Reclaiming Minnesota's Territorial Birthright: Why the Northwest Ordinance Restricts the State's Power of Eminent Domain to Public Exigencies

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RESTRICTS THE STATE’S POWER OF EMINENT DOMAIN TO PUBLIC EXIGENCIES

Introduction

Years before the Bill of Rights was ratified, the just compensation clause of the Northwest Ordinance of 1787 guaranteed:

No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should 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.

The limitation of property takings to “public exigencies” is textually far more restrictive than the “public use” limitation found in the takings clause of the Fifth Amendment to the United States Constitution. And it reflects the fact that the Northwest Ordinance generally embraced a heightened conception of civil liberty, as evidenced by its prohibition on slavery in the territories it governed. Not surprisingly, one scholar has concluded: “Whatever the intent of the Northwest Ordinance’s just compensation clause, it is likely that it was intended to protect property in the broadest manner possible.” Eaton, supra note 2. This intention should not be ignored when interpreting the constitutions of the states, such as Minnesota, that were eventually carved out of the territories governed by the Ordinance’s just compensation clause. Indeed, as discussed below, Minnesota’s power of eminent domain should be limited to public exigencies based on a reading of the Minnesota constitution in pari materia with the Northwest Ordinance.

Part I of this article explains why the Minnesota Constitution should be read in pari materia with the Northwest Ordinance. Part II traces and links the guarantees of the Northwest Ordinance to the Minnesota Constitution’s guarantee of “Rights and Privileges.” Part III

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1 Nick Dranias, Director, Center for Constitutional Government, Goldwater Institute.
2 Andrew S. Gold, Regulatory Takings And Original Intent: The Direct, Physical Takings Thesis "Goes Too Far," 49 AM. U.L. REV. 181, 215 (1999) (“Whatever the intent of the Northwest Ordinance just compensation clause, it is likely that it was intended to protect property in the broadest manner possible.”)
demonstrates that Minnesota’s power of eminent domain should be restricted by the limitations imposed by the Northwest Ordinance by analogy to limitations the Northwest Ordinance has placed on the taxing power. And Part IV buttresses the analysis of the preceding sections by underscoring that the rights guaranteed by the Northwest Ordinance must also be regarded as among the unenumerated rights guaranteed by the Minnesota Constitution. Taken together, this article will empower Minnesotans finally to claim their territorial birthright as a matter of law—the constitutional limitation of the power of eminent domain to public exigencies.

I. The Minnesota Constitution Should be Read in Pari Materia with the Northwest Ordinance.

The Northwest Ordinance expressly contemplates that the “fundamental principles of civil and religious liberty” it protects shall be fixed and established “as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory.” Although the Northwest Ordinance preceded the U.S. Constitution by two years, this fact does not relegate the ordinance to a mere historical document. Congress expressly reenacted the Ordinance by statute shortly after the Constitution was ratified, pursuant to its power to regulate the Territories under Article IV, Section 3 of the Constitution.

Nevertheless, the U.S. Supreme Court subsequently held on numerous occasions that the Northwest Ordinance is not binding on the “internal affairs” of states carved out of the Northwest Territory once they were admitted to the union (to the extent the Ordinance is repugnant to the state constitution). This precedent, however, occasionally vacillated.

5 Economy Light & Power Co. v. United States, 256 U.S. 113, 120 (1921) (“To the extent that it pertained to internal affairs, the Ordinance of 1787—notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the State of Illinois into the Union”); Hawkins v. Bleakly, 243 U.S. 210, 217-18 (1917) (“The regulation, although embracing provisions of the Ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a State and
For example, as late as 1901, one Supreme Court Justice observed: “[t]he opinion has been expressed that the ordinance of 1787 became inoperative and a nullity on the adoption of the Constitution while, on the other hand, it has been said that the ordinance of 1787 was ‘the most solemn of all engagements,’ and became a part of the Constitution of the United States by reason of the sixth article.” The uneasiness evident from this observation may relate to the unspoken fact that the Northwest Ordinance was first deemed non-binding almost immediately after fugitive slaves began invoking the anti-slavery provisions of the Northwest Ordinance.

the adoption of a state constitution, than other acts of Congress for the government of the Territory. All were superseded by the state constitution.’); Cincinnati v. Louisville & N. R. Co., 223 U.S. 390, 401, 406-07 (1912) (“But the ordinance of 1787 as an instrument limiting the powers of government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of States to be carved out of that Territory, ceased to be, in itself, obligatory upon such States from and after their admission into the Union as States, except in so far as adopted by such States and made a part of the law thereof’); Coyle v. Smith, 221 U.S. 559, 573 (1911) (“when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission”); Sands v. Manistee River Improv. Co., 123 U.S. 288, 295-96 (1887) (“The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory . . . And for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them . . . Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original States”); Van Broeklin v. Tennessee, 117 U.S. 151, 159 (1886) (“The articles of confederation ceased to exist upon the adoption of the federal constitution; and the ordinance of 1787, like all acts of congress for the government of the territories, had no force in any state after its admission into the Union under that constitution’); Escanaba & Lake Michigan Transp. Co. v. City of Chicago, 107 U.S. 678, 688-89 (1883) (“The ordinance was passed July 13, 1787, one year and nearly eight months before the constitution took effect; and although it appears to have been treated afterwards as in force in the territory . . . its provisions could not control the authority and powers of the state after her admission. Whatever the limitation upon her powers as a government while in a territorial condition, whether from the ordinance of 1787 or the legislation of congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union’); cf. Donahey v. Edmondson, 105 N.E. 269, 274 (Oh. 1913) (“It appears after diligent search that upon this question there is no conflict of authority, either state or federal . . . the authorities are uniform in support of the proposition that the Ordinance of 1787 was entirely superseded by the respective Constitutions of the several states carved out of this territory when such states were admitted into the Union. Any other construction would lead to the conclusion that the states of the Northwest Territory are restricted and limited by provisions other than those contained in the federal constitution, and thereby deprived of power essential to their equality with the other states”).

7 Strader v. Graham, 51 U.S. 82 (1850) (refusing to enforce Northwest Ordinance to free fugitive slaves, stating “[i]t is undoubtedly true, that most of the material provisions and principles of these six articles, not inconsistent with the
which contradicted earlier decisions that suggested the Northwest Ordinance was binding on the states. In fact, these fugitive slave cases culminated in the Court’s total repudiation of the Northwest Ordinance in Dred Scott. Thus, it appears that the earliest decisions deeming the

Constitution of the United States, have been the established law within this territory ever since the Ordinance was passed; and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the States since formed in the territory, these provisions, so far as they have been preserved, own their validity and authority to the Constitution of the United States, and the constitutions and laws of the respective States, and not to the authority of the Ordinance of the old Confederation. As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in this court”;

Jones v. Van Zandt, 46 U.S. 215, 230 (1847) (refusing to enforce Northwest Ordinance to overturn fugitive slave act based on Permoli v. Municipality No. 1 of City of New Orleans, 44 U.S. 589 (1845), which held “what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act”).

See, e.g., Pollard’s Heirs v. Kibbe, 39 U.S. 353, 417 (1840) (Baldwin, J., concurring) (holding “a higher power confers inviolable sanctity on the right of the inhabitants, and proprietors of land in the disputed territory, which this Court will never question. The ordinance of 1787 is declared to be a compact between the original states and the people and states in the said territory, and ‘shall forever remain inviolable, unless by common consent.’ . . . ‘The inhabitants of the said territory shall always be entitled to the benefits of,’ . . . ‘and of judicial proceedings, according to the course of the common law. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land;’ and if the public emergency requires any person's property to be taken, full compensation shall be made for the same . . . this ordinance, the most solemn of all engagements, has become a part of the Constitution, and is valid to protect and forever secure the rights of property and judicial proceedings to the inhabitants of every territory to which it applies . . . This ordinance, then, is . . . impenetrable to any assault which can be made upon them by any subordinate power”) (emphasis added); Bank of Hamilton v. Lessee of Dudley, 27 U.S. 492, 508 (1829) (considering Ohio statute and stating “[i]f any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States or of the state or to the ordinance of 1787”) (emphasis added); Spooner v. McConnell, 22 F.Cas. 939, 951-52 (D. Ohio. 1838) (“a compact [the Northwest Ordinance] declared on its face to be ‘unalterable, unless by common consent,’ cannot be abrogated by mere implication. . . . All the departments of her government have recognized the sacred and inviolable character of that part of the ordinance of 1787, which is now under review”).

Compare Groves v. Slaughter, 40 U.S. 449, 476 (1841) (“in Ohio, and those states to which the ordinance of 1787 applies, or in those where slaves are not property, not subjects of dealing or traffic among its own citizens, they cannot become so when brought from other states; their condition is the same as those persons of the same colour already in the state”) (emphasis added), with Dred Scott v. Sandford, 60 U.S. 393, 452, 464 (1857) (referring to Northwest Ordinance and holding “the act of Congress which prohibited a citizen from holding and owning property of this kind [i.e. slaves] in the” Northwest Territory “is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident”) (emphasis added).
Northwest Ordinance “non-binding” deviated from *stare decisis* for the purpose of protecting the institution of slavery. It is no wonder that unease with these decisions persisted after the Civil War and the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments.

Despite its dubious origins, the U.S. Supreme Court’s long-standing precedent rejecting the binding nature of the Northwest Ordinance is probably beyond reconsideration at this time. But there is a modern trend of Supreme Court precedent that looks favorably on the Northwest Ordinance for purposes of supplementing textual constitutional interpretation. Mirroring that trend, a strong argument can be made that the Minnesota Bill of Rights should be read *in pari materia* with the robust conception of property rights protected by the Northwest Ordinance.

When used as an adverb, *in pari materia* means “[l]oosely, in conjunction with,” and when used as an adjective, it means “[o]n the same subject; relating to the same matter.” According to the Minnesota Supreme Court:

When construing statutes relating to the same subject matter, we apply the doctrine of *pari materia*, as we have previously noted: ‘Statutes relating to the same subject are presumed to be imbued with the same spirit and to have been passed with deliberation and full knowledge of all existing legislation on the subject and regarded by the lawmakers as being parts of a connected whole. Statutes are *in pari materia* when they relate to same matter or subject even though some are specific and some general and even though they have not been enacted simultaneously and do not refer to each other expressly. Where two acts *in pari materia* are construed together and one contains provisions omitted from the other, the omitted provisions will be applied in the proceeding under the act

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10 *McCreary County v. ACLU*, 125 S. Ct. 2722, 2749 (2005) (“The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50”); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 862 (1995) (“A broader tradition can be traced at least as far back as the First Congress, which ratified the Northwest Ordinance of 1787. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.”); *Wallace v. Jaffree*, 472 U.S. 38, 71 (1985) (Rehnquist, J., dissenting) (“The actions of the First Congress, which reenacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion . . . [t]he Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided 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.’”); *Reynolds v. Sims*, 377 U.S. 533, 573 (1964) (“the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted. Demonstrative of this is the fact that the Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population.”).

not containing such provisions, where not inconsistent with the purpose of the act.\textsuperscript{12}

This interpretive doctrine furnishes a powerful basis for supplementing the Minnesota Constitution with the fundamental principles of civil and religious liberty protected by the Northwest Ordinance.

Most significantly, there is strong evidence that delegates to Minnesota’s Constitutional Convention regarded the Ordinance and the state constitution as being “imbued with the same spirit” and relating to the same matter or subject. For example, during arguments over an amendment to the Preamble, Representative Joseph H. Brown stated “our Organic Act gives to us all the rights and privileges guaranteed to the original Territories formed out of the Territory ceded by Virginia prior to the Ordinance of 1787.”\textsuperscript{13} Later, during arguments over what would later become the anti-slavery portion of the Minnesota Bill of Rights’ “Rights and Privileges” Clause, Representative Willis A. Gorman stated “I would prefer that the language of the Ordinance of 1787 should be used,” whereupon the exact language of the Northwest Ordinance was adopted by the Convention.\textsuperscript{14}

The historical linkage of the Northwest Ordinance to the Minnesota Constitution is further supported by the Minnesota Supreme Court’s practice of reading the state constitution \textit{in pari materia} with the Northwest Ordinance in the course of protecting the tax-exempt status of certain private educational institutions.\textsuperscript{15} And this connection between the Ordinance and the

\textsuperscript{12} \textit{In re Tveten}, 402 N.W.2d 551, 554 (Minn. 1987) (adopting 6 Dunnell, Supp. § 8984).

\textsuperscript{13} Francis H. Smith, \textsc{The Debates and Proceedings of the Minnesota Constitutional Convention Including the Organic Act of the Territory} 279 (1857).

\textsuperscript{14} \textit{Id.} at 281.

\textsuperscript{15} \textit{Trustees of Hamline University v. Peacock}, 217 Minn. 399, 404-405 (1944) (upholding “Hamline's freedom from the general burden of taxation” based on its Territorial Charter and Sections 1 and 2 of the Minnesota Constitution, which state “[t]hat no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place;” and also adopting declaration of Supreme Court in \textit{Board of Trustees for Vincennes University v. State of Indiana}, 55 U.S. 268 (1852), which
state constitution is further strengthened by the fact that the rights protected by the Northwest Ordinance were expressly incorporated into the Minnesota Constitution through positive law.

II. The Rights Protected by the Northwest Ordinance Are Among the Rights and Privileges Protected by the Minnesota Bill of Rights.

The Northwest Ordinance originally embraced the Territory of Wisconsin, which included the eastern portion of the Minnesota Territory. Section 14 of the Act of June 4, 1812 later extended the fundamental principles of civil and religious liberty protected by the Ordinance to the western portion of the Minnesota territory. And, in 1849, the Territory of Minnesota adopted the laws of the Territory of Wisconsin, which included these principles, wholesale. Even after the Territory of Minnesota enacted its own Revised Statutes in 1851, the related legislation included in its appendix a copy of the Northwest Ordinance, as among the “acts or parts of acts of general nature . . . which are not repealed or incorporated in the revised statutes.” The Revised Statutes also explicitly reaffirmed the legal protection of “established” referred to legislative powers granted by “the [Northwest] Ordinance” being effective to exempt a college from taxes, and referencing \textit{State v. Bishop Seabury Mission}, 90 Minn. 92, 96-97 (1903) (stating it “has been the policy of our people, from the organization of the territory to the present time, to encourage and by all proper means assist in the support and maintenance of educational institutions. Such was the policy of the federal government prior to the organization of the state, for it was enacted by article 3, Ordinance of 1787, providing for the government of the Northwest Territory, of which Minnesota formed a part, 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.’ The policy of our own people is shown both by territorial and state legislation, for we find upon our statute books numerous enactments exempting such institutions from taxation . . . In construing the section of the Constitution under consideration, the spirit of the times when it was adopted, as shown by the attitude of the territorial legislature and the people, should be infused into it”); \textit{Nelson v. Stryker Seminary}, 53 N.W. 1133, 1134 (Minn. 1893) (justifying tax exemption as follows: “[b]y the ordinance of 1787, it was declared (article 3:) ‘Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’ In recognition of this principle or obligation, the legislature of the territory of Minnesota, by chapter 12, § 4, Rev. St. 1851, provided that ‘the personal property of all literary, benevolent, charitable, and scientific institutions incorporated within this territory, and such real estate belonging to such institutions as shall be actually occupied for the purposes for which they were incorporated,’ shall be exempt. The same policy is manifested by the constitution, in which, by article 9, § 3, it is provided that ‘laws shall be passed taxing all real and personal property; but public schoolhouses, academies, colleges, universities, and all seminaries of learning, shall, by general laws, be exempt from taxation.’”).

17 William Anderson & Albert J. Lobb, \textit{A HISTORY OF THE CONSTITUTION OF MINNESOTA} 11 (1921) (citing Section 12, Organic Act of 1849 (“the inhabitants of the said [Minnesota] Territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants”)).
18 Revised Statutes of the Territory of Minnesota, Chap. 2, § 5 (January 1, 1851)
and “accrued” rights, stating “[t]he repeal of the acts mentioned in this chapter, shall not effect any . . . right accrued, or established . . . previous to the time when such repeal shall take effect; but every such . . . right . . . shall remain as valid and effectual.”19 Finally, far from repudiating rights and privileges originating from the Northwest Ordinance, Minnesota’s Constitution expressly incorporated them, stating “[t]hat no inconvenience may arise by reason of a change from a Territorial to a permanent State Government, it is declared that all rights . . . as well of individuals as of bodies corporate, shall continue as if no change had taken place,”20 and further stating that, “[a]ll laws now in force in the territory of Minnesota not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature.”21

This positive law connection between the rights protected by the Northwest Ordinance and the Minnesota Constitution warrants the inference that the robust conception of property rights protected by the Northwest Ordinance is among the “Rights and Privileges” secured by Minnesota’s Bill of Rights. This linkage is further supported by the fact that the Supreme Court of Minnesota has cited the Northwest Ordinance as the source of Minnesota’s common law rights of inheritance22 and distress for rent in arrears.23 Consequently, the doctrine of in pari

19 Id., Chap. 137, § 4.
20 MINN. CONST. “Schedule” § 1 (1857).
21 MINN. CONST. “Schedule” § 2 (1857).
22 McDonnall v. Drawz, 3 N.W.2d 419, 423 (Minn. 1942) (rejecting rule of inheritance adopted by Arkansas courts stating “we think that they are not based on sound reason and should not be followed, especially in view of our long established rule dating back to the Ordinance of 1787 to treat half and whole bloods equally with respect to right of inheritance and that any discrimination must rest upon explicit provision of statute”).
23 Dutcher v. Culver, 24 Minn. 584, 588-91 (1877) (stating “[b]ut the ordinance of 1787 for the government of the northwest territory, made it [the common law] the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin over Iowa. And although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was not affected, but remained in full vigor as before” and holding “our conclusion is, that, as at the date of the admission of the state of Wisconsin into the Union, the landlord's common-law right of distress for rent in arrear was in force in the territory of Wisconsin, and as such right of distress is not incompatible with the provisions of our organic act, nor repugnant to the constitution of this state, and has not been altered or repealed by our territorial or state legislature, it is in force in this state”) (adopting Coburn v. Harvey, 18 Wis. 147 (1864)).
materia strongly supports supplementing the “Rights and Privileges” clause with the robust concept of property rights protected by the Northwest Ordinance.

III. The Takings Clause of the Minnesota Constitution Should be Supplemented with the Northwest Ordinance’s Robust Conception of Property Rights.

By analogy, Hamline, Bishop Seabury and Nelson support the argument that the Minnesota takings clause should be read in pari materia with the restrictions on the power of eminent domain implied by the Northwest Ordinance’s robust concept of property rights. In Hamline, Bishop Seabury and Nelson, the Court used the Northwest Ordinance’s policy favoring the establishment of educational institutions to justify construing the taxing power under the State Constitution restrictively, to allow for the preservation of the tax-exempt status of colleges and seminaries that were established by pre-constitutional territorial charter. For example, in the 1944 case of Hamline, the Court was faced with a challenge to the tax-exempt status of Hamline University. It was argued that Hamline’s status was defective since it was based on a pre-constitutional territorial charter, which was supposedly superseded by and repugnant to a provision of the Minnesota Constitution that authorized the legislature to establish tax-exempt

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24 Trustees of Hamline University v. Peacock, 217 Minn. 399, 404-405 (1944); State v. Bishop Seabury Mission, 90 Minn. 92, 96-97 (1903) (stating it “has been the policy of our people, from the organization of the territory to the present time, to encourage and by all proper means assist in the support and maintenance of educational institutions. Such was the policy of the federal government prior to the organization of the state, for it was enacted by article 3, Ordinance of 1787, providing for the government of the Northwest Territory, of which Minnesota formed a part, 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.’ The policy of our own people is shown both by territorial and state legislation, for we find upon our statute books numerous enactments exempting such institutions from taxation . . . In construing the section of the Constitution under consideration, the spirit of the times when it was adopted, as shown by the attitude of the territorial legislature and the people, should be infused into it . . . ”); Nelson v. Stryker Seminary, 53 N.W. 1133, 1134 (Minn. 1893) (justifying tax exemption as follows: “[b]y the ordinance of 1787, it was declared (article 3:) ‘Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.’ In recognition of this principle or obligation, the legislature of the territory of Minnesota, by chapter 12, § 4, Rev. St. 1851, provided that ‘the personal property of all literary, benevolent, charitable, and scientific institutions incorporated within this territory, and such real estate belonging to such institutions as shall be actually occupied for the purposes for which they were incorporated,’ shall be exempt. The same policy is manifested by the constitution, in which, by article 9, § 3, it is provided that "laws shall be passed taxing . . . all real and personal property; but public schoolhouses, academies, colleges, universities, and all seminaries of learning, . . . shall, by general laws, be exempt from taxation."”).
status “by law.” The argument was made that since the state legislature did not confirm or adopt Hamline’s tax-exempt status through subsequent legislation, Hamline was no longer tax-exempt.

In response to these arguments, the Court nevertheless upheld “Hamline’s freedom from the general burden of taxation” based on its territorial charter and provisions of Minnesota Constitution, which stated “[t]hat no inconvenience may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place.” The Court then adopted word-for-word the holding of the 1903 case of Bishop Seabury:

[It] has been the policy of our people, from the organization of the territory to the present time, to encourage and by all proper means assist in the support and maintenance of educational institutions. Such was the policy of the federal government prior to the organization of the state, for it was enacted by article 3, Ordinance of 1787, providing for the government of the Northwest Territory, of which Minnesota formed a part, 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.’ The policy of our own people is shown both by territorial and state legislation, for we find upon our statute books numerous enactments exempting such institutions from taxation . . . In construing the section of the Constitution under consideration, the spirit of the times when it was adopted, as shown by the attitude of the territorial legislature and the people, should be infused into it.

The holding of Bishop Seabury, in turn, reflected the earlier holding of the 1893 case of Nelson, in which the Court upheld the tax exempt status of Stryker Seminary, stating:

By the ordinance of 1787, it was declared (article 3:) ‘Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.’ In recognition of this principle or obligation, the legislature of the territory of Minnesota, by chapter 12, § 4, Rev. St. 1851, provided that ‘the personal property of all literary, benevolent, charitable, and scientific institutions incorporated within this territory, and such real estate belonging to such institutions as shall be actually occupied for the purposes for which they were incorporated,’ shall be exempt. The same policy is manifested by the constitution, in which, by article 9, § 3, it is provided that "laws shall be passed taxing . . . all real and personal property; but public
schoolhouses, academies, colleges, universities, and all seminaries of learning, . . . shall, by general laws, be exempt from taxation.’

Like the power to tax, the power of eminent domain has been described as a sovereign power that is constrained only to the extent of the constitution.25 Also, like the territorial charters of Hamline University, Stryker Seminary, and Bishop Seabury Mission, a strong argument can be made that the rights protected by the Ordinance were expressly incorporated into territorial laws and the Minnesota Constitution by positive law. Accordingly, if territorial laws granting tax exemption combined with the policy of the Northwest Ordinance warranted constraining the power to tax under the Minnesota Constitution,26 then certainly territorial laws that expressly adopted the rights protected by the Northwest Ordinance warrant restricting the power of eminent domain by supplementing the takings clause with the “public exigency” and “common preservation” restrictions of the Ordinance’s robust conception of private property.

IV. The Rights Protected by the Northwest Ordinance Are Among the Unenumerated Rights Protected by the Minnesota Bill of Rights.

Justice Simonett’s concurrence in *Hershberger*27 recently linked the Northwest Ordinance to Section 16 of the Minnesota Bill of Rights. Specifically, Justice Simonett argued:

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25 *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515 (1866) (observing “[t]o take land of the citizen for public use by the State when necessary, is an essential incident to sovereignty. The right of eminent domain is not conferred by the constitution; but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress.”).

26 The relevant part of the Minnesota Constitution states that educational establishments shall be tax exempt as provided “by law.” Ordinarily, this would suggest that for an educational establishment to avail itself of tax-exempt status, the legislature would have to affirmatively grant such status by passing legislation. But the Supreme Court of Minnesota has repeatedly held that even where the legislature has not passed legislation recognizing the tax exempt status of an educational institution, the policy of the Northwest Ordinance and the Minnesota Constitution’s general incorporation of territorial laws still warranted recognizing the tax exempt status of institutions that were given such status by territorial charter. In other words, the Court restricted the sovereign power to tax based on: a) the Constitution’s express incorporation of territorial rights and laws; and b) the policy of the Northwest Ordinance favoring the establishment of educational institutions. Similarly, a strong argument can be made that the sovereign power of eminent domain should be restricted based on: a) the Constitution’s express incorporation of territorial rights and laws, which included the Northwest Ordinance; and b) the Northwest Ordinance’s textual protection of robust property rights.

27 *State v. Hershberger*, 462 N.W.2d 393, 399 n.3 (Minn.1990) (referring to Northwest Ordinance in discussing scope of the right to religious freedom under Minnesota Constitution).
Part of the Minnesota Territory was included in the Northwest Ordinance of 1787 which had been drafted by the Continental Congress, and which ordained that ‘no person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship, or religious sentiments in the said territories.’ . . . Arguably, Section 16 [unenumerated rights/religious liberty clause] protects only expressions of belief and opinion and is no more than a free speech clause. There is no mention in the foregoing clause of religious practices or the free exercise of religion. Section 16 speaks, however, of the right "to worship God" according to the dictates of one's conscience; and the words "to worship," if read within their historical context, surely must mean the practice of one's religion.

Justice Simonett’s foregoing interpretation of Section 16 is a clear indication that the Minnesota Supreme Court has read the Minnesota Bill of Rights in pari materia with the Northwest Ordinance. And if Section 16 has been read in light of the Northwest Ordinance for purposes of protecting religious liberty, the same reading is warranted with respect to Section 16’s protection of unenumerated rights; especially since the Northwest Ordinance explicitly holds itself out as stating “fundamental principles of civil and religious liberty.”

The argument that the unenumerated rights clause of the Minnesota Bill of Rights incorporates the Ordinance’s robust conception of property rights is also supported by the Minnesota Supreme Court’s methodology in identifying unenumerated rights. In the seminal case of Thiede v. Scandia Valley, for example, the Minnesota Supreme Court held that the town of Scandia Valley could not constitutionally evict a pauper from his home merely to remove him from the public dole. The Court reached this conclusion after surveying the traditional protections afforded property ownership in Anglo-American jurisprudence. Proudly adopting the “epigram” that “every man’s house is his castle,” the Court adopted the Magna Carta’s declaration that “no man shall be disseized of his freehold except for a crime,” and held that the right to establish a home is protected by the unenumerated rights clause.28

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28 Thiede v. Scandia Valley, 217 Minn. 218, 223 (1944) (“The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right
Thiede’s holding and constitutional methodology has been reaffirmed in recent years,\textsuperscript{29} and eventually it led the Court to recognize unenumerated rights to a presumption of innocence and proof beyond a reasonable doubt,\textsuperscript{30} equal protection,\textsuperscript{31} and privacy.\textsuperscript{32} Based on this precedent, the Northwest Ordinance’s robust conception of property rights is a natural candidate for recognition as an unenumerated right under Section 16 of the Minnesota Bill of Rights. The Northwest Ordinance is, after all, the Magna Carta of the Midwest.

Conclusion

As shown above, the Northwest Ordinance’s robust conception of property rights should supplement the Minnesota Bill of Rights pursuant to the doctrine of \textit{in pari materia} and restrict the use of eminent domain to circumstances of “public exigency” where “necessary” for the “common preservation.” Notably, persuasive foreign precedent also supports this argument. Most significantly, the Wisconsin Supreme Court has expressly held that the Northwest Ordinance “[t]hough obsolete, may be properly regarded as \textit{in pari materia}, and helpful and of historical value, in construing” constitutional provisions that “came in to take” the place of those of the Northwest Ordinance.\textsuperscript{33} Similarly, the Supreme Courts of the states of Ohio and Indiana

\begin{itemize}
\item \textsuperscript{29} \textit{In re Medworth}, 562 N.W.2d 522, 523 (Minn. Ct. App. 1997) (holding “[t]he right to establish one's home is inherent and inalienable”).
\item \textsuperscript{30} \textit{State v. Kelly}, 218 Minn. 247, 257 (1944) (observing when “testing the validity of statutes creating prima facie proof for use in criminal cases, we must keep in mind not only the guarantees of due process and trial by jury and the constitutional protection against being compelled to testify—which are expressly enumerated—but also such fundamental rights as the presumption of innocence and proof beyond a reasonable doubt, which, though not expressly enumerated therein, are as much a part of the constitution as though expressly set out”)
\item \textsuperscript{31} \textit{State v. Russell}, 477 N.W.2d 886 (Minn. 1991) (holding “[e]qual protection is confirmed in our state constitution as an ‘unenumerated’ constitutional right [under] Minn. Const. art. 1, § 16”).
\item \textsuperscript{32} \textit{State v. Gray}, 413 N.W.2d 107, 111 (Minn. 1987) (recognizing constitutional right of privacy stating “we have not limited our finding of fundamental rights to those expressly stated in our constitution; this, of course, is consistent with the definition of fundamental rights”).
\item \textsuperscript{33} \textit{State v. Cunningham}, 53 N.W. 35, 55-56 (Wis. 1892) (stating again that the Northwest Ordinance should be read “in pari materia” with the state constitution); \textit{State v. Cunningham}, 51 N.W. 724, 738 (Wis. 1892) (holding “[t]he Ordinance of 1787 and the organic act of April 20, 1836, were the fundamental law of the territory, and as a constitution for it, until the admission of the state into the Union, May 20, 1848, under its present constitution, ‘on

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have expressly recognized that various provisions of the Northwest Ordinance should be construed “in pari materia” with their statutes and common law, in such varied contexts as conveyances and probate matters. Lastly, the Supreme Court of Ohio has held that the liberties protected by the Northwest Ordinance were incorporated into the Ohio Constitution. It is now time for Minnesota to join the fold, and recognize that its territorial heritage limits the use of eminent domain to public exigencies.

an equal footing with the original states,’ when the Ordinance of 1787 and the organic act as well, which were adapted only to the territorial condition of Wisconsin, became obsolete and ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union. Though obsolete, these acts may be properly regarded as in pari materia, and helpful and of historical value, in construing secs. 3, 4, and 5 of art. IV of the constitution, which came in to take the place of the provisions briefly quoted”) (citations omitted).

34 Murdock v. Welch, 6 Ohio Dec. Reprint 835, (Oh. 1879) (“These common law principles, the [northwest] ordinance and statutes as to deeds and mortgages, the Code provision as to sale, the order of sale, and the homestead statute, are all in pari materia, and are to be construed together, and effect given to all.”)


36 State ex rel. Methodist Children's Home Ass'n v. Board of Edu., 138 N.E. 865, 870 (Oh. 1922) (holding “[t]he state of Ohio is a part of the old Northwest Territory and the ordinance of the Confederate Congress, passed July 13, 1787, known as the Ordinance of 1787, providing for the government of that territory and for its division into states to be admitted into the Union, in Article III thereof, enacted: ‘Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’ This provision was just as obligatory upon the future policies and future governments of the territory as was that provision of Article VI thereof, which provided that: ‘There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted.’ The obligations of that ordinance were fully recognized by the framers of the original constitution of 1802, and it was said in the preamble to that constitution, in part: ‘We, the people of the eastern division of the territory of the United States, northwest of the river Ohio, having the right of admission into the general government, as a member of the Union, consistent with the Constitution of the United States, the ordinance of Congress of one thousand seven hundred and eighty-seven, and of the law of Congress, entitled ‘An act to enable the people of the eastern division of the territory of the United States, northwest of the river Ohio, to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes;’ do ordain and establish the following constitution or form of government. . . . All the statutes above quoted from are in pari materia with the sections under construction’); Steinglass and Scarcelli, THE OHIO STATE CONSTITUTION 7 (2004) (observing “[u]ltimately, both the U.S. and Ohio Supreme Courts held that state constitutions superseded the Ordinance, but the fundamental rights protected by the Northwest Ordinance, including the prohibition against slavery, became part of the 1802 Ohio Constitution and remain part of the current Ohio Constitution”).