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An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities

ABSTRACT. Since the ratification of the Fourteenth Amendment in 1868, judges and scholars have struggled to coherently identify the rights, privileges, and immunities that no state should abridge. Debates over the ambit of the Fourteenth Amendment, however, have consistently overlooked a crucial source that defines the fundamental civil liberties of American citizens. The Northwest Ordinance of 1787 contains in its Articles of Compact a set of rights that constituted the organic law—the fundamental law—of the United States. Rather than limiting federal power like the Bill of Rights, the Northwest Ordinance enumerates those rights that no state shall abridge. Not only should these rights qualify for protection under the Due Process Clause of the Fourteenth Amendment, but they also give substance to the terms "privileges" and "immunities" as used and understood by Americans throughout the nineteenth century.

This Note chronicles how the rights in the Northwest Ordinance spread, through various acts of Congress, from the Northwest Territory to all corners of the United States. These rights were integral to the organic law of twenty-eight of the thirty states (a supermajority) that ratified the Fourteenth Amendment by 1868. In addition, the admission of new states into the Union was often predicated on two conditions that state constitutions had to satisfy: they had to be republican and not repugnant to the principles of liberty in the Northwest Ordinance. Once they acquired statehood, however, new states were free to change their constitutions and violate the fundamental civil rights enumerated in the Ordinance. It is this defect in the organic laws of the United States that the Fourteenth Amendment was designed to repair, and it is to the Northwest Ordinance that we must look to understand the rights protected by the Fourteenth Amendment.

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> *We are accustomed . . . to praise the lawgivers of antiquity . . . but I doubt whether one single law of any lawgiver, ancient or modern, has produced effects of more distinct, marked, and lasting character than the Ordinance of 1787.*
>
> –Daniel Webster (1830)[1]

INTRODUCTION

Largely forgotten by a nation whose century of territorial expansion is now a faded memory, the Northwest Ordinance is preserved in every version of the *United States Code* as one of the four "Organic Laws of the United States of America,"[2] a vestige of the Ordinance's glorious past. The Northwest Ordinance of 1787[3] organized the Northwest Territory and provided a process by which new states would enter the Union on equal footing with the original thirteen.[4] As this Note will demonstrate, the Northwest Ordinance also defined

1. DANIEL WEBSTER, *First Speech on Foot's Resolution*, *in* 3 THE WORKS OF DANIEL WEBSTER 248, 263 (Boston, Charles C. Little & James Brown 1851).

2. Organic law is law that is fundamental. In a federal republic like the United States, multiple levels of organic law exist. The organic law for the federal government, per the *United States Code*, consists of the Constitution, the Declaration of Independence, the Articles of Confederation, and the Northwest Ordinance. The Organic Laws of the United States of America, *reprinted in* 1 UNITED STATES CODE, at XLIII-LXXIII (Office of the Law Revision Counsel of the House of Representatives ed., 2006). For states, constitutions constitute the organic law. For territories, the organic acts passed by Congress, including the Northwest Ordinance, are the organic law. See *infra* Part I for further discussion of organic law, including the longstanding historical association among the four sources of federal organic law.

3. NORTHWEST ORDINANCE OF 1787, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LV-LVII. The Northwest Ordinance was enacted by the Continental Congress under the Articles of Confederation in 1787. The importance and force of the Northwest Ordinance was such that the Ordinance remained active law under the new Constitution. Many commentators have interpreted an act by Congress in 1789 as a reenactment of the Northwest Ordinance. For a criticism of this interpretation and further evidence of the role of the Ordinance as one of America's crucial founding documents, see *infra* Part I.

4. The Constitution nowhere stipulates whether the new states would enjoy the same status – the same rights, privileges, and advantages – as the original thirteen states. The Constitution simply declares: "New States may be admitted by the Congress into this Union." U.S. CONST. art. IV, § 3. The Northwest Ordinance, however, contains the promise that new states will enter the Union on "equal footing" with the original states. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI. Ironically, the declaration of equality among states helped to unravel the Union and necessitate a Fourteenth Amendment. Because of the weaknesses inherent to the Constitution (drafted after the Ordinance), equal footing meant that new states could be just as exploitative of civil rights as the original thirteen. The tension between the Constitution, which did not

the fundamental rights, privileges, and immunities of citizens of the United States. At the heart of the Ordinance are six Articles of Compact between the original thirteen states and those to be formed from the territories. These Articles of Compact articulated the judicial, political, economic, and religious freedoms that would forever be protected in the territories and in new states. These rights were so fundamental that Chief Justice Marshall suggested that state legislation that violated principles of the Northwest Ordinance could be struck down as "unconstitutional."[5] In addition to creating and defining the rights of citizens, the Northwest Ordinance was the vehicle through which these rights spread—from a few states abutting the Atlantic to the many states of a manifestly continental republic. Throughout the first half of the nineteenth century, congressional acts consistently employed the terms "privileges" and "immunities" to extend the freedoms in the Ordinance's Articles of Compact throughout the territory of the United States—west to the Pacific and south to the Gulf of Mexico. The United States at the time of the Civil War and the ratification of the Fourteenth Amendment was a nation whose contours as well as whose liberties were shaped primarily by the Northwest Ordinance.

The Northwest Ordinance's place alongside the other three official sources of the organic laws of the United States—the Constitution, the Declaration of Independence, and the Articles of Confederation—is well deserved. The Ordinance is a resounding declaration of liberty that served as a model for the

protect the rights of citizens with respect to state action, and the Northwest Ordinance, which was designed to protect citizens against both state and federal authority, is evident in the decisions of the antebellum Court. *See infra* Part IV. In the antebellum battle between the two great sources of organic law (the Ordinance and the Constitution), the Constitution won. But the victory was short-lived. The principles of the Ordinance—free soil, civil rights protected against state abridgment, and perpetual union—triumphed over the principles of the Constitution (strong protections for slavery, few restrictions on states) in the Civil War and were enshrined in the Reconstruction Amendments.

5. Bank of Hamilton v. Dudley's Lessee, 27 U.S. 492, 526 (1829) ("If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States or of the state or to the ordinance of 1787."). In another part of the decision, Chief Justice Marshall considers whether "this law is repugnant to the 10th section of the first article of the constitution of the United States; and to the ordinance of 1787 for the government of the north western territory," but he decided that "these questions" do not "properly arise in the present actual state of this controversy." *Id.* at 525. Like the Northwest Ordinance, Article I, Section 10 of the Constitution limits the power of states. U.S. CONST. art. I, § 10. Indeed, before the Fourteenth Amendment, these two organic law sources contained the only federal provisions that enumerated and protected the civil rights of citizens against state authorities. Forty years after *Bank of Hamilton*, the Framers of the Fourteenth Amendment would borrow the "No State shall" language from Article I, Section 10 to protect the rights, privileges, and immunities enumerated in the Northwest Ordinance. U.S. CONST. amend. XIV, § 1.

Bill of Rights, state constitutions, and the Thirteenth Amendment.[6] The Northwest Ordinance also, as this Note argues, gives substance to the words of the Fourteenth Amendment. Deemed "the six bright jewels in the crown that the Northwest Territory was ever to wear,"[7] the Ordinance's Articles of Compact are a declaration of the fundamental rights of citizens in the original thirteen states as well as a promise that the citizens of the territories will always be entitled to these rights. These fundamental rights include trial by jury, bailability, freedom of religion, writ of habeas corpus, due process for civil and criminal cases, free use of waterways, immunity from uncompensated public takings, freedom from impairment of contract (the basis for the Constitution's Contract Clause[8]), and proportionate representation. Unlike the Bill of Rights,[9] the Articles of Compact in the Northwest Ordinance contain a comprehensive set of personal rights. This set of rights was codified to protect

6. For one example of the influence of the Ordinance on the Bill of Rights, see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 446 (2010) (discussing how Madison likely borrowed from the Ordinance in drafting the Fifth Amendment, as both contain a law-of-the-land clause alongside protection for criminal defendants and a takings clause). *See infra* Part II for a discussion of the importance of the Ordinance in the state constitutions. The language of the Thirteenth Amendment echoes the words of the Ordinance. *Compare* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."), *with* NORTHWEST ORDINANCE OF 1787 § 14, art. VI, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVII ("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."). For a discussion of the origin of the Thirteenth Amendment's language in the Northwest Ordinance, see George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1369, 1372-74 (2008). Similar to how the Ordinance had become the template for the extension of personal rights, "[b]y the time the Thirteenth Amendment was proposed, the Northwest Ordinance had become the template for federal legislation abolishing slavery." *Id.* at 1373.

7. B.A. HINSDALE, THE OLD NORTHWEST: WITH A VIEW OF THE THIRTEEN COLONIES AS CONSTITUTED BY THE ROYAL CHARTER 271 (New York, Townsend MacCoun 1888).

8. The Ordinance was the first instance in written constitutional law "of a provision maintaining the obligation of contracts. Six weeks later it was, on motion of Mr. King of Massachusetts, incorporated in the draft of the Constitution of the United States." WILLIAM FREDERICK POOLE, THE ORDINANCE OF 1787, AND DR. MANASSEH CUTLER AS AN AGENT IN ITS FORMATION 4 (Cambridge, Mass., Welch, Bigelow & Co. 1876).

9. The Bill of Rights was designed as a restraint on a limited federal government, and thus its purpose was to define not the fundamental rights of citizens but rather the most important limitations on government. In addition, the Ninth Amendment declares that additional rights not in the Bill are retained by the people, expressly directing readers to look beyond the four corners of the Constitution to identify the fundamental rights of citizens. U.S. CONST. amend. IX. For a leading exposition of this idea, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 34-41 (1980).

citizens against both territorial and state governments. Through the Fourteenth Amendment, these rights in the Northwest Ordinance can be incorporated simply and completely against the states without any of the problems that plague efforts to protect rights derived from others sources. For example, problems of selective incorporation have plagued efforts to incorporate the Federal Bill of Rights, and the absence of textual foundations continues to frustrate many efforts to protect substantive liberties derived from longstanding tradition under the Due Process Clause of the Fourteenth Amendment.

The Ordinance's expressed purpose was to spread republican principles throughout the territory of the United States[10] and to "fix and establish those principles as the basis of all laws, constitutions, and governments" of future states.[11] Considering this grand purpose, that six of the thirty states that ratified the Fourteenth Amendment[12] were formed from the Northwest Territory,[13] and that the two primary drafters[14] of Section One of the Fourteenth Amendment (as well as all elected presidents but one[15] from

10. *See infra* Section III.A.

11. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

12. This tally is through the end of 1868. *See infra* note 13.

13. For the list of states, see Proclamation No. 13, 15 Stat. 708, 709-11 (1868) (proclamation by William H. Seward, Secretary of State of the United States). Seward's list of thirty includes New Jersey and Ohio, which had rescinded their ratification by the time of the proclamation. Since they were included as official ratifications by Congress, this Note includes them in its tallies (if they are excluded, the Ordinance is the basis of the organic law for twenty-six of twenty-eight states that ratified the Fourteenth Amendment by the time of Seward's proclamation). No other states ratified by the end of 1868, though Oregon withdrew its ratification by the end of the year. Three-fourths of the states were needed to satisfy the requirements of Article V of the Constitution, which means twenty-eight of the then-thirty-seven states were needed for ratification. For a history of this unconventional ratification process, see 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 160-234 (1998). For a critique of Ackerman's history, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 601 n.19 (2005).

14. The primary drafters were Senator Howard of Michigan and Representative Bingham of Ohio. See *infra* Part V for a discussion of their views on organic law and the Fourteenth Amendment.

15. Lincoln was not born in the Northwest Territory, but he moved to Indiana when he was eight years old and settled in Illinois. Andrew Johnson and Chester A. Arthur were never elected, inheriting the presidency as the result of assassins' bullets rather than popular ballots. Ulysses S. Grant, Rutherford B. Hayes, James A. Garfield, Benjamin Harrison, and William McKinley were all born in Ohio. Grover Cleveland was the only president elected from 1861-1904 that was born in a state that was not once part of the Northwest Territory. In 1904, Theodore Roosevelt, from New York, was elected to the presidency (having

Lincoln until the twentieth century) were from the Northwest Territory, it is surprising that the Northwest Ordinance is traditionally overlooked as an important source for understanding the fundamental rights of citizens. This neglect becomes most striking, however, when we realize that the privileges and immunities of the Northwest Ordinance spread, by congressional action, far beyond the boundaries of the Northwest Territory.

Of the thirty states that ratified the Fourteenth Amendment, twenty-eight either were part of the original Congress that passed the Northwest Ordinance or were directly governed by its principles while they were territories. The principles of the Northwest Ordinance, by various acts of Congress, formed the territorial organic law of sixteen of the thirty states that ratified the Fourteenth Amendment before the end of 1868: Tennessee, Oregon, Ohio, Kansas, Illinois, Michigan, Minnesota, Indiana, Missouri, Wisconsin, Nebraska, Iowa, Arkansas, Florida, Louisiana, and Alabama.[16] In addition, ten of the original thirteen states, whose continental Congress of Confederation unanimously[17] passed the Ordinance in 1787 (declaring that the "principles of civil and religious liberty" in the Ordinance formed the basis for the original states[18]), also ratified the Fourteenth Amendment. The remaining four states that ratified the Fourteenth Amendment were Vermont (which was an independent republic before joining the Union), Maine (which was part of Massachusetts before becoming a state), West Virginia (part of Virginia until the Civil War),

previously inherited it upon the assassination of McKinley). Interestingly, Taft and Harding were also from Ohio, and thus only four of the eleven elected presidents from 1861 to 1923 were not born in Ohio: Lincoln, Cleveland, Roosevelt, and Wilson. *See* Jane A. Stewart, *Presidents of the United States*, 92 J. EDUC. 404 (1920).

16. Many of these eighteen states were part of multiple territories and had the principles of the Ordinance extended to them multiple times. See *infra* Part II for a complete history.

17. Eight of the original thirteen states were present and unanimously passed the Northwest Ordinance on July 13, 1787. The lone dissenter was Abraham Yates of New York. Despite the prohibition on slavery in the territories, the four southernmost states—Virginia, North Carolina, South Carolina, and Georgia—were present and voted for the Ordinance without dissent. *See* 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 334-43 (Roscoe R. Hill ed., 1936); *see also* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 937 (1995) (discussing the context of the Ordinance's passage). The original thirteen states are treated together in this Note. For none of them were the Northwest Ordinance's provisions individually binding as they were on the states formed in the territories. Nevertheless, the Northwest Ordinance was a self-conscious declaration of the rights common among the original states, and the absence of some of the states in the final vote on the Northwest Ordinance in 1787 did not affect their relation to the Ordinance. See *infra* Section III.B for a further discussion of the significance of the Ordinance to the original thirteen states.

18. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

and Nevada. In addition, the principles of the Ordinance were incorporated into the constitutions of states that were subsequently admitted to the Union—often mandated by Congress as a condition for admission.[19] Including Maine and West Virginia as part of the original thirteen states, at most two states that ratified the Fourteenth Amendment can claim organic-law independence from the Northwest Ordinance. The Ordinance indeed accomplished its goal of extending its republican principles—its privileges and immunities—throughout the territory of the United States.

By studying the spread of the principles of the Northwest Ordinance, this Note attempts to elucidate the original understanding of the second sentence of Section One of the Fourteenth Amendment, which states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."[20] The concept of the "privileges and immunities" of citizens—far from being an obscure phrase that would have confused ratifiers in the 1860s—was well known to inhabitants throughout the United States. The term was used consistently throughout the nineteenth century to refer to the privileges and immunities of the Northwest Ordinance, including in various territorial acts passed by Congress invoking the Northwest Ordinance in lands far from the Northwest Territory.

While this Note focuses on the antebellum use of the terms "privileges" and "immunities" since these were the words used by the Fourteenth Amendment's Framers to protect substantive rights,[21] this Note's thesis—that

19. *See infra* Part III.

20. U.S. CONST. amend. XIV, § 1. For an understanding of Section Five of the Fourteenth Amendment, which was intended to function in conjunction with Section One, see Steven A. Engel, *The* McCulloch *Theory of the Fourteenth Amendment*, 109 YALE L.J. 115 (1999). *See also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 175 n.* (1998) ("[M]any congressional architects of Reconstruction envisioned not only judicial enforcement of section I but also—and perhaps more centrally—congressional enforcement.").

21. *See* AMAR, *supra* note 20, at 163-80 (presenting a theory favoring refined incorporation of the Bill of Rights via the Fourteenth Amendment); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986) (arguing for the importance of the Privileges or Immunities Clause in incorporating the Bill of Rights); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (discussing the equal protection inherent in the Privileges or Immunities Clause). *But see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (discussing the evidence against complete incorporation of the Bill of Rights). The importance of the Privileges or Immunities Clause is well appreciated by at least one member of the current Court. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring in part and concurring in the judgment); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities*

the Fourteenth Amendment should protect the fundamental rights expressed in the Northwest Ordinance—applies equally strongly (if not more strongly) when the Court chooses to defend fundamental rights against state abridgment through the Due Process Clause. Indeed, the *Glucksberg* test for substantive due process protection, reaffirmed most recently by the Court in *McDonald v. City of Chicago*, asks "whether [a] right is 'deeply rooted in this Nation's history and tradition.'"[22] No rights are more deeply rooted in America's history and tradition than those of the Ordinance of 1787, which went into effect two years before the Constitution and four years before the Bill of Rights.

Indeed, the rights of the Ordinance easily qualify under all the various formulations of the test for protection under substantive due process. For example the Supreme Court has declared that it will incorporate rights that embody something "fundamental to *our* scheme of ordered liberty and system of justice."[23] The Northwest Ordinance declared in 1787 that its purpose for defining the fundamental rights of citizens was to extend "the fundamental principles of civil and religious liberty, which form the basis whereon these republics [the original states], their laws and constitutions, are erected" and 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."[24] Various Congresses over more than half a century would carry out this purpose, extending the Ordinance's principles to all the territories acquired by the United States. To say that the Ordinance is fundamental to our scheme of ordered liberty is an understatement: it created our scheme of ordered liberty.

Clause of the Fourteenth Amendment, 12 HARV. J.L. & PUB. POL'Y 63 (1989). Although Justice Thomas's concurrence does not cite the Northwest Ordinance, it highlights the importance of the treaties in helping to establish the privileges or immunities of the United States. *See, e.g.*, *McDonald*, 130 S. Ct. at 3068-70. Part II reveals how the words "privileges" and "immunities" in many of the treaties cited by Justice Thomas were given substance by the Northwest Ordinance and other territorial organic acts.

22. *McDonald*, 130 S. Ct. at 3036 (majority opinion) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

23. *McDonald*, 130 S. Ct. at 3036 (Thomas, J., concurring in part and concurring in the judgment) (citing Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)). A related standard, invoked in *McDonald*, is whether rights "are 'the very essence of a scheme of ordered liberty' and essential to 'a fair and enlightened system of justice.'" *Id.* at 3032 (majority opinion) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Although the court has "used different formulations in describing the boundaries of due process," *id.*, the test is the same whether the right in question derives from the Bill of Rights, the Northwest Ordinance, or some other source. *See generally id.* at 3031-36 (discussing the history of substantive due process, the Court's chosen vehicle for the incorporation of fundamental rights).

24. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

No rights pass the tests established by *Glucksberg*, *McDonald*, and other Due Process Clause cases more readily than the rights, privileges, and immunities enumerated in and protected by the Northwest Ordinance.

This Note proceeds in five parts. Part I provides a general introduction to "organic law," comparing "organic law" with "constitutional law," and discusses the Northwest Ordinance's enduring status as federal organic law.

Parts II and III describe how the principles in the Ordinance were incorporated into the organic law of almost all of the territories before the Civil War as well as many of the states formed in the territories. Part II describes the spread of the privileges and immunities of the Northwest Ordinance in the territories. This spread was driven by acts of Congress spanning more than sixty years, starting in the Northwest Territory (now the states of the Upper Midwest that hug the Great Lakes) and continuing south to the Gulf of Mexico and west to the Pacific Ocean. Part III considers the role of the Ordinance as the basis for state constitutions as territories became states. Special attention is given to those state enabling acts where Congress required that states incorporate the principles of the Northwest Ordinance into their state constitutions as a prerequisite for admission into the Union.

Part IV reinforces the story constructed in Parts II and III, describing the judicial enforcement of the Northwest Ordinance as a source of binding organic law akin to a constitution. Part IV also suggests that the Taney Court's efforts to weaken the authority of the Northwest Ordinance, culminating in *Dred Scott*, necessitated a Fourteenth Amendment that would protect the fundamental rights of American citizens with respect to state action.

Part V interprets, in light of the history in Parts I through IV, the two primary sources traditionally searched for the original meaning of the Fourteenth Amendment: statements made by the Framers of the Fourteenth Amendment and the majority opinion in the *Slaughterhouse Cases*, the Court's first interpretation of the various clauses of the Fourteenth Amendment. This Note argues that the fundamental rights that constituted state organic law—which the Framers intended the Fourteenth Amendment to protect—are rights derived from the Northwest Ordinance. Part V suggests that the Court in *Slaughterhouse* did not protect these fundamental rights partly because the Court did not appreciate the critical role that the federal government played in defining, extending, homogenizing, and protecting these rights (all under the aegis of the Northwest Ordinance). Nevertheless, since the Supreme Court now protects this class of fundamental rights (those derived from state organic law) under the Due Process Clause, the rights defined in the Ordinance should be understood as protected under the Fourteenth Amendment irrespective of any complications arising from the majority's opinion in *Slaughterhouse*.

This Note concludes by considering the relevance of the Northwest Ordinance to future decisions of the Court. The Fourteenth Amendment remains the crux of civil rights litigation. While many of the Ordinance's principles have been incorporated with reference to the Federal Bill of Rights it helped inspire, the historical argument presented in this Note can inform future cases in which the bounds of these freedoms are in dispute. For example, the Ordinance's support for the freedom of religion is both stronger and clearer than that of the Bill of Rights. Whereas the Bill of Rights prevents Congress from establishing a religion, the Ordinance defines the rights of citizens to be free from religious molestation (which perhaps includes freedom from harassment from other citizens and not only oppressive acts of state governments). In addition, for due process in civil and criminal cases, the Ordinance provides us with a better guide than the Bill of Rights for those procedural rights that no state should abridge: the Ordinance was designed as a restraint on state governments whereas the Bill of Rights was meant to limit the federal government. Confusion persists regarding which rights in the Bill of Rights are fundamental rights that could be applied to states and which are federal-specific procedural rights. The Ordinance resolves such confusion. The Northwest Ordinance also provides textual support for principles that have been incorporated despite appearing nowhere in other constitutional texts, such as the privilege of proportionate representation. Finally, the Ordinance provides support for the incorporation of rights currently not incorporated against the states, such as the immunity from excessive fines,[25] the right to a jury trial in civil cases, and the right to bail for all but certain capital crimes.[26]

25. *See McDonald*, 130 S. Ct. at 3035 n.13.

26. It is important to note that the Eighth Amendment's freedom from excessive bail and the Ordinance's right to bail for all but certain capital cases are distinct rights. *See, e.g.*, Act of Mar. 30, 1822, ch. 13, 3 Stat. 654 (protecting both rights). Neither right has been incorporated against the states. The majority in *McDonald* implied in dicta that the prohibition against excessive bail has been incorporated against the states, 130 S. Ct. at 3035 n.12, but the case *McDonald* cites for support made clear that they were "not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness." Schilb v. Kuebel, 404 U.S. 357, 365 (1971). The Court in *Schilb* did note, however, that the "Eighth Amendment's proscription of excessive bail has been assumed [in the circuit courts] to have application to the States through the Fourteenth Amendment." *Id.* Regardless, the right of bail in the Northwest Ordinance (for all but capital cases) is potentially stronger than the immunity from excessive bail (protected by the Eighth Amendment). Together, these two provisions provide an aggregate right to bail for state citizens (or rather for "persons" since the Court incorporates fundamental rights through the Due Process Clause) that the federal government has a duty to protect against abridgement.

The other three sources of the official organic law of the United States undoubtedly also contributed to the formation of Fourteenth Amendment privileges and immunities.[27] The contribution of the Bill of Rights to rights protected by the Fourteenth Amendment has been studied in detail by many eminent scholars[28] and jurists.[29] Unique among the organic laws, however, the Northwest Ordinance was not only the organic law of the United States but also an expression of the organic law protected by the state constitutions of the original thirteen states, an expression of the organic law that extended to the territories of the United States, and the basis for the organic law (often by congressional decree) of the state constitutions arising from the territories.

Perhaps more than any other document, the Northwest Ordinance shaped privileges and immunities as they were experienced and understood by the Framers and Ratifiers of the Fourteenth Amendment. Like the Privileges or Immunities Clause that it endowed with meaning, the Ordinance has rarely been invoked by the Court since Reconstruction.[30] Even if this Note is unsuccessful in resurrecting the Northwest Ordinance as a source of substantive law in civil rights cases, it can at least shed light on the fundamental rights of citizens protected against state abridgment by the Due Process Clause of the Fourteenth Amendment. Understanding the origin of

27. Others sources that influenced the understanding of privileges and immunities around the time of the Fourteenth Amendment's ratification include the landmark legislation passed during Reconstruction (such as the Civil Rights Act of 1866) as well as infamous court decisions (such as *Dred Scott*).

28. *See, e.g.*, AMAR, *supra* note 20; CURTIS, *supra* note 21. The importance of territorial expansion for the spread of the Bill of Rights and other privileges and immunities has been discussed by Professor Amar. *See* AMAR, *supra* note 20, at 247-52 (discussing freedom of religion and other rights in the federal territories). The influence of the territorial experience on John Bingham, one of the framers of the Fourteenth Amendment, has also been considered. See *infra* Section V.A for a discussion of Bingham's views in relation to the Northwest Ordinance.

29. *See* AMAR, *supra* note 20, at 138 (discussing the "extraordinary number of twentieth-century legal giants who have locked horns in the debate").

30. For a discussion of the importance of the Ordinance in federal court opinions before the Civil War, see *infra* Part IV. During Reconstruction, John A. Campbell, who had been a Justice of the Supreme Court before resigning at the start of the Civil War, invoked the Ordinance in the *Slaughterhouse Cases* on behalf of the plaintiffs. *See* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 49 (1872) ("The thirteenth amendment prohibits 'slavery and involuntary *servitude*.' The expressions . . . appeared in the great Ordinance of 1787 . . . . In that Ordinance they are associated with enactments affording comprehensive protection for life, liberty, and property; for the spread of religion, morality, and knowledge; for maintaining the inviolability of contracts, the freedom of navigation upon the public rivers, and the unrestrained conveyance of property by contract and devise, and for equality of children in the inheritance of patrimonial estates.") (argument of plaintiff in error).

these privileges and immunities in the Northwest Ordinance, as well as the Ordinance's homogenizing effect on the progression of rights in U.S. territories, can help the Court better identify and protect these fundamental rights.

I. THE NORTHWEST ORDINANCE AND FEDERAL ORGANIC LAW

This Part introduces the concept of "organic law," a term that nineteenth-century Americans employed to describe the fundamental documents and principles of nations, territories, and States.[31] Sometimes "organic law" refers primarily to constitutions.[32] As explored in Section A of this Part, however, the term "organic law" captures more than formal constitutions: it includes the most fundamental documents of any nation, such as the Northwest Ordinance in the United States or Magna Carta in England.

The term "organic law" is integral to this Note because the Northwest Ordinance, although not a constitution, nonetheless constituted the organic law of the United States, the several states, and the U.S. territories. Section B

31. Although the term organic law is used in this Note to refer only to the fundamental laws of governments, any political system can have organic laws. Administrative agencies and corporations have organic laws: the charters that create the structure of the entities and define the rights of persons with respect to those entities. For example, in 1862 Lincoln signed the Department of Agriculture Organic Act, which established the structure and duties of the Department. Act of May 15, 1862, ch. 72, 12 Stat. 387.

32. In his First Inaugural Address, Abraham Lincoln referred twice to "organic law," revealing his belief that the Constitution constituted the organic law of the United States and that organic law is the "fundamental law" of any government. *See* First Inaugural Address of Abraham Lincoln (Mar. 4, 1861) *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1908, at 5-12 (James D. Richardson ed., 1909). Lincoln's first invocation of organic law made it clear that organic law was a general class of which the Constitution was an instantiation:

> Perpetuity is implied, if not expressed, in the fundamental law of all National governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever . . . .

Id. at 7. In his second use of "organic law," he made it clear that he thought the Constitution did not directly address many of the most contentious issues in antebellum America:

> All the vital rights of minorities and of individuals are so plainly assured . . . that controversies never arise concerning them. But no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate nor any document of reasonable length contain express provisions for all possible questions.

Id. at 8-9.

of this Part will discuss the official status of the Northwest Ordinance as one of the "organic laws of the United States." The importance of the Northwest Ordinance in shaping the organic law of the states (state constitutions and state bills of rights) will be explored in Part III of this Note. Though territories do not have constitutions, they nevertheless have organic law.[33] Indeed, the various congressional acts that extended the principles of the Northwest Ordinance throughout the territories of the American republic, which will be discussed in detail in Part II of this Note, are called "organic acts."[34]

This first Part concludes by describing how the words "privileges" and "immunities"—terms used by the Framers of the Fourteenth Amendment to protect the fundamental rights of citizens of the United States—were frequently used to describe the principles of organic law. This theme will be developed throughout this Note, as the terms "rights," "privileges," and "immunities" have been used by numerous courts and Congresses to refer to the fundamental rights enumerated in the Northwest Ordinance.

A. Organic Law Versus Constitutional Law

Organic law is the "body of laws (as in a constitution) that define and establish a government."[35] Although the term "constitutional law" is often applied restrictively to the Constitution and its judicial gloss, "organic law" is sometimes synonymous with a broader definition of constitutional law.[36] In countries like England that do not have a formal constitution, "organic law" is coextensive with "constitutional law." For any state or country, the term "organic law" will always embrace any constitutions, but "constitutional law" seldom captures all organic laws.

The border between organic law and constitutional law is sometimes blurry in countries like the United States that use the term constitutional law

33. The Court explained in 1879: "The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities . . . ." Nat'l Bank v. Cnty. of Yankton, 101 U.S. 129, 133 (1879). Counsel for the plaintiffs in the *Slaughterhouse Cases* called the Northwest Ordinance "[t]he American constitution for that great territory [Northwest Territory]." *The Slaughterhouse Cases*, 83 U.S. at 50.

34. The use of the term "organic act" to describe the fundamental law that organizes a territory continued well into the twentieth century. *See, e.g.*, Organic Act of Guam, ch. 512, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421-1428 (2006)).

35. BLACK'S LAW DICTIONARY 1209 (9th ed. 2009).

36. BALLENTINE'S LAW DICTIONARY 898 (3d ed. 1969) ("[O]rganic law. Constitutional law or, at least, law which carries a high degree of authority . . . . The basic law of a state or a society . . . .").

restrictively. For example, in 1840 Justice Baldwin declared that the Northwest Ordinance was not only a solemn pact between the states but also "embodied in the Constitution itself"[37]; it was an "engagement" of the old Congress, and Article VI of the Constitution declared that such engagements would remain valid—in this case, forever inviolable.[38] Article VI of the Constitution was a "confirmation of the ordinance, giving it the same binding effect, ab initio, as if it had been a constitutional provision in all its terms."[39] Chief Justice Marshall provides further evidence of the "constitutionality" of the Ordinance, suggesting that laws could be declared void as "unconstitutional" if repugnant to the Northwest Ordinance.[40] A final link between organic laws in general and constitutions in particular is that both often arise from special assemblies or from moments when legislatures overreach their powers.[41] Both the Northwest

37. Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 417 (1840) (Baldwin, J., concurring).

38. Justice Baldwin wrote:

> But I do not rest this point on judicial authority, a higher power confers inviolable sanctity on the right of the inhabitants, and proprietors of land in the disputed territory, which this Court will never question. The ordinance of 1787 is declared to be a compact between the original states and the people and states in the said territory, and "shall forever remain inviolable, unless by common consent."
>
> . . . .
>
> The sixth article of the Constitution declares, that "all debts contracted, and all engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this Constitution as under the confederation."
>
> Thus this ordinance, the most solemn of all engagements, has become a part of the Constitution, and is valid to protect and forever secure the rights of property and judicial proceedings to the inhabitants of every territory to which it applies.

Id. (citations omitted). Justice Baldwin's views on the Northwest Ordinance were adopted by Justice Catron in his concurrence in *Dred Scott*. *See* Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393, 522 (1857) (Catron, J., concurring), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

39. HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES, FROM 1774 UNTIL 1788, at 90 (Phila., John C. Clark 1837).

40. Bank of Hamilton v. Dudley's Lessee, 27 U.S. (2 Pet.) 492, 526 (1829) ("If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States or of the state or to the ordinance of 1787.").

41. For example, Congress had no authority to regulate the territories and pass the Ordinance under the Articles of Confederation. This illegality or irregularity may be a common feature of organic law; it accords with Bruce Ackerman's theory of constitutional moments, when

Ordinance and the Constitution were written in the same year, 1787. According to Baldwin, "both were 'done,' accordingly, by ordinance; the states in congress using the term, 'be it ordained;' the people using this: 'we do ordain,'. . . one ordained by states, in a convention, or congress; the other, by each state, in a convention of the people."[42]

As will be explored in Part IV, the "constitutional" status of the Ordinance was assailed by the antebellum Court. Chief Justice Taney declared in 1850 that the compact articles, though "said to be perpetual, . . . are not made a part of the new Constitution. They certainly are not superior and paramount to the Constitution . . . ."[43] Taney's view rather than Baldwin's dominated the Court in the decade before the Civil War.[44]

B. The Northwest Ordinance as Federal Organic Law

By definition, the Northwest Ordinance constituted the organic law of the territories. By the inclusion of its principles in state constitutions, the Ordinance became the organic law of the states. In contrast, the Ordinance's status as federal organic law is based largely on tradition and consensus,[45] though Congress officially recognized the fundamental character of the Ordinance during Reconstruction. Only a few years after the Fourteenth Amendment was passed, Congress officially recognized America's four sources of federal organic law: the Declaration of Independence, the Articles of Confederation, the Northwest Ordinance, and the Constitution. Congress

transformative periods (such as Reconstruction and the New Deal) leave indelible marks on constitutional law by transcending the bounds of normal lawmaking. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). Unconventionality may be a general characteristic of "higher laws"—those laws that supersede normal laws. While the Ordinance's status as organic law is undeniable, other transformative statutes may deserve the status of organic law in the United States. Prime candidates from the twentieth century include landmark legislation from the New Deal and from the Civil Rights Era. *See generally* ACKERMAN, *supra* note 13 (discussing the New Deal as well as Reconstruction); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007) (discussing the Civil Rights Act of 1964).

42. BALDWIN, *supra* note 39, at 89.

43. Strader v. Graham, 51 U.S. (10 How.) 82, 96 (1850).

44. *But see* Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393, 522 (1857) (Catron, J., concurring) (adopting Justice Baldwin's views of the Ordinance), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

45. The boundaries of federal organic law are difficult to define, and only in retrospect are many documents considered as components of organic law. Nations often have ancient and fundamental documents, such as the Magna Carta in England, the authority of which rivals many constitutions and which are included as part of federal organic law.

mandated in 1877 that these four documents be included in a special section of the *Revised Statutes*,[46] Congress's effort to provide an authoritative compilation of all the "general and permanent" laws of the United States. When the *Revised Statutes* were replaced by the *United States Code* in the 1920s, these four fundamental documents persisted as the official "Organic Laws of the United States of America."[47] Just as the principles of the Ordinance would be forever protected against state abridgement by the Fourteenth Amendment, the Reconstruction Congress officially enshrined the Northwest Ordinance as one of the four organic laws of the federal government.

The First Congress in 1789 passed a statute to make the Northwest Ordinance consistent with the Constitution so the Ordinance would "continue to have full effect."[48] Nothing in the Act suggests that the Ordinance was nullified by the ratification of the Constitution by the states. The Act states that it is an attempt to "adapt" several details of the Ordinance to the new structure of the government, namely gubernatorial succession and communication with Congress.[49] Many commentators have interpreted this Act as a reenactment of the Ordinance,[50] undermining the status of the Ordinance as organic law. It appears that one reason this 1789 Act has been viewed (perhaps erroneously) by some as a reenactment of the Ordinance is that the text of the Ordinance is

46. These four documents originally appeared by Congressional fiat in the second edition of the *Revised Statutes*. Act of Mar. 2, 1877, ch. 82, § 3, 19 Stat. 268, 269; *see* THE ORGANIC LAWS OF THE UNITED STATES OF AMERICA (George H. Boutwell ed., Government Printing Office, 1878) (supplementing the government's first official efforts in the 1870s to codify the acts of Congress in the *Revised Statutes*). The federal organic laws began on the first page of the second edition of the *Revised Statutes*. The Organic Laws of the United States of America, *reprinted in* 1 REVISED STATUTES OF THE UNITED STATES 1-57 (2d ed. 1878). They now appear in a special section immediately preceding Title 1 of the *United States Code*. The Organic Laws of the United States of America, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at XLIII-LXXIII.

47. They appear in every *United States Code* beginning in 1926 (after the second edition of the *Revised Statutes*, discussed *supra* note 46, an updated and official codification of the general permanent laws of the United States would not appear until the 1920s with the first *United States Code*). *See* The Organic Laws of the United States of America, UNITED STATES CODE OF 1926, 44 Stat., at MDCCCLV.

48. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51.

49. *Id.*

50. *See, e.g.*, Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393, 438 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE, at xviii (1987); Christina Duffy Burnett, Untied *States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 825 n.127 (2005). Numerous other examples could be provided besides Onuf's and Burnett's excellent works.

printed in full in a footnote of the Act as it appears in the *Statutes at Large*.[51] These commentators may have overlooked that the *Statutes at Large* were not created until the 1840s, and this footnote was likely added as an annotation by some anonymous government clerk[52] more than half a century after the Act was passed by Congress.[53]

C. *Use of "Privileges" and "Immunities" as Terms To Express the Principles of Organic Law*

The terms "privileges" and "immunities" were used throughout the eighteenth and nineteenth centuries to refer to expressions of organic law, whether such law came from written constitutions or from other sources. English organic law can be found in such documents as the English Bill of Rights of 1689 or Magna Carta. The fundamental rights protected by these documents were often referred to as "privileges" or "immunities," and such usage would have been familiar to American lawyers in the early nineteenth century, who "began their legal education" with British common law.[54] In Blackstone's *Commentaries on the Laws of England*, the words "privileges" and "immunities" are "used to describe various entitlements embodied in the landmark English 'Charters of liberty' of Magna Charta, the Petition of Right, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1700."[55] As will be seen throughout this Note, the words "privileges" and "immunities" were also used in the nineteenth century to describe the organic laws of the United States (principally the rights protected by the Constitution and the Northwest Ordinance), as well as the organic law

51. Ch. 8, 1 Stat. at 51 n.a.

52. Indeed, the footnote is absent in *Story's Laws*, 1 JOSEPH STORY, THE PUBLIC AND GENERAL STATUTES PASSED BY THE CONGRESS OF THE UNITED STATES OF AMERICA 32 (Boston, Wells & Lilly 1827), which was the standard source for the early laws of the republic before the *Statutes at Large* was published.

53. For support for the contention that the Ordinance had force of its own, independent of acts of Congress under the Constitution, see David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 845-46 (1994). Justice Baldwin similarly argued that the Ordinance had force absent the reenactment. *See supra* notes 37-39 and accompanying text. Although it was likely an act of minor housekeeping rather than a reenactment of the Northwest Ordinance, the Act of 1789 (like so many acts during the next century) was a reaffirmation of the principles of the Ordinance of 1787.

54. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1221 (1992).

55. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *127-45).

of the territories (the organic acts) and the organic law in the several states (the state constitutions).

II. THE GENESIS OF CIVIL RIGHTS: THE NORTHWEST ORDINANCE AND THE ORGANIC ACTS OF THE TERRITORIES

The principles of the Northwest Ordinance were the source of civil rights for citizens in virtually every U.S. territory—from before the Constitution was written until after the Fourteenth Amendment was ratified. By various acts of Congress, the principles of the Ordinance spread from the Northwest Territory (now the states of the upper Midwest that border the Great Lakes) southward to the Gulf of Mexico and westward to the Pacific. While the popular conception of America's "Manifest Destiny" may have been the impetus for the acquisition of new lands, the organic acts of Congress (with specific reference to the Ordinance) were responsible for defining the privileges and immunities of citizens in these new acquisitions. The organic acts set the baseline for the civil, political, and religious freedoms that would be enjoyed by Americans on every frontier of the nation. Throughout this great period of expansion, the terms "privileges" and "immunities" were consistently invoked in these organic acts to refer to the fundamental rights enumerated and protected by the Ordinance. Only one of the numerous organic acts that extended the principles of the Northwest Ordinance to the territories has been considered with regard to its influence in shaping the meaning of the Fourteenth Amendment, and then without reference to the Ordinance.[56] This Part attempts to fill this hole in the historical literature.

Of the thirty states that ratified the Fourteenth Amendment before Secretary of State Seward declared the three-fourths requirement satisfied in 1868,[57] twenty were states admitted after the adoption of the Constitution and seventeen were territories before becoming states.[58] Thus, the majority of the ratifying states—those states through which the words of the Fourteenth Amendment acquire life and meaning—had experienced life as federal

56. AMAR, *supra* note 20, at 167, 361 nn.10-11 (comparing the protections in the Federal Bill of Rights with those rights protected by one of the territorial organic acts). *See infra* notes 155-156 and accompanying text.

57. For a list of ratifying states, see Proclamation No. 13, 15 Stat. 708, 709-11 (1868) (proclamation by William H. Seward, Secretary of State of the United States). *See also* Ferdinand F. Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. CAL. L. REV. 378, 380 n.13 (1966).

58. Maine, which ratified in 1867, was originally part of Massachusetts, and Vermont, which ratified in 1866, was an independent republic before becoming a state.

territories. Figure 1, which follows this Part, illustrates the extent to which the privileges and immunities enumerated in the Northwest Ordinance had spread throughout the United States by the time the Fourteenth Amendment was ratified. Apart from the direct incorporation of the principles of the Ordinance into state organic law by congressional fiat, which will be discussed in Part III, the Ordinance had a less direct but deeper influence on the privileges and immunities of citizens: the Northwest Ordinance defined and protected the fundamental rights of citizens in the territories, often for decades, before the various territories metamorphosed into states.

A. The Privileges and Immunities of the Northwest Ordinance

The Northwest Territory became part of the United States in 1783, a cession from Britain in the Treaty of Paris that officially ended the Revolutionary War. This vast territory was formally organized with the Northwest Ordinance in 1787, two years before the Constitution would go into effect and four years before the Bill of Rights was ratified.[59] The Northwest Ordinance established the process by which America would begin its westward expansion by the admission of new states. In its Articles of Compact, it also established the rights, privileges, and immunities that inhabitants in the territories would enjoy:

> 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 legislatures; 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 paid for the

59. The Ordinance also preceded state constitutions in the minds of citizens of the Northwest Territories: "Before Ohio was even a state, it was a federal territory, governed by the federal Constitution and the Union's Northwest Ordinance. For Bingham, *these* documents came first, framing the state and constraining its lawful powers." AMAR, *supra* note 20, at 158.

> 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. . . .
>
> ARTICLE IV. . . . 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.[60]

Many of the principles established in the Northwest Ordinance would reappear in the Constitution and especially the Bill of Rights, including freedom of religion, benefits of the writ of habeas corpus, full compensation for public takings, protection from the impairment of contract, right to a trial by jury, protection from excessive fines, and protection from cruel and unusual punishment. Others, which appear nowhere in the Constitution, include the right to "proportional representation in the legislature," immunity from religious persecution, privilege of bailability, encouragement of schools and education, and privilege of free use of the waterways.[61] These rights and protections formed the core privileges and immunities of the inhabitants of the Northwest Territories.[62] For the purposes of this Note, all of these rights are considered privileges and immunities. It is possible, however, that some of the

60. NORTHWEST ORDINANCE OF 1787, arts. I-IV, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI-LVII.

61. *Id.* art. III, at LVII.

62. Although outside the scope of this Note, the Northwest Ordinance also contains strong support for the privileges and immunities of "Indians not taxed" as well as for white inhabitants of the territories. Article 3 contains two sentences: one about education (printed above), and the following ringing declaration of Indian rights:

> The utmost good faith shall always be observed towards the Indian; 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.

Id. art. III, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVII.

rights, such as those in the first three articles of the Ordinance's compact, should be regarded with greater respect than other rights. For example, a district court declared in 1838:

> In looking into the ordinance, it is obvious, that all the provisions of the articles of compact, are not to be viewed as standing precisely on the same footing. The guaranties for the security of the great principles of liberty, which lie at the foundation, and constitute essential elements, of all true republican governments, are obviously to be regarded in a different light from those which pertain merely to the right and possession of property, and its advantageous enjoyment.[63]

The court noted in particular that Ohio did not include the provision for "navigability of water courses" when it enshrined the principles of the Northwest Ordinance in its state constitution and reasoned that it was not necessary to respect this particular provision in order to "conform to the great principles declared in the ordinance."[64]

The Articles of Compact in the Ordinance contained other principles of American organic law that, unlike the personal freedoms in the first three articles, do not strictly qualify as rights, privileges, and immunities of citizens of the United States. For example, the Articles of Compact established that new states would enter the Union on "equal footing" with the original thirteen states.[65] In addition, in language that reappears in substantially the same form in the Thirteenth Amendment, the Sixth Article of Compact in the Ordinance declares: "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."[66] The Articles of Compact thus embody the fundamental principles of the Thirteenth as well as the Fourteenth Amendment. Though these additional principles in the Articles of Compact were essential to America's fundamental system of government, they are outside the scope of this Note. When this Note speaks of "privileges and

63. Spooner v. McConnell, 22 F. Cas. 939, 949 (No. 13,245) (C.C.D. Ohio 1838) (considering the extent to which tolls could be added to navigable rivers to pay for improvements). Justice McLean, who also presided over the case while riding circuit, agreed in a separate opinion that much of the Ordinance, including the provision for free use of waterways, was in force in the state of Ohio. See *infra* Part IV for a discussion of the continuing force of the Ordinance in the states after they acquired statehood.

64. *Spooner*, 22 F. Cas. at 949.

65. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

66. *Id.* art. VI, at LVII.

immunities" or "fundamental rights" protected by the Ordinance, the reference is to those essential rights in the first four articles of compact excerpted above. The following Sections will show how Congress variously referred to these same fundamental rights over more than half a century as "privileges," "immunities," "advantages," benefits," and "rights." As in the Fourteenth Amendment's phrase "privileges or immunities," Congress consistently employed at least two of these terms in concert each time they referred to the fundamental rights enumerated in the Northwest Ordinance.

B. Rights, Privileges, and Immunities in the Territorial Offspring of the Northwest Territory

For the last thirteen years of the eighteenth century, the Northwest Territory was governed directly by the authority of the Northwest Ordinance. The inhabitants of the land that would eventually become Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota were protected by the Ordinance and its set of privileges and immunities. As states were formed out of the Northwest Territory, new territories were formed from the former Northwest Territory by organic acts. In all of these territories and in all of these organic acts, the privileges and immunities of the Ordinance were expressly reaffirmed and re-extended to the territorial citizens of the United States.

The first new territory to be created from the Northwest Territory was the Indiana Territory, created by an act of Congress in 1800. It gave the citizens of the territory the privileges and immunities that previously had been granted to the inhabitants of the Northwest Territory:

> [B]e it further enacted, That there shall be established within the said territory a government in all respects similar to that provided by the ordinance of Congress, passed on the thirteenth day of July one thousand seven hundred and eighty-seven, for the government of the territory of the United States northwest of the river Ohio; and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights privileges and advantages granted and secured to the people by the said ordinance.[67]

67. Act of May 7, 1800, ch. 41, § 2, 2 Stat. 58, 59. For a discussion of why the territory was divided, see JAMES R. ALBACH, ANNALS OF THE WEST: EMBRACING A CONCISE ACCOUNT OF PRINCIPAL EVENTS WHICH HAVE OCCURRED IN THE WESTERN STATES AND TERRITORIES, FROM THE DISCOVERY OF THE MISSISSIPPI VALLEY TO THE YEAR EIGHTEEN HUNDRED AND FIFTY-SIX 753-57 (Pittsburgh, W.S. Haven 1858).

While the language in this initial Act mentioned privileges but not immunities, a subsequent statute two years later made it clear that the "privileges and immunities" would encompass all of the rights initially established in the Northwest Ordinance.[68]

As additional states formed out of the former Northwest Territory, new territories were formed, and the fundamental rights of the Northwest Ordinance were protected by new organic acts. Some of these new territories, such as the Michigan and Wisconsin Territories, embraced lands outside the original Northwest Territory, including what would become Iowa as well as North and South Dakota.[69] All of the territories of Wisconsin and Michigan that had become states by 1868—namely, Michigan, Wisconsin, Iowa, and Minnesota—ratified the Fourteenth Amendment.[70] The importance of the civil

68. The act enabling Ohio to become a state in 1802 declared that territory not included within the boundary prescribed for Ohio would be "attached to, and made a part of the Indiana territory . . . and the inhabitants therein shall be entitled to the same privileges and immunities, and subject to the same rules and regulations, in all respects whatever, with all other citizens residing within the Indiana territory." Act of Apr. 30, 1802, ch. 40, § 3, 2 Stat. 173, 174. As noted above, those privileges and immunities to which the other citizens of the Indiana Territory were entitled were those "granted and secured to the people by" the Northwest Ordinance. Act of May 7, 1800, § 2, 2 Stat. at 59.

69. On June 28, 1834, Congress passed an act that attached "half of present-day Minnesota, all of present-day Iowa and the eastern" halves of North and South Dakota to the Territory of Michigan. Sarah Lanier Hollingsworth, *A Bibliographic Survey of Prestatehood Legal Resources for the State of South Dakota*, *in* 2 PRESTATEHOOD LEGAL MATERIALS 1077, 1103 (Michael Chiorazzi & Marguerite Most eds., 2005). The act declared that "the inhabitants therein shall be entitled to the same privileges and immunities, and be subject to the same laws, rules, and regulations, in all respects, as the other citizens of Michigan territory." Act of June 28, 1834, ch. 98, 4 Stat. 701. A few years later, the territory of Michigan was subdivided so that the state of Michigan could be formed out of the larger territory. *See* Act of Jan. 26, 1837, ch. 6, 5 Stat. 144. The rest of the territory became the Territory of Wisconsin (which included present-day Wisconsin, Minnesota, Iowa, and the eastern half of the Dakotas). *See* Hollingsworth, *supra*, at 1104. Congress transferred to the inhabitants of the Wisconsin territory:

> the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the [Northwest Ordinance] . . . . The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the Territory of Michigan, and to its inhabitants, and the existing laws of the Territory of Michigan shall be extended over said Territory . . . and further, the laws of the United States are hereby extended over, and shall be in force in, said Territory, so far as the same, or any provisions thereof may be applicable.

Act of Apr. 20, 1836, ch. 54, § 12, 5 Stat. 10, 15.

70. Proclamation No. 13, 15 Stat. 708, 709-11 (1868) (proclamation by William H. Seward, Secretary of State of the United States).

rights in the Northwest Ordinance in these territories that derived from the Northwest Territories continued long after the territorial organic acts had replaced the Ordinance. As late as 1849, Congress extended the "rights, privileges, and immunities" of the Ordinance to the last of the territories to form in the upper Midwest.[71] The Northwest Ordinance impressed its character upon the Northwest Territory not once,[72] but through repeated Congressional enactments spanning more than seventy years.

C. *The Manifest Destiny of the Northwest Ordinance: The Spread of Civil Rights South and West*

The privileges and immunities secured by the Northwest Ordinance were extended to citizens of territories throughout the United States in the eighteenth and nineteenth centuries, far beyond the borders of the Northwest Territory. Many of the regions to which the Northwest Ordinance extended its protective arm were nowhere near the original territory: the future states of Mississippi, Louisiana, Tennessee, Alabama, Kansas, Missouri, Nebraska, Louisiana, Arkansas, Iowa, Washington, and Oregon—all states outside the Northwest Territory—were protected by the Northwest Ordinance at one point or another during their territorial history. These privileges and immunities, either through their express protection in the act establishing the territory of Missouri or in the numerous invocations of the privileges and immunities in the Northwest Ordinance, were in force at one point or another in every territory (with the exception of Nevada) that became a state by 1868

71. When the Territory of Wisconsin was divided in 1838 to create the Territorial Government of Iowa, the inhabitants of the new Iowa Territory were extended all the "rights, privileges and immunities heretofore granted and secured to the Territory of Wisconsin and to its inhabitants." Act of June 12, 1838, ch. 96, § 12, 5 Stat. 235, 239. When the State of Wisconsin was added in 1848, Act of May 29, 1848, ch. 50, 9 Stat. 233, and the remaining area of the Territory of Wisconsin became the Territory of Minnesota in 1849, it was enacted:

> That the inhabitants of the [Minnesota] Territory shall be entitled to all the *rights, privileges, and immunities* heretofore granted and secured to the territory of Wisconsin and to its inhabitants; and the laws in force in the Territory of Wisconsin at the date of the admission of the State of Wisconsin shall continue to be valid and operative therein . . . .

Act of Mar. 3, 1849, ch. 121, § 12, 9 Stat. 403, 407 (emphasis added). This act is again a substantive transfer of rights to a new territory as an older territory is extinguished, and the phrase "rights, privileges, and immunities" is repeated to capture all the substantive protections for the citizens of the territory as expressed by the Ordinance.

72. The original imprinting has been discussed as important. *See* POOLE, *supra* note 8, at 6 ("It stamped itself upon the soil while it was yet a wilderness, and its impress can be seen today in the laws, the character, the social habits, and thrift of these great Northwestern States.").

and ratified the Fourteenth Amendment. As we will see in Part III, these privileges and immunities became the organic law of the states when they framed their constitutions under the supervision of Congress.

1. The Northwest Ordinance Extended to the Southwest Territory

The *spread* of the Northwest Ordinance's civil rights began in the Southwest Territory. The Southwest Ordinance,[73] approved on May 26, 1790, organized the territory south of the Ohio River that would become Tennessee. It provided that:

> [The] inhabitants of [the territory] shall enjoy all the privileges, benefits, and advantages set forth in the ordinance of the late Congress, for the government of the territory of the United States northwest of the river Ohio. And the government of the said territory south of the Ohio, shall be similar to that which is now exercised in the territory northwest of the Ohio; except so far as is otherwise provided in the conditions expressed in an act of Congress of the present session . . . .[74]

This short act said nothing about the prohibition on slavery in the Northwest Ordinance, despite slavery being common in the Southwest Territory. The act referenced declares, however, "[t]hat no regulations made or to be made by Congress, shall tend to emancipate slaves."[75] Nevertheless, the choice of language in the Southwest Ordinance—in particular, the unequivocal extension of the "privileges, benefits, and advantages" of the Northwest Ordinance to the Southwest Territory—suggests that the privileges and immunities of the Northwest Ordinance did not include the prohibition on slavery.[76] The prohibition on slavery must be something besides a fundamental right. Indeed, the referenced act referred to emancipation laws as "regulations . . . made by Congress."[77] The Constitution gave Congress the authority to pass rules or regulations in the territories, but the privileges and immunities of citizens came from the Northwest Ordinance. This distinction between regulations on slavery and the privileges and immunities of citizens reappeared in the debates over the government of the Oregon Territory in the mid-nineteenth century.[78]

73. Act of May 26, 1790, ch. 14, 1 Stat. 123.

74. *Id.* § 1 (citing Act of Apr. 2, 1790, ch. 6, 1 Stat. 106).

75. Act of Apr. 2, 1790, ch. 6, 1 Stat. 106, 108.

76. *Id.*

77. *Id.*

78. *See infra* notes 102-104 and accompanying text.

Unlike the organic statutes enacted closer to the Civil War, the Southwest Ordinance is likely too remote to have influenced the usage of the terms "privileges" or "immunities" at the time of Reconstruction, but the principles of the Ordinance would nonetheless persist as part of the Tennessee Constitution.

2. The Principles of the Ordinance Extended to the Mississippi Territory

The Mississippi Territory (which would become the states of Mississippi and Alabama) was formed pursuant to the Compact of 1802 between the United States and Georgia, whereby Georgia ceded the land to the United States in return for cash and the promise that Indian tribes would be quickly removed from within Georgia. As part of the Articles of Agreement and Cession of April 24, 1802,[79] the Northwest Ordinance was extended to the Mississippi territory except for the provision that excluded slavery: "[The Northwest Ordinance] shall, in all its parts, extend to the territory contained in the present act of cession, that article only excepted which forbids slavery."[80] This agreement with Georgia solidified the importance of the Northwest Ordinance in the Mississippi Territory,[81] the southernmost frontier[82] of the United States at the dawn of the nineteenth century.

3. The Northwest Ordinance in the Territory of Louisiana

The Louisiana Purchase Treaty, which was signed with Napoleon's ministers in 1803 and doubled the size of the United States, proclaimed:

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79. Articles of Agreement and Cession, U.S.-Ga., Apr. 24, 1802, *reprinted in* GEORGE POINDEXTER, THE REVISED CODE OF THE LAWS OF MISSISSIPPI IN WHICH ARE COMPRISED ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC NATURE, AS WERE IN FORCE AT THE END OF THE YEAR 1823; WITH A GENERAL INDEX 502-05 (Natchez, Francis Baker 1824).

80. *Id.* at 504.

81. Congress had previously extended the rights of the Ordinance to the territory, while Georgia and the Union disputed claims to the land:

> [T]he people of the aforesaid territory, shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio, in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven . . . .

Act of Apr. 7, 1798, ch. 28, § 6, 1 Stat. 549, 550.

82. Georgia and the Mississippi Territory formed the entire southern border of the United States in 1802 until the Louisiana Purchase the following year.

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.[83]

The land acquired in the Louisiana Purchase includes six states that ratified the Fourteenth Amendment before 1868: Kansas, Missouri, Nebraska, Louisiana, Arkansas, and Iowa.[84] The Louisiana Purchase treaty says only that the inhabitants shall be "admitted . . . to the enjoyment of all the rights, advantages and immunities of citizens of the United States."[85] The exact privileges and immunities in these territories would become a source of much of the sectional conflict that precipitated the Civil War.

The Louisiana Purchase Treaty has been mentioned by Akhil Amar and others as helping to establish the use of the terms privileges and immunities.[86] This idea is elaborated in an article by Kurt Lash,[87] who shows how the language reappears in the treaties by which Florida, Texas, and Alaska were ceded to the United States. Lash does not say, however, how or whether the content of these "privileges and immunities" of citizens were defined by the treaties. He merely states that treaties referred to a "unique set of rights conferred upon an individual by virtue of their status as a United States citizen."[88] While the privileges and immunities are mentioned in treaties of accession, they are given content in the organic acts establishing territorial governments as well as in the enabling acts providing for admissions of

83. Treaty Between the United States of America and the French Republic, art. III, Apr. 30, 1803, 8 Stat. 200, 202.

84. Proclamation No. 13, 15 Stat. 708, 709-11 (1868) (proclamation by William H. Seward, Secretary of State of the United States) (listing all the ratifying states).

85. Treaty Between the United States of America and the French Republic, *supra* note 83, art. III.

86. *See* AMAR, *supra* note 20, at 167 & n.*, 361 nn.11-12; *see also* Arnold T. Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights*, 7 WHITTIER L. REV. 765, 783-90 (1985) (discussing the Louisiana Purchase Treaty and several other treaties). This scholarship complements the story told here, providing evidence for the widespread usage of the terms "privileges" and "immunities" to describe the rights of citizens in the territories.

87. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: 'Privileges and Immunities' as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010).

88. *Id.* at 1285.

territories as states. By not studying the organic acts, previous scholars have been unable to give substance to the terms "privileges" and "immunities" as they refer to the rights possessed and experienced by inhabitants of the territories in the nineteenth century.

The organic act to establish a government for Louisiana was passed by Congress on March 26, 1804.[89] Louisiana was split into two territories to prepare it for statehood: the Territory of Orleans (which would become the state of Louisiana) and the district of Louisiana (the rest of the territory, which would become the Territory of Missouri and which extended north all the way to the border with Canada). The first organic act for the Territory of Orleans did not reference the Ordinance specifically. Nonetheless, it established a list of privileges and immunities very similar to those protected by the Bill of Rights and the Northwest Ordinance.[90] This initial organic act for the Territory of Orleans was followed by a supplementary act in 1805 that directly invoked the Northwest Ordinance.[91] Congress declared: "[T]he inhabitants of the territory of Orleans shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi territory."[92]

The privileges and immunities enumerated in the Northwest Ordinance were extended to the district of Louisiana (the bulk of the land obtained in the Louisiana purchase, excluding only the Territory of Orleans) twice: first, by association with the Indiana Territory; and second, though the organic act for the Territory of Missouri (as Territory of Louisiana was renamed in 1812). In 1804, the government of the Indiana territory was extended to the district of

89. Act of Mar. 26, 1804, ch. 38, 2 Stat. 283.

90. With regard to courts, these privileges and immunities to which "[t]he inhabitants of the said territory shall be entitled" included the trial by jury for capital prosecutions by a "jury of twelve," the benefits of the "writ of habeas corpus," the privilege of bailability "unless for capital offences where the proof shall be evident, or the presumption great," and immunity against the infliction of "cruel and unusual punishments." *Id.* § 5. It further provided a list of federal laws of the United States that would "have full force and effect in the above mentioned territories," including patent and copyright acts and prohibitions against the exportation of slaves. *Id.* § 7. It declared, however, that the "laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature." *Id.* § 11. Since most of the rights guaranteed to the citizens of the Territory of Orleans are adopted almost verbatim from the Northwest Ordinance, these rights are in many ways those of the Northwest Ordinance.

91. Act of Mar. 2, 1805, ch. 23, 2 Stat. 322.

92. *Id.* § 1. See *infra* Part V for a discussion of the importance of this organic act in the antebellum courts.

Louisiana.[93] As discussed above, the "rights, privileges and advantages granted and secured to the people by the [Northwest Ordinance]"[94] were protected in the Indiana territory. Whether these fundamental rights were extended to the inhabitants of the district of Louisiana by the words of the act itself is not clear.[95] Nevertheless, the governors and judges of the Indiana territory who

93. This "district of Louisiana," was to be governed by the judges and governor of the Indiana Territory. Act of Mar. 26, 1804, ch. 38, § 12, 2 Stat. at 287.

94. Act of May 7, 1800, ch. 41, § 2, 2 Stat. 58, 59; *see supra* note 67 and accompanying text.

95. The act gave the judges and governor power to

> make all laws which they may deem conducive to the good government of the inhabitants thereof: *Provided however*, that no law shall be valid which is inconsistent with the constitution and laws of the United States, or which shall lay any person under restraint or disability on account of his religious opinions, profession, or worship; in all of which he shall be free to maintain his own, and not [burdened] those of another: *And provided also*, that in all criminal prosecutions, the trial shall be by a jury of twelve good and lawful men of the vicinage, and in all civil cases of the value of one hundred dollars, the trial shall be by jury, if either of the parties require it.

Act of Mar. 26, 1804, ch. 38, § 12, 2 Stat. 283, 287. The words "no law shall be valid which is inconsistent with the constitution and the laws of the United States" could mean that the Northwest Ordinance (or the Bill of Rights) would protect citizens in the territories. One could argue that the provisions for freedom of religion in this Act suggest that neither the Bill of Rights nor the Ordinance applied in the territories, since they both protected the freedom of religion. When protecting fundamental rights, however, the government is prone to redundancy (for example, some might say that a single Due Process Clause could provide all the protections that are needed from organic laws). In addition, the provision in this act may express more than freedom of religion: an inhabitant of the territory is not only free to *practice* his or her religion but is also immune from *legal disability* because of the practice of that religion. The wording in this act about religion has a flavor of equal protection that puts it beyond the crude guarantee of free exercise. Another potential conflict with the Bill of Rights is the provision in the Act that provided for a trial by jury "if either of the parties require it" in "all civil cases of the value of one hundred dollars." *Id.* On its face, the Act seems inconsistent with the Seventh Amendment, which provides that the "trial by jury shall be preserved" where the "value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. This seeming contradiction between this Act and the Bill of Rights is resolved under a states-rights reading of the Seventh Amendment. Under such a reading, the Seventh Amendment simply meant to "preserve" trials when trials were preexisting (and since the Territory of Louisiana was formerly under the control of France, where there was no common law, there were no trials to preserve). *See* AMAR, *supra* note 20, at 391 n.171 (proposing a states-rights reading of the Seventh Amendment in which the Northwest Ordinance set the baseline for rights in the territories). Although the Bill of Rights and this organic act may not conflict, the seeming inconsistency highlights how applications of the Bill of Rights to the territories or states formed after 1781 are often contrived and strained. Unlike the Northwest Ordinance, the Bill of Rights is supposed to restrain federal power and to help "preserve" the baseline rights of U.S. citizens. It is the Northwest Ordinance that actually sets the baseline.

would govern the district of Louisiana were accustomed to respecting the fundamental rights of the Ordinance and thus would be unlikely to take any actions to violate them.[96]

When the Territory of Louisiana[97] was renamed the Territory of Missouri in 1812,[98] Congress established a new organic law for the Missouri Territory that invoked essentially verbatim all the privileges and immunities contained in the Northwest Ordinance. It provided:

> That the people of the said territory shall always be entitled to a proportionate representation in the general assembly; to judicial proceedings according to the common law and the laws and usages in force in the said territory; to the benefit of the writ of habeas corpus. In all criminal cases the trial shall be by jury of good and lawful men of the vicinage. All persons shall be bailable unless for capital offences where the proof shall be evident or the presumption great. All fines shall be moderate, and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his life, liberty or property, but by the judgment of his peers and the law of the land. If the public exigencies make it necessary for the common preservation to take the property of any person, or to demand his particular services, full compensation shall be made for the same. No ex post facto law or law impairing the obligation of contracts shall be made. No law shall be made which shall lay any person under restraint, burthen or disability, on account of his religious opinions professions, or mode of worship, in all which he shall be free to maintain his own, and not [burdened] for those of another. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be encouraged and provided for from the public lands

96. The organic act of 1804 provided for an additional mechanism by which a law inconsistent with the Ordinance or the Bill of Rights could be struck down. The governor was required not only to "publish throughout the said district, all the laws which may be made as aforesaid" but also "from time to time [to] report the same to the President of the United States, to be laid before Congress, which, if disapproved of by Congress, shall thenceforth cease, and be of no effect." Act of Mar. 26, 1804, ch. 38, § 12, 2 Stat. at 287. Congress thus preserved for itself the veto power for all laws in the district of Louisiana.

97. The name was changed from district to Territory of Louisiana in 1805. Act of Mar. 3, 1805, ch. 31, 2 Stat. 331. The essential provisions of the 1804 Act were reenacted in 1805, except that the district was no longer governed by the officials from the Indiana Territory. Even after territory of Missouri was created, those provisions that were not repugnant to the organic laws of Missouri continued in force. *See* Act of June 4, 1812, ch. 95, § 16, 2 Stat. 743, 747.

98. Act of June 4, 1812, ch. 95, 2 Stat. 743.

> of the United States in the said territory, in such manner as Congress may deem expedient.[99]

This expression of the privileges and immunities of the United States contains every single personal right contained in the first three[100] of the Articles of Compact in the Northwest Ordinance. Indeed, most of the expressions are copied verbatim. The only right contained in this 1812 list of fundamental rights and not found in the Ordinance is the immunity from ex post facto laws. Although this 1812 act did not invoke the Northwest Ordinance by name (unlike the organic acts considered throughout this Part), it nonetheless extended the principles of the Ordinance to the Missouri Territory.

4. *The Final Stage of the Ordinance's Spread: The Principles of the Northwest Ordinance Extended to the Pacific Northwest*

The privileges and immunities protected by the Northwest Ordinance were extended to new territory well into the nineteenth century, including the Territory of Oregon, which included the current states of Oregon, Washington, and Idaho (as well as parts of Wyoming and Montana). The act establishing the territorial government of Oregon in 1848 specifically invoked the Northwest Ordinance:

> [T]he inhabitants of said Territory shall be entitled to enjoy all and singular the rights, privileges, and advantages granted and secured to the people of the territory of the United States north-west of the River Ohio, by the [Northwest Ordinance] and the laws of the United States are hereby extended over, and declared to be in force in, said Territory, so far as the same, or any provision thereof, may be applicable. [101]

99. *Id.* § 14, 2 Stat. at 747.

100. The 1812 Act also added the two personal rights from the Fourth Article of the Ordinance. See *supra* quotation accompanying note 60 for the personal rights in the Ordinance. The 1812 Act declared: "The lands of non-resident proprietors shall never be taxed higher than those of residents. The Mississippi and Missouri rivers, and the navigable waters flowing into them, and the carrying places between the same, shall be common highways and forever free to the people of the said territory and to the citizens of the United States, without any tax, duty or impost therefor." *Id.* § 15, 2 Stat. at 747. Congress's decision to place these additional rights in a separate section from those rights expressed in the first three of the Articles of Compact suggests that they occupy a secondary status. This accords with the view of the court in *Spooner*. *See supra* notes 63-64 and accompanying text.

101. Act of Aug. 14, 1848, ch. 177, § 14, 9 Stat. 323, 329.

This section of the Act also declared that the inhabitants of Oregon "shall be subject to all the conditions, and restrictions, and prohibitions in [the Northwest Ordinance] imposed upon the people of said territory."[102] The "conditions, and restrictions, and prohibitions"[103] included, most importantly, the complete prohibition on slavery in the Northwest Ordinance. This free-soil declaration drew inordinate attention to this 1848 organic act, as the nation was highly polarized over the extension of slavery in the territories. The Act was hotly contested in Congress and widely covered in the press.[104] Far from an obscure phrase slipped into an unimportant bill in the mid-nineteenth century, the "rights, privileges, and advantages" of citizens formed a crucial part of this and other territorial acts that became focal points in the intense sectional conflicts that led to the Civil War. Figure 1 summarizes how thoroughly these fundamental rights of citizens had transfused the United States by 1868.

102. *Id.*

103. *Id.*

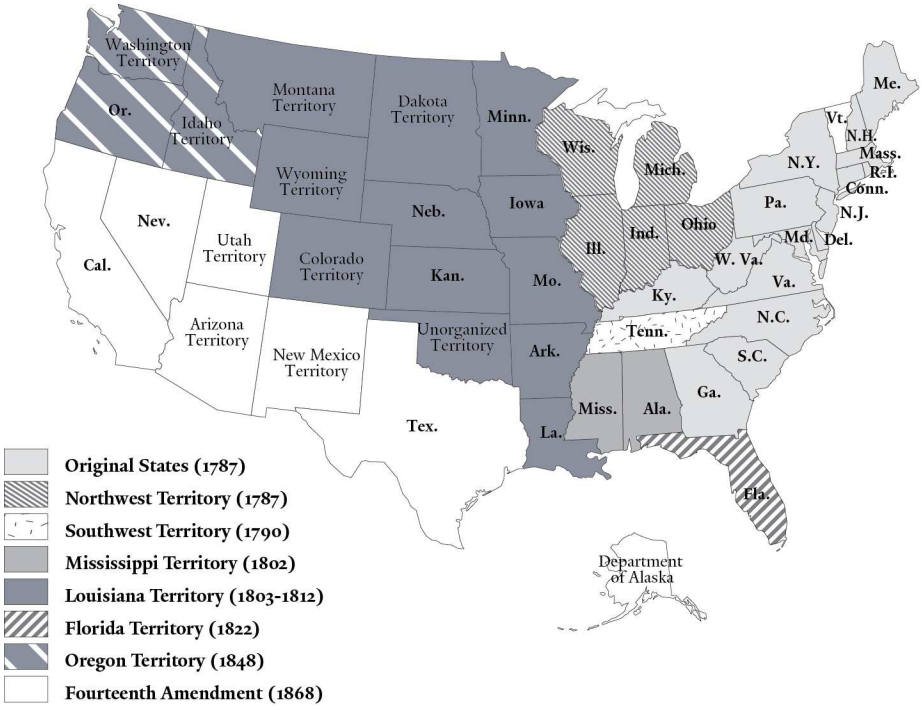
104. *See* O.C. GARDINER, THE GREAT ISSUE: OR, THE THREE PRESIDENTIAL CANDIDATES 151 (New York, Wm. C. Bryant & Co. 1848). Senator John A. Dix from New York spoke at length in the Senate about the rights, privileges, and immunities of citizens secured by the impending bill to create the territory of Oregon on July 26, 1848. He declared:

> In order to see what rights, privileges, and immunities the people of Oregon are to acquire, we must refer to the act organizing the Territory of Iowa . . . . We must next have recourse to the act organizing the Territory of Wisconsin. . . . [which provides] that the inhabitants of said Territory shall be entitled to, and enjoy all and singular the rights, privileges and advantages granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said Territory, passed on the 13th day of July, 1787 . . . .

Id. at 166. He then went on to state that the "exclusion of slavery from the Northwest Territory by the ordinance is to be referred rather to the class of restrictions and prohibitions than to that of privileges and immunities." *Id.* This distinction between restrictions and "privileges and immunities" relates to the distinction between the Constitution and the Northwest Ordinance in the territories—the Constitution authorizes the creation of rules and regulations whereas the Northwest Ordinance enumerates rights, privileges, and immunities. This distinction recapitulates the understanding of the roles of the Constitution and the Ordinance to the territories held almost sixty years earlier. *See supra* Subsection II.C.1.

Figure 1.

UNITED STATES IN 1868: INDICATING WHEN THE RIGHTS FROM THE NORTHWEST ORDINANCE FIRST EXTENDED TO THE STATES AND TERRITORIES



This map shows the states and territories in 1868 and indicates when the privileges and immunities of the Northwest Ordinance spread to various regions. Some of the original territorial boundaries had changed by 1868; for example, only half of the land that became the Territory of Colorado in 1861 was part of the original Louisiana Territory. As this map indicates, only two (California [as unorganized territory] and Nevada) of the nineteen territories that had become states by 1868 never had the privileges and immunities of the Ordinance extended to them by a territorial organic act. In addition, Texas and Vermont, both independent republics before entering the Union, never had the principles of the Ordinance extended to them. Nevertheless, in approving their admission into the Union, Congress acknowledged that their state constitutions were republican and not repugnant to the organic laws of the United States. For a discussion of the significance of the Northwest Ordinance's declaration of rights to the original thirteen states, see *infra* Section III.B (Kentucky, West Virginia, and Maine are shaded in the figure as "original states" because they were part of Virginia and Massachusetts in 1787 and never had a subsequent territorial stage before acquiring independent statehood). For simplicity, all states derived from the Louisiana Purchase are shaded in the map as if they were part of the "Louisiana Territory"; in fact, the State of Louisiana was called the Territory of Orleans, while the rest of the land was part of the Territory of Louisiana and then the Territory of Missouri.

III. THE NORTHWEST ORDINANCE IN THE STATES

The Northwest Ordinance is the basis of the organic law of states, that is, state constitutions and state bills of rights. In the Ordinance and in the various enabling acts that allowed the various territories to become states, Congress mandated that state constitutions be based on the principles of the Northwest Ordinance. Each enabling act allowed an aspiring state to submit a draft constitution to Congress, and Congress would then verify that the principles of the Ordinance were protected by the state's organic law before granting admission to the Union. In the Fourteenth Amendment literature, these enabling acts have been considered only in connection to Due Process Clause jurisprudence (the Northwest Ordinance has a due process clause among its various privileges and immunities),[105] and the importance of the Northwest Ordinance in the enabling acts of states outside the Northwest Territory has been accordingly overlooked.

As will be explored in Section B, the Northwest Ordinance in 1787 was more than an exposition of rights upon which future states would be based: it was, by its own terms, an expression of the fundamental rights common to the citizens in the original thirteen states. Although the Ordinance lacked any mechanism for protecting these fundamental rights in the original thirteen states (hence the need for the Fourteenth Amendment), its declaratory value far exceeds that of the Bill of Rights and the Constitution, which primarily limited the federal government and never attempted to define the fundamental rights of citizens in the states.

A. The Continuing Importance of the Northwest Ordinance as Territories Become States

The centrality of the Northwest Ordinance in forming the organic law for states formed from territories is clear from multiple passages in the Northwest Ordinance as well as from numerous subsequent acts of Congress. The principles enumerated in the articles of Section Fourteen of the Ordinance[106] are explicitly stated in Section Thirteen and the beginning of Section Fourteen of the Northwest Ordinance:

105. *See, e.g.*, Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 393 (1938). See *infra* Part V for Graham's treatment of this issue, which focuses on the Northwest Ordinance's influence on Representative John Bingham's theories of due process.

106. *See supra* Part II.

> 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 . . . .[107]

These words are followed immediately by the Articles of Compact: those privileges and immunities of the Ordinance listed.[108] These rights from the Compact are described by the Ordinance as "fundamental principles of civil and religious liberty," and the Ordinance clearly states these principles are to be fixed and established "as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory."[109] Territories did not have constitutions. Thus, by invoking "constitutions," this clause specifically refers to future states that would be carved out of the territory covered by the Ordinance. State constitutions are directly considered in Article Five of the Ordinance:

> [W]henever any of the said States [formed in the territory] 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 . . . .[110]

107. NORTHWEST ORDINANCE OF 1787 §§ 13-14, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

108. *See supra* note 60 and accompanying text.

109. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

110. *Id.* § 14, art. V, at LVII.

In order to be admitted as states, two conditions for the constitution and government must be met: they must be republican, and they must be in conformity to the principles of the Northwest Ordinance. To "be republican" likely meant the same thing as it did to the Framers who drafted the Republican Guarantee Clause that same year (1787).[111] In light of the language of Section Thirteen of the Ordinance quoted above (a preamble to the Articles of Compact), "conformity to the principles"[112] in the articles likely meant that the organic law formed in the states of the territory must be based on the "principles of civil and religious liberty."[113]

When states began to form out of the Northwest Territory, Congress and the territories consciously obeyed the requirements that the organic law of the new states be republican and based on the principles of the Ordinance. When the Ohio territory applied for statehood in 1802, Congress framed an enabling act that required that Ohio form a constitution and state government "provided the same shall be republican, and not repugnant to the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the original states and the people and states of the territory northwest of the river Ohio."[114] Indeed, the Ohio Constitution of 1802 enacted many of the provisions of the Northwest Ordinance, including the adoption (almost verbatim) of the commitment to education (which does not appear in other sources of federal organic law).[115] Congress would impose the same terms—that the constitutions and government not be repugnant to the Northwest Ordinance—on Indiana in 1816 and Illinois in 1818.[116]

111. For a discussion of the original understanding of the Republican Guarantee Clause, see AMAR, *supra* note 13, at 276-81. According to Professor Amar, the essence of a republican government at the founding was popular sovereignty.

112. NORTHWEST ORDINANCE OF 1787, art. V, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVII.

113. *Id.* § 13, at LVI.

114. Act of Apr. 30, 1802, ch. 40, § 5, 2 Stat. 173, 174.

115. *Compare* OHIO CONST. of 1802, art. VIII, § 3, *reprinted in* ISAAC FRANKLIN PATTERSON, THE CONSTITUTIONS OF OHIO 90 (1912) ("[R]eligion, morality, and knowledge being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision not inconsistent with the rights of conscience."), *with* NORTHWEST ORDINANCE OF 1787 § 14, art. III, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVII ("Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.").

116. Act of Apr. 18, 1818, ch. 67, § 4, 3 Stat. 428, 430 (enabling act for Illinois); Act of Apr. 19, 1816, ch. 57, § 4, 3 Stat. 289, 290 (enabling act for Indiana) ("[T]he said convention . . . shall then form . . . a constitution and a state government: Provided That the same, whenever formed, shall be republican, and not repugnant to those articles of the [Northwest

While the demand that the state governments and constitutions conform to the "principles" of the Northwest Ordinance could be construed as referring to free-soil principles for the states carved out of the Northwest Territory,[117] this demand was extended even to slave territories that were never part of the Northwest Territory. The privileges and immunities contained in the Northwest Ordinance were thus considered fundamental even in the slave territories and slave states that decried the Ordinance's prohibition on slavery. For example, the Mississippi Enabling Act of 1817 authorized Mississippi to form a state constitution provided that it "shall be republican, and not repugnant to the principles of the [Northwest Ordinance], so far as the same has been extended to the said territory by the articles of agreement between the United States and the state of Georgia, or of the constitution of the United States."[118] The Alabama Enabling Act of 1819 contained identical language.[119] The privileges and immunities protected by the Northwest Ordinance can be found protected in the first state constitutions of Alabama and Mississippi alongside protections for slavery.[120] The principles of the Ordinance formed the basis for the organic law throughout the new states in the union.

Ordinance]."). The importance of the Northwest Ordinance in the framing of new state governments continued even after the Civil War and Reconstruction. *See, e.g.*, SHOSUKE SATO, HISTORY OF THE LAND QUESTION IN THE UNITED STATES 120 (Elibron Classics ed. 2006) (1886) ("The wise and enlightened principles of the ordinance pervade the government and life of the people in the remaining Territories. When they grow in population to the required standard, they too will have State Constitutions, republican in form, and 'not repugnant to the principles of the ordinance,' and will be admitted into the Union.").

117. John Eastman has argued that the "fundamental principles" referenced in Section Twelve of the Ordinance were the principles of the Declaration of Independence. John C. Eastman, *Re-evaluating the Privileges or Immunities Clause*, 6 CHAP. L. REV. 123, 130-33 (2003). He even argues that the prohibition on slavery in the Articles of Compact was "mandated by . . . the *principles* of the Declaration." *Id.* at 130. While Professor Eastman reads the Articles of Compact (especially the prohibition on slavery) as corollaries of the principles of civil and religious liberty expressed in the Declaration, this Note suggests that the privileges and immunities in the Articles of Compact *are* direct expressions of principles of civil and religious liberty. Perhaps this difference explains why, even though Professor Eastman writes about the Privileges or Immunities Clause, he does not look to the Ordinance for the substance of privileges and immunities.

118. Act of Mar. 1, 1817, ch. 23, § 4, 3 Stat. 348, 349.

119. Act of Mar. 2, 1819, ch. 47, § 5, 3 Stat. 489, 491.

120. *See* ALA. CONST. of 1819, art. VI. The article contains "General Provisions," which has a section entitled "Education," with words and principles derived from the Ordinance, followed shortly by a section on "Slaves," which denies the legislature the "power to pass laws for the emancipation of slaves." *Id.* art. VI; *see also* MISS. CONST. of 1817, art. VI (containing the Education Clause from the Ordinance along with the prohibition against emancipation).

The principles of the Northwest Ordinance and their importance for Alabama and Mississippi—the states created from the territory ceded from Georgia in 1802—were far from forgotten by the time that the Fourteenth Amendment was ratified by the states. Robert J. Walker and Governor W.L. Sharkey of Mississippi tested the constitutionality of the Military Government Bill in the Supreme Court of the United States during the Fourteenth Amendment's ratification process (in 1867) by citing the principles of the Northwest Ordinance. The petition of complaint argued, in part, that the Compact of 1802 extended

> to said Territory, and to said new State when admitted, all the terms of the ordinance of the 13th of July, 1787, except as to slavery; that said ordinance . . . . contained the provisions that "the inhabitants of said Territory shall always be entitled to the benefits of a writ of *habeas corpus* and of a trial by jury;" ["]no man shall be deprived of his liberty or property but by his peers and the law of the land." . . . And this was the compact between the United States and Mississippi. Has it been kept? By act of Congress of 1st of March, 1817, passed in pursuance of said compact of 1802 and the ordinance of 1787, authority was given to the people of the western part of Mississippi Territory to form a Constitution and State Government . . . . By this act the Constitution of the proposed State was required to conform to said compact of 1802 and said ordinance of 1787, except as aforesaid; and the said provisions were declared to be "irrevocable" without the consent of the United States. . . . On the 10th of December, 1817, Congress, by a joint resolution, admitted said State into the Union, upon the terms and conditions before stated, and especially reaffirming the ordinance of 1787 in its application to said State.[121]

This petition to the Supreme Court claimed that Mississippi and its citizens were entitled to rights derived from the Northwest Ordinance. Both the Ordinance itself and the enabling act are mentioned as sources that protect the privileges and immunities of the citizens of Mississippi including the "right to trial by jury," and the petitioners worried that these rights were subject to imminent violation by "the breath of a military commander or the sentence of the military commission or tribunal."[122] The privileges and immunities that were established by the organic law of the United States, especially the

121. *Mississippi in the Supreme Court*, N.Y. TIMES, Apr. 5, 1867, at 1.

122. *Id.*

Constitution and the Northwest Ordinance, were of the utmost concern to citizens of the North and South following the Civil War.

B. The Northwest Ordinance as an Articulation of the Privileges and Immunities Common to the Original Thirteen States

In addition to expressing the principles of liberty that would govern future states, the Northwest Ordinance's Articles of Compact were a declaration of the rights common to citizens of the original thirteen states. Section Thirteen of the Ordinance, which has been called a preamble[123] and which introduced the Articles of Compact, declares the purposes of the Ordinance:

> [F]or 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 . . . ."[124]

These "fundamental principles of civil and religious liberty" were not created by the framers of the Ordinance. The Ordinance merely extends them. Its Articles of Compact simply enumerate them. They existed before the Ordinance, before the Constitution, before the Bill of Rights. The words of the Ordinance make clear that these principles of liberty already "form the basis whereon" the original thirteen "republics, their laws and constitutions are erected."[125] The principles of liberty articulated in the Northwest Ordinance are thus a statement of a shared bill of rights, of those privileges and immunities shared by all citizens of the United States as citizens of the several states.

Among the four organic laws of the United States, the Northwest Ordinance is thus our best source for understanding the fundamental rights common to the original thirteen states. The Federal Bill of Rights was designed as a restraint on the federal government and applied only to acts of the federal government until its provisions were variously incorporated through the

123. *See* Eastman, *supra* note 117, at 130.

124. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI. For the full text, see *supra* Section III.A.

125. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI. The term "these republics" refers to the original states in contradistinction to those governments that shall be formed in the territories.

Fourteenth Amendment.[126] This understanding of the antebellum role of the Bill of Rights was implicit in the Bill's specific prohibitions on "Congress" (the first word in the First Amendment) and was established by Chief Justice Marshall in *Barron v. Baltimore*.[127] Before the Fourteenth Amendment, only the Northwest Ordinance protected the rights, privileges, and immunities of citizens of the states (and the Ordinance only protected citizens in states formed in the territories). Although the Ordinance enumerated those rights common to the original thirteen states, the Fourteenth Amendment would be necessary to empower the federal government to protect those rights against state abridgement.

IV. THE NORTHWEST ORDINANCE IN THE ANTEBELLUM COURTS

The Northwest Ordinance's declaration that new states would be admitted on "equal footing"[128] with the original thirteen would lead to the Ordinance's eventual demise in the federal courts. Equal footing conflicted with the promise that Ordinance's Articles of Compact would remain forever unalterable, even after the territories had become states. After all, under the antebellum Constitution, the original states did not have to respect the privileges and immunities of citizens of the United States. Equal footing could thus mean that the new states would not be bound to protect the principles of liberty in the Ordinance once they acquired statehood, despite the Ordinance's assurances to the contrary.

Given this inherent tension in the Ordinance between equal footing and the unalterable compact, the antebellum courts were charged with the difficult task of deciding whether the Articles of Compact remained in force after states from

126. *Dred Scott* was the first case in which the Court asserted that the Bill of Rights applied in the territories against territorial government. Before this, the Ordinance and the organic acts were the primary restraints on the territorial governments. The role of the Bill of Rights in the territories was, however, asserted by the executive branch. *See* AMAR, *supra* note 20, at 168 n.*2 (discussing the opinion of Attorney General Butler in 1835); *see also* James Madison, Veto Message (Feb. 21, 1811), *in* JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: JAMES MADISON 52-53 (2006). Madison's veto message was for an act of Congress to establish a church in Washington, D.C., which he thought violated the First Amendment.

127. In *Barron*, John Marshall called the inapplicability of the Bill of Rights to the states a question of "great importance, but not much difficulty." 32 U.S. (7 Pet.) 243, 247 (1833); *see also* Amar, *supra* note 54, at 1198-99 (discussing the views of the Chief Justice in *Barron* as well as Hamilton in *The Federalist No. 83* regarding incorporation).

128. NORTHWEST ORDINANCE OF 1787 § 13, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

the Northwest Territory acquired statehood. To be clear, the debate was never whether the Northwest Ordinance and other territorial organic acts were binding organic law. The Court, at least before *Dred Scott*, never questioned the authority of the Ordinance in the territories. The only question was whether the Ordinance would have the same, or any, force after states acquired statehood.

At first, the Court generally enforced the principles of the Ordinance in the states formed from the Northwest Territory. For example, Chief Justice Marshall suggested that judicial review of Ohio state statutes rightfully included whether they were repugnant to the principles of the Northwest Ordinance.[129] In the 1850s, however, the Taney Court decided that the Ordinance no longer had independent force in states after they entered the Union. The principles of the Ordinance would endure insofar as they were built into the state constitutions, but the Ordinance itself could not be invoked in federal court as a source of jurisdiction when fundamental rights were violated.

The erosion of the force of territorial organic acts culminated in *Dred Scott*. The Court in *Dred Scott* did not question the legitimacy of the Northwest Ordinance itself, but it did cast doubt on the power of Congress to extend the principles of Northwest Ordinance to new territories through organic acts. In addition, Taney writes at length about the rights of citizens in the territories but fails to mention a primary source of those rights: the Northwest Ordinance and other territorial organic acts. He attributes to the Bill of Rights the protective quality in the territories that was actually provided by the Ordinance.

The weakening of the power of the Northwest Ordinance was accompanied by inflamed sectional passions that erupted in the Civil War. With the great protections of the Ordinance lifted, states were free to violate civil rights of citizens without fear of censure from the federal government. It would take the Fourteenth Amendment to restore the civil rights of citizens that were undermined by the Taney Court.

A. Judicial Erosion of the Authority of the Northwest Ordinance as Active Organic Law in the States

Jones v. Van Zandt[130] centered on the force of the Northwest Ordinance in Ohio.[131] John Van Zandt was a white citizen who was active in the

129. Bank of Hamilton v. Dudley's Lessee, 27 U.S. (2 Pet.) 492, 526 (1829).

130. 46 U.S. (5 How.) 215 (1847).

Underground Railroad in Ohio and who was convicted in federal court under the Fugitive Slave Act of 1793.[132] He was represented at oral argument by William Seward, who would be Secretary of State, and Salmon Chase, who would go on to serve as Chief Justice. They argued, in part, that the Fugitive Slave Act, "so far as the present subject is involved, is void, because it violates the ordinance of 1787."[133] Although the Taney Court, a stalwart protector of slavocratic rights, held that the Act was not repugnant to the Ordinance,[134] nothing in the Court's opinion suggested that an act could be valid that was repugnant to the Ordinance. The Court treated the question of whether an act was repugnant to the Ordinance as a valid inquiry for judicial review in the same way that the Court considered a valid inquiry to be whether an act was repugnant to the Constitution. In fact, Chase and Seward argued that the Fugitive Slave Act was repugnant to both the Ordinance and the Constitution. The Court's order ended as follows:

131. *See* SATO, *supra* note 116, at 100. In his historical work prefixed to the *Statutes of Ohio*, Chase wrote:

> [The Ordinance contained] articles of compact between the original states, and the people and states of the territory, establishing certain great fundamental principles of governmental duty and private right, as the basis of all future constitutions and legislation, unalterable and indestructible except by that final and common ruin, which as it has overtaken all former systems of human polity, may yet overwhelm our American union. Never, probably, in the history of the world, did a measure of legislation so accurately fulfil [sic], and yet so mightily exceed the anticipations of the legislators. The 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 northwestern states. When the settlers went into the wilderness, they found the law already there. It was impressed upon the soil itself, while it yet bore up nothing but the forest.

SALMON P. CHASE, A SKETCH OF THE HISTORY OF OHIO 8-9 (Cincinnati, Corey & Fairbank 1833).

132. ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 75 (Cambridge, Mass., The Riverside Press 1899).

133. *Jones*, 46 U.S. at 223.

134. The heart of the Taney Court's opinion in *Jones v. Van Zandt* was that the prohibition of slavery in the territories did not affect slavery in the other states:

> The ordinance prohibited the existence of slavery in the territory northwest of the river Ohio among only its own people. Similar prohibitions have from time to time been introduced into many of the old States. But this circumstance does not affect the domestic institution of slavery, as other States may choose to allow it among their people, nor impair their rights of property under it, when their slaves happen to escape to other States.

Id. at 230.

> [I]t is the opinion of this court . . . [t]hat the act of Congress approved February 12th, 1793, is not repugnant to the constitution of the United States. And,
>
> Lastly. That the said act is not repugnant to the ordinance of Congress adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio."[135]

Even though Ohio had been a state for more than forty years, the Court considered the Ordinance as still in force. The Court declared: "Wherever [the Northwest Ordinance] existed, States still maintain their own laws, as well as the ordinance . . . ."[136] This view of the Court in 1847 accords with Chief Justice Marshall's view in 1829, discussed in Part I of this Note, when he wrote that if any part of an act of the Ohio legislature "be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to . . . the ordinance of 1787."[137]

Despite the Court's suggestions that the Ordinance continued in force in Ohio in *Jones*, the Taney Court declared unequivocally in *Strader v. Graham*,[138] a mere three years later, that the Northwest Ordinance could not be in force in any state of the Union. *Strader* concerned a question similar to the one that the Court would address in *Dred Scott*: whether a slave acquired freedom by time spent in Ohio, as a consequence of either the Northwest Ordinance or the laws of Ohio.

Before *Strader*, the Court decided in *Permoli v. Municipality No. 1*,[139] a case about whether a citizen of Louisiana's freedom of religion was protected against state abridgement by the Ordinance, that the Northwest Ordinance's authority in Louisiana ended once Louisiana became a state.[140] But in *Permoli*,

135. *Id.* at 231-32.

136. *Id.* at 231.

137. Bank of Hamilton v. Dudley's Lessee, 27 U.S. (2 Pet.) 492, 526 (1829).

138. Strader v. Graham, 51 U.S. (10 How.) 82 (1850).

139. 44 U.S. (3 How.) 589 (1845).

140. The Court in *Permoli* wrote:

> [A]s as regards the state of Louisiana, [the Northwest Ordinance] had no further force, after the adoption of the state constitution . . . . So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured

the Court deliberately equivocated: "[W]e do no pretend to say" what "the force of the ordinance is north of the Ohio."[141] *Strader* was thus the first case where the Court held that the Ordinance lacked force in even those states formed from the Northwest Territory.[142] The Court in *Strader* wrote:

> Th[e] opinion [in *Permoli*] is, indeed, confined to the [Louisiana]. But it is evident that the Ordinance cannot be in force in the States formed in the Northwestern Territory, and at the same time not in force in the States formed in the Southwestern Territory, to which it was extended by the present government.[143]

The Court considered it proper that Congress did not allow states into the Union unless their government and constitution be republican and not repugnant to the principles of the Ordinance. Once the territories became states, however, the power of the Ordinance was at an end. Although some district courts continued to assert that the Ordinance remained active law

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> to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cognizance, and equally so in the old states and the new ones; and that the writ of error must be dismissed.

Id. at 610.

141. *Id.*

142. Some federal judges (though not the Supreme Court) questioned the continuing force of the Ordinance in the states formed in the Northwest Territory before *Strader*. More than a decade earlier in *Spooner*, a federal district court opinion questioned the continuing force of the Northwest Ordinance in Ohio. The court (one of whose members was Justice McLean riding circuit) wrote that the Ordinance was superseded by the state constitution of Ohio, but the court was careful to note that the Ohio Constitution protected the principles of liberty—the privileges and immunities—enumerated in the Ordinance: "[S]o far as the constitution of Ohio has embraced, and secured the perpetuity of the essential principles of free government, set forth in the ordinance, the latter instrument may be considered as superseded, within the state." Spooner v. McConnell, 22 F. Cas. 939, 949 (No. 13,245) (C.C.D. Ohio 1838). The court left unresolved whether the Ordinance would still have force if the state constitution did not respect the principles of the Ordinance. *See id.* at 950 ("Whether, in the event of a change in the constitution of Ohio, by which its provisions would be made to conflict with the ordinance, it would be possible to apply a corrective to the evil, is not a question involved in this case."). In doing so, the court allowed the possibility that the federal government would have the power to correct the evil that would result if states did not continue to respect the principles of the Ordinance.

143. *Strader*, 51 U.S. at 95.

throughout the 1850s,[144] the Court had severely undermined Northwest Ordinance jurisprudence, stopping the great wellspring of state organic law. After *Strader*, it was left to the Fourteenth Amendment to empower Congress and the Court to protect the Ordinance's privileges and immunities in the states.

B. *The Supremacy of the Ordinance over the Bill of Rights in the Territories Before* Dred Scott

Section IV.A traced the gradual erosion of the force of the Ordinance in the states, culminating in *Permoli* and *Strader*, in which the Court held that state constitutions supplanted the Ordinance—that the principles of the Ordinance endured only insofar as they were incorporated into state constitutions. This Section considers the decisions of the federal judiciary regarding the relative supremacy of the Constitution and the Ordinance in territories before *Dred Scott*. Special attention is paid to the relationship between the Articles of Compact in the Ordinance and the Bill of Rights in the Constitution.

Barron v. Baltimore settled the issue of the Bill of Rights' force in the states,[145] denying the citizens of the states any protections from the Bill with respect to state action. The question remained, however, whether the Bill of Rights protected citizens in the territories with respect to their territorial governments. Until *Dred Scott*, this question was never addressed by the Court. Several lines of cases, however, suggest that the Bill of Rights may not have had force in the territories with respect to territorial government. Of course, the Bill of Rights still limited Congress. But the territories had special systems of legislation and adjudication that were largely independent from Congress. Further, the territories had their own primary source of organic law independent from and older than the Constitution, namely, the Northwest Ordinance.

Federal courts before 1856 consistently held that citizens were entitled to the privileges and immunities of the organic acts but limited the application of the Constitution to the territories and were silent or ambiguous about any role of the Bill of Rights. In *Benner v. Porter*,[146] decided in 1850, the same year as *Strader* but in the January Term, the Court held that the restraints of Article III

144. *See, e.g.*, Jolly v. Terre Haute Drawbridge Co., 13 F. Cas. 919, 920 (No. 7,441) (C.C.D. Ind. 1853) ("The state of Indiana is one of the states carved out of the North Western Territory, and therefore subject to the operation of that article of the compact contained in the ordinance of 1787 . . . .").

145. 32 U.S. (7 Pet.) 243 (1833).

146. Benner v. Porter, 50 U.S. (9 How.) 235 (1850).

did not apply to the territories. The issue in *Benner* was whether the territorial courts retained jurisdiction as federal courts after Florida became a state. The Court held that they did not. The Court wrote of the territorial courts: "They are not organized under the Constitution . . . as the organic law . . . ."[147] The Court restricted its holding, however, to the "distinction between Federal and State jurisdiction,"[148] and thus the status of the Bill of the Rights and other provisions of the Constitution remained uncertain: "Whether, or not, there are provisions in [the Constitution] which extend to and act upon these Territorial governments, it is not now material to examine."[149] Less than one year later, the Court in *Webster v. Reid*[150]—a case which implicated fundamental personal rights, specifically, the right to trial by jury—invoked the Seventh Amendment. Nevertheless, the Court drew the ultimate authority for the jury trials from Iowa's territorial organic act as well as the Articles of Compact in the Northwest Ordinance:

> By the seventh article of the amendments of the Constitution it is declared, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the Ordinance of 1787, over the Territory, so far as they are applicable.[151]

The plaintiff had alleged that the law that provided that a suit shall be before a court and not a jury was "in violation of the Constitution of the United States, of the Ordinance of 1787, and of the organic law of 1838, establishing the territorial government of Iowa."[152] The Court made no attempt to disentangle these three sources of organic law, all of which provided for a trial by jury. The Court suggested at the end of the nineteenth century, however, that the reference to the organic act and the Ordinance in *Benner* may have indicated that the Court was relying solely on territorial organic law and not on the Constitution.[153] One thing is clear, however: the Ordinance applied in the

147. *Id.* at 242.

148. *Id.*

149. *Id.*

150. Webster v. Reid, 52 U.S. (11 How.) 437 (1850).

151. *Id.* at 460 (citing U.S. CONST. amend. VII).

152. *Id.*

153. Am. Pub. Co. v. Fisher, 166 U.S. 464, 466 (1897) (stating that the "invalidity may have been adjudged by reason of the conflict with Congressional legislation"). For a discussion of the relation between *Webster* and *Fisher*, see Burnett, *supra* note 50, at 828-29.

territories (in this case, by incorporation through an organic act) whether or not the Bill of Rights did as well.

One reason that the issue of whether the Bill of Rights applied in the territories was not litigated more frequently may be because the citizens of the territories had a bill of rights, older than the Federal Bill: namely, the Articles of Compact of the Northwest Ordinance. Indeed, the Northwest Ordinance was described in 1881 as the "great Bill of Rights for the territory northwest of the Ohio."[154] In those territories where the Ordinance was not specifically invoked, the organic acts nevertheless contain an enumeration of the rights of citizens. For example, Justice William Johnson (riding circuit) described the 1822 organic act[155] for the Florida Territory as containing "in nature of a bill of rights, or privileges, and immunities which could not be denied to the inhabitants of the territory."[156] Indeed, the Florida organic act, although not referring to the Northwest Ordinance by name, enshrines the privileges and immunities of the Northwest Ordinance.[157]

154. PUB. LAND COMM'N, THE PUBLIC DOMAIN, H.R. EXEC. DOC. NO. 46-47, pt. 4, at 152 (3d Sess. 1881).

155. Act of Mar. 30, 1822, ch. 13, 3 Stat. 654.

156. Am. Ins. Co. v. Canter, 1 F. Cas. 658, 660 (C.C.D.S.C., date not given) (No. 302A) (quoting Act of Mar. 30, 1822, ch. 13, § 10, 3 Stat. at 658), *aff'd sub nom.* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828). Justice Johnson also explained how the organic acts "constitute what may be properly termed the constitution of Florida." 1 F. Cas. at 661.

157. Akhil Amar points out the similarities between the privileges and immunities in the Florida organic act and the provisions in the Bill of Rights but does not mention the Ordinance's contribution to this organic act. AMAR, *supra* note 20, at 167. Indeed, the privileges and immunities as well as their phrasing are much more similar to the rights in the Ordinance than to the rights in the Bill of Rights. For example, like the Northwest Ordinance, the Florida organic act contains the right of bailability for all "cases, except for capital offences, where the proof is evident or the presumption great." NORTHWEST ORDINANCE OF 1787, art. II, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI. This wording is found nowhere in the Constitution. In addition, the rights appear in the Florida organic act in exactly the same order as in the first two Articles of Compact of the Ordinance (except that the protection for liberty and property—the due process guarantee—appears in the first line of the organic act), an order very different from that in the Bill of Rights. Also, the only rights that are not in the Ordinance but are in the organic act are the prohibition against ex post facto laws (also seen in the organic act for Missouri, cited *supra* note 99) and the immunity from excessive bail (though as discussed previously, the right of bailability for all but capital crimes where the presumption is great is preserved in this organic act—evidence that these two rights are distinct). The right to trial by jury is found in a separate section. Act of Mar. 30, 1822, ch. 13, § 10, 3 Stat. at 658. The only rights in the first two Articles of Compact of the Ordinance but missing from Florida's organic law are the privilege of "proportionate representation" and judicial proceedings according to the course of the common law. NORTHWEST ORDINANCE OF 1787, art II, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI. The omission of the common law provision likely stems from Florida being formerly

Finally, perhaps the best evidence that the Bill of Rights did not apply to the territorial governments is that numerous Congresses enacted dozens of organic acts spanning many decades that consistently invoked the privileges and immunities of the Northwest Ordinance as the rights of inhabitants.[158] Since there is significant overlap between the Northwest Ordinance and the Bill of Rights, such legislation would have been vain and idle if the Bill of Rights conferred special protection on citizens in the territories that it did not confer on the states. In addition, the organic acts for Florida[159] and Missouri[160] included immunity from ex post facto laws in addition to the privileges and immunities of the Northwest Ordinance. The Constitution specifically prohibits both the states and federal government from passing ex post facto laws, further evidence that provisions in the Constitution restricting the federal government did not protect territorial inhabitants from the acts of territorial governments. The Bill of Rights, as held in *Barron v. Baltimore*, only restricted the federal government. A century and a half removed from the cases discussed in the Section, in a world were the Court has incorporated most of the provisions of the Bill of Rights against the states, it is important to remember that the Bill of Rights was of minimal importance in antebellum America. Before the Fourteenth Amendment, the organic laws of the territories and the organic laws of the states (and not the Bill of Rights) provided the greatest protection of the fundamental rights of citizens of the United States.

C. Dred Scott*'s Assault on the Supremacy of Territorial Organic Law*

Dred Scott[161] dealt with the privileges and immunities of citizens of the United States in the federal territories. Dred Scott, who was born a slave, petitioned for his freedom based on his time spent on the free soil of the Northwest Territory: in Illinois, which had incorporated the Ordinance's free

under the control of Spain, which has no common law. In contrast to the great overlap between the Ordinance and Florida's organic act, many rights from the Bill of Rights are absent from Florida's organic act. For the purposes of this Note, the principles of the Northwest Ordinance are considered as built into the organic law of the territory of Florida. Despite the revealing parallels between the privileges and immunities of Florida's organic act and the Articles of Compact in the Ordinance, the connection is not as strong as for the territories explored in Part II of this Note.

158. See *supra* Part II for a detailed history of the territorial organic acts.

159. See *supra* note 157.

160. See *supra* note 99 for Missouri's organic act and *supra* note 157 for a discussion of Florida's organic act.

161. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

soil provision into its state constitution; and in the Wisconsin Territory, in which slavery was prohibited by both the Northwest Ordinance and the Missouri Compromise. As a free citizen, Scott would be entitled to the rights, privileges, and immunities of citizens of the United States. As Chief Justice Taney wrote in the Court's majority opinion:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, [guaranteed] by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.[162]

The case for the respondent was also based on the privileges and immunities of citizenship, that is, that slaves are property and citizens cannot be deprived of their property without due process of law. Faced with these competing claims of the rights of citizenship, Chief Justice Taney decided that Dred Scott was not and could never be a citizen of the United States.[163] Thus, Scott was not entitled to sue in federal court. The case should have ended there for want of jurisdiction. Instead, Chief Justice Taney continued with pages upon page of dicta that, among other things, greatly undermined the authority of the territorial organic acts and elevated the Bill of Rights in support of slavery.

While constricting the privileges and immunities for free blacks with one hand, he vastly extended the privileges and immunities of white citizens with the other. These "rights and privileges of" white citizens were, according to Chief Justice Taney, "regulated and plainly defined by the Constitution itself."[164] Chief Justice Taney then enumerated most of the protections in the Bill of Rights, which he asserted were protected in the territories against congressional action. Indeed, it is true that Congress could not restrict freedom of religion in the territories, for example. But could territorial governments? The Chief Justice thought not:

162. *Id.* at 403.

163. Chief Justice Taney considered whether the "class of persons described in the plea," namely free blacks descended from slaves, are "people of the United States" or "citizens," and therefore "constituent members of this sovereignty." *Id.* at 404. He decided that they were not, and that they "had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 405.

164. *Id.* at 449.

> And if Congress itself cannot [violate the Bill of Rights] — if it is beyond the powers conferred on the Federal Government — it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.[165]

As noted in Section IV.B, the case law was far from clear on whether territorial governments were bound by the Bill of Rights before *Dred Scott*. Further, as ignored by Chief Justice Taney, the citizens in the territories had their own bill of rights — the Articles of Compact in the Northwest Ordinance — that protected them against territorial governments. The Northwest Ordinance, not the Bill of Rights, prevented territorial governments from restricting freedom of religion in the territory. Indeed, the jurisdictions (Wisconsin and Illinois) to which Dred Scott was brought by his master were bound to respect the principles of the Northwest Ordinance, which included, alongside prohibitions of slavery, the following: "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land . . . ."[166] The dangers that Chief Justice Taney conjures — that Congress may authorize territorial legislatures to violate the privileges and immunities of citizens — are expressly neutralized by the words of the Ordinance. In the Northwest Ordinance, the prohibition on slavery coexisted with the rights to life, liberty, and property for seventy years before Chief Justice Taney questioned their association in his dicta. And the Ordinance declared that a man could be deprived of his property "by the judgment of his peers, or the law of the land," a phrase borrowed from Magna Carta and widely understood at the time as synonymous with due process of law.[167] Further, slavery was forbidden in the territory by the law of the land: indeed, the organic law of the land, meaning the Northwest Ordinance. Despite Taney's insistence that the free-soil principles violated due process of law, the Ordinance is a testament to the consistency of the prohibition of slavery with due process of law in America's organic law.

In addition to undermining the status of territorial organic law by elevating the Bill of Rights while ignoring the privileges and immunities protected by the numerous organic acts, Taney undermined the status of the organic acts directly by questioning Congress's constitutional authority to pass them. It

165. *Id.* at 451.

166. NORTHWEST ORDINANCE OF 1787 § 14, art. II, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

167. *See* Williams, *supra* note 6, at 428-34 (discussing the public understanding of the phrases "due process of law" and "the law of the land" in late eighteenth-century America).

should be noted, however, that the Court never questioned the authority of the Ordinance itself, merely the extension of the Ordinance's principles to other territories. Indeed, Chief Justice Taney spends most of the second half of his opinion describing why Congress under the Articles had the authority to pass the Northwest Ordinance in 1787.[168] In addition, according to Chief Justice Taney, Congress had the authority to "reenact"[169] the Ordinance in the First Congress by relying upon the Territory Clause,[170] but Congress lacked the authority to pass organic acts for new territories that outlawed slavery. According to Taney, the Territory Clause applied only to the Northwest Territory (and other territory possessed by the states at the time the Constitution was drafted) and not to any territories acquired from foreign governments after 1789. Thus, in Chief Justice Taney's view, at the very least Congress could not extend the prohibition on slavery found in Article Six of the Ordinance to other territories.

Though enraged by the *Dred Scott* decision, Republicans and free-soil Democrats were more upset by Taney's insistence that free blacks could not be citizens of the United States who could enjoy the privileges of citizenship and that slavery could not be banned in the territories than they were by his definition of the privileges and immunities of citizens of the United States. In particular, they did not object that the Bill of Rights would be applicable in the territories, though they did not think that slavery was protected absolutely by the Due Process Clause of the Fifth Amendment. For Republicans such as Abraham Lincoln, John Bingham, and Jacob Howard, who all grew up in states carved out of the Northwest Territories, the privileges and immunities protected by their state constitutions were the privileges and immunities of the

168. *Dred Scott*, 60 U.S. at 432-54.

169. Chief Justice Taney wrote:

> And, among the earliest laws passed under the new Government, is one reviving the ordinance of 1787, which had become inoperative and a nullity upon the adoption of the Constitution. This law introduces no new form or principles for its government, but recites, in the preamble, that it is passed in order that this ordinance may continue to have full effect, and proceeds to make only those rules and regulations which were needful to adapt it to the new Government, into whose hands the power had fallen.

Id. at 438. Chief Justice Taney believed that the Ordinance needed to be revived, but an alternative interpretation is that the Ordinance continued to be active and that the act to which the Chief Justice refers merely allowed the new Constitution and the Ordinance to work together. For a discussion of this interpretation, see *supra* Part I.

170. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . ." U.S. CONST. art. IV, § 3, cl. 2.

Northwest Ordinance. The Bill of Rights, to them, may have been an adequate expression of the principles of republican organic law, principles that were protected by the Ordinance with respect to the territories and states. Thus, the principles of the Ordinance were not forgotten but rather partially subsumed by the Bill of Rights or incorporated and protected in state constitutions. An organic law theory of the Fourteenth Amendment would thus include protection for the privileges and immunities enumerated in the Northwest Ordinance, even if the Ordinance was no longer active organic law during Reconstruction, because the Ordinance's principles were incorporated into state organic law as well as the post-*Dred Scott* understanding of the Bill of Rights.

V. THE ORDINANCE DURING RATIFICATION AND RECONSTRUCTION: THE ORGANIC LAW OF THE FRAMERS OF THE FOURTEENTH AMENDMENT AND THE JUSTICES IN THE *SLAUGHTERHOUSE CASES*

This final Part considers the relation of the history of the Northwest Ordinance presented in this Note to the conceptions of privileges and immunities embraced by the Framers of the Fourteenth Amendment and the Justices in the *Slaughterhouse Cases*. The rights, privileges, and immunities protected by the organic law of the United States—particularly the Bill of Rights and the Northwest Ordinance—were exactly the sort of rights the Fourteenth Amendment's Framers intended to protect.

A. The Importance of the Northwest Ordinance to the Framers of the Fourteenth Amendment

The Fourteenth Amendment's two principal Framers—Senator Jacob Howard and Representative John Bingham—hailed from states northwest of the Ohio River. Both understood the Privileges or Immunities Clause to protect the fundamental rights enumerated in America's organic law, and they made these views clear to their fellow congressmen through various congressional speeches.

In a speech explaining Section One of the Fourteenth Amendment, which appeared on the front pages of both the *New York Times* and the *New York Tribune*,[171] Senator Howard defined two categories of rights that would be

171. *Thirty-Ninth Congress, First Session*, N.Y TIMES, May 24, 1866, at 1; *XXXIXth Congress. First Session*, N.Y. TRIBUNE, May 24, 1866, at 1.

protected by the Fourteenth Amendment: the "fundamental rights" of citizens of the several states, and the "personal rights [guaranteed] and secured by the first eight amendments of the Constitution."[172] In order to describe the first class of rights—the fundamental rights of citizens protected by the states—Howard quoted[173] the circuit court opinion of Justice Washington in *Corfield v. Coryell* that glossed the Privileges and Immunities Clause.[174] It is worth noting that Justice Washington, like Senator Howard, interpreted the Privileges and Immunities Clause of Article IV narrowly; that is, he confined

> these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens

172. CONG. GLOBE, 39th CONG., 1st SESS. 2765 (1866).

173. Although a citation to *Corfield* appeared in the papers mentioned in *supra* note 171, Justice Washington's dicta was not printed.

174. Some jurists and historians, in order to exclude the Federal Bill of Rights from the purview of the Fourteenth Amendment, have argued that the Privileges or Immunities Clause only protects those rights that are protected under the Comity Clause of Article Four. *See, e.g.*, Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557870. Even under this reading of the Privileges or Immunities Clause, fundamental rights enumerated in the Northwest Ordinance would still be protected by the Fourteenth Amendment. The privileges and immunities of the Ordinance are certainly a subset of "all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. Indeed, they are the subset of the privileges and immunities of citizens that are common among the states. In other words, they are the privileges and immunities in the intersection of the privileges and immunities of the several states. Before the Fourteenth Amendment, they were the only privileges and immunities that were officially privileges and immunities of both citizens of the United States and citizens of all of the several states besides a few provided by clauses in the original Constitution (such as the immunity from ex post facto laws). U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed. . . . No Title of Nobility shall be granted by the United States . . . ."); *id.* § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto law . . . or grant any Title of Nobility."). As restrictions on both federal and state governments, these few immunities—immunities against ex post facto laws, bills of attainder, and titles of nobility—are also properly regarded as privileges and immunities of citizens of the United States. Another is the privilege of having a republican state government. The guarantee of a republican form of government was provided first in the Northwest Ordinance and later in the Constitution. Even though the federal government lacked a mechanism for protecting them against state abridgment before the Fourteenth Amendment, the privileges and immunities of the Northwest Ordinance were nonetheless protected everywhere in the United States against infringement throughout the nineteenth century: by the organic acts in the territories and by the state constitutions in the states.

> of the several states which compose this union, from the time of their becoming free, independent, and sovereign.[175]

In other words, Washington and Howard considered the Privileges and Immunities Clause as protecting only those privileges and immunities that were protected by the organic law of the states. As explained in Part III, the set of privileges and immunities articulated in the Northwest Ordinance represents not only a self-conscious enumeration of the privileges and immunities common among the original thirteen states but also a declaration of those privileges and immunities that will form the basis of the organic law of the states carved out of the territories. Although neither Washington nor Howard refers to the Ordinance, the rights that Washington enumerates as fundamental are many of the same privileges and immunities contained in the Northwest Ordinance. In the section of the *Corfield* opinion that Howard quoted from approvingly in the Senate,[176] Washington declared:

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many

175. Corfield v. Coryell, 6 F. Cas. 546, 551 (No. 3,230) (C.C.E.D. Pa. 1823); *see also* CONG. GLOBE, 39TH CONG., 1st SESS. 2765 (1866) (reporting Senator Howard's recitation of the *Corfield* dicta).

176. CONG. GLOBE, 39th CONG., 1st SESS. 2765 (1866).

> others which might be mentioned, are, strictly speaking, privileges and immunities . . . .[177]

Most of the rights mentioned by Justice Washington are those protected by the Northwest Ordinance, including benefits of habeas corpus, the right to judicial proceedings, the preservation of liberty and property, and the immunity from inequitable taxation. Besides the general right to pursue and obtain happiness and safety (which are implicit in the Ordinance and are part of the organic laws of the United States through the Declaration of Independence), the only concrete right mentioned by Washington in *Corfield* that is not in the Ordinance is the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[178] The Ordinance does, however, express support for the right to travel: "The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free . . . ."[179] Further, the Ordinance declares that it is subject to the Articles of Confederation, and the fourth of those Articles (which, like the Constitution's Article IV contains a Privileges or Immunities Clause) declares: "[T]he people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."[180] The Northwest Ordinance thus protected every right mentioned in *Corfield*, especially considering that the Ordinance explicitly incorporated the Articles of Confederation.

Though neither Howard nor Washington mentioned the Northwest Ordinance, they certainly understood the importance of state organic law. It is not surprising that Justice Washington would find these rights easy to enumerate or that Senator Howard would approvingly quote Washington's obscure opinion[181] "adjudged," in Howard's words, "many years ago in one of

177. *Corfield*, 6 F. Cas. at 551-52.

178. *Id.* at 552.

179. NORTHWEST ORDINANCE OF 1787 § 14, art. IV, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVII ("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.").

180. ARTICLES OF CONFEDERATION of 1781, art. IV.

181. According to Robert Natelson, the *Corfield* opinion only became famous after the Civil War and the ratification of the Fourteenth Amendment. *See* Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1125 n.30 (2009).

the circuit courts of the United States."[182] Privileges and immunities of the United States were so well established that they hardly needed to be spelled out in a judge's dicta or on the floor of Congress. In Howard's view these rights articulated by Washington and the first eight amendments to the Constitution formed the privileges and immunities of the United States. In other words, for Howard, it was the organic laws of the United States, as well as of the several states that defined the privileges and immunities of citizens of the United States.

Howard's counterpart in the House of Representative and the other key Framer of Section One of the Fourteenth Amendment, Representative John Bingham, sometimes took a more restrictive view of the Privileges or Immunities Clause. Representative Bingham sometimes insisted that it had the sole effect of incorporating the Bill of Rights. Nevertheless, the Northwest Ordinance was essential to the development of his conception of privileges and immunities, and thus even if he thought that the Bill of Rights adequately expressed the fundamental principles of American organic law, his understanding of organic law was primarily shaped by the Northwest Ordinance. For example, he cited the second Article of Compact of Northwest Ordinance along with the Comity Clause when objecting to a section of the Oregon Constitution in 1859.[183] Indeed, Professor Howard Graham has noted that Bingham's rhetoric about fundamental or "natural and inherent rights" developed largely from arguments that applied to the territories and to the Northwest Ordinance.[184] It was only in 1866 that Bingham turned his attention to *Barron* and the Bill of Rights.[185] His goal in framing the Privileges or Immunities clause can thus be considered a conscious effort to apply the Bill of Rights against the states in the very way that the Northwest Ordinance applied in the territories.[186] Perhaps he thought the Bill of Rights accurately expressed the core privileges and immunities of the organic law of the United States—privileges and immunities he enjoyed as a citizen of Ohio and which developed in his early speeches with explicit reference to the Northwest Ordinance. It is

182. CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866).

183. CONG. GLOBE, 35TH CONG., 2ND SESS. 984 (1859) (arguing that Oregon's constitution violates many of the privileges and immunities provided in the Ordinance's Articles of Compact); *see* Graham, *supra* note 105, at 393 (focusing on Bingham's use in the congressional debates of the Due Process Clauses of the Ordinance and the Fifth Amendment of the Constitution).

184. Graham, *supra* note 105, at 397 & n.89.

185. *Id.* at 397 n.89.

186. *See* AMAR, *supra* note 20, at 158 (discussing the importance of the Ordinance to Representative Bingham).

clear, however, that his understanding of the privileges and immunities of citizens derived from both the Northwest Ordinance and the Bill of Rights.

B. The Privileges and Immunities of the Northwest Ordinance and the Slaughterhouse Cases

The *Slaughterhouse Cases*[187] were the Court's first interpretation of the various clauses of the Fourteenth Amendment. The plaintiffs, butchers from Louisiana, argued that a state statute, granting to a corporation the exclusive privilege of creating and maintaining slaughterhouses within New Orleans and other parishes of Louisiana,[188] was unconstitutional. They alleged that the monopoly granted to the Slaughter-House Company deprived them of "the right to exercise their trade."[189] Justice Miller, writing for the majority, rejected this basic argument, for the statute did not "prevent the butcher from doing his own slaughtering."[190] Rather, "he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place."[191]

Further, although not essential to his holding, since the right to exercise a trade was not impaired, Justice Miller presented in dicta the Court's first construction of all the clauses in Section One of the Fourteenth Amendment. He examined the Privileges or Immunities Clause in greatest detail. Justice Miller drew a distinction between the rights of federal citizens and the rights of state citizens.[192] For Justice Miller, only the rights of federal citizenship were considered "privileges or immunities of citizens of the United States" and were protected by the Fourteenth Amendment:

> Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever

187. 83 U.S. (16 Wall.) 36 (1873).

188. *Id.* at 59-60.

189. *Id.* at 60.

190. *Id.* at 61.

191. *Id.*

192. *Id.* at 72-74.

> they may be, are not intended to have any additional protection by this paragraph of the amendment.[193]

Justice Miller then quoted from Justice Washington's opinion in *Corfield*, as well as the Privileges and Immunities Clauses of both the Articles of Confederation and the Constitution,[194] in order to establish the substance of the privileges and immunities of state citizenship. He described these rights as "those rights which are fundamental" (quoting from *Corfield*), "civil right[s] for the establishment and protection of which organized government is instituted," and "the class of rights which the State governments were created to establish and secure."[195] These rights are the privileges and immunities of state organic law. They are the privileges and immunities that the Northwest Ordinance standardized and spread through the territories and states. Because of the Ordinance, they are the rights common to free citizens in all states. They are the exact rights that Senator Howard and the other Framers of the Fourteenth Amendment declared would be protected by the Privileges or Immunities Clause.

Unlike the four dissenters in *Slaughterhouse*, Justice Miller did not think that these fundamental rights, protected by the Northwest Ordinance and state organic laws, were embraced by the Privileges or Immunities Clause of the Fourteenth Amendment. One of Justice Miller's fears appears to have been that the power of the federal government would become unlimited,[196] a fear compounded if these fundamental rights lacked a textual source and Justices would be free to invent rights or capriciously alter their scope. Justice Miller does not seem to have considered that the Northwest Ordinance bounded the scope of fundamental rights protected by the Fourteenth Amendment and provided a solution to this potential Pandora's box of privileges and immunities.

In addition, by ignoring the role of the Northwest Ordinance, Justice Miller made a critical error of history. He wrote:

> It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection,

193. *Id.* at 74.

194. *Id.* at 75-76.

195. *Id.*

196. *Id.* at 77-78 (expressing fear of the unlimited power of Congress to protect the "privileges or immunities of citizens" as well as the power of the courts to nullify state laws).

> beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts.[197]

Contrary to Justice Miller's confident assertion, the privileges and immunities of state organic law depended crucially on the federal government for their spread throughout the territories of the United States as well as for their protection. The Northwest Ordinance and the various territorial organic acts were enactments of the federal government that spread the organic law of the territories and the states to all parts of the United States, extending the Northwest Ordinance's blessings of liberty to all citizens of the United States.[198] Further, the federal government allowed new states into the Union only when they formed state governments and state constitutions that were consistent with the privileges and immunities of the Northwest Ordinance.[199] Thus, Justice Miller's assertion that the privileges and immunities of state citizens did not depend upon the federal government for their existence and protection, the crux of his argument against their incorporation through the Fourteenth Amendment, is belied by the history presented in this Note.

CONCLUSION

The Northwest Ordinance shaped not only the foundation of the United States through its rules for state admission but also the substance of privileges and immunities enjoyed by citizens of the several states and of the United States. This Note demonstrates how the principles of the Northwest Ordinance spread through the whole territorial expanse of America in the early nineteenth century. This Note also shows how the principles of the Ordinance made their way into state organic law, which figured prominently in the debates over the Fourteenth Amendment. In light of this history, the Northwest Ordinance should be considered a primary source for understanding the fundamental rights that are protected by the Fourteenth Amendment against state abridgment.

The Note does not, however, claim that the Ordinance is the only source of the rights that should be protected by the Fourteenth Amendment's Due Process Clause and Privilege or Immunities Clause. The essence of an organic

197. *Id.* at 77.

198. *See supra* Part II.

199. *See supra* Part III.

law theory of the Fourteenth Amendment is that all of the privileges and immunities articulated in the organic law of the United States should be protected against abridgement. This body of organic law includes the privileges and immunities laid out in the Constitution and the Bill of Rights, as well as those contained in the Articles of Confederation and in the Declaration of Independence. Indeed, there is a strong overlap between the principles of the Bill of Rights and those of the Northwest Ordinance. Principles enshrined in both documents deserve special protection against state abridgment and should be viewed as composing the core of the privileges and immunities of citizens. Further, while the Ordinance strongly protects freedom of religion (and almost all of the other personal rights explicit or implicit in the Bill of Rights), protection for speech is conspicuously absent. This Note does not contend, however, that freedom of speech should lie unprotected because it is absent from the Ordinance. Instead, freedom of speech is a fundamental part of the organic laws of the states[200] as well as the Bill of Rights, and thus it should continue to be protected against abridgment.

Nonetheless, while we can and should identify other sources for American organic law and for the privileges and immunities of citizens that are protected by the Fourteenth Amendment, the Northwest Ordinance may be America's most effective expression of personal rights. Unlike the Bill of Rights, the Northwest Ordinance does not raise any questions about which limitations are specific to Congress and which are general and should apply to the states. Every privilege and immunity in the Ordinance's Articles of Compact of the Northwest Ordinance can be applied to the states immediately and completely, without doing violence to existing Fourteenth Amendment jurisprudence. Some of the rights, which find additional textual support in the first eight amendments to the Constitution (such as immunity from cruel and unusual punishment and from uncompensated takings), are already protected by the Fourteenth Amendment. Some rights, which appear in both the Northwest Ordinance and the Bill of Rights (such as the immunity from excessive fines), have never been incorporated,[201] and this Note strongly suggests that they should be.

200. Freedom of speech was also protected by most state constitutions in 1868, during the Fourteenth Amendment's ratification. It was thus a nearly universal component of state organic law despite not appearing in the Ordinance. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 42 (2008) ("[A] full thirty-two out of thirty-seven—or more than three-quarters—of the states in 1868 explicitly and textually protected the right to free speech.").

201. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3034 & n.12 (2010).

Rights that receive the Court's protection and yet lack a clear textual basis are buttressed by the Northwest Ordinance. For example, in *Gray v. Sanders*, the Warren Court declared: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."[202] While all these documents express principles of U.S. organic law, none of them clearly articulates the right of "one person, one vote." But these principles can easily be found in the Northwest Ordinance: "The inhabitants of the said territory shall always be entitled to . . . a proportionate representation of the people in the legislature."[203] The Ordinance's support for proportional representation can thus be used to provide a textual basis for the Court's one-person-one-vote cases.[204]

Other rights – not yet protected by the Court and not found in other sources of federal organic law – should nevertheless be incorporated against the states by virtue of their appearance in the Northwest Ordinance. For example, a privilege of citizenship contained in the Ordinance and not in the Bill of Rights is bailability. The Bill of Rights does provide immunity from excess bail, a provision that Court has never formally incorporated against the states.[205] The Ordinance suggests, however, that the rights to bail to which citizens are entitled with respect to state governments are even stronger than those to which citizens are entitled with respect to the federal government. Citizens are entitled to bail for all crimes except capital crimes "where the proof shall be evident or the presumption great."[206]

Another advantage that the Northwest Ordinance possesses over the other main sources of federal organic law is that it was crafted by the people of established states to apply to the citizens of future states. Thus, its principles were forged behind a veritable "veil of ignorance"[207]: the people who were defined the principles of the Ordinance were not expanding or curtailing any of their own freedoms; rather, they were providing the foundation for states yet to be formed – states in which it was conceivable some of their progeny would

202. 372 U.S. 368, 381 (1963).

203. NORTHWEST ORDINANCE OF 1787 § 14, art. II, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

204. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

205. *See supra* note 26.

206. NORTHWEST ORDINANCE OF 1787 § 14, art. II, *reprinted in* 1 UNITED STATES CODE, *supra* note 2, at LVI.

207. *See generally* JOHN RAWLS, A THEORY OF JUSTICE 118-23 (rev. ed. 1999) (discussing the conditions of a veil of ignorance).

eventually settle. They had every reason to aim for just principles rather than private gain.

We should therefore understand the Northwest Ordinance for what it is officially: one of four documents that comprise the organic law of the United States. The Fourteenth Amendment and the substantive protections in the Northwest Ordinance are independent yet complementary parts of the official organic law of the United States. Both can be appreciated and invoked separately. The Northwest Ordinance encapsulates exactly the type of rights deeply rooted in "this Nation's history and tradition" that easily satisfy any of the Court's tests for substantive due process protection.[208] In addition, the principles of the Ordinance could be incorporated via the Guarantee Clause of the Constitution, which guarantees "to every State in this Union a Republican Form of Government."[209] Interpreted in light of the Northwest Ordinance, the Guarantee Clause could conceivably mean that a state must not only elect officials but also respect the republican principles—the privileges and immunities—of the Ordinance. Indeed, respecting both was a prerequisite for acquiring statehood. If so, then protecting both should also be essential for remaining in good standing with respect to other states.

The Northwest Ordinance is a supremely democratic act in its origins and purposes. It passed easily and unanimously in 1787. Its principles were reaffirmed and extended not only by the First Congress in 1789 but also by numerous Congresses and states throughout the eighteenth and nineteenth centuries. No other document in our nation's history can boast such a democratic pedigree, one that precedes the Constitution and the Bill of Rights. The Ordinance's purposes include the protection of republican liberties on all American soil. The Northwest Ordinance was clearly meant to apply to the states. It applied to them when they were territories. It applied to them when they applied for statehood. Before the Fourteenth Amendment, the Ordinance did not apply to them after they had become states,[210] and it is this defect that the Fourteenth Amendment was designed to rectify.

There are some principles that governments cannot abridge, not even by acts of popular sovereignty. There are some rights that are inalienable, that are essential to all free republics. These are the privileges and immunities of

208. See *supra* Introduction for further discussion of the tests for substantive due process protection and the reasons that the fundamental rights in the Ordinance easily pass these tests.

209. U.S. CONST. art. IV, § 4, cl. 1.

210. The Ordinance at least did not apply directly to states after 1850. *See supra* Part IV. Its principles were, however, incorporated into state constitutions. *See supra* Part III.

citizens of the United States. These are the rights enumerated in the Northwest Ordinance.