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"No Person . . . Shall Ever Be Molested on Account of His Mode of Worship or Religious Sentiments": The Northwest Ordinance of 1787 and *Strader v. Graham*

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**“NO PERSON . . . SHALL EVER
BE MOLESTED ON ACCOUNT OF
HIS MODE OF WORSHIP OR
RELIGIOUS SENTIMENTS . . .”:
THE NORTHWEST ORDINANCE OF 1787
AND *STRADER V. GRAHAM***

ALLAN W. VESTAL*

The Article looks at the first article of compact of the Northwest Ordinance, the religious liberty guarantee: “No person . . . shall ever be molested on account of his mode of worship or religious sentiments” Congress provided that the Northwest Ordinance articles of compact would “forever remain unalterable.” But in a fugitive slave case from 1851, Strader v. Graham, Chief Justice Roger Taney declared the articles of compact to be no longer in force.

In evaluating Chief Justice Taney’s reasoning, the question posed at the dawn of the 20th Century by historian Professor Andrew McLaughlin is instructive: “Will they say that, because the men of 1787 did not act and speak in the terms of philosophy which arose from the civilization of the next century . . . they did not do what they intended to do?” Using the language and history of the Northwest Ordinance, the Article argues that Chief Justice Taney’s conclusion was in error.

The religious liberty protection of the Northwest Ordinance first article of compact is arguably broader than that of the First Amendment. The article suggests that it should be available to protect individuals disadvantaged and discriminated against on the basis of their beliefs on matters of religion. Such protection would extend to the over ninety million Americans who live in states as to which the first article of compact was made applicable.

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I. INTRODUCTION

With the Declaration of Independence, the Articles of Confederation, and the Constitution, the Northwest Ordinance of 1787 is one of the nation's constitutional documents.¹ Enacted by the Confederation Congress, the Northwest Ordinance established territorial government for the Northwest Territory, and a path for admission to the Union for the states to be created out of the Territory.²

1. See Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 940–41 (1995). The U.S. Code places the Northwest Ordinance at the beginning of Volume 1, together with the Declaration of Independence, the Articles of Confederation, and the Constitution. *Id.* at 929.

2. The Northwest Ordinance of 1787 governed the areas south of the Great Lakes, north and west of the Ohio River, west of Pennsylvania, and east of the Mississippi River. Ordinance of 1787: The Northwest Territorial Government, reprinted in 1 U.S.C. at LV (2006), [http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field\(DOCID+@lit\(bdsdcc22501\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field(DOCID+@lit(bdsdcc22501))) [<https://perma.cc/QFU9-6Q5G>] [hereinafter *Northwest Ordinance*] (reproduced in Appendix A). The Northwest Territory as originally constituted included lands that would eventually become the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin, and the part of Minnesota east of the Mississippi River. *Map of the Northwest Territory*, WORLD MAPS, <https://wiki--travel.com/detail/map-of-the-northwest-territory-6.html> [<https://perma.cc/7ZQF-3QPE>] (last visited Mar. 22, 2019). In 1836, the lands between the Missouri River and the Mississippi River north of Missouri were added to the Wisconsin Territory and became subject to the articles of compact of the Northwest Ordinance. Act of Apr. 20, 1836, ch. 54, §§ 1, 12, 5 Stat. 10, 10, 11, 15 (establishing the territorial government of Wisconsin). This added the lands that would become the state of Iowa, the western portion of Minnesota, and the eastern portions of North and South Dakota. Randall Schaetzl, *Michigan's Boundaries Through Time*, MICH. ST. U., <http://geo.msu.edu/extra/geogmich/michigansboundaries.html> [<https://perma.cc/SUH7-79T4>] (last visited Mar. 22, 2019).

But the Northwest Ordinance was not intended by Congress to merely manage the period to statehood. The Ordinance provides permanent substantive guarantees for the people of the Territory and the states to be created. Congress included in the Ordinance six “articles of compact” with guarantees ranging from religious liberty to habeas corpus to anti-slavery to freedom of navigation, and provided that the articles of compact would “forever remain unalterable.”³

At the turn of the Twentieth Century, renowned historian Andrew Cunningham McLaughlin noted the importance of the Northwest Ordinance, which he termed “a great state paper,” valuable for “proclaiming in simple, straightforward language the fundamental principles of civil liberty.”⁴ He wrote:

[T]he Ordinance of 1787, which, because of its wise provisions and liberal terms, has justly been considered one of the most important documents in our history. It was the consummation of long discussion and much effort, and laid down a series of fundamental principles of great significance in building up the Union west of the mountains.⁵

Notwithstanding the perpetual language of the articles of compact, in an 1851 fugitive slave case, *Strader v. Graham*, Chief Justice Roger Taney declared the Northwest Ordinance “is not in force.”⁶ Chief Justice Taney’s analysis in *Strader* is unconvincing and is not redeemed by the reasoning of the two Supreme Court cases upon which he relied; *Permoli v. City of New Orleans*⁷ and *Pollard v. Hagan*.⁸

It is interesting to contemplate how our legal history might have played out differently had Chief Justice Taney not erred in his finding that the Northwest Ordinance was not in force in 1854. Of course, several of the articles of compact were overtaken by events within a few years of *Strader*. The provision of the fourth article of compact, that the territory governed by the Northwest Ordinance “shall forever remain a part of this confederacy of the United States of America,”⁹ and the anti-slavery guarantee of the sixth article of compact,¹⁰ were rendered moot in 1865 by Union bayonets and ratification of the

3. *Northwest Ordinance*, *supra* note 2, § 14.

4. ANDREW CUNNINGHAM McLAUGHLIN, *THE CONFEDERATION AND THE CONSTITUTION: 1783–1789*, at 122 (1905) [hereinafter McLAUGHLIN, *CONFEDERATION*].

5. *Id.* at 120.

6. 51 U.S. 82, 94 (1851).

7. 44 U.S. 589 (1845).

8. 44 U.S. 212 (1845).

9. *Northwest Ordinance*, *supra* note 2, § 14, art. IV.

10. *Id.* § 14, art. VI.

Thirteenth Amendment. The fifth article of compact, regarding the admission of states out of the Northwest Territory, was outdated by the admission of South Dakota and North Dakota in 1889.¹¹ But the other articles of compact might have had continuing impact.¹²

Had Chief Justice Taney not erred, and had the Northwest Ordinance remained in force, it is especially interesting to consider how the religious liberty protections of the first article of compact—that “[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments”¹³—might have changed our legal history. Between *Strader* in 1851 and the 1940s, when the First Amendment establishment and free exercise guarantees were incorporated as to the states, the religious liberty guarantees of the Ordinance might have given an alternative theory to citizens disadvantaged because of their beliefs on matters of religion.¹⁴

Nor is the question of merely historic interest. The religious liberty guarantees of the first article of compact are arguably broader than those of the First Amendment. We might well consider how the correction of Chief Justice Taney’s *Strader* error might today provide citizens with another theory with which to vindicate their religious liberty claims.

The following discussion starts with a brief history of *Strader*, the fugitive slave case that gave Chief Justice Taney the setting for his declaration that the Northwest Ordinance was no longer in force. We then review the history, coverage, and operation of the Northwest Ordinance. We then discuss Chief Justice Taney’s *Strader* opinion, starting with the two Supreme Court decisions upon which he relied. *Permoli* involved the religious liberty guarantees of the first article of compact in the case of a priest prosecuted by the City of New

11. *Id.* § 14, art. V. South and North Dakota were both admitted to the Union in 1889. *U.S. Territory and Statehood Status by Decade, 1790–1960*, U.S. CENSUS BUREAU (Feb. 21, 2013), <https://www.census.gov/dataviz/visualizations/048/508.php> [https://perma.cc/2FKP-C6VD] [hereinafter *Statehood Status*]. They were the last states admitted from the Northwest Territory, as expanded. The last state admitted that was governed by the Northwest Ordinance articles of compact, as incorporated by reference into the legislation creating the predicate territory, was Wyoming, which was admitted in 1890. *Id.*

12. *See infra* note 381.

13. *Northwest Ordinance*, *supra* note 2, § 14, art. I.

14. The Supreme Court held the First Amendment inapplicable to the states even after ratification of the Fourteenth Amendment. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) (holding the First Amendment right to freely assemble not applicable to the states). As to the religious liberty guarantees, the Supreme Court found in favor of incorporation only in the 1940s, nine decades after *Strader*. *See Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (incorporating free exercise guarantee); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 7 (1947) (incorporating guarantee against establishment of religion).

Orleans for violating its city ordinance against open-casket funerals.¹⁵ *Pollard* involved the fourth article of compact on navigable rivers and a case of competing claimants for a plot of land in Mobile, Alabama.¹⁶ The discussion continues with an argument Chief Justice Taney added to those from *Permoli* and *Pollard*, and concludes that the *Strader* opinion was in error because of an essential structural misreading of the Northwest Ordinance. The discussion then turns to the reactions to Chief Justice Taney's opinion in *Strader* and concludes with a suggestion as to how a reversal of the *Strader* error might benefit contemporary litigants on some highly contentious issues.

II. *STRADER V. GRAHAM*: THE KENTUCKY COURTS

In the late summer of 1837, Dr. Christopher Columbus Graham, a leading citizen of Harrodsburg, Kentucky, wrote a letter granting permission for two of his slaves to journey some seventy-five miles to Louisville and beyond.¹⁷ The slaves, Henry and Reuben, were talented musicians and Dr. Graham was sending them to Louisville to perform and travel with Williams, “a free man of color.”¹⁸

This is to give liberty to my boys, Henry and Reuben, to go to Louisville with Williams, and to play with him till I may wish to call them home. Should Williams find it his interest to take them to Cincinnati, New Albany, or to any part of the South, even so far as New Orleans, he is at liberty to do so. I receive no compensation for their services except that he is to board and clothe them. My object is to have them well trained in music.¹⁹

Dr. Graham had a hotel at Harrodsburg Springs, “the most fashionable resort in Kentucky,”²⁰ where patrons received the healing benefits of the waters and were entertained by his slave musicians. During the “watering season,” Henry and Reuben performed at Dr. Graham's hotel, joined by a third slave, George.²¹ The three comprised “a splendid band of music” which was a centerpiece of Dr. Graham's resort:

15. See *Permoli v. City of New Orleans*, 44 U.S. 589, 589 (1845).

16. *Pollard v. Hagan*, 44 U.S. 212, 212–13 (1845).

17. *Graham v. Strader*, 44 Ky. (5 B. Mon) 173, 174 (1844).

18. *Id.*

19. *Id.* at 173.

20. Robert G. Schwemm, *Strader v. Graham: Kentucky's Contribution to National Slavery Litigation and the Dred Scott Decision*, 97 KY. L.J. 353, 372 (2009) (quoting J. WINSTON COLEMAN, JR., *THE SPRINGS OF KENTUCKY: AN ACCOUNT OF THE FAMED WATERING-PLACES OF THE BLUEGRASS STATE, 1800–1935*, at 24 (1955)).

21. *Id.* at 372–73.

During the day, this band was stationed in a stand on the grounds: “before daylight you are awakened by the delightful music which continues until night, when it is moved to a most splendid ball-room where you enter dazzled by the glittering lights and interesting company.” As for the slave musicians: “Dr. Graham’s three slave boys composed the house orchestra, competing with the professional actors for the entertainment spotlight of the resort. George, Henry and Reuben’s musical abilities were well known throughout the South, and for years they furnished the music for the gay dances and cotillions held in the large ballroom at the Springs.”²²

In the off-season, Henry and Reuben played engagements around the region.²³ They journeyed with Williams once to Cincinnati, Ohio, once or twice to Madison, Indiana, and two or three times to New Albany, Indiana.²⁴ Accompanied by George they performed in towns near Lexington, Kentucky.²⁵

In his earlier letter granting permission for Henry and Reuben to travel out of Kentucky, Dr. Graham spoke of their character:

They are young, one 17 and the other 19 year of age. They are both of good disposition and strictly honest, and such is my confidence in them that I have no fear that they will ever act knowingly wrong, or put me to trouble. They are slaves for life, and I paid for them an unusual sum; they have been faithful hardworking servants, and I have no fear but that they will always be true to their duty, no matter in what situation they may be placed.²⁶

At the end of January 1841, Henry, Reuben, and George, boarded the steamboat *Pike* in Louisville and made the overnight run to Cincinnati.²⁷ But Dr. Graham’s confidence that his slaves would “be true to their duty” was misplaced.²⁸ From Cincinnati they journeyed to Canada and freedom.²⁹

22. *Id.* at 373 (quoting COLEMAN, *supra* note 20, at 27, 44).

23. *Graham*, 44 Ky. at 175.

24. *Id.*

25. *Id.*

26. *Id.* at 174.

27. *Id.* at 173.

28. *Id.* at 174.

29. *Id.* at 173. What became of Reuben, Henry, and George, whose escape to freedom in Canada ultimately led to the Supreme Court case of *Strader v. Graham*? There is no further evidence as to Henry and George. But Reuben may have reappeared in an intriguing entry in the 1861 Ontario census. The entry is for the southernmost portion of Essex County, directly across the Detroit River from Detroit, which was in the 1840s a frequent destination for escaping slaves. It was for a man with the first name Reuben, who was listed as a “colored person” born in the United States. *Canada West Census of 1861*, LIBR. & ARCHIVES CAN. (Oct. 15, 2016), <https://www.bac->

Dr. Graham pursued the trio to Canada, intending to either kidnap them or persuade them to return to Kentucky and slavery.³⁰ Failing in his attempt, he returned to Kentucky and sought compensation for his economic loss.³¹ He brought an action in the Louisville Chancery Court, seeking damages from Jacob Strader and James Gorman, the owners of the *Pike*, the steamboat upon which the trio had traveled to Cincinnati on the first leg of their journey to freedom, and an attachment of the steamboat itself.³² As outlined by the Kentucky Court of Appeals, the legal basis of the action was a pair of Kentucky statutes:

The acts of 1824 and 1828, (*Stat. Law*, 259–60,) by their joint effect, make the owners, master, &c., and the boat liable, for taking out of the limits of this State, any slave, who has not in his possession, a record of some Court of the United States, properly exemplified, proving his right of freedom, unless the owner or master, &c., of the boat shall have the permission of the master of the slave for such removal; and not only is the offending party made liable in damages to the party aggrieved by such removal, but also, to indictment, and fine, and imprisonment, at the discretion of a jury, and the boat itself is made liable to the party aggrieved, to be proceeded against by suit in Chancery, and condemned and sold to pay the damages.³³

In the Chancery Court, the steamboat owners argued that Henry, Reuben, and George had gained their freedom before their travel to Cincinnati on the *Pike*, by virtue of Dr. Graham's permission for their earlier travels to free states:

[T]hat the said slaves are musicians, and have been, (since a long time previous to their alleged escape,) allowed by the

lac.gc.ca/eng/census/1861/Pages/item.aspx?itemid=1038351 [https://perma.cc/J6JH-4YNT]. His estimated age was shown as 35; his estimated birth year was 1826. *Id.* The age and birth year are somewhat inconsistent with the other information we have about the Reuben from *Strader*, but perhaps not fatally so. If this entry was for the Reuben of *Strader*, we learn something of his life in Canada. He was a farmer and married to a thirty-five-year old "colored person" born in the United States whose name is indecipherable on the record. *Id.* They lived in a log cabin and had four children: fourteen-year-old Eliza, seven-year-old Jonathan, five-year-old Malissa, and newborn Comodore. *Id.* The census record reports that Eliza was born in 1847 in the United States, which might be inconsistent with her being the daughter of the Reuben of the *Strader* case. The other children are all listed as having been born in Canada. Was this the Reuben of *Strader*? We cannot know for sure, but the census record offers one final tempting clue: his last name. Reuben would not have been identified by a last name when he was enslaved in Kentucky. But once he reached Canada, he would have selected a last name. The Canadian census tells us Reuben's last name. *Id.* It was "*Strauder*." *Id.*

30. Schwemm, *supra* note 20, at 353.

31. *Graham*, 44 Ky. at 173.

32. *Id.*

33. *Id.* at 176.

complainant to travel about as free negroes, and to play at parties, public and private, and to receive their wages earned by them: and that they have frequently been allowed to go out of the Commonwealth as if they were free.³⁴

An amended answer supplemented the claim:

[T]hat the complainant allowed the slaves to go to Louisville to live with Williams, a free man of color, to learn music, and afterwards gave them written permission to go to the State of Ohio, that they did go and remained there a long time, and were sent there by complainant's direction, to perform service as slaves, and that in consequence thereof, they acquired a right to freedom, and are free, and were so when the bill was filed and long before.³⁵

In the Chancery Court Dr. Graham prevailed as to George, but not as to Henry and Reuben.³⁶ On appeal by Dr. Graham, the Kentucky Court of Appeals rejected the Chancery Court's ruling as to Henry and Reuben, declaring that "these statutes, and the protection which they intended to give to the owners of slaves in Kentucky" should not be "frittered away by construction, and rendered wholly delusive."³⁷ Although the Court of Appeals was highly critical of Dr. Graham's behavior, asserting that his "conduct . . . in regard to these slaves, was contrary to the laws and policy of the State, and furnished an evil example which was calculated to withdraw other slaves from their duties, and to create in them a desire for similar indulgences,"³⁸ it found neither the pattern of travel nor the 1837 writing constituted sufficient evidence of permission by Dr. Graham.³⁹

The steamboat owners' second argument involved the Northwest Ordinance of 1787:

It is contended . . . that the bill was properly dismissed as to them, because, under the authority contained in the writing referred to, and therefore with the consent of their owner, the

34. *Id.* at 173–74.

35. *Id.* at 174.

36. *Id.* at 174–76.

37. *Id.* at 176.

Now, it seems to us, that unless these statutes, and the protection which they intended to give to the owners of slaves in Kentucky, are to be frittered away by construction, and rendered wholly delusive, the liability which they impose, cannot, in the absence of record evidence of freedom of the slave removed from the State in a steamboat, be avoided or evaded, except by showing the express or implied permission of the owner of the slave, that he may be so removed at the time.

38. *Id.* at 184–85.

39. *Id.* at 176–79.

slaves, Henry and Reuben, were taken into the free States northwest of the Ohio, where, by the ordinance of Congress, for the government of the Northwestern Territory, embracing those States, slavery was prohibited, for the purpose of working, and did there [sic] work as slaves, for wages received by Williams or themselves, and that they thereby became free before the asportation complained of, and consequently, that the complainant has no right to complain of that act, or to recover damages therefor.⁴⁰

The Kentucky Court of Appeals rejected the argument that Henry and Reuben became free as a result of travel permitted by Dr. Graham to states governed by the Northwest Ordinance:

We know that the ordinance referred to declares, “that there shall be neither slavery nor involuntary servitude in the said territory,” &c., and that the States which have been formed in that territory reject slavery as an institution. But while it may be admitted, that in consequence of this principle, no citizen or inhabitant of one of those States can hold another person as a slave in that State, it does not follow, and we do not admit that the citizen of another State, whose laws recognize and establish this species of property, loses instantaneously and forever, by the mere force of this general principle, all dominion and right of property in his slave whom he has taken with him in travelling through one of those States, or in a temporary and momentary sojourn for a particular purpose of business or pleasure, so that upon the voluntary and immediate return of both into their own State, the pre-existing relation of master and slave must, in view of their own laws, be regarded as at an end.⁴¹

The Court of Appeals reversed and remanded the matter to the Chancery Court in Louisville.⁴² It resurfaced in the Kentucky Court of Appeals three years later, when the intervening proceedings in the Chancery Court granting Dr. Graham relief for the loss of all three slaves were affirmed.⁴³

40. *Id.* at 179.

41. *Id.* at 180.

42. *Id.* at 187.

43. See *Strader v. Graham*, 46 Ky. 633 (7 B. Mon.), 635 (1847). Not all of the commentary on the case is accurate. Dena J. Epstein & Rosita M. Sands, *Secular Folk Music*, in *AFRICAN AMERICAN MUSIC: AN INTRODUCTION*, at 35, 42 (Mellonee V. Burnim & Portia K. Maultsby eds., 2d ed. 2015) (reporting incorrectly the Chancery Court outcome (“The court found that the unusual privileges permitted them rendered them restless under restraint and desirous of freedom. Damages were denied.”) and ignoring proceedings in the Kentucky Court of Appeals and United States Supreme Court).

The matter was next appealed to the United States Supreme Court.⁴⁴ Jurisdiction of the Court was asserted under Section 25 of the Judiciary Act of 1789,⁴⁵ based on the claim that the slaves were free before they embarked on the *Pike*, by virtue of the anti-slavery article of compact of the Northwest Ordinance.⁴⁶

Before reviewing the Court's analysis in *Strader*, we turn to the history, coverage, and structure of the Northwest Ordinance.

III. THE NORTHWEST ORDINANCE OF 1787: "[F]OREVER REMAIN UNALTERABLE"

A. History of the Northwest Ordinance

The Northwest Ordinance of 1787, "*An Ordinance for the government of the territory of the United States northwest of the river Ohio*," passed the Confederation Congress on July 13, 1787.⁴⁷ It is comprised of fourteen sections.⁴⁸ The first twelve sections provide the oftentimes mundane rules for the creation of the institutions of government in the territory prior to the

44. See *Strader v. Graham*, 51 U.S. 82, 93 (1851).

45. See Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 25 (1789) ("That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . .").

46. *Northwest Ordinance*, *supra* note 2, § 14, art. VI ("There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted . . .").

47. *Id.* § 14. Only one individual in the Confederation Congress voted against passage, and there seems to have been a good explanation as to why:

The vote on [the Northwest Ordinance of 1787's] passage was unanimous, that is, the votes of the eight States present . . . were all affirmative. Yates of New York was the only individual who voted no. . . . The only explanation of this vote to be found, is given in Dane's letter to Rufus King, . . . that Yates "appeared, in this case, as in most others, not to understand the subject at all."

John M. Merriam, *The Legislative History of the Ordinance of 1787*, AM. ANTIQUARIAN SOC'Y 323-24 (1888), <https://www.americanantiquarian.org/proceedings/48055801.pdf> [<https://perma.cc/3BTU-KYCJ>].

48. *Northwest Ordinance*, *supra* note 2, §§ 1-14. Although in most modern presentations the text of the Northwest Ordinance is divided into separately numbered sections, in the original document they were not. In the original, only the six articles of compact were separately numbered. *An Ordinance for the Government of the Territory of the United States, North-west of the River Ohio*, LIBR. CONGRESS, <https://www.loc.gov/resource/bdsdcc.22501/?sp=1> [<https://perma.cc/EZF9-JRVX>] (last visited Mar. 26, 2019). Thus, what we refer to as Sections 13 and 14 were, in the original, one long sentence presented in two paragraphs.

definition, creation, and admission of the three to five states which the drafters anticipated being formed out of the Northwest Territory.⁴⁹ The twelve sections provide for a legislature,⁵⁰ an administration,⁵¹ and a judiciary,⁵² as well as for other aspects of a territorial government.⁵³

The final two sections are very different, in tone and content, from the first twelve. The thirteenth section speaks in terms of the fundamental principles which should forever be observed in the territory:

Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest.⁵⁴

The thirteenth section introduces the fourteenth, which establishes six “articles of compact” which are permanent, not transitional and temporary like the first twelve sections:

Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:⁵⁵

The six articles of compact speak in terms of permanent guarantees, perpetual commitments, and never-ending promises. One cannot read the text of the articles of compact without getting a sense of the authors’ timeless intentions.

The first article of compact deals with religious liberty:

49. *Northwest Ordinance*, *supra* note 2, §§ 1–12, 14, art. V (“There shall be formed in the said territory not less than three nor more than five States . . .”).

50. *Id.* § 5 (creation of temporary laws), § 9 (election of legislature), § 10 (term of legislators, special elections), and § 11 (legislative function).

51. *Id.* § 3 (appointment of governor), § 4 (appointment of territorial secretary), § 6 (appointment of militia officers), and § 7 (temporary appointment of civil officers).

52. *Id.* § 4 (appointment of court), and § 7 (temporary appointment of magistrates).

53. *Id.* § 1 (creation of territory as a district, subject to later division into two districts), § 2 (creation of system of estates and succession), § 8 (effect of laws, creation of counties and townships), and § 12 (oaths of office and the election of a delegate to Congress).

54. *Id.* § 13.

55. *Id.* § 14.

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.⁵⁶

Refuting any argument that the use of the nomenclature “in the said territories” in the first article of compact was intended to limit the guarantee to the period during which the areas governed by the Northwest Ordinance were territories and not states, the introductory language of Section 14 refers to “the . . . States in the said territory,” indicating that the “territory” reference was to geographic area, not a type of government.⁵⁷

The remaining five articles of compact deal with other topics of a permanent nature. The second article of compact deals with legal guarantees—for example, habeas corpus, cruel and unusual punishments, and sanctity of contract—to which inhabitants of the area will always be entitled.⁵⁸ The third article of compact deals with schools, education, and the Native American population.⁵⁹ The fourth article of compact deals with the guarantee of territorial integrity, allocation of the national debt, disposition of Federal lands, and the free navigation of inland waters.⁶⁰ The fifth article of compact deals with the formation of states.⁶¹ The sixth and final article of compact deals with slavery.⁶²

The Northwest Ordinance was enacted prior to ratification of the Constitution. After ratification, Congress acted to bring the statute into harmony with the new Constitution. On August 7, 1789, a year after the Constitution was ratified, and five months after it became effective,⁶³ Congress passed the harmonization amendment, *An Act to provide for the Government of the Territory North-west of the River Ohio*, which began:

Whereas in order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt

56. *Id.* § 14, art. I.

57. *Id.* § 14.

58. *Id.* § 14, art. II.

59. *Id.* § 14, art. III.

60. *Id.* § 14, art. IV.

61. *Id.* § 14, art. V.

62. *Id.* § 14, art. VI.

63. The Constitution was declared ratified with the vote of the ninth state, New Hampshire, on June 21, 1788. The Constitution went into effect on March 4, 1789. Congress passed the re-enactment of the Northwest Ordinance on August 7, 1789. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789) (reenacting the Northwest Ordinance of 1787).

the same to the present Constitution of the United States.⁶⁴

The 1789 harmonization amendment made only very minor technical changes to the Northwest Ordinance. It designated a different recipient for reports from the territorial governor,⁶⁵ provided a different mechanism for appointing and removing officers,⁶⁶ and altered the procedure for the exercise of the territorial governor's powers in his absence.⁶⁷ The 1789 harmonization amendment made no changes in the articles of compact, clearly indicating that Congress believed they would "continue to have full effect" after ratification of the Constitution, without any action on its part.⁶⁸

B. Coverage of the Northwest Ordinance

The Northwest Ordinance establishes a framework for territorial government and a pathway to statehood for the areas south of the Great Lakes, north and west of the Ohio River and east of the Mississippi River.⁶⁹ The Northwest Territory as originally constituted included lands that would eventually become the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin; and the part of Minnesota east of the Mississippi River.⁷⁰

64. *Id.* at 51. Chief Justice Taney acknowledged the limited scope of the 1789 enactment in his *Strader* opinion. *Strader v. Graham*, 51 U.S. 82, 96 (1851) (noting "the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution").

65. Act of Aug. 7, 1789, ch. 8, § 1, 1 Stat. 50, 52 (1789):

That in all cases in which by the said ordinance, any information is to be given, or communication made by the governor of the said territory to the United States in Congress assembled, or to any of their officers, it shall be the duty of the said governor to give such information and to make such communication to the President of the United States

66. *Id.* at 53:

[A]nd the President shall nominate, and by and with the advice and consent of the Senate, shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him; and in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal.

67. *Id.*:

That in case of the death, removal, resignation, or necessary absence of the governor of said territory, the secretary thereof shall be, and he is hereby authorized and required to execute all the powers, and perform all the duties of the governor, during the vacancy occasioned by the removal, resignation or necessary absence of the said governor.

68. *Id.* at 51.

69. *Northwest Ordinance*, *supra* note 2, § 14, art. V.

70. *See supra* text accompanying note 2.

Over the years, the geographic sweep of the Northwest Ordinance was expanded in two ways. First, as the border of the nation moved west, the Northwest Territory was expanded by the inclusion of certain contiguous territories.⁷¹ Second, Congress from time to time incorporated the Northwest Ordinance by reference as the organizational basis of other, non-contiguous territories.⁷²

Through the middle of the 19th Century, the Northwest Ordinance area was reorganized, as portions of the Northwest Territory gained statehood, and expanded, as additional areas came within the coverage of the articles of compact through the expansion of the original Northwest Territory to include the contiguous territory between the Mississippi and Missouri Rivers. Between 1789 and 1849, Congress acted six times to revise the coverage of the Northwest Ordinance, to reflect the admission of states from the Northwest Territory and the expansion of the Territory to the Missouri River. Congress acted with respect to the Indiana Territory in 1800,⁷³ the Michigan Territory in 1805,⁷⁴ the Illinois Territory in 1809,⁷⁵ the Wisconsin Territory in 1836,⁷⁶ the Iowa Territory in 1838,⁷⁷ and the Minnesota Territory in 1849.⁷⁸ In each instance, the application of the articles of compact continued without modification or exception. For example, the 1836 statute which placed the lands between the Missouri River and the Mississippi River north of Missouri—the areas that are now Iowa, the western portion of Minnesota, and the eastern portions of North and South Dakota—in the Wisconsin Territory, provided that they became subject to the articles of compact of the Northwest Ordinance:

That the inhabitants of the said [Wisconsin] Territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government

71. *See infra* text accompanying notes 73–78.

72. *See infra* text accompanying notes 80–83.

73. Act of May 7, 1800, ch. 41, § 1, 2 Stat. 58, 59 (dividing the Northwest Territory into two governments and thereby creating the Indiana Territory).

74. Act of Jan. 11, 1805, ch. 5, § 1, 2 Stat. 309, 309 (dividing the Indiana Territory into two governments and thereby creating the Michigan Territory).

75. Act of Feb. 3, 1809, ch. 13, § 1, 2 Stat. 514, 515 (dividing the rest of the Indiana Territory into two governments and thereby creating the Illinois Territory).

76. Act of Apr. 20, 1836, ch. 54, § 1, 5 Stat. 10, 10 (establishing the territorial government of Wisconsin).

77. Act of June 12, 1838, ch. 96, § 1, 5 Stat. 235, 235 (dividing the Territory of Wisconsin and thereby creating the Territory of Iowa).

78. Act of Mar. 3, 1849, ch. 121, § 1, 9 Stat. 403, 404 (establishing the territorial government of Minnesota).

of the said Territory, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory.⁷⁹

In addition, through the middle of the 19th Century Congress also expanded the sweep of Northwest Ordinance by incorporating the articles of compact by reference with respect to other, non-contiguous territories: the Southwest Territory in 1790,⁸⁰ the Mississippi Territory in 1798,⁸¹ the Orleans Territory in 1805,⁸² and the Oregon Territory in 1848.⁸³ But here the coverage was sometimes selective. For example, the Mississippi Territory was exempted from the sixth article of compact on slavery,⁸⁴ and the Orleans Territory was exempted from both the second article of compact, on the rules of descent and distribution of estates, and the sixth article of compact, on slavery.⁸⁵

Congress did not make the articles of compact of the Northwest Ordinance effective as to *all* of the territories created to the mid-point of the 19th Century. Before 1849, Congress created five territories to which the articles of compact of the Northwest Ordinance were *not* made applicable: the Louisiana Territory in 1804,⁸⁶ the Missouri Territory in 1812,⁸⁷ the Alabama Territory 1817,⁸⁸ the Arkansas Territory in 1819,⁸⁹ and the Florida Territory in 1822.⁹⁰ After 1849, Congress did not make the articles of compact of the Northwest Ordinance applicable to any of the fifteen territories it created.⁹¹

79. Act of Apr. 20, 1836, ch. 54, § 12, 5 Stat. 10, 15.

80. Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 (establishing the Southwest Territory).

81. Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550 (establishing the Mississippi Territory).

82. Act of Mar. 2, 1805, ch. 23, § 1, 2 Stat. 322, 322 (providing for the government of the Orleans Territory).

83. Act of Aug. 14, 1848, ch. 177, § 1, 3 Stat. 323, 323 (establishing the Territory of Oregon).

84. Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550. The congressional action specifically excepted the article of compact on slavery. *Id.*

85. *See* Act of Mar. 2, 1805, ch. 23, § 5, 2 Stat. 322, 322. The congressional action specifically excepted the articles of compact on the rules of descent and distribution and on slavery. *Id.*

86. Act of Mar. 26, 1804, ch. 38, § 1, 2 Stat. 283, 283 (erecting Louisiana into the Louisiana Territory and Orleans Territory).

87. Act of June 4, 1812, ch. 95, 2 Stat. 743, 743 (establishing the Missouri Territory).

88. Act of Mar. 3, 1817, ch. 59, § 1, 3 Stat. 371, 372 (establishing the Alabama Territory).

89. Act of Mar. 2, 1819, ch. 49, § 1, 3 Stat. 493, 494 (establishing the Arkansas Territory).

90. Act of Mar. 30, 1822, ch. 13, § 1, 3 Stat. 654, 655 (establishing the Florida Territory).

91. Act of Sept. 9, 1850, ch. 49, § 2, 9 Stat. 446, 447 (establishing the New Mexico Territory); Act of Sept. 9, 1850, ch. 51, § 1, 9 Stat. 453, 453 (establishing the Utah Territory); Act of Mar. 2, 1853, ch. 90, § 1, 10 Stat. 172, 173 (establishing the Washington Territory); Act of May 30, 1854, ch. 59, §§ 1, 19, 10 Stat. 277, 283, 284 (establishing the Nebraska Territory and the Kansas Territory); Act of Feb. 28, 1861, ch. 59, § 1, 12 Stat. 172, 172 (establishing the Colorado Territory); Act of Mar. 2, 1861,

Either by the creation and expansion of the Northwest Territory, or by incorporation of some or all of the Northwest Ordinance articles of compact into the organizational documents of other territories, the first article of compact, on religious liberty, became effective as to lands which were eventually incorporated into eighteen states, with a combined contemporary population of more than 90,000,000 Americans.⁹²

C. Operation of the Northwest Ordinance Articles of Compact

How did the Confederation Congress and, after ratification of the Constitution, Congress intend the Northwest Ordinance articles of compact to operate? The language of the relevant Northwest Ordinance section can be read in three very different ways: as a statute, as a bilateral contract, or as a social compact.

In *Pollard v. Hagan*, Justice McKinley identified the statutory possibility, that the Northwest Ordinance “is binding as a law.”⁹³ Presumably, if the Northwest Ordinance is binding as a statute, it is a statute of the national government. Section 1 begins: “*Be it ordained by the United States in Congress assembled.*”⁹⁴ As to the authority for the articles of compact, Section 14 provides: “It is hereby ordained and declared, by the authority aforesaid.”⁹⁵ The construct “the authority aforesaid” is used elsewhere in the Northwest Ordinance.⁹⁶ The reasonable reading of the text is that “the authority aforesaid”

ch. 83, § 1, 12 Stat. 209, 210 (establishing the Nevada Territory); Act of Mar. 2, 1861, ch. 86, § 1, 12 Stat. 239, 239 (establishing the Dakota Territory); Act of Feb. 24, 1863, ch. 56, § 1, 12 Stat. 664, 665 (establishing the Arizona Territory); Act of Mar. 3, 1863, ch. 117, § 1, 12 Stat. 808, 809 (establishing the Idaho Territory); Act of May 26, 1864, ch. 95, § 1, 13 Stat. 85, 86 (establishing the Montana Territory); Act of July 25, 1868, ch. 235, § 1, 15 Stat. 178, 178 (establishing the Wyoming Territory); Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81, 81 (establishing the Oklahoma Territory); Act of Apr. 30, 1900, ch. 339, § 2, 31 Stat. 141, 141 (establishing the Hawaii Territory); Act of Aug. 24, 1912, ch. 387, § 1, 37 Stat. 512, 512 (establishing the Alaska Territory).

92. 91,400,000, consisting of: Alabama (4,870,000), Idaho (1,720,000), Illinois (12,800,000), Indiana (6,670,000), Iowa (3,150,000), Louisiana (4,680,000), Michigan (9,960,000), Minnesota (5,580,000), Mississippi (2,980,000), Montana (1,050,000), North Dakota (760,000), Ohio (11,660,000), Oregon (4,140,000), South Dakota (870,000), Tennessee (6,720,000), Washington (7,410,000), Wisconsin (5,800,000), and Wyoming (580,000). *Resident Population of the U.S. in 2017, by State (Including the District of Columbia) (in Millions)*, STATISTA, <https://www.statista.com/statistics/183497/population-in-the-federal-states-of-the-us/> [https://perma.cc/6VC3-9MUW] (last visited Feb. 3, 2019).

93. 44 U.S. 212, 224 (1845).

94. *Northwest Ordinance*, *supra* note 2, § 1.

95. *Id.* § 14.

96. *Id.* § 2 (“*Be it ordained by the authority aforesaid . . .*”), § 3 (“*Be it ordained by the authority aforesaid . . .*”), and concluding paragraph (“*Be it ordained by the authority aforesaid . . .*”).

refers to “*the United States in Congress assembled*,” as set forth in Section 1.⁹⁷ This is consistent with a reading of the Northwest Ordinance as being a statutory enactment of the Confederation Congress.

But Justice McKinley’s statutory interpretation is problematic for a number of reasons. First, the statutory interpretation is consistent with the first twelve sections of the Northwest Ordinance, which are the provisions governing the organization of the Northwest Territory. But if sections 13 and 14 of the Northwest Ordinance, the articles of compact, are simply statutory enactments of the Confederation Congress, why does Section 14 declare the articles of compact to be “articles of compact, between the original States and the people and States in the said territory”?⁹⁸ And why provide that the articles of compact can only be amended “by common consent”?⁹⁹

Further, if the articles of compact are Federal statutes, why not make them laws of general application as to all the states, both those original states and the new states to be formed out of the Northwest Territory? Of course, the political answer is self-evident as to the sixth article of compact, forbidding slavery.¹⁰⁰ But why would the Confederation Congress have declined to make the first article of compact, on religious liberty, generally applicable?¹⁰¹ Why, in other words, protect a resident of Ohio from being “molested on account of his mode of worship, or religious sentiments,”¹⁰² but not a resident of Pennsylvania?

Additionally, if the articles of compact are nothing more than a Federal statutory enactment, they establish protections, in several cases, that were initially inconsistent with, and were later duplicative of, provisions of the fundamental documents of the national government. For example, if the second article of compact created Federal statutory habeas corpus and trial by jury protections applicable to Federal courts, it initially did so at a time—under the Articles of Confederation—when there were no Federal courts in which such protections would be effective.¹⁰³ And it continued to do so—as the Northwest Ordinance was slightly modified to conform to the new Constitution, and then as the articles of compact were made applicable to additional territories—when

97. *Id.* § 1.

98. *Id.* § 14.

99. *Id.*

100. *Id.* § 14, art. VI.

101. *Id.* § 14, art. I.

102. *Id.*

103. ARTICLES OF CONFEDERATION of 1778. The Articles of Confederation did not provide for a judiciary.

such protections duplicated the habeas corpus and trial by jury protections of the Constitution.¹⁰⁴

Finally, if the Northwest Ordinance is simply a Federal statute, how could the Confederation Congress have justified legislating in areas, such as the legality of slavery and the protection of the religious liberty interests of citizens, over which the Articles of Confederation gave it no authority?¹⁰⁵

Might the Northwest Ordinance have been a statutory enactment of the Northwest Territory and the states to be created out of it? Such a reading encounters the conceptual problem that the articles of covenant would constitute the enactments of legislative bodies that did not exist at the time the Northwest Ordinance was passed. The reading also is inconsistent with the provisions of the first twelve sections of the Northwest Ordinance, which are clearly Federal provisions for the organization of the territory and states. The reading is also inconsistent with the language of Section 14, that the articles of compact are “articles of compact, between the original States and the people and States in the said territory.”¹⁰⁶

In *Pollard v. Hagan*, Justice McKinley also identified a contractual possibility, that the Northwest Ordinance articles of compact “operate as a contract between the parties.”¹⁰⁷ If the statutory model is not correct, is the contractual model more compelling?

The notion of the articles of compact as a contract is more consistent than the statutory model with the language in Section 14: “[T]hat the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory.”¹⁰⁸ The contractual model reading of this text might be that the articles of compact are an agreement between two parties: the original states on one hand, and the people and States in the said territory on the other.

104. U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); *id.* amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved”).

105. The Articles of Confederation reserved to the states all powers not expressly delegated to the United States. ARTICLES OF CONFEDERATION of 1778, art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.”). Nowhere in the text do the Articles of Confederation mention slavery or religious liberty, much less expressly delegate power over slavery and religious liberty to the United States.

106. *Northwest Ordinance*, *supra* note 2, § 14.

107. 44 U.S. 212, 224 (1845).

108. *Northwest Ordinance*, *supra* note 2, § 14.

But if the articles of compact are such a bilateral contract, why is the first party “the original States” and not “*the United States in Congress assembled*”?¹⁰⁹ Especially since the articles of compact are said to be “ordained and declared, by the authority” of “*the United States in Congress assembled*”?¹¹⁰ Further, if the Northwest Ordinance as a whole is such a bilateral contract, what of the first twelve sections that provide for the creation and organization of one of the parties?

There exists a third possibility, one not identified by Justice McKinley. The Northwest Ordinance articles of compact could be precisely what the Confederation Congress called them: articles of compact creating a new political relationship among the parties. This construction is supported by the meaning the authors would have attached to the concept of a “compact,”¹¹¹ and by the language of the Northwest Ordinance itself.

Professor Andrew Cunningham McLaughlin clarified the concept in a work published in 1900. He started his analysis with the observation that:

[I]n the Revolutionary period men believed that society originated in compact To secure the rights of life, liberty and the pursuit of happiness governments were supposed to have been “instituted among men, deriving their just powers from the consent of the governed.” These doctrines were living, actual ideas to the men of one hundred and twenty-five years ago.¹¹²

Professor McLaughlin asserted that the same ideas informed the thoughts and actions of those involved “during the early constitutional period and for many years after the establishment of the United States.”¹¹³ But, he observed in 1900, “[t]he supposition that society originated in compact is now discarded and with it the notion that man ever existed in a state of nature possessed of all rights.”¹¹⁴

109. *Id.* §§ 1, 14.

110. *Id.*

111. Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467 (1900), <https://academic.oup.com/ahr/article-abstract/5/3/467/102994> [<https://perma.cc/CEX9-Y8A9>] [hereinafter McLaughlin, *Social Compact*]. Professor McLaughlin was an authority on American Constitutional history who taught at the University of Michigan and the University of Chicago. *Andrew C. McLaughlin Biography*, AM. HIST. ASS’N, <https://www.historians.org/about-aha-and-membership/aha-history-and-archives/presidential-addresses/andrew-c-mclaughlin/andrew-c-mclaughlin-biography> [<https://perma.cc/5Y8H-5QAG>] (last visited Mar. 27, 2019).

112. McLaughlin, *Social Compact*, *supra* note 111, at 467.

113. *Id.* at 468.

114. *Id.* at 469.

But to understand the writings of the period after the Revolution, McLaughlin asserted, we need to understand their method of thinking.¹¹⁵ And that method of thinking was what he termed “the compact philosophy”:

An examination of the writings of the period seems to demonstrate that men approached the subject at hand—the establishment of a new constitution and government—guided by the ideas of the compact philosophy [A]s far as one can find a consistent principle, it is this, that by compact of the most solemn and original kind a new political organization and a new indissoluble unit was being reared in America.¹¹⁶

As seen by Professor McLaughlin, the contract philosophy had three elements relevant to interpretation of compacts written by its adherents:

To the compact philosophy . . . may be said to belong three ideas which were of influence in our constitutional history: (1) The state is artificial and founded on agreement; (2) Law is not the expression of the will of a superior, but obtains its force from consent; a man can indissolubly bind himself; (3) Sovereignty is divisible.¹¹⁷

The compact philosophy allowed for variations. For example, as to the matter of who were the parties to the compact, there were variations:

The compact was sometimes spoken of as a compact between the individuals of America in their most original and primary character; sometimes it was looked on as a compact between groups of individuals, each group surrendering a portion of its self-control and forming a new order or unity just as society itself was constituted.¹¹⁸

To adherents of the compact philosophy, the creation of the Northwest Territory and the subsequent creation of states out of that territory would have presented a conceptual challenge. The original states, the compact philosophy provided, were created by the agreement of their inhabitants, who existed in a

115. *Id.* at 471–72 (“[I]f we seek to follow out *historically* the interpretation of the Constitution or to find out what men thought of it at the beginning, we must get into their attitude of mind and understand their method of thinking.”).

116. *Id.* at 472.

117. *Id.* at 470.

118. *Id.* at 472. Or, as Professor McLaughlin observed:

Those who likened the Constitution to a social compact seem to have had two ideas somewhat different in character. Some of them had in mind the combination of each person with every other in the establishment of a new society and body politic; others thought of thirteen bodies of individuals each yielding up a portion of its self-control and thus forming a new unity as men do when organizing a simple state or society.

Id. at 480.

state of nature.¹¹⁹ But the Northwest Territory was the property of the national government. The Northwest Territory hardly existed in a state of nature; the first twelve sections of the Ordinance were the detailed plan for its territorial and then state government.

How might one approach the compact philosophy in writing the articles of compact? One way would be to make the agreement among parties the closest one could to the theoretical state of nature. As to the existing states, to frame the agreement as being by the states, not the Confederation. As to the new territory, to frame the agreement as being by the people of the Northwest Territory and, secondarily, by the states to be created out of the Territory.¹²⁰ Such a construction would implement the compact philosophy. This is precisely what the Confederation Congress enacted: “[A]rticles of compact, between the original States and the people and States in the said territory.”¹²¹

Treating the thirteenth and fourteenth sections of the Northwest Ordinance as compacts among the original states, the people of the Northwest Territory, and the states to be created out of the Territory, is to assign them a role far more foundational than that of a typical statute or bilateral contract. It is to equate the articles of compact with the Articles of Confederation and the Constitution, as the fundamental documents of “a time when governments were in process of construction and new states were forming.”¹²² But one has only to consult the introduction to the articles of compact to understand that this was exactly the task the Confederation Congress undertook:

[F]or extending the fundamental principles of civil and religious liberty, which form the basis whereupon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in

119. *Id.* at 480.

“[The Constitution] is, in its very introduction, declared to be a compact between the people of the United States as individuals; and it is to be ratified by the people at large, in their capacity as individuals; all which, it was said would be quite right and proper, if there were no state governments, if all the people of this continent were in a state of nature, and we were forming one national government for them as individuals; and is nearly the same as was done in most of the states, when they formed their governments over the people who composed them.”

Id. (quoting *Luther Martin’s Letter*, in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 344, 360 (Jonathan Elliot ed., 2d ed. 1836)).

120. The notion of a compact with the people of the Northwest Territory may seem unusual to contemporary readers, but it should be remembered that the same year the Northwest Ordinance was enacted, the Constitution was ordained and established by “the People of the United States.” U.S. CONST. pmbl.

121. *Northwest Ordinance*, *supra* note 2, § 14.

122. McLaughlin, *Social Compact*, *supra* note 111, at 468.

the said territory¹²³

Support for the compact philosophy is found in the precursors to the Ordinance of 1787. A March 1, 1784 report to the Confederation Congress introduced provisions that would—with significant alterations—become the fourth, fifth, and sixth articles of compact of the Northwest Ordinance of 1787, with the language: “Provided that both the temporary & permanent governments be established on these principles as their basis.”¹²⁴ But the draft included the compact construction:

That the preceding articles shall be formed into a Charter of Compact, shall be duly executed by the President of the U.S. in Congress assembled under his hand and the seal of the United States, shall be promulgated and shall stand as fundamental constitutions between the thirteen original states & those now newly described¹²⁵

The Ordinance of 1784,¹²⁶ “the first positive legislation on the subject of the government of the northwest lands,”¹²⁷ incorporated the draft language with only minor variations:

That the preceding articles shall be formed into a charter of compact; shall be duly executed by the President of the United States in Congress assembled, under his hand, and the seal of the United States; shall be promulgated; and shall stand as fundamental constitutions between the thirteen original states, and each of the several states now newly described¹²⁸

As Merriam observed, “[t]he articles of this ordinance were made a compact between the original United States and each new State.”¹²⁹

Merriam pointed out, referring to the Ordinance of 1784, that “Jefferson’s form of the statement of this compact did not make the people of the States a party to it.”¹³⁰ The Ordinance of 1787 made that change, providing that the articles of compact “shall be considered as articles of compact, between the original States and the people and States in the said territory.”¹³¹ This brought the structure of the articles of compact even closer to the compact philosophy.

123. *Northwest Ordinance*, *supra* note 2, § 13.

124. Merriam, *supra* note 47, at 309.

125. *Id.* at 310.

126. *The Ordinance of 1784*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0006> [https://perma.cc/2UMB-GXSL] (last updated Jan. 18, 2019) [hereinafter *Ordinance of 1784*].

127. Merriam, *supra* note 47, at 312.

128. *Ordinance of 1784*, *supra* note 126.

129. Merriam, *supra* note 47, at 313.

130. *Id.* at 329.

131. *Northwest Ordinance*, *supra* note 2, § 14.

Once the articles of compact are understood to be within the compact philosophy, the remaining points of interpretation fall into place. If the articles of compact are a compact among the original states and the people and states of the Northwest Territory, the term and amendment provisions—“forever remain unalterable, unless by common consent”—can be seen to be appropriate. The mechanism was the same as provided in the Articles of Confederation, which allowed for amendment only upon the common consent of all the states.¹³²

One potentially confusing aspect of the articles of compact might be traced to the compact philosophy. Section 14 provides that “the original States” are parties to the articles of compact.¹³³ When the Northwest Ordinance was enacted in 1787, the Union included only the original thirteen states.¹³⁴ This was also true in 1789, when Congress passed the harmonization amendment to conform the Northwest Ordinance to the newly-ratified Constitution. The harmonization amendment did not modify the “original States” formulation.¹³⁵ What, then, of the states that joined the Union following the original thirteen states, but which were not part of the Northwest Territory? For example, Vermont, which joined the Union in 1791. What if, as Ohio was poised to join the Union in 1803, it had wanted to alter the articles of compact as applied to it. Would alteration “by common consent” have included Vermont? It would have been consistent with the compact philosophy to exclude Vermont, since it was not a party to the original compact between the original thirteen states and the people of the Northwest Territory. The language of Section 14 provided for future developments in another respect when it included as future parties the “States in the said territory.”¹³⁶ Had the drafters intended to include states admitted after the original thirteen from outside the Northwest Territory, the

132. ARTICLES OF CONFEDERATION of 1778, art. XIII (“[N]or shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”).

133. *Northwest Ordinance*, *supra* note 2, § 14.

134. Eleven of the original thirteen states ratified the Articles of Confederation within the first year. The last of the original thirteen states took over three years to ratify. The states, and their respective ratification dates, were as follows: South Carolina (February 5, 1778), New York (February 6, 1778), Rhode Island (February 9, 1778), Connecticut (February 12, 1778), Georgia (February 26, 1778), New Hampshire (March 4, 1778), Pennsylvania (March 5, 1778), Massachusetts (March 10, 1778), North Carolina (April 5, 1778), New Jersey (November 19, 1778), Virginia (December 15, 1778), Delaware (February 1, 1779), and Maryland (January 30, 1781). FRANKLIN BENJAMIN HOUGH, *AMERICAN CONSTITUTIONS: COMPRISING CONSTITUTION OF EACH STATE OF THE UNION AND THE UNITED STATES* 10 (1872). The fourteenth state, Vermont, was not admitted until 1791, almost four years after the Northwest Ordinance was enacted. *Statehood Status*, *supra* note 11.

135. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 (1789).

136. *Northwest Ordinance*, *supra* note 2, § 14.

provision could have read: “[A]s articles of compact between the original States, the people and States in the said territory, and any States admitted from territories other than the said territory.”¹³⁷ But that is not what the Confederation Congress provided.

The amendment provision of the articles of compact presents another potentially confusing question. Under the Northwest Ordinance, alterations of the articles of compact require “common consent.”¹³⁸ The language should be read to require unanimity among the parties to the compact, thus all of the original thirteen states and not the Union including after-admitted, non-Northwest-Territory states.

Some evidence of the intent of the Confederation Congress, and some support for the compact philosophy, can be gained by looking at the development of the language on amendment. In a March 1, 1784 draft, the substantive provisions were termed a “Charter of Compact,” which was made “unalterable but by the joint consent of the U.S. in Congress assembled and of the particular state within which such alteration is to be made.”¹³⁹ This construction differed from the 1787 Ordinance in two important respects. Although the charter is set up “as fundamental constitutions between the thirteen original states & those now newly described,”¹⁴⁰ in terms of amendment, the charter is set up as a bilateral agreement. The Federal party was “the U.S. in Congress assembled,”¹⁴¹ not “the original States.”¹⁴² The Northwest Territory party was “the particular state within which such alteration is to be made,”¹⁴³ not “the people and States in the said territory.”¹⁴⁴ The Ordinance of 1784 adopted the draft formulation with only minor changes.¹⁴⁵

137. The statutes that incorporated by reference the Northwest Ordinance articles of compact did not modify the “original States” language. *E.g.*, Act of Aug. 14, 1848, ch. 177, § 14, 3 Stat. 323, 329 (“[T]he inhabitants of said Territory shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States north-west of the River Ohio, by the articles of compact contained in the ordinance for the government of said territory, on the thirteenth day of July, seventeen hundred and eighty-seven; and shall be subject to all the conditions, and restrictions, and prohibitions in said articles of compact imposed upon the people of said territory . . .”).

138. *Northwest Ordinance*, *supra* note 2, § 14.

139. Merriam, *supra* note 47, at 310.

140. *Id.*

141. *Id.*

142. *Northwest Ordinance*, *supra* note 2, § 14.

143. Merriam, *supra* note 47, at 310.

144. *Northwest Ordinance*, *supra* note 2, § 14.

145. *Ordinance of 1784*, *supra* note 126 (providing that the “charter of compact . . . shall stand as fundamental constitutions between the thirteen original states, and each of the several states now newly described, unalterable from and after the sale of any part of the territory of such state, pursuant

Interestingly, while the Confederation Congress provided that amendments of the Charter of Compact could be authorized by “the United States in Congress assembled,”¹⁴⁶ it adopted a much more complicated construction when dealing with the admission of new states in the same document:

[S]uch state shall be admitted . . . provided that the consent of so many states in Congress is first obtained as may at the time be competent to such admission. And in order to adapt the said articles of confederation to the state of Congress when its numbers shall be thus increased, it shall be proposed to the legislatures of the states, originally parties thereto, to require the assent of two thirds of the United States in Congress assembled, in all those cases wherein by the said articles, the assent of nine states is now required, which being agreed to by them shall be binding on the new states.¹⁴⁷

With the Ordinance of 1787, the Confederation Congress adopted a very different construction, one more in line with the compact philosophy. It specified that the articles of compact were “between the original States and the people and States in the said territory” and provided that the articles of compact were to “forever remain unalterable, unless by common consent.”¹⁴⁸

How might the consent of the original states have been secured? How might it be secured today? When the Northwest Ordinance was enacted, the original states formulation conformed to the voting provisions of the national legislature. The Articles of Confederation provided that “[i]n determining questions in the United States in Congress assembled, each State shall have one vote.”¹⁴⁹ And while it is true that normal measures passed with less than unanimity,¹⁵⁰ amendments to the Articles of Confederation—which were, one could argue, analogous to amendments of the Northwest Ordinance articles of compact—required a unanimous vote.¹⁵¹

But with ratification of the Constitution, the voting provisions of the national legislature changed to count the votes of individual representatives and senators, not states.¹⁵² And Congress includes states in addition to the original thirteen states. Presumably, the common consent of the original states would

to this resolve, but by the joint consent of the United States in Congress assembled, and of that particular state within which such alteration is proposed to be made”).

146. *Id.*

147. *Id.*

148. *Northwest Ordinance*, *supra* note 2, § 14.

149. ARTICLES OF CONFEDERATION of 1778, art. V, § 4.

150. *Id.* art. V, § 4 (one vote per state), art. IX, § 6 (majority of states for specified votes), and art. X (nine states for specified votes).

151. *Id.* art. XIII.

152. U.S. CONST. art. I, §§ 2–3.

today be secured by votes of the individual legislatures of the original thirteen states.

If the articles of compact of the Northwest Ordinance are compacts among the original states and the people of the Northwest Territory and the states to be formed out of the Territory, one final operational question arises. Are the substantive provisions of the articles of compact self-executing or are they executory? That is, were they effective upon passage of the Northwest Ordinance or did they require some additional action—perhaps action by the Territorial or state legislatures—to become effective.

We are comfortable categorizing the rules by which governments act as being constitutions, laws, and administrative regulations. We know how each is promulgated.¹⁵³ The articles of compact do not fit easily into any of the familiar categories. The language of Northwest Ordinance Section 13, the introduction to the articles of compact, makes it clear that the articles of compact are controlling over, but apart from, laws and constitutions.¹⁵⁴ The articles of compact are “to fix and establish those [fundamental principles of civil and religious liberty] as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in said territory.”¹⁵⁵

The language of the articles of compact is consistent with those provisions being self-executing, not merely executory. Had the authors intended the articles of compact to merely document the agreement of people of the territories and the states to take actions in the future to implement the substantive provisions, they could have done so. For example, the first article of compact could have been written:

Art. 1. The people and States in the said territory agree to adopt a constitution and enact laws which shall guarantee 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, in the said territory.

But it was not. The wording of the first article of compact contains not even a hint that the provision is anything but self-executing.¹⁵⁶

In the same way, the sixth article of compact could have been written to incorporate the same type of executory language:

Art. 6. The people and States in the said territory agree to adopt a constitution and enact laws which shall guarantee there shall

153. Schoolhouse Rock, *How a Bill Becomes a Law*, YOUTUBE (May 20, 2010) <https://www.youtube.com/watch?v=Otbml6WlQP0> [<https://perma.cc/8NYH-4CYK>].

154. *Northwest Ordinance*, *supra* note 2, § 13.

155. *Id.*

156. *Id.* § 14, art. I.

be neither slavery nor involuntary servitude in the said territory, other 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 labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

But it was not. The wording of the sixth article of compact is incompatible with the provision is anything but self-executing.¹⁵⁷

It is acknowledged that one article of compact contains language that is executory in form. The third article begins with language that is aspirational: “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”¹⁵⁸ It continues with language that is self-executing: “The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.”¹⁵⁹ The provision concludes with language that is fairly read as executory: “[B]ut laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.”¹⁶⁰ This clause does not alter the assessment that the articles of compact, taken as a whole, are clearly self-executing and not executory in form.¹⁶¹

The debates leading up to enactment of the Northwest Ordinance were consistent with the articles of compact being self-executing, not merely executory. For example, Rufus King’s proposed language on slavery read “there shall be neither slavery nor involuntary servitude in any of the states . . . and that this regulation shall be an article of compact, and remain a fundamental principle of the constitutions between the thirteen original states and each of the states described in the said resolve.”¹⁶² The committee report leading to the Ordinance of 1787 contained language that “the inhabitants of such districts

157. *Id.* at § 14, art. VI.

158. *Id.* at § 14, art. III.

159. *Id.*

160. *Id.*

161. The second article of compact also contains language about future legislation, providing “[T]hat no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.” *Id.* § 14, art. II. But properly considered, the language is not executory because it operates as an immediately effective *ban* on such legislation, not a promise that any legislation shall be enacted.

162. Merriam, *supra* note 47, at 314–15.

shall always be entitled to the benefits of the act of habeas corpus and of the trial by jury.”¹⁶³ The treatment of the articles of compact by the courts prior to *Strader* is also consistent with those provisions being self-executing, not merely executory.¹⁶⁴

The Northwest Ordinance articles of compact are best understood as the result of a compact between the original states and the people of the Northwest Territory and the states created out of the Territory. They are self-executing protections, forever unalterable except by the consent of all of the parties. But that understanding was challenged by *Permoli*, *Pollard*, and Chief Justice Taney’s error in *Strader*, to which we now turn.

IV. *STRADER V. GRAHAM*: THE SUPREME COURT

A decade after Henry, Reuben, and George escaped Kentucky on the steamboat *Pike*, the appeal of Dr. Christopher Graham’s judgment against the *Pike*’s owners was heard by the United States Supreme Court.

The procedural posture of the case was straightforward. After prolonged proceedings in the courts of the Commonwealth, Dr. Graham obtained a decree against the owners of the *Pike*, Jacob Strader and James Gorman, its captain, John Armstrong, and the steamboat itself, for \$3,000 in damages.¹⁶⁵ Strader, Gorman, and Armstrong appealed to the Supreme Court.¹⁶⁶ Their assertion was that the Supreme Court had jurisdiction over the appeal under Section 25 of the

163. *Id.* at 319.

164. See, e.g., *Jones v. Van Zandt*, 46 U.S. 215, 230 (1847) (“The ordinance prohibited the existence of slavery in the territory northwest of the river Ohio”); *Spooner v. McConnell*, 22 F. Cas. 939, 941 (D. Ohio 1838) (No. 13,245) (“That this ordinance was obligatory in all its parts at the time of its adoption, no one can doubt”); *Jarrot v. Jarrot*, 7 Ill. (2 Gilm.) 1, 23 (1845) (“It can not be denied, but that the ordinance of 1787, in the most express terms, prohibited the future existence of slavery in the territory; it was enacted as an organic law for the government of the territory”); *Reed v. Wright*, 2 Greene 15, 22 (Iowa 1849) (“The legislature could not curtail any rights conferred upon the people by the ordinance, nor confer any rights withheld.”); *Scott v. Detroit Young Men’s Soc’y’s Lessee*, 1 Doug. 119, 133 (Mich. 1843) (“The right, and the power to form such a constitution and government, was as absolutely and irrevocably vested in, and secured to, the inhabitants of Michigan, by the compact contained in the ordinance of 1787”); *Merry v. Tiffin*, 1 Mo. 725, 725 (1827) (“The ordinance is positive, that slavery cannot exist”); *Ruffner v. McLenan*, 16 Ohio 639, 641 (1847) (“This ordinance has ever been considered as the organic law of the territory northwest of the Ohio, as much so as is the constitution of a state the organic law of that state.”); *Hutchinson v. Thompson*, 9 Ohio 52, 62 (1839) (“But when application for admission into the union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and they were granted by the United States as one party, to the state, as the other. This seems to show, that the people of Ohio have, so far, treated the articles of compact as of perpetual obligation.”).

165. *Strader v. Graham*, 51 U.S. 82, 93 (1851).

166. *Id.*

Judiciary Act, which provided such jurisdiction where the highest court of a state ruled against the validity of an exercise of Federal authority.¹⁶⁷

The Supreme Court did not have jurisdiction over a claim that Henry and Reuben had become free by virtue of the provisions of the state constitutions of Indiana and Ohio.¹⁶⁸ The jurisdiction of the Supreme Court depended on the claim that Henry and Reuben were free before they boarded the *Pike* based on the sixth article of compact of the Northwest Ordinance.¹⁶⁹

In his opinion, Chief Justice Taney first noted the assertion that the slaves had gained their freedom by virtue of their travel to and employment in the free state of Ohio and concluded: “But this question is not before us.”¹⁷⁰ His analysis started with the proposition that Kentucky had the right to determine the status of persons within its borders:

Every State has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject.¹⁷¹

Taney’s analysis then rejected the assertion that the status of Henry and Reuben depended upon their status under the laws of Ohio:

And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return. The [Kentucky] Court of Appeals have determined, that by the laws of the State they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it.¹⁷²

167. Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 25 (1789) (“That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity . . . may be re-examined, and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . .”).

168. OHIO CONST. of 1803, art. VIII, § 2; IND. CONST. of 1816, art. XI, § 7.

169. *Northwest Ordinance*, *supra* note 2, § 14, art. VI.

170. *Strader*, 51 U.S. at 93.

171. *Id.* at 93–94.

172. *Id.* at 94.

Chief Justice Taney then turned to the assertion that the involvement of the Northwest Ordinance grounded the jurisdiction of the Supreme Court:

But it seems to be supposed in the argument, that the law of Ohio upon this subject has some peculiar force by virtue of the Ordinance of 1787, for the government of the Northwestern Territory, Ohio being one of the States carved out of it.¹⁷³

Before discussing the question of whether the Northwest Ordinance remained in effect, Chief Justice Taney noted the substance of the sixth article of compact and the language of the Northwest Ordinance providing that it should “for ever remain unalterable unless by common consent.”¹⁷⁴ He concluded that even if the slavery article of compact had still been in effect, it would not have controlled the matter under consideration:

If this proposition [that the Northwest Ordinance remained in effect] could be maintained, it would not alter the question. For the regulation of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them. The Ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or slaves in that State, nor give this court jurisdiction upon this subject.¹⁷⁵

His core assertion was that the Northwest Ordinance was no longer in effect, and thus could not give the Supreme Court jurisdiction.

The argument assumes that the six articles which that Ordinance declares to be perpetual are still in force in the States since formed within the Territory, and admitted into the Union. . . . But it has been settled by judicial decision in this court, that this Ordinance is not in force.¹⁷⁶

To support his assertion that the Northwest Ordinance was no longer effective in the states created out of the Northwest Territory, Chief Justice

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 94.

Taney cited two Supreme Court precedents *Permoli v. City of New Orleans*¹⁷⁷ and *Pollard v. Hagan*.¹⁷⁸

The first case upon which Chief Justice Taney relied in his *Strader* opinion was *Permoli*, a challenge to a New Orleans ordinance which restricted open-casket funerals.¹⁷⁹ Father Bernard Permoli, a Catholic priest, was fined and appealed claiming that the ordinance violated both the Free Exercise Clause of the Constitution and the first article of compact of the legislation creating the Orleans Territory.¹⁸⁰

Writing for the Court, Justice Catron first rejected Father Permoli's claim that the municipal regulation of open-casket funerals violated the Free Exercise Clause of the Constitution:

The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.¹⁸¹

Justice Catron then turned to Father Permoli's second claim, that enforcement of the municipal open-casket funeral ordinance against him violated the first article of compact of the Northwest Ordinance—"[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments."¹⁸² Father Permoli claimed the protection of the Northwest Ordinance's first article of compact

177. 44 U.S. 589, 589 (1845).

178. 44 U.S. 212 (1845).

179. *Permoli*, 44 U.S. at 589–90.

180. *Id.* at 609–10.

181. *Id.* at 609. Both were decided in 1845: *Permoli* in March and *Pollard* in February.

182. *Northwest Ordinance*, *supra* note 2, § 14, art. I.

because that provision had been made applicable to New Orleans under the terms of the statutes that created the Mississippi¹⁸³ and Orleans¹⁸⁴ territories.

Justice Catron described the articles of compact:

In the ordinance, there are terms of compact declared to be thereby established, between the original states, and the people in the states afterwards to be formed north-west of the Ohio, unalterable, unless by common consent¹⁸⁵

Justice Catron's reading of the articles of compact was complicated. During the pre-statehood period, when the areas were part of the Northwest Territory, Justice Catron seems to have believed the articles were simply statutory enactments of the national government, "acts of Congress organizing,

183. The April 7, 1798 action of the Congress creating the Mississippi Territory (which eventually included the area included in present-day Mississippi and Alabama) provided:

That from and after the establishment of the said government, the people of the aforesaid territory, shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio, in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last mentioned territory.

Act of Apr. 7, 1798, ch. 28, § 6, 1 Stat. 549, 550.

Congress specifically excluded from application to the Mississippi Territory the sixth article of compact of the Northwest Ordinance, the prohibition of slavery:

[T]he President of the United States is hereby authorized to establish therein a government in all respects similar to that now exercised in the territory northwest of the river Ohio, *excepting and excluding the last article of the ordinance* made for the government thereof by the late Congress on the thirteenth day of July one thousand seven hundred and eighty-seven

Id. at 550 (emphasis added).

184. The provisions of the Northwest Ordinance were extended to the Orleans territory in 1805 by a statute that authorized the President "to establish within the territory of Orleans, a government in all respects similar, (except as herein otherwise provided,) to that now exercised in the Mississippi territory." Act of Mar. 2, 1805, ch. 23, § 1, 2 Stat. 322, 322. Under that enactment, "the inhabitants of the territory of Orleans shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi territory." *Id.* The statute specifically excluded from effect in the Orleans Territory two of the articles of compact of the Northwest Ordinance; the second article on descent and distributions of estates, and the sixth article on slavery. *Id.* § 5, at 322.

185. *Permoli*, 44 U.S. at 610. It might be noted that Justice Catron misstates the parties to the articles of compact: while on one side there are "the original States," on the other the Northwest Ordinance stipulates "the people and States in the said territory," while Justice Catron states it as "the people in the states afterwards to be formed north-west of the Ohio" Compare *id.* ("[T]he people in the states afterwards to be formed north-west of the Ohio"), with *Northwest Ordinance*, *supra* note 2, § 14 ("[T]he people and States in the said territory").

in part, the territorial government.”¹⁸⁶ He thus ignored the language and history of the articles of compact.

After statehood, Justice Catron believed that the articles of compact “had no further force, after the adoption of the state constitution.”¹⁸⁷ Under this reasoning, the admission of Louisiana into the Union swept away all prior acts of Congress with respect to civil and religious liberties in the area admitted:

So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state.¹⁸⁸

Justice Catron’s reading, that the guarantees of the Northwest Ordinance articles of compact were merely “secured to the people of the Orleans territory, during its existence,” and ceased to have effect once the initial constitution and laws of the newly created states were approved by Congress through admission of the states.¹⁸⁹ After statehood, the substantive provisions of the articles of compact provided merely a suggestion of the checklist Congress might, or might not, use in evaluating the new state’s proposed constitution:

All Congress intended, was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances: the instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not.¹⁹⁰

But the plain language of the Northwest Ordinance was not so limited; under its terms the articles of compact were “to fix and establish those principles as the basis of all laws, constitutions, and governments, *which forever hereafter* shall be formed in the said territory.”¹⁹¹ Accordingly, the articles of compact themselves were created to “forever remain unalterable.”¹⁹²

Having misread the Northwest Ordinance articles of compact, Justice Catron was positioned to reject Father Permoli’s claim:

It is not possible to maintain that the United states hold in trust, by force of the ordinance, for the people of Louisiana, all the

186. *Permoli*, 44 U.S. at 610.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 609.

191. *Northwest Ordinance*, *supra* note 2, § 13 (emphasis added).

192. *Id.* § 14.

great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cogni[z]ance, and equally so in the old states and the new ones; and that the writ of error must be dismissed.¹⁹³

The appeal was dismissed for want of jurisdiction under Section 25 of the Judiciary Act.¹⁹⁴

The second case upon which Chief Justice Taney relied in his *Strader* opinion was *Pollard v. Hagan*, a navigable waters case arising out of Alabama.¹⁹⁵ The plaintiffs in *Pollard* claimed title to a plot of land in Mobile by virtue of “a patent from the United States for the premises in question,” together with two acts of Congress confirming plaintiffs’ title.¹⁹⁶ The defendants asserted that the land in question had been “covered by water of the Mobile river at common high tide” until 1822 or 1823.¹⁹⁷

As Alabama was admitted to the Union on December 14, 1819,¹⁹⁸ it was defendants’ claim that the patent from the United States was ineffective to convey title.¹⁹⁹ The trial court so charged the jury:

“The court charged the jury, that if they believed the premises sued for were below usual high water-mark, at the time Alabama was admitted into the union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title”²⁰⁰

The jury found that the land was underwater at the time of statehood and found in favor of the defendants.²⁰¹

193. *Permoli*, 44 U.S. at 610.

194. *Id.*

195. 44 U.S. 212 (1845). The opinion of the Court was by Justice John McKinley, who was himself from Alabama.

196. *Id.* at 219.

197. *Id.* at 220.

198. *Statehood Status*, *supra* note 11.

199. *Pollard*, 44 U.S. at 220.

200. *Id.* (quoting the trial court).

201. *Id.*

Plaintiffs' challenge to the trial court ruling was based on the fourth article of compact of the Northwest Ordinance, which was made applicable to the Alabama Territory in 1817,²⁰² and under which:

[B]y the compact between the United States and Alabama, on her admission into the union, it was agreed, that the people of Alabama for ever disclaimed all right or title to the waste or unappropriated lands lying within the state, and that the same should remain at the sole disposal of the United States; and that all the navigable waters within the state should for ever remain public highways, and free to the citizens of that state and the United States, without any tax, duty, or impost, or toll therefor, imposed by that state.²⁰³

Under the articles of compact, the *Pollard* court conceded:

[T]he land under the navigable waters, and the public domain above high water, were alike reserved to the United States, and alike subject to be sold by them; and to give any other construction to these compacts, would be to yield up to Alabama, and the other new states, all the public lands within their limits.²⁰⁴

Having reviewed the history of the territory, the *Pollard* court concluded that the authority of the United States—provided in the Northwest Ordinance to be “articles of compact between the original States and the people and States in the said territory and forever remain unalterable”—were merely “temporary:”

We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic . . . ceding Louisiana.²⁰⁵

Such a temporary grant of rights in the United States, the *Pollard* court concluded, was consistent with the intent of the parties: “[I]t was the intention of the parties to invest the United States with the eminent domain of the country

202. Act of Mar. 3, 1817, ch. 59, § 1, 3 Stat. 371, 372 (establishing the Alabama Territory). The *Pollard* court acknowledged the applicability of the Northwest Ordinance articles of compact to the Alabama Territory, excepting the sixth article of compact on slavery.

203. *Pollard*, 44 U.S. at 220–21.

204. *Id.* at 221.

205. *Id.*

ceded, both national and municipal, for the purposes of temporary government.”²⁰⁶

Justice McKinley interpreted that the articles of compact of the Northwest Ordinance under a statutory model, not under the contractual model he identified as the only alternative. Justice McKinley did not address the reading of the articles of compact as being the product of a compact among the original states, the people of the Northwest Territory, and the states to be created out of the Territory, as the language of articles of compact provides. His position was clear, at least as to navigable waters. He declared “the agreement of the people inhabiting the new states . . . cannot operate as a contract between the parties, but is binding as a law.”²⁰⁷ But, Justice McKinley’s analysis continued, “all constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not.”²⁰⁸ He concluded: “The proposition . . . that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new state where it may happen to be, contains its own refutation, and requires no further examination.”²⁰⁹

Having adopted the statutory model, Justice McKinley considered whether the imposition of such statutory provisions on the newly created states would be permissible. Here, the *Pollard* court created the “equal footing” doctrine:

When Alabama was admitted into the union, *on an equal footing with the original states*, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands.²¹⁰

The related proposition to the equal footing doctrine is the assertion that the Federal government lacked the authority to exercise control over lands within a state:

And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would

206. *Id.* at 222.

207. *Id.* at 224.

208. *Id.*

209. *Id.* at 225.

210. *Id.* at 223 (emphasis added).

have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.²¹¹

What of the articles of compact of the Northwest Ordinance, which by their terms were to “forever remain unalterable”?²¹² The *Pollard* court found the United States lacked the Constitutional authority to exercise such authority, except on a temporary basis:

The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.²¹³

Once the United States fulfilled its temporary charge, the theory provided, any national authority would disappear and the equal footing doctrine would be fulfilled: “Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.”²¹⁴

But what of the mechanism established in the Northwest Ordinance allowing for modification of the articles of compact “by common consent”?²¹⁵ Justice McKinley simply recast the articles of compact to eliminate the “common consent” requirement.²¹⁶ Congress had the authority “to make all needful rules and regulations respecting the territory or other property of the United States.”²¹⁷

Having found that the articles of compact of the Northwest Ordinance conferred no authority on the United States with respect to the ownership of public lands in Alabama, Justice McKinley found for the defendants.²¹⁸

But what of Alabama’s declaration, made when it was admitted to the Union, “that all navigable waters within the said state shall for ever remain

211. *Id.*

212. *Northwest Ordinance*, *supra* note 2, § 14.

213. *Pollard*, 44 U.S. at 224.

214. *Id.*

215. *Northwest Ordinance*, *supra* note 2, § 14.

216. *Pollard*, 44 U.S. at 224 (Article of compact “cannot operate as a contract between the parties, but is binding as a law.”).

217. *Id.*

218. *Id.* at 225 (“The supposed compact relied upon by the counsel for plaintiffs, conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy.”).

public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state”²¹⁹ Justice McKinley found that it “would be void if inconsistent with the Constitution of the United States,”²²⁰ but then determined that “[t]his supposed compact is . . . nothing more than a regulation of commerce, to that extent, among the several states,” consistent with Article 1, section 8 of the Constitution,²²¹ “and can have no controlling influence in the decision of the case before us.”²²²

Having recounted *Permoli* and *Pollard*, Chief Justice Taney turned to the assertion that the Northwest Ordinance was not then in force, and thus the Supreme Court could not have jurisdiction over the *Pike* matter based on its sixth article of compact. Although his thinking was not clearly set forth, he seemed to be making three assertions.

First, Chief Justice Taney believed that the articles of compact of the Northwest Ordinance ceased to be effective when each of the states created from the Northwest Territory was admitted to the Union.²²³ This was essentially the *Permoli* reasoning, that the articles of compact were superseded by the constitution of each state as it was admitted to the Union.²²⁴

Second, Chief Justice Taney believed that the articles of compact of the Northwest Ordinance could not have been effective after the admission of the states created from the Northwest Territory because to do so would deny them admission on the same terms as the original states.²²⁵ This was the equal footing doctrine from *Pollard*.²²⁶

Third, Chief Justice Taney argued that the ratification of the Constitution itself rendered the Northwest Ordinance of no further effect.²²⁷ This was a new argument, not found in *Permoli* or *Pollard*.

All three of Chief Justice Taney’s arguments are incompatible with the language and history of the Northwest Ordinance.

219. *Id.* at 229.

220. *Id.*

221. *Id.* at 230; *see* U.S. CONST. art. I, § 8 (“The Congress shall have the Power To lay and collect . . . Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises shall be uniform throughout the United States; . . . [and] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

222. *Pollard*, 44 U.S. at 230.

223. *Strader v. Graham*, 51 U.S. 82, 95 (1851).

224. *Permoli v. City of New Orleans*, 44 U.S. 589, 610 (1845).

225. *Strader*, 51 U.S. at 95–96.

226. *Pollard*, 44 U.S. at 224.

227. *Strader*, 51 U.S. at 95.

A. *The Northwest Ordinance Articles of Compact Ceased to Be Effective Upon the Admission of Each State*

Chief Justice Taney's first argument was that the Northwest Ordinance ceased to be effective when each of the states created from the Northwest Territory was admitted to the Union, that the provisions were superseded by the constitutions of the admitted states.²²⁸ The argument was at odds with the language of the Ordinance and overplayed the authority he cited.²²⁹

Chief Justice Taney's argument in this respect does not withstand a close reading of the Northwest Ordinance itself, for clearly Congress intended it to have effect following the admission of the states. Indeed, in the introduction to the articles of compact, Section 14 provides that the "articles shall be considered as articles of compact, between the original States and the people *and States* in the said territory, and forever remain unalterable, unless by common consent."²³⁰ Thus the articles of compact run between the original states, on the one hand, and the people of the Northwest Territory and the states formed out of the Northwest Territory, on the other.

Additional evidence that Chief Justice Taney's reading of the Northwest Ordinance was in error can be found in the articles of compact themselves. The fourth article of compact provides: "The said territory, *and the States which may be formed therein*, shall forever remain a part of this Confederacy of the United States of America."²³¹ The same article of compact by its terms applies to the states to be created out of the Northwest Territory with respect to taxes²³² and to land grants by the Federal government.²³³ The fifth article of compact

228. *Id.*

229. One might argue that *Permoli* is not supportive of Chief Justice Taney's argument in *Strader* because Justice Catron's opinion in *Permoli* specifically limits the holding to the effect of Louisiana statehood and does not opine on the effect of Ohio statehood on the Northwest Ordinance: "[W]hat the force of the ordinance is north of the Ohio, we do not pretend to say." *Permoli*, 44 U.S. at 610. But it is an argument that Chief Justice Taney countered in his *Strader* opinion:

[T]he [*Permoli*] court held that the Ordinance ceased to be in force when Louisiana became a State, and dismissed the case for want of jurisdiction. This opinion is, indeed, confined to the Territory in which the case arose. But it is evident that the Ordinance cannot be in force in the States formed in the Northwestern Territory, and at the same time not in force in the States formed in the Southwestern Territory

Strader, 51 U.S. at 95.

230. *Northwest Ordinance*, *supra* note 2, § 14 (emphasis added).

231. *Id.* § 14, art. IV (emphasis added).

232. *Id.* ("[T]he taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, *or new States*") (emphasis added).

233. *Id.* ("The legislatures of those districts, *or new States*, shall never interfere with the primary disposal of the soil by the United States in Congress assembled") (emphasis added).

contains language relating to the admission of new states out of the Northwest Territory, and contains a guarantee that those new states shall have a republican form of government:

[W]henver any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided*, The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles [of compact]²³⁴

Although in writing his *Strader* opinion Chief Justice Taney relied upon Justice Catron's *Permoli* opinion, Justice Catron significantly backed away from his earlier position when he wrote his concurrence in *Strader*. Rather than reaffirm his *Permoli* analysis, that the Northwest Ordinance articles of compact were rendered ineffective *in toto* with the adoption of the state constitution, Justice Catron cast the process of Ohio adopting its constitution as an *amendment* of the sixth article of compact, by "common consent" as provided in the Ordinance.²³⁵ He started by misquoting the introductory language of Section 14:

The Ordinance of 1787 provides that the six articles contained in it shall be unalterable, and remain a compact between the original States and the people of the Northwestern Territory, "unless altered by common consent."²³⁶

Of course, Section 14 does not speak only of "a compact between the original States and the people of the Northwestern Territory," as Justice Catron asserted. Section 14 provides for "articles of compact, between the original States and the people *and States* in the said territory."²³⁷

Justice Catron then noted that the sixth article of compact under the Northwest Ordinance includes two provisions regarding slavery. The first, he said, "declares, that slavery shall be prohibited."²³⁸ The second, he said, declares "that absconding slaves there found shall be surrendered to their

234. *Id.* § 14, art. V.

235. *Strader v. Graham*, 51 U.S. 82, 98 (1851) (Catron, J., concurring).

236. *Id.* (Catron, J., concurring).

237. *Northwest Ordinance*, *supra* note 2, § 14 (emphasis added).

238. *Strader*, 51 U.S. at 98 (Catron, J., concurring). Justice Catron was paraphrasing; the first part of the sixth article of compact provides: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted." *Northwest Ordinance*, *supra* note 2, § 14, art. VI.

owners.”²³⁹ He noted that the original Ohio constitution included language adopting the first, but not the second Ordinance provision. As the Ohio constitution was approved by Congress, this process, he claimed, constituted the alteration by common consent contemplated by the Northwest Ordinance:

The constitution of Ohio incorporates the first part of the sixth article, but leaves out the second part. The State constitution having received the sanction of Congress, the alteration was made by common consent, as this was the mode of consent contemplated by the compact; that is to say, by the States in Congress assembled, whether under the Confederation or present Constitution.²⁴⁰

Justice Catron’s analysis continued as to the effect of Congress approving the Ohio constitution with only one of the two slavery provisions of the sixth article of compact:

The power to alter necessarily involves the power to annul, or to suspend; and when the State constitution of Ohio was assented to by Congress, the article stood suspended, or abolished, as an engagement among the States, and can *now* only be recognized as part of the organic State law. And as this law is drawn in question here, no jurisdiction exists to examine the State decision.²⁴¹

It should be noted that Justice Catron’s position was not that the Northwest Ordinance *in toto* became ineffective as to Ohio upon congressional approval of its initial state constitution. It was only that the sixth article of compact, on slavery, became ineffective: “[W]hen the State constitution of Ohio was assented to by Congress, the *article* stood suspended, or abolished.”²⁴² As to the other five articles of compact, Justice Catron’s position had evolved such since *Permoli* that he was unwilling to venture an opinion: “But in regard to

239. *Strader*, 51 U.S. at 98 (Catron, J., concurring). Justice Catron was paraphrasing; the second part of the sixth article of compact provides: “*Provided always*, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.” *Northwest Ordinance*, *supra* note 2, § 14, art. VI. One might have noted, although Justice Catron did not, that the Ordinance language would not, by its terms, have aided Dr. Christopher Graham had he intercepted Henry, Reuben, and George in Ohio since their “labor or service” was not “lawfully claimed in any one of the original States,” the Commonwealth of Kentucky having been admitted to the Union only in 1792 as the fifteenth state. *Id.*

240. *Strader*, 51 U.S. at 98 (Catron, J., concurring). The initial Ohio constitution did prohibit slavery: OHIO CONST. of 1803, art. VIII, § 2 (“There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted . . .”).

241. *Strader*, 51 U.S. at 98 (Catron, J., concurring).

242. *Id.* (Catron, J., concurring) (emphasis added).

parts of the other five articles, I am unwilling to express any opinion, as no part of either is in any degree involved in this controversy.”²⁴³

Justice Catron’s suggestion that congressional approval of the proposed Ohio constitution constituted an amendment of the Northwest Ordinance’s sixth article of compact is in error. Section 14 of the Northwest Ordinance establishes the parties to the articles of compact as “the original States and the people and States in the said territory.”²⁴⁴ The “common consent” to alter the articles of compact would be the consent of all the parties.²⁴⁵ The 1803 vote of Congress to admit Ohio would have been insufficient to evidence such common consent for three reasons. First, in 1803 Congress included representatives from three states admitted after the original thirteen: Vermont, Kentucky, and Tennessee.²⁴⁶ Second, in 1803 votes in Congress were no longer taken under the Articles of Confederation, which provided that each state got one vote, but rather were taken under the Constitution, which provides for counting the votes of individual members of the House of Representatives and the Senate.²⁴⁷ The third reason why the 1803 vote of Congress to admit Ohio was not sufficient to evidence such common consent to amend the articles of compact is especially compelling. It turns out, Congress forgot to take the vote to approve the Ohio constitution in 1803 and did not correct its mistake until 1953.²⁴⁸

243. *Id.* (Catron, J., concurring). Justice Catron’s change of heart was apparently explained by his desire to avoid declaring that the fourth article of compact in the Northwest Ordinance was ineffective. That article dealt with, among other things, the navigable waters of the Mississippi and St. Lawrence rivers, and Justice Catron, a slaveholder from Tennessee, was loathe to give up its protections:

For thirty years, the State courts within the territory ceded by Virginia have held this part of the fourth article to be in force, and binding on them respectively; and I feel unwilling to disturb this wholesome course of decision, which is so conservative to the rights of others, in a case where the fourth article is in no wise involved, and when our opinion might be disregarded by the State courts as *obiter*, and a dictum uncalled for. When the question arises here on the fourth article, it is desired by me, that no such embarrassment should be imposed on this court as necessarily must be by now passing judgment on the force of the fourth article, and pronouncing that it stand superseded and annulled.

Id. at 99. (Catron, J., concurring).

244. *Northwest Ordinance*, *supra* note 2, § 14.

245. *Id.*

246. Vermont was admitted in 1791, Kentucky in 1792, and Tennessee in 1796. *Statehood Status*, *supra* note 11.

247. U.S. CONST. art. I, §§ 2–3.

248. *The Admission of Ohio as a State*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES (Aug. 7, 1953), <http://history.house.gov/Historical-Highlights/1951-2000/The-admission-of-Ohio-as-a-state/> [<https://perma.cc/AZ2M-JRVM>].

Representative George H. Bender of Ohio introduced the legislation . . . to retroactively grant statehood. Calling the mistake a legislative oversight, Bender

In his *Strader* concurrence Justice McLean also refused to join Chief Justice Taney's argument that the provisions of the Northwest Ordinance were rendered ineffective *in toto* with the adoption of the state constitutions. He agreed with Justice Catron that as to the sixth article of compact, on slavery, the adoption of the Ohio constitution constituted an amendment of the Northwest Ordinance which rendered the sixth article of compact ineffective:

The provision of the ordinance in regard to slavery was incorporated into the constitution of Ohio, which received the sanction of Congress when the State was admitted into the Union. The constitution of the State, having thus received the consent of the original parties to the compact, must be considered, in regard to the prohibition of slavery, as substituted for the Ordinance, and consequently all questions of freedom must arise under the constitution, and not under the Ordinance.²⁴⁹

But Justice McLean too was unwilling to go as far as Chief Justice Taney in declaring the articles of compact ineffective *in toto*:

This, in my judgment, decides the question of jurisdiction, which is the only question before us. And any thing that is said in the opinion of the court, in relation to the Ordinance, beyond this, is not in the case, and is, consequently, extrajudicial.²⁵⁰

Both because Chief Justice Taney's first argument is at odds with the language of the Northwest Ordinance articles of compact, and because it overplayed *Permoli*, it is unconvincing.

B. *The Northwest Ordinance Articles of Covenant Were Inconsistent with the Admission of New States on an Equal Footing*

Chief Justice Taney's second argument was that the articles of compact of the Northwest Ordinance could not have been effective after the admission of the states created from the Northwest Territory because to do so would deny them admission on an equal footing with the original states.²⁵¹

The equal footing argument proceeded from the assertion that if the articles of compact "could be regarded as yet in operation in the states formed within

stated, "The State constitutional convention presented the Constitution of Ohio to Congress on February 19, 1803, and Congress chose to ignore the whole business." Without congressional approval of the state constitution, Ohio technically remained part of the Northwest Territory. . . . On May 19, 1953, the House voted to approve legislation retroactively ratifying the state constitution and admitting Ohio to the Union as of March 1, 1803.

249. *Strader v. Graham*, 51 U.S. 82, 97 (1851) (McLean, J., concurring).

250. *Id.* (McLean, J., concurring).

251. *Id.* at 95–96.

the limits of the Northwestern Territory, it would place them in an inferior condition as compared with the other States, and subject their domestic institutions and municipal regulations to the constant supervision and control of this court.”²⁵² This, Chief Justice Taney asserted in describing the process of admission to the Union, could not be allowed:

[W]hen the Constitution was adopted, the settlement of that vast territory was hardly begun; and the people who filled it, and formed the great and populous States that now cover it, became inhabitants of the territory after the Constitution was adopted; and migrated upon the faith that its protection and benefits would be extended to them, and that they would in due time, according to its provisions and spirit, be admitted into the Union upon an *equal footing* with the old States.²⁵³

The equal footing analysis first appeared in *Pollard*, where Justice McKinley used the phrase twice.²⁵⁴ He noted that when a territory reached a population of sixty thousand “such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever.”²⁵⁵ And he asserted that “[t]o maintain any other doctrine [other than that Alabama was entitled to the same sovereignty and jurisdiction over territory within its limits as Georgia had possessed] is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding.”²⁵⁶

Chief Justice Taney was a bit coy about the provenance of the equal footing requirement. He spoke of settlers in the territories who “migrated upon the faith that [the Constitution’s] protection and benefits would be extended to them, and that they would in due time, according to its provisions and spirit, be admitted into the Union upon an equal footing with the old States.”²⁵⁷ But neither the Articles of Confederation nor the Constitution contained a requirement that new states be admitted “on an equal footing” with the original states. The Articles of Confederation simply provided for a vote of nine states to admit a new

252. *Id.*

253. *Id.* at 96 (emphasis added).

254. The “equal footing” language appears once in *Permoli*, but only when Justice Catron quotes from the 1812 enabling statute. *Permoli v. City of New Orleans*, 44 U.S. 589, 609 (1845).

255. *Pollard v. Hagan*, 44 U.S. 212, 222 (1845).

256. *Id.* at 229.

257. *Strader*, 51 U.S. at 96.

state.²⁵⁸ The Constitution only provides that “[n]ew States may be admitted by the Congress into this Union.”²⁵⁹

The origin of the equal footing formulation can be identified from the statutes of admission of the first four states. In 1791, the statutes of admission for the first two states, Vermont²⁶⁰ and Kentucky,²⁶¹ did not use the equal footing formulation. Instead, they characterized the new state “as a new and entire member of the United States of America.”²⁶² That changed with the admissions of Tennessee in 1796²⁶³ and Ohio in 1802;²⁶⁴ their admissions statutes used the “equal footing” formulation.²⁶⁵ What was the origin of the new formulation? Both Ohio and Tennessee were governed by the Northwest Ordinance; Vermont and Kentucky were not.²⁶⁶ And the Northwest Ordinance included the “equal footing formulation”:

Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as

258. See ARTICLES OF CONFEDERATION of 1778, art. XI (“Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.”).

259. U.S. CONST. art. IV, § 3, cl. 1.

260. Act of Feb. 18, 1791, ch. 7, 1 Stat. 191 (admitting the State of Vermont into the Union).

261. Act of Feb. 4, 1791, ch. 4, 1 Stat. 189 (admitting the State of Kentucky into the Union).

262. Act of Feb. 18, 1791, ch. 7, 1 Stat. 191 (“[A]s a new and entire member of the United States of America.”); Act of Feb. 4, 1791, ch. 4, 1 Stat. 189 (“[A]s a new and entire member of the United States of America.”).

263. Act of June 1, 1796, ch. 47, 1 Stat. 491 (admitting the State of Tennessee into the Union).

264. Act of Apr. 30, 1802, ch. 40, 2 Stat. 173 (admitting Ohio into the Union).

265. Act of June 1, 1796, ch. 47, 1 Stat. 491 (“[O]n an equal footing with the original states, in all respects whatever . . .”); Act of Apr. 30, 1802, ch. 40, 2 Stat. 173 (“[U]pon the same footing with the original states, in all respects whatever.”).

266. Ohio was directly governed by the Northwest Ordinance. See *Northwest Ordinance*, *supra* note 2, § 14, art. V. Tennessee was created pursuant to the Southwest Ordinance, which incorporated the terms of the Northwest Ordinance. Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 (establishing the Southwest Territory).

articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent²⁶⁷

The “equal footing” formulation was appropriated from the Northwest Ordinance and became the standard construction in the statutes admitting new states. The formulation was used in every one of the sixteen statutes enacted between 1796 and 1851, when Chief Justice Taney wrote *Strader*. It was used for both states that were governed by the Northwest Ordinance and those that were not, including, following Tennessee and Ohio, Louisiana in 1812,²⁶⁸ Indiana in 1816,²⁶⁹ Mississippi in 1817,²⁷⁰ Illinois in 1818,²⁷¹ Alabama in 1819,²⁷² Maine in 1820,²⁷³ Missouri in 1821,²⁷⁴ Arkansas in 1836,²⁷⁵ Michigan

267. *Northwest Ordinance*, *supra* note 2, §§ 13, 14. The equal footing language also appears in the fifth article of compact: “[S]uch State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government.” *Id.* at § 14, art. V.

268. Act of Apr. 8, 1812, ch. 50, 2 Stat. 701 (admitting Louisiana into the Union) (“[I]s hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever . . .”).

269. Act of Apr. 19, 1816, ch. 57, 3 Stat. 289 (admitting Indiana into the Union) (“[T]he said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.”).

270. Act of Mar. 1, 1817, ch. 23, 3 Stat. 348 (admitting Indiana into the Union) (“[T]he said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.”).

271. Act of Apr. 18, 1818, ch. 67, 3 Stat. 428 (admitting Illinois into the Union) (“[T]he said state, when formed, shall be admitted into the Union upon the same footing with the original states, in all respects whatever.”).

272. Act of Mar. 2, 1819, ch. 47, 3 Stat. 489 (admitting Alabama into the Union) (“[T]he said territory, when formed into a state, shall be admitted into the union, upon the same footing with the original states, in all respects whatever.”).

273. Act of Mar. 3, 1820, ch. 19, 3 Stat. 544 (admitting Maine into the Union) (“[I]s hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.”).

274. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545 (admitting Missouri into the Union) (“[T]he said state, when formed, shall be admitted into the Union, upon an equal footing with the original states, in all respects whatsoever.”).

275. Act of June 15, 1836, ch. 100, 5 Stat. 50 (admitting Arkansas into the Union) (“[S]hall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever . . .”).

in 1837,²⁷⁶ Florida in 1845,²⁷⁷ Texas in 1845,²⁷⁸ Iowa in 1846,²⁷⁹ Wisconsin in 1848,²⁸⁰ and California in 1850.²⁸¹

Chief Justice Taney's appropriation and use of the equal footing formulation from the Northwest Ordinance is subject to two objections, one narrow and the other broad.

The narrow objection to Chief Justice Taney's use of the equal footing formulation is that he misread the language of the text. Section 13 did not guarantee "admission to the Union on an equal footing with the original States,"²⁸² in the sense that the newly formed states could not be required to have substantively different constitutions and laws.²⁸³ Rather than such a notion of substantive uniformity, the "equal footing" language of Northwest Ordinance Section 13 guarantees the new states procedural equality: "[A]dmission to a share in the Federal councils on an equal footing with the original States."²⁸⁴ Thus, one plausible interpretation of the equal footing language is that the newly formed states not be admitted into the Union in an inferior posture *vis a vis* the original states, for example having inferior voting rights in Congress.²⁸⁵ Under this reading, the equal footing language simply

276. Act of June 15, 1836, ch. 99, 5 Stat. 49 (admitting Michigan into the Union) ("[S]hall be, and is hereby, declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatsoever . . .").

277. Act of Mar. 3, 1845, ch. 48, 5 Stat. 742 (admitting the State of Florida into the Union) ("That the States of Iowa and Florida be, and the same are hereby, declared to be States of the United States of America, and are hereby admitted into the Union on an equal footing with the original States, in all respects whatever.").

278. Act of Dec. 29, 1845, res. 1, 9 Stat. 108 (admitting Texas into the Union) ("That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever.").

279. Act of Dec. 28, 1846, ch. 1, 9 Stat. 117 (admitting Iowa into the Union) ("That the State of Iowa shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatsoever.").

280. Act of May 29, 1848, ch. 50, 9 Stat. 233 (admitting Wisconsin into the Union) ("That the State of Wisconsin be, and is hereby, admitted to be one of the United States of America, and is hereby admitted into the Union on an equal footing with the original States, in all respects whatever . . .").

281. Act of Sept. 9, 1850, ch. 50, 9 Stat. 452 (admitting California into the Union) ("That the State of California shall be one, and is hereby declared to be one, of the United States of America, and is admitted into the Union on an equal footing with the original States, in all respects whatever.").

282. *Northwest Ordinance*, *supra* note 2, § 13.

283. *Id.*

284. *Id.* The "equal footing" language of the fifth article of compact is no more supportive of Chief Justice Taney's interpretation: "[S]uch State shall be admitted . . . into the Congress of the United States, on an equal footing with the original States, in all respects whatever." *Id.* § 14, art. V.

285. When the Northwest Ordinance was enacted, voting in the Confederation Congress was by state, with each state having one vote. Had Congress wanted to admit the new states in on inferior footing to the original thirteen states, it might have, for example, allocated each of the original thirteen

required that newly created states have equal representation in Congress with the original states.

The history of the language that evolved to the “equal footing” formulation supports such a procedural reading. A resolution of the Confederation Congress on October 10, 1780 provided that the states to be formed out of the Northwest Territory would “have the same rights of sovereignty, freedom and independence, as the other states.”²⁸⁶ According to one commentator, this resolution “promised the settlers admission into the Union on terms of equality with the original States.”²⁸⁷ A noted historian identified this as one of “the two essential ideas of the American colonial system,” which he framed as “the ultimate admission of the colony into the Union on terms of equality with the older members.”²⁸⁸

In 1782, Theodorick Bland of Virginia made a motion in the Confederation Congress in which he phrased it that each state admitted out of the Northwestern Territory would “become and ever after be and constitute a separate and independant (sic) free & sovereign state and be admitted into the Union as such with all the privileges and immunities of those states which now compose the Union.”²⁸⁹ The Confederation Congress adopted a resolution on October 15, 1783, which said the states to be created out of the Northwest Territory would each be “a free, sovereign and independent state, to be admitted to a representation in the union.”²⁹⁰

The “equal footing” formulation first appeared in the Ordinance of 1784, which provided that the states admitted out of the Northwest Territory would be “admitted by its delegates into the Congress of the United States, on an equal footing with the said original states.”²⁹¹ The Northwest Ordinance of 1787 was taken for a third reading on July 9, 1787.²⁹² It provided that upon the states to be admitted from the Northwest Territory reaching the required population,

states two votes and the newly admitted states one vote, or required a majority of both the total number of states and the original thirteen for a measure to pass, or provided for only the original thirteen states to vote on matters of great importance. Any of these structures would have admitted new states on an unequal footing.

286. Merriam, *supra* note 47, at 304 (citing 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 915 (Gaillard Hunt ed., 1910)).

287. *Id.* at 304.

288. McLAUGHLIN, CONFEDERATION, *supra* note 4, at 115. McLaughlin cast the other essential idea as “temporary government with a large measure of self-government for the colony.” *Id.*

289. Merriam, *supra* note 47, at 306.

290. *Id.* at 308 (citing 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 694 (Gaillard Hunt ed., 1922)).

291. *Ordinance of 1784*, *supra* note 126; Merriam, *supra* note 47, at 309.

292. Merriam, *supra* note 47, at 320.

“such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original states.”²⁹³

The earlier formulations, “have the same rights . . . as the other states,”²⁹⁴ “admission . . . on terms of equality with the original States,”²⁹⁵ “admitted . . . with all the privileges and immunities of those states which now compose the Union,”²⁹⁶ “admitted to a representation in the union,”²⁹⁷ and “admitted . . . on an equal footing with the said original states”²⁹⁸ all seem consistent with the procedural reading and not supportive of Chief Justice Taney’s substantive uniformity reading.

The broader objection to Chief Justice Taney’s use of the equal footing formulation is that he misrepresented the relation of the equal footing guarantee with the articles of compact. He used a misreading of the equal footing formulation to assert a hostility between the equal footing guarantee and the articles of compact. But in fact, the equal footing guarantee is included in the introductory language for the articles of compact, evidencing a congressional belief that the two are compatible. Although in most modern presentations the original text of the Northwest Ordinance is divided into separately numbered sections, in the original document they were not. In the original, only the six articles of compact were separately numbered. Thus, what we refer to as Sections 13 and 14 were, in the original, one long sentence presented in two paragraphs. Thus, Congress articulated the equal footing formulation in the same sentence of the Northwest Ordinance in which it provided for the perpetual articles of compact. For Chief Justice Taney to later claim the articles of compact are precluded by the equal footing formulation is rather intellectually dishonest.

Because of the origin of the equal footing concept in the same Northwest Ordinance text as the articles of compact, Chief Justice Taney’s argument that the articles of compact are incompatible with the equal footing formulation is unconvincing.

293. *Ordinance of 1784*, *supra* note 126.

294. Merriam, *supra* note 47, at 304 (citing 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 915 (Gaillard Hunt ed., 1910)).

295. *Id.* at 304.

296. *Id.* at 306.

297. *Id.* at 308 (citing 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 694 (Gaillard Hunt ed., 1922)).

298. *Ordinance of 1784*, *supra* note 126; Merriam, *supra* note 47, at 309.

*C. The Ordinance Articles of Compact Ceased to Be Effective Upon
Ratification of the Constitution*

Chief Justice Taney's final argument was that the ratification of the Constitution itself rendered the Northwest Ordinance of no further effect.²⁹⁹ He started from the proposition that "many of the provisions" of the Northwest Ordinance articles of compact and the Constitution were "inconsistent":

Indeed, it is impossible to look at the six articles, which are supposed, in the argument, to be still in force, without seeing at once that many of the provisions contained in them are inconsistent with the present Constitution.³⁰⁰

But, he seemed to argue, the allegedly inconsistent articles of compact were amended by ratification of the Constitution. Here, he invoked the language of Section 14 of the Northwest Ordinance on modifications of the articles of compact:³⁰¹

The Constitution was, in the language of the Ordinance, "adopted by common consent," and the people of the Territories must necessarily be regarded as parties to it, and bound by it, and entitled to its benefits, as well as the people of the then existing States.³⁰²

There are two quite substantial problems with this argument. The first is that ratification of the Constitution could not have constituted an amendment of the Northwest Ordinance, by its terms. Section 14 of the Northwest Ordinance provided that the articles of compact would "forever remain unalterable, unless by common consent."³⁰³ Chief Justice Taney conflated several things in his "common consent" statement. Several are true, but irrelevant to the question of whether ratification of the Constitution constituted an amendment of the articles of compact of the Northwest Ordinance. The one relevant assertion is not true.

It is undoubtedly true that, as citizens of the United States, residents of the Northwest Territory were both bound by the Constitution and beneficiaries of it; but those observations are irrelevant to the question of whether ratification of the Constitution constituted an amendment of the Northwest Ordinance articles of compact "by common consent."

299. *Strader v. Graham*, 51 U.S. 82, 95 (1851).

300. *Id.*

301. *Northwest Ordinance*, *supra* note 2, § 14 ("[T]hat the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, *unless by common consent* . . .") (emphasis added).

302. *Strader*, 51 U.S. at 96.

303. *Northwest Ordinance*, *supra* note 2, § 14.

Chief Justice Taney's assertion that "the people of the Territories must necessarily be regarded as parties to [the Constitution]"³⁰⁴ was imprecise. They were parties to the Constitution in the sense that they were citizens and thus beneficiaries of it. But the question of whether ratification of the Constitution constituted an amendment of the Northwest Ordinance depends on whether ratification of the Constitution was by "common consent" of "the original States and the people and States in the said territory."³⁰⁵ And the citizens living in the Northwest Territory simply were not parties to the *ratification* of the Constitution, and that is the fallacy of Taney's argument.

It is true, as Chief Justice Taney asserted, that "[t]he Constitution was, in the language of the Ordinance, 'adopted by common consent.'"³⁰⁶ The problem is, the Constitution was ratified by the common consent of a group that *excluded* "the people and States in the said territory" as required in the Northwest Ordinance to modify that document.³⁰⁷ The Constitution was ratified by the votes of the existing states.³⁰⁸ There was no mechanism for the participation of the people of the territories. That being the case, there was no "common consent" between "the original States and the people and States in the said territory" in the ratification of the Constitution, and it cannot stand as a modification of the Northwest Ordinance articles of compact.

The second substantial problem with Chief Justice Taney's modification argument is that it is quite clear that Congress did not think the Northwest Ordinance was substantively incompatible with the Constitution. After ratification of the Constitution, Congress acted "so as to adapt the same to the present Constitution of the United States."³⁰⁹ But in doing so it made only very minor technical amendments to the Northwest Ordinance, thus indicating that

304. *Strader*, 51 U.S. at 96.

305. *Northwest Ordinance*, *supra* note 2, § 14.

306. *Strader*, 51 U.S. at 96.

307. *Northwest Ordinance*, *supra* note 2, § 14.

308. U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the states so ratifying the same."). There are several problems with using the ratification of the Constitution to constitute the "common consent" of the thirteen original states to modification of the Northwest Ordinance articles of compact. First, ratification, at least as to the ratifying states, required only nine of the thirteen states. *Id.* ("The ratification of the Conventions of nine states, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same."). Second, Rhode Island rejected ratification of the Constitution repeatedly, and only voted to ratify only after the Senate passed an economic embargo of Rhode Island and sent the measure to the House of Representatives. Acting under duress, within days of the Senate action Rhode Island ratified the Constitution but even then did so with multiple caveats on its approval. *Rhode Island's Ratification*, U.S. CONST., https://www.usconstitution.net/rat_ri.html [<https://perma.cc/W3WK-WSBU>] (last modified Jan. 8, 2010).

309. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 (1789).

more substantive revisions were not required to comport with the Constitution.³¹⁰

Because of the language of the Northwest Ordinance and the actions of Congress, Chief Justice Taney's third argument, that the ratification of the Constitution modified the terms of the Northwest Ordinance to conform to the provisions of the Constitution, is unconvincing.

On the basis of these arguments, Chief Justice Taney concluded that the Supreme Court had no jurisdiction in the matter and dismissed the writ of error filed by Strader, Gorman, and Armstrong.³¹¹ After almost a decade, the litigation arising from the escape of Henry, Reuben, and James to freedom was over.³¹²

V. THE LEGAL AFTERMATH OF *STRADER*

Chief Justice Taney's *Strader* opinion enjoyed only modest success, if one measures success on the basis of being cited in subsequent cases. The proposition that states have the right to determine the status and social condition of persons who are domiciled in the state was cited six times in slavery cases.³¹³ The same proposition proved even more successful in divorce and child custody cases, with eleven citations,³¹⁴ and in guardianship cases, with two citations.³¹⁵ *Strader* was cited three times for procedural propositions,³¹⁶ and once as to the

310. See *supra* text accompanying notes 63–67.

311. *Strader*, 51 U.S. at 97.

312. Actually, not quite. In 1855, Dr. Graham's attorney filed a motion in the Supreme Court to amend the 1851 judgment to award his client costs. *Strader v. Graham*, 59 U.S. 602, 602 (1855). His motion was overruled because the early appeal having been dismissed for want of jurisdiction, no award of costs could be made. *Id.*

313. *Scott v. Sandford*, 60 U.S. 393, 452 (1857); *id.* at 462–63 (Nelson, J., concurring); *In re Archy*, 9 Cal. 147, 166 (1858); *Liza v. Puissant*, 7 La. Ann. 80, 81, 83 (1852); *Lemmon v. People*, 20 N.Y. 562, 621, 624 (1860); *Anderson v. Poindexter*, 6 Ohio St. 622, 647 (1856); *Willis v. Jolliffe*, 32 S.C. Eq. (2 Rich. Eq.) 447, 460 (1860).

314. *Haddock v. Haddock*, 201 U.S. 562, 611 (1906); *Cohen v. Cohen*, 84 A. 122, 123 (Del. 1912); *Dunham v. Dunham*, 57 Ill. App. 475, 497 (1895); *Sewall v. Sewall*, 122 Mass. 156, 160–61 (1877); *Payton v. Payton*, 225 P. 576, 576 (N.M. 1924); *Leith v. Leith*, 39 N.H. 20, 33 (1859); *Hunt v. Hunt*, 72 N.Y. 217, 227–28 (1878); *People ex rel. Campbell v. Dewey*, 50 N.Y.S. 1013, 1016 (1898); *Van Fossen v. State*, 37 Ohio St. 317, 319–20 (1881); *Solomon v. Solomon*, 1 Ohio N.P. (n.s.) 113, 116 (1903); *Turpin v. Turpin*, 58 S.W. 763, 771 (Tenn. Ch. App. 1899).

315. *Woodward v. Woodward*, 11 S.W. 892, 893 (Tenn. 1889); *Redmon v. Leach*, 130 S.W.2d 873, 876 (Tex. Civ. App. 1939).

316. The original opinion in *Strader* was noted in the 1855 order denying costs, *Strader*, 59 U.S. at 602, and in two unrelated cases on procedural propositions, *East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 539 (1851) (permissible grounds for revising lower court judgments) and *Abbey v. Stevens*, 1 F. Cas. 10, 12 (D. N.Y. 1861) (No. 8) (no costs if dismissal for want of jurisdiction).

inherent police power of the states.³¹⁷ These *Strader* references did not speak directly to the continuing effectiveness of the Northwest Ordinance.

Twenty-five cases used *Strader* as to the continuing effectiveness of the Northwest Ordinance. Of course, Chief Justice Taney's most notable decision, *Scott v. Sandford*, cited *Strader* for the proposition that the Northwest Ordinance was no longer effective.³¹⁸ Nine other cases generally followed *Strader* in holding the Northwest Ordinance no longer in force.³¹⁹ The equal footing analysis was used in nine cases which found the Northwest

317. *State v. Brown*, 86 S.E. 1042, 1043 (N.C. 1915) ("The police power is inherent in the original sovereignty of the state, and the fourteenth amendment in no wise curtails it."). The court must be citing *Strader* for the first part of the proposition since, of course, the case predated the 14th Amendment.

318. *Scott*, 60 U.S. at 453 (Taney, C.J., majority); *id.* at 463–64 (Nelson, J., concurring); *id.* at 491 (Daniel, J., concurring).

319. See *Woodman v. Kilbourn Mfg. Co.*, 30 F. Cas. 503, 505 (D. Wis. 1867) (No. 17,978) ("By the act of congress admitting the new state upon its application, the several articles of the compact were not merely altered by the common consent required in the ordinance, but were superseded."); see also *Van Brocklin v. Tennessee*, 117 U.S. 151, 159 (1886) ("The Articles of Confederation ceased to exist upon the adoption of the Federal Constitution; and the Ordinance of 1787, like all acts of Congress for the government of the Territories, had no force in any State after its admission into the Union under that Constitution."); *Territory ex rel. Smith v. Scott*, 20 N.W. 401, 406 (Dak. 1884) ("The ordinance of 1787 for the government of the Northwestern territory has been already alluded to, and although that was enacted prior to the adoption of the constitution and is not now in force . . ."); *People ex rel. Woodyatt v. Thompson*, 40 N.E. 307, 313 (Ill. 1895) ("The [S]upreme [C]ourt of the United States has in numerous cases decided that the ordinance of 1787 has become inoperative."); *People ex rel. McCrea v. United States*, 93 Ill. 30, 35 (1879) ("It may be added, as a matter of course, if the ordinance is not in force in Ohio, it can not be in force in Illinois."); *Coyle v. Smith*, 113 P. 944, 951, 961 (Okla. 1911); *Am. Barge Line Co. v. Koontz*, 68 S.E.2d 56, 61 (W. Va. 1951) ("The next question relates to the applicability of the Northwest Ordinance of 1787. It has been repeatedly stated that after the admission of a state into the Union such ordinance is no longer of any force."); *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 738 (1892) ("[W]hen the ordinance of 1787 and the organic act as well, which were adapted only to the territorial condition of Wisconsin, became obsolete and ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union . . ."); *State ex rel. Weiss v. Dist. Bd. of Sch. Dist. No. 8*, 44 N.W. 967, 977 (1890) ("[T]hat by the adoption of our state constitution, and the admission of the state into the Union, that article became superseded and ceased to be longer in force.").

Ordinance to no longer be in force.³²⁰ Two courts avoided the issue.³²¹ One court noted the conflict over the continuing effectiveness of the Northwest ordinance.³²²

Notably, three cases presented challenges to Chief Justice Taney's *Strader* analysis. The first case to challenge Taney's analysis, decided only two years after *Strader*, was *Columbus Insurance Co. v. Curtenius*.³²³ *Curtenius* was an Illinois case involving a collision between a canal boat and a bridge.

320. See *Flambeau River Lumber Co. v. Gettle*, 236 N.W. 671, 676 (1931); see also *Coyle v. Smith*, 221 U.S. 559, 573 (1911) ("The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."); *Huse v. Glover*, 119 U.S. 543, 546 (1886); *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883); *Williams v. Hert*, 110 F. 166, 170 (D. Ind. 1901) ("The ordinance of 1787 and the other acts above quoted have ceased to operate as limitations on the powers of the state. This state possesses all the sovereign powers possessed by any one of the original states of the Union, in all respects whatever."); *Case v. Toftus*, 39 F. 730, 732 (D. Or. 1889) ("The doctrine that new states must be admitted into the Union on an 'equal footing' with the old ones does not rest on any express provision of the constitution, which simply declares (article 4, § 3) 'new states may be admitted by congress into this Union,' but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the states, as established by the constitution,—a union of political equals."); *Wallamet Iron Bridge Co. v. Hatch*, 19 F. 347, 352–53 (D. Or. 1884) ("Although the grant of power to congress to admit new states into this Union (U.S. CONST. art. 4, § 3) is unqualified, yet it is well established by the supreme court that congress cannot admit a state upon any other than an equal footing with the other states therein, and therefore cannot, as a consideration of such admission, make any valid compact or enactment which shall deny to such state within its limits the municipal powers common to the others."); *State ex rel. Donahey v. Edmondson*, 105 N.E. 269, 274 (Ohio 1913) ("Congress has no power to admit a state to the Union under restrictions which render it unequal to other states, or to deprive a state, when admitted, of any attribute of power essential to its equality with the other states."); *Coyle*, 113 P. at 953–54, 956–57.

321. See *Huse v. Glover*, 15 F. 292, 297 (D. Ill. 1883) ("Nor do we perceive that the power of the state in this respect is in any degree affected by the ordinance of 1787, even if that ordinance, as to the matters now under consideration, be not superseded by the constitution of the United States."); *Ex parte Holman*, 28 Iowa 88, 127 (1869) (habeas corpus guaranteed, unnecessary to say whether through Northwest Ordinance).

322. *Guthrie v. McConnel*, 2 Ohio Dec. Reprint 157, 160 (C.P. 1859) ("The ordinance of 1787 provides that this river shall be a public highway, forever free, etc. If this provision is in force, it restrains State legislation, and affords another reason why the license from the State to the defendant shall not be construed to authorize him seriously to obstruct navigation. It is said however, that by the subsequent adoption of the Constitution of the United States, and the admission of Ohio as a State, into the Union, this provision of the Ordinance has been abrogated; that the several States come into the Confederacy upon equal terms; that if this provision is still in force, it serves to restrict the legislation of the State, or is a guarantee from the Federal Government not imposed or given to States not formed from the North-West Territory. Upon that question, the authorities are in conflict.")

323. *Columbus Ins. Co. v. Curtenius*, 6 F. Cas. 186 (D. Ill. 1853) (No. 3,045).

Defendants constructed a bridge across the Illinois River near Peoria.³²⁴ On March 19, 1849, plaintiff's insured's canal boat, which was then under tow, struck defendants' bridge and sank, taking with it a load of wheat.³²⁵ The district court first discussed whether the Illinois River was a navigable river free to all citizens, finding that under the common law, it was not:

The first point to be determined is, whether the river Illinois, over which this bridge has been erected, is in law a navigable river free to all citizens. The tide does not ebb and flow there, and technically, according to the common law, it is not navigable, though it is so in fact.³²⁶

But, the court observed, the Northwest Ordinance provided a different result:

By the ordinance for the government of the territory northwest of the river Ohio, of 1787, it was provided (article 4) that the navigable waters leading into the Mississippi and St. Lawrence should be common highways, and forever free to all the citizens of the United States.³²⁷

Citing *Strader*, *Permoli*, and *Pollard*, the district court allowed: "It is said that this provision of the ordinance is not in force."³²⁸ But, the district court, observed: "This seems to be the doctrine now established by the supreme court of the United States, contrary to what has been the general understanding for many years, in the states carved out of that territory."³²⁹ The *Curtenius* district court then raised some fundamental questions about the analysis in *Strader*. The district court acknowledged the "common consent" mechanism by which the provisions of the Northwest Ordinance might be amended.³³⁰ It then challenged the *Strader* analysis by noting that "it seems certain that congress did not exactly regard the ordinance as at an end, by the adoption of the constitution of the United States."³³¹ To support its analysis, the district court cited four things. First, that Congress enacted a post-ratification statute which made technical amendments to conform the Northwest Ordinance to the

324. *Id.* at 187.

325. *Id.* at 186–87.

326. *Id.* at 187.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*:

It was never doubted but that any provisions of the ordinance which were contrary to the constitution of the United States, and the laws passed in pursuance thereof, or to the constitutions of the states formed out of that territory were abrogated, because the "common consent" mentioned in the ordinance was then presumed.

331. *Id.*

Constitution.³³² Second, that Congress admitted states out of the Northwest Territory with the proviso that they act in conformity with the Northwest Ordinance.³³³ Third, that Congress “extended the provisions of this ordinance, except the introductory clause, over some of the southwestern states.”³³⁴ Fourth, that Congress acted, after ratification of the Constitution, consistently in accord with the navigable waters provisions of the Northwest Ordinance. “Indeed,” the district court concluded, “it may be safely affirmed that in no instance has congress permitted an occasion to pass without declaring that the Mississippi and its navigable tributaries shall remain public highways and forever free.”³³⁵

In the end, the *Curtenius* district court avoided a direct challenge to the suggestion that the Northwest Ordinance was rendered ineffective by ratification of the Constitution:

Now, it is immaterial whether congress has legislated under the impression that a part of the ordinance of 1787 was still in force, although it is not; provided it is apparent from its whole tenor of legislation that it has re-enacted such part and given it continued operation. And that does seem to be the fact in this instance.³³⁶

Finally, the district court argued, even if the Northwest Ordinance was not in effect by its own force, it was in force by virtue of the extensions of the Ordinance subsequent to ratification of the Constitution.³³⁷

The second case which presented a challenge to Chief Justice Taney’s *Strader* analysis came in 1901, in the Supreme Court case of *Downes v.*

332. *Id.* (“[A]s is plain from the very first law on the subject adapting it to the constitution.”) (citing Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (reenacting the Northwest Ordinance)).

333. *Id.* at 187–88 (“And in allowing the various states which were formed out of that territory to adopt state governments, provision was made that they should not do anything repugnant to the ordinance, with certain specified exceptions.”).

334. *Id.* at 188.

335. *Id.*

336. *Id.*

337. *Id.* at 190:

There is great reason for saying, therefore, independently of the various statutes which have been referred to, that if the ordinance of 1787 is not in force in Illinois proprio vigore this part of it which we are now speaking of, is in force by virtue of the compact which may be said to have been made since the adoption of the constitution, between the United States and the states formed out of the northwest territory, and that the compact is binding on the states of the northwest territory, for the same reason that it is binding on Alabama, Mississippi or Louisiana.

Id.

Bidwell.³³⁸ The issues in *Downes* were whether the imposition of duties under the Foraker Act on goods received from Puerto Rico was unconstitutional by virtue of Article I, Sections 8 and 9,³³⁹ and “the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories.”³⁴⁰ The underlying issue was the nature of territories within the national structure.³⁴¹ Justice Brown, writing for the Court, did not address Chief Justice Taney’s *Strader* position.³⁴² Chief Justice Taney’s *Strader* analysis was questioned in Justice White’s concurrence, in which Justices Shiras and McKenna joined.³⁴³ Justice White noted both Chief Justice Taney’s *Strader* analysis and the contrary analysis.³⁴⁴ His conclusion was that the portion of the Northwest Ordinance relevant to the question presented in *Downes* remained effective:

Whatever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion that under

338. 182 U.S. 244 (1901). *Downes* arose shortly following the seizure of Puerto Rico during the Spanish–American War and involved the issue of whether oranges imported from Puerto Rico to the Port of New York were subject to duties. The Foraker Act, which instituted a governmental structure for Puerto Rico following annexation, required the collection of duties on products imported from Puerto Rico equal to “fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries.” *Id.* at 247–48 (citation omitted).

339. U.S. CONST. art. I, § 8 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . .”), § 9 (“[N]or shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”).

340. *Downes*, 182 U.S. at 249.

341. *Id.*

342. *Id.* Justice Brown noted the creation of the Northwest Territory. *Id.* at 250. He also noted, and rejected, Chief Justice Taney’s argument in *Scott* that the Federal government was not authorized to create territorial governments:

It was thought by Chief Justice Taney in the *Dred Scott* case . . . that the power “to make needful rules and regulations” was not intended to . . . authorize the establishment of territorial governments But, as we observed in *De Lima v. Bidell*, the power to establish territorial governments has been too long exercised by Congress and acquiesced in by this court to be deemed an unsettled question.

Id. Justice Brown concluded that the Foraker Act was constitutional because “the Island of Puerto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution.” *Id.* at 287.

343. *Id.*

344. *Id.* at 320 (White, J., concurring):

The opinion has been expressed that the ordinance of 1787 became inoperative and a nullity on the adoption of the Constitution, while, on the other hand, it has been said that the ordinance of 1787 was “the most solemn of all engagements,” and became a part of the Constitution of the United States by reason of the sixth article.

Id. (citations omitted).

the Constitution the provision of the Northwest Territory ordinance making such territory forever a part of the confederation was not binding on the government of the United States when the Constitution was formed.³⁴⁵

Justice White found support for the continued effectiveness of the Northwest Ordinance after ratification of the Constitution in the actions of the First Congress conforming the Northwest Ordinance in technical detail,³⁴⁶ and in the extension of the terms of the Northwest Ordinance to territories organized after ratification of the Constitution.³⁴⁷

The third case which presented a challenge to Chief Justice Taney's *Strader* analysis came in 1911, in the Ohio Supreme Court case of *State v. Boone*.³⁴⁸ *Boone* addresses the question of the limits of the police power of the state.³⁴⁹ The court's analysis on point begins with a Connecticut case, *State v. Wordin*,³⁵⁰ in which the Connecticut Supreme Court declared that the personal liberty guarantees of the Federal Constitution "place no limitation upon the power of the legislature of this state to require gratuitous service from one member of the community in the protection of the lives of all."³⁵¹ The *Boone* court declared: "[T]here is grave reason to doubt whether it is sound law in this jurisdiction, owing to specific provisions of the Ordinance of 1787."³⁵²

The court noted the construction of the Northwest Ordinance, differentiating between the first twelve sections and the articles of compact: "The first 12 sections of the ordinance obviously provided for the temporary government of the territory until it should be divided and organized into states. Then follows something of more enduring interest."³⁵³ The *Boone* court then quoted the introductory language to the articles of compact:

And for extending the fundamental principles of civil and

345. *Id.* at 321.

346. *Id.*:

Beyond question, in one of the early laws enacted at the first session of the First Congress, the binding force of the ordinance was recognized, and certain of its provisions concerning the appointment of officers in the territory were amended to conform the ordinance to the new Constitution.

Id.

347. *Id.* at 321–22.

348. 95 N.E. 924, 926–27 (Ohio 1911).

349. *Boone* involved a challenge to an Ohio statute that required health care professionals to provide information for the registration of births and deaths. The defendant was found guilty and challenged his conviction. *Id.* at 924.

350. 14 A. 801 (Conn. 1887).

351. *Boone*, 95 N.E. at 925 (quoting *Wordin*, 14 A. at 803).

352. *Id.*

353. *Id.*

religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest: It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent³⁵⁴

As to the assertion that adoption of the State of Ohio's first constitution superseded the Northwest Ordinance, the *Boone* court cited the fifth article of compact guarantee that: "The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles."³⁵⁵ The court illustrated the application of the concept:

If our constitution, instead of creating a republican form of government for the state, had provided a pure democracy, a government directly by the people, and, so framed, it had been accepted by the President and Congress of the United States, there might have been *some* reason for the claim that, in that respect, the compact which was to "remain forever unaltered, unless by common consent" had been repealed by implication; yet, even under such circumstances, a conclusive presumption would not be raised that the compact had been altered, without the common consent of all the parties thereto.³⁵⁶

Having acknowledged the possibility of alteration by common consent, the *Boone* court raised the possibility that the original Ohio constitution would have simply omitted some provisions within the Northwest Ordinance:

But if the convention which prepared our constitution had omitted from the Bill of Rights, the famous interdiction against slavery, contained in article 6 of the ordinance, would that have justified the conclusion that the compact was altered and that the existence of slavery in Ohio would be constitutional?³⁵⁷

The *Boone* court answered this question in the negative:

Or, to put the question in another form, if our constitution

354. *Id.* at 925–26 (quoting *Northwest Ordinance*, *supra* note 2, §§ 13, 14).

355. *Id.* at 926 (quoting *Northwest Ordinance*, *supra* note 2, § 14, art. V).

356. *Id.*

357. *Id.*

contained nothing whatever in regard to the privilege of the writ of habeas corpus, or to trial by jury, or to proportional representation of the people in the Legislature, or to the prohibition of cruel and unusual punishments, it could not be justly inferred that the great compact had been altered, and that these privileges and guaranties had been subtracted from the rights of the citizens, and were not included among the rights reserved by the people . . . because there would have been nothing in the constitution which was inconsistent with the Ordinance, and the declared purpose thereof “to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory,” and that these “articles shall be considered as articles of compact between the *original states* and the *people* and *states* in the said territory, and forever remain unalterable, unless by common consent.”³⁵⁸

The *Boone* court quoted with approval from two earlier Ohio cases, saying the “quotations remain as the unmodified expressions of this court upon this subject.”³⁵⁹ The first was *Hogg v. Zanesville Canal & Manufacturing Co.*,³⁶⁰ in which the court spoke of the navigable waters clause in the fourth article of compact:

This portion of the Ordinance of 1787, is as much obligatory upon the state of Ohio as our own constitution. In truth it is more so; for the Constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States through their representatives. It is an article of compact, and, until we assume the principle that the sovereign power of the state is not bound by contract, this clause must be considered obligatory.³⁶¹

The *Boone* court also quoted from *Hutchinson v. Thompson*,³⁶² another navigable waters case:

But when application for admission into the Union was made by the people inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and they were granted by the United States, as one party, to the state as the other. This seems to show that the people of Ohio

358. *Id.* (quoting *Northwest Ordinance*, *supra* note 2, §§ 13, 14).

359. *Id.*

360. 5 Ohio 410 (1832).

361. *Boone*, 95 N.E. at 926 (quoting *Hogg*, 5 Ohio at 416).

362. 9 Ohio 52 (1839).

have so far treated the articles of compact as of perpetual obligation. The alterations proposed were with a view to the immediate formation of a state Constitution, and were of no importance if the states should have a right to annul the Ordinance the moment it assumed that condition.³⁶³

The *Boone* court concluded by noting, and rejecting, the analysis embodied in Chief Justice Taney's *Strader* opinion:

We are not unaware of various dicta which have appeared from time to time in opinions by learned Justices of the Supreme Court of the United States, beginning with Pollard's Lessee v. Hagan, *Permoli v. First Municipality*, and *Strader v. Graham*. But it requires no acute analysis to differentiate those cases and to show that they do not go very thoroughly into the question whether the Ordinance of 1787 can be superseded otherwise than by the "common consent" of the parties to the compact, as required by the terms of the Ordinance, or whether such "common consent" ever has been given; and, giving the fullest effect that can be claimed from those remarks by the distinguished judges, it is obvious that they ignore the distinction between a mere act of Congress, which may be repealed or superseded by subsequent acts, and a solemn and formal "compact," in the nature of a treaty as it were, between the proprietary states and the people and states of the territory which was subsequently to be erected into several states of this Union. They ignore, moreover, the fact that the compact, on the good faith of which the original proprietors ceded this territory to the United States, expressly declared that the principles declared therein shall be the basis of "*all laws, constitutions and governments which forever hereafter shall be formed in the said territory;*" and at best these declarations rest on no stronger foundation than the provision of the compact itself, namely, that a state with constitutional limitations as provided, "*shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever.*" . . . Whatever that clause may mean, it certainly does not mean that all state Constitutions shall be, or are, alike, nor that a new state erected in the Northwest Territory, shall be understood to surrender all the guaranties of the compact as a condition of admission as a state.³⁶⁴

363. *Boone*, 95 N.E. at 926 (quoting *Hutchinson*, 9 Ohio at 62). The court notes: "Similar language is found in the opinion in *Cochran's Heirs v. Loring*, 17 Ohio 409, 424-25 [(1848)]." *Id.*

364. *Id.* at 926-27 (internal citations omitted).

The conclusion was a clear departure from *Strader*:

We have thus briefly indicated the reasons for our belief, that the Great Charter of the Northwest Territory is still under, and above, and before, all laws or Constitutions which have yet been made in the states which are parts of that territory; and that under its guaranties the state has not the right to draft a citizen into particular service without substantial compensation.³⁶⁵

Chief Justice Taney's equal footing argument was cited repeatedly through the next eighty years,³⁶⁶ although some courts evidenced skepticism at the full extent of Chief Justice Taney's assertion,³⁶⁷ or rejected the equal footing argument completely.³⁶⁸ As one Federal judge cast the proposition in 1889:

The doctrine that new states must be admitted into the Union on an "equal footing" with the old ones does not rest on any

365. *Id.* at 927.

366. The *Dred Scott* concurrence of Justice Daniel used the equal footing analysis: Again he says, "with respect to what has taken place in the Northwest territory, it may be observed that the ordinance giving it its distinctive character on the subject of slaveholding proceeded from the old Congress, acting with the best intentions, but under a charter which contains no shadow of the authority exercised; and it remains to be decided how far the States formed within that territory, and admitted into the Union, are on a different footing from its other members as to their legislative sovereignty"

Scott v. Sandford, 60 U.S. 393, 491 (1857) (Daniel, J., concurring); *see also* *Huse v. Glover*, 119 U.S. 543, 546 (1886) (citing *Strader v. Graham*, 51 U.S. 82 (1851) and admission statute for language that state was "admitted into the Union on an equal footing with the original States in all respects whatever").

Other Federal courts have used the equal footing language. *See* *Huse v. Glover*, 15 F. 292, 297 (D. Ill. 1883), *aff'd* 119 U.S. 543 (1886) (noting that the Northwest Ordinance "itself provided for the admission of the new states 'on an equal footing with the original states, in all respects whatever'"); *see also* *Williams v. Hert*, 110 F. 166, 170 (D. Ind. 1901) ("It was admitted into the Union on an equal footing with the original states in all respects whatever. The ordinance of 1787 and the other acts above quoted have ceased to operate as limitations on the powers of the state.") (internal quotation omitted); *Columbus Ins. Co. v. Curtenius*, 6 F. Cas. 186, 188 (D. Ill. 1853) (No. 3,045) ("But it is said, that the new states having come into the Union upon an equal footing with the original states").

The equal footing construction has also been cited by state courts. *State ex rel. Donahey v. Edmondson*, 105 N.E. 269, 273 (Ohio 1913) ("This grant of power, of course, extended to the new states to be formed out of the Northwest Territory, and the original compact provided that these states should be admitted into the Union on equal footing with the original states in all respects whatever."); *Coyle v. Smith*, 113 P. 944, 952-54 (Okla. 1911); *Flambeau River Lumber Co. v. Gettle*, 236 N.W. 671, 675 (1931); *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 738 (1892).

367. *See* *Wallamet Iron Bridge Co. v. Hatch*, 19 F. 347, 357-58 (D. Or. 1884).

368. *See* *Boone*, 95 N.E. at 925-27 (rejecting equal footing argument that Northwest Ordinance was no longer in effect by declaring that "the Great Charter of the Northwest Territory is still under, and above, and before, all laws or Constitutions which have yet been made in the states which are parts of that territory").

express provision of the constitution, which simply declares (article 4, § 3) “new states may be admitted by congress into this Union,” but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the states, as established by the constitution,—a union of political equals.³⁶⁹

Several courts that invoked the equal footing formulation cited the statutes under which the states were admitted to the Union.³⁷⁰ Several courts that invoked the equal footing formulation cited the Northwest Ordinance.³⁷¹

Chief Justice Taney’s *Strader* opinion was last cited by an American court in a 1951 West Virginia tax case.³⁷²

VI. CONCLUSION

In 1787, Congress ordained an article of compact which guarantees that no citizen should ever be molested on account of his or her mode of worship or religious sentiments.³⁷³ Congress made that religious liberty guarantee forever unalterable except by the common consent of the parties.³⁷⁴ Ensuring that

369. *Case v. Toftus*, 39 F. 730, 732 (D. Or. 1889) (citing *Pollard v. Hagan*, 44 U.S. 212 (1845), *Permoli v. City of New Orleans*, 44 U.S. 589 (1845), and *Strader*, 51 U.S. at 82).

370. *Benner v. Porter*, 50 U.S. 235, 241 (1850) (“[T]he Territory [was] admitted, in the language of the act, ‘into the Union on an equal footing with the original States in all respects whatsoever.’”); *Permoli*, 44 U.S. at 609 (citing the act of 1812 which admitted Louisiana “on an equal footing with the original states in all respects whatever”); *City of Mobile v. Eslava*, 41 U.S. 234, 253 (1842) (quoting the statutory affirmation “[t]hat the state of Alabama shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever”); *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. 353, 374 (1840) (citing the statutory basis for the equal footing promise); *City of New Orleans v. De Armas*, 34 U.S. 224, 235 (1835) (citing “the act of congress for admitting the state of Louisiana into the union” for the “equal footing” language); *Menard v. Aspasia*, 30 U.S. 505, 513 (1831) (citing the “joint resolution of the Senate and House of Representatives [by which] the state of Illinois was admitted into the union, ‘on an equal footing with the original states in all respects whatever’”).

371. *Pollard*, 44 U.S. at 222 (“The manner in which the new states were to be admitted into the union, according to the ordinance of 1787, as expressed therein, is as follows: ‘And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever.’” (quoting *Northwest Ordinance*, *supra* note 2, § 14, art. V)); *Cherokee Nation v. Georgia*, 30 U.S. 1, 35 (1831) (“[N]ew states were to be formed within the ceded boundaries, to be admitted into the union on an equal footing with the original states[.] . . . In this spirit congress passed the celebrated ordinance of July 1787 . . .”).

372. *American Barge Line Co. v. Koontz*, 68 S.E.2d 56, 61 (W.Va. 1951) (“The next question relates to the applicability of the Northwest Ordinance of 1787. It has been repeatedly stated that after the admission of a state into the Union such ordinance is no longer of any force.” (citing *Strader*, 51 U.S. at 95)).

373. See *Northwest Ordinance*, *supra* note 2, § 14, art. I.

374. *Id.* § 14.

citizens are not disadvantaged or discriminated against on the basis of their beliefs on matters of religion is precisely the right formulation for government's role.

But should Chief Justice Taney's *Strader* error really be corrected? To do so will trigger the potentially messy task of enforcing the religious liberty guarantee that Congress enacted at the dawn of the nation. As of 2019, it has been 232 years since the Confederation Congress enacted the Northwest Ordinance of 1787; 168 years since Chief Justice Taney wrote his *Strader* opinion. After all these years, why should we reconsider whether the articles of compact are still effective?

One compelling reason is that the Confederation Congress ordained and declared that the provisions of Section 14 of the Northwest Ordinance "shall be considered as articles of compact, between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent."³⁷⁵ The analysis of the courts under which the articles of compact came to be declared "not in force" was intellectually offensive and should be corrected. For example, in 1921, the Supreme Court engaged in especially objectionable misdirection when it observed: "[T]he Ordinance of 1787—notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the State of Illinois into the Union 'on an equal footing with the original States in all respects whatever.'"³⁷⁶ Rather than engage in such sophistry, we should answer in the negative a question posed by Professor Andrew McLaughlin: "Will they say that, because the men of 1787 did not act and speak in the terms of the philosophy which arose from the civilization of the next century . . . they did not do what they intended to do?"³⁷⁷

A second compelling reason to revisit Chief Justice Taney's *Strader* error is the benefit society might realize from application of the Northwest Ordinance article of compact on religious liberty:³⁷⁸ "No person, demeaning himself in a

375. *Id.*

376. *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 120 (1921) (quoting *Permoli v. City of New Orleans*, 44 U.S. 589, 609 (1845)).

377. McLaughlin, *Social Compact*, *supra* note 111, at 487.

378. *See Northwest Ordinance*, *supra* note 2, § 14, art. I. Several of the Northwest Ordinance articles of compact would not have any application today, including the fourth (secession), fifth (admission of states out of the Northwest Territory), and sixth (slavery). As to others, a combination of subsequent guarantees and the course of events suggest that the Northwest Ordinance provisions would be of only limited utility, although minor differences in phraseology and presentation might loom large in the hands of creative experts in the various fields. The liberty and due process guarantees of the second presumably were replicated with incorporation of provisions of the Bill of Rights through the Due Process Clause of the 14th Amendment. The third compact does not seem to have contemporary importance. The first part deals with education in such an aspirational fashion—that

peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.”³⁷⁹ There are intriguing arguments that the substantive guarantees of the Northwest Ordinance articles of compact provide more protection that would otherwise be available.

It is true that since the 1940s, the Establishment Clause³⁸⁰ and the Free Exercise Clause³⁸¹ of the First Amendment have been incorporated as to the states by the Due Process Clause of the 14th Amendment. But the protections of the first article of compact are arguably significantly broader than those of the First Amendment.³⁸² The First Amendment provides religious liberty protections against the actions of the government and those acting under color of law.³⁸³ In contrast, the focus of the first article of compact is on the victim: “No person . . . shall ever be molested.”³⁸⁴ It could be argued that using this formulation would give protection against the actions of private parties, not merely the government and those acting under color of law.

The First Amendment provides religious liberty protections for the “free exercise [of religion]” and from actions “respecting an establishment of religion.”³⁸⁵ In contrast, the focus of the first article of compact is to guarantee the victim that he or she will not be “molested on account of his mode of worship, or religious sentiments.”³⁸⁶ It could be argued that this formulation provides all of the protection for the exercise of religion—“exercise of religion”

“schools and the means of education shall forever be encouraged”—that even if still effective it would not seem to encompass any substantial content; the second part deals with relations with Native Americans. Given Federal preemption of Native American affairs, this provision would seem to have little if any contemporary relevance. Beyond the anti-secession language, the fourth requires the citizens of the states to pay their apportioned taxes equal to the citizens of other states; precludes the states from interfering with Federal land grants, taxing Federal lands, or charging non-residents higher taxes; and prohibits interference with free use of navigable rivers. It would seem to have little contemporary relevance, except with respect to the navigable waters guarantee.

379. *Id.* § 14, art. I.

380. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 7 (1947) (incorporating guarantee against establishment of religion).

381. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (incorporating free exercise guarantee).

382. Compare U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”), with *Northwest Ordinance*, *supra* note 2, § 14, art. I (“No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.”).

383. U.S. CONST. amend. I (“Congress shall make no law . . .”).

384. *Northwest Ordinance*, *supra* note 2, § 14, art. I.

385. U.S. CONST. amend. I.

386. *Northwest Ordinance*, *supra* note 2, § 14, art. I.

under the First Amendment and “mode of worship” under the first article of compact—and in addition provides religious liberty protection based upon religious sentiments. Thus, atheists, agnostics, and all manner of non-believers would unquestionably be brought within the sweep of our religious liberty protections.

It is not completely clear how the first article of compact would play out in the protection of the religious liberty interests of citizens with disfavored beliefs on matters of religion. Perhaps the most substantial unknown is how the courts would interpret the phrase “be molested” in the provision.³⁸⁷ If “molested” means simply physically abused—jailed, beaten up, killed—then the protection is of limited utility. If “molested” is synonymous with “disadvantaged” and “discriminated against,” then the protection becomes real. And if such a broad construction was coupled with protection from the acts of private parties, the protection becomes a substantial improvement over the First Amendment.

Who might benefit from a liberal construction of the Northwest Ordinance first article of compact? A Muslim woman denied the opportunity to swear a testimonial oath on a Koran instead of the Bible specified by state statute?³⁸⁸ An Air Force technical sergeant refused re-enlistment because he crossed out the words “so help me God” on the government form?³⁸⁹ An atheist taxpayer forced to pay taxes to a local government that emblazons its police cars with stickers proclaiming “In God We Trust”?³⁹⁰ A non-Christian citizen who wants to testify at a public hearing of her town council which begins with an official prayer to the Christian God?³⁹¹ These are situations in which the first article of compact of the Northwest Ordinance, broadly interpreted, ought to give these citizens relief against being disadvantaged and discriminated against.

But recourse to the first article of compact might complicate other situations. What of the Christian bake shop owner who refuses to bake a cake for a same-sex wedding? Assuming she could make the somewhat tenuous argument that the decision to bake or not to bake is a function of her religious sentiments, would she not claim that she was being molested by being forced

387. *Id.* (“No person . . . shall . . . be molested . . .”).

388. See Allan W. Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL’Y 443, 453–56 (2016).

389. See Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 55, 95–101 (2015) [hereinafter Vestal, *Lingering Bigotry*].

390. See Allan W. Vestal, *Cents and Sensibilities*, 20 U. PA. J. CONST. L. 245, 289 n.229 (2017).

391. *Town of Greece v. Galloway*, 572 U.S. 565, 630–32 (2013) (Kagan, J., dissenting); Vestal, *Lingering Bigotry*, *supra* note 389, at 55–56.

to bake a wedding cake for a same-sex wedding?³⁹² And what of the more plausible claim of the marital couple that they were being molested on the basis of their religious sentiments that approve of same-sex marriage?³⁹³

Chief Justice Taney's *Strader* error should be corrected; the first article of compact of the Northwest Ordinance should be resurrected. How should the religious liberty article of compact be interpreted and enforced? Should private conduct be within its scope? How broadly should the concept of molestation be taken? Who should prevail when opposing parties both claim that they are being disadvantaged because of their religious beliefs? Interesting questions, but issues for another day.

392. It is assumed that the baker would not claim that the act of baking a cake constituted a "mode of worship." But see *Colossians* 3:23 (New Living Translation) ("Work willingly at whatever you do, as though you were working for the Lord rather than for people.").

393. The Human Rights Campaign reports that the following Christian denominations allow same-sex marriage ceremonies, sometimes with restrictions, sometimes decided at the local level, and sometimes with opt-out provisions: Alliance of Baptists, Christian Church (Disciples of Christ), Episcopal Church, Evangelical Lutheran Church in America, Metropolitan Community Churches, Presbyterian Church (USA), Unitarian Universalist Association, United Church of Christ, and Unity. *Faith Positions*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/faith-positions> [<https://perma.cc/ESA4-VF88>] (last visited Mar. 25, 2019). The same source reports the following traditions in Judaism allow same-sex marriage ceremonies: Conservative Judaism, Reconstructionist Judaism, and Reform Judaism. *Id.*

APPENDIX A, THE NORTHWEST ORDINANCE (1787)

An Ordinance for the government of the territory of the United States northwest of the river Ohio.

Sec. 1. *Be it ordained by the United States in Congress assembled,* That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Sec. 2. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descent 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 the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving, in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Sec. 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

Sec. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Sec. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect a representative from their counties or

townships, to represent them in the general assembly: *Provided*, That, for every five hundred free male inhabitants, there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

Sec. 10. The representatives thus elected, shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

Sec. 11. The general assembly or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the Governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; And every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no

bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not voting, during this temporary government.

Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

Article I. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

Article II. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be paid for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud, previously formed.

Article III. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Article IV. The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Article V. There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a

direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however*, And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided*, The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

Article VI. 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 labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.