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The Louisiana Purchase ; The Constitutional Difficulties of the Louisiana Treaty

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THE LOUISIANA PURCHASE: THE CONSTITUTIONAL
DIFFICULTIES OF THE LOUISIANA TREATY

by

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the Requirements for the Degree of
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LIFE

Robert John Shanahan, S.J., was born in Milwaukee, Wisconsin, June 19, 1922.

He was graduated from Messmer High School, Milwaukee, Wisconsin, June, 1940. In September, 1942, he entered the Society of Jesus at Florissant, Missouri, where he spent the next four years. In the fall of 1946, he began his three-year course in Philosophy at West Baden College, and enrolled in Loyola University. He received his degree of Bachelor of Arts from Loyola University, June 1947. He began his graduate studies at Loyola in September, 1947.

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CHAPTER I

INTRODUCTION

The Constitution of the United States, as is well known, was the result of compromises among the states, and it has been ratified by the people only after a long campaign, and in the face of strong opposition. Merely a framework of government, to be elaborated into a working system, had been laid down by the Constitution. The powers of the Federal Government had to be made strong enough to meet the needs of the country as a whole, but could this be done without infringing upon the constitutional rights of the "original partners" to the compact? Could their relative importance in the councils of state be altered without their consent, given by their legislatures or by conventions called for that purpose? The answer to these questions split political thinkers into two parties: the Federalists, the party of broad construction of the Constitution, and the Republicans, advocates of strict construction.

Only fourteen years after the ratification of the Constitution a tremendous new problem was thrust upon the infant government. This was the acquisition of Louisiana, a vast un-

developed, foreign country, equal in size to the entire United States of the day. The Purchase was to have an important effect in the future as a precedent for further acquisitions of territory by purchase. In its own time, however, the Louisiana Purchase occasioned a bitter party strife over the question of constitutional interpretation. Ironically, both parties changed colors. The Federalists denounced the Louisiana Treaty as a drastic case of implied power, while the Republicans were forced to explain their act by a broad construction of the Constitution.

Undoubtedly the purchase of Louisiana was one of the most momentous steps in the history of our country. In its broader aspects, viewed from the present, it insured to the American people the opportunity of westward expansion; it helped in the up-building of a broader national feeling through the ownership of a vast public domain; it occasioned the downfall of the policy of strict construction of the Constitution.¹ In its own time the acquisition, after the establishment of independence and ratification of the Constitution, was hailed as the "greatest political blessing ever conferred on the United States of America."²

1 F. J. Turner, "Significance of the Frontier in American History," American Historical Association, Annual Report, 1893, Washington, 1894, 218.

2 Everett S. Brown, The Constitutional History of the Louisiana Purchase, Berkeley, 1920, 2.

Yet the purchase of Louisiana incidentally raised many constitutional points, the settlement of which has been of the utmost significance in the constitutional history of the United States. In the words of Professor Frederick J. Turner:

When the whole sweep of American History and the present tendencies of our life are taken into view, it would be possible to argue that the doctrines of the Louisiana Purchase were farther-reaching in their effect upon the Constitution than even the measures of Alexander Hamilton or the decisions of John Marshall.³

To this strong statement may be added that of a well-known commentator on the Constitution, who asserts that the purchase of Louisiana from France,

gave such direction to the subsequent thought of the people and led to such marshalling of political forces, that nearly all the leading events of later American History are either traceable to or in some measure shaped or determined by it.⁴

The constitutional problems of the Louisiana Purchase have been admirably discussed in Everett S. Brown's The Constitutional History of the Louisiana Purchase. This book is concerned mainly with the purchase as a precedent for future acquisitions of territory by the United States and with the problems connected with the government of acquired territory. Our thesis will center its attention on the constitutional problems arising from the

³ F. J. Turner, "Significance of the Louisiana Purchase," Review of Reviews, New York, XXVII, 1903, 584.

⁴ Thomas M. Cooley, "The Acquisition of Louisiana," Indiana Historical Society, Publications, Indianapolis, II, no. 3, 1887, 65.

acquisition of foreign territory, the political status of such territory, the extent of the treaty-making power of the United States government, and the Louisiana Treaty itself. Inconsistencies in the principles by which the Republican Party assumed control of the country and those by which they sought to justify their purchase of Louisiana will be shown. Arguments for this comparison will be obtained from the writings of the statesmen concerned and the debates on the Louisiana Purchase in Congress.

To understand our problem better we must consider more fully the events that lead to the purchase of this territory. Louisiana was a thoroughly French country named after Louis XIV. By the Treaty of Paris, 1763, Louisiana was ceded to Spain. The Spanish government acquired Louisiana to exclude the United States from the Gulf of Mexico. To this same end, Spain, at the end of the American Revolutionary War, also acquired the territory of Florida.

In 1797, Carnot and Barthelemy, French ministers, induced the Directory to offer the King of Spain a bribe for Louisiana. They proposed to take three land grants obtained from the Pope, join them with the Duchy of Parma, and make a principality for the son of the Duke of Parma, who had married the daughter of Charles, King of Spain; but Charles refused the offer at this time because of his sincere attachment to the Church and his unwillingness to share in the spoils of the Church.

Though this appeal failed, France did not, on that account, give up her desire to obtain Louisiana. It was not until Napoleon Bonaparte took control of France that things began to happen. In 1801, six weeks after the battle of Marengo, Napoleon ordered Talleyrand to send a minister to Spain with powers to conclude a treaty by which Spain should cede Louisiana to France, in return for an equivalent aggrandizement of the Duchy of Parma. The minister returned with complete success.⁵

In the history of the United States hardly any document, domestic or foreign, has greater interest than this treaty between France and Spain, for from it the United States must derive any legal title to the vast region west of the Mississippi. This is the famous treaty of San Ildefonso, October 1, 1800.⁶ Subsequent treaties concerning the transfer of Louisiana to France were made merely to clarify the issues in the treaty of San Ildefonso which had not been attended to in the first treaty.

Although the cession of Louisiana to France had occurred practically six months before Jefferson came into office, the secret was so well kept that Jefferson hardly suspected it. He began his administration by anticipating a long period of friendly relations with Spain and France. In sending instructions

⁵ Henry Adams, History of the United States During the Administration of Thomas Jefferson, 4th, New York, 1930, I, 363.

⁶ Ibid., 367.

to Claiborne as governor of the Mississippi Territory, President Jefferson wrote: "With respect to Spain, our disposition is sincerely amicable, and even affectionate. We consider her possessions of adjacent country as most favorable to our interests, and should see with extreme pain any other nation substituted for them."⁷

However, by June, 1801, rumors of the cession of Louisiana had taken such definite shape that, on the ninth of June, Secretary Madison instructed the ministers of London, Paris, and Madrid on the subject.⁸ No protest was officially voiced against a scheme so hostile to the interests of the Union, for by the Treaty of Spain Louisiana passed from the control of the peaceful King of Spain into the hands of the powerful Napoleon. On the contrary, Livingston was told, if possible, to obtain West Florida from France, or by means of French influence, "such proof on the part of France of good-will toward the United States as would contribute to reconcile the latter" to have Napoleon in New Orleans.⁹

By the spring of 1802, Jefferson became aware of the

7 Thomas Jefferson, Writings of Thomas Jefferson, edited with Introduction by Paul L. Ford, New York, 1892-1899, VIII, 71.

8 State Papers and Correspondence Bearing Upon the Louisiana Purchase, edited by L. Gaines, Washington, 1903, 5.

9 Ibid., 9.

danger. He saw what was implied in the French expedition against Toussaint l'Ouverture. The attitude of General Leclerc toward the American shippers in San Domingo opened the President's eyes to the policy of the French. Jefferson took immediate action. To a French gentleman, Du Pont de Nemours, who happened to be in the United States and was returning to France, Jefferson turned as a medium of unofficial communication with the First Consul. He entrusted to Du Pont a letter addressed to Livingston on the Louisiana affair, which he requested him to read, and, after reading to seal.

I wish you to be possessed of the subject because you may be able to impress on the Government of France the inevitable consequence of their taking possession of Louisiana; and though, as I here mention, the cession of New Orleans and the Floridas to us would be a palliation, yet I believe it would be no more, and that this measure will cost France, and perhaps not very long hence, a war which will annihilate her on the ocean, and place that element under the despotism of two nations which I am not reconciled to the more because my own would be one of them.¹⁰

This idea was still more strongly expressed in the enclosed letter to Livingston, which Du Pont was to read and communicate to Bonaparte.

The day that France takes possession of New Orleans fixes the sentence which is to restrain her forever within her low water mark. It seals the union of two nations, who in conjunction can maintain exclusive possession of the oceans. From that moment we must marry ourselves to the British Fleet and nation. ... Will not the amalgama-

¹⁰ Thomas Jefferson, The Correspondence of Jefferson and Du Pont De Nemours, edited with Introduction by Gilbert Chinard, Baltimore, 1931, 46-47.

tion of a young and thriving nation contribute to that enemy the health and force which are at present so evidently on the decline? And will a few years' possession of New Orleans add equally to the strength of France?¹¹

Du Pont was to impress on the First Consul the idea that if he should occupy Louisiana, the United States would wait a few years, until the next war between France and England, and would then make common cause with England. The United States would not be satisfied with mere promises of the good will of the French nation. France must relinquish its hold on the west bank of the Mississippi. To make this clear was the object of Du Pont's unofficial mission. As Jefferson said, in the letter already quoted, "If you can be the means of informing the wisdom of Bonaparte of all its consequences, you have deserved well of both countries."¹²

Jefferson was building his hopes on diplomacy and the conduct of the French at San Domingo. The President felt that the occupation of Louisiana could not take place until peace prevailed on the island of San Domingo. The soundness of this policy was brought out on November 1, 1802, when the news of the death of General Leclerc reached America. The death of this General put an end to Napoleon's schemes for a new French colonial empire.

However, the news of the General's death was overshadow-

11 Jefferson, Jefferson Writings, VIII, 145.

12 Ibid.

owed by more important information that reached Washington on the same day. The people of the United States expected day by day to hear of some sudden attack, from which as yet only the dexterity of Godoy, the Spanish minister, and the disasters of Leclerc, had saved them. Although they could see only indistinctly the meaning of what had taken place, they knew where to look for the coming stroke, and in such a state of mind might easily exaggerate its importance. A few days before Congress met, the Western post brought a dispatch from Governor Claiborne at Natchez announcing that the Spanish Intendant, Morales, had forbidden the Americans to deposit their merchandise at New Orleans, as they had a right to do under the treaty of 1795.¹³

The rumor that Spain had closed the Mississippi roused varied sensations as it spread eastward. Tennessee and Kentucky became eager for war. They knew Morales' act was a foretaste of what they were to expect from France; and they might well ask themselves how many lives it would cost to dislodge a French army once established on the Lower Mississippi. It seemed to many that the existence of the Union would be risked by allowing Napoleon to make his position at New Orleans impregnable.

The New England Federalists knew that President Jefferson must either adopt their own policy and make war on France, or risk a dissolution of the Union. They had hardly dared to hope

13 State Papers, 5.

that democracy would so soon meet what might prove to be its crisis. They too cried for war, and cared little whether their outcry produced or prevented hostilities, for the horns of the dilemma were equally fatal to Jefferson. All eyes were on the President, and people watched eagerly for some sign of his intentions.

After the letters sent by Du Pont, neither the President nor the Secretary of State did very much. Diplomacy was slow in 1800. In October, after the closure of the port, the President again wrote to Livingston.

We shall take our distance between the two rival nations, as, remaining disengaged till necessity compels us, we may haul finally to the enemy of that which shall make it necessary. We see all the disadvantageous consequences of taking a side, and shall be forced into it only by a more disagreeable alternative; in which event we must countervail the disadvantages by measures which will give us splendor and power, but not as much happiness as our present system. ... No matter at present existing between them and us is important enough to risk a breach of peace, -peace being indeed the most important of all things to us, except the preserving an erect and independent attitude.¹⁴

Now peace was all important despite what Jefferson had written to Livingston a few months before.

There the matter rested until December 6, when Congress met. Even at so exciting a moment, senators were slow to arrive at Washington; it was a week before a quorum could be formed. On December 15, the Annual Message was read. The President discussed

¹⁴ Jefferson, Jefferson Writings, VIII, 173.

everything except the danger which engrossed men's minds. He talked of peace and friendship, of law and order, and religion, of differential duties, distressed seamen, the blockade of Tripoli, Georgia lands, Indian treaties, and increase in revenue, and many other things not related to the Louisiana Problem. At the end of the message, he merely alluded to the cession of Louisiana to France.

The cession of the Spanish province of Louisiana to France which took place in the course of the late war, will, if carried into effect, make a change in the aspect of our foreign relations which will doubtless have a just weight in any deliberations of the legislature connected with the subject.¹⁵

No mention was made of the closure of the Mississippi.

Nothing could more disconcert the war party than this manner of ignoring their existence. Jefferson afterwards explained that his hope was to gain time; but he could not have belittled his Federalist enemies more effectually than by thus telling them that a French army at New Orleans would "make a change in the aspect of our foreign relations." Two days after the Message was read, December 17, John Randolph, the administration leader in the House, moved for the papers relative to the violated right of deposit.

Five days passed before Jefferson answered the call of

¹⁵ A Compilation of the Messages and Papers of the Presidents, edited by James D. Richardson, New York, 1897, II, 331.

Jefferson's plan according to a letter written to Monroe at this time. The agitation was great, said the President, however natural and grounded on honest motives it might be. In Jefferson's opinion, the Federalists wanted to push the Government into war in order to derange the country's finances or to gain political control of the West. To avert this, remonstrances and memorials were circulated in the West to quiet the people's minds. But the desired effect was not produced. "The measures we have been pursuing, being invisible, do not satisfy their minds. Something sensible, therefore, has become necessary."¹⁹

The "sensible" measure to be adopted was the appointment of a minister extraordinary to aid Livingston in buying New Orleans and the Floridas. Public opinion, the press, and Congress had made the Government feel its obligation to take measures most likely not only "to re-establish our present rights, but to promote arrangements by which they may be enlarged and more effectually secured."²⁰

On January 11, 1803, the House met again in secret session. General Smith of Maryland moved to appropriate two million dollars for the expenses of foreign diplomacy. On the same day the President sent to the Senate the name of James Monroe as minister extraordinary to France and Spain. The next

19. State Papers 68.

20 Ibid., 68.

day a committee reported in favor of appropriating money with a view to the purchase of New Orleans and West Florida.²¹

In a letter to Monroe, Jefferson explained the reasons which made his course necessary:

The measure has already silenced the Federalists here. Congress will no longer be agitated by them; and the country will become calm as fast as the information extends over it. All eyes, all hopes, are now fixed on you; and were you to decline, the chagrin would be universal, and would shake under your feet the high ground on which you stand with the public. If we cannot, by a purchase of the country, insure to ourselves a course of perpetual peace and friendship with all nations, then, as war cannot be distant, it behooves us immediately to be preparing for that course, without hastening it; and it may be necessary, on your failure on the Continent, to cross the Channel. We shall get entangled in European politics; and figuring more, be much less happy and prosperous.²²

In the spring of 1803, Monroe received his instructions and prepared to sail for France. The instructions provided for three courses of action. Should France be willing to sell New Orleans and the Floridas, the President would bid higher rather than lose the opportunity. Should France refuse to cede any territory whatever, even the site of a town, the two commissioners were to content themselves with securing the right of deposit, with such improvements as they could obtain. Should Bonaparte deny the right of deposit also, the commissioners were to be guided by instructions specially adapted to the case. For New

²¹ Annals, X, 371-374.

²² State Papers, 114.

Orleans and West Florida, Monroe and Livingston were to offer any sum within ten million dollars, commercial privileges for ten years in the ceded ports, incorporation of the inhabitants on an equal footing with citizens of the Union without unnecessary delay, and, if absolutely necessary, a guarantee of the west bank of the Mississippi.²³

There seems to be an inconsistency in these instructions when they are compared with the letter of Jefferson to Du Pont de Nemours. Actually there is not, if we remember the conditions Jefferson put down in the letter. In the first place the President said that friendship between France and the United States would continue "if our rights of navigation and deposit are respected." The war alluded to was a contingent factor, namely, if and when France went to war with England, America would be on the side of the English. Jefferson meant that there should be no war.²⁴ While waiting to hear the results of Monroe's mission the President expressed his true feelings to an English correspondent:

We see ... with great concern the position in which Great Britain is placed and should be sincerely afflicted were any disaster to deprive mankind of the benefit of such a vulwark against the torrent which has for some time been bearing down all before it. But her power and prowess by sea seem to render everything safe in the end. Peace is

23 Ibid., 122-136.

24 Adams, History of Jefferson, I, 445.

our passion, and wrongs might drive us from it. We prefer trying every other just principle, right and safety before we recur to war.²⁵

In order to understand the situation in Europe at the time that Monroe arrived it will be necessary to dwell for a moment on some occurrences that drastically changed French policy and paved the way for Livingston to purchase Louisiana. The death of Leclerc was the most decisive factor that brought about the change in the mind of Napoleon. Without San Domingo the French colonial system could not function and by this time it was folly to think of continuing the war in that island. However, to abandon it would be to admit failure, an extremely distasteful thing to Napoleon. His problem, therefore, was to abandon the island without seeming to do so. By January, Napoleon's policy of abandoning the colonial system was decided. On January 30, the Moniter produced Sebastiani's famous "Report on the Military Condition of the East," -- a publication which could have no other object than to alarm England.²⁶

Livingston was quick to note these changes, but could get nowhere in France. By this time England had begun to arm. Within a few days the alarm was spread throughout Europe and the affairs of San Domingo were forgotten. Monroe arrived in sight

25 Ibid., 446.

26 Ibid., II, 17.

of the French coast on April 7, 1803. While Monroe was still at sea, Bonaparte, without reference to the American minister or to his mission, spoke to Talleyrand in regard to ceding Louisiana to the United States.

Easter Sunday, April 10, 1803, Bonaparte called his two ministers, Talleyrand and Barbe' Marbois to tell them of his intentions of selling Louisiana to the United States. His reason for this action was the fear that England would seize Louisiana as soon as the war begun, and since France could not prevent that, he felt that Louisiana would be better off in the hands of America. After a short discussion among the ministers, Napoleon ended the matter by saying:

Irresolution and deliberation are no longer in season; I renounce Louisiana. It is not only New Orleans that I cede, it is the whole colony without reserve. ... I renounce it with the greatest regret; to attempt obstinately to hold it would be folly. I direct you to negotiate this very day with Mr. Livingston. ²⁷

In a few hours Talleyrand startled Livingston with the offer. ²⁸ After a few weeks haggling over the price, and over other points the treaty was signed and Louisiana was sold to the United States for fifteen million dollars. The annexation of

²⁷ Barbe' Marbois, The History of Louisiana, Particularly of the Cession of that Colony to the United States, translated by an American citizen, Philadelphia, 1830, 263.

²⁸ State Papers, 140-141.

Louisiana was an event so portentous as to defy evaluation; it gave a new face to politics, and ranked in historical importance next to the Declaration of Independence and the adoption of the Constitution; diplomatically it was unparalleled, because it cost almost nothing.

CHAPTER II

REPUBLICAN OPINION OF THE LOUISIANA PURCHASE

The unforeseen purchase of Louisiana from the French became almost immediately a problem for the Administration. The American response to the acquisition was generally favorable, but the President and Congress were confronted with a basic question of constitutionality. Republicans professed adherence to the doctrine of strict construction, according to which federal authority was definitely limited to those powers specifically mentioned in the Constitution. Yet the Constitution said nothing of any right to acquire territory. If so sweeping a power as the right to acquire territory was considered to be implied merely the whole doctrine of strict construction absurd and clearly confirm the Hamiltonian theory of implied powers. To admit a given federal power as a matter of convenience would go far towards impairing the validity of the Tenth Amendment. The doctrine that the federal government was one of enumerated powers would then be replaced by the theory that federal authority could encompass any matter of sufficient importance to the national welfare. The

whole Jeffersonian idea of the Union would thus be subtly altered, or even destroyed.

What were the reactions of the Administration and the Republican Party to the Louisiana Purchase? Did they realize what a strain it would put on their doctrine of strict construction? How did they prepare to handle the situation? What were their plans previous to the Congressional hearing on the treaty? It will be well to answer these questions before our consideration of the actual debates in the House of Congress.

The news of the purchase of the whole of Louisiana must have caused Thomas Jefferson some surprise despite the fact that he had previously contemplated the extension of America and American control westward. As early as 1786 the report of discontent in Kentucky and the threat that that region might withdraw itself from the Confederacy, caused him to remark that this would be a "calamitous event." It was his opinion that the Confederacy "must be viewed as the nest from which all America, North and South, is to be peopled." The land of Louisiana while in the possession of Spain, he continued, was in good hands and care must be taken not to press too soon on the Spaniards. The only danger lay in the fact that the Spaniards might be too feeble to hold the territory until the Americans were ready to take it piece by piece. When he wrote, the navigation of the Mississippi, but not the actual possession of the Mississippi, was regarded as

absolutely necessary.¹

Later, in 1791, in discussion the invitation of Governor Quesada to settlers to come into Florida, Jefferson remarked that he wished a hundred thousand Americans would go. "It will be the means of delivering to us peaceably, what may otherwise cost us a war." Meanwhile America would complain of "this seduction of our inhabitants just enough to make them (the Spaniards) believe we think it a very wise policy of them, and confirm them in it."²

The constitutionality of such acquisitions does not seem to have perturbed Mr. Jefferson. It was not until the decision was made in January, 1803, to send Monroe to France to negotiate for the purchase of New Orleans and Florida, that the constitutional difficulty of such a purchase was raised. Attorney General Levi Lincoln, who foresaw the opposition that would be raised against the intended purchase wished to frame the treaty or convention in such language as to make France appear not as adding new territory to the United States, but as extending already existing territory by an alteration of its boundaries. His ideas on this point were set forth in a letter written to the President.

1 Jefferson, Jefferson Writings, II, 188-189.

2 Ibid., V, 316.

Lincoln's plan was to have France agree to extend the boundaries of the Mississippi Territory, and of the State of Georgia so that they would include all the territory that was to be purchased. Thus he designed not only to increase the area of Mississippi and Georgia, but also to bring the inhabitants of Louisiana under the authority of the United States and of the authority of the respective states. This plan of having Louisiana come under the laws of these enlarged states would sidestep the need of amending the Constitution for the purpose of including Louisiana in the Union, and, consequently, the chances for the ratification of the treaty would be so much the better.

Lincoln's opinion was formed on the assumption that the general government, when founded, was predicated of the then existing United States, and such as could grow out of them, and them only. Thus any independent purchase would be beyond the Constitution since the Constitution was limited to the original states of the Union and those only that could be formed out of them. Such a purchase would also be an enlargement of the power of the Executive contrary to the principles of strict construction advocated by the Republicans. ³

When Jefferson sent this letter of Lincoln to Gallatin, the Secretary of the Treasury replied that the third section of the fourth article of the Constitution, which stated that the

³ Adams, History of Jefferson, II. 78-79.

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, "had been substituted for the eleventh Article of Confederation which provided for the admittance of other colonies into the Union. The Articles of Confederation gave this power of admitting colonies to the nine states, and, Gallatin reasoned, since all powers given to the nine states by the Articles were by the Constitution transferred to Congress, "There was no reason to believe, ... that it was not the true intention of that Constitution to give the powers generally and without restriction."

Gallatin then disposed of Mr. Lincoln's contention that the Government was constitutionally limited to the "then" existing states, by pointing out that this construction would have precluded the United States from governing any territory acquired, since the adoption of the Constitution, by cession of one of the states, "which, however, had been done in the case of the cession of North Carolina and Georgia."

In summing up his views, Mr. Gallatin declared:

- 1) that the United States as a nation have an inherent right to acquire territory.
- 2) that whenever that acquisition is by treaty, the same constituted authorities in whom the treaty-making power is vested have a constitutional right to sanction the acquisition.
- 3) that whenever the territory has been acquired, Congress has the power either of admitting it into the Union as a

new state, or of annexing it to a state with the consent of that state, or of making regulations for the government of such territory. ⁴

After this clear-cut advocacy of broad construction of the Constitution, Gallatin still confessed that he was not perfectly satisfied and that the matter had yet to be "thoroughly examined; and the above observations must be considered hasty and incomplete." ⁵

Here we see that Gallatin not only advanced Federalist doctrine, but used also what the Virginians always denounced as a Federalist play on words. "The United States as a nation" had an inherent right to do whatever the states in union cared to do; but the Republicans with Jefferson, Madison, and Gallatin at their head, had again and again maintained that the United States government had the inherent right to do no act whatever, but was creature of the states in union; and its acts, if not resulting from an expressly granted power, were no acts at all, but void, and not to be obeyed or regarded by the states. No foreigner, not even Gallatin, could master the theory of Virginia and New England, or distinguish between the nation of states in union which granted certain powers, and the creature at Washington to which these powers were granted, and which might be strengthened,

⁴ A. Gallatin, Writings of Gallatin, edited with an Introduction by Henry Adams, Philadelphia, 1879, I, 111-114.

⁵ Ibid., 115.

weakened, or abolished without necessarily affecting the nation. Gallatin's advice was not followed. The negotiations for New Orleans were begun on the understanding that the purchase, if made, would be an act which would need express sanction from the states in the form of an amendment of the Constitution.

Gallatin's argument had weight with Jefferson and the President felt that he was correct in stating there was no constitutional obstacle to the acquisition of territory. The question, however, as to whether the territory could be taken into the Union by the Constitution "as it now stands, will become a matter of expediency. I think it will be safer not to agree to the enlargement of the Union except by an amendment of the Constitution." ⁶

From this and other statements it is apparent that President Jefferson knew from the beginning that the Louisiana Purchase was an extra-constitutional measure. The treaty of cession arrived at Washington July 14, 1803, and the short period allowed for ratification --by October 30-- made it necessary for Congress to convene earlier than usual. The date set was October 17. At this session Jefferson felt it would be necessary that Congress be supplied with all available information respecting the treaty since Congress would be obliged to ask the people for an amendment of the Constitution "authorizing their receiving the

⁶ Jefferson, Writings of Jefferson, VIII, 241.

the province into the Union, and providing for its government; and the limitations of power given by that amendment, will be unalterable but by the same authority." ⁷

Again, on July 18, the President informed Benjamin Austin, by letter, of the arrival of the treaty and conventions, after a brief statement of their provisions, he added: "They will of course require an amendment of the Constitution adapted to the case which will leave the inhabitants and territory for some time in a situation difficult to be defined, but the acquisition has decided the painful question whether we are to be a peaceable or warring nation." ⁸

Later, on August 9, 1803, Jefferson, in writing to John Dickinson, again stated the need for a constitutional amendment to authorize the acquisition. The difficulty, as Jefferson saw it, was one that would give the party which opposed the administration a "handle." The President felt that the confederation "is certainly confined to the limits established by the revolution," and that the general government "has no powers but such as the constitution has given it; and it has not given the power of holding foreign territory, and still less of incorporating it into the Union." For these measures an amendment of the Constitution seemed necessary. In the meantime, while this was pending, "we

7 Ibid., 254-255.

8 Ibid., 256.

must ratify and pay our money, as we have treated for a thing beyond the Constitution, and rely on the nation to sanction an act done for its great good, without its previous authority." ⁹

As the time for the session of Congress approached, the issues pertaining to the purchase of Louisiana took up more of Jefferson's thoughts. Constitutional difficulties and expediency were in conflict in the President's mind. Of all these worries, he spoke in a letter to Breckinridge written in August. It was the same Breckinridge, who, hardly five years before in the Kentucky Resolutions, had declared that unconstitutional assumption of power was the surrender of the form of government the people had chosen, and that in its place, these assumptions set up a government which derived its powers from its own will. Breckinridge may now have been annoyed to find his principles abandoned by the man who had led him to father them. Nor did Breckinridge think that his leader who had sent him the draft of the Kentucky Resolutions would later find it necessary to send to the same man a draft of the Louisiana Treaty. This same letter of Jefferson to Breckinridge further pointed out the need of laying the treaty before both Houses of Congress, since both had important jurisdiction over such a treaty. Jefferson presumed they would ratify the treaty and pay for it in order to secure the good entailed. He then supposed that "they must appeal to the nation

⁹ Ibid., 262.

for an additional article to the Constitution, approving an act which the nation had not previously authorized." ¹⁰ This was necessary because the Constitution had made no provision for the government to hold foreign territory, and still less for incorporating it into the Union. "The Executive in seizing the fugitive occurrence," continued Jefferson, "which so much advances the good of the country, has done an act beyond the Constitution. But the Executive was not alone in this treaty. The Legislature must also concur "by casting aside them metaphysical subtleties, and risking themselves like faithful servants, [The Legislature] must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves." ¹¹ Though the ratification of the treaty was extra-constitutional, Jefferson believed that the nation would support the Administration without any weakening of the Constitution.

In thus appealing to the nation, Jefferson was veering from his former position of decentralization, for, as Henry Adams points out, "The Constitution, 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

¹⁰ Adams, History of Jefferson, II, 85.

¹¹ Jefferson, Jefferson Writings, VIII, 244.

whenever such an expression was needed." ¹² According to the Virginia theory, espoused by Jefferson, Congress had no right to appeal to the nation for an amendment, except as a nation of states. "The language used by Jefferson was the language of centralization, and would have been rejected by him and his party in 1798 or 1820." ¹³

About this time a letter from Livingston caused Jefferson some concern. The letter stressed the fact that a sudden change in the mind of Napoleon might occur at any time, and that the more quickly the treaty could be arranged the better it would be for America. The President immediately wrote to his friends with whom he had discussed the constitutionality of the purchase and enjoined silence about what he said on the acquisition of Louisiana. His ominous message revealed that "nothing must be said on that subject which may give a pretext for retracting, but that we should so sub silentio what shall be found necessary." ¹⁴

Jefferson then began his preparation for the expected struggle along party lines over the acquisition. He cautioned Breckinridge to impress the necessity of the presence of Western Senators on the first day of the session as every friend of the

12 Adams, History of Jefferson, II, 85.

13 Ibid., 86.

14 Jefferson, Jefferson Writings, VIII, 244-245.

treaty would be needed.¹⁵ To Gallatin he reiterated the need of saying nothing about the constitutional difficulty and of having Congress act on the treaty without talking. Yet, strangely, in this letter, and in another written to the Attorney General, he presented an amendment to the Constitution which he felt would cover the difficulty.¹⁶

Jefferson's idea of an amendment of the Constitution was one which gave general powers, with specific exception. He submitted the substance of such an amendment to Madison.

Louisiana as ceded by France to the U.S., is made a part of the U.S. Its white inhabitants shall be citizens, and stand, as their rights and obligations, on the same footing with other citizens of the U.S. in analogous situations. Save only that as to the portion thereof laying north of the latitude of the mouth of the Arkansas river, no new State shall be established, nor any grants of land made therein, other than to Indians, in exchange for equivalent portions of land occupied by them, until an amendment of the Constitution shall be made.¹⁷

These persistent attempts of Jefferson to maintain personal consistency and that of his party, were discussed at length by the President and his friends. Wilson Cary Nicholas, senator from Virginia, and a prominent supporter of the Virginia Resolutions in 1798, had a long talk with Jefferson, and later wrote a lengthy letter embodying the fruits of his reflections on the

15 Ibid., 245.

16 Ibid., 241-245.

17 Ibid., 243.

power of the United States to acquire territory, and to admit new states into the Union. The letter sounded like one that might have been written by a staunch Federalist in defense of Jay's treaty.

"Upon examination of the Constitution," wrote Nicholas, "I find the power as broad as it well could be made [Art. IV, sec. 3], except that the new states cannot be formed out of the old ones without the consent of the state to be dismembered." Remarking on the present case, Nicholas felt that the exception only proved that the Constitution did not intend to confine Congress's power of admitting new states to what was then the territory of the United States. "Nor do I see," he continued, anything in the Constitution that limits the treaty-making power, except the general limitations of the other powers given to the government, and the evident objects for which the government was instituted." Nicholas held that it was not true that Congress possessed exclusively all the powers enumerated for that body in the Constitution, because if that were so then the United States would be incompetent to make a treaty. This conclusion was based on the premise that it required both the Executive and the Senate to make a treaty, and that other nations would cease making treaties with us if Congress alone possessed this power since subsequent legislatures could repeal the treaty and make laws directly against it. Thus any other construction of the Consti-

tution on this point "would be to transfer the treaty-making powers to Congress, or to deprive the Government of the United States of the capacity of making treaties." However, once he had completed his arguments, Nicholas begged the President to avoid giving an opinion on the subject because if the President declared the treaty to exceed the constitutional authority of the treaty-making power it would be rejected by the Senate. "If that should happen that great use would be made with the people of a wilful breach of the Constitution." 18

Such words in the mouths of Virginia Republicans who had asked and gained office by pledging themselves to their people against the use of implied powers, were indeed something quite new. It is evident they feared their arguments would be reduced to absurdity if juxtaposed to their previous stand on the Constitution. Actually, they had no right to ask whether any constitutional grant was less complete than the people might have wished or intended, and if the Constitution were incomplete, not the government, but the people of the states who had made it were the only proper authority to correct it.

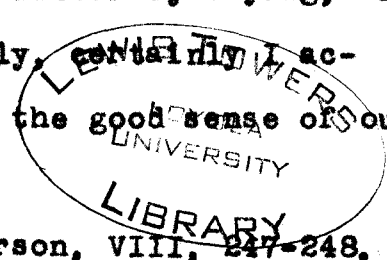
Jefferson's reply to Nicholas's letter is a clear statement of his stand on the interpretation of the Constitution. In his letter the President, after remarking on the danger of delay and the necessity for rapid action on the part of Congress,

18 Adams, *History of Jefferson*, II, 87-88.

turned his attention to the constitutional questions involved. Reasserting his principles of strict construction, he declared his belief that Congress did not have the power of admitting new states into the Union outside the territory at the time of the adoption of the Constitution:

I do not believe, it was meant that [Congress] might receive England, Ireland, Holland, etc., into it, - which would be the case on your construction. ... 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 power boundless. Our peculiar security is in the 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 treat-making power as boundless. If it is so, then we have no Constitution. 19

In these words Jefferson again reiterated his old ideas of strict construction. Two points were made clear. First, the admission of Louisiana into the Union without express authority from the states made waste-paper of the Constitution; and second, that if the treaty-making power was equal to this act, it superseded the Constitution. He seems to realize that the admission of Louisiana would give a fatal wound to strict construction, but he felt that in this case the common good of the people gave permission for the exception for he ended his letter by saying, "If however, our friends shall think 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." 20

Jefferson was apparently won over to broad construction for he no longer held out for an amendment to the Constitution. However, Henry Adams felt that there was no evidence of such a change, but rather that Jefferson merely yielded to friends and allowed them to make him commit an error, "which he could neither repudiate nor defend." 21

The President was not alone in his concern about the constitutional questions involved in the purchase of Louisiana. For most people the issue was decided along party lines, but there were a few opinions expressed that throw light on the interpretation of the Constitution. Although Fisher Ames, a Federalist, denounced the whole affair in no uncertain terms, he could not bring himself to assent to the arguments of the Federalists that "our government is merely an affair of special pleading, and to be interpreted in every case as if everything was written down in a book." Certain powers, as the acquisition of land by purchase, he considered inseparable from the fact of a society being formed, and incident to its being formed; such were the powers

20 Ibid., 247-248.

21 Adams, History of Jefferson, II, 91.

involved in the purchase of Louisiana, ²²

John Quincy Adams was a sturdy defender of strict construction. At a later date he criticized Jefferson for getting into office under the banners of states' rights and state sovereignty, and the pretense that the Government of the Union had no powers except those expressly delegated by the Constitution, and immediately purchasing Louisiana, "an assumption of implied power greater in itself and more comprehensive in its consequences, than all the assumptions of implied power in the twelve years of the Washington and Adams administrations put together." ²³ Adams could not satisfy himself that the power to make treaties was coterminous with the power to purchase territory. He contended that it made the Union totally different from that for which the Constitution had been formed. It gave despotic power over the purchased territory; it naturalized citizens in a mass; it made legislation abhorrent to our institutions; and "all this was done by an administration which came in blowing a trumpet against implied powers." ²⁴

From the beginning Adams felt that an amendment to the Constitution was necessary and he spoke of this matter to Madison.

²² Fisher Ames, Works of Fisher Ames, edited with an Introduction by Seth Ames, Boston, 1854, I, 323-324.

²³ John Quincy Adams, Memoirs of John Quincy Adams, edited with Introduction by W. C. Ford, New York, 1913-1917, V, 364-365.

²⁴ Ibid., V, 401.

Madison replied that "he did not know that it was universally agreed that it required an amendment." ²⁵ However, the opinion of Madison did not deter Adams from moving for an amendment to the last House amendment of the Senate bill which had come back from the House, by adding the words, "consistently with the Constitution of the United States." ²⁶ This was ruled out.

In the autumn of 1803, when the constitutionality of the recent purchase of Louisiana gave rise to considerable agitation, Henry W. Livingston wrote to Gouverneur Morris asking him to find out what was the intention of the framers of the Constitution on this point. Morris replied that it was impossible for him to recollect with precision all that went on in the Convention. But Mr. Morris felt certain that he had not contemplated inserting a clause for the restriction of the limits of the United States because "I knew as well then as I do now, 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." ²⁷

²⁵ Ibid., I, 267-268.

²⁶ Ibid., I, 268.

²⁷ Jared Sparks, Life of Gouverneur Morris, Boston, 1832, III, 185.

Just how much significance can be attached to Morris's statement would be difficult to determine, since his reasons may have been advanced to fit the fait accompli. It is worth noting, however, that an attempt was made to ascertain the mind of the men who framed the Constitution.

One of the strongest defenders of the purchase of Louisiana on constitutional grounds was John Adams, a Federalist and former President. His opinion is all the more remarkable because it came at a time when feeling in New England ran high over the decrease in its power through the acquisition of new territory. In a letter to Josiah Quincy, Adams gave one of the best arguments possible in support of this act of Jefferson's administration. The principal premise of his argument was that since the Union was the rock of salvation for the country every reasonable measure expedient for its preservation should be made. From this premise he concluded that the purchase of Louisiana was absolutely necessary for the Union because it gave this country the navigation of the Mississippi, for without this right of navigation, the western country would "infallibly" withdraw from the Union. Although Adams did express the wish that the states should have been consulted about the purchase, he nevertheless said that: "I cannot say that they [Congress] are destitute of plausible arguments to support their opinion." 28

28 John Adams, Works of John Adams, edited with Introduction by C. F. Adams, Boston, 1850-1856, IX, 631.

In answering Quincy's objection that the Convention did not contemplate the admission of new states, Adams replied that in interpreting the Constitution "the history and state of things at the time may be consulted to elucidate the meaning of words, and determine the bona fide intention of the Convention." On this point Adams held that just as, because of similar circumstances, the Convention had intended to authorize Congress to admit Canada and Nova Scotia into the Union, so Congress should have the power to admit new states through the Louisiana Purchase. 29

Many of the supporters of Jefferson's administration took the stand that the accession of Louisiana gave additional security to the free form of the Constitution. Had the French remained in possession of that country and colonized it, the United States would have been forced to maintain a large standing army. The result would have been heavy taxes for the maintenance of this army and an expensive patronage. Republican forms of government would have been undermined and the way paved for the concentration of power in the hands of an hereditary monarch. 30

Any doubts as to the constitutional right of the United States Government to acquire territory were laid to rest by Chief

29 Ibid., 632.

30 Brown, Constitutional History, 35.

Justice Marshall in 1828 when he declared: "The 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." 31

Thus we see that the Republican Party found itself in a rather precarious position. Justification for one of the first acts of the Jefferson administration lay in a broad construction of the Constitution. Against this very principle the Party had pledged itself in taking over control of the government. They feared making public their conclusions on the Louisiana Purchase. Shrewd members of the opposing Party would be quick in their denunciations of the Republicans, as the Republicans would have position. The ultimate solution of their problem was to explain the Purchase as a matter of expediency, and to depend on "the good sense of the people" to realize why it had to be done.

31 Constitution of the United States of America, edited by W. C. Gilbert, Washington, 1935, American Insurance Company vs. Canter, 392.

CHAPTER III

REPUBLICAN OPINION ON THE STATUS OF ACQUIRED TERRITORY

After reaching a conclusion on the power of the United States to acquire territory, another question presented itself, namely, the status of the territory acquired. Could this territory be formed into States and admitted into the Union on an equal footing with the original States? An affirmative reply merely begged the question: "by whose authority?" Such an addition would seem to endanger the balance of power among the older States. And, was not the consent of each of the parties to the original contract under the Constitution a necessary prerequisite to the admittance of new states into the Union? On the other hand, if such territory was not to be admitted as a State where in the Constitution lay the power to hold such land not destined to become a State?

These were the questions that the Administration had to decide. Jefferson felt it was necessary to come to a decision about the status of the new territory before any discussion in Congress. His idea was to map out a plan and then submit it to Congress. His first step was to draw up an amendment which was

to be presented by Congress to the states as soon as Congress should meet. This amendment was submitted by Jefferson to the members of his cabinet for suggestion or approval. The amendment was quite in harmony with Jefferson's idea of strict construction of the Constitution. It is remarkable in so far as Jefferson foresaw and provided for every conceivable contingency and at the same time completely outlined the power of the Legislature.

The amendment provided for the incorporation of Louisiana into the United States as a part of the Union. The rights of occupancy on the soil, and of self-government, were confirmed for the Indian inhabitants, but land given up by the Indians became part of the United States. The Legislature of the Union had the right to exchange land with the Indians within certain limits. The Legislature had authority to maintain in any part of the province such military posts as would be required for peace and security, to exercise police control over all persons in the territory, except Indians, to work all mines discovered in the territory, to regulate trade and intercourse between Indians and other persons in the territory, to explore any part of the province, to open roads and navigation when necessary for communication, and to establish agencies and factories for the cultivation of commerce, peace and good understanding with the Indians residing there. The Legislature had no authority to dispose of land in the province other than had been stipulated, until a new

amendment of the Constitution gave them the power.¹

The weak points in this lengthy plan of amendment were pointed out by Secretary of the Navy Robert Smith, to whom it had been submitted by Jefferson. While agreeing with the general purpose of the proposed amendment, Smith doubted the advisability of attaching so many provisions to the Constitution.² Regarding the Indian question and occupancy of lands, Smith asked if it might not be better to leave this to be settled by legislative provision. He felt that if the Indian rights of occupancy became a part of the Constitution the Government might find itself much entangled, especially in its dealings with hostile Indians.³

Jefferson was not alone in laying plans for the acceptance of the territory and arranging for its control. It was taken for granted that the treaty would be ratified by the Senate. As early as July 9, 1803, over three months before Congress met, Gallatin, as Secretary of the Treasury, began considerations of the problem of revenue in Louisiana, particularly that drawn from duties on imports and exports. The amount of exports, especially the articles like cotton and sugar, was a subject of investigation. The revenue collected by the United States from

1 Jefferson, Jefferson Writings, VIII, 241-249.

2 Ibid.

3 Ibid.

sugar was estimated at not less than nine hundred thousand dollars a year. It was therefore important to ascertain the quantity annually exported from New Orleans, in order either to find means of supplying the deficiency of revenue should sugar be imported from there duty free, or to devise a method by which the duty might still be collected. In a letter to Jefferson, Gallatin expressed the hope that articles of growth of Louisiana should continue to pay the same duty, or at least such rates as would not affect the revenue.⁴

Gallatin's letter is significant in several respects. The idea that the Constitution would be amended to allow the treaty of cession to be carried into execution was brought out once more. Yet, Gallatin's plan would seem to deny the status of the acquired territory, which was stipulated in the treaty of cession, for the imposition of duties would set Louisiana apart from the rest of the territory of the United States.

The plan of an amendment which would leave but little initiative in the hands of the Legislature was early given up by Jefferson. In a letter written at this time, Jefferson drops some hints as to the contemplated government of the territory. He did not think it would be a separate government, but presumed that New Orleans and the settled country across the river would be annexed to the Mississippi Territory. The rest would be

⁴ Gallatin, Writings of Gallatin, I, 127.

locked up from American settlement and left to the self-government of the natives. ⁵

In his Third Annual Message to Congress, October 17, 1803, Jefferson announced the transfer of Louisiana by France to the United States, adding that when the transfer had been sanctioned by the Senate, the matter would be laid before the House of Representatives "for the exercise of their functions, as to those conditions which are within the powers vested by the constitution in Congress." Then Jefferson came out with a statement of the powers of Congress over territories.

With the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; for its incorporation into the Union; for rendering the change of government a blessing to our newly adopted brethren; for securing to them the rights of conscience and of property; for confirming to the Indian inhabitants their occupancy and self-government; establishing friendly commercial relations with them. ... ⁶

It is clear that Jefferson took for granted that the treaty would be ratified. From the letter already quoted we see that he not only took the ratification for granted, but had even started plans for the government of the territory, before Congress had even met. These measures of the President reduced to a minimum the freedom of opinion in the Senate on this matter.

5 Jefferson, Jefferson Writings, VIII, 249-250.

6 Richardson, Papers of the Presidents, II, 246.

A few days later, Jefferson submitted a special message on Louisiana to Congress, announcing the exchange of ratifications between the President and the First Consul of France. He asked for a consideration of the treaty and conventions by Congress in its legislative capacity. He pointed out that some important provisions could not be carried into execution without the aid of the Legislature, and urged a decision without delay. ⁷

At this time questions of constitutional interpretation were raised. Rufus King, Minister to England, presented one of the most obvious objections to the purchase of Louisiana. He admitted that Congress could admit new states, but, he asked, can the Executive by treaty admit them, or, what is equivalent, enter into engagements binding Congress to do so? Since by the Louisiana Treaty, he continued, the ceded territory must be formed into States, and admitted into the Union, is it understood that Congress can annex any condition to their admission? These questions were roundly discussed in the debates over the question of Louisiana.

Timothy Pickering, referring to King's letter, claimed that the Administration did not pretend that the Louisianians were citizens of the United States; nor had they ventured to say that the Government had a constitutional power to incorporate

⁷ Jefferson, Jefferson Writings, VIII, 269.

the new country into the Union. To him it appeared evident that in a few years, when their power had become more confirmed, they would erect states in the territory and incorporate those states into the Union. As to the future, Pickering took a dim view because he felt the Constitution was becoming a convenient instrument to be shaped, by construction, into any form that would promote the views of the party in power. ⁸

Later, Gouverneur Morris declared that he was not sorry that the Louisiana Treaty had been ratified and provision made for carrying it into effect in accordance with the wish of the President. He added that by their acts the Democrats had done more to strengthen the Executive than the Federalists had ever dared to contemplate. Morris believed that Congress could not admit, as a new state, territory which did not belong to the United States when the Constitution was made. ⁹

It could perhaps be shown that this policy, as Morris stated it, would have been more dangerous to the Government than the overthrow of the balance of power by the admission of new states, which the New Englanders feared so much. Fortunately for the future of the new Republic this interpretation of the Constitution was not accepted.

⁸ Brown, Constitutional History, 44.

⁹ Sparks, Life of Morris, III, 184.

John Quincy Adams, an ardent supporter of strict construction in the Louisiana debates, held that the Administration was being guided by expediency rather than by constitutional right.¹⁰ The prospect of taxing the people of Louisiana without their consent was abhorrent to him. He therefore moved that the Senate adopt resolutions to the effect that no power had ever been given the Legislature to tax Louisiana, that such power would be unwarranted by the Constitution, that the power of originating such bills, for revenue, be vested exclusively in the House of Representatives.¹¹ All three of these proposals were rejected.

Adams believed that the consent of the people of the United States and of the people of Louisiana was necessary to make Louisiana a part of the American Union. France could only cede her property right to the territory, but the right of sovereignty inherent in the people must be ceded by an act of their own and acquired by some act of the people of the United States.¹² Considering an amendment to the Constitution necessary, Adams drafted one, and submitted it to Madison and Pickering. Neither approved it. The exercise of sovereign powers by Congress over the people of Louisiana was, according to Adams, an

10 J. Q. Adams, Memoirs of J. Q. Adams, I, 285.

11 Ibid., 287.

12 Brown, Constitutional History, 46.

assumption of power not delegated. However, once this power was acquiesced in, there was no constitutional obstacle to the admission of Louisiana into the Union as a state. Adams did not think it the intention of the framers of the Constitution to limit the admission of new states into the Union to the original territory of the United States. Such an intention would probably have been expressed. A comparison of the Articles of Confederation with the Constitution showed, said Adams, that the power to admit new states was substituted for the clause authorizing the admission of Canada. The power in the Constitution applied to the admission of states within the original territory of the Union, but there was no reason to believe that it was intended to apply exclusively. Adams believed that the whole continent of North America was destined to be one nation. "For the common happiness of them all, I believe it indispensable that they should be associated in one Federal Union." ¹³

Pickering was in favor of something more practical than the doctrine proposed by Adams. He held that as the people were accustomed to such transfer of rule without their inclinations being consulted, he would give individuals no option except quiet obedience or expatriation. And he would provide for a gradual amelioration of their laws, in conformity with the principles of

¹³ John Quincy Adams, Writings of John Quincy Adams, edited with Introduction by W. C. Ford, New York, 1913-1917, IV, 204-210.

our jurisprudence, winning their affection and assimilating them as fast as possible to the character of citizens of the United States. ¹⁴

In answering the question, by what clause in the Constitution Congress was authorized to tax and govern Louisiana, Pickering said that Congress, in its legislative capacity, was often obliged to legislate in cases where correct theory forbade it. Although some stipulations in the treaty, or even in the purchase itself, were not warranted by the Constitution, and although the abstract theory of government forbade the taxing, or the imposing of laws on any people without their own consent, yet as Louisiana had in fact become a province of the United States the "general welfare" required Congress to provide for its government. Pickering was as willing to cooperate in forming the same regulations for the general welfare as would have been proper had Louisiana been in all respects constitutionally acquired. ¹⁵

The question of the status of acquired territory had to be solved by the Jefferson Administration by means of a broad construction of the Constitution. Here, as in the right to purchase territory, the Republicans were forced to lay aside their former principles. They must again rely on the "good sense" of

¹⁴ Brown, Constitutional History, 47.

¹⁵ Ibid.

the people to sanction an act which the Republicans accomplished by an abandonment of their principles. Expediency, plus the conviction that, in their hands, such an extension of the power of the government would not impair the validity of the Constitution, forced them to act thus.

CHAPTER IV

CONGRESSIONAL DEBATE ON THE LOUISIANA PURCHASE: THE TREATY-MAKING POWER

As Livingston had intimated to Jefferson, it was imperative that no time be lost in ratifying the treaty since no one could judge accurately what Napoleon might do. The time, therefore, had come for the Administration to place the treaty before the Houses of Congress for their approval. The debates in Congress have a peculiar interest because in them the Republicans, the party of strict construction of the Constitution, were forced to maintain their position in the purchase of Louisiana by a broad construction of the Constitution at complete variance with their former attitude.

If Jefferson and Secretary Madison, who wrote the Virginia and Kentucky Resolutions of 1798, acquiesced, in 1803, in a course of conduct which, as Jefferson believed, made waste-paper of the Constitution, and which, whether it did so or not, certainly made waste-paper of the Virginia and Kentucky Resolutions, no one could expect that their followers would be more consistent or more rigid than their leaders. Fortunately, all of the more

prominent Republicans of 1798 had been placed in office by the people as a result of popular approval, and were ready to explain their views. In the Senate sat John Breckinridge of Kentucky, supposed author of the Kentucky Resolutions, and known as their champion in the Kentucky Legislature. From Virginia came John Taylor of Carolina, the reputed father of the Virginia Resolutions, and the soundest of the strict constructionists. His colleague was W. C. Nicholas, who had also taken a prominent part in supporting the Virginia Resolutions, and whose devotion to the principles of strict construction was beyond doubt. One of the South Carolina senators was Pierce Butler; one from North Carolina was David Stone; Georgia was represented by A. Baldwin and James Jackson --all staunch States'-rights Republicans.

The House of Representatives was also controlled by the Republicans of the States'-right school. Speaker Macon was at their head, while John Randolph, chairman of the Ways and Means Committee, was their mouthpiece. J. H. Nicholson of Maryland, and C. A. Rodney of Delaware, supported Randolph on the committee while two of President Jefferson's sons-in-law, Thomas M. Randolph and John Eppes, sat in the Virginia delegation. The power of the Republicans had reached the zenith; it was supreme. In the Senate the Republicans controlled twenty-five of the thirty-four votes, while in the House they had one hundred and two

against thifty-nine.

On October 22, 1803, two days before the actual debate, it was reported to the House that the conventions entered into with the Government of France for the cession of Louisiana to the United States had been ratified by the Senate and were laid before the House in its legislative capacity. John Randolph submitted a resolution providing for the carrying into effect of the treaty and conventions. His resolution was submitted to a committee.¹

Two days later Gaylord Griswold of New York moved a resolution asking that the President be requested to lay before the House a copy of the treaty between France and Spain, entered into October 1, 1800, together with a copy of the deed of cession of Louisiana from Spain to France under that treaty, if such a deed existed; also copies of any correspondence which might have taken place between the Government of the United States and Spain which would show the assent or dissent of Spain to the cession of Louisiana to the United States, and any other documents in possession of the American Government showing that the United States had really acquired little to Louisiana.²

The parts of this resolution were debated until the question was taken on agreeing to the first part of the resolu-

1 Annals, 382.

2 Ibid., 385.

tion which requested the President to lay before the House a copy of the treaty of October 1, 1800, between France and Spain. The resolution was amended and then put to a vote before the House. The motion was lost by a close vote of fifty-nine to fifty-seven.³ The closeness of the vote proved that this decision clashed with the traditions of the Republican Party.

The next day, October 25, 1803, the House took up the motion for carrying the treaty into effect.⁴ Again it was Griswold who began the debate. Griswold desired to know where was to be found the constitutional power of the Government to incorporate the territory with its inhabitants into the Union of the United States, with the privileges of the United States. The constitutional right of making treaties, he said, was vested in the President and Senate, and a treaty made by them on a subject constitutionally within their treaty-making rights, was valid without the consent of the House. The House could refuse the necessary means of carrying treaties into effect but this power was not the same as that conferred by the Constitution. However, should the treaty-making power be exceeded, it ought not to be carried into effect. Even a beneficial measure, if it violated the Constitution, should be resisted. Quoting the third article of the treaty, Griswold declared that he did not find in the

3 Ibid., 418-419.

4 Ibid., 438.

Constitution a power which vested the President and the Senate with authority to admit to citizenship persons beyond the jurisdiction of the United States, and to admit territory outside of the United States into the Union. Griswold held that, if such a power were not expressly given, it was reserved to the people. He also said it was not consistent with the Constitution to admit territory other than that which was attached to the United States at the time of the Convention.

Griswold contended that, even though the framers of the Constitution had looked forward to a greater population, they had not intended that an addition of territory large enough to over-balance all the rest should be made. He did not believe that any such power had been delegated to any department of the Government. If it had been placed anywhere it must rest with the Legislature, for the Constitution states that new states are to be admitted into the Union by Congress.⁵ This provision, however, related to the then existing territory of the United States. Power to incorporate new territory did not exist; but if this power did exist the Legislature, and not the Executive, could incorporate the territory into the Union. It was the duty of the House, he concluded, to resist the usurped power exercised by the Executive.⁶

5 Ibid., 431.

6 Ibid., 432-433.

Finally, the treaty, according to article seven, gave to French and Spanish ships special privileges for twelve years in the port of New Orleans, while the Constitution forbade that any preference be given, by any regulation of commerce or revenue, to the ports of one State over those of another. Agreement to this article would be "a fatal blow proposed against the Constitution of the United States, for it would destroy the reciprocity of interest that unites at present the different members of the Union."⁷

John Randolph then rose to answer the objections of Griswold. This was the same Randolph who had so vigorously supported his party in 1798 and 1800 and had encouraged resistance to the national government. He had been willing to back the theories of Jefferson with force and to fix "by display of Virginia power the limit beyond which neither Executive, Congress, nor the Judiciary should pass."⁸ Force was his answer to any measure which threatened to increase the power of the national government at the expense of the States.

But now we find Randolph speaking in a different tone, for he stated that if the Government possessed the Constitutional power to acquire territory from foreign states, the Executive, as

⁷ Ibid., 434.

⁸ Adams, History of Jefferson, II, 97.

the organ for dealing with foreign powers, must be the agent in negotiating such an acquisition.⁹ Randolph conceded that the power of confirming this act rested ultimately with Congress.

If this be true, he asked:

where has been the invasion of the privileges of that body? Does not the President of the United States submit this subject to Congress for their sanction? Does not he recognize the principle ... that no treaty is binding until we pass the laws for executing it - that the powers conferred by the Constitution of Congress cannot be modified, or abridged, by any treaty whatever - that the subjects of which they have cognizance cannot be taken, in any way, out of their jurisdiction? ... As to the initiative, in a matter like this, it necessarily devolved on the Executive.¹⁰

Roger Griswold was not altogether satisfied with the interpretation given by Randolph. He agreed that the initiative did lie with the Executive, and that with the consent of the Senate any treaty, constitutionally made and ratified, became a law and must be executed. But he still maintained that a treaty repugnant to the Constitution, either in subject matter or in form of ratification, could not be constitutionally considered a treaty. Congress, in such a case was bound to support the Constitution and refuse its consent to laws which would infringe that instrument.¹¹

9 Annals, 434.

10 Ibid.

11 Ibid., 460.

Now it was necessary for the Republicans to answer the charge that the President and Senate have no right to pledge the Government to anything not immediately within their own powers. J. H. Nicholson took it upon himself to do just that. He pointed out that the President and Senate have the treaty-making power, but nearly all of the treaties ratified by them contain stipulations which must be performed by the House. He referred to the last treaty with Great Britain in which the President and Senate had pledged themselves to do something for which they had no constitutional power. Yet, no question had been raised as to the constitutionality of the stipulation. He then drew an analogy between the treaty with Great Britain and the present treaty with France, and affirmed that no question had been raised over the pledge in the present treaty to pay to France fifteen million dollars, although the treaty could not be carried into effect without the appropriation of the House.

J. H. Nicholson also discussed the point made by Roger Griswold that since the treaty implied powers not within the competence of the General Government, the whole treaty was invalid. This he held was not true. Unconstitutional covenants in a treaty might be void without invalidating the rest. As a precedent he cited the treaty with Great Britain made in 1783 which contained a stipulation that neither side could carry out. Thus Nicholson claimed that even if it should be determined that Con-

gress could not admit the ceded territory into the Union as a state, yet the remainder of the treaty with France would remain valid. ¹²

The treaty-making power was also the subject of a great deal of discussion in the Senate. Samuel White of Delaware declared that the acquisition of a territory as large as that of Louisiana was unconstitution. Senator White said that the United States must have possession of New Orleans and other parts of the Mississippi necessary to secure complete navigation of the river. This was essential to the peace and prosperity of the country. But as to 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." ¹³

The constitutional right to acquire by treaty a small area does not seem to have troubled Senator White, but a larger area was another matter. Members of the Republican Party were quick to point out the weakness of this argument.

Timothy Pickering of Massachusetts was next on the floor and he gave a classic exposition of the state-compact

¹² Ibid., 468.

¹³ Ibid., 31.

theory in the formation of the Federal Government. He quoted article 6, clause 2, of the Constitution which says that "The Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, shall be the supreme law of the land. ..." But, like Roger Griswold in the House, he declared that for a treaty to be obligatory, it must not contravene the Constitution, nor contain any stipulations which transcend the powers therein given to the President and the Senate. The treaty between the United States and France contained such an article. He referred to the third article, that the inhabitants of the ceded territory shall be incorporated in the Union of the United States. But such an act was not within the powers of the President or Congress. He believed that the Administration had admitted that this incorporation could not be made without an amendment to the Constitution. But, he continued, such an amendment could not be made in the ordinary mode for the assent of each individual state was necessary for the admission of a foreign country as an associate in the Union. He drew a parallel from business where the consent of each member of a corporation was necessary to admit a new partner. However, Pickering admitted "the right of the United States to acquire new territory either by purchase or conquest and to govern the territory so acquired as a dependent province." 14

14 Ibid., 44-45.

A different interpretation was presented by John Taylor of Virginia in reply to the objection of the Federalists that the United States could not constitutionally acquire territory, and that there was no power in the Government with the necessary authority to fulfill the stipulations of the treaty. Taylor argued that before the formation of the Constitution, each state, being sovereign, possessed the right to acquire territory. This right was either still held by the states or had been surrendered to the General Government; but under the Constitution this power was not possessed by the states separately because no state could engage in war or compacts with other states or with foreign powers. No other right for acquiring territory existed. The Constitution, by taking from each state the right to acquire territory, had taken the right itself. On the other hand, the means and right of acquiring territory were not forbidden to the United States; since the fourth article of the Constitution gave Congress "the right to dispose of and regulate the territory belonging to the United States." Thus the right of acquiring territory existed and the means were war or compact. "But since both the means and the right had been surrendered to the Government it followed that these attributes of sovereignty were transferred to the United States." 15

15 Ibid., 50.

William C. Nicholas held it to be rather extraordinary that arguments against the unconstitutionality of the treaty should be made in the Senate, to prevent its execution, after the treaty had already been ratified by the Senate. Therefore, there was no reason to ask whether or not there was a power to make the treaty; it had been done, therefore it could be done. The only question was whether the bill should pass at this time or not. When the British treaty was under discussion, it had been decided that the treaty-making power of the Government was so limited that the consent and cooperation of Congress was necessary before engagements to pay money could be carried out. In the Constitution the treaty-making powers were not specified nor were any reservations made, but from this it was not to be inferred that the treaty-making power was unlimited. If special grants of power to Congress were to be considered as limitations of the treaty-making power, then the power of making treaties did not substantially exist in the Government. Thus, though the constitutional power of making treaties was vested in the President and Senate, a commercial treaty could not be formed without interfering with the Congressional power to regulate commerce. The mere fact that a treaty had been made sufficed to prove, as Nicholas said, that it could be done.

To make the Government practical, continued Nicholas, it had to be understood that the treaty-making power could nego-

tiate in regard to many of the subjects upon which Congress could legislate, but that Congress was not bound to carry into execution such compacts unless they approved of them. However, on any other subject proper for a national compact, not inconsistent with the Constitution, and under the limitations already stated, a treaty may be negotiated and absolutely concluded by the treaty-making power so as to bind the nation. In reference to the British treaty cited by Nicholas as a precedent, many persons had the right to become American citizens, not only without a law, but contrary to an existing law. And in that treaty many powers given specifically to Congress had been exercised by the treaty-making power.

Nicholas continued by saying that if the third article of the treaty with France is an engagement to incorporate the territory of Louisiana into the Union of the United States and to make it a state, it cannot be considered an unconstitutional exercise of the treaty-making power because it was not asserted that the territory was made a state by the treaty itself. On the contrary, it stated that the inhabitants should be incorporated into the Union according to the principles of the Constitution. This clause, said Nicholas, delegated to the proper authority the duty of admitting the territory to the Union at such time, and in such manner as they would think proper. This could be

done by Congress or by an amendment of the Constitution. ¹⁶

William Cooke, the Republican senator from Tennessee, took up the argument against the Federalists by asking whether the Constitution had been such a barrier to these same people when they had advocated the taking of New Orleans and the Floridas by force just a short time before the treaty was signed. Cooke then went on to present an extremely broad construction of the Constitution by contending that the treaty-making powers were "competent to the full and free exercise of their best judgment in making treaties, without limitation of power; for, on every subject in which that power is called to act, it must act on its own responsibility. ¹⁷ According to Cooke's interpretation, the treaty-making power passes out of the hands of the people by their consent, and for a time, limited by them, is vested in the President and Senate. There it remains until the time set by the people for the resumption of their rights. All in all it was a sweeping statement of the power of the President in regard to the making of treaties.

The vote on the bill to appropriate the necessary money for the purchase of Louisiana was carried in the Senate by a count of twenty-five to five. The opposition were members of the

16 Ibid., 68-71.

17 Ibid., 71-73.

Federalist Party.

Senator William Plumer had voted against ratifying the treaty but voted in favor of the bill to appropriate the money to pay for the territory. His justification for this act was based on the principle that once the President and Senate had declared the negotiation was a treaty, the faith of the nation was pledged to make the necessary appropriations, since the President and Senate were the only tribunal established to make treaties. Plumer went on to say that the ratification of the treaty made it constitutional even if its articles violated the Constitution. As such the Government was bound to carry it into effect. He did not hesitate to add that certain cases may arise in which the treaty could be questioned and even declared repugnant to the Constitution. ¹⁸

The extent of the treaty-making power, like practically all the other constitutional issues raised by the Louisiana Purchase, was one of interpretation. To a great degree it remained so, yet precedent has added much to interpretation. Just as the decision at the time of the Jay Treaty was made use of in the debates on the Louisiana Treaty, so the latter has been cited each time the same question has recurred. That sectional interests have entered into these interpretations is not of less

¹⁸ Brown, Constitutional History, 60.

interest and importance; for it goes to show how men sought, under the Constitution, a justification of their acts and votes.

We must note that here again, as in previous questions, the Republicans were forced to defend themselves in contradiction of those principles under which they had assumed office. They now had to act on the principles of the Federalist Party and convince themselves that objections to the principles of that Party would, in their hands, prove to be invalid.

CHAPTER V

CONGRESSIONAL DEBATE ON THE LOUISIANA PURCHASE: THE LOUISIANA TREATY

The debate on the Louisiana treaty was concerned mainly with three points: 1) the right to acquire territory; 2) the status of the acquired territory; 3) the commercial privileges in the treaty. This chapter will discuss the debates on these points in the above order.

The right of the Government to acquire new territory did not cause much debate in Congress when the Louisiana treaty was under discussion. Although involved in some of the other points at issue this right, in some of its phases at least, stands apart. The doctrine that a republic ought not to cover too extensive an area was early introduced, as it had been when the ratification of the Constitution itself was before the country.¹ This doctrine Senator Breckinridge of Kentucky pronounced old and hackneyed. He asked whether the principle would have

¹ The Federalist, edited by Edward M. Earle, New York, 1937, Sec. 9, 10, 14.

been violated by including the island of Orleans and the Floridas. Since all parties seemed to think their acquisition essential, why not acquire territory on the west bank of the Mississippi as well as on the east side? Instead of believing in the theory that a republic ought to be confined to narrow limits, he believed that the more extensive its dominion the more durable it would be. ²

Jefferson concurred in this opinion. He believed that if the territory of the United States had been even a third smaller than it was the "revolution" of 1800 would not have happened. As it was, the parts that were thrown into confusion by the events of that time were steadied by those that remained sober. ³

Upon the right to acquire territory, Randolph of Virginia stood, in the House, as the champion of broad construction of the Constitution. He held that if, by the Constitution, the United States was restricted to the limits which existed at the time of its adoption, those limits must have been accurately defined and generally known at the time, but the boundaries had been neither particularly described nor settled beyond dispute. They were unsettled on the northwestern, southern, and north-

² Annals, 60.

³ Jefferson, Writings of Jefferson, VIII, 24.

eastern frontiers when the Constitution was adopted. Thus Randolph held that the Constitution could not restrict the country to particular limits, because at the time of its adoption the boundary was unsettled. The power to settle disputes as to limits was indispensable; it existed in the Constitution, had been repeatedly exercised, and involved the power of extending boundaries. ⁴

This argument was startling in the mouth of one who had helped to arm the State of Virginia against a moderate exercise of implied powers. However, Randolph asserted that the right to annex Louisiana, and any other country for that matter, was involved in the right to decide boundary lines. The power to do this, of course, devolved on the Executive as the organ for dealing with foreign powers. ⁵ This assertion was prompted by the position then held by the opposition, namely, that the Constitution did not provide for an addition of territory as large as that of Louisiana.

H. R. Elliot of Vermont declared that the treaty-making power had been constituted by the American people with an eye to the law of nations; and that by virtue of this law, the Government and the people of the United States possessed the power and

4 Annals, 434-435.

5 Ibid., 435.

right of acquiring territory by conquest, cession, or purchase. ⁶

J. H. Nicholson of Maryland traced historically the right of the United States to acquire territory. When, in 1776, allegiance to Great Britain was severed each state became a separate and independent sovereignty. Included among the rights of each state was that of extending its limits, either by conquest or by purchase. In 1781, under the Articles of Confederation each state surrendered a portion of its sovereignty for the common benefit of the whole. Among the rights surrendered was that of acquiring territory, with the powers of peace and war. Again, in 1788, the states resumed their original independence. The present Constitution was adopted, giving the right to declare war to Congress and the right to make treaties to the President and Senate. These were the means of acquiring territory. ⁷

Nicholson's argument that powers inherent in sovereignty which had not been expressly reserved to the states were vested in the national Government was one that tended to centralization. Again, we find the Republicans retreating from their principles.

The widest sweep of authority for the Government was claimed by C. A. Rodney of Delaware who held that unless special

6 Ibid., 447-448.

7 Ibid., 468.

restriction of the Constitution forbade it, there was no reason why the power of acquiring territory could not come under the clause providing for the general welfare and common defense. The territory of the United States might also be extended by war, and by the treaty-making power. Furthermore, added Rodney, since Congress had the right to purchase territory from a State for a capital, forts, arsenals, public buildings, etc., it must possess the power to purchase territory from a foreign state.⁸ This appeal to the "general welfare" clause was another break with Republican principles, for the Party had always considered that this clause led to centralization.

The next issue that was hotly debated was that of the status of the acquired territory. This difficulty arose from the third article of the treaty with France for the cession of Louisiana to the United States. The article provided that the inhabitants of Louisiana be incorporated into the Union and, "as soon as possible according to the principles of the Constitution, be admitted to the enjoyment of the rights, ... of citizens of the United States."⁹

This article gave rise to the principal struggle over the constitutional interpretation aroused by the treaty. The right under the Constitution to incorporate into the Union this

8 Ibid., 472-473.

9 State Papers, 254.

new territory, or any new territory, was questioned by opponents. The very wording of the article called for interpretation. Just what was meant by the term "incorporation into the Union"? What obligation was involved in the stipulation "as soon as possible?" What rights did the inhabitants have in the interval between acquisition and statehood, allowing that ultimate statehood was to be the goal for Louisiana?

Some light is thrown on the plans of the Jefferson Administration in regard to the rights of the inhabitants of the acquired territory by an examination of the outline of the treaty drawn up by Madison for the guidance of Livingston and Monroe, dated March 2, 1803. Article seven of the treaty provided that the inhabitants of the new territory be incorporated into the Union on an equal footing with the citizens of the United States. Though this could not be done immediately, it was to be done without unnecessary delay.¹⁰

There were various answers to the question, What obligation did the third article of the Louisiana Treaty impose on the United States? John Taylor, speaking in the Senate, denied that the third article stipulated that Louisians must be erected into a state. He argued that the treaty-making power could not, by treaty, erect a new state. It had been proved, he continued, that the United States could acquire territory, but the territory,

¹⁰ Ibid., 129.

so acquired, became a portion of the territory of the United States and not a State. Thus the United States possessed a union of territories distinct from the union of states. Over these areas Congress had the necessary power of regulation. The people in these sections were considered citizens of the United States with the rights arising from this status. This, however, did not include those political rights arising from the original compacts which varied in different states. Thus, supposing that the General Government did not have the power of adding states, it did have a power of adding territory and territorial citizens to the United States.

By admitting Louisiana as a territory and not as a state, Taylor argued, the United States was complying with the stipulation that the inhabitants of Louisiana should become citizens "as soon as possible according to the Federal Constitution." If one accepted this construction, the treaty could not be called unconstitutional, for Louisiana was admitted as a territory, and her inhabitants became citizens protected by the United States Government. ¹¹

The first rejoinder to this interpretation was made by Senator Urian Tracy of Connecticut, who held the meaning of the third article of the treaty to be that the inhabitants of Louis-

¹¹ Annals, 50-52.

iana were incorporated by it into the Union on an equality with the territorial governments already existing and similarly, this territory, when the population had increased sufficiently, could be admitted as a state, with the same rights as the other states. He questioned the power of the President and Senate to make these guarantees. Although it was true that the Constitution provided for the admission of new states by Congress, Tracy declared that the President and Senate alone could not admit Louisiana. Furthermore, even Congress could not admit new "foreign" states into the Union without the consent of the old partners.

The article of the Constitution alluded to, Tracy said, referred only to "Domestic" states. It was "unreasonable to suppose that Congress should, by a majority only, admit new foreign states, and swallow up by it, the old partners, when two-thirds of all the members are made requisite for the least alteration in the Constitution." The principles of the Government, the rights of the partners to the compact, forbade a measure which would introduce a large foreign element into the Union. This could only be done by the consent of all the partners. The reason for such an interpretation comes out in Tracy's frank statement that "the relative strength which this admission gives to the South and West is contradictory to the principles of our original Union." ¹² This was the reason for much of the New

¹² Ibid., 54-56.

England opposition to the treaty.

The argument for the Republicans was then taken up by Senator Breckinridge who denied the charge of unconstitutionality as regards the third article of the treaty. Opponents of the treaty, he pointed out, had gone so far as to advocate the seizure of a part of the country under question. Where was the constitutional distinction between acquisition by conquest and purchase through a treaty? An amendment could be made to the Constitution to avoid the difficulty. In direct answer, Breckinridge said that Tracy's construction admitted the power to acquire territory which was much more dangerous than the unconditional admission of new states, because according to this construction territories and citizens are held as property of the United States, and may, consequently, be used against the people. As to Tracy's stand that Congress could admit new States but the President and Senate could not, Breckinridge replied that Congress could not do anything until the territory was acquired and that such acquisition could only be made by the President in the form of a treaty or convention. Once the acquisition was made, Congress could make such dispositions as were expedient. ¹³

Roger Griswold interpreted the third article to mean either that the inhabitants of the ceded territory were to be in-

13 Ibid., 60-63.

corporated into the Union, by the treaty itself, or that the faith of the nation was pledged that this would be done within a reasonable time. He denied the right of the President and Senate to add new members to the Union by treaty, and, like other opponents, he declared that the consent of all the parties to the compact was necessary for the admission of a new partner. The Government, he said, was formed to make a more perfect union of the United States. "The United States here cannot be mistaken. They were the States then in existence, and such other new States as should be formed, within the limits of the Union, conformable to the provisions of the Constitution." ¹⁴ Any treaty stipulating that a foreign nation should be brought in would destroy the Union and would therefore be void.

Taking up another line of attack, Griswold argued that a promise to incorporate was the same in principle as incorporation. If no incorporation of new territory could take place without an amendment to the Constitution, he declared the treaty-making power had no right to stipulate for such an amendment. Stipulations which created such an obligation were void. Admitting that new territory and new subjects could undoubtedly be obtained by conquest and by purchase, Griswold maintained that they must remain in the condition of colonies, and be governed as such. "The objection to the third article is not that the prov-

¹⁴ Ibid., 460-461.

ince of Louisiana could not have been purchased, but rather that this nor any other foreign nation can be incorporated into the Union by treaty or by law." ¹⁵

The policy adopted by the Government with regard to the steps by which people of the territories prepared for statehood was laid down by John Mitchill of New York. He cited the treaty of 1794 with Great Britain as a precedent that, without an act of Congress, aliens could be converted by the provisions of a treaty duly ratified by the President and Senate. By the second article of that treaty it was stipulated that all British subjects continuing within the evacuated posts and precincts longer than a year, should be considered to have abandoned allegiance to the British Crown, and to have declared their desire to become American citizens. By taking the oath of allegiance, they became at once, by an act of treaty, citizens of the United States. In the Louisiana treaty the power of making citizens had not been exercised by the President and Senate but was left to Congress at some future day. ¹⁶

Political thinkers of the United States have long been divided in their opinion of the power of Congress over the territories. One group, of whom John Randolph is an early exponent,

15 Ibid., 462-463.

16 Ibid., 480-481.

holds that although the Constitution grants to Congress the power of legislating for the territories, legislation by Congress is not necessary for the extension to the inhabitants of the territories of the rights and immunities of citizens. Such rights, it is claimed, are extended to the territories by the Constitution, ex proprio vigore. The opposing school maintains that Congressional legislation is necessary in all cases, and that no exception whatever can be made. Congress necessarily must pass legislation extending the rights and immunities of citizens to the newly acquired citizens. ¹⁷

The third main issue involved in the Louisiana Treaty was the commercial privileges granted by the treaty. Opponents claimed preference was given by article seven of the treaty to ports of the new territory over other ports of the United States. The article provided that French ships coming from France or her colonies "should be admitted during the space of twelve years in the port of New Orleans and in all other legal ports of entry in the ceded territory." ¹⁸ French ships were to enter ports in the new territory without being subject to any greater duty on merchandise than that paid by American ships.

Opponents of the treaty held that article seven violated the provision of the Constitution that "no preference shall

¹⁷ Brown, Constitutional History, 74.

¹⁸ State Papers, 255.

be given by a Regulation of Commerce of Revenue to the Port of one State over those of another." 19 Republicans replied to this argument by stating that this provision of the Constitution was for the States only and that Congress might legislate as it chose for the territories. This argument recognizes the difference between state and territory, a distinction which formed the basis of the controversy. Finally, John Quincy Adams claimed that an amendment to the Constitution would be necessary to carry out the stipulations of article seven of the treaty. 20

In the House of Representatives, Gaylord Griswold of New York and Joseph Lewis of Virginia maintained that a violation of the ninth section of article one of the Constitution would result if the newly ceded territory should ever become incorporated with the United States, because there would then be ports of entry in the United States into which French and Spanish ships might enter on terms different from those on which they could enter other ports of the United States. 21 Randolph introduced a novel interpretation in his denial of the unconstitutionality of the seventh article on the ground that the privilege given French and Spanish vessels was a part of the price of the territory. 22

19 Annals, 57.

20 Ibid., 67.

21 Ibid., 434, 440-441.

22 Ibid., 437.

Representative Henry Griffin of Virginia held that the seventh article of the treaty was a commercial regulation. Therefore, since, by the eighth section of article one of the Constitution, Congress had been given power to regulate commerce with foreign nations, the treaty stipulations made by the President and Senate were a contravention of this constitutional investiture of Congress. The President and Senate, in their executive capacity, had legislated, and by so doing had infringed upon the rights of the House. ²³

In defense of article seven of the Louisiana Treaty, H. R. Elliot of Vermont reiterated the opinion that the provision of the Constitution, cited by Griffin, applied only to States and not to territories. The Louisiana Treaty left the United States free to decide the time and manner of the admittance of the inhabitants of the new territory into the Union. And Elliot said since it would be unnecessary to admit them within the twelve years during which the commercial privileges were enjoyed by France and Spain, there could, therefore, be no possible violation of the Constitution. ²⁴

Just as it was fear of losing political power which drove certain of the New Englanders to oppose the third article

23 Ibid., 442.

24 Ibid., 459.

of the treaty, so it was sectional and economic interests which dictated their stand on the seventh. Roger Griswold presented the case clearly and frankly. To admit the ships of France and Spain into the port of New Orleans, on the same terms with American ships, would result in the development of French and Spanish shipping and ruin of the trade of the Atlantic ports. "How gentlemen," he continued, "under these circumstances you can consider the interests of the Eastern States uninjured, is to me inexplicable." ²⁵

Once more the distinction between state and territory, and the powers of the Government over the latter, were set forth by J. H. Nicholson, when he said that Louisiana "is a territory purchased by the United States in their confederate capacity, and may be disposed of by them at pleasure. It is in the nature of a colony whose commerce may be regulated without any reference to the Constitution." ²⁶ Thus Nicholson held that the real difficulty was not constitutional but rose merely from the fact that Louisiana, a territory, was adjacent to the United States. Under this construction he felt that there would have been no difficulty if the territory in question had been, for example, Cuba.

25 Ibid., 464-465.

26 Ibid., 471.

Territories, then, according to the Republican Party, were beyond the pale of the Constitution. Not satisfied with this sweeping interpretation, defenders of the treaty found still other grounds for justification of the controverted provisions. Rodney of Delaware even contended that if the territory of the United States benefited because of particular territorial regulations, the territory being the common property of the United States, every state in the Union reaped the benefit. ²⁷

John Randolph called attention to the fact that by the third article of the Treaty of London, the United States was pledged not to impose on imports in British vessels from British territories in America, adjacent to the United States, any higher duties than would be paid upon such imports, if brought into the Atlantic ports of the United States in American vessels. Here was no distinction between territory and states, the ports being those of New York. Randolph said he did not defend the constitutionality of this provision; as a matter of fact he had not voted to carry the treaty into effect. He desired to know how such men as Griswold of Connecticut, who had advocated the treaty, got over the constitutional difficulty which was urged against the Treaty of London. How could a preference be given to particular ports of certain states which could not constitu-

27 Ibid., 475.

tionally be given to the ports of New Orleans, not within a State? 28

Because of his knowledge of the meaning of the Constitution it may be well to quote at length a letter written by James Madison some years after the purchase of Louisiana.

In the case of Louisiana, there is a circumstance which may deserve notice. In the Treaty ceding it, a privilege was retained by the ceding party, which distinguished between its ports and others of the U.S. for a special purpose and a short period. This privilege, however, was the result, not of an ordinary legislative power in Congress; nor was it the result of an arrangement between Congress and the people of Louisiana. It rests on the ground that the same power, even in the nation, over that territory, as over the original territory of the U.S., never existed; the privilege alluded to being in the deed of cession carved by the foreign owner out of the title conveyed to the purchaser. A sort of necessity, therefore, was thought to belong to so peculiar and extraordinary a case. Notwithstanding this plea, it is presumable that if the privilege had materially affected the rights of other ports, or had been of a permanent or durable character, the occurrence would not have been so little regarded. Congress would not be allowed to effect, through the medium of a treaty, obnoxious discrimination between new and old States more than among the latter. 29

It is interesting to hear from Madison that the commercial privileges granted by the treaty were "in the deed of cession, carved by the foreign owner out of the title conveyed to the purchaser," and that the United States never possessed entire

28 Ibid., 483-484.

29 James Madison, Writings of Madison, edited with Introduction by G. Hunt, New York, 1900-1910, V, 7-8.

power over that territory as over the original territory of the United States.

As already shown, defenders of the constitutionality of the seventh article of the treaty based their arguments on the distinction between territory and state. During the debate on the seventh article Elliot had declared that he had no idea that it would be necessary to admit the inhabitants of Louisiana to statehood within the twelve years during which the commercial privileges were to be enjoyed by France and Spain. The question is at once suggested -- if Louisiana should be admitted before this twelve-year period ended could the provisions of the treaty be carried out in the face of the apparent violations of the constitutional prohibition against granting preferences to ports of one state over those of another? The fact is Louisiana became a state four years before the twelve-year period expired. Curiously enough, the New Englanders did not raise the point during the debates on the passage of the bill admitting Louisiana into the Union. Attention was called to this inconsistency only by the complaints of the French minister. 30

30 Max Farrand, "The Commercial Privileges of the Treaty of 1803," American Historical Review, VII, 494-499.

CHAPTER VI

CONCLUSION

The Louisiana Purchase had been accomplished. A vast territory, a territory larger in extent than the then existing United States, cost only fifteen million dollars. But when we add to this the fact that the act was accomplished by Thomas Jefferson and the Republican Party, the acquisition is even more astounding. The Republican Party, which had secured office as the champion of states'-rights and state-sovereignty, performed an act which was an "assumption of implied power greater in itself and more comprehensive in its consequences, than all the assumptions of implied powers of the Washington and Adams administrations put together." ¹

The Jeffersonian State was founded on the state-compact theory. The Constitution, according to this theory, was a compact, an agreement among the States in which were set down the various powers of the national government. According to this theory, the powers of the government were enumerated so definitely that if no mention was made specifically of some power that par-

1 J. W. Adams, Memoirs of John Quincy Adams, V, 364-365.

particular power was not enjoyed by the national government but was reserved to the States. Thus the Republican Party maintained again and again that the United States government had no right to act if not authorized by an expressly granted power. Any act beyond these enumerated powers was void, and not to be obeyed by the States. This was the meaning of the Virginia and Kentucky Resolutions during John Adams' administration. Because of the importance of these resolutions in this discussion it will be well to go into them at some length.

The foreign policy of John Adams was essentially that of Washington. But the efforts of Adams to maintain peace and neutrality encountered even greater difficulties than those of his predecessor. The French Directory, convinced that the Jay Treaty was a violation of the treaties of 1778, and that it marked the beginning of an Anglo-American alliance, refused to receive Charles C. Pinckney, the new American minister sent by Washington to succeed Monroe. The French navy was then turned loose on American shipping. By June of 1797 over three hundred American ships and their cargoes had been confiscated.

In America this situation deepened the party cleavage. The Republicans, bitterly hostile to the Jay treaty, and sympathetic with France, were inclined to justify French depredations. They failed to realize that France had passed the idealistic state of the Revolution, that her government was fast approaching

a dictatorship under the control of corrupt officials. Nor did they comprehend that the policy of France toward the United States was to resent any close relationships with Great Britain, and that her ambition was to obtain Louisiana, Florida, and Canada and thus surround the young republic with French territory. The Federalists, on the other hand, whose ships had been confiscated, clamored for retaliatory action against France.

Hoping to reconcile the differences, Adams proposed that a peace mission be sent to France. For this he picked the Republican, Elbridge Gerry, and the two Federalists, John Marshall and C. C. Pinckney. The strange treatment accorded these envoys by the French was revealed in the XYZ papers. It was a disillusioning experience for the Republicans, and thereafter they heartily cooperated in plans for retaliation.

The troubles with France, which for the moment had increased the strength of the Federalists and had enabled them to win their last political victory in the congressional elections of 1798-1799, was in the end to prove their undoing. Taking advantage of the war furor and the temporary weakening of the Republicans, they pushed through Congress in 1798 four acts known as the Naturalization and the Alien and Sedition Acts. A Naturalization Act lengthened the period of residence necessary for citizenship from five to fourteen years, while the two alien acts gave the President the power to expel from the country aliens

judged dangerous to the peace and safety of the United States, and in time of war to expel or restrain aliens as he deemed wise. The Alien Acts were not enforced, but the accompanying Sedition Act, which made it a crime under penalty of fine or imprisonment to write or publish any "false, scandalous or malicious" statement condemning the President or either house of Congress was enforced. War might have been a partial excuse for some of this legislation but the Republicans had a well-grounded suspicion that it was aimed at them rather than at the enemies of the republic. Many French aliens were residents in America, and with exceptions they were active in Republican politics. Of some twenty-five persons arrested and ten convicted under the Sedition Act, most, it was noticeable, were Republican editors or politicians.

The Sedition Act, however, was a boomerang. Wise leaders of the Federalist Party, such as Hamilton and Marshall, had advised against it but with no success. The Republicans, who considered the acts directly aimed at their party and who hailed everyone convicted as a martyr, actively opposed them, and Republican leaders decided to make a direct appeal to the States. This appeal resulted in the famous Virginia and Kentucky Resolutions of 1798.

This opposition of Virginia to the Government is not surprising. The majority by which the State Convention of Vir-

ginia, after an obstinate contest, adopted the Constitution was very slight. From the first the State took an attitude of opposition to the National Government, which became more and more decided until in 1798 it found expression in a formal announcement, through the Legislature and Governor, that the limit of further obedience was at hand. The General Assembly adopted resolutions promising support to the Government of the United States in all measures warranted by the Constitution, but declaring the powers of the Federal Government no further valid than they had authorized by the grants enumerated in that compact; and that in case of a "deliberate, palpable, and dangerous exercise of other powers, not granted," the States have the right to "interpose, for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them." ²

Acting immediately on this view, the General Assembly did interpose by declaring the Alien and Sedition Laws unconstitutional, and by inviting other States to concur in confidence "that the necessary and proper measures will be taken by each for cooperating with this State in maintaining unimpaired the authorities, rights and liberties reserved to the States respectively or to the people." ³

² Adams, History of Jefferson, I, 72.

³ Ibid., I, 72.

These Virginia Resolutions, which were drawn up by Madison, seemed strong enough to meet any possible aggression from the National Government, but Jefferson, as though not quite satisfied, urged the Kentucky Legislature to adopt still stronger ones. The draft of the Kentucky Resolutions, representing Jefferson's convictions, declared that "where powers are assumed which have not been delegated a nullification of the act is the rightful remedy," and that every State has a natural right, "in cases not within the compact, to nullify of their own authority all assumptions of power by others within their limits." Any act of the National Government accomplished by an assumed power was to be declared by the states void and of no force. The Resolutions then went on to declare that the National Government was not the "exclusive or final judge of the extent of the powers delegated to itself," since that would have made its discretion, and not the Constitution, the measure of its powers. Rather, each party had an equal right to judge for itself as to an infraction of the compact, and the proper redress. Finally, in the case of the Alien and Sedition Acts, the compact had been infringed and these acts, being unconstitutional and therefore void, "may tend to drive these States into revolution and blood."⁴

Considered in the light of the Virginia and Kentucky

⁴ Ibid., 73.

Resolutions and of the other principles of Republican theory, it is indeed surprising that the Louisiana Purchase was accomplished during the Jefferson administration. However, it must be said that in the acquisition of Louisiana there were extenuating circumstances which can explain, in part at least, the actions of Jefferson and the Republican Party. The Administration found itself confronted with a dilemma: either make war on France to secure the navigation of the Mississippi River, which was felt to be necessary for the well-being of the Union, or try by some other means to obtain sufficient land to insure unimpeded navigation of the river. The Administration chose the latter alternative. It was unfortunate for the Party that it became necessary to accomplish their end largely by extra-constitutional measures.

There was a definite threat to the United States in Napoleon's schemes of a new French colonial empire and it is easy to realize why the people in the southern and western states were not at all eager to have as their neighbor the ambitious and unpredictable Napoleon. At the zenith of his power the First Consul was feared by all nations. As minister to France, Livingston advocated a quick affirmation of the treaty so as to forestall any changes of Napoleon's capricious mind. Fortunately for the United States, the French scheme of colonial empire was abandoned because of the failure in San Domingo and a new threat of war in Europe; but even these events failed to remove the fears

of the Administration, and, consequently, they gave up their theories, for the time being, as they thought, and embarked on a course of expediency which directed them to take advantage of the opportunity while they were able to do so.

Having adopted the course of expediency, the Republican Party members were forced to explain themselves by arguments at complete variance with their former ideas of government. They found themselves defending an act which demanded a strong centralized government, quite contrary to their former opinions, and an act whose completion depended on the extensive use of implied powers. Formerly they had tried to eradicate both these abuses by the Virginia and Kentucky Resolutions. But they went on bravely "casting aside metaphysical subtleties" and throwing themselves on their country "for doing for them unauthorized, what we know they would have done for themselves had they been in a position to do it." ⁵

The Louisiana Purchase is perhaps the greatest event in the first administration of Thomas Jefferson. The benefits of this acquisition have been tremendous, for it insured to the American people the opportunity of westward expansion, and, through the ownership of a vast public domain, helped to build up a broader national feeling. Speaking of the Louisiana Purchase,

5 Jefferson, Writings of Jefferson, VIII, 240.

Professor Frederick J. Turner states that: "It would be possible to argue that the doctrines of the Louisiana Purchase were farther-reaching in their effect upon the Constitution than even the measures of Alexander Hamilton or the decisions of John Marshall." 6

The Louisiana Purchase is not a dead issue but lives in the constitutional history of today. It serves as the cornerstone for all interpretations of the constitutional right of the United States to acquire and govern foreign territory; and such acquisitions have been one of the most significant features in the history of the United States.

6 Turner, "Significance of the Frontier," American Historical Association, 1894, 218.

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APPROVAL SHEET

The thesis submitted by **Robert J. Shanahan, S.J.** has been read and approved by three members of the Department of **History.**

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

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Charles H. Metzger, S.J.
Signature of Adviser