American Singularity:
The 1787 Northwest Ordinance and The 1862 Homestead and Morrill Acts

BY

Harold M. Hyman

Foreword

BY

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In the Introduction to the publication of his Richard B. Russell Lectures delivered in 1985 at the University of Georgia, Harold M. Hyman quoted Goethe's famous observation that America "du hast es bersser." But, he went on to ask, if it "has it better," in what is it better? As a self-described "skeptical mugwump," Dr. Hyman offered a tentative answer to this question: "American singularity" results from public policies that increased individuals' "access to recognized avenues of mobility, opportunity and success" and that are expressed in particular laws encouraging access to land, to education and to legal remedies.

"Access legislation" was enacted in different periods of the nation's history: first, the founding of the nation and the creation and early implementation of the Constitution, centering on the 1787 Northwest Ordinance; second, the period of the Civil War and Reconstruction, centering on the 1862 Morrill and Homestead Acts; and third, the period of World War II and its aftermath, centering on the 1944 G.I. Bill.

The Northwest Ordinance increased access to ownership of land, stabilized property rights, and required the establishment of public schools. The Homestead and Morrill Acts, enacted during the bleakest days of the Civil War, assured access to public lands in the West and to state land-grant colleges, thereby countering economic and social disadvantages faced by blacks and poor whites faced after the conflict ended. The G.I. Bill vastly expanded educational opportunities in the post-World War II era. These "access laws" were imperfectly drafted, necessitating amendments and, during some periods, many Americans, especially blacks and women, were denied their benefits; nevertheless, they express the values and aspirations that triggered the Revolution and are embodied in the Declaration of Independence and the Constitution, especially the Bill of Rights and the Reconstruction Amendments.

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Dr. Hyman's scholarship has concentrated on U. S. constitutional and legal history and the Civil War and Reconstruction. Among his books are *To Try Men's Souls: Loyalty Tests in American History* (University of California Press, 1959); with Benjamin P. Thomas, *Stanton: The Life and Times of Lincoln's Secretary of War* (Knopf, 1962); *New Frontiers of the American Reconstruction* (University of Illinois Press, 1966); *The Radical Republicans and Reconstruction, 1861-1870* (Bobbs-Merrill, 1967); *A*

More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution (Knopf, 1973); *Union and Confidence: the 1860s* (Thomas Y. Crowell Co., 1976); *Era of the Oath: Northern Loyalty Tests During the Civil War and Reconstruction* (Octogan Books, 1978); with William M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875* (Harper and Row, 1982); *Character and Craftsmanship: A History of Houston's Vinson & Elkins Law Firm, 1917-1997* (University of Georgia Press, 1998); and *The Reconstruction Justice of Salmon P. Chase: In re Turner and Texas v. White* (University Press of Kansas, 1997).

Only Dr. Hyman's lectures on the Northwest Ordinance and the Homestead and Morrill Acts are posted in the following article. They appeared first on pages 18-61 of *American Singularity*, published by University of Georgia Press in 1987. The footnotes followed on pages 80-88. The lectures are posted on the Minnesota Legal History Project with the consent of the copyright holder, the University of Georgia Press, and Dr. Hyman. The text and footnotes are complete, though reformatted. Pages breaks have been added.

For the convenience of the reader, the Northwest Ordinance, the Homestead Act and the Morrill Acts of 1862 and 1890 are posted in an Appendix, pages 58-79, following the footnotes (these laws were not included in the original edition of the book).

Related articles on the MLHP are Douglass C. North and Andrew R. Rutten, "The Northwest Ordinance in Historical Perspective" (MLHP, 2011), and Jonathan Hughes, "The Great Land Ordinances" (MLHP, 2011). □

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Chapter 1

The 1787 Northwest Ordinance

James McPherson of Princeton asserted recently, as noted earlier, that the notion of a singular American history has "received quite a drubbing since the heyday of the consensus school of historians in the 1950s, . . .suffering heavy and perhaps irreparable damage." This singularity notion involved an assumption, McPherson stated, "that something special [in] the American experience — whether it Was abundance, free land on the frontier, the absence of a feudal past, exceptional mobility and the relative lack of class conflict, or the pragmatic and con-sensual liberalism of our politics — set the American people apart from the rest of mankind. Historians writing since the 1950s, by contrast, have demonstrated the existence of class and class conflict, ideological politics, land speculation, and patterns of economic and industrial development similar to those of Western Europe which placed the United States in the mainstream of modern North Atlantic history, not on a special and privileged fringe." [1]

Exceptionalist ideas had withered in part as revisionist historians argued that the 1787 Northwest Ordinance and Constitution were conservative, almost counter-revolutionary triumphs more than libertarian achieve-ments. Merrill Jensen, a scholar of great talent and happy longevity, concluded in 1950 that Jefferson's Ordinance of 1784, which the 1787 Northwest Ordinance statute replaced, had "provided for democratic self-government of western territories, and for that reason it was abolished in [19] 1787 by . . . land speculators." [2] Jensen's version won lasting acceptance on and off campuses. Prominent historians discounted contemporary testimonies to the global uniqueness and salutary effects of the 1787 Ordinance, including those by Daniel Web-

ster, who had doubted "whether one single law of any lawgiver, ancient or modern, has produced effects of a more distinct, marked, and lasting character than the Ordinance of 1787," and by Salmon Portland Chase, who had estimated that:

> Never, probably, in the history of the world did. . . legislation fulfill and yet so mightly exceed the expectations of the legislators. The [Northwest] ordinance has been well described as having been a pillar of cloud by day and of fire by night in the settlement and government of the Northwest States. When the settlers went into the wilderness they found the law already there. . . . The purchaser of land became, by that act, a party to the compact, and bound by its perpetual covenants, so far as its conditions did not conflict with the terms of the cessions of the States. [3]

Instead scholars who stressed inequalities in sizes of holdings developed out of the abundant western land concluded that the system of distribution was itself flawed; that, as Vernon Carstensen described it, a "wide gap . . . existed between high intentions and low performance." An outstanding specialist in land history, Carstensen noted that "the history of the public lands has been full of words such as speculators, land monopolists, rings, corrupt officials, hush money, fraudulent entry, land sharks . . . land grabs, . . . mineral grabs, . . . [and] timber grabs." All, Carstensen continued, "excite great interest and bring forth lamentations." But he concluded also that land history was not solely a rogue's gallery: "The alienation of the public land exhibits much human cunning and avarice, but in many instances what was called fraud represented local accommodation to the rigidities and irrelevance of the laws." Honest land seekers by the millions "got their land without violating either the spirit or the letter of the law." [4] [20]

Carstensen's effort the better to balance opposed views is part of an impressive current revival of exceptionalist reinterpretations of the 1787 Northwest Ordinance, along with such related statutes as the 1785 Land

Ordinance, the 1789 Judiciary Act, and the Constitution itself. Some of these reexaminers concur that the framers and implementers of the 1787 Constitution and Northwest Ordinance were not merely knavish members of a small, economically self-serving class looking primarily toward a bigger common market. They were, rather, politically pragmatic activists who added to self-interest a desire to make the new nation work and to realize potentialities in the human condition. For these reasons, the framers of the Northwest Ordinance, years before the Bill of Rights graced the Constitution, increased individuals' access to ownership of land, subsidized public education, and stabilized property rights in the territories as preconditions to the enhancement of liberty. They institutionalized the pursuit of happiness by dramatically and singularly enlarging individuals' access to landed property, to education, and to legal remedies for securing rights. [5]

Like Carstensen, Ray Allen Billington acknowledged defects in the ordinance, especially its property qualifications for voting and officeholding and the absolute veto power of the territorial governor in the initial phases of settlement. Nevertheless, Billington concluded that "despite these faults the Ordinance of 1787 did more to save the union than any document save the Constitution. Men could now leave the older states assured that they were not surrendering their [legal protections and ultimate] political privileges." The popular undergraduate history textbook by Bernard Bailyn et al, described the ordinance as solving "at a stroke the problem of relating 'colonies' or dependencies to the central government that Great Britain had been unable to solve." Elsewhere, Bailyn praised the ordinance's "brilliantly imaginative provisions [Article V] made for opening up new lands in the West and for settling new governments within them" as precisely re-[21]-flecting the optimistic striving mood and interests of almost all white Americans. This concept — no practice— of equality of new states with older ones, as a statutory procedure triggered by a specified population minimum that transformed settlements into states, was indeed new in history, another American invention in public law

equaling the exhilarating state Constitution making of 1775 through 1787. Edmund Morgan saw the ordinance as an early model of how Congress could implement vague clauses of the new Constitution.[6] Peter Onuf, whose monographic output on all these matters is itself a cottage industry, asserted recently that "Americans would continue to celebrate the Northwest Ordinance, both for what it had accomplished in the early history of the territorial system and for the enlightened principles it set forth." [7]

Such positive estimates of the 1787 Ordinance echo James Monroe's, who assured Jefferson the 1787 version retained "the most important principles" of the Superseded law of 1784.[8] Robert Berkhofer concluded that the two men did indeed share in a consensus of the 1780s that they were providing for the expansion of a republican empire; that "this [American] empire was *novus ordo sceclorum*, as they proudly proclaimed on their Great Seal; [and that] the United States was not only a newly-independent nation but a new type of nation." New in what? "Its. . . republican institutions," Berkhofer continued, including "religious freedom relative economic opportunity hence relative social equality, and that which made all these possible — republican government." [9]

The novel principles of territorial evolution reached in the Northwest Ordinance included also an ancient technique, the reward of land for military veterans. Congress reserved for Revolutionary War veterans one-seventh (ca. 2,660,000 acres) of the enormous acreage the ordinance embraced to be drawn for by lotteries. Roman and Chinese rulers of antiquity used frontier lands to reward former soldiers and to attract recruits to explore [22] frontiers, with Hadrian's Wall and the Great Wall as examples. More recently, Britain rewarded the United Empire Loyalists in Canada and the anti-Boer military veterans in South Africa with land grants. Japan and Russia granted lands to members of the military units that, respectively, conquered Hakkaido and built the Trans-Siberian railroad. Brazil at present awards lands to troops after service along the Amazon River. All these and other land-grant policies

separated military veterans from the mass of a society's citizenry, and rewarded for particular public services a special segment of the public which, like Ulysses returning home war-weary but victorious, it was wise to placate.

In America of the 1780s, placation of state and Continental veterans was clearly in order. Shay's Rebellion was no idle bogeyman. But a simultaneous assumption existed that American soldiers, once victorious, should not be separated from general citizens The *Independent Chronicle* in Boston encapsulated the view: "To be soldiers and conquerors is one thing: to excel in the arts of peace is another." [10]

In 1787 Congress Stipulated that the remainder of the vast Northwest Territory, after the veterans' lotteries, be open for sale to all corners at a dollar an acre minimum. Many thousands of war veterans sold their claims to speculators who resold these rights of access to third parties. Land speculation, endemic throughout our history, raged during the 1780s. Economic conditions, especially the tightness of capital, plus the excess of land over settlers even at the heights of immigrations encouraged speculations. Proofs remain unsatisfying, however, for long-axiomatic propositions that speculations resulted in high land prices that shut out genuine settlers, dispersed residences unhealthily, invited wasteful farming methods, and encouraged large holdings. Daniel Feller's significant recent reevaluation concluded that these "arguments rested on agrarian postulates that historians are not required to accept." We are beginning to see that the speculations even had certain constructive results. Among them, [23] it helped to prevent creation of segregated communities and to merge veterans' rights into citizens' rights. [11]

If land distributions generated fierce sectional antagonisms, they also encouraged enduringly confident government and marketplace processes The pathbreaking English economist Thomas Malthus's *Essay on the Principles of Population; or, A View of Its Past and Present Effects on*

Human Happiness, published in 1798, was hardly dismal to Washington, Adams, Jefferson, or Monroe. Malthus argued (pp. 190, 194) that America, in part because of the swift and orderly availability of Northwest Ordinance land, was the singular exception to the sad fact that populations tended to expand beyond the food supply, thus ensuring impoverished generations, unless wars, famines, and epidemics reduced the eating surplus. Americans' "happiness" Malthus wrote, "depended much less upon their peculiar degree of civilization, than upon the peculiarity of their situation, as new Colonies, upon their having a great plenty of fertile uncultivated land."

Summing up similar contemporary data, historian Robert H. Wiebe concluded that "by 1840, millions of Americans enjoyed an easy faith in the distinctiveness of their society. The heart of their unique America was its democracy, a term that no longer identified [only] the popular element in the republican balance but now covered all the essentials in American life. . . [It] beckoned to all white Americans who had at least a modest base of property." [12]

In sum, speculators and all, the 1785 Land Law and the 1787 Northwest Ordinance began a series of distributions that transformed successive Wests into stabilized promised lands. Visions of the West as a nursery of republican virtues over a vast continent whose very boundaries were still unknown in 1787 excited Confederation congressmen in New York City and the framers of the Constitution in Philadelphia. Fee-simple ownership by large numbers of smallholders would transform the frontier, where civilization was at risk, into settlements where morality and laws [24] (including responsibilities to repay debts) would be honored and national cohesion maintained. Publicly supported education, a topic in the 1785 and 1787 Statutes, would create literate, free farmers who would staff the governments sketched in the 1787 law. Because settlers derived their titles to land and attendant property from the nation, these unservile land-busters and their children, whose right to education was also a statutory duty of government, would be linked

in grateful loyalty to the nation and to the new state they had conceived.[13]

This goal of linkage makes understandable why the Northwest Ordinance implanted commitments to public education in the territorial chrysalis of future states. In planning the republic, most supporters of the Constitution and the ordinance espoused not-yet Federalist "loose construction-internal improvement" doctrines and policies. In addition to advocating roads, turnpikes, canals, and forts, such supporters gave priority to various forms of public education, all aiming to make the frontier quickly interdependent with the dismayingly distant East. Schools, one recent commentator suggested, would foster an "empire of system" to temper Jefferson's "empire of liberty."[14] Therefore the 1787 Ordinance is known for its Article III, on schools: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

A long history underlay this extraordinary provision. Britain's monarchs and other benefactors occasionally favored church-related educational institutions by establishing endowments, commonly from the firmly anticipatable rents of donated, tenanted lands. Analogous efforts here, however, led to failures. As an example, in 1619 the Crown chartered Henrico College in Virginia with a substantial land grant. But underpopulated Virginia, like almost all British North America, could not generate stable incomes from vacant land. Henrico College died. Colonies soon modified the familiar British practice by dedicating to [25] schools, especially colleges, portions of the incomes from lotteries, license fees, ferry tolls, mill services, and certain taxes. Harvard, Yale (the Collegiate School of Connecticut), and William and Mary benefited from these fiscal adaptations. In the eighteenth century, increasing sectarian controversies resulted in newer colleges, including those known now as Princeton, Pennsylvania, Columbia, Brown, and Dartmouth, supplementing incomes from granted lands and prerogatives with private solicitations.

.Concerning the lower "common" grades, the constitutions of several states (Vermont, Pennsylvania, North Carolina) pledged support for elementary schools as well as collegiate "seminaries of learning." The Revolution, by preserving and enhancing the colonies-become-states as the base of American federalism, frustrated proponents of a national university and of a national system of education. Congressmen entertained many proposals for dedicating to what would become state-controlled education the income from the sales or rents of federal lands. Jefferson's 1784 Ordinance did not so provide, however, an omission New England's Thomas Pickering and other critics repair by including in the 1785 Land Ordinance the famous clause reserving the sixteenth lot (one section) of every township for the fiscal maintenance of lower schools in that township, a provision that combined nicely with Article III of the 1787 Ordinance quoted earlier. But they remained more pious preachment than mandate until the contract Congress made with the Reverend Manasseh Cutler on behalf of the Ohio Company.

The contract stipulated support for elementary and collegiate education requiring that "not more than two complete town ships [of good land] to be given perpetually for the purposes of a university, to be applied to the intended objects by the legislature of the state."[15] Thereafter, beginning with Ohio in 1803, every new state that was carved from the public lands received this allowance for education. In 1790 Congress extended the sub-[26]-stance of the 1785 and 1787 laws to the Southwest, minus antislavery provisions, of course. With Georgia the first in the nation, some states established state universities from their own resources. Most states preferred to exploit the federal 1785 and 1787 laws and created state universities that were partially land-grant in their financing. As the nation, by purchase, conquest, or treaty, acquired territories that spawned new states, the educational systems in these states developed initially around the availability of federal lands. In 1850, Congress increased the grant to two sections in each township (Oklahoma, New Mexico, and Arizona received four sections). Additionally, each new state, on entering the Union, received a further federal

gift of two townships (ca. 46,000 acres) for the "seminary of learning," or university. By 1860 the substance of what Congress had provided in response to needs of the nation and the speculations of the Ohio Company, concerning access to land and education, had also migrated westward. Almost a score of publicly supported school systems, including colleges and universities, had blossomed by then in the new states. Whatever the motives of 1787, this sustained governmental support for education from the grades through college, especially in a manner that respected national, state, and local resources, interests, procedures, prejudices, and pride, was globally unique. [16]

In short, Congress looked westward toward the developable frontier that, as Mary Young noted, "has always served as a metaphor of . . . [the] nation's unique potentialities." [17] Perhaps, therefore, the slower evolution toward statehood in the 1787 law, as compared to Jefferson's statute of 1784, was a matter less of contrary purposes than of the pace anticipated for operations of the 1785 Land Law, especially the educational provisions. Tying the 1784 and 1787 laws together were advanced provisions for *gavelkind*, veterans' land bounties, and publicly supported education, plus the famous antislavery provision of the ordinance, Article VI, a policy that alone makes almost fanciful the perennially popular economic interpretations of the 1787 Constitution and Northwest Ordinance as conservative counter-revolutions. Instead, like the Constitution, the ordinance was a consensus product. Contemporaries' sharp differences concerned how best to expand an empire upon republican principles as well as to encourage privileged individuals to profit financially. [18]

Perhaps best capturing the essence of these linked purposes of the ordinance writers of the middle 1780s, in the 1980s Joyce Oldham Appleby discerned among ideas derived from Britain circulating in the new nation, those concerning the self-determination rights of a corporate body, free men's rights to share in public affairs, and the secure possession of private property. Americans, Appleby argued, accepted

this derived and restricted catalog as original concerns for liberty. But they also added not only better accommodations for capitalism in this new social order but also a sense of personal freedom only minimally limited to others' enjoyments of the same large personal freedom. The drafters of the ordinance tried to reshape America as a relatively un-hierarchical society in which ordinary individuals enjoyed with other undisadvantaged persons access to what most people then believed were major assets of life. [19]

Critics of these positive views, and of their implications for exceptionalist-consensus positions, have not been idle. Gary Nash noted that the ordinance encouraged republican governments for whites at the expense of whole nonwhite cultures that suffered military sub-jugation; a development leading to Lawrence Wittner's remark that "American exceptionalism becomes particularly questionable when set against the grim premises of 'realism.'" Robert Hill and Paul Finkelman cautioned that, though tiny in number, Indians and Negroes in the territories and states of the Old Northwest were, if nominally free, sub-stantially unequal. Black codes disguised involuntary servitude in the ostensibly free Northwest Territories long after 1787. [20] [28]

Of these criticisms, Finkelman's are the most telling. Boiled down, they underscore imperfections in this state-centered federal Union. Looking ahead from 1787, Finkelman noted correctly how constitutional doctrines and power relationships of federalism and legal doctrines of comity constrained freedom more than slavery. North and South, individuals' moral repugnance to slavery did indeed face discouragingly high barriers. Antislavery litigants who pleaded the Northwest Ordinance found that the federal courts, including the Supreme Court, were often weak and erratic reeds to use as staffs. Such famous decisions as those in *Strader* (1850) and *Dred Scott* (1857) corroded the ordinance as an antislavery base, at least in terms of implementable political positions flowing from constitutional law. Final solutions for slavery in federal territories came, not from courageous decisions of Jeffersonian and

Jacksonian high jurists about the Northwest Ordinance as a kind of constitution, but from decisions Lincoln's generation carried on bayonets to Appomattox. [21]

Yet we know also that antislavery lawyers and jurisprudents perpetuated with impressive tenacity and ingenuity the often-flickering abolitionist impulse because hope for its realization existed not only in the 1787 Constitution but more deeply in the Northwest Ordinance. The libertarian antislavery heritage survived even the accommodationist, misnamed "compromises" of 1820, 1833, 1850, and 1854, *Dred Scott*, and the ultimate sectional blackmail, state secessions in 1860 through 1861. The Northwest Ordinance described the future Union of states as it should be. The ordinance, like the Constitution, was a vision as well as a blueprint for immediate implementation. Consistent, sustained federal monitorship of the antislavery clause in the ordinance was not in the cards of history. The national government had only a sparse capacity to implement any policy except revenue-collection, and that, ultimately, by resorting desperately to military coercion as in the "Whiskey Rebel-lion."[22] Yet, however flac-[29]-cidly implemented, the ordinance helped to make the laws of the slaveholding states, Lawrence Friedman concluded, appear to be "something alien," dangerous, diseased, and distorted.[23] This alone was a substantial accomplishment But more benefits than this were to accrue to America from the ordinance.

These ongoing benefits derive from the fact that numerous connections existed between the Declaration of Independence, the Northwest Ordinance, and the Constitution, especially to its Bill of Rights, as well as to other contemporary creations including the first Judiciary Act. These links were, however unanticipatedly, to extend across decades in a manner to affect the configurations and character of the Thirteenth and Fourteenth Amendments of 1865 and 1868, and still further, to *Brown v. Board of Education* in 1954 and thus to our time.

Does the antislavery pledge in the Northwest Ordinance link it to larger

contexts of American Revolutionary and early national history, and beyond? Not even to a broader Revolutionary context, insisted historian Jack Rakove. He criticized attempts "to locate the Northwest Ordinance within some larger context of Revolutionary enactments," especially the Declaration of Independence and the Constitution's Bill of Rights. Yet Rakove himself conceded that the Declaration of Independence, clauses in the Constitution and all versions of the ordinance stressed resident individuals' rights of mobility as basic to free society, a view that was to sustain abolitionist jurisprudents through frustrating decades. [24]

It is always important how we perceive the society that produced the ordinance, and, earlier, the 1776 Declaration of Independence and its author, Thomas Jefferson. As Carl Prince noted recently:

> For a long time everybody knew that Thomas Jefferson cribbed the Declaration of Independence and most of his political thought, when it was not uniquely his own, from John Locke. During the [30] last decade, however, the Lockean Jefferson has been dismissed, and at least five other Jeffersons have appeared in his place; a Bolingbrokean and English Oppositionist Jefferson (Lance Banning), a Scottish Enlightenment moral-sense Jefferson a la Francis Hutcheson (Gary Wills), a Scottish Enlightenment rationalist Jefferson a la Thomas Reid (Morton White), an anti-modern agrarian expansionist Jefferson (Drew McCoy), a champion of commercialism and capitalism Jefferson (Joyce Appleby) [; . . . and] a radical libertarian communitarian Jefferson (Richard K. Matthews). [25]

So with the Northwest Ordinance. The 1787 Northwest Ordinance was indeed an element in a broad contemporary Jeffersonian current, with the American Revolution as the most immediate and generalized context.

David Brion Davis, in his intriguing 1983 "counter-factual fantasy," after

surveying contemporary England, the Caribbean, and Latin America, mused over paths that history might have taken had Britain suppressed its American rebels. He noted that "it was not an army of liberation that Pitt dispatched to rebellious St. Domingue; nor did the British, when they captured Martinique in 1795, intend to implement the French Convention's recent decree of universal emancipation." Further, "in striking contrast to the Northwest Ordinance of 1787, the British Imperial Act of 1790, intended to encourage [white] immigration to Canada, the Bahamas and Bermuda, allowed whites freely to import all their Negroes [i.e., slaves], household furniture, utensils of husbandry or clothing." Without the American victory in the Revolution there would have been "no Northwest Ordinance and no truly 'free soil.' " [26]

And in 1984, in factual not counter-factual terms, Davis reinforced his earlier judgment on the globally innovative quality of the ordinance's antislavery commitment. Until the 1770s, slavery and human progress were seen as compatible. But thereafter the ordinance served as a premier proof of a now self-evident truth, that slavery was an unacceptable and uncivilizing evil. [31] Limits on slavery like those in the ordinance would, many persons asserted, lead to the demise of the bondage system. Its curtailment and eventual death would ensure human progress everywhere in America free labor, cheap or free land, popular education, liberal capitalism, constitutional and legal procedures, and political democracy would hasten abolition and be nourished by its deterioration, Davis wrote.[27]

The burden of these analyses is that the ordinance was, if imperfect, exceptional and perhaps unique. True, relatively few blacks ever resided in ordinance states until the turn of the twentieth century. Nevertheless, the majority of white residents of ordinance states fulfilled the hopes of framers of the Constitution and the ordinance better than most judgments allowed. Politically active Ohioans, Indianans and Illinoisans, as examples, themselves subsequently enforced the substance of the ordinance when they aided runaway slaves via underground railroads

and frustrated repetitive efforts to reintroduce slavery.[28] These same voters, however also introduced, retained, could not erase, and/or strengthen blatantly racist "black codes" in constitutions and laws of their states, not to speak of community customs.

The ordinance was exceptional also concerning individuals' access to legal remedies. Nathan Dane, in drafting the 1787 Ordinance, aimed to preserve the legal rights of residents and nonresidents as the territories evolved toward statehood. Contract performance and rights of possession were continuing concerns of Dane's generation of legalists.[29] As Mark De Wolfe Howe noted, "The intense interest of nineteenth century jurists [and lawyers] in problems of possession is somewhat mystifying [even] to lawyers of the twentieth Century." [30]

In addition to a clause against contract impairment, Dane introduced into the 1787 Northwest Ordinance legal rights and remedies guaranteed in the bills of rights for Massachusetts and [32] other states, a commitment that the descent of property be free from "feudal or monarchical" remnants, a place for the rights of habeas corpus and trial by jury, an inheritance provision more liberal than *gavelkind* since females were permitted to share in a deceased father's property, and a stipulation that territorial judges were to use criminal laws of *some* states until a territory, becoming a state, created its own. All these, plus the Article III commitment to public aid for education and the Article VI prohibition against slavery though coming from the floor of Congress rather than from Dane's committee, received his sponsorship and support. [31]

Access to courts was a step toward these manifold, complex linked goals. Under authority of Article III of the Constitution, the first Congress enacted the famous 1789 Judiciary Act, its "transcendant achievement" according to Felix Frankfurter and James Landis, and another essential context for evaluating the ordinance.[32] By its terms and those of its successor judiciary statutes, the lower federal courts became forums of primary importance in protecting private interests,

especially in civil suits involving litigants of diverse state citizenship. State and local courts had proved to be hostile to "strangers." But the congressmen were not hostile to state interests; congressmen were, and are, states' men, only a few becoming statesmen. They had written into the Judiciary Act a requirement that federal judges, including those in territories, when hearing diversity suits, employ the statutes, rules of procedure and common law of a forum state, a requirement that explains the hurried forum-shopping of generations of lawyers earning their fees. With respect to territorial criminal prosecutions, Congress specified that each territorial legislature choose the criminal law of some state, and that territorial judges apply the chosen state law. In short, for civil and criminal actions, Congress created a national context for living in the federal union, while yet honoring legal Standards of states.[33] [33]

Does all this claim too much for American policymakers of the 1780s? Even modern Congresses, though blessed with sophisticated staffs, librarians, and computers, function quickly, vigorously and imaginatively primarily in crises. Emergencies were common in the 1780s and endemic through 1860. But the systematic application of the laws of the 1780s suggests more than spasmodic reaction to emergencies. By selling ordinance land, Congress was raising revenue, encouraging settlement, discouraging the expansion of slavery, and developing a chain of educational institutions from beginning grades through the collegiate — a sophisticated mix of goals. At the most, as Allen Nevins asserted in 1962, "This vision of rising Western empires, leaning on ever stronger Eastern commonwealths was pervaded . . . by an assured concept of democracy. Its cornerstone was Jeffersonian equality, the right of every person to an equitable chance in the world, . . . and his fair station before the law." At the least, as Robert H. Wiebe suggested in 1985, formulas developed by all interests in the 1784-87 years "invested the revolutionary republic with a vague, serpentine expand-ibility." [34] This serpentine expandability or, better, adaptability and adequacy was to be the context of major party and courtroom battles of the Ages of Jefferson, Jackson, Lincoln, and Franklin Roosevelt.

As the nineteenth century advanced toward its vital center, evolving concepts of economic and political democracy and of free and unfree labor became defined by individuals' access to degrees of interest in land, whether ownership, leasehold, or other forms. Successive tinkerings with land distribution techniques fanned fierce sectional antagonisms and, at least in the free states, an enduring vision of a confident process and a moral vision of what came to be called social mobility. [35]

By the time the Age of Jackson merged into that of Lincoln, Americans boasted with good reason that, better than any other, [34] their nation knew how to transform subservient territories into equal states, to harmonize individuals' mobility over vast distances with social integration and legal responsibilities, to preserve state-centered, localistically defined, politically stable federalism, and yet allow for measured progress. But America possessed another singular element: the unique presence of millions of blacks living in physical propinquity with white majorities who controlled all levels of government, especially those that counted most, the states and localities. The historic statutes of the 1780s on access to land, education, and legal remedies could not solve the slave law dilemma faced by American democracy and federalism.[36] Only a war — the longest, bloodiest, most searching conflict fought anywhere in the Western world between Napoleon's final defeat and World War I —"solved" that corroding question. [35]

Chapter 2

The 1862 Homestead and Morrill Acts

The very fact that a nation caught up in such a trauma as our Civil War should trouble to legislate on the greater access of its citizens to land, education, and legal remedies is itself singular. Congress creating the 1862 Morrill and Homestead Acts (on education and land), and the 1863 Habeas Corpus Act (on legal remedies) frequently acknowledged the antecedents of these legislations to be in the Declaration of Independence the Northwest Ordinance, the Bill of Rights, and the first Judiciary Act. [1]

First, a brief look at these remarkable Civil War statutes beginning with the May 1862 Homestead Act. It afforded loyal adult citizens access to a quarter section of public lands at a minimum $1.25 per acre, with protection for preemptive squatters. Congress gave only a weak priority in homesteading to Union military veterans, one reflecting the aforementioned article of republican faith not to separate soldiers from the mass of citizens. This assumption helps to explain also two globally unique phenomena destined to be carried on in the declared and undeclared wars of the twentieth century. The first phenomenon is the fact that from Sumter to Appomattox Union, states carried on calendared elections including those for humblest sheriffs and justices of the peace to congressmen and presidents. The second is that in the majority of these states, including the most populous, soldiers voted. In Lincoln's memorable phrase, blue-coats were "thinking bayonets" — voting citizens, in short. [36]

The July 1862 Morrill Land-Grant Act granted to loyal states (Congress added the crumpled Confederate states in 1866) an empire (finally, thirteen million acres) of federal land, substantial portions of which each recipient state was to transform into perpetually inviolable endowments for "the support . . . of at least one college where the leading object shall be, without excluding other subjects, scientific and classical studies, and including military tactics, . . . agriculture and mechanic arts, in such manner as the legislatures of the State may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." This was the first nation in the world, whether in peace or war, systematically to commit its resources for the support of higher education, and the Morrill Act scale far transcended even the pioneer Northwest Ordinance. The Morrill Act ensured (i.e., if a Union survived the war) local (i.e., state) not national control of derivative collegiate institutions, yet tried to precommit the beneficiary states to make their universities serve the contemporary needs of a swiftly changing society. The lawmakers imposed no restrictions on the gender, religion, or race of students. The statute spoke to the growing popular appreciation of what Charles Beard described in 1937 as *The Unique Function of Education in American Democracy*. Beard's use of the word *unique* deserves emphasis. [2]

Last of the trio, the March 3, 1863, Habeas Corpus Act, plus several amendments from 1866 to 1875, significantly enlarged the jurisdiction of federal courts in certain appeals from allegedly prejudiced state courts, even when diverse state residence, the primary basis of federal jurisdiction since 1789, was not involved.[3] Congress stipulated, additionally, that in appeals, the statutes, legal procedures, and common laws of the forum states must apply, with two exceptions. Negroes' testimony was admissable even adversely to whites, and court officers, lawyers, and jurors must swear to their Union allegiance.[4] [37]

Rooted in the Declaration of Independence, Northwest Ordinance, and first Judiciary Act, these three laws were destined to shape the

Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1865–66, which link in turn to momentous public policies of the twentieth century's vital center, especially to the landmark 1954 *Brown v. Board of Education* school desegregation decision of the Supreme Court. Since *Brown*, critics, even those friendly to desegregation have denied the significance or even the existence of this linkage. Lawyer-writers especially suggest that evidence of school integration from 1866, the year Congress wrote the Fourteenth Amendment, leaves uncertain the intentions and perceptions of its framers. In effect, therefore, the argument runs, in 1954 the justices struck down school segregation on morally justifiable yet largely nonhistorical grounds. [5]

Perhaps brieflike analyses that use history noncontextually, on the alleged weakness of the *Brown* decision, themselves want reconsideration. Although some of my best friends, and one of my children and her husband, are lawyers, the opinion of that usually soft-spoken Princeton historian and former law school associate dean, Stanley Katz, is relevant: "Lawyers are arrogant and think they can do anything, including write [legal] history." [6]

Rarely do law writers on *Brown* recognize the dynamic, mobile, "can do" quality permeating constitutional and legal thought on race and access in the 1860s, or the fact that reformist Republicans, including leaders of the bar Montgomery Blair, Salmon Portland Chase, Thomas McIntyre Cooley, David Dudley Field, Reverdy Johnson, George Washington Paschal, Edwin M. Stanton, William Whiting, and, of course, Abraham Lincoln, acquiesced to "perpetual" slavery in 1860–61. Coerced by state secessions, Republican congressmen, with Lincoln's unhappy assent, wrote and sent out to the states for ratification an "unamendable" Thirteenth Amendment that would bar the nation from ever interfering with slavery in the extant states. Three [38] states ratified this ultimate denial of access before the events of the Civil War made the matter moot. [7]

But thereafter the Union's leaders and, ultimately, voters ascended to advocacy of military emancipation affecting only the occupied Confederacy, then to Congress's nonracial exclusionary provisions for state universities, individuals' homesteads, and legal remedies in 1862—63, then to the national unqualified "freeitude" of the Thirteenth Amendment in 1865. The presence, pace, and force of such changes in our history do not mesh neatly with conclusions that in 1866-68 Lincoln's Republicans rather casually accepted segregation in major policies including the Fourteenth Amendment, and that the 1954 *Brown* decision is thereby suspect.[8]

Legal history has come a long way since *Brown*, a time when eminent Yale law professor Grant Gilmore proclaimed that "there is absolutely no point in setting up a separate category of legal writing (or law teaching) to be known as 'legal history.'" [9] The extent of its growth is measurable in part by the sheer bulk of scholars' commitment to or perceptions about the field (granting that legal history is a field) as represented by relevant professional papers, learned journal articles, and scholarly books. One bibliographer of 1975 needed only a slim volume of 106 pages to list roughly one thousand titles. But, in 1984, another compiler required five fat volumes, listing more than sixty-eight thousand items, to list and cross-list significant titles adequately. The difference reflects not only the bibliographers' differing horizons or even the explosion of interest in the field. It reflects also the fact that many scholars who deal with legal history assume now that it is interlinked with constitutional history and that still-wider linkages tie this combination field to social-cultural contexts that illuminate the subtly woven fabrics of technical law and constitutional change. [10]

This assumption about context and linkages evidences itself also in almost every subfield of history. Recent histories of edu-[39]-cation, as an example, argue for every researcher more seriously to accommodate community as a mix of dynamic contextual issues.[11] Historians of wars and battles, elections, cities, science, and business share this concern.

Scholarly debates on the significance of, as examples, social mobility in the Age of Jackson or blacks' immobility in Reconstruction labor markets are most useful when contextually considered.[12]

As with any approach to history, this emphasis on context has hazards. Some "new" historians so stress mass contextual data as to worry Thomas Bender, who wrote that "to the extent that these ever deeper explorations into the interiors of subcultures succeed, one is more and more confronted with the irreducible Particularity that obscures the common and relational elements that make an American history." And Harry Scheiber of Berkeley warned that "the new legal history manages to push landmarks like federalism or the Civil War into the background."[13]

Neither federalism nor the Civil War deserve to fade into irrelevance.[14] Middle grounds exist between monocular focus on black letter, "positive" law and "macro" views of the "blinding lights" of history.[15] These middle grounds offer comfort to those disturbed by the implicit position of the Warren Court in *Brown*, that history from the 1860s has little if any illumination for a position that delights anti-*Brown* crusaders of 1985. Instead, evidence from this middle ground suggests, as noted earlier that the Brown decision was justifiable not "only" because of the immorality of segregation but also because it rested on sounder history than the Warren Court knew.

The evidence derives in part from the Homestead, Morrill, and Habeas Corpus Acts of 1862-63, considered in the contexts of the Thirteenth Amendment of 1865 and their antecedents, the Northwest Ordinance the Declaration of Independence, and the Bill of Rights. Taken together, the progression of these policies suggests that the Civil War and Reconstruction [40] pushed white America toward goals transcending reunion. It suggests also that during the 1860s access to the most treasured fruits of American life increased substantially for most whites and many blacks, these benefits including access to land, education,

and legal remedies. Further still, this evidence indicates the Lincoln administration adapted to unanticipatable situations a heritage, wrote historian Donald Pickens, "of [John Locke's and] Scottish common sense philosophy, Adam Smith's laissez-faire creed, and Puritan religious sentiments. In addition, this [new Republican] synthesis provided the basis for. . . understanding the transformation of the American War of Independence. . . from 1776 to 1865 and beyond." [16]

Fortunately the idea of connectives between 1776 and 1865, between the Declaration of Independence and the Thirteenth and Fourteenth Amendments, no longer startles many historians, and important law writers are contributing to this healthy research tide.[17] That tide takes us to contextual aspects of the Fourteenth Amendment relevant to *Brown*.

An informative—no, essential—context for the Fourteenth Amendment and therefore for *Brown* remains the too-long-overlooked trio of access laws of 1862-63, considered by contemporaries as essential sources as well as definitions of the Thirteenth Amendment of 1865 and the Fourteenth Amendment of 1866. Stated another way, the Thirteenth and Fourteenth Amendments were born not only out of the Civil War itself, but also from efforts extending back thirty years of abolitionist lawyers, including Salmon Chase, Charles Sumner, and William Whiting, to return public policies to the principles of the Declaration of Independence and the Northwest Ordinance.[18] With the Civil War, the small minority of antislavery champions successfully linked their eventually great cause with patriotic nationalism and also with continued respect for the state-based federal system as the only acceptable foundation for private rights.[19] This linkage among state rights nationalists raised the question: if ab-[41]-olition ever occurred, how could the woefully under-institutionalized American government shield the millions of freed men?

During the pre-1860 decades when young, upwardly mobile lawyer

Lincoln was climbing professional and political ladders, government, especially the national government, encouraged, but itself rarely implemented, public work. Alexis de Tocqueville reported accurately that "the citizen of the United States is taught from infancy to rely upon his own exertions in order to resist the evils and the difficulties of life."[20] This habit links the eighteenth century "republican [small 'r'] synthesis" with that which Lincoln's Republicans (capital "R") perceived, pursued, and, partially at least, achieved in the heat of the Civil War and Reconstruction. The new Republican synthesis retained a self help emphasis and augmented essentially noncoercive roles for government on all levels of the federal system. [21]

By 1865 in Union states, this refined Republican synthesis exhibited itself in relatively color-blind (though rarely gender-blind) extensions of suffrage and legal remedies as basic to self-help and elf-protections. Voting majorities of states, themselves enlarging by reason of wartime reforms in state constitutions, accepted the Republican marriage of adequacy constitutionalism and novel uses for public law. Voting and litigating allowed individuals to protect their access to the enhanced categories of public services that the new era was calling into existence: schools, asylums, police, urban utilities, streetcars, firefighters, and orphanages among others. The admission and exclusion of blacks, white women, and former rebel whites from these enhanced services, from licensed callings, and from elective or appointed offices became first political, then legal and constitutional issues on local, then state, then Washington stages. Republicans, rejecting state sovereignty constitutional dogmas, hailed Massachusetts Chief Judge Lemuel Shaw's newer "state police power" doctrine. Columbia Professor Francis Lieber, celebrating [42] the news of Appomattox, paid tribute to the bluecoats who had won nationhood. But by nation, Lieber added, "I do not mean centralization." [22]

The Republicans' mixtures of agrarian values with Federalist-Whig constitutional and legal doctrines encouraged changes. These often-

uncomfortable changes allowed Democrats to disassociate from secession and treason and, in political campaigns and courtroom procedures, to champion static state rights and white-only rights. Lincoln came to accept basic assumptions of abolitionist jurisprudents: that democratic federalism was evolutionary not static, that the Constitution was adequate to all unfolding needs including emancipation and race equality, and that the war powers of the nation (i.e., both of the President and Congress) could extend even into states.[23] In short, the Republicans' wartime synthesis included the Declaration of Independence, federalism, constitutionalism, and acquisitive individualism leading to economic and social mobility, all reflected in the Homestead, Morrill, and Habeas Corpus laws.

As suggested earlier, supporters of the Thirteenth Amendment often defined it in terms of these laws and their antecedents. Individuals' equality in the lawyers' trinity of rights — remedies and responsibilities before all levels of law and authority in the multilayered federal system — was the keystone for the war-time Republican arch. In the 1862 and 1863 laws on access, Republicans, clinging to this trinity and to the self help ethic Tocqueville perceived, espoused public policies designed to make self help more realistic and meaningful. Although responding to urgent immediate needs, these policies retained state local, and individual implementation. Settlers themselves triggered the procedures of the Homestead and Morrill Acts, plaintiffs enforced their enlarged rights in federal courts that the Habeas Corpus Act made available, as well as in state courts. Although federal capacities for monitoring states or individuals remained underwhelmingly thin throughout the decade — a fact that [43] boded ill for effective implementation of the civil rights laws of the late 1860s and early 1870s — land offices and courts were familiar, comfortable, and unthreatening institutions. Thinly staffed, inexpensive, and uncoercive, save to losers in litigations, with few and brief exceptions these institutions became quickly and generally available to former greybacks as well as to former bluecoats. [24]

Disagreeing, historians Harry Scheiber and William Miller argue impressively that centralization did occur, especially in "national" banking and federal tax collecting.[25] No doubt the Union victory altered historic diffusions of power. But in the context of penalties that losers in civil wars suffered abroad in the mid-nineteenth century (not to speak of the late twentieth) can greater vigor by federal revenue agents equal centralization? Postwar federally chartered banks under the 1863 National Banking Act neither obliterated nor controlled state-chartered private banks, nor, as the sponsor of the bill, Ohio Senator John Sherman noted in 1863, were these the purposes of the law. The drastic oscillations in money markets between the 1863 banking act of Lincoln's administration and the Federal Reserve Act of Wilson's hardly reflect centralization. [26]

Instead, after Appomattox as never before Sumter, American states became what one EngJish lawyer described as the "great transatlantic workshop" where Britishers should look for "Yankee notions" as "models in working order of all our projected reforms." He noted admiringly that "the United States are generally the *vile corpus* out of which by dint of many an experiment, essay, and strange vagary, the good comes by which we tardily profit. The American loves to dabble in those subjects which are somewhat vaguely known as 'Social Science,' and we believe that in State or another in the Union . . . education, crime, legal reforms, sanitary improvements and so on, has been further sifted than at home. . . . A little more attention to Yankee notions would not be thrown away." [27] [44]

"Yankee notions," products of the Republicans' permissive, evolutionary, "can do" constitutionalism to which they added an elastic war powers gloss, permitted party spokesmen from Lincoln down to perceive of the war as revolution and as constitutional conservator. Peyton McCrary concluded recently that "by accepting the moral legitimacy of revolution, they were also able to take more seriously the radical implications of their own Declaration of Independence. The principles of 1776 had long

been a centerpiece of the Republican ideology, . . . but only the war made possible the extension of the idea that 'all men are created equal' to include the Afro-American population." [28]

This inclusion developed logically from "freedom national" ideas of the aforementioned abolitionist lawyers, ideas long antedating the Civil War. A generation of Republican voters, including Lincoln and ballot-casting white and black bluecoats, concluded that heritages of the American Revolution, including the Declaration of Independence, the Constitution, and the Northwest Ordinance, were what the Civil War was about. The embattled Union must encourage the states — *all* the states — to afford a state resident formal equality before the laws of his state as the primary definition of nationwide republican government.[29]

The Thirteenth Amendment embraced this vision. Its adherents were of course conscious of tenacious racism in northern states, commonly including "black code" segregations and Jim Crow exclusions from streetcars, schools, and balloting, anti-miscegenation policies and unpunished racial violence.[30] Nevertheless, the Thirteenth Amendment seemed finally to harmonize the new Republican synthesis with the fact that states and localities defined almost all legal rights, remedies, and responsibilities in individuals' economic relationships (civil rights), in criminal justice, and in what we now label civil liberties. The Thirteenth Amendment made individuals free and equal where it counted, in their community and state as well as nationally. It [45] restrained not only nation and states but all officials and private individuals from acting or failing to act in ways that reduced other persons to involuntary servitude, a condition that only the future contexts of particular situations would define (which explains why Congress appended an enforcement clause, the first in the Constitution for an amendment). By prohibiting involuntary servitude everywhere, the amendment imposed a positive duty on all authorities and private persons to sustain freedom, a position sustained in 1866 and 1867 by Chief Justice Chase and Justice Noah Swayne, on circuits.[31]

In prewar America, freedom was primarily the undefined condition of whites, and, in the free states, of blacks as well, a condition achieved by birth. In 1865 Republicans were optimistic about avoiding coercive government initiatives in the novel arena of implementing freedom defined as equality, in part because the 1862 Homestead and Morrill Acts and the 1863 Habeas Corpus Act had already enlarged access to the best self-protections for freedom and equality that the generation knew: land, education, and litigations. No one in 1865 predicted a need for more amendments, much less the Fourteenth or Fifteenth Amendments or military reconstruction laws, plus their batteries of coercive implementing statutes.

The Republican synthesis of 1865, as illustrated by the Thirteenth Amendment, was extraordinarily open in potentialities. Lincoln's own wartime evolution toward radical Republican positions on race, and, along with his party majority, to policies favoring equal access to education, land, and legal remedies, connected the liberal past to immediate needs and to enlarged auguries for the future. As is well known, Lincoln, though always unsympathetic to slavery, was no abolitionist activist when he became president. But as the Civil War progressed this educable man dropped his earlier advocacy of colonization abroad for free slaves, a process aiming at whiteness as a definition for free soil. Instead by 1865 he accepted a vision of a slaveless, [46] biracial America in which millions of both races would coexist in physical legal propinquity on terms of legal equality defined, as for whites, by their states and communities.

In 1865, the year of the Thirteenth Amendment, the question of blacks' access to public education became a war aim — one unthinkable in 1861 and only timidly advanceable even in late 1863 or 1864. Lincoln, in his December 8, 1863, war powers proclamation on state reconstructions, pardons, and amnesty, promised to support "any provision" by a returning state that declared "permanent freedom" for all its Negro citizens (i.e., residents) "and provided for their education." In 1864 he

secretly suggested to the Union military governor of Louisiana that former black bluecoats vote there, but he did not press the exceedingly delicate matter.[32] Then, with a second term won that would keep him in office until March 1869, and with the proposed Thirteenth Amendment out to the states for ratification, in an April 11, 1865, public address Lincoln redefined postvictory Reconstruction, a process dependent until then on the uncertain base of a president's war powers, in terms of the more permanent form of a constitutional amendment. He would use his carryover commander-in-chief and war powers under the soon-to-be-amended Constitution, Lincoln stated, publicly this time, to encourage the crumpled Confederate states to allow literate blacks, especially Negro veterans of Union armies, to vote and to accept in public schools children of both races, the latter without commitment to segregation or integration. No less an authority than John Wilkes Booth, on hearing this speech, equated it with "nigger citizenship." [33]

Lincoln had defined the viable postwar agenda of the antislavery generation in his open ascent into radical Republican ranks. He had never identified himself publicly with any policy until he was ready to pursue it, and of course had no foreknowledge that Booth and his fellow conspirators had determined on political murder, one that must be accounted as one of the most suc-[47]-cessful in history. Lincoln's successor, Andrew Johnson, had sharply differing and ineducable views on desirable federal policy on race equality in education or anything else. By 1868, when state voters ratified the Fourteenth Amendment, Johnson, despite the impeachment, had already blunted the precarious commitment to effective enforcement of biracial equality of access. To be sure, his obstructionism also inspired the creation and ratification of the Fourteenth Amendment, which, if divorced from the context of the Thirteenth Amendment, as it has been, limits only official state action.[34]

Can our contemporaries equally successfully blunt these historical though recently rerecognized commitments to race and gender equality? Assumptions concerning *Brown v. Board of Education* and the 1866 and

1965 civil rights laws analogous to those Andrew Johnson possessed, as noted earlier, appear to be popular again in Washington. These misreadings of history encourage efforts to reverse equalitarian policies spinning off from the "burden of *Brown*." Therefore stress is justified on the burdens—and inspirations—of history that the creators and ratifiers of the Thirteenth Amendment bore with them to Appomattox and beyond.

Models for "beyond" were the 1862–63 federal laws on access. Consider education as a public duty. Northern state voters were so convinced about the benefits of public education that they interfered by statutes even with family relationships, in the form of required attendance-truant officer coercions, and raised property taxes to finance public school systems. Sophisticated not primitive in their concerns about education, the Lincoln Republicans accepted the judgments of professionalizing educators that illiteracy, slavery, secession, and disloyalty were cancers capable of destroying not only the Union of states but all states, Northern and Southern, all property and all morality. So pervasive was this climate of opinion, remarked John Y. Simon, [48] a close student of the 1862 Land Grant–College Bill, that "one need not ask how [Congressman Justin Smith] Morrill got the idea for his bill, but how he could have avoided it." [35] Despite opposition by President Johnson and by whites in Southern states to which Congress beginning in 1866 extended the essence of the Morrill and Homestead Acts, Congress had established ties between access to homesteads and support for higher public education for blacks.[36]

Times changed. By 1890 Justin Morrill still championed federal supports for state-run higher education, especially land grants. But he had also become a nonopponent to racial segregation in education. Law Professor Avins took Morrill's career to be a proof of a proposition that "the Fourteenth Amendment does not cover education at all, or give the federal courts the power to control state policies in regard to higher education, whether those policies relate to racial segregation or otherwise." [37]

Alternative conclusions are viable. Viewed in its dynamic contemporary context, policies embraced in the years from the Morrill Act to the Thirteenth Amendment suggest a brave if fragile outreaching toward new frontiers of color-blind equality of access. Even in 1865, the year of ratification of the Thirteenth Amendment, Frederick Douglass worried to Lydia M. Child that "unfriendly legislation by a state may undo all the friendly legislation by the Federal Government." Three years later, in 1868, the year of ratification of the Fourteenth Amendment and of Johnson's impeachment, abolitionist jurisprudent J. C. Hurd and Republican constitutionalist Lieber agreed that "just now it looks as if the question of state rights in our national politics were about to make new trouble." [38] This was also the year that Thomas McIntyre Cooley published what was to become the first of many editions of his *Constitutional Limitations*, a book that was destined to serve generations of paper-chasing students in Langdellian law schools soon to be born. Georgia Republican [49] Amos T. Akerman, soon (1870) to be Grant's attorney general, advised Massachusetts Senator Charles Sumner that because the Civil War had made the constitutional system "more national [only] in theory," even Republican stalwarts like Morrill expressed "a hesitation to exercise the powers to redress wrongs in the states." [39]

The Supreme Court was part of the cause of the hesitation. By 1866 its astonishing, still inadequately explored revival from the *Dred Scott* depths of 1857 was under way. It had signaled its climb in the 1862 *Prize Cases* when, by a single vote, the justices sustained the legitimacy of a war already two years old. Then, in the far more alpine outreach of the 1867 *Test Oath* decisions, the jurists, by five to four, declared against the constitutionality not only of a federal law but of a state constitution. Only a few years later, in the 1873 *Slaughterhouse* decision, the Supreme Court held that the defendable federal rights of national citizenship were few and insignificant, inventing the tradition that the Fourteenth Amendment limited itself to federal and state public (i.e., "positive") laws, and did not affect nonactions by officials or the

host of community customs and private actions capable then and since of reducing individuals to "involuntary servitude." *Slaughterhouse* and its unillustrious progeny to *Plessy v. Ferguson* helped to make respectable states' denials of blacks' access to federally subsidized land-grant and state universities, to homesteads, or to federal courts, and the access of white women to licensed professions.

So defined, the Fourteenth Amendment quickly overshadowed the far vaster implications of the Thirteenth Amendment and made it seem that the emancipation amendment, if not repealed by the Fourteenth, was a finished, superfluous appendage to the Constitution once states ceased formally defining humans as property.[40] In short, *Slaughterhouse*, followed soon by *Cruikshank*, *Granger*, and that familiar string leading to *Plessy* at the turn of this century, substantially redirected the nature of the contextual "package" of the Thirteenth and Fourteenth Amendments away from the potentially universal and integrationist visions of 1865 and 1866. [41]

Reconstruction "ended" and Americans celebrated the centennial of their Revolution in 1876, the year when a brand new Heidelberg Ph.D. and history fellow of the equally new Johns Hopkins University reached Baltimore. In his Hopkins seminars, young Herbert Baxter Adams advanced an evolutionary "germ theory" of national development derived from his Heidelberg mentors, a theory in which American constitutional forms and democratic practices grew from Teutonic and Anglo-Saxon "racial" seeds. A shrewd academic gamesman as well as able scholar, Adams cultivated regional social and business elites. His special lectures stressed the leadership of Maryland in assigning western land claims to the national government in the 1780s. Proud Marylanders applauded Adams's assertion that the resulting expanded material interests were more important than the creation of the Articles of Confederation or the Constitution. There could, he iterated, be "no state [i.e., nation] without a people, no state without land: these are the fundamental principles of political science and were recognized as early as the days of Aristotle."[42]

Wisconsinian Frederick Jackson Turner joined Adams's seminar in the late 1880s, just when the federal government opened the Oklahoma territory to homesteading in a spectacular "land rush" of would-be agricultural entrepreneurs. Turner, unsatisfied by his mentor's germ theory, developed more "scientific" approaches that, according to one analyst, provided "a historical summit from which to view American history." Descending from this summit in 1893, Turner unveiled his "Frontier thesis," developing it subsequently in a thin body of vastly influential papers and publications. He encapsulated his environmentalist argument: "The existence of an area of free [51] land, its continuous recession, and the advance of American settlement westward, explain American development." On this land settlers threw off European chains of class and hierarchy, moved upward in status and material possessions, and participated in political democracy and economic opportunity, thus forming the American character and peculiarly American institutions. The end of free or cheap land must lead to social homogeneity and a lessening of individualism, democracy, social mobility, and opportunity.[43]

Turner's evaluations, and, in the ensuing three quarters of a century, those in the pride of his students and intellectual beneficiaries, unleashed a large, rich, and often-acrimonious literature about Turnerian concepts. Some critics discredited Turner because he too uncritically asserted the benefits of American life, especially those provided by unequaled opportunity to own or rent land. As an example, David Potter asserted that "Turner did not recognize that the attraction of the frontier was simply as the most accessible form of abundance, and therefore he could not conceive that other forms of abundance might replace it as the lodestone to which the needle of American aspirations would point." [44]

If Turner could not conceive of what Potter called "other forms of abundance," others could. Charles Beard, one of the most illustrious and influential of Turner's critics, conceived of the singular commitment by

urban and rural taxpaying voters to public education as the most important alternative "form of abundance." Despite his reputation as an iconoclastic muckraker, Beard, in his 1937 monograph entitled *The Unique Function of Education in American Democracy*, suggested that "the association of educational history with the encompassing history of American civilization is not a form of antiquarianism and dust-sifting. On the contrary by this process alone does it seem possible to obtain sure guidance in the formulation of an educational policy corresponding to the realities of the living present, now [52] rising out of the past." So viewed, Beard continued, the Civil War was indeed a second American Revolution, but one by no means of predominantly selfish, mean-spirited characteristics. Instead, the policies of increased access to education and other fruits of American life generated during the Civil War and Reconstruction preserved and democratized the nation, widened liberty by establishing equality of access as the duty of society, and profoundly stimulated individual enterprise because "education equalized opportunity for training." [45]

Many analysts have since denied the significance of what Beard discerned. They stressed instead the frequent, bitter party battles of Gilded Age-New Deal decades, including those concerning implementations and adaptations of the Homestead and Morrill Acts. Noting how Congresses, responding to special interests, modified the Homestead law to favor cattle barons and exploiters of mineral, timber, and water resources, historians described land grabs since the Revolutionary and Mexican wars when nation and states gave military veterans land scrip, much of which passed to speculators. Scholars stressed the favoritism to the populous eastern states implicit in a formula that tied land allotments to a state to a ratio of thirty thousand acres of federal land for each representative and senator, and at exposés of venal officials of states selling Homestead and Morrill Act scrip at foolishly low prices, so depriving their infant universities of potentially larger incomes. Historians concluded also that reform attempts from 1862 to 1935 were disappointing. Homesteads remained alienable, and the statute's

safeguards against speculators proved to be inadequate. Congresses, without meaningful controls over resales, speculations, and monopolies, dedicated enormous acreage to railroads and other "internal improvements," and almost 500 million acres to states and territories, while exempting these grants from free land approaches of the Homestead law. Thus a dual land system developed, one of special congressional grants and the other, often involving [53] inferior lands, deriving from the Homestead Act. Yet, after developing this powerful catalog of misdeeds and misdirected opportunities, Paul Gates concluded that the Homestead Act and its amendments possessed "noble purpose" and played a "great part. . . in enabling nearly a million and a half people to acquire farm land, much of which they developed into farm homes, (and these results) far outweigh the misuse to which they were put." [46]

Recent interpretations stress anachronisms involved in judging nineteenth century standards of public administration by higher minima. Save theoretically, no pre-New Deal Congress could have deleted these unsavory features from the 1862 laws or grant money directly to higher education (except to Gallaudet College for the blind, to Howard University for blacks, both in the federal district, to the military academies, and to Indian schools on federal reservations) The interests of the nation in swift development of its territories took precedence over fiduciary responsibility. [47]

Parallel limitations on adequate federal monitorship existed in education Save for thin reporting responsibilities state beneficiaries of the Morrill Act, though developing public education into their fourth branch of government were virtually (though not virtuously) free of federal reins. Critics including presidents of competing private and state colleges, emphasized inadequate laboratories and skeletal library holdings at land-grant institutions, without mentioning that many private and nonland-grant state universities were also ill-equipped. Congress's stress on technical jobs for the future colleges ultimately redirected

whole sciences and professions and raised educational standards at all levels. [48]

Ultimately is a big word. Concerning research and teaching, for a long time even the best land-grant institutions had low reputations even among well-wishers and state university and Ivy League critics thought them laughable. In their first fifty [54] years, according to one critic, "The best [land-grant schools] called for apology; the worst [were] ... appalling." Carpers mocked the anemic student enrollments at the "cow colleges," which served mere corporals' guards at a time when homesteading embraced hundreds of thousands. In many states, elementary and secondary school systems produced sparse matriculants for the new colleges. The University of Wisconsin long retained the name and function of "High School for the Village of Madison" and PennsyJvania State University was the "Farmers' High School." Total Student enrollments of sixty to four hundred were common for decades at California and Kansas. [49]

Yet similar low numbers obtained also at Harvard where only 637 students enrolled in 1872, Princeton half that, Columbia 124, and 88 at PennsyJvania. In the 1880s (as in the 1980s) deficiencies in elementary and secondary schools forced land-grant universities into essentially remedial functions in part because some constitutions of states, as in Indiana, Illinois and Texas, well into the twentieth century required their universities to admit all secondary school graduates.

As if to balance this deleterious catalog, Morrill Act Universities, Abraham Flexner perceived in 1910, were also escalating standards of the secondary school and teacher training systems in their states. Both effects, indeed, though paradoxical were occurring simultaneously and intermixing in subtle and complex ways.[50] By World War I, the Morrill Act institutions as well as the older state universities were allocating increasing shares of their resources for the enhanced research libraries and laboratories and faculty talent essential for the new theoretical and

applied sciences (including the social sciences). Resulting stirs in the academic disciplines and professions also shook the historic undergraduate liberal arts colleges, whether secular or church related evoking difficult questions about the traditional character-building emphases of these institutions. [55]

Old, still frankly elitist Ivy League universities and new, equally picky graduate- and science-focused institutions including Hopkins, Chicago, and Stanford, seemed by their very histories and styles, not to mention resources, to outshine the relatively democratized Morrill Act schools. But beneath postures of austere, confident superiority, by the 1890s all universities were caught up in reassessments and explosions of knowledge. Academics, as an example, though in the main delighted by the accelerated access to research data that the new card catalogs provided, were unsure how to keep pedagogy abreast of the fallout. All universities were competing for frontrunning faculty, superior students, increased endowments, and general prestige. A national academics' profession as distinguished from licensed teachers' professional associations, was coming into being, one marked by loyalties more to disciplines than to employing institutions

Some of the derision heaped on the "ag" and "cow" colleges in their early decades requires skeptical evaluation in light of these factors. The ongoing commitments of the Morrill Act schools to unprestigious (in critics' views) applied fields, such as teacher-training, home economics, and farm management, should not have obscured for so long the widening contribution of these same universities to "pure" research and increasingly significant libraries (with that of the University of Illinois one day to rank only below that of Harvard and Yale). [51]

Obscured they were. Aesthetes satirized even the locations of many Morrill Act and state university campuses whose faculty often eased the critics' task by perpetuating folklore about political deals at state capitals and county courthouses in which a "winning" community got a state insane asylum or penitentiary and the "loser" received the land-

grant university as consolation prize. The efforts of state lawmakers and regents to protect undergraduates' physical and perhaps intellectual virginities by lo-[56]-cating most land-grant and/or state universities in state capitals and in semiruraJ towns as at Ann Arbor, Athens, Bloomington, Columbia, Columbus, Madison, and Urbana appeared comical along the Char1es or Hudson rivers. Or, perhaps, sinister in the opinions of muckraking Progressive-era analysts, since these bucolic locations, perhaps by design, for many decades attracted relatively few urban Catholics Jews, and blacks. Few cities then supported tuition-free or low-tuition municipal colleges much less universities offering quality graduate and professional degrees. Private institutions, often Catholic church-related, though requiring substantial tuitions, only partially filled urban voids. Thin scholarly evidence and literary insights from John Dos Passos, Meyer Levin, Sinclair Lewis, and George R. Stewart, among others, suggest that the rural locations of land-grant universities, political foot-dragging on substantial urban branches, and discriminatory admission policies perpetuated serious "upstate-downstate" gulfs. These abysses endured until the G.I. Bill and the 1954 Supreme Court *Brown v. Board of Education* and 1963 *Baker v. Carr* "one-man, one-vote" decisions better equalized urbanites' status in state politics and greatly widened their access to public benefits. But this peers too far ahead.

Ascending toward their present eminences, early state and land-grant universities linked with licensed professions and established standards for admission to relevant degree programs and licensed practice. Universities and professional associations commonly contrived means to exclude women and racial/ethnic religious minorities from entry or practice.[52] In sum, avarice and prejudice existed in the administrations of the Homestead and Morrill Acts. But, historian Paul Varg concluded, so did selflessness and loftiness of purpose that "extend[ed] to the sons of farmers and mechanics the richness which life possesses when endowed with the philosophical habit." [53] And a major scholarly critic of the land-grant schools concluded that: [57]

> Nothing did more *eventually* for mass or democratized education. . . They were committed, they opened their doors, and they pressed fate with action. Their early contribution was the ardent conviction and the provision of opportunity, the expectation, and the ideal, not the actual achievement. They were ahead of their times. . . When the ideal did blossom, it did so magnificently.[54]

The Morrill Act was formally gender-blind. But the Supreme Court's 1873 *Slaughterhouse* decision broadcast to the legal and teaching professions the notion that, despite state and federal bills of rights and the Thirteenth and Fourteenth Amendments, the states could disfavor whole classes of state (and, therefore, of federal) citizens from access to professional educations newly required for practice. In the same year as *Slaughterhouse* the justices rejected Myra Bradwell's petition that the Fourteenth Amendment forbade Illinois from barring her from the bar despite her fine qualifications for legal practice. Two years later, in *Minor v. Happersett* the Court ruled that states could restrict voting to males without violating that amendment. Law writers like Thomas McIntyre Cooley who were composing constitutional commentaries for the new Langdell-style law schools, many of which were associating with land-grant universities, further dignified the inventive proposition of the Court. In short, access to the highest court failed fully to open professions or suffrage to women.[55]

But some "disorderly women" refused to be stuffed like genies into that historic bottle, the home. Shouldering into professional degree programs and practice, they helped to preserve claims on federal and state justice and on fairer shares of state budgets for schools and other public facilities, while refining relevant legal and constitutional doctrines and developing future leadership cadres. More than the tiny Seven Sisters, the state [58] and land-grant universities, Elizabeth Janeway concluded, "were not only educating mothers- and housewives-to-be but offering the company of educated women alternative profess-[58]-

sional careers. Intimate alumnae connections developed among those who chose careers over marriage. Old female ties were recreated in long and close friendships, while college campuses or settlement houses substituted for family homes." [56]

Ambitious, determined, and able females wrested B.A.s, LL.B.s, M.A.s, and Ph.D.s from Victorian and Edwardian male administrators and academics who usually blocked their entry into "unwomanly" degree programs, or pressured them into "women's" curricula, especially elementary education, home economics, nursing, and librarianship. So pressured, Louisa Allen Gregory developed an innovative domestic-science program for the Illinois Normal University in the 1870s, of which institution she was an alumna. If only because no one thought to block their entry, INU had allowed women into science courses, and Gregory applied her lab training to the task of creating curricula in better household management.

By contrast, Florence Bascom refused deflection to ladylike pursuits and forced her way into the graduate geology curriculum at the University of Wisconsin and Johns Hopkins, becoming the first woman to receive a Ph.D. from the latter institution. Similarly, in nonscience areas, Texan Oveta Culp Hobby and Nebraskan Mari Sandoz both transcended their families' economic situations (Sandoz emerging from especially hard-scrabble rural homestead origins), because their respective state universities afforded them opportunities to parlay opportunities, talents, and tenacity into significant careers. Among the first Women admitted even as an auditor to the University of Texas School of Law, Hobby (née Culp), unable to continue without a job, wrangled herself a patronage appointment as the first female parliamentarian of the Texas Senate, a position in which she was a marked success. After marrying the then-governor, Hobby became, successively, a communications tycoon, the first commander of the World War II Women's Army Corps, and the first [59] Secretary of Health, Education, and Welfare.[57] Sandoz, that fine West-facing author of *Old Jules* (1935) and *Crazy Horse* (1942) among

other engaging fiction, and of estimable nonfiction including *The Cattlemen* (1958), was the daughter of a Nebraska homesteader who went busted several times, but, who, persevering, finally created a decent living for his family. Despite deficiencies in her rural education, young Sandoz taught in grade schools until the University of Nebraska admitted her as an "adult special" student. She remained in this limbo from 1922 to 1931, earning pittances as an exam grader and proof-reader. Sandoz believed that her subsequent career attested to the opportunity the Morrill Act created for her to learn her craft. And of her father, she wrote, "The Homestead Act was the hope of the poor man."[58]

The struggles of many such intensely motivated women prepared them not only for professional and other careers but also for effective political action. In the coeducational Morrill Act and state universities, North and South, they necessarily learned how to exploit the resources of large, complex, collective institutions. A few themselves ran for state elective office, sometimes winning. They applied their training and insights in political lobbying for antichild labor statutes, settlement house administration, and exposé journalism, so shaping Populism, Progressivism, and the New Deal. Kathryn Kish Sklar, after reevaluating Florence Kelley's career, argued recently that:

> American women played a more important part in the process of the creation of the 'social welfare state' than was the case elsewhere. Two sets of reasons explain their greater power; one had to do with the greater access American women had to social resources such as education, one having to do with the greater demand for their skills in the United States, where in comparison with other industrializing nations, such as Germany and Great Britain, there was a relative political vacuum of male leadership on these 'social welfare' issues. [59] [60]

Race was another matter. Familiar separate-but-unequal evasions of the Fourteenth Amendment by Southern states included segregated land-

grant institutions for blacks. By 1887 W. E. B. Du Bois's "Open Letter to the Southern [White] People" conceded that "the vast majority of the Negro race, thanks in great measure to your own lack of foresight, are not intelligent." By World War I, the general effects of segregation, and of discriminatory state funding in particular, were exaggeratedly visible in skewed "scientific" aptitude and IQ tests. Yet generations of striving black youths obtained inexpensive postsecondary educations, many in segregated and unsegregated land-grant schools, and, Du Bois included, became apostles of Americans' secular religion, education. They created enduring heritages of respect for learning and imposed claims on white society for more equal access to its fruits. [60] Even in the deepest Jim Crow decades, probably more American nonwhites received higher educations than was true of blacks in the rest of the world.

That access of blacks to education endured at all in the redeemer South, in segregated institutions of course, is attributable in part to spasmodic federal pressures after 1877, and to the fact that, considering impedements and risks, impressively large clusters of blacks homesteaded under the 1862 law and its amendments. Resulting Negro enclaves of residence sometimes meant black control of balance-of-power electoral situations in close districts and when Republicans controlled national offices if terrorism was suppressed. Such chancy situations occasionally impelled white politicos to appropriate fairer shares of tax money to black land-grant schools, asylums, and other public institutions. [61]

These eclectic developments suggest that the analyst of Tennessee black land-grant colleges was correct to conclude that the Morrill Act "created a legislative mechanism for synthesizing...ideas [on multiracial access] into educational formula [61] of inestimable importance." [62] The numerous idiosyncratic patterns in the access of females and blacks (and, elsewhere, of Indians, Asians, and Hispanics) also reflect the fact that higher education history has always been, and remains, state and local history. This connection between the democratized politics of federalism and the purposes and policies of higher education bred

numerous foolishnesses and wrongs. They include commercialized "sports" and almost-dehumanized large class sizes. Red Scare and Accuracy in Academia-style interferences in educational policy by pressure groups and politicians mar the past and tar the present. But this connection also inspired or allowed development of universities' extension and correspondence courses, of the University of Iowa's Writers' Conferences, and of the University of Illinois's splendid library. Enlarging access as well as exclusions leavens the mix. It is a singularly American mixture.

Notes

Chapter 1. The 1787 Northwest Ordinance

[1] McPherson, "Antebellum Southern Exceptionalism: A New Look at an Old Question," *Civil War History* 29 (1983): 230.

[2] Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (1950), 354; cf. Julian P. Boyd, "Jefferson's 'Empire of Liberty,'" *Virginia Quarterly Review* 24 (1948): 583.

[3] Quotations in, respectively, Peter Onuf, "A Constitution for New States," (Paper delivered at Claremont (Calif.) Institute Conference, Feb., 1984), 31; Onuf, "From Constitution to Higher Law: The Reinterpretation of the Northwest Ordinance," *Ohio History* 94 (1985): 32.

[4] Carstensen, ed., *The Public Lands: Studies in the History of the Public Domain* (1962), xxv—xxvi.

[5] R. S. Hill, Peter Onuf, and other members of the Northwest Ordinance Bicentennial Planning Committee generously supplied research papers and other data. See also William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from The Seventeenth to the Twentieth Century* (1977); Fred Mathews, "The Reassertion of American Exceptionalism: From Progressivism to Liberalism in the Intellectual Weeklies, 1920-1950" (Paper delivered at Southern Historical Association annual meeting, 1985).

[6] Billington, *Westward Expansion* (1949), 217; Bailyn et al., *The Great Republic* (1977), 304; Bailyn and Morgan in *Essays on the American Revolution*, eds. S. G. Kurtz and J. H. Hutson (1973), 20, 306-7.

[7] Onuf, "From Constitution to Higher Law," 32; Onuf, "Settlers, Settlements, and States: The Origins of the American Territorial System" (Paper delivered at Johns Hopkins University, 1985).

[8] May 11, 1786, in Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, 20 vols. to date (1950-) 9:51.

[9] Berkhofer, "Providing for the Expansion of a Republican Empire: From Jefferson's Ordinance of 1784 to the Northwest Ordinance of 1787" (Paper delivered to annual meeting of the Organization of American Historians, 1968); Berkhofer, "Northwest Ordinance and the Principles of Territorial Evolution," in John Bloom, ed., *American Territorial System* (1983) 45–55.

[10] Undated, quoted in Dixon Wecter, *When Johnny Conies Marching Home* (19l4), 47; Davis R. B. Ross, *Preparing for Ulysses: Politics and Veterans During World War II* (1969), intro.

[11] Wecter, *When Johnny Comes Marching Home*, 47–100; Feller, *The Public Lands in Jacksonian Politics* (1984), 197–98.

[12] Wiebe, *The Opening of American Society from the Adoption of the Constitution to the Eve of Disunion* (1984), 129. See also Jefferson's *Notes on the State of Virginia* (1782).

[13] Onuf, "Liberty, Development, and Union: Visions of the West in the 1780s," (Paper delivered at Liberty Fund Conference, 1985); Major L. Wilson, *Space, Time, and Freedom* (1974); Lawrence J. Friedman, *Inventors of the Promised Land* (1975), esp. 3–43; Rush Welter, *Popular Education and Democratic Thought in America* (1962), chap. 2.

[14] A. R. L. Clayton, "Planning the Republic: The Federalists and Internal Improvements in the Old Northwest," (Paper delivered to annual meeting of the Organization of American Historians, 1985), 10.

[15] G. S. Fainsford, *Congress and Higher Education in the Nineteenth Century* (1971), 36 n. 20; chaps. 1–2.

[16] Eldon L. Johnson, "Misconceptions About the Early Land-Grant Colleges," *Journal of Higher Education* 52 (1981): 334.

[17] Young, "Congress Looks West: Liberal ideology and Public Land Policy in the Nineteenth Century," in D. M. Ellis, ed., *The Frontier in American Development* (1969), 74.

[18] Berkhofer, "Providing for the Expansion of a Republican Empire."

[19] Appleby, *Capitalism and a New Social Order* (1984), 16 and passim.

[20] Nash, Review *of Essays on the American Revolution*, ed. by Stephen G. Kurtz and James H. Hutson, *William and Mary Quarterly* 31 (3d ser., 1974): 311–14; ibid., 32 (1975), 182–85; Lawrence S. Wittner, "Pursuing the 'National Interest': The Illusion of Realism," *Reviews in American History* 13, (1985): 284; R. S. Hill, "The Northwest Ordinance and the French Slaves," and Finkelman, "Slavery, the Northwest Ordinance, and the Founding Fathers," (Papers delivered at Claremont (Calif.) Institute Conference, Feb. 1984); *Irredeemable America: The Indians' Estate and Land Claims*, ed. Imre Sutton (1985), 3–70 passim.

[21] Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1983); H. M. Hyman and W. M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (1982), esp. chaps. 4–5, 10–11.

[22] Wallace Farnharn, "The Weakened Spring of Government," *American Historical Review* 68 (1963): 662; William E. Nelson, *Roots of American Bureaucracy, I830–1900* (1982), chaps. 1–2.

[23] L. M. Friedman, "The Law Between the States: Some Thoughts on Southern Legal History," in D. J. Bodenhamer and James W. Ely, Jr., eds., *Ambivalent Legacy* (1984), 30.

[24] Rakove, "Ironies of Empire: Hope, Desperation, and the Making of the Northwest Ordinance," (Paper delivered at Claremont (Calif.) Institute Conference, Feb. 1985), esp. p. 4 and n.; Avins, "Black Studies, White Separation, and Reflected Light on College Segregation and the Fourteenth Amendment from Early Land Grant College Policies," *Washburn Law Journal* 10 (1971): 181; William Wiecek, *The Sources of Antislavery Constitutionalism, 1760–1848* (1977).

[25] Prince's review of Richard Matthews, The Radical Politics of Thomas Jefferson: A Revisionist View (1984), in *Journal of American History* 72 (1985): 395.

[26] Davis, in Ira Berlin and Ronald Hoffman, eds., *Slavery and Freedom in*

the Age of the American Revolution (1983), 279–80; see also his *The Problem of Slavery in the Age of Revolution, 1770–1823* (1975), 503 and passim.

27 Davis, *Slavery and Human Progress* (1984).

28 Onuf, "From Constitution to Higher Law," 5, 30–33.

29 Dane, *General Abridgement and Digest of American Law*, 9 vols. (1829) 9: iv; Andrew J. Johnson, "Life and Constitutional Thought of Nathan Dane," (Ph.D. diss., Indiana University, 1964).

30 Howe, *Justice Oliver Wendell Holmes: The Proving Years* (1963), 201.

31 Berkhofer, "Providing for the Expansion of a Republican Empire."

32 Frankfurter and Landis, *The Business of the Supreme Court* (1928), 4.

33 M. K. Bonsteel Tachau, *Federal Courts in the Early Republic* (1978); Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971), esp. chaps. 1, 16.

34 Wiebe, *Opening of American Society*, 135; Nevins, *The State Universities and Democracy* (1962), 21 and chap. 1.

35 Fred Mathews, "'Hobbesian Populism': Interpretive Paradigms and Moral Vision in American Historiography," *Journal of American History* 72 (1985): 92, 98, esp. n. 10.

36 A. Fede, "Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet's 'The American Law of Slavery'," *Law and History Review* 2 (1984): 301.

Chapter 2. The 1862 Homestead and Morrill Acts

[1] H. M. Hyman and W. M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* (1982), chaps. 4-5, 9-10.

[2] See also G. N. Rainsford, *Congress and Higher Education in the Nineteenth Century* (1971), 96-97.

[3] *Statutes at Large of the United States*, 12: 755.

[4] W. M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1876," *American Journal of Legal History* 13 (1969): 333.

[5] A. Avins, "Black Studies, White Separation, and Reflected Light on College Segregation and the Fourteenth Amendment from Early Land Grant College Policies," *Washburn Law Journal* 10 (1971): 181.

[6] Katz interviewed in *New York Times*, May 3, 1983: (quoted in Stephen Botein, "Scientific Mind and Legal Matter." *Reviews in American History* 13 [1985]: 315) and see *Times* (Oct. 13, 1985), 1, for parallel views by Justice William Brennan.

[7] Hyman and Wiecek, *Equal Justice Under Law*, 222-23.

[8] Avins, "Black Studies," 181, esp. 211; J. Lurie, "The Fourteenth Amendment: Use and Application in Selected State Court Civil Liberties Cases, 1870-1890," *American Journal of Legal History* 28 (1984): 295.

[9] Gilmore, *Ages of American Law* (1977), 146.

[10] Cf. S. Millet, *Selected Bibliography of American Constitutional History* (1975), and Kermit Hall, *Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979*, 5 vols. (1984); P. Murphy, "Time to Reclaim: The Current Challenge of American Constitutional History," *American Historical Review* 69 (1963): 65; Milton Klein, "Clio and the Law: The Uncertain Promise of American Legal History," (Paper delivered at Fourth Reynolds Conference, University of South Carolina, 1978); Botein, "Scientific Mind and Legal Matter," 303.

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[11] R. Goodenow and D. Ravitch, eds., *Schools in Cities: Consensus and Conflict in American Educational History* (1983), ix.

[12] E. Pessen, "Social Mobility in America: Some Brief Reflections," *Journal of Southern History* 45 (1979): 165; William Cohen, "Black Immobility and Free Labor: The Freedmen's Bureau and the Relocation of Black Labor, 1865-1868," *Civil War History* 30 (1984): 221.

[13] Bender, "The New History—Then and Now," *Reviews in American History* 12 (1984): 612, 620-21; Scheiber, "American Constitutional History and the New Legal History: Complementary Themes in Two Modes," *Journal of American History* 68 (1981): 343 n. 31, and 377 n. 1.

[14] H. M. Hyman, "Is American Federalism Still a Fundamental Value? Scholars Views in Transition," in R. Jeffreys-Jones and Bruce Collins, eds., *The Growth of Federal Power in American History* (1983), 143.

[15] W. Washburn, "The Supreme Court's Use and Abuse of History," Organization of American Historians *Newsletter* (Aug. 1983); J. Wofford, "The Blinding Light: The Uses of History in Constitutional Interpretation," *University of Chicago Law Review* 31 (1964): 502.

[16] Pickens, "The Republican Synthesis and Thaddeus Stevens," *Civil War History* 31 (1985): 57.

[17] R. J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (1985).

[18] Hyman and Wiecek, *Equal Justice Under Law*, chap. 11.

[19] Beverly W. Palmer, "From Small Minority to Great Cause: Letters of Charles Sumner to Salmon P. Chase," *Ohio History* 93 (1985): 164.

[20] Phillip Bradley et al., eds., *Democracy in America*, 2 vols. (Vintage ed., 1945), 1: 198-99.

[21] Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956).

[22] Lieber to Sumner, Aug. 24, 1865, no. L13908, box 53, Lieber Papers, Huntington Library.

[23] H. M. Hyman, *Quiet Past and Stormy Present? War Powers in American History* (1986).

[24] Nelson, *The Roots of American Bureaucracy*, chap. 3; Morton Keller, *Affairs of State* (1977), pt. 1.

[25] Scheiber, "American Federalism and the Diffusion of Power," *University of Toledo Law Review* 9 (1978): 619; Miller, "Reconstruction and Revenue: Dilemmas of Federal Law Enforcement in the South, 1870-1885," (Paper delivered to annual meeting of the Organization of American Historians, 1985).

[26] Sherman in *Congressional Globe*, 37th Cong., 3d sess., 820-6 (Feb. 9, 1863); M. L. Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *Journal of American History* 61 (1974): 65; H. M. Hyman, *A More Perfect Union*, chaps. 18-19.

[27] "Americans and Their Prisons," *Law Magazine and Law Review* 25 (London, 1868): 57-58.

[28] McCrary, "The Party of Revolution: Republican Ideas About Politics and Social Change, 1862-1867," *Civil War History* 30 (1984): 330, 350.

[29] Louis Gerteis and William Nelson graciously allowed me access to the typescripts of their forthcoming books, Gerteis's on freedom national, and Nelson's on *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*. I thank them both.

[30] David Fowler, "Northern Attitudes Toward Interracial Marriage" (Ph.D. diss., Yale University, 1963); John M. Werner, "Reaping the Bloody Harvest': Race Riots During the Age of Jackson" (Ph.D. diss., Indiana University, 1972).

[31] Kaczorowski, *Politics of Judicial Interpretation*, chaps. 1-3; Hyman and Wiecek, *Equal justice Under Law*, chap. 11. Judith Baer's *Equality Under the Constitution: Reclaiming the Constitution* (1983) is self-de-

scribed (p. 13) as "passionate, committed scholarship." It shares in the Critical Legal Studies thrust of imposing authors' present aims on the past. I prefer to have the past speak for itself in terms of its own context. See also Nelson and Reid, *Literature of American Legal History*, 264 and chap. 16, passim. The foregoing embraces with the Morrill Act, the 1887 Hatch Act, establishing agricultural experiment stations, and the 1914 Smith-Lever Act, which established extension programs in agricultural and home economics.

32 Lincoln, *Collected Works*, ed. R. P. Basler, 9 vols. (1953), 7: 55; Hyman, *A More Perfect Union*, 210–11.

33 William Hanchett, *The Lincoln Murder Conspiracies* (1983), 37, 155; H. M. Hyman, "Hitting the Fan(s) Again; or, Sic Semper Conspiracies," *Reviews in American History* (1984), 388; Hyman, *Lincoln's Reconstruction: Neither Failure of Vision Nor Vision of Failure* (1980). Contemporary perception that emancipation was tied to access to education is evident in such illustrations as J. L. Magee's print entitled "Emancipation," in which Lincoln is depicted as treading on the serpent of evil and the symbolic chain and shackle of slavery and in which black and white beneficiaries look toward a public school, offering "education to all classes," as the symbol of their deliverance. Harold Holzer, Gabor S. Boritt, and Mark E. Neely, Jr., in *Changing the Lincoln Image* (Fort Wayne, Ind., 1985), p. 50, say of this print: "What is most remarkable about this print, of course, is its unprecedented, almost radical universality: this Lincoln is emancipating not only slaves but the starving whites of the ravaged South — something Lincoln himself hoped emancipation would accomplish. Its message was of equal opportunity, equal access to self-improvement. It is unique in the archives of Lincoln print portraiture."

34 Hyman and Wiecek, *Equal Justice Under Law*, chaps. 8–11.

35 Simon, "The Politics of the Morrill Act," *Agricultural History* 37 (1963): 103, 104. Raymond Walter's *Burden of Brown: Thirty Years of School Desegregation* (1984) is, according to Nelson and Reid, *Literature of*

American Legal History, 270: "Like most lawyers' legal history, . . . concerned not with historical inquiry into why the past occurred as it did but with an existing line of decisions which, in the author's view, should be modified or overruled."

36 W. Hoffnagle, "The Southern Homestead Act: Its Origins and Operation," *Historian* 32 (1970): 612.

37 Avins, "Black Studies," 213.

38 Douglass to Child, July 30, 1865, in Foner, ed., *Douglas*, 4 vols. (1950–55) 4:71; Hurd to Lieber, undated (Ca. July 1868), no. LI 2422, Lieber Papers, Huntington Library.

39 April 2, 1869, Sumner Papers, vol. 94, no. 4, Houghton Library, Harvard University.

40 R. L. Labb, "New Light on the Slaughterhouse Monopoly Act of 1869," in E. W. Haas, ed., *Louisiana's Legal Heritage* (1983), 143; Hyman and Wiecek, *Equal Justice Under Law*, chaps. 10–12.

41 R. C. Palmer, "The Parameters of Constitutional Reconstruction: Slaughterhouse, Cruikshank, and the Fourteenth Amendment," *University of Illinois Law Review Symposium in Legal History* (1984): 739.

42 In John Higham, "Herbert Baxter Adams and the Study of Local History," *American Historical Review* 89 (1984): 126.

43 In Gene Gressley, "The Turner Thesis—A Problem in Historiography," *Agricultural History* 32 (1958): 227, 229.

44 Potter, *People of Plenty* (1954), 158; D. J. Weber, "Turner, the Boltonians, and the Borderlands," *American Historical Review* 91 (1986): 66.

45 Pp. 68—69. Continuing, Beard asserted that "by a strange fate the energies of individual enterprises thus trained in schools under state and local auspices, and released in action, swiftly rounded out the continent, laced all parts of the country together by systems of transportation, and bound its sections and industries into a national economy. Meanwhile agencies of communication merged provincial

ideas and thought into a larger consensus, such as the founders of the Republic had sought to create. So it has come about that public education, as in 1789 [under the Northwest Ordinance], is once more concerned with the national economy and interests, despite its origins in state and local enterprise. The age-long conflict between centralism and particularism, between collective interest and private interest, has not closed, and cannot be closed; but upon educational leadership devolves a . . . responsibility for keeping that conflict within the bounds of exact knowledge and the democratic process, and of contributing to the formation of wise and humane decisions."

46 Gates, "The Homestead Act: Free Land Policy in Operation, 1862-1935," in H. W. Ottoson, ed., *Land Use Policy and Problems in the United States* (1963), 28, 43.

47 See earlier citations to titles by Hurst, Hyman, Keller, Nelson, and Scheiber.

48 Joland Mohr, "Higher Education and the Development of Professionalism in America" (Ph.D. diss., University of Minnesota, 1984).

49 Eldon L. Johnson, "Misconceptions About the Early Land-Grant Colleges," *Journal of Higher Education* 52 (1981): 333, 338-39.

50 See R. P. Hudson, "Abraham Flexner in Perspective: American Medical Education, 1865-1910," *Bulletin of the History of Medicine* 46 (1972): 546.

51 Lawrence Veysey, *The Emergence of the American University* (1967); Talcott Parsons in Edwin R. A. Seligman and Alvin Johnson, eds., *Encyclopedia of the Social Sciences*, 15 vols. (1968), 12: 545.

52 Johnson, "Misconceptions," 338-91.

53 Varg, "The Land Grant Philosophy and Liberal Education," *Centennial Review* 6 (1962): 435, 436, in Thomas LeDuc, "History and Appraisal of Land Policy to 1862," in H. W. Ottoson, ed., *Land Use Policy*, 3, 24.

54 Johnson, "Misconceptions," 391.

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55 D. K. Weisberg, "Barred from the Bar: Women and Legal Education in the United States, 1870-1890," *Journal of Legal Education* 28 (1977): 485.

56 Janeway, review of Carroll Smith-Rosenberg, *Disorderly Conduct: Visions of Gender in Victorian America* (1985), in *New York Times Book Review*, Aug. 25, 1985, 11; Barbara M. Solomon, *In the Company of Educated Women* (1985).

57 Interview, Mrs. Hobby with author, Houston, Tex., 1969; on Bascom and Gregory, Lois B. Arnold, *Four Lives in Science: Women's Education in the Nineteenth Century* (1985).

58 Sandoz, "The Homestead in Perspective," in Ottoson, ed., *Land Use Policy*, 47, 6.

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61 Donald Nieman, "Black Ballot Power and Republican Justice: The Impact of Black Political Power on the Administration of Justice in the Reconstruction South," (Paper delivered at Symposium on Emancipation and Its Aftermath, City University of New York, 1983).

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Appendix A

THE NORTHWEST ORDINANCE

(July 13, 1787)

U. S. Rev. Stat., 1878, 2d ed., pp. 13-16.

An ordinance for the government of the territory of the United States northwest of the river Ohio.

Section 1. Be it ordained by the United States in congress assembled, That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of congress, make it expedient.

Sec. 2. Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent 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 parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised, or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real 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, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Sec. 3. Be it ordained by the authority aforesaid, 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, and have a freehold estate therein, in one thousand 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 five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the secretary of congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdictions and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their office; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by congress.

Sec. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives

from their counties or townships, to represent them in the general assembly: Provided, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty five after which the number and proportion of representatives shall be regulated by the legislature: Provided, That no person 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: 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.

Sec. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

Sec. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to congress, five of whom congress shall appoint and commission to serve as aforesaid; and whenever a vacancy

shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to congress, one of whom congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the tithe of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress, five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the president of congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to congress, who shall have a seat in congress, with a right of debating, but not of voting, during this temporary government.

Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government therein, and for

their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest:

Sec.14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I

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.

ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. 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. And, in 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.

ARTICLE III

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 utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV

The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new states, as in the original states, within the time agreed upon by the United States in congress assembled. The legislatures of those districts, or new states, shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters

leading into the Mississippi and Saint Lawrence, and the carrying places between the same, 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 into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V

There shall be formed in the said territory not less than three nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western state, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: Provided, however, And it is further understood and declared, that the boundaries of these three states shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: Provided, The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of

the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

ARTICLE VI

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: Provided always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully re-claimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth. □

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Appendix B

The Homestead Act of 1862

37th Congress, Ch. 75, 12 Stat. 392
May 20, 1862

CHAP. LXXV. — *An Act to Secure Homesteads to Actual Settlers on the Public Domain*.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preëmption claim, or which may at the time the application is made, be subject to preëmption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: *Provided*, That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Sec. 2. *And be it further enacted*, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family,

or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or is given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided*, *however*, That no certificate shall be given or patent to issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has, been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: *And provided, further*, That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall enure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell said land for the benefit of but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified.

Sec. 3. *And be it further enacted*, That the register of the land office shall note all such applications on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

Sec. 4. *And be it further enacted*, That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

Sec. 5. *And be it further enacted*, That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government.

Sec. 6. *And be it further enacted*, That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land offices shall be entitled to receive the same compensation for any lands entered under the provisions of this act that they are now entitled to receive when the same quantity of land is entered with money, one half to be paid by the person making the application at the time of so doing, and the other half on the issue of the certificate by the person to whom it may be issued; but this shall not be construed to enlarge the maximum of compensation now prescribed by law for any register or receiver: *Provided*, That nothing contained in

this act shall be so construed as to impair or interfere in any manner whatever with existing preëmption rights: *And provided, further*, That all persons who may have filed their application for a preëmption right prior to the passage of this act, shall be entitled to all privileges of this act: *Provided*, *further*, That no person who has served, or may hereafter serve, for a period of not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this act on account of not having attained the age of twenty-one years.

Sec. 7. *And be it further enacted*, That the fifth section of the act entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the third of March, in the year eighteen hundred and fifty-seven shall extend to all oaths, affirmations, and affidavits, required or authorized by this act.

Sec. 8. *And be it further enacted*, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting preemption rights. □

[The Homestead Act was repealed by the Federal Land Policy and Management Act of 1976, although homesteading was permitted in Alaska until 1986]

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Appendix C

MORRILL ACT of 1862

7 U. S. C. ch. 13, §301 (1862)
12 Stat., ch. 130, at p. 503 (July 2, 1862)

Chap. CXXX.--*AN ACT Donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and Mechanic Arts.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this Act.

Sec. 2. *And be it further enacted*, That the land aforesaid, after being surveyed, shall be apportioned to the several States in sections or subdivisions of sections, not less than one quarter of a section; and whenever there are public lands in a State subject to sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said State shall be entitled shall be selected from such lands within the limits of such State, and the Secretary of the Interior is hereby directed to issue to each of the States in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said State may be entitled under the provisions of this act, land scrip to the amount in acres for the deficiency of its distributive share: said scrip to be sold by said States and the proceeds thereof applied to the uses and purposes prescribed in this act, and for

no other use or purpose whatsoever: *Provided*, That in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other State, or of any Territory of the United States, but their assignees may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at one dollar and twenty-five cents, or less, per acre: *And provided, further*, That not more than one million acres shall be located by such assignees in any one of the States: *And provided, further*, That no such location shall be made before one year from the passage of this Act.

Sec. 3. *And be it further enacted*, That all the expenses of management, superintendence, and taxes from date of selection of said lands, previous to their sales, and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the States to which they may belong, out of the Treasury of said States, so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes hereinafter mentioned.

Sec. 4. *And be it further enacted*, That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, (except so far as may be provided in section fifth of this act,) and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal

and practical education of the industrial classes in the several pursuits and professions in life.

Sec. 5. *And be it further enacted*, That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative acts:

First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, except that a sum, not exceeding ten per centum upon the amount received by any State under the provisions of this act may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said States.

Second. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretence whatever, to the purchase, erection, preservation, or repair of any building or buildings.

Third. Any State which may take and claim the benefit of the provisions of this act shall provide, within five years from the time of its acceptance as provided in subdivision seven of this section, at least not less than one college, as described in the fourth section of this act, or the grant to such State shall cease; and said State shall be bound to pay the United States the amount received of any lands previously sold; and that the title to purchasers under the State shall be valid.

Fourth. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, with their cost and results, and such other matters, including State industrial and economical statistics, as may be supposed useful; one copy of which shall be transmitted by mail [free] by each, to all the other colleges

which may be endowed under the provisions of this act, and also one copy to the Secretary of the Interior.

Fifth. When lands shall be selected from those which have been raised to double the minimum price, in consequence of railroad grants, they shall be computed to the States at the maximum price, and the number of acres proportionally diminished.

Sixth. No State while in a condition of rebellion or insurrection against the government of the United States shall be entitled to the benefit of this act.

Seventh. No State shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature within two years from the date of its approval by the President. *

Sec. 6. *And be it further enacted*, That land scrip issued under the provisions of this act shall not be subject to location until after the first day of January, one thousand eight hundred and sixty-three.

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* On July 23, 1866, Congress amended this subdivision to permit former Confederate states to qualify for the act's benefits:

> No State shall be entitled to the benefits of this act unless it shall express its acceptance thereof by its legislature within three years from July 23, 1866: *Provided*, That when any Territory shall become a State and be admitted into the Union, such new State shall be entitled to the benefits of the said act of July two, eighteen hundred and sixty-two, by expressing the acceptance therein required within three years from the date of its admission into the Union, and providing the college or colleges within five years after such acceptance, as prescribed in this act.

14 Stat., ch. 209, at p. 208 (1866).

Sec. 7. *And be it further enacted*, That the land officers shall receive the same fees for locating land scrip issued under the provisions of this act as is now allowed for the location of military bounty land warrants under existing laws: *Provided*, their maximum compensation shall not be thereby increased.

Sec. 8. *And be it further enacted*, That the Governors of the several States to which scrip shall be issued under this act shall be required to report annually to Congress all sales made of such scrip until the whole shall be disposed of, the amount received for the same, and what appropriation has been made of the proceeds. □

MORRILL LAND GRANT ACT of 1890

(Also known as The Second Morrill Act or
the Agricultural College Act of 1890)
7 U.S.C. §322 (1890).
26 Stat., ch. 841, at p. 417 (August 30, 1890)

An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two.

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That there shall be, and hereby is, annually appropriated, out of any money in the Treasury not otherwise approvided, to each State and Territory for the more complete endowment and maintenance of colleges for the benefit of agriculture and the mechanic arts now established, or which may be hereafter established, in accordance with an act of Congress approved July second, eighteen hundred and sixty-two, the sum of fifteen thousand

dollars for the year ending June thirtieth, eighteen hundred and ninety, and an annual increase of the amount of such appropriation thereafter for ten years by an additional sum of one thousand dollars over the preceding year, and the annual amount of be paid thereafter to each State and Territory shall be twenty-five thousand dollars to be applied only to instruction in agriculture, the mechanic arts, the English language and the various branches of mathematical, physical, natural, and economic science, with special reference to their applications in the industries of life, and to facilities for such instruction: *Provided*, That no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act if the funds received in such State or Territory be equitably divided as hereinafter set forth: *Provided*, That in any State in which there has been one college established in pursuance of the act of July second, eighteen hundred and sixty-two, and also in which an educational institution of like character has been established, or may be hereafter established, and is now aided by such a State from its own revenue, for the education of colored students in agriculture and the mechanic arts, however named or styled, or whether or not it has received money heretofore under the act to which this act is an amendment, the legislature of such a State may propose and report to the Secretary of the Interior a just and equitable division of the fund to be received under this act between one college for white students and one institution for colored students established as aforesaid, which shall be divided into two parts and paid accordingly, and thereupon such institution for colored students shall be entitled to the benefits of this act and subject to its provisions, as much as it would have been if it had been included under the act of eighteen hundred and sixty-two, and the fulfillment of the foregoing provisions shall be taken as a compliance with the provision in reference to separate colleges for white and colored students.

Sec. 2. That the sums hereby appropriated to the States and Territories for the further endowment and support of colleges shall be annually paid on or before the thirty-first of July of each year, by the Secretary of the Treasury, upon the warrant of the Secretary of the Interior, out of the Treasury of the United States, to the State or Territorial treasurer, or to such officer as shall be designated by the laws of such State or Territory to receive the same, who shall, upon the order of the trustees of the college, or the institution for the colored students, immediately pay over said sums to the treasurers of the respective colleges or other institutions entitled to receive the same, and such treasurers shall be required to report to the Secretary of Agriculture and to the Secretary of the Interior, on or before the first day of September of each year, a detailed statement of the amount so received and of its disbursement. The grants of moneys authorized by this act are made subject to the legislative assent of the several States and Territories to the purpose of said grants: *Provided*, That payments of such installments of the apportion herein made as shall become due to any State before the adjournment of the regular session of legislature meeting next after the passage of this act shall be made upon the assent of the governor thereof, duly certified to the Secretary of the Treasury.

Sec. 3. That if any portion of the moneys received by the designated officer of the State or Territory for the further and more complete endowment, support, and maintenance of colleges, or of institutions for colored students, as provided in this act, shall, by any action or contingency, be diminished or lost, or be misapplied, it shall be replaced by the State or Territory to which it belongs, and until so replaced no subsequent appropriation shall be apportioned or paid to such State or Territory; and no portion of said moneys shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings. An annual report by the president of each of said colleges shall be made to the Secretary of Agriculture, as well as to the Secretary of the Interior, regarding the condition and progress of each college, including

statistical information in relation to its receipts and expenditures, its library, the number of its students and professors, and also as to any improvements and experiments made under the direction of any experiment stations attached to said colleges, with their cost and results, and such other industrial and economical statistics as may be regarded as useful, one copy of which shall be transmitted by mail free to all other colleges further endowed under this act.

Sec. 4. That on or before the first day of July in each year, after the passage of this act, the Secretary of the Interior shall ascertain and certify to the Secretary of the Treasury as to each State and Territory whether it is entitled to receive its share of the annual appropriation for colleges, or of institutions for colored students, under this act, and the amount which thereupon each is entitled, respectively, to receive. If the Secretary of the Interior shall withhold a certificate from any State or Territory of its appropriation the facts and reasons therefor shall be reported to the President, and the amount involved shall be kept separate in the Treasury until the close of the next Congress, in order that the State or Territory may, if it should so desire, appeal to Congress from the determination of the Secretary of the Interior. If the next Congress shall not direct such sum to be paid it shall be covered into the Treasury. And the Secretary of the Interior is hereby charged with the proper administration of this law.

Sec. 5. That the Secretary of the Interior shall annually report to Congress the disbursements which have been made in all the States and Territories, and also whether the appropriation of any State or Territory has been withheld, and if so, the reasons therefor.

Sec. 6. Congress may at any time amend, suspend, or repeal any or all of any of the provisions of this act. ■

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