Land Policy and the Principle of Equality of States under the Articles of Confederation

by Frederick Merk

THE CONTINENTAL CONGRESS assumed a major obligation in accepting the western claims of the landed states. The obligation was to frame an effective administrative system for this immense public domain. It was not merely a responsibility, but a challenging opportunity. No adequate administrative system had been developed for that area by France or Great Britain, nor could it be while the region was contested. It would have required surveying of land, formulation of the mode and terms of sale, and establishing the method of recording title. Preliminary steps to the creation of such a system had been taken by the British government in the Proclamation of 1763 and the Plan of 1764. But in 1768 the fulfillment of them had been abandoned and the administration of the area had been restored to the colonial governments possessing claims, each of which had maintained its own pattern of survey, sale, and recording of title. The result had been chaos.

The response of Congress was the Land Ordinance of 1785, adopted while the cessions were still coming in. This was one of the most important and admirable measures ever enacted by an American legislature. It established basic principles that were to apply to the region north of the Ohio. Later the same principles were extended to all the western country coming into federal possession. A first principle was that survey must precede sale in any federal wilderness. The wilderness was to be laid out in a pattern of straight lines and rectangular blocks. This would minimize the danger of surveying errors and overlapping boundaries.

A starting point was fixed for the survey. It was at the geographic point where the Ohio River cuts across the boundary of Pennsylvania west of the Virginia panhandle. From this point a so-called base line was to be drawn due west, on which range lines were to be laid off at right angles, at six-mile intervals. Within the range lines townships were to be erected, each six miles square, and numbered in a specified order. Then each township was to be cut into 36 sections which were to be numbered in an order prescribed by law. This was the checkerboard pattern of land division.

The chief merit of rectangular survey was the avoidance of errors likely to occur in marking irregular angles in an era when surveying instruments were crude. The recording of title to land by number rather than by a description of markers left on trees or rocks had a like merit of avoiding errors. The reservation of land for educational purposes was an added virtue of the Ordinance. In every township one section was reserved for such purposes. Country schools throughout the West owe their inception to that provision. The principle of reserving public land for education was later much extended. In the Dakotas and in Montana two sections of land were reserved in every township for common schools. Also, later, the reserving of public lands for higher education was added.

The merit of the 1785 ordinance can be fully realized only when compared with the cumbersome and complex system followed on Virginia's western waters. There the first step in acquiring public land was to purchase a warrant from the Virginia land office, which was a certificate stipulating the number of acres the purchaser had paid for. Location of the warrant was permissible wherever wilderness land had not already been pre-empted or settled or restricted. It was made simply by marking off the boundaries of the tract desired on rocks or blazing it on trees. The person making the markings had no means of knowing whether the land had already been pre-empted by a speculator or a prospective settler. The next step was to call a county surveyor to make a plat of the land. If a county surveyor was not available a private surveyor was used. The plat was then registered in Virginia's land office. Finally, after a wait of six months, a deed or patent to the land was issued, provided that no counterclaim or "caveat" had been filed in the meantime. This was the system used for Kentucky by Virginia and for Tennessee by North Carolina.

An essential feature of this system was survey after a warrant had been bought and paid for. Location of the warrant could be made wherever in the wilderness Virginia had land. The shape of the tract purchased was normally irregular, which resulted in difficult surveying angles. The recording of boundaries was in terms of perishable symbols such as blazes on trees or marks on rocks.

A multitude of errors crept into titles acquired in this way, errors of surveying, overlapping boundaries, and of recording. The result was endless litigation later in the courts. Litigation of disputed land titles filled the courts of Kentucky and Tennessee beyond the close of the 19th century. When the Tennessee Valley Authority was established and title to land for reservoirs was sought by the federal government a mass of confusion was dredged up.

The principles of the Ordinance applied only to the area possessed by the government north of the Ohio. Later they were extended by Congress to other areas acquired in the West. They were also later copied from the United States by other countries—by Canada, Australia, and New Zealand.

The origins of the Ordinance were colonial. What Congress did in drawing up the measure was merely to select and combine the best ideas of various colonial systems. The idea of township tracts, laid out in orderly fashion before settlement, was taken from the New England town-planting system. The rectilinear form of the townships came, also, from the New England towns, though they were seldom exactly six miles square. Concord was the first town six miles square. The idea of reserving land for public uses, such as education, emanated also from the New England town system. The size of sections of land—640 acres—came from the North

Carolina pre-emption laws and from the grants made by Virginia to Kentucky stations. The Ordinance combined the best of colonial diversities.

The financial terms for sale of public land under the Ordinance were far less generous than those in effect in the states during the Revolutionary War. Purchase was to be by bidding at public auction. The lowest bid permitted—where bidding was to begin—was a dollar an acre. Once land had been offered at auction in a given district, it could be bought at the minimum price fixed by the law. Payment had to be made in hard money or its equivalent.

These stiff terms were established because the federal government was desperately in need of revenue. Revenue considerations had to be put ahead of social considerations in the disposal of the public domain, and that continued to be the case until the federal debt was paid off.

Other illiberal features of the Ordinance of 1785 related to the size of the parcels of land to be sold. Every alternate township had to be sold in quarter townships—in blocks of nine square miles—which meant, in effect, to speculators. The smallest parcel of land that could be bought was a square mile (640 acres). In subsequent land legislation three issues recurred: what should be the size of the minimum allowable purchase; what should be the price per acre; and what form should the payments take—cash or otherwise?

Actual surveying of land under the Ordinance of 1785 was delayed. The delay was due in part to the lack of means of Congress to pay for surveying, partly to Indian disturbances in the West. In the meantime, land-speculating companies were eager to buy land direct from Congress in big blocks. This was a period of feverish speculation in public lands. Many of the nation's leaders, including George Washington, were in it. Robert Morris held millions of acres of western land. James Wilson was heavily involved. Alexander Hamilton was so involved at the time of his death that he was virtually insolvent.

One of the largest of the land-speculating ventures was the Ohio Company, a Massachusetts organization, centered in Boston. It was headed by General Rufus Putnam, who had done surveying for Congress under the Ordinance of 1785. Putnam had noticed the beauty and the fertility of the lands in the Muskingum Valley of Ohio, and in 1786 he formed the Ohio Company for the purpose of buying a big block of them direct from Congress.

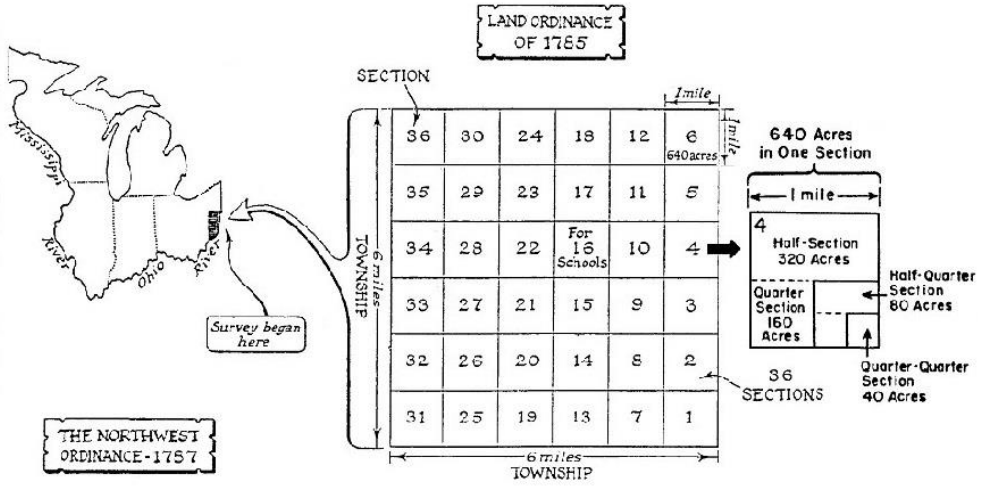
The land purchase of the Ohio Company was a stimulus to the Confederation Congress to meet a second obligation in taking over the trans-Allegheny West—that of providing for the government of the area. Land speculators needed to have in the West a liberal form of government as an inducement to Easterners to buy from them land for new farms. Congress met this requirement in the Northwest Ordinance of 1787. Like the Ordinance of 1785, it established principles that were expected to apply to the remainder of American territory westward to the Mississippi and that might apply, some day, as far westward as the Pacific Ocean.

The authors of the act were acquainted with history. They had learned from it that any government which extended its authority over an area of continental proportions was likely to degenerate into an autocracy in which the people lost their freedom. This was the danger to be avoided. The problem was how to extend the authority of their government over a continental interior without repeating the errors of the past. The solution found to the problem was the Northwest Ordinance.

This Ordinance provided that the region north of the Ohio be divided into not more than five, nor less than three, territories. So long as any of the territories had a small population it was to have a purely executive government—a governor, secretary, and three judges, all appointed by Congress. When the population had reached 5000 adult males it was to have an elected assembly, and when it had grown to a population of 60,000 inhabitants it was to have the right to statehood in the Union on a basis of complete equality with the original thirteen states.

This system of government carried none of the trappings or potentialities of colonialism. Its terminology was meaningful. It described the future communities as "territories," not as "colonies," and it assured them, in advance, of a gradually increasing autonomy as they grew in population and maturity. It prepared for them a position of full equality with the founding states—a full partnership in the governing Union.

The Ordinance also contained the equivalent of a bill of rights. It guaranteed to the communities to be established in the Northwest Territory religious freedom, the right of habeas corpus, the right of jury trial, and other freedoms sacred to Englishmen. A concluding article declared that in the Northwest Territory "there shall be neither slavery nor involuntary servitude . . . otherwise than in the punishment of crime whereof the party shall have been duly convicted."



The area south of the Ohio was not organized during the Confederation period. Virginia had retained jurisdiction in Kentucky, governing it as a county until 1792, when it consented to the county's becoming a state of the Union, without ever having passed through the territorial stage. North Carolina retained the Tennessee region throughout the Confederation period, ceding it to Congress only in 1790, when Congress organized it as the Territory Southwest of the Ohio River. The basis of organization was that of the Northwest Territory, with the exception of the provision prohibiting slavery. The territory became the state of Tennessee in 1796.

Thus by 1804 all the trans-Allegheny area to the Mississippi—which came to the nation as little more than an inchoate wilderness in 1783—had either achieved statehood or acquired territorial status under the principles enunciated in the Northwest Ordinance. In 1803 Ohio became a state. The same year the United States acquired the Louisiana Purchase. In this great extension of sovereignty, and in later extensions of it to equally vast regions, the system went along. The United States is today a republic of 50 equal partners. Of the 50, 31 have come into the Union under the principles of the Northwest Ordinance of 1787.

The elevation of new settlements to a position of equality in the partnership of the Union was a surprisingly advanced concept for the 18th century, so advanced that two questions arise at once: where did it originate, and how did it evolve? These used to be answered by ascribing them to Thomas Jefferson or James Monroe. Actually the Ordinance was the brainchild of no individual. It was a product of gradual evolution.

The first stage in the evolution emerged from the clash of the American radicals with the British Parliament in 1774, following the Boston Tea Party. Parliament responded to the riotous party by adopting the Coercive Acts, which aroused the radicals throughout the colonies. They took the stand that Parliament had no power to pass such legislation, that it lacked the right to legislate for them at all. The American colonies, the radicals argued, had a position of autonomy in the British Empire. They were autonomous dominions of the King. They had a status of equality in the British Empire with the realm of England. They were under the King, but not under Parliament. This doctrine of autonomy, of equality with the realm of England in the Empire, was developed especially by such colonial radicals as Sam Adams, John Adams, and Thomas Jefferson.

In England, the radical John Cartwright wrote a pamphlet in 1774 defending the idea of colonial autonomy. He referred to autonomy as a kind of independence under the Crown. The pamphlet was republished in America in 1776.

Cartwright suggested that not only the thirteen colonies already established along the seaboard, but future western colonies built up in the interior, should have a status in the Empire of equality with the realm of England. He thought that nineteen new colonies might be established in the future in the interior. All of these, as soon as they had a minimum of population, should become autonomous dominions of the Empire, with a status of equality with the realm of England under the King. He published a map as a frontispiece to the pamphlet. It shows the new dominions that Cartwright proposed in the interior which should have equality with England inside the Empire. This proposal was a foreshadowing of the 1787 Northwest Ordinance.

The next step in the evolution of the great principle was a pledge the Continental Congress made in October 1780 to the landed states during the Revolutionary War, when it was trying to persuade them to cede their western claims to the nation. The pledge was that if the western lands were ceded they would be used for the common benefit, and when settled, would be divided into states which would be admitted to the Union on a basis of full equality with the older states.

The third step in the evolution of the principle of equality of statehoods was an ordinance drawn up by Jefferson and adopted by Congress in 1784 for government of the West. Under it sixteen trans-Appalachian territories were to be formed. As soon as any one of the sixteen had a sufficient population, it was to have the right to enter the Union on the basis of equality with the older states. The Ordinance was provi-

sional. It was to go into effect only when all the landed states had ceded their western claims to Congress. It never went into operation because it was superseded within three years by the Northwest Ordinance of 1787. But it is significant as the first legislative formulation of the principle of equality of the new states with the old. The Northwest Ordinance of 1787 merely gave detailed and final form to the crude legislation of 1784.

An important element in the evolution of the equality principle of the Northwest Ordinance was the clamor of frontier communities for statehood. All the frontier communities from Vermont to Tennessee were demanding statehood in the Union in the years after the Revolution and demanding it belligerently. Vermont, whose territory was claimed by New York and New Hampshire, was demanding statehood. When Vermont was refused by Congress, out of deference to New York and New Hampshire, its leaders, Ira and Ethan Allen, turned to the British authorities in Quebec for support, asking for a treaty with England.

Another frontier area that demanded equal statehood was the one that called itself Westsylvania—the region of western Pennsylvania, western Virginia, and eastern Kentucky. It wanted separation from Virginia and equal statehood. When this was delayed, it flirted with the Spanish authorities at New Orleans. Another was eastern Tennessee, calling itself the state of Franklin. It maintained its right to statehood under the provisional Ordinance of 1784, drew up its own constitution, and flirted with Spanish authorities at New Orleans when independence was denied. North Carolina quelled this separatist state in 1789, shortly before ceding its claims in Tennessee to Congress. The pressure of these frontier communities was an important force in the adoption by Congress of the Northwest Ordinance with its great principle of equal statehood in the Union.

A few weeks after the adoption of the Northwest Ordinance, the Constitutional Convention, summoned to draw up a new framework of government for the Union, assembled in Philadelphia. It met next door to the Congress of the Confederation. The Convention was at once confronted by the question whether the great principle just approved for the Northwest would be made to apply to the whole of the western country. In view of the clamor which Kentucky, Tennessee, and Westsylvania were making for statehood, this issue was one of the most pressing before the Constitutional Convention.

A sharp division of opinion at once appeared over the issue. One element, led by Madison, wished to apply the principle of the Northwest Ordinance to all the West, as fast as the cessions of lands came in, and to any future areas acquired. This group wrote into the first draft of the Constitution the provision: "If the admission be consented to, new states shall be admitted on the same terms with the original states." That provision was a clear triumph for the equality principle of the Northwest Ordinance. It was a mandatory extension of the equality principle to any new states admitted into the Union.

But another element in the Convention, led by Gouverneur Morris of New York and Elbridge Gerry of Massachusetts, objected to such a provision. They believed that if it were approved and made to apply to all the West, it would lead to a future domination of Congress by radical majorities from the West. They advocated a plan that consisted of two ideas. One was that a limit be set to the number of new states admitted to the Union in the future. The limit should be low enough so that the new

states would never outnumber the original thirteen. The West was to have power in the future only in safe proportions. The second proposal was that Congress should have the right, in admitting new states, to decide whether equality should be the basis of the admission, or something less than equality. These ideas represented a retreat from the principle of equality of new states that the Ordinance of 1787 had just established for the Northwest.

The Convention finally adopted a compromise between the proposals of the two groups. It consisted of scrapping Madison's mandatory equality proposal and replacing it with the neutral and colorless statement which is now in Article IV, Section 3, of the Constitution: "New states may be admitted by Congress into this Union." This was agreed to by a vote of 9 states to 2.

In this compromise nothing at all was said as to the basis on which new states were to be admitted, whether on a basis of equality with the older states or something less. But the fact that Madison's mandatory equality provision had been rejected would seem to indicate that the framers intended Congress to have the right to admit new states on a basis of less than equality.

In the exercise of its powers, however, Congress regularly admitted new states on a basis of full equality with the older states. Vermont, in 1791, and Kentucky, in 1792, were admitted as complete and entire states. In the case of Tennessee, which was admitted in 1796, the words used were "on an equal footing with the original states in all respects whatsoever."

In 1820, however, the issue of equality for new states became a matter of controversy, when the slavery problem arose in the fight over the admission of Missouri. The issue was raised by Senator James Tallmadge of New York, who proposed that a condition be attached to the admission of Missouri—an agreement to gradually do away with slavery within its boundaries. That condition was objected to by Missouri and by the slave states of the South.

The objection to it was best stated by Senator William Pinkney of Maryland, one of the great constitutional lawyers of his day. He argued that no condition could be imposed in admitting Missouri that would make it less than equal to the older states of the Union; that since the older states had the right to maintain slavery, Missouri must have it also. Any restriction imposed on Missouri which made it less than equal to the older states would be contrary to the Constitution, and if this were attempted by Congress, Missouri could ignore the restriction as unconstitutional, once safely in the Union. This argument was allowed to prevail in the settlement of the Missouri question. The state was admitted, under the Missouri Compromise, without restriction as to its right to have slaves.

Thereafter no state seeking admission to the Union was in danger of restriction as to slavery. All had the right to establish it or not. In 1851 in *Strader v. Graham* the Supreme Court ruled that Ohio as a state could have permitted slavery, despite having been under the restriction of the Northwest Ordinance while a territory. And this right continued until the adoption of the Thirteenth Amendment, which abolished slavery in all the states.

But the issue of equality of new states arose in different forms after the Civil War. When Utah applied for admission to the Union in 1896, it was required to write into its constitution a provision prohibiting polygamy. Its legislature complied. After the state was admitted, the legislature could, theoretically, have re-established polygamy, but it did not do so. Congress considered that possibility, but dismissed it

with the rather strange argument that if Utah ever did re-establish polygamy, it could be excluded from Congress on the ground that it would have ceased to have a republican form of government.

In 1911 Arizona applied for admission to the Union with a constitution permitting the recall of judges. Congress complied, but coupled its resolution with a condition that a referendum be held by the people of the territory on the recall provision. This was vetoed by President Taft, who as a former judge objected to even a referendum on the issue. While the problem was before Congress, the Supreme Court in *Coyle v. Smith* rendered a decision which re-echoed the thesis developed by Senator Pinkney a century earlier that, if a state was admitted, it must be on the basis of full equality with the older states, and that any political restrictions or conditions imposed would have no binding force on it, once it was in the Union.

Arizona, encouraged by this ruling, amended its constitution by taking out the recall of judges. Congress then voted to admit the state without conditions, and the state was formally admitted in 1912. But no sooner was it safely in the Union than the recall provision was put back in the state's constitution and left there.

"Land Policy and the Principle of Equality of States" appears as a chapter in *History of the Westward Movement* by Frederick Merk. Completed shortly before Merk's death in 1978, the book culminated 60 years of research regarding America's fervent expansion westward. Merk succeeded renowned frontier historian Frederick Jackson Turner as a faculty member at Harvard University.