treaty was, like the Northwest Ordinance, a compact with the residents of the territory that promised they would become full citizens of the United States. Even though the treaty did not set any timetable, nor did it, like the Ordinance, promise statehood upon the achievement of any particular population, there is no reason to believe Article III was not taken as seriously as the provisions of the treaty in which the United States pledged to pay France for the cession. Indeed, the three major agreements that made up the treaty, as historian Alexander DeConde observed, “formed one transaction and were

146. 11 ANNALS OF CONG. 1103 (speech of March 30, 1802).

147. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (De Capo Press 1970) (1829); see also 3 STORY, *supra* note 31, at 160.

148. *Strader v. Graham*, 51 U.S. (10 How.) 82, 95–96 (1850).

149. See ONUF, *supra* note 133, at 59–61. Ohio had been admitted to statehood while the Louisiana Treaty was being negotiated, and “the broad consensus” was that “the Ordinance and not the Constitution governed Congress’ authority with respect” to its admission. CURRIE, *supra* note 2, at 94.

150. 12 ANNALS OF CONG. 1101 (1802–03).

151. Letter from James Madison to James Monroe, in BROWN, *supra* note 2, at 66.

interdependent."¹⁵² Since territory was then considered merely to be a transitional phase in preparation for the imminent achievement of statehood, the Louisiana Purchase meant the admission of an unknown number of new states into the Union.

B. *THE BALANCE OF FORCES: FEDERALIST OPPOSITION IN NEW ENGLAND*

Despite the widespread popularity of the Louisiana Purchase, the treaty raised alarm bells in New England, the last bastion of Federalist influence. Struggling to articulate why the treaty violated the Constitution, the Federalists ironically summoned the same *balance of forces* federalism principle that inspired their opponents, the Anti-Federalists, during the ratification debates. The consequences of the treaty were more than just political, New Englanders concluded. The Constitution did not permit such a sweeping transformative act because it ignored the understandings upon which the Constitution itself had been ratified.

In his *History of the United States*, Henry Adams wrote that, when the news of the Louisiana Treaty was announced on July 4, 1803, "the Federalist orators . . . set about their annual task of foreboding the ruin of society amid the cheers and congratulations of the happiest society the world then knew."¹⁵³ But the reality is that, in general terms, the cession of the Louisiana territory to the United States initially met with approval even in the strongholds of Federalism. The *Newburyport Herald* announced that "[t]his province will prove a valuable acquisition to our growing empire We pleurably yield a tribute of praise for one meritorious transaction of the present administration."¹⁵⁴ Even Jefferson's most vociferous critics could see the benefits.

Only after the precise terms of the treaty became known did New Englanders begin to fear its consequences. The criticism centered on the disadvantages to the northern states. The *Herald* worried that the purchase would lead to considerable emigration from east to west.¹⁵⁵ In other northern newspapers, critics complained about the deal's expense, arguing that it would cost nearly all of the gold and silver coins in the United States and would be funded "not on the gilt carriages of Virginians, or on the whiskey of Kentucky and Tennessee; but on the opulence of the middle, the industry and enterprise of the northern states."¹⁵⁶ Those who opposed the treaty also thought it poor foreign policy. The Federalists believed that

152. DECONDE, *supra* note 2, at 171.

153. 1 HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA* 358 (Library of America 1986).

154. NEWBURYPORT HERALD, July 1, 1803; Harvey Putnam Prentiss, Timothy Pickering as the Leader of New England Federalism (1932) (unpublished dissertation, Northwestern University).

155. NEWBURYPORT HERALD, Aug. 6, 1803.

156. SALEM GAZETTE, Aug. 16, 1803. *See also* COLUMBIA SENTINEL, July 20, 1803.

Republican plans to expand the Union westward were foolish because the result would be a huge, sparsely populated nation unable to govern itself or muster the resources necessary to secure its borders.¹⁵⁷ In his diary, Senator William Plumer articulated these concerns, writing that “[a]n extension of the body politic will enfeeble the circulation of its powers [and] energies in the extreme parts.”¹⁵⁸

Moreover, Federalists suspected that France stood to benefit more than the United States, and that the treaty had been not a little the result of Jefferson and his Republican friends’ love of France and its radical version of democracy.¹⁵⁹ Such suspicions were easily aroused in Federalists, who nearly always favored closer relations with Britain than France. One newspaper published a memo by Livingston containing anti-British references, and some had described Livingston as a “rank Jacobin.”¹⁶⁰ In the *Columbian Centinel*, “Fabricus” saw the purchase as evidence of the power of French influence in the United States.¹⁶¹ By making such a deal with France, the U.S. had become a tool in the imminent war between France and Great Britain.¹⁶² This was also the sentiment of the young Federalist political leaders. Fisher Ames called the transaction “mean and despicable” and believed that Monroe and Livingston willingly played into the hands of the French.¹⁶³ “The cession of Louisiana,” wrote George Cabot to Rufus King, was like “selling us a ship after she is surrounded by a British fleet. It puts into safe keeping what she could not keep herself”¹⁶⁴

Still, the attention of the Federalist community focused most closely on Article III, requiring the incorporation of the territory into the Union, which all assumed meant the admission of new states in the South and West. The loss of political influence would be so profound that the nature of the union itself had been irrevocably changed.¹⁶⁵ In August, the *Newburyport*

157. See Onuf, *Expanding Union*, *supra* note 18, at 74.

158. See WILLIAM PLUMER’S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803–1807, at 6 (Everett Somerville Brown ed., 1923) [hereinafter PLUMER].

159. See MALONE, *supra* note 2, at 295–96. Of course, Napoleon would not have been willing to sell Louisiana were he not convinced it was the best he could do for France. He perceived, quite correctly, that the Jefferson administration had been engineering a potential rapprochement with Britain, and he felt something needed to be done quickly to halt it. *Id.* at 294–95. By ceding Louisiana, Napoleon would remove the one area of conflict between the U.S. and France. *Id.* In addition, Napoleon’s earlier plans to send a military expedition to Louisiana had gone up in smoke when yellow fever decimated the contingent of French soldiers in St. Domingo who had been assigned the task. MCDONALD, *supra* note 2, at 63–67.

160. MALONE, *supra* note 2, at 298.

161. THE COLUMBIAN CENTINEL, July 20, 1803.

162. *Id.*, July 23, 1803 (“Who does not sicken at such baseness and folly? To give money to France at this time is to strengthen the world’s worst foe at a moment when its best friends are entitled to every help.”).

163. 1 WORKS OF FISHER AMES 323 (Seth Ames ed., 1854) [hereinafter AMES].

164. HENRY CABOT LODGE, LIFE AND LETTERS OF GEORGE CABOT 331 (1877).

165. Prentiss, *supra* note 154, at 69.

Herald had declared that “the cession of Louisiana will cause, in effect, a Revolution in our country, and a complete alteration of its political powers and influences must take place.”¹⁶⁶ According to “a Merchant” in the *Atlantic Daily Advertiser* that November, the treaty had caused “an unfortunate change in the system of our policy, if not in our form of government.”¹⁶⁷ Although these complaints made clear the widespread alarm about loss of political influence, they never articulated a cogent theory as to why it should be unconstitutional.

That task was for William Plumer of New Hampshire, a young, reform-minded Federalist leader in the United States Senate who, along with John Quincy Adams and others, sought to remake the Federalists into a more popularly oriented party.¹⁶⁸ In his diary, Plumer set forth in some detail what he saw as the constitutional problems with Article III of the treaty—many of them the ones that, during the same period, troubled Jefferson.

First, Plumer focused on the assumption, shared by Federalist colleagues, that Louisiana was in essence a foreign country. Wondering why Napoleon had insisted on the provision in the treaty requiring incorporation, Plumer mused “that their admission would create an influence in his favor in the Councils of our nation. What could induce our Ministers to agree to an article in direct opposition to the spirit [and] genius of our Constitution?”¹⁶⁹ The Constitution, Plumer believed, never contemplated “the accession of a foreign people,” and the New States Clause only applied to the existing territory of the United States when the Constitution was ratified.¹⁷⁰

Plumer then advanced the *balance of forces* view of federalism through the metaphor of a trading company. Just as a firm could not admit new partners without the consent of each of the old partners, Plumer reasoned, neither can a new state “formed from without the limits of the original territory” be admitted “into the Union without the previous consent of each State.”¹⁷¹ To permit provinces of a foreign country to be admitted by treaty would “immediately change both the forms [and] the principles of our government” because “the influences and votes of the *old* states would be controuled and negatived by the *new*.”¹⁷² “If we can admit Louisiana,” he

166. NEWBURYPORT HERALD, Aug. 9, 1803.

167. THE NEWBURYPORT HERALD, Nov. 25, 1803. The *Salem Gazette* had reasoned earlier that month that “[t]he weightiest argument against [the treaty] is not the money price, but . . . that it would drain the population, and injure the interests, of the present confederacy. The Western People dance on account of the purchase; but the Atlantic States must pay the piper.” SALEM GAZETTE, Nov. 15, 1803.

168. DAVID HACKETT FISCHER, *THE REVOLUTION OF AMERICAN CONSERVATISM: THE FEDERALIST PARTY IN THE ERA OF JEFFERSONIAN DEMOCRACY* 44–45 (1965).

169. PLUMER, *supra* note 158, at 7.

170. *Id.*

171. *Id.* at 8.

172. *Id.* at 8–9 (emphasis in original).

concluded, “why not the British provinces, why not the *terrible* Republic of France itself!”¹⁷³ Admitting Louisiana—“of itself a *world*”—would “destroy with a single operation the whole weight [and] importance of the eastern states in the *scale* of politics.”¹⁷⁴

Next, Plumer compared the addition of new states required by the Louisiana treaty and the potential use of the treaty power that had most troubled Anti-Federalists in the state ratifying conventions.

If the President [and] Senate can by treaty purchase new territory [and] stipulate that it shall be incorporated into the Union, without the previous consent of each of the old States—why may they not by treaty, sell a State, [and] sever it from the union, without its consent?

In making this argument, Plumer returned to the basis of fears that animated criticism of the treaty power from the beginning. The Northerners now thought of something like Patrick Henry’s mathematical possibilities whereby a supermajority of states could bargain away the rights of western states to navigate on the Mississippi River through the treaty power.¹⁷⁵ This time, however, the shoe was on the other foot. It was the New Englanders who imagined that their votes in the Senate would be swamped by the tide of votes from the Senators of the new, Republican western states.

Moreover, new slaveholding states in the South and West would enjoy disproportionate power in the House of Representatives and in the Electoral College due to the operation of the Three-Fifths Clause, which counted slaves as three-fifths of a person for purposes of representation.¹⁷⁶ As early as 1803, “New York and New England had about sixty thousand more free inhabitants than did the entire slaveholding South, yet the South had thirteen more seats in the House of Representatives and twenty-one more electoral votes.”¹⁷⁷ This imbalance would increase if the Louisiana Territory were incorporated.¹⁷⁸ Despite the good fortune for the nation as a whole, the impact upon individual states would be powerful. The fears about the treaty power that haunted Anti-Federalists during the Convention had returned.

C. THE POWER TO ACQUIRE TERRITORY

In October of 1803, Jefferson presented the treaty to the Senate for ratification, a task that was accomplished in four days.¹⁷⁹ Afterwards,

173. *Id.* at 9.

174. PLUMER, *supra* note 158, at 9 (emphasis in original).

175. *See supra* notes 44–66 and accompanying text (discussing fears that the Treaty Clause granted to the federal government powers that are too broad).

176. U.S. CONST. art. I, § 2, cl. 3.

177. McDONALD, *supra* note 11, at 60.

178. *Id.*

179. CURRIE, *supra* note 2, at 95.

Jefferson invited the House and the Senate to enact implementing legislation, seeking to allay one of the significant concerns expressed by opponents during the debate over the Jay Treaty.¹⁸⁰ The implementing legislation authorized the President to take possession of the province, appropriated money, and extended federal statutes to the new territory. Congress divided the area into two parts: south of the thirty-third parallel, the present northern border of the state of Louisiana, would be the territory of Orleans. North of that line would be the Louisiana Territory.¹⁸¹ The ratification vote split along party lines.¹⁸²

But even before the congressional debates, Jefferson conducted his own debate—with his conscience and with his closest advisors. The first issue President Jefferson confronted, when he learned of France's offer to sell the Louisiana territory, was whether the federal government could constitutionally admit new territory into the United States. This issue proved to be the less problematic, and while Jefferson had reservations about it, the consensus view—even given the relatively strict interpretation of federal power common at the time—was that the foreign affairs powers of the national government included the ability to acquire territory because it was a necessary part of conducting foreign policy. Thus the treaty power clearly included the power to acquire territory.

The Constitution does not explicitly vest the federal government with the power to acquire new territory. However, Article Four, section three provides for the admission of new states into the Union.¹⁸³ The Articles of Confederation, in Article Eleven, had provided for the automatic admission of Canada into the union, but “no other colony shall be admitted into the same, unless such admission be agreed to by nine states.”¹⁸⁴

Evidence from the Convention suggests that some, though certainly not all, of the Framers believed new states would only be carved out of the

180. *Id.* For a discussion of the Republicans' criticism of the Jay Treaty, see *supra* notes 89–103 and accompanying text.

181. *Id.*

182. BROWN, *supra* note 2, at 13.

183. U.S. CONST. art. IV, § 3, cl. 1

New states may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Id. Another potential textual source for the power to acquire territory is the subsequent clause, authorizing Congress to “dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States . . .” U.S. CONST. art. IV, § 3, cl. 2. But there is no evidence that the Framers had the acquisition of territory in mind when drafting this clause. In *Sere v. Pitot*, 10 U.S. (2 Cranch) 332, 336 (1810), Chief Justice Marshall, writing for the Supreme Court, assumed that Congress possessed the power to acquire territory and looked to this clause simply to confirm that “the power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory.”

184. ARTICLES OF CONFEDERATION AND PERPETUAL UNION, art. XI.

existing territory of the United States. Edmund Randolph's "Propositions in the Federal Convention," known as the "Virginia Plan," called for the "admission of states lawfully arising within the limits of the United States."¹⁸⁵ An early report of the Committee of Detail proposed that new states soliciting for admission into the United States "must be within the *present* limits of the United States,"¹⁸⁶ although the word "present" was omitted from a later report.¹⁸⁷ By contrast, Patterson's New Jersey Plan merely stated that "provision ought to be made for the admission of new states into the Union."¹⁸⁸ Nor did Alexander Hamilton's plan include this limitation.¹⁸⁹

The draft of the Constitution reported by the Committee of Five imposed the tightest restrictions on the admission of new states. It contained an article providing that new states "lawfully constituted or established *within the limits of the United States*, may be admitted by the legislature into this government; but to such admission the consent of two-thirds of the members present in each house shall be necessary."¹⁹⁰ This language most closely resembles the text of Article Four, section three. Obviously, however, the final language contains no two-thirds majority requirement and, importantly, imposes no territorial limitation. Gouverneur Morris said that the clause was left vague on purpose, deferring more precise interpretation of the phrase for later.¹⁹¹

The question was still unresolved when Jefferson first considered proposing a deal with France to buy New Orleans and Florida so that the U.S. could effectively control the Mississippi River. Jefferson knew that expanding the territory of the United States was politically complicated, so he asked his cabinet for advice. Attorney General Levi Lincoln wrote to Jefferson suggesting a means by which the question could be avoided: the existing State of Georgia and the Territory of Mississippi would simply expand their borders to include the desired territory along the Mississippi to New Orleans, thus abrogating the need for the federal government itself to

185. 1 ELLIOT'S DEBATES, *supra* note 52, at 144-45; 1 CONVENTION RECORDS, *supra* note 49, at 22.

186. See 2 CONVENTION RECORDS, *supra* note 49, 147.

187. *Id.* at 173.

188. 1 ELLIOT'S DEBATES, *supra* note 52, at 177.

189. BROWN, *supra* note 2, at 16.

190. 1 ELLIOT'S DEBATES, *supra* note 52, at 229-30 (emphasis added).

191. BROWN, *supra* note 2, at 16. In THE FEDERALIST NO. 43, Madison said only that it made sense to provide for the admission of new states and to protect existing ones against involuntary alteration. THE FEDERALIST NO. 43 (James Madison), *supra* note 15, at 273-74. The acquisition of new territory probably was not much on the Framers' minds. The greatest controversy in the discussion of the New States Clause was whether it permitted the existing states to be divided. For analysis of the meaning of the Clause with respect to this thorny problem, see Michael Stokes Paulson & Vasanth Kesavan, *Is West Virginia Constitutional?*, 90 CAL. L. REV. 291, 334-95 (2002). See also Kesavan, *supra* note 25.

acquire territory.¹⁹² "By this indirect mode," he wrote to Jefferson, "would not the General Govt avoid some constitutional, and some political embarrassments, which a direct acquisition of a foreign territory by the Govt of the United States might occasion?"¹⁹³

As a New Englander, Lincoln was in the best position to predict the nature of the opposition from the northern states to the federal government's acquisition of, and creation of new states from, the purchased territory. He reminded Jefferson of the *balance of forces* federalism costs. "Is there not danger," he wrote, that the northern states would object

to the ratification of a treaty directly introducing a state of things, involving the idea of adding to the weight of the Southern States in one branch of the Govt of which there is already too great jealousy [and] dread, while they would acquiesce in that increase of the other branch consequent on the enlargement of the boundaries of a State?¹⁹⁴

Lincoln's implication was that expanding the representation of southern states in the House of Representatives was preferable to adding southern seats in the Senate, which could be coerced by some future President into further expanding by treaty the nation's borders southward, thus adding new slave states indefinitely:

The principles, and the precedent, of an independent purchase of territory, it will be said, may be extended to the East or West Indies, and that some future executive, will extend them, to the purchase of Louisiana, or still further south, [and] become the Executive of the United States of North and South America.¹⁹⁵

Even though northern states wanted access to the Mississippi River, Lincoln concluded, they would not be willing to pay so high a price for it.¹⁹⁶

But Treasury Secretary Gallatin rejected Lincoln's idea, arguing to Jefferson that there was, in terms of the constitutional difficulties, "no difference between a power to acquire territory *for* the United States and the power to extend by treaty the territory *of* the United States."¹⁹⁷ The issue must be faced head-on, Gallatin thought, and he reasoned that the power to acquire territory derived from the treaty power itself. He noted that the clause providing for the admission of new states did not require that new states be carved from existing territories of the U.S., nor did the provision

192. Letter from Levi Lincoln to Thomas Jefferson, in BROWN *supra* note 2, at 18.

193. *Id.* at 19.

194. *Id.*

195. *Id.* at 20.

196. *Id.*

197. 1 ALBERT GALLATIN, WRITINGS 111-14 (Henry Adams ed., 1879) (emphasis added).

granting Congress the power to legislate for the territories refer specifically to the existing territory.¹⁹⁸

Jefferson responded to this analysis by returning to the principle of strict construction. Although he appears to have at first cautiously approved of Gallatin's argument with regard to the acquisition of territory, Jefferson clearly balked at the idea of admitting new states formed from that territory into the union:

You are right, in my opinion . . . [that] there is no constitutional difficulty as to the acquisition of territory, and whether, when acquired, it may be taken into the Union by the Constitution as it now stands, will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment of the Constitution.¹⁹⁹

If the text did not so provide, it generally should not be done.

Once it became known that Napoleon was willing to sell all of Louisiana, Jefferson became even more convinced, concluding that a constitutional amendment was necessary *both* to acquire territory and to form new states from it. What probably cemented Jefferson's feelings on the issue was the enormous size of the territory to be acquired from France, which, according to historian Dumas Malone, "magnified and accentuated the constitutional question[s]."²⁰⁰ Jefferson saw in the vast territory the potential transformation of national politics with the addition of new states. At any rate, he announced his conviction that a constitutional amendment was required in communication with a number of people, including his son-in-law Thomas Randolph; prominent Virginian politician William Dunbar; renowned Massachusetts antilegalist Benjamin Austin; elder statesman John Dickinson, who had worked with Jefferson on the Declaration of Independence; the rising Republican congressional star, Kentuckian John Breckinridge; and even, apparently, the Federalist William Plumer.²⁰¹

Because the treaty was ratified and implemented so quickly, opponents of the treaty did not have time publicly to express their views regarding the constitutionality of acquiring territory.²⁰² However, a few Federalists expressed serious doubts privately, and along the lines predicted by Attorney General Lincoln. Manasseh Cutler and George Cabot warned that the admission of new territory to the South and West would diminish the

198. *Id.*

199. Letter from Thomas Jefferson to Albert Gallatin (January 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 241 n.1.

200. MALONE, *supra* note 2, at 313.

201. See BROWN, *supra* note 2, at 23–25.

202. CURRIE, *supra* note 2, at 101.

influence of New England.²⁰³ Fisher Ames complained that, by adding territory beyond the Mississippi River, “we rush like a comet into infinite space. In our wild career, we may jostle some other world out of its orbit, but we shall, in every event, quench the light of our own.”²⁰⁴ Senator Plumer expressed doubts in his diary, writing that, “The constitution of the United States was formed for the express purpose of governing the people who then & thereafter should live within the limits of the United States as then known & established. It never contemplated the accession of a foreign people, or the extension of territory.”²⁰⁵ Yet later in the same diary entry, Plumer seemed to admit that the United States probably did have the power to acquire territory, either by conquest or acquisition.²⁰⁶

Perhaps the most candid assessment of the Framers' intent came from Gouverneur Morris, who wrote that, when drafting the New States Clause, the strongest reason against adding language restricting the future territory of the United States had been the fact that it would fly in the face of public demand. “I knew as well then as I do now,” Morris wrote, “that all North America must at length be annexed to us. It would, therefore, have been perfectly Utopian to oppose a paper restriction to the violence of popular sentiment in a popular government.”²⁰⁷ Sharing the popular view, Jefferson's advisors and friends did not seem to agree with him that the treaty power could not extend to even the acquisition of territory.²⁰⁸

The U.S. Supreme Court recognized in 1828 that the federal government has the power to acquire territory as an adjunct to its authority to conduct foreign policy.²⁰⁹ In *American Insurance Company v. Canter*, Chief Justice Marshall declared that “[t]he Constitution confers absolutely on the Government of the Union the powers of making war, and of making treaties; consequently, that Government possesses the power of acquiring territory, either by conquest or by treaty.”²¹⁰ Indeed, a supporter of the Jefferson administration had justified the acquisition of the Louisiana Territory strictly in foreign policy terms: had the French maintained control of Louisiana and colonized it further, the United States would have been forced to maintain a

203. See George Cabot to Timothy Pickering (Dec. 10, 1803), in LODGE, *supra* note 164, at 333–34; Manasseh Cutler to Dr. Torrey (Oct. 31, 1803), in 2 CUTLER & CUTLER, *supra* note 13, at 138.

204. Letter from Fisher Ames to Christopher Gore (Oct. 3, 1803), in 1 AMES, *supra* note 163, at 323–24).

205. See PLUMER, *supra* note 158, at 7.

206. *Id.* at 12.

207. 3 JARED SPARKS, THE LIFE OF GOUVERNEUR MORRIS 185 (1832).

208. See MALONE, *supra* note 2, at 314. However, as noted above, New Englander Attorney General Levi Lincoln shared Jefferson's doubts. See *supra* notes 192–96 and accompanying text.

209. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

210. *Id.*; see also 3 STORY, *supra* note 28, § 1282 (“As an incidental power, the constitutional right of the United States to acquire territory would seem so naturally to flow from the sovereignty confided to it, as not to admit of very serious question.”).

standing army along the lengthy mutual border.²¹¹ Jefferson's reservations about this power, however, particularly when he learned of the size of the purchase, undoubtedly stemmed from the likely result of the acquisition—the incorporation of Louisiana into the United States as states.

D. *THE POWER TO INCORPORATE FOREIGN TERRITORY AS STATES*

When the Louisiana Treaty was concluded, most believed that the United States had the power under the Treaty Clause to acquire foreign territory in order to secure its own borders and preserve access to the Mississippi River. This power arguably flowed from the need of any sovereign nation to defend itself. But once the newly-acquired territory opened for settlement, the inquiry shifted from the scope of the national government's foreign affairs power to an alternative power—to alter the domestic relationship among the states, and thus to transform the nature of the Union itself. Settlement inevitably meant new states, and new states would mean new Senators and Representatives in Congress. Knowledgeable observers could easily see dozens of new states emerging from this huge territory, and the Federalists of New England accurately feared that the new states would be Republican, and that they would side with the interests of the South.

This subpart examines whether the treaty clause provided the federal government authority to incorporate new states from foreign territory—a question that not only divided Republicans and Federalists, but also divided Jefferson himself.

1. The Debate in Congress

Facing a popular president with strong majorities in both houses of Congress, the Federalists needed to persuade some of their Republican colleagues that the treaty would violate the Constitution. The Republicans would have none of it. They simply demurred, claiming that these issues needed to be resolved later. That may have been because the Federalists' *balance of forces* concerns eerily echoed the alarms raised by the Republicans during the ratification debates.

What is striking about the debate in Congress on the treaty and the implementing legislation is the degree to which the Republican majority failed to engage the major substantive constitutional questions raised by the Federalists. During the treaty's ratification debate in the Senate, not a single Republican Senator took the position that the Constitution allowed for the admission of new states outside the original territory of the United States.²¹² The strategy that these Senators adopted was simply to deny that the treaty

211. See DAVID RAMSAY, AN ORATION ON THE CESSION OF LOUISIANA TO THE UNITED STATES 14 (1804).

212. CURRIE, *supra* note 2, at 1470.

required statehood. Virginia Senator John Taylor observed that “the words are literally satisfied by incorporating [Louisiana] into the Union as a territory, and not as a State.”²¹³

That the Republicans would choose to avoid the issue of whether the Louisiana Treaty itself actually had the effect of bringing the new territory into the Union as states is not surprising. During the debate on the Jay Treaty, they insisted that the House of Representatives have a role in choosing whether and how to implement the changes in domestic and commercial law required by that treaty.²¹⁴ In their analysis, if a treaty involved matters within the purview of Congress, then both houses of Congress needed to be consulted.²¹⁵ Similarly, in the case of the Louisiana Treaty, Congress’s power to admit new states into the Union required that any treaty calling for the admission of new states could not take effect without the approval of Congress.

This proved to be a distinction without a difference.²¹⁶ Once the treaty became the law of the land, the admission of new states was a *fait accompli*. After ratification, the Federalist’s fears were confirmed; the treaty tied their hands with regard to the ultimate admission of new states, and slave states in particular. In a letter to Timothy Pickering, Rufus King asked if the Executive could admit states by treaty or enter into an agreement binding Congress to do so, which amounts to the same thing. Moreover, he asked, “as Slavery is authorized & exists in Louisiana, and the treaty engages to protect the *Property* of the inhabitants, will not the present inequality, arising from the Representation of Slaves, be increased?”²¹⁷ Pickering was pessimistic. He believed that Jefferson and his fellow Republicans had not even bothered to claim that the Constitution permitted incorporation of

213. 13 ANNALS OF CONG. 51 (1803). This was at best a technical argument designed to deflect serious debate, and a dubious one given Republican protestations during the Jay Treaty controversy. See *supra* Part III. Still, at least one Federalist believed that the treaty was legal and could be later sanctioned with a constitutional amendment. Senator John Quincy Adams acknowledged that the treaty was valid even if the federal government did not have the power to admit Louisiana as a state; consent of the states could be obtained later if it was required. See *id.* at 58–59. However, Adams certainly must have realized that he was mistaken when his attempts to ratify the treaty with a constitutional amendment went nowhere. See *infra* notes 283–85 and accompanying text.

214. See *supra* notes 89–95 and accompanying text.

215. See *id.*

216. As became clear in *Missouri v. Holland*, Congress has the same power under the Necessary and Proper Clause to carry out the treaty provisions as the Senate and the President have in negotiating treaties. *Missouri* actually concerned the constitutionality of the legislation implementing the Migratory Bird Treaty. See *Holland*, 252 U.S. at 432 (“If the treaty is valid there can be no dispute about the validity of the statute under Article I, section 8, as a necessary and proper means to execute the powers of the Government.”).

217. 4 KING, *supra* note 12, at 324 (emphasis added).

new territory into the Union as states. But the admission of new states was inevitable now that the territory had been acquired.²¹⁸

Expressing similar fears, Gouverneur Morris wrote to Livingston that Louisiana should be governed as a province with “no voice in our councils.”²¹⁹ He recalled that he had never thought it wise, when the New States Clause was drafted, for states to be formed from new territory—even Canada, which the Articles of Confederation had clearly anticipated could become a state. He did acknowledge, however, that putting such a limitation into the language of the New States Clause in Article IV would have provoked strong opposition.²²⁰ Nonetheless, Morris believed that, with the admission of so many new states, “the Constitution cannot last, and an unbalanced monarchy will be established in its ruins.”²²¹

The constitutionality of the treaty occupied the House of Representatives’ attention when it went into the Committee of the Whole to consider implementing legislation. New York Representative Gaylord Griswold observed that the Louisiana Treaty clearly called for the incorporation of the territory into the United States, something which the Constitution simply did not give the President and the Senate the power to do. In fact, he added, the power could not be found anywhere in the text of the Constitution, and the framers clearly had not intended an addition of territory large enough as possibly to “overbalance the existing territory.”²²² However, if the power was lodged anywhere, it was with the Congress, and Jefferson had usurped Congress’s power by making a treaty that had the effect of admitting new states.²²³ It was thus incumbent on Congress to reject the treaty because it was unconstitutional: even a beneficial measure, if it violated the Constitution, should be resisted.²²⁴

In their response to Griswold and the Federalists, the Republicans shrewdly deferred consideration of the substantive objections. First, they insisted that, since Jefferson had submitted the treaty to Congress for implementation, those aspects of the treaty that fell within the purview of Congress would not take effect without Congressional approval. And surely, the highly partisan floor leader John Randolph added, the President, “as the organ by which we communicate with [foreign states], must be the prime agent, in negotiating such an acquisition.”²²⁵ Thus, the Republicans could argue a position at least ostensibly consistent with the one they had taken during the debate on the Jay Treaty.

218. BROWN, *supra* note 2, at 43.

219. 3 SPARKS, *supra* note 207, at 192.

220. *Id.*

221. *Id.*

222. 13 ANNALS OF CONG. 433 (1803).

223. *Id.* at 433.

224. *Id.* at 432.

225. *Id.* at 436.

Yet Randolph conceded even more: he reassured Federalists by insisting that provisions of the treaty that exceeded the constitutional power of the federal government in general would not take effect at all, absent a constitutional amendment.²²⁶ His Republican colleague Nicholson pointed out that the 1783 Treaty with Great Britain contained a provision requiring the states to honor pre-war debts. Since the states had plenary power over the recovery of debt, that provision never took effect.²²⁷ Of course, the 1783 Treaty was negotiated under the Articles of Confederation, before the states fully delegated the treaty power to the federal government. Randolph's reassurances did not persuade Griswold, who argued that a promise in the treaty to add states amounted in principle to incorporation.²²⁸

On the Senate side, many Republicans also insisted that the treaty did not require that the new territory be admitted as states. John Taylor found that the words of Article III of the Louisiana Treaty "are literally satisfied by incorporating them into the Union as a territory, and not as a State."²²⁹ Senator Smilie of Pennsylvania made the point that the constitutionality of Article III need not be resolved, saying that, if the principles of the Constitution forbade the admission of Louisiana into the Union, the solution was a constitutional amendment, and until one was approved the territory could remain "in a colonial state."²³⁰ Whether these arguments were sincerely raised is doubtful: they were clearly contrary to the policy of the administration favoring statehood and Jefferson's own strongly-held views.²³¹

The Republicans' insistence that the treaty would not require the incorporation of states did have the virtue of enabling them to attack the Federalists as inconsistent. A number of Federalists argued that the treaty power could never encompass the acquisition of any territory.²³² But others, such as Senator White of Delaware, said that, while the U.S. could acquire the port of New Orleans and other areas necessary to control the Mississippi, "Louisiana, this new, immense, unbounded world, if it should ever be incorporated into this Union, which I have no idea can be done but by altering the Constitution, I believe it will be the greatest curse that could at present befall us."²³³ Republicans, who willfully did not distinguish between acquiring territory and incorporating it as states, made great hay out of this difference of opinion. But what truly united Federalists was the shift in the balance of power between regions likely to result once new states were admitted.

226. *Id.*

227. 13 ANNALS OF CONG. 468-69 (1803).

228. *Id.*

229. *Id.* at 50-51.

230. *Id.* at 457-58.

231. *See supra* Part IV.A.

232. 13 ANNALS OF CONG. 457-58 (1803).

233. *Id.*

The Senate Federalists took a hard line against the treaty based on the compact theory of states' rights that Plumer had expressed in his diary.²³⁴ The firebrand Senator Timothy Pickering argued during the debate that even a constitutional amendment would not make the treaty acceptable. Such a significant expansion of the nation could not be effected without the unanimous consent of the existing states. He believed that "the assent of each individual State to be necessary for the admission of foreign country as an associate in the Union; in like manner as in a commercial house, the consent of each member would be necessary to admit a new partner into the company."²³⁵

The problem with this argument was that the text of the Constitution did not support it. It was one thing to say that the treaty exceeded the enumerated powers of the national government; it was another to impose a special requirement—found nowhere in the Constitution—that the consent of every existing state be obtained. Instead, the logical answer was a constitutional amendment, and that was exactly what Jefferson had already proposed.

2. Jefferson and His Advisors

When Congress met to ratify the treaty and enact the implementing legislation, the more important debate had already occurred elsewhere—within the Jefferson Administration. For Jefferson, the treaty presented the same constitutional problems the Federalists had identified. He firmly believed that ratifying the treaty was an extra-constitutional act. In the end, Jefferson and the Congressional Republicans both decided to avoid publicly engaging the constitutional questions, but for different reasons. Most Republicans thought it was not necessary; in marked contrast, Jefferson believed that the exigencies of the moment required him to remain silent despite profound misgivings.

While historians excuse, on practical and legal grounds, Jefferson's failure to pursue a constitutional amendment, they overlook the *balance of forces* federalism implications of the treaty that may have motivated those doubts. A constitutional amendment was necessary because the Louisiana Treaty altered the relationship between individual states and the federal government. The treaty led to the admission of states with interests opposed to those of many of the existing states and extended the operation of the Three-Fifths Clause to more territory, upsetting the careful balance of power between North and South struck by the states that ratified the

234. BROWN, *supra* note 2, at 69. For a discussion of Plumer's diary entry, see *supra* notes 204–05 and accompanying text.

235. 13 ANNALS OF CONG. 44–45 (1803); see also *id.* at 73 (statement of Senator Thacher). Senator Tracy of Connecticut added that "the relative strength which this admission gives to a Southern and Western interest, is contradictory to the principles of our original Union." *Id.* at 54–56.

Constitution. The individual states' status as sovereigns required that they assent to such a drastic change in the nature of the union. Growing resentment in New England, and confusion and bitterness surrounding the spread of slavery in the new territory, would result from the failure to properly execute this constitutional change.

Even though his party now controlled two of the three branches of the national government—and the third, the judiciary, had just begun to assert its power—Jefferson was still subject to the checks and balances of his own conscience. Jefferson clearly shared the Federalists' concerns about the admission of foreign territory as states, and privately he expressed those concerns in a similar fashion. He shared these doubts with most of his closest friends and advisors, starting from the moment he received news of the treaty.²³⁶ But one of the administration's most influential members, Treasury Secretary Gallatin, had already anticipated the concerns about the incorporation of states earlier that year in response to Jefferson's query about the acquisition of territory.²³⁷ Gallatin's long, elegant response showed how it was easy to think that the incorporation of states from new territory flowed naturally from the various powers of the national government:

The existence of the United States as a nation presupposes the power enjoyed by every nation of extending their territory by treaties, and the general power given to the President and Senate of making treaties designates the organ through which the acquisition may be made, whilst this section [Article IV, section three] provides the proper authority (viz. Congress) for either admitting in the Union or governing as subjects the territory thus acquired.²³⁸

Gallatin then reminded Jefferson that the New States Clause was designed to replace a provision in the Articles of Confederation, which had anticipated the admission of Canada—a territory outside the current boundaries of the United States.²³⁹

236. See BROWN, *supra* note 2, at 23–24.

237. CURRIE, *supra* note 2, at 8 n.30. Albert Gallatin was, along with Madison, Jefferson's closest advisor; together the three men formed the "triumvirate" that Henry Adams said ran the Jefferson Administration. Adams called Gallatin a "perfect model of statesmanship." *Id.*

238. *Id.*

239. *Id.*; see also Letter from Wilson Cary Nicholas to Thomas Jefferson (Sept. 3, 1803), in BROWN, *supra* note 2, at 26–27:

I find the power as broad as it could well be made . . . except that new States cannot be formed out of the old ones without the consent of the State to be dismembered; and the exception is a proof to my mind that it was not intended to confine the congress in the admission of new States to what was then the territory of the U.S.

This answer never satisfied Jefferson, and Gallatin himself later acknowledged doubts.²⁴⁰ Gallatin's structural argument Jefferson answered most eloquently in a famous letter to one of his closest confidants, Senator Nicholas. The letter is worth quoting at some length. First, he entertained the absurd results from a broad construction:

[W]hen I consider that the limits of the U S are precisely fixed by the treaty of 1783 . . . I cannot help believing that the intention was to permit Congress to admit into the Union new States, which should be formed out of the territory for which, & under whose authority alone, they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, &c. into it, which would be the case on your construction.²⁴¹

He also described the reasons for his belief in strict construction, which meant that, when in doubt, he would conclude that the government did not have the power to do something:

When an instrument admits of two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe & precise. I had rather ask an enlargement of power from the nation; when it is found necessary, than to assume by a construction which would make our powers boundless.

Finally, in sweeping language that called to mind his passionate invective against the treaty power during the Federalist administrations, he explained the importance of Constitutional change via the amendment process:

Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is, then we have no Constitution. . . . Nothing is more likely than that their enumeration of powers is defective. . . . Let us go on then perfecting it, by adding, by way of amendment to the Constitution, those powers which time & trial show are still wanting. . . . I confess, then, I think it important, in the present case, to set an example against broad construction, by appealing for new power to the people.²⁴²

240. "[N]ot even Congress can prevent some constitutional irregularity in the proceedings relative to occupying and governing the country before an amendment to the Constitution shall take place." 1 GALLATIN, *supra* note 197, at 158 (remarks on Jefferson's address to Congress, Oct 4, 1803).

241. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 247.

242. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 247-48.

Jefferson's stirring letter to Nicholas was written after nearly two months spent discussing the problems and considering various constitutional amendments. He had in fact proposed an amendment as soon as the treaty arrived from France, writing to William Dunbar that Congress would be "obliged to ask from the People an amendment of the Constitution, authorizing their receiving the province into the Union, and providing for its government; and the limitations of power which shall be given by that amendment, will be unalterable but by the same authority."²⁴³ While the Federalists proposed an impossible solution—that the treaty would require the consent of every state—Jefferson proposed to rely on the device provided for in the Constitution.²⁴⁴

Yet some historians portray Jefferson in this situation as merely an overzealous strict constructionist. To David N. Mayer, Jefferson's concerns were oddly technical.²⁴⁵ Since states never had the power to acquire or incorporate territory, Mayer argues, the treaty did not pose the kind of threat to federalism that animated Jefferson's abhorrence of implied national power and drove him to oppose, for example, the bill establishing the Bank of the United States.²⁴⁶ Rather, the consequences were merely political. Moreover, Jefferson had always espoused more flexibility in the realm of foreign affairs when it did not concern states' rights, and later on in his presidency, Jefferson and Congress imposed a total embargo without entertaining the slightest doubts as to its constitutionality.²⁴⁷

But there are two reasons why the Louisiana Purchase was different. First, it involved the use of the treaty power, which Jefferson had a special antipathy toward because of the ways in which its broad scope overlapped with the powers of Congress to legislate domestically. That is why Jefferson railed against the treaty power during the Jay Treaty debate and published a very narrow view of the power in the Senate Handbook of Parliamentary Practice.²⁴⁸ Second, Jefferson clearly understood, if he did not write explicitly, that the Louisiana Treaty, even more than the Jay Treaty before it, would have a tremendous impact on states' rights. Attorney General Lincoln accurately predicted the passionate response of the New England

243. Letter from Thomas Jefferson to William Dunbar (July 17, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 255.

244. The promise of a constitutional amendment would have been an important tool for disarming the treaty's Federalist critics, and at least some segment of the public also believed that an amendment was required to admit, as states, territory outside the original borders of the U.S. Before the treaty was announced, anonymous "Sylvestris" proposed an amendment to the Constitution permitting West Florida (to be purchased from Spain), the New Orleans territory, and the Mississippi Territory to enter the Union as a state. BROWN, *supra* note 2, at 37.

245. MAYER, *supra* note 2, at 216-17.

246. *Id.* at 215-16.

247. *Id.* at 216-17.

248. See *supra* notes 72-76 and accompanying text (discussing the founders' debates concerning dangers of the treaty power).

Federalists, who feared the loss of influence when new states were added to the South and West.²⁴⁹ In addition, maintaining the regional balance of power was the impetus for negotiating the treaty in the first place: though the end result was unexpected, it began as an attempt to gain for western and southern states the access to the Mississippi River they felt they might lose amid treachery from northern states anxious to make treaties with Spain and France favorable to them.²⁵⁰

Most historians describe the *empire of liberty* theory as if it represented the accepted view of states' rights without acknowledging the dissonant notes struck by the *balance of forces* theory. Mayer approvingly quotes Thomas Paine's argument to Jefferson that the Louisiana Purchase was "within the morality of the Constitution" because it did not alter the American system of republican government, but merely applied it to a much larger geographical area.²⁵¹ It is true that Jefferson himself sympathized with this view. Writing to a friend about the Louisiana Purchase in 1804, he said its greatest achievement was "this duplication of area for the extending a government so free and economical as ours."²⁵² After all, it was Jefferson himself who had first referred to an "Empire of Liberty."²⁵³

But the limitations of this *empire of liberty* theory are apparent. It is too abstract; it ignores the fact that the Constitution was and is a document designed to provide processes for governing a particular nation with its unique geographic and cultural circumstances. Since the Constitution was written so that it could win the approval of most legislatures in the original

249. MALONE, *supra* note 2, at 321.

250. See *supra* notes 48–63 and accompanying text (discussing the scope of the treaty power).

251. MAYER, *supra* note 2, at 251.

252. Letter from Thomas Jefferson to Joseph Priestly (Jan. 29, 1804), in 8 JEFFERSON WRITINGS, *supra* note 4, at 294–95.

253. See ONUF, EMPIRE, *supra* note 18, at 65–70. Jefferson first used the expression "Empire of Liberty" in a letter to George Rogers Clark. See Letter from Thomas Jefferson to George Rogers Clark (Dec. 25, 1780), in 2 JEFFERSON WRITINGS, *supra* note 4, at 390. Others have taken a similar view. The historian Everett Somerville Brown, who wrote the first in-depth analysis of the constitutional questions raised by the Louisiana treaty, did not take a clear position on the constitutionality of its provisions. See generally BROWN, *supra* note 2. Nonetheless, Brown approvingly quoted James Madison, who, during the controversy over admitting Missouri into the Union, wrote to a friend that the significant issue with regard to admitting new states was simply whether they would be placed on an even footing with the existing states. *Id.* at 48 (quoting Letter from James Madison to Robert Walsh (Nov. 27, 1819), in 9 MADISON PAPERS, *supra* note 93, at 6–7). Brown assumes, like Mayer and Thomas Paine, that there was nothing offensive to the Constitution so long as new states were admitted on an even footing with the old. More recently, Professor David Currie dismissed most arguments against the legality of the treaty. See CURRIE, *supra* note 2, at 103. For Currie, the seemingly broad nature of the New States Clause demonstrates the Framers' intent that states be admitted from newly-acquired territories. While Currie admits that the clause was written to account for the problem of existing territories, "there seems no more reason to limit it to those territories than to hold that the Thirteenth Amendment protected only blacks from slavery." *Id.*

thirteen states, its structure resulted from a series of compromises among large and small states, South and North, with conflicting interests. For the Federalists, the maintenance of balance and harmony among the sections, "the national compromise of regional and economic interests" were essential republican traits.²⁵⁴ Timothy Pickering, in a speech to Congress, noted that the Constitution expressed exactly these qualities, since it was "the result of compromise—of mutual sacrifices, of State interests, of local wishes, and attachments, to the common good."²⁵⁵ The *balance of forces* theory thus respects the hard-won, organic identity of the existing states.

A close reading of Jefferson's plans for constitutional amendments reveals a deep concern, not only for states' rights in general, but for the *balance of forces*. Jefferson had always looked westward. As early as 1780, Jefferson had described the "Empire of Liberty" as a continent-wide, decentralized, republican empire, free of corruption and made up of equal, autonomous states.²⁵⁶ However, the paradox at the heart of the "Empire of Liberty," Jefferson envisioned, was that its fruition depended not only on the expansion of the American Republic westward, but on the concomitant preservation of local autonomy and self-government, and therefore, states' rights.²⁵⁷ This meant respecting not only the rights of future potential states, but of the existing states as well.

Although Jefferson never explicitly admitted it, his concerns indicate that he was aware of the problems with the "Empire of Liberty." The addition of at least several new states with new interests in one part of the nation, and in a territory equal to the size of the existing states, was bound to change the relationship between the federal government and the existing states. Jefferson understood this as well as any radical Federalist. As the historian Forrest McDonald points out, Jefferson knew that full incorporation of the entire Louisiana territory "would drastically alter the constitutional nature of the Union."²⁵⁸ Thus, his proposed constitutional amendments reveal that he at least considered it important, if not crucial, that the process of growth should be strictly controlled so that the nature of the Union would change gradually, and each time with the assent of the existing states, North and South.

In drafting the amendments, Jefferson carefully considered the order and process by which this huge new territory should be brought into the Union. He frequently spoke of closing off to settlement the area west of the Mississippi River. He wrote to Horatio Gates that New Orleans and the surrounding settled area would be annexed to the Mississippi Territory while

254. BANNER, *supra* note 16, at 20.

255. *Id.* at 27.

256. ONUF, EMPIRE, *supra* note 18, at 65–70.

257. *Id.* at 64–65.

258. McDONALD, *supra* note 2, at 70.

the rest would be locked up from settlement and left to the Indians.²⁵⁹ Navy Secretary Robert Smith, one of the advisors Jefferson consulted early on, assured him that a constitutional amendment could prohibit Congress from establishing a new state or territorial government north of the thirty-third parallel, or granting anyone title to land in the territory.²⁶⁰

Yet Jefferson knew that the settlement of the entire Louisiana Territory would eventually happen, so he devised a plan by which states would be brought slowly into the union as the population achieved the proper density.²⁶¹ Once the eastern side of the Mississippi had been settled, presumably starting with New Orleans and working northward, settlements, and eventually statehood, would proceed in the opposite direction on the western side of the river, working from the headwaters of the Mississippi to the delta.²⁶² This plan reflected a careful balancing of north and south, and potentially slave and non-slave, territories.

Jefferson drafted amendments designed to take away from Congress, as much as possible, the manner in which the Louisiana Territory could be incorporated as states. Jefferson sent the first proposed amendment to his Cabinet for comment in July of 1803.²⁶³ As constitutional language, it seems preposterously bulky, but it reflected Jefferson's concern that Congress have as little wiggle room as possible.²⁶⁴ It laid out in significant detail the powers

259. Letter from Thomas Jefferson to Horatio Gates (July 11, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 250–51.

260. Letter from Robert Smith to Thomas Jefferson (July 9, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 241–42.

261. Letter from Thomas Jefferson to John C. Breckinridge (Aug. 12, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 244.

262. *Id.*

263. See, e.g., BROWN, *supra* note 2, at 38; Letter from Thomas Jefferson to Albert Gallatin (July 9, 1803) in 8 JEFFERSON PAPERS, *supra* note 4, at 96.

264. The proposed amendment is even too long to quote in its entirety, but here is a portion:

The legislature of the Union shall have authority to exchange the right of occupancy in portions where the U.S. have full right for lands possessed by Indians within the U.S. on the East side of the Mississippi, [sic] to exchange lands on the East side of the river for those of the white inhabitants on the West side thereof and above the latitude of 31 degrees: to maintain in any part of the province such military posts as may be requisite for peace or safety: to exercise police over all persons therein, not being Indian inhabitants; to work salt springs, or mines of coal, metals and other minerals within the possession of the U.S. or in any others with the consent of the possessors; to regulate trade [and] intercourse between the Indians inhabitants and all other persons; to explore and ascertain the geography of the province, its productions and other interesting circumstances; to open roads and navigation therein when necessary for beneficial communication; [and] to establish agencies and factories therein for the cultivation of commerce, peace and good understanding with the Indians residing there.

Thomas Jefferson, Draft Constitutional Amendment (July 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 243–48.

of Congress over the territory, which included the authority to explore the province, establish military posts, and build mines and roads. But significantly, it left the area west of the Mississippi above thirty-three degrees latitude to the Indians, who would maintain "[t]he rights of occupancy in the soil, and of self government."²⁶⁵ The proposed amendment also denied Congress the power "to dispose of the lands of the province otherwise than as hereinbefore permitted, until a new Amendment of the constitution shall give that authority."²⁶⁶

This first amendment received a cool reception from Jefferson's advisors, who pointed out to him that it was far too long and complex to be workable.²⁶⁷ In response, Jefferson drafted a shorter amendment that provided general powers to Congress with specific limitations:

Louisiana, as ceded by France to the US is made part of the US. Its white inhabitants shall be citizens, and stand, as to their rights & obligations, on the same footing with other citizens of the US in analogous situations. Save only that as to the portion thereof lying North of an East & West line drawn through of the mouth of the Arkansa [sic] river, no new State shall be established, nor any grants of land made, other than to Indians in exchange for equivalent portions of land occupied by them, until authorized by further subsequent amendment to the Constitution shall be made for these purposes.²⁶⁸

Like the earlier amendment, this one reveals Jefferson's mistrust of the power of the central government. It gives constitutional status to the acquisition of the territory itself, thus confirming that Jefferson still believed that the federal government did not have the power to acquire territory for the United States, much less the power to incorporate new states into the Union. It also reveals Jefferson's great concern about large, unincorporated territories that the federal government potentially could wield against the states. In assessing Jefferson's proposed amendments, Henry Adams remarked that Jefferson seemed unaware "[o]f any jealousy between North and South which could be sharpened by such a restriction of northern and extension of southern territory."²⁶⁹ But Adams was probably unaware that Jefferson received reports from Attorney General Lincoln about the unhappiness of New Englanders with the treaty and had, in fact, received a

265. *Id.* at 241.

266. *Id.* at 248.

267. See Letter from Navy Secretary Robert Smith to Thomas Jefferson in BROWN, *supra* note 2, at 39; MALONE, *supra* note 2, at 315.

268. Letter from Thomas Jefferson to James Madison (Aug. 25, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 241-45.

269. 1 ADAMS, JEFFERSON HISTORY, *supra* note 2, at 358.

proposal from Lincoln concerning ways that North-South tensions regarding the incorporation of new states could be reduced.²⁷⁰

In proposing and arguing for the constitutional amendments, Jefferson explained that he thought it appropriate to seek the approval of “the people” or “the nation” before opening each new stretch of land for settlement and eventual statehood.²⁷¹ Henry Adams made much of this language, arguing that Jefferson essentially abandoned his federalism principles in favor of centralized national government. The Constitution, Adams wrote,

in dealing with the matter of amendments, made no reference to the nation; the word itself was unknown to the Constitution, which invariably spoke of the *Union* wherever such an expression was needed; and on the Virginia theory Congress had no right to appeal to the nation at all, except as a nation of States, for an amendment.²⁷²

Adams’s point is well taken, but the fact that Jefferson believed that a constitutional amendment was necessary showed that Adams misconstrued Jefferson’s meaning. For one thing, the Founders often spoke of “the people” when referring to constitutional amendments because they believed that a constitutional amendment was a decisive act of the people.²⁷³ And Jefferson believed that federalism was the best means of preserving republicanism, that securing states’ rights secured individual rights.²⁷⁴ In seeking a constitutional amendment, Jefferson would have put faith in a process that required the legislatures of three-fourths of the existing states to approve the incorporation of new territory that had the potential to become new states of the Union.

At the same time, enormous pressures conspired to make upholding

270. See *supra* notes 192–96 and accompanying text. Attorney General Lincoln, who had been Jefferson’s eyes and ears in New England, wrote to the President on September 10, 1803, to report that, as he had predicted, the Federalists were “vexed, disappointed, mortified, enraged . . .” While he suggested that Jefferson could argue for the constitutionality of the treaty, he admitted that a constitutional amendment was the safest option. Letter from Levi Lincoln to Thomas Jefferson from Worcester, Mass. (Sept 10, 1803), in MALONE, *supra* note 2, at 321 n.24.

271. 1 ADAMS, JEFFERSON HISTORY, *supra* note 2, at 359–60.

272. *Id.* (emphasis in original).

273. George Washington spoke of constitutional amendments this way. In his farewell address, Washington said, “If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates.” George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 212 (James D. Richardson ed., 1897).

274. Letter from Thomas Jefferson to A.C.V.C Destutt de Tracy (Jan. 26, 1811), in 9 JEFFERSON WRITINGS, *supra* note 4, at 309; Letter from Thomas Jefferson to Gideon Granger (Aug. 13, 1800), in 7 JEFFERSON WRITINGS, *supra* note 4, at 451–52.

Jefferson's principles difficult. Jefferson felt that, unless Congress acted quickly, the opportunity to purchase Louisiana would be lost. The treaty of cession had arrived on July 14, 1803, and had to be ratified by October 30.²⁷⁵ Livingston wrote Jefferson from France warning him that Napoleon could change his mind about the deal.²⁷⁶ Jefferson also knew that expressing his doubts about the treaty's constitutionality would give his Federalist opponents a trump card.²⁷⁷ Thus the strategy emerged to get Congress to approve the treaty first, and then use the treaty's doubtful constitutionality to build support for a constitutional amendment. Senator Nicholas expressed the view, widely held among Republicans, that if Jefferson declared he believed the treaty unconstitutional, the Senate would probably reject it. Nicholas suggested that Jefferson "avoid giving an opinion as to the competence of the treaty-making power" because "if the Senate act before your opinion is known they will at least divide responsibility with you."²⁷⁸ So neither Jefferson nor any of his allies mentioned the constitutional questions when he called Congress in special session to consider the treaty in October of 1803.²⁷⁹ In fact, Jefferson urged his friends to avoid mentioning potential constitutional difficulties, noting "that what is necessary for surmounting them must be done sub-silentio."²⁸⁰

In another oft-quoted letter to Breckinridge, Jefferson struggled to reconcile the need to act quickly with his strict construction principle, eventually deciding that expediency would require an extra-constitutional act be subsequently made constitutional by amendment:

The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it. It is the case of a guardian, investing the money of his ward in purchasing an

275. MALONE, *supra* note 2, at 302.

276. 12 ANNALS OF CONG. 1158 (1803). While there is no reason to doubt that Jefferson honestly feared losing such a bargain, the truth is that Napoleon had already made up his mind and was unlikely to change it. In fact, Napoleon was in such a weak bargaining position that he probably issued the threat to prod Jefferson into accepting the deal instead of simply taking the territory by force. See MCDONALD, *supra* note 2, at 71. As for Livingston, his own personal interest in the success of the treaty probably motivated him to put pressure on Jefferson to act quickly. One historian called his letter to Jefferson self-serving "nonsense." See 4 BRANT, *supra* note 2, at 143.

277. Malone, *supra* note 2, at 316.

278. BROWN, *supra* note 2, at 27.

279. MALONE, *supra* note 2, at 316.

280. Letter from Thomas Jefferson to Breckinridge and Thomas Paine (Aug. 18, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 245.

important adjacent territory; & saying to him when of age, I did this for your own good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you. But we shall not be disavowed by the nation, and their act of indemnity [(constitutional amendment)] will confirm & not weaken the Constitution, by more strongly marking out its lines.²⁸¹

This argument, that constitutionality could be conveyed *ex post facto*, is suspect, and marks the beginning of Jefferson's retreat from principle. It does reveal the way in which Jefferson believed he could reconcile a strict rule with the need for executive flexibility. Most importantly, Jefferson believed that the worst result could be avoided—that the Louisiana Purchase would set a precedent for expanding the power of the national government.

But this reasoning turned out to be a trap. Nicholas reminded Jefferson of the practical consequences—that proposing a post-hoc constitutional amendment would lead Federalists to argue that Jefferson had exceeded his authority in urging ratification. Even after the Senate passed the treaty and the Congress had passed implementing legislation, an amendment passed to justify these acts would have diminished the administration's credibility. Breckinridge voiced this concern to Jefferson: "If we attempt amendments & fail, we shall be placed in a worse situation than we are now in."²⁸²

The Federalist John Quincy Adams, who also believed that a constitutional amendment was necessary to approve the treaty, was the only person in Congress who actually proposed one.²⁸³ After the treaty was approved, Adams told Madison he would introduce a constitutional amendment if no one else did. Madison put him off, replying that "he did not know that it was universally agreed that it required an amendment."²⁸⁴ When Adams went ahead and proposed a committee to draft an amendment that would allow for the incorporation of acquired territory into the Union, it garnered only three votes.²⁸⁵ While a few Republicans argued that an amendment was not necessary, most simply did not engage the question, and Breckinridge dismissed the proposal as impractical.²⁸⁶ Most of the momentum for an amendment dissipated once the Senate ratified the Louisiana Treaty and the Congress passed the implementing legislation.

As for Jefferson, his fiery, principled letter to Wilson Cary Nicholas had ended with a sunny whimper: "If, however, our friends shall think

281. MALONE, *supra* note 2, at 313–14.

282. PLUMER, *supra* note 158, at 76–77.

283. BROWN, *supra* note 2, at 30–31.

284. 1 MEMOIRS OF JOHN QUINCY ADAMS 267–268 (Charles Francis Adams ed., 1877) [hereinafter ADAMS MEMOIRS].

285. PLUMER, *supra* note 158, at 78.

286. MALONE, *supra* note 2, at 331.

differently, certainly I acquiesce with satisfaction; confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effects."²⁸⁷ Although he still sought advice on the treaty's constitutionality after writing the letter to Nicholas, he never did submit an amendment.²⁸⁸ Scholars do not agree upon why Jefferson failed to follow through with his plans given his grave doubts and firmly expressed principles. For example, since Thomas Paine was one of the last to correspond with Jefferson on the constitutionality of the treaty, the historian Forrest McDonald concludes that Paine persuaded Jefferson to change his mind.²⁸⁹

However, it seems far more likely, given the seriousness with which he treated the issue in private correspondence and his continuing advocacy of states' rights and strict construction after the treaty was approved, that Jefferson's own doubts about the constitutionality of the Louisiana Purchase were never assuaged.²⁹⁰ He never abandoned or compromised his belief that federalism was the primary canon of constitutional interpretation. Periodic amendment was Jefferson's favored approach to constitutional change, as it reinforced the republican principles that Jefferson and his allies had rallied to during the lean Federalist years.²⁹¹ Jefferson knew not only that the treaty was an act beyond the Constitution, but that it was a betrayal of his principles concerning the mode of constitutional interpretation he forcefully advocated until the end of his life.²⁹²

Most revealing are Jefferson's later attempts, after his presidency, to justify his actions that seemed inconsistent with his own principles as grounded in the doctrine of necessity. In 1810, Jefferson, while not referring specifically to the Louisiana Treaty, could easily have been thinking of it

287. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 248.

288. Jefferson received letters from Attorney General Lincoln supporting an amendment and from Thomas Paine arguing that one was not necessary.

289. MCDONALD, *supra* note 11, at 59. Biographer Dumas Malone concludes that Jefferson was "caught in a chain of inexorable circumstances" and driven "by the pitiless logic of events" to refrain from publicly proposing a constitutional amendment. MALONE, *supra* note 2, at 319, 332. Joseph Ellis believes that the West triggered Jefferson's most "visionary energies" which "overrode his traditional republican injunctions." ELLIS, *supra* note 77, at 252.

290. MAYER, *supra* note 2, at 251. In particular, Paine's argument that the acquisition of Louisiana had been foreseeable by the Framers "probably did not move Jefferson," who viewed questions of original intent very strictly. *Id.*

291. *See id.* at 296:

The generally strict theory of interpretation that Jefferson applied to the federal constitution had as its corollary an emphasis upon explicit change through amendment, rather than accommodation through interpretation, as the vehicle for adding to federal powers, as his proposals with respect to the Louisiana Purchase and internal improvements, for example, indicate.

292. Jefferson protested attempts to authorize internal improvements projects within the states as "usurpations" of states' powers. *Id.* at 220.

when he addressed the question of whether high public officers must assume authority beyond the law:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not the *highest*. The laws of necessity, of self-preservation, of saving our country . . . by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.²⁹³

If we take this later writing as evidence of Jefferson's views at the time of the Louisiana Treaty, Jefferson seemed to agree to disagree with his friends on the legality of the treaty while at the same time acknowledging the necessity of following their advice and trusting in the soundness of public opinion, rather than his own principles, for the good of the nation and his presidency. As he wrote in his letter to Nicholas during the treaty debates, "[w]hat is practicable must often control what is pure theory; and the habits of the governed determine in a great degree what is practicable."²⁹⁴ Thus Jefferson's exception to the principle of strict construction was justified by the same purpose as the principle—that the voice of the people needed to be heard.

The irony is that Jefferson probably need not have resorted to this constitutional escape clause at all. Although he doubtless felt a great deal of pressure to move quickly, Jefferson probably had the freedom to protect both the constitutional principles he prized and the national interest. There is little evidence to suggest that a constitutional amendment would not have been speedily approved given the widespread popularity of the purchase and the Republican dominance in most states. Even the Federalist John Quincy Adams believed that all of the state legislatures would approve an amendment and that, at the very least, "there could be no possible doubt it would be ratified by a number sufficient to make it part of the Constitution."²⁹⁵ Of course, one can also believe that the treaty was technically legal and still assert that a constitutional amendment would have been the best way to guarantee widespread acceptance of that legality. As a practical matter, Jefferson and his friends' concerns about the risks of openly proposing a post-hoc constitutional amendment, if not unfounded, were overstated. Indeed, Professor David Currie, who believes the treaty was constitutional, points out that the approval of an amendment would have removed the question of legitimacy from the table, and would have removed

293. MALONE, *supra* note 2, at 320.

294. Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in MAYER, *supra* note 2, at 320.

295. DOCUMENTS RELATING TO NEW ENGLAND FEDERALISM 158 (Henry Adams ed., 1905) [hereinafter ADAMS, NEW ENGLAND]; see also BROWN, *supra* note 2, at 29 ("Doubtless such an amendment as Jefferson desired could have been carried without great difficulty . . .").

doubt as to whether states could be admitted when the time came.²⁹⁶ In sum, Jefferson would have at once eliminated critics' arguments that he was usurping power while satisfying his own concerns about the treaty power being too broad.²⁹⁷

Instead, by abandoning his principles out of purported necessity, Jefferson left himself vulnerable to legitimate criticism. And many of the early assessments of his performance during the Louisiana Purchase were withering. One of the harshest critics was John Quincy Adams who, later in his life, perhaps still bitter about his failure to muster much support for a constitutional amendment, denounced the Louisiana Treaty:

It made a Union totally different from that for which the Constitution had been formed. It gives despotic power over territories purchased. It naturalizes foreign nations in a mass. It makes French and Spanish laws a large part of the laws of the Union. It introduced whole systems of legislation abhorrent to the spirit and character of our institutions, and all this done by an administration which came in blowing a trumpet against implied power.²⁹⁸

The purchase of Louisiana was, Adams concluded, "an assumption of implied power greater in itself and more comprehensive in its consequences than all the assumptions of implied powers in the years of the Washington and Adams Administrations put together."²⁹⁹

Henry Adams carried on this family legacy in his *History of the United States* with an almost tragic portrayal of Jefferson as a man surrendering his ideal of strict construction for short-term political benefit. "The Pope could as safely trifle with the doctrine of apostolic succession as Jefferson with the limits of Executive power," Adams wrote.³⁰⁰ Yet "the Louisiana treaty gave a fatal wound to 'strict construction,' and the Jeffersonian theories never again received general support."³⁰¹ To Adams, Jefferson had done what he himself warned against: made blank paper of the Constitution.³⁰²

Later in the Nineteenth Century, Judge Thomas Cooley assessed Jefferson's actions negatively, arguing that the damage had been lasting even though the issues it raised had been essentially settled by default. "The practical settlement of the question of Constitutional power," he said in a speech,

did not heal the wound the Constitution received when the chief

296. CURRIE, *supra* note 2, at 107.

297. *See id.*

298. 5 ADAMS MEMOIRS, *supra* note 284, at 401.

299. *Id.* at 364-65.

300. ADAMS, *supra* note 153, at 362.

301. *Id.* at 363.

302. *Id.* at 364.

officer holding office under it advised the temporary putting it aside, and secured the approval of his advice by a numerical majority of the people. The poison was in the doctrine which took from the Constitution all sacredness, and made subject to the will and caprice of the hour that which, in the intent of the founders, was above parties, and majorities, and presidents. After that time the proposal to exercise unwarranted powers on a plea of necessity might be safely advanced without exciting the detestation it deserved³⁰³

Henry Cabot Lodge summed it up most succinctly when he wrote that the purchase “was the first lesson which taught Americans that a numerical majority was superior to the Constitution.”³⁰⁴

More recent assessments have been far more generous. As if to confirm Judge Cooley’s fears, most contemporary historians seem content to rely simply on the judgment that the vast benefits accruing to the nation from the Louisiana Purchase were more than worth the costs to constitutional principles.³⁰⁵

But in the end, the greatest harm with regard to the Louisiana Purchase was not in the changes it made to the geographical character of the Union; although these changes were certainly important, they were probably inevitable. Rather, the lasting damage would come from the wrong choice of means for constitutional change. Jefferson biographer Joseph Ellis calls the decision to avoid an amendment “unquestionably correct” because the resulting debate “would have raised a constellation of nettlesome questions—about slavery and the slave trade, Indian lands, Spanish land claims and a host of other jurisdictional issues—that might have put the entire purchase at risk.”³⁰⁶ But the amendment process was the means by which Jefferson believed the most difficult questions facing the nation should be worked out. As David Mayer noted, Jefferson believed strongly in the “principle that constitutional problems ought to be resolved not through ingenious construction—whether as an exercise of executive prerogative, as

303. LODGE, *supra* note 164, at 333–34.

304. *Id.* at 434–35. Similarly, the eminent historian Frederick Jackson Turner later concluded that the Louisiana Purchase “resulted in strengthening the loose interpretation of the Constitution.” Frederick J. Turner, *The Significance of the Louisiana Purchase*, 27 AM. MONTHLY REV. OF REVS. 578, 583 (1903).

305. *See e.g.*, ELLIS, *supra* note 77, at 211. Some contemporary historians, in judging Jefferson’s actions with regard to the Louisiana Purchase, have concluded that he could not have done otherwise. Jefferson biographer Dumas Malone acknowledged that the Louisiana treaty changed the character of the Union. MALONE, *supra* note 2, at 325. Nonetheless, he believed Jefferson was “caught in a chain of inexorable circumstances,” *id.* at 332, and driven “by the pitiless logic of events,” *id.* at 319, to refrain from publicly proposing a constitutional amendment. To Malone, Jefferson’s suppression of his principles demonstrated his skills as a leader—that he “was a good party man, that he did take counsel.” *Id.* at 319.

306. ELLIS, *supra* note 77, at 211.

in the Louisiana Purchase, or as an exercise of judicial interpretation . . . — but rather through appeals to the people.”³⁰⁷ As I discuss in the next Part, an appeal to “the people” through a constitutional amendment was especially important given the eventual consequences of the treaty—those that had been anticipated by the Federalists—the disruption of the balance of power between regions and the addition of numerous slave states in the South and West.

V. THE LEGACY OF THE LOUISIANA PURCHASE

In this Part, I consider the consequences of the failure to ratify the Louisiana Treaty with a constitutional amendment. Inevitably, this involves a great deal of speculation.³⁰⁸ However, what is striking about subsequent developments is the degree to which the debate between the Jeffersonians’ *empire of liberty* federalism and the Federalists’ *balance of forces* federalism never really ended. As I discuss in the first subpart, this conflict merely faded into the background while Congress addressed the regulation of slavery in the Louisiana Territory. When the two theories of federalism re-emerged, they became inextricably intertwined with the issue of slavery: *balance of forces* with the regulation of slavery by the national government; the *empire of liberty* with the right of states to permit slavery. This demonstrates that the most important issues raised by the Louisiana Treaty itself were not satisfactorily resolved until the Civil War. I argue that a constitutional amendment could well have resolved this conflict, and possibly also resolved the question of whether Congress could regulate slavery in the territory—the burning issue in the decades leading up to secession. Yet because the *empire of liberty* federalism finally triumphed in the Dredd Scott decision—resulting in the triumph of slavery in the West—federalism itself was suspect.

In the second subpart, I discuss a related consequence of the failure to seek an amendment: it paved the way for further re-interpretations of the Constitution outside the Article Five amendment process. The Louisiana Purchase set a precedent for expansion of federal power, and the corresponding reduction of states’ rights, through federal actions that failed to give the states a voice in constitutional change.

A. THE REGULATION OF SLAVERY IN THE TERRITORIES

Once the treaty was ratified and implemented, Congress was left to decide how to go about preparing the citizens of the territory for statehood. In some respects, the Louisiana Territory was treated differently than other existing territories, in part because its inhabitants were largely non-English. Even so, the southern portion proceeded to join the Union by 1812.³⁰⁹ But

307. MAYER, *supra* note 2, at 313.

308. I proceed fully aware of the danger of engaging in counter-factual hypotheticals.

309. Onuf, *Expanding Union*, *supra* note 18, at 64.

the crucial question was whether slavery would be permitted in this vast new area of the United States. The Republicans' success at incorporating the Louisiana Territory brought slavery to the forefront of the issues causing tension among the states. The Federalists would eventually associate slavery—rightly, perhaps—with their loss of influence in the national government. Jefferson's failure to request a constitutional amendment was a lost opportunity to seek approval from all of the states for changes that would one day drive them to separation.

The Northwest Ordinance promised statehood to each territorial unit upon reaching a population of sixty thousand.³¹⁰ The same promise was extended to the Mississippi Territory—encompassing what is now Mississippi and Alabama—with one important difference—slavery was permitted.³¹¹ In contrast to these earlier compacts with territories, the Louisiana treaty merely promised incorporation and the admission of the inhabitants “to the rights” of U.S. citizens. Jefferson's original plan for Louisiana, as his very detailed first proposed amendment indicates, involved the annexation of New Orleans, and the settled territory surrounding it, to the existing Mississippi Territory and “locking up” the rest from white settlement.³¹² Thus this small area of the Louisiana Territory would have proceeded to statehood in a manner similar to the states governed by the Northwest Ordinance.

However, once the treaty and implementing legislation were approved, Jefferson changed his mind. He wrote in a letter to Gallatin that, “[w]ithout looking at the old territorial ordinance [Northwest Ordinance] I had imagined it best to found a government for the territory or territories of *lower* Louisiana on that basis. But on examining it, I find it will not do at all; that it would turn all their laws topsy-turvy.” Instead, Jefferson decided the best arrangement was for him to appoint a governor and three judges with full legislative powers who would introduce the rights of American citizenship—trial by jury in criminal cases, habeas corpus, freedom of the press—“by degrees as they find practicable without exciting too much discontent.”³¹³ Historian Everett Brown pointed out the irony of this plan: “Jefferson, who had drawn up the Declaration of Independence, is here found planning a form of government in which the people to be governed were to have no voice whatever.”³¹⁴ Despite these limitations, Louisiana

310. *Id.* at 70. For analysis of the Ordinance, see *supra* notes 141–49 and accompanying text.

311. *Id.* at 64.

312. Letter from Thomas Jefferson to Horatio Gates (July 11, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 249–50; *supra* notes 256–74 and accompanying text (discussing Jefferson's proposed constitutional amendments).

313. Letter from Thomas Jefferson to Albert Gallatin (Nov. 9, 1803), in 8 JEFFERSON WRITINGS, *supra* note 4, at 275.

314. BROWN, *supra* note 2, at 97.

proceeded quickly along the path to statehood, joining the Union in 1812, earlier than Mississippi (1817) or Alabama (1818).³¹⁵

The most significant question remaining to be resolved was that of slavery. The Northwest Ordinance, unlike the Mississippi Territory's compact, contained an absolute prohibition on slavery. Even delegates from states with large slave populations voted for the provision in 1786 because they knew that western states would share their interests anyway, and their real concern was with preserving economic ties to the West.³¹⁶ Nor had slavery been the most important worry for the Federalists. As late as 1815, Federalist leaders, such as Timothy Pickering, were more concerned that the West would seek to dominate by forming a temporary alliance with the South, then overthrowing the entire eastern seaboard. Thus some New Englanders on occasion still contemplated an alliance between North and South against West.³¹⁷

Inevitably, however, the Three-Fifths Clause tied the dominance of the southern and western states in the Congress, and thus the dominance of Republicans, to the existence of slavery. Many sons of Federalist fathers assumed leading roles in the rise of abolitionism in New England after 1815, and they considered the fight against slavery and the South as the true heritage of Federalism. By the 1830s, abolitionist historians saw the 1800 election, and the Louisiana Purchase, as victories "of forces scheming to extend slave territory and Southern power."³¹⁸

Still, when Congress debated and approved the government bill for Louisiana in 1804, the country was not yet geographically stratified on the issue of slavery.³¹⁹ At least some Senators and Representatives did not yet feel that slavery, or the opposition to it, was inextricably bound up with their states' interests. Not all southern Senators supported allowing slavery in Louisiana; some felt that it would be too difficult to prevent a slave insurrection in the wilderness province, and Senators Franklin of North Carolina and Breckinridge of Kentucky declared themselves opposed to permitting any slavery to exist.³²⁰ Conversely, Senator Dayton of New Jersey supported allowing slavery, believing that the province would never be settled without it, and that the treaty had committed the United States to respecting the right of Louisiana's inhabitants to own slaves.³²¹

However, the issue dominated discussion of the government bill, and a fault line began to develop that would one day become an unbridgeable chasm. After efforts by Federalists to prohibit slavery in Louisiana failed, a

315. Onuf, *Expanding Union*, *supra* note 18, at 64.

316. ONUF, *supra* note 133, at 111.

317. BANNER, *supra* note 16, at 111–12.

318. *Id.* at 109.

319. BROWN, *supra* note 2, at 108.

320. *Id.* at 108, 119–20.

321. *Id.* at 113–14.

bill was introduced allowing only U.S. citizens residing in a state who were bona fide owners of slaves to bring them into the Louisiana Territory for the purposes of settlement. The importation of slaves from abroad was prohibited, and any slave imported since May 1, 1798, was excluded from the territory.³²² The debate in the Senate was confused and bitter, but the bill passed. "I think it unfortunate," said Senator White of Delaware, "that whenever this question is stirred, feelings are excited that [are] calculated to lead us astray."³²³

The result demonstrated the growing power of slavery as a vital interest for southern states and their increasing dominance in national politics. In the end, it was only the divisions among Republicans that allowed the limitations on slavery that were achieved.³²⁴ Thus Louisiana became much more like the Mississippi Territory in terms of slavery than the territory governed by the Northwest Ordinance. The existence of slavery in Louisiana, once established, would be difficult to eliminate, and the geographical area in which it could now potentially spread was vast.

The success of the Louisiana Purchase, and the inability of its opponents to limit the inevitable introduction of new Republican states, embittered the New England Federalists. Inclined toward paranoia, they saw the declining influence of their region and party as the workings of a malevolent political force.³²⁵ They felt that the Louisiana Purchase represented the defeat of the view of the Constitution as a compact among states and a victory for the power of the national government. "Instead of free republics united by solemn compact, under a federal government with limited powers," expressed the Massachusetts Federalists, "we have become a consolidated empire under the absolute controul of a few men—we have sunk into the deep abyss of a frightful despotism."³²⁶ An anonymous pamphleteer in 1804 proclaimed that "[w]e are parties in name to a confederacy over which we have no influence, nor control, nor effective voice in the national councils, and the wishes and the policy of New England are only known as they furnish themes for the invective and irony of those who rule the nation."³²⁷

Increasingly, the Federalists came to believe that slavery, rather than the Constitution, was to blame.³²⁸ Convinced that the dominance of Virginia and the South, and the Louisiana Purchase itself, had been the result of the operation of the Three-Fifths Clause, the Federalists after 1804 began

322. 13 ANNALS OF CONG. 1297 (1803).

323. PLUMER, *supra* note 158, at 115.

324. MCDONALD, *supra* note 11, at 61.

325. BANNER, *supra* note 16, at 40.

326. *Id.* at 40–41.

327. A DEFENCE OF THE LEGISLATURE OF MASSACHUSETTS, OR THE RIGHTS OF NEWENGLAND VINDICATED 4 (Boston, 1804), *quoted in* BANNER, *supra* note 16, at 86.

328. BANNER, *supra* note 16, at 103.

actively to seek its repeal. "[T]he slave representation," said Josiah Quincy, "is the cause of all the difficulties we labor under."³²⁹

So great was the disillusionment that talk of secession began to be taken seriously. William Plumer said that the eastern states would be forced "to establish a separate and independent empire."³³⁰ In January of 1804, as Congress was to debate the Louisiana government bill, Timothy Pickering convened a group in Washington to come up with a plan of secession.³³¹ Their plot to elect Aaron Burr as a secessionist governor of New York was thwarted by other Federalists, and other subsequent schemes were equally stillborn.³³² However, after a series of foreign policy blunders led to the War of 1812, the secessionist movement gained new life, and the Massachusetts legislature called for other New England states to convene in Hartford, Connecticut, for a convention that most expected to propose secession.³³³ Moderates prevailed at the Convention, however, and it merely proposed seven constitutional amendments designed to address New Englanders' concerns. The first proposed amendment sought to eliminate the Three-Fifths Clause.³³⁴ Another would have required a two-thirds majority vote in each house of Congress before a state could be admitted to the Union.³³⁵

The arguments raised by the Federalists during the Louisiana Treaty debate, and the *balance of forces* view of the Constitution they implied, kept returning even after most believed they had been discredited. When Louisiana, which comprised the southern, and most settled, tip of the huge territory, applied for statehood in 1811, the Federalists had not given up, and they repeated their warnings about the dangers to the balance of the Union. "Instead of these new States being annexed to us," Representative Laban Wheaton of Massachusetts warned, "we shall be annexed to them, lose our independence, and become altogether subject to their control."³³⁶ Josiah Quincy delivered a long, impassioned speech in which he insisted that "[t]he proportion of the political weight of each sovereign State depends upon the number of States which have a voice under the compact." If Congress should "throw the weight of Louisiana onto the scale," the balance that the original states sought to sustain would be "destroyed."³³⁷ The solution, proposed repeatedly by the Federalists, and always defeated, was a constitutional amendment.³³⁸

329. *Id.* at 102.

330. MCDONALD, *supra* note 11, at 61.

331. *Id.*

332. *Id.* at 61–62.

333. *Id.* at 69.

334. BANNER, *supra* note 16, at 101–03.

335. *Id.*

336. 22 ANNALS OF CONG. 22 (1811) (Statement of Rep. Laban Wheaton).

337. *Id.* at 525, 535, 540.

338. *See, e.g., id.* at 108 (proposed amendment of Rep. Dana).

Historian Peter Onuf argues that the Federalists' *balance of forces* vision of the Constitution was already obsolete when Quincy expressed it in the House debate. It relied, Onuf believes, on an outmoded European concept that simply did not apply to a peacefully-expanding union.³³⁹ At the same time, however, Onuf seems to be aware that a great deal had been lost in abandoning the *balance of forces* view. The Republicans' *empire of liberty* theory held that the Union could expand indefinitely so long as each new state was admitted on an equal footing with the old.³⁴⁰ Yet, Onuf points out, "Quincy's speech would prove prophetic, for union depended on sustaining an intersectional balance and accommodating the fundamentally conflicting interests that his use of the language of state sovereignty so obviously assumed."³⁴¹ Keeping the union together would depend on awareness of the Federalists' *balance of forces* vision of the Constitution, which the Louisiana treaty implicitly rejected.

Onuf was not quite right when he declared the *balance of forces* dead. Like Banquo's Ghost, it kept returning to the dinner table to frighten the *empire of liberty*.³⁴² Its most devastating appearance was on February 13, 1819, when the U.S. House of Representatives "resolved itself into a Committee of the Whole to consider statehood enabling bills for the territories of Missouri and Alabama."³⁴³ Not only did the sectional balance of power hinge on the status of Missouri, but these two territories would set a precedent for the rest of the states admitted from the Louisiana Territory.³⁴⁴ In a provocative move that summoned the *balance of forces* from its grave, James Tallmadge introduced an amendment to ban the admission of slaves into Missouri or any other part of the territory.³⁴⁵

During this debate, the Federalists advanced the same arguments from a *balance of forces* theory of states' rights that they had used during the Louisiana Treaty debate. The original compromises in the Constitution regarding slavery, the Federalists argued, were the result of a balance struck among the thirteen original states. Rufus King, who had also been present during debates on the Louisiana Treaty, said that "the considerations arising out of their actual condition, their past connexion, and the obligation which all felt to promote a reformation in the federal government, were particular to the time and parties."³⁴⁶ To extend those balances beyond the original limits of the United States would not be faithful to the original compact. As a practical matter, the incorporation of new slave states in the West would

339. Onuf, *The Expanding Union*, *supra* note 18, at 79.

340. *Id.*

341. *Id.*

342. See WILLIAM SHAKESPEARE, *MACBETH* act III, sc. 4.

343. MICHAEL A. MORRISON, *SLAVERY AND THE AMERICAN WEST* 45 (1997).

344. *Id.* at 45-48.

345. *Id.* at 45.

346. *Id.* at 46-47.

result in a huge increase of the area in which the Three-Fifths Compromise operated. Thus the northern states, losing relative representation in Congress, would be helpless to enforce the terms of the original bargain. So, they concluded, the federal government had the power to regulate slavery in order to preserve the interests of the original states.³⁴⁷

The Southern Republicans responded with Jefferson's *empire of liberty* federalism. No state could be forced to enter the Union according to conditions. All states were born equal. Missouri, they argued, had the right to enter the Union on an equal footing, without restrictions. This time, however, the *balance of forces* argument enjoyed a temporary revival. Congress enacted the Missouri Compromise, in which Missouri was admitted as a slave state, Maine as a free state, and which led to the drawing of the 36°30' North latitude line, north of which slavery would be excluded and south of which it would be authorized.³⁴⁸ This action pushed the debate into the background temporarily. Yet the *empire of liberty* again emerged with Stephen Douglas's idea of popular sovereignty, implemented by the Kansas-Nebraska Act of 1854, which abandoned the geographical line in favor of elections to determine a new states' slave or free status.³⁴⁹ The *empire of liberty* view of the Constitution was ultimately endorsed by the Supreme Court in the infamous *Dred Scott* decision, in which the Missouri Compromise was struck down as unconstitutional.³⁵⁰

Jefferson, sick at home in Monticello, called the Missouri Crisis a "fire bell in the night" that woke him from his satisfied retirement because it threatened to undo the work of his entire political career.³⁵¹ He condemned the restrictionist efforts, unable to accept that an artificial line would divide the "Empire of Liberty" he had sought to build.³⁵² As Peter Onuf concluded, Jefferson's ambitions were the victim of the *empire of liberty* theory that he had long advocated.³⁵³ Jefferson wanted the United States to become a large nation of many equal states, each exercising broad powers in its own domain, yet with its interests in harmony with the others. So long as state equality was recognized, Jefferson hoped that "relations of blood and affection" would overcome considerations of geography.³⁵⁴ Yet Jefferson had a blind spot for slavery; he simply refused to address it, declaring it a matter

347. *Id.*

348. RICHARD A. BERNSTEIN, *AMENDING AMERICA* 78 (1993).

349. *Id.* at 79.

350. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

351. Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in 15 *JEFFERSON WRITINGS* (LIPSCOMB), *supra* note 112, at 248–50.

352. Letter from Thomas Jefferson to Hugh Nelson (Mar. 12, 1820), in 15 *JEFFERSON WRITINGS* (LIPSCOMB), *supra* note 112, at 238.

353. ONUF, *EMPIRE*, *supra* note 18, at 109–19.

354. *Id.* at 119.

for the next generation to resolve.³⁵⁵ He could not accept the fact that slavery had become a powerful sectional interest that transcended state boundaries while dividing the nation in two. Such were the consequences of his having earlier ignored the *balance of forces* view.

These debates over slavery, the Constitution, and the nature of the union, would have occurred even if Jefferson had followed through with his plan to ratify the Louisiana Treaty with a constitutional amendment. Yet Jefferson's original instincts were correct: only by returning to the People for permission to expand, and perhaps resolving the issue of slavery in the territories while it was not yet the issue that would reflexively fracture the nation along sectional lines, could the nation have hoped to avoid the battles that paralyzed Congress in the years leading up to the Civil War.³⁵⁶

B. THE DECLINE OF THE ARTICLE FIVE METHOD OF CHANGING THE CONSTITUTION

This subpart examines the long-term consequences of the Louisiana Purchase on the method by which the Constitution could be altered. Under a *balance of forces* view of federalism, the Article Five constitutional amendment process is crucial, because it secures a role for the existing states whenever there is a proposed alteration in the fundamental relationship between the states and the national government. But by ratifying the Louisiana Treaty without seeking an amendment, Jefferson and the Congress reinterpreted the Constitution. The act of approving and implementing the treaty effectively established that it was constitutional for the federal government to incorporate new states into the Union through the treaty power. The failure of Jefferson and Congress to affirm the constitutionality of the Louisiana Purchase with an amendment seriously diminished the role that Article Five, and the states themselves, would play in future constitutional change.

Article Five is the only text-based method for amending the Constitution. An amendment approved by two-thirds of both houses of Congress must be ratified by the legislatures of three-fourths of the states to take effect.³⁵⁷ Alternatively, if two-thirds of the state legislatures petition Congress, it must call a constitutional convention for proposing amendments, which take effect when approved either by three-fourths of the state legislatures or, if Congress directs, by conventions in three-fourths of the states.³⁵⁸

355. JOSEPH J. ELLIS, *FOUNDING BROTHERS* 239–40 (First Vintage 2000).

356. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 147 (1996). Kyvig explains that when the secession finally came, Congress finally considered constitutional amendments that might resolve the crisis “because bitter experience had demonstrated that compromise arrangements expressed in legislative enactments could easily be upset by further legislation such as the Kansas-Nebraska Act of 1854 or judicial decisions such as *Dred Scott v. Sanford*.” *Id.*

357. U.S. CONST. art. V.

358. *Id.*

A wave of recent scholarship, led by Professor Bruce Ackerman, concludes that most fundamental constitutional change has taken place outside Article Five.³⁵⁹ According to Professor Ackerman, American democracy operates on two levels, with long periods of ordinary lawmaking interrupted by "higher lawmaking," or "constitutional moments," in which one or more of the political branches create a new constitutional regime with the overwhelming support of the People.³⁶⁰ There have been three such transitions in American history, initiated by the writing of the Constitution, the Civil War, and the New Deal.³⁶¹ Each of these constitutional moments proceeded through a discrete series of stages. First, in a "signaling stage," the reformers moved to the center stage of public attention. Next, during a "proposal stage," a series of reforms was articulated. Then followed a "mobilized popular deliberation" and finally, legal codification.³⁶² Ackerman believes it is particularly significant that each of these major changes occurred without the normal Article Five procedure.³⁶³

Other scholars have built on Ackerman's thesis and expanded the definition of constitutional change to include less obviously dramatic shifts in the law. Professor James Pope focused on "republican moments," or "periodic outbursts of democratic participation and ideological politics," in which social movements overcome interest group politics in order to

359. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); see JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES* 76–80 (1994) (describing various methods of constitutional change, including court decisions and acts of political branches); Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION* 37, 39 (Sanford Levinson ed., 1995) (defining the Constitution as "text-based institutional practice"). *But see* KYVIG, *supra* note 356, at xi (arguing that constitutional amendments are qualitatively unique constitutional acts).

Akhil Reed Amar believes that Article Five is not the only constitutionally-sanctioned method for amending the Constitution. Akhil Reed Amar, *Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457, 459–60 (arguing that Article Five merely enumerates the ways that government actors may initiate constitutional reform, but that the People may initiate it on their own). For a contrasting view, see David R. Dow, *The Plain Meaning of Article Five*, in *RESPONDING TO IMPERFECTION*, *supra*, at 117 (criticizing Amar and Ackerman's theories and insisting on Article Five as the exclusive means of amending the Constitution).

360. 1 ACKERMAN, *supra* note 359, at 6. One criticism of Ackerman's view is that it can be used by its proponents to pick and choose moments that support their arguments. Bradley, *supra* note 21, at 124 n.156. For this and other criticisms, see RICHARD A. POSNER, *OVERCOMING LAW* 215–28 (1995); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *STAN. L. REV.* 759 (1992); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *HARV. L. REV.* 1221 (1995).

361. 1 ACKERMAN, *supra* note 359, at 40.

362. *Id.* at 266–67.

363. *Id.* at 267.

produce changes by working outside formal democratic procedures.³⁶⁴ In addition to the Civil War and the New Deal, republican moments include the Jeffersonian upsurge, the Age of Jackson, the Populist Era, and the 1960s.³⁶⁵ While also minimizing the role of the formal amendment process, Professor Robert Lipkin took a slightly different approach, insisting that the judiciary, rather than the people, is the true engine of constitutional revolution.³⁶⁶ Lipkin articulates a theory of constitutional change patterned on Thomas Kuhn's formulation of scientific revolutions.³⁶⁷ Periods of "normal adjudication" are interrupted by "revolutionary adjudication," in which judges appeal to factors extrinsic to the Constitution in order to solve a pressing moral or political problem.³⁶⁸ Finally, in a recent article, Professor David A. Strauss dispensed with the significance of Article Five altogether, arguing that constitutional amendments are simply irrelevant.³⁶⁹ According to Strauss, not only does constitutional change occur without amendments, but the amendments themselves are superfluous because they either ratify an already existing constitutional order or they are simply ignored, as the Fourteenth Amendment was ignored in the South for nearly a century.³⁷⁰

In many ways, the Republican ascendancy in 1800—the beginning of what Professor Pope calls the "Jeffersonian upsurge"—resembles the contexts of other significant episodes of constitutional change. Realignment elections often herald shifts in constitutional understandings.³⁷¹ Jefferson was swept into office on a popular tidal wave that nearly drowned the Federalists.³⁷² And once in office, Jefferson "was a stronger president than either of his predecessors tried to be."³⁷³ According to biographer Dumas Malone, Jefferson's influence in Congress remained unmatched until the Wilson administration, and Congress passed "virtually no bills of any significance" without his approval.³⁷⁴

On the other hand, the Louisiana Purchase does not fit neatly into the theories of constitutional change articulated by Ackerman or Pope because there was no inter-branch conflict requiring the President and Congress to

364. James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 292–93 (1990).

365. *Id.* at 312.

366. Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701, 701–02 (1989).

367. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 125 (2d ed. 1970).

368. Lipkin, *supra* note 366, at 736–39.

369. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–59 (2001).

370. *Id.* at 1459.

371. VILE, *supra* note 359, at 12 n.36.

372. See BANNING, *supra* note 78, at 278 n.15.

373. *Id.* at 280 n.20.

374. MALONE, *supra* note 2, at 110.

work outside of the system through a call for support from the People.³⁷⁵ Instead, the Purchase was made possible by a triumph of the system. Because the Supreme Court had not yet decided *Marbury v. Madison* and asserted its prerogative as interpreter of the Constitution,³⁷⁶ victory at the polls—the Jeffersonian Republicans' overwhelming triumph in the 1800 elections—supplied all of the authority Jefferson needed to negotiate and ratify the Louisiana treaty.

Nonetheless, the Louisiana treaty certainly wrought fundamental constitutional change as defined by Professor Strauss: it affected “matters at the core of what the written Constitution addresses,” including “the allocation of power between the federal government and the states.”³⁷⁷ The treaty affirmatively resolved the question of whether the treaty power enabled the President and the Senate to bring vast new territory into the United States and incorporate it into the Union as new states. Their influence in the national government diluted, the original states, particularly the northeastern ones, would never be the same. Moreover, once Jefferson dropped his plans to declare most of the Louisiana Territory off limits to settlement, the federal government now directly ruled a territory as vast as that of the original thirteen states.

That Jefferson and the Republicans authored this constitutional change without relying on the amendment process is striking considering that they had been the Article Five faithful. The adoption of the first ten amendments relieved Republicans' anxieties about an overreaching federal government and offered proof that a workable system for constitutional reform existed.³⁷⁸ Many Federalists shared this view. In his farewell address, George Washington spoke of Article Five as preserving the sovereignty of the people: “If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates.”³⁷⁹

Also of particular importance to Republicans was Article Five's preservation of the balance between state and federal power. Madison argued in Federalist 39 that Article Five, in

requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the national and advances towards the *federal* character; in rendering the

375. See 2 ACKERMAN, *supra* note 359, at 10–12; Pope, *supra* note 364, at 291–92.

376. *Marbury v. Madison* 5 U.S. (1 Cranch) 177, 177–78 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is. . . . So, if a law be in opposition to the constitution; . . . the court must determine which of these conflicting rules governs the case . . .”).

377. Strauss, *supra* note 369, at 1469.

378. KYVIC, *supra* note 356, at 109.

379. George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 209 (James D. Richardson ed., 1897).

concurrence of less than the *whole* number of states sufficient, it loses again the *federal* and partakes of the *national* character.³⁸⁰

The Article Five amendment process was, as Professor Ackerman observed, a “state-centered medium,” which ensured that a “national consensus, no matter how broad or deep, would not generate higher law unless the states, acting as states, gave their free and overwhelming assent.”³⁸¹ The Eleventh Amendment, which directly overruled a decision of the Supreme Court permitting states to be sued in federal court, seemed to confirm for the Republicans that the constitutional amendment was an important means of checking federal power and bolstering states’ rights.³⁸²

The Republicans’ victory in 1800 was, Jefferson wrote, “as real a revolution in the principles of our government as that of 1776 was in its form.”³⁸³ Many rank and file Republicans believed their victory would initiate a new round of constitutional reform in which the Article Five amendment process would be used to limit federal power.³⁸⁴ Indeed, when Federalists sought to deny Jefferson the presidency after the 1800 election resulted in an electoral college tie between him and Aaron Burr, Jefferson threatened to use the Republican majorities in the state legislatures to call for a constitutional convention.³⁸⁵ As Jefferson recounted to James Monroe, this threat was effective:

[T]hey were completely alarmed at the resource for which we declared, to wit, a convention to re-organize the government, & to amend it. The word convention gives them the horrors, as in the present democratical spirit of America, they fear they should lose some of their favorite morsels of the Constitution.³⁸⁶

In October 1801, just before the new Republican Congress began its first session, Edmund Pendleton published “The Danger Not Over,” a widely-read list of policies that he thought should be implemented to complete the 1800 revolution.³⁸⁷ It called for several new constitutional amendments to limit federal power, including one requiring a single-term

380. THE FEDERALIST NO. 39 (James Madison), *supra* note 15, at 246.

381. 2 ACKERMAN, *supra* note 359, at 121.

382. U.S. CONST. amend. XI. The amendment’s immediate effect was to overrule *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (holding that the Constitution authorized the federal courts to hear suits between a state and the citizen of another state or a foreign country).

383. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 JEFFERSON WRITINGS, *supra* note 4, at 140.

384. BANNING, *supra* note 78, at 281–82.

385. JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 69–70 (1992).

386. Letter from Thomas Jefferson to James Monroe (Feb. 15, 1801), in 7 JEFFERSON WRITINGS, *supra* note 4, at 490, 491.

387. BANNING, *supra* note 78, at 281–82.

presidency, shorter terms for U.S. Senators, and that both houses of Congress, through simple majorities, approve treaties.³⁸⁸

However, despite possessing strong majorities in Congress and in most state legislatures, the Republicans managed to ratify only one amendment during the Jefferson administration—the Twelfth—which was designed to ensure that the electoral college snafu that tied up the presidential election of 1800 would not be repeated in 1804.³⁸⁹ Of course, it is not surprising that Jefferson would ignore the amendments proposed by the more radical Republicans, for such changes would have crippled the national government their party now controlled. But it is more puzzling why the Republicans would fail to seek amendments to approve obvious expansions of federal power beyond the limits set by a strict textual interpretation of the Constitution. The most prominent of these expansions of federal power, the Louisiana Purchase, set a bad precedent for supporters of states' rights and limited federal power.

Indeed, the failure to seek an amendment for approving the Louisiana Treaty triggered Article's V's fall into disuse. After the ratification of the Twelfth Amendment in 1804, not a single amendment was ratified until the Thirteenth Amendment in 1865—the longest period in the Constitution's history in which it was not amended. Nor was the amendment process seriously considered as a means of resolving the most important issues of the day. Not until the thirty-sixth Congress in 1860—far too late—were amendments offered concerning Congressional power over slavery in the territories, a question which had bedeviled Congress at least since 1820, and which eventually helped to provoke secession.³⁹⁰ While one proposed amendment did come very close to ratification, coming up just one state short, its significance would hardly have been earth-shattering. It would have extended to all citizens, Article I, section 9's ban on grants of "Emolument, Office, or Title . . . from any King, Prince, or Foreign State."³⁹¹ In contrast, proposed amendments that would have resolved disturbing ambiguities concerning the relative power of the state and federal governments went nowhere. Even strenuous efforts by Jefferson and Madison, when both were out of office, failed to move Congress to propose amendments ratifying expansions of federal power such as the authority to build internal

388. Edmund Pendleton, *The Danger Not Over*, RICHMOND EXAMINER, Oct. 20, 1801, quoted in BANNING, *supra* note 78, at 282.

389. U.S. CONST. amend. XII.

390. See Herman V. Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of its History*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, at 201–02 (1897). Several amendments were proposed in Congress only after Lincoln's election, and once states had already begun to secede. A Peace Conference led by former President John Tyler proposed amendments, which were defeated in Congress. See BERNSTEIN, *supra* note 348, at 82–93.

391. See KYVIC, *supra* note 356, at 117; U.S. CONST. art. I, § 6.

improvements.³⁹² Having failed to push for constitutional amendments during their respective presidencies, both Jefferson and Madison deserve blame for the neglect of the Article Five process which both had praised as the most important means of effecting constitutional change.

As historians point out, however, the Supreme Court also played an important role in the neglect of Article Five. The same year the Louisiana Treaty was signed, the Supreme Court decided *Marbury v. Madison*, which declared unconstitutional a provision of the Judiciary Act of 1789.³⁹³ Later, in *McCulloch v. Maryland*, the Court took an expansive view of the federal government's right to take actions "necessary and proper" to carry out textually-granted powers.³⁹⁴ Professor David E. Kyvig argued that "these steps . . . eroded the sense of amendment as the necessary solution to every uncertainty about governmental authority."³⁹⁵ However, while judicial review may have removed the need to call for a constitutional amendment each time disputes about the meaning of the text arose, the Court was not well-positioned to resolve fundamental disagreements about the scope of federal and state power, or to protect the interests of the states. Indeed, the Court did not strike down another exercise of federal power for another half century, until *Dredd Scott v. Sanford* in 1857.³⁹⁶ Here, the Court's effort to resolve a profound constitutional crisis over slavery in the territories, which had paralyzed the political branches, failed spectacularly.³⁹⁷ Only during the "Secession Winter" of 1860–61, after Abraham Lincoln had been elected President and seven states had seceded from the Union, did Congress seriously consider constitutional amendments to address the conflict over slavery.³⁹⁸

The failure to approve a constitutional amendment authorizing the Louisiana Treaty weakened states' rights in two significant ways. First, it confirmed that the federal government could fundamentally and permanently alter the domestic relations among the states through the treaty power. Second, it set a precedent for bypassing the Article Five method of constitutional change, which gave the states a role equal to that of Congress. The Louisiana Purchase thus laid the groundwork for two subsequent significant expansions of federal power outside of the formal amendment process—Reconstruction and the New Deal.

While the Reconstruction Amendments—the Thirteenth, Fourteenth,

392. MAYER, *supra* note 2, at 313.

393. *Marbury v. Madison*, 5 U.S. (1 Cranch) 177, 177–78 (1803).

394. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

395. KYVIG, *supra* note 356, at 111.

396. *See Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

397. The Court's decision created a firestorm of protest from antislavery forces and "damaged for over a generation the Court's authority as an interpreter of the Constitution." BERNSTEIN, *supra* note 348, at 80.

398. BERNSTEIN, *supra* note 348, at 82–93.

and Fifteenth—marked a return to the formal method of constitutional change, their ratification is mired in controversy. As Professor Strauss put it, “The states of the Confederacy did not so much ratify the amendments as submit to them because they were the defeated parties and had little choice.”³⁹⁹ The First Reconstruction Act blocked the readmission into the Union of any of the Southern states until enough states ratified the Fourteenth Amendment to make it part of the Constitution.⁴⁰⁰ Subsequent Reconstruction Acts passed in the spring and summer of 1867 divided the South “into five military districts and placed the Union Army in control of any further transition to statehood. Commanding generals were authorized to call new constitutional ‘conventions’” after compiling voting registers that enfranchised blacks and disenfranchised disloyal whites.⁴⁰¹ Thus Professor Ackerman calls the Reconstruction Amendments “amendments-simulcra” because their ratification “made a hash” of the Article Five method: Congress possessed an effective override of the states’ right to veto the amendments, telling Republican governments that a decision to reject “deprived them of all political power in the councils of the nation.”⁴⁰² According to Ackerman, the Reconstruction Amendments marked a shift from the Framers’ constitutional regime—expressed by the Article Five treatment of the states and the federal government as co-equal partners in constitutional change—to a new regime in which the federal government dominates constitutional change.⁴⁰³ While some scholars, such as Professor John Harrison, have argued that the Reconstruction Amendments were lawful, even Harrison admits that Article Five failed to adequately serve its purpose of balancing principles of federalism and nationalism.⁴⁰⁴

During the New Deal, another constitutional change that vastly expanded federal power, reformers abandoned even the pretext of using Article Five. Through a series of election victories and the direct pressure of Roosevelt’s court-packing scheme, the President and Congress persuaded the Supreme Court to produce decisions ratifying the reformers’ vision of activist government.⁴⁰⁵ Significantly, the states played no role, and Roosevelt deliberately eschewed the Article Five process.⁴⁰⁶ Thus, as Ackerman concludes, the New Deal regime “substituted a model of Presidential leadership of national institutions for a model of assembly leadership based

399. Strauss, *supra* note 369, at 1479–80.

400. First Reconstruction Act ch. 153, 14 Stat. 428, 429 (1867).

401. 2 ACKERMAN, *supra* note 359, at 110.

402. *Id.* at 111.

403. *Id.*

404. See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 379 (2001).

405. 2 ACKERMAN, *supra* note 359, at 269; William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347, 383–86 (1966).

406. Leuchtenberg, *supra* note 405, at 383–86; Strauss, *supra* note 369, at 1470.

on a dialogue between the nation and the states."⁴⁰⁷ One hears in the New Deal echoes of the Louisiana Purchase. Acting with broad popular support, the President and the Congress instituted constitutional change—the expansion of federal power—without resort to the Article Five method, even when a constitutional amendment could have been approved and ratified with relative ease.

The use of a constitutional amendment to ratify the Louisiana Treaty would not necessarily have prevented the Civil War, or the Reconstruction transformation that increased the power of the federal government, but it would at least have reinforced the importance of the states' role in implementing constitutional change. Moreover, as Professor Stephen Griffin summarized Jefferson's view, "[r]esort to amendment ensures that significant changes in constitutional practice are clearly recognized and openly debated."⁴⁰⁸ If Jefferson and his Republican successors had regularly introduced amendments when seeking to expand the scope of federal power, starting with the Louisiana Purchase, then the Article Five amendment process would more likely have been seen later on as a way of addressing the most controversial issues, including slavery in the territories. A decision made through the amendment process would have had far more legitimacy and staying power than single-branch solutions such as *Scott v. Sanford* or the Missouri Compromise. Although the issue of slavery would never have been satisfactorily resolved until it was eliminated, even a decision by amendment to ratify the existence of slavery would have been preferable to war, at least in the short term, because slavery could be eliminated by the same peaceful means once the People were ready.

VI. CONCLUSION: THE TREATY POWER TODAY AND THE NATIONALIST VIEW

The Louisiana Purchase set a precedent for subsequent expansions of federal power, and a corresponding reduction of states' rights, through mere acts of the President and Congress. These expansions of federal power, through interpretation alone, did not give the states a voice in deciding the very constitutional changes that diminished each state's individual influence as well as the influence of one geographical section of the nation. The failure to seek a constitutional amendment left Jefferson's popular revolution incomplete and provided the means for its unraveling. *Empire of liberty* federalism, while in its ascendancy, still faced the nagging questions posed by the *balance of forces* federalism. The ultimate triumph of the *empire of liberty* brand of states' rights destroyed the legitimacy of both, tied federalism to slavery, and paved the way for the rise of an even stronger national government.

407. 2 ACKERMAN, *supra* note 359, at 271; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559–60 & n.56 (1954).

408. Griffin, *supra* note 359, at 42.

The world in which Thomas Jefferson and his Federalist opponents struggled with the constitutional implications of a peacefully expanding union seems distant from our own. Today the prospects are obviously remote that the United States will acquire territory large enough to disrupt the balance among regional interests, nor is the nation likely to be bitterly divided along sectional lines by a single issue. But it is important to recognize that Jefferson's concerns about the Louisiana Purchase arose, not from a bizarrely-strict and already-obsolete vision of national power, but from a desire to preserve the same core constitutional principles that are now the subject of a revival in the courts and intense debate in the academy. These concerns transcend Jefferson and his oft-idiosyncratic constitutional views, and would be just as valid were the U.S. now seeking to add new states to the Union. The Louisiana Purchase demonstrated that the opponents of the Constitution could not contemplate all of the ways in which the treaty power might be used to undermine states' rights. Warnings in 1790 by the Anti-Federalists that the federal government could, by treaty, sell portions of a states' territory or cede navigation rights crucial to a states' economy were simply the contemporary manifestations of a fear that the states' independence, and their sovereignty, would be diminished or destroyed by an overreaching federal government.

The harmful consequences of the Louisiana Purchase should cast doubt on the prevailing view of the treaty power today—the “nationalist” view—which holds that its scope is broad.⁴⁰⁹ The anchor for this view is the U.S. Supreme Court's decision in *Missouri v. Holland*, upholding the Migratory Bird Treaty with Canada, which lower courts held unconstitutional when it was enacted as ordinary legislation.⁴¹⁰ Most scholars assume from the holding in *Missouri* that the President and the Senate, acting pursuant to the Treaty Clause, can regulate matters of traditional state concern where Congress, acting under its Article I powers, cannot.⁴¹¹ The potential reach of the treaty power is not limitless, however. The Supreme Court has held, and scholars acknowledge, that the Bill of Rights, the Fourteenth Amendment, and other explicit constitutional limits constrain the treaty power.⁴¹² And a treaty clearly must at least involve another foreign state; it cannot be a sham.⁴¹³

409. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 303 cmt. b (1986); HENKIN, *supra* note 9, at 441; Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1129 (1999) (arguing that the Court paid lip service to states' rights while in practice federalism placed “few meaningful limits on the treaty power”); Damrosch, *supra* note 23, at 530; Griffin, *supra* note 359, at 42; Healy, *supra* note 21, at 1731.

410. 252 U.S. 416 (1920); see also *supra* note 23.

411. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 303 cmt. c (1986); HENKIN, *supra* note 9, at 442 n.2. *But see* Bradley, *supra* note 9, at 458–59.

412. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (holding that a defendant's right to trial by jury under the Sixth Amendment cannot be abrogated by the terms of a treaty); HENKIN, *supra* note 9, at 141–56.

413. See Golove, *supra* note 21, at 1124.

But within these hazy contours, disagreements over the intersection of the treaty power with states' rights have not abated. Most advocates of the nationalist view continue to maintain that, under *Missouri v. Holland*, federalism limitations simply do not apply to exercises of the treaty power.⁴¹⁴ Professor David Golove recently argued for a modified nationalist view: while the anti-commandeering principles recognized in *New York v. United States*⁴¹⁵ and *Printz v. United States*⁴¹⁶ apply to the treaty power, Eleventh Amendment sovereign immunity may not.⁴¹⁷ Moreover, Golove adds, even the explicit Constitutional guarantees in the Bill of Rights and separation of powers principles do not apply as rigidly to the treaty power: they may "sometimes require a . . . more forgiving construction when applied to treaties."⁴¹⁸ How this "more forgiving" approach would play out is, of course, unclear until the Supreme Court considers a conflict between federalism principles and the treaty power. What is clear, according to Golove, is that the occasions where states' rights could interfere with the operation of a treaty are exceedingly rare.⁴¹⁹

While its full potential remains untapped, the treaty power today still poses the threat to states' rights that the Anti-Federalists feared.⁴²⁰ It is a reserve of virtually unlimited federal power that even believers in strict construction of the Constitution may find an irresistible means for carrying out their policies. This was no more apparent than during the Louisiana Purchase, when the Republicans, who had fought to preserve state prerogatives against an encroaching national government during the Federalist administrations, ratified and implemented the treaty despite its powerful impact on the rights of the existing states.

As Professor John Yoo has pointed out, today's threats to state sovereignty through uses of the treaty power are subtler, but no less real or important.⁴²¹ Ironically, it may fall to Jefferson's old enemy—the courts—to

414. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 303 cmt. c (1986); HENKIN, *supra* note 9, at 76.

415. 505 U.S. 144 (1992) (declaring invalid a statute commandeering state legislatures).

416. 521 U.S. 898 (1997) (declaring invalid a statute commandeering state executive officials).

417. See Golove, *supra* note 21, at 1086–87; cf. Bradley, *supra* note 9, at 391 (concluding that, under the common interpretation of *Missouri*, "the treaty power is immune from" the state sovereign immunity). Compare John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1899–920 (1983) (arguing the Eleventh Amendment did not protect states from suits brought under Article III to enforce treaties), and William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1285–87 (1989) (similar), with Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 114–15 (1989) (arguing the opposite view).

418. Golove, *supra* note 21, at 1086.

419. *Id.* at 1085.

420. These fears are explored *supra* in Part II.

421. Yoo, *supra* note 22, at 1989 ("While modern [international] agreements do not require the alienation of land or people to another government, they do call for something

resist efforts by the political branches to circumvent federalism principles by means of the treaty power.⁴²² Globalization puts great pressure on the United States to conform to worldwide standards and delegate more authority to international organizations.⁴²³ The battle over competing visions of federalism waged during the Louisiana Purchase still holds a great deal of relevance for the contemporary debates about the treaty power.⁴²⁴ Recalling this two-hundred-year-old battle invites us to choose again between the *empire of liberty* and the *balance of forces*. How will these profound changes in the nature of the United States be given constitutional status in a process that recognizes the sovereignty of the states as well as the national government?

In an era of globalization, the ability of the states to preserve their identities, and thus preserve local accountability, will become more valuable than ever.⁴²⁵ *Balance of forces* federalism ought to be dusted off, because this vision of the Constitution preserves the interests of the existing states—not states in the abstract—where real people live and work.

similar—a sovereign nation's transfer of control over a certain type of conduct occurring with its territory.”).

422. See *supra* note 23 and accompanying text.

423. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 271–85 (1995) (discussing the increased deference of nation states to international organizations); *id.* at 16–17 (discussing the increased recognition of individual rights in international law); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 79–80 (2000).

424. An emerging development raises federalism concerns similar to the dilution of state sovereignty brought about by the Louisiana Treaty—the United States' participation in complex and sweeping international agreements. Just as the addition of new states diminished the power of existing states that did not share their interests, the delegation of authority by the United States to international bodies such as the World Trade Organization (WTO) reduces the ability of states effectively to advocate for their interests in the national government. See Ku, *supra* note 423, at 79–80. In both situations, the national government, through an exercise of the treaty power, alters the relationship between individual states and the union; and in both situations, the sovereignty of the individual state is weakened.

425. See Friedman, *supra* note 22, at 1442; Knowles, *supra* note 21, 773–77 (arguing for federalism as a means of preserving democratic accountability).

