

May 1998

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David P. Currie, *The Constitution in Congress: Jefferson and the West, 1801-1809*, 39 Wm. & Mary L. Rev. 1441 (1998), <https://scholarship.law.wm.edu/wmlr/vol39/iss5/2>

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William and Mary Law Review

VOLUME 39

MAY 1998

NUMBER 5

THE CONSTITUTION IN CONGRESS: JEFFERSON AND THE WEST, 1801-1809

DAVID P. CURRIE*

The original understanding of the Constitution, I wrote not so long ago, was forged not in the courts but in Congress and the executive branch.¹

That was true of the Federalist period, the first twelve years under the new Constitution—a time of great constitutional controversies involving such matters as the Bank of the United States, the Jay Treaty, and the Alien and Sedition Acts and of quaint and curious squabbles now largely forgotten: what to call the president, whether he must accept a salary, how the vice president signs a bill. Some of these disputes sound petty, but even they helped to define what kind of country the United States would be. All of them were initially, and many of them

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1. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 296 (1997).

finally, fought out in the executive and legislative branches.

The same was true of the years that followed, when Thomas Jefferson was president.

Jefferson's inauguration was a significant victory for the new system, a peaceful transfer of power from one political party to another, which at the time was not to be taken for granted.² "We are all Republicans," he said in his inaugural address, "we are all Federalists."³ It was a breath of fresh air.

Jefferson's brave words, of course, did not put an end to controversy. His presidency was another exciting time: the Burr conspiracy, the embargo, the war against the Barbary pirates—in which Jefferson, following Washington's example, took a refreshingly narrow view of the president's powers as commander in chief.⁴ The Twelfth Amendment, designed with the simple goal of avoiding the near disaster of the 1800 election, proved to be a surprising can of worms, a monument to the difficulty of constitutional drafting.⁵ In the great Court fight of Jefferson's first term, which rivaled that of the 1930s, judicial independence suffered grave setbacks in the repeal of the Judiciary Act and the removal of Judge Pickering, only to emerge more firmly entrenched than ever after the dramatic acquittal of Justice Samuel Chase.⁶

Jefferson's presidency was also a time of significant events in westward expansion: the admission of Ohio, the Louisiana Purchase, and the beginnings of the Cumberland Road. Each of these events raised fundamental constitutional questions. Each was extensively debated in Congress and in the executive branch, not in the courts. And each served as an important precedent when similar issues arose again.

2. See *id.* at 288-94.

3. Thomas Jefferson, First Inaugural Address (Mar. 11, 1801), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 321, 322 (James D. Richardson ed., 1897).

4. See MONTGOMERY N. KOSMA, CONSTITUTIONAL ISSUES IN THE TRIPOLITAN WAR (forthcoming 1998).

5. See David P. Currie, *The Twelfth Amendment*, in UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENTS (David Kyvig ed., forthcoming 1998).

6. See David P. Currie, *The Most Endangered Branch*, 33 WAKE FOREST L. REV. (forthcoming 1998).

I. OHIO

The Northwest Ordinance contemplated the creation of three to five new states in the territory ceded by individual states to the Union after the Revolution.⁷ As soon as any of the areas defined in the Ordinance had sixty thousand free inhabitants it was to be admitted to statehood, and Congress was directed to admit it earlier if that was "consistent with the general interest of the confederacy."⁸

Settlement of the Northwest was retarded, however, by hostile Indians; the first western states admitted were Kentucky and Tennessee.⁹ Then Mad Anthony Wayne defeated the Indians at Fallen Timbers, Jay's Treaty dispersed their British protectors, and Thomas Pinckney's treaty opened the Mississippi to western goods.¹⁰ The population of the eastern part of the territory grew by leaps and bounds, and it was separated from the remaining portion, which was christened the "Indiana Territory," in 1800.¹¹ By 1802 a number of its inhabitants were banging on Congress's door in search of admission to the union.¹²

Although the 1800 census reported that the Eastern Division had a population of only 45,365, a House committee recommended that its inhabitants be authorized "to form for themselves a constitution and State government."¹³ Congress obliged,¹⁴ but not without a little bloodletting on the House floor.

The problem was that not everyone in the division favored immediate statehood. Governor Arthur St. Clair did not; the territorial legislature did not; neither did the territorial delegate in Congress, Paul Fearing. Neither did most Federalists in the House, who perceived that the new state would vote Republican.¹⁵

7. Northwest Ordinance of 1787, art. V, 1 Stat. 51, 53 n.(a) (amended 1789).

8. *Id.*; see CURRIE, *supra* note 1, at 103-07.

9. See CURRIE, *supra* note 1, at 100, 217-22. Vermont was also admitted to the union, in 1791. See *id.* at 100-02.

10. See 1 BEVERLY W. BOND, JR., HISTORY OF THE STATE OF OHIO: THE FOUNDATIONS OF OHIO 275-436 (1941); CURRIE, *supra* note 1, at 215; STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 436-40 (1993).

11. See Act of May 7, 1800, ch. 41, 2 Stat. 58 (amended 1804).

12. For petitions seeking statehood see 11 ANNALS OF CONG. 471, 814, 1017 (1802).

13. *Id.* at 1098.

14. See Act of Apr. 30, 1802, ch. 40, sec. 1, 2 Stat. 173.

15. See 1 BOND, *supra* note 10, at 449, 467-76. The territorial legislature had

Fearing led off the debate with what he described as a constitutional objection.¹⁶ The resolution proposed that Congress provide for election of delegates to a convention that would decide whether or not to pursue statehood and then, if the convention decided to do so, would take the necessary steps.¹⁷ But Congress, said Fearing, "had nothing to do with the arrangements for calling a Convention."¹⁸ There was nothing in the Ordinance about it, and therefore the matter was left entirely to the territory; Congress could no more prescribe a constitutional convention in a territory than in "any State in the Union."¹⁹

The comparison with a state was silly. "Was there ever a more absurd doctrine," asked Joseph Nicholson of Maryland, than "that States, acknowledged to be sovereign and independent, should be compared to a Territory dependent upon the General Government?"²⁰ Congress, he did not have to add, had express

gone so far as to pass a law inviting Congress to redivide the original Northwest Territory into three rather than two parts, with the evident intention of preventing the existence of any single area with a population large enough to qualify for statehood. See Act of Dec. 21, 1801, ch. 160, 1 STATUTES OF OHIO AND NORTHWESTERN TERRITORY 341-42 (Chase 1833). The House voted 81-5 to disapprove this proposal. See 11 ANNALS OF CONG. 466 (1802); 1 BOND, *supra* note 10, at 467-70. The form of the House resolution in this matter is puzzling: "Resolved, . . . that the act passed by the Legislature for the Territory . . . ought not to be assented to by Congress." 11 ANNALS OF CONG. 466 (1802). Though acts of the Governor and judges in the first stage of territorial government were subject to congressional veto under the Northwest Ordinance, acts of the second-stage legislature, which first met in 1799, did not appear to be. See Northwest Ordinance of 1787, 1 Stat. 51, 51-52 n.(a) (amended 1789). Nor was there any report of Senate disapproval, or of presentation of a disapproval order to the president, which Article I, Section 7 of the Constitution would presumably require. Moreover, by November 1801, when the territorial legislature met, it had no further authority over matters affecting the Indiana Territory, which would have had to be divided under its proposal. See Act of May 7, 1800, ch. 41, § 5, 2 Stat. 58, 59. The only plausible explanation is that the House was merely declining to initiate legislation of its own to reconfigure the territory; the peculiar phrasing of the resolution may have been prompted by the fact that the territorial statute had purported to redefine the boundaries "as soon as the congress of the United States shall declare their assent thereto." Ch. 160, § 1, 1 STATUTES OF OHIO AND NORTHWESTERN TERRITORY at 342.

16. See 11 ANNALS OF CONG. 1103 (1802).

17. See *id.* at 1099.

18. *Id.* at 1103.

19. *Id.*; see also *id.* at 1104-05, 1115-16 (stating the similar positions of Rep. Roger Griswold and Rep. Goddard).

20. *Id.* at 1105.

authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States";²¹ it had no such authority over the states.²²

Nor should there have been any doubt of congressional authority to provide for a convention to determine whether or not to apply for statehood. As Massachusetts Representative John Bacon said, Article IV, Section 3 empowered Congress to admit new states; prescribing a means of ascertaining whether the people wanted statehood was necessary and proper to admission.²³ Roger Griswold of Connecticut went so far as to deny that the Constitution *could* alter the Ordinance without territorial consent,²⁴ but there was little to say for that. The Constitution was an avowedly revolutionary document, based on ultimate popular sovereignty and expressly designed to do away with existing law without conforming to its requirements for change.²⁵ If it could sweep away the Articles of Confederation, as everyone agreed it had done,²⁶ then it could sweep away the Ordinance too.

21. U.S. CONST. art. IV, § 3, cl. 2.

22. Griswold's suggestion that Congress had no power to interfere with the "internal concerns" of the territory, 11 ANNALS OF CONG. at 1104 (1802), was reminiscent of the position taken by dissident colonists as to the powers of Parliament before the Revolution. See ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 85 (1935); 1 J. CONTINENTAL CONG. 68-69 (1774). This suggestion had no more to recommend it than its predecessor; there is no hint of any such limitation in Article IV.

23. See 11 ANNALS OF CONG. 1111-12 (1802). Griswold's argument that only the territorial legislature could consent to a convention seemed to suggest that Congress had no right to admit a new state against the wishes of its inhabitants. See *id.* at 1113. Certainly one thinks of admission as a consensual process. It had always been so in the past, although there is no explicit requirement to that effect in Article IV. Yet Representative Davis, relying on the provision in the Ordinance prescribing that a territory "shall be admitted" upon attaining a population of 60,000, went so far as to declare that Congress could admit a state without its consent. See *id.* at 1104.

24. The people of the Territory never consented to [the Constitution]; nor are they bound by any part of it which gives more power to the Federal Legislature than it [is given] by the compact. Their rights, under the compact, cannot be taken away by any provisions of the Constitution, to which they were not a party.

Id. at 1112.

25. See the remarks of James Wilson in the Convention: "We must . . . go to the original powers of Society, The House on fire must be extinguished, without a scrupulous regard to ordinary rights." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 469 (rev. ed., 1937).

26. See, e.g., WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED

Whether the Constitution *had* done so was another matter. Article VI, to be sure, made the Constitution, and not the Ordinance, the "supreme Law of the Land."²⁷ That the same Article preserved the validity of the Ordinance as a preexisting "engagement" did not give it constitutional rank; that this clause meant constitutional provisions should be construed to respect the Ordinance in cases of doubt was a better argument that Griswold did not make.²⁸ In any event there was important precedent for the view that, as Bacon implied, the Constitution did not leave the Ordinance wholly unaltered. The new Congress, in one of its first acts, passed a statute that brought the Ordinance into conformity with the Constitution.²⁹

Fearing buttressed his argument against congressional authority to prescribe a convention by insisting that the Ordinance did not require that the territory adopt a constitution in order to become a state.³⁰ The territory was thus "at liberty to form, or not to form, a constitution,"³¹ and thus there was no basis for requiring a convention to adopt one.

STATES OF AMERICA 29 (Da Capo Press 1970) (1829).

27. U.S. CONST. art. VI, cl. 2.

28. See CURRIE, *supra* note 1, at 218-21 (discussing the argument that Congress was required to admit Tennessee).

29. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50-51 (amended 1800); CURRIE, *supra* note 1, at 106. It would not be long before Congress was bombarded with petitions from Governor William Henry Harrison asking that it suspend the Ordinance's ban on slavery in the Indiana Territory. See Northwest Ordinance of 1787, art. VI, 1 Stat. 51, 53 n.(a) (amended 1789); 16 ANNALS OF CONG. 375 (1807). House and Senate committees in the Eighth and Ninth Congresses recommended that the petitions be granted, arguing (honest!) that no issue of freedom was involved; because there already were slaves elsewhere, it was only a question of where they would live. See 16 ANNALS OF CONG. 375, 482 (1807); 15 *id.* at 466 (1806); *id.* at 293 (1805); 13 *id.* at 1023 (1804). Neither the House nor the Senate was ever persuaded, however, and in the Tenth Congress a Senate committee finally recommended against relaxing the ban after hearing from outraged settlers who had gone to Indiana to escape slavery. No one was reported to have doubted Congress's power to modify the Ordinance during these proceedings. See 17 *id.* at 23-31 (1807). But that power was doubted when proposals were made to democratize the government of the Mississippi Territory, though other members rightly pointed out that only the rights provisions (including, of course, the slavery ban), and not the entire Ordinance, were designated as a "compact" binding on Congress. See 16 *id.* at 333-34, 374-75; 19 *id.* at 492-510 (1808).

30. See 11 ANNALS OF CONG. at 1103 (1802).

31. *Id.* at 1118.

Nicholson denied that the resolution would require the territory to adopt a constitution,³² and he was right. The resolution did seem to say, however, that the territory could not become a state without doing so; Fearing's argument raised the important question whether Congress could make adoption of a constitution a condition of statehood.³³

This was not the only condition the resolution imposed. Authority to form a constitution and state government was subject to the proviso that "the same" be republican and consistent with both the Ordinance and the Constitution.³⁴

No one questioned this proviso, except to the extent it required adoption of a written constitution. It would have been hard to do so, because the proviso required nothing the territory was not already required to do. The Ordinance itself specified that new states be republican and conform to its principles.³⁵ The Supremacy Clause made clear that the state government had to comport with the Constitution, and Article IV reinforced the requirement that it be republican.³⁶ It could hardly be unconstitutional for Congress to insist that the new state satisfy the requirements laid down by preexisting law. To ensure that the new state really did adopt a republican form of government, it was surely necessary and proper to make it an additional condition of admission that the form of government be put into writing and made binding as a matter of state law.

The committee also urged that Congress make certain "propositions" that the new state was at liberty to accept or refuse, "without any condition or restraint whatever."³⁷ If the state would agree to exempt land sold by the United States from taxes for ten years, Congress would grant the state three things: certain salt springs "for the use of the people"; one section of

32. *See id.* at 1106.

33. *See id.* at 1103.

34. *See id.* at 1098.

35. *See* Northwest Ordinance of 1787, art. V, 1 Stat. 51, 53 n.(a) (amended 1789).

36. *See* U.S. CONST. art. VI; *id.* art. IV, § 4. Indeed, the language of the Enabling Act respecting adoption of a state constitution was copied directly from the Ordinance; if the statute required a written constitution, so did the Ordinance itself. *See* Act of Apr. 30, 1802, ch. 40, 2 Stat. 173 (amended 1803).

37. 11 ANNALS OF CONG. 1100 (1802).

each township "for the use of schools"; and one tenth of the net proceeds of local land sales to build roads "leading from the navigable waters emptying into the Atlantic, to the Ohio," and through the state itself.³⁸

Adopted with minor modifications,³⁹ this was a provision of transcendent importance. It was the beginning of federal support for internal improvements and schools.⁴⁰

Federal authority to construct roads and canals would soon become a major issue of states' rights. Presidents Madison and Monroe would both veto internal improvement bills on constitutional grounds⁴¹—the latter, indeed, in the context of the very highway to Ohio contemplated by the 1802 provision.⁴² One of the few changes made when the self-styled Confederate States of America adopted their own version of the Constitution was to forbid the central government to support internal improvements.⁴³

The House committee that advocated this momentous step in 1802 did not even advert to the constitutional question. It did note that a 1785 ordinance had already reserved the same sections for school purposes and added that intercourse between East and West was crucial "to the stability and permanence of the union";⁴⁴ the committee did not think it necessary to defend the constitutionality of its proposal. Nor did opponents raise constitutional doubts. Not surprisingly, Fearing thought it would be better to

38. *Id.*

39. Federal contributions for roads were reduced to five percent of the proceeds of local land sales, and the tax exemption was reduced to five years. *See* ch. 40, § 7, 2 Stat. 175.

40. *See* 1 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 302 (Charles Scribner's Sons 1917) (1889). For an excellent summary of the improvements controversy from its beginnings through the administration of John Quincy Adams, *see* LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, ch. 31 (1951).

41. *See* James Madison, Veto Message to the House of Representatives (Mar. 3, 1817), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 584; *see also infra* note 42 (citing President Monroe's veto).

42. *See* James Monroe, Veto Message to the House of Representatives (May 4, 1822), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 142; *see also* Letter from James Monroe to the House of Representatives (May 4, 1822), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 144 (discussing Monroe's views on the constitutionality of internal improvement).

43. *See* CONST. OF THE CONFEDERATE STS. OF AM. art. I, § 8, cl. 3.

44. 11 ANNALS OF CONG. at 1100 (1802).

spend the entire amount for roads within the new state;⁴⁵ he had no objection to taking the money. Griswold griped that it was inappropriate to use funds earmarked for discharging the national debt to build roads for the benefit of Pennsylvania and Virginia;⁴⁶ but he did not say it was unconstitutional.

William Giles of Virginia responded that local projects often produced national benefits, as in the case of lighthouses, which Congress had authorized before.⁴⁷ He felt no need to explain why the proposal was within Congress's power, but his argument seemed to suggest two possible sources of authority: the Commerce Clause and the General Welfare Clause.⁴⁸

Giles was not one to construe the welfare provision broadly; he had been loud in insisting that Congress had no right to help the victims of the great Savannah fire.⁴⁹ Despite the lighthouse analogy, other Republicans would soon deny that the commerce power reached so far as to permit Congress to build roads or canals.⁵⁰ What then explains the conspicuous indifference of the 1802 Congress to the constitutional question?

It seems likely that both supporters and opponents of the Ohio Enabling Act⁵¹ assumed that the three proposed grants fell within the authority Article IV gave Congress to dispose of the property of the United States.⁵²

Congress had granted great gobs of public lands since the beginning.⁵³ It had conveyed lots to war veterans in recognition of

45. See *id.* at 1125.

46. See *id.* at 1124.

47. See *id.*; CURRIE, *supra* note 1, at 69-70.

48. U.S. CONST. art. I, § 8, cl. 1, cl. 3.

49. See CURRIE, *supra* note 1, at 224. Faithful to the narrow conception of the spending power they had enunciated in the Savannah case, Republicans in the Jeffersonian Congress limited the relief they provided to victims of subsequent blazes in Norfolk and Portsmouth to a year's extension of the time for discharging customs obligations, presumably pursuant to the power to collect taxes. See Act of Mar. 19, 1804, ch. 28, 2 Stat. 272; 16 ANNALS OF CONG. 1252 (1807); cf. CURRIE, *supra* note 1, at 168-69 (discussing an earlier tax rebate afforded as a means of subsidizing the cod fisheries).

50. See, e.g., James Madison, Veto Message to the House of Representatives (Mar. 3, 1817), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 584.

51. Act of Apr. 30, 1802, ch. 40, 2 Stat. 173 (amended 1803).

52. See U.S. CONST. art. IV, § 3.

53. See CURRIE, *supra* note 1, at 207 nn.5-7.

their services, it had transferred acres to Indians and others the federal government had displaced from their homes, and it had set up a land office to sell off the public domain to speculators and settlers.⁵⁴ As Article IV made clear, Congress was *supposed* to get rid of its title to public lands.⁵⁵ Nothing in that provision limited the purposes for which land could be conveyed. Nothing required that the government receive anything in return, although it did in this case: To qualify for the proffered goodies, the new state would have to give purchasers of federal land a tax exemption for ten years.⁵⁶

Can it really be that simple? The first source of uncertainty is that the proposal was not to transfer land to the state so that it could build roads, but to set aside a fraction of the proceeds of land sales so that Congress could build them. Federal money is, of course, federal property, but that proves too much; surely the limitations on the power to tax and spend for the general welfare that Republicans had so vociferously proclaimed cannot be annihilated simply by regarding tax revenues as "property" of which Congress is authorized to dispose.

Perhaps a tracing principle is in order. If Congress can give land away for purposes of internal improvements, it can give away the proceeds of land sales for the same purpose. It should not matter in terms of states' rights whether the land is sold before or after it is transferred. This argument, however, highlights a basic difficulty with the original assumption that Congress is free to subsidize improvements with donations of public land. For it would seem most peculiar for the Framers to limit federal spending to that which is incident to the exercise of its enumerated powers, as Madison contended,⁵⁷ and at the same time to permit this restriction to be circumvented by the simple expedient of substituting land for money. Maybe the power to dispose of property was only the power to sell it after all.⁵⁸

54. *See id.* at 207 nn.5-6.

55. "The Congress shall have Power to dispose of . . . the Territory or other Property belonging to the United States" U.S. CONST. art. IV, § 3.

56. *See* 11 ANNALS OF CONG. 1100 (1802).

57. *See* CURRIE, *supra* note 1, at 79, 169.

58. It might also be argued that roadbuilding by the federal government was a far cry from merely disposing of federal property, even if there were no restrictions on the disposition itself. Related concerns were to inform Monroe's later veto of a

The proposed exchange of land and its proceeds for a tax break that increased the value of other federal lands thus raised fundamental questions of constitutional authority that Congress did not even begin to discuss. It did not, however, raise additional issues respecting Congress's power to impose conditions on the admission of new states, for, as the committee emphasized, the exchange was not made a condition of statehood; it was a separate offer the new state was free to accept or refuse.⁵⁹

The committee phrased it that way deliberately in order to ensure its constitutionality. For Treasury Secretary Albert Gallatin, who had proposed the bargain, had expressly disputed Congress's authority to impose additional conditions on the admission of states:

[I]t does not appear to me that the United States have a right to annex new conditions, not implied in the articles of compact, limiting the Legislative right of taxation of the Territory or new State. The limitations, which they may rightfully impose, are designated by the articles themselves, and these being unalterable unless by common consent, all Legislative powers, which of right pertain to an independent State, must be exercised at the discretion of the Legislature of the new State, unless limited either by the articles or the Constitution of the United States or of the State.⁶⁰

Gallatin did not say that additional conditions would violate the Constitution itself; like Fearing, who argued that Congress could not prescribe a constitutional convention, he appeared to view the Ordinance as binding on Congress. That was what the Ordinance said,⁶¹ and the Constitution made it as valid as ever.⁶² Perhaps the best explanation was that, as Representative Giles said, the Ordinance was like a treaty.⁶³ It might not be

bill to collect tolls for maintenance of the Cumberland Road. *See* Veto Message of James Monroe (May 4, 1822), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 1817-1833, *supra* note 3, at 142.

59. *See* 11 ANNALS OF CONG. 1100 (1802).

60. *Id.* at 1101.

61. *See* Northwest Ordinance of 1787, 1 Stat. 51, 52 n.(a) (amended 1789).

62. *See* U.S. CONST. art. VI.

63. *See* 11 ANNALS OF CONG. 1103 (1802).

unconstitutional for Congress to violate the Ordinance, but it would be a breach of faith; no one in the House argued that Congress had a "right" to disregard what the Ordinance described as a "compact between the original states and the people and states in the said territory."⁶⁴

If this view was correct, Congress was not only within its rights in conditioning Ohio's admission on adoption of a republican form of government and conformity with the Ordinance; it was required to do so, as both of these conditions were prescribed by the "compact" itself.⁶⁵ And on this view the resolution's further provision that the new state would be admitted on "the same footing with the original States"⁶⁶ was not an act of grace either, for that too was in substance what the compact prescribed.⁶⁷

The question of Congress's power to impose conditions on admission arose in yet another context in connection with the boundaries of the proposed new state. The original Northwest Territory had already been divided into east and west sections for statehood purposes along the present line between Ohio and Indiana.⁶⁸ But the two sections extended northward through what is now Michigan to the Canadian border, and the committee proposed to amputate the new state at a line extending eastward from the southern tip of Lake Michigan.⁶⁹ That is what Congress ultimately did; the committee's line was essentially the present boundary between Ohio and Michigan.

After losing in their effort to block the resolution permitting immediate statehood, Federalists attacked the boundary provision. It was unfair to the inhabitants in the Detroit area, said James Bayard of Delaware, to exclude them from the new state; they would have to travel many miles to reach their new seat of government in the Indiana Territory, and it was undemocratic to

64. Northwest Ordinance of 1787, 1 Stat. at 52 n.(a).

65. *See id.* at 53 n.(a).

66. 11 ANNALS OF CONG. 1098 (1802).

67. *See* Northwest Ordinance, art. V, 1 Stat. at 53 n.(a).

68. *See* Act of May 7, 1800, ch. 41, § 5, 2 Stat. 58-59 (amended 1801). This was the same statute that created the Indiana Territory, whose boundary differed slightly from that prescribed for the future state. *See supra* note 11 and accompanying text.

69. *See* 11 ANNALS OF CONG. 1098-99 (1802).

return them to the autocratic first stage of territorial government after they had enjoyed the benefits of an elected assembly in the Eastern Division.⁷⁰ He accordingly proposed that the resolution be amended to include the northern part of the division in the new state, reserving to Congress "the right of making one or more States in said State at any future time."⁷¹

Once Congress admitted the new state, Pennsylvania's John Smilie replied, it would be too late to divide it;⁷² for Article IV forbade the creation of one state within another without the latter's consent.⁷³ The Constitution, said Bayard, was irrelevant; the new states were to be admitted under the Ordinance, not under the Constitution.⁷⁴ Moreover, the greater power embraced the lesser: "If you are vested with the greater power of admitting, you have certainly the minor powers included in the greater power."⁷⁵ It was thus wrong to argue "that Congress has only a right to admit, without any reservation."⁷⁶ Congress could perfectly well say it would "not now exercise the whole power committed to [it], but reserve[d] the right of exercising it hereafter."⁷⁷ In other words, Congress could condition admission of a state on the possibility of dividing it in the future.⁷⁸

70. *See id.* at 1120-21. Fearing even questioned Congress's authority to exclude the northern portion of the division: The Ordinance did not permit Congress, without territorial consent, to admit one part of a division without admitting the other. *See id.* at 1120. Giles replied that the committee proposal was in full accord with the Ordinance; for while Congress in admitting part of the division as one state was obliged to form the remainder into another, it had discretion to determine when the latter should be admitted. *See id.* Giles seems to have had the better of this argument on the basis of the relevant text.

71. *Id.* at 1122.

72. *See id.* at 1123.

73. *See* U.S. CONST. art. IV, § 3. Bacon contended that the state could not surrender its power over the northern territory even if it wanted to. *See* 11 ANNALS OF CONG. 1123 (1802). The same argument was made, without much effect, against a proposal to disestablish the District of Columbia. *See* 12 *id.* at 490 (1803) (statement of Rep. Dennis). It was even less convincing here. Virginia had ceded not only her half of the District for the seat of government, but also Kentucky (and the Northwest Territory itself) for the formation of new states. Article I expressly contemplated the first of these cessions, as Article IV expressly contemplated the second.

74. *See* 11 ANNALS OF CONG. 1123 (1802).

75. *Id.*

76. *Id.*

77. *Id.*

78. The committee report, *see id.* at 1099, and the statute as adopted, *see* Act of

Bayard's remarks underline once again the broad consensus that the Ordinance, and not the Constitution, governed Congress's authority with respect to the admission of Ohio. That is a queer enough perception at best to modern eyes. But this time there was a difference. It was one thing to argue, as Fearing and Gallatin did, that the Ordinance precluded Congress from doing what the Constitution alone might allow. It was quite another to contend that the Ordinance permitted Congress to do what the Constitution expressly forbade. Thus, to the modern observer, Bayard's position stands or falls with the compatibility of conditional admission with the statehood provisions of Article IV.

That question would soon be vigorously aired when it was proposed to admit additional states. The constitutional question was not explored in the Ohio debates, where all the participants believed the Ordinance rather than the Constitution governed. This is not the time to consider it in depth; we shall have ample occasion to do so later. But it may not be amiss to point out at this juncture that as early as 1791 Bayard's predecessor, John Vining, had denied that the power not to hire a tax collector included the power to forbid those who were hired to engage in political activities.⁷⁹ Others had denied that the power to refuse citizenship included the power to condition it on renunciation of titles or slaves.⁸⁰ As every modern student knows, the greater

Apr. 30, 1802, ch. 40, § 2, 2 Stat. 173 (amended 1803), reversed the burden: Congress reserved the right to attach the northern part of the Division to the new state. This provision raised the question whether Congress had power to *enlarge* a state without its consent. Article IV does not directly address this issue. Later decisions limiting federal authority on the basis of implicit state autonomy, however, suggest a negative answer. Cf. *Printz v. United States*, 117 S. Ct. 2365 (1997) (holding unconstitutional a federal requirement that state officers perform background checks on potential handgun buyers); *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that a state could not be sued in federal court by one of its citizens); *Collector v. Day*, 78 U.S. 113 (1871) (holding that Congress could not tax the salary of a state judicial officer). If this conclusion is correct, the committee's version posed the same question of unconstitutional conditions as Bayard's opposite proposal. Congress never attempted to exercise this option, however, as Michigan was made a separate territory in 1805. See Act of Jan. 11, 1805, ch. 5, 2 Stat. 309; see also Act of Feb. 3, 1809, ch. 13, § 1, 2 Stat. 514, 514-15 (amended 1812) (creating a separate Illinois Territory in that portion of Indiana west of the Wabash River).

79. See CURRIE, *supra* note 1, at 62.

80. See *id.* at 194-95.

power does not always include the lesser.

Congress enacted the committee's recommendations almost word for word, the territorial convention adopted a constitution and erected the new state's government.⁸¹ In February 1803 Congress passed a second law reciting these facts, declaring that Ohio "has become" a state, and making existing federal laws applicable within its borders.⁸² The first statute had authorized Ohio to form a state government, the second recognized that it was already a state. Congress never passed an act admitting Ohio to the Union.⁸³

One last controversy attended Ohio's admission. Near the end of December 1802, after the territorial convention had completed its work, Representative Davis questioned Fearing's right to continue to serve as Delegate from the Northwest Territory. That

81. See Act of Apr. 30, 1802, ch. 40, 2 Stat 173 (amended 1803). The statute spelled out the procedure for electing convention delegates, omitted the superfluous requirement that the new government be consistent with the Constitution, awarded the state a single representative until the next census, reduced the road fund to five percent of the land proceeds and the period of tax exemption to five years, and attached the excluded northern part of the division to the Indiana Territory. See *id.*

82. Act of Feb. 19, 1803, ch. 7, 2 Stat. 201. The new state constitution, which gave the state its name, set up a government unquestionably republican. It also faithfully incorporated most of the Ordinance's requirements, including such matters as habeas corpus, OHIO CONST. of 1802, art. VIII, § 12, freedom of religion, *id.* § 3, protection of property, *id.* § 4, and contracts, *id.* § 16, and the prohibition of slavery, *id.* § 2. The Ohio constitution appended a number of additional rights the Ordinance had omitted, such as freedom of speech, *id.* § 6, press, *id.*, assembly, *id.* § 19, petition, *id.*, right to counsel, *id.* § 11, to a speedy public trial, *id.* § 7, protection from double jeopardy, *id.* § 11, self-incrimination, *id.*, general warrants, *id.* § 5, and "unwarrantable" searches or seizures, *id.* The failure to repeat the Ordinance's law of the land provision, exemption of federal lands from taxation, and freedom of navigation raised the question whether the Ordinance itself remained enforceable after statehood, as the Ordinance seemed to say. The same question would be presented if the state ever failed to enforce the provisions the Ordinance had required it to enact. There is no evidence that Congress ever determined whether the provisions of this constitution met the requirements laid down in the Enabling Act, as one would expect it to do, before announcing that Ohio had become a state.

83. As a result there are five different theories as to when Ohio became a state; the state legislature said it was on the date the legislature first met. See 2 WILLIAM T. UTTER, HISTORY OF THE STATE OF OHIO: THE FRONTIER STATE 31 (1942) (describing the suggested dates and the legislature's solution). The Enabling Act had ambiguously said that "the said state, when formed, shall be admitted into the Union." Enabling Act, ch. 40, § 1, 2 Stat. 173 (1802) (amended 1803). Use of the passive voice appeared to envision further action by Congress, which was not forthcoming.

territory ceased to exist when Ohio became a state, argued Davis, and Ohio had not elected Fearing as its representative.⁸⁴ A committee found that Fearing was still entitled to his seat, and the House took no further action.⁸⁵ Fearing served until the session ended, although by that time Congress had formally acknowledged that Ohio was a state. The committee may have shared the state legislature's view that until the legislature met Ohio was not a state,⁸⁶ but that cannot explain the House's subsequent inaction. Perhaps there was a tacit agreement not to deprive the new state of a voice on the basis of a technicality. Perhaps it was thought that, as William Smith had argued in support of the statute authorizing a delegate from the Southwest Territory, the House could permit anyone it liked to participate, short of voting, in its proceedings.⁸⁷ Or perhaps in the end-of-the-session rush no one remembered that there was a problem.

Oh, yes. Ohio did vote Republican: For Governor, for the legislature, and for Congress. There hadn't been many Federalists there to begin with, and their selfish opposition to statehood did them in entirely.⁸⁸

II. LOUISIANA

It was too good to be true. In order to ensure an unimpeded outlet for the products of the western states, President Jefferson authorized Robert Livingston and James Monroe to buy New Orleans and the Floridas from France,⁸⁹ and Napoleon offered them the whole Mississippi basin. Like any good agent, they eagerly exceeded their instructions and signed on the dotted line, confident that their principal would ratify their actions.⁹⁰

84. See 12 ANNALS OF CONG. 295 (1802). The state constitution had sensibly and optimistically provided that all territorial officers should continue to exercise their duties until new officers replaced them, but the federal Constitution set the requirements for state representation in Congress. See Ohio Const. of 1802, Sched., § 3; U.S. CONST., art. I, § 2.

85. See 12 ANNALS OF CONG. 447 (1803).

86. See *supra* note 83 and accompanying text.

87. See CURRIE, *supra* note 1, at 202-03.

88. See 2 UTTER, *supra* note 83, at 26-27.

89. See 12 ANNALS OF CONG. 1095-108 (1803) (reproducing a letter from Madison to Livingston and Monroe dated Mar. 2, 1803).

90. See *id.* at 1145. For the argument that the enlarged purchase fell within the

As noted in the preceding section, free navigation of the Mississippi, together with the ancillary right to deposit goods at New Orleans pending transfer to ocean-going vessels, was guaranteed by Thomas Pinckney's 1795 treaty with Spain,⁹¹ which had acquired the capacious province of Louisiana from France at the close of the Seven Years' War. In 1800, however, Spain agreed to cede Louisiana back to France,⁹² and a year later Spanish authorities in New Orleans suspended the right of deposit in evident violation of the treaty.⁹³ These events brought home the precariousness of permitting the lifeblood of the western economy to depend upon promises on a piece of paper.⁹⁴

Federalists rattled their sabres and called for military seizure of New Orleans.⁹⁵ Instead, Congress appropriated two million

envoys' authority to negotiate for the "more effective security of the rights and interests of the United States in the River Mississippi and in the territories eastward thereof," see 4 IRVING BRANT, JAMES MADISON: SECRETARY OF STATE 1800-1809, at 107 (1953) (quoting an unpublished power of attorney).

91. See Treaty of Friendship, Limits and Navigation, Between the United States of America and the King of Spain, Oct. 27, 1795, art. 4 & 22, 8 Stat. 138, 140, 152.

92. See 1 ADAMS, *supra* note 40, at 403.

93. See *id.* at 420.

94. By 1800, once-mighty Spain was a pushover and France a superpower. Gouverneur Morris thought it likely France would not respect the treaty between the United States and Spain. See 12 ANNALS OF CONG. 191 (1803). "The day that France takes possession of New Orleans," wrote Jefferson (Jefferson!), "we must marry ourselves to the British fleet." Letter from Thomas Jefferson to Robert Livingston (Apr. 18, 1802), in JEFFERSON'S LETTERS, at 208 (Willson Whitman ed., 1940). For further information, see Jefferson's Second Annual Message to Congress (Dec. 15, 1802), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 343; Jefferson's Message to the Senate Respecting the Appointments of Livingston and Monroe, in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 350-51 and the House committee report recommending appropriations, 12 ANNALS OF CONG. 371-74 (1803).

95. See 12 ANNALS OF CONG. 83-88, 91-96 (1803) (statement of Sen. Ross); *id.* at 107-15 (statement of Sen. White); *id.* at 136-39 (statement of Sen. Dayton); *id.* at 142-46 (statement of Sen. J. Mason); *id.* at 153-57 (statement of Sen. Wells); *id.* at 185-206 (statement of Sen. Morris). Ross's proposed resolutions, see 12 ANNALS OF CONG. at 95-96, would have authorized the president not only to take possession of New Orleans and adjacent territories, but also to employ the militia for that purpose. But as Virginia's Stevens Mason observed Article I, Section 8 permitted the militia to be used only "to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15; see 12 ANNALS OF CONG. 216 (1803). (Mason later stated, with the support of Senator Nicholas, see *id.* at 236-37, that Congress could not constitutionally delegate to the president its authority to declare war. See *id.* at 225.) On Breckinridge's motion the House voted instead to

dollars to purchase the strategic territories.⁹⁶ Then Napoleon made the offer Jefferson's envoys had no authority to accept and could not in good conscience refuse.⁹⁷

By the first article of the new 1803 treaty,⁹⁸ France ceded to the United States "the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it"⁹⁹—declaring that France had acquired "an incontestable title to the domain" pursuant to its 1800 treaty.¹⁰⁰ Article III provided what the United States

authorize the president to hold up to 80,000 militiamen in readiness in case they were needed—presumably for purposes the Constitution allowed. *See id.* at 119, 255-56. For the resulting statute, see Act of Mar. 3, 1803, ch. 32, 2 Stat. 241 (repealed 1806).

96. *See* Act of Feb. 26, 1803, ch. 8, 2 Stat. 202. West Florida was included because the mouths of the Mobile and Appalachicola Rivers, the Mississippi Territory's avenues to the sea, lay within its borders. The case for acquisition of East Florida (the present state of that name), was admittedly less urgent. It would facilitate trade with the West Indies, "would likewise make our whole territory compact, would add considerably to our seacoast, and by giving us the Gulf of Mexico for our southern boundary, would render us less liable to attack, in what is now deemed the most vulnerable part of the Union." 12 ANNALS OF CONG. 373 (1803).

97. For a streamlined account of these events, see MARSHALL SMELSER, *THE DEMOCRATIC REPUBLIC, 1801-1815*, at 83-103 (1968). For more detailed depictions, see 1 ADAMS, *supra* note 40, at 227-392; 4 BRANT, *supra* note 90, at 98-159; GEORGE DANGERFIELD, *CHANCELLOR ROBERT LIVINGSTON OF NEW YORK 307-94* (1960); ALEXANDER DECONDE, *THIS AFFAIR OF LOUISIANA* (1976); 4 DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 239-363 (1970); ARTHUR PRESTON WHITAKER, *THE MISSISSIPPI QUESTION, 1795-1803* (1934).

98. Treaty Between the United States of America and the French Republic, Apr. 30, 1803, art. I, 8 Stat. 200, 200-02 [hereinafter Louisiana Treaty].

99. *Id.* at 202. The boundaries of this grant were later to give rise to serious disputes with Spain, not least over East and West Florida, which included the Gulf Coast westward to the Mississippi. *See* 1 ADAMS, *supra* note 40, at 347-51; 4 MALONE, *supra* note 97, at 303-09 and authorities cited; SMELSER, *supra* note 97, at 96, 104-08.

100. Louisiana Treaty, *supra* note 98, art. I, 8 Stat. at 202. In opposing the purchase, Senator Plumer made much of the fact that the 1800 agreement did not itself transfer the territory back to France, but only promised that Spain would do so after certain conditions were met, arguing—as the Spanish minister had protested—that it was not clear France had any right to sell. *See* WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 4 (Everett S. Brown ed., Da Capo Press 1969) (1923) [hereafter PLUMER]; *see also* 13 ANNALS OF CONG. 32-33 (1803) (statement of Sen. White) (opposing a bill to appropriate money for the purchase price because it was doubtful whether Spain would transfer possession). Jackson and Adams sensibly replied that the money would not be paid until we took possession, and the bill was passed. *See id.* at 40, 66; *see also infra*

would do with Louisiana after acquiring it:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.¹⁰¹

Article VII provided certain privileges for Spanish and French vessels that were to raise troublesome constitutional questions.¹⁰² The greatest controversy, however, would surround Article III's requirement that Louisiana be "incorporated in the Union of the United States."¹⁰³

note 112 and accompanying text (discussing subsequent appropriations bills).

101. Louisiana Treaty, *supra* note 98, art. III, 8 Stat. at 202.

102. *See id.* at 204; *see also infra* notes 189-207 and accompanying text.

103. Louisiana Treaty, *supra* note 98, art. III, 8 Stat. at 202. There was some flak about the citizenship provision as well. Representative Mitchill rightly stressed that the treaty itself did not confer citizenship but only promised it in the future, though he noted with much force that the Jay Treaty had authorized British subjects who remained in the country to become citizens by simply taking an oath. *See* 13 ANNALS OF CONG. 480-81 (1803). Plumer objected that admission to the Union would naturalize all inhabitants en bloc without regard to the requirements otherwise applicable by statute, in violation of Article I, Section 8, Clause 4, which empowered Congress to adopt only "an uniform rule" on the subject. U.S. CONST. art. I, § 8, cl. 4; *see* PLUMER, *supra* note 100, at 10. The purpose of this provision of the Constitution was to preclude states with liberal views on immigration from inflicting their ideas on other parts of the country. *See* U.S. CONST. art. IV, § 2 ("The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."). Even if the clause also forbids Congress generally to pass special naturalization laws, *but see* FREDERICK VAN DYNE, CITIZENSHIP OF THE UNITED STATES 235-37 (1904) (noting, *inter alia*, several instances respecting naturalization of Indian tribes), it is difficult to apply the clause to preclude blanket naturalization upon admission of a new state, given the original understanding that citizenship in a state meant citizenship in the Union. *See* 2 RAWLE, *supra* note 26, at 86. As stated in *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 175-76 (1892):

So far as the original States were concerned, all those who were citizens of such States became upon the formation of the Union citizens of the United States, and upon the admission of Nebraska into the Union "upon an equal footing with the original States, in all respects whatsoever," the citizens of what had been the Territory became citizens of the United States and of the State.

Jefferson had doubts about the constitutionality of the entire enterprise. As he said in a letter to Kentucky Senator John Breckinridge, "[t]he Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union,"¹⁰⁴ as Article III of the treaty unequivocally required. But Jefferson knew a good deal when he saw one, and he had no intention of repudiating the treaty. He suggested to Breckinridge that the Constitution be amended to remedy the perceived want of power.¹⁰⁵

A few days later, on the strength of a letter from Livingston warning that Napoleon might be looking for an excuse to weasel out of the bargain, Jefferson urged Breckinridge to say nothing of constitutional qualms.¹⁰⁶ Accordingly, there was no reference to

Plumer's additional argument that the treaty could not be performed because Louisiana citizens would not be eligible for election to the presidency refutes itself. As his own argument shows, presidential eligibility is not a privilege of mere citizenship. See PLUMER, *supra* note 100, at 10; see also U.S. CONST. art. II, § 1 ("No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of President.").

104. Letter from Thomas Jefferson to John Breckinridge (Aug. 12, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, at 7 (Paul Leicester Ford ed., 1905). He had written to John Dickinson to the same effect a few days before. See Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra*, at 29.

105. See Letter from Thomas Jefferson to John Breckinridge, *supra* note 104, at 7. Indeed he had already sent Robert Smith a draft amendment on the subject, see Drafts of an Amendment to the Constitution (July 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 3-12. Smith had responded with a second, see Letter from Robert Smith to Thomas Jefferson (July 9, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 3-5 n.1, and Jefferson had sent Madison and Attorney General Levi Lincoln a third. See Drafts of an Amendment to the Constitution, *supra*, at 3-8; see also 12 ANNALS OF CONG. at 1166 (1803) (conveying the president's "entire approbation" of his agents' unauthorized action).

Jefferson's first proposal would have "incorporated" Louisiana "with the United States," given Congress a narrowly drafted list of specific powers over it, and authorized establishment of a territorial government in the southern portion, reserving the rest essentially for the settlement of Indians pending further amendment. See Drafts of an Amendment to the Constitution, *supra*, at 3-12. Smith's revision preserved Jefferson's basic principles but sensibly replaced the specific powers with general authority "to dispose of and make all needful rules and regulations." Letter from Robert Smith to Thomas Jefferson, *supra*, at 4-5 n.1. Jefferson's later draft simply made Louisiana "a part of the U S," and its inhabitants citizens, making similar provision for Florida "whenever it may be rightfully obtained," and still declaring the northern portion of Louisiana basically out of bounds. Drafts of an Amendment to the Constitution, *supra*, at 3-8.

106. See Letter from Thomas Jefferson to John Breckinridge (Aug. 18, 1803), in

any constitutional question when the president called the treaty to the attention of a special session of the Eighth Congress in October 1803,¹⁰⁷ when he asked the Senate to endorse it,¹⁰⁸ or when he invited both Houses to implement it by legislation.¹⁰⁹

The Senate approved the treaty within four days,¹¹⁰ and Congress passed a series of implementing statutes. The president was authorized to take possession of the new province;¹¹¹ money was appropriated to pay for the purchase;¹¹² the tariff laws and other federal statutes were extended to the new territory.¹¹³ The area was divided at the thirty-third parallel, the northern boundary of the present state of Louisiana. The southern portion, which contained the city of New Orleans, was christened the Territory of Orleans and the remainder the District (later territory) of Louisiana.¹¹⁴ Each was ultimately given its

10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 7-8 n.1; see also Letter from Thomas Jefferson to James Madison (Aug. 18, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 8 n.1 (informing Madison that the "less said" of the constitutional difficulties "the better"). For Livingston's letter of June 3 to Madison urging prompt action, see 12 ANNALS OF CONG. 1158 (1803). Livingston's similar letter to the president is apparently unpublished. For the view that Livingston's fears were self-serving "nonsense," see 4 BRANT, *supra* note 90, at 143.

107. See Jefferson's Third Annual Message to Congress (Oct. 17, 1803), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 357-58.

108. See Jefferson's Special Message to the Senate (Oct. 17, 1803), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 362.

109. See Jefferson's Special Message to Congress (Oct. 21, 1803), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 362-63.

110. See 1 S. EXEC. J. 450 (1803).

111. See Act of Oct. 31, 1803, ch. 2, 2 Stat. 245 (amended 1804). Despite the sound constitutional objections Republicans raised in Congress against an earlier attempt to authorize employment of the militia to take possession of portions of Louisiana, see *supra* note 95, the administration apparently was prepared to do just that. See 4 MALONE, *supra* note 97, at 335. But Louisiana now belonged to the United States, and in helping to exercise their treaty right to occupation, the militia could fairly be said to be executing federal law.

112. See ch. 2, 2 Stat. at 245; Act of Nov. 10, 1803, ch. 3, 2 Stat. 247. There were two separate laws because some of the money was to be used to pay off debts owed by France to United States citizens, in accord with two separate conventions that accompanied the treaty. See Convention Between the United States of America and the French Republic, Apr. 30, 1803, art. 1, 8 Stat. 206; Convention Between the United States of America and the French Republic, Apr. 30, 1803, art. 1, 8 Stat. 208. The total sum, as you remember from elementary school, was \$15,000,000.

113. See Act of Feb. 24, 1804, ch. 13, 2 Stat. 251, 251-54.

114. See Act of Mar. 26, 1804, ch. 38, 2 Stat. 283 (repealed 1805).

own territorial government,¹¹⁵ and Orleans received the promise of statehood the treaty arguably required.¹¹⁶ Congress appropriated three thousand dollars for exploration of the new domain¹¹⁷ and established a commission—not a court—to pass upon claims to land within its boundaries.¹¹⁸

The Louisiana Purchase was a grand coup for the United States. But it was not achieved without a fight. Yankee Federalists, perceiving that westward expansion portended diminution of their influence,¹¹⁹ opposed it tooth and nail. While Jefferson

115. See Act of Mar. 2, 1805, ch. 23, 2 Stat. 322; *id.* 2 Stat. 331 (repealed 1812). As an initial stopgap measure, the northern district ("Louisiana") had previously been administered by the governor and judges of the Indiana Territory. See ch. 38, § 12, 2 Stat. 283, 287.

116. See ch. 23, 2 Stat. at 323. Following the model of the Northwest Ordinance, Congress authorized the admission of Orleans "upon the footing of the original states" once its population reached 60,000, provided its constitution was republican and consistent with the Constitution and with the Ordinance itself, insofar as it applied. See *id.* Congress reserved the right to alter the boundaries before admission so long as it did not thereby delay statehood. See *id.* These conditions, which did not significantly go beyond those imposed with respect to Ohio, provoked no constitutional debate. The additional statement that Orleans would be admitted "conformably to the provisions of the third article of the treaty" was probably meant only to show that by this act the United States would fulfill its obligation to France. *Id.* The statute can scarcely have made treaty promises respecting the protection of liberty, property, and religion a further condition of admission, because by the terms of the treaty these promises respected only the period before the territory became a state.

117. See Act of Mar. 27, 1804, ch. 61, § 13, 2 Stat. 303. No, this was not Lewis and Clark's expedition. They had been sent on their way before Louisiana was acquired, Jefferson having justified the expenditure as serving "the interests of commerce" because he saw no basis for financing a purely scientific investigation. Letter from Thomas Jefferson to Congress (Jan. 18, 1803), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 354. The resultant act appropriated \$2,500 "for the purpose of extending the external commerce of the United States." Act of Feb. 28, 1803, ch. 12, 2 Stat. 206; see H.R. REP. NO. 8-178 (1804), reprinted in 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES (MISCELLANEOUS) 390-91 (1834) [hereinafter AMERICAN STATE PAPERS (MISC.)] (discussing the benefits to be gained from such an expedition and recommending that the House of Representatives approve the appropriation); 4 MALONE, *supra* note 97, at 276. Contrast the First Congress's refusal, in the face of constitutional doubts, to bankroll an exploration of Baffin's Bay and the magnetic pole. See CURRIE, *supra* note 1, at 71-72.

118. See Act of Mar. 2, 1805, ch. 26, § 5, 2 Stat. 324, 327.

119. See, e.g., 13 ANNALS OF CONG. 58 (statement of Sen. Tracy); *id.* at 433 (statement of Rep. Griswold); EVERETT S. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812, at 32-33 (1920); PLUMER, *supra* note 100, at 9 ("Admit this western world into the union, & you destroy with a single operation

pocketed his constitutional concerns in order not to jeopardize his dream, Federalist adversaries made his arguments against him. The debate over approval and implementation of the Louisiana treaty, like so many others of the time, was in significant part a debate over the meaning of the Constitution.¹²⁰

A. Acquisition and Admission

There was little time for constitutional debate when the treaty itself was before the Senate; even New Hampshire Senator William Plumer, who kept the most complete record of Senate debates at the time, recorded only his own unspoken reservations.¹²¹ But seven Federalists voted not to approve the treaty,¹²² and most of them renewed their objections when legislation was proposed to carry it out.¹²³ A valid treaty, they argued, was the law of the land and left no room for congressional discretion, but this treaty was unconstitutional and thus could not be implemented at all.¹²⁴

But how could the Federalists—or Jefferson, for that matter—doubt the power to acquire Louisiana and to admit it to the

the whole weight & importance of the eastern states in the *scale* of politics.”)

120. For a thorough study of the constitutional arguments that were made at the time, see BROWN, *supra* note 119, at 14-35, 62-83.

121. See PLUMER, *supra* note 100, at 3-14.

122. See 13 ANNALS OF CONG. 308 (1803). Dayton voted for the treaty. See *id.* Adams, who favored acquisition, had not yet arrived in Washington. See 4 MALONE, *supra* note 97, at 328. Tracy voted against the treaty. See 13 ANNALS OF CONG. 308 (1803). Gouverneur Morris, who was no longer in the Senate, also supported the purchase, though he thought it would be “injurious” to admit the new territory into the Union. See Letter from Gouverneur Morris to Jonathan Dayton (Jan. 7, 1804), in 2 THE DIARY AND LETTERS OF GOUVERNEUR MORRIS, 452-53 (Anne Cary Morris ed., Da Capo Press 1970) (1888). So did Hamilton, who, when he thought Napoleon would never sell, had urged conquest, and who still thought it would have been preferable to acquire New Orleans alone. See ALEXANDER HAMILTON, *For the Evening Post*, in 26 THE PAPERS OF ALEXANDER HAMILTON, 82-85 (Harold C. Syrett ed., 1979); ALEXANDER HAMILTON, *Purchase of Louisiana*, in 26 THE PAPERS OF ALEXANDER HAMILTON, *supra*, 129-36.

123. See PLUMER, *supra* note 100, at 31. Plumer did not, concluding that he was bound by the Senate’s decision to approve the treaty. See *id.*

124. See 13 ANNALS OF CONG. 44, 431 (1803) (statements of Sen. Pickering and Rep. Gaylord Griswold). The insistence that Congress was bound to implement a valid treaty was in accord with the position Federalists had taken with respect to appropriations under the Jay Treaty in 1795. See CURRIE, *supra* note 1, at 213.

Union? The acquisition of territory had been the subject of treaties since time immemorial, and Article II, Section 2 gave the treaty power to the United States;¹²⁵ Article IV, Section 3 explicitly empowered Congress to admit new states,¹²⁶ as it had already done on several occasions.¹²⁷ For Gallatin that was enough to justify the treaty: "[T]he existence of the United States as a nation presupposes the power enjoyed by every nation of extending their territory by treaties, . . . whilst this section [Article IV, Section 3] provides the proper authority (viz., Congress) for either admitting in the Union or governing as subjects the territory thus acquired."¹²⁸

As Representative Nicholson stressed, there were two distinct constitutional issues: the power to acquire territory and the pow-

125. See U.S. CONST. art. II, § 2.

126. See U.S. CONST. art. IV, § 3.

127. Representative Thomas Sandford of Kentucky, who described himself as "a plain Western farmer," had a simpler theory to sustain the treaty: "The Constitution does not prohibit the powers exercised on this occasion; and not having prohibited them, they must be considered as possessed by Government." 13 ANNALS OF CONG. 454 (1803). Even a plain Western farmer, one would think, ought to read the Constitution that defines his authority.

John Randolph, who was no lawyer either, seemed to think it comparable that the United States had settled disputed borders by treaty and accepted a cession of territory from Georgia. See *id.* at 435-36. In neither of these cases, however, was there any pretense of acquiring territory outside the United States. See *id.* at 455 (statement of Rep. Thatcher). The same was true of the Indian treaties invoked by Representative Mitchill. See *id.* at 478. Whether they ceded jurisdiction or only title, the land in question lay entirely within the boundaries drawn by the Treaty of Paris in 1783. See *id.* at 455.

Caesar Rodney of Delaware, considered one of the stars of the Republican firmament, betrayed one of his party's fundamental principles in arguing unabashedly that the General Welfare Clause empowered Congress to acquire territory, for he made no effort to tie the expenditure to any of the substantive powers enumerated in Article I. See *id.* at 472. In any event it was not Congress but the president, with Senate consent, who had purportedly acquired Louisiana.

128. Letter from Albert Gallatin to Thomas Jefferson (Jan. 13, 1803), in 1 THE WRITINGS OF ALBERT GALLATIN 113 (Henry Adams ed., 1879) (dismissing Attorney General Lincoln's unstable suggestion that the government could acquire territory only to add to existing states); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1282 (Leonard Levy ed., Da Capo Press 1970) (agreeing that Congress had the requisite authority). In support of the option of governing the territory "as subjects," Gallatin appropriately invoked the further clause of the same section authorizing Congress to "make all needful rules and regulations respecting the territory or other property of the United States." Letter from Albert Gallatin to Thomas Jefferson, *supra*, at 112.

er to admit it to the Union.¹²⁹ Jefferson had lumped them together in his first letter to Breckinridge, concluding that the Constitution conferred neither authority.¹³⁰ Senator Plumer, in one passage in his diary, recited the same conclusion: "The constitution of the United States was formed for the express purpose of governing the people who then & thereafter should live within the limits of the United States as then known & established. It never contemplated the accession of a foreign people, or the extension of territory."¹³¹ He supported this conclusion by quoting the Preamble, in which "[w]e the *people* of the *United States*" spoke of establishing a constitution "for the *United States of America*" in order, among other things, to "secure the blessings of liberty to ourselves & our posterity."¹³²

If that was the best opponents of acquisition could do, it was pretty poor; nothing in the Preamble suggested that the United States must remain within their original limits or that the "posterity" of the Founders must live there. On its face the treaty power was broad enough to include the normal authority to acquire territory.¹³³ Surely, as Nicholson argued, the sovereign

129. See 13 ANNALS OF CONG. 467 (1803).

130. See Letter from Thomas Jefferson to John Breckinridge, *supra* note 104, at 7 n.1.

131. PLUMER, *supra* note 100, at 7.

132. *Id.* (quoting U.S. CONST. preamble).

133. See 13 ANNALS OF CONG. 448-49 (1802) (statement of Rep. Elliott) (arguing that the treaty clause should be read in light of the law of nations and citing Vattel, Grotius, Puffendorf, and others to establish the right to acquire territory by treaty); see also RAWLE, *supra* note 26, at 65 (arguing, as the Supreme Court would confirm in *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890), that the treaty power "extends to all those matters which are generally the subjects of compacts between independent nations").

Responding to Pickering's argument that Congress should not implement the treaty because it was unconstitutional, Senator Taylor came close to falling into the Holmes fallacy that because Article VI made all treaties created under U.S. authority supreme law whether or not, like statutes, they were enacted "in pursuance" of the Constitution, there was no limit to the treaty power at all. See 13 ANNALS OF CONG. 52-53 (1803); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 100-01 (1990). Tracy appropriately objected: Surely a treaty could not impose a tax on exports, which Article I, Section 9 forbade. See 13 ANNALS OF CONG. 55 (1803). Nicholas set the record straight: Treaties were limited by express prohibitions in the Constitution but not by the enumeration of congressional powers. See *id.* at 69-70; cf. *Reid v. Covert*, 354 U.S. 1, 16 (1957) (confirming that treaties must comply with the Constitution).

powers claimed for each state by the Declaration of Independence had embraced this authority, and the states had transferred their external powers to the Union as early as the Articles of Confederation.¹³⁴ Moreover, only a year before, the Federalists had advocated that the United States seize New Orleans by force to enforce the right to free deposit of goods;¹³⁵ if territory could be acquired by war it was hard to see why it could not be acquired by agreement as well.¹³⁶

In fact, neither Jefferson nor the Federalists in Congress seem to have taken the constitutional objection to the mere acquisition of Louisiana very seriously. Though Jefferson insisted privately that the treaty power was not "boundless,"¹³⁷ he never explained why it did not include the traditional authority to acquire territory, and in an earlier letter to Gallatin he had conceded that it did.¹³⁸ Despite the passage quoted above, so did Plumer, who in the same diary entry acknowledged that he had no doubt the United States could acquire territory either by conquest or by treaty.¹³⁹ So did several of the Federalists recorded as speaking against implementation of the treaty,¹⁴⁰ and not one of them expressly denied that authority.¹⁴¹

134. See 13 ANNALS OF CONG. 468 (1803); *id.* at 50 (statement of Sen. Taylor); *id.* at 457 (statement of Rep. Smilie); see also U.S. CONST. art. I, § 10 ("No state shall enter into any treaty . . .").

135. See *supra* note 95 and accompanying text.

136. See 13 ANNALS OF CONG. 62 (1803) (statement of Sen. Breckinridge); *id.* at 71-72 (statement of Sen. Cocke). Representative Thatcher later denied that Federalist advocates of force had meant to retain possession of the disputed territory after subduing it, see *id.* at 455, but they had not made this qualification plain at the time they were clamoring for war.

137. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 10-11 n.1.

138. See Letter from Thomas Jefferson to Albert Gallatin (Jan. 18, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 3 n.1. Neither Jefferson nor any member of Congress had expressed constitutional doubts when Livingston and Monroe were authorized to acquire New Orleans and the Floridas or when money was appropriated to buy them.

139. See PLUMER, *supra* note 100, at 12.

140. See 13 ANNALS OF CONG. 45 (1803) (statement of Sen. Pickering); *id.* at 58 (statement of Sen. Tracy); *id.* at 463 (statement of Rep. Roger Griswold).

141. See HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE ADMINISTRATIONS OF JEFFERSON AND MADISON 76 (William E. Leuchtenburg & Bernard Wishy eds., Prentice Hall 1963) (1889) ("Every speaker, without distinction of party, agreed that the United States government had the power to acquire new territory

What they did insist, in Plumer's words, was that territory outside the original boundaries of the United States "cannot be admitted as a State into the Union without the previous consent of each State first obtained."¹⁴² For Article IV's provision for admitting new states, said Connecticut Senator Uriah Tracy,

refers to domestic States only, and not at all to foreign States; and it is 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.¹⁴³

Jefferson had said much the same thing in a letter to Virginia Senator Wilson Cary Nicholas, who had argued that Article IV authorized the admission of Louisiana:¹⁴⁴

[W]hen I consider that the limits of the U S are precisely

either by conquest or by treaty; the only difference of opinion regarded the disposition of this territory after it was acquired."); *see also* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J.) ("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.").

142. PLUMER, *supra* note 100, at 12; *see* 13 ANNALS OF CONG. 45 (1803) (statement of Sen. Pickering); *id.* at 56 (statement of Sen. Tracy); *id.* at 463 (statement of Rep. Roger Griswold) ("A new territory and new subjects may undoubtedly be obtained by conquest and by purchase; but neither the conquest nor the purchase can incorporate them into the Union."). Both Plumer and Griswold invoked the analogy of a partnership, whose agents could not admit new members. *See id.* at 461; PLUMER, *supra* note 100, at 8. They might have done better to look at the words of the document they were construing, which expressly authorized the peoples' agents in Congress to admit new states.

Plumer's suggestion that even a constitutional amendment could not authorize the admission of Louisiana had little to recommend it. The language of Article V contained no relevant restriction on the amending power, and Congress would soon reject the argument that there were implicit limitations. *See* Currie, *supra* note 5. Moreover, if Article V did not authorize such an amendment it was not clear what unanimous state consent would add; there was no provision authorizing the states, with or without the support of Congress, to adopt amendments outside the scope of Article V.

143. 13 ANNALS OF CONG. 56 (1803); *see also id.* at 433 (statement of Rep. Gaylord Griswold) (making a similar argument).

144. *See* Letter from Wilson Cary Nicholas to Thomas Jefferson (Sept. 3, 1803), in BROWN, *supra* note 119, at 26-27.

fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the U S, I cannot help believing the intention was to permit Congress to admit into the Union new States, which should be formed out of the territory for which, & under whose authority alone, they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, &c. into it, which would be the case on your construction.¹⁴⁵

There was nothing in the broad terms of Article IV to support Jefferson's narrow interpretation. The operative provision declares that "[n]ew states may be admitted by the Congress into this Union"; the sole qualification is that existing states may not be divided or joined without their consent.¹⁴⁶ Roger Griswold argued that admission of states outside the original boundaries would have such horrifying consequences that it could not have been intended: It was unlikely the states would have ratified the Constitution if they had imagined that "a new world was to be thrown into the scale, to weigh down the influence which they might otherwise possess in the national councils."¹⁴⁷ In support of this assertion he might have added that with states carved out of the original territory the Framers at least knew what they were getting, in terms of both numbers and compatibility. But there was nothing in the records of the Constitutional Convention, the state ratifying conventions, or *The Federalist Papers* to suggest that the provision was intended to mean less than it said.¹⁴⁸ The words of the provision were so sweeping, and its

145. Letter from Thomas Jefferson to Wilson Cary Nicholas, *supra* note 137, at 10 n.1.

146. U.S. CONST. art. IV, § 3, cl. 1. Nicholas thought this explicit exception proved that the authority was otherwise unconfined. See Letter from Wilson Cary Nicholas to Thomas Jefferson, *supra* note 144, at 27.

147. 13 ANNALS OF CONG. 462 (1803). He also made the bare assertion that admission of states outside the original boundaries would impair the "more perfect union" envisioned by the Preamble, but that was only a restatement of his conclusion. See *id.* at 461 (quoting U.S. CONST. preamble).

148. The only subjects of recorded debate relating to the admission of states in the Constitutional Convention were whether to provide that new states were to be admitted on the same basis as the old (the Convention voted not to after several delegates argued it would be a bad idea, but the principle had already been written into the Northwest Ordinance) and whether to permit states like Virginia and North

purpose so plainly applicable to additional territories, that if the delegates meant to limit statehood to territory already within the jurisdiction of the United States one might have expected them to say so—as, indeed, earlier rejected drafts would have done.¹⁴⁹

Nor was it so obvious as Griswold said that the Framers would have looked with disfavor on the admission of states outside the original boundaries.¹⁵⁰ There is much to be said for the view that expansion had been American policy even before the Constitution was adopted.¹⁵¹ As Gallatin pointed out in his letter to Jefferson, the Articles of Confederation had explicitly authorized admission of Canada and “other colon[ies].”¹⁵² Moreover, in making the unavoidable concession that the United States could acquire new territory, opponents of the treaty seriously compromised their argument against the power to grant statehood. Not only did it seem likely, as Breckinridge noted, that the existence of colonial dependencies posed a greater danger to the Union than the admission of new states;¹⁵³ it was so

Carolina, which possessed vast domains west of the mountains, to be divided without their consent. See 2 FARRAND, *supra* note 25, at 454-56, 461-65. In *The Federalist* No. 43, Madison said only that it made sense to provide for the admission of new states and to protect existing ones against involuntary alteration, as Article IV did. See THE FEDERALIST NO. 43, at 273-74 (James Madison) (Clinton Rossiter ed., 1961).

149. See 2 FARRAND, *supra* note 25, at 147, 173. That the Convention considered and rejected drafts that would have authorized the erection of new states only “within the present limits of the united states,” *id.* at 147, demonstrates that some delegates thought such a limitation desirable, but surely not that this was the view of the Convention as a whole.

150. See *supra* note 147 and accompanying text.

151. See, e.g., DECONDE, *supra* note 97, at 41-55.

152. See Letter from Albert Gallatin to Thomas Jefferson, *supra* note 128, at 113. John Adams thought it entirely possible that the Framers had actually contemplated the admission of Canada as well as New Orleans and the Floridas. See Letter from John Adams to Josiah Quincy (Feb. 9, 1811), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, at 631-32 (Charles Francis Adams ed., Books For Libraries Press 1969) (1850).

153. See 13 ANNALS OF CONG. 63 (1803). This point was illustrated graphically by the yelps of indignation that emanated from Orleans when that territory was initially denied the elected legislature to which its population easily entitled it under the principles of the Northwest Ordinance. See the “Remonstrance” presented to Congress by an officious group of volunteers in the name of “the people of Louisiana,” 14 *id.* at 1014-17 (1805).

inconsistent with the principle of self-government on which the country had been founded¹⁵⁴ that it seems very difficult to deny that the Framers would have wanted any territory that might be acquired to come within the statehood provision.¹⁵⁵ Of course it was the problem of existing territories that prompted the inclusion of the clause authorizing admission of new states,¹⁵⁶ but the language employed was general; there seems no more reason to limit it to those territories than to hold that the Thirteenth Amendment forbade the enslavement only of blacks.¹⁵⁷

Although both Gallatin and Nicholas had advised the president that Article IV authorized Congress to admit states outside the original boundaries,¹⁵⁸ and although Jefferson himself had initially said admission was "a question of expediency,"¹⁵⁹ not one Republican speaker was prepared to take a position on the question in debate. Virginia Senator John Taylor denied that the treaty required statehood: "[T]he words are literally satisfied by incorporating [Louisiana] into the Union as a territory, and not as a State."¹⁶⁰ Representative Smilie emphasized that the trea-

154. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

155. That the United States could acquire territory but not admit it to statehood, wrote Madison's biographer, "meant that Congress had implied power to acquire colonies but no power to treat their inhabitants as free and equal human beings." 4 BRANT, *supra* note 90, at 144.

156. See U.S. CONST. art. XI, § 3.

157. See *The Slaughter-House Cases*, 83 U.S. 36, 69 (1873). Several Federalists argued that states could no more be added to than subtracted from the Union; obviously even a treaty could not transfer one of the original states to another country. See PLUMER, *supra* note 100, at 9; 13 ANNALS OF CONG. 56 (1803) (statement of Sen. Tracy); *id.* at 455 (statement of Rep. Thatcher). The Supreme Court has since confirmed that states cannot be detached from the Union without their consent, though the same tradition that established that one nation could accept territory proved another could part with it. See *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (dictum); cf. *Texas v. White*, 74 U.S. 700, 724-25 (1869) (holding a state had no right to secede from the Union). Article IV's provision for new states, however, punctured the syllogism by demonstrating that, whether or not states could be dropped, they could sometimes be conjoined. Breckinridge and Nicholas explained the distinction by arguing that to cast out a state would offend Article IV, Section 4, which requires the United States to guarantee that state a republican form of government. See 13 ANNALS OF CONG. 63, 70 (1803).

158. See *supra* notes 128, 144 and accompanying text.

159. Letter from Thomas Jefferson to Albert Gallatin, *supra* note 138, at 3 n.1.

160. 13 ANNALS OF CONG. 51 (1803); see *id.* at 487 (statement of Rep. Randolph). Both Jefferson and Robert Smith had used the term "incorporation" in their proposed constitutional amendments in the same limited sense. See *supra* notes 104-06

ty provided for incorporation "according to the principles of the Constitution," which he took to mean only if the Constitution allowed it.¹⁶¹ Senator Nicholas, assuming for the sake of argument that the treaty required statehood, saw no constitutional difficulty: If the present Constitution did not permit admission of states outside the initial boundaries, then it could always be amended.¹⁶² Massachusetts Senator John Quincy Adams, still a Federalist and convinced that Article IV did not confer the requisite authority, agreed: Even if, as some of his colleagues argued, every state had to consent, that could be arranged; it did not impair the validity of the treaty.¹⁶³

Thus while approval and implementation of the treaty resoundingly confirmed the power to acquire territory, Congress left open the question whether that territory could be admitted to statehood. After the treaty was safely approved, Adams forthrightly proposed to authorize its implementation by constitutional amendment, as Jefferson had initially intended.¹⁶⁴ Secretary of

and accompanying text. The distinction between "incorporated" and "unincorporated" territories was to play a significant role in the so-called *Insular Cases* a century later, when the question was the applicability of various constitutional provisions to overseas possessions acquired by virtue of the Spanish-American War. See *Dooley v. United States*, 183 U.S. 151 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); CURRIE, *supra* note 133, at 59-65.

161. 13 ANNALS OF CONG. 457 (1803); see PLUMER, *supra* note 100, at 77 (statement of Sen. Anderson).

162. See 13 ANNALS OF CONG. 71 (1803).

163. "We can therefore fulfil[] our part of the conventions, and this is all that France has a right to require of us." *Id.* at 67-68. For similar reasons, Republicans rightly rejected the Federalist objection that such authority to admit states as the Constitution provided was given to Congress, rather than to the president and Senate. See *id.* at 56 (statement of Sen. Tracy); *id.* at 433 (statement of Rep. Gaylord Griswold); *id.* at 455-56 (statement of Rep. Thatcher). The treaty did not purport to admit new states, and treaties commonly made promises—such as the appropriation of money—that only Congress could perform. See *id.* at 70-71 (statement of Sen. Nicholas); *id.* at 469 (statement of Rep. Nicholson).

164. See 13 ANNALS OF CONG. 67 (1803); 4 MALONE, *supra* note 97, at 330-31; PLUMER, *supra* note 100, at 75. Unlike the backhanded and baroque amendments Jefferson had drafted, see *supra* note 105, Adams's proposal was straightforward: "Congress shall have power to admit into the Union the inhabitants of any territory which has been or may be hereafter ceded to or acquired by the United States." 4 MALONE, *supra* note 97, at 330-31. Madison's counterproposal was even simpler but failed to address the question of principle: "Louisiana is hereby admitted into this Union." *Id.*; see SAMUEL FLAGG BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY 120-21 n.28 (1949); 3 WRITINGS OF JOHN QUINCY AD-

State Madison put him off with vague assurances that the matter would be attended to later, adding that not everybody was convinced an amendment was needed.¹⁶⁵ Meanwhile Jefferson had become increasingly enamored of his bird in hand, assuaging his doubts by professing willingness to defer to the judgment of his friends in Congress.¹⁶⁶ Breckinridge, echoing Jefferson's earlier argument that it would be best not to raise constitutional questions, added that an attempt to amend the Constitution was risky: "If we attempt amendments & fail, we shall be placed in a worse situation than we are now in."¹⁶⁷ Adams's proposal was rejected,¹⁶⁸ and no more was heard of a constitutional amendment. Louisiana became a state in 1812.¹⁶⁹

Commenting on the Louisiana Purchase a century later, Judge Thomas Cooley roundly condemned both sides. The Federalists, he argued, had betrayed their own principles by taking an absurdly narrow view of federal authority and thereby sealed their own oblivion.¹⁷⁰ Jefferson had betrayed his principles too, for he believed in strict interpretation of federal powers: "[U]nder a construction of the Constitution as strict as [Jefferson] had been in-

AMS 20-21 (Worthington Chauncey Ford ed., 1914).

165. See 1 MEMOIRS OF JOHN QUINCY ADAMS, 267-68 (Charles Francis Adams ed., Books For Libraries Press 1969) (1874).

166. See Letter from Thomas Jefferson to Wilson Cary Nicholas, *supra* note 137, at 10-11 n.1.

167. PLUMER, *supra* note 100, at 76-77. Other Republicans argued that no amendment was necessary because the treaty was constitutional, but on their theory that the treaty was valid whether or not Congress could admit the new territory to statehood that did not necessarily obviate the need to amend. See *id.* (statements of Sens. Wright, Cocke, and Anderson). New Jersey Federalist Jonathan Dayton took the same position. See *id.* at 77. That supporters of statehood did not pause to make a constitutional case when enacting a statutory promise of future admission, however, was entirely consistent with that theory: Any constitutional doubts could be eliminated by subsequent amendment. See *supra* notes 162-63 and accompanying text. Plumer voted against this bill for the same reason he had opposed the treaty: "I think we cannot admit a new partner, formed from without the limits of the United States, into the Union without the previous consent of each partner composing the firm first obtained." PLUMER, *supra* note 100, at 293.

168. See PLUMER, *supra* note 100, at 78. It received only three votes: those of Adams, Pickering, and Hillhouse. See *id.*

169. See Act of Apr. 8, 1812, ch. 50, 2 Stat. 701 (1812) (amended 1812).

170. See THOMAS M. COOLEY, THE ACQUISITION OF LOUISIANA (1887), reprinted in 2 IND. HIST. SOC. PUBLICATIONS, 83-86 (1903) (speech delivered to the Indiana Historical Society (Feb. 16, 1887)).

sisting upon, it was plain that the government would have no power to acquire foreign territory by purchase"¹⁷¹

With all respect, this conclusion seems open to question. It is easy enough to agree with Jefferson and Madison that not every chain of distant consequences should suffice to make a measure necessary and proper to the exercise of one of the limited congressional powers, that the General Welfare Clause is not a license to spend federal money on whatever is good for the country, and that there is no room for the notions of unwritten power that had helped to justify the Alien and Sedition Acts.¹⁷² It is very hard today, even for one who shares their general approach to federal authority, to find merit in the remarkably cramped reading that Jefferson in his most self-effacing moment offered of the explicit authorization to make treaties¹⁷³ and to admit states.¹⁷⁴

Cooley's more serious complaint was not that Jefferson's position on Louisiana was inconsistent with his general philosophy, but that the president had done what he believed to be unconstitutional in the actual case. To Cooley it did not matter that the Constitution really did empower Jefferson to make the disputed

171. *Id.* at 80; see 2 ADAMS, *supra* note 40, at 125-31.

172. See CURRIE, *supra* note 1, at 79-80, 169, 223 n.139, 254-61, 269.

173. In the manual of parliamentary practice he compiled as vice-president during the late 1790s, Jefferson defined the treaty power to exclude both matters on which Congress could legislate and those otherwise reserved to the states. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PROCEDURE, reprinted in JEFFERSON'S PARLIAMENTARY WRITINGS 420-21 (Wilbur Samuel Howell ed., Princeton Univ. Press 1988) (1812). As a leading commentator has observed, these painful limitations "would leave little room for treaties." LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 189 n.* (2d ed. 1996). Thus it is not surprising that such limitations have not been accepted, see *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890), but even they would not deny the president and Congress authority to acquire territory by treaty.

174. For the same reason, one may question the conclusion of the eminent historian Frederick Jackson Turner that the Louisiana Purchase "resulted in strengthening the loose interpretation of the Constitution." Frederick J. Turner, *The Significance of the Louisiana Purchase*, 27 AM. MONTHLY REV. OF REV. 578, 583 (1903); see also 2 ADAMS, *supra* note 40, at 90 ("[T]he Louisiana treaty gave a fatal wound to 'strict construction'"). Yet Jefferson was surely right that to insist upon a constitutional amendment (even in such an easy case, we might add) would have "set an example against broad construction, by appealing for new power to the people." See Letter from Thomas Jefferson to Wilson Cary Nicholas, *supra* note 137, at 10-11 n.1.

arrangements; it was unforgivable for him to take the position that he could do what he thought the Constitution forbade.

It is immaterial that as we look back upon [Jefferson's] work we can see that what he did was not *ultra vires*; the poison was in the doctrine which took from the Constitution all sacredness, and made [it] subject to the will and caprice of the hour After that time the proposal to exercise unwarranted powers on a plea of necessity might be safely advanced without exciting the detestation it deserved¹⁷⁵

Cooley's concern is certainly legitimate. The Constitution is pretty worthless if presidents can ignore it whenever public opinion is with them—or whenever they deem it advisable.¹⁷⁶ Of course the Constitution itself is living proof that, as Governor Randolph said in urging the Convention to disregard restrictions on amending the Articles of Confederation, there are “great seasons” when those with limits on their authority are justified in disregarding them.¹⁷⁷ The colonists had relied heavily upon John Locke's similar views in defending their rebellion against Great Britain.¹⁷⁸ But as Locke himself had insisted, the moral right of revolution must be strictly confined lest it gobble up the rule of law entirely.¹⁷⁹

Jefferson's initial plan stood on firmer ground. His analogy to the faithful guardian who goes beyond his orders was a good one.¹⁸⁰ Livingston and Monroe had exceeded the authority the

175. COOLEY, *supra* note 170, at 88-89; see also *id.* at 82 (“Mr. Jefferson, therefore, struck a dangerous blow at the foundation principles of the government, and offered to demagogues who should come after him a corrupting and dangerous precedent, when he proposed to violate the Constitution in order to accomplish an object of immediate desire.”).

176. Cf. Washington's Farewell Address (Sept. 17, 1796), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 213, 220 (arguing against “change by usurpation” and in favor of constitutional amendment where necessary).

177. 1 FARRAND, *supra* note 25, at 262.

178. Compare THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it”) with JOHN LOCKE, TWO TREATISES OF GOVERNMENT 224-42 (J.M. Dent & Sons Ltd. 1989) (1690) (discussing the dissolution of governments).

179. See LOCKE, *supra* note 178, at 231-32.

180. See Letter from Thomas Jefferson to John Breckinridge, *supra* note 104, at

president gave them, and he had not only ratified their action but applauded it.¹⁸¹ Alexander Hamilton, like most other prominent early statesmen, had taken a similar position with regard to spending in anticipation of future appropriations, even though the Constitution clearly required authorization from Congress.¹⁸² It was in the spirit of these precedents that Jefferson proposed to seize the day and seek constitutional approval afterward.¹⁸³

Even if one rejects the analogy of the agent who anticipates ratification of his actions, it seems difficult to chastise Jefferson for ratifying the Louisiana treaty or the Senate for approving it. As John Taylor argued, the only serious question was whether Congress had the power to admit states within the new territory, and that authority could be supplied by subsequent amendment.¹⁸⁴ Jefferson himself was not consistent in his extreme suggestion that the territory could not even be acquired; it is not clear he did anything that he was convinced he could not lawfully do.

Jefferson seems more subject to criticism for failure to follow through on his original plan. A constitutional amendment would have eliminated the argument that he was usurping power and the objection that he thought he was above the law. It would have removed lingering doubts as to the power to admit new states when the time came. It would have strengthened the Constitution by demonstrating respect for the rule of law. Final-

5-7 n.1; cf. PHILIP MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 196 (4th ed. 1952) ("Every ratification is dragged back and treated as equivalent to prior authority.").

181. See *supra* notes 89-90 and accompanying text.

182. See U.S. CONST. art. I, § 9; CURRIE, *supra* note 1, at 166 n.260 (discussing the Giles Resolutions). See also Jefferson's Seventh Annual Message to Congress (Oct. 27, 1807), in 1 *MESSAGES AND PAPERS OF THE PRESIDENTS*, *supra* note 3, at 425, 428, reporting that, after the British seizure of the *Chesapeake*, Jefferson contracted for military stores in advance of an appropriation, trusting that Congress would ratify his decision—as of course it did. See Act of Nov. 24, 1807, 2 Stat. 450; 17 *ANNALS OF CONG.* 818-53 (1807). Only Randolph objected, see *id.* at 836-37; Gardener said the president had acted unconstitutionally but justifiably because "the safety of the nation is the supreme law." *Id.* at 847-48. Others argued that because Jefferson had only contracted to pay and had taken no money from the Treasury there was no violation at all. See *id.* at 840-41, 847 (statements of Reps. Alston, Chandler, Fisk, and Cook).

183. See, e.g., 1 *MEMOIRS OF JOHN QUINCY ADAMS*, *supra* note 165, at 267.

184. See 13 *ANNALS OF CONG.* 51-53 (1803); *supra* notes 133-36 and accompanying text.

ly, given the dominance of Jefferson's party both in Congress and in the states, it seems likely he would have got an amendment if he had tried.¹⁸⁵ One is reminded of the New Deal.¹⁸⁶

The most charitable explanation—and the most comforting—is the one Jefferson suggested in private: that his constitutional doubts were dissipated by the inability of his friends to share them.¹⁸⁷ On this hypothesis one can fairly refrain from castigating Jefferson for concluding a deal that (at least to modern eyes) seems to have been not only monumentally advantageous but lawful as well.¹⁸⁸

At a reunion of Justice Frankfurter's former law clerks some years ago, one of the guests was heard to remark that it was difficult to reconcile Jefferson's actions in the Louisiana affair with his principle of limited federal authority. "That's right," replied the Justice with a cheekful of tongue, "and we've never forgiven him!"

B. Other Constitutional Issues

In order "to favour the manufactures, Commerce, freight and navigation of France and of Spain,"¹⁸⁹ Article VII of the Louisiana treaty provided:

that the French ships coming directly from France or any of her colonies, loaded only with the produce and manufactures of France or her said colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce and manufactures of Spain or her colonies, shall

185. See BROWN, *supra* note 119, at 29 ("Doubtless such an amendment as Jefferson desired could have been carried without great difficulty . . .").

186. See CURRIE, *supra* note 133, at 235-38.

187. See *supra* notes 128, 166 and accompanying text.

188. See JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 211 (1997):

The decision to bypass the constitutional issue was unquestionably correct, for the practical reason that the debate over a constitutional amendment would have raised a constellation of nettlesome questions—about slavery and the slave trade, Indian lands, Spanish land claims and a host of other jurisdictional issues—that might have put the entire purchase at risk.

189. Louisiana Treaty, *supra* note 98, 8 Stat. at 204.

be admitted during the space of twelve years in the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandize, or other or greater tonnage than that paid by the citizens of the United States.¹⁹⁰

In other words, French and Spanish ships loaded with their own goods were to be exempted from the discriminatory tariff and tonnage duties laid upon foreign vessels arriving in other ports.¹⁹¹ Congress implemented this provision by statute.¹⁹² But several Federalists said it was unconstitutional.

Plumer made the obvious thrust in his journal: The eighth section of Article I required duties, imposts, and excises to be "uniform throughout the United States";¹⁹³ the ninth forbade Congress to give Louisiana ports a preference over others.¹⁹⁴ Vermont Representative James Elliott made the obvious parry: Section 9 forbade preferences only for the ports of a state, not of a territory or possession.¹⁹⁵ The Federalists had anticipated

190. *Id.*

191. See Act of July 20, 1789, 1 Stat. 27-28 (codified as amended at 22 U.S.C. § 2651 (1994)); CURRIE, *supra* note 1, at 58.

192. See Act of Feb. 24, 1804, ch. 13, § 8, 2 Stat. 251, 253-54.

193. U.S. CONST. art. I, § 8, cl. 1.

194. See PLUMER, *supra* note 100, at 11; see also 13 ANNALS OF CONG. 434 (1803) (statement of Rep. Gaylord Griswold) (explaining that the treaty gave a preference to Louisiana ports "[b]ecause the produce of France and Spain can be carried cheaper to their ports than to any other"). For other statements to the same effect, see 13 ANNALS OF CONG. at 441, 442-43 (statements of Reps. Lewis and Griffin). Rep. Roger Griswold also invoked both clauses. See *id.* at 463-64.

195. See 13 ANNALS OF CONG. 450 (1803); see, e.g., *id.* at 482 (statement of Rep. Mitchell); *id.* at 475 (statement of Rep. Rodney). Rep. Rodney gave the following reasons for the distinction:

When Territories grow into States, and become represented in the public councils, a majority of them may league together, and carry into effect regulations prejudicial to other States But such a league cannot be effected by Territories, which have no Senators in the other branch, and in this only the voice, without the vote, of a single delegate.

Id. In addition, any special privilege conferred on territorial ports would redound to the benefit of every state, because territories were "the common property of the United States." *Id.*

this objection: The preference would become unconstitutional if Louisiana became a state within the twelve-year period¹⁹⁶—as in their view, Article III of the treaty required.¹⁹⁷

The alternative argument for unconstitutionality was simpler, for Section 8 required that duties be uniform “throughout the United States.”¹⁹⁸ To argue that in this context the United States meant the states themselves, as the Supreme Court would later conclude in the *Insular Cases*,¹⁹⁹ would undermine the crucial Republican position that Congress could incorporate Louisiana into the United States, as the treaty demanded, without making it a state.²⁰⁰

The Republican response was the same demurrer they had employed against the contention that Louisiana could not be admitted to statehood: Uniformity could be achieved, and preferences avoided, by eliminating the discriminatory duties charged in other ports.²⁰¹ Moreover, as Adams noted, the Constitution could be amended before admission to permit the discrimination it now forbade.²⁰²

196. See 13 ANNALS OF CONG. 57 (1803) (statement of Sen. Tracy); *id.* at 434 (statement of Rep. Gaylord Griswold); *id.* at 455-56 (statement of Rep. Thatcher). When Louisiana did become a state in 1812, this “difficulty” was unaccountably overlooked. See Max Farrand, *The Commercial Privileges of the Treaty of 1803*, 7 AM. HIST. REV. 494, 495 (1902).

197. Mitchell argued that the Preference Clause was “meant as a check to the legislative power of Congress only, and by no means as a restraint upon the treaty-making power of the President and Senate.” 13 ANNALS OF CONG. 481 (1803). In support of this position it may be noted that the clause appears in Article I, which deals generally with the legislative power, and that what it forbids are “regulation[s],” which sounds like statutes. See U.S. CONST. art. I, § 9. But treaties often contain regulations too, and the Appropriations Clause of the same section plainly limits executive action; the purpose of the Preference Clause, like that of the adjacent ban on export taxes, applies to treaties as well.

198. U.S. CONST. art. I, § 8, cl. 1.

199. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901).

200. See CURRIE, *supra* note 133, at 61-63; PLUMER, *supra* note 100, at 11-12.

201. See 13 ANNALS OF CONG. 437 (1803) (statement of Rep. Randolph).

202. See *id.* at 67. Representative Griffin argued that the provision barring discriminatory duties was void because it was a regulation of commerce that only Congress could make. See *id.* at 442. Nicholas soundly responded that “the treaty-making power may negotiate respecting many of the subjects upon which Congress may legislate.” *Id.* at 70. Whether, as he went on to say, Congress was free not to execute such a treaty was one of the questions that had been agitated in the debates over the Jay Treaty nearly a decade before. See *id.*; CURRIE, *supra* note 1, at 211-17.

Not content to rest on the irrefragable point that Louisiana was not yet a state subject to the ban on port preferences, Representative Nicholson seemed to allow himself to be carried away: "It 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."²⁰³

If he meant what he said, then one is left wondering where he thought the government got authority to govern Louisiana at all, or indeed to acquire it; for the Constitution is the sole source of federal power.²⁰⁴

Because Nicholson made this comment in the context of an argument that Louisiana was not a state within the meaning of the Preference Clause, and because he later asserted that it was the Territorial Clause of Article IV that empowered Congress to take possession of the ceded area,²⁰⁵ it may well be that he did not mean the Constitution did not apply at all.²⁰⁶ Soon afterward, however, when the House began to discuss the first bill to implement the treaty, two Representatives unmistakably took that remarkable position.²⁰⁷

The bill authorized the president, if necessary, to employ military and naval forces to take possession of Louisiana.²⁰⁸ It also provided that, until Congress made provision for the temporary government of the territories, "all the military, civil, and judicial powers, exercised by the officers of the existing government of the same, shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct."²⁰⁹ Federalists raised a variety of

203. 13 ANNALS OF CONG. 471 (1803) (statement of Rep. Nicholson).

204. Even the argument that the necessary authority is inherent in sovereignty ultimately rests upon the Constitution, for at least to the modern mind that document is the source of federal sovereignty.

205. See 13 ANNALS OF CONG. 502 (1803).

206. Henry Adams, however, took Nicholson at his word. See 2 ADAMS, *supra* note 40, at 102.

207. See *infra* notes 211-13 and accompanying text.

208. See Act of Oct. 31, 1803, ch. 1, § 2, 2 Stat. 245, amended by Act of Mar. 26, 1804, ch. 38, 2 Stat. 289.

209. *Id.* The bill was enacted as introduced, with two exceptions. At Randolph's request, it was amended to expire no later than the end of the current legislative session, see 13 ANNALS OF CONG. 498 (1803), and in accord with the treaty, the

constitutional objections to this provision. Representatives Varnum and Smilie replied that the Constitution did not apply.

The terms of the treaty, said Varnum, made clear that the Constitution was not to take effect in Louisiana the minute the government took possession.²¹⁰ The inhabitants of the territory were to be admitted to the rights of citizenship, in accordance with the principles of the Constitution, in the future; in the meantime they were instead to enjoy their existing rights under Spanish law.²¹¹ Smilie agreed: "[T]he Constitution of the United States did not extend to this territory any farther than they were bound by the compact between the ceding power and the people," and thus Louisiana could be given "such government as the Government of the United States might think proper . . ."²¹²

Representative Rodney's theory for upholding the challenged provision avoided the logical difficulty of arguing that the Constitution did not apply to the territory at all, but the effect of his theory was just as broad. Article IV's grant of power to adopt "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"²¹³ he argued, "does not limit or restrain the authority of Congress with respect to Territories, but vests them with full and complete power to exercise a sound discretion generally on the subject."²¹⁴ Thus this provision put an end to all constitutional objections; Congress could do as it liked with Louisiana.²¹⁵

These assertions of plenary congressional authority over the territories contrasted sharply with the narrow conceptions later embraced by the Supreme Court in the *Dred Scott* case.²¹⁶ Not

following words were added to the end of the provision: "for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion," § 2, 2 Stat. at 245.

210. See 13 ANNALS OF CONG. 505 (1803).

211. See *id.* at 505-06.

212. *Id.* at 511-12. Dayton and Pickering, both Federalists, came to the same conclusion in the Senate. See PLUMER, *supra* note 100, at 136-37.

213. U.S. CONST. art. IV, § 3, cl. 2.

214. 13 ANNALS OF CONG. 513 (1803).

215. See *id.* at 513-14.

216. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 267-73 (1985) (discussing the *Dred Scott* case).

one Southerner in Congress protested at the time; only Yankee Federalists raised constitutional objections to the interim government provision,²¹⁷ and it was Connecticut's Roger Griswold who protested that "the idea of some gentlemen, that this territory, not being a part of the United States, . . . and that therefore we may do as we please with it," was "not correct."²¹⁸

This time the constitutional text seemed to support the Federalist position. As Rodney said, the language of Article IV looked broad enough to give Congress general legislative authority over the territories.²¹⁹ But the Bill of Rights, at least, was phrased as a limitation on *all* congressional powers.²²⁰ Indeed in the then recent debate over disestablishment of the District of Columbia, several Republican congressmen had insisted, almost without contradiction, that its provisions applied to the seat of government—over which Congress had powers at least as sweeping as those conferred by Article IV.²²¹

The following year, when Congress came to establish a tempo-

217. John Randolph successfully urged that the necessary authority last no longer than the present session of Congress, perceiving that "[i]f we give this power out of our hands, it may be irrevocable until Congress shall have made legislative provision; that is, a single branch of the Government, the Executive branch, with a small minority of either House, may prevent its resumption." 13 ANNALS OF CONG. 498 (1803). This was a pretty compelling answer to the common contention that delegations of legislative power are no cause for concern because Congress can always reclaim its authority.

218. *Id.* at 510.

219. *See id.* at 513.

220. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law. . .").

221. *See id.*, art. I, § 8, cl. 17: "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . ." *See, e.g.*, 14 ANNALS OF CONG. 927 (1805) (statement of Rep. Lucas); *id.* at 946 (statement of Rep. Goddard); *id.* at 956 (statement of Rep. Lewis); *id.* at 960-61 (statement of Rep. Williams); *id.* at 973 (statement of Rep. Dennis). *But see id.* at 962 (statement of Rep. Stanford) (arguing that, by authorizing Congress to exercise legislative authority over the District "in all cases whatever," Article I, Section 8 made the (later) Bill of Rights inapplicable); *id.* at 908-10 (statement of Rep. Elmer) (arguing that Congress's power under Article I, Section 8 was discretionary). The Supreme Court has confirmed that the Bill of Rights applies. *See Callan v. Wilson*, 127 U.S. 540 (1888). In suggesting that such rights as jury trial and freedom of press and religion be extended to Louisiana gradually by local legislation, however, Jefferson appeared to assume that the Bill of Rights did not apply there of its own force. *See Letter from Thomas Jefferson to Albert Gallatin* (Nov. 9, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 46.

rary government for the Orleans Territory, Representative G.W. Campbell, a Tennessee Republican, moved to provide for trial by jury in all criminal prosecutions and in all civil cases involving more than twenty dollars, in accord with the Sixth and Seventh Amendments.²²² In legislating for the new province, said Campbell, Congress was "bound by the Constitution of the United States" and "had not a right to establish courts in that Territory on any other terms than they could in any of the States."²²³ His motion was roundly rejected, receiving only twenty votes.²²⁴

Interestingly, though there had been territories since the beginning, Congress had never debated this issue before. The Northwest Ordinance, which antedated the Constitution, contained its own catalog of basic rights, from religious freedom, habeas corpus, and jury trial to protection against cruel and unusual punishment, uncompensated takings, and impairment of preexisting private contracts.²²⁵ All other territories established prior to Orleans and Louisiana were subjected by statute to most, if not all, of the Ordinance provisions.²²⁶ But the very existence of those statutory rights provisions, and the fact that they by no means embraced all the protections of the Bill of Rights,²²⁷ are some evidence that earlier Congresses may not have shared Campbell's view that those constitutional provisions applied to the territories of their own force.²²⁸

222. See 13 ANNALS OF CONG. 1129 (1804). The Seventh Amendment itself applied only to suits at common law, but equity was unknown in Spanish and French law.

223. *Id.* (statement of Rep. Campbell).

224. See *id.*

225. See Northwest Ordinance of 1787, art. 1-2, 1 Stat. 50, 52 n.(a) (amended 1789).

226. The Southwest and Mississippi Territories were exempted from the prohibition of slavery. The Indiana Territory, which had been part of the original Northwest Territory, remained subject to the Ordinance in its entirety. See CURRIE, *supra* note 1, at 107, 286.

227. The Northwest Ordinance conspicuously omitted such central rights as freedom of expression, assembly, and petition, as well as provisions respecting searches and seizures, self-incrimination, double jeopardy, and other procedural rights of the accused.

228. There is no evidence, however, that members of Congress had thought about the question whether the Bill of Rights applied to the territories. An alternative explanation is that the simplest and most uniform solution was to incorporate the Ordinance to govern the later territories, because it had met with general approval.

The Federalists' objections, both to the emergency provision preserving Spanish law and to the later plan for a temporary territorial authority, were not based on the Bill of Rights. They went to the basic structure of government.

By providing that existing powers should be exercised by such persons as the president might designate, said Roger Griswold, the emergency bill effectively gave him legislative and judicial as well as executive powers, contrary to the separation the Constitution required.²²⁹ The Constitution, Elliott added, "delegated the legislative power to Congress, and not to the President; . . . it not only precluded the President from exercising it, but likewise forbade our delegation of it to him."²³⁰ Nicholson responded that the bill merely authorized the president to *appoint* those who would exercise legislative and judicial powers,²³¹ but as Griswold observed that was not so; it also said those powers should be exercised as the president might direct.²³² Moreover, said Griswold, even the provision for appointment was not in accord with the requirements applicable to ordinary federal officers; for neither the governor nor the judges were "inferior officers" whom the president was authorized to appoint under Article II, Section 2.²³³

In addition to denying that there were any constitutional limits to Congress's power over Louisiana, defenders of the emergency provisions invoked the law of necessity: Something

Moreover, it was not pointless to make the Ordinance applicable even if the Bill of Rights did apply, for in some respects (e.g., the duty to support education and the sometimes omitted antislavery provision), the Ordinance went beyond what the Constitution required. See Northwest Ordinance, art. 1-2, 1 Stat. at 52 n.(a).

Even if the Bill of Rights does apply to congressional action respecting the territories, whether it also limits the acts of local territorial authorities is a separate question. The best argument that it does is that Congress cannot authorize others to do what it could not do itself without undermining the purposes of its provisions.

229. See 13 ANNALS OF CONG. 500-01, 508-09 (1803).

230. *Id.* at 508; see *id.* at 499.

231. See *id.* at 501.

232. See *id.* at 509.

233. *Id.*; see PLUMER, *supra* note 100, at 26-27. Griswold was also concerned about the nature of the powers whose exercise the president was to direct because "[i]t is probable that some of them may be inconsistent with the Constitution of the United States," which among other things guaranteed the availability of habeas corpus. 13 ANNALS OF CONG. 499 (1803).

had to be done to preserve order until a proper government could be put in place.²³⁴ Others cited pertinent legislative precedent.²³⁵ For there were numerous respects in which the organization of territorial governments had consistently departed from that which the Constitution prescribed for the federal government itself. For one thing, in every preexisting territory, legislative authority was initially vested in the Governor and judges, all of whom were appointed rather than elected.²³⁶ Thus precedent seemed to recognize in the territories neither the separation of powers, nor meaningful limitations on the delegation of congressional authority, nor a constitutional right of democratic self-government—which was feebly asserted²³⁷ when the 1804 bill was criticized for failure to provide for an elected assembly.²³⁸

234. See 13 ANNALS OF CONG. 499-500 (1803) (statement of Rep. Randolph); *id.* at 506-07 (statement of Reps. Eppes and Eustis); *id.* at 513 (statements of Rep. Rodney). Both Randolph and Rodney analogized to the case of military conquest. See also *Texas v. White*, 74 U.S. 700, 730 (1868) (confirming the president's authority, as commander-in-chief, to institute temporary government in conquered Southern states); 4 MALONE, *supra* note 97, at 329 ("No one could justly deny . . . that for a time at least the exercise of executive power was the only visible alternative to anarchy.").

235. See 13 ANNALS OF CONG. 514 (1803) (statement of Rep. Rodney); PLUMER, *supra* note 100, at 137 (statement of Sen. Wright).

236. See Northwest Ordinance of 1787, art. III-IV, 1 Stat. 51, 52 n.(a) (amended 1789). This provision, like others of the Ordinance, was made applicable to later territories by statute. See *supra* note 29.

237. Few speakers invoked the Constitution, and with good reason; the best they could manage was to appeal to the "spirit" of that document, see 13 ANNALS OF CONG. 1056 (1804) (statement of Rep. Elliott), or of Article IV's guarantee of a republican form of government, see U.S. CONST. art. IV, § 4; PLUMER, *supra* note 100, at 136 (statement of Sen. Anderson), which as Senator Wright noted applied only to states, not to territories. See *id.* at 137. Breckinridge, who argued for an elected legislature, expressly said there was no constitutional problem. See *id.* at 138.

238. See 13 ANNALS OF CONG. 1054-78 (1804); PLUMER, *supra* note 100, at 134-38. The House amended the bill to provide for representative government, but receded in the face of Senate disapproval. See 13 ANNALS OF CONG. 1191-99, 1229-30 (1804). As enacted, the statute placed legislative authority in the Orleans Territory in the hands of the governor and an appointed legislative council and attached Louisiana administratively to the Indiana Territory. See Act of Mar. 26, 1804, ch. 38, §§ 4, 12, 2 Stat. 283, 284, 287 (repealed 1804). The following year legislative power in Louisiana was given to the governor and judges. See Act of Mar. 3, 1805, ch. 31, § 3, 2 Stat. 331 (repealed 1812). Orleans was given an elected assembly that year as well. See Act of Mar. 2, 1805, § 2, 2 Stat. 322.

In light of the same precedents and of the plain language of Article IV with

Appointment by the president alone, in contrast, was a striking departure from precedent. Earlier statutes, as Roger Griswold noted, had required Senate confirmation of important territorial appointments,²³⁹ and the First Congress had gone out of its way to bring the Ordinance itself into conformity with Article II's requirement that federal officers be appointed by the president with Senate consent.²⁴⁰ Similarly, Congress's subsequent decision to provide four-year terms for judges in the new territories²⁴¹ was a novelty, since earlier statutes had adopted the Ordinance provision purporting to give territorial judges the same tenure during "good behavior" required of federal judges by Article III.²⁴² Yet Adams's constitutional protest²⁴³ fell upon

respect to governance of the territories, Adams's related argument that Congress lacked authority to set up *any* government for Louisiana without its consent, see PLUMER, *supra* note 100, at 73, 143, was, at best, a rerun of his contention that the statehood provision of the same Article applied only within the original United States. See *supra* note 163 and accompanying text. There wasn't much to his additional contention that Louisiana could not be taxed without its consent either; the Declaration of Independence was not part of the Constitution. See 13 ANNALS OF CONG. 228 (1804); PLUMER, *supra* note 100, at 103; 3 WRITINGS OF JOHN QUINCY ADAMS, *supra* note 164, at 26-30.

239. 13 ANNALS OF CONG. 509 (1803); see Act of May 7, 1800, ch. 41, § 2, 2 Stat. 58, 59 (amended 1801) (Indiana); Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550 (amended 1800) (Mississippi); Act of May 26, 1790, ch. 14, § 2, 1 Stat. 123 (Southwest Territory).

240. See Northwest Ordinance, art. 1, ch. 8, 1 Stat. 50, 53 (1789) (amended 1800); CURRIE, *supra* note 1, at 106. At the time Mississippi governor Winthrop Sargent came under attack for his conduct in office, it was also assumed that the impeachment provisions of Articles I and II applied to territorial officers. See 10 ANNALS OF CONG. 854 (1800) (appointing a committee to investigate charges with a view toward impeachment); *id.* at 1037; H.R. REP. NO. 6-143 (1801), reprinted in 1 AMERICAN STATE PAPERS (MISC.), *supra* note 117, at 233-41 (finding no evidence of corrupt motives and recommending no further proceedings); see also ANNALS OF CONG. 2068-69, 2189 (1808) (appointing a committee to consider impeachment of a territorial judge).

241. See Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 283, 284 (Orleans); Act of Mar. 3, 1805, ch. 31, § 4, 2 Stat. 331 (Louisiana).

242. See Northwest Ordinance of 1787, art. IV, 1 Stat. 51n.(a) (amended 1789); Act of May 7, 1800, ch. 41, § 2, 2 Stat. 58, 59 (amended 1801); Act of Apr. 18, 1798, ch. 28, § 3, 1 Stat. 549, 550; Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123; 13 ANNALS OF CONG. 505 (1803) (statement of Rep. Dana). The suggestion of limited tenure came from President Jefferson. See Letter from Thomas Jefferson to John Breckinridge (Nov. 24, 1803), in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 104, at 51-52.

243. "The Judicial officers are to be appointed for a term of years only, & yet the bill is not limited. The constitutional tenure for judicial officers is *during good behavior*." PLUMER, *supra* note 100, at 144; see U.S. CONST. art. III, § 1. Representa-

deaf ears.²⁴⁴ There seemed to be nearly universal agreement that territorial courts did not exercise the judicial power of the United States within the meaning of Article III.²⁴⁵ In short, all constitutional objections brought forward in the Louisiana debates were decisively rejected.²⁴⁶ For practical purposes, Congress appeared to think the only constitutional provisions that applied to the territories were those authorizing the United States to acquire and administer them; how it did so seemed to be, as Rodney said, within the discretion of Congress.²⁴⁷

It was at least arguable, as the Supreme Court would later

tive Campbell, who, in arguing for trial by jury declared that Congress "had not a right to establish courts in that Territory on any other terms than they could in any of the States," 13 ANNALS OF CONG. 1129 (1804), did not follow the implications of this statement for the tenure of judges. Adams returned the favor, suggesting that while the first section of Article III applied to Louisiana, the third section did not: "Tis too soon to extend the trial by jury to that Country." PLUMER, *supra* note 100, at 145.

244. Indeed, as already noted, Congress created a commission rather than a court to pass on land claims in Louisiana, without recorded objection. See *supra* text accompanying note 118.

245. The Supreme Court would hold that they did not in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). See CURRIE, *supra* note 216, at 119-22.

246. Worthington's proposal to authorize Orleans (like other territories) to send a nonvoting delegate to the House was initially defeated after White, Dayton, and Adams raised constitutional objections. The next year, however, Orleans was granted "all the rights, privileges, and advantages" secured by the Ordinance and enjoyed in Mississippi, and Daniel Clark took his seat as Delegate on December 1, 1806. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989, 73 (Bicentennial ed. 1989) [hereinafter BIOGRAPHICAL DIRECTORY]. Some of the arguments against such a provision again rested on the fact that Orleans lay outside the initial boundaries of the Union; others had been rejected in the case of the Southwest Territory. Several senators, without citing the Constitution, invoked the separation of powers: Because the legislative council that would choose the delegate was appointed by the president, he would represent the president and not the people. See PLUMER, *supra* note 100, at 107-09; Act of Mar. 2, 1805, ch. 23, § 1, 2 Stat. 322; CURRIE, *supra* note 1, at 200-03. Citing the Northwest Ordinance, the statute applying the Ordinance to Mississippi, and the later Act giving that territory an elected legislature, a House committee recognized Mississippi's right to a delegate in 1801, and Narsworthy Hunter was duly elected to represent Mississippi in the Seventh Congress. See H.R. REP. NO. 7-147 (1801), reprinted in 1 AMERICAN STATE PAPERS (MISC.), *supra* note 117, at 252; BIOGRAPHICAL DIRECTORY, *supra*, at 67. Indiana was given a delegate in 1809. See Act of Feb. 27, 1809, ch. 19, § 1, 2 Stat. 525 (amended 1809).

247. See *supra* notes 214-216 and accompanying text.

conclude,²⁴⁸ that a more discriminating approach was in order. Prior legislative practice is suggestive, even though Congress may have based its earlier decisions respecting appointments and judicial tenure on policy considerations rather than constitutional compulsion.²⁴⁹ On its face, Article I's provision for popular election applies only to the House of Representatives, not to a territorial legislature; and the provisions of the Ordinance, unchanged after adoption of the new Constitution, suggest that delegation of legislative authority to a local body composed of appointed executive and judicial officers was within the contemplation of the Framers.²⁵⁰ But both the language and the purposes of the appointment and tenure provisions, as well as the Bill of Rights, seem no less applicable to territories than to federal action affecting the states. The last word on these questions was not spoken during the debates on the Louisiana Purchase.

III. INTERNAL IMPROVEMENTS

In exchange for a tax break on federal lands sold within its borders, the Ohio Enabling Act had offered the new state, among other things, a portion of the proceeds of those sales for the construction of roads.²⁵¹ The Ohio convention accepted the deal, on conditions to which Congress agreed.²⁵² In March 1803 Congress appropriated three percent of the proceeds to be paid to the state for road construction within its borders, in partial satisfaction of its side of the bargain.²⁵³ Three years later Con-

248. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1856) (applying the Due Process Clause and other Bill of Rights provisions to the territories acquired by the Louisiana Purchase); CURRIE, *supra* note 133, at 62-65 (discussing the distinction drawn for this purpose in the *Insular Cases* (e.g., *Rassmussen v. United States*, 197 U.S. 516, 525-26 (1905)), between "incorporated" and "unincorporated" areas, in terms reminiscent of the Louisiana treaty).

249. Moreover, in the case of the Northwest Territory some change was obviously necessary because the old Continental Congress, which had previously made appointments under the Ordinance, no longer existed.

250. It also conformed to parliamentary practice before the Revolution. See McLAUGHLIN, *supra* note 22, at 7-16.

251. See *supra* notes 38-39 and accompanying text.

252. See Act of Mar. 3, 1803, ch. 21, 2 Stat. 225; 1 STATUTES OF OHIO AND NORTHWESTERN TERRITORY 74 (Chase 1833).

253. See ch. 21, § 2, 2 Stat. 225, 226.

gress dropped the other shoe, authorizing the president to appoint commissioners to lay out a road from Cumberland, Maryland (or some nearby point) to the state of Ohio.²⁵⁴

If the president approved the commissioners' plans, he was empowered to seek the consent of each affected state for passage of the road through its territory,²⁵⁵ and thereupon "to take prompt and effectual measures to cause said road to be made through the whole distance, or in any part or parts of the same as he shall judge most conducive to the public good."²⁵⁶ Congress initially appropriated thirty thousand dollars for the purpose.²⁵⁷ The remaining two percent of land proceeds promised in the Enabling Act were to be drawn first.²⁵⁸ If they did not suffice, resort was to be had to "any money in the treasury not otherwise appropriated," to be repaid out of future land sales.²⁵⁹

The three-year delay in carrying out the agreement is evidence that, despite the absence of recorded objections when the Ohio Enabling Act was passed, construction of the road to Ohio had become a matter of some controversy. Bills were introduced in three successive sessions before one finally was adopted.²⁶⁰

254. See Act of Mar. 29, 1806, ch. 19, § 1, 2 Stat. 357, 357-58. For a detailed summary of the tortuous history of this project (with particular emphasis on the continuing congressional debates), see JEREMIAH S. YOUNG, A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD (1902).

255. The requirement of state consent was in accord with the Enabling Act. If anyone in Congress thought that consent was constitutionally required, see *infra* text accompanying notes 288-91 (discussing Gallatin's 1808 report), he didn't say so. The consent provision did not moot the basic constitutional question, because a single state could not legitimate spending for a purpose beyond the authority of Congress.

256. Ch. 19, § 3, 2 Stat. at 358-59. Thus the president, not Congress as a House draft at one point would have provided, see 13 ANNALS OF CONG. 986 (1804), was to select the route. If there were constitutional objections to this delegation, as there had been in connection with designation of post roads in the First and Second Congresses, see CURRIE, *supra* note 1, at 146-49, Congress did not find them convincing.

257. See ch. 19, § 6, 2 Stat. at 359.

258. See *id.*

259. Ch. 19, § 6, 2 Stat. at 359. Although any money taken from general funds in the Treasury was to be reimbursed from future land sales, the authorization to use it at all arguably meant that the Act could no longer be defended simply as a disposition of land and its proceeds; some constitutional justification would still have to be found for lending general tax revenues for the purpose of internal improvements. See CURRIE, *supra* note 1, at 72-73 (discussing an abortive proposal to lend federal funds to promote the manufacture of glass).

260. See 15 ANNALS OF CONG. 39, 43, 200 (1806); *id.* at 22 (1805); 14 *id.* at 27,

Reports of debates on those bills are fragmentary. There was squabbling over how much money Ohio had been promised²⁶¹ and whether congressional action was premature.²⁶² The final bill passed the House by the narrow margin of sixty-six to fifty.²⁶³ Many people were plainly dragging their feet.

For constitutional reasons? The record does not reveal them. But the record is so spotty that one cannot be confident that no constitutional objections were made. Nor does the record reveal whether anyone took the floor to defend the constitutionality of the bill. Senator Tracy's committee report waxed eloquent in justifying the new road:

Politicians have generally agreed that rivers unite the interests and promote the friendship of those who inhabit their banks; while mountains, on the contrary, tend to the disunion and estrangement of those who are separated by their intervention. In the present case, to make the crooked ways straight, and the rough ways smooth, will, in effect, remove the intervening mountains, and by facilitating the intercourse of our Western brethren with those on the Atlantic, substantially unite them *in interest*, which, the committee believe, is the most effectual cement of union applicable to the human race.²⁶⁴

But neither Tracy nor anyone else was reported to have addressed the question of congressional authority—perhaps because it was thought to have been settled by adoption of the Enabling Act, which had initially proposed the bargain.

In light of what President Jefferson had said in his second

776 (1804); 13 *id.* at 305, 1012, 1242 (1804); 13 *id.* at 553 (1803).

261. There was a minor dustup over whether the three percent voted for local roads was intended to be over and above the five percent initially offered, but the majority rejected the claim. See ch. 19, § 6, 2 Stat. 359; H.R. REP. NO. 7-147 (1801), reprinted in 1 AMERICAN STATE PAPERS (MISC.), *supra* note 117, at 340-41; 14 ANNALS OF CONG. 37 (1805); 13 ANNALS OF CONG. 631-36 (1803); 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 165, at 335-36.

262. Smilie argued that Congress should wait until there was significant money in the Treasury, see 13 ANNALS OF CONG. 943 (1804); Leib argued for waiting until state consent was obtained, see 15 *id.* at 836 (1806).

263. 15 ANNALS OF CONG. 840 (1806).

264. *Id.* at 25 (1805).

inaugural address only a few months before, someone might nevertheless have been expected to raise the constitutional question.

Basking in the light of a successful first term and overwhelming electoral approval,²⁶⁵ the president boasted that despite elimination of most internal taxes the Treasury had accumulated a surplus that had been applied to Gallatin's pet project, reduction of the public debt.²⁶⁶ Once that debt was retired, he optimistically continued, "the revenue thereby liberated may, by a just repartition of it among the States and a corresponding amendment of the Constitution, be applied *in time of peace* to rivers, canals, roads, arts, manufactures, education, and other great objects within each State."²⁶⁷

In short, Jefferson favored not only territorial expansion, but also an aggressive program of federal spending that would have done justice to his old adversary Alexander Hamilton.²⁶⁸ By lumping internal improvements with federal aid to education and industry that could be justified only by a broad reading of the General Welfare Clause his party had always rejected, however, Jefferson appeared to be saying that improvements required a constitutional amendment. That was what he had said privately about Louisiana at one point;²⁶⁹ but in the case of improvements he commendably disclosed his constitutional doubts to Congress as he urged an amendment to provide the necessary authority.

265. Jefferson and George Clinton received 162 electoral votes in the 1804 election to 14 for C.C. Pinckney and Rufus King. See 14 ANNALS OF CONG. 56 (1805).

266. See Second Inaugural Address of Thomas Jefferson (Mar. 4, 1805), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra* note 3, at 378-79.

267. *Id.*

268. As early as 1801 Jefferson had urged Congress to consider occasional aids to relieve "[a]griculture, manufactures, commerce, and navigation . . . from casual embarrassments, . . . within the limits of our constitutional powers." First Annual Message of Thomas Jefferson to Congress (Dec. 8, 1801), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra* note 3, at 326, 330-31. Compare Hamilton's ambitious 1791 *Report on Manufactures*, see CURRIE, *supra* note 1, at 72, 169 n.283, proposing federal subsidies to encourage manufacturing.

Predictably, Hamilton thought Congress should subsidize internal improvements too: "To provide roads and bridges is within the direct purview of the constitution," and canals and aqueducts were also "fit subjects" for federal aid. ALEXANDER HAMILTON, *The Examination, Number III*, in 25 THE PAPERS OF ALEXANDER HAMILTON, 1800-1802, *supra* note 122, at 464, 467.

269. See *supra* notes 104-05 and accompanying text.

This time the answer does not seem to be that Jefferson was persuaded by his friends in Congress that they already had the necessary authority, as in the case of Louisiana.²⁷⁰ Nine months after signing the Cumberland Road bill, he returned to the subject of improvements in his sixth annual address to Congress, urging once again that future surpluses be applied

to the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of Federal powers. . . . I suppose an amendment to the Constitution . . . necessary, because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied.²⁷¹

This time there could be no doubt. Stripped of Hamiltonian schemes for the support of manufacturing, the president's message was clear: Congress could finance neither education nor internal improvements under the existing Constitution.

Yet in the next paragraph of his 1806 address Jefferson drew a distinction that might serve to explain at last how he was able to endorse the Cumberland Road bill despite his narrow view of federal authority:

The present consideration of a national establishment for education particularly is rendered proper by this circumstance also, that if Congress, approving the proposition, shall yet think it more eligible to found it on a donation of lands, they have it now in their power to endow it with those which will be among the earliest to produce the necessary income.²⁷²

In other words, although Congress could not appropriate tax revenues to support education, it could accomplish the same goal by a grant of public lands. If that was true of education, then it

270. See *supra* note 187 and accompanying text.

271. Sixth Annual Message of Thomas Jefferson to Congress (Dec. 2, 1806), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra* note 3, at 405, 409-10.

272. *Id.* at 410.

was true of roads and canals as well; and thus the great battle between Federalists and Republicans over the scope of federal spending power was reduced to a petty squabble over the source of funds.

As if to underline this troubling distinction, less than two months after denying Congress's authority to finance internal improvements, the president ceremoniously filed with Congress the first of a series of reports proudly detailing the progress he had made toward construction of the Cumberland Road.²⁷³

In his last annual message, in November 1808, Jefferson brought the question of improvements to the attention of Congress one more time. Though this address was dominated by concerns over hostile actions by Britain and France, the president also found room to speculate about the disposition of surplus revenue "whenever the freedom and safety of our commerce shall be restored".²⁷⁴

Shall it lie unproductive in the public vaults? Shall the revenue be reduced? Or shall it not rather be appropriated to the improvements of roads, canals, rivers, education, and other great foundations of prosperity and union under the powers which Congress may already possess or such amendment of the Constitution as may be approved by the States? While uncertain of the course of things, the time may be advantageously employed in obtaining the powers necessary

273. See Thomas Jefferson, Message to Congress (Jan. 31, 1807), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 418. The commissioners he had appointed, Jefferson recounted, had filed their report recommending a route; Maryland and Virginia had consented, but the president was awaiting word from Pennsylvania before deciding whether to approve the commissioners' proposal. See *id.* For the commissioners' report, see 1 AMERICAN STATE PAPERS (MISC.), *supra* note 117, at 474-77 and 16 ANNALS OF CONG. 1001-08 (1807). A year later the president reported further progress: Pennsylvania had consented, and Jefferson had approved the commissioners' route "as far as Brownsville," Thomas Jefferson, Message to Congress (Feb. 19, 1808), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 440, with one alteration, and he had decided to preserve the trace "by opening one-half of its breadth through its whole length," *id.* at 441, which is to say he had begun actual construction. See 18 ANNALS OF CONG. 2746-48 (1808) and 1 AMERICAN STATE PAPERS (MISC.), *supra* note 117, at 714-15, for a description of the proposed route. See also the commissioners' report in *id.* at 940-41, and 19 ANNALS OF CONG. 1784-88 (1808), for descriptions of the extension of the route to the Ohio River.

274. Thomas Jefferson, Eighth Annual Message to Congress (Nov. 8, 1808), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 456.

for a system of improvement, should that be thought best.²⁷⁵

This final message suggests a subtle change of emphasis not unlike that revealed by Jefferson's private correspondence with respect to Louisiana.²⁷⁶ Still uncertain of existing authority, he was beginning to acknowledge the possibility that the Constitution might not have to be amended after all.

Historians have said without documentation that, as in the case of Louisiana, Gallatin never shared Jefferson's reservations as to the constitutionality of federal projects for the construction of roads and canals.²⁷⁷ It is certainly true that from the beginning the Treasury Secretary had been an enthusiastic booster of internal improvements. The Cumberland Road, embodied in the ingenious bargain he designed for the Ohio Enabling Act, was his idea.²⁷⁸ He had sold it to Giles not only as an inducement to the state to postpone taxation of alienated public lands, but also for the contribution it would make "toward cementing the bonds of the Union."²⁷⁹

In 1807, reportedly at Gallatin's urging, Ohio Senator Thomas Worthington persuaded the Senate to request from the Secretary "a plan for the application of such means as are within the power of Congress, to the purposes of opening roads and making canals"²⁸⁰ Gallatin responded a year later with a comprehensive report proposing a \$20,000,000 plan of roads and canals to improve communications throughout the country.²⁸¹ While

275. *Id.*

276. See, e.g., *supra* note 144-45 and accompanying text.

277. See HENRY ADAMS, *THE LIFE OF ALBERT GALLATIN* 350 (Philadelphia, Lippincott 1880); RAYMOND WALTERS, JR., *ALBERT GALLATIN: JEFFERSONIAN FINANCIER AND DIPLOMAT* 181 (1957).

278. Letter from Albert Gallatin to William B. Giles (Feb. 13, 1802), in 1 *THE WRITINGS OF ALBERT GALLATIN*, at 79 (Henry Adams ed., 1879).

279. *Id.*; see 11 *ANNALS OF CONG.* 1102-03 (1802). For Gallatin's role in promoting the Cumberland Road, see WALTERS, *supra* note 277, at 181-82.

280. 16 *ANNALS OF CONG.* 97 (1807). For a discussion of Gallatin's alleged authorship of this proposal, see WALTERS, *supra* note 277, at 182.

281. See Report from the Secretary of the Treasury to the Senate (Apr. 6, 1808), reprinted in 1 *AMERICAN STATE PAPERS (MISC.)*, *supra* note 117, at 724 [hereinafter *Gallatin Report*]. For brief and admiring descriptions of Gallatin's plan, see ADAMS, *supra* note 277, at 350-52 and WALTERS, *supra* note 277, at 182-84.

he did not overtly identify any basis of congressional authority, his observation that improvements would "facilitate commercial and personal intercourse"²⁸² might be an oblique reference to the Commerce Clause, and the report itself might be understood as an implicit assertion that the projects it proposed were "within the power of Congress,"²⁸³ as the resolution had required. Unlike Jefferson, Gallatin seemed to draw no distinction between tax revenues and land sales, presenting them as alternative sources of funding for his ambitious plan without adverting to any constitutional question.²⁸⁴ Near the end of the report, however, he did hazard one observation on the limits of congressional authority:

It is evident that the United States cannot, under the constitution, open any road or canal, without the consent of the State through which such road or canal must pass. In order, therefore, to remove every impediment to a national plan of internal improvements, an amendment to the constitution was suggested by the Executive when the subject was recommended to the consideration of Congress. Until this be obtained, the assent of the States being necessary for each improvement, the modifications under which that assent may be given, will necessarily control the manner of applying the money.²⁸⁵

In so saying, Gallatin seemed to imply that there was no constitutional objection to federal support of internal improvements as such, although Jefferson had pointedly argued that improvements were not among the subjects to which federal revenues could be applied.²⁸⁶

Gallatin's comments on a preliminary draft of the president's 1806 message, however, afford a somewhat different impression of his constitutional views. Urging that Jefferson delete a hare-

282. Gallatin Report, *supra* note 281, at 725.

283. 16 ANNALS OF CONG. 97 (1807).

284. *See* Gallatin Report, *supra* note 281, at 740-41.

285. *Id.* at 741. Gallatin went on to say that because most of the projects he proposed either had already been authorized by the states or were immediately beneficial to them, little difficulty was to be expected on that account. *See id.*

286. *See supra* notes 265-71 and accompanying text.

brained passage advocating repeal of the General Welfare Clause,²⁸⁷ Gallatin first observed that

even if those words had the greatest extent in the Constitution of which they are susceptible, viz., that Congress had power to raise taxes, &c., for every purpose which they might consider productive of public welfare, yet that would not give them the power to open roads and canals through the several States.²⁸⁸

In light of the report that Gallatin was to file on the subject over a year later, we can safely conclude that he was here referring to the perceived need for state consent before the federal government itself could construct improvements.²⁸⁹ His letter went on to say, however, that Jefferson's argument "that the objects now recommended are not among those enumerated" (as the message ultimately said) was "conclusive" and "sufficient" to show that a constitutional amendment was in fact required²⁹⁰—suggesting that at that time, at least, he agreed with Jefferson on this point as well. Two years later, while objecting on modern externality grounds to the president's proposal to apportion among the states the federal funds an amendment would make available, Gallatin added that he was "clearly of opinion that without an amendment to the Constitution nothing efficient can be done."²⁹¹ He may have been referring to political rather than legal impossibility, or to his earlier insistence on state consent to federal construction; but from all this evi-

287. Fortunately, Jefferson confined most of his wacky flights of enthusiasm to private correspondence. For example, see his defense of Jacobin excesses in Letter from Thomas Jefferson to William Short (Jan. 3, 1793), in THOMAS JEFFERSON: WRITINGS, at 1004 (Merrill D. Peterson ed., 1984), where he stated that "[m]y own affections have been deeply wounded by some of the martyrs to this cause, but rather than it should have failed, I would have seen half the earth desolated." *Id.*; see also Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) in *id.* at 91 ("Calculate that one rebellion in 13 states in the course of 11 years, is but one for each state in a century & a half. No country should be so long without one.").

288. Letter from Albert Gallatin to Thomas Jefferson (Nov. 16, 1806), in 1 THE WRITINGS OF ALBERT GALLATIN, *supra* note 278, at 320.

289. See *supra* note 285 and accompanying text.

290. Letter from Albert Gallatin to Thomas Jefferson, *supra* note 288, at 320.

291. Letter from Albert Gallatin to Thomas Jefferson (Nov. 2, 1808), in 1 THE WRITINGS OF ALBERT GALLATIN, *supra* note 278, at 425.

dence, it is not easy to be sure that Gallatin did not share Jefferson's constitutional misgivings about federal support for internal improvements.

In any event there were others who had no such reservations. Avid members of Congress continued to press for particular projects without waiting for the constitutional amendment that, as in the case of Louisiana, was not then proposed. One of them, at least, made the constitutional argument that was an answer to Jefferson's doubts.²⁹²

In January 1806, shortly before Congress authorized construction of the Cumberland Road, the president and directors of the Chesapeake and Delaware Canal Company petitioned Congress to provide financial support for a canal to connect "the waters of the Delaware and Chesapeake bays,"²⁹³ which, as a Senate committee concluded, would substitute "a safe inland navigation of twenty-one miles" for "a circuitous and an exposed navigation of five hundred."²⁹⁴ One month later the Kentucky legislature filed a similar petition seeking federal support for a canal around the rapids of the Ohio River.²⁹⁵

Lauding the advantages of these projects for commerce and national defense and emphasizing that improvement of the Ohio River would enhance the value of unsold public lands, House committees reluctantly concluded that it would be inexpedient to grant the requested assistance given the parlous state of the Treasury, but left no doubt that Congress ought to support both projects if only it could.²⁹⁶ A Senate committee, equally enthusiastic about the Chesapeake project, was more sanguine: "If it be inconvenient at this moment to spare the money from the Treasury, the United States have it in their power to contribute the assistance prayed for by a grant of land," in exchange for which the government would receive stock in the company.²⁹⁷

292. See *infra* notes 302-03 and accompanying text.

293. 15 ANNALS OF CONG. 192 (1806).

294. *Id.* at 193.

295. See *id.* at 448. A Senate committee had found an earlier request to the same effect premature, because the company had not yet been organized or chartered. See H.R. REP. NO. 8-188 (1805), reprinted in 1 AMERICAN STATE PAPERS (MISC.), *supra* note 117, at 419.

296. See 15 ANNALS OF CONG. 536-37, 827-28 (1806).

297. *Id.* at 192, 194. The Senate apparently did not consider the Ohio rapids

None of these committees appeared to entertain doubts as to the authority of Congress to employ either land or tax revenues for internal improvements, but nothing came of either request during this session.²⁹⁸

Both proposals were renewed in 1807. On January 12, one Henry Clay of Kentucky, who had presented his credentials to the Senate only two weeks before,²⁹⁹ moved that Congress "appropriate" land in support of the Ohio River project.³⁰⁰ Three days later Senator Bayard's committee endorsed the previous year's recommendation of a similar subsidy for the Chesapeake and Delaware Canal.³⁰¹

After reprising the benefits to be derived from connecting the Chesapeake with the Delaware, Bayard went directly to the question of authority, noting (in obvious allusion to the president's recent annual message) "that doubts of the highest authority exist as to the Constitutional right of this Government to apply the public money to objects of this kind."³⁰² Bayard himself had no doubts:

There is no express power given to erect a fort or magazine, though it is recognized in the delegation of exclusive legislative powers in certain cases. The power to erect light-houses and piers, to survey and take the soundings on the coast, or erect public buildings, is neither expressly given nor recognized in the Constitution, but it is embraced by a liberal and just interpretation of the clause in the Constitution, which legitimates all laws necessary and proper for carrying into execution the powers expressly delegated. On a like principle the bank of the United States was incorporated. Having a power to provide for the safety of commerce and the defence of the nation, we may fairly infer a power to cut a

petition at this time.

298. See *id.* at 235. The negative reports were never taken up in the House, and the Senate formally postponed consideration of its committee's favorable proposal.

299. See 16 ANNALS OF CONG. 24 (1806). Clay had been appointed in midterm to replace John Adair, who had resigned. Born in 1777, he was younger than the Constitution allowed, and he served—this time—only until 1807. See BIOGRAPHICAL DIRECTORY, *supra* note 247, at 789.

300. 16 ANNALS OF CONG. 30 (1807).

301. See *id.* at 34.

302. *Id.* at 59.

canal, a measure unquestionably proper with a view to either object.³⁰³

The plan before the Senate, Bayard continued, was even easier to sustain; for he proposed to sell the company public land, not to give it money from the Treasury.³⁰⁴ Congress had already conveyed land "for the endowment of schools, for the making of roads, and [had] made gratuitous grants; and surely," he concluded, "we must have the right to sell it for canal stock."³⁰⁵ Though he did not say so directly, his proposal comported with the distinction drawn by Jefferson in his annual message; and thus it was squarely supported by the precedent of the Cumberland Road.

There were objections, but we do not know whether any of them went to the basic question of federal authority. The Senate voted that a bill be drafted to carry out Bayard's proposal but then postponed it until the next session of Congress.³⁰⁶ On the basis of another favorable committee report that sidestepped the general constitutional issue by emphasizing that the Ohio River project would increase the value of federal lands, the Senate watered down Clay's parallel proposal so as to provide for the appointment of commissioners to study various means of improving navigation at the rapids and endorsed the changes proposed.³⁰⁷ The House, however, did nothing, and both plans

303. *Id.*

304. *See id.*

305. *Id.*

306. *See id.* at 87. The *Annals* tell us that Adams was opposed to the proposal, that Giles and Baldwin expressed doubts, and that the vote on Bayard's motion to draft a bill was 20-6. *See id.* at 60. Apart from Senator White's reply to an unfounded charge that the proposal was sprung upon the Senate without adequate time for consideration, the reporter discloses neither the arguments of the three named skeptics nor the names of the remaining dissenters. *See id.* at 80. Other observers reveal that Adams branded the bill a revenue measure that ought to have originated in the House, but there was nothing to that; the provision he had in mind applied to taxing, not to investment. *See* U.S. CONST. art. 1, § 7; 1 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 165 at 452; PLUMER, *supra* note 100, at 628. For Randolph's unconvincing assertion (in the context of a bill respecting the duty on salt) that under the same provision the Senate could amend only the details of a revenue bill and not the amount or subject of a tax, see 16 ANNALS OF CONG. 629 (1807); for responses, see *id.* at 631-35.

307. *See* 16 ANNALS OF CONG. 92-96 (1807); 1 MEMOIRS OF JOHN QUINCY ADAMS,

failed again.

The Senate finally passed the Chesapeake and Delaware bill in February 1808,³⁰⁸ one month before the end of the Tenth Congress, and of Jefferson's second term. The bill did not reach the House floor until the last day of the session, and Virginia Representative John Eppes moved to postpone it indefinitely, saying it involved not only a great quantity of federal land, but also a constitutional question that there was not sufficient time to consider.³⁰⁹ Thomas Newton, also of Virginia, protested that Congress had settled any constitutional question when it voted to take stock in the national bank, but that was to trivialize the issue; it was still necessary to identify some enumerated power to which the canal, like the bank, was necessary and proper.³¹⁰ Noting the benefits of the project for national defense, North Carolina's Richard Stanford more pertinently invoked the precedent of the Cumberland Road.³¹¹ But Eppes had the votes if not the better argument, and the bill was lost again.³¹² The Ohio River project was not heard from at all in the House.

Thus Jefferson's presidency came to an end without significant progress on internal improvements beyond the initial steps toward constructing the Cumberland Road.³¹³ Bayard's argu-

supra note 165, at 461-63.

308. *See* 19 ANNALS OF CONG. 341 (1808).

309. *See id.* at 1558.

310. *See id.*

311. *See id.* at 1560.

312. *See id.*

313. Not long after authorizing the Cumberland project, Congress empowered the president to cause three other roads to be opened as well. Two of them were entirely in the territories, over which Congress had broad legislative power under Article IV, Section 3, and accordingly posed no constitutional problem. *See* Act of Apr. 21, 1806, ch. 41, § 7, 2 Stat. 396, 397. The third, however, was to reach from Nashville to Natchez and thus to pass in substantial part through the state of Tennessee. *See id.* Significantly, appropriations for this undertaking were to come from general funds in the Treasury, not from the proceeds of public land sales. *See* ch. 41, § 8, 2 Stat. at 397. On its face, therefore, the statute suggests that Congress may have been unimpressed by the distinction President Jefferson would soon propose in this regard and that it agreed with Bayard that Congress had authority to appropriate tax revenues for improvements within the states. Nor did this statute speak of obtaining consent before causing the road to be opened within the state, as the Cumberland law had demanded and as Gallatin would soon say the Constitution required. Because there was no reported discussion of these important points, the explanation may be that it was not actually contemplated that the United States

ments from the commerce and war powers remained unanswered, and his lighthouse analogy was strong. Though Jefferson professed doubts, the Republican Congress had encountered no difficulty in continuing to finance aids to maritime navigation.³¹⁴ The words and purpose of Article I embraced commerce by land as well as by sea, interstate as well as foreign, and support for armies as well as navies; there was no need to rely on the dreaded General Welfare Clause as an independent source of congressional authority. Nor did there seem to be much to Gallatin's more modest argument that the federal government could not build a road or canal through a state without the state's consent.³¹⁵ Federal construction as well as federal financing might be necessary and proper to promoting commerce or defense, just as the Navy may build ships as well as buy them. Any negative inference from the clause empowering Congress to exercise exclusive authority over places ceded voluntarily by the states had been rejected when the Army obtained West

would construct a road in Tennessee, but only extend through the Mississippi Territory existing roads already maintained by the state. See Message from Thomas Jefferson to Congress (Feb. 19, 1808), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 440-41.

314. See Act of Mar. 17, 1808, ch. 35, 2 Stat. 476; Act of Feb. 10, 1807, ch. 9, 2 Stat. 414; Act of Jan. 22, 1806, ch. 4, 2 Stat. 349 (repealed); Act of Mar. 26, 1804, ch. 49, 2 Stat. 294; Act of Mar. 16, 1804, ch. 25, 2 Stat. 270; Act of Apr. 6, 1802, ch. 20, 2 Stat. 150; see also Act of Feb. 10, 1807, ch. 8, 2 Stat. 413 (authorizing a coastal survey, with obvious benefits for both commerce and defense). The first of these statutes, besides providing for additional lighthouses, authorized the expenditure of federal funds to construct and repair piers in the Delaware River. See ch. 20, § 8, 2 Stat. 152. In a letter to Gallatin, Jefferson protested that the Commerce Clause no more empowered Congress to build piers than to build factories, though the distinction seems obvious to us; "I well remember the [unreported] opposition, on this very ground, to the first act for building a lighthouse." Letter from Thomas Jefferson to Albert Gallatin (Oct. 13, 1802), *microformed on* Presidential Papers Microfilm, Thomas Jefferson Papers, Series 1: Sept. 1, 1802 to Mar. 17, 1803 (Library of Congress). Apparently willing to let sleeping dogs lie, the president vetoed none of the new lighthouses that Congress authorized, and he reconciled himself to the pier provision by construing it to apply only to facilities for the use of warships: "[A] power to provide and maintain a navy, is a power to provide receptacles for it and places to cover & preserve it." *Id.* That was reasonable enough; it was the same line of reasoning that justified construction of piers for merchant vessels under the commerce power.

315. See *supra* note 285 and accompanying text.

Point by private purchase.³¹⁶ The apparent purpose of that provision was to require state consent before its authority could be extinguished entirely.³¹⁷

Thus, even without considering the express authority to establish post roads, which Madison in an earlier exchange with the shocked Jefferson had said included the power to build them,³¹⁸ a strong case could be made, and had been made, for comprehensive federal authority over internal improvements. The case was too strong, and the stakes were too high, for the potential beneficiaries to give up the fight after a series of disappointing failures. With a new president who had said Congress could build roads and with the outgoing president and his influential treasury secretary firmly on record in favor of finding a way to provide federal support for them, it was obvious the question was not about to go away.

IV. CONCLUSION

What do the admission of Ohio, the Louisiana Purchase, and the beginnings of the Cumberland Road teach us about the Constitution and its history? Apart from specifics about the meaning of particular constitutional provisions, at least the following:

First, they remind us once again how much significant constitutional interpretation takes place outside the judicial branch. The Court did not affirm the power to acquire territory, even in

316. See CURRIE, *supra* note 1, at 84 n.236.

317. Jefferson himself appealed to Congress at one point to consider authorizing him to condemn property needed for fortifications until the states could get around to ceding it, noting that exclusive jurisdiction was not necessary to protect the government's interests. See Thomas Jefferson, Message to Congress (Mar. 25, 1808), in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 3, at 447; 17 ANNALS OF CONG. 175 (1808).

318. See CURRIE, *supra* note 1, at 225 n.149. The Jeffersonian Congress was notably reticent in the exercise of this ambiguous authority. Although Representative Dawson twice boldly moved to employ surplus postal revenues to repair deteriorating post roads, Congress meekly (or cheaply) prescribed that it be informed when roads were blocked or in disrepair so it could designate others for carriage of the mail. See 12 ANNALS OF CONG. 311 (1803); 13 *id.* at 554 (1803); Act of Mar. 26, 1804, ch. 34, § 4, 2 Stat. 275, 277. Employment of the term "post routes" rather than "post roads" would have made it easier to read this clause to apply to canals, to which its purpose obviously extended.

dictum, until 1829;³¹⁹ it did not clarify limits of Congress's authority to impose conditions on the admission of states until *Coyle v. Smith* in 1911,³²⁰ or the scope of the spending power until *United States v. Butler* in 1936.³²¹ In each case, as usual, the relevant arguments had long since been brought out in Congress and by the Executive.

Second, these events remind us once again how many interesting and important constitutional issues there are in addition to those that dominate the agenda today—issues such as those concerning the admission of states and the acquisition and government of territory—as well as how far we have departed from earlier widespread conceptions of the limited reach of federal authority.

Third, they introduce us (or reintroduce us) to a number of fascinating figures: the two great former legislative leaders, Madison and Gallatin, who formed the twin bulwarks of Jefferson's Cabinet; talented members of the House and Senate like John Quincy Adams, James Bayard, and Wilson Cary Nicholas; and a whole raft of lesser lights who labored diligently in Congress, arguing forcefully and thoughtfully about the Constitution.

Finally, they give us a better understanding of Jefferson himself, a man much maligned by his critics but surely, by any standard, one of the great figures in American history. Yes, like the rest of us, he had feet of clay, and not just because he may have had a sex life or failed to practice what he preached about slavery. More significant for present purposes are his failings as president and statesman, not least his lamentable attack on the independence of the judges.

When it came to westward expansion, however, Jefferson was a man of vision. He perceived the imperative of both Louisiana and internal improvements and, despite constitutional qualms, he had the courage to seize the day. For Louisiana he deserves our heartfelt thanks, not our censure.

So let us not wallow in the fact that Jefferson was less than perfect. Let us rather rejoice at the extent to which he was able

319. See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

320. 221 U.S. 559 (1911).

321. 297 U.S. 1 (1936).

to transcend his own limitations and those of the society in which he lived. Looking beyond his actions as president, the accomplishments he selected for his tombstone remind us of what he was all about: the Declaration of Independence, the Virginia Statute on Religious Freedom, the University of Virginia. Democracy, liberty, and enlightenment—not a bad epitaph for a man with feet of clay.

From the ankles up he's still in my Pantheon.