

The Northwest Ordinance

In his books *The Myth of Separation* and *Original Intent*, David Barton, using one sentence from the Northwest Ordinance, and a number of misquotes from early state constitutions, leads his audience to the erroneous conclusion that the founders of our country not only intended, but required, that religion be included in public education.

Barton's claim, like similar claims found in many other religious right American history books, is based on the following sentence from the ordinance's 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.¹

Although mentioning in his earlier book, *The Myth of Separation*, that the Northwest Ordinance was initially passed by the Continental Congress, Barton omits this in *Original Intent*, the later book in which he refined many of the lies from *The Myth of Separation*. In *Original Intent* he attributes the ordinance entirely to the framers of the First Amendment, concluding from this that the men who wrote the First Amendment didn't consider promoting religion in public schools to be a violation of that amendment.

1. Richard Peters, ed., *The Public Statutes at Large of the United States of America*, vol. 1, (Boston: Charles C. Little and James Brown, 1845), 52.

In *Original Intent*, Barton begins his Northwest Ordinance story with the following statement: “Perhaps the most conclusive historical demonstration of the fact that the Founders never intended the federal Constitution to establish today’s religion-free public arena is seen in their creation and passage of the ‘Northwest Ordinance.’ That Ordinance (a federal law which legal texts consider as one of the four foundational, or ‘organic’ laws) set forth the requirements of statehood for prospective territories. It received House approval on July 21, 1789; Senate approval on August 4, 1789 (this was the same Congress which was simultaneously framing the religion clauses of the First Amendment); and was signed into law by President George Washington on August 7, 1789.

Article III of that Ordinance is the only section to address either religion or public education, and in it, the Founders couple them, declaring:

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 Framers of the Ordinance—and thus the Framers of the First Amendment—believed that schools and educational systems were a proper means to encourage the ‘religion, morality, and knowledge’ which they deemed so ‘necessary to good government and the happiness of mankind.’”

In *The Myth of Separation*, Barton claims: “A strong declaration that the First Amendment was never intended to separate Christianity from public affairs came in the form of legislation approved by the same Congress which created the First Amendment. That legislation, originally entitled ‘An Ordinance for the

Government of the Territory of the United States, North-west of the River Ohio' and later shortened to the 'Northwest Ordinance,' provided the procedure and requirements whereby territories could attain statehood in the newly United States."

Also from *The Myth of Separation*: "Since the same Congress which prohibited the federal government from the 'establishment of religion' also required that religion be included in schools, the Framers obviously did not view a federal requirement to teach religion in schools as a violation of the First Amendment."

The 1789 dates on which the ordinance was approved by the House and the Senate and signed by George Washington are correct. In *Original Intent*, Barton just leaves out that the 1789 Congress was merely reenacting an ordinance passed over two years earlier by the Continental Congress to give it force under the new Constitution. Of the twenty-eight senators and over sixty representatives in the 1789 Congress, only six, four senators and two representatives, were present when the Continental Congress passed the ordinance in 1787. It was not framed by the same Congress that was "*simultaneously framing the religion clauses of the First Amendment.*"

Before getting to the rest of Barton's lie, it's important to understand how the religious wording ended up in Article III of the ordinance in the first place, and why the Congress of 1789 would not have seen it as conflicting with the First Amendment.

Article III was the work of a Massachusetts man named Manasseh Cutler. Dr. Cutler, a minister and former army chaplain, was also one of the directors of the Ohio Company of Associates, a land speculating company comprised mainly of former army officers. In the summer of 1787, the Ohio Company was negotiating with the Continental Congress to buy a large amount of land in the Northwest Territory.

To pay off the large public debt from the Revolutionary War, Congress asked those states with sparsely populated western lands to cede these lands to the United States. The ceded lands would then be sold by Congress to reduce the debt. Most of the Northwest Territory was ceded by Virginia, but it also contained the smaller cessions of

Massachusetts and Connecticut.

In 1785, two years before the Northwest Ordinance, Congress passed the first ordinance for the disposal of land in the territory. One problem with this earlier ordinance, however, was that few people could afford the large tracts it required them to buy. Land speculating companies began negotiating with Congress to buy large tracts at a low price. These tracts could then be divided into smaller lots and resold at a profit. This was the plan of the Ohio Company when they sent Manasseh Cutler to meet with the Continental Congress in July 1787.

The Ohio Company knew they had the upper hand in these negotiations, and would not make a move towards purchasing the land until Congress adopted a new ordinance that better suited their plans. The result was the Northwest Ordinance.

Nathan Dane, a delegate from Massachusetts, has been credited with drafting the ordinance, but there is little doubt that Dr. Cutler arrived in New York with the provisions required by his company already written in some form. On his way to New York, Cutler met with two other founders of the Ohio Company, General Rufus Putnam in Boston and General Samuel Holden Parsons in Connecticut, to decide on the conditions their company would require. This, along with the fact that parts of the ordinance were borrowed from the laws of Massachusetts, explains how the committee was able to draft the ordinance literally overnight.

Cutler had his first meeting with what he referred to in his journal as "*the committee*" on the morning of Monday, July 9, 1787. This meeting was actually only with Edward Carrington and Nathan Dane, two of the five members of the committee originally appointed. The other three were not in New York when Cutler arrived. Two of them, James Madison and Rufus King, were in Philadelphia at the Constitutional Convention. It wasn't until later on that first day that Richard Henry Lee, John Kean, and Melancton Smith were appointed to replace the three absent members. By the next morning, the committee had finished drafting the ordinance and submitted a copy to Dr. Cutler for his approval. Within a matter of hours, Dr. Cutler returned it to the committee with a few additional provisions, including the education provision that became part of Article III.

Cutler knew the Ohio Company had Congress over a barrel.

Congress was so broke in 1787 that they had to choose between making the payments due on the foreign debt to France or those due to Holland. That year, they decided to default on the loan to France and use all their resources to pay Holland. Repaying Holland was a priority for two reasons. First, Holland was in a position to lend the United States more money in the near future, while France was not. Second, the Dutch were likely to start seizing American ships if they weren't paid. Cutler didn't even stick around for the ordinance to be voted on. He left New York for Philadelphia that evening, confident that his provisions would be added and the ordinance would be passed. Cutler wasn't even concerned that the ordinance needed seven votes to pass, and out the eight states present in Congress, half were southern states. He knew that the necessity of selling the land would outweigh any objections, even to the provision prohibiting slavery in the territory.

Nathan Dane, however, wasn't quite as confident as Dr. Cutler about the anti-slavery provision. When the ordinance was read for the first time on July 11, this provision was left out. Dane wanted to be sure that the rest of the ordinance would be favorably received before bringing up the slavery issue. By the next day, when the ordinance was read for the second time, this provision had been restored. The following day, Friday, July 13, only four days after Cutler's arrival in New York, the ordinance was read for the third time and enacted.

After the ordinance was passed, the Ohio Company continued to put pressure on Congress, threatening to back out of the deal if other demands were not met. The following is from a letter written by Dr. Cutler and Major Winthrop Sargent to the Board of Treasury while negotiating the contract for their land purchase.

If these terms are admitted we shall be ready to conclude the Contract. If not we shall have to regret, for a numerous Class of our Associates, that the Certificates they received as Specie, at the risque of their lives and fortunes, in support of the Common cause, must, for a considerable time longer, wait the tedious and precarious issue of public events; (altho' they are willing to surrender their right in them on terms advantageous to the public;) and that the United States may lose an opportunity of securing in the most effectual manner, as well as improving the value of their western

lands, whilst they establish a powerful barrier, against the irruptions of the Indians, or any attempts of the British power, to interrupt the security of the adjoining States.²

There was only one provision that Dr. Cutler assented to compromise on. Although the Continental Congress could not levy taxes, each state was responsible for its share of the public debt and government expenses, paid by taxes levied by the state legislatures. The Northwest Ordinance made the future states in the territory responsible for their share of the country's debts and expenses, and gave the temporary legislatures the power to levy taxes for this purpose. Dr. Cutler considered this to be taxation without representation, and proposed that no such taxes be levied in a new state until that state was represented in Congress. The compromise was that the temporary legislatures could levy taxes, but would also elect a non-voting delegate to Congress.

There is no question that the Northwest Ordinance provisions regarding religion, education, and slavery were written and insisted on by Dr. Cutler. A number of nineteenth century articles about the history of the ordinance refer to a note written in the margin of the Ohio Company's copy crediting Cutler with these provisions.

From an 1887 article in the *New Englander and Yale Review*:

There is, indeed, at this moment, in the hands of Dr. Cutler's descendants a printed copy of the ordinance of 1787, with a memorandum in the margin, stating that Mr. Dane asked Dr. Cutler to suggest such provisions as he deemed advisable, and that at his instance was inserted what relates to religion, education, and slavery.³

From an 1895 article in *The New England Magazine*:

There has been found, too, among the papers of the Ohio Company, a copy of the ordinance of 1787, with a pencil

2. Roscoe R. Hill, ed., *Journals of the Continental Congress, 1774-1789*, vol. 33, (Washington D.C.: Government Printing Office, 1936), 428-429.

3. Rev. A. P. Peabody, D.D., "Manasseh Cutler," *New Englander and Yale Review*, Vol. 46, No. 205, April 1887, 326-327.

note in the margin to the effect that the provisions relating to religion, education and slavery were the contribution of Manasseh Cutler; and his son remembers to have heard his father say, a year after the passage of the ordinance, that he was the author of these provisions.⁴

Although the education provision in Article III was written by Dr. Cutler, Congress made some changes to it. Cutler's provision clearly gave the government of the Northwest Territory the authority to promote religion. As much as Congress had to go along with the demands of the Ohio Company, this apparently went too far. The following was the original wording.

Institutions for the promotion of religion and morality, schools and the means of education shall forever be encouraged...⁵

This is what appeared in the ordinance.

Religion, Morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged...⁶

Congress kept enough of the original wording to appease Dr. Cutler, but stripped the provision of any actual authority to promote religion or religious institutions. The final language of Article III only gave the government authority to promote education. The first part of the sentence was turned into nothing more than an ineffectual opinion of what was necessary to good government.

When the Congress of 1789 reenacted the ordinance, they knew Article III didn't give the government any power to promote religion. There was no conflict with the First Amendment. Other parts of the Northwest Ordinance, however, did raise constitutional questions for the early Congresses, leading to an opinion in 1802, and reaffirmed in

4. Elizabeth H. Tetlow, "The Part of Massachusetts Men in the Ordinance of 1787," *The New England Magazine*, Vol. 18, No. 1, March 1895, 60.

5. Roscoe R. Hill, ed., *Journals of the Continental Congress, 1774-1789*, vol. 32, (Washington D.C.: Government Printing Office, 1936), 318.

6. Richard Peters, ed., *The Public Statutes at Large of the United States of America*, vol. 1, (Boston: Charles C. Little and James Brown, 1845), 52.

1816, 1818, and 1835, that the ordinance was nothing more than an act of Congress, with no more force or inviolability than any other act of Congress. In fact, as will be explained more fully later in this chapter, the very first time that Congress used the ordinance to admit a state, they substituted a different education provision for the one in Article III. This substituted provision was similar to that in the earlier ordinance, the 1785 *Ordinance for ascertaining the mode of disposing of lands in the Western Territory*.

The 1785 ordinance, as originally drafted by Thomas Jefferson in 1784, contained nothing regarding either religion or education. In 1785, the committee appointed to prepare this ordinance proposed that the following be added.

There shall be reserved the central Section of every Township, for the maintenance of public Schools; and the Section immediately adjoining the same to the northward, for the support of religion. The profits arising therefrom in both instances, to be applied for ever according to the will of the majority of male residents of full age within the same.⁷

A debate on this proposal quickly removed most of it. First, a motion was made to replace the words “*for the support of religion*” with “*for religious and charitable uses,*” then another to delete from that “*religious and,*” so that it would simply read “*for charitable uses.*” When the ordinance was read again three days later, the land grant for religion had been removed entirely. The following is all that was left of the proposed article.

There shall be reserved the central section of every township, for the maintenance of public schools within the said township.⁸

James Madison couldn’t believe that the original proposal had even been considered by the committee, writing the following to James Monroe.

7. John C. Fitzpatrick, ed., *Journals of the Continental Congress, 1774-1789*, vol. 28, (Washington D.C.: Government Printing Office, 1933), 293.

8. *ibid.*, 301.

It gives me much pleasure to observe by 2 printed reports sent me by Col. Grayson that, in the latter Congress had expunged a clause contained in the first for setting apart a district of land in each Township for supporting the Religion of the majority of inhabitants. How a regulation so unjust in itself, foreign to the Authority of Congress, so hurtful to the sale of the public land, and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee is truly matter of astonishment.⁹

Madison's letter to Monroe also clears up a bit of a mystery regarding Virginia's votes through this debate. The Virginia delegates, completely out of character, voted in favor of leaving the religious land grants in. Madison guessed that this was just a misguided move on the part of these delegates to protect the interests of their own state, albeit at the expense of another part of the country. The following was the next sentence of Madison's letter.

In one view it might have been no disadvantage to this State, in case the General Assessment should take place, as it would give a repellent quality to the new Country in the estimation of those whom our own encroachments on Religious liberty would be calculated to banish to it.¹⁰

The General Assessment bill, introduced in the Virginia legislature by Patrick Henry, would have levied a tax on all Virginians for the support of the Christian religion. In April 1785, when the debate over religious land grants was going on in Congress, the fate of Henry's bill was still uncertain. The Virginia delegates in Congress knew that if the General Assessment passed, Virginians who opposed it might start moving to the Northwest Territory as a way to escape religious intolerance, and the new territory would be more attractive to immigrants who might otherwise settle in Virginia. But, if the Northwest Territory had an equally obnoxious system of government support for religion, religious freedom wouldn't be a reason for anyone to choose it over

9. James Madison to James Monroe, May 29, 1785, *Letters and Other Writings of James Madison*, vol. 1, (New York: R. Worthington, 1884), 154.

10. *ibid.*

Virginia.

Despite their 1785 vote against religious land grants, the necessity of selling land forced Congress in 1787 to give in to the Ohio Company and grant Lot No. 29 of each township in their purchase for religious purposes. This grant was made in only two contracts – that of the Ohio Company and that of John Cleeves Symmes, who was also purchasing a large amount land. Symmes required, with a few exceptions unrelated to the land grants, that his purchase be on the same terms as that of the Ohio Company.

A number of religious right websites present images of maps showing townships in Ohio with Lot No. 29 designated for religious purposes. These maps are claimed to be representative of the entire Northwest Territory. They are not representative of the territory, or even the state of Ohio. They are maps of the townships in the original Ohio Company and/or Symmes purchases, the only townships ever to receive this land grant. Technically, these maps aren't even representative of the entire Ohio Company purchase. Some of the Lot No. 29 religious grants were not made by Congress, but were actually paid for by the Ohio Company.

The original Ohio Company purchase in July 1787 was to be a million and a half acres, but a few months later the company backed out of half of this. Five years later, they petitioned Congress to purchase part of the half they had backed out of. The first section of the 1792 act of Congress authorizing this purchase confirmed the boundaries of, and land grants in, the seven hundred and fifty thousand acres already purchased. The second section described a two hundred and forty thousand acre tract being purchased in 1792. This section said nothing about land grants.¹¹ The Ohio Company wrongly assumed that Congress intended to make the same land grants made in 1787 for this tract, and that the failure to mention this in section two of the act was merely an oversight. As townships in this new tract were settled, the Ohio Company appropriated the usual lots for schools and religion. By the time they realized that Congress had not granted these lots, they had appropriated them in ten townships, giving away twenty lots that they had to pay for. In addition to any lots reserved or granted for other purposes, there were, in every township, three

11. Richard Peters, ed., *The Public Statutes at Large of the United States of America*, vol. 1, (Boston: Charles C. Little and James Brown, 1845), 257-258.

lots reserved for the “*future disposition of Congress.*” When the Ohio Company realized their mistake, they petitioned Congress to grant them twenty of these lots to make up for the twenty they had given away. In 1806, Congress denied this request.¹²

In 1811, the inhabitants of one township in the original Ohio Company purchase petitioned Congress, requesting that a different lot in their township be designated for religious purposes. The system of dividing the Northwest Territory into square townships had left a number of fractional townships. These were the townships that, due to being along the rivers, were not square. Townships were divided into thirty-six lots, uniformly numbered according to their position, and whatever lots a fractional township happened to contain were numbered according to their position as if they were in an entire township. The township that petitioned Congress in 1811 was a fractional township that did not have a Lot No. 29. Because their township was in the original Ohio Company purchase, the petitioners felt they were entitled to a land grant for religion. Their request was that Congress grant them Lot No. 26, one of the lots reserved by Congress, in lieu of Lot No. 29. Congress did not grant this request.¹³

Religious right American history books rarely contain anything about the Northwest Ordinance other than the religious wording of Article III, and a claim that this article is proof that our founders promoted religion in public schools. One book, however, *America's Providential History* by Mark Beliles and Stephen McDowell, does include a sentence about Manasseh Cutler. The following sentence appears in a chapter listing clergymen who were politicians and statesmen: “*Manassas [sic] Cutler was the author of the Northwest Ordinance written in 1787.*” In this book, which is one of the most often recommended American history books for Christian homeschooling, the Northwest Ordinance is mentioned five times – once to mention that “*Manassas*” Cutler was a clergyman, once to mention that it prohibited the sin of slavery in the new states, and three times to bring up the religious wording of Article III. Nowhere do the authors of this American history book actually bother to explain

12. Walter Lowrie, ed., *American State Papers: Public Lands*, vol. 1, (Washington D.C.: Duff Green, 1834), 236-237.

13. *ibid.*, vol. 2, 220.

what the Northwest Ordinance was. Instead, they present statements like the following.

From *America's Providential History*: “‘Virtue... Learning...Piety.’ These words are found throughout our official documents and statements of our Founders. Sometimes they are called ‘Morality,’ ‘Knowledge,’ and ‘Religion,’ such as are found in the Northwest Ordinance. ‘Religion’ meant Christianity. ‘Morality’ meant Christian character. ‘Knowledge’ meant a Biblical worldview.”

As mentioned at the beginning of this chapter, David Barton, in his books *The Myth of Separation* and *Original Intent*, uses a number of misquotes from state constitutions to support his claim that the same Congress that wrote the First Amendment also required that religion be included in schools. Barton takes the fact that Article III of the Northwest Ordinance mentions both religion and schools, combines that with the fact that the enabling acts for some states required that their state governments conform to the ordinance, and concludes from this that Congress required all new states to include religion in their schools as a condition of statehood.

Most religious right authors don't go as far as Barton's claim that the federal government *required* religion in the public schools, but use Article III to claim that religion was expected to be promoted.

In his book *America's Christian History: The Untold Story*, Gary DeMar quotes the following from *Religion and Politics: The Intentions of the Authors of the First Amendment* by Michael J. Malbin: “...One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: ‘Religion, morality, and knowledge,’ the clause read, ‘being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged.’ This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were

expected to promote religion as well as morality. In fact, most schools at this time were church-run sectarian schools.”

David Barton’s evidence that Congress required religion in public schools consists of language similar to that of the ordinance’s Article III appearing in four state constitutions, three of which he misquotes, and the fact that the enabling acts for certain states required a conformity to the ordinance.

An enabling act, the act giving a territory permission to frame a state constitution, contained certain basic requirements for statehood, such as the state government being republican in form. Six states, in addition to the usual requirements, were required to be “*not repugnant to*” the Northwest Ordinance. These six states included four of the five Northwest Territory states – Ohio, Indiana, Illinois, and Michigan. The other two were Mississippi and Alabama.

Mississippi and Alabama were formed from land ceded by the state of Georgia. When the states ceded their land, they did so under conditions negotiated by their state legislatures and Congress. One of Georgia’s conditions was that the federal government establish in the ceded territory a temporary government similar to that in the Northwest Territory, but that the Northwest Ordinance’s anti-slavery provision would not apply. Because the temporary government of their territory had been established according to the ordinance, the enabling acts for Mississippi and Alabama contained the not repugnant to the ordinance requirement.

By not repugnant to the Northwest Ordinance, Congress meant not repugnant to the ordinance’s provisions prohibiting things like taxing land owned by the federal government and charging tolls on the Mississippi River, and that a state government could not take away the rights guaranteed to individuals by the ordinance. David Barton, of course, makes not repugnant to the Northwest Ordinance synonymous with requiring its Article III, and, although the ordinance itself was only used for six states, implies that *all* new states were admitted on the condition of complying with this article.

From *The Myth of Separation*: “Following the passage of that legislation, Congressional enabling acts

which allowed territories to organize and form a state government and ratify a state constitution required that those potential states adhere to the ‘Northwest Ordinance’ as a requisite for admission. Consequently, the state constitutions of the newly admitted states frequently included exact wordings from portions of the ‘Northwest Ordinance,’ specifically Article III.”

From *Original Intent*: “Subsequent to the passage of the Ordinance, when a territory applied for admission as a state, Congress issued an ‘enabling act’ establishing the provisions of the Ordinance as criteria for drafting a State constitution. For example, when the Ohio territory applied for statehood in 1802, its enabling act required that Ohio form its government in a manner ‘not repugnant to the Ordinance.’ Consequently, the Ohio constitution declared:

[R]eligion, morality, and knowledge being essentially necessary to the good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision.”

As already mentioned, three of Barton’s four state constitution examples are misquotes. This is the first one. Barton cuts off the last seven words of the sentence. It actually ends “*by legislative provision, not inconsistent with the rights of conscience.*” This is the last sentence of the religious freedom section from Article 8, which was the bill of rights in Ohio’s 1802 constitution. The following is the entire section.

Article 8.

§ 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no human authority can in any case whatever, control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support, any

place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given by law to any religious society or mode of worship; and no religious test shall be required as a qualification to any office of trust or profit. But religion, morality, and knowledge, being essentially necessary to the good government, and the happiness of mankind, schools, and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.¹⁴

In Ohio's 1851 constitution, the wording was further modified, clearly separating laws protecting religious worship from laws encouraging education.

Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.¹⁵

Also added in Ohio's 1851 constitution was the following prohibition of religious control of state school funds.

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.¹⁶

Ohio is the only Northwest Territory state among Barton's four

14. *The American's Guide: Comprising the Declaration of Independence; the Articles of Confederation; the Constitution of the United States, and the Constitutions of the Several States Composing the Union*, (Philadelphia: Towar, J. & D. M. Hogan, 1830), 307.

15. *The American's Guide: Comprising the Declaration of Independence; the Articles of Confederation; the Constitution of the United States, and the Constitutions of the Several States Composing the Union*, (Philadelphia: J.B. Lippincott & Co., 1864), 335.

16. *ibid.*, 341.

examples of states using the language of Article III. Barton includes nothing from the constitutions of Indiana, Illinois, and Michigan, the three other Northwest Territory states whose enabling acts contained the Northwest Ordinance requirement. This is because none of these states' constitutions contained anything remotely like Article III. The following are the reasons for establishing schools from the education sections of the original constitutions of Indiana and Michigan. Neither of these states included religion among their reasons. (The Illinois constitution did not contain anything at all regarding education.)

Constitution of Indiana – 1816:

Article 9.

§ 1. Knowledge and learning generally diffused through a community, being essential to the preservation of a free government, and spreading the opportunities, and advantages of education through the various parts of the country, being highly conducive to this end, it shall be the duty of the general assembly to provide by law for the improvement of such lands as are, or hereafter may be, granted by the United States to this state, for the use of schools, and to apply any funds which may be raised from such lands, or from any other quarter, to the accomplishment of the grand object for which they are or may be intended....¹⁷

Constitution of Michigan – 1835:

Article X. — *Education.*

2. The Legislature shall encourage, by all suitable means, the promotion of intellectual, scientific, and agricultural improvement. The proceeds of all lands that have been or hereafter may be granted by the United States to this State, for the support of schools, which shall hereafter be sold or disposed of, shall be and remain a perpetual fund; the interest of which, together with the rents of all such unsold lands,

17. *The American's Guide: Comprising the Declaration of Independence; the Articles of Confederation; the Constitution of the United States, and the Constitutions of the Several States Composing the Union*, (Philadelphia: Towar, J. & D. M. Hogan, 1830), 324-325.

shall be inviolably appropriated to the support of schools throughout the State.¹⁸

Michigan's constitution also expressly prohibited the use of public money for religious teachers and religious schools.

Article I.

4. Every person has a right to worship Almighty God according to the dictates of his own conscience; and no person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes, or other rates, for the support of any minister of the gospel or teacher of religion.

5. No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries.¹⁹

Since Ohio was the only Northwest Territory state to include anything close enough for Barton to misquote, he has to look elsewhere for constitutions containing the Article III language. He next moves on to the Mississippi Territory, the territory formed from Georgia's cession.

Barton continues: "While this requirement originally applied to all territorial holdings of the United States in 1789 (the Northwest Territory—Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota), as more territory was gradually ceded to the United States (the Southern Territory—Mississippi and Alabama), Congress applied the requirements of the Ordinance to that new territory.

Therefore, when Mississippi applied for statehood in 1817, Congress required that it form its government in a manner "not repugnant to the provisions of the

18. *The American's Own Book; or the Constitutions of the Several States in the Union; Embracing the Declaration of Independence; Constitution of the United States, and the Constitution of Each State, with the Amendments and Much Other Matter of General Interest, from Authentic Documents*, (New York: J.R. Bigelow, 1847), 444-445.

19. *ibid.*, 436.

Ordinance.” Hence, the Mississippi constitution declared:

Religion, morality, and knowledge being necessary to good government, the preservation of liberty and the happiness of mankind, schools and the means of education shall be forever encouraged in this State.”

Barton’s quote from the Mississippi constitution is accurate. It is the only one of his four examples that he doesn’t have to misquote. But, to give the impression that this quote is representative of similar provisions found in *all* state constitutions, he mentions seven other states in the paragraph introducing it. To the four Northwest Territory states already mentioned, he adds Wisconsin and Minnesota. Minnesota shouldn’t be in this list. Wisconsin was the fifth and last of the Northwest Territory states. For geographic reasons that would make governing it impractical, there was an area of Northwest Territory land in the Wisconsin Territory that did not become part of the state of Wisconsin. It made more sense to attach this area to Minnesota, so that’s what Congress did. The rest of Minnesota was not part of the Northwest Territory. Other than being an example of the general inaccuracy of Barton’s books, however, this doesn’t really matter because neither Wisconsin’s or Minnesota’s enabling acts contained any mention of the Northwest Ordinance, and neither of their constitutions contained anything like the language of Article III.

Wisconsin’s constitution included a lengthy education section containing no mention of religion, and none of which is relevant here. And, like Michigan, Wisconsin’s Declaration of Rights expressly prohibited state funding of religious schools.

Constitution of Wisconsin – 1848:

Article 1.

Declaration of Rights.

18. The right of every man to worship Almighty God according to the dictates of his own conscience, shall never be

infringed, nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent. Nor shall any control of, or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments, or modes of worship. Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.²⁰

Like Wisconsin and Michigan, Minnesota prohibited state funding for religious schools, and did not mention religion in its reason for establishing schools.

Constitution of Minnesota – 1857:

Article 8.

School Funds, Education and Science.

§ 1. The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools.²¹

In addition to adding Minnesota to the Northwest Territory, Barton is clearly confused about which territory became Mississippi and Alabama. The source he cites for his statement about “*the Southern Territory—Mississippi and Alabama*” is the 1790 act establishing a territorial government for the land ceded by North Carolina.²² This was the territory that became Tennessee. The land ceded by Georgia in 1802 that became the states of Mississippi and Alabama was named the Mississippi Territory in 1798 when the act was passed authorizing the president to appoint commissioners to negotiate the cession with the legislature of Georgia.²³

20. *The American's Guide: Comprising the Declaration of Independence; the Articles of Confederation; the Constitution of the United States, and the Constitutions of the Several States Composing the Union*, (Philadelphia: J.B. Lippincott & Co., 1864), 539.

21. *ibid.*, 584.

22. Richard Peters, ed., *The Public Statutes at Large of the United States of America*, vol. 1, (Boston: Charles C. Little and James Brown, 1845), 123.

23. *ibid.*, 549-550.

Barton groups Alabama with Mississippi to give the impression that Alabama's constitution contained something similar to his quote from the Mississippi constitution. But, unlike Mississippi, Alabama did not use the language of Article III in its education provision.

Constitution of Alabama – 1819:

Article 6. *General Provisions.*

Education.

Schools, and the means of education, shall forever be encouraged in this State; and the general assembly shall take measures to preserve, from unnecessary waste or damage, such lands as are or hereafter may be granted by the United States for the use of schools within each township in this State, and apply the funds, which may be raised from such lands, in strict conformity to the object of such grant....²⁴

Barton works as many states and territories as possible into his story for two reasons. The first, of course, is to imply that *all* state constitutions contained something similar to Article III. The second is to give the impression that the Northwest Ordinance continued to be used for a long time after the Northwest Territory states were admitted. Barton is using a common tactic of the religious right American history authors – transforming something that never actually happened in the first place into a long standing practice by giving the impression that it happened many times over a period of many years. The truth is the Northwest Ordinance wasn't even used for all of the Northwest Territory states. For reasons explained later in this chapter, Congress stopped using the ordinance upon the admission of Michigan, writing a different act to establish the temporary government for Wisconsin.

To give the impression that Congress *continued* to use the ordinance for *later* territories, Barton implies that his so-called “*Southern Territory*” wasn't formed until after all of the Northwest Territory states were admitted. The Mississippi Territory, as already mentioned, was

24. *The American's Guide: Comprising the Declaration of Independence; the Articles of Confederation; the Constitution of the United States, and the Constitutions of the Several States Composing the Union*, (Philadelphia: Towar, J. & D. M. Hogan, 1830), 400.

created in 1798, four years before Ohio, the first Northwest Territory states, was admitted. The state of Mississippi was admitted in 1817, and Alabama in 1819, decades before the last of the Northwest Territory states. Michigan wasn't admitted until 1836, Wisconsin in 1848, and Barton's additional Northwest Territory state, Minnesota, in 1857.

Barton then continues, adding even more territories: "Congress later extended the same requirements to the Missouri Territory (Missouri and Arkansas) and then on to subsequent territories. Consequently, the provision coupling religion and schools continued to appear in State constitutions for decades. For example, the 1858 Kansas constitution required:

Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to make suitable provisions...to encourage schools and the means of instruction.

Similarly, the 1875 Nebraska constitution required:

Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws...to encourage schools and the means of instruction."

Up until this point in his story, the only dates provided by Barton were those of the Ohio and Mississippi constitutions, 1802 and 1817 respectively. This makes these next quotes, from 1858 and 1875, appear to support his claim that Congress *later* extended the ordinance to the Missouri and other unspecified territories. But, the Missouri Territory was established in 1812²⁵ – prior to the admission of every state mentioned so far by Barton with the exception of Ohio. The Missouri Territory was what remained of the Louisiana Purchase

25. Richard Peters, ed., *The Public Statutes at Large of the United States of America*, vol. 2, (Boston: Charles C. Little and James Brown, 1845), 743.

when Louisiana became a state. The Louisiana Purchase had actually been divided into two territories eight years earlier, in 1804, the part that would become the state of Louisiana being called the Orleans Territory. Arkansas Territory was what was left of the Missouri Territory when the state of Missouri was split off in 1819.

Parts of the Northwest Ordinance, including the language of Article III, were copied into the 1812 act forming the Missouri Territory, but all of this was dropped in the 1819 act forming the Arkansas Territory. The enabling act for Missouri contained no mention of either the ordinance or the act of 1812, and the education provisions in neither the Missouri or Arkansas constitutions contained anything like the language of Article III.

Constitution of Missouri – 1821:

Article 6.

Of Education.

§ 1. Schools and the means of education, shall for ever be encouraged in this State; and the general assembly shall take measures to preserve from waste or damage such lands as have been, or hereafter may be granted by the United States for the use of schools within each township in this state, and shall apply the funds which may be arise from such lands in strict conformity to the object of the grant; and one school or more, shall be established in each township as soon as practicable and necessary, where the poor shall be taught gratis.²⁶

Constitution of Arkansas – 1836:

Article IX.— *General Provisions.* — *Education.*

SEC. 1. Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government, and diffusing the opportunities and advantages of education through the various parts of the State

26. *The American's Guide: Comprising the Declaration of Independence; the Articles of Confederation; the Constitution of the United States, and the Constitutions of the Several States Composing the Union*, (Philadelphia: Towar, J. & D. M. Hogan, 1830), 417.

being highly conducive to this end, it shall be the duty of the General Assembly to provide by law for the improvement of such lands as are or hereafter may be granted by the United States to this State for the use of schools, and to apply any funds which may be raised from such lands, or from any other source, to the establishment of the object for which they are or may be intended. The General Assembly shall from time to time pass such laws as shall be calculated to encourage intellectual, scientific and agricultural improvement, by allowing rewards and immunities for the promotion and improvement of arts, science, commerce, manufactures and natural history; and countenance and encourage the principles of humanity, industry, and morality.²⁷

Barton's quotes from the 1858 Kansas and 1875 Nebraska constitutions are both misquotes. These states used the Article III sentence as modified by Ohio in 1851, separating legislation to protect religious freedom from legislation to encourage education. Barton removes the middle of the sentence from both. He also neglects to mention that the 1858 Kansas constitution was not the Kansas constitution approved by Congress. Kansas drafted several constitutions between 1857 and 1861. It was the constitution of 1861 that was approved. Barton uses the unapproved 1858 version because the approved 1861 version didn't contain anything even close enough to the Article III language to misquote.

Constitution of Kansas – 1861:

Article VI.

Education.

§ 2. The Legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools, and

27. *The American's Own Book; or the Constitutions of the Several States in the Union; Embracing the Declaration of Independence; Constitution of the United States, and the Constitution of Each State, with the Amendments and Much Other Matter of General Interest; from Authentic Documents*, (New York: J.R. Bigelow, 1847), 479.

schools of higher grade, embracing normal, preparatory, collegiate, and university departments.²⁸

The 1861 Kansas constitution also prohibited religious control of state education funds.

§ 8. No religious sect or sects shall ever control any part of the common-school or University funds of the State.²⁹

In addition to misquoting the Nebraska constitution, Barton adds eight years to the length of time of his story by using the date of the state's second constitution, 1875. Nebraska's first constitution, approved by Congress in 1867, also contained the provision misquoted by Barton. The following is the entire sentence, as it appeared in both the 1867 and 1875 Nebraska constitutions.

Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.³⁰

In its 1875 constitution, Nebraska added not only a general prohibition on religious control of state education funds like those in other state constitutions, but the following, prohibiting even privately funded religious education in public schools.

Article VIII.—*Education.*

Sec. 11. No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes, nor shall

28. *The American's Guide: Comprising the Declaration of Independence; the Articles of Confederation; the Constitution of the United States, and the Constitutions of the Several States Composing the Union*, (Philadelphia: J.B. Lippincott & Co., 1864), 626.

29. *ibid.*, (Philadelphia: J.B. Lippincott & Co., 1864), 627.

30. M.B.C. True, *A Manual of the History and Civil Government of the State of Nebraska. Designed for the Use of the Schools of the State*, (Boston and New York: Leach, Shewell, and Sanborn, 1885), 34.

the State accept any grant, conveyance or bequest of money, lands or other property to be used for sectarian purposes.³¹

In an 1885 state history and civil government textbook produced by the state of Nebraska for use in its public schools, each article of the Nebraska constitution was explained to the students. The following was the explanation of the constitution's religious freedom section, the section at the end of which the modified version of the Article III language is found. Just as protection of religious freedom and the promotion of education were separated in the state's constitution, they were separated in this textbook.

No one has a right to regulate our consciences or our worship for us. The right of each one to obey his own conscience in the matter of worship cannot be defeated by any law. This applies to his right to attend such church as he chooses, or not to attend; and to helping in the erection and support of any church or religious organization. That a person belongs to any particular church, or does not belong to any, cannot be urged as a qualification or disqualification for an office, nor deny to any suitor in court the right to call him as a witness. This does not say, nor does it mean, that the state, or the law, or the court, only, shall not apply the "religious test;" it means that no one has a right to apply that test. If a voter votes for a candidate solely because of that candidate's religious belief, that voter violates the letter and spirit of this section of the bill of rights. As all the people have the right to their religious belief, it is right that the law shall not give any preference to any religious body or organization, but that it should fully protect each body in the enjoyment of its own organization and mode of worship. As education makes better citizens, the state ought to encourage it.³²

31. M.B.C. True, *A Manual of the History and Civil Government of the State of Nebraska. Designed for the Use of the Schools of the State*, (Boston and New York: Leach, Shewell, and Sanborn, 1885), 59.

32. *ibid.*, 34-35.

In his story about the Northwest Ordinance, David Barton mentions a total of twelve states. To recap, only one of these twelve used the ordinance's Article III in its constitution without changing its meaning, two modified it so significantly that Barton had to misquote their versions, and nine omitted it entirely. Nevertheless, Congress approved the constitutions of each and every one. Clearly, Barton's claim that the Northwest Ordinance proves that Congress "*required that religion be included in the schools*" is not true.

What Congress did require of new states, however, was that their governments guarantee certain rights to their citizens. Among these rights was religious freedom. Although Congress could not impose any such requirement on the original states, it could, and did, make it a condition of admission for new states. Clearly, the early Congresses, well over a century before the Supreme Court used the Fourteenth Amendment to extend the First Amendment to the states, did not think "*Congress shall make no law respecting an establishment of religion*" meant that they couldn't require religious freedom in the states they were admitting.

In one way or another, religious freedom was a condition of statehood for all new states beginning with Ohio. For some states, it was explicitly stated in their enabling acts. It was occasionally even required that this right be irrevocable in any future constitutions without the consent of Congress. In a few cases, there was no need to specify any conditions in an enabling act because a territory had already gone ahead and written a state constitution that met the approval of Congress. For the Louisiana Territory states, religious freedom was guaranteed in the treaty by which France ceded the territory to the United States. Although there was some debate in Congress over whether or not the president had the right to guarantee that this territory would be admitted as states, there was no question that the rights guaranteed to the inhabitants of the territory by the treaty could not be taken away by a state constitution. For the six states admitted under the Northwest Ordinance, not repugnant to the ordinance was clearly understood to mean not repugnant to the following.

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:

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:

Art. 1. 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.³³

The authority of Congress to require anything whatsoever of new states that it couldn't require of the original states was questioned in 1819, but this was not prompted by the requirement that new states guarantee their citizens religious freedom and other rights. The question was raised by those who didn't want Congress to prohibit slavery in Missouri. Their argument was that new states, once admitted, were considered to be "*on an equal footing*" with the original states, so, if Congress didn't have the authority to prohibit slavery in the original states, it didn't have the authority to prohibit it in new states. The counter argument, of course, was that Congress had imposed conditions on every new state since Ohio. It was decided in 1802 that Congress, by having the power to admit states, also had the power to dictate any reasonable conditions under which they were to be admitted. This opinion was not changed by the question raised in the debate over Missouri. Congress continued to require that new states guarantee civil and religious liberties as a condition of admission.

None of the states objected to the condition of including these civil and religious liberties in their constitutions. In fact, all but a few went far beyond the basic religious freedom required by Congress. Most, as already mentioned, explicitly prohibited state funding of religion and religious schools, and many prohibited religious tests for

33. Richard Peters, ed., *The Public Statutes at Large of the United States of America*, vol. 1, (Boston: Charles C. Little and James Brown, 1845), 52.

public offices in their state constitutions as the federal Constitution did for federal offices.

In spite of the opinion of the early Congresses that the ordinance was no more than an ordinary act of Congress, the numerous times that they disregarded its provisions, and the fact that both Congress and the inhabitants of the territories considered the governments established by it to be pretty bad, the ordinance is considered to be one of the foundational documents of the United States. The *U.S. Code Annotated* lists it as one of four "*Organic Laws of the United States*." The other three are the Constitution, the Declaration of Independence, and the Articles of Confederation. Religious right authors, of course, use this to support the notion that Article III of the ordinance was as inviolable as an article of the Constitution.

In 1802, the first time the ordinance was used to admit a state, Congress decided to alter some of its provisions, offering the prospective state of Ohio different provisions in lieu of some of those in the ordinance. One of the substitutions offered to and accepted by Ohio replaced the education provision in Article III. So, in complete contrast to David Barton's claim that Congress required Article III as a condition for admission of all new states, this article, or at least its sentence regarding education, was superceded in the enabling act for the very first Northwest Territory state. The rest of the article, regarding fair treatment of Indians, remained in effect.

Although the 1785 land ordinance was no longer in force in 1802, both ordinances were taken into consideration by the committee that drafted the substitute provisions for Ohio. Congress's goal was to get Ohio to agree to giving up the right to tax any land sold by the United States until ten years after it was purchased. This, of course, would make it easier for Congress to sell the land. The deal offered to Ohio in exchange for this included land grants for schools, as in the ordinance of 1785, in lieu of the vague statement about encouraging schools in Article III of the Northwest Ordinance. Since no legislation had been passed that conflicted with the 1785 provision for school land grants, the committee simply drafted a new education provision, similar to that of 1785, for Ohio's enabling act.

The committee observe, in the ordinance for ascertaining the mode of disposing of lands in the Western Territory of the

20th of May, 1785, the following section, which, so far as respects the subject of schools, remains unaltered:

“There shall be reserved for the United States out of every township, the four lots, being numbered, 8, 11, 26, 29, and out of every fractional part of a township, so many lots of the same numbers as shall be found thereon. There shall be reserved the lot No. 16 of every township, for the maintenance of public schools within the said township. Also one third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of, as Congress shall hereafter direct.”

The committee also observe, in the third and fourth articles of the ordinance of the 13th of July, 1787, the following stipulations, to wit:

“Art. 3rd. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools, and the means of education shall forever be encouraged,” &c.

“Art. 4th. 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 nonresident proprietors be taxed higher than residents.”

The committee, taking into consideration these stipulations, viewing the lands of the United States within the said Territory as an important source of revenue; deeming it also of the highest importance to the stability and permanence of the union of the eastern and western parts of the United States, that the intercourse should, as far as possible, be facilitated; and their interests be liberally and mutually con-

sulted and promoted; are of the opinion that the provisions of the aforesaid articles may be varied for the reciprocal advantage of the United States, and the State of _____ when formed, and the people thereof; they have, therefore, deemed it proper, in lieu of the said provisions, to offer the following to the Convention for the Eastern State of the said Territory, when formed, for their free acceptance or rejection, without any condition or restraint whatever; which, if accepted by the Convention, shall be obligatory upon the United States:

1st. That the section No. 16, in every township sold, or directed to be sold by the United States, shall be granted to the inhabitants of such townships, for the use of schools.³⁴

When the House of Representatives debated the committee's recommendations, the education provision substituted for Article III wasn't even mentioned. The House debated several resolutions at the beginning of the report regarding things such as the state's boundaries and method of holding a constitutional convention, then skipped right to the other provisions being offered, salt springs and ten percent of the proceeds from federal land sales for road construction. Apparently, nobody cared that the new education provision didn't mention religion.

Substituting other provisions for those in the Northwest Ordinance did not violate the ordinance, as long as the prospective state consented to the changes, as was the case with Ohio in 1802. What prompted a debate over Congress's authority to deviate from the ordinance on this occasion was the committee's proposal that Congress dictate the time, place, and mode of selecting representatives for Ohio's constitutional convention. This was objected to on the grounds that by attaching conditions for a state's admission beyond those contained in the ordinance, Congress was violating the ordinance. The prevailing opinion was that the ordinance was no more than an act of Congress, so Congress did have the authority to do this.

One part of the ordinance that Congress did adhere to when writ-

34. *The Debates and Proceedings of the Congress of the United States of America*, vol. 11, 7th Cong., 1st Sess., (Washington D.C.: Gales & Seaton, 1851), 1099-1100.

ing the enabling act for Ohio was Article V, the article specifying the boundaries of the states that would be formed from the territory. When establishing the boundaries of Illinois and Indiana, however, Congress disregarded this article. But, it was the boundaries of Ohio, laid out according to the ordinance, that later caused a problem.

The dispute over Ohio's boundaries resulted from the fact that the Continental Congress, when writing the Northwest Ordinance in 1787, had used a bad map. According to the ordinance, the Northwest Territory was first to be divided from north to south into three states – and eastern state, a central state, and a western state. At the discretion of Congress, the territory could be further divided by making the northern part of it into two states, with dividing line between the northern and southern states being an east-west line even with the southern end of Lake Michigan. For some reason, although newer and more accurate maps existed, the committee drawing the dividing lines for the future states used a map from 1755 that placed the southern end of Lake Michigan much farther north than it actually was. When the line that would be the northern boundary of Ohio and southern boundary of Michigan was drawn eastward from the southern end of Lake Michigan, it appeared that most of Lake Erie would fall below the line, giving Ohio a good amount of access to the lake. In reality, a line drawn eastward from the southern end of Lake Michigan barely skimmed the southern side of Lake Erie.

During Ohio's constitutional convention, a trapper who happened to be in Chillicothe, where the convention was being held, brought it to the attention of some of the convention members that Lake Michigan extended much further south than they thought it did. The convention immediately attached a proviso to the boundaries laid out in their enabling act to ensure that, if this trapper was correct, the northern boundary of their state would be moved far enough north to give them the part of Lake Erie that met the Miami River. When the convention received no rejection of this proviso from Congress, they assumed it had been adopted. But, although Congress didn't object to it, they never formally adopted it. By the time the Michigan Territory was being established two years later, they had completely forgotten about it. The southern boundary of the Michigan Territory was drawn according to the Northwest Ordinance, causing it to overlap what Ohio thought was the northern part of its state.

Three decades later, when Michigan was preparing for statehood, Congress reaffirmed what had been decided in 1802 – that the Northwest Ordinance was nothing more than an act of Congress. To admit Michigan as a state, Congress had to confirm the boundaries of the part of the Michigan Territory that would become the state of Michigan, and establish the remainder as a new territory. The new territory being formed, which would eventually become the western state in the northern part of the Northwest Territory, was the Wisconsin Territory. According to the ordinance, the southern boundary of Wisconsin, like the southern boundary of Michigan, was to be even with the southern end of Lake Michigan. Congress, however, had already altered this boundary when admitting Illinois, the state directly to the south of Wisconsin. In order to give Illinois a fair share of the shoreline of Lake Michigan, its northern boundary had been placed farther north than the line in the ordinance.

In 1835, Congress had to settle the boundary dispute between Michigan and Ohio, and define the boundaries of the Wisconsin Territory. This resulted in the final debate over Congress's authority to disregard the Northwest Ordinance. Michigan, of course, wanted the land claimed by Ohio in 1802, which, according to Article V of the Northwest Ordinance, belonged to them. Michigan claimed that the ordinance was a compact that could not be broken by Congress, and the few members of Congress who sided with Michigan, particularly John Quincy Adams, unsuccessfully tried to use this argument. Those who sided with Ohio argued that Congress had decided three decades earlier that it did not have to adhere to the ordinance, and, in addition to that, giving in to Michigan would cause another problem. The Wisconsin Territory, when it later applied for statehood, might demand that the northern boundary of Illinois, which had been moved even farther north than the disputed Ohio boundary, also be moved back to the line specified in the ordinance.

John Reynolds, a Representative of Illinois, made the following comments regarding his state's constitution and northern boundary.

...This constitution has been made in pursuance of an act of Congress, passed in 1818, authorizing the people of the Territory of Illinois to form a constitution and State Government, and which State, so formed, was admitted into

the Union with the limits as prescribed in the constitution. This course of proceeding showed the sense of Congress on the ordinance of 1787, made for the government of the people of the Northwestern Territory. Congress, as early as 1802, expressed an opinion on this ordinance in the admission of the State of Ohio into the Union. They considered the ordinance then, and they have so considered it ever since, down to a very recent date, as changeable by their legislation. It is, in fact, nothing more than an ordinary act of Congress, changeable, like other acts, for the public good.³⁵

After noting that the ordinance actually said only that the northern states were to be formed *north of* the specified line, not that their southern boundaries had to be *on* that line, Reynolds continued.

...But we are not compelled to resort to this rigid construction of the ordinance, which was peculiarly made, not to regulate boundaries of new and future States, but for the government of the people in the Northwestern Territory. It can be demonstrated, according to the principles of our constitution and the laws of the country, that the ordinance is nothing more than an act of Congress. Its assuming to itself the high-sounding titles of "ordinance," and "compact," does not make it so. It is not contended that the Congress that passed this act in question possessed any more power or authority under the Constitution of the United States than the present or any other Congress possess. Each Congress that existed under the same constitution of Government must possess the same power, and no more. Could the present Congress make a compact between any people in this Government? It is useless to inform this House what a contract or compact is. There must be competent parties, in the first place. Who were the parties in this "compact" mentioned in the ordinance? Congress were the only party concerned in the whole transaction. It is clearly not a compact, as there were no parties to it. The people in the new Territory were not

35. *Register of Debates in Congress*, vol. 11, 23rd Cong., 2nd Sess., (Washington D.C.: Gales and Seaton, 1835), 1252.

present, represented in the Congress that enacted this organic law of the Northwestern Territory.

The Congress of the United States have no power to make constitutions for any people. They may make organic laws for the Territories of the United States, and no more. These laws are always in the control and power of Congress, to alter and change at pleasure, which they have done on various occasions. They are completely within the constitutional competency of Congress, to change and alter whenever the public good requires it. Congress have so considered the subject since this act or ordinance had existed. They admitted the State of Ohio into the Union with an alteration of the ordinance act. The same has been done with Indiana and Illinois. It has been the uniform course of legislation, when it became necessary, since the ordinance was enacted in 1787...³⁶

John Quincy Adams, after reading the part of the ordinance stating that it was an unalterable compact between the original states and the people of the territory, and reading the boundaries specified in Article V of the ordinance, made the following comments.

These are the terms of the compact—a compact as binding as any that was ever ratified by God in heaven.

The further provision is for the admission of these States into the Union at the proper time. I pass that over because it has no reference to the question now at issue before the House. I pass over, also, the laws which have been enacted by Congress from that time to the present; and the question whether Congress has, by its subsequent acts, violated this provision. I appeal to it now, in order to say that it cannot be annulled; that it is as firm as the world, immutable as eternal justice; and I call upon every member of this House to defend it with his voice and vote, and to sustain the plighted faith of this nation—of the thirteen original States by which

36. *Register of Debates in Congress*, vol. 11, 23rd Cong., 2nd Sess., (Washington D.C.: Gales and Seaton, 1835), 1253-1254.

the compact was made.

In the year 1805, the Territory of Michigan was formed by law, and the Southern line of the Territory is identical with these words of the provision: "an east and west line drawn through the southerly bend or extreme of Lake Michigan." And what do these twenty-nine members ask Congress to do? They call upon you to repeal this provision; to declare that it is not binding; to say that this shall not be the line, and to establish a different one. And why? Because it suits their convenience, and the convenience of their States, that the line should be altered....³⁷

Adams then asserted that the earlier Congresses had deviated from the ordinance because they didn't understand what they were doing.

...It is true that the boundary of Indiana and Illinois has been formed by Congress, without knowing, as I believe, what they were doing, or what principles were involved; and if this question does not come to the arbitrament of the sword, as has been intimated by the member from Illinois, who says that the people of Illinois will not suffer their boundary line to be touched—all I ask, and all the people of the two Territories ask, is, that you will not touch the line at all—that Congress will no more commit itself. There is no necessity for it. If they have committed an error in establishing a new boundary, drawn from a Territory which has no one to represent its interests, let them be satisfied with the evil they have done, and not repeat it now, when they know what is involved in the question.³⁸

Thomas Hamer of Ohio responded to Adams with the following.

...Now sir, can Congress pass a law that cannot be repealed?
Can one Congress by a law bind their successors and the

37. *Register of Debates in Congress*, vol. 11, 23rd Cong., 2nd Sess., (Washington D.C.: Gales and Seaton, 1835), 1255-56.

38. *ibid.*, 1256.

country through all time to come? Yet such is the doctrine advanced in opposition to our claim. The ordinance is an act of Congress. It is no compact, as to the country north of the line named, whatever it may as to the rest. A compact requires two parties to its execution. Here there was but one, the Congress of the United States. Virginia had no claim; the other States gave up theirs without reserve, and there was no assent or dissent of the people residing in the Territory.

He could but admire what he might be permitted to call the ingenuity of the gentleman from Massachusetts. He had remarked that Congress had no power to change the line prescribed in the ordinance, and that it was wholly unimportant what their subsequent legislation had been upon the subject. Yet he carefully passes over the laws which conflict with this line, and brings out those only which accord with it. Thus, sir, he passes by the laws of 1816 and 1818, admitting Indiana and Illinois into the Union, and fixing their boundaries north of this line; but presents the law of 1805, erecting Michigan into a Territory, to show that Congress had regarded the line as fixed, by their adoption of it on that occasion. Why not bring out all, on both sides?...³⁹

As in all prior debates on the subject, the prevailing opinion in 1835 was that Congress did not have to adhere to the ordinance. Ohio kept the northern boundary it had claimed in 1802, and the boundaries of Indiana and Illinois were left where Congress placed them in 1816 and 1818. As a consolation prize, Michigan was given its upper peninsula, an area it didn't want in the first place.

In the act establishing the Territory of Wisconsin, and the later act enabling Wisconsin to become a state, the Northwest Ordinance was not even mentioned. Congress wrote a new act for the temporary government of Wisconsin. So, contrary to David Barton's claim that the ordinance was required for all new states, and was still being used decades after the Northwest Territory states were admitted, it wasn't even used for all of the Northwest Territory states.

39. *Register of Debates in Congress*, vol. 11, 23rd Cong., 2nd Sess., (Washington D.C.: Gales and Seaton, 1835), 1258.

The Northwest Ordinance has been used as historical evidence by a few Supreme Court justices in their opinions in cases regarding religion in public schools.

Justice Thomas, in his concurring opinion, *Rosenberger v. University of Virginia*, 1995: “A broader tradition can be traced at least as far back as the First Congress, which ratified the Northwest Ordinance of 1787....Article III of that famous enactment of the Confederation Congress had provided: ‘Religion, morality, and knowledge...being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged.’...Congress subsequently set aside federal lands in the Northwest Territory and other territories for the use of schools. ...Many of the schools that enjoyed the benefits of these land grants undoubtedly were church-affiliated sectarian institutions as there was no requirement that the schools be ‘public.’”

Justice Rehnquist, in his dissenting opinion, *Wallace v. Jaffree*, 1985: “The actions of the First Congress, which reenacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the Federal Government was of course not bound by draft amendments to the Constitution which had not yet been proposed by Congress, say nothing of ratified by the States, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The

Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided that '[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'...Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new States and Territories to non-sectarian schools."

Justice Rehnquist claimed that it was not until 1845 that Congress limited school land grants in the new states and territories to non-sectarian schools. Apparently, he derived this from the fact that the act admitting Florida as a state was worded a little differently than the acts for other states and designated Lot No. 16 in each township for the use of *public* schools, rather than simply schools. This is ridiculous. Some enabling and admission acts said schools, some said public schools, and others said common schools. Obviously, they all meant public schools.

Justice Thomas, in *Rosenberger v. University of Virginia*, also used an 1833 act regarding disposal of the religious land grants in the Ohio Company and Symmes purchases.

According to Justice Thomas: "See, e.g. Act of Feb. 20, 1833, ch. 42, 4 Stat. 618-619 (authorizing the State of Ohio to sell 'all or any part of the lands heretofore reserved and appropriated by Congress for the support of religion within the Ohio Company's...purchases...and to invest the money arising from the sale thereof, in some productive fund; the proceeds of which shall be for ever annually applied...for the support of religion within the several townships for which said lands were originally reserved and set apart, and for no other use or purpose whatsoever')."

When Congress gave the legislature of Ohio permission to sell the

land reserved for religious purposes in the Ohio Company and Symmes purchases, they had no choice but to require that the proceeds from these sales be used for the support of religion. The reason for this was that the contracts with the Ohio and Symmes Companies specified that any proceeds from the future sale of these lands could not be used for any other purpose. Justice Thomas omits the fact that Congress could not violate these contracts, and misquotes the 1833 act to hide this fact.

The following is the section of *An Act to authorize the legislature of the state of Ohio to sell the land reserved for the support of religion in the Ohio Company's, and John Cleeves Symmes' purchases* misquoted by Justice Thomas with the omitted parts of the sentence restored.

That the legislature of the state of Ohio shall be, and is hereby, authorized to sell and convey, in fee simple, all or any part of the lands heretofore reserved and appropriated by Congress for the support of religion within the Ohio Company's, and John Cleeves Symme's purchases, in the state of Ohio, and to invest the money arising from the sale thereof, in some productive fund; the proceeds of which shall be for ever annually applied, under the direction of said legislature, for the support of religion within the several townships for which said lands were originally reserved and set apart, and for no other use or purpose whatsoever, according to the terms and stipulations of the said contracts of the said Ohio Company's, and John Cleeves Symme's purchases within the United States....⁴⁰

Justice Rehnquist, in *Wallace v. Jaffree*, misquoted the same 1833 act, omitting even more of the sentence than Justice Thomas. Rehnquist also threw in the 1792 Ohio Company act. As mentioned earlier in this chapter, this was the act for the second Ohio Company purchase, in which Congress confirmed the land grants made in the 1787 contract, but did not make the same grants in the new purchase.

40. Richard Peters, ed., *The Public Statutes at Large of the United States of America*, vol. 4, (Boston: Charles C. Little and James Brown, 1846), 618-619.

According to Justice Rehnquist: “In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. ...In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds ‘for the support of religion...and for no other use or purpose whatsoever...”

In the companion book to the *Religion and the Founding of the American Republic Exhibit*, James H. Hutson, Chief of the Manuscript Division at the Library of Congress, includes the Northwest Ordinance among the examples of what he describes as “Congress’s broad program to promote religion.”

According to Hutson: “Continuing to share the widespread concern about the corrupting influence of the frontier, Congress, in the summer of 1787 Congress revisited the issue of religion in the new territories and passed, July 13, 1787, the famous Northwest Ordinance. Article 3 of the Ordinance contained the following language: ‘Religion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall be forever encouraged.’ Scholars have been puzzled that, having declared religion and morality indispensable to good government, Congress did not, like some of the state governments that had written similar declarations into their constitutions, give financial assistance to the churches in the West. Although rhetorical encouragement for religion was all that was possible on this occasion, Congress did, in a little noticed action two weeks later, offer financial support to a church.”

The “*little noticed action two weeks later,*” a land trust put in the name of a religious society for a completely non-religious reason, is the subject of Chapter Four of this book.