The "Ordinance" of 1784?

Richard P. McCormick

The so-called Ordinance of 1784 presents some intriguing problems. Although it has long drawn attention because of its identification with Thomas Jefferson, its primacy among plans for governing the western territory, and its relationship to the more famous Northwest Ordinance, some of its most interesting features remain obscure. Others have been misrepresented. It is not my purpose in this brief note to deal comprehensively with the substance of the enactment. That mission has been ably undertaken by many others, although their interpretations have been anything but congruent.1 My purpose is quite limited; it is confined to explicating the form, rather than the content, of the measure. To do so is to probe the matters of how the Confederation Congress struggled to define its ambiguous authority and how it chose to frame its decisions.

The first scheme for the government of the West was drafted by a committee chaired by Jefferson. After its report had been revised and amended, the Congress agreed to it on April 23, 1784, with only South Carolina opposed. The plan called for the division of the ceded, and as yet unceded, lands beyond the Appalachians into "distinct states" and fixed their boundaries.2 Settlers in a state could form a temporary government

Richard P. McCormick is University Professor of History, Emeritus, at Rutgers, the State University. He is grateful to Ronald M. Gephart, Peter Onuf, and Eugene R. Sheridan for their helpful comments on this essay.


2 Terminology here can be confusing. Jefferson, and his committee, used the
by adopting the constitution and laws of one of the original thirteen states. When a state's free inhabitants numbered 20,000, they could write and adopt their own constitution. When the population matched that of the least populous of the old states, the new state could become an equal member of the Confederation. Both the temporary and the permanent governments must conform to seven specified conditions. The most important of these were that the governments be republican in form and that the new states remain always a part of the United States. A final paragraph called for a "charter of compact" to be formed between the old states and the new as a mutual guarantee of the terms of the plan.\footnote{See n.1.}

Over the past century, virtually all scholars who have dealt with this act have referred to it as the "Ordinance of 1784" or as "Jefferson's Ordinance." Robert F. Berkhofer, Jr., Arthur Bestor, Francis S. Philbrick, and Peter S. Onuf, among the ablest of recent writers on the subject, identify it as an ordinance,\footnote{Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789 (New York, 1950), 354; Burnett, The Continental Congress (New York, 1941), 627, 631, 632; Boyd et al., eds., Jefferson Papers, VI, 613. See also Richard B. Morris, The Forging of the Union, 1781-1789 (New York, 1987), 168, 227; H. James Henderson, Party Politics in the Continental Congress (New York, 1974), 371-374; Jack N. Rakove, The Beginnings of National Politics: An Interpretive History of the Continental Congress (New York, 1979), 352; and Onuf, "Settlers, Settlements, and New States," in Jack P. Greene, ed., The American Revolution: Its Character and Limits (New York, 1987), 172, 173, 175, 177.} as do such respected authorities as Merrill Jensen, Edmund Cody Burnett, and Julian P. Boyd.\footnote{See n.1.} The convention seems to have been established by at least 1891, when Jay A. Barrett published his pioneering study of the Northwest Ordinance, and it was carried forward by Max Farrand, Paul Leicester Ford, Andrew Cunningham McLaughlin, Frederic Austin Ogg, and others.\footnote{See n.1.}
Some earlier commentators were more meticulous. Nathan Dane, the last survivor of the old Congress, alluded somewhat disdainfully to "Mr. Jefferson's resolve or plan, (not ordinance.)." Peter Force, writing in 1847, merely stated that the report of Jefferson's committee "was agreed to" by the Congress. The renowned lawyer George Ticknor Curtis used the terms "resolve" and "measure." J. P. Dunn, Jr., like Edward Coles, displayed some indecision by employing both "resolution" and "ordinance." 7

The first point to be determined is whether the measure was in fact an ordinance. After the ratification of the Articles of Confederation on March 1, 1781, "the United States in Congress Assembled" began to enact ordinances, along with the "resolutions," "recommendations," and "orders" that from the first expressed its decisions. As a general rule, to which there were notable exceptions, Congress adopted ordinances in areas where it was specifically empowered to legislate by the Articles of Confederation. Representative examples include regulating the alloy and value of coins, managing Indian affairs, establishing a post office, appointing courts for the trial of pirates, and instituting civil offices to administer the public business. 8

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8 There is no adequate study of why the Confederation Congress chose to enact ordinances or what this form of enactment implied. The form was not unknown. It had been used by the Provincial Convention in Virginia and the Provincial Congress in New Jersey in 1775-1776 and by South Carolina in the the colonial period. In England during the Civil War, Parliament enacted ordinances, as did Cromwell and his council during the Protectorate. The form can be traced back at least to the time of Henry II. There is no reference in the Articles of Confederation, however, to ordinances, and the writings and correspondence of contemporaries are not helpful in explaining why the form was adopted in 1781 or why it was used so selectively. The respected legal scholar Julius Goebel, Jr., sought to define the difference between an ordinance and a resolve: "When Congress had
That ordinances were recognized as constituting a distinctive category of legislation is evident from the rules adopted by Congress on May 4, 1781. Rule nine required that any ordinance "introduced by report or otherwise" must go through three readings. Then the question would be put: "Shall this ordinance pass?" If the vote was affirmative, a fair copy would be made, signed by the president of the Congress and attested by the secretary, and the document would be recorded in the latter's office. Ordinances were also distinguishable by their style. They invariably began with the formula: "Be it ordained by the United States in Congress assembled . . . ." A complete file of attested ordinances is in the "Register of Ordinances," carefully maintained by Charles Thomson, secretary of Congress.

On March 1, 1784—the same day that Congress formally accepted Virginia's land cession—Jefferson's committee reported its plan in the form of a resolution. After undergoing revisions, the report was presented on April 19 and was debated and amended over the course of four days. No reference was made to first, second, or third readings. On April 23, "On the question of agreeing to the foregoing [resolution] . . . it was resolved in the affirmative" by a vote of ten states to one. It will be apparent that the measure was not processed in accordance with rule nine, and it was not in the style of an ordinance. It is not recorded in the "Register of Ordinances." In sum, it was not an ordinance.

Legislated on the few matters within its competence, it had enacted ordinances—e.g., appointing courts for the trial of piracies or the disposal of the Western lands. These alone could be said to have had the quality of statutes. Otherwise, when a matter depended upon state action, Congress used the resolve, usually in the idiom of recommendation." Goebel, History of the Supreme Court of the United States, vol. 1: Antecedents and Beginnings to 1801 (New York, 1971), 201, but see also 163–176. The 25 ordinances enacted by the Confederation Congress have never been compiled and published, but about half of them are in Laws of the United States of America from the 4th of March, 1789 to the 4th of March, 1815 . . . and Many Other Valuable Ordinances and Documents . . . ., 5 vols. (Philadelphia and Washington, D. C., 1815), I. For the "resolutions" of Apr. 23, 1784, see ibid., 480–481.

9 W. C. Ford et al., eds., JCC, XX, 477–478. The previous set of rules, adopted May 27, 1778, contained no reference to ordinances; ibid., XI, 534–538. Rule nine was drafted by John Matthews, a member of the committee that submitted the report, and in all probability was a last-minute amendment; ibid., 478 n. 1. Papers of the Continental Congress (NARS) M 247, reel 31, item 23, p. 64. It may be significant that Matthews was from South Carolina, where ordinances were a common form of enactment.

10 The "Register of Ordinances" in the Papers of the Continental Congress (NARS) can be found in the microfilm edition, M 247, reel 194, item 176. It has rarely been cited and does not appear in the massive Index: The Papers of the Continental Congress, 1774–1789, comp. John P. Butler, 5 vols. (Washington, D. C., 1978). Also useful is "Ordinances Reported by Committees," M 247, reel 254, item 17, fols. 307–308, which does not list the "Ordinance" of 1784.

The failure to draft the plan in the style of an ordinance was hardly fortuitous. The immediate impetus for the appointment of Jefferson's committee can be traced to the report of a committee on Indian affairs, headed by James Duane, in September 1783. This report called, among other things, for the appointment of a committee “to prepare and report an ordinance for regulating the Indian trade.” It also cited several reasons for the “speedy establishment of Government” in a district to be formed out of a portion of the territory west of the Ohio River, and it urged that a committee be charged with reporting “a plan, consistent with the principles of the Confederation, for connecting with the Union by a temporary government the purchasers and inhabitants of the said district.”

Jefferson was involved with the preparation of both the ordinance regulating Indian affairs and the plan of government. Also relevant is the fact that only a week after Congress agreed to the plan of government, Jefferson, as chair of yet another committee, introduced an “Ordinance for ascertaining the mode of locating and disposing of lands in the western territory,” which was ultimately enacted with modifications, May 20, 1785. Obviously, the ordinance was quite a familiar form of enactment, and we can only conclude that there must have been reasons why that form was not used for the plan of government.

The question of why the ordinance form was not adopted leads us into a murky area. Congress had wrestled for many years with the problem of a policy for the western territory. At first, there was merely the matter of inducing the landed states to make cessions of their claims. Complications is most insistent that it was an ordinance. “It has been stated in various excellent books that Jefferson's ordinance never become law; or in Nathan Dane's words was not an ordinance. This is an egregious and manifest error. The 'plan' was formally approved by Congress; its 'repeal' was recommended by Monroe's committee in reporting their own new 'plan' of temporary government for the same territory, and was finally effected by the adoption of the new plan on July 13, 1787. The second plan acquired in its late stages the title of 'ordinance,' which Jefferson's never did, but that is of no significance; both 'plans' were bills until adopted, and when approved were ordained. Jefferson's was law, and was an ordinance for more than three years” (Introduction, Laws of the Illinois Territory, XXV, cclxii-cclxiii). By this line of reasoning, Philbrick would make no distinction between ordinances and other enactments of Congress. Unaccountably, Rufus King, who had served in the Confederation Congress, referred to the 1784 act as an “ordinance” in the course of a debate in the Constitutional Convention. Farrand, ed., The Records of the Federal Convention of 1787, 4 vols. (New Haven, Conn., 1911-1937), I, 541.

12 W. C. Ford et al., eds., JCC, XXV, 690 (emphasis added), 693, 694 (emphasis added). At one point the report proposed that “if Congress conceive it doubtful whether the powers vested by the Instrument of Confederation and perpetual union are competent to the establishment of such Government that then the Committee be instructed to prepare and report to Congress a proper address to the respective states for remedying the defects of the said instrument in this respect”; ibid., 691. On the significance of this report and its confused editing in JCC, see Berkhofer, “Jefferson [and] the Ordinance of 1784,” 237-241.

soon developed as states attached conditions to their cessions, rival claims were made to the same regions, and land companies with alleged royal grants intruded on the deliberations. Then a host of other issues challenged the ingenuity of the delegates. They had to consider Indian relations, the immediate need for revenue, provisions for defense of the West, and a scheme for selling or disposing of the land, along with some plan of government.

Most perplexing of all was the unresolved, even unresolvable, question of the nature and extent of Congressional authority. Prior to the ratification of the Articles, as James Madison summarized the matter in 1830, “the power of Congress was measured by the exigencies of the war, and derived its sanction from the acquiescence of the States.” Subsequently, “habit and a continued expediency . . . prolonged the exercise of an undefined authority.” Even in the 1780s, Madison believed that the Congress had on occasion exceeded its rightful authority; in this regard he cited especially legislation for organizing the western territory, and he was not alone in this opinion. Yet Congress faced a dilemma. By 1784 it found itself in possession of a vast domain that, for many reasons, required immediate attention. It had to take action, but on what authority?

The Articles of Confederation did not supply an assured answer. Article XI specified that Canada, if it acceded to the Confederation and joined in measures of the United States, would be accepted into the Union. But “no other colony” was to come in without the assent of nine states. Some delegates argued that “no other colony” meant no other of the existing British colonies (Nova Scotia and Florida, among others). Therefore, western states could not be admitted under Article XI. Those who believed that the article could be interpreted to apply to such states differed over whether admission could be granted by a vote of nine states in Congress, or whether approval by the legislatures of nine states was required.

14 The Supreme Court in 1795 held that in wartime Congress possessed all powers required for waging war and making peace. Justice William Paterson, who delivered the leading opinion, held that “the powers of Congress were revolutionary in nature, arising out of events, adequate to every emergency, and co-extensive with the object to be attained”; Penbellow et al. v. Doane’s Administrators, Alexander J. Dallas, Reports of Cases Ruled and Adjudged in . . . Pennsylvania . . . (Philadelphia, 1790–1807), III, 80. With the termination of the war and the ratification of the Articles of Confederation, the constitutional authority of Congress was uncertain. See, for example, the discussion below of the opinions rendered in the Dred Scott Case in nn.21, 22.

15 Madison to Andrew Stevenson, Nov. 27, 1830, William T. Hutchinson et al., eds., The Papers of James Madison, 17 vols. to date (Chicago, 1962–), III, 19n., 20n.


17 Boyd et al., eds., Jefferson Papers, X, 27–28. In 1786 Jefferson expressed the opinion that the prospective applications of Kentucky and Franklin (Tennessee) would “soon bring on the ultimate decision of all these questions”; ibid., 28. On
How Jefferson’s committee sought to resolve the problem of Congress’s authority is revealed in the final paragraph of the plan of 1784. Its meaning is not readily apparent. Neither Jefferson nor his contemporaries left a record of how it was to be interpreted. It does not seem to have generated discussion among the delegates. The paragraph provided:

That the preceding articles shall be formed into a charter of compact; shall be duly executed by the President of the United States in Congress assembled, under his hand, and the seal of the United States; shall be promulgated; and shall stand as fundamental constitutions between the thirteen original states, and each of the several states now newly described, unalterable from and after the sale of any part of the territory of such State, pursuant to this resolve but by the joint consent of the United States in Congress assembled, and of the particular State within which such alteration is proposed to be made.18

The notion of a “covenant” or “charter of compact” originated with a committee on finance in 1778. Its report urged states with claims to the West to cede those lands to the United States. As a condition of the cessions, it would be “covenanted with the States” that such territory would be erected into distinct states, which would eventually be admitted to the Union.19 Jefferson’s committee, beset with uncertainty about the authority of the Congress under Article XI, seized on the device of a covenant to provide a source of legitimacy for its plan of government. Its proposals (the preceding articles) would be formed into a charter of compact, which, when duly executed by the president, would be promulgated. The compact would have the status of fundamental constitutions binding the original states and those now newly described. Rather than an ordinance, which was a legislative act, the committee presented Congress

the statehood movements in those localities see Burnett, Continental Congress, 707–710, 627–628.

18 W. C. Ford et al., eds., JCC, XXVI, 278–279. Whether “preceding articles” meant the whole of the report, including the sections relating to state boundaries and government, or only the 7 enumerated “principles” is open to question. Philbrick leans toward the latter alternative, without offering persuasive evidence; Introduction, Laws of the Illinois Territory, XXV, cccxxii n. 123. The reference to the “seal of the United States” is interesting. The seal was affixed neither to ordinances nor to resolutions, but it was impressed on treaties. See Richard S. Paterson, The Eagle and the Shield: A History of the Great Seal of the United States (Washington, D. C., 1976), 141.

19 W. C. Ford et al., eds., JCC, XII, 931. The term “charter of compact” is an unusual one. As is so commonly the case with political terminology, it is not readily definable. For a commendable effort to explain the meaning of “covenant,” “charter,” “compact,” and “constitution”: Donald S. Lutz, “From Covenant to Constitution in American Political Thought,” Publius, X (1980), 101–133.
with quite a different approach to the vexatious problem of bringing the new western states into the Union.\textsuperscript{20}

We might well inquire whether the charter of compact represented a plausible solution to the committee’s dilemma. Here the opinions of the justices of the Supreme Court in the Dred Scott case are relevant. In the view of Chief Justice Roger B. Taney, the Confederation Congress lacked any power under the Articles to legislate for the western territory. “It was little more than a congress of ambassadors, authorized to represent separate nations, in matters in which they had a common concern.” But the delegates of the sovereign states represented in the Congress “had a right to establish any form of government they pleased, by compact or treaty among themselves, and to regulate rights of person and rights of property in the territory, as they might deem proper.”\textsuperscript{21} Thus he could uphold the validity of the Northwest Ordinance as a compact or treaty, and by implication the Ordinance of 1784 as well.

The leading dissenter, Justice Benjamin R. Curtis, agreed with Taney that “it was not within the legitimate [legislative] powers of the confeder- ation” to enact the Northwest Ordinance. However, unlike Taney, Curtis denied that Congress had the power even to make a charter of compact, “there being no new states then in existence in the territory, with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming party to a treaty even if the congress of the Confederation had had power to make one touching the government of that territory.” It was his contention that the act of August 7, 1789, confirming the Northwest Ordinance was constitutional under the “territorial clause” (Article IV, section 3) of the Constitution, a position that Taney rejected.\textsuperscript{22} The justices agreed, then, that the Confederation Congress lacked authority to legislate on territorial government, but Taney and Curtis were in sharp disagreement with respect to the efficacy of a charter of compact. It would be pointless now to speculate on whose opinion was correct.

Can we, then, confidently describe the 1784 document as a charter of compact that effectively bound the relevant parties until it was superseded

\textsuperscript{20}How the charter of compact would have been effectuated is problematic. Some awkward questions are raised by Philbrick in Introduction, \textit{Laws of the Illinois Territory}, XXV, cxxxii n. 123, and by Justice Benjamin R. Curtis in his dissenting opinion in the Dred Scott Case.

\textsuperscript{21}Benjamin C. Howard, \textit{A Report of the Decision of the Supreme Court of the United States \ldots in the case of Dred Scott \ldots} (New York, 1857), 434–435. Justices John A. Campbell and John McLean agreed that the Confederation Congress lacked authority to provide for the government of the territory, although McLean upheld the constitutionality of the act of Aug. 7, 1789, which in essence confirmed the Northwest Ordinance; ibid., 503–504, 547.

\textsuperscript{22}Ibid., 608, 617. The most recent study of the case is Don E. Fehrenbacher, \textit{The Dred Scott Case: Its Significance in American Law and Politics} (New York, 1978). Fehrenbacher is critical of Taney’s “peculiar version of American history” (p. 370). The relevance of Taney’s decision to the “Ordinance of 1784” is succinctly stated by Bestor, “Constitutionalism and the Settlement of the West,” 36–37 n. 21.
by the Northwest Ordinance? Alas, no. Its "articles" were never formed into a charter of compact, nor were they duly executed, sealed, or promulgated. Indeed, the resolution was not even officially communicated to the states by Secretary Thomson until May 28, 1785.\textsuperscript{23} Thus it would seem that the Congress approved a proposal for organizing governments in the West but did not choose to implement it. The plan could hardly have been made operative before the ordinance of May 20, 1785, set forth a method for disposing of the lands, and as time passed, doubts mounted about the wisdom of key features of the model that Jefferson's committee had contrived.

Jefferson himself had misgivings about the efficacy of Congress's action. Writing early in 1786, he was of the opinion that alterations were needed in the Articles "to establish a general rule for the admission of new states into the Union." He now interpreted Article XI to mean that, except for Canada, no state could be admitted "without first obtaining the consent of all the thirteen legislatures." He also believed it would be necessary to establish agreement on what districts might be erected into separate states and what population these must attain before achieving full statehood. "The act of Congress of April 23, 1784," he continued, "has pointed out \textit{what ought to be agreed upon}."\textsuperscript{24} These considered judgments strongly imply that Jefferson regarded the plan of 1784 as something that "ought to be agreed upon" rather than an accomplished fact.

The subsequent fate of the plan, and its curious charter of compact, merits brief mention. In March 1786, on the initiative of James Monroe, the Congress again turned its attention to the government of the West. Now there was a disposition to carve the region into larger and fewer states than had been agreed to in 1784. There was, as well, the growing conviction that the settlers should initially be placed under a colonial-type

\textsuperscript{23} There is no evidence in \textit{JCC} or in other sources that these actions were taken. The \textit{Index: Papers of the Continental Congress} cites references to many circular letters sent by President Thomas Mifflin, but none of them referred to the plan of 1784. On May 28, 1785, Thomson sent letters to all the governors transmitting the "act [of Apr. 23, 1784] ... for laying out into distinct States the Western territory ... and stating the principles on which the temporary and permanent governments of the new States shall be established; also an ordinance [of May 20, 1785] for ascertaining the mode of disposing of lands in the western territory"; (NARS) M 247, reel 25, item 18A, fols. 82, 85, 86. Soon thereafter, the two documents were published together in several newspapers: (Trenton) \textit{New Jersey Gazette}, June 6, 1785; (Boston) \textit{Independent Chronicle and the Universal Advertiser}, June 23, 1785. See also Jensen, ed., \textit{The Documentary History of the Ratification of the Constitution}, vol. i: \textit{Constitutional Documents and Records, 1776–1787} (Madison, Wis., 1976), 150–151.

\textsuperscript{24} Boyd et al., eds., \textit{Jefferson Papers}, X, 14 (emphasis added), 28. Jefferson's observations were prepared in Paris to assist M. Déméunier in the preparation of the \textit{Encyclopédie Méthodique}; ibid., 3–11. His reference to the "act" of Apr. 23, 1784, should not be misinterpreted. It was common usage at that time to refer to all types of actions voted by the Congress as "acts." See, for example, Burnett, ed., \textit{Letters of Members of the Continental Congress}, 8 vols. (Washington, D. C., 1921–1936), VI, 33, 50, 100, 271, and W. C. Ford et al., eds., \textit{JCC}, XXX, 7, 10, 116, 202–203, 225.
regime, with all officials appointed by Congress, before they were permitted the privilege of self-government. By July, the Congress resolved to request Virginia and Massachusetts to revise their acts of cession to sanction the creation of as few as three and as many as five states northwest of the Ohio River. A second resolution called for the repeal of two sections of the 1784 plan: those that described the boundaries of the projected states and set forth the charter of compact. A later committee report in September went much further. It recommended: “That the resolutions of the 23d of April, 1784, be, and the same are hereby annulled and repealed.” Next, the plan then under consideration was reported in the form of an ordinance. After further revisions it was adopted as the Northwest Ordinance on July 13, 1787. Its final paragraph reads: “That the Resolutions of the 23d of April 1784, relative to the subject of this ordinance be, and the same are hereby repealed and declared null and void.”

“Jefferson’s Ordinance,” it may be said, had issued forth stillborn; it lacked viability. As Berkhofer concluded, it “represented an incomplete set of resolutions about fundamental principles, or a policy statement.” Some of those principles were abandoned in 1784, notably those regarding the size and number of states and the type of government to be imposed on the settlers. But the concept of a charter of compact was revived in the six “articles of compact” that were a conspicuous feature of the Northwest Ordinance.

26 Ibid., XXXI, 673.
27 Ibid., 700–702. One can only speculate on why this plan, unlike that of 1784, was at this point framed in the style of an ordinance. Contemporary sources are not enlightening. There was, of course, the precedent of the Ordinance of 1785, but that did not deal directly with the touchy question of admitting new states. The committee had been reconstituted on Sept. 18 (ibid., 667n.), and its members may have been less anxious about the issue of legislative authority than their predecessors. In any case, the adoption of the ordinance format was presumably intended to give an appearance of greater authority to the enactment than a mere resolution.
29 Ibid., XXXII, 343. The words “relative to the subject of this ordinance” were added by amendment during the debate on July 13 (334n.). There is no clue to the intent of this amendment or who moved it, but it could be interpreted to mean that the “resolutions” of 1784 were not repealed insofar as they related to ceded or unceded territory not encompassed within the bounds set forth in the 1787 ordinance. On the other hand, William Grayson informed James Monroe on Aug. 8, 1787, that “the former Act [of Apr. 23, 1784] is repealed absolutely,” and this has been asserted by all authorities on the subject; Burnett, ed., Letters, VIII, 632. In his meticulously edited text of the Northwest Ordinance, Clarence E. Carter takes no notice of this amendment; The Territorial Papers of the United States, 28 vols. (Washington, D. C., 1934–1975), II, 50.
31 Onuf traces the subsequent history of the compact, both as legal reality and as influential myth, in Statehood and Union, xviii–xxi, 133–152. Philbrick is scornful of
The Confederation Congress's struggles over the matter of providing for the creation of new states in the West reveal its continual uncertainty about the nature and extent of its authority. Depending on the matter under consideration, it might "recommend," "resolve," or "ordain," although it was not rigorously consistent in its choice of forms. In 1784, the Congress was not prepared to give to the plan put forward by Jefferson's committee the sanction of an ordinance. By 1787, with its doubts not yet fully resolved, it ventured to ordain a new scheme of territorial government and to buttress it with a compact. The subsequent disputes over the legitimacy of this act by learned justices and informed scholars command our attention. But no less interesting is the problem of trying to decipher how the Congress itself assessed its powers and how it chose to frame its enactments. This investigation of the "Ordinance of 1784" represents a modest attempt at addressing that problem by directing attention to the little explored question of how the Congress used, or refrained from using, ordinances to express its will.