

## On the nature of commonwealth

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Is Puerto Rico a colony? Does the U.S. Congress have plenary powers over Puerto Rico? Is the Commonwealth a territory or a state? Not a state of the union, of course, but a state in the sovereign sense.

The answers to these questions require delving deep into the constitutional history of the U.S. Puerto Rico deserves that this analysis be made in a serious way. This and following columns intend to undertake such an analysis.

The Articles of Confederation, which preceded the U.S. Constitution, knew not the term territory as a political status. The word is used in that document only when referring to the tract of land or geographical containment of the particular states.

Regular use is made, however, of the term state. A reading of the articles is enough for an adequate notion regarding the nature of states. Article II gives notice of their sovereignty, freedom, and independence. Other references in the articles indirectly testify that states are political communities organized under a system of government.

This contrast between the appearance of one of the terms under analysis and the absence of the other is of some importance, since it raises the question of the power of Congress under the articles to acquire or legislate for the then-unoccupied Western land.

Though the existence of such power was never settled in theory, the Land Ordinance of 1785 and the Northwest Ordinance of 1787 show the power was exercised in fact. Before the passing of these ordinances, the Congress of the Confederation had been the converging point of different interests arising from the existence of unoccupied Western land. Maryland refused to ratify the articles until all Western claims had been surrendered to the central government. Virginia wouldn't cede her claimed lands unless Congress declared void all land-company purchases in that region. Land speculators of Pennsylvania and Maryland, claiming land both north and south of the Ohio River, evolved constitutional theories to beseech Congress to exercise its sovereign powers and take the land from Virginia.

The speculators, who at times were members of Congress, rallied to whatever theory might best support their claims of land. Consistency was no limitation, and we find the same men urging Congress to take over the land by exercising its sovereignty while trying to force an unrestricted cession from Virginia.

Americans fought with one another over whether the central government or individual states should control the lands claimed by them on the basis of their ancient charters. The reason for the conflict was primarily simple, although its ramifications were endless and clouded by constitutional and legal theories that have led later generations to lose sight of the realities upon which eighteenth-century men kept a steady eye.

The Land Ordinance of 1785, which was an outgrowth of the Ordinance of April 23, 1784, provided for temporary government of the Northwest Territory. Thomas Jefferson was chairman of the committee entrusted by the Continental Congress with the drafting of the instrument. As a result, the document was endowed with the finest democratic principles. One of its sections states that Congress shall authorize the free males of full age of the different states into which the Northwest Territory was subdivided “to meet together for the purposes of establishing a temporary government; to adopt the constitution and laws of any one of the original states, so that such laws nevertheless shall be subject to alteration by their ordinary Legislature; and to erect, subject to a like alteration, counties or townships for the election of members of their Legislature.”

This self-government program was promptly replaced by a rigid system of congressional control provided in the Northwest Ordinance of 1787. The change was due partly to fear of the lawlessness of Westerners and partly to fears of Indian war, but mostly to the pressure of new speculative interests that swept down upon the Continental Congress. The Ohio Co., a speculative concern, asked for a virtual suspension of the Land Ordinance of 1785. To further land speculation, the guarantee of property rights and rigid political control were essential. The Northwest Ordinance of 1787 provided that.

The political communities organized under the Ordinance of 1785 or under that of 1787 weren't termed territories. Both ordinances refer to them as states. No doubt the political community termed a state was the counterpart of what is today termed a territory, and it is perfectly logical to say the name doesn't alter the nature of the thing. Yet, the terminology of the ordinances is significant for ascertaining the meaning of the terms within the framework of the present Constitution.

The framers of the U.S. Constitution didn't employ the term territory as designating a political status under the American constitutional system. The term as used in Article IV, Section 3 means a tract of land; it doesn't refer to a political status. Article IV, Section 3 wasn't in the original draft of the Constitution as returned by the Committee of Detail on Aug. 6, 1787.

On Aug. 18, the journal reports: “The following additional powers proposed to be vested in the Legislature of the United States, having been submitted to the consideration of the Convention. It was moved and seconded to refer them to the Committee to whom the proceedings of the Convention were referred. The propositions are as follows: To dispose of the unappropriated lands of the United States. To institute temporary governments for new states arising thereon.”

James Madison reported the return of this proposition to the convention as proposed by Gouverneur Morris: “The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution contained shall be so construed as to prejudice any claims either of the U.S. or any particular state.”

The Committee of Style altered only three words of the above presentation: “Congress” was substituted for “Legislature,” and “contained” and “either” were dropped. With these minor changes, the above passed to be the second paragraph of Article IV, Section 3 as we know it today.

Nowhere in the development of this clause do we see a political status in creation. Power was being given to Congress; the result of the exercise of this power—the actual creation of a government upon a tract of land belonging to the U.S.—wasn’t given a name. That was to come later, once Congress had exercised the power.

Some understanding of the framers’ conception of territorial power is derived from a letter from Gouverneur Morris to Henry Livingston in which he stated: “I always thought that when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed, a strong opposition would have been made.”

In addition to the use of the term province for what today would be termed a territory, this letter is significant because it suggests a limitation on the grant of power to Congress under Article IV, Section 3. A territory, the letter seems to suggest in a subtle way, may be governed temporarily by Congress, but once the territory becomes a body politic, admission to the union as a state is mandatory. Though Morris didn’t personally favor this, he apparently believed it to be the feeling of the convention.

Furthermore, it is significant that the original phrasing of the power granted to Congress was to institute temporary governments on these lands. The clause providing for admission of a new state to the union was put together with the so-called territory clause in Article IV, Section 3, by no mere coincidence. This joinder represents a policy. The power may well have been granted in Article I, Section 8. That it wasn’t indicates the reason it was placed in Article IV, Section 3 was an interest that such power be exercised to effect the preceding grant in the same section. Statehood is not only a logical but also a necessary next step to the so-called territorial status.

This affords a reasoned answer as to why there are virtually no limits to congressional power under the territorial clause. Congress was given a free hand because the unruly state of the West required absolute control, because land speculators urged Congress to rule with a heavy hand for the protection of their interests; but this grant was temporary. As soon as the settlers in the West matured into body politics, they were to be turned into states.