

# Morton's History of Nebraska

Authentic—1400 to 1906—Complete

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## CHAPTER IV CONTINUED (11)

In the new-born spirit of devotion to an impracticable literal construction of a word-bound constitution, Jefferson was bitterly assailed for violating it; and he has not wholly escaped the assaults of our contemporary publicists: "Mr. Jefferson 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."

The singular error of this eminent expositor of constitutions in saying that, "the purchase, according to the federal view of the Constitution was perfectly legitimate," is sufficiently illustrated by the foregoing brief showing of the attitude of contemporary federal leaders. In brief, this process of immediate constitution-making at the righteous dictate of the public welfare and opinion—though sometimes most unrighteous, and against the one and in spite of the other—which Jefferson, the strict constructionist, began, and which all shades of constructionists have continued to the present day, serves chiefly to illustrate the misconception and the vanity of the painful hair-splitting of "the fathers" as to the constitutionality of the great Purchase. While of necessity we make our constitution as we go, as the work is done in England, according to the order of public opinion, we are hampered, morally and otherwise, by being cut off from that easy and natural test of appeal to the public which, under the responsible cabinet system, our British brethren enjoy. Under a like system of government by discussion we are forced as well as we may to make British bricks without the British straw. All the constitutional questions and speculations raised in the transaction of this momentous business were left to be controverted from time to time during the various phases of the coming struggle over African slavery, and to be revamped and become familiar to our own ears a century later under the Philippine question, and the present question of the constitutional treaty-making power to enact "reciprocity" without the consent of the House of Representatives—all old yet ever new. But it was decided beyond controversy and without dissent that the government might constitutionally acquire territory, though its constitutional status after acquisition is even yet unsettled.

The acquisition was popular on the whole from various motives, chiefly of self-interest. The omnipresent slavery question, though only in a negative and defensive form, affected, if it did not determine, the attitude of the South. Slave-holders would gladly be rid of this French next neighbor whose inculcation of a bias for freedom in the West Indies had broken out in the fearful negro revolution of Santo Domingo. The extreme West, as we have seen, would dispossess the French to insure free travel and trade along the natural and only commercial highway. New England, as usual, at least in those provincial days, was both bigoted and selfish. Her strong religious scruple against having "infidel France" perpetually at our doors was overbalanced in some degree by jealousy of the expansion of the West, as she feared at her own loss in power and population. In this spirit a Massachusetts politician said: "I consider Louisiana the grave of the Union." Elbridge Gerry inadvisedly on the danger to the country—that is to the East—to be apprehended from the creation of new states in the West. Even so great a political figure as Gouverneur Morris could contract his vision to this:

"Among other objections they (new western states) would not be able to furnish men equally enlightened to share in the administration of our common interests. The busy haunts of men, not the remote wilderness, is the proper school of political talents. If the western people get the power in their hands they will ruin the Atlantic interests."

And we wonder if these far-seeing New England statesmen are not at this moment turning in their graves at the spectacle of the commanding personages in the federal Congress and two members of the federal cabinet, all from a single state of this "remote wilderness" of the Louisiana Purchase.

New England's opposition to the Louisiana Purchase and other manifestations of her earlier temper show how lightly the value of the federal union was held, and were precursors and stimulants of the Civil war. The speech of Josiah Quincy, Jr., of Massachusetts, in the House of Representatives, in 1811, opposing the admission of Louisiana as a state on these familiar New England grounds, might well have furnished the very text for the nullification convention of 1832 or of the secession resolutions of 1860-1861.

As Louisiana, in the inevitable order of Providence, was annexed, so it has developed into a family of imperial food-producing states.

"A vast, unexplored, almost limitless empire was ours; perpetual immunity from dangerous neighbors; sole possession of this river of rivers, with all its tributaries; a sure dominating influence in the affairs of the North American continent; national opportunities for the future almost de-

pressing in their sublimity."

What wonder that even Jefferson almost feared that it might not stop—not east of the Pacific or north of the isthmus; and that, not foreseeing the cleavage of the slavery question between the North and South, he feared division along the Mississippi.

The limits of Louisiana were defined in this momentous transfer with less care than we now give to the conveyance of an ordinary town lot or a forty acre tract within the Purchase. Both Napoleon and Talleyrand had either some malign subjective design or some undisclosed objective purpose in keeping the boundaries ill-defined; and the southeast and southwest bounds were not settled until the treaty with Spain and Great Britain in 1819, when the claim of the United States to Oregon, which included the present state of that name and Washington and part of Idaho, was also recognized. When at the time of the negotiations the American representatives urged the need of a more definite boundary, Napoleon treated the suggestion lightly if not scornfully, remarking that the very indefiniteness was so much the better for us, implying, Napoleon-like, that, being the stronger party, it would leave us a good opportunity to get the better of Spain in the final settlement. Decrees, the French minister of marine, had undertaken to fix the boundary for the retrocession from Spain. He said that it was well determined on the south by the Gulf of Mexico; "but, bounded on the west by the river called Rio Bravo (Rio Grande) from its mouth to about the 30th parallel, the line of demarcation stops after reaching this point, and there seems never to have been any agreement in regard to this part of the frontier. The farther we go northward the more undecided is the boundary period. This part of America contains little more than uninhabited forests or Indian tribes, and the necessity of fixing the boundary has never yet been felt there. There also exists none between Louisiana and Canada." The eastern boundary was more definite, and Decrees fixed it by the terms of the treaty of 1763: "It is agreed that in future the boundaries between the States of His Most Christian Majesty and those of His Britannic Majesty shall be irrevocably fixed by a line drawn down the Mississippi river from its source to the river Iberville, and from there by a line down the middle of that river and of the lakes Maurepas and Pontchartrain to the sea. New Orleans and the island shall belong to France." The western boundary was described in the treaty of 1819 with Spain as follows: "The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the 32d degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo, of Natchitoches, or Red river; then following the course of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then crossing the said Red River and running thence by a line due north to the river Arkansas; thence following the course of the southern bank of the Arkansas to its source in latitude 42 north; and thence by that parallel of latitude to the South Sea" (Pacific ocean).

In the year 1899 a conference of experts was appointed at the request of the census office to make a special study of disputed questions in relation to the boundaries of the western territory acquired by the United States. This conference made its report April 5, 1900, and its conclusions in regard to the boundaries of the Louisiana Purchase follow:

"1. The region between the Mississippi river and lakes Maurepas and Pontchartrain to the west, and the Perdido river to the east, should not be assigned either to the Louisiana Purchase or to the Florida Purchase, but marked with a legend indicating that title to it between 1803 and 1819 was in dispute.

"2. The line between the Mississippi river and the Lake of the Woods, separating the territory of the United States prior to 1803 from the Louisiana Purchase, should be drawn from the most northwestern point of the Lake of the Woods to the nearest point on the Mississippi river in Lake Bemidji.

"3. The western boundary of the Louisiana Purchase between 49° and 42° north followed the watershed of the Rocky mountains; thence it ran east along the parallel of 42° north to a point due north of the source of the Arkansas river, and thence south to that source."

The conference found further, "That the territory of Louisiana, as described by France and granted to Crozat by Louis XIV., extended on the east to the river Mobile, which, with the port, was ceded specifically by France to England by the treaty of Paris in 1763, Spain at the same time ceding the Floridas to Great Britain, with St. Augustine and the bay of Pensacola—thus, inferentially at least, determining the respective boundaries of Louisiana and West Florida; that the first occupation of the interior of the territory between the rivers Mississippi and Perdido by the Spaniards, was during the War of the American Revolution, when it belonged to Great Britain; that Great Britain retroceded

the Floridas to Spain in 1783, at which time the Louisiana territory belonged to Spain by the French cession in the preliminaries of peace of 1762 (confirmed 1763), whereby 'all the country known under the name of Louisiana' was transferred; that Spain in 1800 retroceded Louisiana to France as it was received from France in 1763; that France in 1803 ceded the territory of Louisiana to the United States, as discovered and held by France, ceded to Spain, and retroceded to France; and, finally, that in 1819 Spain ceded to the United States all the territory held or claimed by His Catholic Majesty under the names of East and West Florida. In addition to the grounds of dispute between France and Spain, and the United States and Spain, here shown, there was a conflicting claim concerning the extent of West Florida, born of the contention between French and Spanish discoverers and settlers in the sixteenth and seventeenth centuries; and there was also the claim of the French, by right of La Salle's descent of the Mississippi in 1682, to 'all the country drained by that river.'

"With reference to the Louisiana boundary, there remained but one point of difference between the maps under consideration. Article II of the definitive treaty of peace in 1783, between the United States and Great Britain, after defining the northern boundary to the Lake of the Woods, continues as follows: 'Thence through the said lake to the most northwestern point thereof, and from thence on a due west course to the river Mississippi.' Such a line as that described being obviously impossible, the Mississippi river being south not west of the Lake of the Woods, the line drawn by the conference was a line from the most northwestern point of that lake to the nearest point on the Mississippi. This line the conference regarded as justified by rules of international law and practice respecting vaguely described boundaries in such topographical circumstances."

The temporary act of October 31, 1803, for taking formal political possession of the new territory continued the form of the Spanish government, merely substituting Jefferson for the king, and subordinate officers of his appointment for the king's officers. The act of March 26, 1804, divided the territory on the 33d parallel—the present line between Louisiana and Arkansas—and provided for a government for the lower division, or "territory of Orleans," by a governor and secretary, judicial officers and a so-called legislative council of thirteen, all appointed by the president. There was much clamor against the arbitrary character of this government in which the people had no voice at all, but this form was modeled upon that of the ordinance of 1787, under which the whole northwest territory and then the individual territories, such as Indiana and Michigan, as they were successively carved out of it, were governed. It was known as government by "the governor and judges," and under it all executive and legislative power was vested in a governor and three judges appointed by the president. These officers might adopt such laws of other states as were applicable to the territory. "The whole government thus originated in Washington and centered there, and was never derived from the people governed nor responsible to them."

While this government, in form at least, was obviously arbitrary and un-republican, yet its temporary necessity, until there should be people enough to form a popular government or render it practicable, was alike obvious; and the republican principle was saved by providing for a legislative assembly as soon as there should be five thousand free male persons of full age in the territory to elect its members. This assembly would submit names of ten persons to the governor from whom he should select five for a legislative council or upper house, though the governor had absolute veto power over legislation—"the source of unseen harm still inhering in the institutions of Ohio."

The upper division, called the "district of Louisiana," was attached to the territory of Indiana for governmental purposes. Thus, with the exception that the legislative authority in the territory of Orleans was broadened into the council of thirteen appointed exclusively by the president, the whole territory started under the same government as that under which the territory of Ohio had started. If the people of Ohio were fewer in number and so scattered that their participation in governing was impracticable, while those of Orleans were more compactly settled, yet the former were largely Americans, "to the manner born," while as to the latter it was frankly insisted that "the principles of civil liberty can not suddenly be engrafted on a people accustomed to a regimen of a directly opposite line," and who by prejudices of race were largely hostile to the new government. In both instances wise expediency amounting to temporary necessity prevailed. True, the principles of the government of the northwest territory which, as we have seen, were applied to Louisiana, were adopted under the cooperative leadership of Washington and Adams, and Jefferson and Madison, before they and their followers had divided on federalist and republican party lines. And the defense of the principle by some of the republicans on the ground that

Congress had absolute power over the territories—that "the limitations of power found in the Constitution are applicable to states and not to territories"—was inconsistent with the spirit, at least, of the strict constructionist principles which in its youthful ardor the new republican party was just then promulgating with such enthusiasm. This incongruity was illustrated when Marshall, the great federalist chief justice, validated this principle of the extra-constitutional power of Congress as applied to Florida. It was left to Chief Justice Taney, thirty years after, somewhat under the spur of the later developed slave interests, to bring the belated Marshallized constitution back again into consistency with Jeffersonian principles.

But though some of Jefferson's followers, like Breckinridge and Rodney, lost their heads and professed a false faith, and though Jefferson himself, in the temporary government as in the purchase, found it necessary to technically burst some impracticable bonds of a written constitution, yet both Jefferson and his party were in the long run absolutely true to their republican faith in their policy of giving republican government to all territories and of admitting them as states in the Union under republican constitutions of their own making at the earliest practicable moment. In his general republican aim touching the new territory Jefferson was, as the sequel shows, "steady as the magnet itself."

On the 30th of November the Spanish authorities formally and, we may well believe, most reluctantly, turned over Louisiana to Laussat, the French prefect at New Orleans, and on December 20 following possession was in turn given to Gen. James Wilkinson and Governor Claiborne of Mississippi, who were authorized to receive it on the part of the United States. When the French flag, which was floating in the square, was hauled down and the American flag hoisted to its place, it is related that the few Americans present at the momentous ceremony cheered, but that not a few of the Frenchmen shed tears. On the 9th of March, 1804, a detachment of American troops crossed the river from Cahokia to the village of St. Louis, and Don Carlos Dehaute Delassus delivered upper Louisiana to Capt. Amos Stoddard, of the United States army, who was authorized to receive it on behalf of France. The next day he turned it over to himself representing the United States, thus ending thirty-eight years of Spanish rule. On the 26th of the same month President Jefferson approved the act of Congress dividing the territory and placing the upper division, the "district of Louisiana," under the government of Indiana territory. That government was embodied in Gov. William Henry Harrison, afterward president of the United States, and three judges—William Clark, Henry Vanderburgh, and John Griffin. The secretary was John Gibson. These men had organized the first government of Indiana, July 4, 1800. In a very broad sense, therefore, both territorially and politically speaking, William Henry Harrison—"Old Tippecanoe"—was the first governor of Nebraska, and the first capital was Vincennes. Governor Harrison relieved Captain Stoddard, who had been "king for a day" with the powers and prerogatives of a Spanish lieutenant-governor.

By act of Congress the laws of the district of Louisiana were to remain in force until they were altered, modified, or replaced by the governor and judges of Indiana territory. On the 1st of October the governor and judges promulgated six laws for Louisiana territory; but these did not affect Indiana, and no law of Indiana extended over Louisiana. The most important of these six laws applied to slavery, and many of its provisions remained in force as long as slavery existed in Missouri. The French settlers had carried slavery with them to St. Louis, and slaves were actually held at this time in Indiana under the quasi-protection of the law; and Harrison, the first governor over "the Nebraska country," was himself a slaveholder. The people of the new territory stoutly rebelled against the arbitrary absentee government, and they again gave cry to the "no taxation without representation" shibboleth whose revolutionary echoes had scarcely died away.

We have already seen that the slavery question faintly shadowed the Louisiana Purchase from the first. Now one of the chief objections to the absentee government was based on the fear that the extension of the abolition ordinance of 1787 over Louisiana might be a preliminary to the abolition of slavery there. It was insisted that re-union of the whole territory under a single government would be more convenient than the Indiana annexation, and that the separation from the territory of Orleans might afford the pretext to "prolong our state of political tutelage." At the same time that these people of upper Louisiana were insisting on being detached from Indiana the people of western Indiana were petitioning Congress to have that territory attached to Louisiana, as they believed their slave property would be safer under such an arrangement.

These grievances were formulated in a petition prepared and adopted by a convention held at St. Louis, September 4, 1804, and which was received by the Senate December 31,

Congress gave prompt ear to the remonstrance, and March 3, 1805, a law was passed to take effect July 4, erecting the territory of Louisiana under a separate government, but the same in form as that of Indiana, legislative power being vested in a governor and three judges appointed by the president, "who shall have power to establish inferior courts in the said territory and prescribe their jurisdiction and duties and to make all laws which they may deem conducive to the good government of the inhabitants thereof." The act contained a provision in the nature of a bill of rights guaranteeing to the people of the territory right of jury trial in civil and criminal cases and immunity from religious disability, and prohibiting the passage of laws inconsistent with the Constitution.

The first governor of the new territory was Gen. James Wilkinson who had been a leader in the agitation for forcibly clearing the Mississippi of Spanish obstruction. He went to Kentucky as a merchant in 1784, and appeared in New Orleans as a trader in 1787. In 1807 Aaron Burr was tried for treasonable conspiracy to break up the federal union, and a few years later Wilkinson was also tried as an accessory. Though both escaped conviction, yet the bad character of both was established. J. B. C. Lucas, a French Pennsylvanian, was appointed chief justice, and Dr. Joseph Browne, of New York, a brother-in-law of Burr's, was appointed secretary.

Captain Lewis, who had returned from the Lewis and Clark expedition in September, 1806, was appointed governor in place of Wilkinson in the spring of 1807. He encountered great disorder on account of disputes over land titles and the hostility of creoles to American rule. Spain had continued in possession of Louisiana after the treaty of retrocession to France in 1800 till the time of American occupancy, and the act of March 28, 1804, provided that all grants of land made by Spain during this time were void. In 1808, Pierre Chouteau, under the instructions of Governor Lewis, concluded a treaty with the Osage Indians for the cession of forty-eight million acres of land extending from Ft. Clark, thirty-five miles below the mouth of Kansas river, due south to the Arkansas and along that river to the Mississippi. The Sacs and Foxes sold three million acres in 1804. In 1803 this tribe and the Iowas, their allies, claimed all the state of Missouri, as well as the northwest quarter of Illinois and part of southern Wisconsin. The treaty of Portage des Sioux, a village on the west side of the Mississippi, a few miles above the mouth of the Missouri, put an end to the Indian wars in the territory, but on the part of the Indians there was the familiar bitter complaint of dark ways and vain tricks pursued by the white negotiators.

Howard succeeded Lewis as governor in 1810. By the census of 1810 the population of the territory was twenty thousand, and settlements had been pushed along a strip from fifteen to twenty miles wide from the Arkansas river to a point not far above the mouth of the Missouri, and had already necessitated the treaties with the Indians. By the act of June 4, 1812, which was to take effect December 12, the territory of Louisiana became the territory of Missouri, and its government was advanced to the second grade, after the fashion of the second grade territories of the northwest territory. The act provided for a governor appointed by the president, a house of representatives elected by the people, and a legislative council of nine members appointed by the president from a list of eighteen persons furnished by the house of representatives—a somewhat more than half-way republican form of government. Governor Howard divided its settled portion into five counties by proclamation, and then for some months the secretary of the territory, Frederick Bates, acted as governor until William Clark, of the Lewis and Clark expedition, was appointed in 1813. He held the office until Missouri became a state in 1821, and after this he was superintendent of Indian affairs until his death. He seems to have been even more skillful and a better selection than his famous companion for the main function of these officers, which was to get hold of the lands of the Indians; and through his negotiations, by 1825, the Sacs and Foxes, the Osages and the Kickapoos had relinquished all their domains within the state of Missouri.

All the part of the original territory between latitude 33° and 36° 30', that is, between the south line of Missouri and the north line of Louisiana, and extending west to the Mexican line, about five hundred and fifty miles, was included in Arkansas territory by the act of March 2, 1819.