

The Founders' Common-Law Empire

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INTRODUCTION

The Northwest Ordinance of 1787 once had a sure spot in our constitutional canon. The New Deal Congress celebrated it as “one of the greatest civil documents of all time,” in part because it marked “a complete change in the method of governing new communities formed by colonization.”¹ Rejecting the European model of “second-class colonies,” the Ordinance instead framed an “empire of liberty” that treated old states and new territories as equals.² That view still has prominent defenders: Professor Akhil Amar “celebrates” the Ordinance’s “strong anti-imperialist thrust,”³ while Judge Sutton would put it “on a Mount Rushmore of American laws.”⁴

But most historians these days take a dimmer view. Their oldest and most frequent critique concerns the Ordinance’s role in dispossessing Natives,⁵ though historians continue to debate its intentions and implications for

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1. H.R. J. Res. 208, 74th Cong., ch. 249, 49 Stat. 511 (1935).

2. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 122 (2009); accord ERIC HINDERAKER, *ELUSIVE EMPIRES: CONSTRUCTING COLONIALISM IN THE OHIO VALLEY, 1673-1800*, at xiii (1997).

3. AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760-1840*, at 683 (2021); see also Edmund S. Morgan, *Conflict and Consensus in the American Revolution*, in *ESSAYS ON THE AMERICAN REVOLUTION* 289, 306 (Stephen G. Kurtz & James H. Hutson eds., 1973) (“The Northwest Ordinance . . . saved the nation from future attempts to make subordinate colonists out of its western emigrants.”); cf. A.G. HOPKINS, *AMERICAN EMPIRE: A GLOBAL HISTORY* 236–37 (2018).

4. JEFFREY S. SUTTON, *WHO DECIDES: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION* 105 (2021).

5. See, e.g., AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 109 (2010).

Native Americans.⁶ More recent work has added another charge: that the Ordinance enabled not just settler colonialism but colonialism *simpliciter*. “[F]rom the beginning,” Gregory Ablavsky argues, “the United States, like its British predecessor, was an empire that excluded its subjects . . . from self-governance.”⁷ Until territorial inhabitants obtained statehood, everyone in the Old Northwest—even white, propertied men—was under the sway of an eastern metropole. Rather than forging an “empire of liberty,” the Ordinance of 1787 reprised the very style of empire that Americans had purported to reject.⁸

This dispute over the character of the Northwest Ordinance has practical implications. As the legal academy has now come to remember, the United States controls several overseas territories, including American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Each has a distinctive status, but they are all colonies, guaranteed neither statehood nor independence, and their inhabitants lack many rights enjoyed by other Americans. In the early twentieth century, the Supreme Court endorsed this arrangement in a series of decisions known as the *Insular Cases*.⁹ Critics of those cases have cited the Northwest Ordinance as evidence of those decisions’ infirmity.¹⁰ According to those critics, the Ordinance of 1787 represents the only authentic model of American empire: equal laws during a brief period of territorial rule, followed by a path to statehood.¹¹ But if the revisionists are right and the United States has always

6. See, e.g., Jack N. Rakove, *Ambiguous Achievement: The Northwest Ordinance*, in *THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY* 1 (Frederick D. Williams ed., 1988); Michael Witgen, *A Nation of Settlers: The Early American Republic and the Colonization of the Northwest Territory*, 76 WM. & MARY Q. 391 (2019).

7. Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1664 (2019).

8. See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 187 (2009); JULIAN GO, *PATTERNS OF EMPIRE: THE BRITISH AND AMERICAN EMPIRES, 1688 TO THE PRESENT* 48–49 (2011); Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 32–33 (2023); R. Douglas Hurt, *Historians and the Northwest Ordinance*, 20 W. HIST. Q. 261, 267–68 (1989) (summarizing similar arguments by earlier historians); cf. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1727, 1774 (2002) (comparing the power of the territorial governor to that of “British monarchs and royal colonial governors”); Jessica Choppin Roney, *1776, Viewed from the West*, 37 J. EARLY REPUBLIC 655, 679 (2017) (“Out west, the people, elsewhere deemed to have the ‘supreme power,’ would in fact be beholden to an eastern legislature . . .”).

9. See José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 436–42 (1978).

10. See, e.g., *Igartua v. United States*, 626 F.3d 592, 618 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part); Gustavo A. Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawaii, and the Philippines*, FED. LAW. 22, 22 (2011); Pedro Capó Rodríguez, *Colonial Representation in the American Empire*, 15 AM. J. INT’L L. 530, 541 (1921); cf. *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1678 n.3 (2020) (Sotomayor, J., concurring in the judgment); GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 188–89* (2008) (critiquing the *Insular Cases* from an originalist perspective).

11. The “statehood” part is controversial, particularly in Puerto Rico. See Christina D. Ponsa-Kraus,

treated its territories like European colonies, then this historical critique lacks bite. And that might have doctrinal consequences. In a recent opinion calling for the *Insular Cases* to be overruled, Justice Gorsuch argued that America's imperial constitution must be squared with "the Nation's historical practices."¹² If his colleagues agree, then much depends on what those practices were.

With that backdrop in mind, this Essay offers a reappraisal of the Northwest Ordinance. Perhaps it isn't "one of the greatest civil documents."¹³ But it nonetheless embodied a distinctive imperial vision that differed both from its British predecessor and from its post-1898 successor. That vision emphasized not only statehood but also a particular approach to pre-statehood governance. The key to understanding it lies in one of the Ordinance's least-studied provisions: that the "French and Canadian inhabitants" of Illinois might retain "their laws and customs now in force among them, relative to the descent and conveyance, of property."¹⁴ By explaining that obscure phrase, this Essay illuminates the kind of empire that the Ordinance was meant to build—and, perhaps, suggests some new ways to think about the American empire today.

I. A REVOLUTION IN FAVOR OF EMPIRE

The United States was not the first empire to govern what became the Northwest Territory. The area, long an indigenous homeland,¹⁵ had been claimed by France in the seventeenth century and ceded to Britain in 1763. As others have noted, the Northwest Ordinance was in many ways a repudiation of Britain's approach to ruling the region.¹⁶ Let's start, then, by understanding Britain's model of empire and why Americans rejected it.

A. Patriot Empire

The American Revolution has been described as a "revolution against

Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in Aurelius, 130 YALE L.J. F. 101, 105 (2020). Nonetheless, invocations of the Northwest Ordinance are not limited to proponents of statehood. See, e.g., JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 150 (1985); JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 110–11 (1997).

12. United States v. Vaello Madero, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring).

13. H.R. J. Res. 208, 74th Cong., ch. 249, 49 Stat. 511 (1935).

14. Northwest Ordinance of 1787, ch. 8, 1 Stat. 50 (1789).

15. HINDERAKER, *supra* note 2, at 26–28; ROBERT MICHAEL MORRISSEY, EMPIRE BY COLLABORATION: INDIANS, COLONISTS, AND GOVERNMENTS IN COLONIAL ILLINOIS COUNTRY 51–59 (2015).

16. See, e.g., AMAR, *supra* note 3, at 177; Ollivier Hubert & François Furstenberg, *Introduction: Entangling the Quebec Act*, in ENTANGLING THE QUEBEC ACT: TRANSNATIONAL CONTEXTS, MEANINGS, AND LEGACIES IN NORTH AMERICA AND THE BRITISH EMPIRE 3, 21 (Ollivier Hubert & François Furstenberg eds., 2020).

empire.”¹⁷ But it sought to overthrow a particular kind of imperial rule, not empire per se.¹⁸ For American Patriots and like-minded Britons, the British Empire was properly understood as an egalitarian enterprise (at least for white Protestant men), in which the metropole and its colonies worked together toward a common imperial good.¹⁹

Shared access to English law played an important part in this imperial vision. A *common* law for the empire both reflected and guaranteed the equal status of all British subjects, whether they lived in England or overseas.²⁰ A common law was also important for holding the empire together. Patriots insisted that each colony ought to govern itself and that Parliament should have a minimal role in superintending the empire, in what one historian has dubbed a “protofederalist” polity.²¹ In the absence of a domineering central government, the empire’s cohesion depended on Britons’ allegiance to the same Crown and the same kind of law.²² As Benjamin Franklin put it, it was important for colonial laws to be “agreeable to the laws of England” in order “to preserve the connection of the parts of the British empire with the whole, of the members with the head.”²³

Franklin summarized the Patriot perspective in a 1768 letter to a London newspaper. He defined “[t]he British state or empire” as “several islands and other distant countries . . . *all united in allegiance to one Prince*, and to the *common law* (Scotland excepted).” (Note, by the way, his casual conflation of “empires” and “states”: unlike modern theorists, he didn’t assume that empires and nation-states were fundamentally different from each other.²⁴) Each British “province” had its own “right of legislation.” If it were otherwise—if the Westminster Parliament could legislate for Americans—then colonists would cease to be “fellow subjects” of George III and would instead become “subjects of subjects.”²⁵

Such “subjects-of-subjects” arguments were a common theme in Patriot

17. JUSTIN DU RIVAGE, *REVOLUTION AGAINST EMPIRE: TAXES, POLITICS, AND THE ORIGINS OF AMERICAN INDEPENDENCE* (2017).

18. *Id.* at 245.

19. STEVE PINCUS, *THE HEART OF THE DECLARATION: THE FOUNDERS’ CASE FOR AN ACTIVIST GOVERNMENT* 20–23 (2016).

20. CHRISTIAN R. BURSET, *AN EMPIRE OF LAWS: LEGAL PLURALISM IN BRITISH COLONIAL POLICY* 69 (2023).

21. Amy Watson, *The New York Patriot Movement: Partisanship, the Free Press, and Britain’s Imperial Constitution, 1731–39*, 77 WM. & MARY Q. 33, 37 (2020); *see also* ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 44–59 (2010).

22. *See* T.T. Arvind & Christian R. Burset, *Partisan Legal Traditions in the Age of Camden and Mansfield*, 20 OXFORD J. LEGAL STUDS. 1 (2024).

23. Benjamin Franklin, *Reasons and Motives for the Albany Plan of Union* [July 1754], FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-05-02-0109>.

24. *Cf.* Daniel J. Hulsebosch, *Constitution-Making in the Shadow of Empire*, 56 AM. J. LEGAL HIST. 84, 85 (2016) (“Empire and nation were overlapping concepts for revolutionary Americans.”).

25. Benjamin Franklin, *Subjects of Subjects* (Jan. 1768), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-15-02-0019>.

writing, and historians have tended to read them as sounding in sovereignty and self-government.²⁶ That's not wrong. But a sovereignty-focused interpretation misses one of Patriots' even more basic concerns: the fear of unequal treatment.²⁷ Many colonists objected to parliamentary rule not (only) because of they lacked representation at Westminster, but because they worried that an unrepresentative Parliament would target them unfairly.

This fear of unequal treatment informed Patriots' attempts to distinguish between proper and improper exercises of parliamentary authority. Alexander Hamilton, for example, conceded that Parliament might legislate for colonies via "*general* acts for the amendment of the common law, and for the *general* regulation of trade."²⁸ But he objected to "*special* laws, to bind the colonies, in particular."²⁹ The difference between "*general*" and "*special*" laws had less to do with democratic deficits—colonists were unrepresented either way—than with discrimination. Similarly, Franklin thought "the essential difference between *real* and *virtual* representations" boiled down to generality: "The laws made [in Britain] to tax the Americans affect them as a distinct body, in which the law makers are in no manner whatever, comprehended; whereas the laws made to tax Great-Britain, affect alike every member who gives his concurrence to such law."³⁰ Colonists preferred to govern themselves through their own colonial institutions. But when that wasn't possible—when Parliament had to legislate on an imperial scale—they sought safety in laws that bound all British subjects equally, regardless of where they happened to live.

B. Patriots' Nightmare: The Quebec Act

That was the Patriot ideal of how the British Empire ought to operate. In the 1760s and 1770s, however, Britain was mostly led by politicians with a very different sense of how Britain's empire should work. Paternalist reformers such as George Grenville and William Knox rejected Patriots' egalitarian, "protofederalist" model of empire. Instead, they insisted that

26. See, e.g., 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 76–82 (1986).

27. Cf. Steven Pincus, *Confederal Union and Empire: Placing the Albany Plan (1754) in Imperial Context*, in SCOTLAND AND THE WIDER WORLD: ESSAYS IN HONOUR OF ALLAN I. MACINNES 167, 182 (Neil McIntyre & Alison Cathcart eds., 2022) (noting that American colonists were relatively slow "to develop a critique of parliamentary sovereignty").

28. [Alexander Hamilton], *The Farmer Refuted* ([Feb. 23] 1775), FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-01-02-0057> (emphasis added).

29. *Id.* (emphasis added); see also Novanglus [John Adams], *To the Inhabitants of the Colony of Massachusetts-Bay*, 6 March 1775 (March 6 1775), FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-02-02-0072-0008> (allowing for parliamentary legislation "from the necessity of a case not provided for by common law").

30. Franklin, *supra* note 25; see ALAN HOUSTON, BENJAMIN FRANKLIN AND THE POLITICS OF IMPROVEMENT 172–73 (2008).

colonies (and colonists) must be politically and economically subordinate to the mother country.³¹ Like the Patriot model, the paternalist view of empire also had a corollary in law. Because colonists were not equal to Britons, they had no right to the same law. Nor did paternalists think a common law was needed to hold the empire together. Imperial unity depended on the coercive force of an imperial Parliament and its bureaucratic agents, not vague loyalty to an amorphous common law.³²

Britain's treatment of Quebec and the Illinois Country provided a perfect example of the kind of empire that paternalist reformers wanted to build—and that American Patriots feared. Quebec and Illinois had both come to Britain from France via the 1763 Treaty of Paris. But Britain was ambivalent about its new acquisitions and sought to suppress their growth, for reasons I've explained elsewhere.³³ Imperial officials experimented with a variety of techniques to discourage those colonies' settlement,³⁴ until in 1774 Parliament finally settled on the Quebec Act.³⁵ That legislation restored French law for civil disputes, provided for an appointed legislative council (but no assembly), and made several accommodations for Quebec's Catholic majority. The statute also redefined "Quebec" to include much of what is now the midwestern United States, including Illinois and the rest of what would become the Northwest Territory.³⁶

The Quebec Act's most controversial provision was its revival of French law³⁷—or, to take the more negative framing of the Declaration of Independence, its "abolishing the free System of English Laws" in Quebec.³⁸ For American Patriots and sympathetic Britons, denying English law to Quebec was the central pillar of an authoritarian program that would soon be extended across North America.³⁹ (The Act's defenders preferred to frame it as a humanitarian gesture that respected *Canadiens'* preference for familiar law; more on that below.⁴⁰) To be sure, Patriots also criticized

31. See, e.g., JAMES M. VAUGHN, *THE POLITICS OF EMPIRE AT THE ACCESSION OF GEORGE III: THE EAST INDIA COMPANY AND THE CRISIS AND TRANSFORMATION OF BRITAIN'S IMPERIAL STATE* 12–13 (2019).

32. See Arvind & Burset, *supra* note 22.

33. BURSET, *supra* note 20, at 39–89.

34. See Christian R. Burset, *Arbitration and Empire: The Anti-Adjudicatory State in Bengal and British America, 1763–1775*, in *LEGAL HISTORIES OF EMPIRE: NAVIGATING LEGALITIES* (Lyndsay Campbell & Shaunnagh Dorsett eds., forthcoming 2025).

35. Quebec Act (14 Geo. 3 c. 83).

36. See JEFFERS LENNOX, *NORTH OF AMERICA: LOYALISTS, INDIGENOUS NATIONS, AND THE BORDERS OF THE LONG AMERICAN REVOLUTION* 1–18 (2022).

37. HEATHER WELLAND, *POLITICAL ECONOMY AND IMPERIAL GOVERNANCE IN EIGHTEENTH-CENTURY BRITAIN* 105 (2021).

38. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

39. See, e.g., LISA FORD, *THE KING'S PEACE: LAW AND ORDER IN THE BRITISH EMPIRE* 58–99 (2021); [Benjamin Franklin], *Notes on Britain's Intention to Enslave America, [1774–75?]*, FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-21-02-0312>.

40. BURSET, *supra* note 20, at 119–148.

the Quebec Act's failure to authorize a colonial legislature. But many Patriots suggested that shared access to English law was more important even than local self-government. When the First Continental Congress demanded that Parliament impose English law on Quebec, John Jay felt uneasy about intruding on the internal affairs of another colony. "Will it not be said that we go beyond our sphere?" he asked.⁴¹ "If government is founded on consent," shouldn't Congress inquire whether the Quebec Act was "agreeable to the majority of inhabitants" in that colony before demanding its repeal? What if *Canadiens* actually preferred French law?⁴² His colleagues dismissed his concerns. The "Magnitude of the law compels us to make a stand," one of them replied; consent was relevant but not decisive.⁴³ One of the Quebec Act's British opponents, Edmund Burke, made a similar point. Although he acknowledged the need to give *Canadiens* a "Government which they like," he also insisted that Britain shouldn't blindly bow to their wishes. Conquerors had the duty to rule well; in Britain's case, that meant helping *Canadiens* accept the superiority of English law.⁴⁴ For Patriots, self-government mattered, but it was not the only—or even the most important—criterion for distinguishing good empires from bad ones.

Francis Maseres, an English lawyer sympathetic to Patriots' concerns, found a different way to resolve the tension between good law and self-government. Maseres, the former attorney general of Quebec, argued that the common law *necessarily* reflected the consent of its subjects—even conquered ones. The reason, he suggested, was that the common law emerged through custom. As such, it could be presumed to reflect popular consent. By imposing that same law on a conquered colony, the Crown merely transplanted "rights and privileges" that "may well be presumed to have the approbation of the conquering nation."⁴⁵ Moreover, because the conquest had turned French Canadians into British subjects,⁴⁶ one might even say that *Canadiens* shared in the fictive consent that Blackstone and

41. John Jay, in *LETTERS OF DELEGATES TO CONGRESS, 1774-1789*, at 198 (Paul H. Smith et al. eds., 1976).

42. *Id.*

43. *Id.*

44. Edmund Burke, Notes for Speech on the Canada Bill (1774), WWM/Bk P/6/5, Sheffield Archives; Edmund Burke, Commons Debates (June 10, 1774), in *5 PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA, 1754-1783*, at 204, 204 (R.C. Simmons & P.D.G. Thomas eds., 1982); RICHARD BOURKE, *EMPIRE & REVOLUTION: THE POLITICAL LIFE OF EDMUND BURKE* 466–67 (2015).

45. FRANCIS MASERES, *THE CANADIAN FREEHOLDER: VOLUME II*, at 67 (London, B. White 1779); cf. GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 16 (2d ed. 2019) (describing the theory of the common law as a product of consent).

46. See HANNAH WEISS MULLER, *SUBJECTS AND SOVEREIGN: BONDS OF BELONGING IN THE EIGHTEENTH-CENTURY BRITISH EMPIRE* 121–65 (2017).

others used to legitimate the common law.⁴⁷ To impose the common law on Quebec, then, was no imposition at all, but merely the implementation of a law that the English nation—of which *Canadiens* were now a part—had endorsed for generations.

II. PATRIOTS' IMPERIAL LAW

These arguments failed to persuade Parliament, and Canada remained under French law. As the imperial crisis shifted into open war, Congress looked for other ways to convert Quebec into a common-law country, including invasion and diplomacy. These also failed.⁴⁸ But the Americans had more success in Quebec's interior, including the Illinois Country. Acting under authority from the State of Virginia, soldiers led by George Rogers Clark took the village of Kaskaskia on July 4, 1778, without firing a shot. Other villages soon followed, and Virginia established the County of Illinois to administer the region.⁴⁹ Virginia now had a colony of its own,⁵⁰ where it could put the Patriot vision of empire into practice.

A. Reversing the Quebec Act

Illinois's new rulers adopted a legal policy that reversed the Quebec Act in nearly every respect. While Britain had withheld English law from the colony to slow its growth, Virginia established a common-law judiciary that was meant to attract new settlers, especially the "great numbers of Canadian Emigrants" who were predicted to flee Quebec's civil-law tyranny.⁵¹ American politicians understood that it would take time to introduce a new legal system to Illinois, whose Francophone inhabitants had little experience with Anglo-American institutions.⁵² But Virginia wasted no time in starting the process. Even before Cornwallis surrendered at Yorktown, Governor Thomas Jefferson urged local officials "to introduce our Laws and form of Government among the people of Illinois as far as their temper and disposition will admit."⁵³ Although he conceded "the

47. Cf. STEPHANIE ELSKY, CUSTOM, COMMON LAW, AND THE CONSTITUTION OF ENGLISH RENAISSANCE LITERATURE 68–69, 78–79 (2020) (discussing earlier iterations of this theory).

48. LENNOX, *supra* note 36, at 19–59.

49. CLARENCE WALWORTH ALVORD, THE ILLINOIS COUNTRY, 1673–1818, at 326–35 (1920).

50. Cf. *Harry v. Decker*, 1 Miss. 36, 37 (1818) (describing Illinois as "a province" of Virginia).

51. George Washington, *Sentiments on a Peace Establishment, May 1, 1783*, FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/99-01-02-11202>; see ROGER L. SEVERNS, PRAIRIE JUSTICE: A HISTORY OF ILLINOIS COURTS UNDER FRENCH, ENGLISH, AND AMERICAN LAW 21–22 (2015).

52. See An Act for Establishing the County of Illinois, and for the More Effectual Protection and Defence Thereof (1778), *reprinted in* 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 553 (William Waller Hening ed., 1810).

53. Letter from Thomas Jefferson to [John Todd] (Jan. 28, 1780), FOUNDERS ONLINE, NAT'L

difficulties attending” a change of legal systems, he nonetheless insisted that it was “essentially necessary that all who are parts of the same body politic should be governed by the same laws.”⁵⁴ In other words, he adhered to the same philosophy of empire that he and other Patriots had previously endorsed.

The same homogenizing mission animated the Northwest Ordinance. In the early 1780s, Virginia and several other states ceded their western territories (including Illinois) to the United States. This created an unavoidably colonial situation. Under the Articles of Confederation, Congress was less a national government than an assembly of states.⁵⁵ Americans outside the states lacked congressional representation, and Congress had no choice but to rule them as colonial subjects. To do so, it adopted the familiar model of the British Empire—specifically, the version of that empire that had been endorsed by Patriots before the war. As James Monroe explained, the government of the Northwest Territory “is in effect to be a colonial government similar to that which prevail’d in these States previous to the revolution.”⁵⁶

There were two key differences between the British and American empires, however. The first and most obvious was that American colonies had a path to statehood.⁵⁷ The second—less often appreciated by historians—was how those colonies would be governed in the meantime. American colonies were to be part of a common-law empire. Under the Northwest Ordinance, “Judicial proceedings” had to follow “the course of the common law,” territorial judges received only “a common law jurisdiction,” and the territory’s first legislation had to be drawn from the “laws of the original States.”⁵⁸ This last requirement mitigated the lack of an elected territorial legislature. Recall that some colonists, including Franklin and Hamilton, had been especially worried that Parliament might single out the colonies for malign special treatment.⁵⁹ To spare the Northwest Territory from similar anxieties, the Ordinance required that any territorial laws be copied from legislation that states had already imposed

ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-03-02-0310>.

54. *Id.*; accord Letter from Thomas Jefferson to George Rogers Clark (Jan. 29, 1780), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-03-02-0311>.

55. See ALAN TAYLOR, AMERICAN REPUBLICS: A CONTINENTAL HISTORY OF THE UNITED STATES, 1783-1850, at 61 (2021).

56. Letter from James Monroe to Thomas Jefferson (May 11, 1786), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-09-02-0419>.

57. *Id.*

58. Northwest Ordinance of 1787, art. 2, 1 Stat. 50 n.(a), §§ 4, 5, 8; see also RANA, *supra* note 5, at 109; Robert P. Swierenga, *The Settlement of the Old Northwest: Ethnic Pluralism in a Featureless Plain*, 9 J. EARLY REPUBLIC 73, 74 (1989).

59. See *supra* notes 27–30 and accompanying text.

on themselves.⁶⁰ Territorial officials had only the power to *adopt* laws, not to make new ones.⁶¹ A truly legislative power would emerge only when the territory had a sufficient population to elect its own assembly.⁶² Until then, it would be protected by the self-government of the eastern states whose laws it would share.

B. Explaining an Exception

There was one exception to this overwhelming insistence on uniformity. In the western part of the Northwest Territory, the Francophone residents of Illinois had outlasted French and British rule to become subjects of yet another empire. The Northwest Ordinance allowed these “French and Canadian inhabitants” to retain “their laws and customs now in force among them, relative to the descent and conveyance, of property.”⁶³ Why?

To some extent, the retention of French property law was the inevitable consequence of Congress’s decision to honor preexisting property rights. Congress understood that many Francophones held land by “equitable or customary” titles that were incompatible with Anglo-American property law, and that erasing French law might erase French titles along with it.⁶⁴ But Congress’s preservation of French law went beyond what was needed to protect existing claims.⁶⁵ The Ordinance retained not only French laws

60. Arthur St. Clair, Address of the Governor to the Legislature (May 29, 1795), in 2 THE ST. CLAIR PAPERS, 356–57 (William Henry Smith ed., 1882).

61. Although the authority to adopt laws might strike us as legislative—see, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 227, 334–36 (2021)—contemporaries thought that the inability “form new laws” was a significant limitation. See 2 ST. CLAIR PAPERS, *supra* note 60, at 67–68; 2 THE TERRITORIAL PAPERS OF THE UNITED STATES, 43 n.15 (Clarence Edwin Carter ed., 1934). The Land Ordinance of 1784 had contained a similar provision, which authorized a “temporary government” in the northwest “to adopt the constitution and laws of any one of the original states,” subject to later amendment “by their ordinary legislature.” Ordinance of 1784 (Apr. 23, 1784), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-06-02-0420-0006>.

62. Northwest Ordinance of 1787, 1 Stat. 50 n.(a), § 9. The ordinance also provided for uniformity within the Territory by requiring that any laws “have force in all parts of the district.” Northwest Ordinance of 1787, art. 2, 1 Stat. 50 n.(a), §§ 4, 5, 8.

63. Northwest Ordinance § 2. Several scholars have noted this provision without discussing its origins. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 137 (4th ed. 2019); Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 442–43 (2014); see also Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J. EARLY REPUBLIC 343, 354–55 (1986) (arguing that this provision served to protect French property in slaves).

64. See GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U. S. TERRITORIES 91–96 (2021). For this reason, some eighteenth-century lawyers thought that the law of nations demanded continuity in property law. See *id.* at 93. As a general rule, conquered subjects were entitled to keep their property. See Richard Bourke, *Edmund Burke and the Politics of Conquest*, 4 MOD. INTELL. HIST. 403, 422 (2007). And since property depended on “the laws which define, create, and modify it,” those laws also had to be retained. Alexander Wedderburn, in 1 DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA, 1759–1791, at 424, 430 (Adam Shortt & Arthur G. Doughty eds., 2d ed. 1918). But see *infra* note 65.

65. Many lawyers thought it was possible to protect property rights acquired under French law without retaining French law itself. See, e.g., Fowler Walker, Considerations on the Present State of the Province of Quebec (March 1, 1766), Add MS 35915, pp. 20–45; William Wirt Blume, *Probate and*

concerning title, but also French “laws and customs . . . relative to the *descent and conveyance*, of property.”⁶⁶ This was a prospective requirement that exempted the “ancient Settlers” of the Territory from ordinary rules of property transfer.⁶⁷ And it placed serious demands on the territorial government. Because French conveyancing had depended on notaries public, Governor Arthur St. Clair interpreted the Ordinance as requiring him to commission such officials—no small burden in a sparsely populated colony that struggled to find qualified officeholders.⁶⁸ St. Clair also interpreted the Ordinance as requiring him to exempt French inhabitants from a general law concerning fencing and enclosure.⁶⁹ He wished it were otherwise: as he told James Madison, his ultimate goal was “to amalgamate and reduce . . . to one Mass” the diverse “manners and customs” of the Old Northwest.⁷⁰ And he wondered whether the Ordinance’s reservation of French law might be abrogated when the territory gained an elected legislature.⁷¹ In the short term, however, the United States had committed itself to a certain amount of legal pluralism.

Congress’s solicitude for French property law can be traced, incongruously, to the Quebec Act. As noted above, the Quebec Act’s defenders framed it as an act of toleration: it would be inhumane, they argued, to deprive French-speaking *Canadiens* of the laws that had always governed their lives.⁷² In response, some of the Quebec Act’s opponents proposed a compromise: instead of eliminating French law *tout court*, Britain might preserve it with respect to property, inheritance, and domestic relations, while introducing English law for procedure, contract, and tort.⁷³ In theory, that would allow *Canadiens* to enjoy the supposed benefits of English law—such as its capacity to knit the empire together, its protection of civil liberties, and its support for economic growth—while keeping the parts of French law that were thought to be most deeply embedded in Canadian culture.⁷⁴

Parliament rejected this compromise, but its underlying logic became embedded in Anglophone legal thought.⁷⁵ Even Patriot lawyers who treated

Administration on the American Frontier, 58 MICH. L. REV. 209, 213 n.16, 215–16 (1959).

66. NORTHWEST ORDINANCE OF 1787 § 2 (emphasis added).

67. The Northwest Ordinance specified inheritance rules for everyone else. *Id.*

68. Arthur St. Clair, Report (Feb. 10, 1791), in 2 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 61 at 323, 328–29.

69. An Act Regulating the Enclosures of Grounds (June 29, 1791), reprinted in THE LAWS OF THE NORTHWEST TERRITORY, 1788-1800, at 50 (Theodore Calvin Pease ed., 1925).

70. Letter from Arthur St. Clair to James Madison (June 17, 1802), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/02-03-02-0380>.

71. 3 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 61, at 443.

72. *Supra* note 40.

73. BURSET, *supra* note 20, at 75–82.

74. *See id.* at 82.

75. *See id.* at 82–83, 128–31, 151–54.

the common law as crucial for Britain's empire started to think that empires might have a duty to tolerate local customs, at least when it came to property. This perspective survived American independence; and so, rather than imposing the common law wholesale on Illinois, American officials made some accommodation for Francophone inhabitants. When Virginia captured Illinois in 1778, its legislature introduced common-law procedure (including juries) but left French property law in place.⁷⁶ Nine years later, the Northwest Ordinance did the same. In doing so, it continued Congress's commitment to a Patriot theory of empire that leavened its drive for assimilation and uniformity with a modicum of pluralism and toleration.

III. THE FAILURE OF THE NORTHWEST ORDINANCE

The Northwest Ordinance embodied an authentically Patriot style of empire. Nonetheless, by the 1790s, territorial citizens claimed to be "in a much worse situation, than the United States were, before the late revolution"—a "despotism" more akin to British India than an empire of liberty.⁷⁷ If the Northwest Ordinance represented the very kind of empire that colonists had demanded before the Revolution, why did it strike their descendants as a failure?

Professor Ablavsky suggests one explanation. During the 1790s, Governor St. Clair developed an increasingly antagonistic relationship with territorial citizens, which was exacerbated by the divergence between his Federalist politics and the territory's Jeffersonian majority. At first, St. Clair's opponents sought simply to oust him from office. But, fearing that President Adams might name an even worse replacement, the territory's Jeffersonians broadened their critique from the governor to territorial government.⁷⁸

Without disputing that account, this Essay will suggest another, complementary explanation—one that looks to changing conceptions of law.⁷⁹ The Patriot theory of empire had paid relatively little attention to sovereignty.⁸⁰ In part, this was because the nature of sovereignty was contested at the time,⁸¹ and so the topic was an attractive one to dodge.

76. An Act for Establishing the County of Illinois, and for the More Effectual Protection and Defence Thereof (1778), *reprinted in* 9 STATUTES AT LARGE, *supra* note 52, at 553; 2 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 61, at 40 n.5; ALVORD, *supra* note 49, at 338.

77. Ablavsky, *supra* note 7, at 1659.

78. *Id.* at 1658–59.

79. My approach is indebted to Professor Whitman's account of jurisprudential confusion during this period. James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991).

80. See *supra* note 27. It's notable, for example, that Professor Bilder could give a book-length account of the "transatlantic constitution" without mentioning sovereignty. MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004).

81. See, e.g., LACROIX, *supra* note 21; GORDON S. WOOD, *THE CREATION OF THE AMERICAN*

Contemporary writers struggled especially to articulate the relationship between sovereignty and legislation—for instance, whether parliamentary sovereignty was subject to natural-law or constitutional constraints.⁸² But such confusion mattered little for legal practice. For eighteenth-century lawyers, the paradigmatic form of law was not legislation but common law.⁸³ And common law, according to its classical theorists, didn't emerge from a sovereign's command but from the customs of the community. There was some fuzziness about the definition of that community (was it the people of England? the legal profession? the courts?).⁸⁴ But that ambiguity proved useful for empire. By imagining law primarily as a form of communal practice, English lawyers allowed it to travel with Britons as they moved overseas⁸⁵—and to adapt to local conditions without having to resolve who, exactly, had authorized the adaptation.⁸⁶

The imperial crises of the 1760s and 1770s put pressure on this workable but undertheorized arrangement. Nonetheless, even as polemicists offered increasingly elaborate maps of legislative sovereignty, they didn't quite nail down the sovereign foundations of the common law. Thus, in 1774, the Continental Congress could simultaneously assert colonies' "exclusive power of *legislation*" and their right "to the common law *of England*."⁸⁷ The common law's hazy relationship to sovereign authority proved equally useful after American independence, as nationalist lawyers like James Kent and Joseph Story sought to craft a body of private-law doctrine that transcended state lines and smoothed the rough borders between state and federal authority.⁸⁸

In many respects, the nationalist legal project was a practical and doctrinal success.⁸⁹ But it quickly faced political resistance. In the 1790s, the common law became "a political football" in the fight between the

REPUBLIC, 1776-1787, at 361-62 (2d ed. 1998).

82. See DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 50-55 (1989).

83. See WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: VOLUME IV: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735-1776*, at 23 (2018).

84. POSTEMA, *supra* note 45, at 15-17; A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77 (A.W.B. Simpson ed., 2d series 1973).

85. A more formally rigorous common law would have been harder to transport. See Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 L. & HIST. REV. 439 (2003).

86. See, e.g., WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 36 (1975).

87. The Bill of Rights; A List of Grievances (Oct. 14, 1774), FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Adams/06-02-02-0041-0005> (emphasis added).

88. DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 274-94 (2005).

89. See *id.* at 294-95; William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

nation's emerging parties.⁹⁰ As Federalists came to dominate the federal courts, Jeffersonians accused them of trying to erect a "common law of the United States" that would drown state authority.⁹¹ The ensuing debates led Jeffersonian lawyers to rethink the relationship between the common law and sovereign power.⁹² Increasingly, they described the common law as owing its force not to customary practice but to its "adoption" by each sovereign state.⁹³ At the same time, Jeffersonians resisted common-law nationalism by emphasizing the diversity of states' laws. As an empirical matter, it was incoherent to talk of *the* common law; each state had its own.⁹⁴ Nor was a general common law desirable: democratic legislation, not the dead hand of custom or judicial precedent, ought to rule a republic.⁹⁵

These political and jurisprudential developments led Jeffersonians to rethink the legal architecture of empire. The Northwest Ordinance had relied on common law to palliate the lack of local self-government. But the common law itself now seemed a gift of dubious worth.⁹⁶ In the 1770s, Congress had fought a revolution to maintain access to the common law, and each of the thirteen colonies chose after independence to take that law as its own. But when Ohio gained statehood in 1803, its Jeffersonian legislature jettisoned English common law as a "disgraceful badge of remaining Servitude."⁹⁷ (New Jersey had already acted similarly, and other states would soon follow.⁹⁸) To some extent, this was an exercise in legal

90. HULSEBOSCH, *supra* note 88, at 288.

91. Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231 (1985).

92. See ELLEN HOLMES PEARSON, REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC 27–29 (2011).

93. Edmund Randolph's Notes on the Common Law ([c. Sept.] 1799), FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-17-02-0170>; 1 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES 407 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803). Jeffersonians disagreed about the details. Randolph suggested that American independence entailed "the destruction of" all English laws, which were "emanations from" an imperial sovereignty that had ceased to operate. *Id.* Jefferson disagreed on the theory that laws emerged from the will of the sovereign people, not the government. Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-31-02-0142>. Under either theory, however, much depended on identifying the sovereign in question.

94. See, e.g., 1 BLACKSTONE'S COMMENTARIES, *supra* note 93, at 378–493; Thomas Jefferson, Observations on the Common Law and Hardin's Case (Nov. 11 1802), FOUNDERS ONLINE, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-38-02-0592-0002>.

95. David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, in THE MANY LEGALITIES OF EARLY AMERICA 97, 116 (Christopher L. Tomlins & Bruce H. Mann eds., 2001); Andrew Shankman, *Malcontents and Tertium Quids: The Battle to Define Democracy in Jeffersonian Philadelphia*, 19 J. EARLY REPUBLIC 43, 55 (1999).

96. There had been earlier versions of this critique. See, e.g., Aaron T. Knapp, *Law's Revolution: Benjamin Austin and the Spirit of '86*, 25 YALE J.L. & HUMAN. 271 (2013).

97. ANDREW R. L. CAYTON, THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780–1825, at 98 (1986) (quoting future governor Samuel Huntington); cf. Shankman, *supra* note 93 (noting internal divisions among Jeffersonians with respect to the common law).

98. David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1425–27 (2006).

nationalism—a postcolonial accentuation of independence.⁹⁹ But for many Jeffersonians, the enemy was not just *English* common law but the common law in general.¹⁰⁰ Law, in their view, had to be created by legislatures. If the territories lacked legislatures of their own, that meant that someone else must be ruling them. This theoretical concern soon crossed party lines. Even Chancellor Kent—neither a Jeffersonian nor a naïve lover of state assemblies—worried that the “complete subordination” of the territories reproduced the “tendency . . . to abuse and oppression” characteristic of the British Empire.¹⁰¹

Despite all of this, the architects of American expansion continued to assume that the “empire of liberty” had to be governed by a shared system of laws. Writing in 1807, a judge in the Michigan Territory insisted that “the American government has promptly, steadily and uniformly manifested its disposition to introduce its own forms of government, and to apply its own laws” in former French and British territories, and that it had declined to recognize, “even in a temporary point of view,” the laws of earlier colonial powers.¹⁰² As we’ve seen, that wasn’t quite true; but the claim illustrates the persistent appeal of a common-law empire.¹⁰³ Even Jefferson never abandoned his old conviction that “all who are parts of the same body politic should be governed by the same laws.”¹⁰⁴ In 1803, as he contemplated the Louisiana Purchase, he assumed that “we shall certainly endeavor to introduce the American laws there.”¹⁰⁵ He instructed Governor William C.C. Claiborne accordingly.

But much had changed since Jefferson had issued similar instructions for the County of Illinois. In the eighteenth century, Illinois’s French-speaking *habitants* had mostly welcomed the common law. Many of them wanted to keep their laws of property and testation, but they otherwise had little attachment to their “own” laws, and in some cases, they positively

99. See *id.* at 1427–28.

100. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 176–77 (1971).

101. 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 360–61 (New York, O. Halsted 1826); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 18–20 (1977). For Kent’s views of legislation, see Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712 (2018).

102. 1 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN, 1805-1814, at 394 (William Wirt Blume ed., 1935).

103. See Blume, *supra* note 65, at 214–15, 246.

104. See *supra* note 54; Letter from Thomas Jefferson to James Monroe (Nov. 24, 1801), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-35-02-0550>.

105. Letter from Thomas Jefferson to Horatio Gates (July 11, 1803), FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-41-02-0004>; see also MORRIS S. ARNOLD, *UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836*, at xviii (1985) (“[I]t was Jefferson’s desire to introduce the common law of England into the vast Louisiana Territory as quickly as he could.”).

demanded Anglo-American institutions.¹⁰⁶ In the early nineteenth century, however, Louisiana's francophone population was decidedly more attached to French law¹⁰⁷—a reflection, to some extent, of a broader shift toward “legal nationalism” after the eighteenth century.¹⁰⁸ Moreover, many Louisianans had embraced the Jeffersonian skepticism of a transcendent common law: “the common law of Virginia is no more like that in use in South Carolina” or “the State of New York,” they explained in one manifesto.¹⁰⁹ Each state had crafted its own law; surely Louisiana could do the same without endangering national unity.¹¹⁰ Claiborne, despite his instructions and against his own inclinations, eventually accepted that Louisiana would adopt a hybrid legal system.¹¹¹

The result was a revolution in American empire, as John Quincy Adams observed a little while later. In his view, the Louisiana Purchase resulted in “a Union totally different from that for which the Constitution had been formed.”¹¹² Strikingly, he called Louisiana “the first” “Colonial system of government” that the United States had ever formed—despite referring, just a few sentences later, to the territorial government of Indiana, which in 1804 still lacked elected representatives.¹¹³ (As before the Revolution, self-government was not always the most important criterion for evaluating empire.) Adams noted a few differences between Louisiana and previous U.S. territories, including the large “foreign” population in America's latest acquisition.¹¹⁴ But what struck him most was the difference in law. The introduction of Louisiana “makes French and Spanish Laws a part of the Laws of the Union,” he observed, and “introduces whole systems of Legislation, abhorrent to the Spirit and character of our Institutions.”¹¹⁵ This, he predicted, would become a prototype for future American

106. A willingness to adopt the law of the conqueror was a common feature of many colonies. *See, e.g.,* Lauren Benton, *Historical Perspectives on Legal Pluralism*, 3 HAGUE J. ON RULE L. 57, 61 (2011).

107. *See* John W. Cairns, *Spanish Law, the Teatro de La Legislación Universal de España e Indias, and the Background to the Drafting of the Digest of Orleans of 1808*, 31/32 TUL. EUR. & CIV. L.F. 79, 80–81 (2017).

108. *Cf.* COLIN KIDD, *UNION AND UNIONISMS: POLITICAL THOUGHT IN SCOTLAND, 1500–2000*, at 173 (2008) (describing a transition “from assimilationist jurisprudence to legal nationalism”).

109. 9 THE TERRITORIAL PAPERS OF THE UNITED STATES, *supra* note 61, at 650, 651–52.

110. *Id.*

111. GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* 236–39, 267–70 (rev. ed. 2009); Mark Fernandez, *Edward Livingston, America, and France: Making Law*, in *EMPIRES OF THE IMAGINATION: TRANSATLANTIC HISTORIES OF THE LOUISIANA PURCHASE* 268, 278 (Peter J. Kastor & Françoise Weil eds., 2009).

112. John Quincy Adams, *John Quincy Adams Digital Diary*, MASSACHUSETTS HISTORY SOCIETY (2023), <https://www.masshist.org/publications/jqadiaries/index.php/document/jqadiaries-v32-1821-11-17-p121>.

113. John Quincy Adams, Speech of Feb. 18, 1804, in EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803–1812*, at 233, 234 (1920).

114. Adams, *supra* note 112.

115. *Id.*

expansion: “the U.S. in time will have many colonies—precedents are therefore important.”¹¹⁶ America’s common-law empire was not quite dead, and in the nineteenth century, many U.S. territories would still receive anglicized legal systems.¹¹⁷ But another path had been opened.

IV. CONCLUSION

The structure of American empire has changed dramatically since 1787, but the basic problems of imperial rule are similar. On the one hand, there’s a lingering suspicion that “special” treatment is rarely good for colonies;¹¹⁸ indeed, unequal governance is what *makes* them colonies.¹¹⁹ On the other hand, perfect uniformity also strikes many observers as potentially oppressive, particularly when it comes to the laws that structure the family and real property.¹²⁰ (For example, American Samoa restricts land ownership by non-Samoans—a practice that some American Samoans describe as essential for protecting their culture but which might be threatened by the application of American equal-protection doctrines.)¹²¹ The Northwest Ordinance suggests a way to navigate these competing concerns in a way that is consistent with—and indeed constitutive of—the American constitutional tradition.¹²² Drawing out those lessons will take more space than I have in this short Essay. But perhaps it’s enough to suggest some places to start.

We might start by noticing the Ordinance’s suspicion of legal difference—its presumption that treating a province differently means treating it badly.¹²³ Some aspects of that suspicion are difficult to translate

116. Adams, *supra* note 113, at 234.

117. See, e.g., STUART BANNER, *LEGAL SYSTEMS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750-1860* (2000); William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions (Part I)*, 61 MICH. L. REV. 39, 54 (1962); William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions (Part II)*, 61 MICH. L. REV. 467, 518–19 (1963).

118. See, e.g., José A. Cabranes, *Closing Remarks on Judge Juan Torruella*, YALE L.J. F. 852, 855 (2020); Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J. F. 284, 285 (2020).

119. See Christina Duffy Burnett [Ponsa Kraus] & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1, 11–12 (Christina Duffy Burnett [Ponsa Kraus] & Burke Marshall eds., 2001).

120. See, e.g., Blackhawk, *supra* note 8, at 115–16.

121. See, e.g., *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. 1680, 1697–1700 (2017); Rose Cuisson Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 134–36 (2018).

122. Cf. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012); Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2510 (2022).

123. Like other presumptions, this one was rebuttable. See *infra* text accompanying notes 133–134; cf. Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of “We the People of the*

to the present. The Ordinance's obsession with the common law seemed dated even by the nineteenth century, *a fortiori* in today's "age of statutes";¹²⁴ and implicit reliance on transcendent, non-legislated common law might be hard to resurrect in our post-*Erie* world.¹²⁵ Nonetheless, in designing a modern law of American empire, we might still take seriously the eighteenth-century axiom "that all who are parts of the same body politic should be governed by the same law."¹²⁶ For the Founding generation and its Patriot predecessors, a uniform legal system was part of what distinguished good empires from bad ones. Universal access to a common law protected colonists from metropolitan mistreatment, gave them access to imperial prosperity, and effected the equality of all imperial subjects.¹²⁷ Political representation was important, but it was not the only or even the most important guarantor of equality within the empire.

To be sure, other scholars have also observed the early Republic's commitment to uniformity. But they have usually portrayed it as exacerbating, not alleviating, the evils of empire. So, for example, Max Edling rightly observes that "the United States was much less tolerant of jurisdictional and status diversity than the British Empire had been,"¹²⁸ while Aziz Rana describes early American expansion as "a project . . . in which American institutions necessarily followed the flag."¹²⁹ For these historians, uniformity was hardly something to celebrate; the vaunted egalitarianism of the early Republic was made possible only by a disturbing distaste for diversity.¹³⁰ That's hardly a model for today.¹³¹

There is truth to that critique; the settler egalitarianism of early America certainly had its dark side.¹³² But it would also be a mistake to read the first American empire as incapable of accommodating difference. The Northwest Ordinance did, after all, single out "French and Canadian" customs for protection—a small thing in itself, perhaps, but symptomatic of a broader willingness to soften the hard edges of American rule. Nor was the Ordinance an aberration in this respect. As William Novak has observed, the antebellum United States followed a "common law of status

United States?", 9 TEX. A&M.L. REV. 655, 685–86 (2022) (suggesting a Founding-era "baseline norm" of equality for territorial inhabitants, which permitted exceptions when there were "good reasons for differential treatment").

124. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

125. *But cf.* Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527 (2019).

126. Jefferson, *supra* note 54.

127. *See generally* BURSET, *supra* note 20.

128. Max M. Edling, *United States Expansion and Incorporation in the Long Nineteenth-Century*, 49 J. IMPERIAL & COMMONWEALTH HIST. 431, 437 (2021).

129. RANA, *supra* note 5, at 109.

130. Edling, *supra* note 128, at 450.

131. *See id.* at 452–53.

132. As Professor Whitman has reminded us. JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW, at xi–xii (paperback ed. 2018).

and membership” that focused less on rigid, undifferentiated claims of citizenship than on a complicated matrix of identities and associational memberships.¹³³ In such a world, it was hardly surprising to add yet another status to the mix—in this case, one rooted in a community’s prior history of empire.

Like the Northwest Ordinance’s obsession with the common law, its easy embrace of differentiated status might be hard to translate to the present. After the Civil War, Reconstruction introduced a nationally uniform conception of citizenship that was far more hostile to group distinctions. This was particularly true with respect to race, of course, but the Reconstruction Amendments had broader implications than that. Senator Charles Sumner, for example, insisted that the reconstructed Constitution erased *all* distinctions of race and ethnicity. After 1868, there would be neither slave nor free, Jew nor Greek—only children of the new national state.¹³⁴ The question, then, is whether this salutary vision of equal and national citizenship might coexist with the more flexible, common-law framework of the Founding generation—an approach that, by frankly treating the United States as an empire, perhaps made it easier to accommodate its imperial subjects.

133. William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in *THE DEMOCRATIC EXPERIMENT* 85 (Meg Jacobs, William J. Novak, & Julian E. Zelizer eds., 2009); see also Lawson and Seidman, *supra* note 123, at 658.

134. Novak, *supra* note 133, at 110–11. This insistence on near-universal citizenship profoundly influenced U.S. attitudes to territorial expansion. See SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 2 (2018).