



2001

Religion, Establishment, and the Northwest Ordinance: A Closer Look at an Accommodationist Argument

Thomas Nathan Peters
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Legal History Commons](#), and the [Religion Law Commons](#)

Click here to let us know how access to this document benefits you.

Recommended Citation

Peters, Thomas Nathan (2001) "Religion, Establishment, and the Northwest Ordinance: A Closer Look at an Accommodationist Argument," *Kentucky Law Journal*: Vol. 89 : Iss. 3 , Article 8.

Available at: <https://uknowledge.uky.edu/klj/vol89/iss3/8>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Religion, Establishment, and the Northwest Ordinance: A Closer Look at an Accommodationist Argument

BY THOMAS NATHAN PETERS*

Scholarly interpreters of the Establishment Clause fall generally into two camps: separationists who claim the Establishment Clause bars the federal government from legislating religion¹ and accommodationists who claim the Establishment Clause bars only the preferential treatment of religious groups.² While scholars in both camps

* J.D. expected 2002, University of Kentucky. The author is indebted to the work of Jim Allison and Susan Batte, independent researchers who have spent countless hours studying primary source documents related to religious liberty in America. The author at one time participated with Allison and Batte in a collaborative web page dealing with religious liberty issues. Most of the arguments in this Note originate from that collaboration. This Note reworks, expands, and documents these arguments in a manner appropriate to legal scholarship. Allison and Batte's current work can be found at Jim Allison & Susan Batte, *The Constitutional Principle: Separation of Church and State*, at <http://members.tripod.com/~candst/> (Jan. 31, 2001).

¹ Leading separationist studies include THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); DEREK DAVIS, *ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS* (1991); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed. 1994); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (rev. ed., 1967); Douglas Laycock, "Nonpreferential" *Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986) [hereinafter Laycock, "Nonpreferential" *Aid*]; Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683 (1990); Douglas Laycock, *Original Intent and the Constitution Today*, in *THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS* 87 (James E. Wood, Jr. ed., 1990).

² Leading accommodationist studies include ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* (1990); WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1970); GERARD V.

make appeals to the text and legislative history of the Establishment Clause,³ much of the accommodationist argument is focused on the claim that, in the decades following the adoption of the Constitution, the federal government acted inconsistently with the separationist understanding of the First Amendment. Examples of such supposed accommodation include the establishment of chaplains for Congress⁴ and the military,⁵ presidential declarations of days of prayer and Thanksgiving,⁶ land grants to Christian missionaries working in the Indian territories,⁷ and, notably, certain provisions of the Land Ordinance of 1787, more commonly known as the Northwest Ordinance.⁸

Enacted by the last Congress to sit under the Articles of Confederation, the Northwest Ordinance created a temporary government for the Northwest Territory, a vast swath of land extending from the Great Lakes to the Ohio River ceded to the federal government by the states at the end of the Revolutionary War.⁹ As the first "constitution" for the Terri-

BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT (1987); MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); JAMES M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949); RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION (1987); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

³ For separationists see LEVY, *supra* note 1, at ch. 5; Laycock, "Nonpreferential" Aid, *supra* note 1, at 877-94. For accommodationists see BRADLEY, *supra* note 2, ch. 4; CORD, *supra* note 2, at 7-12; MALBIN, *supra* note 2, at 1-13.

⁴ 1 ANNALS OF CONG. 242 (Joseph Gales ed., 1789).

⁵ CORD, *supra* note 2, at 54.

⁶ *Id.* at 51-53.

⁷ *Id.* at 57-80.

⁸ Act to Provide for the Government of the Territory North-west of the River Ohio, Ch.8, 1 Stat. 50, 51 n.(a) (1789). This reference reproduces the Northwest Ordinance as a three page footnote to a 1789 statute that conforms the Ordinance to the recently ratified Constitution. See *infra* Part II.

⁹ Important discussions of the genesis, provisions, and effect of the Ordinance can be found in JAY A. BARRETT, EVOLUTION OF THE ORDINANCE OF 1787 (1891); THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY (Frederick D. Williams ed., 1989); PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987); HOWARD CROMWELL TAYLOR, THE EDUCATIONAL SIGNIFICANCE OF THE EARLY FEDERAL LAND

tory,¹⁰ the Ordinance is famous for its guarantees of religious¹¹ and civil¹² liberties, its promotion of goodwill toward Native Americans,¹³ and its prohibition of slavery.¹⁴ Equally famous is the Ordinance's framework for territorial self-government¹⁵ and its mechanisms for dividing the territory into states and providing for their admission into the Union.¹⁶ The

ORDINANCES (1922).

¹⁰ Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 931-33 (1995). Professor Denis Duffey argues that the Northwest Ordinance was more than just a constitution for the Northwest Territory. Duffey sees the Ordinance as an authoritative expression of the guiding principles of American governance and so ranks the Ordinance alongside *The Federalist Papers* and the Declaration of Independence as a "constitutional" document with "quasi-constitutional" status. *Id.* at 931-33. According to Duffey constitutional documents have an "authority of an extraordinary, foundational character" and "express[] principles that guide the actions of a political entity." *Id.* at 933.

¹¹ Article I of the Ordinance provided that "[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments." 1 Stat. at 52 n.(a).

¹² Article II of the Ordinance provided for a writ of habeas corpus, trial by jury, and proportionate representation in the legislature, and prohibited cruel and unusual punishment and required Congress to reimburse residents for takings of personal property. *Id.*

¹³ Article III of the Ordinance provided that "[t]he utmost good faith shall always be observed toward the Indians," and that "laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to [Native Americans]." *Id.*

¹⁴ Article VI of the Ordinance provided that "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes." 1 Stat. at 53 n.(a).

¹⁵ The body of the Ordinance provided that, "[s]o soon as there shall be five thousand free male inhabitants, of full age, in the district . . . they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly" to "consist of a governor, legislative council, and a house of representatives." The house of representatives was freely elected. The governor was appointed by Congress, and candidates for the legislative council were nominated by the house of representatives and approved by Congress. *Id.* at 51-52 n.(a).

¹⁶ Article V of the Ordinance authorized the creation of "not less than three, nor more than five States" from the Northwest Territory, and provided that when: any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State

significance of the Ordinance for accommodationists, however, lies not in these provisions, but in the first sentence of its third “article of compact” between the citizens of the Territory and the states,¹⁷ which reads: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”¹⁸

Accommodationists make two arguments that the “religion, morality, and knowledge” clause (“RMK” clause) is inconsistent with separationism. First, accommodationists argue that, in positioning religion as the first of three justifications for widespread education, the clause commits the federal government to a policy of encouraging religion in the territorial schools.¹⁹ Indeed, one accommodationist writer has gone so far as to claim that the Ordinance required schools to teach religion.²⁰ Second, accommodationists note that shortly after the Ordinance was enacted—and seemingly in keeping with the RMK clause—Congress sold two large tracts of territorial land with the stipulation that section twenty-nine of each township be reserved for the support of religion.²¹ Accommodationists

government: [p]rovided the constitution and government so to be formed, shall be republican

1 Stat. at 53 n.(a). These provisions ultimately created the states of Illinois, Indiana, Ohio, Michigan, and Wisconsin. NORTHWEST TERRITORY CELEBRATION COMMISSION, HISTORY OF THE ORDINANCE OF 1787 AND THE OLD NORTHWEST TERRITORY 66-74 (1937). Additionally, a small section of the Territory became part of the state of Minnesota. *Id.* at 74.

The Ordinance’s legacy of state-creation extends far beyond the Northwest Territory. So successful was the Ordinance at dealing with the exigencies of territorial land administration that its provisions were frequently extended to new territories as they were created by Congress, and so “set the pattern of territorial governance and statemaking that was ultimately applied to thirty-one of the fifty states.” Duffey, *supra* note 10, at 930. Elsewhere Duffey refers to the Ordinance as the “foundational document of American expansionism.” *Id.* at 949. For an authoritative discussion of the role of the Ordinance in the history of American expansionism, see JACK ERICSON EBLEN, THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784-1912 (1968).

¹⁷ The body of the Ordinance was followed by six articles, designated as “articles of compact between the original States, and the people and States in the said territory” that were declared to “forever remain unalterable, unless by common consent.” 1 Stat. at 52 n.(a).

¹⁸ *Id.*

¹⁹ See *infra* Part I.

²⁰ DAVID BARTON, THE MYTH OF SEPARATION 39 (1992).

²¹ See BRADLEY, *supra* note 2, at 99.

argue that these set asides amounted to direct federal aid to religion and would not have been approved by a Congress concerned with maintaining a wall of separation between church and state.²² For the purposes of this Note, the text of the RMK clause and the religious set aside provisions of the 1787 land sales are termed “substantive” arguments that the Ordinance is inconsistent with separationism.

Accommodationists are aware that neither substantive argument establishes a direct conflict with separationist readings of the First Amendment. The Ordinance and the land sales were approved while Congress was still operating under the Articles of Confederation and, hence, were governed neither by the Constitution nor the restrictions of the Establishment Clause.²³ To remove this difficulty, accommodationists advance the corollary argument that the Northwest Ordinance was “reenacted” by the same Congress that framed the text of the First Amendment.²⁴ Reasoning that Congress would not approve legislation that aided religion while at the same time framing an amendment that prohibited such aid, accommodationists conclude that the Establishment Clause could not have been intended as an outright ban on support for religion.²⁵ Together, the substantive and corollary arguments comprise the core of the accommodationist claim that the Northwest Ordinance evidences an accommodationist intent for the Establishment Clause.

Despite the frequency with which the Northwest Ordinance is invoked in discussions of the religion clauses of the First Amendment, few scholars on either side of the debate have paid much attention to the grammar and legislative history of the Ordinance, or the logical difficulties involved in using legislation passed under the Articles of Confederation to prove something about the Constitution. Among accommodationists only John Baker,²⁶ David Barton,²⁷ Gerard

²² See *id.* at 101.

²³ Congress operated under the Articles of Confederation between 1778 and 1789. ALFRED H. KELLY ET AL., 1 *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 78, 94-95 (7th ed. 1991).

²⁴ See SMITH, *supra* note 2, at 105, 211. As suggested later in this Note, the term “reenact” is not a good description of the actions of the First Congress. See *infra* note 189.

²⁵ See SMITH, *supra* note 2, at 105, 211.

²⁶ John S. Baker, Jr., *The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 48-50 (Eugene W. Hickok, Jr. ed., 1991).

²⁷ BARTON, *supra* note 20, at 37-39.

Bradley,²⁸ and Robert Cord²⁹ devote more than a few sentences to the Ordinance. Among separationists only Derek Davis³⁰ addresses the Ordinance in detail. This Note proposes to remedy this lacuna by providing a more thorough examination of the substantive and corollary arguments than have heretofore been provided in the relevant literature. This Note concludes that many of the claims accommodationists make about the Northwest Ordinance are poorly grounded in fact and that the Ordinance may actually undercut some of the assumptions upon which accommodationists depend to frame their arguments in other contexts.

Part I of this Note examines the RMK clause and the religious reservation provisions of the first two land sales under the Northwest Ordinance and concludes that neither presents a clear substantive challenge to separationism.³¹ Part II examines the legislative history of the “reenactment” of the Ordinance by the Congress that framed the text of the First Amendment and concludes there are insuperable chronological difficulties in using the Ordinance to say anything meaningful about the Establishment Clause.³²

I. THE SUBSTANTIVE ARGUMENTS

A. *The “Religion, Morality, and Knowledge” Clause*

The claim that the RMK clause committed the federal government to the support of religion dates at least from Isaac Cornelison’s pioneering 1895 work on religion and civil government.³³ Nevertheless, the claim played no part in the Supreme Court’s analysis of the religion clauses until

²⁸ BRADLEY, *supra* note 2, at 98-104.

²⁹ CORD, *supra* note 2, at 61-63.

³⁰ DAVIS, *supra* note 1, at 141-44. *See also* DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS: 1774-1789, at 168-72 (2000) [hereinafter DAVIS, CONTINENTAL CONGRESS].

³¹ *See infra* Part I.

³² *See infra* Part II.

³³ ISAAC A. CORNELISON, THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA 111-20 (Da Capo Press 1970) (1895). Cornelison claimed that the United States was “bound by the compact of 1787 to promote ‘religion, morality, and knowledge,’” and that “there can be no doubt that the religion which it was under obligation to promote was the Christian religion.” *Id.* at 120. In making these claims Cornelison goes beyond the position of most modern accommodationists who argue that, whatever type of accommodation is permitted by the First Amendment, it cannot favor a single religion.

1985, when Justice Rehnquist cited the clause in his dissenting opinion in *Wallace v. Jaffree*.³⁴ Modern accommodationists have produced several versions of the argument, ranging from the flat assertion that the clause required territorial schools to teach religion³⁵ to the less extreme claim that the clause amounted to an official sanctioning of the “benevolent promotion by the state of religious education.”³⁶ All of these claims hinge on the fact that the clause positions religion as the first of several justifications for the encouragement of education.

This section argues that accommodationists go beyond the evidence in claiming that the RMK clause committed the federal government to the support of religion. In fact, the clause neither required schools to teach religion, nor bound the federal or state governments to any policy toward territorial schools. Rather, the clause is better understood as a prescient but legally unenforceable expression of sentiment toward the encouragement of public education. Additionally, this section argues that the language of the RMK clause and the legislative history of the Ordinance suggest that Congress did not intend the clause to authorize direct support for religion.

1. *The RMK Clause Did Not Require Schools to Teach Religion*

The most interesting accommodationist claim about the meaning of the RMK clause is David Barton’s assertion that the clause required territorial schools to teach religion.³⁷ In a popular 1991 book, Barton recites the text of the RMK clause,³⁸ and notes that the Northwest Ordinance was reauthorized by the same Congress that framed the text of the First Amendment.³⁹ He concludes that, “[s]ince the same Congress which prohibited the federal government from the ‘establishment of religion’ *also required that religion be included in schools*, the Framers [of the Establishment Clause] obviously did not view a federal requirement to teach religion in schools as a violation of the First Amendment.”⁴⁰ Additionally, Barton notes that language modeled after the RMK clause was inserted by

³⁴ *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting); see Baker, *supra* note 26, at 48.

³⁵ BARTON, *supra* note 20, at 39.

³⁶ CHARLES E. RICE, *THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT* 31 (1964).

³⁷ BARTON, *supra* note 20, at 39.

³⁸ *Id.* at 38.

³⁹ *Id.* at 37.

⁴⁰ *Id.* at 39 (emphasis added).

Congress into the legislative acts creating various states after the enactment of the Northwest Ordinance⁴¹ and later concludes—possibly on the basis of this evidence—that the Ordinance made the teaching of religion in schools a “prerequisite for statehood in the United States.”⁴² These are strong claims, and they go well beyond the conclusions of most other accommodationist scholars.⁴³ Nevertheless, responding to these arguments disposes of a number of issues related to the purpose of the Ordinance and its actual effect on education in the Northwest Territory.

Barton’s arguments are vulnerable to attack on multiple linguistic and historical grounds. First, assuming *arguendo* that the RMK clause was intended to bind Congress to a policy of encouraging education, Barton exaggerates the scope of the power the clause conferred upon Congress to regulate schools. A provision allowing “encouragement” of education is not the same as a provision authorizing the federal government to prescribe curricula or subject matter. Nothing in the wording of the Ordinance conferred power on the federal government to regulate education, nor did it remove such power from territorial governments. Note also that Barton provides no evidence from contemporary sources that the Ordinance was understood to have required such federal regulation. Second, while Barton is correct that the clause assumes that “schools and educational systems [are a] proper means to encourage ‘religion, morality, and knowledge,’ ”⁴⁴

⁴¹ *Id.* at 38-39.

⁴² *Id.* at 130. Barton certainly does not reach this conclusion on the basis of HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY 131 (1948), the source he cites in the footnote to this statement. The footnote points to a reprint of a portion of the Northwest Ordinance, but nothing in the language reproduced there requires states to teach religion as a prerequisite for admission to the Union. It is possible that Barton is misreading the language of Article IV of the Ordinance, also reprinted on that page, which requires states formed from the Northwest Territory to obey acts of Congress.

⁴³ It is worth noting that Barton is neither an historian nor a scholar in the traditional sense of those terms. A former school principal with no advanced degree in any discipline, Barton left the world of education to found Wall Builders, a national organization dedicated to restoring what Barton sees as the moral and religious foundations of American government. See David Barton, *David Barton/Wallbuilders: Partial Resume*, at <http://www.wallbuilders.com/resume.html> (last visited Feb. 18, 2001). Critics argue that Barton is often less than honest in his use of historical data. See *infra* note 63. Nevertheless, his books are extremely influential among religious conservatives and deserve to be taken seriously by mainstream scholars.

⁴⁴ BARTON, *supra* note 20, at 38.

it does not follow from this that such encouragement required schools to teach religion. The framers of the Ordinance may have linked religion to education on the more general ground that educated people are simply more likely to be religious, moral, and knowledgeable than uneducated people.⁴⁵ Third, while the Ordinance may have viewed religion as one of the components “necessary to good government and the happiness of mankind,” only “schools and the means of education” were actually encouraged.⁴⁶ The absence of the word “religion” from the “encouragement” clause is conspicuous in the face of its presence only one clause earlier. It suggests that the framers were consciously distinguishing between religion and education; while religion might be important to good government, only education was actually encouraged.⁴⁷ That Barton’s argument ignores this distinction does nothing to increase its probability.

Fourth, historians are unanimous that the RMK clause did not formally commit the federal government to any policy toward schooling in the Northwest Territory. While it is accurate to understand the RMK language of the Northwest Ordinance as a prophetic statement of the importance of public education,⁴⁸ the terms of the Ordinance did not themselves establish a school system for the Old Northwest⁴⁹ or require territorial schools to conform to federal regulation.⁵⁰ The Ordinance built no schools, appropriated no money, prescribed no curriculum, nor required territorial governments to provide any of the elements of a school system. Moreover, and unlike previous land ordinances, it did not require that land be set aside for

⁴⁵ This is the interpretation given to the clause whenever it was interpreted by courts operating under state constitutions that incorporated RMK language. *See infra* notes 66-104 and accompanying text.

⁴⁶ Act to Provide for the Government of the Territory North-west of the River Ohio, Ch. 8, 1 Stat. 50, 52 n.(a) (1789).

⁴⁷ Note that the Continental Congress considered RMK language allowing direct support for religion and rejected it. *See infra* notes 135-42 and accompanying text.

⁴⁸ Article III of the Ordinance has been referred to as both the “charter of the public school system of the great Middle and Far West,” PAUL MONROE, *FOUNDING OF THE AMERICAN PUBLIC SCHOOL SYSTEM* 196 (1940), and “the cornerstone in the foundation of the free public school system which . . . made possible the development of an educated and useful citizenship in a rapidly growing and expanding democratic society.” TAYLOR, *supra* note 9, at 53. Both statements are facial exaggerations of the immediate influence of the Ordinance, as Taylor himself confirms. *See infra* note 61 and accompanying text.

⁴⁹ *See* R. CARLYLE BULEY, *THE OLD NORTHWEST: PIONEER PERIOD, 1815-1840*, at 326 (1951).

⁵⁰ TAYLOR, *supra* note 9, at 82-83.

the support of education.⁵¹ Nor did it require territorial governments to create such set asides.⁵² Rather, reserved land for education was first secured for territorial residents through Congressional land sales to private land speculators, the terms of which were unconnected to the provisions of the Northwest Ordinance.⁵³

Similarly, when historians unpack the educational significance of the Ordinance they are careful to distinguish between the rhetoric of the RMK clause and its actual effect on territorial education. In reality, the Ordinance played no role in the development of federal education policy in the territory "except in that it established a form of territorial government which led to the rapid settlement of the unoccupied lands and thereby made effective and useful . . . land grants for public education."⁵⁴ Accordingly, historians have described the RMK clause as "merely an expression of sentiment, a gesture of approval of something which seemed desirable,"⁵⁵ "more pious preachment than mandate,"⁵⁶ and as "a pious pronouncement that doubtless had a great moral value, but . . . did nothing toward the support of schools."⁵⁷ Other scholars observe that the Ordinance "had very

⁵¹ The Northwest Ordinance replaced Jefferson's Ordinance of 1784, Congress's first attempt to provide for governance in the territory. MAX FARRAND, *THE LEGISLATION OF CONGRESS FOR THE GOVERNMENT OF THE ORGANIZED TERRITORIES OF THE UNITED STATES: 1789-1895*, at 7-8 (1896). At the time of the enactment of the Northwest Ordinance, disposal of land in the Northwest Territory was governed by the Ordinance of 1785, which replaced Jefferson's proposed Land Ordinance of 1784, an entirely different statute than the Ordinance of 1784. ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1970*, at 7-8 (1942). The 1785 Ordinance created a system of land surveys to divide the Northwest Territory into townships. The terms of the Ordinance required section 16 of each township to be reserved for the support of education. BENJAMIN HORACE HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 37-38 (1967). The Northwest Ordinance had no corresponding provisions relating to the disposal of land.

⁵² See NEWTON EDWARDS & HERMAN G. RICHEY, *THE SCHOOL IN THE AMERICAN SOCIAL ORDER* 216 (2d ed. 1963).

⁵³ TAYLOR, *supra* note 9, at 41; *infra* notes 160-65 and accompanying text.

⁵⁴ TAYLOR, *supra* note 9, at 41.

⁵⁵ BULEY, *supra* note 49, at 326.

⁵⁶ HAROLD M. HYMAN, *AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL* 25 (1986).

⁵⁷ WILLIAM M. FRENCH, *AMERICA'S EDUCATIONAL TRADITION: AN INTERPRETIVE HISTORY* 48 (1964).

little effect on the actual support of schools,⁵⁸ that it “failed to place the responsibility for education upon the government,”⁵⁹ and conclude that it “provided scarcely any direction whatsoever” to territorial legislatures.⁶⁰ As one eminent historian of the Ordinance summarized, “education was a minor consideration in the Ordinance of 1787 and . . . no special credit is due those responsible for the passage of this ordinance because its provision for the encouragement of schools was later used effectively as an argument for land grants for education.”⁶¹ While none of this is intended to downplay the significance of the Ordinance either as the first expression of federal support for public education, or as a vehicle for encouraging land sales in the Old Northwest,⁶² it does suggest how far Barton’s claims about the RMK clause are removed from the conclusions of reputable historians.⁶³

As noted earlier, Barton makes much of the fact that Congress inserted RMK language into the enabling acts of many states created after the passage of the Northwest Ordinance.⁶⁴ The consequence is that many states adopted the language into their own constitutions.⁶⁵ This fact does not help

⁵⁸ CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, 182-83 (1983).

⁵⁹ EDWARDS & RICHEY, *supra* note 52, at 216.

⁶⁰ Ruth Bloch, *Battling Infidelity, Heathenism, and Licentiousness: New England Missions on the Post-Revolutionary Frontier, 1792-1805*, in *THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS AND LEGACY*, *supra* note 9, at 39.

⁶¹ TAYLOR, *supra* note 9, at 118.

⁶² The encouragement of land sales was a primary purpose of the Northwest Ordinance. *See id.* at 30.

⁶³ This is not the first time Barton has made claims at odds with all known historical data. In a 1989 videotape Barton attributed Thomas Jefferson’s famous “wall of separation” metaphor to an 1801 speech and claimed that the metaphor was immediately followed by the words, “[t]he wall is a one-directional wall. It keeps the government from running the church but it makes sure that Christian principles will always stay in government.” Videotape: *America’s Godly Heritage* (Wallbuilders 1989) (on file with author). In fact, Jefferson used the wall metaphor in his 1802 letter to the Danbury Baptists, and the attributed words appear nowhere in the letter. 16 ANDREW A. LIPSCOMB & ALBERT E. BERGH, *THE WRITINGS OF THOMAS JEFFERSON* 281-82 (1903). This and other examples of Barton’s misstatements can be found in Robert S. Alley, *Public Education and the Public Good*, WM. & MARY BILL RTS. J. 316-18 (1995); Rob Boston, *Sects, Lies and Videotape*, CHURCH AND STATE, April 1993, at 80; Rob Boston, *When a Myth is as Good as a Mile*, CHURCH AND STATE, April 1993, at 82.

⁶⁴ BARTON, *supra* note 20, at 38-39.

⁶⁵ *Id.*

Barton's case. Whenever early state courts interpreted the Ordinance's RMK clause, or the RMK language appearing in state constitutions, they held that the language did not mandate the teaching of religion in schools. At least three early cases presented the issue squarely, and in each the courts held against Barton's position. The earliest and most famous of these cases is *Board of Education v. Minor*.⁶⁶

In 1852 the Cincinnati Board of Education adopted a rule requiring that common school classes begin their day by reading a portion of the King James Bible "by or under the direction of the teacher, and appropriate singing by the pupils."⁶⁷ The rule allowed dissenting students to read silently from scriptures other than the King James Bible.⁶⁸ Some years later the school board reversed itself and passed two resolutions repealing the rule and prohibiting religious instruction in the public schools.⁶⁹ A group of parents sued for a permanent injunction against enforcement of the resolutions, which a lower court granted.⁷⁰ In 1872, the school board appealed to the Ohio Supreme Court, arguing that Bible reading ran afoul of the religious freedom provisions of the Ohio Constitution. The parents responded by arguing that the Ohio Constitution contained the following language, clearly adapted from Article III of the Northwest Ordinance:

Religion, morality, and knowledge . . . 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."⁷¹

Despite this language, the Court refused to read the Ohio Constitution to allow religious instruction in the schools:

The three things so declared to be essential to good government are 'religion, morality, and knowledge.' These three words stand in the same category, and in the same relation to the context; and if one of them is used

⁶⁶ Bd. of Educ. v. Minor, 23 Ohio St. 211 (1872).

⁶⁷ *Id.* at 211-12.

⁶⁸ *Id.* at 212.

⁶⁹ *Id.* at 211.

⁷⁰ *Id.* at 215.

⁷¹ *Id.* at 241. While the Northwest Ordinance also contained language protecting freedom of religion, the Ohio Constitution inserted this language into the middle of its RMK clause. Nothing in the Court's opinion, however, suggests that the insertion affected its reading of the clause.

in its generic or unlimited sense, so are all three. . . . The last named of these three words, 'knowledge,' comprehends in itself all that is comprehended in the other two words, 'religion' and 'morality,' and which can be the subject of human 'instruction.' . . . The fair interpretation seems to be, that true 'religion' and 'morality' are aided and promoted by the increase and diffusion of 'knowledge,' on the theory that 'knowledge is the handmaid of virtue,' and that all three—religion, morality, and knowledge—are essential to good government.⁷²

Additionally, the court noted that "[t]he real claim here is, that by 'religion,' in this clause of the constitution, is meant 'Christian religion,' and that by 'religious denomination' in the same clause is meant 'Christian denomination.'"⁷³ The consequence of so interpreting the clause, argued the court, "would be to withdraw from every person not of Christian belief the guaranties therein vouchsafed, and to withdraw many of them from Christians themselves."⁷⁴ Finally, the court argued that the city's interpretation of the Ohio RMK clause reversed the clause's stated roles for religion and government:

The declaration is, not that government is essential to good religion, but that religion is essential to good government. . . . [R]eligion, morality, and knowledge are essential to government, in the sense that they have the instrumentalities for *producing* and *perfecting* a good form of government. On the other hand, no government is at all adapted for producing, perfecting, or propagating a good religion. . . . Religion is the parent, and not the offspring, of good government.⁷⁵

Accordingly, noted the court, good religion is best secured by a policy of "masterly inactivity" that allows "free conflict of opinions as to things divine."⁷⁶ The role of the state in religious matters is merely to "keep[] the conflict free, and prevent[] the violation of private rights or of the public peace."⁷⁷

A second case is *Pfeiffer v. Board of Education*.⁷⁸ In 1896, the Board of Education of the city of Detroit bought 4000 copies of a book titled "Readings from the Bible" and introduced the books into the grammar grades of the

⁷² *Id.* at 243-44.

⁷³ *Id.* at 245.

⁷⁴ *Id.*

⁷⁵ *Id.* at 248-49.

⁷⁶ *Id.* at 251.

⁷⁷ *Id.*

⁷⁸ *Pfeiffer v. Bd. of Educ.*, 77 N.W. 250 (Mich. 1898).

public schools of the city under a resolution requiring the book to be read daily at "such time as the superintendent shall direct."⁷⁹ Parents could excuse their children from the exercise upon written application to the superintendent.⁸⁰ Conrad Pfeiffer, a Detroit taxpayer and parent of a thirteen year-old public school student,⁸¹ objected to the readings on the ground that they violated the Michigan Constitution's prohibitions of compulsory attendance at religious worship, the expenditure of money for religious purposes, and the enlargement or diminution of civil or political rights on the basis of religious belief.⁸² Pfeiffer petitioned the circuit court for a writ of mandamus compelling the school board to discontinue the readings.⁸³ The court granted the petition and the school board appealed.⁸⁴

The Michigan Supreme Court reversed the circuit court and allowed the readings to continue.⁸⁵ Writing for the majority, Justice Montgomery observed that the Michigan Constitution was adopted pursuant to the provisions of the Northwest Ordinance, and then recited the Ordinance's RMK language.⁸⁶ Reasoning that the Michigan Constitution would carry forward the spirit, if not the provisions of the RMK clause, Montgomery held that "[i]t is not to be inferred that, in forming a constitution under the authority of this ordinance, the [Michigan constitutional] convention intended to prohibit in the public schools all mention of a subject which the ordinance, in effect, declared that schools were to be established to foster."⁸⁷ The Ordinance's RMK clause, in other words, was read into the religious freedom provisions of the Michigan Constitution as a limitation on those provisions' meaning.⁸⁸ At the same time, Montgomery denied that the Ordinance required schools to teach religion:

⁷⁹ *Id.* at 253 (Moore, J., dissenting).

⁸⁰ *Id.* (Moore, J., dissenting).

⁸¹ *Id.* (Moore, J., dissenting).

⁸² *Id.* at 250-51.

⁸³ *Id.* at 253 (Moore, J., dissenting).

⁸⁴ *Id.* at 258 (Moore, J., dissenting).

⁸⁵ *Id.* at 253.

⁸⁶ *Id.* at 251-52. Note that there was no RMK language in the Michigan Constitution itself. Rather, the court was interpreting the Northwest Ordinance directly, as the legal background of the Michigan Constitution.

⁸⁷ *Id.* at 252.

⁸⁸ Montgomery's argument is, to say the least, suspect. In *Permoli v. First Municipality*, 44 U.S. (3 How.) 589, 609-10 (1845), and *Strader v. Graham*, 51 U.S. (10 How.) 82, 94-97 (1850), the Supreme Court held that the Northwest Ordinance ceased to have legal effect in political entities formed from the Northwest Territory once those entities became states. Michigan was free to depart from the provisions of the Ordinance in framing its constitution, and nothing required Montgomery to read the Ordinance forward into that document.

I do not wish to be understood as assenting to the proposition that the ordinance of 1787 makes it imperative that religion shall be taught in the public schools. It was doubtless the opinion of the framers of that great document that public schools would of necessity tend to foster religion. But the extent to which I go is to say that the language of this instrument, when read in the light of the fact that this was at that date a Christian nation, is such as to preclude the idea that the framers of the constitution, "in conformity with the principles contained in the ordinance," intended, in the absence of a clear expression to that effect, to exclude wholly from the school all reference to the Bible.⁸⁹

In a vigorous dissenting opinion, Justice Moore excoriated the majority's reasoning, reproducing Judge Carpenter's lower court opinion and large sections of *Board of Education v. Minor* in the process.⁹⁰ Moore relied upon Carpenter's opinion to do most of the work in responding to the school board's arguments about the Northwest Ordinance. Carpenter held that state-sponsored Bible reading was a straightforward violation of the religious freedom provisions of the Michigan Constitution,⁹¹ and that the state constitution trumped the Northwest Ordinance in religious matters:

It is impossible that the people meant the precise opposite of what they explicitly declared. If the ordinance imposes taxation for the support of teachers of religion, the people, when they asserted [in the preamble to the constitution] they had complied with its provisions by making a constitution which forbade such support, could not have thought that to be a condition with which they were bound to comply. They expressed themselves clearly in their constitution as to the continuance in force of existing laws by saying: "[a]ll laws now in force in the territory of Michigan which are not repugnant to this constitution, shall remain in force until they expire by their own limitation or be altered or repealed by the legislature."⁹²

⁸⁹ *Pfeiffer*, 77 N.W. at 252. The material in quotation marks is taken from Article V of the Northwest Ordinance which provided that, after a state formed from the Northwest Territory was admitted to the union, it was at liberty to adopt a constitution, provided that the constitution was "in conformity to the principles contained in these articles." Act to Provide for the Government of the Territory North-west of the River Ohio, Ch. 8, 1 Stat. 50, 53 n.(a) (1789).

⁹⁰ *Pfeiffer*, 77 N.W. at 253 (Moore, J., dissenting).

⁹¹ *Id.* at 258 (Moore, J., dissenting). "Our constitutional provisions respecting religious liberty mean precisely what they declare. . . . Respondent's proposed use of 'Readings from the Bible' in public schools is in direct conflict with these constitutional provisions." *Id.* (Moore, J., dissenting).

⁹² *Id.* at 254 (Moore, J., dissenting).

More importantly, Carpenter held that, even if the Ordinance still had some continuing legal validity in the state, the Ordinance's RMK clause did not require Michigan schools to teach religion:

This language is clear. It enjoins forever the encouragement of schools and all means of education, because religion, morality, and knowledge, being essential to good government and the happiness of mankind, will be promoted thereby. It is an expression of the faith that I was taught as a child, and that I, in common with many others, still hold, that, as you increase the efficiency of schools and other means of education, religion, morality, and knowledge will prosper.⁹³

Hence, nothing in *Pfeiffer* suggests that the Northwest Ordinance's RMK language was understood to require schools to teach religion. The majority affirmed the practice of Bible reading but did not believe the Ordinance required such practice, and the dissent found nothing in the Ordinance to prevent the religious freedom provisions of the Michigan Constitution from being read in the broadest possible manner.

A third case is *People ex rel. Ring v. Board of Education*.⁹⁴ In *Ring* a group of Catholic parents objected to the reading of the King James Bible, the saying of the Protestant version of the Lord's Prayer, and the singing of hymns in the public schools of Scott County, Illinois.⁹⁵ The parents argued that these practices amounted to "devotional, sectarian exercises" that violated their "right of the free exercise and enjoyment of religious profession and worship."⁹⁶ A lower court dismissed the petition and in 1910 the parents appealed to the Illinois Supreme court.⁹⁷ While the court noted that the First Amendment to the United States Constitution "left [the state] free to enact such laws in respect to religion as [it] may deem proper,"⁹⁸ it held that the state constitution guaranteed the right of religious freedom, and that this freedom included the right not to worship.⁹⁹ Additionally, the court noted that, while the territory had been under the jurisdiction of the Northwest Ordinance for many years,¹⁰⁰ no support for prayer and Bible reading could be found in the Ordinance's RMK language. Not only was

⁹³ *Id.* at 254-55 (Moore, J., dissenting).

⁹⁴ *People ex rel. Ring v. Bd. of Educ.* 24, 92 N.E. 251 (Ill. 1910).

⁹⁵ *Id.* at 251.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 252. The Establishment Clause was not incorporated until *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁹⁹ *Ring*, 92 N.E. at 253.

¹⁰⁰ *Id.*

the Ordinance no longer in force, having been superceded by the state constitution, but:

The ordinance did not . . . by any means as originally adopted, impose upon the states the duty of religious instruction in the schools which were to be encouraged. It recognized education as a means promotive of religion and morality by the increase of knowledge. The recital or preamble recognized religion, morality, and knowledge as three things essential to good government and the happiness of the people, and to secure those three things it enacted, not that religious instruction (which is not within the province of civil government) should be given by the states, but that the means of education should be encouraged, and thus the essentials of good government should be promoted.¹⁰¹

Thus, case law directly refutes Barton's argument that the Ordinance's RMK language required schools to teach religion.¹⁰² Two of the three courts to address the issue held that the clause mandated only the promotion of general knowledge, and the third held only that, in light of the clause, the religious freedom provisions of the state constitution should not be read to ban Bible reading in the schools in the absence of a clear statement from the legislature to the contrary.¹⁰³ Therefore, Barton's claim is entirely without historical support.¹⁰⁴

¹⁰¹ *Id.*

¹⁰² With the exception of *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890), no early federal case attempted to interpret the meaning of the Ordinance's RMK clause. *Late Corp.* concerned the disposal of property once owned by the Church of Jesus Christ of Latter-Day Saints (Mormon), since forfeited to the United States. The Court applied the *cy pres* doctrine and distributed the property to benefit the common schools of the Utah Territory. The Court cited the Ordinance's RMK clause as evidence that "[s]chools and education were regarded by the Congress of the Confederation as the most natural and obvious appliances for the promotion of religion and morality," *id.* at 65, but said nothing about the actual effect of the clause on territorial education.

¹⁰³ A fourth related state case deserves brief mention. In *State ex rel. Weiss v. District Board*, 44 N.W. 967 (Wis. 1890), a state supreme court struck down the practice of Bible reading in the schools of Edgerton, Wisconsin. The majority ignored the school board's reference to the Ordinance's RMK clause and held that the case "must be decided under the constitution and laws of this state now in force." *Id.* at 973. A concurring opinion held that the school board's claim that the RMK clause required the state to "foster and encourage" religion "is, to say the least, debatable." *Id.* at 977. Neither opinion, however, addresses directly the question whether the clause required schools to teach religion.

¹⁰⁴ It is worth noting that, since the publication of his book, *MYTH OF SEPARATION*, Barton appears to have backed away from the claim that the

2. *The Legislative History of the RMK Clause Suggests the Framers Did Not Want to Directly Support Religion*

While mainstream accommodationists generally do not claim that the RMK clause required schools in the Northwest Territory to teach religion, they are nevertheless agreed that the clause is incompatible with separationist readings of the First Amendment. The typical mainstream argument is that the clause evidences an intention on the part of the framers of the Ordinance to encourage religion and religious education. Harold Berman, for example, suggests that the Ordinance "provided for government establishment of religious schools,"¹⁰⁵ while Walter Berns asserts that the Ordinance "promot[ed] religious and moral education."¹⁰⁶ Gerard Bradley finds that the Ordinance, "closely inspected, implies that schools would ensure good government by inculcating religion, morality, and knowledge,"¹⁰⁷ while Charles Rice contends that the clause was a "sanction" for the "benevolent promotion" of religion by the state.¹⁰⁸

Standing somewhat apart from these authors, Justice William Rehnquist is content merely to hold that the Ordinance "confirm[s] the view that Congress did not mean that the Government should be neutral between religion and irreligion."¹⁰⁹ Significantly, none of these claims is accompanied by a substantive analysis of the grammar of the RMK clause, or a review of the historical evidence about the actual effect of the Ordinance on territorial government and education.

As should be clear from the previous section, separationists have good responses to each of these claims. *Contra* Berman and Berns, it is simply

Ordinance required religious instruction in the schools. In his most recent work he omits the claim and says merely that "[t]he Framers of the Ordinance . . . 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.'" DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION 41 (1997).

¹⁰⁵ Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 48 (James Davison Hunter & Os Guinness eds., 1990).

¹⁰⁶ BERNs, *supra* note 2, at 8.

¹⁰⁷ BRADLEY, *supra* note 2, at 125. Bradley's statement occurs in a paragraph dealing with the role of "common [publicly supported] schools" in the promotion of religion. This is odd placement for the statement in that the Ordinance did not create a system of common schools. See *supra* notes 48-61 and accompanying text.

¹⁰⁸ RICE, *supra* note 36, at 31.

¹⁰⁹ *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting).

untrue that the Northwest Ordinance provided for religious schools or promoted religious education. The Ordinance had nothing to do with territorial schools, except to express encouragement for education in the vaguest of terms.¹¹⁰ *Contra* Bradley, the Ordinance does not assume that schools would inculcate religion; it is just as likely that the framers believed that public education would benefit religion indirectly, by the promotion of general knowledge.¹¹¹ *Contra* Rice, the Ordinance did not sanction anything with respect to religion,¹¹² except religious tolerance.¹¹³ Finally, while Rehnquist is correct that the wording of the RMK clause implies a preference for religion over irreligion, this is not itself evidence for accommodationism. The framers of the Ordinance may have preferred religion to irreligion, but they apparently did nothing to enact that preference into law. It is telling that the framers justified public schooling on the ground that it would promote religion, yet did not set up a school system in the Ordinance, or require territorial government to provide for schools. It is hardly an argument for accommodationism that the framers expressed a preference for religion yet refused to act upon it.

Beyond these points, accommodationists do not consider either the history of prior congressional attempts to provide for governance in the Northwest Territory¹¹⁴ or the history of the RMK clause itself. These histories suggest that Congress was wary of writing direct support for religion into the governing documents of the Old Northwest. In 1785, for example, Congress rejected an attempt to insert language aiding religion into a bill “for ascertaining the mode of locating and disposing of lands in the Western Territory.”¹¹⁵ The first version of the bill, penned by Thomas Jefferson and presented to Congress in 1784, authorized the survey of the Northwest Territory for the purpose of dividing it into sections for sale to the public.¹¹⁶ The bill set aside no land for either education or religion.¹¹⁷ Action on the bill was postponed until April 1785 when a thoroughly

¹¹⁰ See *supra* notes 48-61 and accompanying text.

¹¹¹ See *supra* notes 64-104 and accompanying text.

¹¹² See *supra* notes 64-104 and accompanying text.

¹¹³ See *supra* note 11.

¹¹⁴ The Northwest Ordinance was not the first attempt to provide for governance in the Old Northwest. See *supra* note 51 and accompanying text.

¹¹⁵ 27 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1784, at 446 (1928).

¹¹⁶ HIBBARD, *supra* note 51, at 37. This bill should not be confused with Jefferson’s Ordinance of 1784, which set up a temporary government for the Northwest Territory and had nothing to do with land sales. See *supra* note 51. See also *infra* notes 128-29.

¹¹⁷ HIBBARD, *supra* note 51, at 37-38.

reworked version of the ordinance was presented to Congress.¹¹⁸ This bill, most likely the work of William Grayson of Virginia and Rufus King of Massachusetts,¹¹⁹ divided the Territory into townships of forty-nine miles square¹²⁰ and contained the following provision:

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.¹²¹

The provision would clearly have committed the federal government to a policy of supporting religion in the Northwest Territory.

After considerable debate, Congress elected to retain the land reservations for education while abandoning the reservations for religion.¹²² The resulting Land Ordinance of 1785 “helped,” in the words of one historian, to “determine that the new western lands would be free from federal governmental support of religion.”¹²³ The rejection of the land reservations particularly pleased James Madison, who was then leading a difficult fight in the Virginia legislature to enact Jefferson’s Bill for Religious Freedom.¹²⁴ In a famous letter to his friend James Monroe (who, as a Virginia delegate to the Continental Congress, had voted in favor of the land reservations for religion),¹²⁵ Madison left no doubt that he “was aghast that such a provision so contrary to the spirit of religious liberty should have ever been proposed at all.”¹²⁶ Wrote Madison:

It gives me much pleasure to observe . . . that . . . Congs. had expunged a clause . . . setting apart a district of land in each Township, for supporting

¹¹⁸ *Id.* at 38.

¹¹⁹ Ronald A. Smith, *Freedom of Religion and The Land Ordinance of 1785*, in 24 JOURNAL OF CHURCH AND STATE 589, 594 (1982).

¹²⁰ 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 299 (1933).

¹²¹ *Id.* at 293 (emphasis added).

¹²² Smith, *supra* note 119, at 595-96. The vote was extremely close. While only five states voted to retain the reservations (two short of the number required), at the level of individual delegates the vote was seventeen to six in favor of retention. *Id.* at 596. The votes of three states favoring retention were ignored because each was represented by a single delegate, instead of the two required by the Articles of Confederation. *Id.* at 595-96 n.35.

¹²³ *Id.* at 601.

¹²⁴ *Id.* at 598.

¹²⁵ *Id.* at 599.

¹²⁶ DAVIS, CONTINENTAL CONGRESS, *supra* note 30, at 170.

the Religion of the Majority of inhabitants. How a regulation, so unjust in itself, so foreign to the Authority of Congs. 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 [a] matter of astonishment.¹²⁷

Two years later Congress took a similar stand against direct aid to religion by modifying the language of the RMK clause itself. In 1784 Congress passed the first ordinance establishing a temporary government in the Northwest Territory.¹²⁸ The ordinance proved deficient in a number of respects,¹²⁹ and by 1786 Congress was working on replacement legislation that would ultimately become the Northwest Ordinance.¹³⁰ By 1787 Congress was anxious to complete the work, spurred on by an offer from the Ohio Company—a group of Revolutionary War veterans who had organized to try their hand at land speculation¹³¹—to buy large tracts of land in the Territory.¹³² Concerned to secure good terms for the purchase, the Company dispatched one of its directors, the Reverend Manasseh Cutler, to New York to negotiate directly with Congress.¹³³ In addition to negotiating for land, Cutler also made a number of suggestions to Congress for the improvement of the ordinance, which was not yet in final form.¹³⁴ Perhaps as a result of Cutler's work, the draft of the ordinance considered by Congress on July 11, 1787 contained the first version of what would become the RMK clause.¹³⁵ This version read: "Institutions for the promotion of religion and morality, schools and the means of education shall forever be encouraged, and all persons while young shall be taught some useful Occupation."¹³⁶

¹²⁷ 8 THE PAPERS OF JAMES MADISON 286 (Robert A. Rutland et al. eds., 1973).

¹²⁸ FARRAND, *supra* note 51, at 7.

¹²⁹ *Id.* at 7-8; Duffey, *supra* note 10, at 936.

¹³⁰ FARRAND, *supra* note 51, at 8.

¹³¹ TAYLOR, *supra* note 9, at 21-22.

¹³² *Id.* at 23-24.

¹³³ *Id.* at 24.

¹³⁴ *Id.* at 24-25.

¹³⁵ *Id.* at 46-47. As New Englanders, the members of the Ohio Company would have naturally favored state support of both religion and education. *Id.* at 47. Similarly, as a representative of the Company, Cutler would certainly have "exerted his influence . . . to have these [positions] incorporated into the Ordinance of 1787." *Id.*

¹³⁶ 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 318 (1936).

In listing “institutions for the promotion of religion and morality” among the objects to be “forever . . . encouraged”¹³⁷ in the Territory, the provision was accommodationist in both form and spirit.¹³⁸ Given the long tradition of government support for religion in many of the states,¹³⁹ and the heavy involvement of the Continental Congress in matters religious,¹⁴⁰ the framers of the ordinance may well have assumed that the provision would garner little opposition or debate. Nevertheless, Congress appears to have balked at the prospect of providing direct support for religion. When the Northwest Ordinance became law on July 13, 1787¹⁴¹ the provision had been stripped of its language encouraging support for religious institutions and changed to its present form, which only encouraged “[s]chools and the means of education.”¹⁴² The final version of the RMK clause, passed unanimously by the last Congress to sit under the Articles of Confederation,¹⁴³ acknowledged religion and morality as “necessary to good government and the happiness of mankind,” but did nothing to provide either with government support.

If accommodationists are right that the RMK clause was intended to establish religious schools, promote religious education, or provide for the benevolent promotion of religion, this change in wording is inexplicable. It is impossible that a Congress intent on supporting religion in the Territory would abandon language that allowed such support in favor of language that did not. The Congress of the Confederation certainly had little hesitation in supporting religion in other circumstances.¹⁴⁴ The more reasonable interpretation is that Congress did not want to aid religion directly, and so they altered the language of the RMK clause to make that point clear, while at the same time retaining language that affirmed the

¹³⁷ *Id.*

¹³⁸ See DAVIS, CONTINENTAL CONGRESS, *supra* note 30, at 170 (“This [version of the clause] was an obvious attempt to provide that churches (‘institutions for the promotion of religion and morality’) and schools would be encouraged”). *Id.*

¹³⁹ See, e.g., BRADLEY, *supra* note 2, at 19-57.

¹⁴⁰ DAVIS, CONTINENTAL CONGRESS, *supra* note 30, reviews the history of Congress under the Articles of Confederation and concludes that, despite the “impressive” record of Congress on religious issues, *id.* at 203, the Continental Congress “operated almost totally within an accommodationist paradigm.” *Id.* at 202.

¹⁴¹ FARRAND, *supra* note 51, at 8.

¹⁴² 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 136, at 340.

¹⁴³ *Id.* at 343.

¹⁴⁴ See DAVIS, CONTINENTAL CONGRESS, *supra* note 30, at 200-02.

importance of religion and morality to civic life. If this interpretation is accurate the change of wording suggests the beginnings of an even more fundamental change in the orientation of Congress toward support for religion, e.g., an “attempt[] to ensure that the sustenance of religious life would come from the people and the schools, not from the government.”¹⁴⁵

In summary, the text of the Northwest Ordinance offers no support for accommodationism. The RMK clause did not mandate the teaching of religion in schools. It also did not substantively advance schooling in the Northwest Territory nor did it provide for federal regulation of the territorial schools. It was not understood by state courts to require the direct advancement of religion nor was it obviously intended to “promote” or “encourage” religious education. Ultimately, it was stripped of its language encouraging direct aid to religion. While the Ordinance did contain guarantees of religious freedom, it was otherwise silent on matters of faith. It goes well beyond the evidence to assert that the RMK clause, or the Ordinance in general, encouraged federal support for religion.

B. Land Sales Under the Northwest Ordinance

A separate argument that the Northwest Ordinance supports an accommodationist reading of the First Amendment is that, in the years following the passage of the Ordinance, Congress sold two large tracts of territorial land with the stipulation that section twenty-nine of each township contained therein be reserved for the support of religion.¹⁴⁶ The terms of these sales, 1.5 million acres to the Ohio Company¹⁴⁷ and another million acres to John Cleave Symmes,¹⁴⁸ also stipulated that section sixteen of each township be reserved for the support of schools, and that additional land be set aside for the purposes of a university.¹⁴⁹ The terms of a third major contract, an option for the Scioto Company to purchase some five million acres of land,¹⁵⁰ although contemporaneous with the Ohio Company purchase, contained no reservations for religion.¹⁵¹

¹⁴⁵ DAVIS, *supra* note 1, at 108-09.

¹⁴⁶ HIBBARD, *supra* note 51, at 49. The effect of the stipulation was to resurrect the substance of the provision rejected by Congress in passing the Ordinance of 1785. *See supra* note 121 and accompanying text.

¹⁴⁷ HIBBARD, *supra* note 51, at 49.

¹⁴⁸ *Id.* at 50-51.

¹⁴⁹ *Id.* at 49.

¹⁵⁰ TAYLOR, *supra* note 9, at 60-61.

¹⁵¹ HIBBARD, *supra* note 51, at 49.

Gerard Bradley¹⁵² and John Baker¹⁵³ devote considerable effort to developing the accommodationist implications of these sales. Neither, however, scores a direct hit on the Ordinance. Bradley's argument is twofold: not only are the land reservations contained in the Ohio Company and Symmes transactions facially inconsistent with the wall of separation, they were only a small part of a broader web of laws that "suffused" the Northwest Territory with "aid, encouragement, and support for religion."¹⁵⁴ In addition to the land reservations, there were independent grants of land for supporting religion in Illinois,¹⁵⁵ and other grants—many of which were authorized after the adoption of the Constitution—to missionary societies working in the Territory to evangelize frontier Indians.¹⁵⁶ What is more, the first federal Congress knew about these laws when it reenacted the Northwest Ordinance in 1789.¹⁵⁷ According to Bradley, this knowledge is important because it proves that the First Congress did not believe "in the complete separation of church and state."¹⁵⁸ On the contrary, the reenactment "effectively continued arrangements ordained by the Northwest Ordinance of 1787," of which "aid, encouragement, and support of religion" were a part.¹⁵⁹ But while Congressional aid to religion was a common occurrence in the Northwest Territory, Bradley's conclusion follows only if the land grants and reservations Congress knew about, and which breached the idea of separation, had something to do with the Ordinance. If the land grants were independent of the Ordinance, and if Congress knew they were independent, the reenactment of the Ordinance would say nothing about Congress's attitude toward the land grants, or about the relationship between church and state generally.

In fact, neither the Ohio Company or Symmes reservations, nor any of the other land grants identified by Bradley, had anything to do with the Ordinance. This can be seen, not only in the Ordinance, which contains no

¹⁵² BRADLEY, *supra* note 2, at 98-101.

¹⁵³ Baker, *supra* note 26, at 48-50.

¹⁵⁴ BRADLEY, *supra* note 2, at 98.

¹⁵⁵ *Id.* at 99.

¹⁵⁶ *Id.* at 99-100. Separationists argue that these land grants prove too much. The grants were given to individual religious societies, making it impossible to see them as non-preferential. *Id.* The land grants, in other words, are equally non-supportive of both the separationist and accommodationist accounts of history.

¹⁵⁷ *Id.* at 98.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

provisions whatsoever regarding land disposal in the Territory,¹⁶⁰ but also from the text of Congress's report of July 23, 1787, which set out the terms of the proposed land sale to the Ohio Company.¹⁶¹ The report does not reference the Northwest Ordinance, which became law ten days earlier, but the Land Ordinance of 1785.¹⁶² It was the Ordinance of 1785 that governed land sales in the Territory,¹⁶³ and it remained good law until 1796.¹⁶⁴ Moreover, the terms contained in the report deviated from the Ordinance of 1785. While the report specified that lot sixteen in each township was to be "given perpetually for the purposes contained in the said Ordinance [i.e., schools],"¹⁶⁵ it also specified that lot twenty-nine in each township was to be "given perpetually for the purposes of religion."¹⁶⁶ Recall that the framers of the Ordinance of 1785 failed to include language that would have reserved land for religion.¹⁶⁷ Hence, in requiring the Ohio Company to set aside section twenty-nine of each township for religious purposes, Congress was acting independently of either of the governing documents then in force in the Territory.¹⁶⁸ Indeed, the report of July 23 appears to recognize this independence when it points out that the land reservations for education were for "the purposes contained in the said Ordinance,"¹⁶⁹ while omitting those words from the grants for religion.¹⁷⁰ Similarly, the

¹⁶⁰ TAYLOR, *supra* note 9, at 54.

¹⁶¹ 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 399-401 (1936).

¹⁶² *Id.* at 400.

¹⁶³ TAYLOR, *supra* note 9, at 47. The Northwest Ordinance repealed only Jefferson's Ordinance of 1784—Congress's first attempt to provide for governance in the Northwest Territory. See BRADLEY, *supra* note 2, at 98. See also *supra* notes 128-29 and accompanying text.

¹⁶⁴ HIBBARD, *supra* note 51, at 66-67.

¹⁶⁵ 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 161, at 400.

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* notes 114-27 and accompanying text.

¹⁶⁸ The relationship of the Ohio Company purchase to the Ordinance of 1785 is a matter of some controversy. Taylor, for example, agrees that "the provisions of the [Ohio Company] ordinance were not in complete harmony with the system of surveys and sales which was established by the Ordinance of 1785." TAYLOR, *supra* note 9, at 59. Nevertheless, Taylor does not believe the sale required the "suspension" of the Land Ordinance. *Id.* Taylor's position is that the Ohio Company Ordinance was "supplementary to the Ordinance of 1785 rather than in opposition to it." *Id.* at 60.

¹⁶⁹ 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 161, at 400.

¹⁷⁰ See *supra* notes 165-66 and accompanying text.

land reservation in the Symmes purchase and the other land grants identified by Bradley were independent of the Ordinance.¹⁷¹ It is simply not true, as Bradley implies, that the Ohio Company and Symmes land reservations were part of the arrangements “ordained by the Northwest Ordinance of 1787.”¹⁷² Reenacting the Ordinance would have had no effect on the continuing validity of the land reservations, and thus implies nothing about Congress’s attitude toward church and state.

Baker’s argument concerns James Madison’s role in shaping the terms of the Ohio Company purchase and the implication of those terms for our understanding of Madison’s attitude toward separation.¹⁷³ As noted earlier, Madison opposed the attempt to include land reservations for religion in the Ordinance of 1785.¹⁷⁴ Nevertheless, Madison’s name appears as one of the members of the committee that drafted the July 23, 1787 report establishing the terms of the Ohio Company sale, which included land reservations for religion.¹⁷⁵ Baker reconciles the apparent inconsistency by analyzing the language of the land reservation provisions themselves:

The 1785 provision would have set apart a district of land in each township “for the support of religion . . . of the majority of the male residents.” [The Ohio Company] provisions simply set apart land “for purposes of religion.” The proceeds from the sale of the land were to be distributed equally among the various sects.¹⁷⁶

Baker, in other words, argues that Madison was acting like a good accommodationist—he opposed land reservations when they preferred the

¹⁷¹ The Symmes purchase was granted on similar terms as the Ohio Company purchase, TAYLOR, *supra* note 9, at 62-63, and is referred to by Taylor as “private sales [made] by contract.” *Id.* at 54. The Illinois land grants and the land grants to the various missionary societies were all authorized by separate acts of Congress. BRADLEY, *supra* note 2, at 99-100.

¹⁷² BRADLEY, *supra* note 2, at 98.

¹⁷³ This is a much corrected version of Baker’s argument. Baker’s actual claim is that Madison was involved “in the drafting of the Northwest Ordinance.” Baker, *supra* note 26, at 48. This claim is false. Madison did not serve on any of the committees in charge of drafting versions of the Ordinance. BARRETT, *supra* note 9, at 36-37, 42, 50-51. Indeed, during the summer of 1787, when Congress was drawing up the final version of the Ordinance, Madison was in Philadelphia serving in the Constitutional Convention. *See infra* notes 183-85 and accompanying text.

¹⁷⁴ *See supra* notes 124-27.

¹⁷⁵ 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 161, at 401.

¹⁷⁶ Baker, *supra* note 26, at 49-50.

religion of the majority, but affirmed them when the land was to be used equally by all religions. In another sentence Baker directly links the “for the purposes of religion” language to the First Congress, thereby implying that Congress, too, understood the difference between preferential and non-preferential support for religion. He writes:

It would seem difficult to argue that the First Congress, which proposed the religion clauses of the First Amendment and which by reenacting the Northwest Ordinance extended religious freedom to the territories, acted unconstitutionally by promoting religion, morality, and knowledge in public education and setting aside land “for the purposes of religion.”¹⁷⁷

Nothing credits Baker’s account. To begin with, the First Congress did not set aside land “for the purposes of religion.” Like Bradley, Baker appears to assume that, in reenacting the Northwest Ordinance, the First Congress was also reenacting the terms of the Ohio Company and Symmes land sales. As suggested above,¹⁷⁸ the terms of those sales were independent of the Ordinance. Even if Congress had never reenacted the Ordinance, the sales would have continued in force. Second, the premise of Baker’s argument—that the words “for the purposes of religion” would have been understood by the Ohio Company as a requirement to distribute proceeds from the land “equally among the various sects”¹⁷⁹—requires a semantic leap of gigantic proportions. Nothing in the language of the July 23 report suggests that proceeds from the reserved lands were to be divided among all religions.¹⁸⁰ The words “for the purposes of religion” certainly do not suggest it. Moreover, such a non-preferentialist arrangement was unknown on American soil.¹⁸¹ It is difficult to believe that Congress would impose such a novel requirement on land purchasers without explaining the arrangement in more detail than “lot N 29 . . . [is] to be given perpetually for the purposes of religion.”¹⁸²

Third, it is unlikely that Madison played any role in drafting the July 23 report. The committee responsible for the report was appointed on May

¹⁷⁷ *Id.* at 49.

¹⁷⁸ See *supra* notes 160-68 and accompanying text.

¹⁷⁹ Baker, *supra* note 26, at 50.

¹⁸⁰ See 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 161, at 399-401.

¹⁸¹ Good surveys of the forms of religious establishment in America before 1787 can be found in CURRY, *supra* note 1, at chs. 1-7; LEVY, *supra* note 1, at 1-78. Nothing like the arrangement hypothesized by Baker is found in these surveys.

¹⁸² 33 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 161, at 400.

9, 1787,¹⁸³ seven days *after* Madison left New York for the Constitutional Convention.¹⁸⁴ Madison did not return to New York until September 24, almost a month after the Ohio Company land sale was completed.¹⁸⁵ During the entire drafting process Madison was 100 miles away in Philadelphia attending to the Constitution. While Madison occasionally corresponded with members of Congress while in Philadelphia, his surviving papers from this time contain no references to the drafting committee or to the religious reservation provisions of the proposed sale.¹⁸⁶ While it may seem odd that Madison was appointed to a committee during his absence from New York, the appointment can be explained on the theory that Congress assumed the Convention would complete its business in short order, and that Madison would return to New York in time to help the committee draft its report.¹⁸⁷

Finally, even if it could be shown that Madison participated in the work of the committee, the terms of the July 23 report do not require the conclusion that Madison was an accommodationist. Alternative explanations of Madison and the report abound. One possibility, completely overlooked by Baker, is that Madison disagreed with the reservations but was simply outvoted by the rest of the committee. A second possibility is that Madison disagreed with the reservations but voted for them anyway because he thought they were necessary to secure the sale. A third

¹⁸³ 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 136, at 276 n.2. The committee was appointed in response to the first proposal by the Ohio Company to purchase large amounts of land in the Northwest Territory. The proposal took the form of a memorial presented to Congress on July 8, 1787 by Gen. Samuel Holden Parsons, the first agent of the Ohio Company to approach Congress about land acquisition in the Territory. *Id.* at 276; TAYLOR, *supra* note 9, at 24.

¹⁸⁴ 9 THE PAPERS OF JAMES MADISON xxv (Robert A. Rutland ed., 1975).

¹⁸⁵ 10 THE PAPERS OF JAMES MADISON xxv (Robert A. Rutland ed., 1977).

¹⁸⁶ *Id.* The first mention of the Ohio Company land reservations in Madison's papers occurs in a November 3, 1787 letter from the Virginia congressional delegation (of which Madison was a part) to Virginia Governor Edmund Randolph, more than a month after the Ohio Company land sale was completed. *Id.* at 239. The letter, signed by Madison, William Grayson, Edward Carrington, and Henry Lee, purports to recap the major events of the recently completed legislative session. It notes that the Ohio Company land sale required the Company to mark the land "into Townships and Sections, agreeably to the Ordinance [of 1785], subject to the reserves therein described, except that one of the Sections for future Sale shall be granted forever for the purposes of Religion." *Id.*

¹⁸⁷ The Convention was called only to reform the Articles of Confederation, a considerably more limited goal than to write an entirely new Constitution. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 42 (1926).

possibility is that the committee proposed something even more objectionable to Madison than land reservations, and the resulting report was the best that Madison could do. Each of these explanations is as likely as Baker's argument (the first considerably more so), and none involve the assumption that the words "for the purposes of religion" were proposed as a direction to distribute the proceeds of the reserved land equally to all religions.

Nothing in this section should be taken to suggest that the land reservations for religion do not constitute a real challenge to separationism. In particular, the Ohio Company and Symmes land reservations continued in force after the adoption of the Constitution and the First Amendment. If separationists are right in arguing that the reservations violate the Establishment Clause, they carry the burden of explaining why Congress did not modify or abolish the reservations after 1789. Rather, the intention of this section is to demonstrate that, in reenacting the Northwest Ordinance, the First Congress did not thereby reenact the reservations, or pass judgment on their constitutionality. When accommodationists cite the Ohio Company and Symmes land reservations, they do not make an argument relevant to the reenactment of the Northwest Ordinance. As with the first substantive argument, it goes well beyond the evidence to argue that the substantive provisions of the Ordinance support an accommodationist reading of history.

II. THE COROLLARY ARGUMENT

As noted earlier,¹⁸⁸ accommodationists are aware that neither the RMK clause or the Ohio Company and Symmes land reservations establish direct violations of the separationist interpretation of the Establishment Clause. Both the Ordinance and the land reservations were enacted under the authority of the Articles of Confederation and can tell us nothing about what was legal under the First Amendment. Hence, to make their argument, accommodationists point out that the Ordinance was "reenacted" by the first Congress to meet under the Constitution¹⁸⁹ at about the same time this

¹⁸⁸ See *supra* notes 23-25 and accompanying text.

¹⁸⁹ The term "reenact" is not a good description of Congress's actions. Congress's concern was to "adapt" the Ordinance to the provisions of the new Constitution, mainly by adjusting the chain of command for territorial decision-making described in the Ordinance. Act to Provide for the Government of the Territory North-west of the River Ohio, ch. 8, 1 Stat. 50, 50-51 (1789). The power to appoint territorial officers, for example, was removed from Congress and given

Congress was framing the Bill of Rights.¹⁹⁰ Reasoning that Congress would not simultaneously enact legislation aiding religion while adopting an amendment that prohibited such aid, accommodationists conclude that Congress could not have intended the First Amendment to prohibit aid to religion. This argument treats the Ordinance almost as a commentary on the First Amendment, as if one could understand the meaning of the Amendment by looking at the Ordinance.

Canonical statements of the corollary argument can be found in the writings of many scholars. Walter Berns, for example, notes that, in "readopting" the Northwest Ordinance, the First Congress also readopted the RMK clause. He concludes that "it is not easy to see how Congress, or a territorial government acting under the authority of Congress, could promote religious and moral education under a Constitution that promoted 'the absolute separation of church and state.'" ¹⁹¹ Charles Rice observes that the Ordinance was adopted verbatim by the First Congress despite its "sanction of a benevolent promotion by the state of religious education."¹⁹² Similarly, Rodney Smith argues that the reenactment "offers further support for the proposition that the First Congress felt that the accommodation and even facilitation of religious exercise in the public sector was permitted by the First Amendment."¹⁹³ The statements of John Baker¹⁹⁴ and Gerard

to the President of the United States, subject to the advice and consent of the Senate. *Id.* at 52-53. The preamble of the Act seems to assume that the Ordinance would have remained in effect in the absence of action on the part of the First Congress. *Id.* at 50-51; David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 845 (1994). Nevertheless, the word "reenact" is common in the literature and is used in this Note.

¹⁹⁰ The Ordinance was reenacted on August 7, 1789. 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: LEGISLATIVE HISTORIES, MIGRATIONS OF FINES BILL THROUGH RESOLUTION OF UNCLAIMED WESTERN LANDS 1561 (Charlene Bangs Bickford & Helen E. Veit eds., 1986). The First Amendment was approved by Congress on September 25, 1789. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: LEGISLATIVE HISTORIES, AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL 48 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

¹⁹¹ BERNs, *supra* note 2, at 7-8.

¹⁹² RICE, *supra* note 36. Rice, of course, is wrong in claiming that Congress readopted the Ordinance verbatim. At least some of the substantive provisions of the Ordinance were changed in the reenactment. *See supra* note 177.

¹⁹³ SMITH, *supra* note 2, at 105.

¹⁹⁴ *See supra* note 177.

Bradley¹⁹⁵ to this effect have already been noted. It is Justice William Rehnquist, however, who puts the argument most forcefully:

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;¹⁹⁶ . . . [I]t 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.¹⁹⁷

Obviously, Rehnquist's argument assumes that the Northwest Ordinance either required or encouraged federal aid to religion. As suggested in Part I of this Note, this is a matter of great doubt. Even if Rehnquist is right about aid to religion, however, he is wrong in thinking that the reenactment of the Ordinance had implications for the First Amendment. The key to the problem is Rehnquist's assumption that the reenactment of the Ordinance and the framing of the Bill of Rights was, at some level, "simultaneous." Rehnquist's argument, like all those noted above, is that the degree of overlap between Congress's work on the Ordinance and Congress's work on the First Amendment was such that discrepancies between the two would have been immediately evident to members of Congress. Rehnquist uses the word "simultaneous," but the point is equally well made by Rice, who notes that the Ordinance was reenacted "during the period when Congress was considering the proposed amendments to the Constitution,"¹⁹⁸ and by Bradley, who argues incorrectly, that on July 21, 1789, the House of Representatives both "debated the Establishment Clause" and passed the Northwest Ordinance.¹⁹⁹ For each

¹⁹⁵ See *supra* notes 154-59.

¹⁹⁶ *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985). This statement is false. The House first took up the Northwest Ordinance on July 14, 1789 when a committee was appointed to create a bill to "provide for the government of the Western Territory." 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: HOUSE OF REPRESENTATIVES JOURNAL 110 (Linda Grant De Pauw ed., 1977). Madison introduced his proposed amendments to the Constitution on June 8, 1789, long before work began on the Ordinance. *Id.* at 84.

¹⁹⁷ *Wallace*, 472 U.S. at 100.

¹⁹⁸ RICE, *supra* note 36.

¹⁹⁹ BRADLEY, *supra* note 2, at 98. The House of Representatives did not debate the Establishment Clause on July 21, 1789. The debate on that day was whether the House should discuss Madison's amendments on the floor or refer them to a special committee. 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-

of these scholars, the ultimate guarantee that the Ordinance and the amendments were internally consistent is that Congress considered them both at the same time. More precisely, each assumes that the chronological proximity of the Ordinance and the amendments means that Congress could not have voted for one proposal without understanding its implications for the other.

To Rehnquist's credit, there is a sense in which Congress's consideration of the Ordinance and the proposed First Amendment were simultaneous. The Bill of Rights, including the religion clauses, was introduced into the House of Representatives on June 8, 1789 and was approved by Congress on September 25.²⁰⁰ Work on the reenactment began July 14, 1789 and was finished on August 5.²⁰¹ Work on the Bill of Rights, in other words, wholly encompassed work on the Ordinance. But these dates obscure the more important sense in which the Ordinance and the First Amendment were strangers. Although Madison introduced the religion clauses on June 8, they were not debated in Congress until August 15,²⁰² ten days after Congress voted to reenact the Ordinance, and eight days after the reenactment became law.²⁰³ In other words, the reenactment was approved before the clauses were ever subjected to scrutiny in either house. This is not the sort of overlapping presupposed by the corollary argument. Rather than being simultaneous, Congress's work on the Ordinance was distinct from its work on the First Amendment. As separationist scholar Derek Davis writes, "[t]he argument that Congress, in passing the Northwest Ordinance, did so in contravention of matters that it had not yet even discussed on the floor, is hardly convincing."²⁰⁴

A possible response to this argument is to assume that Congress was so familiar with the content and implications of Madison's original proposals that such content would have been in the minds of the reenactors even in the absence of discussion or debate. The difficulty with this view is that the

1791: DEBATES IN THE HOUSE OF REPRESENTATIVES 1157-58 (Charlene Bangs Bickford et al. eds., 1992). No specific amendment was ever discussed. *See id.* at 1158-63.

²⁰⁰ 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 190, at 3, 9.

²⁰¹ 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 190, at 1560-1561.

²⁰² 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 199, at 1260-63.

²⁰³ 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 190, at 1561.

²⁰⁴ DAVIS, CONTINENTAL CONGRESS, *supra* note 30, at 171.

wording, and presumably the meaning, of the religion clauses changed dramatically after they were first introduced into the House. It is impossible that Congress could have anticipated either the final form of the religion clauses or the course of the debate that attended their passage through Congress. The nature and extent of Congress's alterations of Madison's proposals can be gleaned from the following brief description of the legislative history of the religion clauses as they made their way through the House and Senate.

Madison introduced the religion clauses into the House of Representatives on June 8, 1789.²⁰⁵ This version read: "[T]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."²⁰⁶ When it emerged from a select House committee on July 28, however, the proposal had been pared down to read: "'No religion shall be established by law, nor shall the equal rights of conscience be infringed.'"²⁰⁷ The committee not only removed the word "national" from the "no establishment" guarantee, thereby reducing its value as support for accommodationism,²⁰⁸ it also eliminated Madison's language about civil rights. On August 15, the House, sitting as a Committee of the Whole, debated the proposal and changed it to read: "Congress shall make no laws touching religion, or infringing the rights of conscience."²⁰⁹ This version eliminated the "no establishment" guarantee altogether and substituted in its place the much broader prohibition of laws even "touching" religion. The House made its final changes to the proposal on August 20, eliminating the recently added "no touching" language and producing the version that, after some stylistic modification, was submitted to the Senate—"Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."²¹⁰

²⁰⁵ 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 190, at 9.

²⁰⁶ *Id.* at 10.

²⁰⁷ *Id.* at 28.

²⁰⁸ CORD, *supra* note 2, at 7.

²⁰⁹ 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 199, at 1262. The House also considered and rejected two other amendments to the proposed version, including Elbridge Gerry's amendment that the clause should read "no religious doctrine shall be established by law," *id.* at 1261, and Madison's proposal to put the word "national" back into the amendment. *Id.* at 1262.

²¹⁰ LEVY, *supra* note 1, at 102.

On September 3, 1789, the Senate considered three amendments to the House proposal, all of which seemed narrowly tailored to prohibit Congress from establishing a single religion in preference to others.²¹¹ The Senate rejected these versions in favor of the following, much broader language: "Congress shall make no law establishing religion."²¹² Six days later the Senate approved its final version, which declared, "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion"²¹³ This version seems, at least partly, to reinstate the accommodationist philosophy of the amendments rejected by the Senate on September 3. The Senate version then went to a conference committee which reconciled the House and Senate proposals.²¹⁴ On September 25, this committee produced the version enacted by the states—"Congress shall make no law *respecting an establishment of Religion*, or prohibiting the free exercise thereof."²¹⁵

Even if we assume that the members of Congress were conversant with Madison's original proposal for the religion clauses, it was not Madison's proposal that emerged from Congress. Unlike Madison's proposal, the final version prohibited not just the establishment of a national religion, but even laws "respecting" establishment. Note that the word "respecting" did not

²¹¹ The amendments were as follows: (1) "[T]o strike out these words, 'Religion or prohibiting the free exercise thereof,' and insert, '[o]ne Religious Sect or Society in preference to others,'" (2) "To adopt the following, in lieu of the third Article, 'Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society,'" and (3) "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: SENATE LEGISLATIVE JOURNAL 151 (Linda Grant De Pauw ed., 1972). The mention of "the third Article" in (2), above, refers to what is now the First Amendment. The First Amendment was originally the third of twelve amendments submitted to the states for approval. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 190, at 46-47.

²¹² 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 211, at 151. The amendment to the House language formally read: "To adopt the third Article proposed in the Resolve of the House of Representatives, amended by striking out these words—'[n]or shall the rights of conscience be infringed'" *Id.*

²¹³ *Id.*

²¹⁴ LEVY, *supra* note 1, at 103.

²¹⁵ 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 190, at 47 (emphasis added).

appear in any prior version of the Amendment considered by Congress.²¹⁶ It is impossible that the reenactors of the Northwest Ordinance could have anticipated that the final version of the First Amendment would contain the word “respecting.” Nor could they have anticipated that the final version would reject Madison’s civil rights provisions and the language safeguarding rights of conscience. To the extent that any of these changes affect the meaning of the First Amendment,²¹⁷ they count as evidence that the Ordinance was not reenacted with the final version of the Establishment Clause in mind.

The most important events in the Congressional debates over the religion clauses are the House debate of August 15, 1789 and the actions of the Senate in rejecting three alternatives to the proposed House language for the clauses on September 3. In the House debate, Madison appeared to say that the religion clauses were intended only to prohibit the establishment of a national religion.²¹⁸ Accommodationists find in these remarks powerful evidence for a narrow reading of the Establishment Clause.²¹⁹ Conversely, separationists see the actions of the Senate in rejecting three versions of the religion clauses that would have codified the “no preference” view of establishment as a powerful rejection of accommodation-

²¹⁶ See *supra* notes 206-15 and accompanying text. The closest one can find to the “respecting” language of the final version of the religion clauses is the “touching on” language of the amendment of August 15, 1787, which survived for all of five days in the House of Representatives. See *supra* notes 209-10 and accompanying text.

²¹⁷ The word “respecting,” for example, is important to separationists and accommodationists alike. Separationists see the word as proving that a law can “fall short of creating an establishment yet still be unconstitutional.” LEVY, *supra* note 1, at 118. Conversely, accommodationists interpret the word as evidence that the Establishment Clause was merely a federalist guarantee that protected the states from federal intervention in matters of religion. See MALBIN, *supra* note 2, at 15.

²¹⁸ 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 199, at 1261-62. Two excerpts from the debate are particularly important to accommodationists. In the first, Madison argues that the religion clauses were intended to reassure the states that Congress would have no power to “establish a religion.” *Id.* at 1261. In the second, Madison argues that the clauses are a response to the fear that “one sect might obtain a pre-eminence, or two combine together and establish a religion to which they would compel others to conform,” and that inserting the word “national” before the word “religion” in the version of the amendment adopted by the House on July 28 “would point the amendment directly to the object it was intended to prevent.” *Id.* at 1262. See *supra* note 207 and accompanying text.

²¹⁹ CORD, *supra* note 2, at 9-10; see also MALBIN, *supra* note 2, at 8-9.

ism.²²⁰ Both of these events happened after the Northwest Ordinance was enacted. It is entirely possible that members of the First Congress would have found in these events important guidance as to the meaning of the final version of the First Amendment. Again, to the extent these events would have shaped the minds of the First Congress about the meaning of the religion clauses, they count as evidence that the final versions of the religion clauses were irrelevant to the reenactment of the Ordinance.

An additional criticism of the corollary argument is that, even if Congress was aware of a conflict between the Northwest Ordinance and the yet-to-be debated religion clauses, there is no reason to think that Congress would have resolved the difficulty by modifying the Ordinance. There was no compelling reason to alter the Ordinance to fit the First Amendment since there was no guarantee the Amendment would ever become law. The Constitution required three-fourths of the states to approve new amendments,²²¹ and no one could predict with certainty whether such approval would materialize. Indeed, the first two amendments proposed by Congress in 1789 were rejected by the states.²²² The Bill of Rights itself did not become effective for more than a year after its passage by Congress.²²³ Rather than assume that Congress would have prospectively altered the Ordinance to conform to an amendment not yet part of the Constitution, and which Congress was powerless to enact on its own,²²⁴ it is just as likely that Congress would have approved the Ordinance as it stood with the

²²⁰ See *supra* notes 211-12 and accompanying text; LEVY, *supra* note 1, at 102; Laycock, "Nonpreferential" Aid, *supra* note 1, at 879-81.

²²¹ U.S. CONST. art V.

²²² Congress originally submitted twelve amendments to the states. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 190, at 45-48. Only the last ten amendments were approved. The first amendment established a formula for determining the number of representatives each state could elect to the House of Representatives based on increments of population. *Id.* at 46. The second amendment prohibited alterations in the compensation for Senators and Representatives from taking effect in the absence of an intervening congressional election. *Id.* The second amendment was ultimately approved by the requisite number of states in 1792. 1 U.S.C. lxviii.

²²³ The Bill of Rights was submitted to the states upon passage from Congress in September 1789. It was ratified by the states in November 1790. KELLY ET AL., *supra* note 23, at 119.

²²⁴ Rehnquist recognizes explicitly that Congress was not bound to follow amendments not yet passed by the House. *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting). Nevertheless, he does not attempt a response to that argument.

understanding that any discrepancies between the Ordinance and the First Amendment could be remedied if the Amendment happened to become law.

In summary, the corollary argument is not convincing support for an accommodationist interpretation of the First Amendment. Contrary to the assumptions of the argument, there is no good reason to think that the work of the First Congress in reenacting the Northwest Ordinance so overlapped with the framing of the religion clauses that Congress would have had the clauses in mind when reenacting the Ordinance. On the contrary, at the time of the reenactment the religion clauses had yet to be debated on the floor of the House or the Senate, and they bore little resemblance to the version that was finally submitted to the states. It would have been impossible for the members of the First Congress to anticipate, at the time of the reenactment, the circuitous rout Madison's amendments would take through Congress or the final shape of the First Amendment. Even if accommodationists are right that the substantive provisions of the Northwest Ordinance violated separationist expectations about the Establishment Clause, there is no good reason to think that the First Congress would have been aware of those violations when they reenacted the Ordinance.

CONCLUSION

The purpose of this Note has been to take a single argument in the debate over the meaning of the Establishment Clause and subject it to searching scrutiny. While references to the Northwest Ordinance are scattered throughout accommodationist literature, few scholars have dealt with the issue in adequate depth. This Note suggests that the accommodationist position rests on two arguments: (1) that the Northwest Ordinance contains substantive provisions that violate the separationist reading of the Establishment Clause, and (2) that since the Northwest Ordinance was reenacted by the same Congress that framed the First Amendment, the Ordinance can be read as a sort of commentary on that Amendment. This Note concludes that both arguments are false.

The purpose of Part I of this Note was to demonstrate that the Ordinance does not violate any separationist construction of the First Amendment. Contrary to the claims of many accommodationists, the "religion, morality, and knowledge" clause was not intended to require or allow federal aid to religion. First, the clause cannot grammatically be construed to encourage religion. Second, historians and state judiciaries do not view the clause as anything more than a prophetic statement of the importance of education to "good government and the happiness of

mankind.”²²⁵ Third, the legislative history of the clause, and the Ordinance’s immediate legislative predecessors, suggest that the Congress of the Confederation was reluctant to write support for religion into the governing documents of the Northwest Territory. In fact, Congress stripped the “religion, morality, and knowledge” clause of wording that would have encouraged support for religion. Finally, this section explored aid to religion in two large sales of land finalized after the passage of the Ordinance and found that nothing in the Ordinance required such aid. This section concluded that there is no evidence that the Ordinance violates separationist expectations of the First Amendment.

Part II of this Note explored the claim that the Ordinance can be read as a type of commentary on the First Amendment. The argument assumes that the work of the First Congress in reenacting the Ordinance and framing the text of the First Amendment overlapped to the point that the First Congress could not have reenacted the Ordinance without understanding its implications on the Establishment Clause. This section concluded that the reenactment of the Ordinance and the framing of the Amendment were so chronologically distinct that it would have been impossible for the First Congress to have any real sense of the outlines of the First Amendment at the time of the reenactment. Accordingly, it is impossible to see the Ordinance as a commentary on the Establishment Clause.

In summary, there is no evidence that the Ordinance either substantively violates the separationist understanding of the Establishment Clause, or can be used to infer anything meaningful about the intentions of the First Amendment. Neither of the primary accommodationist assumptions about the Ordinance is true. Accordingly, the argument “should be frankly and explicitly abandoned.”²²⁶

²²⁵ Act to Provide for the Government of the Territory North-west of the River Ohio, ch. 8, 1 Stat. 50, 52 n.(a) (1789).

²²⁶ *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting). Rehnquist is referring to Jefferson’s “wall of separation” metaphor.