

“THE GREAT LAND ORDINANCES”

By

Jonathan Hughes

FOREWORD

By

Douglas A. Hedin
Editor, MLHP

TWO CENTURIES AGO, in 1787, two remarkable documents were formulated that served as the major institutional framework for the development of the United States and its midwestern heartland. Most scholarly attention has focused on the U.S. Constitution, but the Northwest Ordinance of 1787 was of perhaps equal importance in terms of the role it played in the creation of the greatest American phenomenon of the nineteenth century, the Westward Movement. Not only did the Ordinance help provide for the orderly settlement of the five East Central states, but it served as a model for development that was emulated throughout the West, as Jonathan Hughes demonstrates in the opening essay. In the century following 1787, the area to the west of the original northern states—the new states of Ohio, Indiana, Illinois, Michigan and Wisconsin—moved from being the unpopulated frontier of a young country that itself was a frontier, to being the geographic and economic center of an emerging colossus that by 1887 was already becoming the world’s leading economic power as measured by gross national product or many of the other indicators that economists have devised to evaluate economic magnitudes.

So begins the “Introduction” of Professors David C. Klingaman and Richard K. Vedder to *Essays on the Economy of the Old Northwest* published in 1987. As editors commissioning and compiling these essays, they sought to correct an imbalance or fill a gap in studies of the economic history of the country: there is an abundance of accounts of the development of the South and West, but much less on the Midwest, which was, “by many measures, the most important in the nation by 1900, and certainly the economically most vibrant and growing throughout most of the nineteenth century.”

Critical to this development were the Great Land Ordinances: the Ordinances of

1784 and 1785 and, particularly, the Northwest Ordinance of 1787, which are the subjects of the following article by the late Jonathan Hughes. Together, he writes, these laws shaped America:

The land ordinances became the great American colonizing machine: they left the intellectual mark of the Americans on the nation's geography as indelibly as did the Roman roads on physical England, still cutting straight across the undulating English countryside. The Northwest Ordinances were the colonial Americans' institutional thumbprint on the American continent all the way from the Ohio River to the Pacific.

The Northwest Territory or Old Northwest as it became known was created by the Northwest Ordinance. It included all land of the United States west of Pennsylvania and northwest of the Ohio River. It covered the modern states of Ohio, Indiana, Illinois, Michigan, Wisconsin and the northeastern part of Minnesota. Minnesota Territory, established on March 3, 1849, was carved out of Wisconsin.

Jonathan R. T. Hughes was one of this country's foremost economic historians. A prolific writer, his books include *The Vital Few: The Entrepreneur and American Economic Progress* (Oxford Univ. Press, 1986) (expanded edition),¹ and with Louis P. Cain of Loyola University Chicago, *American Economic History* (Addison Wesley, 2011), now in its eighth edition.

Professor Hughes died in 1992 at the age of 64. The Salt Lake City *Desert News* carried his obituary:

Jonathan Roberts Tyson Hughes, a native of Twin Falls, Idaho, died of cancer May 30, 1992, in Evanston, Illinois.

A memorial service will be held for him in Twin Falls, Idaho, 1 p.m. Saturday, June 6, in the Twin Falls LDS Stake Center, 421 Maurice Street North, Twin Falls. Officiating will be Leonard J. Arrington, Salt Lake City. Jonathan Hughes was born on April 23, 1928, in Wenatchee, Washington, the son of Benjamin Bartholomew and Rachel Ward Hughes. His father died in an automobile accident when John was a baby and his mother relocated with John, and his older sister and brother in Twin Falls, her home town. His mother, having later married Jack Brown, died in Twin Falls in 1987.

A graduate of Twin Falls High School, John played football and was one of the region's finest clarinetists. He attended Utah State University, graduating in economics in 1950. After two years at the University of Washington, he received a Rhodes Scholarship to Oxford, where he earned a D. Phil. in economics in 1955, studying with the finest economists in England.

¹ *The Vital Few* has been a text book for "American Business History," an acclaimed course taught for many years by Professor George D. Green at the University of Minnesota.

At Oxford, John met Mary Gray Stilwell, a Texas studying anthropology, and they were married in 1953. A son, Benjamin, was born in 1960, and twin daughters, Charis and Margaret, were born in 1962.

John worked for the Federal Reserve Bank of New York, Purdue University, Columbia University, University of California at Berkeley, and spent the last 30 years as a professor of economic history at Northwestern University in Evanston, Illinois. He has been a Distinguished Professor of Economics and Robert E. and Emily King Professor of Business Institutions there since 1989. A productive scholar, Dr. Hughes has written widely in the field of economic history, producing a dozen books and more than one hundred professional articles. His book, "The Vital Few: The Entrepreneur and American Economic Progress," won a \$25,000 prize from the Kenan Enterprise Center for its celebration of American entrepreneurship. His writing was witty and insightful. He has been a Guggenheim Fellow, Ford Foundation Faculty Fellow, Fellow of All Souls College, Oxford, and president of the Economic History Association. In 1990 he was given an honorary Doctor of Social Science degree from Utah State University. The same year, his former students and colleagues published a festschrift in his honor entitled "The Vital One: Essays in Honor of Jonathan R.T. Hughes".²

Following his death, the Economic History Association established the Jonathan Hughes Prize for Excellence in Teaching Economic History

Professor Hughes' article appeared first on pages 1-15 of *Essays on the Economy of the Old Northwest*. It is posted on the Minnesota Legal History Project with the approval of Louis Cain and Joel Mokyr, the literary executors of the Estate of Jonathan R. T. Hughes. It is complete, though reformatted. Pages breaks have been added.

It is also posted with the consent of David C. Klingaman and Richard K. Vedder who are Professors in the Economics Department of Ohio University. Professor Klingaman contributed "The Nature of Midwest Manufacturing in 1890," and Professor Vedder authored with Lowell Gallaway, "Economic Growth and Decline in the Old Northwest" for *Essays on the Economy of the Old Northwest*.

"The Great Land Ordinances" complements "The Northwest Ordinance in Historical Perspective" by Douglass C. North and Andrew R. Rutten, which also appeared in *Essays on the Economy of the Old Northwest*. That article is posted separately on the MLHP, as are the Resolutions on Public Land (1780), the Ordinances of 1784 and 1785, the Northwest Ordinance (1787), and the Southwest Ordinance, also known as the Ordinance of 1790. □

² *Desert News*, June 3, 1992.

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THE GREAT LAND ORDINANCES

Colonial America's Thumbprint on History

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GEORGE DALTON ONCE SAID that the European imperialists of the nineteenth century “left their thumbprints all over Africa.” Americans also had an historical thumbprint: the way they settled empty land. It is a pity that popular knowledge of the great land ordinances of 1784, 1785, 1787, and 1790 should have become so slight. American history textbooks typically say very little about them. Compared to the federal constitution, the average college student today knows almost nothing about the land ordinances of the 1780s. Yet, as legal guidelines directing the nation’s physical and political growth the ordinances were as fundamental as was the federal constitution itself.

With the land ordinances in place, the Americans did an amazing thing: they surveyed and settled an empty continent in about a century, dividing it into small pieces of private property, peaceably, with few exceptions. This was done by a planned process of political mitosis: the organism created by the ordinances in the “Old Northwest” spread westward, recreating itself in measured townships and the sequence of territories and states again and again. This settlement system was cut into the wilderness primarily by privately motivated frontiersmen making small family farms acquired by purchase or homesteading from an undifferentiated wilderness systematically reduced to townships and sections dearly delineated by celestial surveys. The process was only stopped by nature and government action. Nature left great areas too poor in rainfall to support farming without irrigation, and the federal government finally withdrew the remaining public domain from occupation by homesteading in the interests of conservation and public amenity.

In the long run, the new country’s freedom-spawning land tenure produced a social system that was generalized to the landless citizen, property qualifications were abandoned and the civil rights of the colonial New England “freeman” became the rights of all. What the frontiersman achieved by possession, ordinary citizens would come to achieve by birth or naturalization. The land ordinances became the great American colonizing machine: they left the intellectual mark of the Americans on the nation’s geography as indelibly as did the Roman roads on physical England, still cutting straight across the undulating English countryside. The Northwest [2] Ordinances were the colonial Americans’ institutional thumbprint on the American continent all the way from the Ohio River to the Pacific.

CONTEMPORARY EVENTS AND JEFFERSON’S ROLE

THE COUNTRY’S LAND AREA in the 1780s was an outcome of the War of Inde-

pendence, and much of the policy governing that land was conceived while the future was still at risk to the fortunes, sometimes entirely by chance, of battles between contending forces of colonists, British, Indians, Spanish, and others. Settlement of the interior land was thus halting and uneven until after the War of 1812. By then the British had settled with us on division and control of the eastern half of the continent, the French had sold us Louisiana, and the Spanish role in Florida was at an end. But in addition to the political disorder that formed the background to the land ordinances and their operations, the establishment of the apparatus of survey and sale set out in the 1785 ordinance was uneven both in planning and execution.

It is therefore all the more impressive that a single conception, a single geopolitical mind, should have guided and shaped so much of our history connected with land acquisition and settlement. Mr. Jefferson's enthusiasm for Louisiana is well known. Not so well remembered is his decisive role in acquiring the old Northwest even before he outlined how to map, organize, and settle it.

The 1787 ordinance was in part a revision, expansion, and readoption of Jefferson's Ordinance of 1784,¹ which originally laid out conditions for self-government in all of the western lands. Jefferson included a provision to ban slavery after 1800 in his original plan, but it lost in Congress by only a single vote. Jefferson wrote of his defeat in 1784 on slavery in the western lands:

There were ten states present. Six voted unanimously for it, and one was divided; and seven votes being requisite to decide the proposition affirmatively, it was lost. The voice of a single individual of the state which was divided, or one of those which were of the negative, would have prevented this abominable crime from spreading itself over the new country. Thus we see the fate of millions unborn hanging on the tongue of one man—and Heaven was silent in that awful moment.²

And thus did Thomas Jefferson narrowly miss being the man in American history who did more than any other single person to determine the peaceful demise of chattel slavery! In 1787 slavery was excluded only from the territories north of the Ohio, and the new states entering south of that line under the 1790 ordinance thus armed the coming Civil War.

Generally speaking, Thomas Jefferson, our national prodigy, can be [3] given major credit for the entire project of settling the continental United States. This was so even during the Revolution when Jefferson, as governor of Virginia, on 25 December, 1780 ordered General George Rogers Clark to assemble an expedition: “. . . under your command at a very early season of the approaching year [to go] into the hostile country beyond the Ohio, the principle object of which is to be the reduction of the British post at Detroit and incidental to it the acquiring possession of Lake Erie.”³ Clark did not capture Detroit, but did capture Vincennes, and in consequence of General Clark's expedition, the treaty of peace in 1783 had to

recognize, as *fait accompli*, the American national claim to the old Northwest. It was also as Governor of Virginia that Jefferson shepherded in 1781 the legislation to hand over Virginia's vast claim to western territory to the new national government. Jefferson drafted the actual deed of cession in 1784.⁴ The famous scheme followed faithfully to the present day, of celestial surveys of the American land and subdivision into 36-square-mile townships—the Northwest Ordinance of 1785, was also Jefferson's work, if not solely his inspiration.

The Northwest Ordinance of 1787 was thus one part of a complex set of events, one island in a stream, that was destined to create a completely novel political organism, a giant amoeba-like social system that would grow (mainly without central direction or motivation) and subdivide itself steady-fly until the empty land was full. From start to finish, the new system, as well as the 1787 ordinance at the political heart of it, was among Jefferson's lesser-known achievements.

ESTABLISHMENT OF PROPERTY RIGHTS UNDER THE 1787 ORDINANCE

PRESSURE WAS PUT ON Congress in 1787 when the Reverend Manasseh Cutler asked Congress to provide a settled plan of self-government for the proposed settlers of the huge blocs of land Congress had granted to the Ohio and Scioto Companies—the Act of 1785 notwithstanding. The Committee of 1787 was the result.⁵ Jefferson was in France in 1787 when the committee drafted the new Ordinance for the Northwest Territories. Committee members Nathan Dane and Rufus King, both of Massachusetts, seized the opportunity to reinstate the antislavery provision, and it became law.⁶ The 1787 ordinance also settled the rule for the descent of land ownership by a simplification of the Massachusetts practice. There, the system of gavelkind of County Kent in England had been changed to be not merely equal division among sons, but equal division among all children, with a double portion going to the eldest son, the so-called Mosaic practice. The latter was now dropped. The 1787 ordinance reads: [4]

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 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 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 part of the personal estate. . .⁷

Dane said the idea was taken directly from the laws of Massachusetts, with the double portion dropped.⁸ This was the famous rule, in equal parts in equal degrees of consanguinity that would determine the basic way private ownership of a

continent would pass peacefully from generation to generation. Jefferson himself had favored the adoption of gavelkind,⁹ but that divided the land equally among the sons only.

From the time of Henry VIII, owners of property rights in free socage tenure (the American tenure) had been allowed to pass real property by will. After the *Statute of Frauds* of 1667, the English had established rules for making wills, rules that were followed even in the backwoods of colonial America.¹⁰ Consequently, the 1787 ordinance provided for intergenerational land transfers by will: "...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."¹¹

This was the practice established by the *Statute of Frauds*, except in that legislation special provisions were made for soldiers and mariners fatally wounded in military actions.¹² It is interesting, considering the violence attending the occupation of the Northwest Territories, including decades of Indian wars to come, that loopholes were not made in the law to accommodate the consequences of military violence. You needed to have your will made out and properly witnessed before you went off to your military adventures.

One reason for legislating the *Statute of Frauds* in England had been to end the ancient common-law practice of conveying ownership in real property by "delivery" (the only method recognized by the common law). The 1787 ordinance provides for transfer of personal property by delivery, but real property ultimately will have to be conveyed by deed.

. . . 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 convey-[5]-ances be acknowledged, or the execution thereof duly proved, and be recorded within one year after a proper magistrate, courts, and registers, shall be appointed for the purpose; and personal property may be transferred by delivery. . . .¹³

Although "signed, sealed, and delivered" now conveys no real meaning, it is reasonable to believe that until a deed of conveyance could be duly registered, an actual act of delivery (turning over property at the site before witnesses) would achieve a working, or practical, right to occupy the land for the lessee or the buyer. Such had been the case in the backwoods of New England, where it could be *years* before a deed of conveyance could be registered after land had been sold and occupied by new owners.¹⁴

Since parts of the territories had been in Virginia, where primogeniture had been the rule, and there were French occupants who followed their own customs, the ordinance left loopholes for them. ". . . saving. the French and Canadian inhabitants,

and other settlers of Kaskaskias, St. 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.”¹⁵ Jefferson himself had written these provisions in 1783 in the Virginia Act of Cession,¹⁶ and they reappear in the 1787 ordinance.

Until this ordinance the legal right to ownership of real property in the United States had descended one way or another from royal power, through land grants and royal charters. Now there had been a revolution and the power of England’s kings was considered finished. *Dartmouth College v. Woodward* (1819) would amend this conception later on.¹⁷ Nevertheless, the committeemen of 1787 believed they were finished with the British crown, in law at least. Therefore their grant from the “old Congress” (the Constitutional Convention was meeting in the summer of 1787) was thought a truly revolutionary act, or at least it was the use of power created by revolution. There had been a change of sovereignty, and Nathan Dane believed that the 1787 ordinance spoke directly to that change. Writing years later (26 March 1830) to Daniel Webster, Dane’s opinion was: “. . .I believe these were the first titles to property, completely republican, in Federal America: being in no part whatever feudal or monarchical. . .”¹⁸ Jefferson’s own interpretation was that the royal power, that of the “donor,” had passed to the United States by the state land grants to Congress, and that once sold off to private owners, the residual donor’s rights (escheatment for nonpayment of taxes, failure of heirs, etc.) would go to the new states that were to come into existence as the land was sold, settlers arrived, and the succession to statehood was accomplished. The federal government would step out of its donor’s rights *when the land was sold*, and “never after in any case” reenter the land.¹⁹ Jefferson feared that a great endowment of land or [6] rights left in the central government’s hands would necessarily breed tyranny. In the end both Dane and Jefferson would be confounded by history. The King’s powers stood against the revolution in *Dartmouth College v. Woodward*, and the federal government was never totally separated from its lands and related rights to those lands. It now reenters by eminent domain and by direct appropriation for failure by owners to pay their federal income taxes.

Article III exhorts the forthcoming settlers to a life on a high plane of public and private morality and fair dealing with the Indians.

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 toward 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. . . be made, for preventing wrongs being done to them and for preserving peace and friendship with them.²⁰

Dane said of this article, as well as the famous prohibition of slavery in Article VI, that they were meant for New England people. The committee had not intended to throw down a gauntlet before the southerners. Hence, the 1790 ordinance, extending that of 1787 to the south, apart from the prohibition against slavery was a perfectly natural development to Dane. He did not foresee, in 1830, that extending the nation westward with two totally different agricultural labor systems was necessarily breeding an irrepressible conflict.

. . . in the years 1784, '85, '86 and '87, the Eastern members of the Old Congress really thought they were preparing the North-Western Territory for New England settlers, and to them the third and sixth Articles of the compact more especially had reference; therefore, when North Carolina ceded her western territory and requested this ordinance to be extended to it, except for the slave article, that exception had my full assent, because slavery had taken root in it, and it was then probable it would be settled principally by slave-owners.²¹

In coming years other states followed the rule of the 1787 ordinance and an ancient and marvelously arcane history ended. Primogeniture in the U.S. ended, was abolished by Virginia in 1776, and in the last case, by Rhode Island in 1798. The double portion lingered until Pennsylvania finally abolished it in 1810. Massachusetts had already abolished the practice in 1801.²² [7]

What was the content of the ownership of real property whose descent was regularized by the 1787 ordinance? The substantive content of ownership was (is) contained in the tenure granted. That of the English new-world mainland colonies seems simple enough: from the original Virginia charter in 1606 to the final charter, that of Georgia in 1732, only land ownership in “free and common socage” was allowed. There were some variations in Maryland, Delaware, Pennsylvania, and (originally) in Georgia, but they were transitory. The tenure remains essentially today what it was then. We now call it fee simple—the simple feud. The basic rights are:

1. Descent is directly to the heir without escheatment.
2. The tenure is “perpetual,” usually shown by the words “heirs and assigns forever.”
3. There is complete freedom of alienation and devise (right of will).
4. There is the right of “waste” (the right to change the nature of the property cut the trees, dig mines, etc.)
5. There is the freedom from “incidents uncertain,” all the dues and obligations of the ownership are known when it is conveyed. Neither the conveyor nor the donor can add on incidents (conditions for transfer of title) after the title is settled.

The American land tenure was the historical product of a long evolution in England that I have treated elsewhere.²³ There are many other characteristics of it not listed

above. The variations on it, allowance for certain “feudal” rights and practices in Maryland, Delaware, Pennsylvania, and New York (to accommodate the Dutch tenures) vanished in time, in New York, only by constitutional revision in 1846. The custom of the British, when land was acquired already settled under the laws of other nations was to leave unchanged all practices that did not positively conflict with British laws. The Americans, in their turn, followed the same routine, so in Louisiana and the Southwest there are certain practices associated with real property rights that are not entirely the same as those in other states; e.g., “pueblo right” in California. Chancellor James Kent, in his *Commentaries on American Law* in 1826, tried to make sense of it all by the assertion that in the United States “the title to lands is essentially allodial, and every tenant [owner] has an absolute and perfect title, yet, in technical language, his estate is called an estate in fee simple, and the tenure free and common socage.”²⁴ The reference to allodial ownership is an assertion that there is no donor, that ultimately an American property owner holds in the same ownership as did the King of England—a grant from God. This is not so in the U.S., as anyone knows who does not meet the modern incidents of his tenure—does not pay his property taxes—his “ownership” simply vanishes, and his property escheats to the donor, the state. [8]

As a practical matter, after 150 years or so of living with the common law of England and free and common socage, the colonial Americans understood their land tenure inside and out—so much so that the federal constitution, in the fifth amendment (and elsewhere) could guarantee secure property rights without ever specifying what the rights were it guaranteed. The tenure, along with the common law, went straight through the Revolution into federal America via the conduits of the state courts and constitutions.²⁵ So the 1787 ordinance was not burdened with the need to establish any definitions of property rights in the lands about to be conveyed by the federal government to individuals, except to straighten out their descent in cases of intestacy

MEASURING THE CONTINENT

THE 1787 ORDINANCE, AS we have seen, was largely an update of the legislation of 1784, and it embraced the 1785 ordinance. That law laid out the scheme for celestial surveys, before the land went up for sale, with the lands divided into square townships of 36 square miles each, 6 miles by 6 miles. The 1785 survey system is part of the metaphorical American thumb-print and is deserving of some kind of an explanation since it is still the way Americans measure their lands.

Although Jefferson’s ideas were embodied in the 1785 ordinance, they represented an amalgam of colonial experience and ideals. The original idea of selling land in townships with specific (land) parcels set aside to support a school, and in New England a church (the glebeland), were examples. The New England way of westward expansion had been by planned settlements of groups committed to forming complete new social organisms, towns, at the very beginning of each extension into the wilderness.²⁶ Indeed, that is how Marietta, Ohio, was settled, and

Brigham Young, of Whittingham, Vermont,²⁷ continued the practice in Zion, far into the nineteenth century. The Puritan commitment to an orderly existence, including the establishment and support of a church, motivated the settlement technique. The fact that the New England communities were church-centered is still apparent to the tourist's eye.

Expansion into Vermont on the New Hampshire government's authority in the mid-eighteenth century demonstrates the technique in its perfected form. Beginning in 1749 with Bennington Township, New Hampshire's governor, Benning Wentworth, began laying out square townships along the southern edge of present-day Vermont. The ideas involved—advance survey, advance sales (promises to settle)—were old colonial ideas going all the way back to the Virginia colony. Massachusetts had expanded that way, mostly. Consider the instructions for the surveyors laying out Marlboro town in 1751 in southern Vermont. The adjacent town, Halifax, had been [9] chartered the year before. There was no celestial-survey base line. The base line was by “metes and bounds.” “Beginning at a marked tree standing half a mile west of Green River, in the boundary line between the government of Massachusetts Bay and New Hampshire, and from thence due west one said boundary line six miles. . .” This is the Halifax charter. It instructs the surveyors around by lengths of six miles at 90-degree angles to come back to the same tree. That was one town.²⁸ A year later Marlboro town picked up the line. Marlboro's charter reads: “Beginning at the North West Corner of a Township called Halifax lately granted. . . thence running by the Needle North Ten degrees East Six miles from Thence East Ten Degrees South Six miles from thence South Ten Degrees West Six miles & from thence West Ten degrees North by Halifax aforesaid Six Miles to the corner first mentioned...”²⁹ They were using a compass. More towns were laid out thusly, without regard to the topography. Mountains, streams, gorges, all were ignored. It is a true inspiration for a celestial survey with transit and rod. Political organizations, counties, and, later, states, took topography into account, but not townships. They were to be surveyors' lines only. In New England these little thirty-six square mile units, arbitrarily laid out, actually embraced, as they still do today, tiny direct democracies ruling over miniature domains.

Where the six-by-six mile unit came from is a mystery.³⁰ Each town contained thirty-six square miles, equal to 23,040 acres. Later on these would seem rational enough; each township divided into thirty-six sections, each one a square mile section containing 640 acres, or four farms of 160 acres each: the “squatter's 160” of colonial New England, and later on the size of a homestead farm under the Homestead Act of 1862. When you fly over Iowa, that is what you see. However, in the mid-eighteenth century, the Vermont townships were not so divided. They were divided instead into sixty-four lots of 360 acres each; not a natural multiple of 160 acres. So what was there later on, was not there at the beginning.

One can see the attraction of squares in the wilderness easily enough. Once you decided to ignore topography, a square is the easiest regular shape. It is believed that both William Penn and Lord Shaftsbury (a Carolina proprietor), early-day

enthusiasts for square settlements, were inspired thusly by the work of Sir William Petty. He was a famous “Political Arithmetician” of the mid-seventeenth century and was surveyor general of England in 1655. Cromwell ordered the division of Northern Ireland’s ten counties by dividing the counties into squares.³¹ But why the thirty-six square miles per township in New England? Scholarship (Amelia Clewley Ford) cannot take us further, and neither can theory. Why six by six? Why not ten by ten? In 1717 Sir Robert Montgomery proposed a colony organized as a Margravate in what became Georgia. The colony, Azilia, was laid out in 640-acre [10] squares—square miles but not thirty-six square mile townships: no such colony was ever actually established. After 1727 there was legislation in Massachusetts ordering new towns to be laid out in rectangles. Governor Oglethorpe had some square towns laid out in Georgia, but they were never developed. Then in 1749 came Benning Wentworth and Bennington—six miles by six miles square. Then came more towns in Vermont of the same size. Jefferson accepted the idea of the township as the basic survey unit, ignoring actual topography. But being an eighteenth-century rationalist, he naturally wanted a unit that made some kind of sense mathematically. He wanted, in fact, ten miles by ten miles. The New England men wanted their thirty-six square mile unit. A compromise left the proposed townships at seven miles by seven miles, but the New England men had their way and the township in 1785, and forevermore, was declared to be six miles by six miles square, even if it made no obvious sense.³²

Given the importance the New England saints had placed on religion it is not surprising that the New England townships typically provided for the support of it. The land for support of the established church was called the *glebe*—and that word was not to be known beyond New England because of the 1785 ordinance. The New England towns also provided for schooling in their land grants. The 1751 royal charter for Marlboro Vermont reads in these matters: “. . . one Shear [share] for the First Settled Minister one Shear for the benefit of the School forever, one Shear for to remain as a Glebe for the benefit of the Church of England as by Law Established. . . for the Benefit of the Church there ‘till an Episcopal Clergyman is Settled in the town. . . then to remain for the Sole Benefit of the Ministry there. . .’”

In that case one sixty-fourth of the town was a gift for the first minister of faith willing to settle there. A second share was for the established church whenever an Anglican clergyman was willing to go live in the Vermont backwoods, and one share would support the school. During the American revolution, the established church was, of necessity, on the losing side. It was to be left out when new lands were up for settlement. What lay behind this change was doubtless as much a distaste for establishing another state church as it was due to Jefferson’s famous “atheism.” In any case, anticipating the first amendment (first proposed in 1789) to the upcoming federal constitution, the support for religion was now omitted altogether and 150 years of colonial tradition were assigned to history’s famous trashcan. One tradition did survive: a 640-acre section in each town (section 16) was set aside to support schooling and four sections were reserved to support government.

Under the 1785 ordinance, the first base line was to run due west from the point where the border of Pennsylvania crossed the Ohio River. The first seven north-south range lines were measured at intervals westward from the Ohio River, and the land was scheduled to be offered for sale once [11] the first seven ranges were surveyed.³³ That plan for survey and sales, and 1787 ordinance's provision for intergenerational transfers of real property together with the conditions for establishing self-government were the "constitution" of the Old Northwest. The ordinances were destined to provide the geographic, political, and property rights systems on the land for nation's westward expansion. The actual historical process to come was far less orderly than the committees of the "old congress" could have imagined in 1787. But the system held together in the decades of change and mess that absorbed the newly independent nation.

SELLING IT OFF

THE ORDINANCES PROVIDED A kind of rational expansion machine in the background—*a deus ex machina*—while the foreground was filled with drama and often enough, chaos. From the Treaty of Paris in 1783 to the end of the Blackhawk War in 1832, the Old Northwest was buffeted by a long sequence of upheavals. Yet the settlement process continued. The 1783 treaty left a northern boundary stretching eastward and southward from Lake of the Woods across Lake Superior, then down Lake Huron to Detroit, then around through Lake Erie to Niagara, and from there through Lake Ontario to the St. Lawrence. But British military and trading posts below that meandering line were kept maimed for years on various pretexts, and Hudson's Bay Company traders roamed far and wide below the lakes. Given the problems involved for the new nation in acquiring the hunting lands of the resident and unwilling Indian tribes, supported by British policies that targeted a hoped-for *de facto* buffer Indian state between the old colonies and lower Canada, there were many bloody and violent episodes to come in the Northwest territories after the American Revolution had cancelled out the Quebec Act of 1774. Nevertheless, by the cessions of the original states the new government in 1786 had nominal control of the Northwest, apart from the Virginia and Connecticut reserves, the Indians, the British.

The Southwest had an even more traumatic future coming. Its fate was to include not only the several Yazoo land scandals emanating from the Georgia legislature, but murky and sometimes bloody intrigues involving the Spaniards based in Florida and New Orleans, together with their would-be Indian allies. In addition, a host of frontier adventurers of mercurial loyalties played for and against all sides. The settlement, when it came, the Louisiana Purchase, was mainly the outcome of European power politics together with some adroit military bluffing by (then) President Thomas Jefferson. He bought an empire for \$15 million from the French in 1803. They had just swindled it from the helpless Spaniards.³⁴

By 1785 there already were several thousand squatters in the Ohio territory. They were described by Colonel Josiah Hannar as "banditti" who en-[12]-tered and

claimed their “undoubted right to pass into every vacant country, and there to form their own constitution.”³⁵ Conflicts with the Indians came thick and fast, and perforce often enough drew in the regular American forces in the neighborhood. Several expeditions against the Indians in 1786-87, including one led by George Rogers Clark, had failed to pacify the tribes and a widespread Indian war seemed inevitable.

Nevertheless, against all odds the first seven mountain ranges, westward from the Ohio River, had been surveyed according to the 1785 ordinance in the years 1785-87. The Ohio Company had acquired a massive land grant from Congress just to the southwest of the seven ranges. New England settlers had set out for those lands in the winter of 1787-88 and on 7 April 1788 they came ashore and founded Marietta.³⁶ A few months later, in January 1789, Arthur St. Clair, the new governor of the territory, tried to dictate a treaty with the Indians at nearby Fort Harmar.

War was the immediate result. St. Clair himself was in command of a disaster in the fall of 1791 in which the Americans sustained nearly a thousand casualties in a single engagement. After that, for many months most of the white settlements in Ohio were abandoned. For two more years the Ohio frontier was aflame. Then, in late August of 1794, General Anthony Wayne had his way with the Indians at the battle of Fallen Timbers. The British did not come out of their fortress at Detroit to help their allies, and in early 1795, in the Treaty of Greenville, dictated by Wayne, the Indians abandoned most of Ohio. By then the British, at war with revolutionary France, had bigger fish to fry and gave the American representative, John Jay, a promise that the British military posts in the Old Northwest would be given up by 1 June 1796. Wayne’s treaty of Greenville, together with Jay’s Treaty, gave the Northwest peace until nearly 1812.

Widespread frontier fighting resumed again in 1811 with the Indians now led by Chief Tecumseh and his crippled brother, “the Prophet.” By then the Indians were being pushed back to the Mississippi and beyond by a series of treaties in which their lands had been taken. They were now losing Indiana, Illinois and Wisconsin piece by piece. The Battle of Tippecanoe, 7 November 1811, opened this final phase of Indian wars and the Battle of the Thames, 5 October 1813, in which Tecumseh was kified, ended it. The Indian power was broken forever east of the Mississippi, and despite their successes against American arms in the Northwest in 1812-14, the British would soon withdraw their influence south of the lakes for good.

After 1815 the legendary emptying-out of the eastern backwoods was on, the time had come when “the whole country is breaking up and moving west.” Settlers flooded into the new lands. Ohio filled up first, then came the invasions of Michigan and Illinois, then the Indiana prairies above the river valleys that had been ignored. The tide swept into Wisconsin and Minnesota. The Blackhawk War of 1832 was a pitiable and desperate piece of hopelessness on the part of the Indians remaining east of the Mississippi. It [13] did serve to focus attention on the swamplands at the portages at the base of Lake Michigan, from which Chicago soon mushroomed. By

1830 the states of the Old Northwest contained a population of 1,470,000 which had grown to 2,934,000 by 1840, a total greater than New England's 2,235,000. In terms of settlement, farms, towns and industry the Northwest was fulfilling its promise in a hurry.³⁷

Most of the sales under the new federal government had been made by the General Land Office. But before 1800 the secretary of the treasury (under a land act of 1796) had been the official responsible for making the sales. The internal history of the General Land Office has been told incomparably by Malcolm Rohrbough. The details of that internal history are sometimes thrilling, and nearly always just this side of easy belief. One pictures with difficulty the survey crews in the field during the War of 1812 following the line of fighting with rod and chain, retreating when the army retreated, fleeing into the few safe white strong points chased by irate Indians, then venturing forth again and again.³⁸ In the Washington offices a hopelessly understaffed bureaucracy struggled, decade after decade, under an increasing avalanche of paper-quill pens in hand. The treasury secretary, Albert Gallatin, with his singular long vision was an early hero of the office in the history of land sales. Surveyor General Jared Mansfield, the mathematician, also achieved immortality by settling the survey techniques on scientific principles—creating the system of base lines and principal meridians that would last for all time.³⁹ There was the pragmatic commissioner, Edward Tiffin, who loaded up the precious land office records in August 1814, and as the British entered Washington, D.C., with arson in their hearts, had his staff busy drafting plats, posting accounts, and correcting arithmetic in temporary quarters safely across the Potomac in Virginia. One member of the land office staff thought the flames of Washington, seen at night, “an interesting event.” Tiffin, despite such heroics, was destined to be thrown out of office by President Jackson years later when the spoils system took over federal appointments.⁴⁰

At other levels, of course, the record was notoriously less heroic: it was heavily flavored with fraud and corruption, not only by the appointed district land office officials, but by the landbuying public as well. But fraud and corruption had been common enough even before there was a land office, when the U.S. Treasury handled the sales under the direction of Congress. The Scioto Company was a piece of fraudulence from stem to stern, yet its needs directly motivated passage of the great Ordinance of 1787. The distribution of the public land seemed to offer temptation beyond the capacity of common humanity to resist, decade after decade. The corruption and fraud, however, “made a market,” and the lands went quickly enough into private hands, which was, after all, the object of it all. That the federal government hoped for a profit was a secondary consideration.

What was important in the long run was that the land be distributed into [14] private hands in the standard American land tenure, and that the titles be perfectly secure, and that the American political democracy be expanded in its pure form from east to west as the continental nation was formed, piece by piece, township by township. The people and wagons moved ever westward and a stable institutional

framework of settlement went with them until the nation extended from ocean to ocean, the remote heritage of the original Virginia Company charter of 1606.

After the fiascos of the Ohio and Scioto companies, the powers of the old Congress ended. In 1790 the new federal Congress gave the responsibility to the Treasury to sell off the public domain. Then began the long series of efforts to find the best vending techniques: the means of payment, extent of credit allowed, and optimal sizes of parcels for sale. The sizes became smaller and the amount of credit larger as time went on—democratization. Up to 1837 Congress had passed 375 laws governing the land distribution,⁴¹ including acts of preemption, acts of donation, warrants for military service, settlements of titles derived from foreign grants. The land office, within the Treasury but after 1800 with its own commissioner, in 1800 set up the first district offices. Attached to them were the district surveyors, the registrars (who collected the money and had the greatest opportunities for fraud). The technique of survey before sales together with public auctions persisted, sometimes with difficulty. It could take just 30 seconds to “cry off” a parcel of land at an auction, but usually five years to get all the paperwork completed and a title, signed by the president, into the purchaser’s hands. Rohrbough suggests that the inevitable delay guaranteed that there would be no property qualifications on voting in the new lands. Inefficiency bred popular democracy.⁴²

The surveys made it possible for every parcel of land for sale to have a distinct trigonometric identity. Rohrbough wrote of the rectangular surveys: “One of the principal objects of the rectangular survey was a usable system of land description, and here the surveys proved successful. But much of the surveying was bad, and all of it was tardy.”⁴³ It was done though, and the Washington bureaucracy was forever behind in the resulting paperwork. At one point President Jackson faced ten thousand separate land patents awaiting his quill-pen signature. It was all done by hand, from the survey team in the forest to the president in the White House.⁴⁴

In 1854 the Graduation Act was applied to liquidate the remaining public holdings east of the Mississippi. Only the West remained public. The government, according to Vernon Carstensen, actually lost money overall on the land sales.⁴⁵ Rigged auctions and larcenous district officials accounted for much of the loss. Millions of people had poured into the public lands and yet the primary seller lost money. There was a huge rent to be realized from the lands, and the federal government did not realize its possible maximum share. [15]

Then in 1862 the Homestead Act was passed and the frontiersman’s dream of free land was nearly realized, except this meant there was a return to the practices of colonial times and the land so occupied had to be improved by the occupier. Once again raw labor could acquire land. Those lands so acquired were mainly quarter sections, 160 acres, and were also laid out in square miles. Ten percent of the public domain of 1850 was destined to be given away to the railroads as construction subsidies. Finally, some 174,000,000 acres of desert and mountains were left in the contiguous forty-eight states, and they remained as part of the “national land

reserve”, used mainly for mining, timbering, and grazing under federal license. It is all surveyed in thirty-six square mile sections according to the act of 1785 and New England custom. Owyhee County, Idaho, huge and empty is laid out in little thirty-six square mile townships, just like southern Vermont. And it all lies in the states that were initially territories, organized according to the ordinances of 1787 and 1790.

Uncelebrated in history books, unknown to the average citizen, the land ordinances of the “old Congress” achieved an almost ubiquitous domination beyond the Appalachians. The objects of those acts were achieved in a century of unparalleled economic development. Arizona came into the union in 1912 after passing through the traces of a territorial government according to the eighteenth-century land acts. It is true that the machinery of the land distribution was oiled by fraudulence. But no amount of wisdom and virtue could have distributed without sin a legacy taken “from others of the Sons of Adam”⁴⁶ by military force, or the threat of it, from the beginning. From the Ohio River to the Pacific Ocean, the American thumbprint covered it all.

Notes

1. The Ordinance of 1784 is reprinted in *Old South Leaflets no. 127* (Boston, Mass., Directors of the Old South Work, 1896—1903). Hereafter, OSL 127.
2. OSL 127, 43. Jefferson wrote the lines quoted in 1786.
3. OSL 127, 27. In this place the entire letter from Jefferson to Clark is reprinted.
4. OSL 127, 33-34.
5. Ray Allen Billington, *Westward Expansion: A History of the American Frontier* (New York, Macmillan, 1949), 212-16.
6. Dane’s account is given in Albert Bushnell Hart, ed., *American History Told By Contemporaries* (New York, Macmillan, 1901), 3: 155-58.
7. Jay Barrett, *The Evolution of the Ordinance of 1787* (New York, Putnam’s Sons, 1891), 82.
8. Hart, *American History*, 155-57.

9. Marshall Harris, *Origin of the Land Tenure System in the United States* (Westport, Conn.: Greenwood Press, 1970), 389. However, Jefferson said he preferred the rule of descent in Virginia lands to be: “. . .the lands of any person dying intestate will be divisible equally among his children, or other representatives of equal degree.” (*Notes on the State of Virginia* [London: John Stockdale, 1788], 227). Dane may have written it in the 1787 Ordinance, but obviously Jefferson advocated it.

10. For more discussion by the present author on these matters, see J. R. T. Hughes, *Social Control in the Colonial Economy* (Charlottesville, University Press of Virginia, 1976), 43-44, 81-82.

11. Barrett, *Evolution of the Ordinance of 1787*, 182.

12. Hughes, *Social Control*, 82.

13. Barrett, *Evolution of the Ordinance of 1787*, 82.

14. In my paper, “A World Elsewhere: The Importance of Starting English;” (forthcoming in *Essays in Honour of Sir John Habakkuk*, Oxford University Press), I give an example from the deed book of Halifax township in southern Vermont. Jeremiah Read, who calls himself “husbandman,” conveys 26 March, 1773 to William Scot, “yeoman,” in fee simple, for cash in exchange for “delivery” of the land (transfer of property rights before witnesses). The use of the old-style identification yeoman continues for some years after the Revolution, when all persons are equally “citizens.” The archaic word *husbandman* does not recur in the Halifax records. In the case of the conveyance from Read to Scot, it is March 1778, five years after the delivery before the deed is entered in the town deed book (Halifax Vermont Town Deedbook, vol. I. A.)

15. Barrett, *Evolution of the Ordinance of 1787*, 82.

16. Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*. . . (Washington, D. C., Government Printing Office, 1909), 956. [17]

17. That is, Dartmouth’s charter had been granted by King George III, and the charter was upheld by the U.S. Supreme Court against an attempted seizure by the state of New Hampshire, thus sustaining by implication all the prior grants of the English crown, i.e., all the vested property rights derived therefrom. As Chief Justice Marshall phrased it: “It is too clear to require the support of argument that all contracts, respecting property, remained unchanged by the revolution.” 4 Wheaton, 518 (1819), 651.

18. Hart, *American History*, 155.

19. Harris, *Origin of the Land Tenure System*, 389.
20. Barrett, *Evolution of the Ordinance of 1787*, 87.
21. Hart, *American History*, 157.
22. Hughes, *Social Control*, 86.
23. Details and citations for the general information in the next four paragraphs may be found in Hughes, *Social Control*, “The Background of Tenures,” 23-31, and “The American Tenure and Its Establishment,” 37-50.
24. James Kent, *Commentaries on American Law*, 13th ed. (Boston: Little, Brown and Co., 1884) 3: *488..*489
25. As a practical matter the constitutional continuity of the common law and hence the old practices regarding land-holding is covered by the tenth amendment to the federal constitution—the powers reserved to the “States respectively, or to the people.”
26. Billington, *Westward Expansion*, 206-7.
27. Leonard Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints* (Boston, Houghton Mifflin, 1958), 24-25.
28. Amelia Clewly Ford (Philadelphia), says of Wentworth’s methods: “In the interval between King George’s war and the last French and Indian War, Governor Benning Wentworth began to grant townships in the region beyond the Connecticut, with the hope of strengthening the claim of New Hampshire to the disputed country as against New York. He mapped out on paper a large part of the present Vermont into townships six miles square.” This after a long period of failed efforts to settle the new land elsewhere in squares of various dimensions. Settlement followed and a new system had begun “a brilliant innovation.” (*Colonial Precedents of Our National Land System As It Existed in 1800* [Philadelphia: Porcupine Press, 1976 reprint, 1st ed., 1910).
29. Both charters remain today in the custody of the townships. I am indebted to Laura Sumner and Harold Makepeace, the town clerks (as of the summer of 1986) of Halifax and Marlboro, respectively, for their assistance.
30. Ford, *Colonial Precedents*, 33-37 on square townships, and pp. 43-83 on 640-acre sections.
31. Ford, *Colonial Precedents*, 21-22, n. 53.
32. Ford, *Colonial Precedents*, 45-54, 65.

33. Malcolm J. Rohrbough, *The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837* (New York, Oxford University Press, 1971), 9-10. [18]
34. Billington, *Westward Expansion*, 199, 228-44.
35. Billington, *Westward Expansion*, 210.
36. Billington, *Westward Expansion*, 217-18. The following two paragraphs are drawn from Billington's full account, pp. 174-245.
37. Rohrbough, *Land Office Business*, 89-136, covers the postwar (1815-19) surge into the midwest beyond Ohio.
38. Rohrbough, *Land Office Business*, 57-58.
39. Rohrbough, *Land Office Business*, 55.
40. Rohrbough, *Land Office Business*, 68-69.
41. Rohrbough, *Land Office Business*, 295. Jonathan Hughes, *American Economic History* (Glenview, Illinois: Scott, Foresman, 1983), 103-4 For a summary of parcel sizes and prices.
42. Rohrbough, *Land Office Business*, 301; Hughes, *American Economic History*, 105.
43. Rohrbough, *Land Office Business*, 297.
44. Rohrbough, *Land Office Business*, 271-94, for a description of the land office business in the 1830s, at the height of public land sales. The volume of the 1830s was never reached again; 20.1 million acres were sold in 1836. Two years later the figures were down to 3.4 million. The highest level ever reached again in a -single year was 12.8 million acres in 1854.
45. Vernon Carstensen, ed., *The Public Lands: Studies in the History of the Public Domain* (Madison: University of Wisconsin Press, 1962), xviii.
46. John Winthrop's (attributed) description of the American Indians in 1629 just before the Puritans sailed for Massachusetts. Indian tenure, unless granted by the crown, was simply right of occupancy. Its extinction from 1607 to the closing of the frontier in 1890 is the history of the public lands. The Northwest Ordinances spelled inevitable disaster for the Indians, of course. It was so from the beginning. Winthrop wrote: "The whole earth is the Lord's garden and hee hath given it to the sons of Adam to bee tilled and improved by them, why then should we stand starving now for places of habitation. . . and in the meane tyme suffer whole

countryes as profitable for the use of man, to lye waste without any improvement?” (*General Considerations for the Plantation in New England, Thomas Hutchinson, The Hutchinson Papers* [Albany, New York: The Prince Society, 1865], 1: 32-33). The logic was inexorable. Two-and-a-half centuries later, one need not question. T. R. Roosevelt wrote: “To recognize the Indian ownership of the limitless prairies and forests of this continent—that is, to consider the dozen squalid savages who hunted at long intervals over a territory of a thousand square miles as owning it outright—necessarily implies a similar recognition of the claims of every white hunter, squatter, horsethief, or wandering cattle-man” (*The Winning of the West*, [New York, Putnam, 1889], 1: 331).



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