

shared by his attorney general, Levi Lincoln. For a while Jefferson thought he would have to secure a constitutional amendment in order to gain the territory. But his secretary of the treasury, Albert Gallatin, realized that the time lost in seeking such an amendment could well lead the fickle Napoleon to withdraw his offer, and in a memorandum to Jefferson on January 13, 1803, Gallatin laid out a constitutional basis for proceeding with the transaction. Gallatin, like Hamilton in the dispute over the Bank of the United States (Document 35), took a broad view of constitutional power and claimed that the treaty power included sovereign prerogatives such as acquiring new territory. Eager to secure Louisiana, Jefferson followed Gallatin's interpretation, which the Supreme Court later upheld (see next document). This document illustrates the remarkably flexible nature of American constitutional theory. While claiming to believe in strict construction, as he did in his own arguments against the Bank of the United States (see Document 34), President Jefferson developed a far different notion of constitutional theory. This would be a pattern that most presidents would follow in subsequent years.

See E. S. Brown, *Constitutional History of the Louisiana Purchase* (1920); R. Walters, Jr., *Albert Gallatin* (1957); and Irving Brant, *James Madison, Secretary of State* (1953).

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## Memorandum on Louisiana Purchase (1803)

ALBERT GALLATIN

In 1802, President Thomas Jefferson began to negotiate with the Emperor of France, Napoleon Bonaparte, for the purchase of the part of the French territory west of the United States. Specifically, Jefferson wanted to gain the city of New Orleans, and with it a Gulf Coast port for Americans who sent their produce and goods down the Mississippi River. By the time serious negotiations began, Napoleon realized he would never recover what had been the crown jewel of the French Empire in America, Haiti, which he had lost when the slaves on that island overthrew their French masters. Thus, to Jefferson's great surprise, Napoleon offered to sell the vast Louisiana Territory to the United States. Jefferson badly wanted this huge tract of land, stretching from the Mississippi to the Rocky Mountains and from the Gulf Coast to Canada, but his belief in a narrow interpretation of the Constitution (see Document 34) created a severe problem for him. Nothing in the Constitution, he believed, explicitly granted the national government power to acquire additional territory, a view

I have read Mr. Lincoln's observations, and cannot distinguish the difference between a power to acquire territory for the United States and the power to extend by treaty the territory of the United States; yet he contends that the first is unconstitutional, supposes that we may acquire East Louisiana and West Florida by annexing them to the Mississippi Territory. Nor do I think his other idea, that of annexation to a State, that, for instance, of East Florida to Georgia, as proposed by him, to stand on a better foundation. If the acquisition of territory is not warranted by the Constitution, it is not more legal to acquire for one State than for the United States; if the Legislature and Executive established by the Constitution are not the proper organs for the acquirement of new territory for the use of the Union, still less can they be so for the acquirement of new territory for the use of one State; if they have no power to acquire territory, it is because the Constitution has confined its views to the then existing territory of the Union, and *that* excludes a possibility of enlargement of one State as well as that of territory common to the United States. As to the danger resulting from the exercise of such power, it is as great on his plan as on the other. What could, on his construction, prevent the President and the Senate by treaty annexing Cuba to Massachusetts, or Bengal to Rhode Island, if ever the acquirement of colonies shall become a favorite object with governments, and colonies shall be acquired?

But does any constitutional objection really exist?

The 3d Section of the 4th Article of the Constitution provides:

Source: Henry Adams, I *Writings of Albert Gallatin* 111 (1879)

1st. That new States may be admitted by Congress into this Union.

2d. That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Mr. Lincoln, in order to support his objections, is compelled to suppose, 1st, that the new States therein alluded to must be carved either out of other States, or out of the territory belonging to the United States; and, 2d, that the power given to Congress of making regulations respecting the territory belonging to the United States is expressly confined to the territory *then* belonging to the Union.

A general and perhaps sufficient answer is that the whole rests on a supposition, there being no words in the section which confine the authority given to Congress to those specific objects; whilst, on the contrary, the existence of the United States as a nation presupposes the power enjoyed by every nation of extending their territory by treaties, and the general power given to the President and Senate of making treaties designates the organs through which the acquisition may be made, whilst this section provides the proper authority (*viz.*, Congress) for either admitting in the Union or governing as subjects the territory thus acquired. It may be further observed in relation to the power of admitting new States in the Union, that this section was substituted to the 11th Article of Confederation, which was in these words: "Canada acceding, &c., shall be admitted into, &c., but no other colony shall be admitted into the same, unless such admission be agreed to by nine (9) States." As the power was there explicitly given to nine (9) States, and as all the other powers given in the Articles of Confederation to nine (9) States were by the Constitution transferred to Congress, there is no reason to believe, as the words relative to the power of admission are, in the Constitution, general, that it was not the true intention of that Constitution to give the power generally and without restriction.

As to the other clause, that which gives the power of governing the territory of the United States, the limited construction of Mr. Lincoln is still less tenable; for if that power is limited to the territory belonging to the United States at the time when the Constitution was adopted, it would have precluded the United States from governing any territory acquired, since the adoption of the Constitution, by cession of one of the States, which, however, has been done in the case of the cessions of North Carolina and Georgia; and, as the words "other property" follow, and must be embraced by the same construction which will apply to the territory, it would result from Mr. L.'s opinion, that the United States could not, after the Constitution, either acquire or dispose of any personal property. To me it would appear:

1st. That the United States as a nation have an inherent right to acquire territory.

2d. That whenever that acquisition is by treaty, the same constituted authorities in whom the treaty-making power is vested have a constitutional right to sanction the acquisition.

3d. That whenever the territory has been acquired, Congress have the power either of admitting into the Union as a new State, or of annexing to a State with the consent of that State, or of making regulations for the government of such territory.

The only possible objection must be derived from the 12th Amendment, which declares that powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States or to the people. As the States are expressly prohibited from making treaties, it is evident that, if the power of acquiring territory by treaty is not con-

sidered within the meaning of the Amendment as delegated to the United States, it must be reserved to the people. If that be the true construction of the Constitution, it substantially amounts to this: that the United States are precluded from, and renounce altogether, the enlargement of territory, a provision sufficiently important and singular to have deserved to be expressly enacted. Is it not a more natural construction to say that the power of acquiring territory is delegated to the United States by the several provisions which authorize the several branches of government to make war, to make treaties, and to govern the territory of the Union?