SLAVERY AND THE NORTHWEST ORDINANCE: A STUDY IN AMBIGUITY

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For many antebellum northerners the Northwest Ordinance's prohibition of slavery was almost a sacred text. A young Salmon P. Chase, writing well before he gained fame as an antislavery lawyer, described Article VI as a "remarkable instrument . . . the last gift of the congress of the old confederation to the country . . . a fit consummation of their glorious labors." To an aging Edward Coles, the antislavery former governor of Illinois, the legislation appeared "marvellous" and showed "the profound wisdom of those who framed such an efficacious measure for our country." Coles contrasted the sectional tensions of the 1850s following the Kansas-Nebraska Act to an earlier period, when "the Territories subject to it [the ordinance] were quiet, happy, and prosperous." Coles believed that if American politicians had followed the pattern set by the ordinance the turmoil of the 1850s might have been avoided. For men like Chase and Coles the ordinance was responsible for the creation of the free states along the Ohio River. Without it many antebellum northerners believed the Midwest would have become a bastion of slavery.[1]

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[1] Salmon P. Chase, ed., *The Statutes of Ohio and of the Northwestern Territory* (3 vols., Cincinnati 1833-1835), I, 18; Edward Coles, *History of the Ordinance of 1787* (Philadelphia 1856), 32-33. Peter S. Onuf, "From Constitution to Higher Law: The Reinterpretation of the Northwest Ordinance," *Ohio History*, 94 (Winter-Spring 1985), 5-7, 31-33, discusses nineteenth century views of the ordinance. For one politician's views of the ordinance, see Abraham Lincoln's various speeches between 1854 and 1860 in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (9 vols., New Brunswick, N.J. 1953-1955), especially Lincoln's speech at Cincinnati, Ohio, in September 1859, at III, 454-457. Post-Civil War historians also interpreted the or-

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In spite of the praise that Article VI received in the nineteenth century, recent scholars have, for the most part, ignored it. Although Ulrich B. Phillips described it as "the first and last antislavery achievement by the central government" in this period, a careful examination of the provisions and its implementation suggests that it is unclear exactly what the article was intended to accomplish. At the time of its passage the ordinance did not threaten slavery in the South. It may even have strengthened slavery there. Nor did the ordinance immediately or directly affect slavery in the territory north of the Ohio River. Slavery continued in the region for decades. Thus in the nineteenth century usage of the term, the ordinance was not abolitionist and was only barely "antislavery."[2]

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dinance in this way. See B.A. Hinsdale, *The Old Northwest* (New York 1888), 263, 273; Wager Swayne, *The Ordinance of 1787 and the War of 1861* (New York [1892?]); and William Frederick Poole, *The Ordinance of 1787, and Dr. Manasseh Cutler as an Agent in Its Formation* (Cambridge, Mass. 1876). During the Missouri Compromise debates southerners denied that the ordinance could in fact prevent any state from adopting slavery once that state was admitted into the union. Glover Moore, *The Missouri Controversy, 1819-1821* (Lexington 1953), 121-122.

Whether the ordinance actually prevented slavery in the Northwest from ultimately surviving is open to question. Robert McColley, *Slavery and Jeffersonian Virginia* (Urbana 1964), 181, argues that "What prevented the slaveholding planters from dominating Illinois, and possibly even Indiana, was, of all things, cotton." McColley suggests that cotton pulled slavery south, because that was where slavery was most profitable. This variation on the "natural limits" theory of slavery is persuasive as a partial explanation of why slavery did not expand into Illinois. Had it not been for political factors, however, it is likely that Illinois would have become a slave state in the 1820s.

[2] U. B. Phillips, *American Negro Slavery* (New York 1918), 128. For nineteenth century analyses, see George Bancroft, *History of the United States of America, From the Discovery of the Continent* (6 vols., New York 1883-1885), VI, 290; J.P. Dunn, Jr., *Indiana: A Redemption From Slavery* (Boston 1888), 177-218; and Poole, *The Ordinance of 1787*. See also Hinsdale, *The Old Northwest*, 276-277, for his statement that "No act of American legislation has called out more eloquent applause than the Ordinance of 1787. . . . In one respect it has a proud pre-eminence over all other acts on the American statute-books. It alone is known by the date of its enactment, and not by its subject-matter."

Recent historiography is striking for the lack of interest in the ordinance in general, and the slavery provision in particular. Since World War II no article in either the *Journal of American History* (originally the *Mississippi Valley Historical Review*) or the *William and Mary Quarterly* has focused on the ordinance. The indexes of these two journals reveal that the ordinance is mentioned in only seven *MVHR/JAH* articles and only three *WMQ* articles during this period. The slavery provision is discussed in passing in only one article: William Cohen, "Thomas Jefferson and the Problem of Slavery," *Journal of American History*, 56 (Dec. 1969), 511. In his attempt to rehabilitate the image of the Founding Fathers, William W. Freehling mentioned Article VI of the

Certainly it is unlikely that all those who voted for the ordinance saw the provision as antislavery. The congressmen from the Deep South who voted for it were not consciously undermining slavery. On the contrary, some of the slaveholders who voted for the legislation may have believed that Article VI actually strengthened slavery. The fact that the ordinance was specifically limited to the territory north of the Ohio seemed to imply that the territories south of the river were open to slavery. This assumption was strengthened by the fact that an attempt in 1784 to prohibit slavery in *all* the western territories after the year 1800 had been defeated.[3] Furthermore, the ordinance's fugitive slave clause offered protection to the slaveowners whose property might escape into the territory. Since the Articles of Confederation contained no such protection, and the Constitutional Convention had not yet added a similar clause to the proposed new compact, this was an important victory for slavery.[4]

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ordinance but did not analyze it in "The Founding Fathers and Slavery," *American Historical Review*, 77 (Feb. 1972), 87-89, and Robert F. Berkhofer, Jr., in "Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System," *William and Mary Quarterly*, 29 (Apr. 1972), 231-262, briefly mentions Jefferson's attempt to prohibit slavery in the national territories in 1784 but does not discuss the Ordinance of 1787. Similarly, Jack Ericson Eblen, *The First and Second United States Empires: Governors and Territorial Government, 1784-1912* (Pittsburgh 1968), says little about the slavery provision, and the same is true of Peter S. Onuf's excellent book, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia 1983). Article VI of the ordinance is dealt with at some length in Donald L. Robinson, *Slavery in the Structure of American Politics, 1765-1820* (New York 1971). The only important article of the last two decades devoted to the slavery provision is Staughton Lynd's "The Compromise of 1787," reprinted in Lynd, ed., *Class Conflict, Slavery, and the United States Constitution* (Indianapolis 1967), 185-213.

State historical society journals have shown more interest in the ordinance. See Onuf, "From Constitution to Higher Law"; Ray A. Billington, "The Historians of the Northwest Ordinance," *Journal of the Illinois State Historical Society*, 40 (Dec. 1947), 397-413, and J. David Griffin, "Historians and the Sixth Article of the Ordinance of 1787," *Ohio History*, 78 (Autumn 1969), 252-260. See also Phillip R. Shriver, "America's Other Bicentennial," *The Old Northwest*, 9 (Fall 1983), 219-235.

[3] This analysis was first suggested by Staughton Lynd in "The Compromise of 1787," 189-200, to explain why southerners supported the slavery prohibition. The clause may also have strengthened slavery in the South by preventing competition between the Ohio Valley and Virginia or Kentucky. This point is discussed in more detail below.

[4] The fugitive slave clause of the ordinance was the first important protection given to slavery by the national government. The Constitutional Convention did not consider a fugitive slave provision until August 28, a month and a half after the ordinance provided such protection for slaveowners. It is likely that the South Carolinians at the convention who demanded this clause got the idea for such a clause from the ordinance. Max Farrand, ed., *The Records of the Federal Convention of 1787* (4 vols.,

While the ordinance gave support to slavery in the South, it did not destroy slavery north of the Ohio. Article VI was not an emancipation proclamation for the Northwest. No slaves were freed immediately because of the ordinance. Neither it nor the state constitutions of the free states in the Northwest led to an immediate end to slavery throughout the area.

In the long run, of course, Article VI helped set the stage for the emergence of five free states in the region. By discouraging slaveowners from moving into the region, the ordinance helped create a white majority in the Northwest that was hostile to slavery. This proved especially crucial in Illinois, where the attempt to amend the Illinois Constitution of 1818 to allow slavery was barely defeated. Yet, even after the defeat of the proslavery forces, slavery lingered in Illinois for nearly thirty years.[5] Slavery lingered so long in the Northwest at least in part because the ordinance itself was ambiguous, internally inconsistent, and written by men who were uncertain of their own objectives.

An examination of the transition from slavery to liberty in the Northwest illustrates the ambivalence of the founding generation over slavery, the naiveté of the early opponents of the peculiar institution, the tenacity of slaveowners in maintaining control over their "servants," even when they lived in theoretically "free" jurisdictions, and the support for slavery expansion that existed in the early national period.[6] Finally, this examination illustrates the difficulty of ending

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New Haven 1911), II, 443, 453-454. The vigorous defense of slavery by the Deep South delegates at the constitutional convention stands in contrast to the adoption of Article VI of the ordinance, if that article is seen as "antislavery." It is likely, however, that the Deep South delegates in Congress thought Article VI would protect slavery where it was and allow it to spread to the Southwest. Thus, they may have seen the article as proslavery, or at least as protective of slavery.

[5] For a discussion of this see Onuf, "From Constitution to Higher Law," 23-29.

[6] Cases throughout the antebellum period raised the problem that persons might be held as slaves in an area where slavery itself was prohibited. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill 1981). The problem of enslavement without the sanction of law persists to this day. In *United States* v. *Mussry*, 726 F 2d 1448 (1984), a federal court in California ruled that the coercion necessary to produce slavery need not be physical, but could be a result of threats, especially if those enslaved were aliens unfamiliar with the laws of the United States. In *Mussry* the court allowed the prosecution for enslavement of persons who had enticed Indonesian aliens to the United States, then seized their passports and return airline tickets, and told the Indonesians that they would suffer terrible penalties if they tried to escape. Such a case illustrates the power of a "master" over illiterate minorities, be they Indonesians in late twentieth century California or "indentured servants" in late eighteenth century Indiana and Illinois.

an entrenched institution merely by constitutional dictates and without the support of legislative enactments and executive enforcement.

The failure of the ordinance and state constitutions to end slavery immediately has a fourfold explanation. First, Article VI was drafted quickly and accepted without debate. Such debate might have clarified its intent and the meaning of its various clauses. After Article VI was added the rest of the ordinance was not changed to provide internal consistency in the document. Thus, specific dictates of the ordinance protected some slavery in the area. For example, throughout the ordinance there are references to "free" inhabitants of the territory, indicating that "unfree" inhabitants might also be allowed to live there.

Second, slavery had a certain staying power—a power of inertia—which made eradication of the institution difficult. Slavery existed in the Northwest before the ordinance was enacted, and the mere passage of a law by a distant and virtually powerless Congress could hardly effect immediate change. Nor would a state constitution necessarily end slavery immediately. Notions of private property fundamental to the ideology of the American Revolution further strengthened existing slavery in the territory. Was it fair, asked men raised on Lockean concepts of "life, liberty, and property," to deprive one man of his property to give another his liberty? For example, in 1815 Pennsylvania's Chief Justice William Tilghman concluded that property was as important as liberty. In denying the freedom claim of the slave Peggy he wrote: "I know that freedom is to be favoured, but we have no right to favour it at the expense of property." Tilghman articulated an attitude prevalent throughout the legal community. Thus, perhaps it is not surprising that the Illinois Constitution of 1818 protected slavery and involuntary servitude and that until 1845 the Illinois Supreme Court was unwilling to free all the slaves (or their descendants) in that state.[7]

Third, the abolition of slavery in the Northwest Territory created serious conflict-of-laws questions. The three most important antebellum states in the area—Ohio, Indiana, and Illinois—shared long borders

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[7] *Marchand v. Negro Peggy*, 2 Sergeant & Rawle 18 (1815). Holding Peggy to be a slave, Tilghman declared: "The only just mode of extirpating the small remains of slavery in the state, would be by purchasing the slaves at a reasonable price, and paying their owners out of the public treasury." *Ibid.*, 19. In *Jarrot (colored man)* v. *Jarrot*, 2 Gilman (Ill.) 1 (1845), the Illinois Supreme Court held that the descendants of slaves owned by the original settlers, born after Illinois statehood, were free. It is significant that the Illinois court used the year of statehood, 1818, and not the year of the ordinance, to determine freedom.

with slave states. These borders were demarcated by the two great river highways of the American interior, the Ohio and the Mississippi. Numerous masters traveling with their slaves on these waterways found it necessary or convenient to land on the free side of these rivers. In later years the National Road would begin in the slave state of Maryland, but pass through two northwestern states and terminate in a third. If these states did not allow transit with slaves then comity among the states and harmony within the union would be disrupted. On the other hand, to allow such transit would require the states to violate their own constitutional prohibitions of slavery. This was so because even slaves temporarily in a free state were, nevertheless, slaves. As lawyers in England had successfully argued in *Somerset* v. *Stewart*, and as antislavery lawyers and politicians would argue in the antebellum period, freedom was essentially indivisible. It was impossible to bring slaves into a free jurisdiction without bringing some or all of the attributes of a system of slavery with them. If the slave followed the master into a free territory or state, so would the whip, the chain, and the coercion of the master.[8]

Finally, there was a lack of will on the part of many local officials, as well as officials of the national government, to actually enforce the spirit, and perhaps the precise letter, of the ordinance. Many of those theoretically opposed to slavery (such as Thomas Jefferson), or ambivalent about it, were willing to allow the institution to survive in the Northwest on the theory that the diffusion of slaves throughout the nation would benefit both the slaves and the white population. This theory was supported by many slaveholding settlers in the territory who were also not anxious to see the ordinance implemented.

The Northwest Ordinance directly addressed slavery in its last article:

> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: provided always, that any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed,

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[8] *Somerset* v. *Stewart*, Loft 1 (1772); 20 Howell State Trials 1 (1772). See also William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca 1977), 20-39. On the problems of slavery and the conflict of laws, see Finkelman, *An Imperfect Union*. For discussions of slavery in the North see arguments of counsel in *Commonwealth* v. *Aves*, 18 Pickering (Mass.) 193 (1836), and *Lemmon* v. *The People*, 20 New York 562 (1860).

> and conveyed to the person claiming his or her labour or service as aforesaid.[9]

Such language, on its face, appears to be straightforward and conclusive. The words "there shall be neither slavery nor involuntary servitude" seem to mean that all slavery is prohibited in the territory and that the status of "slave" cannot be recognized by the laws of the territory. Yet this apparently conclusive language was partially compromised by the fugitive slave provision of the same article. The article gives no hint as to how a fugitive slave was to be treated in the territory. Could a master beat his fugitive with impunity? Might a master rape his female fugitive slave? What would be the status of the child of a fugitive born in the territory? These questions, and similar ones, suggest that slavery presented problems that might not be easily overcome by a single article in the ordinance.

The apparent simplicity of Article VI is further undermined by other provisions of the ordinance and by the circumstances of the drafting of Article VI itself. The ordinance initially consisted of fourteen sections that outlined how the territory was to be governed, and five "articles" that would "forever remain unalterable, unless by common consent."[10] This proposed ordinance, with no mention of slavery, was discussed intermittently between May 1786 and May 1787. In April and May 1787 the proposal received two favorable readings in the Congress. A third reading, set for May 10, was postponed, and by May 12 Congress lacked a quorum. When Congress resumed its deliberations in July a new committee was formed to finish work on the ordinance. On July 11 that committee reported the ordinance, which did not contain the slavery clause. On the 12th the ordinance was given a second reading and scheduled for a final vote the next day. Again, no mention of slavery was made in the ordinance or on the floor of the Congress. On July 13 Nathan Dane, a delegate from Massachusetts, proposed the addition of Article VI. This amendment was apparently accepted without debate or protest. The ordinance, with the slavery prohibition now added to it, passed by a unanimous vote of all the states present.[11]

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[9] Clarence Edwin Carter, ed., *The Territorial Papers of the United States* (18 vols., Washington 1934-1952), II, 49.

[10] Northwest Ordinance, Sec. 14, *ibid.*

[11] *Journals of the Continental Congress, 1774-1789* (34 vols., Washington 1904-1937), XXXII, 281-283, 292, 313-320, 333-334. The only dissenting vote in Congress came from Abraham Yates of New York.

Historians have long puzzled over this chain of events. Although Nathan Dane drafted Article VI in committee, some have doubted that he really deserved credit for the famous provision. While this point remains unresolved, it is not as compelling as the questions surrounding why the southern majority then in the Congress so readily accepted the clause.[12] Staughton Lynd offered two explanations: that southerners expected the Northwest to be sympathetic to southern issues even if it had no slaves; and that the Northwest Ordinance tacitly implied that the Southwest would remain open to slavery. More recently Peter Onuf has endorsed this position.[13]

The notion that the ordinance implied that the territory south of the Ohio would remain open to slavery is also supported by an economic explanation of southern support for the ordinance first offered by William Grayson. Grayson, a Virginian on the congressional committee that had drafted the ordinance, wrote to James Monroe that the slavery prohibition "was agreed to by the Southern members for the purpose of preventing Tobacco and Indigo from being made" in the Northwest. The ordinance would thus prevent the Northwest from competing with the emerging Southwest. The fugitive slave clause in Article VI doubtless helped gain the votes of southerners, and may have in fact been the necessary element in obtaining their support for the ban on slavery.[14]

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[12] The nineteenth century historians cited above sought to determine who deserved the credit for the ordinance in general and Article VI in particular. In an attempt to duck the issue George Bancroft wrote: "Thomas Jefferson first summoned Congress to prohibit slavery in all the territory of the United States; Rufus King lifted up the measure when it lay almost lifeless on the ground . . . a congress . . . headed by William Grayson, supported by Richard Henry Lee, and using Nathan Dane as scribe, carried the measure to the goal . . . ." *History of the United States*, VI, 290. At the time the ordinance was passed only one state present, Massachusetts, had ended slavery. The five southern states present—Delaware, Virginia, South Carolina, North Carolina, and Georgia—would retain slavery until the Civil War. The two remaining states, New York and New Jersey, would be the last northern states to take steps to end slavery, not doing so until 1799 and 1804 respectively.

[13] Lynd, "Compromise of 1787," 199; Onuf, *Origins of the Federal Republic*, 169-171. Lynd also argues that the South was anxious to pass the ordinance so that the American side of the Mississippi River would be quickly settled. Such a settlement would strengthen America's hand in negotiations with the Spanish for access to New Orleans. This would explain why southerners were anxious to have some bill for organizing the territory, but does not explain why southerners should have been willing to give up slavery in the area.

[14] William Grayson to James Monroe, Aug. 8, 1787, in Edmund C. Burnett, ed., *Letters of Members of the Continental Congress* (8 vols., Washington 1921-1936), VIII, 631-633. Grayson's argument suggests that Deep South congressmen may have sup-

There is, finally, one other possible reason for southern support of the ordinance with an article prohibiting slavery: the need to pass an ordinance that would satisfy Manasseh Cutler, the lobbyist for the New England investors who formed the Ohio Land Company.

The final impetus for passage of the ordinance, for both southern and northern congressmen, was the possibility of selling some five million acres of land to Cutler and his associates. In two letters written immediately after passage of the ordinance Richard Henry Lee asserted that it was passed as "preparatory to the sale of that Country [Ohio]." Lee noted that as soon as the ordinance was passed Congress turned "to consider of [*sic*] a proposition made for the purchase of 5 or 6 millions of Acres, in order to lessen the domestic debt."[15] Evidence of this sort led the nineteenth century historian William F. Poole to conclude that the "chief motive of the Southern members in voting unanimously for the Ordinance was doubtless to relieve the financial embarrassment of the government, and to bring the public lands into the market at the highest price." Poole further argued that the slavery prohibition was placed in the ordinance at the insistence of Manasseh Cutler, because Congress felt it must frame "an instrument which would be satisfactory to the party proposing to purchase these lands." Perhaps informed by the realities of Gilded Age politics, Poole saw the lobbyist for the land company as the most important actor on the scene.[16]

Cutler came to New York on July 6 to lobby for the right to purchase land for the Ohio Company. On the 10th he presented the committee with some suggestions for amendments to the ordinance, and then immediately left New York for Philadelphia. On the 13th the ordinance, with the slavery prohibition, was adopted.[17] It is unknown

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ported Article VI because prohibiting slavery in the Northwest would lower the price of slaves in the Southeast and Southwest while Upper South congressmen supported the ordinance to avoid economic competition from north of the Ohio River. See also Peter Force, "The Ordinance of 1787, and Its History," in William Henry Smith, ed., *The St. Clair Papers: The Life and Public Services of Arthur St. Clair* (2 vols., Cincinnati 1882), II, 611-612.

[15] Richard Henry Lee to Francis Lightfoot Lee, July 14, 1787, in Burnett, ed., *Letters of Members*, VIII, 619-620; Richard Henry Lee to George Washington, July 15, 1787, *ibid*, 620.

[16] Poole, *The Ordinance of 1787*, 27, 26.

[17] *Ibid.*, 29; *Journals of the Continental Congress*, XXXII, 343. Eblen, *First and Second United States Empires*, 43n, denies that Cutler could have had any effect on the ordinance because "it is clear that by the time Cutler arrived in New York in 1787, there was nothing really new to be offered." However, Article VI, containing the slavery prohibition and the quite new fugitive slave provision, was in fact added to

if Cutler would have agreed to purchase Ohio lands if the ordinance had not contained the prohibition of slavery. His known antipathy to slavery suggests that he was instrumental in persuading the committee, and the Congress, to accept the clause.[18] On the other hand, he apparently was willing to accept the version of the ordinance he read on July 10, which did not include the slavery prohibition, because he left New York immediately after giving his suggested amendments to the committee. Had he been overwhelmingly concerned with the fate of his suggestions Cutler probably would have stayed in New York for the vote on the thirteenth. It is impossible to know if Cutler's proposed amendments even included the prohibition of slavery, because his diary entry on this subject gives absolutely no indication of what the amendments were.[19] Poole's assertion that Cutler was responsible for the slavery prohibition is, then, subject to the Scotch verdict—not proved. Poole seems more correct in his conclusion that the "Ordinance of 1787 and the Ohio purchase were parts of one and the same transaction. The purchase *would* not have been made without the Ordinance, and the Ordinance *could* not have been enacted except as an essential

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the ordinance *after* Cutler left New York. Eblen is also confused about when Cutler appeared in New York. He states that Cutler arrived in New York on May 9 (page 37), and predicates his analysis accordingly. Cutler, however, did not come to New York until July 6.

[18] *Cf.* Jay A. Barrett, *Evolution of the Ordinance of 1787* (1891, rep. New York 1971), 74-77, who argues against Cutler's antislavery credentials on the basis of subsequent votes in the United States Congress.

[19] Cutler's son Ephraim recalled in a statement written after Cutler's death, that Cutler had personally claimed to be the author of the slavery prohibition. William Parker Cutler and Julia Perkins Cutler, *Life, Journals and Correspondence of Rev. Manasseh Cutler, LL.D.* (2 vols., Cincinnati 1888), I, 343-344. This claim, or the memory of it by his descendants, may be a function of nineteenth century filiopietism common among the descendants of the revolutionary era patriots. Cutler himself left no written documentation to support his claim of authorship. Cutler's presence at the Congress is ambiguous. He arrived on July 6, wrote down some suggestions for amendments to the pending bill, and left on the 10th. On the 11th, after Cutler had left New York, the bill, as read to the Congress, did not include the antislavery amendments. Not until the 13th, when the bill had its third and final reading, did the slavery prohibition appear. See also Edmund Cody Burnett, *The Continental Congress* (New York 1941), 685. On July 19 when Cutler saw the final bill, as passed, he noted in his diary that all but one of his suggestions had been accepted. At no time, however, did Cutler indicate in his diary, or a letter, what those suggestions were. *Life, Journals and Correspondence of Rev. Manasseh Cutler*, I, 230, 242, 293. The reliability of the printed version of Cutler's journals has also been questioned, although not on this point. Lee Nathaniel Newcomer, "Manasseh Cutler's Writings: A Note on Editorial Practice," *Mississippi Valley Historical Review*, 47 (June 1960), 88-101.

condition of the purchase.''[20] As noted above, the ordinance, in some form, had been under consideration since at least 1785.[21] It is likely that a version of the ordinance would have passed, sooner or later. But the evidence does suggest that Cutler's lobbying and the interest of the Massachusetts land speculators in purchasing land in Ohio did spur the Congress to act.

In the final analysis it may not matter who proposed Article VI, whether Cutler's lobbying made it possible, or why Congress enacted the ordinance when it did. What is important is that the history of the ordinance shows (1) that there was virtually no debate over the slavery provision; (2) that it was added at the last possible moment, without careful consideration; (3) that the rest of the ordinance was not redrafted to make it consistent with Article VI; and (4) that although the language of Article VI meant that slavery could not exist in the territory (except for fugitives), it is unlikely that the southern majority which passed the ordinance understood the article to mean this.

Whatever the reasons were, the prohibition of slavery was added to the ordinance at the eleventh hour. This was, of course, not the first time that a prohibition on slavery in the territories had been considered. In 1784 Jefferson had proposed the prohibition of slavery in *all* the national territories after 1800. It is difficult to imagine how Jefferson's proposal would have worked, had it been accepted; by 1800 some of the territories probably would have had large slave populations and politically powerful masters who would have worked to undermine the Ordinance of 1784, had it included Jefferson's prohibition. With no enforcement clause it is almost impossible to imagine a territorial or state legislature voluntarily ending slavery after the institution had been allowed to grow until 1800. There is no indication that anyone at the time considered or discussed how the proposal might have been implemented. Whatever enforcement problems Jefferson's clause might have caused were mooted when Congress defeated the proposal with strong and vocal opposition from the southern states.[22]

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[20] Poole, *The Ordinance of 1787*, 31.

[21] Berkhofer, "Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System"; Onuf, *Origins of the Federal Republic*, ch. 7.

[22] Berkhofer, "Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System," discusses the defeat of Jefferson's prohibition on slavery. No one, as far as I know, discusses the potential enforcement problems of Jefferson's proposal. William Cohen, "Thomas Jefferson and the Problem of Slavery," 511, notes that under Jefferson's proposal "bondage would have been legal in the area for sixteen years; and it seems likely that, if the institution of slavery had been allowed to get a foothold in the territory, the prohibition would have been repealed."

In 1785 Rufus King proposed a similar provision, but it too was defeated without debate. Nor was the slavery prohibition debated in 1787. Nathan Dane, King's successor in Congress, also wanted slavery prohibited, but he initially excluded such a provision from the ordinance because he thought the attempt would be futile. Why it did pass is unclear. When the last minute amendment was accepted with apparently no discussion and little comment, Dane could offer no explanation. He wrote Rufus King that he "had no idea the States would agree to the sixth article, prohibiting slavery, as only Massachusetts of the Eastern States, was present," and thus he "omitted it" from the draft; "but finding the House favorably disposed on the subject, after we had completed the other parts, I moved the article, which was agreed to without opposition." No one in the Congress seemed to think this clause was extraordinary. Dane's comments on it in his letter to King were immediately followed by a discussion of what seemed to matter most to Dane, King, and Cutler: the purchase of land in Ohio. Besides Dane, only William Grayson, another member of the committee, commented on the slavery prohibition in any existing letter. The lack of debate on the article or comment on it by members of Congress, especially the many southerners present, suggests that the clause was not considered particularly important.[23]

The lack of debate on the clause, and the fact that it was tacked on to the document at the last moment, explains why the rest of the ordinance conflicts with the famed Article VI. Throughout the ordinance there are indirect references to slavery. Section 2 provides that "the French and Canadian inhabitants, and other settlers of the Kaska[s]kies, St. Vincent's, and the neighbouring villages, who have heretofore pro-

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According to Merrill D. Peterson, the Ordinance of 1784 ultimately proved to be "ineffectual." *Thomas Jefferson and the New Nation* (New York 1970), 283. Thus, it is likely that even if Jefferson's slavery prohibition had been enacted it never would have been implemented.

[23] Nathan Dane to Rufus King, July 16, 1787, in Burnett, ed., *Letters of Members*, VIII, 621-622. The editors of the forthcoming edition of the letters of members of the Continental Congress at the Library of Congress have been kind enough to share their materials for this period. Except for the letters cited in notes 14, 15, and 23, there are no existing letters indicating that anyone in the Congress even mentioned the slavery prohibition in his correspondence. This in part may undermine Lynd's theory of concerted effort between the convention and the Congress. Manasseh Cutler could not have brought news of the slavery prohibition to the convention because he did not find out the exact wording of the ordinance until July 19. Of the sixteen letters written to or from southern congressmen in the month following the passage of the ordinance, only the Grayson letter cited in note 14 mentioned the slavery provision. *Ibid.*, VIII, 619-639.

fessed themselves citizens of Virginia [may retain] their laws and customs now in force among them, relative to the descent and conveyance of property." The main purpose of this clause was to allow the French settlers to follow French inheritance practices, rather than Anglo-American ones. Much of the property to be inherited, however, was slave property, and it is reasonable to believe that this "property" could still be conveyed through sales and passed on through wills. Much litigation in Missouri and Illinois would eventually focus on the status of the slaves owned by these early settlers of the Northwest.[24]

Article II of the ordinance provided protection for all private property, and required compensation for private property taken for the public good. Did Article VI provide an exception to Article II where slave property was concerned? Article II also provided that the territorial government could never pass legislation which would "interfere with, or affect private contracts or engagements, *bona fide*, and without fraud previously formed." It would not be farfetched to argue, as many slaveowners would, that slave property purchased or acquired before 1787 could not be taken—or freed—without compensation to the master, and that contracts for the purchase, sale, or rent of slaves, made before 1787, were still enforceable in the territory. Such an argument would ultimately be made by Chief Justice Taney in *Dred Scott* v. *Sandford*.[25] While Taney's notions of substantive due process may have been inapplicable for the introduction of slavery into a totally unsettled territory, the concept seems somewhat more reasonable for slaves already present in a territory when the federal government extended its jurisdiction over the area.

Another problem for the application of the slavery prohibition in Article VI is that in other places the ordinance refers to "free male

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[24] For example, in Missouri see *Merry* v. *Tiffin and Menard*, 1 Mo. 725 (1827); *Theoteste* v. *Chouteau*, 2 Mo. 144 (1829); *Nancy* v. *Trammel*, 3 Mo. 306 (1836); *Chouteau and Keizer* v. *Hope*, 7 Mo. 428 (1842); *Chouteau* v. *Pierre (of Color)*, 9 Mo. 3 (1845); and *Charlotte (of Color)* v. *Chouteau*, 11 Mo. 193 (1847), reargued at 21 Mo. 590 (1855), 25 Mo. 465 (1857), and 33 Mo. 194 (1862). In Illinois the leading case is *Jarrot* v. *Jarrot*, 2 Gilman 1 (1845). A number of other Illinois cases involved slaves brought into the Illinois territory after 1787 by the French settlers: *Boon* v. *Juliet*, 1 Scammon 258 (1836); *Choisser* v. *Hargrave*, 1 Scammon 317 (1836); and *Borders* v. *Borders*, 4 Scammon 341 (1843). Apparently a number of cases involving the "French" slaves went unreported. Roger D. Bridges, ed., "John Mason Peck on Illinois Slavery," *Journal of the Illinois State Historical Society*, 75 (Autumn 1982), 201. Slaves brought to Illinois before 1787 were referred to as "French" slaves even if they were owned by Anglo-Americans.

[25] 19 Howard (U.S.) 393 (1857). See also Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York 1978), *passim*.

inhabitants" (Section 9) and "free inhabitants" (Article II). Until Article VI was added at the very last moment, there was no doubt that slavery would be perfectly legal in the area. But, when Article VI was added and the rest of the ordinance was not rewritten, the document contained logical and linguistic contradictions. If there were "free inhabitants" then there must also have been "unfree" inhabitants. This language suggests that the congressmen who initially wrote the ordinance expected slaves to be there,[26] and that after Article VI was added they made no effort to insure that the rest of the language conformed with the new article. Had they done so, the sweeping language of Article VI might have been debated and clarified. Without such clarification and redrafting, the entire ordinance remained at odds with Article VI. These inconsistencies would enable slaveowners in the area to argue that their property rights had not been affected by Article VI.

Finally, Article IV of the ordinance provided for free navigation of the "waters leading into the Mississippi and St. Lawrence, and the carrying places between the same" for all Americans.[27] It is doubtful if the congressmen from the southern states, as well as the representatives from such slave states as New York and New Jersey,[28] who

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[26] It is unlikely that the congressmen were making a distinction between indentured servants and others when they used the term "free inhabitants." For one thing, indentured servants, like apprentices, were usually considered "free," even though they might be under some sort of long term contract. This is clearly the understanding of the Constitution's three-fifths clause (Article I, Section 2). The Articles of Confederation are less clear on this issue. Article IV talks about "the free inhabitants of each of these states" and excludes "paupers, vagabonds, and fugitives from justice." It seems likely that this clause included indentured persons as "free inhabitants." Article IX of the Articles of Confederation allocates quotas for military enlistments based on "the number of white inhabitants." This certainly included white indentured servants. In a strictly legal sense indentured servants were free persons who *voluntarily* contracted to serve someone for a term of years. As such they were not in "involuntary servitude."

[27] In *State* v. *Hoppess*, 2 Western Law Journal 279 (1845), Judge Nathaniel Read of the Ohio Supreme Court refused to free a slave whose master voluntarily allowed him to leave a boat that was temporarily docked in Cincinnati. Read believed that the Ohio River and its wharves were open to unrestricted transit for all Americans, including masters traveling with their slaves. Finkelman, *An Imperfect Union*, 167-172.

[28] New York did not take steps to end slavery until 1799. "An Act for the gradual abolition of slavery," *New York Laws, 1799*, ch. LXII. New Jersey did not act until 1804. "An Act for the gradual abolition of slavery," *New Jersey Session Laws, 1804*, 251. In 1787 there was no indication that New York or New Jersey would end slavery in the near future. See Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago 1967). James Madison told the Virginia ratifying convention in 1788 that these two states "would, probably, oppose any attempts to annihilate

voted for the ordinance, understood it to mean that they could not take their slaves with them when traveling on the important inland water routes of the United States.

Despite the intentions of Dane and others to guarantee that the Northwest would be "free soil," Article VI of the ordinance was ill-suited to the task of ending slavery in the Northwest Territory. It contained no enforcement clause, as would the Civil War amendments to the United States Constitution. The article did not indicate what organ of government—the territorial governor, the territorial judiciary, the territorial legislature (which would not be formed until the territory's voting population reached five thousand), or the national Congress—would take action to end slavery.

Since an end to slavery would require an innovative change in public policy and social institutions, some governmental intervention was necessary. In its failure to provide a mechanism for enforcement Article VI must be compared and contrasted to other parts of the ordinance. Article III, for example, declared that "schools and the means of education shall forever be encouraged." But it neither required that schools be built nor did it provide an enforcement mechanism. In this way Article III and Article VI are similar. But the substance of the articles was so different that in one an enforcement mechanism was unnecessary while in the other it was vital.

A requirement that schools be built, or a declaration of what governmental body should do so, was unnecessary because for more than a century public schools had been built by local communities in America. Americans knew what schools were and knew how to build them. But few Americans had any experience with dismantling an entrenched social system that provided wealth for those who had political power at the expense of those who lacked all power. The education clause could be implemented by those who would benefit from the clause. But those people who would most directly benefit from Article VI were prohibited from participating in the political process, and thus could not insure the implementation of the article. Finally, both the creation of public schools and the abolition of slavery would have financial costs. While the Ordinance of 1787 provided no funds for either object, the Land Ordinance of 1785 had provided that one section in each township would be reserved "for the maintenance of public

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this species of property" because they "had made no attempt, or taken any step, to take them from the people." Jonathan Elliot, ed., *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2nd ed., 5 vols., Philadelphia 1888), V, 459.

schools, within the said township."[29] Thus, the national government had committed financial resources to the education provisions of Article III but not to the prohibition of slavery required by Article VI.

Article III also dealt with Indians, admonishing the settlers to treat them fairly and not take their property without their consent. Unlike slaves, the Indians were in a position to defend their property rights, either in court or on the battlefield. Indeed, as Peter Onuf has recently noted, "emigration to the Northwest [was] . . . sluggish . . . because it took so long to pacify the Indian frontier." The settlers knew that peaceful relations with the Indians might be maintained if this provision of Article III were carried out. Thus, this part of the ordinance could be enforced. Just to make sure, however, Article III also explicitly reserved for Congress the right to declare war and explicitly directed that "laws founded in justice and humanity" would "be made" to protect Indian rights. The policy towards Indians was clear: either the settlers would observe "good faith" towards the Indians or the Congress would intervene.[30] No such threat of intervention existed for Article VI. Nor were the settlers in the territory even admonished to treat the slavery prohibition with "good faith."

The slavery prohibition compared unfavorably to both the education and the Indian provisions of Article III. Those who would benefit most from Article VI lacked the political power to implement it, the legal rights or support to enforce it in court, or the military might to fight for it on the battlefield. Neither the Congress nor the territorial government was directed to pass any enforcement legislation. Moreover, those in the territory who had the power to implement the slavery prohibition were the men least likely to do so.

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[29] "An Ordinance for ascertaining the mode of disposing of Lands in the Western Territory," Act of May 20, 1785, *Journals of the Continental Congress*, XXVIII, 375-381, quotation, 378.

[30] Onuf, "From Constitution to Higher Law," 19. Article II of the ordinance protected such civil liberties as access to the writ of habeas corpus, jury trial, and bail while prohibiting "cruel or unusual punishments," excessive fines, and the taking of property without legal authority or just compensation. These protections could be enforced by the people of the territory through their elected representatives, through petitions to Congress, or by appeals to courts when they were created. With the exception of initiating legal action, slaves in the territory had no way to vindicate their rights. Initiating legal action was made more difficult by the low level of literacy among slaves, their lack of mobility, their lack of money to hire counsel, and laws that prohibited them from testifying against whites. A comparison between Articles II and VI suggests that granting constitutional rights to people is only effective if those people have the power, resources, and liberty to protect their rights.

The ordinance is worth reading and studying as an example of *how not to* draft a statute. It serves to remind legislators, lawyers, and jurists that hastily drafted and poorly planned amendments to legislation, added at the last minute, may not accomplish what their authors wish. Besides not giving any indication how the slavery prohibition was to be enforced, the framers of the ordinance did not resolve the internal contradictions created by Article VI. Thus, its meaning was left to whoever held power in the territory. Had there been a full-fledged debate over Article VI a clearer sense of its meaning might have emerged. In such a debate someone might have asked if the ordinance was meant to free the slaves then living in the territory. Similarly, a debate over Article VI might have clarified the status of the children of slaves in the region. Something modeled along Pennsylvania's gradual emancipation statute might have emerged, which would have specified the status of the existing slaves, their children, and any slaves brought into the territory, either as transients, sojourners, or residents. The ordinance was passed, however, when there were no delegates present from Pennsylvania, Rhode Island, or Connecticut, where gradual emancipation statutes already existed.[31] In fact, all of the delegates who voted for the ordinance came from states where emancipation had never been a political issue. Thus, the exact meaning of Article VI, and how it was to be implemented, was not debated and remained in doubt.[32]

In another context, the ordinance can be seen as an example of the tension between liberty and property inherent in revolutionary America. The "self-evident" truths of the Declaration of Independence—"that all men are created equal," and are endowed with the rights to "Life, Liberty and the pursuit of Happiness"—were, of course, written by a man who owned nearly two hundred

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[31] "An Act for the Gradual Abolition of Slavery," *Pennsylvania Acts, 1780*; "An Act authorizing the manumission of negroes, mulattoes, and others, and for the gradual abolition of slavery," *Rhode Island Laws, 1784*; "An Act concerning Indian, mulatto, and negro servants and slaves," *Connecticut Laws, 1784*.

[32] Massachusetts had abolished slavery through its constitution and judicial decisions. Emancipation had been a political issue in Massachusetts only to the extent that the 1778 Massachusetts constitution did not have a free and equal clause and because it discriminated against blacks. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era* (Chapel Hill 1980), 184. However, to be charitable to Dane and others, when dealing with great social issues—with such monumental questions as human freedom—it may be better to pass what legislation you can, when you can, than to wait until something better can be accomplished at a later date.

slaves. There were numerous slaveowners in the Continental Congress and at the Constitutional Convention. Many of those who struggled against "enslavement" by King George III apparently had few scruples about enslaving others.[33]

Over the years "The Ordinance has become a symbol of the Revolution's liberalism" towards race, at least in part, because it was the only important act by the national government under the Articles of Confederation that indicated disapproval for the peculiar institution.[34] During the revolution Samuel Johnson chided the rebellious colonists by asking, "How is it that we hear the loudest *yelps* for liberty among the drivers of negroes?"[35] Unfortunately, there were no comfortable answers to the question. The American revolutionaries were trapped in an ideology of private property that made it almost impossible for them collectively to give up their own pursuit of happiness for the liberty of others.[36] In the ordinance the ideals of liberty came into conflict with the selfish happiness of the ruling race. Thus, the Congress could easily declare there would be no slavery in the Northwest Territory. It was quite another matter to eliminate the institution there.

Whatever it was supposed to accomplish, Article VI had little immediate impact on the legal status of slaves in the area that would become the states of Indiana and Illinois, where the bulk of the slaves in the territory lived.[37] This area had been French until 1763, when

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[33] On the use of the term "slavery" in the rhetoric of the revolution, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge 1967), esp. ch. 6.

[34] Lynd, "The Compromise of 1787," 186. The only other obvious victories for "liberty" were the constitutional and statutory abolition of slavery in the North (see Zilversmit, *The First Emancipation*) and the Virginia manumission statute of 1782, "An act to authorize manumission of slaves," 11 Hening *Statutes of Virginia* 39, act of May 1782. For a different view see Freehling, "The Founding Fathers and Slavery."

[35] Quoted in Robinson, *Slavery in the Structure of American Politics*, 80.

[36] Linda Grant DePauw has demonstrated that very few Americans in the revolutionary period had the liberty to pursue happiness. Women, minors, propertyless white adult males, free blacks, and of course slaves faced numerous legal restrictions that limited their opportunities and rights. "Land of the Unfree: Legal Limitations on Liberty in Pre-Revolutionary America," *Maryland Historical Magazine*, 68 (Winter 1973), 355-368. Both the ordinances of 1784 and 1787 provided for universal adult male suffrage, although there is no record that free blacks were in fact allowed to vote in the Northwest.

[37] While population figures for this period are unreliable, all evidence indicates that nearly all the slaves in the Northwest lived in what would become Indiana and Illinois. All of the petitions to Congress in favor of allowing slavery in the Northwest came from that area. There were no doubt a few, but very few, slaves in what would

Britain took possession through the Peace of Paris. This treaty guaranteed the property rights of the original French settlers. In 1779 the Northwest was seized by George Rogers Clark, whose home state of Virginia claimed the area under its charter of 1609. Other states also claimed the territory under their charters. Although Virginia never intended to govern the area indefinitely, for a number of political reasons Virginia continued to assert authority over the area until it was ceded to the national government in 1784. Virginia's act of cession transferred possession of the area to the United States government but also protected the property rights of the residents of the territory. When the territory came into the hands of the United States, slaveowners were living there and the national government was obligated to protect their property.[38]

Although the ordinance contained no enforcement mechanism, and would in fact remain unenforced for many years, it nevertheless troubled the slaveowners living in the territory. The Franco-American slaveowners, coming out of a civil law tradition, may have believed that the ordinance was self-enforcing, or would be enforced by the national government.[39] Thus, shortly after the ordinance was adopted, various settlers in the area that later became Indiana and Illinois appointed Barthelemi Tardiveau as their agent to lobby Congress on matters involving land titles and other matters of concern to the Northwest. In July 1788 Tardiveau petitioned Congress "By order & in behalf of the french [*sic*] inhabitants of the Illinois [Country]." The petition asked Congress to secure certain land titles, reimburse the settlers for goods impressed by American soldiers, and to protect the rights of the French settlers in other ways. The last part of the petition noted:

> There is in an Ordinance of Congress, an Ex post facto law . . . which declares that Slavery Shall not take place in the Western territory. Many

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become the states of Ohio and Michigan. N. Dwight Harris, *The History of Negro Servitude in Illinois* (Chicago 1904); Emma Lou Thornbrough, *The Negro in Indiana: A Study of a Minority* (Indianapolis 1957).

[38] See Onuf, *Origins of the Federal Republic*, 75-77; William M. Malloy, ed., *Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers, 1776-1937* (4 vols., Washington 1910-1938), I, 586; and "An act to authorize the delegates of this state in congress, to convey to the United States, in congress assembled, all the rights of this commonwealth to the territory north westward of the river Ohio," 11 Hening *Statutes of Virginia* 326.

[39] Little is written on the transition from civil law to common law in areas north of the present state of Louisiana. One excellent beginning is Morris S. Arnold, *Unequal Laws Unto a Savage Race: European Legal Traditions in Arkansas, 1686-1836* (Fayetteville 1985).

> of the inhabitants of these districts have Slaves, and Some have no other property but Slaves. If they wish to preserve their property, they must transport themselves to the Spanish Side of the Mississipi [*sic*]; but if they do, they Shall lose the lands granted them by Congress. One law tells them: leave the country, or ye Shall forfeit your negroes: the other Saith; Stay in the country, or your lands shall be taken from ye.[40]

The French settlers hoped Congress would resolve their dilemma by allowing them to keep their slaves in the territory and thus hold on to their lands as well. When this request received no action Tardiveau presented a second petition that requested Congress either to modify the slavery prohibition of the ordinance or to "abrogate that part of their Resolve which binds them to a three years residence in the country in order to be entitled to the property of the lands granted them." Once again Tardiveau asserted that the slavery prohibition of the ordinance "operates as an Ex post facto law."[41]

The settlers of the Illinois Country believed the ordinance violated their property rights. The emancipation of slaves could not technically be considered an *ex post facto* law,[42] but the assertion that the ordinance was such a law underscored the popular hostility to it. *Ex post facto* laws symbolized tyranny and oppression; they were also simply bad policy. It was against such arbitrary lawmaking that the revolution was fought. The new national Constitution would prohibit such laws in the United States. The message from Tardiveau and the other French settlers was clear: by destroying property rights in slaves the Congress was violating its revolutionary commitment to fair government and the protection of private property. Justice and human liberty were not an issue for the slaveowners of the Northwest.

For many of those living in the Illinois Country the new United States was simply another "government." Since 1763 the area had been ruled by France, Great Britain, and Virginia. Certainly the settlers could not have felt great attachment for the United States. The

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[40] "Memorial of Barthelemi Tardiveau, July 8, 1788," in Clarence W. Alvord, ed., *Kaskaskia Records, 1778-1790* (Springfield, Ill. 1909), 485-488. See also Arthur C. Boggess, *The Settlement of Illinois, 1778-1830* (1908, rep. Freeport, N.Y. 1970), 50-53.

[41] "Memorial of Barthelemi Tardiveau, September 17, 1788," in Alvord, ed., *Kaskaskia Records*, 491-493.

[42] An *ex post facto* law makes conduct criminal (or changes the punishment or penalty for such conduct, or the rules of evidence to prove such conduct) subsequent to the conduct. Since the holding of slaves was not made criminal under the ordinance, Article VI could not be considered an *ex post facto* law. The taking of property by the state, or altering the nature of property by the state, has never been considered *ex post facto* legislation.

revolution had not been *their* revolution. Thus, when the Congress failed to respond positively to their petitions many of the French settlers voted with their feet. In July 1789 Major John Hamtramck reported that "the King [of Spain] has permitted to the inhabitants living on the American side to settle themselves" in the Spanish territory west of the Mississippi. A few weeks later he noted that "A number of people had gone & were about going from the Illinois to the Spanish Side, in consequence of a resolve of Congress respecting negroes, who . . . were to be free."[43]

Tardiveau could not blame the slaveholding settlers for leaving. He explained to Governor Arthur St. Clair that "the wretched inhabitants of Illinois, who had seen themselves for ten years neglected by that [national] power from which alone they could expect protection, now found that the very first act of attention paid to them pronounced their utter ruin." With the passage of the ordinance "many aggravating circumstances rumored that the very moment" the territorial governor arrived "all their slaves would be set free." Thus, a "panic seized upon their minds" and the wealthiest settlers sought "from the Spanish Government that security which they conceived was refused to them" by the United States.[44]

Those slaveowners who remained in the Northwest Territory quickly discovered that the words of the ordinance were much like the words of the Declaration of Independence. They sounded idealistic but had little force. Although the Congress refused to modify the ordinance along the lines suggested by Tardiveau's petitions, neither did the Congress take any steps to see that the ordinance was implemented. Indeed, Tardiveau explained to St. Clair that he had failed to pressure Congress for a definitive answer to his memorial because "it was needless" and he had already "troubled that body with a number of petitions." Tardiveau assured St. Clair that certain unnamed "gentlemen" in Congress "remarked that the intention of the obnoxious resolution had been solely to prevent the future importation of slaves into the Federal country; that it was not meant to affect the rights of the ancient inhabitants." Tardiveau wanted St. Clair to convey this information to the settlers in the territory. In addition to informing St. Clair of this interpretation of the ordinance, in the summer of 1789 Tardiveau wrote friends in Illinois that "the resolve of

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[43] Major John Hamtramck to General Josiah Harmar, July 29, Aug. 14, 1789, in Alvord, ed., *Kaskaskia Records*, 506-508, 508-509.

[44] Tardiveau to St. Clair, June 30, 1789, in Smith, ed., *St. Clair Papers*, II, 117-118.

Congress respecting the Slavery of this Country was not intended to extend to the negroes of the old French inhabitants." Major Hamtramck "immediately published" this information in an effort to stem the tide of emigration from the Northwest.[45]

Tardiveau was not entirely correct in his assessment of congressional intent. Congress had in fact made no dispositive interpretation of Article VI of the ordinance. Rather, Tardiveau's petitions had been referred to a committee made up of Abraham Clark of New Jersey, Hugh Williamson of North Carolina, and James Madison of Virginia. This committee of slave state congressmen offered a resolution which declared that the

> Ordinance for the government of the Western territory, shall not be construed to deprive the Inhabitants of Kaskaskies Illinois[,] Post St. Vincents and the other Villages formerly settled by the French and Canadians, of their Right and property in Negro or other Slaves which they were possessed of at the time of passing the said Ordinance, or in any manner to Manumit or Set free any such negroes or other persons under Servitude within any part of sd. Western territory; any thing in the said Ordinance to the contrary notwithstanding.[46]

This proposed resolution was never brought before the Congress for debate or a vote. Therefore, it could not really be said to explain congressional intent. At best it indicated what some men in Congress believed to be the best application of the ordinance. As the new Constitution of the United States went into effect, the meaning of the ordinance, passed under the old Articles of Confederation, remained unclear.

On another level, however, this committee report is a significant indication of sentiment on the issue. The report suggests how truly *uncommitted* the Founders were to ending slavery. James Madison's presence on this committee is particularly revealing. On the eve of the adoption of the Constitution the "father" of that document was unwilling to interpret the ordinance in an antislavery light, despite language in it which would have supported such an interpretation.

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[45] *Ibid*; Hamtramck to Harmar, Aug. 14, 1789, in Alvord, ed., *Kaskaskia Records*, 508-509.

[46] *Journals of the Continental Congress*, XXXIV, 540-543, quotation, 541. Tardiveau wrote Governor St. Clair that privately a number of congressmen "remarked that the intention of the obnoxious resolution had been solely to prevent the future importation of slaves into the Federal country; that it was not meant to affect the rights of the ancient inhabitants." Tardiveau to St. Clair, June 30, 1789, in Smith, ed., *St. Clair Papers*, II, 117-118.

Although intellectually opposed to slavery, when given the opportunity Madison was unwilling to take any concrete steps to abolish it in one corner of the country where it was relatively weak. If Madison could not take a stronger position on liberating the slaves in the Northwest, then it is perhaps understandable that others of the founding generation failed to confront the problem of slavery where the institution was more entrenched and the number of slaves was greater.[47]

The committee report seemed to distort the plain meaning of the ordinance. The committee urged the Congress to "construe" it to mean that slaves living in the territory were not in fact emancipated, and that the French inhabitants (and by this time a good number of Anglo-American inhabitants as well) would not be deprived of their property. Slaveowners throughout the nation assumed that their property right in slaves included a right to the children of their female slaves. Thus, the committee report implied some sort of perpetual slavery for the descendants of those slaves living in the territory in 1787, in spite of the ordinance. The committee asked Congress to accept this construction, "any thing in the said Ordinance to the contrary notwithstanding." Such a statement implies that the committee felt the language of the ordinance was "to the contrary" and that the proffered construction violated the plain meaning of the clause.

Like the congressional committee, territorial Governor Arthur St. Clair had no interest in interfering in the master-slave relations of those he governed. Despite the language of the ordinance, the governor saw no reason to take action to end slavery. In 1790 he reported to President Washington that settlers were still moving west of the Mississippi to protect their slave property. To help stop this depopulation St. Clair told the president:

> I have thought proper to explain the Article respecting Slaves as a prohibition to any future introduction of them, but not to extend to the liberation of those the People were already possessed of, and accquired

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[47] At the Constitutional Convention Madison was also unwilling to confront the problem of slavery in the new republic. The most striking example of this was Madison's support of the electoral college. Madison told the Philadelphia Convention that he thought "the people at large" were "the fittest" to choose the president, but he supported the electoral college scheme because otherwise "the Southern States . . . could have no influence in the election on the score of the Negroes." Farrand, ed., *Records of the Convention*, II, 56-57. Madison's role in protecting slavery at the convention is discussed at length in Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in Richard Beeman *et al.*, eds., *Beyond the Confederation: Origins of the Constitution and American National Identity* (Chapel Hill 1986), 188-225.

> [*sic*] under the Sanction of the Laws they were subject, at the same time I have given them to understand that Steps would probably be taken for the gradual Abolition of Slavery, with which they seem perfectly satisfied.[48]

This interpretation assumed that the ordinance was only a directive to the territorial authorities, and that without further legislation slavery might continue. St. Clair was concerned, however, about satisfying the desires of his white, slaveholding constituency, and not with any rights slaves might have under the ordinance. There is no extant record that anyone in the new national government challenged St. Clair's interpretation, perhaps because Washington and his cabinet agreed with it.

A year later, however, St. Clair revealed to Secretary of State Thomas Jefferson that neither he nor his constituents were happy with his earlier interpretation of the ordinance. His initial understanding would prevent the return of those slaveholders who had fled to the Spanish territory because they thought the ordinance would free their slaves. St. Clair felt that those slaveowners who had left the territory should be allowed to return with their slaves. The governor was certain "that the [Spanish] Country itself is much less desirable than on the american side—could they be allowed to bring them [their slaves] back with them, all those who retired from that Cause would return to a man."[49]

Two years later the territorial governor no longer wished to be held to either of the interpretations he offered Washington and Jefferson. St. Clair wrote that the ordinance was "no more than the Declaration of a Principle which was to Govern the Legislature in all Acts respecting that matter, and the Courts of Justice in their Decisions upon Cases arising after the Date of the Ordinance." This idea had been implied in his 1790 letter to Washington. Now he spelled it out. But St. Clair went further still in reinterpreting the ordinance. He asserted that "the Sense of Congress is very well to be known on this Subject by what they have actually done—Viz: By making it unlawful to import into any of the States any Negroes after a certain specified Time, and which is yet to come—so that if any person after the Arrival of that period should import a Cargoe of Negroes there is no

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[48] Governor Arthur St. Clair to President George Washington, May 1, 1790, in Carter, ed., *Territorial Papers*, II, 244-248, quotation, 248.

[49] "Report of Governor St. Clair to the Secretary of State [Thomas Jefferson]," Feb. 10, 1791, in Carter, ed., *Territorial Papers*, II, 332-337, quotation, 333.

Doubt that they would all be free while those that were in the Country before remain in Slavery according to the former Laws."[50]

In his official duties St. Clair never had an opportunity to implement this interpretation of the ordinance. He did, however, use his office to discourage pro-freedom interpretations of it. In 1794 territorial Judge George Turner issued a writ of habeas corpus for slaves owned by another territorial official, Henry Vanderburgh. Turner asserted that all slaves were "free by the Constitution of the Territory" but before the case could come to trial a group of men, allegedly employed by Vanderburgh, kidnaped the blacks and reenslaved them. Turner sought indictments for kidnapping against Vanderburgh and his associates, but St. Clair interceded to protect the kidnappers. St. Clair also informed Turner that the ordinance was prospective only, and could not be used to emancipate slaves living in the territory before 1787.[51]

Turner later tried to liberate other slaves through the use of habeas corpus. Slaveowners complained to St. Clair about Turner, and residents of the Illinois Country petitioned Congress to remove him from office. The pressure was successful. In 1796 United States Attorney General Charles Lee reported to the House of Representatives that Turner should be prosecuted in a territorial court for abusing his office and, if convicted, he might then be impeached and removed from office. In 1797 a congressional committee concurred with Lee's advice, and under this threat Judge Turner resigned his office and left the territory.[52]

At the end of Washington's administration the status of slaves in the Northwest remained substantially what it had been before the ordinance. The territorial governor had publicly and privately asserted that the ordinance applied only to those slaves brought into the Northwest *after* 1787. Slaveholders in the territory, who were often the most

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[50] St. Clair to Luke Decker, Oct. 11, 1793, *ibid.*, III, 415-416. In *Groves* v. *Slaughter*, 15 Peters 449 (1841), the U.S. Supreme Court would make a similar analysis of a provision of the Mississippi Constitution of 1832, which prohibited the importation of slaves as merchandise. The court would assert that this provision could not become enforceable without legislative action.

[51] Judge George Turner to Governor St. Clair, June 14, 1794, in Smith, ed., *St. Clair Papers*, II, 325-326; St. Clair to Turner, Dec. 14, 1794, *ibid.*, II, 330-332.

[52] St. Clair to Winthrop Sargent, Apr. 28, 1795, *ibid.*, II, 340-343; "Inquiry into the Official Conduct of a Judge of the Supreme Court of the Northwestern Territory," *American State Papers*, Class X, *Miscellaneous* (2 vols., Washington 1834), I, 151-152, 157; Governor St. Clair to William St. Clair, June 3, 1795, in Smith, ed., *St. Clair Papers*, II, 372-373.

politically powerful men in the region, were not, however, content with this interpretation. Some had brought slaves into the territory since 1787. Others hoped to bring more slaves into the territory. As of 1797 no slaves appear to have been freed by the ordinance. But the language of the ordinance posed a potential threat to slavery north of the Ohio River, especially for those who owned slaves brought to the territory after July 1787. In the early years of the nineteenth century slaveowners would unsuccessfully petition Congress to modify the ordinance to protect their slaves.[53] In the meantime the territorial governments in Indiana and Illinois would adopt laws to protect slavery and involuntary servitude in those territories. Not until the second decade of the century would slavery begin to end in those jurisdictions. And not until the adoption of the second Illinois constitution in 1848, more than sixty years after the ordinance was passed, would all slavery end in the region.[54]

The sixty-year lag from the adoption of the ordinance to the final abolition of slavery in the Northwest reflects the ambiguous nature of the ordinance. As suggested at the beginning of this essay, many nineteenth century northerners venerated the Northwest Ordinance, in part because of Article VI. Much of this veneration was politically motivated. Those who opposed slavery sought to wrap themselves in the memory of the Founders. Article VI enabled them to do this. Thus, when an attempt was made to make Illinois a slave state, the words of the ordinance and the memory of those who were involved in its passage were important weapons for Edward Coles and his antislavery supporters. Similarly, in the Webster-Hayne debate, Daniel Webster

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[53] These petitions are collected in Jacob Piatt Dunn, "Slavery Petitions and Papers," *Indiana Historical Society Publications* (Indianapolis 1894), II, 443-529. See esp. "Memorial of Randolph and St. Clair Counties, Jan. 17, 1806," 498; "Legislative Resolutions of 1807 [1806]," 507; "Petition of Randolph and St. Clair Counties, February 20, 1807," 510; "Legislative Petition of 1807," 515; and, against slavery, "Petition of Randolph County, February 20, 1807, Counter to the Preceding Petition," 512; "Counter Petition of Clark County," 518; and "Report on the Preceding," 521. "The Report of General W. Johnston, Chairman of the Committee to which the Petitions on the Slavery Question had been Referred," reprinted from the Vincennes *Sun*, Dec. 17, 1808, is at 522. See also "Slavery in the Indiana Territory," No. 222, 9th Cong., 2d sess., House of Representatives, *American State Papers, Miscellaneous*, I, 477-478; and "Slavery in the Indiana Territory," No. 222, 10th Cong., 1st sess., Senate, *American State Papers, Miscellaneous*, I, 484-486.

[54] "A Law concerning Servants. Adopted from the Virginia code, and published at Vincennes, the twenty-second day of September one thousand eight hundred and three . . . ," in Francis S. Philbrick, eds., *Laws of Indiana Territory, 1801-1809* (Springfield, Ill. 1930), 42; Illinois Constitution, 1848, Art. XIII, Sec. 16.

not only used the ordinance to his advantage but tried to claim that a Massachusetts man, Nathan Dane, deserved the credit for its passage. Thomas Hart Benton, who also opposed South Carolina's extremism, invoked the ordinance as well, but claimed the glory for a southerner, Thomas Jefferson.[55]

The use of the ordinance in the debates over slavery suggests its impact on the nation's political culture. But its impact on slavery in the Northwest, especially in what became Indiana and Illinois, is more ambiguous. Slavery continued in Indiana until after statehood. Not until 1820, in *State* v. *Lasselle*, did the Indiana Supreme Court declare that the institution violated the new state constitution. Even then, a few slaves were held until the 1830s.[56]

In Illinois the record is even bleaker. Here slavery remained vigorous throughout the territorial period. Illinois would most likely have adopted a full-fledged system of slavery in 1818 if the territorial leaders had not been certain that Congress would not have granted statehood under a constitution which allowed slavery.[57] Congressional opposition to slavery in Illinois was directly connected to the reverence that some northerners in Congress had for the ordinance. But it was the threat of rejection of a proslavery constitution by Congress, rather than the legal force of the ordinance itself, that preserved Illinois as a nominally free state. Nevertheless, slaveholders in Illinois were powerful enough to protect the institution in the state's Constitution of 1818 and in subsequent legislation.[58] No slaves living in the state were explicitly freed under the constitution and the Illinois Supreme Court did not follow Indiana's lead in interpreting the constitution to have ended slavery. On the contrary, the court continued to support slavery and servitude in the state until the 1840s. Not until the Constitution of 1848 did Illinois finally abolish slavery.[59]

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[55] Poole, *Ordinance of 1787*, 8-9.

[56] *State* v. *Lasselle*, 1 Blackford 60 (1820). In 1820 the United States Census reported 190 slaves living in Indiana. As late as 1840 the census found 3 slaves in the state.

[57] Harris, *History of Negro Servitude in Illinois*, 18; Moore, *The Missouri Controversy*, 34, 54.

[58] Illinois Constitution, 1818, Art. VI, declared that slavery shall not "hereafter be introduced into this State," which implied that slaves already in the state could be retained. This article also upheld certain forms of indentured servitude, and allowed slaves to be brought from other states for limited amounts of time to work in the salt-making industry. See also Moore, *The Missouri Controversy*, 258-287. For a handy list of Illinois laws supporting slavery passed before 1840, see *Slave Code of the State of Illinois* (Julilet [*sic*] 1840), published by the Will County Anti-Slavery Society.

[59] For example, see *Hays* v. *Borders*, 1 Gilman (Ill.) 46 (1844), upholding inden-

Had the ordinance been drafted more clearly, it might have provided a better guide to the legislators of the Northwest. A requirement of gradual emancipation, such as Pennsylvania adopted in 1780, or one of absolute abolition, such as Vermont adopted in its first constitution, might have clarified the intent of the framers of the ordinance and given guidance to the settlers of the territory. Such clarification might have headed off the struggle to legalize slavery completely in Illinois in 1823-1824. It might also have led to freedom for the two to three thousand blacks who remained enslaved in the Northwest between 1787 and 1848.[60] In at least one small corner of revolutionary America the legacy of freedom written into Article VI would then have been a reality to those who were denied their natural rights under existing laws.

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tures made before statehood that amounted to lifetime slavery. Illinois Constitution, 1848, Art. XIII, Sec. 16, finally abolished all slavery in the state.

[60] The exact number of slaves living in Indiana and Illinois is impossible to determine. The 1810 census listed 237 slaves and 393 free blacks in Indiana, "although many of the latter group were undoubtedly held under indentures." Thornbrough, *The Negro in Indiana*, 22. The 1820 census found 917 slaves in Illinois and 190 slaves in Indiana. Undoubtedly many of the 1,677 free blacks in those two states were also held in some form of servitude. As late as 1840 Illinois had 331 slaves. It is likely that more than 2,000 persons were held in slavery in Indiana and Illinois between 1787 and 1848.