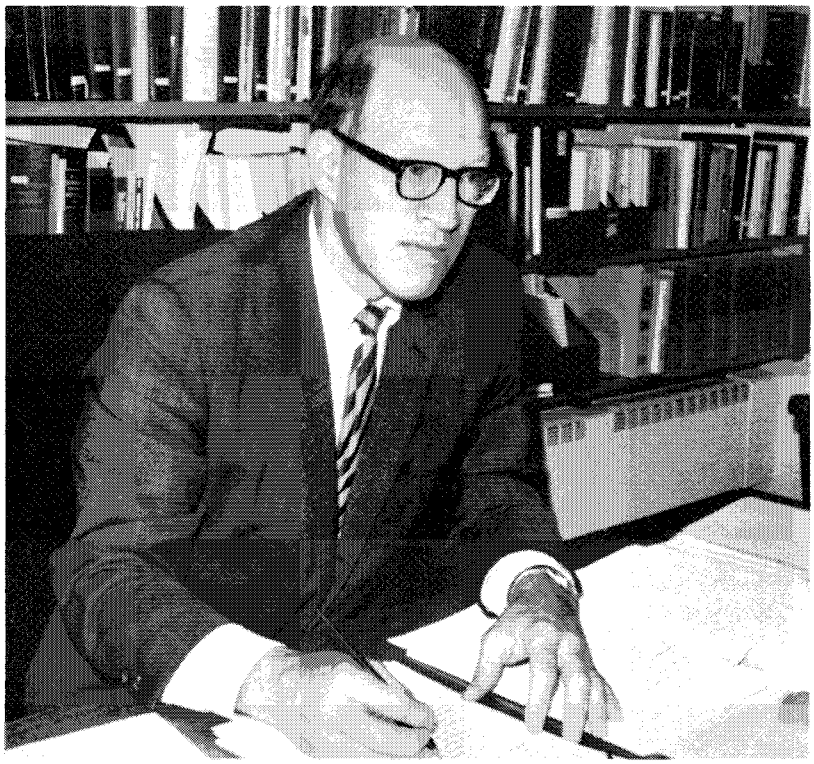
The Northwest Ordinance: Fundamental Law or Trivial Pursuit?

By Professor Gordon B. Baldwin



On July 13th we observed the 200th Anniversary of the Northwest Ordinance, the last significant work of the expiring Continental Congress in New York. It predates the Constitution by two months, but we don't celebrate it with fireworks as we did for the Statute of Liberty, or with the hoopla that at Disneyland began the Constitution's bicentennial. But we should pay tribute, because the Ordinance, I submit, was an indispensable precondition to the success of the Constitutional Convention in Philadelphia. Without the assurance it guaranteed that more states would, in due course, join the union, and that they would dilute the influence of such big states as Virginia, the small states would not have agreed to the federal union.

Three vital forces converged to produce the Northwest Ordinance: high minded idealism, pragmatism, and greed. The authors of the Ordinance, and the minds behind it, included idealists such as Jefferson, honest but aggressive lobbyists like Mannaseh Cutler, politicians with a gift for writing turgid prose like Nathan Dane, and greedy knaves such as William Blount. These remarks focus on those forces and upon the people representing them.

The Continental Congress with its power to dispose of lands was a magnet for rapscallions—hot Philadelphia offered them very little. Hence although there were some overlaps with delegates in Philadelphia acting also as state representatives in New York, the knaves and pharisees mostly collected in New York while perhaps the most competent collection of living Americans gathered in Philadelphia.

The good, the bad and the indifferent politician-drafters of the Ordinance shared a common quality—they were terrible writers. Primary blame for the Ordinance's style and prose must be placed on Nathan Dane, for whom Dane county is named. But there is too much crabbed, inverted and obscure writing to blame on a single mind. The Ordinance's phrasing reflects the worst of our profession. Two of its first three sentences are more than 170 words long.

Who but lawyers would frame a new government by starting with the words, "be it ordained by the authority aforesaid that there shall be appointed from time to time by Congress a governor. . . ."? They didn't teach legal writing in those days.

In contrast to the turgid Ordinance, the language of the Constitution reflects the style and grace of Gouverneur Morris, Chair of the Committee of Style. Much in final draft of the Constitution was written by that brilliant but notorious rake. How many great writers were philanderers!

The Ordinance's stolid prose at the beginning deals with an apparently dreary subject: "Be it ordained . . . that the estates of both resident and non-resident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children, and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild, to take a share of their deceased parent in equal parts among them. . . ."

And so the first substantive part of the Northwest Ordinance of 1787 starts with the rules of intestate succession. There follows, in this dense opening paragraph, directions preserving the law of dower, a rudimentary law of wills, and finally rules for conveying real and personal property.

"First things first." What one places first tells us something about the placer. Who else but lawyers would put the rules of intestate succession and the law of wills in the vanguard of a document charting the course for new governments, and who else but landowners, or potential landowners, would reveal concern about rights to sell and convey property.

Idealism, pragmatism and self-interest are revealed in these initial provisions

relating to intestate succession, and authorizing bequests and transfers by will. Idealism and equality are revealed in treating male and female children equally, and by failing to give any special rights to the first born child. Fairness is exemplified by the Ordinance's recognition that French and Canadian settlers could retain their own laws and customs relating to rights of conveyance and descent.

By focusing first on the right to convey property, inter vivos or by will, the Ordinance's framers promoted the self interest of those representatives with western land claims, and also the interests for which Dr. Mannaseh Cutler lobbied. Mannaseh Cutler is an appealing figure. In the Revolution he served as an Army chaplain. Later he read law, and learned enough medicine to practice that too. He was also an accomplished botanist; he talked shop with Benjamin Franklin, whom he met in Philadelphia. He was in New York and Philadelphia in 1787 because he was a lobbyist—perhaps the first successful one in our history. Several of Cutler's fellow lobbyists were rapscallions. Cutler went back and forth between New York and Philadelphia revealing his concern with the immediate in New York, and with the future plans of the nation being debated in Philadelphia. Cutler was among several people who helped New York and Philadelphia politicians understand each other.

Cutler represented the Ohio Company, which was organized in New England, and he was instrumental in that company's purchase of large tracts of Ohio land from New York, Massachusetts and Connecticut. The Ordinance legitimized some of those cloudy claims, and set the stage for future purchases. Soon after Cutler persuaded the Congress to confirm the Ohio Company's title to 5,000,000 acres for a few cents an acre. The Ordinance made that land marketable. The national government would make a modest profit and the speculative land companies might make a lot more. To buy land wholesale, and sell it retail was the trick, and the land beyond the Ohio River, if it could be pacified, promised vast profits.

The Ordinance like the Constitution, inspires overblown praise. Given its opening, and its origin, Daniel Webster's statement that no law in world history produced effects "more distinct, marked and lasting" than the 1787 Ordinance sounds absurd. Likewise inflated is the claim Senator George Hoar of Massachusetts made 100 years ago that the Ordinance ranked with the Constitution and the Declaration of Independence as one of the three "title deeds of American constitutional liberty."

What is in the Ordinance that inspires such hyperbole, and is it justified? Certainly not the law of wills and of intestate succession. The chief merit is that the Ordinance succeeded where previous efforts to establish a legal regime in the northwest failed. Those failures were spectacular and fully understood by all Americans.

Failure begins with the French. France sent missionaries, explorers and fur traders, but no settlers in large numbers. The Paris government never supported large migration to America. "Why do you wish to depopulate France," scolded Colbert, chief minister to Louis XIV, in response for a plea to promote settlement. Colbert was wise, but not enough to appreciate that world history would indeed be different had French settlers poured into the Mississippi valley as did British settlers onto the Atlantic coast.

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Victorious Britain took over French Canada in 1763 and they also discouraged settlement, but with better reasons. The American colonists were a rough, hardy and prolific breed moving foolishly close to Indian settlements. Naturally Indians and settlers fought, and the brutality of those wars matches anything we've experienced in the 20th century. Many white men inflicted cruelties on the red men as savage as anything the Indians had done to them. The British solution to the Indian conflicts was in 1774 to extend the boundaries of Quebec into the Ohio lands, and most irritating to the colonists to forbid settlement. It would have been easier to stop the tides! This foolhardy prohibition is mentioned in the Declaration of Independence and was among the causes of our Revolution.

After 1783 the promise of rich lands, which could be used to raise revenues, and pay off the Continental Army, inspired new effort to agree upon some legal regime for the wilderness.

Ancestry of the Ordinance, but not its language, is traceable to the imagination and foresight of Thomas Jefferson who in 1784 framed what we may consider the first draft. It was Jefferson who conceived the idea that the settlers to come on those vast, unexplored but Indian occupied lands should form a free society linked to the 13 states by articles of compact. The new territories would, in his view, become new states equal in law to the old. Jefferson also urged that slavery be forbidden, but that idea was quickly put aside.

Only a bare outline of Jefferson's ideas survived the sporadic debates between 1784 and 1787. The idea of a multiplicity of new western states was viewed suspiciously by the North, largely because they feared that Southern interests would dominate them, and that the settlers would either fight Spain, or demand concessions from her. Spain controlled the Mississippi, and showed no signs of giving up that valuable monopoly. New England wanted concessions from Spain too, the right to trade freely with its colonies in Latin and South America. Northerners rightly feared that western settlers would give up free trade interests in return for navigational rights on the Mississippi. So, it looked better to discourage settlements.

It took several years for the knaves to realize that a legal regime for the Northwest would produce an incentive for settlement, and that settlers would buy land retail from those smart enough, or powerful enough, to get title wholesale. Land, they eventually realized, offered better promise of profit than trade by sea. William Blount was one of the greedy.

William Blount's notoriety lies less in the fact that he was a boorish, uneducated, and successful rascal, than in his being the first person expelled from the United States Senate, and the first ever impeached by the House of Representatives. His father was wealthy, but didn't press much formal education on his eldest son. The Blount family's abiding interest was making money. William Blount's indifference as to means was matched only by his success. He could resist anything except temptation. He owned mills, forges, ships and plantations, but it was in western lands that he saw the most promise. He owned millions of acres when he died, young at 51, although a good deal of his land claims rested on forged or false deeds.

William Blount is a sleazy and altogether unappealing figure. At the end of the American Revolution he promoted piracy against British merchants who had some claims of safe passage back across the seas. During 1787 he acquired more than 100,000 acres of western land by inventing dummy purchasers. Any land title traceable to William Blount is surely weak. All in all William Blount was a liar, a cheater and a thief.

Blount was 38 in 1787 and serving as one of North Carolina's representatives

in the Continental Congress in New York. Blount's chief interest, after being frustrated in his hope that he'd be elected President of the Congress, was in buying and selling tobacco, the value of which was enhanced by Virginia's willingness to accept tobacco in payment of taxes. He also sought much more land. But he was distracted by a call for duty, which uncharacteristically he answered.

North Carolina needed another hand at the Philadelphia Convention and Blount's younger brother, John, also an affluent merchant and entrepreneur, recommended him to the friendly Governor of North Carolina. It wouldn't cost much to give double duty to the delegates in New York, so Blount, whose ambitions to become President of the Continental Congress were thwarted, willingly set off for Philadelphia.

Blount arrived at the Constitutional Convention in mid June, and promptly breached the pledge of secrecy by writing a North Carolina friend and describing in detail the Randolph/Madison plans for a federal union. He never said a public word in Philadelphia, but his vote was vital.

Blount's legacy to us lies not in what he bought, or in what he said—evidently he said not a word at the Constitutional Convention. Blount's importance was in where he was at a critical time in July 1787—he was not at Philadelphia where he was a delegate, but in New York promoting the Ordinance. We are fortunate in his choice.

The Convention at this time was deadlocked on the question whether the Senate would reflect population, that is be proportional or whether it's membership would be equal. The small states insisted on equal representation, the large ones, including North Carolina, demanded proportional representation.

Each state voted as a unit: if a state's delegates were tied, the state's vote was not counted. The Georgia delegation narrowly favored proportional representation in the Senate, but at a critical time two Georgia representatives favoring proportionality left town. This left the Georgia vote divided, and hence null. The Convention was equally divided, and in effect the large states lost their battle for proportionality.

Blount bears some responsibility for the Georgia split. He and his two Georgia colleagues who favored proportionality might well have changed history by their votes. But they never voted, instead they hurriedly scurried off to New York. Their absence saved the day. The Convention continued; the small states were mollified, and were willing to make some concessions to their larger neighbors. With Blount's group present it's entirely likely the Constitutional Convention would have foundered on the small state versus large state acrimony.

Why did Blount so hurriedly return to New York? A short note from the secretary of the Continental Congress told him that he, and his Georgia friends were needed in New York to make a quorum. If a quorum could be gathered, an ordinance authorizing disposition might make the lands of the northwest available for quick sale. Blount realized his personal interests would be immediately served. The land speculators were getting impatient. They wanted the Northwest Ordinance passed quickly. They summoned Blount, Few, Pierce and Hawkins. They came, voted and prospered.

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They had other immediate interests. The Continental Congress might, they prayed, supply aid to the settlers in Tennessee who were hard pressed by Indians. The Congress might also be persuaded to obtain navigation rights on the Mississippi from Spain.

Congress had toyed with the Ordinance for nearly three years, but there was no agreed upon text. What it approved on July 13th was a hurriedly prepared final draft, a condition that doubtless contributed to its graceless prose.

The Ordinance allowed the United States to become the most successful colonizing nation in all history. The Ordinance promoted colonization without the promise of long colonial rule. As soon as enough people congregated an area would become a state, but only after defeating the Indians in battle. It was military victories, not a statute, that permitted settlement. The first victory was in 1795 when the Indians, defeated by Mad Anthony Wayne abandoned the lower midwest. Then only a few thousand people inhabited the Territory. Eighty five years later there were more than eleven million, and nearly half of the total wealth of the nation was held in the five states formed from the old northwest. Military victory was the indispensable precondition for settlement. The Ordinance supplied the mechanics for exploiting those victories.

More important, the Ordinance supplied a natural and convenient model for other territories. Thirty-one of the 50 states joined the union under the principles of the Northwest Ordinance.

The Ordinance has two parts. Part I establishes the interim rules for that vast mostly unexplored land. With the exception of the property rules the document is procedural. It tells us how the land shall be governed in the beginning, and how, "five thousand free male inhabitants of full age" can elect representatives to a territorial assembly. Like the contemporaneous Constitution, the Ordinance is largely a procedural document telling us how, and when, the settlers can create a new local government. The Ordinance promotes colonization, but not colonialism, for it tells us how, in due course, the settlements may become states on an equal footing with the original 13.

The "equal footing" doctrine that all states must be treated equally has roots in the Ordinance as it has in the Constitution itself. It is remarkable that newcomers to the union enjoy the same rights as those in the original parts of the nation.

Part II of the Ordinance consists of the "Articles of Compact" between the "original states and the people and states" in the northwest. This part of the ordinance is substantive law. The compact binds the new states, and in form and substance it constitutes more formidable limits on government than were supplied by the XIVth Amendment eighty years later.

Part II, the Articles of Compact, makes the Ordinance enduring. The contents of the Compact explain why for years it was periodically republished in the biennial collection of Wisconsin Statutes. The Articles of Compact are superior to state laws and state constitutions. They reflect modern values despite their graceless form. The 6 Articles concern religion, the protection of civil liberties, Indians, taxes, navigable waters; new states, and slavery. It is these provisions that give the Ordinance permanent value.

The clause calling for freedom of religion supplies an instructive contrast to the first amendment. It has no establishment clause, the source of our greatest difficulty in accommodating religion and government. It simply states that: "no person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments." Instead of a clause like the Establishment Clause, forbidding too much government aid, the Ordinance actually encourages the teaching of religion, and thus accommodates church and state interests in ways that Chief Justice Rehnquist would like to promote today! "Religion, morality, and knowledge being necessary to good gov-

ernment and the happiness of mankind, schools and the means of education shall forever by encouraged." Nothing in the Ordinance forbids teaching religion in the schools.

At the last minute a clause forbidding slavery was added. This was not simply unselfish idealism, it was self interest as well. Congress had earlier rejected the abolitionist measure, but in 1787 half the Continental Congress was from the south, and southerners feared that new states might compete with them in growing cotton, indigo and tobacco—crops which slave labor made profitable. Best eliminate slavery and eliminate dangerous competition. So, like the Temperance Union and the bootleggers in Kansas who march together to the polls to vote dry, the interests of slave owners and abolitionists converged and they voted together to abolish slavery in the new lands.

The speculators who already had purchased land in the unsettled west were worried—their titles were by no means clear given the bribery, theft, and naked force underlying their claims. The Ordinance, while not explicitly recognizing these cloudy titles, did allow claims, however shady, to be conveyed and bequeathed.

Notable, and it was a practical as well as an idealistic move, the lands and properties of the Indian inhabitants were recognized. Doubtless the protection of Indian claims was more a pious platitude than a significant limitation on invading settlers, but it did promote an important value. The settlers, knowing that Indian land claims had some legal basis, were encouraged to deal with the tribes and make treaties with them. Without the Ordinance it would be cheaper to simply fight. In reality the Indians had no real choice but to fight or make the best deals they could and move further west—the Ordinance supplied some incentive to make treaties, but many Indians fought. Without the Ordinance, however, fighting would have been the norm—with it treaties, even ones we now view as unfair, were encouraged.

It is not, moreover, in any way a model representative government. Its method for choosing the first territorial government is authoritarian. Congress appoints the governor, for a three year term, a secretary for a four year term, and a three judge court, the judges to hold office "during good behavior." So littered among the miasmic prose are the roots of an independent judiciary.

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Basically the Ordinance is framed to promote colonization. In the first stage of territorial government the inhabitants have no rights to self government. Even in the second stage, reached when 5,000 free male inhabitants appear, rights of self government are minimal. The governor still appoints major government officials and has an absolute veto over territorial laws passed by the elected representatives. Substantial property qualifications for voters assured that relatively conservative legislators would be chosen. One sees in the second stage government the ideals of a monarchy which a few of our early leaders promoted. That the settlers did not like this part of the Ordinance is suggested by the first state constitutions which established male suffrage, and which made their governors weak.

The document is littered with ambiguity and questions that necessarily had to be answered promptly. If draftsman today wrote so sloppily their malpractice carrier would surely cancel their policy. In the first stage the governor and the judges, or a majority of them, are empowered to "adopt and publish" such laws of the original states as best suited for the territory. They presumably can't make new laws, they merely can import laws already existing on the seaboard. Could a law once adopted for the territory be repealed? Could only portions of existing state laws be imported, or must the whole statute, which might include appeals to the Privy Council in England, be adopted. These unanswered questions simply illustrate the slovenly language of the Ordinance.

When the Ordinance says a majority of the four (Governor plus 3 judges) may adopt and publish laws does it mean that the three judges can act alone? Is the signature of the governor required? In short the Ordinance is so slovenly written that it is hard to acknowledge it as the product of a committee of lawyers.

But these are in large measure quibbles. What makes the Ordinance great, important, and in some measure enduring are:

1. It settled, albeit imperfectly, competing state claims, and supplied an assurance that the nation would grow and the influence of the old seaboard states would be diluted.

2. It promoted notions of equality—new settlers and new states would stand on equal footing with the old.

3. It supplied a small, but indelible model upon which self governing territories could be formed, which would, in the course of human events become states.

It did these jobs awkwardly. Hence the Ordinance confirms Lord Chesterfield's poignant observation, that "anything worth doing, is worth doing badly."

The Ordinance is worthy of note, but not worthy of being read aloud.