

VIRGINIA AND WESTERN TERRITORIAL GOVERNMENT, 1780-1787

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DEDICATION

To my family

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ABSTRACT

Revolutionary leaders of Virginia, the state with the most extensive western claims, considered it their responsibility to help direct congressional land policy. This study of Virginia and the West focuses on the influence of Thomas Jefferson, James Monroe, and George Washington on United States territorial policy, 1780-1787. Within this paper their opinions are used to represent the spectrum of political thought in Virginia toward the West. Their contributions are traced through an analysis of the Ordinances of 1784, 1785, and 1787, with particular emphasis on the last.

All three men agreed that new states should be created in the West. They differed on how to develop these new states so that they would be a positive addition, rather than a hindrance, to the Union. They also wished to strengthen the links between Virginia and the West.

The thesis concludes with an explication of the Ordinance of 1787 emphasizing how it addressed the perceived problems of the time. It also analyzes how the territorial ordinances reflect changing attitudes toward the strength and character of the central government.

VIRGINIA AND WESTERN TERRITORIAL GOVERNMENT, 1780-1788

CHAPTER I

TERRITORIAL GOVERNMENT IN THE CONFEDERATION PERIOD

The most common map in American history textbooks is that of the nation's westward growth. When we view today's United States, criss-crossed by Interstate highways and bound by an ever-present mass culture, the earlier expansion of the nation takes on an aura of inevitability. This perspective, however, obscures the contemporary debates and uncertainty that accompanied the republic's geographic growth.

At the close of the Revolution in 1783, the United States had no western territories. Instead, the future national domain was imperfectly divided into the overlapping claims of individual states. Within seven years, however, the United States had both a national domain and a plan for its governance. That plan, the Ordinance of 1787, was to form the basis of U. S. territorial policy through the following century. The ordinance was the product of many minds, but the leaders of one state, Virginia, were instrumental in determining the shape of western policy during the 1780s. Virginia, as the state with the most extensive western claims, strongly influenced the nation's western policy. The views of her leaders toward the West were, in turn, shaped by a

combination of political philosophy and personal ties with the West.

The following essay will first explore the views of three Virginians who represented the general range of political opinion in their state toward the nation's western policy during the 1780s, namely, Thomas Jefferson, James Monroe, and George Washington. The opinions of others will be considered to the extent that they affected the outlook of these men.¹ The final chapter will explicate the Ordinance of 1787, emphasizing how it addressed the perceived problems of the time and highlighting portions of the ordinance not discussed earlier.

American Revolutionaries were aware of the fragility of their victory over the British Empire. While some advocated continental expansion for the new republic, most thoughtful Americans were more patient.² They believed that the example of Roman history had proven the danger of mixing an empire and a republic. They expected to use peaceful persuasion and example, rather than military force, to accomplish the spread of republican ideals. Thus they supported the provision in the Articles of Confederation that allowed Canadians to join the union if they elected to do so, two unsuccessful invasions having proved that the issue could not be forced.

This conviction, that the United States lacked the

military strength to conquer Canada, also caused some leaders to doubt the ability of the United States to maintain control the trans-Allegheny West. Though these territories had been formally acquired by the Treaty of Paris of 1783, it was feared that what had been won through diplomacy and bluff would be lost by distance and bullets. British troops were still in possession of the Northwest posts. Spain quickly proved to be a fair-weather ally as it moved to negate American claims through its control of the Mississippi. Both European powers were, in American eyes, overly friendly with the Indians.

The Confederation's western policy was further clouded by the doubtful loyalty of Americans already settled west of the Alleghenies. Colonial and state legislatures had experienced difficulty in controlling their immediate hinterlands.³ It was feared that the trans-Allegheny region--what was then the far West--would prove even more problematic. This uncertainty led the Confederation government to debate almost all aspects of western policy.

The Revolutionary generation tended to view the West and its people along two broad dichotomies. First, the region could be seen as either a westward extension of the eastern states by liberal interpretation of colonial charters or as the foundation of a new national domain won through the common sacrifices of the states. Second, western settlers were believed to be either an independent society existing in a state of nature or a subordinate

society--the newly independent Americans were reluctant to use the word colony--in need of guidance and protection. Of the two views of the region itself, the first tended to predominate in states with western claims, the so-called "landed" states. Opposing them were the "landless" states with limited bounds and no western claims, which wanted to prevent the potentially vast "landed" states from gaining a disproportionate influence in national affairs. "Landless" states preferred to see the West as part of a common prize won during the Revolution. Views along the second dichotomy, the human and political landscape, were less easily predicted, depending as they did more on political temperament than on state loyalties.

The debate over the future of the West was formally resolved with the passage of the Ordinance of 1787, commonly known as the Northwest Ordinance. This ordinance set forth the guiding principles of United States territorial policy for the next century. At its most basic level the ordinance provided for a territorial government for the newly settled western regions. Though based on colonial principles, the territorial government was the first step to the granting of full statehood and inclusion of new states in the Union as equal members. At its most symbolic, the ordinance laid the foundation for what Thomas Jefferson later called an expanding "empire of Liberty."⁴

The importance of the ordinance is often overshadowed by the far greater importance of the Constitution. The

Constitutional Convention in Philadelphia easily outshone what was left of the Confederation Congress meeting in New York City. History has been far kinder to the attendees of the former than to those of the latter. But while historians have often trivialized the Confederation Congress in comparison to the Constitutional Convention, they have usually linked the Ordinance of 1787 with the Constitution in their interpretations. It was John Adams who originally connected the two in importance; these "two authorities," he said, provided the means by which the organization of the republic might be concluded "with unexpected dignity."⁵

However, where Adams found "unexpected dignity," historian Staughton Lynd discovered a duplicitous bargain. Lynd suggests that the famed anti-slavery article of the ordinance was one half of a purely sectional deal. In return for northern support of the three-fifths clause of the Constitution southern delegates at the Confederation Congress agreed to the banning of slavery in the Northwest Territories through Article Six of the ordinance.⁶ Paul Finkelman adds to Lynd's argument by noting the inconsistencies between Article Six and the rest of the ordinance. He implies that with neither funds nor power provided for its enforcement, Article VI was merely a cosmetic addition to an ordinance that otherwise fully protected the property of the slave holder.⁷

Other historians focus on real, rather than chattel,

property. Through comparison with Jefferson's Ordinance of 1784, Merrill Jensen portrayed the later ordinance as a victory for land speculators--with the prize being the millions of acres sold to the Ohio Company for as little as ten cents an acre. According to Jensen, it was the earlier ordinance that "provided for democratic self-government of western territories, and for that reason it was abolished by the land speculators and their supporters."⁸

Arthur Bestor described the Ordinance of 1787 as a repudiation of the liberal Jeffersonian principles of its predecessor. He considered similarities between the Ordinance of 1784 and its successor of 1787 to be mostly superficial.⁹ Not all historians agreed. For Robert F. Berkhofer, Jr. the "1787 document [was] more an extension and replacement than a repudiation of the Ordinance of 1784."¹⁰

These interpretations may be partially resolved by looking, not at the two ordinances, but at the governments that framed them. The relative freedom granted by the Ordinance of 1784 was necessary because the government to which the potential new state would belong--the Confederation--was considered by its framers to be appropriately weak. In December 1783, just before he submitted the report describing the Ordinance of 1784, Jefferson wrote that "the constant session of Congress can not be necessary in time of peace."¹¹ Under these circumstances it is not surprising that the chairman of the

committee on western lands felt it necessary to give the new states of the West as much free rein as possible. Western states were to be perpetual members of the Confederation, not the union as we now know it.

The weakness of the Confederation was corrected by the Constitution when many of the powers formerly left to the states were given to the central government. Regardless of whether members of Congress knew of the specific debates taking place in Philadelphia, they were aware of the mood of the Constitutional Convention.¹² The strength of the proposed national government made possible an enlarged role for the central government in territorial administration.¹³ The Ordinance of 1787 took advantage of this while retaining the promise of republican equality once statehood was achieved.

Historians have debated everything from the authorship of the ordinance to its constitutionality.¹⁴ In doing so they have followed a well-trodden path. No aspect of western policy was agreed upon by the leaders of the early republic. Passage of legislation did not simplify the matter; almost every provision for the realization of western policy was likewise challenged. While sectional interests played an important role in setting the parameters of debate, the character of dissent was often defined by ideological criteria.

Nowhere is this more evident than in Virginia. Most

Virginians recognized the inevitability of western settlement. An expansive settlement pattern was one of the better-known traits of their state. But acknowledgment of the situation did not lead to consensus on an appropriate response. The most pressing question to Jefferson, Monroe, and Washington was not whether the West should be settled but rather how to govern the West and integrate it into the Union once such settlement had taken place.

NOTES TO CHAPTER I

¹Among these men were James Madison and Richard Henry Lee of Virginia and Nathan Dane of Massachusetts. Madison usually agreed with Monroe. His opinions certainly fell within the Jefferson, Monroe, Washington, spectrum. Unlike Monroe, Madison never served on the committee responsible for territorial governance. Lee and Dane did serve on later incarnations of that committee, but their contributions were not as noteworthy as those of Jefferson and Monroe. Washington did not serve on the committee, but his national reputation and travel and experience in the West added weight to his opinion.

²Reginald Horsman, The Diplomacy of the New Republic, 1776-1815 (Arlington Heights, Ill., 1985), 28-29, 41.

³For an analysis of frontier loyalism, see Robert M. Calhoon, "The Floridas, the Western Frontier, and Vermont: Thoughts on the Hinterland Loyalists," in Calhoon, The Loyalist Perception and Other Essays (Columbia, S.C., 1989).

⁴Drew R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America (Chapel Hill, N.C., 1980), 203-204.

⁵John Adams, "A Defense of the Constitutions of Government of the United States of America--(1787-1788)," in Adrienne Koch, ed., The American Enlightenment: The Shaping of the American Experiment and a Free Society (New York, 1965), 267.

⁶Staughton Lynd, "The Compromise of 1787," in Lynd, Class Conflict, Slavery, and the United States Constitution (Indianapolis, Ind., 1967), 185-213.

⁷Paul Finkelman, "Slavery and the Northwest Ordinance: A Study in Ambiguity," Journal of the Early Republic, VI (1986), 343-370.

⁸Merrill Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 (New York, 1950), 354.

⁹Arthur Bestor, "Constitutionalism and Settlement of the West: The Attainment of Consensus, 1754-1784," in John Porter Bloom, ed., The American Territorial System (Athens, Ohio, 1973), 28.

¹⁰Robert F. Berkhofer, Jr., "Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System," William and Mary Quarterly, 3d Ser., XXIX (1972),

231-262.

¹¹Jefferson to Marbois, Dec. 5, 1783, in Julian P. Boyd, ed., The Papers of Thomas Jefferson, 22 vols. to date (Princeton, N.J., 1950-), VI, 374.

¹²Edmund Cody Burnett, The Continental Congress (New York, 1941), 692-693.

¹³Only minimal changes were necessary to bring the ordinance into agreement with the new national government. Congress acted quickly to assure "that the ordinance . . . continue to have full effect," by passing it again during its first session. See Act of August 7, 1789, in Francis Newton Thorpe, ed., The Federal and State Constitutions, 7 vols. (Washington, 1909), 2:963-64.

¹⁴For an excellent discussion of the historiography and the historical reputation of the Ordinance of 1787, see Peter S. Onuf, Statehood and Union: A History of the Northwest Ordinance (Bloomington, Ind., 1987), 133-152. One of the first critics of the constitutionality of the Northwest Ordinance was James Madison. He charged in The Federalist, No. 38 that the Confederation Congress had assumed unfairly its power to legislate for the western regions. The Northwest Ordinance had been enacted "without the least colour of constitutional authority." See Edward Gaylord Bourne, ed., The Federalist: A Commentary on the Constitution of the United States (New York, 1947), 254.

CHAPTER II
VIRGINIA AND THE WEST, 1780-1787:
THE VIEWS OF JEFFERSON, MONROE, AND WASHINGTON

More than most travelers, Thomas Jefferson kept up with his correspondence. As newly appointed American minister to Paris, he relied on letters to keep posted on the latest developments in Congress as well as in Virginia. On June 23, 1786, he might very well have reflected on how little was new on the other side of the Atlantic. His latest communication from James Monroe contained little good news. Congressional business was at a standstill with few members in attendance. Money troubles continued, and yet another series of Indian treaties had been signed, though it was unclear if these would be any more successful than their predecessors. The debate over western lands had also been resurrected, a new form of government having evidently been proposed. But what was Monroe saying? "It [the new form of government] is in effect to be a colonial government similar to that which prevailed in these States previous to the revolution."¹

Monroe did not provide Jefferson with a great deal of detail about the proposed changes. The size of the new western states was to be increased, thereby decreasing their total number to only three or five. In addition,

Congress was to appoint all senior territorial officials. The most important difference between the American and British territorial systems, according to Monroe, was that American territories would eventually be "admitted into the confederacy." While no vote had yet been taken on the proposed changes, Monroe believed that the new plan was "generally approved" by his fellow congressmen.²

Jefferson's response was polite yet insistent. He feared that many congressmen supported Monroe's plan for the wrong reasons. To formulate a policy based on the needs and potential benefits of the "maritime states" was an exercise in bad faith. Instead, Jefferson argued that Congress should "state the question in it's just form, How may the territories of the Union be disposed of so as to produce the greatest degree of happiness to the inhabitants?"³

There was little agreement as to the role of the western territories. Gouverneur Morris argued that the undeveloped West should be kept in a state of dependence, similar to that which the thirteen states had recently escaped. Others opposed western settlement for fear that the eastern states would never be able to effectively control the strong-willed frontiersmen.⁴ Some, such as Jefferson, acknowledged that the backcountry might be uncontrollable but felt that the West not the East, should direct its own destiny, even to the point of political

independence.⁵ Though Jefferson and Monroe disagreed on some aspects of western policy, they and other Virginians always assumed that the West should be part of the Union or at least a closely allied sister republic. Their disagreement was over how best to secure the West to the Confederation. Tied to this were their diverse appraisals of the West and its people.

Congressional disagreement over the relationship between East and West, or between old states and new, was the principal reason for the differences between the Ordinance of 1784 and its successor of 1787. The debate was not, however, very well informed. Most members of Congress had not ventured beyond the Alleghenies. Their image of the West was based on faulty maps, travelers' accounts, and their own wishful thinking. For some members the real West existed only in the speculative certificates of land companies. For others it was a region defined by negatives--a lawless wasteland, lacking in books, towns, roads, and other amenities of civilization.

Although Jefferson had never visited the region, his interest in it was well known. By the time of his second election to the Continental Congress in 1783, he was a recognized authority on western issues.⁶ It was not surprising that he took part in drafting both Virginia's cession of her western lands and the Ordinance of 1784 for the governance of the same. The latter, in particular, is generally regarded as his handiwork. While the full extent

of his contribution is debatable, as chairman of the committee on western lands he doubtless concurred in the general features of the ordinance.

The cession and the ordinance share traits that are traceable to the influence of Virginia. A number of Virginians were on the congressional committee of western lands, where they protected the interests of their state. They did so by assuring that Congress closely adhered to the restrictions included in the Virginian cession: first, that the West should be divided into small states conducive to a republican form of government; second, that these states should be admitted into the union as equals; third, that the western lands should be used for the benefit of all Americans, rather than being monopolized by speculators.⁷ This last stipulation was particularly in Virginia's interest, as most land companies were based in other states, notably Maryland and Pennsylvania.⁸

Under the Ordinance of 1784 the West was to be divided into small states of approximately 15,000 square miles, their boundaries based on lines of latitude and longitude. Settlers would be responsible for their own government in the earliest stage, the only restriction being that it must be based on the constitution of one or another of the original thirteen states. When a state achieved a population of 20,000, it would receive permission from Congress to form a permanent government. The state would be eligible to join the Confederation when its population

equaled that of the "least numerous of the original thirteen."⁹

The ordinance concluded with an enumeration of the principles upon which "both the temporary and permanent governments [were to be] established." The new states were required to be perpetual members of the Confederation and their "respective governments" were to be "republican." They were also subject to the Articles of the Confederation in the same manner as the original thirteen, including responsibility for a full share of the federal debt. They were restricted in their powers to tax federal property, and the property of nonresidents was to be taxed at the same rate as residents. "The preceding articles . . . formed . . . a charter of compact" and were to "stand as fundamental constitutions . . . unalterable . . . but by the joint consent" of Congress and the respective states.¹⁰

As soon as the Ordinance of 1784 was passed, work began on a supplementary ordinance to facilitate the sale of western lands. As early as 1776 Jefferson had attempted to amend the proposed Articles of Confederation to allow Congress full control over Indian lands purchased in the territories--a process that would have initiated the creation of a national domain. Lands purchased by Congress were then to "be freely given to those who may be permitted to seat them."¹¹ This proposal was never seriously considered, and Jefferson was overruled by the pressing needs of the Confederation treasury. Money troubles

continued to plague the new nation into the 1780s. Western lands were seen as a painless panacea that could cure the ills of congressional finance, and most members of Congress favored land sales as the most expedient means of reducing the debt. Putting a price on the national domain also protected the investments of land speculators, including several members of Congress. An additional benefit would be the discouragement of marginal settlers. Those able to afford the purchase price should also be able to afford the price of improvements, and there would be less danger of settlers becoming impoverished.

Jefferson's initial draft of the land ordinance called for a decimal system of land division similar to his more successful plan for monetary reform. Congress kept the overall scheme of the rectilinear survey but rejected Jefferson's attempt to redefine the familiar, albeit unwieldy, acre, mile, and chain into decimal units.¹² In this more modest form Jefferson's proposal was adopted as the Land Ordinance of 1785, which initiated a program for the division and sale of western lands. Two goals of the ordinance were to provide a structure for the sale of public lands and to prevent boundary disputes and title conflicts through a standardized system of rectangular surveys.

The Ordinance of 1784 was never implemented. This was not due to any deficiencies of the ordinance but rather to the relative lack of settlement northwest of the Ohio. The

blame for that shortcoming must rest with Congress and its failure to adequately support the Land Ordinance of 1785. Though enacted later, the Land Ordinance was meant by its framers to be a prerequisite to the earlier ordinance. Without the regulated settlement made possible by the survey system of the Land Ordinance, the orderly society envisioned by the Ordinance of 1784 would not be possible. As Congress quibbled over the details of western policy and searched hopelessly for adequate funding to implement those policies agreed upon, men more familiar with the West warned that time was running out. In a letter to Richard Henry Lee, George Washington noted that it was impossible to "stop the road" of western migration, though it was in the power of Congress to "mark the way." But, Washington warned, if Congress hesitated too long, it would soon "not be able to do either."¹³

During the 1780s Kentucky was the principal area of settlement in the trans-Appalachian West. Jefferson was well aware of the rapid growth occurring in these westernmost counties of Virginia. A surge of migration increased the population from a few hundred to more than 75,000 in just over ten years.¹⁴ Viewing Kentucky as the norm, Jefferson saw the duty of Congress to be fairly straightforward--the formal establishment of new states followed quickly by their incorporation into the Union as equal members.¹⁵ The thousands of people already settling in the West would initiate their own local governments and

institutions. If Congress would set forth the conditions of statehood, westerners themselves would take care of meeting those conditions.

The simple legislation of the Ordinance of 1784 was not adequate, however, to solve the nation's problems in the Northwest territories. Whereas Kentucky was quickly maturing, the Northwest appeared destined to remain a chaotic frontier for much longer. Squatters were swarming to the north shore of the Ohio, upsetting already delicate Indian relations. Most of the tribes in this region had sided with the British during the Revolution, and it was feared that they would do so again, especially with British troops still in possession of the northwestern posts despite American diplomatic protests.

It is doubtful that the Confederation government was in a position to occupy these forts even if the British had complied with the peace treaty. The prevailing fear of a standing army coupled with the distrust of a strong central government and a general war weariness combined to limit military actions.¹⁶ When the British did voluntarily withdraw from their post on Penobscot Bay in Maine, Washington had no choice but to ask the Massachusetts militia to occupy it. The forces of the United States were unable to do so because the "few troops remaining in service" and the "great distance of Penobscot . . . totally prevent[ed] [his] sending a Detachment to receive possession of that Garrison from the British."¹⁷ Some

members of Congress were doubtful whether the United States should occupy the northwestern posts because of the "inconveniences arising from the great distance [to] the posts, their exposed situation and the expense attending them."¹⁸ Even the French inhabitants of the Illinois country, who admitted the sovereignty of the United States, had to beg Congress to provide them with a proper government.¹⁹

It was also becoming clear that Spain intended to block another American right promised by the Treaty of 1783--free navigation of the Mississippi. This closure would not only damage western trade but also polarize opinion within the Confederation as the carrying states of the northeast squared off against the agricultural South and West in a debate colored entirely by sectional interests. By the most simple definitions of sovereignty, the United States was not in full control of its national domain.

Immediately after the passage of the Ordinance of 1784 Jefferson went to Paris, where he replaced the aging Franklin as American minister to France. As principal author of the ordinance and the Virginia cession Jefferson had been instrumental in securing the acceptance of these two acts, each of which met the conditions deemed necessary by Virginia in the surrender of her western claims. Even though both acts were ultimately accepted by Congress, passage was not easy. Virginia had "insisted on hard

terms," and it was only the pressing financial needs of the Confederation that led to the cession's acceptance.²⁰

With Jefferson's departure, the task of protecting Virginia's interests in the West was assumed by Monroe. During his first congressional term Monroe had served under Jefferson on the committee for western lands, and in 1784 he succeeded Jefferson to the chairmanship. The younger man quickly moved to become personally familiar with the western territories. In late July 1784 he journeyed through western New York to the lower Great Lakes. From there he meant to tour the northwest posts, visit the upper Ohio country, and return thence to Virginia, but his itinerary was shortened by Indian hostilities and the active discouragement of the British, who were still firmly in command of the northwest posts.²¹ The following summer Monroe planned to accompany the congressional peace commission to the Indian treaty conference at the Falls of the Ohio. Once again he was forced to cut short his trip as a result of the hostility of some tribes and poor travelling conditions.²² Though abbreviated, these two trips served as a catalyst to Monroe's reevaluation of his thinking on western policy.

As late as 1783 Monroe's view of the West was quite similar to Jefferson's. In October of that year he "assured" George Rogers Clark that the Virginia legislature wished "to effect a separation [of the Kentucky settlements] and erect an independent State westward, as it

will enable [Virginia] to economize [her] affairs . . . and give [her] greater strength in the federal councils."²³ He was much less optimistic after visiting the region. Just before his second departure in August 1785, he had "confess[ed]" to Jefferson that he doubted the wisdom of Kentuckian independence, not because that region was unfit for statehood, but because of the disadvantage such a loss would bring Virginia. Not only would a smaller Virginia lose influence, but her congressional power would be reduced by the increase in the number of states. Monroe also implied that the potentially numerous states of the Mississippi Valley would ignore the needs of the older states of the Atlantic seaboard.²⁴

Monroe returned from this second trip West with increased conviction of the need to alter the plan for governance of the western territories. To Madison he acknowledged his fear that the admission of new states would result in a confederacy "so fluctuating [that] there will never be energy or calculation on it either at home or abroad, every thing will be in a state of uncertainty."²⁵ With Jefferson he was slightly less alarmist, writing instead "of the impolicy of our measures" regarding the West.²⁶

Monroe was instrumental in altering the Ordinance of 1784 to reflect the conditions he had witnessed. These changes provided the "colonial government" he described to Jefferson in his letter of May 1786. In that letter,

however, Monroe did assure Jefferson that the new plan would preserve the "most important principles of the act," namely, that once the territories reached a minimum population they would be "admitted into the confederacy" as equal members.²⁷ This latter point was, without doubt, the most important aspect of America's territorial policy. However, through emphasizing the prospective statehood of a territory, it is easy to lose sight of Monroe's prerequisite "colonial government." Jefferson, who certainly did not, feared that western settlers would be unwilling to remain in a confederation that did not provide for fundamental rights, specifically the right of self-government.

While Jefferson understood Monroe's rationale for increasing the size and thus decreasing the number of states, he did not trust the motives of Monroe's congressional supporters. The younger Virginian simply wished to shorten the time necessary to achieve statehood: by reducing the number of states, any one state would easily include the territory and the population of three or four of Jefferson's smaller states and thus be eligible for full statehood much sooner.²⁸ Jefferson, however, realized that the question was more than one of size. Convinced that small republics were preferable, he also believed that western settlers themselves preferred smaller states. Most of all, he recognized the partisan logic that drove some members of Congress to support larger states. By arguing

for fewer western states, Monroe was inadvertently lending support to the argument that the West should have less power and a smaller voice in the national government. Monroe was soon to realize the same.

Two months later, on July 16, 1786, Monroe advised Jefferson that some members of Congress wished to go far beyond merely reducing the number of states: it was "plainly the policy of these men to . . . keep them [the western states] out of the confederacy altogether." Such a "mischievous . . . policy" could only be "calculated to throw [the West] into the hands of Great Britain."²⁹ Through population quotas and other restrictions, representatives from New England were attempting to "rescind everything" they had agreed to in the Ordinance of 1784. Nor were they willing to leave it at that, as Monroe also warned Jefferson of "an intrigue . . . to occlude the Mississippi," closing it to American trade.³⁰

On December 16, 1786, after a three-month leave from writing due to a dislocated wrist, Jefferson wrote to Madison expressing his alarm over Congress' reversal over the proposed division of western states--making them "fewer and larger." Jefferson viewed this, together with New England's attempt to close the Mississippi, as a purely partisan action designed to secure advantage for the northeastern states. Together, these measures made the break-up of the Confederation much more likely. As Jefferson explained, "it might have been made the interests

of the Western states to remain united with us, by managing their interests honestly and for their own good. But the moment we sacrifice their interests to our own, they will see it better to govern themselves. The moment they resolve to do this, the point is settled. A forced connection is neither in our interests nor within our power."³¹

This concern points to the basic difference between Monroe and Jefferson over governance of the territories. Jefferson preferred to see settlers as Americans first. He feared that if they were not accorded those rights and liberties enjoyed in the thirteen eastern states, they would break away to form their own nation. His fears appear more plausible when it is remembered that he expected most settlers to be drawn from the native-born of the eastern states. He was opposed to immigration from monarchist countries, because he feared that it would "warp and bias" the direction of American society "and render it a heterogeneous, incoherent, distracted mass."³² Foreign migrants were likely to prove even more troublesome in the West. Native-born Americans, on the other hand, would not only be well versed in their republican responsibilities but would also expect to enjoy the same republican rights as their countrymen in the East. A West settled by eastern Americans would require less instruction and less outside control because its settlers were already Americans.

Monroe and others who had actually visited the West

tended to disagree, as did the majority of Congress in 1786. While members of the Continental Line had expressed an interest in settling veterans together in a new western state as early as 1783, most settlers were believed to be a different caliber of people.³³ Washington pointedly described them as a "parcel of Bandetti" who "bid defiance to all authority." Worse, they were "skimming and disposing of the Cream of the Country at the expense [of those who had] fought and bled to obtain it."³⁴

Washington's concerns were threefold. As commander in chief he was well aware that western lands were about the only compensation the officers and men of the Continental Army could expect from the beleaguered Congress. He also feared an Indian war, doubtless provoked by these irregular western settlements; Washington did not trust western settlers to respect the boundary of Indian lands. To secure the separation between red and white he proposed "a Proclamation . . . making it a Felony . . . for any person to Survey or Settle beyond the Line" of lands legally purchased from the Indians. He further proposed that the military "should have pointed and peremptory orders" to enforce the proclamation.³⁵

In effect, Washington was advocating a return to the British policy of separation attempted with the Proclamation of 1763, but his rationale was not limited to preventing conflict with the Indians. For "even supposing no disputes . . . with the Indians [or] that it was not

necessary to guard against . . . other evils," a compact settlement would still be preferable to allowing "People to roam over a Country of at least 500,000 Square Miles contributing nothing to the support, but much perhaps to the Embarrassment of the Federal Government."³⁶

Washington's views were also colored by his personal hopes for the West. Many of the "bandetti" he encountered were squatters on his own land. And he, like most men of property, took a dim view of trespass. Additionally, a compact settlement would help to maintain property values. Jefferson, by contrast, was much more trusting. He doubted in 1784 that settlers were squatting on the north side of the Ohio. But if they were, he was sure that "[t]hese very people will be glad to pay the price which Congress will ask to secure themselves in their titles to these lands."³⁷

Washington knew better. Even with the power of the courts behind him, he found it difficult to evict squatters. With his extensive western land holdings, he had a large personal stake in the West. By his own calculations he owned about 40,000 acres just along the Ohio River.³⁸ As a property owner, he was unwilling to leave western development to chance. To strengthen economic connections, he advocated a system of inland navigation to link the Ohio with the James and Potomac rivers. Not only would this increase the value of his lands, but the increase in trade would serve to cement the interests of the West with those of the maritime states,

particularly Virginia.³⁹ To maintain political connections he advocated a strong central government to control the unruly western "bandetti."⁴⁰

The views of men such as Washington and Monroe helped persuade Congress to take a different view of the West. At the same time, inhabitants of Illinois were asking Congress for a stronger government and reminding delegates that not all western settlers were transplanted Americans. On June 22, 1784, these Illinoisans petitioned Congress that they might be permitted to "form a new state." In addition, they noted that it would be "necessary for Congress to send . . . somebody to help . . . in drawing up a constitution." This assistance was needed because the inhabitants had "always been governed by the military" and had "never had experience with the machinery of a republic."⁴¹ Unknown to Congress, the petitioners, a minority of those living in Illinois, had misrepresented their region. While the Illinois region was officially under a military governor, the self-reliant French had usually managed their own affairs, in much the same manner as colonial New Englanders.⁴² But Congress did not know this. As late as 1787, Madison confessed that the problem of government for the settlements of Illinois was "a subject very perplexing in itself; [one] rendered more so by our ignorance of many circumstances on which right judgment depends."⁴³ To be sure the Americans were probably inclined to doubt the ability of the French to govern themselves. The humble

request of the Illinoisans contrasts sharply with petitions from the upstart "state" of Franklin in western North Carolina (now Tennessee). There the "privileges of American citizens" were assumed and the Declaration of Independence was held up as an example to justify their actions.⁴⁴

The Franklinites and other separatists wrongly believed that the Ordinance of 1784 gave them the right to form their own governments and then apply to Congress for admission into the Confederation.⁴⁵ This was not the intent of Congress, and the ambiguities that made this misinterpretation possible were removed from the new plan of government, the Ordinance of 1787, which also corrected other perceived deficiencies of the Ordinance of 1784.

Members of Congress had soon begun to doubt the wisdom of Jefferson's policy of minimal interference in the West, especially in regard to the northwest territory.⁴⁶ Rather than sturdy republican farmers, the national domain seemed to only attract squatters and other undesirables. The Ordinance of 1784 was clearly inadequate. Distant territories, where the authority of the United States was tenuous at best, were not the best place to experiment with Jefferson's idealistic notions of government. Most congressmen were more inclined to accept Washington's view: Territorial government should reflect the needs of the federal government, and, when possible, settlers should be selected to fit the needs of the government, rather than

molding government to meet the needs of backwoods "bandetti." Richard Henry Lee described the Ordinance of 1787 as "much more tonic than our democratic forms on the Atlantic."⁴⁷ This was necessary, he wrote to Washington, "for the security of property among uninformed, and perhaps licentious people as the greater part of those who go there are."⁴⁸ Even those New Englanders who had once opposed westward migration now advocated the same as a means of improving the territory.⁴⁹

In Virginia the spectrum of thought toward the West may be neatly symbolized by the opinions of Jefferson, Monroe, and Washington. All three men agreed that "new states . . . must be the inevitable consequence of emigration to [the West]."⁵⁰ They disagreed on the best means of securing these states to the union. For Jefferson, the republican sentiments of westerners would be enough to connect them to the American republic, although he did see the need to promote an economic connection as well; thus his encouragement of Washington's involvement in improvements of Potomac navigation. But Washington was much more insistent on the importance of this connection. In addition to the bond of trade, he also felt that the right sort of people had to settle in the West. Unwilling to trust westerners to do what was best for the United States, he thought they should to be persuaded to do so, preferably through legislation, but by force if necessary. Monroe,

through the evolution of his own thought, served as an ideal compromise between Jefferson's idealism and the more conservative views of such men as Washington. Monroe realized that it was not enough to legislate equality as the Ordinance of 1784 had done. Personal experience convinced him, like Washington, of the dangers in Jefferson's hands-off policy, especially during the beginning stages of territoriality. The changes he proposed to Jefferson's Ordinance of 1784 were designed to give the new states the resources they needed to become truly equal members of the nation.

Monroe's proposed revisions in territorial government eventually became the core of the Ordinance of 1787. Admittedly, his "colonial government" was initially less democratic than the Ordinance of 1784. But self-government was only deferred, not denied. Jefferson's proposal that western states should be "free and independent" was widely accepted by 1787.⁵¹ Additionally, his amendment banning slavery--rejected by Congress in 1784--was adopted in 1787 by an almost unanimous vote. Jefferson's idea of a compact between the old states and the new was also revised and expanded into the six Articles of Compact of the Ordinance of 1787.

Washington's concerns with Indian relations were addressed by both the ordinances of 1785 and 1787. Through its requirement of prior survey the Land Ordinance effectively separated white settlement from Indian lands.

This same requirement also encouraged compact settlement--a necessity of good government in Washington's view. The Ordinance of 1787 reminded settlers that only Congress could lawfully wage war against the Indians.

NOTES TO CHAPTER II

¹James Monroe to Thomas Jefferson, May 11, 1786, in Julian P. Boyd, ed., The Papers of Thomas Jefferson, 23 vols. to date (Princeton, N.J., 1950-), IX, 511.

²Ibid.

³Jefferson to Monroe, July 9, 1786, ibid., X, 112.

⁴Merrill Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 (New York, 1950), 10-11. John Jay to Jefferson, April 24, 1787, Jefferson Papers, XI, 314; Rufus King to Elbridge Gerry, June 4, 1786, in Edmund Cody Burnett, ed., Letters of the Members of the Continental Congress, 8 vols. (Washington, D.C., 1921-1936), VIII, 380. In "To the People of the United States," Carlisle Gazette, July 5, 1786, Benjamin Rush, writing under the pseudonym of "Nestor," argued that Great Britain had deliberately ceded the western territories to the United States as a means of weakening an overextended republic.

⁵Jefferson to Monroe, July 9, 1786, in Boyd, ed., Jefferson Papers, X, 112.

⁶Noble E. Cunningham, Jr., In Pursuit of Reason: The Life of Thomas Jefferson (Baton Rouge, La., 1987), 84. This recognition may have been partially due to the mediocrity of his fellow congressmen as well as to the general lack of reliable information about the West.

⁷"The Virginia Cession of Territory Northwest of the Ohio [1 March 1784]," in Boyd, ed., Jefferson Papers, VI, 571-580.

⁸Jensen, New Nation, 350-351.

⁹"Ordinance of 1784," [April 23, 1784], in Boyd, ed., Jefferson Papers, VI, 613-15.

¹⁰Ibid.

¹¹Ibid., I, 182.

¹²In a letter to Francis Hopkinson, Jefferson sarcastically referred to the fear that the adoption of "decimal arithmetic" would cause us to "forget how to cipher." Jefferson to Hopkinson, May 3, 1784, in Boyd, ed., Jefferson Papers, VII, 205-206.

¹³George Washington to Richard Henry Lee, Dec. 14, 1784, in John C. Fitzpatrick, ed., The Writings of George

Washington, 39 vols. (Washington, 1931-44), XXVIII, 12.

¹⁴Sam B. Hilliard, "A Robust New Nation," in Robert D. Mitchell and Paul A. Groves, eds., North America: The Historical Geography of a Changing Continent (Totowa, N.J., 1987), 165-66.

¹⁵Peter S. Onuf, Statehood and Union: A History of the Northwest Ordinance (Bloomington, Ind., 1987), 51.

¹⁶William B. Skelton, "The Confederation's Regulars: A Social Profile of Enlisted Service in America's First Standing Army," William and Mary Quarterly, 3d Ser., XLVI (1989), 771.

¹⁷Washington to John Hancock, Oct. 8, 1783, in Fitzpatrick, ed., Writings of Washington, XXVII, 183.

¹⁸The Committee consisting of Mr. Mercer, Mr. Lee, Mr. Gerry, Mr. Howell, and Mr. Paine, "Appointed to Consider of the Measures Proper to be Adopted in Order to Take Possession of the Frontier Posts" . . . Beg Leave to Observe. . . . (Annapolis, Md., 1784).

¹⁹Clarence Walworth Alvord, ed., Collections of the Illinois State Historical Library, V, Kaskaskia Records, 1778-1790, (Springfield, Ill., 1909), 360-369.

²⁰New York Delegates to the Governor of New York [George Clinton], Sept. 19, 1783, in Burnett, ed., Letters of the Members of the Continental Congress, VII, 300. See also, Stephen Higginson to Samuel Adams, June 10, 1783, ibid., 184, and North Carolina Delegates to the Governor of North Carolina [Alexander Martin], Sept. 26, 1783, ibid., 313.

²¹Monroe to Jefferson, Nov. 1, 1784, in Boyd, ed., Jefferson Papers, VII, 459-462.

²²Monroe to Jefferson, Jan. 19, 1786, ibid., IX, 186-191.

²³Monroe to George Rogers Clark, October 19, 1783, in Alvord, ed., Collections of the Illinois State Historical Library, XIX, 250.

²⁴Monroe to Jefferson, Aug. 25, 1785, in Boyd, ed., Jefferson Papers, VIII, 441-442.

²⁵Monroe to James Madison, Dec. 26, 1785, in Stanislaus Murray Hamilton, ed., The Writings of James Monroe: Including a Collection of His Public and Private Papers and Correspondence Now For the First Time Printed, 7 vols. (New York, 1898-1903), I, 110.

²⁶Monroe to Jefferson, Jan. 19, 1786 in Boyd, ed., Jefferson Papers, IX, 189.

²⁷Ibid., IX, 511.

²⁸Ibid., IX, 189

²⁹Monroe to Jefferson, July 16, 1786, ibid., X, 143.

³⁰Ibid.

³¹Jefferson to Madison, Dec. 16, 1786, ibid., X, 603.

³²Jefferson, Notes on the State of Virginia, ed. William Peden (Chapel Hill, N.C., 1954), 85.

³³Jay A. Barrett, Evolution of the Ordinance of 1787 (New York, 1891), 7-9.

³⁴Washington to James Duane, Sept. 7, 1783, in Fitzpatrick, ed., Writings of Washington, XXVII, 136-137. Unlike Jefferson, Washington apparently preferred foreign migration as a source of western settlement. Perhaps he agreed with Jefferson's sentiment that only a "tractable people may be governed in large bodies." But where Jefferson rationalized that the government should be formed to fit the people, Washington was not averse to encouraging the settlement of people who would fit the government. See Washington to Richard Henry Lee, Aug. 22, 1785, ibid., XXVIII, 231 and Jefferson to Madison, Dec. 16, 1786, in Boyd, ed., Jefferson Papers, X, 603.

³⁵Washington to Duane, Sept. 7, 1783, in Fitzpatrick, ed., Writings of Washington, XXVII, 136-137. Washington's advocacy of a Proclamation line to separate the frontiersmen from the Indians is ironic in view of the reception Americans gave the earlier British Proclamation Line of 1763.

³⁶Ibid., 139.

³⁷Jefferson, notes in response to inquiry of Gijsbert Karel van Hogendorp, in Boyd, ed., Jefferson Papers, VII, 220-221.

³⁸Washington to Israel Shreve, July 15, 1785, in Fitzpatrick, ed., Writings of Washington, XXVIII, 199.

³⁹Washington to Jefferson, March 29, 1784, in Boyd, ed., Jefferson Papers, VII, 49-50. This letter was written in reply to Jefferson's letter to Washington, March 15, 1784, ibid., VII, 25-29. See also Washington to Robert Morris, Feb. 1, 1785, in Fitzpatrick, ed., Writings of Washington, XXVIII, 48-55, and Washington to Marquis de

Chastellux, Sept. 5, 1785, ibid., XXVIII, 254.

⁴⁰Washington to Duane, Sept. 7, 1783, in Fitzpatrick, ed., Writings of Washington, XXVII, 136-137.

⁴¹John Dodge to the President of the United States in Congress, June 22, 1784, in Alvord, ed., Collections of the Illinois State Historical Library, V, 365-366.

⁴²Winstanley Briggs, "Le Pays des Illinois," WMQ, 3d Ser., XLVII (1990), 30-56.

⁴³Madison to Jefferson, April 23, 1787, in Boyd, ed., Jefferson Papers, XI, 308.

⁴⁴"Extracts from an Address to the Western Inhabitants" enclosed in Charles Cummings to the President of Congress as quoted in Peter S. Onuf, The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787 (Philadelphia, Pa., 1983), 34-38, 222 n. 78.

⁴⁵Ibid., 161.

⁴⁶Monroe to Jefferson, Jan. 19, 1786, in Burnett, ed., Letters of the Members of the Continental Congress, VIII, 285-286, and Monroe to the Secretary for Foreign Affairs [John Jay], April 20, 1786, ibid., VIII, 342.

⁴⁷Richard Henry Lee to William Lee, July 30, 1787, ibid., VIII, 429-430.

⁴⁸Richard Henry Lee to Washington, July 15, 1787, ibid., VIII, 620.

⁴⁹The Massachusetts Delegates to the Governor of Massachusetts [John Hancock], May 27, 1788, ibid., VIII, 740

⁵⁰Washington to William Grayson, April 25, 1785, in Fitzpatrick, ed., Writings of Washington, XXVIII, 138.

⁵¹Jefferson had suggested that Virginia set up new independent colonies in his draft of a new state constitution in 1776. See his draft of a constitution for Virginia, in Boyd, ed., Jefferson Papers, I, 363.

CHAPTER III

EXPLICATION OF THE ORDINANCE OF 1787

It has often been charged that the Ordinance of 1787 was the quintessential product of a bureaucratic committee. Matters are further complicated by the frequently changing membership of the committee responsible for the ordinance. From 1784 until 1787 a total of thirteen men served on this five-member committee.¹ These "different" committees would often rearrange the work of their predecessors to suit their own views of western policy. The various working drafts of the ordinance at times appear almost unrelated. The text of the final document is a reflection of these changing priorities. However, the underlying principles were essentially those intended by Jefferson and Monroe.

Lack of direction is most evident than in the organizational scheme of the ordinance, one of its more unusual attributes. The document may be divided into three sections, but the first section appears to be an afterthought. Rather than outlining the territorial government, it provides a detailed description of the inheritance law for those who die intestate. This section also includes the brief acknowledgment of the property rights of the French inhabitants of the Illinois region. Not until the middle section is the structure of the

territorial government described, along with the duties, responsibilities, and terms of office of the governor and other principal officials. The six Articles of Compact, composing the final section, are an agreement between Congress and the future state governments of the region to protect the civil rights of the inhabitants.

Section One: Permanent Laws of Inheritance and Property

It is from the standpoint of stability that this oddly placed section on inheritance gains importance; in effect it encouraged widespread land ownership, an important republican principle. By it was recognized the right of all children--of both sexes and including those of previous marriages--to an equal portion of an estate.

It was not enough for Congress to simply demand that new states have republican governments, although Article V of the ordinance did include this prescription. In addition, a republican society had to be encouraged. As Jefferson and others realized, a wide distribution of wealth would promote a similar distribution of power. The "equal partition of inheritances" was vitally important if a government were to be "truly republican."² While Congress did not advocate a general redistribution of wealth, it was quite willing to alter the distribution of wealth under those circumstances that typically fell within the sphere of government.

When someone died intestate it was customary for the

local government to decide the future of his estate. In the seventeenth century most of the American colonies followed the English custom of primogeniture. However, by the eighteenth century this practice was subjected to increasing criticism. By the time of the Revolution many colonies had, through custom and statute, replaced primogeniture with a more equitable distribution scheme. Still, in most cases the eldest son could expect to receive a greater share than his siblings, and children from previous marriages were often neglected.³

The intestate inheritance section of the ordinance continued the reforms initiated by individual states and carried them through to their logical conclusion. In an early draft of the ordinance (1786) this section had included an explicit example that emphasized the right of daughters as well as sons to an equal share of intestate property.⁴ Though the example was removed from the final draft, the intent to protect the inheritance of all children remained.

This 1786 draft is also interesting in its arrangement of the sections. Appropriately, the description of officials and their powers is first, followed by the Articles of Compact (without Article VI on slavery) and the section on intestate inheritance.⁵ When the two drafts are compared, it is apparent that their meaning is the same. The 1787 version is more concise, but it still retains the full intent of the 1786 version. The difference is in

placement. The decision to begin the Ordinance of 1787 with the section on inheritance was deliberate; it was not due to the committee's disorganization, nor was it a last minute addition. This encouragement of widespread property ownership was intentionally republican and also eminently practical, as good republican legislation should be. The widow retained her traditional third, but no advantage was given to first-born sons or younger brothers.

Methods of conveyance and tenure were simplified as well. This greatly facilitated property ownership and transfer, an advantage for the family farmer as well as for the land speculator.⁶ Nathan Dane, the committee member responsible for this section, thought it "vastly important." And while this section could be repealed upon achievement of statehood, it was Dane's intention that the custom of equitable inheritance "take root in the first settlement" and thus become "permanent."⁷

This section also included a clause guaranteeing to "the french and canadian inhabitants & other settlers of the Kaskaskies, Saint Vincents and the neighboring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them relative to the descent and conveyance of property."⁸ This assurance was not included in either the Ordinance of 1784 or any of the intervening drafts, though it does partially replicate one of the conditions of the Virginia Act of Cession.

This guarantee is reflective of the supremacy of the national government. Under the Ordinance of 1784 it was not necessary to explicitly protect the rights of the inhabitants because it was assumed that they would do so themselves. Jefferson, as a member of both Virginia's congressional delegation responsible for the cession and the committee that drafted the Ordinance of 1784, would certainly have included this clause if he had thought it necessary. There is also a significant difference in the wording of the Ordinance of 1787 and that of the Virginia cession. Where the ordinance only protected certain property rights, the act of cession stipulated that these settlers were to "have their possessions and titles confirmed to them and be protected in the enjoyment of their rights and liberties."⁹ Here the settlers were explicitly protected in rights and liberties beyond those relating to property. Such a guarantee in the Ordinance of 1787 would have created conditions under which state laws, and to a limited extent state sovereignty, would have been superior to those of the nation. Under the Ordinance of 1784, which allowed a high degree of local sovereignty, such a guarantee was not necessary. Under the Ordinance of 1787 it would have been in conflict with the overall intention of the ordinance.

Section Two: A Temporary Territorial Government

Rather than leaving settlers to their own devices, the

Ordinance of 1787 gave Congress a measure of firm control through the almost unlimited power of the territorial governor. His power was especially strong during the initial stages of territoriality. As commander in chief of the militia, the governor could appoint all officers below the rank of general officer, as well as any magistrates or civil officers he thought necessary. Together with three congressionally appointed territorial judges, he was responsible for promulgating the legal code of one of the thirteen original states for use in the territory. While this code could be repealed once statehood was achieved, it was expected that the future state government would retain the legal system under which it was founded. Stability and continuity were also assured by a system of staggered terms for territorial officials.¹⁰

After the territory contained at least 5,000 adult "free male inhabitants," the governor was to authorize the election of a House of Representatives. This body would then nominate ten persons to Congress, of whom five would be chosen to serve on the Legislative Council. The Council and the House, together with the governor, formed the General Assembly, which elected the territory's single representative to Congress and was responsible for adopting laws for the territory, as well as initiating all money bills. As a member of the Assembly the governor could introduce legislation, and as senior executive officer he had absolute veto over its acts. He also had the power to

"convene, prorogue, and dissolve" the Assembly whenever he thought such actions "expedient." These were the powers described by Monroe as "in effect a colonial government."¹¹ The prerogatives assigned to the territorial governor were very similar to those of a British imperial governor.

Although the governor's control over the Assembly was extensive, it was not unchallenged. The territorial delegate elected to Congress, while not allowed to vote, was permitted to take part in congressional debate. Presumably, he would also become familiar with Congress, its personnel, protocol, conventions, and connections. As an elected official, the territorial representative was in a position of more potential power than the territorial governor, who was subject to congressional recall at any time.

After serving as an "apprentice" representative, the territorial delegate would be an obvious candidate for election to Congress once statehood was achieved. Once again, stability and continuity are the key emphasis. The lesser status of territoriality was made much easier to accept by the built-in provision for its end. As soon as a district had a population of 60,000 it was to be admitted to the union as a full and equal partner with the original thirteen states. This clear means of ending territoriality did much to assuage bitterness over the loss of republican rights experienced by a citizen moving to the territory from one of the older states.

At the same time the territorial status altered the future state's relationship with the federal government. Unlike the Ordinance of 1784, which allowed settlers a greater voice in their own government, thus encouraging a loyalty to the state potentially greater than loyalty to the nation, the Ordinance of 1787 first made territorial citizens subject to the federal government through its appointed officers. In this manner, the superiority of the federal government was clearly established.

Section Three: A Permanent Bill of Rights

The Six Articles of Compact were intended by Congress to form the foundation of "all laws, constitutions, and governments" of the territory and to provide for the "establishment of States" as full and equal members of the Union.¹² Congress also had the option to offer statehood to a territory before this threshold population was reached.

Article I. Religious worship was not to be "molested" so long as such worship was conducted in a "peaceable and orderly manner." Notably, this article did not provide for complete freedom of religion but only freedom of worship, qualified in the interests of order. This was not the first time religious liberties had been protected in the old Northwest. The religious, civil, and property rights of the French inhabitants had been guaranteed by the state of Virginia in 1780 when it organized the region into a

county.¹³

Article II. The legal rights of the inhabitants were fully protected. Habeas Corpus, trial by jury, moderate fines, and the right to bail were guaranteed. "Cruel and unusual punishments" were prohibited. Proportional representation insured that the legislature would be responsive to the electorate. The remainder of this article was devoted to the preservation of property rights; citizens whose personal property was taken for public use were to be completely compensated. It was further suggested "that no law ought ever to be made, . . . that shall, in any manner whatever, interfere with, or affect private contracts, . . . previously formed."

This clause may be the result of congressional concern over Shays's Rebellion. Committee member Nathan Dane must have been painfully aware of this uprising in his home state. And as an eastern lawyer he doubtless had little sympathy for the debt-ridden western farmers. The disdain in which they held the legal profession combined with their readiness to interfere with the due process of law through the force of arms must have especially damned them in Dane's eyes.¹⁴

Debt relief was a consistent theme of the Shaysites. In Massachusetts there had earlier been a movement for a government moratorium on the payment of debts. Merchants who would be adversely affected by a debt moratorium considered such an action to be outside the proper sphere

of government. As William Pynchon and others instructed Springfield's representative to the General Court, "no government can possibly have a right to alter private contracts, already made."¹⁵ Living in an economy that relied heavily on credit, they felt the creditors should be protected. By including this clause to protect private contracts, Congress warned insolvent farmers away from the volatile frontier.

However, it was only a warning, not an injunction. The phrase "ought not" implies that the framers did acknowledge that there were indeed times when such drastic measures might be necessary. Before the constitutional prohibition on state interference with contract responsibilities, most of the thirteen states had initiated some form of legislative debt relief. Such actions usually took one of three forms: installment laws allowed payments to be divided and then made over a period of time; stay laws postponed payment beyond the original contract period; and commodity laws allowed payment in a specified commodity rather than in specie.¹⁶ Any of these measures would impair a merchant's ability to do business, for he also bought on credit. When faced with the loss of much of his expected revenue he would be inclined to agree with Manasseh Cutler's hyperbolic assessment of Shays's Rebellion: the "commonwealth" of Massachusetts was, he feared, "on the very border of anarchy."¹⁷ Cutler later assisted the government by recruiting for General Lincoln's

army, which marched against the insurgents.¹⁸

Cutler's alleged participation in drafting the Ordinance of 1787 is one of the minor debates surrounding it. Cutler, General Rufus Putnam (who also fought against Shays) and General Samuel Parsons were the directors of the Ohio Company. This speculative enterprise was formed by several Massachusetts Continental officers for the purpose of settling veterans and others on the Ohio frontier.¹⁹

In the spring of 1787, while the ordinance was under consideration, the Ohio Company petitioned Congress to purchase several million acres beyond the seven ranges that had already been surveyed.²⁰ Cutler personally visited Congress on July 6 to argue the company's position. While there, he was given a draft copy of the ordinance upon which he indicated several changes he would like to see. He later noted in his diary that all except one were incorporated into the ordinance. Unfortunately, this is the only concrete evidence for Cutler's role in the ordinance. Cutler's contribution may be justifiably narrowed to those portions of the ordinance not borrowed from earlier drafts. This elimination, coupled with his role in Shays's Rebellion, points toward the contract clause. The qualifying phrase "ought not" used to introduce this section may be explained by Congress' reluctance to fully adopt Cutler's suggestion. It is also possible that Cutler had some input into the third Article. However, both Articles Two and Three may also be

attributable to Dane, likewise from the Bay State and equally familiar with both Shays's Rebellion and the importance New Englanders placed on virtuous behavior.²¹

Article III. "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." This article, together with the Land Ordinance of 1785, gave public education a solid foundation in the territory. The "rights, property, and liberty" of the Indians are also protected, except in the case of "just and lawful wars authorized by Congress." While expressing a republican ideal, this last passage is probably primarily indicative of Congress' concern for the prevention of costly and inopportune wars.

It is because of the Land Ordinance that both sections of this article were functional. Not only did that ordinance reserve Section 16 of each township for the support of education, but it also decreased Indian/white conflict through separation. By requiring that lands be surveyed prior to settlement, the Land Ordinance put a brake on unchecked immigration, thereby lessening the pressure on Indian lands.

Article IV. The territory and those states formed from it were to be permanent members of the Union, with all the rights and responsibilities such membership entailed. As equal members of the Union, new states would be required to honor their share of the national debt. Taxation of

federal property was forbidden, and absentee landowners were protected from being taxed at a higher rate than resident land owners. All navigable streams and portages between them were reserved for public use in perpetuity.

Article V. The number of new states was limited to between three and five, with boundaries corresponding roughly to modern state boundaries. At both the state and territorial levels governments were required to be republican and were also bound to uphold the principles of the Articles of Compact. Statehood was guaranteed once the territory achieved a population of 60,000, though Congress could elect to allow an earlier admission if it were deemed in the interests of the Confederation to do so. Large territories would meet the minimum requirements much sooner than the smaller territories stipulated by the Ordinance of 1784.

Article VI. Slavery and involuntary servitude were prohibited except as a punishment of crimes. Fugitives--presumably this applied primarily to escaped slaves--could be "lawfully reclaimed and conveyed to" their place of legal servitude.

Historians have thoroughly debated this article. Its origins, purpose, and effectiveness have all been called into question. Nathan Dane, the man responsible for its last-minute addition, was amazed at its easy acceptance. He was not, however, the originator of the idea.²²

Jefferson was the first to propose that slavery be

eventually banned in the West. And if Dane's Article VI is compared with Jefferson's earlier clause from the Ordinance of 1784, the two are remarkably similar. It is, in fact, easier to enumerate their differences. Jefferson's clause restricted slavery throughout the national domain after the year 1800. Dane's appeared to take effect immediately but was limited to the Northwest Territory. Only the 1787 document provided for the return of fugitives. Beyond this, Dane's Article VI was taken almost word for word from the earlier ordinance.

The legal expertise of Dane may be called into question by the haphazard manner with which the slavery clause was attached to the Ordinance of 1787. Conflicting language in the remainder of the ordinance was not removed. No provision was made for the enforcement of the anti-slavery clause, nor was any indication given who would be responsible for its enforcement.²³

Still, there remains the seemingly inexplicable southern support for this clause. Slavery was important in the South of 1787 though it was not unique to that region, nor was it yet the crucial litmus test of sectional identity that it would become in later years. Sectional issues of the Revolutionary era were usually framed in terms of commercial and producing states. The West, as a potential agricultural region, was thus considered a natural ally of the plantation South. With the West already inclined to support the South because of this

common bond, Southerners were willing to restrict slavery as a means of lessening competition in staple agricultural products such as tobacco and hemp.²⁴ Slaveowners were protected by the "fugitive" clause. While the Northwest was to be a free territory, Congress did not intend it to become a haven for runaway slaves.

The Ordinance of 1787 was intended to provide "for the government of the Territory of the United States northwest of the River Ohio." For that limited purpose it must be judged a success. The development of the old northwest surpassed all expectations of the time. The ordinance was also successful beyond the bounds of the territory for which it was initially prescribed. With modifications, the principles of the ordinance were used in the governance of all United States territories until the Civil War. Ultimately, the most important provision of the ordinance was its well-defined program for the eventual inclusion of territories within the union as full and equal members.

Jefferson's philosophy of letting the needs of the West determine western policy was never seriously considered by the national government, though it did help modify the more conservative opinions of such men as Washington. The views of Monroe were far more typical. While his perspective changed with time, Monroe's ideal western program was always determined by the needs of the East, particularly his home state of Virginia. Fortunately for the West, men

such as Jefferson, Monroe, and Washington, were in favor of new states in the West.

The western problem faced by the early republic was twofold. How was the west to be secured? And how was Congress to assure that a west thus secured would be a positive addition, rather than a hindrance, to the Union? A policy that combined firm control with the republican principles of self-government was the ideal answer. The ordinance achieved this balance in its coupling of temporary and permanent measures. Together with the Constitution, the Ordinance of 1787 made possible the continental expansion of the United States.

NOTES FOR CHAPTER III

¹Of these thirteen men, four, Thomas Jefferson, James Monroe, Edward Carrington, and Richard H. Lee, were representatives of Virginia.

²Thomas Jefferson, "Foundation . . . for a Government Truly Republican," in Adrienne Koch, ed., The American Enlightenment: The Shaping of the American Experiment and a Free Society (New York, 1965), 300.

³Marshall Dee Harris, Origin of the Land Tenure System in the United States (Ames, Iowa, 1953), 61, 198, 319-320.

⁴The Committee consisting of Mr. Johnson, Mr. Pinckney, Mr. Smith, Mr. Dane, and Mr. Henry . . . submit the following report to the consideration of Congress. . . . (New York, 1786).

⁵Ibid.

⁶Jay A. Barrett, Evolution of the Ordinance of 1787 (New York, 1891), 55-56.

⁷Nathan Dane to Daniel Webster, March 26, 1830, in Charles M. Wiltse, ed., The Papers of Daniel Webster, 15 vols. to date (Hanover, N.H., 1974-), III, Correspondence, 1830-1834, 43-48. In this same letter Dane claimed that he was the "framer of the celebrated ordinance." As the "only member of Congress living who had any concern in forming" the ordinance, his claim was unchallenged. But his role should be understood in the same manner as the carpenter who frames a house while following the blueprint of others.

Dane deflated the importance of Jefferson's "meagre, inadequate plan of '84." Monroe fared no better. Not only is he not mentioned, but Dane dismissed his plan of government as "not important." Most significant, Dane failed to acknowledge the guiding principles of both Virginians that were incorporated into the Ordinance of 1787.

Ultimately, Dane's claim rests on the fact that he literally wrote the final draft. In his letter to Webster he stated that he "never claimed originality, except in regard to the clause against impairing contracts, & perhaps the Indian article, [and] part of the 3d article."

⁸Clarence Edwin Carter, ed., Territorial Papers of the United States, (Washington, D.C., 1934-), II, 40-41.

⁹The Virginia Cession of Territory Northwest of the Ohio [March 1, 1784], in Boyd, ed., Jefferson Papers, VI, 578-579.

¹⁰Terms of office were two years for representatives, three years for the governor, four years for the territorial secretary, and five years for the Council. Judges were appointed for life. All appointed officials were subject to congressional recall.

¹¹James Monroe to Jefferson, May 11, 1786, in Boyd, ed., Jefferson Papers, IX, 511.

¹²All quotations within descriptions are taken from the appropriate article of the ordinance.

¹³William Waller Hening, ed., The Statutes at Large: Being a Collection of all of the Laws of Virginia (Richmond, Va., 1821), IX, 553.

¹⁴As a member of Congress, Dane believed it improper for him to speak out too strongly on what was, strictly speaking, a state affair. "He alluded," however, "to the late commotions" in Massachusetts and expressed a desire "to see the government again restored to its former firmness and order." (Nathan Dane, "Address Before the Massachusetts House of Representatives" [Nov. 9, 1786], in Burnett, ed., Letters of the Members of the Continental Congress, VIII, 504-505. See also, Dane to Thomas Dwight, March 12, 1787, ibid., VIII, 556.)

¹⁵William Pynchon, Thomas Stebbins, Reuben Bliss, and Thomas Williston to Samuel Lyman [Springfield representative to the General Court], as quoted in David Szatmary, "Shays' Rebellion in Springfield," in Michael F. Konig and Martin Kaufman, eds., Springfield, 1636-1986 (Springfield, Mass., 1987), 53.

¹⁶Steven R. Boyd, "The Contract Clause and the Evolution of American Federalism," William and Mary Quarterly, 3d Ser., XLIV (1987), 534.

¹⁷Manasseh Cutler to Winthrop Sargent, Oct. 6, 1786, as quoted in David Szatmary, Shays' Rebellion: The Making of an Agrarian Insurrection (Amherst, Mass., 1982), 72.

¹⁸Ibid., 89.

¹⁹Ibid., 86; Barrett, Evolution of the Ordinance of 1787, 46.

²⁰Merrill Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 (New York, 1950), 355-56.

²¹Dane claimed authorship of these two articles. However, in light of their late addition to the ordinance it is possible that Dane added them at Cutler's insistence.

It is also possible that Cutler pressed for the reintroduction of the ban on slavery found in Article VI. See note 7 above.

²²Dane to Webster, March 26, 1830, in Wiltse, ed., Webster Papers, III, 43-48. While Dane acknowledged Jefferson's attempt to exclude slavery after 1800, he failed to note that it would have applied to all the West, including the cessions of south of the Ohio, where Dane himself voted to admit slavery.

²³If these basic problems were solved there still remained the problem of funding the clause's enforcement. See Paul Finkelman "Slavery and Bondage in the 'Empire of Liberty,'" in Frederick D. Williams, ed., The Northwest Ordinance: Essays on its Formulation, Provisions, and Legacy (East Lansing, Mich., 1988), 72-77.

²⁴William Grayson to Monroe, Aug. 8, 1787, in Burnett, ed., Letters of the Members of the Continental Congress, VIII, 631. See also Drew McCoy, "James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective," in Richard Beeman, Stephen Botein, and Edward C. Carter, II, eds., Beyond Confederation: Origins of the Constitution and American National Identity (Chapel Hill, N.C., 1987), 236-237, and Peter S. Onuf, Statehood and Union: A History of the Northwest Ordinance, (Bloomington, Ind., 1977), 111-113. As noted in the Introduction, it has been argued that this article was part of a sectional trade-off. See Staughton Lynd, "The Compromise of 1787," in Lynd, Class Conflict, Slavery, and the United States Constitution (Indianapolis, Ind., 1967), 185-213. In return for northern support of the three-fifths clause of the Constitution, southern delegates at the Confederation Congress agreed to the banning of slavery in the Northwest Territory. Lynd finds support for this possibility in a reference in Manasseh Cutler's diary to a certain Mr. Hamilton. Assuming this was Alexander Hamilton, Lynd suggests that these two men engineered a sectional compromise that also served the needs of the Ohio Company. The inexplicable nature of southern support for a ban on slavery also lends weight to Lynd's hypothesis. However, to suggest that southern sectionalism has always been grounded in advancing the sphere of slave labor is to allow the powerful arguments of the nineteenth century to intrude into a time when their validity is more easily challenged. Sectionalism was present, and slavery was often a part of sectional differences. But as Drew McCoy has ably argued, it was not the critical factor in sectional identification. (McCoy, "Madison and Visions of American Nationality," 236-237.)

Lynd does acknowledge other reasons for southern support such as the fear of competition from the agricultural produce of the Northwest and the implicit

guarantee of slavery's protection in the Southwest. Drew McCoy considers these latter points more important than the possible compromise. He contends that the crucial difference was between the "carrying states" of New England and agrarian remainder of the nation. Within this scheme the agricultural West would naturally ally itself with the agricultural South. Both arguments highlight the importance of eastern sectional politics in determining western policy.

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