

## ● 論 文 ●

# The Constitution of the United States and Expansionism

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## Abstract

This article is a part of a larger project, a comparative study of Japanese and American colonialism, this article examined the origin of the American expansionism/colonialism from the mid-18th to early 19th centuries.

The constitutionalism is the vital parameter of the comparison. In both Japan and the U.S., through the legal and constitutional debate on colonialism/expansionism, their essential nature has always been revealed. This article, thus, seeks to trace the emergence of the United States as it was accompanied by a “built-in” expansionism in constitutional and legal terms. For this objective, the initial important documents and events, such as the Northwest Ordinance of 1787, the Louisiana Purchase, as well as the Articles of the Confederation and United States Constitution, will be thoroughly examined.

Due to the urgent problem on the treatment of the ceded land outside of the Confederacy, the Constitution built in the procedure to establish the statehood for the expansion of the United States in the Third Section in Article IV. The Constitution, however, lacked the description on the procedure to acquire new territories. Therefore, the territorial expansion of the United States required a process to solve critical constitutional problems during the respective period.

The sources of the controversies and problems concerning American expansionism and colonialism can be seen most fundamentally in its founding ideology. Between the Declaration of Independence and the Constitution of the United States, there is a critical difference and conflict between the concepts of the universal and the domestic, or concerning issues of universalism within the United States.

The principle of acquiring and controlling new territories was floated between the universal and the domestic during the respective period. In conclusion, Thomas Jefferson’s concept of “empire for liberty” presented the powerful tool to cover such conflict, and has been signified the American self-justification for its expansionism and colonialism.

This article is a part of a larger project, which is a comparative study of Japanese and American colonialism. Since Japan and the U.S. became colonial empires at almost the same time, at the end of the 19th century, both colonialisms responded to national independence movements inspired by Western political philosophy, and in the process developed shared characteristics. In both Taiwan and the Philippines there were movements to declare a republic. Each metropolitan state deployed military forces to suppress the movement, and established a military government to control over the colony. And these along with similar movements and metropolitan responses elsewhere signified a new historical stage of colonialism/expansionism at the turn of the 20th century.

Yet the Japanese and American historical settings of colonialism/expansionism are very different. While Japan struggled to avoid becoming colonized in the mid-19th century, after the end of seclusion policy in 1854, the 13 American colonies declared their independence in 1776 to form the United States of America. Still an interesting question can be posed. Why did Japan and the U.S. develop colonialisms and expansionisms in Asia that shared many commonalities, even though their historical backgrounds were so different? My hypothesis is that a global historical stage of colonialism existed in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Therefore the experience of colonial expansion in Asia was not unique to any one country. Instead, both Japan and the U.S., despite their many differences, participated in a type of colonialism/expansionism that belonged to the period in which they developed their Asian empires. In order to establish such a theorem, it is necessary first of all to examine and compare the legal, constitutional foundations for colonialism and expansion in each country. In both Japan and the U.S., through the legal and constitutional debate on colonialism/expansionism, their essential nature has always been revealed. The constitutional background of colonialism needs to be examined. This article, thus, seeks to trace the emergence of the United States as it was accompanied by a “built-in” expansionism in constitutional and legal terms.

## The Problem

At the moment when the United States became independent, the treatment of its territory beyond the borders of the 13 original States was an urgent and central item in the political and legal agenda. After the Declaration of Independence was issued in 1776, the Continental Congress adopted the Articles of Confederation and Perpetual Union (hereafter, the Articles of Confederation) in November 1777. Due to conflict among the States over the Northwestern territory, however, almost three years passed before all the States ratified the Articles, in March 1781.

Even after the Constitution of the United States took effect, the U.S. territory outside of the States was a source of frequent constitutional controversies on such issues as the legal procedure to include it within the United States, and the rights and duties of residence in Territories expected to become States in the future. All through the period from the Northwest Ordinance of 1787, to the Louisiana Purchase, and to the acquisition of the Philippines of 1898, the territorial expansion of the United States required a process to solve critical constitutional problems. In other words, a process was needed to establish a rational legal explanation for how American expansionism and colonialism could be constitutionally justified. Nevertheless, it should be noted that even though it was always a minority, there was opposition in the Congress which sought to employ the Constitution against American expansionism and colonialism.

The sources of the controversies and problems concerning American expansionism and colonialism can be seen most fundamentally in its founding ideology. There is an irreconcilable rift between the two documents, the Declaration of Independence and the Constitution of the United States. The former is a compilation of justifications of American independence from Great Britain, which includes the following words.

... all men are created equal, that they are endowed by their Creator with certain unalienable Rights, ...<sup>1</sup>

On the other hand, the preamble of the Constitution of the United States begins,

We, the People of the United States, in order to ... secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>2</sup>

Between the two documents, there is a critical difference and conflict between the concepts of the universal and the domestic, or concerning issues of universalism within the United States. The phrase, “all men are created equal” was an endorsement of natural rights for all human beings beyond the national border, while the constitution just guaranteed “the Blessing of Liberty” for the “People” within the border of the United States. Furthermore, in essence, why and how could people be distinguished by the border of the United States? How should American territories other than the States be constitutionally situated? Who could be granted citizenship of the United States? Multiple layers of conflicts in concepts and practices come to the surface, once we thoroughly examine this conceptual conflict between the universal and the domestic.

Needless to say, the Constitution of the United States was not intended to cover countries and territories beyond the borders of the United States. Nevertheless, this Constitution defines itself as “the supreme Law of the Land” in Clause 2 of Article VI. It should be examined whether or not the “land” originally implied only the States of the Union, or the whole territory under the dominion of the United States. Moreover, it should be analyzed if within the defined territory, all the people, who were “created equal,” could be “endowed by their Creator with certain unalienable Rights.”

It is well known that Clause 3, Section 2 of Article I justified the distinction of political rights between “free Persons” and slaves. After the Civil War in 1868, this constitutional discrimination was terminated by means of Section 2 of Amendment XIV. It seems therefore that the application of the Constitution and the guarantee for the rights of

the people have leaned more toward universalism within the States. Still, even at the present moment, there are unsolved issues, such as those concerning the constitutional rights of non-American citizens in the United States, as well as those of people in Puerto Rico, and this shows that there remain conflicts between the universal and the domestic in the United States.

It is possible to reveal the origin and nature of American expansionism and colonialism by tracing the development of the rift within the founding ideology. This is the key to understanding the justification of American territorial expansion after the post-colonial period, which is usually explained simply by reference to the concept of Manifest Destiny.

### **From the Albany Plan to the Articles of the Confederation**

The territorial disposition of North American lands in the 18<sup>th</sup> century was complex. Before the Seven Years' War in Europe from 1756 to 1763, Britain and France went into a state of war in colonial America. France, allied with the Native Americans, lost the war and concluded the Treaty of Paris in 1763, by which Canada and all of its territory east of the Mississippi River were ceded to Britain. In the treaty, Spain, a French ally, also ceded Florida to the British. Moreover, before the United States became independent of Britain in 1783, colonial companies and individual entrepreneurs obtained land from the Native Americans outside of the 13 Colonies.

When the 13 States obtained independence from Britain in 1783, one urgent issue for the new government of the United States was to define the territory where it could exercise sovereignty and control. Should that territory include lands beyond the borders of the 13 original States, such as all those previously under British control and also land under the complex ownership of companies and entrepreneurs? This problem could not be solved promptly, because there were conflicts of interests in connection with various issues among the original States. By focusing on such conflicts, David C. Hendrickson has argued that

federalism was a form of international cooperation and security system among states, and that the Constitution of the United States was a “peace pact.”<sup>3</sup>

Although each colony in America independently insisted upon its own sphere of control, it was Benjamin Franklin who showed the way toward the unification of the American Colonies and then the establishment of central general government under Britain. In the “Albany Plan” of 1754, he proposed that the unified general government would be given a strong power over lands beyond the border of the Colonies.<sup>4</sup> Notably, in Article XII of the plan, it was stipulated that the purchase from “Indians” of lands “not now within the bounds of particular Colonies” should be made by the “President-General with the Grand Council” of the general government. And in the following Article XIII, “they make new settlements on such purchases, by granting lands in the King’s name, reserving a quitrent to the crown for the use of the general treasury.” Franklin’s idea to create such a powerful general government was not supported by the Colonies and the metropolitan government, however, and temporarily faded out. Instead, the proprietary rights over lands defined by Article XII, remained in the hand of the Colonies, speculators in the Western land, and an agency directly under the British King. And no apparatus existed that was capable of sorting out this complex ownership of the lands.<sup>5</sup> Nevertheless, Franklin’s idea resurfaced in the process of establishing the federal government and drafting the constitution.

After the outbreak of the War of Independence, and the sequent issuance of the Declaration of Independence, the United States were, in fact, a simple compilation of sovereign States. Even though each State recognized the necessity of an alliance to fight the common enemy, it took 16 months to reach an agreement of alliance among the Colonies by ratifying the terms of agreements in the Articles of Confederation at the Second Continental Congress.<sup>6</sup>

Similar to the “Albany Plan,” the initial draft of the Articles of Confederation presented by John Dickinson was intended to give firm control to the central government and congress over land not within the 13

States.<sup>7</sup> Article XVIII in the draft was as follows:

Limiting the Bounds of those Colonies, which by Charter or Proclamation, or under any Pretence, are said to extend to the South Sea, and ascertaining those Bounds of any other Colony that appear to be indeterminate-Assigning Territories for new Colonies, either in Lands to be thus separated from Colonies and heretofore purchased or obtained by the Crown of Great-Britain from the Indians, or hereafter to be purchased or obtained from them-Disposing of all such Lands for the general Benefit of all the United Colonies-Ascertaining Boundaries to such new Colonies, within which Forms of Government are to be established on the Principles of Liberty...

While the ideas of the “Albany Plan” were employed in terms of the sovereign right of the central government over territories without, this draft went further to propose that self-autonomous government should be established based upon the “Principles of Liberty.”

This article on territories without became one of the focal points of controversy at the Continental Congress. In particular, conflict arose and intensified between coastal States not having Western territories, and other States. As a consequence, in order to avoid an irreconcilable split and to give priority to unity during the War of Independence, no terms on the control of the Western territories by the central government were included in the final version of the Article of Confederation. The 13 States had failed to reach an agreement on the Western territories.

In the final draft, Article XI made the following rather equivocal statement about external territories:

Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.<sup>8</sup>

Although they were critical for the governance of the Confederation over the Western territory, sovereignty and popular rights and duties in the Western territories were not defined in the Articles of Confederation. In order to avoid an unnecessary conflict during the War, the original States postponed to make a final legal settlement over the Western territory at the Congress of the Confederation.

As the future course of the War of Independence was not clear at the moment when the Articles of Confederation were discussed at the Continental Congress, no one could tell what would happen to the territories ceded to Britain after the French-Indian War and those in the West. The failure to clarify detailed rules on the governance of the Western territories may have been a rational decision intended to avoid unnecessary conflict. The only consensus was that Canada could be admitted into the United State without qualification, if it wished. And it should be recognized as an achievement that more than 9 out of the 13 States, i.e. at least two-third majority votes, could admit a new territory as a State. This means, from a different perspective that from the start of the United States territorial expansionism was already built in as a federal project.

Although conflicts of interest remained, solidarity among the States was strengthened little by little by means of the Continental Congress, as they compromised with each other. The resolution of “unappropriated lands” on October 10, 1780 is an example of this process.<sup>9</sup>

... the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be ~~granted and~~ disposed of for the common benefit of all the United States ~~that shall be members of the federal union~~, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states: ... (deletion is original)



In this resolution, the States agreed that “unappropriated lands” should be placed under the control of the central government. And such incorporated lands would become a part of the union as “republican states” in the future, and would enjoy the same privileges and rights as did the other original States. This procedural principle determined the basic attitude of the United States toward the Western territories. And it should be noted that there was no mention of popular rights and duties in “unappropriated lands.” The absence of legal status for residents in territories without had been overshadowed in the constitutional controversy on American expansionism in the 19th century.

### **The independence and territorial issues**

By the time that the Treaty of Paris of 1783 was concluded, the War of Independence was ended, and the United States was internationally recognized as an independent state. It occupied the vast territory east of the Mississippi River, which Britain had acquired after the French-Indian War. In order to maintain peace with the Native Americans, the British government had formerly restricted migration into the territory. Once the United States was ceded this area, however, the restriction was void and a vast number of settlers flooded into the territory. Confronted with this phenomenal demographic movement, Thomas Jefferson submitted the resolution of his committee on March 1, 1784 to the Congress of the Confederation on the guidelines of the policy toward the western lands, which was the territory between the Appalachian Mountains and the Mississippi River.<sup>10</sup> After tense discussion and revision at the Congress, this resolution was adopted on April 23, 1784.<sup>11</sup> Jefferson’s original proposal called for the prohibition of slavery in these western lands after 1800. The Congress rejected the section on slavery and also deleted Jefferson’s proposed names for the future states; Assenisippia, Cherronesus, Illinoia, Metropotamia, Michigania, Pelisipia, Polypotamia, Saratoga, Sylvania, and Washington. Although Jefferson had previously projected 14 western States in the future, the Ordinance of 1784 specified boundaries for sixteen new states.<sup>12</sup>

In this ordinance, first, territory ceded or to be ceded by “individual states, to the United State, as is already purchased, or shall be purchased, of the Indian inhabitants, and offered for sale by Congress” should be a States of the Union in the future. In order to become a State, a temporary government of “free males of full age” needed to be established by petition of the residents, or by Congressional order, and that government had to adopt the constitution and laws of the United States. Once the region in question had acquired 20000 inhabitants, a convention of representatives would be called to establish a permanent regional state constitution and government for themselves. Finally, if the number of “free” inhabitants in the regional new state reached that of the least populated original state at the time, its statehood would be admitted after two-thirds of the States cast affirmative votes in the Congress. Until then, after the establishment of temporary government, an aspiring state could send a delegate to Congress with the right to debate, although not to vote.<sup>13</sup>

This road map for statehood clearly shows inequalities between the original 13 States and the State-to-be. Even though it was expected that “governments” would be established in the western lands, self-autonomy was, in fact, denied by the central government. The size and name of the State-to-be was determined not by themselves, but by the Congress of the Confederation. This superior-inferior relationship was enforced by the seven provisions of the Ordinance of 1874 for both temporary and permanent state governments.

First, these governments “shall for ever remain a part of this confederacy of the United States of America.” Second, they “shall be subject to the government of the United States in Congress assembled and to the Articles of Confederation ... and to all the acts and ordinances of the United States in Congress assembled. ...” Third, “they in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled; nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the bona fide purchase.” The first three provisions specifically restrain the central government’s control over State-to-be territories. In other

words, these provisions implied that until the United States recognized them or until the establishment of their statehood, the “colonial” status of those territories should remain, and that they should be much as the 13 original States had been before the Independence. This reversion of “colonial” rule becomes even more evident in the provisions on taxation.

The fourth provision stated that “they shall be subject to pay a part of the federal debts, contracted or to be contracted; to be appointed on them by Congress, according to the same common rule and measure by which appointments thereof shall be made on the other states.” The fifth and seventh provisions were presented for the protection of the United States, as well as of American citizens who were landowners. In the fifth provision it was written that “no tax shall be imposed on lands the property of the United States.” The final seventh provision stipulated that “the lands of non-resident proprietors shall in no case be taxed higher than those of residents within any new state, before the admission thereof to a vote by its delegates in Congress.”

The tax-related provisions reveal that while the tax autonomy of the temporary or permanent governments in the western lands was denied, the United States imposed substantial taxation over them. “No taxation without representation” was the slogan in the period from 1763 to 1776 that was used to criticize the British colonial rule and to justify the independence of the 13 Colonies from the British metropolis. The origins of American colonialism can be found here, in this early phase of U.S. history, with the contradiction of one of the guiding principles of the founding ideology of the United States. Therefore, the text of the sixth provision – “their respective governments shall be republican” – should be read not only as a statement of American republicanism, but also as a defense of the United States against a possible resurgence of the Western territories allied with European monarchical states, just like each 13 original States had been anxious about the betrayal of other States for the Britain less than a decade ago. Except for the prohibition of slavery and the names of the new states, Jefferson’s radical ideas on the treatment of the western lands and his road map for statehood were approved by the Congress of the Confederation. Al-

though the colonial framework for the disposition of the western lands was accepted by the 13 original States without serious opposition, the slavery issue created tense controversy. In this respect, until the end of the Civil War, territorial problems of acquisition, sovereignty and statehood at the Congress of the Confederation and the subsequent United States, were determined by the treatment of slavery in the western lands. In other words, while no State was against the expansion of the Confederation or United States, the stance toward slavery shaped each State's policy toward territorial problems.<sup>14</sup>

The ordinance of the western lands of 1784 fundamentally set the framework for the rules and regulations for U.S. territories beyond the borders of the 13 original States. Since the ordinance, the universal principle of the Declaration of Independence, that "all men are created equal," has not been applied to newly acquired territories. Until admission to statehood by the Congress, new territories cannot enjoy rights and privileges equivalent to those of other States. Particularly the ordinance denied their freedom and rights to be independent from the United States of America by saying "they shall for ever remain a part of this confederacy of the United States of America." The new territories shall be subject to the Confederate until their statehood was established in uncertain due course.

Even though the Land Ordinance of 1785 was issued in order to -put into effect? The ordinance of 1784 and to build another revenue source for the Congress, the settlement of the western lands was delayed by the trouble of registering land ownership, and by the process of surveying and selling the land, which the government counted on to relieve the Confederation's financial burden.<sup>15</sup> Before the completion of the objectives of the Ordinance of 1784, the Congress needed to take new, immediately effective measures due to the financial difficulties of the Confederate government, as well as in response to the lobbying of a land speculation company, the Ohio Company. By limiting itself to the territory in the Northwest – all the land claimed by the United States west of Pennsylvania and northwest of the Ohio River – the ordinance was passed on July 13, 1787.<sup>16</sup>

Different from the Ordinance of 1784, this Northwest Ordinance of 1787 imposed strict restrictions on temporary governments in the Northwestern lands, and also it enforced more control by the central government over the territory.<sup>17</sup> First, the Congress of the Confederation had the authority to appoint one governor to control this newly created Territory – Northwest Territory, and a temporary government was to be established under certain circumstances, the Congress could divide the territory into two districts.<sup>18</sup> The governor was to be Commander in chief of the Militia, and had a veto power in the general assembly, or legislature. Through the governor, the central government exercised an enormous controlling power.

The road map for statehood was as follows. After the establishment of a temporary government in the territory, and once the number of free male inhabitants of full age in the district reached 5000, they should receive authority to elect one representative for every 500 residents of “free males” from their counties or townships to represent them in the general assembly. Next, although the Congress could determine how to divide the Territory, the Northwest Territory was expected to be divided by the key waterways, such as the Ohio, Mississippi, and Wabash Rivers and Lake Michigan, as the provisions of the Ordinance were intended to establish a minimum of three and a maximum of five new States. If any of the divided areas fulfilled the population requirement for statehood, which was 60000 free inhabitants, that portion of the Northwest Territory would become a new State. This population requirement was not absolute, however. It could be waived by the Congress to be consistent with the general interests of the nation.<sup>19</sup>

One of the most important provisions of the 1787 Ordinance is that once they had fulfilled the population requirement, new states created out of the Northwest Territory were to be admitted to the Union “on an equal footing with the original States, in all respects whatever.” Still, the final settlement of the division of the Northwest Territory was determined by the Congress. In a reflection of the conflict of interests among the States, the fixing of the borders of new states was a very critical issue that was related to efforts to control the size of a

new state's population. In other words, through a tug of war in the Congress, each State tried to frame the size of territories so as to regulate the size of the populations within them. In addition, each existing State made an effort to set the timing by which territories were granted statehood. One of the key issues in the Northwest Ordinance was again slavery. Although the Ordinance of 1784 failed to do so, the 1787 Ordinance successfully included the anti-slavery clause of Article VI. This, however, limited the area of legal coverage to just the Northwest Territory, rather than the entirety of the western lands. In addition, as the ordinance guaranteed to the French inhabitants and citizens of Virginia "their laws and customs now in force among them, relative to the descent and conveyance of property," they were not legally bound to obey the anti-slavery clause. Also the use of the phrase "free inhabitants" in the Ordinance assumed the legal existence of slaves in the Territory, and it was a common understanding among territorial governors and judges that "the article was not intended to be retroactive -- that it prohibited introduction of more slaves but did not affect the status of those already in the territory and their descendants."<sup>20</sup>

As the Southern states interpreted the Northwest Ordinance as a reconfirmation of the legality of slavery outside the territory in question. They voted in favor of it. Moreover, farmers in the southern slave States expected to take an advantage in the competition in agriculture with the Northern free States, since the prohibition of slaves would cause the short of their labor force in the north . In the end, the Congress unanimously passed the Ordinance.

While the Congress engaged in debate on the bill of the Northwest Ordinance, a convention was held in Philadelphia that was initially intended to revise the Articles of the Confederation.<sup>21</sup> Participants in the convention were well aware of the contents of and discussion on the Northwest Ordinance, yet they hardly discussed the issues of the western lands and the expansion of the territories. The participants evidently took for granted that the Union should be expanded and new States would be created.<sup>22</sup>

Nevertheless, no one had any idea of how many new States would

be created or to what extent the Union should be expanded. Roger Sherman of Connecticut asserted:

... there is no probability that the number of future States would exceed that of the existing States. If the event should ever happen, it was too remote to be taken into consideration at this time.<sup>23</sup>

There was also expressed at the convention some anxiety about maintaining the unity of the States as territory increased. Nathaniel Gorham of Massachusetts had a pessimistic view of the future of the Union.

It is not to be supposed that the Government will last so long as to produce this effect. Can it be supposed that this vast country, including the western territory, will, one hundred and fifty years hence, remain one nation?<sup>24</sup>

In general, however, legislators seemed to support expansionism even as they had little concrete vision of what the results of continued growth would be. The Northwest Ordinance was the only organized idea beforehand at the convention. Under such circumstances, the first draft of the constitution was submitted on August 6, 1787 to the convention. After a discussion of five weeks, the United States Constitution was adopted on September 17, 1787 at the convention. The Constitution has been depicted persuasively as a “peace pact” among the 13 original States, since it was a result of compromises and appeasement caused by the conflict of interests between northern and southern States, and/or between larger and smaller States.

### **The United States Constitution and the Terms of the Territory**

In the United States Constitution, Section 3 of Article IV defined Congressional power toward the territory outside of the States. The

clauses constitutionally endorsed the terms of the Northwest Ordinance, and clarified the legal procedure to establish new statehood. Clause 1 of Section 3 is as follows:

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.<sup>25</sup>

It should be pointed out, first of all, that this clause clearly stated that the Congress had the sole authority to add a new State to the Union. At the same time, although the Articles of the Confederation had allowed Canada to participate in the Union at will, and without Congressional approval, this procedure was repealed. In addition, the increase of population was no longer a single basic criteria to start the automatic procedure for gaining statehood in the Northwest Territory. The Congress alone possessed the power to grant statehood, as well as to determine the borders of States.

Second, it should be noted that this clause was not simply following the terms of the Northwest Ordinance. As seen in later constitutional controversies over territorial expansion in the 19th and 20th centuries, this clause was ambiguous, and open to interpretation. Since it did not specify any particular territory – i.e. that of the western lands – new States could be created anywhere in the world.

Third, the discussion at the convention was mainly focused not on the creation of new States, but on Congressional power over the division and junction of States. James Madison of Virginia, one of the cardinal drafters of the Constitution, looked back at the discussion in January 1788.

The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precau-



tion against a junction of States without their consent.<sup>26</sup>

Madison's comment shows that along with the discussion of constitutional procedure for territorial expansion, the 13 original States engaged in tense debate on the meaning and status of States themselves in relation to the Federal government. In other words, the establishment of new statehood was not simply an external territorial issue beyond the boundary of the 13 original States. The process to build up a new State by the division or merge of existing State(s) by the Congress was vital issue for the State's autonomy and fundamental rights. The critical question posed in the debate was to what extent, the Federal government could control over States in the United States. The rule for the expansion of territory for the erection of new States could have defined the domestic configuration of power relations among States. The application of domestic rule for external issues, and vice versa became the guiding principle for American Constitutionalism.<sup>27</sup>

Clause 2 of Section 3 in Article IV defined the Congressional control over the United States' territory other than the States.

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.<sup>28</sup>

This clause was taken from the articles on the Congressional power over sales of the land in the Land Ordinance of 1775 and on Congressional control over territory in the Northwest Ordinance of 1787. It is important to note that the Constitution reconfirmed an unlimited power of the Congress over "the Territory or other Property," and also the limited rights of residents of the Territory even under the United States jurisdiction. While Territorial residents could not send their delegates to the Congress with the right to vote, the Congress possessed legislative power over lands within the Territory, as well as power over land sales,

without the consent of residents. The people in the Territory remained unequal under the United States Constitution.

Clauses 1 and 2 of Article IV, Section 3 are the only Constitutional terms regarding the United States territory other than States. No Constitutional clauses existed on the conditions and procedure to place territories under Federal jurisdiction. In addition, the Tenth Amendment of the Constitution, which came into effect on December 15, 1791, restricted power within the Constitutional terms.

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.<sup>29</sup>

This article is an expression of the American fear and hatred against tyranny, which can be seen as one of the sources of the founding ideology of the United States from even before the War of Independence. This straitjacket imposed on the Federal government's exercise of power caused constitutional controversy when it came to territorial expansion. By the specific terms in the Constitution, the power of the government to acquire new territories was not clearly defined. Under the provisions of the Tenth Amendment, the government had to show that territorial expansion was conducted by the enumerated power. Moreover, in the absence of an interpretation that held that the Constitution could be applied to external American territories just as it was within the States, the Federal government could not exercise its power over them. Thus, American expansionism was always embroiled in constitutional problems from the 19th to the early 20th centuries.

### **The Louisiana Purchase**

After the United States Constitution came into effect, it was the Louisiana Purchase that first provoked a major constitutional controversy in connection with territorial expansion.<sup>30</sup> This was a vital item on the international and domestic agenda for the Thomas Jefferson ad-

ministration. When Napoleon Bonaparte of France faced confrontation by Britain along with an uprising in Haiti, and realized that he was unable to defend Louisiana against future British intervention from Canada, President Jefferson sent Robert R. Livingston to Paris in 1801 to sound out the possibility of purchasing New Orleans, which was the key port for the traffic in agricultural products on the Mississippi River. This initial attempt failed, however.

In 1803, President Jefferson again dispatched James Monroe and Livingston to Paris to negotiate the purchase of the land. As he had decided not to maintain French interests in North America any longer, Napoleon offered for sale a territory much larger than the United States delegates expected. By doing this, he intended to defuse a potential conflict with the United States, and to gain \$15 million to cover military expenses. The Louisiana Territory that was thereby acquired encompassed lands that include the current State of Louisiana as well as parts of the States of Montana, Wyoming and North Dakota. The purchase doubled the territory of the United States. The acquired land comprises 23.3% of the territory of the current continental United States.<sup>31</sup>

While trying to maintain a rigorous interpretation of the Constitution, Thomas Jefferson worked hard to effect the purchase of Louisiana against the Federalist opposition, which argued that the purchase was unconstitutional. The Federalist Party attached the purchase as “over-extending congressional and presidential powers, and as a violation of the original compact.”<sup>32</sup> Still, beneath the surface, Jefferson himself questioned the constitutionality of the Purchase. After signing the Louisiana Purchase Treaty on April 30, 1803 and making it public on July 4, 1803, he personally sent letters discussing the constitutional problem raised by the Purchase. He, wrote, for example, to John Dickinson, a drafter of the Articles of the Confederation, that,

The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this.<sup>33</sup>

To Wilson Cary Nicholas, Senator of Virginia, Jefferson's doubt about the constitutionality of the purchase was clearly expressed.

I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction.<sup>34</sup>

To Jefferson, the constitution was an apparatus to prevent the emergence of tyranny. It was rational of him, therefore, to seek to maintain the constitution's primary function by using an amendment to add new States to the Union, rather than risking the Constitution's integrity by stretches of interpretation.

One of the drafters of the constitution, Gouverneur Morris, wrote a letter to Livingston, a member of the purchase delegation, on the constitutional interpretation of the admission of new States.

...whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion they cannot.<sup>35</sup>

Here an original constitutional drafter also took the position, similar to Jefferson's, that the constitution had not defined Congressional rights to admit new States, where the territories were not under the jurisdiction of the United States when the Constitution was issued. This interpretation was shared by the Attorney General as well as the majority of United States Senators and Congressmen.<sup>36</sup>

Nevertheless, those who took this interpretation did not necessarily oppose the admission of new States. In fact, Jefferson and Morris had promoted the idea of purchasing Louisiana. To avoid constitutional controversy on the establishment of new statehood, they insisted on taking preventive measures in advance. Nevertheless, Jefferson's letter to Nicholas showed that he made a political compromise at the expense

of legal consistency.

If, however, our friends shall think differently, certainly I shall acquiesce with satisfaction: confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effect.<sup>37</sup>

To the president, his priority was not maintaining rigid constitutional application toward the conduct of the Federal government, but rather achieving a political goal by compromising over his belief in constitutional doctrine.

In addition, Article 3 of the Louisiana Purchase Treaty made the constitutional problem more complex.

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 these 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.<sup>38</sup>

Although this Article of the Treaty determined the domestic policy toward the territory, the Constitution did not define who or which federal apparatus had the power to grant the same rights to residents in the Louisiana Territory, as possessed people in the States. Indeed this article had the potential to restrict the Congressional option regarding its enumerated power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” If this was found to be constitutional, then the President and the Senate could exercise *de facto* power through the conclusion of an international treaty to shape domestic policies without Congressional sanctions.

President Jefferson restrained himself strictly against abuse presi-

dential power to conclude international treaties.<sup>39</sup> He thought that treaty power should be restricted explicitly within international affairs. It was unconstitutional for him to extend the treaty power to deter federal regulations, or to make treaties function as if they were federal laws.

Article 3 of the Louisiana Purchase Treaty did not, however, guarantee the statehood of the newly acquired Louisiana Territory. Moreover, there was a precedent in that after the United States Constitution took effect, the Northwest Ordinance was applied to the territories ceded from the States of North Carolina and Georgia to the Union in respectively 1790 and 1798, which granted residents of those territories “the enjoyment of all these rights, advantages and immunities of citizens of the United States.” In these senses, the treaty was not totally unconstitutional.

In the case of the Louisiana Purchase, it was necessary that the expense for the purchase should be approved by the Congress, as well as that the Louisiana Purchase Treaty be ratified by the United States Senate. A group of Congressmen, mainly Federalists, employed the flaws of constitutionality to oppose the purchase, because of their apprehensions that it would produce change in the power relations within the United States.

Even though there was intense opposition by Federalists within the Congress, President Jefferson requested the approval of the Louisiana Purchase. The Senate ratified the Treaty on October 20, 1803 by a vote of 24 to 7.<sup>40</sup> The House approved the expense of the purchase on October 29, 1803, by a vote of 85 to 7, and the Senate did also on November 2. The treaty came into effect on November 10, when it was signed by President Jefferson.<sup>41</sup>

Although Jefferson initially planned one, no amendment to the United Constitution was made concerning the addition of new States. The Louisiana Purchase was effected without any clarification of the gray zone of constitutionality, due to the demand for development of the West and for the expansion of territory. Historian Anders Stephanson sees that this procedure became the precedent as “the preferred and

morally correct American way of expansion.” He also points out that “Even when adding territory through war, the United States would often insist on paying something.”<sup>42</sup>

Jefferson himself later changed his constitutional interpretation. His letter to President Madison in 1809 exemplified this.

I am persuaded no Constitution was ever before so well calculated as ours for extensive empire and self-government.<sup>43</sup>

Jefferson is still regarded as a figure who rigorously interpreted and implemented the United Constitution when it came to presidential and congressional powers. Yet he shifted his position on the enumerated rights of territorial expansion, by accepting the procedure of the Louisiana Purchase as constitutional, while due to the doubt about its constitutionality, his initial idea of the necessity of the constitutional revision for the purchase was totally faded out 5 years later. He rather indulged in the success of American territorial expansion by revising his own interpretation on the United States Constitution.

## **Conclusion**

The change in Jefferson’s interpretation did not mean that constitutional problems regarding the territorial expansion of the United States were totally resolved. Through the 19th century, the Congress and Supreme Court were constantly asked to make judgments and take legislative measures to certify the constitutionality of American territorial expansion. The questions posed in the constitutional controversies were the same as ones surfaced in the late 18<sup>th</sup> and early 19<sup>th</sup> century. In other words, since the period covered in this article, American expansionism and colonialism had already been developing.

Fundamental rifts in the founding ideology, between universalism and domestic federalism, as seen in the two documents, the Declaration of Independence and the Constitution of the United States, surfaced when expansion became an item on the political agenda. The

proponents of expansion—who were a majority in the Congress from the time of its inauguration—used the excuse of “national” necessity to pay less attention to the constitutionality of expanding the territory of the Union.

This could be possible, as Jefferson’s latter interpretation on the constitutional basis of the American empire signified, because the justification of American expansionism and colonialism were built into the United States Constitution. Nevertheless, constitutional controversies over territorial expansion continued through the 19th century, and this was the process by which the United States of America gave more emphasis to domestic federalism than to universalism.<sup>44</sup> Jefferson also wrote in his letter to President Madison, “we should have such an empire for liberty as she [the American Confederacy] has never surveyed since the creation.”<sup>45</sup> While facing the ideological conflict between the universal and the domestic, the concept of “empire for liberty” itself has been the self-justification for its expansionism and colonialism.

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- 1 *Documents Illustrative of the Formation of the Union of the American States*, Selected, arranged, and indexed by Charles C. Tansill, (Washington, D.C. : U.S. Govt. Print. Office, 1927), p22.
  - 2 *ibid.*, p989.
  - 3 David C. Hendrickson, *Peace Pact : the lost world of the American founding*. (Lawrence: University Press of Kansas, 2003).
  - 4 “The Albany Plan of Union,” in *The Paper of Benjamin Franklin*, Vol. 5, (new Heaven, Yale University Press, 1962), p378-92.
  - 5 Arthur Bestor, “Constitutionalism and the settlement of the West: The Attainment of Consensus, 1754-1784” in Bloom JP. *The American Territorial System* (Athens: Ohio University Press, 1973) , p15.
  - 6 “The Articles of Confederation and Perpetual Union” ratified finally by the State of Maryland on March 1, 1781.
  - 7 The text of the first draft of Articles of Confederation and Perpetual Union appears in Library of Congress, *Journals of Continental Congress 1774-1789*[Hereafter, JCC], Vol. V (Washington D.C.: Government Printing Office, 1906) p546-p555.
  - 8 *Documents Illustrative of the Formation of the Union of the American States*, p35.
  - 9 JCC, (Washington D.C.: U.S. Government Printing Office, 1910) Vol. XVIII, p915-p916.
  - 10 “Printed Resolution on Western Territory Government: with Notation by Thomas Jefferson” in *The Thomas Jefferson Paper, Series 1, General Correspondence, 1651-1827*, (The Library of Congress). Thomas Jefferson was at the time, Chairperson of “the COMMITTEE appointed to prepare a PLAN for the temporary Government of the WESTERN TERRITORY.”



- 11 *JCC Vol. XXVI 1784*, pp274-279.
- 12 See so-called Jefferson-Hartley Map, in, for example, Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Heaven: Yale University Press, 2009), p312. Peter S. Onuf, *Statehood and Union : A History of the Northwest Ordinance*, *Midwestern History and Culture* (Bloomington: Indiana University Press, 1987), p46.
- 13 The procedure for a new state, see, Robert F. Berkhofer, Jr. "Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System," in the *William and Mary Quarterly*, 3rd Ser., Vol. 29, No. 2. (April, 1972) Pp231-262.
- 14 See, Gary Lawson and Guy Seidman, *The Constitution of Empire : Territorial Expansion and American Legal History* (New Haven: Yale University Press, 2004). Earl M. Maltz, *Dred Scott and the Politics of Slavery* (Lawrence, Kansas: University Press of Kansas, 2007).
- 15 Bestor, "Constitutionalism and the settlement of the West", p31-p32.
- 16 For details of the legislative procedure, see Onuf, *Statehood and Union*, p1-p66. Especially, on the Ohio Company, p42-p43, and p58-p59.
- 17 Regarding the legal and historical discussion of the Northwestern Ordinance article by article, see Robert M. Taylor, *The Northwest Ordinance, 1787 : A Bicentennial Handbook* (Indianapolis: Indiana Historical Society, 1987), P31-p78.
- 18 In fact, as the establishment of the State of Ohio was prepared, the Congress divided in 1800 the Northwest Territory in two areas, the Indiana Territory was created under the new governor William Henry Harrison. In order to distinguished two kind of territories, an organized incorporated territory with self-autonomy, is especially called Territory (starting with capital letter T), while an unorganized and/or unincorporated territory is simply written as territory (starting with lower case t).
- 19 The fact that the Congress decided to create the State of Ohio, the population was not reached 60000. According to the census in 1800, the population was 45365. Onuf, *Statehood and Union*, p76-p77.
- 20 Taylor, *The Northwest Ordinance, 1787*, p73.
- 21 This convention was later well known as the Constitutional Convention. The convention was not intended to draft the U.S. Constitution at the beginning. Details on the Convention, see Hendrickson, *Peace Pact*. p211-p212.
- 22 Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire*, *Landmark Law Cases & American Society* (Lawrence, KS: University Press of Kansas, 2006). p16-p17.
- 23 E.H. Scott ed., *Journal of the Federal Convention Kept by James Madison* (Chicago: Albert Scott & Co., 1893), p346
- 24 *ibid.*, p477.
- 25 *Documents*, p1000.
- 26 James Madison, *Federalist*, No 43, p290-p91, January 23, 1788, cited in *The Founders' Constitution*, Philip B. Kurland, Ralph Lerner eds. (Chicago: The University of Chicago Press, 1987) Vol. 4, p547-p548.
- 27 Later, when the United States colonized the Philippines, the slogan for Democrats' Presidential campaign, "the Constitution follows the flag" clearly represents this notion. Christina Duffy Burnett's *Foreign in a Domestic Sense* (Durham: Duke University Press, 2001), also discussed the constitutional relationship between domestic and foreign affairs from this perspective.
- 28 The same as 25.
- 29 *Documents*, p1067.
- 30 The Louisiana Purchase is one of the most discussed topics in American constitutional

- history. See Lawson and Seidman, *The Constitution of Empire*, and Everett Somerville Brown, *The Constitutional History of the Louisiana Purchase 1803-1812* (Berkeley, CA: University of California Press, 1920) . Sanford Levinson and Bartholomew H. Sparrow, *The Louisiana Purchase and American Expansion, 1803-1898* (Lanham, MD: Rowman & Littlefield Publishers, 2005).
- 31 D.W. Meinig, *The Shaping of America: A Geographical Perspective on 500 Years of History* (New Heaven: Yale University Press, 1993) Vol. 2. Table 1-1.
- 32 Junius P. Rodriguez, *The Louisiana Purchase: A Historical and Geographical Encyclopedia*, (Santa Barbara, CA, USA: ABC-CLIO, 2002), p106.
- 33 Letter from Thomas Jefferson to John Dickinson, Aug. 9, 1803 in *The Writing of Thomas Jefferson VIII*, Paul Leicester Ford ed., (New York: G.P. Putnam's Sons, 1897), P262.
- 34 Letter from Thomas Jefferson to Wilson Cary Nicholas, Sept 7, 1803 in *The Works of Thomas Jefferson Federal Ed. Vol. X*, Paul Leicester Ford ed., (New York: G.P. Putnam's Sons, 1905), p10-p11.
- 35 Letter of Gouverneur Morris to Henry W. Livingston, December 4, 1803, in Jared Sparks, *The Life of Gouverneur Morris with Selections from his Correspondence and Miscellaneous Papers, Vol. 2*, (Boston: Gary and Bowen, 1832), p192.
- 36 See, *The Constitution of Empire*, p93.
- 37 The same as 30.
- 38 Cited from *The Treaties and other International Acts of the United States of America Vol. 2*, (Hunter Miller ed.)(Washington D.C.: Government Printing Office, 1931), p501.
- 39 *The Constitution of Empire*, p37.
- 40 *Journal of the Executive Proceedings of the Senate of the United States of America 8th Congress—October 17, 1803 to March 3, 1805, Vol. 1*, p450.
- 41 *Annals of Congress (House of Representative), 8th Congress, 1st Session*, p547. *Journal of the Senate of the United States, 8th Congress 1st Session, Vol. 3*. p 307. 及び *Annals of Congress, Appendix, 8th Congress 1st Session*, pp1247-1248.
- 42 Anders Stephanson, *Manifest Destiny* (New York: Hill and Wang, 1995), p23.
- 43 Letter from Thomas Jefferson to the President of the United States (James Madison), April 27, 1809 in *The Writings of Thomas Jefferson Vol. XII* (Andrew A. Lipscomb ed.) (Washington D.C.: The Thomas Jefferson Memorial Association, 1903), p277.
- 44 Regarding the constitutional controversy in the 19th century, see Seldon Bacon, "Territory and the Constitution" in *The Yale Law Journal*, Vol. 10, No. 3 (January 1901), p104-105.
- 45 The same as 42.
- \*\* The preliminary form of this article appears as a chapter of my book length report in Japanese, 『日本およびアメリカにおける植民地政策の比較研究』[平成一四年度～平成一八年度科学研究費補助金(基盤研究(c))研究成果報告書].  
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