Property and Republicanism in the Northwest Ordinance

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Matthew J. Festa*

ABSTRACT

This Article shows that individual property rights held a central place in the republican ideology of the founding era by examining the Northwest Ordinance of 1787. Between the two predominant strains of founding-era political ideology—liberalism and republicanism—the conventional view holds that individual property rights were central to Lockean liberalism but not to the republican political tradition, where property is thought to have played more of a communitarian role as part of promoting civic virtue and the common good. Republicanism has been invoked in modern debates, and its emphases are present in current ideas such as the important new theory of “progressive property.” This Article considers property and republicanism in light of a critically important, but relatively neglected, founding document: the Northwest Ordinance.

The Northwest Ordinance established republican government in the unorganized territories of the new nation and provided the blueprint for admitting new states to the union. Through a close reading of the Ordinance, this Article observes that it is a document that is fundamentally concerned with property and individual property rights but is also thoroughly republican in character. It includes numerous provisions regarding property ownership in society, it contains precursors to the Constitution’s property clauses, and it reflects a consideration for the role of property in the development and governance of an expanding republic. Only

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by securing property rights could the virtuous yeoman citizen be encouraged to settle the frontier and build a republican society in what would become new states. The concern for property rights in the Northwest Ordinance therefore demonstrates a desire to promote not only individual liberty, but also—through a virtuous society of property owners—the common good. This suggests that individual property rights were indeed a central component of republicanism at the founding and in debates over property’s role today.
TABLE OF CONTENTS

ABSTRACT ............................................................................................................... 409

I. INTRODUCTION ................................................................................................. 412

II. PROPERTY RIGHTS IN THE LIBERALISM AND REPUBLICANISM OF THE
    FOUNDING ERA .............................................................................................. 416
    A. Liberalism and Republicanism as Founding Ideologies ....................... 417
    B. The Modern Civic Republican Revival and Property Rights ............ 420

III. PROPERTY IN THE EARLY REPUBLIC: THE NORTHWEST
    ORDINANCE AS A REPUBLICAN PLAN ................................................... 423
    A. Land, Economy, and Property in 1780s America .............................. 423
    B. Creating a Republican Order in the Expanding New Nation .......... 427
    C. The Enactment of the Northwest Ordinance ..................................... 431
    D. The Northwest Ordinance as a Republican Document .................. 433
    E. The Northwest Ordinance as Historical Evidence ......................... 434

IV. PROPERTY RULES IN THE NORTHWEST ORDINANCE ..................... 435
    A. Private Property Ownership ................................................................. 436
        1. Inheritance and Transfer of Property ............................................. 437
        2. Property Requirements for Political Participation ....................... 443
    B. Constitutional Protections of Property Rights ................................... 447
        1. The Contracts Clause of the Northwest Ordinance ....................... 448
        2. Due Process and the Law of the Land ........................................... 452
        3. Takings and Just Compensation .................................................... 453
        4. Property Takings and Public Use .................................................. 455
    C. The Prohibition of Slavery in the Northwest ..................................... 457

V. PROPERTY AND ECONOMIC DEVELOPMENT IN THE EXPANDING
    REPUBLIC ........................................................................................................ 459

VI. FROM THE REPUBLICAN REVIVAL TO PROGRESSIVE PROPERTY:
    LESSONS FROM THE NORTHWEST ORDINANCE .............................. 463
    A. Bringing Property Rights Back into Republicanism ....................... 463
    B. Rights, Republicanism, and Progressive Property .......................... 466

VII. CONCLUSION ................................................................................................. 469
I. INTRODUCTION

The summer of 1787 is often seen as the pivotal point in the story of the founding of the United States, since it was then that the Constitutional Convention met in Philadelphia to craft the document that would form the new basis of the national government. But while the members of that Convention deliberated on loftier themes such as the nature of law and government and visions for the new nation, back in New York the Confederation Congress continued with the quotidian business of governing. While the Convention was engaged in “higher-order” constitution-making, the Confederation Congress was faced with the more immediate problems of maintaining national security, dealing with the Revolutionary War debt, and providing for the organization of the vast territorial lands west of the Appalachians. On July 13 of that summer, the Congress passed what was formally called “An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio,” known to history as the Northwest Ordinance.

While it has received much less scrutiny than the product of the Philadelphia Convention, the Northwest Ordinance is a document of great historical significance and can also provide insight into the legal and intellectual history of the founding generation. In particular, the text and context of the Ordinance illuminate the prevailing attitudes in the early republic toward property in an expanding union. Most Americans of the 1780s, regardless of political or ideological orientation, believed that


2. See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266–94 (1991), for the theory outlining the difference between higher lawmaking and normal politics.


property rights were essential to an ordered society based on liberty. The Northwest Ordinance, along with several early state constitutions, included what may be regarded as precursors to the Property Clauses of the Constitution. There is also direct evidence linking some of the property provisions in the Ordinance to the framing of the Constitution. And when read as a whole, the Ordinance reveals a primary concern with ordering the legal regime of rights, regulations, and distribution of property in the expanding Union. This Article shows that the Northwest Ordinance applied those property ideas as founding, constitutional principles for the expansion of the nation into the new territory.

This Article shows that the Northwest Ordinance’s property provisions reflect a vision of a broader, integrated national republic that would provide for the security of commerce and the rule of law, and also the promotion of a virtuous, industrious citizenry. In this sense, it can be argued that individual property rights were essential to the republican political theory of the founding era. This interpretation challenges the prevailing view that individual property rights were primarily part of the Lockean liberal ideology and were of less importance to the civic republican tradition in America, which emphasized a virtuous citizenry to promote the common good. Contemporary scholars of civic republican ideology tend to focus on the narrative of property as something of a communitarian institution in the founding era; individual property rights are more traditionally described as part of the alternative strain of liberalism, which focused more on individual rights, interest-group pluralism, and may be roughly correlated with modern political conservatism (or libertarianism). The Northwest Ordinance, however, shows that in the constitutional year of 1787, property rights were thought to be necessary to develop and secure a republican society.


The Northwest Ordinance included specific guarantees of individual property rights that were nearly identical to what became the Constitution’s Takings and Just Compensation Clauses, the Due Process Clause, and the Contracts Clause. Because the Northwest Ordinance was one of the most important documents of the founding era, marking the signal legislative achievement of the Confederation Congress, the background of these property-rights provisions in the Ordinance provides insight about the original meaning of those constitutional provisions. But a study of the history and text of the Ordinance reveals that it is also imbued with an overriding concern with property law. Not only did the Ordinance protect individual property rights, it also established a system of property holding and alienation, and property qualifications for political participation. It enacted a procedure for disposing of federal lands and establishing both communities and new states. It also promoted commerce and economic development on a national scale.

This Article is framed within three different areas of scholarship: the Northwest Ordinance, property rights, and civic republicanism. The Northwest Ordinance itself has received comparatively scant attention from historians and legal scholars but has seen an increase in citation recently. The only modern book-length monograph by a professional historian is Peter S. Onuf’s Statehood and Union: A History of the Northwest Ordinance, focusing on the Ordinance as a response to a need to plan for orderly settlement and on its role as a charter for the new states in the early republic. In addition to those attributes, other scholars have cited the Northwest Ordinance for its statements on religious liberty, support of

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12. The Northwest Ordinance, as discussed infra, had tremendous significance in bringing order to the Territory, in establishing a blueprint for the admission of new states on equal footing, and in both regional and national historical memory. The United States Code Annotated still catalogues the Ordinance as one of four “Organic Documents” of U.S. law, along with the Declaration of Independence, the Articles of Confederation, and the Constitution. See U.S.C.A. Ordinance of 1787: The Northwest Territorial Government (West 2012).


14. Northwest Ordinance, art. IV–V.

15. ONUF, supra note 3, at 80–87.

16. Hegreness, supra note 5, at 1832.

17. ONUF, supra note 3.

education, privileges and immunities, and perhaps most often—due to its frequent invocation during the antebellum era—for its prohibition on slavery. This Article seeks to highlight the continuing relevance of the Northwest Ordinance as a founding charter and will be the first study to focus primarily on property.

The Article also draws from the legal and historical scholarship on property rights. While the Northwest Ordinance often is mentioned in these studies for its role as a precursor to specific constitutional property provisions, it has not been discussed at length, nor has it been suggested to be a document fundamentally concerned with property in the larger sense of affirmatively promoting alienability and an expanding union and political economy. This Article focuses on a close reading of the Ordinance to show that property, and individual property rights, were central to its vision for an expanded republic.

Relatedly, this Article discusses the role of property rights in the republican ideology that influenced the founding generation. I challenge the conventional wisdom among legal scholars that property rights were exclusively a tenet of Lockean liberalism, rather than an important part of both liberal and republican ideology. I suggest that the ideas reflected in the Northwest Ordinance indicate the founding generation’s belief in property rights not only as a part of liberty itself, but also as fundamental for establishing a framework of order, security, and economic development for the expanding nation. Individual property rights were in fact necessary in order to encourage the very civic virtue that was required for the promotion of the common good and were thus central to the founders’ republican ideology.

In this Article, I will explore that thesis by first introducing the modern understandings of liberalism and civic republicanism in the founding era and how the contemporary literature regards the role of property in the two ideological strains. I will then examine in detail the background of the Northwest Ordinance, followed by a close analysis of the document itself, focusing on its property provisions. These sections will show that the Ordinance is imbued with concern for property in terms of both individual security and in a larger republican sense. Then, I will turn to the particular

20. Hegreness, supra note 5, at 1820.
protections in Article II of the Ordinance—the forerunners of the Constitution’s Due Process Clause, Contracts Clause, and Takings Clause, which are among the most important protections in the history of American property rights.23 The purpose of that analysis is to show that the Ordinance was not only concerned with property, but also reflected prevailing attitudes—and underscored their importance by making these principles part of the founding charter for what would be new states.

I will then proceed to offer some preliminary observations about how this interpretation of property and republicanism might impact our modern understanding of constitutional property rights as well as of recent developments in property theory such as “progressive property.”24 Understanding the civic republicanism of the Northwest Ordinance to include a primary place for individual property rights will expand our understanding of both founding-era ideology and the role of property in society today.

II. PROPERTY RIGHTS IN THE LIBERALISM AND REPUBLICANISM OF THE FOUNDING ERA

This Article posits that the overriding concern with property in the text of the Northwest Ordinance is evidence that property rights were central to the republican ideology of Americans in the founding era. This Part covers the background of the split between property rights and civic republicanism. It will begin with a brief review of the modern scholarly understanding of liberalism and republicanism as the two predominant founding-era ideologies. It will then focus on how modern scholars view the role of property in republicanism as primarily a communitarian institution, or as Professor Gregory Alexander has described it, an institution whose purpose was in the realm of “propriety” (as opposed to the classical-liberal view of property as “commodity”).25 The way in which the academic discourse has set up the liberalism–republicanism dichotomy has resulted in the separation of individual property rights (associated with liberalism) from the more communitarian property theory of civic republicanism.

23. ELY, supra note 7, at 63–77.
25. ALEXANDER, supra note 9, at 30–36.
A. Liberalism and Republicanism as Founding Ideologies

“Republicanism” has come to stand in contemporary scholarship for a particular set of ideas and values centered on the concepts of “civic virtue” and the common good that were prominent in the political discourse of the revolutionary and constitutional era. However, the modern version of republicanism fails to account for the critical role of property rights in the founders’ ideology for maintaining a virtuous society through ordered liberty. This de-emphasis on property is somewhat understandable, since as this Section will show, one of the major points of what scholars refer to as the “civic republican revival” is that there were certain communitarian norms present at the founding in addition to the traditional story of individual rights liberal pluralism. This Section will briefly review the modern historiography of the liberalism–republicanism scholarship.

For the last generation of historians, the dominant paradigm for interpreting the founding era has been the theory of republicanism (displacing the postwar “liberal” or “consensus” school) underlying the political philosophy of the framers. During the postwar era, historians posited an ideological consensus among the founding generation that derived primarily from Lockean thought and ascribed this consensus as the foundation of American liberty and progress. Writing in the 1960s, Bernard Bailyn fundamentally changed the terms of the discussion of the American founding among historians. With the publication of his study of revolutionary political pamphlets in 1967 as the seminal The Ideological Origins of the American Revolution, Bailyn made the first attempt at explaining the American Revolution as the product of republican ideology, in what is now known as the “republican synthesis.”

What emerged was the American version of republicanism. More than economic interests, social agendas, or liberal notions of rights and liberties, republican ideology caused the Revolution, according to Bailyn. Thanks largely to its roots in the opposition writings of the early eighteenth century, the republican view of events in the pre-Revolutionary struggle saw them in direct contravention of the British constitution. Such assertion of power necessarily meant an antagonistic “dominion of some men over others,”

26. See Wood, supra note 8, at 196.
30. Id. at 94.
31. Id.
which necessitated rebellion.\textsuperscript{32} Furthermore, as the British actions were interpreted as the product of “corruption,” the proper foundation for both their Revolution and their society should be one of “regeneration.”\textsuperscript{33}

Gordon Wood’s acclaimed \textit{The Creation of the American Republic} extended Bailyn’s analysis through the Revolution to the framing of the Constitution in 1787.\textsuperscript{34} And as republicanism has become the new paradigm,\textsuperscript{35} and set the terms of debate within which we have studied the founding for over a generation, Wood has been credited with providing the greatest contribution to the scholarship of the period.\textsuperscript{36}

Wood described the Americans’ reaction to the perceived arbitrary oppression and “tyranny” as recognition of the need not just for political independence but for a fundamental “reordering” of their society.\textsuperscript{37} This meant, to the Americans, that (in order to prevent more of the “corruption” they had suffered at the hands of Britain) their society could only succeed if properly grounded in the character of the citizenry.\textsuperscript{38} The vocabulary of republicanism relied on terms such as “public virtue,” which was the “willingness of the individual to sacrifice his private interests for the good of the community,” and was furthermore “primarily the consequence of men’s individual private virtues,” which included frugality, industry, and self-sacrifice for the greater good.\textsuperscript{39}

Wood’s interpretation led to what historians referred to as an emerging “republican synthesis,”\textsuperscript{40} which is still the dominant interpretation of the founding era today, as other historians have continued to write in this vein.\textsuperscript{41} Republicanism would turn out to have significant implications for the legal analysis of constitutional history.\textsuperscript{42} By highlighting the essential role of

\begin{footnotes}
\item[32] Id. at 56.
\item[33] Id. at 82.
\item[34] \textsc{Wood, supra} note 8.
\item[35] The rise of the “republican synthesis” was identified as a new paradigm in historiography by Robert Shalhope. Robert E. Shalhope, \textit{Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography}, 29 \textit{Wm. & Mary Q.} 49, 49 (1972).
\item[36] \textsc{Rakove, supra} note 1, at 12.
\item[37] \textsc{Wood, supra} note 8, at 48.
\item[38] Id.
\item[39] Id. at 68–69.
\item[40] Shalhope, \textit{supra} note 35, at 49.
\item[41] See, \textit{e.g.}, \textsc{Banning, supra} note 1; \textsc{Pauline Maier, American Scripture: Making the Declaration of Independence} (1997); \textsc{Drew R. McCoy, The Elusive Republic} (1980); \textsc{J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition} (1975).
\item[42] \textit{The Creation of the American Republic} was so well established by the 1980s as the dominant work of early American historiography, discussion of its impact was the subject of the
\end{footnotes}
public virtue as the foundation of a republican state, republicanism has as its primary concern the character of society as a whole—as an organic unit. The purpose of politics was to deliberate over, and ultimately achieve, the common good.\textsuperscript{33}

The legal academy also has its own tradition or “historiography” of the intellectual origins of the founding, particularly as it influences theories of constitutional interpretation. Beginning in the 1980s, history took center stage among constitutional law scholars and courts.\textsuperscript{44} The use of “original intent” by conservative judges and scholars was given much attention.\textsuperscript{45} A reaction by left-leaning members of the legal academy resulted in the formulation of an alternate interpretation of history, and hence of constitutional interpretation: the theory of “civic republicanism.”\textsuperscript{46}

In the 1980s, some prominent legal scholars seized upon republicanism as a political theory that had links to the laudatory events of the American founding—the Revolution and framing of the Constitution—and also provided a way to interpret contemporary legal issues in a framework that emphasized “virtue” and the “public good.”\textsuperscript{47} The appeal of republicanism derived from its roots in country/Whig ideology as an opposition theory, and one that focused on the importance of preserving liberty in the face of corruption, and the need for political leadership that was willing to subordinate private interests to the benefit of the polity as a whole.\textsuperscript{48} Republicanism offered a way of resolving legal and constitutional issues that at the same time seemed consonant with history while supportive of a communitarian interpretation of law.

Perhaps the most well-known advocate of republicanism from the legal academy is Cass Sunstein. Professor Sunstein was the one of the most prominent legal scholars to call for a renewal of republican principles in addressing current legal issues.\textsuperscript{49} The suggestion of a “republican revival” by Sunstein, Frank Michelman, Suzanna Sherry, and others led to a \textit{Yale Law Journal} symposium.\textsuperscript{50} In the lead articles, Sunstein and Michelman described republicanism as useful because of the salutary aspects it had as a political theory that both explained the founding and provided insights for

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\textsuperscript{33}\textit{Id.}

\textsuperscript{34}\textit{Wood, supra} note 8, at 606–08.

\textsuperscript{35}Laura Kalman, \textit{The Strange Career of Legal Liberalism} 73 (1998).

\textsuperscript{36}Id.; Rakove, \textit{supra} note 1, at 369.

\textsuperscript{37}Kalman, \textit{supra} note 44, at 176.

\textsuperscript{38}Id.


\textsuperscript{40}Symposium, \textit{The Republican Civic Tradition}, 97 \textit{Yale L.J.} 1493 (1988).
contemporary policy. \textsuperscript{51} Sunstein developed these modern republican ideals further in his 1993 book, \textit{The Partial Constitution}. \textsuperscript{52} His theory is that the Constitution was designed to create a “republic of reasons,” a deliberative democracy where the crass competition of interest groups would be subordinated to a unified search for the common good. \textsuperscript{53}

Historian Laura Kalman has extensively chronicled the “turn to history” in the legal academy’s republican revival, and how that turn was motivated in large part by the persuasive effect of invoking the ideological authority of the past and in particular the founding generation. \textsuperscript{54} Republicanism was attractive to legal scholars because it came cloaked in the mantle of history, ostensibly as the ideology of, and with an implied benign posthumous sanction from the founders. \textsuperscript{55} While left-leaning legal academics felt as though they were put on the defensive in the 1980s by the conservative call for a jurisprudence of “original intent,” \textsuperscript{56} the theory of civic republicanism offered a way to fight back without having to appear to disregard history and at the same time make an alternative claim to historical authority. If the founding of the republic was truly inspired by the passionate desire for civic virtue and the promotion of the common good, then history could support more progressive modern-day outcomes in constitutional interpretation and in public policy. In a very real sense, civic republicanism offered an alternative “originalism of the left.” \textsuperscript{57}

\textbf{B. The Modern Civic Republican Revival and Property Rights}

Individual property rights are seen by some today—inaccurately, in my view—not only as outside republicanism, but as somewhat antirepublican. While civic republican values are invoked to support modern social goals and distributive justice, property rights are more often viewed as procedural

\begin{itemize}
  \item \textsuperscript{51} Frank Michelman, \textit{Law’s Republic}, 97 \textit{Yale L.J.} 1493, 1494 (1988); Sunstein, \textit{supra} note 49, at 1539.
  \item \textsuperscript{52} \textit{CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION} 17–18 (1993).
  \item \textit{Id}.
  \item \textsuperscript{54} \textit{KALMAN, supra} note 44, at 141.
  \item \textsuperscript{55} Rodgers, \textit{supra} note 27. Rodgers seemed to think at the time that the republican revival had played itself out. But while the debates over republicanism have died down, the academic discourse that has invoked civic republicanism directly or indirectly has shown that the concept remains powerful in historiography and legal scholarship.
  \item \textit{KALMAN, supra} note 44, at 145.
\end{itemize}
protections for private wealth in a system of interest-group pluralism and identified specifically with conservative or libertarian political thought. But “property” is a very complex historical concept with respect to the views of the founding generation. The reigning view is that property rights are more properly associated with the Lockean liberalism that, according to leading legal historians such as Morton Horwitz, is thought to have replaced republicanism as the dominant intellectual paradigm as the eighteenth century gave way to the nineteenth.

Modern civic republicanism, however, does not seem to favor individual property rights. Its emphasis is on a positive (contra liberalism’s negative) freedom that includes the primacy of virtue and the collective good—as they are seen through a contemporary lens. The republican revival “rejects liberalism’s procedural vision of justice, which tolerates wide disparities in wealth, and insists that if citizens are in fact created equal, then they must enjoy a rough measure of equality in the actual distribution of wealth.” Thus, perhaps more by omission than by design, modern theorists of civic republicanism have de-emphasized, neglected, or ignored the role of property rights in the early republic.

The preeminent scholarly work on property and republicanism is Professor Gregory Alexander’s *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970*. *Commodity & Propriety* analyzes the vast historical record and offers a civic republican interpretation of property in the ideology of the early republic. Alexander suggests that the classical liberal view of property as “market commodity” leaves out another side of the narrative—the conception of “property as propriety.” The “proprietarian” view is that property exists not merely to advance individual liberty, but to serve as the material basis for promoting civic virtue and the common good. This view of property, Alexander asserts, is consistent with the republican view of the normative ends of government and society.

This view of property-as-propriety holds several potential implications for our understanding of the founding generation’s ideology and, to the

58. E.g., Epstein, supra note 10, at 344–45.
59. McDonald, supra note 1, at 11.
61. Sunstein, supra note 49.
63. Alexander, supra note 9.
64. Id.
65. Id. at 1.
66. Id. at 2.
67. Id. at 1–10.
extent that we find that history to be relevant, to modern approaches to property law. An alternative narrative of the founding that considers property to be less sacrosanct as an individual right, and more of a communitarian resource, challenges the core liberal view of property as an individual liberty interest, which should be protected for its own sake. This could suggest that modern constitutional interpretation should take a less strict approach to property rights. Alexander notes that one of the upshots of unearthing the proprietarian view is the realization that the founding generation may have been less hostile to regulation of private property than some believe—that in fact, property was extensively regulated in the late colonial and early republic eras. Property as a communitarian resource, furthermore, indicates perhaps a greater receptiveness to redistribution of property as a proper object of government.

The research and analysis in Commodity & Propriety has been highly influential and has added a great deal to our understanding of property in American law and society. I should make it clear that I am not necessarily critiquing Alexander’s thesis on the merits; to the extent that he has shown us the existence of a second ideological strain in the American property tradition, it is incredibly valuable. Nor does Commodity & Propriety necessarily set up a strict dichotomy between individual property rights and the proprietarian vision—the account is quite complex, and underscores the continuing tension that has always characterized these “competing visions.” It recognizes that individual property rights were not simply a tenet of Lockean liberalism—they were part of republicanism too.

What I mean to suggest in this Article is that this newer narrative of property as propriety risks leaving behind the individual-rights component and that the concept of property as an individual right was important not only to the competing liberal paradigm but to the founders’ republican ideology itself. Alexander acknowledges a role for property rights in securing the material needs of the virtuous citizen, but the proprietarian story nonetheless tends to deemphasize property rights as an end in itself for members of a republican society. My argument, and the account of property I attempt to give in this Article, is that property—more specifically, individual property rights—were also an important part of republican theory. The Northwest Ordinance shows that protection of property was seen by eighteenth-century Americans as a key component in promoting the

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68. Id.
69. Id. at 9.
70. Id.
71. Id. at 12–13.
common good, by preserving economic order and by encouraging industrious, self-sufficient citizens to contribute to the common weal. Property rights are indeed central to the historical republican vision of a virtuous society. This Article contends that a modern civic republican theory would be historically incomplete if it focuses only on the communitarian aspects of property as propriety and minimizes the role of individual property rights as an essential condition for a virtuous republic.

Today, some of the ideas of the civic republican vision can be seen in the cutting-edge “progressive property” theory advanced by Professor Alexander, Eduardo Peñalver, and others applying a concept of civic virtue to modern property issues. The progressive property school draws from a similar ideological vein as the “proprietarian” story that Alexander tells of founding-era republican property theory. In Part VI this Article will discuss some preliminary implications of the Northwest Ordinance’s brand of property republicanism for progressive property; for the time being it is sufficient to note that there is much in contemporary property debate that draws from the more communitarian conception of property rights that is set forth in the civic republican narrative.

As this Article will show, the original understanding of property exemplified by the Northwest Ordinance requires us to recognize the importance of property rights in the framers’ republicanism. This recognition has two implications for our latter-day understanding of republican theory. First, it challenges the prevailing notions among legal scholars about what belongs as part of “republicanism.” Second, it holds to account the implicit (and sometimes explicit) appeal to historical authority in the scholarship of civic republicanism that constitutes part of its appeal and its legitimizing force for the constitutional interpretations and policy outcomes being advocated.

III. PROPERTY IN THE EARLY REPUBLIC: THE NORTHWEST ORDINANCE AS A REPUBLICAN PLAN

A. Land, Economy, and Property in 1780s America

The Northwest Ordinance reflects the importance of property rights to Americans in the period between the Revolution and the Constitution.

Because property rights had a central place in American thought, it was natural for the Northwest Ordinance to embody them. Because property rights had a central place in American thought, it was natural for the Northwest Ordinance to embody them.73

English subjects traced their property rights back to Magna Carta, which established that property could not be taken away without due process of law.74 Whig theorists who emerged in the late seventeenth and eighteenth centuries emphasized that property rights were part of natural law and were essential to freedom.75

John Locke’s writings on property lend themselves to both liberal and republican understandings.76 Locke influenced many in the founding generation with his theory that it was a fundamental purpose of government to protect property rights.77 Locke’s trinity of “life, liberty, and property”—which has reappeared in some form countless times from the Declaration of Independence, to many state constitutions, to the Fifth and Fourteenth Amendments—is perhaps the most famous articulation of the most basic individual freedoms in society and therefore the primary goal of government.78 More specifically, Locke explained the rationale of what would become the due process clause of the Northwest Ordinance:

The Supremum Power cannot take from any Man any part of his Property without his own consent . . . the preservation of Property being the end of Government . . . For a man’s Property is not at all secure . . . if [the government] have the Power to take from any private Man, what part [it] pleases of his Property . . . .”79

Locke’s notion that liberty and property were intertwined influenced Blackstone, other English writers, and the intellectual leaders of the American Revolution.80 While we generally associate Lockean thought with

74. Reid, supra note 73, at 106.
75. Ely, supra note 7, at 13, 16–17.
79. Locke, supra note 78, Ch. XI § 138 (emphasis in original).
80. Ely, supra note 7, at 17. Blackstone and Locke were among the four most cited authors in the political literature of the founders. Lutz, supra note 77.
the liberal paradigm, Locke’s conception of property also influenced the English Whig tradition from which the American republican movement partly derived.81

Americans had particular reason to be receptive to these arguments giving property rights a high status. For many colonists, emigration was induced by the wide availability of cheap land in North America.82 Land ownership was much more widespread and less concentrated than in Europe, and there was a rising norm of free alienability.83 Colonial society was largely middle-class by the late eighteenth century, and Americans regarded property rights as an important guarantor of their security.84

The Revolution was inspired in part by Britain’s interferences with traditional economic liberties exercised by the colonists. The taxes placed on the colonists (e.g., Stamp Act, Tea Act, Intolerable Acts) provided much of the spark for revolt.85 Interpreting these economic interferences as violations of their rights as English subjects, some of the political literature of the revolutionaries invokes the sanctity of property rights, especially in the Lockean form, but also in a sense of an affront to social virtue.86

During the Revolutionary era, the newly independent states also began to give property rights constitutional status in their fundamental charters.87 The 1776 Virginia Declaration of Rights began by asserting that Americans had “certain inherent rights . . . namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining

83. Id.
84. Id., supra note 7, at 10–16.
86. E.g., James Otis, The Rights of the British Colonies Asserted and Proved (1764), reprinted in 1 The Founders’ Constitution 52–53 (Philip B. Kurland & Ralph Lerner eds., 1987) (declaring “[t]he end of government . . . is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty, and property” and there can be no liberty “where property is taken away without consent”; this taking of property was “in effect an entire disfranchisement of every civil right”). Samuel Adams, hardly an elitist protector of wealth, in 1772 echoed Otis’s sentiments, asserting that “[t]he absolute Rights of Englishmen, and all freemen in or out of Civil society, are principally, personal security personal liberty and private property.” Samuel Adams, The Rights of the Colonists (Nov. 20, 1772), reprinted in 5 The Founders’ Constitution 396 (Philip B. Kurland & Ralph Lerner eds., 1987).
happiness and safety.”\textsuperscript{88} Delaware’s Declaration of Rights and Fundamental Rules asserted: “[N]o part of a man’s property can be justly taken from him or applied to public uses without his own consent or that of his legal Representatives.”\textsuperscript{89}

These experiences and theories informed the political views of American leaders in the 1780s.\textsuperscript{90} American attitudes toward property rights began to appear as founding principles of the thirteen new states.\textsuperscript{91} Echoing Locke and the Virginia Declaration, and foreshadowing similar phraseology in years to come, the Massachusetts Constitution of 1780 begins with a statement of the trilogy, but expounding on the rights of property, and tying all three together as part of the same goal:

All men are born free and equal, and have certain natural, essential, and unalienable rights: among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.\textsuperscript{92}

These examples show that property was generally seen as a basic part of the arrangement between individuals and government. Again, this individual-rights focus has both a liberal and a republican import. These ideas—in both ideological strains—were present at both New York and Philadelphia in 1787, as the leaders in Congress and the Constitutional Convention were at work.\textsuperscript{93}

The original republicanism of the founders—derived from classical republican theory—encompassed property rights as a basic building block of the social order.\textsuperscript{94} Property was inseparable from life and liberty as part of the conditions that were essential to allow virtuous citizens to participate in the polity.\textsuperscript{95} Though the “life, liberty, and property” credo is often associated with Lockean liberalism, it represented a whole greater than the sum of the parts. Property, in the founding era, was important to cultivate as a central liberty, in order to set the conditions for industrious, virtuous

\textsuperscript{88} Virginia Declaration of Rights, § 1 (June 12, 1776), reprinted in 1 \textsc{The Founders’ Constitution} 6 (Philip B. Kurland & Ralph Lerner eds., 1987).

\textsuperscript{89} Delaware Declaration of Rights and Fundamental Rules (September 11, 1776), reprinted in 5 \textsc{The Founders’ Constitution} 6 (Philip B. Kurland & Ralph Lerner eds., 1987).

\textsuperscript{90} Adams, supra note 87, at 187–91.

\textsuperscript{91} Id.

\textsuperscript{92} Mass. Const. of 1780, Art. I., in 5 \textsc{The Founders’ Constitution} 7 (Philip B. Kurland & Ralph Lerner eds., 1987).

\textsuperscript{93} Ely, supra note 7, at 42–44.

\textsuperscript{94} Adams, supra note 87, at 191–92.

\textsuperscript{95} Id.
citizens to achieve self-sufficiency and to prosper so that they in turn could give back to the common good as political participants and guarantors of the collective social order and security.

B. Creating a Republican Order in the Expanding New Nation

The “Ordinance of 1787,” as the Northwest Ordinance is sometimes called, was the culmination of the better part of a decade’s worth of planning and deliberation about the future of the territories beyond the Appalachian Mountains and north of the Ohio River. It passed with little debate and near unanimity because it reflects a general consensus on how the national government should approach the western lands. It was a regular legislative act of the Confederation Congress, unlike the Constitutional Convention, which is perhaps one of the reasons that the Ordinance receives much less attention than the contemporaneous events at Philadelphia. Though I argue that it is a significant reflection of prevailing liberal and republican political ideas, the Ordinance was largely a practical response to events—to the reality that the Northwest Territories were already being settled, and the national government had to act to retain any control. But because of this, and perhaps precisely because it was simply the legislative business of the Confederation Congress, the Ordinance can be seen as a snapshot of Americans’ attitudes toward property rights in 1787.

The statutory history of the Northwest Territory can in a sense be traced back to the Proclamation of 1763, when Parliament prohibited settlement west of the Appalachians. Great Britain attempted to control the settlement patterns of colonists in accordance with its geopolitical goals (wishing to avoid provoking the French-allied Indians after the conclusion of the Seven Years’ War), but by the end of the Revolution, Americans were streaming into the Kentucky country and were beginning to move to

96. ONUF, supra note 3, at 58–60.
98. Id.
the fertile land north of the Ohio. Without a legal process for settlement or for law and order, the region threatened to be overrun by speculators and squatters. This unregulated settlement threatened a loss of control for the national government.

There were several reasons that Congress felt it must step in. First of all, as mentioned, the reality of settlement was a \textit{fait accompli}. It was happening without any legal framework—squatters and speculators, often with conflicting claims, were parceling up the land. The idealized yeoman farmer—the central character in Jefferson’s agrarian republican vision—was being left out. The territory was a new national domain that rested on the cessions of state claims. There was no orderly legal process for selling land or establishing titles. Furthermore, the region was an area of military instability. Conflicts with the resident Native Americans threatened to plunge the frontier into chaos, especially given the tendency of the settlers to organize ad hoc offensive operations. Also, the British had not evacuated some of their outposts, such as Detroit (it would not do so until after Jay’s Treaty in 1794). Finally, the national government was in a fiscal crisis. It had long been imagined that one way—perhaps the only way—to pay off the huge debts incurred in the Revolutionary War was from land sales by the government.

The challenge for Congress was to find some way to regulate this national growth, in a way that would strengthen the union, keep peace with the Indians and other powers, pay the public debt, and still permit enterprising settlers to pursue their own goals. The Northwest Ordinance was the result of a perceived need to create a legal and political framework conducive to both establishing control and fostering regional and national

102. Onuf, supra note 3, at 25.
103. See Eduardo Penalver & Sonja Katyal, Property Outlaws (2010).
104. Onuf, supra note 3, at 28–36.
105. Id. at 2, 21.
106. Id. at 21; Robert F. Berkhofer, Jr., Jefferson, the Ordinance of 1784, and the Origins of the American Territorial System, 29 Wm. & Mary Q. 231, 232 (1972).
109. Id.
111. Onuf, supra note 3, at 2, 21.
economic development. The problem that the Ordinance was intended to solve was one of property, at the individual level (land distribution) as well as structural (national fiscal health and economic development).

The first step in the process was the cession of state land claims. All of the land west of the Appalachians was claimed by one or more states during the Revolution. The largest claim was Virginia’s, which ran from Kentucky through the entire Old Northwest (present day Ohio, Michigan, Indiana, Illinois, and Wisconsin). In February of 1784, Congress agreed to accept the offer of the Virginia General Assembly for the title to all its western land claims. Once Virginia agreed to cede its claim, the rest of the states followed within a year. The national domain was thus established.

Within a week of Congress accepting the land claims of his home state, Thomas Jefferson submitted a report that proposed a government for the territory, later formalized as the proposed “Ordinance of 1784.” While it did not offer a specific plan for conducting the land sales, the proposal did attempt to establish order in the region. Jefferson’s plan directed the settlers in the territory to set up temporary government by adopting the constitution and laws of one of the existing states. Significantly, the plan called for the territory to eventually be formed into new states, which would enter the union “on equal footing with the said original states.” Americans chose to cast aside the colonial blueprint, and provide for the expansion of their union to new territories—significantly, as will be discussed below—as republican governments. The framers contemplated a broader conception of the nation and its lands, which finally became law in the Northwest Ordinance.

113. Peter S. Onuf, Liberty, Development, and Union: Visions of the West in the 1780s, 43 Wm. & Mary Q. 179, 181 (1986).
115. Id.
116. Id.
117. 26 Journals of the Continental Congress 90 (Feb. 23, 1784), http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field%28DOCID%3A%28jc02648%29%29. Interestingly, the cession was more than just an act of the legislature forswearing any claim to the land—it consisted of an actual deed, executed by the Assembly after Congress agreed to accept it.
118. With one exception: Connecticut, while ceding most its claim, did not formally relinquish claims to its “Western Reserve” in Ohio until 1800.
119. See Berkhofer, supra note 106, at 231.
120. Id. at 246.
121. See Northwest Ordinance, art. V.
122. Berkhofer, supra note 106, at 234.
The “Ordinance of 1784” was never fully implemented, but it provided the baseline of ideas—including a plan for land distribution and an orderly settlement pattern, with the machinery of self-government and working towards eventual statehood—that soon became law in the Northwest Ordinance. The Land Ordinance of 1785 imposed a national survey system that was based on a grid pattern. The entire territory was divided geometrically into ranges starting at the western border of Pennsylvania, then townships six miles square, and subdivisions below that, to be marked off by government surveyors. Everything was supposed to be uniform and described precisely on plats, in order to create the reliance and predictability in land titles that yeoman settlers would demand. The United States reserved parts of each township for “the use of the late Continental army” (bounties), for future sales, and “for the maintenance of public schools” (a form of which also appeared in the Northwest Ordinance). The Ordinance’s immediate precursors were significant in finally coming up with a national plan for the new nation’s land and situating it within a republican project.

The subject of government for the territories was visited again in 1786, when Congress debated a motion of James Monroe regarding the formation of states. Congress decided that the territory should be formed into “distinct republican states, not more than five nor less than three,” depending on geography.

124. See generally ONUF, supra note 3. The plan may also have been deemed unwieldy for requiring the territory to be split into ten states (already named by Jefferson, including “Polypotamia” and “Assenisipia”) and moving them too quickly towards statehood—diluting the relative power of the eastern states. Jefferson, “Report on Government for Western Territory.” To the dubious extent that the 1784 Ordinance ever had any legal authority, it was expressly declared null and void in the Northwest Ordinance.


126. Id.

127. Id.


131. Id. at 392.
navigation to the settlers, who needed a market for their crops if the area was ever to develop beyond bare subsistence.\textsuperscript{132} The states were to be formed based on “lakes, rivers, navigation, and Mountains” because of the need for economic integration of the union.\textsuperscript{133} The resolution concluded that the states “shall hereafter become members of the federal Union, and have the same rights of sovereignty, freedom and independence as the original states.”\textsuperscript{134}

C. \textit{The Enactment of the Northwest Ordinance}

Though some progress had been made, and it seemed that Congress agreed on the goals for how the Northwest Territory should be sold, settled, and governed, none of the legislation proposed or passed had really had much effect by 1787. Squatters and speculators were still taking the land, and Congress was having trouble implementing its system of surveying and sales because many settlers simply disregarded the authority of the weak Confederation government.\textsuperscript{135} In early 1787 the political leaders were disturbed even more by the outbreak of Shays’s Rebellion, seen as a dangerous outbreak of localism and resistance to authority.\textsuperscript{136} Shays’s Rebellion was widely seen as a threat to the future of republicanism in the new nation.\textsuperscript{137}

What was needed was an official charter of government, one that would establish the machinery of national sovereignty and pursue the twin goals of establishing order and raising money off the new lands while promoting a republican expansion of the federal union. Congress needed to pass a fundamental document for the territory that would be able to impose order and establish an American society that would enlarge the union of states,  

\textsuperscript{132} \textit{Id.} at 393.  
\textsuperscript{133} \textit{Id.} at 393–94.  
\textsuperscript{134} \textit{Id.} at 394. As an illustration of the weakness of the Confederation government, to implement the resolution the Congress had to “recommend[] to the legislature of Virginia, to take into consideration their Act of cession, and revise the same, so far as to empower the United States . . . to make such a division of the territory . . . .” \textit{Id.}  
\textsuperscript{135} \textit{ONU\textsuperscript{F}, supra} note 3, at 39–42.  
\textsuperscript{136} Andrew R.L. Cayton, \textit{The Northwest Ordinance from the Perspective of the Frontier}, \textit{in THE NORTHWEST ORDINANCE, 1787: A BICENTENNIAL HANDBOOK} 1 (Robert M. Taylor, Jr., ed., Indiana Historical Society 1987). Shays’s Rebellion also had a great impact on the framers of the Constitution. See \textit{C\textsuperscript{A}TH\textsuperscript{E}RINE \textit{DRI\textsuperscript{N}KER B\textsuperscript{OW}EN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787}, at 123, 218 (1966).  
\textsuperscript{137} \textit{BANNING, supra} note 1, at 121.
while securing individual rights and encouraging commerce and production.\(^\text{138}\)

Such a plan was reported in the Congress on April 26, 1787, debated on May 9 and 10, and then postponed until Congress reassembled in July.\(^\text{139}\) On Wednesday, July 11, 1787, the committee to which the proposal had been referred presented “An Ordinance for the Government of the territory of the United States North West of the river Ohio.”\(^\text{140}\) It was given its first reading that day, and its second reading on July 12.\(^\text{141}\) During this entire week, there was no debate on the Ordinance recorded in the Journals of Congress.\(^\text{142}\) On July 13, the Northwest Ordinance passed by a unanimous vote of the states present.\(^\text{143}\)

This section has described the events that led up to the passage of the Northwest Ordinance, focusing on the practical realities of settlement, and the desire to implement order and control in the earlier plans. This context is important to understanding the Ordinance as a document fundamentally concerned with both land ownership and participation in the union. In light of the contemporary attitudes toward the importance of property, as described in the previous section, the Northwest Ordinance can be seen as having its basis in property. Because property rights were important to the founders, it was equally important that the property in the new territory—both individual and national—be protected by a fair distribution, by the establishment of order and security, and by eventual statehood on equal terms.

\(^{138}\) Onuf, supra note 3, at 5–20.

\(^{139}\) Historians have long claimed that Manasseh Cutler, the director of the Ohio Company, which wanted to buy vast amounts of land, used this intervening period to undertake a lobbying campaign to get the ordinance passed, in order to facilitate his economic aggrandizement. See Jay A. Barrett, Evolution of the Ordinance of 1787, 46–48 (G.P. Putnam’s Sons, 1891); Theodore C. Pease, The Ordinance of 1787, 25 Miss. Valley Hist. Rev. 167, 167–68 (1938). The repeated efforts of the 1780s to pass such legislation, however, seem to belie any suggestion that the Northwest Ordinance resulted from the efforts of the speculator lobby.

\(^{140}\) Journals of the Continental Congress (July 11, 1787). The committee consisted of five Congressmen including Nathan Dane, who is usually credited with authorship of the Northwest Ordinance (though the authorship was the subject of a heated sectional controversy in the Nineteenth Century). Onuf, supra note 3, at 141–43.

\(^{141}\) See Journals of the Continental Congress, supra note 140.

\(^{142}\) See id.

\(^{143}\) There were eight states present of the thirteen. Under the rules of the Articles of Confederation, each state delegation had only one vote. Articles of Confederation of 1781, art. V, para. 4. Even so, there was only one dissenting vote in the entire Congress, an unexplained “no” from Abraham Yates of New York. Journals of the Continental Congress (July 13, 1787).
D. The Northwest Ordinance as a Republican Document

Understanding the Northwest Ordinance as a document fundamentally concerned with an ordered society in turn leads to an inquiry as to how that overriding concern fit into the founding generation’s political ideology. At first glance, the protection of individual property rights and the promotion of commerce seem to accord with the classical liberal paradigm. However, both the holistic reading of the text and an understanding of the historical background of the Ordinance nonetheless indicate its consistency with republican values. Indeed, the Ordinance aimed towards expanding republicanism on a continental scale. The Northwest Ordinance was the culmination of a long process that the Continental Congress grappled with since its inception, namely, how to establish a republican order in the vast western territories.\(^{144}\) Faced with the realities of rapid settlement by squatters, military instability with British and French presences on the frontier, hostile Native Americans, and general lawlessness on the one hand, and a crushing Revolutionary War debt but an enormous resource in federal lands on the other, no problem was more pressing to the Confederation government after independence in the 1780s.\(^{145}\)

Congress’s answer, the Northwest Ordinance, was a very republican project. In providing a strong guarantee of individual economic rights and the rule of law, the intent of the Ordinance was to encourage the migration and settlement of the virtuous, industrious yeoman farmer and citizen, rather than allowing a lawless regime of speculators and squatters to take root.\(^{146}\) And by encouraging the broad development of an integrated national economy, the Ordinance recognized the necessity of promoting a commercial republic for the greater good of the society.\(^{147}\) The framers of the Ordinance understood that to succeed within the context of the American experiment, republicanism would have to accommodate both a large-scale national polity (contrary to the admonitions of Montesquieu but

\(^{144}\) ONUF, supra note 3, at 59.
\(^{145}\) Id. at 2, 28.
\(^{146}\) Id. at 59.
\(^{147}\) Id.
effectively rebutted by Madison in The Federalist)\(^\text{148}\) and the promotion of an integrated national economy in order to preserve civic virtue.\(^\text{149}\)

The historical context of the Northwest Ordinance shows that the larger plan of which the Ordinance was the legal keystone was to provide the mechanism for the expansion of republican institutions within the context of the federal union. Historian Robert Hill has argued persuasively that the Northwest Ordinance was designed to promote republicanism.\(^\text{150}\) Hill focuses on the institutions of government that were provided for in the Ordinance in order to encourage the settlement of virtuous republican citizens as well as the background of its enactment to achieve the twin goals of raising revenue and regulating the land.\(^\text{151}\) He concludes that the Northwest Ordinance reflected a desire among the leaders of the founding generation in Congress to provide an ordered society that would provide security for liberty and property to the yeoman settlers who would be the guardians of republicanism in the expanding union.\(^\text{152}\)

### E. The Northwest Ordinance as Historical Evidence

The historical record shown in the political context of the Northwest Ordinance reflects not a dichotomy between republicanism and property rights but rather a strong regard in the founding era with protection of property as one of the key requirements for encouraging a virtuous, self-sufficient citizenry. The interpretation of the Northwest Ordinance advanced in this Article—and by implication the original understanding of the founding era—is corroborated by the primary and secondary evidence of how the leaders of the founding generation conceived of property rights not just in their own right as individual liberties but more importantly as building blocks of the ordered liberty necessary to establish a successful republic. This helps us understand that property rights were central to both

\(\text{148. Montesquieu, The Spirit of the Laws bk. VIII ch. XVI vol. I, available at http://www.constitution.org/cm/sol_08.htm (arguing that the preservation of virtue necessary to maintain a republican government could only occur in a relatively small and homogenous polity); The Federalist No. 10 (James Madison) (arguing that in America, the very existence of factions and competing interests rendered it necessary to rely on a large federal system to preserve republican government).}\)

\(\text{149. ONUF, supra note 3, at 18–19.}\)

\(\text{150. Robert S. Hill, Federalism, Republicanism, and the Northwest Ordinance, 18 PUBLIUS 41, 41 (1988) (“It is seen how the Northwest Ordinance, establishing government, procuring certain social and economic conditions, and inducing proper habits and opinions, sought to make the expansion of the Union an extension of republicanism.”).}\)

\(\text{151. See id. at 41–52.}\)

\(\text{152. Id. at 52.}\)
individual rights and the larger public good—in other words, to both liberal and republican ideologies. The uniquely American brand of republicanism, contrary to the modern understanding, depended on the preservation of individual liberties, including property rights. The Northwest Ordinance is important to understand in its own right because it served as a quasi-constitutional charter for the expanding territories and as the blueprint for the admission of new states to the Union. As a matter of legal history, it also serves as excellent evidence of the original understandings of the founding generation, especially concerning the original meaning of the Constitution’s property clauses. In fact, the Northwest Ordinance, which gave Congress the opportunity to create the conditions for its ideal republican society on an essentially blank political slate, is in one sense a much more constitutive document than the Constitution itself, which was focused on compromise between existing political interests and allocation of power between them. Thus, while this Article offers a particular thesis about the role of property rights in civic republican ideology, it also suggests that there is much more relevant analysis about the founding era that might be gained from further study of the Northwest Ordinance.

IV. PROPERTY RULES IN THE NORTHWEST ORDINANCE

Thus far this Article has analyzed the important role of property in the founding era and has suggested that the Northwest Ordinance was in certain ways an important component of the founders’ republican vision. In this Part, I will undertake a close reading of the Northwest Ordinance itself to examine how concern for property permeates the document, particularly in light of the founders’ republicanism. Much of the scholarly attention that has been paid to the Ordinance has come from focusing on single provisions by themselves, such as the “religion, morality, and knowledge” clause or the prohibition of slavery. This Part will provide a more detailed study of some of those provisions, especially the Ordinance’s “constitutional”

153. See Rakove, supra note 1, at 166.
155. E.g., Hyman, supra note 19, at 18–35.
property rights clauses. It will at the same time attempt to provide a more holistic reading of the document’s other provisions regarding property. Read as a whole and coherent text, its primary concerns of government, property, and order seem to be intertwined. Even though the legislative history of the Ordinance does not reveal any particularly fierce debate or much argument over its language,\textsuperscript{157} it nonetheless evinces an inner logic in its context. Perhaps this is because the ideas finally implemented in it were derived from such a long period of rumination; or perhaps it was because they were generally consistent with a broader consensus about how to design a system of ordered liberty in the new territories.

This Part will focus on the array of property rules set forth in the Northwest Ordinance. The Northwest Ordinance consists of two groupings of provisions. It begins with thirteen “sections” that set forth specific rules for governance of the Northwest Territory.\textsuperscript{158} Section 14 then includes six “articles of compact” that describe the path to statehood and set forth numerous guarantees of rights, including the due process, takings, and contracts clauses similar to those that appeared in the draft federal constitution shortly thereafter.\textsuperscript{159} This Part will focus first on the provisions concerning private property ownership (including descent and distribution, transferability and requirements for political participation) in Sections 1 through 13, and will then turn to the “constitutional” property rights guarantees in the articles of compact: the due process, takings, and contracts clauses. It will then consider the property implications of the Ordinance’s prohibition of slavery as well as the role of property in the larger plan for securing a republican order for the expanding Union.

A. Private Property Ownership

In this Section of the Article, I will discuss the role of property rules in the structural scheme of the Northwest Ordinance. The first thirteen sections of the Northwest Ordinance set forth the basic legal order and rules for government of the new American territory beyond the Appalachian Mountains and north of the Ohio River.\textsuperscript{160} They include a structure for the territorial system of government, a process for appointing and electing

\textsuperscript{157} \textsc{Calvin Jillson} \& \textsc{Rick K. Wilson}, \textit{Congressional Dynamics: Structure, Coordination, and Choice in the First American Congress, 1774–1789}, at 277 (1994) ("Given the intensity of conflict over almost every issue before the Congress, the ease with which the Northwest Ordinance passed seems startling.").

\textsuperscript{158} \textit{See} \textit{Northwest Ordinance, §§ 1–13}.

\textsuperscript{159} \textit{See id. arts. I–VI}.

\textsuperscript{160} \textit{See id. §§ 1–13}.
officials, and a process for establishing territorial laws. These sections also contain rules for property ownership, and numerous property requirements for political participation through suffrage and officeholding. These rules individually reflect elements of both liberalism and republicanism. When read together, these property rules pervade the Territory’s structure of governance, evincing the important role of property in the larger scheme.

1. Inheritance and Transfer of Property

After providing that the Northwest Territory shall be governed as one district, it is noteworthy that the second section of the entire Ordinance deals extensively with private property. Section 2 of the Ordinance provides rules for intestate with the disposition of real and personal property in the territory, including intestate descent and distribution, requirements for leaving property via will, and conveyances of real estate. That the drafters placed so much emphasis on property so early in the document indicates at the outset a concern for stable rules to secure individual property rights as an important object of the new order for the expanding union.

Section 2 goes into some detail regarding intestate succession. It is significant for prohibiting primogeniture and entail and for providing equal distribution of property through intestacy. Reading the full intestacy portion of Section 2 gives a sense of the priority given to the scheme for property succession:

Sec. 2. Be it ordained by the authority aforesaid, That the estates, both of resident and nonresident proprietors in the said territory, dying intestate, shall descent to, and be distributed among their children, and the descendants of a deceased child, in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parents’ share; . . .

This intestacy scheme may look familiar to modern readers versed in contemporary state wills acts in its general plan for distribution to next of

161. See id.
162. See id.
163. Id. § 2.
164. Id.
165. Id.
kin in equal shares.\textsuperscript{166} It is also reflective of the intestacy schemes that some of the original thirteen states enacted during and after the Revolution.\textsuperscript{167} This overall trend—and the inclusion of the Northwest Ordinance in this trend—was part of a move toward a republican vision of property in the founding era.

The Ordinance provides that when a person dies intestate, his or her property shall descend to his or her descendants in equal parts.\textsuperscript{168} This is significant because it formally disavows the old-world custom of primogeniture, which kept estates intact by transmitting them in entirety to the eldest son.\textsuperscript{169} It also prohibits the entailment of estates—the feudal custom that required land to be passed inalienably down the chain of descendants through the legal device of the fee tail.\textsuperscript{170} The system of primogeniture and entail stifled the dispersal of wealth and symbolized the old aristocratic order to the citizens of the new republic.\textsuperscript{171} These customs had already begun to trail off in the colonies in practice and had been formally abolished in several revolutionary state constitutions and codes.\textsuperscript{172} Thomas Jefferson considered the institutions to be antithetical to a republican society and that their abolition through legislative reform would serve as “a foundation laid for a government truly republican.”\textsuperscript{173}

Scholars have interpreted the trend towards abolishing primogeniture and entail in the founding era as a part of the republicanism of the day.\textsuperscript{174} Willi Paul Adams notes that in the public discussions of the new state constitutions that were drafted during and after the Revolution, many commentators argued strenuously that these restrictions on property had no place in a republic.\textsuperscript{175} Stanley Katz focused on intestate succession law as one of the key facets of the republican ideology of the day in his article \textit{Republicanism and the Law of Inheritance in the American Revolutionary Era}.\textsuperscript{176} Noting that inheritance law served as a symbol of the aristocratic

\begin{itemize}
\item \textsuperscript{166} Jesse Dukeminier et al., \textit{Wills, Trusts, and Estates} 71–74 (2009).
\item \textsuperscript{167} See Adams, \textit{supra} note 87, at 193–94.
\item \textsuperscript{168} Northwest Ordinance, § 2.
\item \textsuperscript{169} Adams, \textit{supra} note 87, at 193–94.
\item \textsuperscript{170} Jesse Dukeminier et al., \textit{Property} 198–201 (7th ed. 2010).
\item \textsuperscript{171} Ely, \textit{supra} note 7, at 30.
\item \textsuperscript{172} Adams, \textit{supra} note 87, at 193–94. Adams notes that among other states, Pennsylvania and Georgia abolished entailment in their state constitutions, and New York and Virginia by statute—the latter through the efforts of Jefferson. \textit{Id.}
\item \textsuperscript{174} Adams, \textit{supra} note 87, at 193–94.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} Katz, \textit{supra} note 173, at 3–4.
\end{itemize}
English society against which the colonists rebelled, Katz explains that many Americans saw the abolition of primogeniture and entail as crucial reforms central to the promotion of a republican society.\(^\text{177}\) Though the revolutionary-era reforms did not extend further towards egalitarianism, Katz concludes, removing the compulsory inequality of restricting property through inheritance was a very important goal of republican ideology.\(^\text{178}\) Gordon Wood likewise notes how the abolition of primogeniture and entail were part of the Revolution’s attack on the power of hereditary privilege.\(^\text{179}\) Clare Priest has recently suggested that the “republicanism interpretation” of American property may overstate the actual effect of these founding-era reforms but that nonetheless the formal abolition of the feudal property inheritance system was thought to be a significant republican achievement by increasing the alienability of property.\(^\text{180}\)

This emphasis on equal distribution not only rejects the specific feudal customs of primogeniture and entailment, it affirmatively creates an intestacy scheme that promotes greater equality in property rights, and—especially with the largely unsettled Northwest Territory—it encourages a wider distribution of property among citizens. These two goals are essential components of founding-era republicanism. In terms of equality, the intestacy scheme treats equally all similarly situated relatives (e.g., children, grandchildren, first cousins).\(^\text{181}\) No one sibling is favored or disfavored by the accidental order of birth. And the provision is gender-neutral: both male and female siblings stand to inherit equal shares. Gordon Wood describes the post-revolutionary changes in inheritance law as a confirmation of “the new enlightened republican attitudes toward the family” by recognizing greater property rights for widows and daughters.\(^\text{182}\) Application of these republican property trends in the Northwest Ordinance was particularly important given the unsettled situation of land ownership in the expanding nation.

Because the rule allows for the breaking up of landed estates by equal distribution of land between descendants, it also promoted a more widespread distribution of land. Over the course of time, as the western

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177. Id. at 11 (“For the Revolutionary generation, the law of inheritance took on a new, strategic importance, since it appeared to symbolize the aristocratic aspects of English government against which the Revolution increasingly directed itself.”).
178. Id. at 28–29.
182. WOOD, supra note 179, at 183.
territories attracted more settlers, their estates (large and small) would be divided among an even larger number of citizens. While the size of individual landholdings could well become smaller under an equal-distribution law, this was thought of as a benefit under republican ideology, which idealized the virtuous yeoman landowner. The wide distribution of property would increase the number of “stakeholders” in the political process and would also diffuse the political power that came from larger concentrations of property. As Priest notes, Alexis de Tocqueville described the dispersed nature of property ownership as one of the central features of American democracy. The Northwest Ordinance was to play a key role in promoting this dispersal in the then-unsettled western regions. The concern for property distribution in Section 2 of the Ordinance thus reflected a desire to populate the new territories with a greater number of virtuous, freeholding republican citizens.

Many Americans of the time were already, in practice, avoiding the restrictions of traditional English inheritance rules by dividing their property equally among descendants by will. Furthermore, John Hart has noted how Madison’s support for the Virginia statute abolishing the fee tail was consonant with his larger concern for property rights. The Northwest Ordinance recognized this trend and ratified the idea that citizens are free to make their own decisions about to whom to leave their property, through a version of a “wills act” in Section 2:

[E]states in the said territory may be devised or bequeathed by wills in writing signed and sealed by him or her in whom the estate be, (being of full age,) and attested by three witnesses . . .

This language, similar to a typical state wills act of the time, may not be remarkable for originality, but it is once again noteworthy for its placement at the beginning of this charter legislation, reflecting the importance of individual control over property. The practical effect of individual wills in

183. HYMAN, supra note 19, at 23.
185. HYMAN, supra note 19, at 20.
188. Priest, supra note 180, at 394.
190. Northwest Ordinance, § 2.
avoiding the feudal restrictions went along with the formal reforms in state laws and the Northwest Ordinance in abolishing primogeniture and entail. As Katz notes, “[t]he reform of inheritance law thus carried a symbolic importance disproportionate to the significance of its substantive implications” because of their association of traditional restrictions with the aristocratic order.191

In addition to the rules regarding inheritance of property, the Northwest Ordinance further promoted free alienability of real and personal property through voluntary transfer:

[R]eal estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose, and personal property may be transferred by delivery . . . .192

This language creates a general presumption that property can be freely transferred through voluntary exchange. As with the inheritance reforms, these property rules were not new, nor were they inconsistent with the general tenor of contemporary property law in the states, but they are significant for their prominent inclusion at the beginning of the Northwest Ordinance.

The concern for free alienation of land and personal property reflected in this language contains strains of both liberalism and republicanism. In one sense, it can be interpreted within the “commodity” conception of property as simply one form of wealth that can be exchanged in the marketplace.193 A free-exchange system also makes possible the accumulation of larger estates; given the historical commentary on the role of speculators such as Mannasseh Cutler in lobbying for the Northwest Ordinance, this has long been suggested as one of the motives behind the legislation.194 The emphasis on procedural requirements and recordation can also be viewed, however, as a system for promoting the republican goals of wide distribution and virtuous yeoman citizenry. Having a recording system for property would

193. See generally ALEXANDER, supra note 9.
194. See supra Part II.
allow the individual settler to move his family, work the land, and participate in society with confidence that his property was secure.\(^{195}\)

The provisions for alienability rights for property, however, are also consistent in several ways with republicanism. As discussed above, the literature on inheritance law in the founding era shows that many Americans thought that removing restrictions on transfer of property at death was a crucially important component of establishing a republican society.\(^{196}\) For similar reasons, the unrestricted inter vivos transfer of property could help broaden the base of land ownership among the citizenry. After all, one of the main objectives of Jefferson and other proponents of establishing a system of governance for the Territory was to populate it with American citizens; the predecessor Land Ordinance of 1785 was designed to implement a distribution system to divide the land and encourage its sale to those who would settle and improve it.\(^{197}\) The Jeffersonian vision of a republican society depended in large part on the ability of his virtuous yeomen to acquire property.

The recordation requirement can also be thought of as a means for providing security to those republican landowners. The ultimate goal of any potential speculators—as well as the federal government—was to sell the land.\(^{198}\) A recording system, while allowing land to serve as a commodity in the liberal sense, would also provide an important form of security for individual property rights on the then-lawless frontier. Squatters were as repugnant to the ideal republican society as were aristocrats,\(^{199}\) and the disorder that could come from uncertain or disputed land claims would discourage the settlement of those virtuous and productive yeomen citizens. The republican goal was to have a society of independent, small landholders; these freeholders would insist on a degree of security for their property before committing to moving their families to new lives on the frontier. In this sense, the provision of a recording system for the settler can be regarded as a necessary protection of individual property rights to promote a republican order in the new territories.

Section 2 included one additional property provision: it limited the rules described above by declaring that the French and Canadian settlements in the western portions of the Northwest Territory (primarily in present-day Illinois) could maintain “their laws and customs now in force among them,

\(^{195}\) Onuf, supra note 3, at 31.

\(^{196}\) See generally Katz, supra note 173.

\(^{197}\) Onuf, supra note 3, at 21.

\(^{198}\) Id. at 33.

\(^{199}\) Id. at 34–35.
relative to the descent and conveyance, of property.”

All in all, the first substantive section of the Northwest Ordinance (and the largest in terms of word count) is entirely concerned with setting forth a system of rules for individual property ownership.

The movement towards a freer, more equal, and wider distribution of property through inheritance and alienability rules was considered in the founding era to be an important component of promoting a republican society. The Northwest Ordinance, then, was part of the general move toward a more republican conception of property. This Article suggests that in addition to its conformance with the general trend, and its specific importance in applying it to the new American territories, the Northwest Ordinance also has significance in “nationalizing” these property rules for the first time by adopting them in federal legislation—legislation that furthermore operated as a charter law, and even in a certain sense as a constitutional document.

2. Property Requirements for Political Participation

Another important part of the Northwest Ordinance’s consideration of property is the land ownership qualifications for holding office and for suffrage. While the concept of land ownership as a prerequisite for political participation has long since passed, in the late eighteenth century it was a common feature and not inconsistent with the prevailing understanding of civic republicanism. The Northwest Ordinance, like many early-republic constitutional documents, included property requirements for both officeholding and voting.

Sections 3 and 4 of the Ordinance establish the qualifications for the chief officials—governor, secretary, and judges—who would be appointed to administer the new territories, including residency requirements and property holdings:

Sec. 3. Be it ordained by the authority foresaid, That there shall be appointed from time to time by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district,

201. Elazar, supra note 82, at 3; Hart, supra note 189, at 193.
203. ADAMS, supra note 87, at 194–96.
204. Northwest Ordinance, § 3.
and have a freehold estate therein in 1,000 acres of land, while in the exercise of his office.  

Sec. 4. There shall be appointed from time to time by Congress, a secretary, whose commission shall continue in force for four years unless sooner revoked; he shall reside in the district, and have a freehold estate therein in 500 acres of land, while in the exercise of his office.

There shall also be appointed to a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in 500 acres of land while in the exercise of their offices.

Under this system of governance, all of the senior public officials would be required to live in the territory and to own a certain minimum amount of land. The governor, appointed by Congress, would be granted a freehold estate of one thousand acres, and the other appointed officials would receive smaller estates commensurate with their rank. To be eligible, the legislators elected by the people were required to own an estate of two hundred acres. This system was not unusual for the time. As James W. Ely, Jr., has noted, “when the Constitution was written, virtually every state imposed a property or taxpaying qualification on suffrage and set higher property qualifications to hold public office.” Though it seems, well, somewhat undemocratic in light of modern attitudes toward political participation and universal franchise, these requirements were seen in the 1780s as a natural part of establishing an ordered free society within the more limited conception of the polity that prevailed at the time. This was partly because, as Ely describes, the framers believed property owners would make the best candidates to respect individual property rights. The property requirements were also consistent, in a related sense, with republicanism: ensuring that the officeholders were landowners in the territory incentivized virtuous governance and aligned them with the interests of fellow landowning citizens, even if of the smaller “yeoman” variety.

205. Id.  
206. Id. at § 4.  
207. Id.  
208. Id. at §§ 3–4.  
209. Id. at § 9.  
210. ELY, supra note 7, at 47.  
211. Id.
The Ordinance also had a property requirement for service as a representative in the territorial assembly. Section 9 set forth a process for electing representatives:

>[N]o person [will] be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same . . .

Once the representatives were elected, they were to meet and nominate persons to serve in the upper-house “legislative council”; these nominees were also subject to residency requirements and property qualifications:

>[The representatives] shall nominate ten persons, residents in the district, and each possessed of a freehold of five hundred acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid . . .

The property qualifications for legislative representation are consistent with those for the governor, secretary, and judges; it is especially significant considering the prominent place of the legislative branch in republican ideology as the part of government that most closely represents the people (and also the branch most feared for the potential to meddle with property rights). While legislative candidates faced a smaller property requirement than the governor, secretary, and judges, it could potentially have served as a steeper barrier to office, since the Ordinance seems to indicate that the administrative and judicial officers appointed by Congress were to receive a land grant, while the representatives seemed to be expected to acquire their 200 acres on their own.

A separate, but closely related property qualification for political participation was the requirement that a citizen needed to be a landowner in order to vote. Section 9 of the Ordinance, after establishing the process for electing representatives, stated the qualifications for electors, including a freehold estate:

>Provided also, That a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the
district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.\textsuperscript{218}

In 1787, when both the Northwest Ordinance and the Constitution were drafted, every American state had some sort of property or taxpaying requirement for voting.\textsuperscript{219} Thus, the Ordinance’s property requirement was not unusual, but rather was entirely consistent with the prevailing trend.\textsuperscript{220} This trend, which seems antiquated to modern eyes, had elements of both liberalism and republicanism. Willi Paul Adams, in his study of the early state constitutions, gives several reasons for the property qualifications, including the liberal-sounding reasons of majority rule for decisions that affect property and keeping property and power in the same hands.\textsuperscript{221} But the primary reasons that Adams cites are more consistent with a republican ideological perspective: first, that owning property confers personal independence; and second, that ownership of land ties the owner to the well-being of the community.\textsuperscript{222}

In addition to the fact of land ownership itself, the residency requirements further tied the citizen to the land in the Northwest Territory. The governor, secretary, judges, representatives, and electors were all required to “reside in the district.”\textsuperscript{223} The residency requirements both for voting and for serving in public leadership reinforce the notion that land was thought of not just as a commodity, but as an important part of community membership in a civic republican sense. This analysis is similar to Adams’s explanation that land ownership was thought to bind the virtuous citizen to the common good of the community—which he notes was the standard justification of ownership requirements in the founding era.\textsuperscript{224}

In short, the property requirements were not an elitist device intended to perpetuate an aristocracy, as much as they were a reflection of the “stakeholder” facet of republican ideology—the belief that those persons who have a personal investment in the society will be the most virtuous and judicious decision-makers for it. Thus, the hierarchy of property qualifications keyed to the respective roles in government can be interpreted

\begin{itemize}
  \item \textsuperscript{218} Id.
  \item \textsuperscript{219} ADAMS, supra note 87, at 315–31.
  \item \textsuperscript{220} ELY, supra note 7, at 47.
  \item \textsuperscript{221} ADAMS, supra note 87, at 207.
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} Northwest Ordinance, §§ 3–4, 9.
  \item \textsuperscript{224} ADAMS, supra note 87, at 209–10.
\end{itemize}
as a part of establishing a republican society of virtuous citizens who were personally tied to the land.

The Ordinance continues with six “[a]rticles of compact between the Original States and the People and States” in the territory to “forever remain unalterable, unless by common consent . . . .”225 Here we see another guarantee of security: instead of a mere statute revocable at will by the Congress, the Ordinance is to be considered a compact, requiring the national government to live up to the provisions of the act even before the new states were admitted. The first Article provides that no person “shall ever be molested on account of his mode of worship, or religious sentiments . . . .”226

Article II of the Ordinance is the most significant regarding traditional private property rights. Because the provisions requiring due process and just compensation when property is taken and prohibiting laws that interfere with private contracts subsequently appear in the Constitution, I will describe them in greater detail in the next Section. But there is even more to Article II. It also confirms traditional rights of accused criminals, such as rights to bail, trial by jury, moderate fines, no cruel or unusual punishments, and judicial proceedings according to the common law. The fact that the most basic personal property rights are included with these criminal rights—similar to the structure of the Bill of Rights—suggests that the founding generation thought of liberty and property rights as important components of a republican order.227

B. Constitutional Protections of Property Rights

Congress’s concern for property in the Northwest Ordinance is most evident in its constitutional protection of property rights. Article II of the Northwest Ordinance contained precursors to the Constitution’s Contracts Clause and to the Due Process and Takings Clauses of the Bill of Rights.228 Within five years, these three provisions were written into the federal Constitution. The Northwest Ordinance was the direct inspiration for the inclusion of the Contracts Clause in Article 1, Section 10; the Ordinance’s due process and takings clauses marked the first time these property rights

226. Id. at art. I. This is considerably more liberal than, for instance, the practice of New Hampshire, which provided in its 1792 constitution that no person could be a state senator “who is not of the Protestant religion.” N.H. CONST. of 1792, pt. 2d, § 29.
227. ELY, supra note 7, at 54.
228. Id. at 29–31, 45.
provisions were incorporated as constitutional rights at the federal level. Thus, the Northwest Ordinance is invaluable—though underappreciated in scholarship—for its relevance to the original meaning of the Constitution’s property rights clauses.

The Ordinance indicates that the original understanding of individual property rights in the founding era may have been somewhat more robust than has been emphasized in the civic republican narrative. The Ordinance was representative of prevailing attitudes in 1787 and was consistent with them by incorporating property rights as founding principles of compact. The property protections granted in the Ordinance also advanced Congress’s civic republican vision for the Northwest. Individual property rights, as well as alienability and a stakeholder approach to politics, were thought necessary to provide the conditions under which the virtuous yeoman citizen could move to the territory secure in his land and his investment and then to improve the land and secure the economic independence that would allow him to participate in the creation of republican society in what would become new states.

1. The Contracts Clause of the Northwest Ordinance

Article II of the compact set forth a contracts clause. This clause, securing private property rights, was directly incorporated into the Constitution as what we know today as the Contracts Clause. The Ordinance provided that the government would not interfere with private obligations:

“[I]n the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.”

Though there were minor differences, this same principle was made
part of the supreme national law: “No state shall . . . pass any law . . . impairing the Obligation of Contracts.”

The Contracts Clause is not as deeply grounded in English tradition and colonial practice as the due process or takings principles. Nor is its interpretation as much at issue today—though in the nineteenth century it was the most litigated part of the entire Constitution. However, since it was part of the original Constitution and was thus debated and scrutinized at Philadelphia and afterwards, there is a substantial documentary record of the framers’ intentions in including the Clause.

The economic situation in 1787 inspired the Contracts Clause. The purpose of the clause in the federal Constitution—and the reason it was specifically applied to states—was to protect existing property rights from state legislation. In the 1780s, as the American economy was floundering, states began to pass laws to relieve pressure on debtors. In so doing, they were abolishing private, bona fide contracts by legislative fiat. The pattern of practices the states engaged in included laws for the use of paper money, which, being subject to extreme inflation, undermined the value of contracts by allowing debtors to tender worthless paper for their original obligations. “Installment laws” were legislative determinations that debtors could pay their bills over a period of time regardless of the terms of the contract; “stay laws” likewise postponed the payment of debts. These state practices undermined the ability of citizens to have any hope that the economic decisions they made would be secure.

A reading of the Contracts Clause with the other provisions of Article I, Section 10 indicates that this situation was the chief evil addressed. Before the Section mentions laws interfering with the obligations of contracts, it also prohibits the states from legislating to “coin Money; emit Bills of

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Northwest Ordinance, as one of the “articles of compact,” it was operative on both Congress and the territorial governments. For the significance of this difference between the constitutional contracts clause and the operation of the takings clause (on the federal government, but not the states), see Michael W. McConnell, _Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure_, 76 CAL. L. REV. 267 (1988).

237. See ELY, supra note 7, at 68.
239. ELY, supra note 7, at 68.
240. Id.
241. Id.
Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto law,” as well as to interfere with contracts.\textsuperscript{243} The primary effect of all these practices, as employed by the state governments, was to undermine the value of legitimate contracts.

The Constitution’s Contracts Clause was first introduced in the Philadelphia convention on August 28, 1787, when Rufus King “moved to add, in the words used in the Ordinance of Congress establishing new states, a prohibition on the states to interfere in private contracts.”\textsuperscript{244} King felt that the contracts clause in the Northwest Ordinance was such a good idea that it should be copied into the federal Constitution.\textsuperscript{245} The presence of any causal link or direct influence of the Northwest Ordinance on the framers at Philadelphia\textsuperscript{246} is not central to the argument of this paper, but for this particular property right, at least, there is direct evidence that the Northwest Ordinance was the source of the Contracts Clause in the Constitution.\textsuperscript{247}

The delegates did not immediately agree on the wisdom of such a measure. Gouvernour Morris objected, stating that “this would be going too far” in interfering with the prerogatives of the state governments.\textsuperscript{248} But James Wilson seconded King’s motion, and Madison noted that while inconveniences may arise, he “thought on the whole it would be overbalanced by the utility of it.”\textsuperscript{249} However, no decision was reached that day.\textsuperscript{250}

The matter was referred to a committee of detail, which on September 14 reported a draft that included the current wording of the Contracts Clause.\textsuperscript{251} According to Madison, Elbridge Gerry “entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts.”\textsuperscript{252} With no other dissent recorded, the Contracts Clause was approved.\textsuperscript{253}

\textsuperscript{243} U.S. CONST. art. I, § 10.
\textsuperscript{245} Id.; see also Ely, supra note 238, at 5–6.
\textsuperscript{246} Catherine Drinker Bowen noted that the members of Congress were in constant communication with their counterparts at Philadelphia, who were intimately aware of the Northwest Ordinance. BOWEN, supra note 1, at 174.
\textsuperscript{247} See Ely, supra note 238, at 4.
\textsuperscript{248} FARRAND, supra note 244, at 439 (referencing inclusion of Contracts Clause in Article I, section 10).
\textsuperscript{249} Id. at 440 (referencing Convention debate over Article I, section 10).
\textsuperscript{250} Id. at 439.
\textsuperscript{251} Id. at 610.
\textsuperscript{252} Id. at 619.
\textsuperscript{253} Id.
The framers, while not necessarily unconcerned about the plight of debtors, were alarmed at the effects these state interferences were having on the national economy (especially the terms of credit for international trade, which the state practices undermined by forgiving debts owed to foreign countries) and on the principle of property rights.\footnote{Ely, supra note 238, at 5.} In Federalist No. 44, Madison asserted that “the sober people of America are weary of . . . legislative interferences in cases affecting personal rights.”\footnote{The Federalist No. 44, at 248–50 (James Madison) (Clinton Rossiter ed., 1961).} He claimed that “laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation,” and that such laws were antithetical to “the spirit and scope” of the state constitutions.\footnote{Id.} He continued by stating that the people demand a reform that will “inspire a general prudence and industry and give a regular course to the business of society.”\footnote{Id.} Thus, protection of the obligations of legal contracts was important not only for individual rights, but for the national economy. In that sense, the protection of contracts in both the Northwest Ordinance and the Constitution must be seen as expressing a concern for both individual rights but also the greater social good, in trying to restore general faith in the economy and the legal system.

Hamilton agreed.\footnote{The Federalist No. 7, at 30–33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).} He was concerned that such laws would tear at the fabric of the Union itself.\footnote{Id.} If each state pursued a system of economic policy that interfered with the rights of citizens in other states, he argued, then the public debt and “competitions of commerce” would lead to conflict among states; “laws in violation of private contracts” would be the responsible “source of hostility.”\footnote{Id.} Hamilton further noted that the “vacant western territory” (i.e., the Northwest), as the “common property of the Union,” required that these potential conflicts between the property rights of citizens in different states be prevented, or else the area would be prevented from development.\footnote{Id.} Hamilton was concerned with the orderly and beneficent disposal of the commons.\footnote{Id.}
Several of the state ratifying conventions, where one might expect to find hostility at this federal restraint upon state action, saw vigorous defenses of the Constitution’s Contracts Clause along the same lines. In South Carolina, Charles Pinckney lauded the clause for ensuring that “the citizens of the States may trade with each other without fear of tender-laws or laws impairing the obligation of contracts . . . public as well as private confidence shall again be established; industry shall return among us; and the blessings of our government shall verify . . . that with states, as well as individuals, honesty is the best policy.” This shows that even in South Carolina, where concern for debtors influenced politics, a concern for enforcing contracts was an important part of the public debate.

The Northwest Ordinance, as the direct source of the Constitution’s Contracts Clause, is highly relevant to our understanding of the framers’ concept of property rights in republican society. The events of the time indicate that interference with private obligations by the government was causing major problems with personal security and the national economy. As Hamilton suggested, in the new territories it was especially important to guarantee to a new settler that the government would not undermine his investments. Its adoption in the Constitution is strong evidence that the framers believed the contracts clause of the Northwest Ordinance provided important security for economic rights in the expanding republic by embedding it as a constitutional principle for the new states.

2. Due Process and the Law of the Land

Article II sets forth a precursor to the Constitution’s Due Process Clause:

“No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land . . . .”

This due process requirement is very similar to the formulation of Magna Carta and early American state constitutions. Thus, the English

263. The Contracts Clause was one of the only restraints on the states until the Reconstruction Amendments were passed and the subsequent case law incorporating in them much of the Bill of Rights. See ACKERMAN, supra note 2, at 81–82.
264. Ely, supra note 238, at 8 (quoting Charles Pinckney, who described Article I, section 10 while addressing the South Carolina ratifying convention as “the soul of the Constitution”).
265. Charles Pinckney, Address to the South Carolina Ratifying Convention (May 20, 1788), in 3 THE FOUNDER’S CONSTITUTION, supra note 86, at 396.
267. Northwest Ordinance, art. II.
268. Hill, supra note 150, at 50.
269. ADAMS, supra note 87, at 142–43.
constitutional tradition was becoming a part of the charter for this new territory. Like the American revolutionaries, the drafters of the Ordinance were concerned that without such protection the citizens would be subject to the arbitrary interference of government and that the security of their property would be at risk.\(^\text{270}\) What is different about the context of the Northwest Ordinance is that this security for property was seen as important not just in the abstract, for the sake of the rights themselves, but as necessary conditions for the settlement of the new territory with virtuous political citizens. Thus, the clause is consistent with the structural provisions of the Ordinance that provide for order and law. A similar due process requirement was soon to be established in the Fifth Amendment to the Constitution: “No person shall…be deprived of life, liberty, or property, without due process of law.”\(^\text{271}\) This same formulation was later applied to the states in the Fourteenth Amendment.\(^\text{272}\)

3. Takings and Just Compensation

In the Northwest Ordinance, an even greater level of protection was applied in the next clause of Article II:

> “[S]hould the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.”\(^\text{273}\)

Americans’ property rights were not absolute—they were subject to the government’s implied power of eminent domain.\(^\text{274}\) But their rights were secured when the government was required to indemnify the citizens when that power was exercised.\(^\text{275}\) The same principle appeared in the Fifth Amendment’s Takings Clause: “nor shall private property be taken for public use without just compensation.”\(^\text{276}\) The compensation principle was not as grounded in English constitutional theory as due process, but it was part of the common law and regularly practiced in many of the colonies.\(^\text{277}\) The takings clause of the Northwest Ordinance was significant because it

\(^{270}\) ONUF, supra note 3, at 67–69.

\(^{271}\) U.S. CONST. amend. V.

\(^{272}\) U.S. CONST. amend. V, amend. XIV; Northwest Ordinance, art. II.

\(^{273}\) Northwest Ordinance, art. II.

\(^{274}\) ELY, supra note 7, at 23–25.

\(^{275}\) Id.

\(^{276}\) U.S. CONST. amend. V; see Northwest Ordinance, art. II.

was the first national legislation to incorporate that principle.\textsuperscript{278} Furthermore, the Ordinance’s operation as a fundamental charter elevates that principle to constitutional status.

There is ample evidence from state constitutions that due process for property was deemed a fundamental right and that just compensation was gaining acceptance as warranting more than just common law protection.\textsuperscript{279} The influential Massachusetts Constitution of 1780 held:

\begin{quote}
[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people . . . [a]nd whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.\textsuperscript{280}
\end{quote}

New Hampshire, which made no mention of property rights in its 1776 Constitution, included a Bill of Rights, with a due process requirement, when it revised its charter in 1792.\textsuperscript{281} By the time Tennessee was admitted to the Union in 1796, the property provisions that became national principles through the Northwest Ordinance, and then the Constitution, were well established as fundamental points of civil liberty.\textsuperscript{282} The Tennessee Constitution included, in sequence, two sections that applied the federal Constitution’s Contracts Clause and Takings Clause.\textsuperscript{283} While there is direct evidence linking the Northwest Ordinance’s contracts clause to the language adopted in the U.S. Constitution, the Due Process and Just Compensation clauses are more reflective of the predominant trend in early state constitutionalism.\textsuperscript{284} The inclusion of similar provisions in the state constitutions of the 1780s is testament to the common acceptance of these principles during the era in which republican

\begin{footnotesize}
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\item[278] ELY, supra note 7, at 30.
\item[279] ADAMS, supra note 87, at 192.
\item[280] MASS. CONST. OF 1780, art. X.
\item[281] Compare CONST. OF N.H. OF 1776, WITH N.H. CONST. OF 1792, pt. I. A possible reason for the change is that the first constitution, enacted before the Declaration of Independence, was aimed primarily at establishing a functional government after the royal governor left; by 1792, the Constitution included a Bill of Rights. As for why New Hampshire left out the compensation principle, it could be because they felt it was adequately protected in the common law, or perhaps they were not willing to fully commit to the fiscal implications of compensation.
\item[282] See CONST. OF TENN. OF 1796, art. XI (approved in “An Act for the Admission of the State of Tennessee into the Union,” Act of June 1, 1796, 1 Stat. 491 (1796)).
\item[283] CONST. OF TENN. OF 1796, art. XI, §§ 20–21.
\item[284] See generally ADAMS, supra note 87.
\end{itemize}
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ideology loomed large. James Madison, who authored the Bill of Rights, was well aware that those principles had been established by the English constitutional tradition, incorporated into state constitutions, and become part of the charter for the expanding union in the Northwest Ordinance. Madison, moreover, was a member of the Congress that enacted the Ordinance during the Constitutional Convention in 1787. In his speech proposing the Bill of Rights, Madison stressed the importance of providing for “the security of rights” at the national level. Article II of the Ordinance shows that these principles were commonly accepted in the 1780s and that the Congress felt they were important for securing the property of settlers in what would become new states.

4. Property Takings and Public Use

The Northwest Ordinance’s “takings clause” may also shed some light on our understanding of the “public use” requirement in the Constitution’s Fifth Amendment. Our current jurisprudence interprets the public use requirement to be satisfied by a showing of public “benefit” in the line of cases from *Kelo v. City of New London* back through *Midkiff* and *Berman* in the twentieth century. Justice Thomas’ dissent in *Kelo*, for example, focuses on the original textual meaning of the words “public use.” The Northwest Ordinance has not been directly cited in the Supreme Court’s modern jurisprudence on the Public Use Clause, but because of its internal and contextual concern for property rights, it should be relevant to our analysis of the founding generation’s understanding of the scope of government power over private property.

If we look at the Northwest Ordinance—enacted by Congress as a charter document for what would become new states—as an example of

287. See id. at 32.
289. See *Northwest Ordinance*, art. II.
291. *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting). Justice Thomas in dissent set forth a strident textual interpretation, focusing on the original meaning of the words “public use,” and arguing that the majority’s opinion effectively read the Public Use Clause out of the Constitution.
founding-era contemporary understanding, the language used might support a more robust interpretation of the takings principle: the Ordinance stated that when public *exigencies* required a taking, compensation was due.292 “Exigencies” can be interpreted as setting a higher bar for what sort of things can be taken in the first place—that the government should only take property when truly required for emergencies or strict necessity.293 The text of the Ordinance is but one source of evidence to add to the debate over the original meaning of the Constitution’s Takings Clause, but it should be given some significance in light of the close relation between the Constitution and the Northwest Ordinance in their treatment of property rights.

All of these principles—due process, just compensation, and public use—remain important today. In both the Fifth and Fourteenth Amendments, the Due Process Clause eventually became the key to substantive protection of rights not specifically listed, including “economic due process.”294 And the just compensation principle is the subject of much debate today.295 The issue of whether the Constitution requires indemnification when a government regulation interferes with the use of property short of an actual physical taking—i.e., whether there is such thing as a “regulatory taking”—has occasioned some important Supreme Court jurisprudence in recent years.296 In trying to determine the scope of the constitutional right, scholars and judges have examined the intent of the framers and researched the practices of colonial and state legislatures.297 Scholars who seek to undermine the rationale for providing compensation when the government interferes with property have argued that because compensation was not universally practiced by the colonies and states, the principle was not fundamental to the founders and should be construed narrowly.298 But a contextual reading of the Northwest Ordinance, coupled with the plain fact of its inclusion of a takings clause, with little debate,

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292. Northwest Ordinance, art. II.
293. I am grateful to Dale Whitman for suggesting this potential reading of the “exigency” language in the text, which should be the subject of further research and analysis.
294. ELY, supra note 7, at 78–80, 87–90.
297. See, e.g., Hart, supra note 295, at 1252–53.
298. Id. at 1255; Treanor, supra note 295, at 784.
suggests that the compensation principle was thought to be of fundamental importance to an expanding, integrated national republic.

C. The Prohibition of Slavery in the Northwest

One of the most important provisions in the Ordinance—in retrospect—was its prohibition of slavery in the Territory. Article VI mandates that “[t]here shall be neither Slavery nor involuntary Servitude in the said territory,” though it did provide for the return of fugitive slaves.\(^{299}\) The Article was added by Massachusetts delegate Nathan Dane after the original draft was circulated.\(^ {300}\) The story of how the Ordinance was passed with unanimous support from southern Congressmen, when it included this provision, has never been fully understood.\(^ {301}\) According to Paul Finkelman, it may have been a quiet bargain to establish a non-slaveholding order in the Northwest in exchange for tacit approval of the institution in the southwest territories.\(^ {302}\) Finkleman has also documented the pervasive failure to enforce the prohibition by the territorial and subsequent state governments of the Northwest.\(^ {303}\) Earlier, Staughton Lynd suggested something of a conspiracy to exchange the prohibition in the Ordinance for the Constitutional Convention’s passing of the three-fifths clause in Philadelphia on July 14, 1787—the very next day after the Northwest Ordinance was approved by the Congress in New York.\(^ {304}\)

For the purposes of this study, what is significant about the prohibition of slavery is that it unilaterally destroyed an entire species of property that was still available in the rest of the nation (except where prohibited by certain states). While this paper has focused on the Northwest Ordinance as establishing a system that protects property rights, the prohibition of slavery suggests that there is an ultimate limitation to that argument—for at least

\(^{299}\) Northwest Ordinance, art. VI.

\(^{300}\) The Northwest Ordinance: An Annotated Text, in THE NORTHWEST ORDINANCE, 1787: A BICENTENNIAL HANDBOOK, supra note 136, at 72.

\(^{301}\) One possible explanation is that the southern states saw it to their economic advantage, in preventing the Northwest from establishing a competing system of labor-intensive plantation agriculture in the same crops, or alternatively, held an assumption that the slave-based plantation system would be impossible to transfer to the Northwest for geographical and climatological reasons. See, e.g., ROBERT WILLIAM FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 35 (1989) (“Slavery was marginal in the northern U.S. . . . because no major crops lent themselves to the gang system.”).

\(^{302}\) See PAUL FINKELMAN, SLAVERY AND THE FOUNDERS 42 (2d ed. 2001).

\(^{303}\) Id. at 51–55; see also Paul Finkelman, The Northwest Ordinance: A Constitution for an Empire of Liberty, in PATHWAYS TO THE OLD NORTHWEST, supra note 108, at 13–15.

\(^{304}\) Lynd, supra note 21, at 238 n.45.
some of the founders, moral concerns may have prevented them from recognizing the possibility of a property right in another human being. The Northwest Ordinance later became an important part of the litigation in the *Dred Scott* case, with Chief Justice Taney ultimately dismissing the document’s continuing legal salience.\(^{305}\) Despite the lack of enforcement that Professor Finkelman documents, the moral appeal of the ostensible prohibition later came to be celebrated in the region.\(^{306}\) In fact, in the mid-nineteenth century, when some of the states of the Old Northwest became more firmly abolitionist in sentiment, the Northwest Ordinance became adopted as an important part of the historical memory in the region.\(^{307}\)

Professor Finkelman’s account explains effectively the basis for a less-than-celebratory interpretation of the Ordinance’s prohibition. I would suggest, however, that regardless of its ultimate merit or effectiveness, the prohibition of slavery in the text is in its own way entirely compatible with the founding era’s republican ideology. In fact, many in the founding era believed that slavery was incompatible with the personal independence that formed the very core of the republican vision of society. The eminent historian Edmund S. Morgan wrote in his seminal *American Slavery, American Freedom* that republican freedom was essentially the intellectual opposite of dependency—signified most prominently by the institution and the condition of slavery.\(^{308}\) In other words, a state of slavery was the antithesis of republicanism. By precluding slavery, the Ordinance indicated the intent to have the territory settled by citizens who would have the independence and the virtue to secure a republican society in the western lands.\(^{309}\) It is possible, then, to see the abolition clause of the Ordinance as part and parcel of the larger republican vision for the new territory.

Also, the prohibition of slavery can be seen as republican in the sense of promoting the wider distribution of property that Jefferson advocated. By purporting to disallow this one particular form of property, it indicated a preference against a large plantation economy (which elite southerners may have been happy with, in order to limit competition for their cash crops); instead, it seemed to prefer a system of smaller farms that would be owned by those virtuous agrarian yeomen. It thus encouraged an even wider distribution of property—secured by individual property rights—among the


\(^{306}\) ONUF, *supra* note 3, at 133–36.


\(^{308}\) See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM*, at x (1975).

\(^{309}\) Davis, *supra* note 156, at 88–89.
citizens that would form the bedrock of establishing a republican order on
the frontier.

V. PROPERTY AND ECONOMIC DEVELOPMENT IN THE EXPANDING
REPUBLIC

Several other provisions in the Articles of Compact in the Northwest
Ordinance are geared towards using property as a foundation for the
expansion of republican government and society into the new American
territories. The Ordinance reflected a desire to promote free navigation,
which also served as an important act establishing the public trust doctrine
in the U.S. 310 It sought to promote western settlement and security for land
titles. 311 It established a blueprint for the eventual admission of new states
on “equal footing” provided that the new states followed the procedures set
forth and guaranteed a republican form of government. 312 In all of these
state-constitutive provisions, the Northwest Ordinance used property as a
mechanism for promoting and achieving an expanded republican society in
the federal union. 313

Section 12 requires officials to take an oath of office and also provides
that the legislature may elect a nonvoting delegate to Congress (much as the
District of Columbia does today), both of which affirm the territorial
government’s participation in national affairs. 314 The next section
incorporates unnamed “fundamental principles of civil and religious
liberty” as the basis of government and provides for the establishment of
states “on an equal footing with the original States,” finally fulfilling the
goal of Jefferson in 1784. 315 The admission of new states on equal footing is
not merely a political decision, but a property right in the broadest sense. It
guaranteed to settlers that if they were to move to the new territories, they
would not be treated like colonists or be subject to the whims of the central
government. 316 Their property would be secured by participation in the
union, with rights and civil liberties equal to those of all citizens.

Mere title to property had to be supplemented with full political
participation in order to guarantee the security of that property from the

311. ONUF, supra note 3, at 58–59.
312. Id.
313. Hill, supra note 150, at 52.
314. Northwest Ordinance, § 12; ONUF, supra note 3, at 59.
316. Hill, supra note 150, at 49–50.
arbitrary interference that inspired the Revolution. Furthermore, the territorial procedures and the equal footing doctrine was a decision that the land of the national domain would truly be the property of the United States, not as a possession of the central government, but by belonging to the people of the Union generally and specifically to those citizens of the equal new states. Thus, the statehood provided for in the Ordinance unites individual property rights with a broader political understanding of property.

Article III contains a clause that “religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”317 Some commentators have focused on the mention of religion to argue that the Northwest Ordinance reflects founding-era solicitude for the role of religion in public life.318 It is more likely, though, based on the wording of the entire clause, that it reflects more of a value on education generally (which was generally assumed, in the eighteenth century, to include religion and morality along with knowledge).319 This clause, while accomplishing little in practice, also reflects the republican vision of the Ordinance. Religion, morality, and knowledge were necessary qualities in the virtuous citizens intended to settle the land and bind it to the Union. For this reason, Harold Hyman has argued that the Northwest Ordinance—along with the Homestead Act and the G.I. Bill—was one of the three most important acts for furthering American education.320 The concern for education is indicative of the Congress’s intent to promote an educated, moral, sober citizenry in the new states that would have the stability and civic responsibility of a republican society.321 The Article also pledged “good faith” toward the Indians and security for their “property, rights, and liberty.”322

Article IV is more focused on the national interest in the territory. It affirms that the land will be subject to the laws of Congress and that the residents would pay a proportional share of taxes.323 The Article also mandates that the new states never interfere with the disposal of land by the

317. Northwest Ordinance, art. III.
319. See Northwest Ordinance, art. III.
320. See HYMAN, supra note 19, at 18, 35, 62.
321. See Northwest Ordinance, art. III; HYMAN, supra note 19, at 24.
322. Northwest Ordinance, art. III.
323. Northwest Ordinance, art. IV.
United States or with the title to land by bona fide purchasers. These provisions support the argument that the Ordinance embodied a vision for the territory as an integral part of the nation and that the states would be prevented from interfering in the economic rights of both the national government and the individual property owners. Once again, concern for providing economic security for individuals meshed with preserving the nation’s republican vision by establishing an ordered process of disposing of federal property and enhancing the greater political economy.

Article IV further provides that all navigable rivers and carrying places “shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted . . . .” This indicates several things. First, it shows that the founders understood that transportation would be essential to the region. If farmers could not get their crops to a market, the territory would remain underdeveloped and commerce could not flourish. This would hurt not only the national economy, but also the value of the investment the settlers had made in their property and their labor. Scholars today credit the Northwest Ordinance with helping establish the doctrine of the public trust, which is increasingly important in contemporary discussions.

The vastness of the union would require efficient transportation not only for commerce, but also for communication and political unity. Indeed, one of the greatest issues of national concern in the early republic was the security of the river routes to New Orleans for the lands west of the eastern continental divide. Having decided not to heed Montesquieu’s advice that republican government is best suited to smaller states, the founders recognized the need for an integrated commercial union. Finally, by keeping the waters open to all citizens and preventing the states from taxing...
transportation, this clause in the Ordinance portends the Privileges and Immunities Clause and the constitutional authority to regulate interstate commerce, which became the bulwark of federal economic power in the twentieth century.\textsuperscript{331}

Article V discusses the particulars of the boundaries of the eventual states and the process of attaining statehood.\textsuperscript{332} It also reaffirms that they would enter on equal footing, and could form their own constitutions, so long as they had a republican form of government.\textsuperscript{333} By providing a minimum population of 60,000 for statehood, Congress sought to ensure that the equal footing worked both ways—the old and new states would be more equal in size, and the voting power in the Senate would not be diluted by tiny nascent states.\textsuperscript{334} More importantly, it established that the United States would not act as a colonizing agent of new lands but would extend to those territories (after an orderly development of social, legal, and political institutions) an invitation to join as equal partners in union.\textsuperscript{335} The goal of the Ordinance, and of the founding generation that enacted it, was to create an “empire of liberty,” a union of republican states committed to the betterment of all citizens.\textsuperscript{336}

Read as a whole, the Northwest Ordinance is a document that is fundamentally concerned with property. At the individual level, it provides specific protection for property rights. It also gives a more general promise of security to individuals by establishing a government. In providing a legislature and guaranteeing a republican form of government, the Ordinance affirmed that the government would provide not just physical security, but the representation necessary to check arbitrary interferences with liberty and property. And at the broadest level, the Ordinance’s role as a blueprint for statehood and as a compact indicates an understanding that the new territories were an important national property—not in the possessory sense, but as fully equal partners in union.

While read in light of its concerns for property and its political and economic context, the Ordinance supports property rights as an individual liberty. But these concerns were not simply for the individual and his

\textsuperscript{331} U.S. CONST. art. IV, § 2; U.S. CONST. art. I, § 8; see, e.g., Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); see also Hegreness, supra note 5. But see United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

\textsuperscript{332} Northwest Ordinance, art. V.

\textsuperscript{333} Id.

\textsuperscript{334} See id.

\textsuperscript{335} See id.

\textsuperscript{336} Wood, supra note 110, at 357.
preferences in the abstract. The Northwest Ordinance was thoroughly concerned with property rights precisely because its drafters understood property’s importance in creating a thriving union that would increase the common weal—a thoroughly republican consideration.

VI. FROM THE REPUBLICAN REVIVAL TO PROGRESSIVE PROPERTY: LESSONS FROM THE NORTHWEST ORDINANCE

A. Bringing Property Rights Back into Republicanism

Property rights are an important part of republican political theory. The modern revival’s vision of civic republicanism is incomplete in its exclusion of individual property rights. In this Article, I have argued that in the context of historiographical theory, and on its own merits as a very important (but relatively uncontroversial) contemporary document, the Northwest Ordinance should be considered to provide great insight into the original understanding of property rights among the founding generation. Part V expanded on those insights to argue that that original understanding among politically participating Americans in the 1780s placed the protection of property rights not simply in the vanguard of an impending, inexorable liberal paradigm, but instead that property rights, as well as economic expansion and the idea of the commercial republic, were central to American republican theory itself.

While this argument is in itself a challenge to the prevailing paradigmatic structure of historical and legal scholarship on the intellectual origins of the Revolutionary era and the Constitution, it also has some implications for other, related areas of modern legal theory, and for the way we think about several important doctrines or assumptions of contemporary legal theory and public policy. While republicanism itself is not always explicitly invoked, the structure of the debate has only hardened the separation between the modern iterations of communitarianism and libertarianism, a dichotomy which influences almost every contemporary political and legal debate. Our contemporary understanding of how the founding generation viewed property and economics might affect how we understand the modern division between personal and economic liberties, the public–private distinction, the republican revival in legal academia, and the use of history in constitutional scholarship. Each of these aspects of modern legal theory can be explored further with a more robust understanding of the importance of individual property rights to republican theory.
The modern understanding of republican ideology as translated first in the legal academy’s “revival” of civic republicanism, and currently manifested in the recent development of the “progressive property” discourse by several leading property scholars, is incomplete. There was instead a great importance placed on individual property rights in republican theory as a means to promote civic virtue. The emphasis on property reflected in the Northwest Ordinance, properly understood, is not simply an enactment of the supposedly anti-republican, federalist agenda of expansion, national strength, and commercial growth or a rejection of the supposedly competing vision of agrarian republicanism. It demonstrates, rather, the recognition that property rights were indeed central to republicanism—the American brand of republicanism that an expanding commercial republic required. The Northwest Ordinance articulates in a founding charter a coherent vision of liberty and order that values both property rights and civic virtue, consistent with the framers’ concern for both individual rights and the common weal.

The claim that property rights were important to the republicanism of the founders will not likely seem extremely peculiar or outlandish to historians, but it is somewhat more counterintuitive to lawyers and legal scholars because of their reliance on such mutually exclusive categorization. The historians who developed the “republican synthesis” explanation of the founders’ ideology generally situated their analyses in the eighteenth-century intellectual milieu and understood that the founding generation could not have conceived of republicanism—or liberty—without property rights. Legal scholars, however, are sometimes more likely to overlay elements of republican theory on current issues, and are consequently less likely to perceive the essential role of private property rights to an ideology that stresses the common good.

337. ALEXANDER, supra note 9, at 1.

338. For republicanism, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1998 ed. 1969). For the argument that the founders sought primarily to protect their own wealth, see CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). For discussions of the tension between republicanism and economic expansion, see ALEXANDER, supra note 9; and McCoy, supra note 41. McCoy, however, understood the subtle distinction between property and commerce as individual rights, and as components of the founders’ broader republican vision. See McCoy, supra note 41.

339. Robert Shalhope authored the first analyses identifying the historians’ work as forming a “republican synthesis.” See Shalhope, supra note 35.

340. Forrest McDonald is the historian of the founding era most prominently associated with the analysis of property rights as a fundamental element of the founders’ ideology. See FORREST Mc Donald, E PLURIBUS UNUM (Liberty Press 1979) (1965); McDonald, supra note 1.
Professor Alexander’s analysis of the “proprietarian” dimension of property certainly does not ignore the institution. But Alexander describes “competing visions” of property in the early republic. According to Alexander, civic republican ideology contemplated an entirely different conception of property as “propriety”—as a resource to be used for the common good. While Alexander’s groundbreaking critique is generally correct, I believe that even his “propriety” understanding of founding-era property—and in turn, the larger civic republican vision—did in fact include a significant appreciation for the individual property rights that most modern commentators tend to associate with the liberal view. As evidenced by the Northwest Ordinance, the founders’ republicanism may have considered individual property rights to be a central, if not the primary, component in achieving the common good by promoting the independence and security of the virtuous yeoman citizen and by tying the citizen to the polity as a stakeholder in the republic. I suggest that there was a more universal understanding of property that underlay both liberal and republican worldviews in the founding era.

This reading of the Northwest Ordinance challenges the dominant scholarly view of property in the early republic by synthesizing the individual property rights of liberalism with the collective welfare of republicanism. Scholars such as Jennifer Nedelsky consider property rights to be antithetical to achieving the common good. Other legal scholars apply republicanism as a shorthand for a sort of progressive or communitarian framework to make normative claims about contemporary issues such as land use planning or eminent domain, and these arguments tend to minimize concern for individual property rights. This approach may be partly correct, but it is also incomplete. Our contemporary discussions must begin to account for the important role of individual property rights as part of the republican narrative.

This dichotomy would have been unknown to the founding generation: to them, property rights protected the security of the common farmer as much as, if not more than, the interests of the landed or commercial wealthy class. Eighteenth century Americans who discussed republican values exalted the “yeoman” as a sort of paragon, archetype republican citizen. When the founders spoke of property rights, we shouldn’t interpret that—as we tend to today—as a signal of favor for selfish wealth accumulation in

341. See ALEXANDER, supra note 9, pts. 1 & 2.
opposition to a redistributionist common good. Property was the essential ingredient to the success of the yeoman, or any other form of virtuous republican citizen, who provided for his own family, thereby being able to devote some of his excess time and resources to his civic duties for the republic.

In the founding generation, property rights were especially esteemed in republican theory. Property rights were not associated with wealth per se, but rather were identified as the guarantor of every individual’s economic freedom and chance to prosper\textsuperscript{344}—hence Jefferson’s neat substitution of “pursuit of happiness” for what everyone knew was originally “property” as the companion of life and liberty in the (Lockean) trinity of inalienable rights he identified in the Declaration of Independence.\textsuperscript{345} These rights were necessary not just in the abstract, but as conditions that allow for virtuous citizens to create a new republican society. The Northwest Ordinance shows that solicitude for individual property rights was an important part of republican ideology.

**B. Rights, Republicanism, and Progressive Property**

There is, however, a more direct application of civic republican principles to contemporary property theory: the theory of “progressive property.” In 2009, the *Cornell Law Review* published a Special Issue on progressive property that began with the brief piece *A Statement of Progressive Property* by Professors Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler.\textsuperscript{346} The *Statement* declares that the dominant view of property in the United States is too strictly limited to a focus on individual rights in property toward the pursuit of individual preferences.\textsuperscript{347} The more appropriate view, it declares, is one that “look[s] to the underlying human values that property serves and the social relationships it shapes and reflects.”\textsuperscript{348} As a values-oriented approach, progressive property explicitly invokes the concept of virtue in pursuit of the common good:

\textsuperscript{344} Ely, supra note 7, at 48–49.


\textsuperscript{347} Id. at 743.

\textsuperscript{348} Id.
2.4. The pursuit of these values implicates moral and political conceptions of just social relationships, just distribution, and democracy. It requires virtue, particularly humility, and attentiveness to the effects of claiming and exercising property rights on others, including future generations, and on the natural environment and the non-human world.\textsuperscript{349}

As Alexander lays out in his lead article, \textit{The Social-Obligation Norm in American Property Law}, the progressive property theory places a high priority on property as a means of promoting “human flourishing.”\textsuperscript{350} This in turn draws from the classical Aristotelian concept of virtue as a necessary component for human flourishing in political society.\textsuperscript{351} The second major article of the progressive property issue also relies heavily on virtue ethics. In \textit{Land Virtues}, Eduardo Peñalver advocates applying the Aristotelian tradition of virtue ethics to land use issues.\textsuperscript{352}

Response articles challenged the progressive property theorists’ reliance on virtue ethics from several different directions. Noting that the theory is centered on the apparent tension between virtue and rights, Eric Claey\textsuperscript{s} suggests that overpromotion of virtue as an end in itself in property law (as opposed to political philosophy) can potentially lead to problematic political outcomes.\textsuperscript{353} Katrina Wyman generally approves of the virtue-centric approach to property but has doubts about the practicality of its adoption.\textsuperscript{354} What both the lead articles and the responses have in common, though, is the recognition that the theory of progressive property is fundamentally centered on the concept of virtue—and that this concept of virtue is in tension with the concept of individual property rights.

Alexander does not rely primarily on his work in \textit{Commodity & Propriety} in asserting virtue as the centerpiece of progressive property; rather he focuses more on applying Aristotelian virtue ethics, as theorized by Amartya Sen and Martha Nussbaum, to a contemporary approach to property.\textsuperscript{355} Alexander notes, however, that the social-obligation norm he

\begin{itemize}
  \item \textsuperscript{349} \textit{Id.} at 743–44.
  \item \textsuperscript{351} \textit{Id.} at 760–73; see also Gregory S. Alexander & Eduardo M. Peñalver, \textit{Properties of Community}, 10 \textsc{Theoretical Inquiries L.} 127 (2009).
  \item \textsuperscript{352} Eduardo M. Peñalver, \textit{Land Virtues}, 94 \textsc{Cornell L. Rev.} 821 (2009).
  \item \textsuperscript{353} Claey\textsuperscript{s}, \textit{supra} note 18.
  \item \textsuperscript{355} Alexander, \textit{The Social-Obligation Norm in American Property Law}, \textit{supra} note 350, at 750, 750 n.13 (citing various works by Martha Nussbaum and Amartya Sen).
\end{itemize}
favors is essentially the same as the proprietarian vision of property that he earlier ascribed to the republicanism of the founding era. Indeed, recognizing the correlation, Jedediah Purdy expresses the wish that Alexander had more explicitly grounded The Social-Obligation Norm in the tradition of American property law that he had set forth in Commodity & Propriety. Regardless of Alexander’s tactical decision not to situate the normative property theory in its historical context, it is clear that progressive property is entirely consistent with the proprietarian vision of property that he ascribes to the civic republican tradition.

The theory of progressive property outlined in the Cornell issue implicitly invokes the republican theory of property and explicitly explores it as a conflict between public virtue and individual rights, concluding that rights must yield to the common good. Alexander applies the social-obligation norm to suggest that the prioritization of virtue might lead to a different balancing of contemporary property issues, including the use of eminent domain for public objectives, nuisance remedies, historic preservation regimes, environmental restrictions, beach access rules, and intellectual property law. Peñalver likewise takes on NIMBYs, LULUs, and other current land use controversies with an approach toward fostering “virtuous land use.” Progressive property seems to be centered on a dialectic conflict between virtue and rights.

This Article has shown, however, that the proprietarian story of republican property at the founding may be too narrow in excluding the individual rights aspect of property and ascribing them to classical liberal theory. As Professor Claeys notes in his response, using property law to promote virtue has traditionally been in the context of “claim[s] that citizens’ rights cannot be secure unless citizens are virtuous enough to respect one another’s rights freely.” The understanding of the Northwest

356. Id. at 760 n.62 (“This understanding of the social-obligation norm is one version of what I have called the ‘proprietarian’ theory of property. See GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970 passim (1997).”).
360. Claeys, supra note 18, at 892.
Ordinance set forth in this Article provides another way to think of the relation between virtue and rights: that individual property rights are necessary to allow virtuous citizens to establish a republican society to promote the common good. Both of these notions—virtue as necessary to secure rights and rights as necessary to promote virtue—underscore the more interactive relationship between property and the common good that I believe was present in the founding era and remains relevant today.

VII. CONCLUSION

The Northwest Ordinance has been described as an “organic document” of American constitutionalism; it is still listed in the first section of the United States Code today. Others have argued that it should be considered a “constitutional” document. Whatever the ultimate historical status of the Ordinance should be, this paper has attempted to demonstrate that it is an important document in the story of American property rights. By examining the history and text of the Ordinance from a property perspective, the document can be read as being fundamentally concerned with property. The Ordinance provided for a government and for eventual statehood in order to preserve both the security of individual rights and to extend the concept of union to the expanding republic. The Ordinance also elevated to constitutional status some of the most important guarantees of personal property rights as part of its overall framework for ensuring liberty and order in the new union.

James Madison’s 1792 essay entitled Property reinforces the broad conception of the importance of property as demonstrated in the Northwest Ordinance. Madison suggests that property rights should not just be limited to land and personal possessions, but should extend to labor, commerce, liberty, and conscience. “In a word, as a man is said to have a right to his property, he may be equally be said to have a property in his rights.” This broader conception of property reflects elements of both liberalism and republicanism. Similarly, the Northwest Ordinance provided a coherent scheme for the protection of property—by providing for government—for protecting commerce, and for statehood on equal footing, as well as for

individual rights. With this holistic protection and application of property, the Northwest Ordinance can be said to be consistent with both liberal and republican principles as understood during the founding era. We might therefore reconsider the conventional wisdom that equates property rights primarily with libertarian, rather than communitarian, ideals. At least we should recognize that by its status as a founding document for the expansion of the union, the Northwest Ordinance not only reflected this contemporary emphasis of property rights but also made property rights constitutional.

In this Article I hope to have accomplished three things. The first goal is to renew interest in the Northwest Ordinance as a foundational U.S. document with important implications for our modern understanding of property rights and the Constitution. Second, the Article has established that the Ordinance is fundamentally concerned with property, including individual property rights. Finally, it has shown that the attitude toward property displayed in the Northwest Ordinance is consistent with the civic republican as well as the liberal vision of the founding, which in turn has implications for how we understand property rights and its application to current property issues today.