

# OUR CONSTITUTIONAL LOGIC

## Part I: Jefferson's Thirteenth Amendment

"Tell me about the Thirteenth Amendment," I ask our country's third President. "Yours."

"I was going to abolish slavery," he replies. "Starting with the Louisiana territory. I thought my proposal would be numbered the Fourteenth Amendment. The Twelfth chased Aaron Burr into history. The lapsed Thirteenth can be blamed on Buonaparte."

"Background our readers," I urge Jefferson.

"Americans got their knickers in a twist," Jefferson begins, "when Jérôme Buonaparte married that girl from Baltimore."

"Elizabeth Patterson," I interject. "This was 1803, right after the Senate ratified the treaty with France. The Louisiana Purchase."

"She's the grandmother of the founder of the FBI," he adds. "If I may digress."

"So J. Edgar Hoover's agency's founder's grandfather's brother was Napoleon Buonaparte," I muse. "Wow! History does mean something."

"Can we get back to the Titles of Nobility Amendment?" he asks me.

"Its purpose was to banish Americans who married into the nobility," I show off. "But the amendment, although obtaining the requisite endorsement by Congress, never got enough states to pass the ratification bar."

"And so, back to my proposal. It was dead on arrival."

"Which made it – "

"Incredibly successful," Jefferson declares. "Unlike the other Thirteenth. TONA in your parlance."

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“You proposed a constitutional amendment to incorporate the Louisiana Territory into the United States and to establish territorial government in the lands purchased from France,” I rattle along. “But your amendment never got a hearing in the Eighth Congress.”

“I was the last of the old believers.”

He pours one for himself and one for me.

“As you know I objected to the constitution-without-limits-on-federal-power. This is 1787. The restrictions, the ‘no’s,’ were pretty sparse. A guarantee of jury trial in Article III, Section 2 and miscellaneous provisions of Article I, Section 9 being the exceptions proving my point. I was looking for a lot of restrictions, limits and burdens on government functionaries. Popular opinion backed me up, starting in the spring of ’88. So Madison did a ‘u-turn.’ Voilà, we got a mish-mash of limits on the national government. The Bill of Rights as proposed by Congress to the states for ratification in 1789.”

“But in 1803 you advocated Madison’s original logic,” I point out.

“The national government was obliged, I argued, to obtain a *new* constitutional pedigree for every *new* activity. More work for us.gov/ requires more permissions from the Constitution. As a growing continental power, and in our first trans-Mississippi foray, that expansion required an amendment to the Constitution.”

“But everyone had gone over to Madison’s way of thinking,” I point out.

“But they didn’t,” Jefferson winks, “tease out the implications of their acceptance of the not-so-limited concept of federal powers. I did.”

He pours another round. We ching-ching.

“My cunning plan – this is 1803 – outfox’d the Republicans, on the one hand, and the Federalists, on the other hand. It outflank’d both Southerners and Northerners, that is, slavery apologists and slavery

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abolitionists, who were more or less in the preliminary stages of the bad sportsmanship we may call the surliness between the States.”

“You proposed, if I may draw on my reading in the archives at the Library of Congress,” I reply, “that the Constitution be amended to give the federal government the power that a state government would have in territories acquired from France and organized by Congress.”

“There’s an analogy in your Alaska Constitution,” Jefferson suggests. “Acquired forty-one years after my death and also by treaty of purchase.”

“Quite so,” I reply.

“I didn’t want you to think I was moldering away, Professor.”

“The Alaska Constitution makes the state legislature,” I mind my cue, “the borough assembly for so much of the state as is not organized within a local government.”

“Article X, Section 6,” Jefferson provides the cite and quote. “ ‘The legislature ... may exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough’ .”

“Exactly so. Back to the fall of 1803,” I go on. “Somebody had to provide local government in the west after the treaty was ratified.”

“The federal Congress would be expected to do for the Trans-Mississippi what the Congress of the Confederation did with the Trans-Appalachia we acquired in the Treaty of Paris.”

“Seventeen eighty-three,” I ahem the citation.

“Territories would be organized in various degrees of autonomy. These may be regarded as, in essence, territories palatinate, and even, in the case of New Orleans, sophisticate, and most recently, triumphant. The constitutional amendment I wrote,” Jefferson continues, “assumed that Congress would have the power of a state government in any unorganized expanse that was left over after territories and states were carved out at

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(more or less) the rate of two degrees of latitude to three degrees of longitude, rivers approximating boundaries as necessary. Or vice versa.”

“This is going to bring us around to Dred Scott's case,” I ask. “Right?”

“In a minute. Take the distinction between enslaved persons *escaping* from one state to the next, on the one hand, and *migrating* from one state to another,” Jefferson continues, “on the other hand.”

“Since Congress addresses these points in Article IV, Section 2 and Article I, Section 9, clause the first,” I suppose, “these are two different topics for constitutional consideration.”

“The right of a state to control migration must be conceded because the federal constitution imposes on states the duty to surrender any escaped person, even if ‘in consequence of any law or regulation’ the escaping person would otherwise ‘be discharged from such service or labor’.”

“I see your point,” I have to agree.

“And therefore,” Jefferson declares, “it must be conceded that states had the power to make such laws or regulations, ante-1787, because they gave up such rights in the federal Constitution of that year.”

“But Taney argued – ”

“That the Confederacy Congress should not have adopted the Land Ordinance of 1784. Which I drafted.”

“Taney referenced the 1787 Northwest Ordinance,” I mumble the citation to pages 446-447. “Same deal.”

“Taney relied on Madison's Federalist No. 38,” Jefferson adds.

“The only example of founder's intent he could or would muster,” I slip in. “You're on a roll here, Mr. J.”

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“But what Madison actually said,” Jefferson explains, “is this: ‘Congress have undertaken ... to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy. All this has been done; and done without the least color of constitutional authority’.”

Jefferson signals me, via raised eyebrow.

“ ‘Yet no blame has been whispered; no alarm has been sounded,’ Madison said. In 1788,” I add, “he blew the whistle on your theory of federal power, vintage 1784.”

“So,” Jefferson concludes, “Congress had the power that the states would (eventually) have in territories acquired from France.”

“Whether or not,” I suppose, “Congress ever created states in that territory.”

“ ‘Is the importation of slaves permitted by the new Constitution for twenty years?’ Madison argued. ‘By the old it is permitted forever.’ ”

Jefferson gives me a wink.

“You see, Madison is arguing that the Confederacy Congress was too powerful. In arguing that the federal Congress will have less power than the Continental Congress, he concedes the proposition that, absent some express limit, Congress has or will have the power of a state in the Louisiana Territory. The only true measure of a power of a state is the power the thirteen states enjoyed in the interval from 1778 – ”

“The organization of the Continental Confederacy,” I slip in.

“To 1789,” he adds.

“The organization of the federal government,” I mind my cue.

“Where Taney really let the cat out of the bag,” Jefferson declares, “was his insistence, that ‘the the words of the Constitution [should not be

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given] a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.' At 405."

"He then proceeded to rely on none of the framers' opinions or views," I point out.

"Except for Taney relying on Madison criticizing Jefferson," Jefferson tut-tuts. To be fair," Jefferson adds, Taney never said that the court should give two hoots for the framers' intent."

"And, like Madison, Taney argues from the original logic of the federal Constitution, indeed the Articles of Confederation," I counterpoint.

"When you analyze the power to regulate slavery in the territories as a function of Congress's power to make new states then you are working from 'yes' to get an answer regarding the civil rights of African Americans, which answer must be a 'no' answer. To avoid oppression, naturally."

"That's what a 'no' answer is," I agree. "One man's answer to tyranny. Like the guy standing in front of the tank at Tien An Men Square."

"In short," Jefferson muses, "to get fairness for any one person, Taney and I agree you work from goodness. For the group or collective."

"Ditto," I presume, "analyzing the power to make treaties of purchase or to declare and conclude war."

"Ditto analyzing Congress's power in the territory acquired under the treaty of 1783. All of these are," Jefferson concludes, "the same approach to constitutional interpretation."

"That is the substance of Taney's argument. What happens when government says *yes*? Benefits, entitlement programs, subsidies to business, and so forth."

"Up to the point that," I summarize pp. 449-450, "Taney concludes that the powers of Congress in Louisiana are limited by the property rights of individual slaveowners in slaveowning states."

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“The powers of Congress,” Jefferson cites to p. 448, “are to be considered as a ‘trustee charged with the duty of prompting the interests of the whole people of the union’.”

“Question begging, if I do say so myself,” I allow myself to sniff. “Because the majority opinion launched the question, ‘where do property rights end and civil rights begin’?”

“You don’t seem to have gotten the big picture,” Jefferson counter-sniffs and in my direction. “The answer to the question, ‘What does the original logic of the federal constitution tell us about the power of Congress in territories it acquires by treaty?’ can hardly be found in the property rights of some citizens in some but not all of the states.”

“And he used Madison to trash the Land Ordinance of 1784.”

“Unforgiveable,” Jefferson sighs, while aspirating his esters.

“Your cue,” I prod our Third President.

“We’ve got a lot of rivers in North America,” Jefferson considers his favorite legislation from that decade. “I suggested states named after abstract concepts. Like the ‘land between the rivers’?”

“Metropotamia? Polypotamia?” I demur. “It’s all Greek to me. If Congress had the power of a state in new territories, acquired by treaty of 1783 or 1803, then Congress did not need a constitutional amendment to exercise the power of a territorial legislature for the unorganized territory west of the Mississippi River.”

“Everyone fell for it,” Jefferson permits himself a presidential guffaw.

“So your proposal forced Congress,” I suppose, “to choose between the Madison of 1787 and the Madison of 1789.”

“A ‘sucker’ punch I believe it’s called,” Jefferson swirls his cordial. “Of course, Madison could hardly whirl about – in a second volte face – and

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claim to be an old believer. *I* was the old believer. Everyone else believed in inherent municipal power with necessarily explicit limitations.”

Jefferson reaches for his Blackstone.

“I became the last Madisonian. Of course, I could have relied on Sir William’s aphorism. ‘The public good is in nothing more essentially interested than in the protection of every individual’s private rights, as modelled by the municipal law.’” 1 Blackstone 135 (1765).

“Whoa!” I blurt. “I think I get it. Congress has only limited, enumerated powers. But if one of those powers is the power to do everything a state can do, then *those* powers are unlimited. Or limited only by the ‘nay’s’ set forth in the Constitution or the Bill of Rights.”

“You’re still one step behind,” Jefferson corrects me. “Sir William’s municipal law promotes the public good by protecting private rights. Very interesting, wouldn’t you say?” Jefferson smiles. “Teasing *no* from *yes*.”

“This throws into stark relief the list of commands and permissions in Article I, Section 8, for example,” I work through the logic offered me. “That which is *yes* to the *federal* soul seeking to do good works, may be set off against the people’s *no*, written, eight to ten times, your choice, in the Bill of Rights.”

“Have you ever wondered why the laundry list of federal powers in the Constitution fits so badly with the first ten amendments?”

“Madison’s list of un-powers in the Bill of Rights?” I answer his question with my own. “‘What may be called a bill of rights ... was neither improper nor altogether useless.’ Madison wasn’t wild about the idea, as you can see,” I add.

“The original *yes*’s,” Jefferson continues, “are set off against the second-after-thoughts in the Bill of Rights, in which the people say their *nay*’s to Congress. No one in the last two hundred years has teased out a connection between what Congress may and should do, on the one hand, and what Congress shall not do, on the other hand.”

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“Does Jeremy Bentham have anything to do with this?” I wonder.

“I, too,” Jefferson considers my point, “have often blamed the War of 1812 on the Dark Lord.”

“Perhaps,” I venture, “this is what happens when you let the people loose. They ratify constitutions but fail to supply that grand unified theory that pleases the Academy.”

“I’m sure you can figure it out,” Jefferson sniffs.

“Now that we have that resolved,” I press the interview to its conclusion, “invasion of private rights by congressional action should be weighed in this balance. Does it lack a pedigree as precise as that crafted – in your five separate versions – to authorize the government of the Louisiana territories?”

“Take warrantless wiretapping,” Jefferson assures me. “We old believers argue that Congress and the President have no power to approve warrantless wiretapping because there is no constitutional pedigree for any wiretapping. The technology was not in existence as of 1787.”

“There are not many old believers, are there?”

“We do have our own bowling team.”

“And that would be?” I ask.

“Dolley Madison and Sally Hemmings, along with Dred Scott.”

“I understand he lived a free man, at least at the end of his life,” I reply.

“Amazingly enough,” Jefferson explains, “Sandford’s brother’s widow’s husband was an abolitionist Congressman, who found out about the Supreme Court proceedings only a month before the decision came down. He emancipated Scott, who died a free man in St. Louis.”

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Jefferson reaches for the decanter.

I accept the pour on offer.

“Don't forget,” Jefferson reminds me, “to dissect this mystery: Why is it that those who govern by *yes* must take *no* for an answer?”

*Apparatus*

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