2006

The Constitution and the Annexation of Texas

Earl M. Maltz

THE CONSTITUTION AND THE ANNEXATION OF TEXAS

*Earl M. Maltz**

I. INTRODUCTION

The annexation of Texas was by any standard a pivotal moment in the political history of the United States. The decision to add Texas to the Union was either directly or indirectly responsible for the acquisition of all of the territory of the United States south and west of the Louisiana Purchase. Annexation was also a critical issue in the presidential election of 1844 and the more general political struggle between Whigs and Democrats. Moreover, the dispute over Texas was a flashpoint in the evolving sectional conflict between the representatives of the free states and slave states.[1]

The discussions of the issue in Congress had a dual aspect. Many of the arguments both for and against annexation were overtly phrased in terms of expediency. In addition, however, the debate over Texas had an important constitutional dimension, raising fundamental questions about the structure of the nation. These constitutional issues have never been adequately addressed by the commentators.

This article will provide a compact but complete analysis of the constitutional aspects of the struggle over Texas. The article

* Distinguished Professor of Law, Rutgers (Camden) University.

1. The dispute over the annexation of Texas has generated a vast historical literature. Despite its age, JUSTIN H. SMITH, THE ANNEXATION OF TEXAS (1911), remains the most complete, balanced treatment of the issue. Other indispensable sources include 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854, chs. 20–25 (1990); THOMAS R. HIETALA, MANIFEST DESIGN: ANXIOUS AGGRANDIZEMENT IN LATE JACKSONIAN AMERICA chs. 2, 3 (1985); FREDERICK MERK, SLAVERY AND THE ANNEXATION OF TEXAS (1972); MICHAEL A. MORRISON, SLAVERY AND THE AMERICAN WEST: THE ECLIPSE OF MANIFEST DESTINY AND THE COMING OF THE CIVIL WAR 16–36 (1997); DAVID M. PLETCHER, THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR (1973); 2 CHARLES G. SELLERS, JAMES K. POLK: CONTINENTALIST, 1843-1846 (1966); JOEL M. SILBEY, STORM OVER TEXAS: THE ANNEXATION CRISIS AND THE ROAD TO CIVIL WAR (2005).

will begin by briefly describing the political background of the dispute over annexation. It will then discuss the place of the constitutional arguments in the efforts to annex Texas by treaty. The article will then describe and evaluate the constitutional objections to admitting Texas directly as a state by statute, without the benefit of a treaty. Finally, the article will assess the significance of the constitutional debates more generally.

II. HISTORICAL BACKGROUND

The sequence of events that led to the annexation and admission of Texas can be traced to the Adams-Onis Treaty of 1819, in which the United States renounced its claims to Texas and the Spanish government agreed to sell Florida to the United States. Subsequently, the administrations of both John Quincy Adams and Andrew Jackson made efforts to purchase Texas. However, the Mexican government rebuffed these overtures. The situation became more complex after Texas declared its independence from Mexico in 1836. Even before its official recognition of the Republic of Texas by the Jackson administration, the government of Texas evinced a desire to join the United States. The reaction to these overtures was divided largely along sectional lines, with many Southern Democrats pressing hard for annexation and antislavery Northerners equally vehement in their opposition.Against this background, for a variety of reasons, neither Jackson nor Martin Van Buren made any effort to effectuate annexation.[2]

The presidential election of 1840 set in motion a series of events that brought the issue of Texas to center stage in national politics. The Whig party nominated William Henry Harrison as the party standard bearer in the election. Seeking to strengthen Harrison's appeal in the South, convention delegates then selected John Tyler of Virginia to be his running mate. The Whig ticket was elected, and when Harrison died soon after his inauguration, Tyler succeeded to the presidency in 1841. Dubbed "His Accidency" by contemporaries, Tyler soon quarreled with his Whig compatriots and was excommunicated from the party, effectively becoming a President with no constituency in either national political party. Tyler pursued annexation with an enthusiasm that stemmed in part from a desire to use the issue to cre-

2. The background for the decision not to pursue the annexation of Texas during this period is discussed in SMITH, *supra* note 1, at 63–68.

ate an independent power base for his administration. His representatives successfully negotiated a treaty which provided that Texas would be annexed to the United States and, at least initially, would be treated as one of its territories. The treaty of annexation was submitted to the Senate for ratification on April 22, 1844.[3]

The submission of the treaty set off an intense political struggle over ratification. In America, such struggles are often cast not only as debates over expediency, but also in constitutional terms. The debate over Texas was no exception. The constitutional issues raised by the discussions posed fundamental questions about the nature of the Union and the circumstances under which it could be legitimately expanded.

III. THE DEBATE OVER THE RATIFICATION OF THE TREATY

The contours of the debate over the ratification of the treaty to annex Texas had been largely foreshadowed by the political controversy that had been generated by the Louisiana Purchase in 1803. During the debate over Louisiana, some Federalists argued that the addition of such an immense territory would strain the bonds that held the Union together. For example, Senator William White of Delaware complained that:

> [O]ur citizens will be removed to the immense distance of two or three thousand miles from the capital of the Union, where they will scarcely ever feel the rays of the General Government; their affections will become alienated; they will gradually begin to view us as strangers; they will form other commercial connexions [sic], and our interests will become distinct.[4]

New England Federalists were particularly alarmed because they believed that the eventual admission of states carved from Louisiana would enhance the political strength of the agrarian forces of the South and West, to the detriment of the mercantile interests that predominated in New England. The distress of New Englanders was exacerbated by the impact that the three-fifths clause would have on the potential representation of any

3. *Id.* ch. VIII.
4. 8 ANNALS OF CONG. 34 (1803).

slave states that might be created in the newly-acquired territory.[5]

Animated by concerns such as these, Federalists such as Senator Timothy Pickering of Massachusetts and Senator Uriah Tracy of Connecticut argued that Jefferson had exceeded his constitutional authority by entering into the treaty that conveyed Louisiana to the United States.[6] Lacking explicit textual authority to acquire territory, Jefferson himself had expressed doubts about the constitutionality of adding such a vast territory by treaty. Supporters of the treaty, however, adopted the position that was elaborated by Senator John Taylor of Virginia:

> Before a confederation, each State in the Union possessed a right, as attached to sovereignty, of acquiring territory, by war, purchase, or treaty. This right must be either still possessed, or forbidden both to each State and to the General Government, or transferred to the General government. It is not possessed by the States separately, because war and compacts with foreign Powers and with each other are prohibited to a separate State; and no other means of acquiring territory exist. . . . Neither the means nor the right of acquiring territory are forbidden to the United States; on the contrary, in the fourth article of the Constitution, Congress is empowered "to dispose of and regulate the territory belonging to the United States." This recognises [sic] the right of the United States to hold territory. The means of acquiring territory consist of war and compact . . . . [B]eing both given to the United States, and prohibited to each State, it follows that these attributes of sovereignty once held by each State are thus transferred to the United States, and that, if the means of acquiring and the right of holding, are equivalent to the right of acquiring territory, then this right merged from the separate States to the United States, as indispensably annexed to the treaty-making power, and the power of making war; or, indeed, is literally given to the General Government by the Constitution.[7]

Pickering and Tracy attacked the constitutionality of the treaty on narrower grounds. They conceded that the federal government had the power to acquire Louisiana and to rule it as a "dependent province."[8] Their objection was based on the

---

5. *Id.* at 56.
6. *Id.* at 44–45 (statement of Sen. Pickering); *id.* at 53–58 (statement of Sen. Tracy).
7. *Id.* at 50.
8. *Id.* at 45.

clause of the treaty that provided that "[t]he inhabitants of [Louisiana] shall be incorporated into 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."[9] They contended that this provision required the federal government to eventually admit new states from the newly-acquired territory, and that such a commitment was not within the purview of the treaty-making power.[10] Indeed, they claimed that the federal government had *no* constitutional authority to admit such states.[11] While Article IV, Section 3 explicitly grants Congress the power to admit new states, Tracy asserted that it "refers to domestic States only, and not at all to foreign States."[12] Pickering went even further, contending that even an ordinary constitutional amendment would not suffice and that "the assent of each individual State [is] necessary for the admission of a foreign country as an associate in the Union: in like manner as in a commercial house, the consent of each member would be necessary to admit a new partner into the company."[13] Supporters of the treaty did not respond directly to this analysis of the constitutional authority to admit new states; instead, they insisted that the treaty required only that the inhabitants of Louisiana be recognized as citizens under a territorial government.[14]

Whatever the merits of the constitutional arguments in the abstract, the outcome of the debate over the ratification of the Louisiana treaty was foreordained by the political context in which the debate took place. Despite their general preference for a narrow interpretation of the powers of the federal government, the dominant Jeffersonians were solidly behind the treaty. Even among the Federalists, opposition to the treaty came primarily from New Englanders. Thus, when the vote was taken, the acquisition of Louisiana was overwhelmingly approved by the Senate.[15]

The political cross currents surrounding the proposed annexation of Texas were far more complex. Many Senate Democrats rallied around the treaty. They argued that annexation was

9. *Id.* at 54.
10. *Id.* at 58.
11. *Id.* at 56.
12. *Id.*
13. *Id.* at 45.
14. *Id.* at 49–50.
15. *Id.* at 26.

necessary to protect against the expansion of British influence in North America; that the entire nation would gain significant economic benefits from annexation; and that the South in particular needed protection from the abolitionist designs of the British and would benefit from the acquisition of a vast new territory that would allow the "diffusion" of slaves.[16]

Treaty opponents, on the other hand, were drawn from both the Whig and Democratic parties. They raised a variety of different objections. Some of these objections reflected Whig distrust of the idea of territorial expansion generally. Thus, Whig Representative Joseph R. Ingersoll asserted that:

> The danger of this country was that it would break to pieces at its extremities—these extremities being made more distant from the central government; which after all, was like the heart, from which issued and was circulated the spring of life throughout the whole system to its farthest extremities.[17]

Ingersoll also stated the following:

> Considering the annexation of another territory to that which was already possessed by the nation is calculated to produce one disastrous result. If there were a defect more prominent than any other in the national character of these United States, it was the very want of nationality. A spirit of common loyalty has not been as successfully cultivated here as among some other nations. It would be a calamity to weaken still further this vital principle. A nation derives strength as well as pride from the recollection of its heroic ancestry. . . . What has the rock of Plymouth or the settlement—the purity of the pilgrims or the gallantry of the lover of Pocahontas—to do with Texas or the Rio del Norte? [18]

Other objections to the treaty focused more specifically on Texas itself. Treaty opponents contended that annexation would almost certainly lead to war with Mexico, and that the movement to acquire Texas was designed to enhance the position of the "slave power" in the Union. This impression was reinforced by the Packenham Letter, in which Secretary of State John C. Calhoun of South Carolina, *explicitly* defended the treaty on the ground that annexation was necessary to protect the South from the abolitionist designs of the British.

---

16. For perceptive discussions of the political crosscurrents, see MORRISON, *supra* note 1, at 20–26; SMITH, *supra* note 1, ch. XII.

17. CONG. GLOBE, 28th Cong., 2d Sess. 91 (1845).

18. *Id.* app. at 56.

In addition to arguing that annexation was inexpedient, the opponents of the treaty maintained it could not constitutionally be adopted. Some critics noted that Mexico had never officially recognized the independence of Texas and argued that the annexation treaty was in effect a declaration of war against Mexico which required the concurrence of both houses of Congress. Thus, Whig Senator Spencer Jarnagin of Tennessee asserted that:

> The President and Senate have no right to make war; they cannot, therefore, rightfully enter into a treaty, the direct effect of which is war, and gives to another nation a right of war against us, or assumes a war pending. They surely cannot do that which is an aggression upon another nation, as well as an usurpation upon our own constitution. . . . Texas cannot deliver us possession, but only the war upon the event of which that possession depends; so that the misnamed treaty of annexation or incorporation is not such, but war under another name, faithlessly and unconstitutionally made.[19]

More commonly, treaty opponents made objections similar to those that had been leveled against Jefferson's purchase of the Louisiana Territory. Opponents of annexation revived the arguments of the Federalists who had opposed Jefferson. Thus, Jarnagin contended the following:

> The constitution has given, and could give, no such authority as that now assumed by the treaty-making power. It is a strictly extra and ultra-constitutional one; for a constitution is an agreement between the parties to it. If it is that of a single society, then the parties are the body of its citizens. If it is a compact between several societies, forming by it a federative league, it is these separately who make the parties to it. In either case, to introduce or exclude a member cannot be within the scope of the compact; because it would vary the parties, and so terminate the agreement. The terms of the instrument itself could in no manner bestow a power contrary to this condition, inherent in the contract itself, and incapable of being excluded from it. Legally to alter these, the special assent of each party must precede the act.[20]

Other opponents of annexation distinguished between the acquisition of an incorporated territory such as Louisiana and acquisition of a hitherto sovereign state such as Texas. John

19. CONG. GLOBE, 28th Cong., 1st Sess. app. at 685 (1844).
20. *Id.* app. at 682.

Quincy Adams made this point bluntly in a resolution that he proposed in 1843:

> Resolved, That by the constitution of the United States no power is delegated to their congress, or to any department or departments of their government, to affix to this union any foreign state, or the people thereof. Resolved, That any attempt of the government of the United States, by an act of congress or by treaty, to annex to this union the republic of Texas, or the people thereof, would be a violation of the constitution of the United States, null and void, and to which the free states of this union and their people ought not to submit.[21]

Ultimately, the treaty of annexation was overwhelmingly rejected by the Senate. Attitudes toward the treaty broke down along predictable political lines. Whigs, who opposed territorial expansion generally, voted against ratification by a twenty-seven to one margin. Southern Democrats, by contrast, were almost equally unanimous in supporting the treaty, voting ten to one in support of ratification. By contrast, Northern Democrats faced a complex political dilemma. On one hand, Democrats generally supported territorial expansion, and by the time that the ratification vote was taken, the party had adopted a platform that advocated the annexation of both Texas and Oregon. However, Democrats who supported the treaty risked being labeled tools of the Southern slaveocracy. In addition, some Northern Democrats were angered by the role that annexationists had played in denying the party's presidential nomination to Martin Van Buren. Against this background, it should not be surprising that Northern Democrats split, with seven out of twelve voting to ratify.[22]

IV. THE ADMISSION OF TEXAS AS A STATE

This defeat of the treaty did not end the controversy over Texas. Even before Senate action on the treaty, Tyler had entertained the idea of having Texas admitted as a state by a joint resolution of Congress.[23] This proposal gained momentum after the election of 1844. Henry Clay, the nominee of the Whig party, opposed immediate annexation. Martin Van Buren, the pre-

21. MERK, *supra* note 1, at 136.

22. 6 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 312 (1844).

23. SMITH, *supra* note 1, at 281.

convention favorite for the Democratic nomination, had taken a similar position. However, the Democratic nomination ultimately went to James K. Polk, an ardent annexationist who made the issue a centerpiece of his campaign. When Polk won a narrow victory over Clay, annexationists claimed a popular mandate for their position. Although the strength of the Whigs in the Senate was substantially reduced in the Senate, even in the new Congress Democrats would be well-short of the two-thirds majority necessary to ratify a treaty. Thus, the idea of proceeding by joint resolution was the only viable option.

Not surprisingly, opponents of annexation raised strong constitutional objections to this effort. Those scholars who have ventured an opinion have typically been equally dubious about the constitutionality of admitting Texas as a state by joint resolution, rather than acquiring its territory by treaty, which would have required a two-thirds majority in the Senate. Thus, for example, during his more general discussion of the joint resolution, Frederick Merk states flatly that this procedure "required twisting, indeed wrenching, the language of the Constitution."[24] Similarly, William W. Freehling suggests that "southern annexationists appeared to be playing fast and loose with majoritarian rules [and their] disregard for any republican procedure in their way caused Yankees and even key Southerners to bridle at their bullying."[25] In fact, the claim that Texas could constitutionally be admitted by joint resolution was much more plausible than these comments would suggest.

One objection was that Texas could not be immediately annexed as a state because no Texan could meet the residency requirement for service in the Senate or House of Representatives. The Constitution requires members of the Senate to have been citizens of the United States for nine years, and members of the House of Representatives to have been citizens for seven years. Opponents contended that, since Texas was a foreign country and had previously been a part of Mexico, residents would not become citizens of the United States until annexation was complete. Under this view, all Texans would be ineligible to serve in the Senate for nine years after annexation and ineligible to serve in the House for seven years. In short, under this view, immediate statehood for Texas would create the anomaly of a state that could not be represented in Congress.

24. MERK, *supra* note 1, at 139.
25. FREEHLING, *supra* note 1, at 441.

By contrast, supporters of annexation argued that Congress could simply take the view that Texas had in fact become a possession of the United States with the Louisiana Purchase, that it had not been legitimately surrendered by the Adams-Onis Treaty, and thus that the residents of Texas had been citizens of the United States since the early nineteenth century.[26] Others, such as Whig Representative Alexander H. Stephens of Georgia, contended that the term "citizen of the United States" should be interpreted to include citizenship of a state that was currently part of the United States, and that once Texas was annexed, the full amount of time that a person had been a citizen of Texas should count toward the constitutional requirements.[27]

In any event, the major constitutional claim of anti-annexationists was that the use of a joint resolution usurped the treaty-making authority held jointly by the President and the Senate. On this point, both sides appealed to the original understanding of the Constitution. Representative Robert C. Winthrop of Massachusetts provided one of the clearest explanations of the anti-annexation argument:

> [T]he constitution provide[s] a legislative and an executive power, providing a treaty-making power of the executive and the Senate of the United States; and while such a power existed, the resolutions now [being considered by the House of Representatives] had no sort of right to be there. This House had no authority to make treaty compacts with foreign powers. . . . It was the doctrine of the constitution that one third of the States—and those might be even the smallest, might forbid alliances with foreign powers. . . . [Winthrop] knew the chairman of the Committee on Foreign Affairs had omitted the word treaty [from the resolution], and had taken care to use the word "settlement," and "Texas consenting;" but it related to laws, and lands, and persons, out of our territory, and therefore it belonged to the treaty-making power.[28]

Arguments such as these reflected a basic misunderstanding about the scope of the treaty-making power. In essence, Winthrop was suggesting that the joint resolution was constitutionally flawed because it was designed to achieve a result that was properly within the treaty-making authority, while at the same time circumventing the requirement of ratification by two-thirds of the Senate. The difficulty with this argument is that any effort

26. CONG. GLOBE, 28th Cong., 2d Sess. 158 (1845).
27. *Id.* at 190.
28. *Id.* at 95.

to directly admit Texas as a state of United States by treaty alone would itself have been clearly unconstitutional. While the House of Representatives has no role in considering treaties, the Constitution clearly requires that the House approve the admission of new states. Thus, the joint resolution was not subject to the objection that it trenched on the treaty-making power.

The stronger constitutional claim was based on an appeal to the basic concept of enumerated powers. The argument was that the power to admit new states was the only conceivable source of authority for the joint resolution, and that this power did not extend to the admission of foreign sovereigns. Senator Rufus Choate of Massachusetts put the point bluntly:

> [U]ntil it was found [that] the treaty of last session had no chance of passing the Senate, no human being, save one—no man, woman, or child, in this Union, or out of this Union, wise or foolish, drunk or sober, was ever heard to breathe one syllable about this power in the constitution of admitting new States being applicable to the admission of foreign nations, governments, or states.[29]

Under this view, Texas could only be admitted as a state after having first been acquired by the United States through the medium of a treaty.

Not surprisingly, defenders of the joint resolution procedure had a different perspective on the constitutional issues. Some annexationists contended that, notwithstanding the provisions of the Adams-Onis Treaty, Texas was rightfully a possession of the United States whose title had never been validly conveyed to Spain. This argument was based on two premises. The first premise was that Texas was part of the territory that had been ceded to the United States in the Louisiana Purchase. The second premise was that cession of Texas in the Adams-Onis Treaty was void because the federal government lacked authority to transfer any portion of the territory of the United States to a foreign government. Under this view, the admission of Texas as a state was in principle no different than the admission of the other states that had been carved out of the Louisiana Purchase.[30]

Opponents of admission pointed out that, if the Adams-Onis Treaty was not valid, then Florida should be reconveyed to

29. *Id.* at 304.
30. *See, e.g., id.* at 158.

Spain. At the very least, as Representative James Belser of Alabama observed, it would be "very bad grace . . . to deny the validity of the treaty [in 1845]."[31] Representative Stephen A. Douglass of Illinois had an ingenious response to this argument. Douglass conceded that the United States was estopped from denying the validity of the treaty *per se*. At the same time, he noted that the treaty which effectuated the Louisiana Purchase provided that "the ceded territory should be admitted into our Union, as soon as possible."[32] Having gained their independence from Mexico, the people of Texas were now entitled to claim the benefits of this provision and demand admission into the Union.[33]

However, even Douglass's solution did not meet a more fundamental objection to reliance on the Louisiana Purchase Treaty. Opponents of the joint resolution procedure argued simply that the United States' claim to Texas under this treaty was dubious at best, and that on this point the Adams-Onis Treaty did no more than confirm the *status quo*. Given the uncertainty surrounding both the original relationship of Texas to the Louisiana Purchase and the claim that the government did not have authority to abandon that claim, supporters of the joint resolution turned to other arguments to bolster their legal claims.

Annexationists at times contended that the precedents of North Carolina, Rhode Island and Vermont established the authority of Congress to proceed by joint resolution. All of these states had been independent entities prior to being admitted to the Union created by the Constitution, and each was admitted without benefit of a treaty. The supporters of the joint resolution contended that the case of Texas was no different. Anti-annexationists, however, argued that the issues presented by these cases were quite different from those presented by the controversy over Texas.

North Carolina and Rhode Island were the easiest precedents for the opponents of the joint resolution to distinguish. Admittedly, both states were technically independent at the time that they entered the Union. Neither had ratified the Constitution on June 21, 1788—the date on which, by its terms, the Constitution went into effect by virtue of ratification by New Hampshire, the ninth state to give its assent. Indeed, both states

31. *Id.* at 88.
32. *Id.* at 96.
33. *Id.*

initially rejected the Constitution—Rhode Island by popular referendum on March 24[34] and North Carolina by a vote in the state ratification convention on August 2.[35] Thus, both states were at least technically independent until state conventions ultimately ratified the new Constitution on May 29, 1790,[36] and November 21, 1789, respectively.[37]

Nonetheless, the situation of North Carolina and Rhode Island was dramatically different from that of Texas. Both North Carolina and Rhode Island had been signatories to the Articles of Confederation, and (although Rhode Island sent no delegates to the Constitutional Convention) both were among the states originally invited to join the new government created by the Constitution.[38] Thus, the federal government had no occasion to choose between the treaty power and the power to admit new states. Instead, *no* Congressional action was necessary for these states to enter the Union.

The admission of Vermont raised more complex issues.[39] Vermont was in fact an independent republic at the time that it was admitted to the Union by an act of Congress on March 4, 1791. Although Vermonters fought against the British during the Revolutionary War, the government of Vermont had not been a party to the Articles of Confederation, had not been represented at the Constitutional Convention, and had not been invited by Congress to ratify the Constitution in 1787. Indeed, at one time Vermont explored the possibility of negotiating a separate peace with the British and even reentering the British Empire.

At the same time, Vermont had always been considered to be within the territorial limits of the United States and was recognized as such by the Treaty of Paris, which brought a formal end to the Revolutionary War in 1783. The government of the republic was created in 1775 by a group of settlers who, beginning in 1760, had occupied land that had initially been granted to the colony of New York. For almost the entire period between the formation of the Republic of Vermont and the admission of

34. 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 1066 (Bernard Bailyn ed., 1993).

35. *Id.* at 1068–69.

36. *Id.* at 1074.

37. *Id.* at 1072.

38. *Id.* at 935–36, 939.

39. The circumstances surrounding the admission of Vermont are described in detail in the essays in A MORE PERFECT UNION: VERMONT BECOMES A STATE, 1777-1816 (Michael Sherman ed., 1991).

Vermont to the Union, New York claimed that the breakaway republic in fact remained part of New York. This claim, together with territorial disputes between Vermont and both New Hampshire and Massachusetts, was primarily responsible for the failure of Vermont to become a state under the Articles of Confederation. The admission of Vermont as a state under the Constitution came almost immediately after Vermont had paid New York thirty thousand dollars to abandon its claim in 1791.

Moreover, the situation of Vermont had been a focal point of the Convention during the drafting of Article IV, Section 3. As originally proposed by Gouverneur Morris of Pennsylvania, this section would have provided that "no new State shall be erected within the limits of any of the present States, without the consent of the Legislature of such State."[40] Luther Martin objected that this language would have allowed Vermont "[to] be reduced by force in favor of the States claiming it[.]"[41] While Martin's proposal to deal with the problem was rejected by the Convention, other delegates had similar concerns. "[T]o save Vermont . . . from a dependence on the consent of N[ew] York," William Samuel Johnson of Connecticut moved to amend the Morris proposal so that it would read "no new State shall be *hereafter formed or* erected within the limits of any of the present States without the consent of the Legislature of such State."[42] He reasoned that Vermont was *already* a state, and thus his amendment would obviate the need to obtain the consent of New York as a precondition for admission to the Union. While the Johnson amendment was initially approved by the Convention, it did not survive in the Committee on Style.

Ultimately, Morris himself devised the solution to the problem of Vermont. He proposed to amend his original language so that consent would be required only if the new state was within the *jurisdiction* of another state rather than simply within its *limits*. Morris asserted that, while New York might plausibly claim that all or part of Vermont was within its territorial limits, the government of New York could not claim jurisdiction over Vermont because Vermont had become a sovereign state. This amendment was accepted by a majority of the states[43] and ultimately incorporated into the final draft of the Constitution.

---

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 455 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

41. *Id.*

42. *See id.* at 463 (emphasis added to indicate Johnson's addition).

43. *Id.*

Against this background, the analogy between the admission of Vermont and the admission of Texas is imperfect at best. To be sure, the discussions at the Convention reflected the drafters' belief that Vermont was a sovereign state that was separate and independent from the Union that had been created by the Articles of Confederation and would be reconfigured by the new Constitution. However, at the same time, they saw Vermont as part of the same basic territorial unit that comprised the United States. Indeed, William Johnson contended that Vermont should, if necessary, be *compelled* to enter the Union.[44] Unless one accepts the view that Texas was part of the Louisiana Purchase and had never been validly ceded to Spain, the situation of Texas was obviously quite different.

Ultimately, both sides of the controversy appealed directly to the language and evolution of Article IV, section 3, Clause 1 of the Constitution, which states that:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected with the Jurisdiction of any other State; nor any State be formed by the Junction of two or more states, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.[45]

This formulation differs significantly from the analogous provision in the Articles of Confederation, which provided that:

> Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.[46]

As Madison noted in *The Federalist Papers*, the language in the Articles seemed to encompass only the admission of former colonies of Great Britain.[47] Nonetheless, even prior to the adoption of the Constitution, Congress had adopted the Northwest Ordinance, which looked to the creation of new states in the area west of the Alleghenies that had previously been claimed by a number of different colonies. In order to deal with this problem, the Virginia Plan proposed that "provision ought to be

---

44. *Id.* at 456.
45. U.S. CONST. art. IV, § 3, cl. 1.
46. ARTS. OF CONFEDERATION art. XI.
47. THE FEDERALIST NO. 43, at 274–75 (James Madison) (Clinton Rossiter ed., 1961).

made for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of Government and Territory, or otherwise."[48] On June 19, the Convention agreed to this concept in principle,[49] and on August 6, the Committee on Detail reported the following clause:

> New States lawfully constituted or established *within the limits of the United States* may be admitted, by the Legislature, into this Government; but to such admission the consent of two thirds of the members present in each house shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall be also necessary to its admission.[50]

On August 29, the Convention adopted a substitute proposed by Gouverneur Morris of Pennsylvania: "New States may be admitted by the Legislature into the Union: but no new State shall be erected within the limits of any of the present States, without the consent of the Legislature of such State, as well as of the Gen[eral] Legislature."[51] With only minor alterations, the Morris language was ultimately incorporated into the Constitution as Article IV, Section 3.[52]

Supporters of annexation relied on both the text and the legislative history of Article IV to support their position. For example, Representative Thomas H. Bayly of Virginia asserted the following:

> The power [to admit new states] is general, without any other limitation than that "no new State shall be formed or created within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of Congress." The imposition of this limitation, upon the most familiar rules of construction, excludes the idea of the intention to impose any other.[53]

Annexationists bolstered this argument by noting that the original proposal from the Committee on Detail had expressly limited the power of Congress to the admission of states *established within the limits of the United States*, while the Morris lan-

---

48. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 40, at 22.
49. *Id.* at 322.
50. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 40, at 188.
51. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 40, at 455 (emphasis added).
52. *Id.* at 464; *see also supra* note 45 and accompanying text.
53. CONG. GLOBE, 28thCong., 2d Sess. 102 (1845).

guage contained no such limitation. The final language of the Constitution is much the same, stating that "New States may be admitted by the Congress into this Union" without requiring that the states be formed from territory that is already owned by the United States government or one of the state governments. They reasoned that, because the Convention had considered and rejected language that would have limited the Article IV power to areas within the territorial limits of the United States, the drafters must have believed that the power to admit new states was broad enough to encompass situations such as the admission of Texas.[54]

While this change in language does provide some support for the pro-annexation position, other aspects of the debates over Article IV suggest the opposite conclusion. The problem for the pro-annexation argument is that the Convention also considered and rejected language that would have *explicitly* armed Congress with the authority to admit states that were not within the preexisting territorial limits of the United States. On August 30, Luther Martin of Maryland moved to replace the Morris language with a clause which provided in part that "[t]he Legislature of the [United States] shall have power to erect New States within *as well as without* the territory claimed by the several States or either of them, and admit the same into the Union."[55] Only the delegations of Maryland, New Jersey, and Delaware supported this proposal,[56] and Article IV as ultimately adopted tracked the Morris formulation.

Ultimately, it would be a mistake to read too much into either the adoption of the Morris formulation or the rejection of the Martin language. The goal of the Martin proposal was not to clarify the territorial reach of the power to admit new states. Rather, it was designed to give Congress the power to divide states without the consent of the relevant state legislatures.[57] Indeed, Martin's general focus was apparently shared by most of the delegates to the Convention. With the somewhat ambiguous exception of the Vermont situation, the drafters were not thinking of the problem of territorial expansion. Instead, the delegates to the Constitutional Convention were preoccupied with the problem of creating a framework of government that would

54. *Id.* at 101.

55. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 40, at 464 (emphasis added).

56. *Id.*

57. *Id.* at 463–64.

adequately deal with the problems that were then facing the recently-freed colonies (including their Western possessions).

Nonetheless, the historical record includes some fragmentary evidence that bears directly on the annexation issue. Some annexationists also appealed to the authority of James Madison, widely-regarded as the father of the Constitution. For example, Representative Joseph A. Woodward of South Carolina noted that, in *The Federalist Papers*, Madison had declared that "the immediate object of the constitution was to secure the the [sic] Union of the thirteen primitive States, and such States as might arise within their bosom or *within their neighborhoods*."[58] Woodward and others reasoned that Madison's assertion reflected a contemporary understanding that the Union might eventually include states formed from territory outside the boundaries of the original thirteen colonies, and that the power to admit new states must have been drafted with that possibility in mind.[59]

By contrast, private correspondence between Morris and Henry W. Livingston in 1803 points to the opposite conclusion. Expressing the view that Louisiana and other foreign territory should only be acquired as "provinces [with] no voice in our councils," Morris asserted that "[i]n wording the third section of the fourth article, I went as far as circumstances would permit to establish [this principle]. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."[60]

For a person who is seeking in good faith to follow the original understanding of the Constitution, the Morris letter presents something of a dilemma. On one hand, the letter is a clear expression of the understanding of the man who actually drafted the relevant provision—an expression which, since made in private, is entirely credible. On the other, the drafter seems to suggest that he made a deliberate effort to obscure the meaning of the provision from the other delegates because he realized that, if they understood the language as he did, they would oppose the provision. Further, Madison's statement in *The Federalist* suggests that the other delegates did not share Morris's understanding of Article IV.

---

58. CONG. GLOBE, 28th Cong., 2d Sess. 191 (1845) (emphasis in original).

59. *Id.*

60. The letter is reproduced in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 40, at 404.

In any event, against this background of conflicting evidence, the results of the presidential election changed the political dynamic sufficiently to pave the way for the approval of the joint resolution. With the party having succeeded in electing a President on a platform that promised annexation, dissident Northern Democrats came under pressure to change their position. This factor alone was sufficient to guarantee a victory in the House of Representatives, which was under Democratic control. There, the resolution passed notwithstanding the fact that twenty-seven anti-slavery Democrats joined the united Whigs in opposition.[61]

Supporters of annexation faced a more difficult task in the Senate. The Whigs held a slender majority in the lame duck session of the Twenty-Eighth Congress that met in early 1845. Thus, even assuming that Democratic senators could unite around a joint resolution, some Whig support would be necessary for passage. While Northern Whigs continued their resolute opposition to annexation, the election had left their Southern counterparts with an uncomfortable political dilemma. Polk's strength in the Deep South had demonstrated the appeal of annexation to the general populace in the slave states. Moreover, the results of the election had guaranteed that Democrats would have a solid majority in the Senate in the incoming Twenty-Ninth Congress, virtually assuring the eventual success of the annexation movement. Nonetheless, most Whigs continued to stand firmly against the joint resolution. However, three Southern Whigs senators deserted their party, providing the pro-annexation forces with a razor-thin victory by a margin of twenty-seven to twenty-five.[62] The government of Texas accepted the terms presented to it, and Texas officially joined the Union as a state on December 29, 1845.

V. CONCLUSION

In retrospect, the practical impact of constitutional arguments on the debate over the annexation of Texas appears to have been negligible. The depth and sophistication of the constitutional analysis was often extremely impressive. Nonetheless, the evidence does not suggest that the arguments actually

61. CONG. GLOBE, 28th Cong., 2d Sess. 372 (1845).

62. *Id.* at 362. For a general discussion of the political dilemma faced by Southern Whigs, see MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR 218–21 (2003).

changed any votes. The members of the House of Representatives and the Senate do not seem to have developed their positions on the constitutional issues based on "neutral," distinctively legal principles; instead, they chose the constitutional positions that would support their predetermined political views.

The debate over the annexation of Texas is by no means unique in this regard. For example, John C. Calhoun could hardly have believed that Northern senators and representatives who were committed to the position that slavery should be excluded from the Mexican cession would be converted to the Southern view by his argument that such exclusion would be unconstitutional.[63] Conversely, there is no indication that congressional support for the Fugitive Slave Act of 1850 was in any way weakened by those who argued that the provisions of the statute violated the constitutional rights of putative escapees.[64] Nonetheless, appeals to the Constitution played an important role in creating the political climate surrounding the debate over these issues.

Throughout our history, most Americans have viewed the Constitution as far more than a simple collection of legal rules. Instead, the document is also seen as the repository of the most fundamental values underlying the structure of the American government and society more generally. Thus, when opponents label a policy "unconstitutional," they are in effect expressing the view that the policy is not only wrongheaded, but is inimical to those values. This claim has the effect of both exhorting opponents to use their strongest efforts to defeat the policy, and of signaling the supporters of the policy that the opposition views implementation of the policy as an ongoing threat to the stability of the system as a whole, and that the opposition is therefore unlikely to be defused by the ordinary process of political accommodation and compromise. Plainly, those who invoked the Constitution in opposition to the annexation of Texas saw the issue in just such terms. Whigs in general emphasized the destabilizing effect of annexation generally, and Northern opponents asserted that the addition of such a vast territory in which slavery was tolerated would upset the delicate political balance between North and South upon which amicable relations between the sections depended—particularly since the joint resolution

63. For Calhoun's argument, see CONG. GLOBE, 29th Cong., 2d Sess. 455 (1846).

64. For an excellent example of the argument against the constitutionality of the Fugitive Slave Act of 1850, see HORACE MANN, SLAVERY: LETTERS AND SPEECHES 299–304 (B. B. Musey & Co. 1853).

provided that Texas could be divided into as many as five states. Subsequent events demonstrated that these concerns were far from insubstantial; while annexation did not result in the immediate disruption of the Union, it set in motion a series of events that ultimately led to the Civil War.[65] Thus, while the constitutional arguments against annexation may not have been compelling in purely legal terms, the fears that underlay those arguments were ultimately vindicated.

65. The best account of these events is DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861 (1976).