

Legal, Political and Economic Bases for the Building of the West

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How the West was won¹, or if we rephrase it as a question such as “How was the West Won?” the short answer would be it was won in many ways and over a fairly long period of time. For some people it was won in a glorious way and the whole story is an epic with pioneers, farmers, and cowboys as its heroes, and for others it is a shame. History books and motion pictures are divided: some contend that the building of the West was a great achievement, others call it a disgrace because it led not only to taking over the Indians’ lands but also to exterminating them, or at least exterminating those who stood in the way. The purpose of this article is not to pass judgments but to examine facts and laws that made white settlement possible across the continent, laws that fall under the Public Land Policy.

It is important to keep in mind that in American history the West started at the Atlantic shoreline. When the early settlers in Virginia and Massachusetts discovered the land, the only place they could go was west. Subsequently, the notion of west designated areas further and further in that direction until it was settled coast to coast.

For the first settlers, whether in Virginia or Massachusetts, the West extended to the Appalachians. Beyond these mountains lay French Louisiana, extending from the Appalachians to unknown areas beyond

1. From the title of the 1962 motion picture *How the West Was Won*, directed by John Ford and Henry Hathaway and starring a bevy of popular actors such as Gregory Peck, John Wayne, James Stewart, Debbie Reynolds and others. The picture shows four generations of settlers from the late 1830s to the late 1880s.

the Mississippi, which later turned out to be the Rocky Mountains. After the French and Indian War, also known as the Seven Years' War, the Anglo-American West extended, as France lost Eastern Louisiana to Britain. Eastern Louisiana was the area between the Appalachians and the Mississippi. At the end of the Revolutionary War, for the former American colonies, the West included the former Eastern Louisiana won over from Britain. When this area became American as a result of the Treaty of Paris (1783), the area of the United States almost doubled. With the Louisiana Purchase in 1803—which is actually the purchase of the former Western Louisiana—the West that was won was almost as big as the purchasing country, whose area doubled again and now extended to the Rocky Mountains. Finally, with the Mexican War and the treaty with Great Britain in 1848, the United States covered the area from the Atlantic to the Pacific between Canada and Mexico.

Thomas Jefferson was a visionary; he saw beyond the remainder of Louisiana that he bought from Napoleon. The Lewis and Clark Expedition explored the areas all the way to the Pacific. Until the Civil War, the area beyond the former Louisiana was mostly unknown, except for some places such as Texas and the Pacific coast, taken from Mexico and Britain. The whole southern part was taken from Mexico and the Pacific Northwest was taken from Britain. California started to be settled right after it became American, especially as a result of the Gold Rush, but the vast area that led there was not explored or settled in any significant way.

Before Independence, the former Eastern Louisiana, rechristened Northwest Territory, which is now the Midwest, was coveted by the colonists and became a flash point between them and Britain and eventually one of the many reasons for the Revolutionary War. After 1763, both to save defense money and to avoid conflicts with the Indians, Britain closed the West to settlement under the Western Proclamation, a decision rejected by many colonists, and especially land speculators, George Washington and Benjamin Franklin being among the biggest ones.

Winning the West geographically was, of course, the first step. The aftermath of this huge conquest was the settlement of the area, and the settlement was achieved almost over a whole century. The motion pictures dealing with the 1865-1895 period can best be apprehended with some knowledge of the legal foundations that underlay the nation's situation. This article examines the part the federal government played in the process through acts, facts and decisions both before the Civil War and during and after the conflict along the latter half of the nineteenth century.

Pre-Civil War

To be sure, the West was seen as wild and woolly, but the building of the West by the federal government was far from wild or haphazard. It started to take care of Western settlement as soon as it was set up. While in the public imagination the building of the West started in earnest mostly after 1865, the federal government, right after Independence, provided for the settlement of the West.

The first English settlers in Virginia were authorized under the charter granted by James I to settle and conquer land from sea to sea. They moved west as soon as they settled because they were looking for more fertile and more healthful lands, away from the marshes they had encountered.

After Independence, the Articles of Confederation were drafted in 1777 and ratified in 1781, which means that both writing and ratification occurred during the Revolutionary War, that is, during a period when there were only 13 states fighting for their independence and the issue of western settlement was not relevant, as the territories to settle were still a British possession.

After the United States gained independence indefinitely from Britain in 1783, one of the major issues for the Confederation was the fate of the territories west of the existing states. One possibility was to extend those existing states, but it was too late, since all except Connecticut had ceded those lands to the Confederation by 1780; another option was to turn them

into colonies, but as a former colony, the United States was reluctant, to put it mildly, to set up colonies; as a result, this solution was not even to be contemplated. Another choice was to turn them into new states. This choice was the one that was eventually made. For that purpose, the federal government had to enact specific legislation.

The 1784 Ordinance: To turn territories into states, a legal process was needed. This requirement was addressed in the Land Ordinance of 1784, drafted by Thomas Jefferson and enacted by Congress April 23, 1784. The sources of the land were cession by the states and purchase from Indians, and it was to be “offered for sale by Congress¹”. The territory was divided into districts and each state should extend two degrees of latitude, the reference point being 45° North, which is a line crossing Wisconsin².

The individuals and families who bought land from Congress and settled could, either because they requested it, or because Congress so ordered, set up a provisional government, including legislature, and when the population reached 20,000 “free inhabitants”, they could establish a permanent Constitution. Of course, both the temporary government and the permanent government, as they were authorized by the Confederation, had to meet a certain number of conditions to be acceptable:

1. They had to “forever remain” a part of the United States—called “Confederacy³” in the Ordinance. This provision is of major importance, as it later justified going into the Civil War to preserve the Union, no state being allowed to leave that Union.
2. They were bound to abide by the laws of the Confederation;

1. Land Ordinance of 1784.

2. The extent in longitude is a complex detail which is not necessary in a short article. Besides, the 1784 Ordinance was superseded by subsequent ones and extensions in latitude were much larger, as Wisconsin covers about 6° in latitude.

3. Another very interesting term used in this Ordinance is “President”: the Ordinance was to be “duly executed by the President of the United States”. In this context it should mean the president of Congress, as there was no executive and therefore no President of the United States under the Articles of Confederation. This president was not part of a separate branch, the executive branch, as it was termed in the Constitution. The president’s term was no more than one year, as compared to the three-year term of the Congress.

3. They had to abide by the disposal of the land as decided by the United States and honor the titles of the “bona fide purchaser”;
4. They had to pay their part of the “federal” debts as apportioned by Congress;
5. No taxes should be imposed on lands still belonging to the United States;
6. All new states had to have a republican form of government. This provision is important because one year after independence, the new nation was intent on eradicating any other form, especially the hated monarchy;
7. Non residents owning lands in a new state could not be taxed more than residents;
8. When the population of a territory reached the same number as that of the least populous among the thirteen original states, the territory could request admission into the Confederation as a state with the same rights and duties as all other states.

The Land Ordinance of 1784 is not well known except by American history scholars, but its examination shows how important it was for the future, because it set the tone of how the West would be built decades later. The subsequent ordinances and other legislation regarding the settlement of the West relied on the same basic principles.

The 1785 Ordinance: The 1784 Ordinance was followed and repealed or superseded by the Land Ordinance of 1785¹. The new feature was the introduction of land surveying. The land was divided into square units called townships, each measuring 6 miles by 6 miles, or 36 square miles. A township was divided into square sections one mile each side, or 1 square mile². This mode showed that the West, from the outset, was to be organized in an orderly way. Besides, out of the 36 sections, one (no. 16) was to be set aside to build a public school; the selling price was one dollar per acre.

1. The official title is An **ordinance** for ascertaining the Mode of disposing of **lands** in the **western territory**.

2. One square mile is 640 acres, or 258 hectares.

One of the reasons why Congress decided to sell the lands was the need for revenue, as under the Article of Confederation the Central Government could not levy taxes. In addition, one important objective—and result—of the land ordinances was the strengthening, the confirmation and establishment for good in the American system of the notion of private property, and private property once bought, held perpetually. Of course, this notion is not specific to the United States. It was implemented in many countries, including European countries, but in a new, unsettled land, it was necessary to spell it out in clear terms and to oppose it to the Indian tribal system which did not recognize private property and landholding in perpetuity (“for ever”); besides, heirs and assigns would “for ever” be tenants in common. Another goal the Ordinance sought to achieve was implanting the notion of democracy, the rationale being that when an individual owns the land he lives on he has a powerful incentive to improve it and become a good citizen.

As the Articles of Confederation united the new nation—albeit loosely, and with states still jealous of their independence—the West to be settled could only strengthen the union, and as importantly, because it was an unprecedented situation, the government of the Confederation, by selling lands to individuals and their families, initiated a privatization of resources, be they agricultural or otherwise. The national government, however, did not relinquish all power and authority, of course. Regarding mining, for example, the land and the underground belonged to their rightful owners, but the Department of the Interior, as it was called later, was the one to grant mining licenses. In other words, the West was not built in a sort of economic or political chaos. It was incorporated into the “common market” that existed, among others, through the notion of interstate commerce.

But there was a dark side to the way the Ordinance was enforced and implemented. The Congress wanted individuals to take care of the settling, but under rules set by Congress. There were two main obstacles to honest enforcement: first, the too big area of 1 square mile for individuals. They

could not afford to pay 640 dollars. The government had to lower the price but still many individuals could not afford it. As a result, revenue from the operation remained limited.

The second obstacle to honest enforcement and implementation involved speculators. They deemed the price of one dollar per acre too high. As they always pack more power than individuals because they can regroup, and because they have more money, in 1786 a group known as the Ohio Company—not the same as George Washington’s former business—pushed for a deal with Congress. Instead of one dollar per acre they were able to bring the price all the way down to about 9 cents. In this way, they were in a position to buy one and a half million acres. As the transaction was not legal, it could not proceed. The only way for the speculators—among whom William Duer, the secretary of the United States Treasury Board—to achieve their goal was to have the law changed so that they could settle legally, and the result was the Northwest Ordinance. Despite the obstacles and the corruption, the public land policy and public land administration as determined in the two ordinances remained valid until the Civil War.

The Northwest Ordinance: As the new nation as a whole realized that the Articles of Confederation could not work, at least in part because the central government was powerless, many politicians started to seek a way to achieve unity and workability. Alexander Hamilton, who had Washington’s ear, advocated a strong union. Eventually, since the Articles of Confederation could not be reformed efficiently, the politicians moved toward a constitutional convention in 1787. The new Constitution was drafted in September 1787 but not ratified until 1789. Meanwhile, the Confederation made a major decision by enacting the Northwest Ordinance on July 13, 1787, that is, at the same time as the Constitution was being prepared¹.

1. The official title is “**An ordinance for the government of the territory of the United States Northwest of the river Ohio.**”

The Ordinance did not provide for land sale by the United States, for sale was an established practice. However, from the outset, it confirms the ownership of land in perpetuity, not only during the lifetime of the purchaser, but if the purchaser dies intestate, the land shall descend to his children and grandchildren. The significance of the Northwest Ordinance also lies in the political organization of the territory. The Congress could, from time to time, appoint a governor for a 3-year term. In addition, a secretary was appointed. His duty was to keep public records and transmit them to Congress. A 3-judge court was also appointed. Governor and court were to publish and enforce the Confederation's laws until a legislature was set up. The legislature could make changes if they were consistent with the laws of the Confederation. The governor could appoint magistrates and "other civil officers" to ensure law and order, until the legislature was set up.

When the population reached 5,000 free males, these could elect representatives to the general assembly—subject to qualification for voting such as owning landed property. The term of the representatives was 2 years. They would meet in a house of representatives; they could make laws—consistent with the Ordinance—and once passed, the laws had to be referred to the governor, who had a veto power, and even the power to dissolve the assembly if he saw fit.

Eventually, the territory, when the population reached 60,000 "free inhabitants," would apply for statehood and become a state equal to the original states. Religious liberty was to be preserved. Regarding justice, the Ordinance spelled out many of the individual freedoms that existed in many state constitutions and which were to be incorporated in the 1787 Constitution and the Bill of Rights of 1791, such as provisions regarding the privilege of the writ of Habeas Corpus, a trial by jury, prohibition of cruel and unusual punishment. Besides, no law could be made to interfere with private contracts. Education was to be encouraged. Slavery and "involuntary servitude" were prohibited¹.

1. However, if a fugitive slave from one of the original states is caught, he had to be returned to his owners.