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Property and Progress: Antebellum Landscape Art and Property Law

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Abstract

Landscape art in the antebellum era (the period before the American Civil War, 1861-1865), often depicts the role of humans on the landscape. Humans appear as hunters, settlers, and travelers and human structures appear as well, from rude paths, cabins, mills, bridges, and canals to railroads and telegraph wires. Those images parallel cases, treatises, orations, essays, and fictional literature that discuss property's role in fostering economic and moral development. The images also parallel developments in property doctrine, particularly related to adverse possession, mistaken improvers, nuisance, and eminent domain.

Some of the conflicts in property rights that gripped antebellum thought also appear in paintings, including ambivalence about progress, concern over development of land, and fear of the excesses of commerce. The concerns about wealth, as well as the concerns about the lack of control through law, appear at various points. Other paintings celebrate intellectual, moral, technological, and economic progress. The paintings thus remind us of how antebellum Americans understood property, as they struggled with the changes in the role of property from protection of individual autonomy of the eighteenth century to the promotion of economic growth in the nineteenth century.

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With apologies to those who, over the past 120 years, have used similar titles: Stephen Thernstrom, *Poverty and Progress: Social Mobility in a Nineteenth Century City* (1964), who in turn built on Henry George's *Progress and Property* (London, William Reeves 1884). The first three words of my title are the same as William Hurrell Mallocks' *Property and Progress: Or, A Brief Inquiry Into Contemporary Social Agitation in England* (New York, G.P. Putnam, 1884), a sustained critique of Henry George.

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Wild nature, uninhabited and uncorrupted by humans may be the image that is most conjured by the phrase "American landscape art." One might think of John Locke's phrase, that "Thus in the beginning all the World was America."[2] Locke's phrase calls to mind the state of nature. Indeed, some landscape painters of our early national period depicted scenes of nature. In Jasper Cropsey's *Autumn on the Hudson* America appears new and uninhabited. Sometimes when people are shown on the landscape, as in Frederick Church's *Hooker and Company Journeying Through the Wilderness* on their way in 1638 from Plymouth to Hartford, the landscape is, well, a wilderness. Such images and Locke's phrase parallel Americans' self-image in the 1830s that the world of the mind is new and untried. When Ralph Waldo Emerson told the Dartmouth College Phi Beta Kappa Society in 1842, "The constant admonition of nature to man is, do not believe the past, I give you the Universe, a virgin today,"[3] he expressed the grand optimism of antebellum Americans that they were different—and ought to celebrate that difference—from Europeans. Emerson sought to reclaim early Americans' practical ability to have a direct relationship with God and nature.[4]

Judges were among those Americans who sought that direct relationship between truth and their modes of thought in the early nineteenth century. Judges frequently returned to original principles. Ralph Waldo Emerson's 1837 "American Scholar" Address told of the life of the mind in America. It urged a rejection of irrational precedent and a vigorous adaption of literature and ideas for each new generation. The scholar bore a striking resemblance to the jurist, who continually re-tested old assumptions:

> Whatsoever oracles the human heart, in all emergencies, in all solemn hours, has uttered as its commentary on the world of actions,—these he shall receive and impart. And whatsoever new verdict Reason from her inviolable seat pronounces

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[2] With all of the changes brewing in American society, it is easy to forget, however, that Locke appended to that saying, "and more so than that is now." For even in Locke's time–the middle of the seventeenth century–there was substantial development in the Americas. JOHN LOCKE, TWO TREATISES OF GOVERNMENT ¶ 49 (1690) (Peter Laslett ed. 1988). *See also* BARBARA ARNEIL, JOHN LOCKE AND AMERICA: THE DEFENSE OF ENGLISH COLONIZATION 1 (1996). Locke had already told how central property was to economic development, with an illustration from the experience of American Indians, whose standard of living was inferior to that of common laborers in England. LOCKE, *supra*, ¶ 41("several nations of the Americans are of this, who are rich in land, and poor in all the comforts of life; whom nature having furnished as liberally as any other people, with the materials of plenty, i.e. a fruitful soil, apt to produce in abundance, what might serve for food, raiment, and delight; yet for want of improving it by labour, have not one hundredth part of the conveniences we enjoy: and a king of a large and fruitful territory there, feeds, lodges, and is clad worse than a day-labourer in England."). Commerce was central to property. Locke illustrated this by asking what would the value of property be if it is so far away from the stream of commerce that the produce could not make it to market? LOCKE, *supra*, ¶ 48 ("[W]hat would a man value ten thousand, or an hundred thousand acres of excellent land, ready cultivated, and well stocked too with cattle, in the middle of the inland parts of America, where he had no hopes of commerce with other parts of the world, to draw money to him by the sale of the product? It would not be worth the enclosing, and we should see him give up again to the wild common of nature, whatever was more than would supply the conveniences of life to be had there for him and his family.").

[3] Ralph Waldo Emerson, *Literary Ethics*, *in* RALPH WALDO EMERSON, NATURE, ADDRESSES, AND LECTURES 148, 162 (Cambridge, Riverside Press 1883).

[4] RALPH WALDO EMERSON, NATURE, *in id.* at 9.

on the passing men and events of to-day,—this he shall hear and promulgate.[5] American judges came to believe, with Emerson, that "There are new lands, new men, new thoughts." It was natural, then, for them to "demand our own works and laws and worship."[6] Americans looked around and saw, with Emerson, extraordinary technological, moral, and economic advances. Theodore Parker characterized the American people's search for reasons: "[T]here is a philosophical tendency, distinctly visible; a groping after ultimate facts, first principles, and universal ideas. We wish to know first the fact, next the law of that fact, and then the reason of the law."[7] That process of revisiting precedent and bringing the law into line with reason led to a gradual evolution, particularly in property law. South Carolina attorney Hugh S. Legaré, who later served as attorney general of the United States, wrote in 1828 that "the influence of America upon the mind"--a wonderfully evocative phrase coined by Philadelphia attorney Charles Jared Ingersoll--was most visible in law, where lawyers had to be masters of precedent as well as the reasons for the rule they advanced:

> Here, at once, we perceive a vast field opened up for oriental speculation and reasoning. Every case might present a twofold difficulty; first, to decide what was the law in England, and secondly, whether it were applicable here. The latter question it was impossible to answer without going into the true grounds and reasons of the law; and Burke's lawyer, who was at a loss 'whenever the waters were out,' and 'the file afforded no precedent,' would often find himself as much embarrassed in an American court of justice, as in our deliberative assemblies.[8]

By the nineteenth century, Americans had become accustomed to thinking of nature as something, well, savage–and while nature provided beauty and bounties, nature was something that needed to be improved upon and cultivated. We were "nature's nation" and that meant we were specially privileged; the feudal past that burdened Europe did not burden us. However, we also harnessed that nature and improved upon it. We hear people talking about instructing the moral conscience, about conquering nature, about bringing human institutions, like the rule of law, to the frontier, and about the role of property law in particular in that project.[9]

In political philosophy, we no longer thought freedom was greatest in the place where

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[5] Emerson, *American Scholar*, *supra* note 3. Emerson drew on some common themes here, which stretched back to Joseph Stevens Buckminster, *On the Dangers and Duties of Men of Letters*, 9 MONTHLY ANTHOLOGY AND BOSTON REVIEW 145 (September 1809).

[6] EMERSON, *Nature*, *in* EMERSON'S ESSAYS, *supra* note 3, at 7.

[7] Theodore Parker, *The Political Destination of America*, in 2 THEODORE PARKER, SPEECHES, ADDRESSES, AND OCCASIONAL SERMONS 198, 214 (Boston, Horace B. Fuller 1867).

[8] [Hugh S. Legaré,] *Kent's Commentaries*, 3 SOUTHERN REVIEW 72 (1828).

[9] DONALD MEYER, THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC (1974) (focusing on moral philosophy instruction in early America); LAWRENCE KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA (1989) (discussing conflicting ideas of Democrats and Whigs toward economy and law); PERRY MILLER, LIFE OF THE MIND IN AMERICA FROM REVOLUTION THROUGH CIVIL WAR 129 (1964) (focusing on ideas of evolution in law); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835(1988); William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65 (1990) (discussing conflicting ideologies in early America).

people were in a state of nature; we thought freedom greatest where the government existed to limit the powerful against the weak. University of Virginia Professor Albert Taylor Bledsoe applied such ideas in his proslavery treatise, *Liberty and Slavery*. In opposition to generations of writers from Hobbes to Locke to Blackstone, who thought that humans gave up freedom to enter society, Bledsoe thought society increased human freedom. "The law which forbids mischief is a restraint not upon the natural liberty, but upon the natural tyranny, of man."[10] Such sentiments were by no means confined to the world of proslavery theorists. Frequently, Whigs celebrated the role that law played in bringing order to society. Just as humans brought order to nature, the law brought order to humans. Abraham Lincoln's 1837 address to the Springfield Lyceum was inspired by the scenes of mob rule–mobocracy-that had recently occurred in such places as Natchez, Mississippi, where gamblers were run out of town during a riot, to St. Louis where a black man was burned to death, to the anti-abolition mobs. Passions, which had served us so long should rule us no longer, Lincoln thought. Instead, we needed reason and the rule of law. "Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defense.--Let those materials be moulded into general intelligence, sound morality, and in particular, a reverence for the constitution and laws: and, that we improved to the last."[11]

In James Fenimore Cooper's 1827 novel *The Prairie*, the aging hero Leatherstocking, who once had wandered the forests, following nature's law of taking only what he could consume and who hunted only when necessary[12] (but also was not constrained by private property or by hunting laws or other human constraints), believed law was now necessary. Upon meeting a young woman traveling on the prairie, Leatherstocking asked, "Why then do you venture in a place where none but the strong should come? ... Did you not know that when you crossed the Big River you left a friend behind you that is always bound to look to the young and feeble like yourself?" The friend left behind was the law. "'tis bad to have it," the Leather-stocking said, "but I sometimes think it is worse to be entirely without it. Age and weakness have brought me to feel such weakness at times. Yes, yes, the law is needed when such as have not the

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[10] Albert Taylor Bledsoe, *Liberty and Slavery: Or, Slavery in the Light of Moral and Political Philosophy*, in COTTON IS KING AND PROSLAVERY ARGUMENTS 269, 278 (E.N. Elliot ed., 1860). Many in the antebellum era thought in such terms. Boston Unitarian Frederick Henry Hedge spoke during his 1841 Harvard Phi Beta Kappa address, "Conservatism and Reform," in such terms: "Liberty and Law are not adverse, but different sides of one fact." *See Conservatism and Reform,* in FREDERICK HENRY HEDGE, MARTIN LUTHER AND OTHER ESSAYS 130, 135 (Boston, 1888).

[11] *Address Before the Young Men's Lyceum of Springfield, Illinois, January 27, 1837*, in COMPLETE WORKS OF ABRAHAM LINCOLN 37, 50 (John G. Nicolay & John Hay eds. New York, Francis Tandy 1905).

[12] And in this he seemed rather like Locke's description of primitive people, who had the right to collect property for their own use. *See* LOCKE, *supra* note 2, ¶ 46 ("The greatest part of things really useful to the life of man, and such as the necessity of subsisting made the first commoners of the world look after, as it doth the Americans now, are generally things of short duration; such as, if they are not consumed by use, will decay and perish of themselves: gold, silver and diamonds, are things that fancy or agreement hath put the value on, more than real use, and the necessary support of life. Now of those good things which nature hath provided in common, every one had a right (as hath been said) to as much as he could use, and property in all that he could effect with his labour; all that his industry could extend to, to alter from the state nature had put it in, was his. He that gathered a hundred bushels of acorns or apples, had thereby a property in them, they were his goods as soon as gathered. He was only to look, that he used them before they spoiled, else he took more than his share, and robbed others. And indeed it was a foolish thing, as well as dishonest, to hoard up more than he could make use of.").

gifts of strength and wisdom are to be taken care of."[13] The hero observed that "When the law of the land is weak, it is right the law of nature should be strong."[14] The converse of which seems to be that when the law of the land is strong, the law of nature should be weak.

The theme of law versus nature continued throughout *The Prairie*. One of the conflicts was between a squatter and the Native Americans who claimed to be the owners of the land where he resided:

> "Owners!" echoed the squatter. "I am as rightful an owner of the land I stand on as any governor of the States! Can you tell me, stranger, where the laws-or the reason is to be found which says that one man shall have a section, or a town, or perhaps a county to his use, and another have to beg for earth to make his grave in? This is not nature, and I deny that it is law. That is, your legal law."[15]

Literature, like philosophy, was coming to believe that humans are inherently social beings, who need society and law with it.

Some fictional literature illustrates the desire to improve over nature. Edgar Allen Poe's short story "The Domain of Arnheim," (originally published as the "Landscape Garden") for instance, tells of a beautiful garden, in an otherwise barren land.[16] The domain was built by Seabright Ellison using a fortune (of 450 million dollars) left to him by a remote ancestor, who had devised his fortune to his nearest living heir 100 years after his death. Poe noted the efforts that had been made to defeat the devise (and though they were ineffective, the state legislature prevented similar devises by statute).[17] No one could even begin to conceive of how to spend that fortune, which would generate more than a million dollars a month in income. So Ellison set about "solving what has always seemed to [Poe] an enigma":

> that no such combination of scenery exists in nature as the painter of genius may produce. No such paradises are to be found in reality as have glowed on the canvas of Claude. In the most enchanting of natural landscapes there will always be found a defect or an excess -- many excesses and defects. While the component parts may defy, individually, the highest skill of the artist, the arrangement of these parts will always be susceptible of improvement. In short, no position can be attained on the wide surface of the natural earth, from which an artistical eye, looking steadily, will not find matter of offence in what is termed the 'composition' of the landscape.[18]

The domain was made to look like nature, but it was artificial. It shows the ways that humans might try to create the sublime, in landscape, as in literature. All of this depended on the hand of humans and an extraordinary fortune. And thus, even in this idealized setting humans

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[13] J. FENIMORE COOPER, THE PRAIRIE 37 (New York, Stringer and Townsend 1855) (1827).

[14] *Id.* at 124.

[15] *Id.* 126.

[16] *See Domain of Arnheim*, 1 THE WORKS OF THE LATE EDGAR ALLAN POE 388 (New York, Redfield 1857); *The Landscape Garden,* LADY'S COMPANION (October 1842).

[17] *Domain of Arnheim*, *supra* note 16, at 389-90.

[18] *Id.* at 392-93.

were critical, indeed indispensable.

What is perhaps most exciting about the Domain of Arnheim is that is it based on the 1799 English case of *Thellusson v. Woodford*. The testator, Peter Thellusson, left a fortune of £800,000 to the eldest male lineal descendant, who was alive immediately after the death of all the testator's issue living at the time of the testator's death. In essence, the testator wanted to disinherit all of his living relatives and leave the money to a remote descendant–a person he had never met and could not meet. Moreover, the money was to accumulate while it was waiting for the remote descendant to become eligible to take the estate. That led to Parliament's passage in 1800 of the Thelluson Act, which limited the accumulations that were permissible.[19] Thus, Poe's short story was motivated by a case that itself was important part of the emerging law that limited inherited wealth. A short story about the ways that humans tried to improve upon nature was motivated by a legal controversy that itself was about the struggle to limit inherited wealth.[20]

Legal commentators similarly found a progression of rules for the possession of the earth. William Blackstone's *Commentaries* rested the right of possession of the earth in Genesis: "In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man 'dominion' over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."[21] And as society developed, as we moved from "a state of primaeval simplicity" seen in "the manners of many American nations when first discovered by the Europeans" there developed rights of property. First, Blackstone hypothesizes, there was the rule that a possessor owned property, but upon abandonment of the property, another might come along and possess it and thus become the owner. But then, as "mankind increased in number, craft, and ambition," other, more permanent rights emerged. "Hence a property was soon established in every man's house and home-stall; which seem to have been originally mere temporary huts or moveable cabins, suited to the design of providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the foil or ground was established."[22]

In the United States, commentaries on Blackstone in turn developed the right to property in more detail. Hugh Henry Brackenridge's *Law Miscellanies* asked why there was a right to take property from Native Americans. Brackenridge placed the right on the need to cultivate soil, in order to provide for humans' needs.[23] There was a biblical basis: "The Lord God sent him forth to till the ground." There were also practical reasons that compelled property rules that promoted agriculture. For "common reason has discovered that from the goodness and benevolence apparent in the whole creation, and from that provision made abundantly for every

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[19] Robert Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501 (2006).

[20] For more on *Thellusson v. Woodford*, 32 Eng. Rep. 1030 (1805), see Gregory Alexander, *Commodity and Property: Competing Visions of Property in American Legal Though, 1776-1970* 120-21 (1997).

[21] 2 BLACKSTONE'S COMMENTARIES *2 (Oxford, 1765).

[22] *Id.* at *

[23] HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES: CONTAINING AN INTRODUCTION TO THE STUDY OF LAW ... (Philadelphia, P. Byrne 1814).

creature, it must be most agreeable to the Creator that the earth be stored with inhabitants; and that in order to this end, a way of life be chosen in which individuals or particular nations may subsist with the least extent of territory."[24] Brackenridge concluded that those nations that needed more territory and would put it to good use had the right to it. He simply stated the right of a "nation greatly populous, whose numbers overcharge the soil, ... to demand territory from a nation in possession of a soil equally fertile, and less abounding with inhabitants."[25] Brackenridge relied upon a crude utilitarian argument–one nation could make better use of property than another. Such arguments were in the nineteenth century more commonly linked with statements that taking property from natives was in everyone's best interest, not just the best interest of the acquirer. John Locke justified property rights in part on the basis that cultivated and improved land yielded a greater return than unenclosed, untilled land. He asked "whether in the wild woods and uncultivated waste of America, left to nature, without any improvement, tillage or husbandry, a thousand acres yield the needy and wretched inhabitants as many conveniences of life, as ten acres of equally fertile land do in Devonshire, where they are well cultivated?"[26] Soon Blackstone's and Brackenridge's arguments about the importance of European discovery of relatively uninhabited land in America would become the law of the land through Chief Justice John Marshall's opinion in *Johnson v. M'Intosh*. Judges and politicians developed a regime to regulate the acquisition of property and then its use. The rule was succinctly stated by Marshall in *Johnson*, which had several key components–discoverers could acquire title to the property they used; and the discovering nation then had the right to distribute the property, which it owned in common, to its citizens for their private ownership:

> It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connection with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parceled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.[27]

Images in landscape ran parallel to those rules; we see the use of property, the harvesting of timber, the turning of forests into fields, and the division of common property into individual property.

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One might begin this examination of nature and humans through Thomas Cole's *Notch in*

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[24] *Id.* at 124.

[25] *Id.* at 126.

[26] LOCKE, *supra* note 2 , at ¶ 37.

[27] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595 (1823).

the White Mountains painted in 1839.[28] Thomas Cole was born in 1802 in England, had moved with his family to Ohio in his youth and by the mid-1820s had established himself as a landscape painter.[29] He was one of the most famous and earliest of the landscape painters of the nineteenth century. In *Notch* we have a scene of a rider on a horse, following a road towards a house; a cut stump is in the foreground. This picture confirms the reach of property that Ralph Waldo Emerson told of in his address *The Conservative*, "I find this vast network, which you call property, extended over the whole planet. I cannot occupy the bleakest crag of the White Hills or the Allegheny Range, but some man or corporation steps up to show me that it's his."[30] Property had extended its reach far indeed.

The Notch was made famous by a landslide in August 1826 that–most tragically–killed the Willey family who lived in a house there.[31] As the landslide was approaching, the family and a guest fled from the house. They were caught up in the slide and killed. The home, however, was untouched by the landslide. The next morning, as rescuers arrived, they found a bible open on the table and a candle burned down to its base. This was remembered in New England folklore for decades, including in a ballad by T.W. Parsons, which recalled how rescuers were excited to come upon the Willey House and see it still standing, which raised their hopes. Of course, that hope turned out to be unwarranted, as they soon discovered:

> That avalanche of stones and sand,
> Remembering mercy in its wrath,
> Had parted, and on either hand
> Pursed the ruin of its path.
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> And there, upon its pleasant slope,
> The cottage, like a sunny isle
> That wake the shipwrecked seaman's hope
> Amid that horror seemed to smile.

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[28] *See* A SUBALTERN'S FURLOUGH: DESCRIPTIVE OF SCENES IN THE UNITED STATES (1833); CHARLES LYELL, A SECOND VISIT TO THE UNITED STATES OF NORTH AMERICA 56-70 (1849) (discussing testate and intestate distribution of property, along with White Mountains); NATHANIEL P. WILLIS, AMERICAN SCENERY (1840).

[29] JAY CANTOR, THE LANDSCAPE OF CHANGE: VIEWS OF RURAL NEW ENGLAND, 1790-1865 (1976); Christine Stansell & Sean Wilentz, *Cole's America*, in THOMAS COLE: LANDSCAPE INTO HISTORY 3-21 (William H. Truettner and Alan Wallach eds. 1994); Alan Wallach, *Thomas Cole: Landscape and the Course of American Empire*, in *id.* at 23-111; ELLWOOD C. PARRY III, THE ART OF THOMAS COLE: AMBITION AND IMAGINATION (1988); BARBARA NOVAK, NATURE AND CULTURE: AMERICAN LANDSCAPE AND PAINTING, 1825-1875 9-10 (3rd ed. 2007).

[30] Ralph Waldo Emerson, *The Conservative*, in 5 WORKS OF EMERSON: MISCELLANIES 239, 249 (Cambridge, Riverside Press 1880).

[31] *See* APPLETONS' RAILROAD AND STEAMBOAT COMPANION 56 (1856) ("Nearly in range of the house, a slide from the extreme point of the westerly hill came down in a deep mass to within about five rods of the dwelling, where its course appears to have been checked by a large block of granite, which blocked the rolling mass for a moment until it separated into two streams, one of which rushed down to the north end of the house, crushing the barn, and spreading itself over the meadow ...The house remained untouched, though large stones and trunks of trees made fearful approaches to its walls and the moving mass, which separated behind the building, again united in its front! The house alone, the only spot untouched by the crumbling and consuming power of the storm, could have been their refuge from the horrible uproar around.").

And still upon the lawn before,
The peaceful sheep were nibbling nigh;
But Farmer Willey at his door
Stood not to count them with his eye.

And in the dwelling—oh despair!
The silent room! the vacant bed!
The children's little shoes were there—
But whither were the children fled?[32]

Historian Angela Miller suggests that the preservation of the house amidst the rubble hinted at the divinity of property. Not even nature would touch it–though many cases of fire and eminent domain told a different story in those years.[33] Cole visited the Notch in the late 1820s, shortly after the slide, and then painted *The Notch in the White Mountains* in 1839.

There is a common language and mode of thinking among the landscape painters and other culture bearers of the mid-nineteenth century, like lawyers, judges, and academics: they wrote of a constellation of ideas, of nature, of humans, of democracy, property, and progress.[34] And we can see the human divisions of property in their paintings. In the vista of "The Ox Bow" (which is also known as "View from Mount Holyoke, Northampton, Massachusetts, After a Storm") Cole shows the move from wild nature at the left through civilization on the right. Well below the vantage are well-ordered fields, orchards, and roads. The property lines are visible on the canvas. All this is evidence of humans' subduing of nature, of their improvement upon it, of the advance of civilization. For, as Cole told a lyceum audience, the cultivated scenery "is still more important [than the natural] to man in his social capacity–necessarily bringing him in contract with the cultured; it encompasses our homes, and, though devoid of the stern sublimity of the wild, its quieter spirit steals tenderly into our bosoms mingled with a thousand domestic affections and heart-touching associations–human hands wrought, and human deeds hallowed all around."[35] In America, Cole concluded, the scenes were not of the past but of the present and the future:

Seated on a pleasant knoll, look down into the bosom of that secluded valley, begirt with

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[32] THOMAS STARR KING, THE WHITE HILLS 201 (Boston, Crosby & Ainsworth 1866). *See also* Benjamin G. Willey, *Incidents in White Mountain History...* 110 (Boston, Nathaniel Noyes 1858).

[33] ANGELA MILLER, THE EMPIRE OF THE EYE: LANDSCAPE REPRESENTATION AND AMERICAN CULTURAL POLITICS, 1825-1875 154 (1993).

[34] *See generally* ALBERT BOIME, MAGISTERIAL GAZE: MANIFEST DESTINY AND AMERICAN LANDSCAPE PAINTING, C. 1825-1875 (1991); MILLER, *supra* note 33; BARBARA NOVAK, NATURE AND CULTURE: AMERICAN LANDSCAPE AND PAINTING 1825-1875 (1980); William Cronin, *Telling Tales on Canvas: Landscapes of Frontier Change*, in DISCOVERED LANDS, INVENTED PASTS: TRANSFORMING VISIONS OF THE AMERICAN WEST 57 (1992). If we seek to understand antebellum legal thought, then it is important to look around to all sorts of cultural data, including speeches lawyers and judges gave and even the art their times produced.

[35] Thomas Cole, *Essay on American Scenery*, 7 AMERICAN MONTHLY MAGAZINE 1, 3 (Jan. 1836).

> wooded hills–through those enamelled meadows and wide waving fields of grain, a silver stream winds lingeringly along–here, seeking the green shade of trees–there, glancing in the sunshine: on its banks are rural dwellings, shaded by elms and garlanded by flowers–from yonder dark mass of foliage the village spire beams like a star.[36]

In 1836, the same year that Ox Bow appeared, Ralph Waldo Emerson published his first major work–a tiny volume called *Nature*. And so we might look there for evidence of the role of property and nature:

> The charming landscape which I saw this morning, is indubitably made up of some twenty or thirty farms. Miller owns this field, Locke that, and Manning the woodland beyond. But none of them owns the landscape. There is a property in the horizon which no man has but he whose eye can integrate all the parts, that is, the poet. This is the best part of these men's farms, yet to this their warranty-deeds give no title.[37]

Emerson embraces the language of property–warranty deeds–to talk about property and nature. We see in Ox Bow that different people own the pieces; the poet or the painter owns the whole. But as we shall see later, perhaps those who can view the whole have ways of possessing it.

Emerson's hypothesis that one might own individual property but not the landscape was challenged, metaphorically anyway, by a character in Catharine Marie Sedgwick's 1830 novel *Clarence: Or, A Tale of Our Own Times*, in which a suitor of a beautiful young woman purchased a Cole painting auctioned off for a *bargain* ($50). He then refused requests by others to see it. Thus he completed his possession of the image of the falls of Trenton.[38] Talk about

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[36] *Id.* at 11-12.

[37] RALPH WALDO EMERSON, NATURE, ADDRESS, AND LECTURES 16 (Boston, Houghton Mifflin 1893). *See also* In re Pea Patch Island, 1 Wall.Jr.C.C. IX, 30 F.Cas. 1123 (1848) (New Jersey residents "erect their mansions upon [the Delaware River's] margin, and contemplate, with the pride of ownership, the broad and beautiful expanse which gives to the landscape its crowning grace.").

[38] Fifty dollars might be a fair price for a landscape painting. *See* Rose v. Thompson, 17 Ala. 628, 1850 (affirming order of a justice court that a painter be paid $50 for a landscape he painted for the defendant). And at other times, landscapes became the subject of lawsuit, such as when a testator gave two landscape paintings. Walsh v. Mathews, 11 Mo. 131 (1847). They were sometimes subject of a bequest at death. *See, e.g.,* Pinckney v. Pinckney, 2 Rich.Eq. 218 (S.C. 1846) (gift of a painting by Ruebens). And sometimes paintings were the subject of mortgages. Runyon v. Groshon, 12 N.J. Eq. 86, 1858 (finding that Rembrandt Lockwood used his painting "last judgment" to secure a loan for $300 and upon his failure to repay the loan, the creditor was entitled to take title to the painting; the painting is now in the Newark Museum of Art in New Jersey). At other times, the title of a painting was obscured by time. Laguna v. Acoma, 1 N.M. 220 (1857) (disputing title of painting in the possession of the pueblo of Acoma). Another case described *Laguna* as providing protection to the pueblo:

> However much the philosopher or more enlightened Christian may smile at the simple faith of this people in their supposed immediate and entire guardian of the pueblo, to them it was a pillar of fire by night and a pillar of cloud by day, the withdrawal of whose light and shade crushed the hopes of these sons of Montezuma, and left them victims to doubt, to gloom, and to fear. The cherished object of the veneration of their long line of ancestry, this court permanently restores, and by its decree confirms to them, and throws around them the shield of the law's protection in their enjoyment of their religious love, piety, and confidence.

De la O v. Acoma, 1 N.M. 226 (1857).

commodification and possession of beauty![39] Emerson recognized that such sentiments were common. Some wanted the whole earth and still more. "Yonder sun in heaven you would pluck down from shining on the universe, and make him a property and privacy, if you could; and the moon and the north star you would quickly have occasion for in your closet and bed-chamber. What you do not want for use, you crave for ornament, and what your convenience could spare, your pride cannot."[40] It was, indeed, the age of acquisition, of commerce, and of the market.

Others in that romantic age besides Emerson also wondered how a person could "own" nature. The Natural Bridge in western Virginia, which Thomas Jefferson described in his *Notes on the State of Virginia*:

> The Natural bridge, the most sublime of Nature's works,…must not be pretermitted. It is on the ascent of a hill, which seems to have been cloven through its length by some great convulsion.…Though the sides of this bridge are provided in some parts with a parapet of fixed rocks, yet few men have resolution to walk to them and look over into the abyss. .... It is impossible for the emotions, arising from the sublime, to be felt beyond what they are here: so beautiful an arch, so elevated, so light, and springing, as it were, up to heaven, the rapture of the Spectator is really indescribable.[41]

In fact, Jefferson had already purchased the land on which the bridge stood, in 1774. Jefferson wrote in 1815 that he viewed the bridge as a public trust: "I view it in some degree as a public trust, and would on no consideration permit the bridge to be injured, defaced, or masked from public view."[42]

But in the late 1840s, because of a lawsuit, the property was up for auction. This led one romantic Virginian, John Rueben Thompson, editor of the *Southern Literary Messenger*, to wonder how the property could be sold. He wrote of the sublime beauty of the bridge:

> we confess we were greatly surprised to learn that the Natural Bridge was to be sold. Such a thing had never occurred to us. Somehow—we know not how—we had taken up the idea that it belonged to nobody, that it was a sort of *nullius status*, that it was indeed incapable of transfer from one person to another. ... If we had looked upon it as property at all, we should have rather considered it an "incorporeal hereditament" as affecting the imagination, and we should as soon have thought of buying a rainbow or a sunset, evanescent as they are, as becoming the owner of the Natural Bridge. The magnificent phenomena of nature everywhere—Alps, torrents, cataracts, illimitable prairies,—seem to us in their eternal grandeur to mock the efforts of man to reduce them into possession. ...

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[39] In other ways, paintings were commodities as well. They were distributed by lot by the American Art Union, which was a violation of the New York law against lotteries. *See* People v. The Art Union, 3 Selden 240 (N.Y. 1852); Bennet v. The Art Union, 6 Sanford 614 (N.Y.); The People v. The Art Union, 13 Barb. 577. (N.Y.).

[40] Emerson, *supra* note 37, at 293.

[41] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 22-23 (Richmond, J.W. Randolph, 1853) (1787).

[42] Thomas Jefferson to William Caruthers, 15 March 1815.

> At what value should such a bridge be held? In ordinary structures of this description, the value bears some proportion to the cost of building. But he who should sit down, with card and pencil, to estimate the cost of putting up another Natural Bridge, would be apt, I think, to find the task a *pons asinorum*.[43]

Perhaps Frederick Church's 1852 painting *Natural Bridge* should be viewed alongside John Reuben Thompson's poem complaining about the sale of the Natural Bridge:

> A SALE! A sale! Earth's proudest things are daily bought and sold,
> And art and nature coincide in bowing down to gold.
> Alas! at such a sale as this sad thoughts within us rise
> Until the Bridge becomes to us a very Bridge of Sighs.
>
> Ho! citizens of Lexington, ho! keepers of the springs,
> To whom the Bridge a revenue in transient travel brings,
> Rebuke the cruel auctioneer with your severest frown
> Before in his destructiveness he seeks to knock it down!
> ...
> The earth is full of stately works of monumental pride—•
> The famed Rialto thrown above the dark Venetian tide—•
> And pyramids and obelisks of ages passed away—
> And friezes of Pentelicus majestic in decay:—
>
> But arches, domes, colossal piles that human skill has wrought,
> All, all, when in comparison with thy proportions brought,
> Are fleeting as the palaces fantastically vain
> That Russian monarchs rear in ice on Neva's frozen plain!
>
> A Saxon priest once stood beneath the Coliseum's wall
> And augured that the globe itself should topple with its fall!
> Oh, when this mighty arch of stone shall from its base be hurled
> An elemental war shall work the ruin of the world![44]

Thompson, like other romantics, praised nature instead of human constructions. Yet, like many other southern intellectuals, Thompson also supported slavery.[45] The connection between

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[43] Σ [John R. Thompson], *Advertisement Extraordinary*, 15 S. LIT. MESSENGER 664-65 (Nov. 1849).

[44] *Stanzas on the Proposed Sale of the Natural Bridge*, in *id.* at 665.

[45] *See* PETER CARMICHAEL, THE LAST GENERATION: YOUNG VIRGINIANS IN PEACE, WAR, AND REUNION (2005) (discussing combination of ideas of romanticism and progress). Michael O'Brien's Conjectures of Order: The Intellectual in the South, 1810-1860 (2004) similarly emphasizes romanticism in the slaveholding south. A generation ago Perry Miller linked landscape artists and romanticism, though slavery was not so much a piece of Miller's account of the antebellum mind. He linked landscape painters and many others:

romanticism and slavery is strange, to say the least, as were Americans' attitudes toward property.

This brings me to two points. First, that landscape art reflects the values of Americans and we can see in the images much of Americans' love for property. We can read these texts to provide additional information on ideas about property.[46] From adverse possession, nuisance, mistaken improver, and landlord-tenant law, to vested rights, landscape art can help us understand American property law of the time.[47] And we can also use it to understand more abstract ideas, like the centrality of property law in the advance of civilization–in making it possible to purchase rights from the crown, securing society against upheaval, facilitating commerce and industry. And thus we have additional evidence on how central property was, from voting rights to vested rights, to the evolution of common law property rights. There are, moreover, tensions here between law (in this case property law) and nature, even as many celebrated the role of property rights in assisting the progress. Many of the landscape artists, like Cole, expressed ambivalence about the utilitarian spirit of the age. Second–and more speculatively–landscape art may have helped propagate those values and helped create a ferment for progress.[48]

> The Sublime and the Heart! That they should, so to speak, find each other out and become, in the passions of the Revival, partners–this is a basic condition of the mass civilization of the nation. That the religious, dedicated to the immediate tasks before them, did not see all the implications in this union, which the Hudson River painters, Cooper, Melville, and Whitman later explored, simply underscores the truism that these artists were as much children of the age as Charles Finney.

PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM REVOLUTION THROUGH CIVIL WAR 65 (1963).

[46] Antebellum Americans understood that paintings could convey ideas and sentiments. Thus, paintings were subject to regulation in some cases, just as was print. A painting might be a libel. *See* Commonwealth v. Blanding, 3 Pick. 304, 20 Mass. 304 (1825) ("the common law has put a check upon the licentiousness of the press, and the expression of opinion by writing, painting, &c. when the effect and object is to blacken the character of any one, or to disturb his comfort...."). It might also be obscene. *See* Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Penn., 1815) (prosecution for exhibition "for money, to persons to the inquest aforesaid unknown, a certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman"). Paintings could also serve as evidence in a case. Thus, a portrait painting was used to establish family connections. *See* Emerson v. White, 9 Fost. 482 (N.H. 1854).

Moreover, judges recognized the place that paintings might have in elevating society. In a case involving the Pennsylvania Academy of Fine Arts' request for exemption from taxation, the Pennsylvania Supreme Court acknowledged

> It is true that the arts of painting and sculpture are refining and elevating in their tendencies. They advance the fame and fortunes of all who are qualified for the beautiful creations which belong to them. Like the kindred arts of poetry and music, they furnish "a joy for ever" to those whose tastes invite, and whose circumstances permit them to drink at the Castalian fountain.

Pennsylvania Academy of Fine Arts v. Philadelphia County, 22 Pa. 496 (1854). Still, the Court construed the Pennsylvania Academy of Fine Arts as not a trade school for purposes of exemption from taxation.

[47] Claire Priest, *Creating an American Property Law: Alienability and its Limits in American History*, 120 HARV. L. REV. 385 (2006), which discusses the changes in property doctrine that run parallel to the changes here.

[48] This paper is, thus, part of a much larger movement in legal history that seeks to connect law to the culture that surrounds it. *See, e.g.,* DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES (1941). Many of the contradictory tendencies that Boorstin identified in mid-eighteenth century England were resolved in American by the early nineteenth century, so that one looking to the leading early American legal treatise, Kent's Commentaries, is tempted to speak of the "understandable science of the law." And even followers of Blackstone in early America, St. George Tucker and Hugh Henry Brackenridge, were more concerned with the understandable aspects of law than its mysteries. In

One of the key ideas of the antebellum era was a belief in divinely inspired progress. It was an era in which Americans told ourselves that we were on a divinely sanctioned mission. That mission linked the market and law with the course of subduing nature. John Frederick Kensett's *Beacon Rock in Newport*, Rhode Island's harbor was one representation of that mission. Beacons had a religious significance.[49] The divinity of property we have already seen in Blackstone and his American followers. In the beacon we get the imagery of the community setting a fire to warn of danger and to guide us as well.[50] In the law of beacons we see the community's obligation to protect.[51]

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addition to Brackenridge's *Law Miscellanies*, his *Modern Chivalry* provides a distillation of ideas about law and culture that helps systematize American law.

[49] MILLER, *supra* note 33, at 176 (discussing Frederick Church's 1851 painting *Beacon Off Mount Desert* and linking it to Puritan imagery of New England as a beacon).

[50] *See, e.g.,* ICHABOD BARTLETT, SPEECH OF MR. BARTLETT OF NEW-HAMP. ON THE PROPOSITION TO AMEND THE CONSTITUTION OF THE UNITED STATES… 28 (Washington City, 1826) ("We are reminded that our fathers here kindled the beacon of liberty, while our foes still predict that it is but the transient flash of a meteor, soon to leave the world in deeper gloom."). Benjamin Watkins Leigh used beacon in both meanings in 1824 as he opposed the extension of suffrage in Virginia. He urged the examination of the "experiments that have been made of universal suffrage; and verily believe, that the inquiry will result in the undoubting opinion, that the example of other states is a beacon to warn, not a guide to direct." WATKINS LEIGH, SUBSTITUTE INTENDED TO BE OFFERED TO THE NEXT MEETING OF THE CITIZENS OF RICHMOND: ON THE SUBJECT OF A CONVENTION ... 22 (Richmond, Shepherd and Pollard 1824). *See also* JAMES TRECOTHICK AUSTIN, AN ORATION: DELIVERED ON THE FOURTH OF JULY, 1829, AT THE CELEBRATION OF AMERICAN INDEPENDENCE, IN THE CITY OF BOSTON (Boston, 1829) ("The Senate of the United States, intended to stand like an island among the waves and throw its beacon light of safety over their angry surges, is itself but a vessel on the same ocean, driven by all the impulses that move the elements about it.").

[51] Beacons were seen as central to the community's well-being, so that the erection of beacons was a charitable purpose. *See* McGill v. Brown, 16 Fed. Cases 408, 432 [No. 8,952] (C.C. Pa. 1833) (Baldwin, J., sitting as circuit justice) (listing trusts for the erection of beacons, bridges, and repair of highways as satisfying the requirements of charitable purpose). Counsel for a railroad analogized in the Connecticut Supreme Court the charter of a railroad to the legislature's power and duty to construct beacons to protect the community. *See* City of Bridgeport v. Housatonuc R.R., 15 Conn. 475 (1843) ("[I]t is the peculiar duty of the legislature to protect the interests of each portion of the state. If it should consider the construction of a rail-road necessary for this purpose, it would have the right to direct it to be built, as well as to construct light-houses, beacons, &c."). The James River Canal Company was required to place beacons for the benefit of people using the Kanawha river. *See* James River & Kanawha Co. v. Early, 13 Gratt. 541 (Va. 1856). Moreover, towns were sometimes required to place beacons to guide travelers away from hazardous conditions on land. *See* Kimball v. Bath, 38 Me. 219 (1854) ("Towns are not only authorized, but required by law to repair their public ways, including streets and side-walks, so that they may be safe and convenient for those who may have occasion to pass and repass upon them. ... But while, for the purpose of repairs, they may thus break up and temporarily obstruct the passage over their public ways and side-walks, they are not authorized to leave their streets or side-walks, while undergoing repairs, in such a condition as unnecessarily to expose those who may pass upon them to inconvenience or danger. At such times, ways should not be left during the night without some temporary railing, or other means of protection, or some beacon to warn passengers against such uncommon danger. By neglecting to adopt such reasonable precautionary measures for the safety of citizens and travelers, towns are equally culpable, and as liable as they are when their ways are permitted to become unsafe from want of repairs. Any other rule would enable negligent or vicious town officers to set pit-falls for the unwary, with impunity."). Still, failure to follow a beacon–even when a pilot used the utmost care--was no defense to a cause for loss of a ship. *See* McArthur & Hurlbert v. Sears, 21 Wend. 190 (1839). Indeed, beacons were part of a close to strict liability regime in early America.

Precedent, of course, could also serve as a beacon. *See* Leavitt v. Morrow, 6 Ohio St. 71, 76 (1856) ("A legal principle, to be well settled, must be founded on sound reason, and tend to the purposes of justice. ... Otherwise, it could never be said that law is the perfection of reason, and that it is the reason and justice of the law which give to it its vitality. When we consider the thousands of cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application, we can appreciate the remark of Chancellor Kent in his *Commentaries*, vol. 1, page 477, that ' even a series of decisions are not always evidence of what the law is.' Precedents are to be regarded as the great storehouse

Let us start with some of the evidence of property ownership and the ways land is used in this art–the divisions of the land, even fences. Emerson told in a "Lecture on the Times," that some condemned institutions, like marriage. That attack on institutions had turned to property as well. "Grimly the same spirit looks into the law of Property, and accuses men of driving a trade in the great boundless providence which had given the air, the water, and the land to men, to use and not to fence in and monopolize. It casts its eye on Trade, and Day Labor, and so it goes up and down, paving the earth with eyes, destroying privacy, and making thorough-lights. Is all this for nothing? Do you suppose that the reforms, which are preparing, will be as superficial as those we know?"[52]

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of experience; not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although, at times, they be liable to conduct us to the paths of error, yet, may be important aids in lighting our footsteps in the road to truth."). The beacon might warn of danger. *See* Williamson v. Beckham, 8 Leigh 20, (1837) ("The decisions of the english judges are not binding upon us; and where those decisions are opposed to their own reason and judgment, we should look upon them rather as beacons to warn us from danger, than as land marks to guide us in our path."). But precedent was not to be the only beacon, for antebellum recognized that progress occurred through following the guidance of precedent and from reconciling precedent to the political principles of the United States. The Ohio Supreme Court confronted this in *Bank of Toledo v. City of Toledo,* 1 Ohio St. 622, 630-31 (1853):

> I would not be understood as repudiating the aid of precedents, which are properly regarded as the great storehouse of experience, not always to be followed, but to be viewed as beacon lights in the progress of judicial investigation, which, if they do not prove deceptive and conduct us to the paths of error, may light our footsteps in the road to truth. Lessons of wisdom are to be extracted from the errors as well as the rightful judgments of mankind; while the one admonishes and warns, the other stands forth for imitation and adoption. Had precedent alone been consulted and followed, the great reforms in the progress of mankind would never have been adopted.

And counsel arguing that a trust to transport slaves to Africa and free them should not be enforced in Mississippi argued based on North Carolina precedent that the slaves could not be freed, for the precedent provided a clear beacon. "View it as you may, turn it as you will, twist it as you please, still in principle it covers the sole and only question before the court. That opinion was a just exposition of the laws and policy of the state, and must stand the test of scrutiny, and of time; a beacon pointing to a just interpretation of the laws and policy of the state, on the subject of domestic slavery." Ross v. Vertner, 5 Howard 305 (1840). Nevertheless, the Mississippi Supreme Court enforced the trust, because the slaves would not return to Mississippi.

In the antebellum mind, which reified so much, precedent might be both a landmark and a beacon. *See* Broaddus v. Turner, 26 Va. (5 Rand.) 308 (1827) ("it is wonderful to me, that these substantial beacons and landmarks, (to say nothing of the consideration that estates tail cannot be created, and ought not therefore to be inferred, unless that is unavoidable,) should not be looked to, instead of supposing things that the testator evidently never thought of."); *cf.* Hart v. Burnett, 15 Cal. 530, 601 (1860) ("If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a Court of appeal or review, and never by the same Court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law.") (quoting 1 Kent's Commentaries 476); Hubbard v. Beckwith, 1 Bibb 492 (Ky. 1809) ("But, as judges, we must decide by the law, not make it; and we cannot break through the rules, and remove the landmarks which for ages have discriminated the remedies by action, to get at that which, not looking through the medium of the law, might appear to be just.") (refusing to overturn a judgment against a plaintiff who sued in case when he should have sued in debt, a formalism that was on the decline in the 1800s).

[52] Emerson, *Lecture on the Times*, *supra* note 10 (thorough-lights are windows on opposite sides of a house). Emerson the transcendentalist was more enamored of nature and celebrated humans' connections to it more than did many of his contemporaries. Where they saw nature as something to be taken, harnessed, turned to a money-making function, Emerson was more circumspect. He worried about the reduction of everything to a commodity, as did some painters.

> Religion was not invited to eat or drink or sleep with us, or to make or divide an estate, but was a holiday guest. Such omissions judge the church; as the compromise made with the slaveholder, not much noticed at first, every day appears more flagrant mischief to the American constitution. But now the purists are looking into all these matters. The more intelligent are growing uneasy on the subject of Marriage. They wish to see the character represented also in that covenant. There shall be nothing brutal in it, but it shall honor the man and the woman, as much as the most diffusive and universal action. Grimly the same spirit looks into the law of Property, and accuses men of driving a trade in the

We see those divisions in the land in such paintings as Jonathan Fisher's *View of Blue Hill Maine*, which depicts the town where Reverend Fisher lived. It is a well-ordered landscape, with fenced fields and rows of crops, amidst finely crafted houses and buildings. And even more the divisions appear in Jasper Frederick Cropsey's *American Harvesting* (1851), which divides the scene into wild nature on one side of a fence and a cultivated field that is yielding the harvest on the other. Fences are important because they define what was really private property. At the time, there was a general right for animals and humans to cross rural property that was not fenced.[53] It's not just human structure–houses, fences, roads–that appear. Machines begin to appear on the landscape. In Elihu Vedder's 1857 *Landscape with Sheep and Old Well*, we see a well in the middle of a field, a sign of industry. Vedder's painting was once owned by Senator Charles Sumner of Massachusetts, a founder of the Republican Party, whose ideology included both anti-slavery and emphasis on development of the market.

Industry sometimes appeared on the landscape in literature are well. The hero in Herman Melville's short story "Tartarus of the Maids" heard the sound of industry in nature. He went in search of a paper-mill so that he might purchase paper more cheaply. He was the seed business, so he used an extraordinary amount of paper, often as envelops for the seeds. The man, who went on a sleigh during the winter, was lost in a valley, looking for the mill. "The whole hollow gleamed with the white, except, here and there, where a pinnacle of granite showed one wind-swept angle bare. The mountains stood pinned in shrouds -- a pass of Alpine corpses. Where stands the mill?" Then, he heard it. "Suddenly a whirling, humming sound broke upon my ear. I looked, and there, like an arrested avalanche, lay the large whitewashed factory."[54]

In fact, while traveling there was much to look at. The landscape painter Charles Lanman recalls the scenes of humans and their animals on the land. During a journey through New England, he is lost in thought about what the landscape looked like:

> My thoughts were upon the earth once more, and my feet upon a hill out of the woods, whence might be seen the long broad valley of the Amonoosack, melting into that of the Connecticut. Long and intently did I gaze upon the landscape, with its unnumbered farm-houses, reposing in the sunlight, and surmounted by pyramids of light blue smoke, and also upon the cattle gazing on a thousand hills. Presently I heard the rattling wheels of the stage-coach; — one more look over the charming valley,—and I was in my seat

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> great boundless providence which had given the air, the water, and the land to men, to use and not to fence in and monopolize. It casts its eye on Trade, and Day Labor, and so it goes up and down, paving the earth with eyes, destroying privacy, and making thorough-lights. Is all this for nothing? Do you suppose that the reforms, which are preparing, will be as superficial as those we know?

[53] ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 29-60 (2007) (discussing the "lost right to roam"); William W. Fisher, The Law of the Law: American Property Doctrine, 1776-1876 141 (Ph.D. Dissertation, Harvard University, 1991) (discussing southern states' preference for open range and northern states' preference for closed range). In antebellum America, livestock and hunters had the customary right to cross land that was not fenced. Of course, this was modified by statute in some places, which is what led to the conflict between Natty Bumppo and Judge Marmaduke Temple in *The Pioneers.* Freyfogle cites Nashville & Chattanooga R.R. v. Peacock, 25 Ala. 229 (1854); Macon & Western R.R. v. Lester, 30 Ga. 911 (1860);Vicksburg & Jackson R.R. v. Patton, 31 Miss. 156 (1856).

[54] Herman Melville, *The Paradise of Bachelors and the Tartarus of Maids*, 10 HARPERS 670, 674 (1855). I learned of this story from Leo Marx, *The Machine in the Garden* 15 (1963).

beside the coachman.[55]

In fact, that jumbled scene, populated with people, their fields, buildings, roads, bridges, even mills, appears in Frederick Church's 1851 *New England Scenery*. It is a busy canvass. There is a bridge with a covered wagon, a mill with a waterwheel, and a town with a church in the background. In short, the industrial and economic revolution appears on the canvas. The economic revolution that is depicted on the canvass runs parallel to the legal world, with its preferential treatment of the use of property for economic efficient uses of the land. The mill in Church's landscape reminds us of the centrality of the mill to antebellum property disputes and then later to property legislation. Problems arose when mills owners built dams to generated power, by increasing the vertical drop in water at their mill. Those dams flooded neighbors' property and in short order led to nuisance and trespass suits by those neighbors. In order to limit the damage judgements against the mill owners, the mill acts gave owners the right to condemn neighbors' property and, in effect, purchase a permanent right to flood.[56]

There were conflicts over how legislatures and courts realigned property rights. Some of

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[55] CHARLES LANMAN, LETTERS FROM A LANDSCAPE PAINTER 133 (Boston, James Munroe and Company 1845).

[56] John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719-1859*, 27 J. LEGAL STUDIES 455-471 (1998); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NORTHWESTERN U. L. REV. 1099-1156 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine,* 109 HARVARD L. REV. 1252 (1996). Moreover, a New York Court rejected the argument that a damn is nuisance per se. Instead, the court reflected on the damns as evidence of civilization. *See* Rogers v. Barker, 31 Barb. 447 (1860):

> [Damns] are sources of mechanical power, and tend to diffuse health and strength and comfort to large numbers of people. Reservoirs and collections of water by means of dams in the beds of running streams, for the purposes of manufactures and supplying cities and towns with water for public and domestic uses, are to be found every where throughout the state. They are ranked among the evidences of its civilization and progress in the useful arts.

A subplot of John Pendleton Kennedy's *Swallow Barn, Or a Sojurn in the Old Dominion* (New York, J. Gutnam revised ed. 1852) revolved around a lawsuit over a boundary line between the property of the owner of an old mill and his neighbor. Kennedy invoked the imagery of a bank to describe the problems with the mill, an illuminating invocation of commerce. *See id.* at 135 ("The mill-dam was like a bank that had paid out all its specie, and, consequently. could not bare the run made upon it by the big wheel, which, in turn, having lost its credit, stopped payment ...."). There was a certain public-spiritedness to the mill, which the narrator told about when he recalled how the mill was a reminder of his relative who built it:

> My grand uncle, very soon after the peace, was gathered to his fathers, and has left behind him a name, of which, as I have before remarked, the family are proud. Amongst the monuments which still exist to recall him to memory, I confess the old mill, to me, is not the least endearing. Its history has a whimsical bearing upon his character, illustrating his ardent, uncalculating zeal; his sanguine temperament ; his public spirit; his odd perceptions; and that dash of comic, headstrong humorousness ....

Id. at 143.

Kennedy told how the constructor of the damn had purchased land from his neighbor so that he could create a large pool, though that led to a dispute over the boundary line between the property of the mill's owner and his neighbor. *Id.* at 141-42, 242-44. In describing the broken-down mill, Kennedy invokes romantic imagery characteristic of the landscape painters:

> The ruin of the mill is still to be seen. Its roof has entirely disappeared ; a part of the walls are yet standing, and the shaft of the great wheel, with one or two of the pinions attached. still lies across its appropriate bed. The spot is embowered with ancient beech trees. and forms a pleasant and serene picture of woodland quiet. The track of the race is to be traced by some obscure vestiges, and two mounds remain, showing the abutments of the dam. A range of light willows grows upon what I presume was once the edge of the mill-pond; but the intervening marsh presents now, as of old. its complicated thickets of water plants, amongst which the magnolia. at its accustomed season, exhibits its beautiful flower, and throws abroad its rich perfume.

Id. at 142-43.

the most contested cases of antebellum property rights involved the interpretation of corporate charters related to bridges. Private companies spent considerable sums of money constructing bridges and hoped to recover their costs by charging to cross the bridge. Legislatures sometimes chartered other, competing bridges–or even built public bridges–which limited the profit to be made from the first bridge. Chief Justice Roger Taney's 1836 opinion in *Charles River Bridge v. Warren Bridge* crystalized the conflict, which pitted claims of vested rights against the community's rights. Chancellor James Kent wrote an article in response, which highlighted the fear many Whigs felt for the security of property rights.[57] Kent used imagery of nature in describing what was happening. The Supreme Court "cast deep shadows over our fairest and proudest hopes." The change of the Supreme Court from the leadership of Chief Justice John Marshall to Chief Justice Roger Taney caused cast "a gathering gloom ... over the future." "We seem to have sunk suddenly below the horizon, to have lost the light of the sun and to hold on our way...."[58]

Democrats, however, viewed the issues at stake in vested rights differently from Whigs like Chancellor James Kent. George Bancroft, who wrote Andrew Jackson's second inaugural address, indicted the fascination with vested rights in an oration on July 4, 1836. Bancroft spoke of the implications of the Whig interpretation of the Constitution as a compact between individuals and government. Bancroft attacked the foundation of vested rights in long-term use. A theory of vested rights, Bancroft said, "adduces no arguments in its support but from the musty archives of the past. Instead of saying, 'It is right,' it says, 'It is established.' It asserts an immortality for law, not for justice...." The idea of the inviolability of contracts "regards every injustice, once introduced into the compact, as sacred; a vested right that cannot be recalled; a contract that, however great may be the pressure, can never be cancelled. The Whig professes to cherish liberty, and he cherishes only his chartered franchises."[59] Bancroft sought more flexibility in government and less veneration for vested rights.

However, while there were key points of conflict, there was also great consensus in the value of property and in the ways that its protection led to the advancement of civilization in the United States. Property law helped to shape American character, as Daniel Webster explained in his 1820 oration at Plymouth, by encouraging wide distribution of property through elimination of the rule of primogeniture for intestate estates and the discouragement of entail:

> The character of their political institutions was determined by the fundamental laws respecting property. The laws rendered estates divisible among sons and daughters. The right of primogeniture, at first limited and curtailed, was afterwards abolished. The property was all freehold. The entailment of estates, long trusts, and the other processes for fettering and tying up inheritances, were not applicable to the condition of society, and seldom made use of. On the contrary, alienation of the land was every way facilitated,

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[57] James Kent, *Supreme Court of the United States*, 2 N.Y. REV. 372, 385 (April 1838).

[58] *Id.* at 385.

[59] GEORGE BANCROFT, AN ORATION DELIVERED BEFORE THE DEMOCRACY OF SPRINGFIELD, AND NEIGHBORING TOWNS, JULY 4, 1836 (Springfield, George and Charles Merriam, 1836).

> even to the subjecting of it to every species of debt. The establishment of public registries, and the simplicity of our forms of conveyance, have greatly facilitated the change of real estate from one proprietor to another. The consequence of all these causes has been a great subdivision of the soil, and a great equality of condition; the true basis, most certainly, of a popular government.[60]

Webster saw in the United States' equitable division of property the keys to our country's stability and progress. "If the people," says Harrington, "hold three parts in four of the territory, it is plain there can neither be any single person nor nobility able to dispute the government with them; in this case, therefore, except force be interposed, they govern themselves." Webster saw these lessons confirmed in English history:

> It has been estimated, if I mistake not, that about the time of Henry the Seventh four fifths of the land in England was holden by the great barons and ecclesiastics. The effects of a growing commerce soon afterwards began to break in on this state of things, and before the Revolution, in 1088, a vast change had been wrought. It may be thought probable, that, for the last half-century, the process of subdivision in England has been retarded, if not reversed; that the great weight of taxation has compelled many of the lesser freeholders to dispose of their estates, and to seek employment in the army and navy, in the professions of civil life, in commerce, or in the colonies. The effect of this on the British constitution cannot but be most unfavorable. A few large estates grow larger; but the number of those who have no estates also increases; and there may be danger, lest the inequality of property become so great, that those who possess it may be dispossessed by force; in other words, that the government may be overturned.[61]

Property not only shaped our nation's character, however. It was also an engine that provided the power to democracy and to economic progress. The age was utilitarian and it measured value by the amount it contributed to wealth, as many observed–some saw this in positive terms, others in negative terms. Silas Jones' treatise *Introduction to Legal Science*–which the *Southern Literary Messenger* introduced to its readers with the observation that "The spirit of the age is utilitarian in a high degree and we hail the publication of such useful and practical works, always with pleasure."[62]–identified as one of the great virtues of the United States that property was widely diffused. "There should be neither great riches secured to the few, nor great poverty fastened upon the conditions of the many. In these respects, no nation on earth was ever more happily situated than our own."[63] Jones, drawing upon James Kent's *Commentaries*, saw property as a central feature of human society and a key ingredient of civilization

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[60] Daniel Webster, *First Settlement of New England: A Discourse Delivered at Plymouth, on the 22nd of December, 1824*, in THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 25, 44 (Edwin Percy Whipple ed., 1914).

[61] *Id.* at 44.

[62] *Notices of New Works, Silas Jones*, 8 S. LIT. MESSENGER 363 (May 1842) .

[63] SILAS R. JONES, INTRODUCTION TO LEGAL SCIENCE 44 (1842).

> The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from it feeble force in the savage state to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society. Man as fitted and intended by the author of his being, for society and government, and for the acquisition and enjoyment of property. It is to speak correctly the law of his nature; and by obedience to this law he bings all his faculties into exercise, and is enabled to display the various and exalted powers of the human mind.[64]

Those sentiments of acquisition of property and use of it extended into the wilderness. We see in paintings, like Thomas Cole's *Daniel Boone at His Cabin at the Great Osage Lake* in the wilderness of Missouri, a place where humans are carving out an existence, amidst a wild nature.[65]

As Americans pushed past the Allegheny mountains, into Kentucky, in the early part of the nineteenth century they faced an uncertain property recording system. Thus, settlers faced unpredictability in land titles, particularly in early Kentucky. At the time people began settling in Kentucky, records and surveying were both sufficiently unclear that there was substantial uncertainty in land titles. As a result, a lot of people settled on land and began improving it, without certainty about whether they were actually the owner or if someone with a superior title might come along and oust them. The Kentucky legislature addressed these problems with several statutes. One absolved those who mistakenly–though in good faith--occupied property owned by others from rent for the time they occupied the property. An 1812 statute required claimants with superior title to land to pay those who were occupying it for the value of the land, as well as the improvement. These statutes were challenged as an abrogation of the promise that Kentucky made to Virginia in 1789 that Kentucky would respect the private rights in land that had been ceded to Kentucky. The heirs of a claimant sued on the theory that the statutes violated the compact and that they interfered with the claimant's property rights. Justice Story wrote an opinion in the case, *Green v. Biddle*, in 1821[66] which upheld the right of the claimant over the statutes. It was subsequently withdrawn. Then in 1823, Justice Bushrod Washigton again invalidated the statutes. For Justice Washingon the principle was that original property rights ought to be secured. He accomplished this by invalidating a state's statutes that he saw as inconsistent with a contract between Virginia and Kentucky. In essence, the contract between Virginia and Kentucky was construed broadly to trump subsequent Kentucky legislation. Justice Johnson in dissent thought that broad reading of the states' contract inappropriate. He feared that in the name of upholding vested rights, Kentucky would be held to an unusual property regime.

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[64] *Id.* at 166 (quoting 2 KENT, COMMENTARIES *318). *See also* ELISHA P. HURLBUT, ESSAYS ON HUMAN RIGHTS AND THEIR POLITICAL GUARANTIES 63 (Edinborough 1847). For further discussion of Kent's discussion of property, see Charles J. Reid, *Judging Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries*, 5 AVE MARIA L. REV. 43, 86 (2007).

[65] *See generally* STEPHEN ARON, HOW THE WEST WAS LOST: THE TRANSFORMATION OF KENTUCKY FROM DANIEL BOONE TO HENRY CLAY 82-101 (1999) (discussing the "rules of law" in eighteenth and nineteenth century Kentucky).

[66] *See* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); 19 U.S. (6 Wheat.) 131 (1821); WHITE, *supra* note 9, at 641-48; Theodore Ruger, *"A Question Which Convulses a Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARVARD LAW REVIEW 827 (2004) (discussing Kentucky context of *Green v. Biddle*).

Why, Johnson asked, should Kentucky be "forever chained down to a state of hopeless imbecility -- embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, setoffs, &c., appropriate to a state of society and a state of property having no analogy whatever to the actual state of things in Kentucky"? Johnson believed there might be the need for change of Kentucky's real property law "to the ever varying state of human things which the necessities or improvements of society may require."[67] *Green v. Biddle*, thus, represented one of those conflicts between prior vested rights and newer users of property, which appeared so frequently in antebellum America and on which there was continuing struggle between Whigs (formerly Federalists) and Democrats. When the issue appeared a decade later in *Charles River Bridge*, it was the Democratic position rather than the Federalist one that triumphed.[68]

Yet, *Green v. Biddle* did not settle these issues. Courts and legislatures continued to struggle with mistaken improver legislation. When the Texas Supreme Court confronted such issues in 1852, it recalled the legislature's policy to protect those whom they had encouraged to settle the land. It was through the settlers "alone the soil could be cultivated, houses built, improvements made, and the wilderness reduced to civilization." Texas had two problems. First, questions about title to land and, second, "the incursions of ferocious and hostile savages." The Court starkly concluded that "the settlement of the frontiers especially could not advance unless there was some security that the lands conquered from savages and beasts of prey should become the property of the actual conqueror and settler of the soil, provided that if there were a claimant having equitable or legal title he should have a reasonable time to set up and establish his claim."[69]

Claims of adverse possession invoked similar questions about preferences for prior owners and current occupiers and users of the property. Adverse possession, however, involved potentially even larger questions about reassignment of rights than Kentucky's mistaken improver legislation, so adverse possession held the potential to remove purchasers' entire

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[67] 21 U.S. at 104.

[68] Alfred L. Brophy, *"Necessity Knowns No Law": Vested Rights and the Confederate Conscription Cases*, 68 MISS. L.J. (1999) (discussing antebellum vested rights decisions, including *Charles River Bridge*).

[69] Horton v. Crawford, 10 Tex. 382 (Tex. 1853). *See also* Emery v. Spencer, 23 Pa. 271, 1854 WL 6336 (Pa. 1854) ("The actual settler has always been a favorite with the legislature and the Courts in Pennsylvania, and justly, for it is he who introduces civilization into the wilderness places; and an enabling statute which permits others to buy what he has not appropriated, would be grossly misapplied if construed to exclude his rights.").

Property law, moreover, encouraged the construction of towns in California by gathering settlers together. *See* Hart v. Burnett, 15 Cal. 530, 1860 WL 1138 (Cal. 1860):

> It was very natural that in founding the new pueblo, the inhabitants of the adjacent country should be called upon to assist in commencing a new settlement, and forming its municipal organization. ... It was rather for the purpose of carrying out the general policy which had been pursued by Spain in her American dominions, and which is often alluded to in the instructions issued to the Governors of California, of inducing the scattered inhabitants of the country to unite and build up towns, as being more conducive to civilization, and as forming a better protection against the incursions of hostile Indians.

interest in their property.[70] Some courts responded to the potentially radical claims of adverse possession by expanding the evidence of what constituted use of property (and thus encouraging use of it) and by requiring a good faith claim to property. This strategy avoided giving squatters rights in property, for they know they were not the owners of the property.[71]

George Caleb Bingham, like Thomas Cole before him, used Boone in his pictures. Bingham painted a scene of Boone leading settlers through the Cumberland Gap. Transylvania University Law Professor George Robertson's lecture at Centre College in 1834 put that march through the wilderness into the context of progress. He marveled at the advance of civilization that Daniel Boone was a part of:

> Could Boone and Harrod and Logan–when once this "land of blood" they first trod in the tracks of the Indian and Buffalo–have dreamed that what we now behold in this smiling West, would so soon have succeeded their adventurous footsteps, how would such a vision have cheered them amidst the solitude and perils which they encountered in aiding to plant civilization in the wilderness![72]

Thomas Cole, too, noted how rapidly these changes occurred in his 1836 Lyceum address:

> A very few generations have passed away since this vast tract of the American continent, now the United States, rested in the shadow of primaeval forests, whose gloom was peopled by savage beasts, and scarcely less savage men; or lay in those wide grassy plains called prairies–
>
> "The Gardens of the Desert, these
> The unshorn fields, boundless and beautiful."
>
> And, although an enlightened and increasing people have broken in upon the solitude, and with activity and power wrought changes that seem magical, yet the most distinctive, and perhaps the most impressive, characteristic of American scenery is its wilderness.[73]

There is a conflict in some of this art about the law and the progress made possible by it. William Gilmore Blythe provides a direct conflict between property law and art in his 1859

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[70] John G. Sprankling addresses these doctrines over the entire course of American history in "The Antiwilderness Bias in American Property Law," 63 *U. Chi. L. Rev.* 519 (1996) and he locates the origins of the pro-development, anti-wilderness bias in the antebellum era. *Id.* at 530-37. He shows how antebellum adverse possession encouraged development of land in John G. Sprankling, "An Environmental Critique of Adverse Possession," 79 *Cornell L. Rev.* 816, 841-49 (1994).

[71] The rejection of squatters' rights was itself part of getting control over law. Equity allowed good faith possessors to get clear title. Bad faith possessors were ousted and not be permitted to further interfere with title. *See* Fisher, *supra* note 53, at 163, 178.

[72] GEORGE ROBERTSON, SCRAP BOOK ON LAW AND POLITICS, MEN AND TIMES 164 (Lexington, A.W. Elder 1853). Indeed, Robertson's opinion in Maysville Turnpike turns on the private nature of a turnpike and thus denies the federal government the power to use a turnpike for the United States mail unless it pays the standard fare. These issues of public and private arose in many places.

[73] Cole, *supra* note 35, at 4-5 (quoting William Cullen Bryant, *The Prairies*, *in* WILLIAM CULLEN BRYANT, POEMS 50 (New York, Harper & Brothers, 6th ed. 1840)).

painting "Law versus Art." Here an artist is locked out of his studio in Pittsburgh and he is told to "inquire below–way below," a euphemism, perhaps, for "go to Hades."[74] The studio is to be relet in accordance with a landlord-tenant statute.

Indeed, much of Cole's work–unlike some of the later landscape painters–expresses concern over the loss of nature, even as it records that loss as a central feature of the antebellum economy. Cole expressed skepticism about the progress.[75] The cut stumps that appear at various places in his art–like Notch in the White Mountains and Daniel Boone's Cabin–suggest both human advancement over nature and our loses. For Cole found much sadness in the cutting of trees. He wrote of this sadness in his 1834 poem, "On seeing that a favorite tree of the Author's had been cut down"

> And is the glory of the forest dead?
> Struck down? Its beauteous foliage spread
> On the base earth? O! ruthless was the deed
> Destroying man! What demon urg'd the speed
> Of thine unpitying axe? Didst thou not know
> My heart was wounded by each savage blow?
> Could not the loveliness that did begird
> These boughs disarm thine hand and save the bird
> Its ancient home and me a lasting joy!
> Vain is my plaint! All that I love must die.
> But death sometimes leaves hope---friends may yet meet
> And life be fed on expectation sweet---
> But here no hope survives; again shall spread o'er me
> Never the gentle shade of my beloved tree---[76]

This skepticism of progress a concern that appeared in literature as well. That celebration

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[74] SARAH BURNS, PAINTING THE DARK SIDE: THE GOTHIC IN AMERICAN ART OF THE NINETEENTH CENTURY.

[75] Cole worried about the utilitarian sentiments of his age and opposed development in his 1841 Catskill Lyceum Address:

> In this age when a meager utilitarianism seems ready to absorb every feeling and sentiment, and what is called improvement, in its march, makes us fear that the bright and tender flowers of the imagination will be crushed beneath its iron tramp, it would be well to cultivate the oasis that yet remains to us, and to cherish the impressions that nature is ever ready to give, as an antidote to the sordid tendencies of modern civilization. The spirit of our society is to contrive and not to enjoy–toiling in order to produce more toil–accumulating in order to aggrandize. ...
> [W]here it is not NECESSARY to destroy a tree or a grove, the hand of the woodman should be checked, and even the consideration, which alas, weighs too heavily with us, of a few paltry dollars, should be held as nought in comparison with the pure and lasting pleasure that we enjoy, or ought to enjoy, in the objects which are among the most beautiful creations of the Almighty.

Thomas Cole, *Lecture on American Scenery: Originally Delivered before the Catskill Lyceum, April 1, 1841*, 1 NORTHERN LIGHT 25-26 (May 1841). *See also* Alan Wallach, *Thomas Cole's River in the Catskills as Antipastoral.*, 84 ART BULLETIN 334-50 (June 2002).

[76] THOMAS COLE'S POETRY: THE COLLECTED POEMS OF AMERICA'S FOREMOST PAINTER OF THE HUDSON RIVER SCHOOL 67 (Marshall Tymn ed. 1972).

of nature and America's special place in it appeared in writings by William Cullen Bryant, such as his 1821 poem delivered to the Harvard Phi Beta Kappa Society, "The Ages." It tells us about the evolution of human society. There is the evolution from the stage where people "Banded, and watched their hamlets, and grew strong" and "Grave and time-wrinkled men, with locks all white,/ Gave laws, and judged their strifes, and taught the way of right."[77] Over time, the barbarians of Europe were overthrown[78] and in the west, hunters began to conquer the land.[79] And then came the description of life in the United States, where the Indians had lived and fought against the settlers.[80] All of that led to new inhabitants of the land, who brought civilization and commerce.

> Look now abroad—another race has filled
> These populous borders—wide the wood recedes,
> And towns shoot up, and fertile realms are tilled:
> The land is full of harvests and green meads;
> Streams numberless, that many a fountain feeds,
> Shine, disembowered, and give to sun and breeze
> Their virgin waters; the full region leads
> New colonies forth, that toward the western seas
> Spread, like a rapid flame among the autumnal trees.
>
> Here the free spirit of mankind, at length,
> Throws its last fetters off; and who shall place
> Or curb his swiftness in the forward race!
> Far, like the cornet's way through infinite space
> Stretches the long untravelled path of light,
> Into the depths of ages: we may trace,
> Distant, the brightening glory of its flight,

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[77] William Cullen Bryant, *The Ages*, in BRYANT, POEMS, *supra* note 73, at stanza 11.

[78] *Id.* at stanza 23:

At last the earthquake came—the shock, that hurled
To dust, in many fragments dashed and strown,
The throne, whose roots were in another world,
And whose far-stretching shadow awed our own.
From many a proud monastic pile, o'erthrown,
Fear-struck, the hooded inmates rushed and fled;
The web, that for a thousand years had grown
O'er prostrate Europe, in that day of dread
Crumbled and fell, as fire dissolves the flaxen thread.

[79] *Id.* at stanza 27.

[80] *Id*. at stanzas 30-31.

Till the receding rays are lost to human sight.[81]

If you wonder whether Bryant's poem is connected to landscape art and property law, you might recall that Bryant was a lawyer and that he wrote a poem for Thomas Cole, about the scenes that Cole will find when he visits Europe.[82] Moreover, Bryant's most famous poem, "Thanatopsis,"[83] was turned into a painting by Asher Durand. To bring the connections together even more, recall that the "kindred spirits" of Durand's painting *Kindred Spirits* were Bryant and Cole, together on a promontory in the Catskills. Cole, too, thought about places of law. In 1838, he sketched the Ohio Capitol.

But there are lots of themes running through Cole's work and not all of them are towards economic and moral progress. Much of that still relates to property law. Two series illustrate Cole's ideas about property and feudalism. In 1837, Cole painted *The Departure* and *The Return*. The scene is one of optimism as the warriors go off to do battle–and then return on their shield. The senselessness of violence is in a medieval setting. The medieval setting holds a particularly apt place for at least three reasons. First, the sense that Americans had broken free of feudal restraints and progressed beyond them–we had moved from an era of people to an era of law. Second, Americans of that romantic era had a particular fascination with the medieval world of chivalry and the mystic past. Third–and what particularly interests me here--is that Cole painted it for William Van Rensselaer of Albany in 1837. Van Rensselaer was about to inherit tens of thousands of acres in New York around Albany. The land had been sold by his grandfather, with feudal incidents, like the requirement that the "tenants" pay a modest yearly fee or perform a few days' service each year. Van Rensselaer was known as the good patroon. Tenants expected that they would not have to pay the feudal incidents. However, shortly after the "good patroon's" death in 1839, when there was no forgiveness, the anti-rent movement began. It stretched from 1839 to the Civil War. This was a struggle over vested rights and about the meaning of the rule of law. Tenants wanted to be able to buy their property and be freed of the incidents. The feudal setting may have had a somewhat different meaning for the patroon.[84]

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[81] *Id.* at stanzas 32-33.

[82] *See Sonnet—to Cole, the Painter Departing for Europe*, BRYANT, POEMS, *supra* note 73, at 217. Robert Ferguson connected Bryant and Cole to the search for order in *Law and Letters in American Culture* 174 (1984).

[83] BRYANT, *supra* note 73 , at 31-33.

[84] Daniel Barnard, *The "Anti-Rent" Movement and Outbreak in New York,* 2 WHIG. REV. 577-98 (Dec. 1845); JAMES FENIMORE COOPER, THE REDSKINS; OR INDIAN AND INJIN (New York, Burgess and Stringer 1846). Barnard focused on the reasonableness of the rent payments and also on the economic damage that would be done by refusal to pay for property. If "every man is to have his house and his shop free of cost, how is the allotment to be made, at present, and by what magic are future dwellings and shops to rise, free of cost, as number increase, and farther accommodations are required?" What will become of property if the Anti-Rent philosophy prevails? Look "through the Anti-Rent regions themselves–those disturbed, agitated, distracted, half-ruined districts of country, as some of them are, but once peaceful, prosperous and happy." *Id.* at 589. The Anti-Rent movement would mean economic ruin:

> It is repudiation of debt, because it is debt due for land, or for the use of land, and because every man is entitled to his proper share of land, free of cost! How long a fine agricultural district of country, like Albany, Rensselaer, Columbia, Delaware or Schoharie county, could stand this beautiful experiment in agrarianism—how long the schools, academies and churches would be maintained—how long those who have farms which they have paid for, or are paying for, and houses which they have built, would be allowed to keep them in the face of a growing population, addicted to the

So in the Anti-Rent movement, there was a conflict between vested rights and tenants' claims to property, which they sough to be freed from what they claimed were feudal obligations.

Cole realized that America's past did not include feudal towers; and that none were to be found, ruined, in the United States. He told a lyceum audience about the influence of the lack of a feudal past and its implications for art.

> You see no ruined tower to tell of outrage–no gorgeous temple to speak of ostentation; but freedom's offspring–peace, security, and happiness, dwell there, the spirits of the scene. On the margin of that gentle river the village girls may ramble unmolested–and the glad school-boy, with hook and line, pass his bright holiday–those neat dwellings, unpretending to magnificence, are the abodes of plenty, virtue, and refinement. And in looking over the yet uncultivated scene, the mind's eye may see far into futurity. Where the wolf roams, the plough shall glisten; on the gray crag shall rise temple and tower–mighty deeds shall be done in the now pathless wilderness; and poets yet unborn shall sanctify the soil.[85]

But in *The Departure* and *The Return* we see those medieval scenes. Perhaps there is an analogy to the violence of the age of Jackson and the realization of the costs of that violence. Feudalism had its moments of high hope and expectation and also its moments of defeat.

Likewise, Thomas Cole's series *The Past* and *The Present* is foreboding. The medieval past–the age of chivalry, which was celebrated in some ways in the antebellum era--contrasts with the present age of pastoral, but it is also an age of destruction. Now, in the present, a shepherd works among the ruins of the past. It is a depressing scene in many ways–of the wages of the past; of how far we have fallen. And perhaps of where Europe is; but also perhaps where we are all headed, for there is much evidence Cole intended some of his paintings as a critique of Jacksonian democracy. Many others were concerned with such themes. Cole's series anticipates Thomas Carlyle's 1844 book *Past and Present*, a central volume in the advancement of romantic thought in the antebellum era. Nevertheless, in other places in antebellum America–like Tuscaloosa, Alabama--some continued to see hope independent of Carlyle's pessimistic work. Benjamin Porter's 1846 address to the University of Alabama, also titled *The Past and The Present*, saw cause for optimism about the present.

These themes of the life and death of culture and in particular the dangers America faced in the 1830s appear strongly in Cole's most famous work, *Course of Empire*, a series of five paintings that trace the cycle of empires from birth to death.[86] Cole's image of the course of

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> luxury of good lands and houses free of cost—how long such a district would continue civilized—we commend to the profound consideration and inquiry of those among us who seem to condemn the violent demonstrations of "Anti-Renters," but who yet profess to see a great deal of merit and a great deal of wisdom in their cause.

Id. at 590.

[85] Cole, *supra* note 35, at 12.

[86] Cole's description of the scenes appears in *The Fine Arts*, 8 THE KNICKERBOCKER: OR, NEW-YORK MONTHLY MAGAZINE 629-30 (1836):

No. l., which may be called the 'Savage State,' or 'the Commencement of Empire,' represents a wild scene of rocks, mountains,

woods, and a bay of the ocean. The sun is rising from the sea, and the stormy clouds of night are dissipating before his rays. On the farthest side of the bay rises a precipitous hill, crowned by a singular isolated rock, which, to the mariner, would ever be a striking land-mark. As the same locality is represented in each picture of the series, this rock identifies it, although the observer's situation varies in the several pictures. The chase being the most characteristic occupation of savage life, in the fore-ground we see a man attired in skins, in pursuit of a deer, which, stricken by his arrow, is bounding down a water-course. On the rocks in the middle ground are to be seen savages, with dogs, in pursuit of deer. On the water below may be seen several canoes, and on the promontory beyond, are several huts, and a number of figures dancing round a fire. In this picture, we have the first rudiments of society. Men are banded together for mutual aid in the chase, etc. The useful arts have commenced in the construction of canoes, huts, and weapons. Two of the fine arts, music and poetry, have their germs, as we may suppose, in the singing which usually accompanies the dance of savages. The empire is asserted, although to a limited degree, over sea, land, and the animal kingdom. The season represented is Spring.

No. 2. — The Simple or Arcadian State, represents the scene after ages have passed. The gradual advancement of society has wrought a change in its aspect. The ‘untracked and rude' has been tamed and softened. Shepherds are tending their flocks; the ploughman, with his oxen, is upturning the soil, and Commerce begins to stretch her wings. A village is growing by the shore, and on the summit of a hill a rude temple has been erected, from which the smoke of sacrifice in now ascending. In the fore-ground, on the left, is seated an old man, who, by describing lines in the sand, seems to have made some geometrical discovery. On the right of the picture, is a female with a distaff, about to cross a rude stone bridge. On the right of the picture is a boy, who appears to be making a drawing of a man with a sword, and ascending the road, a soldier is partly seen. Under the trees, beyond the female figure, may be seen a group of peasants; some are dancing, while one plays on a pipe. In this picture, we have agriculture, commerce, and religion. In the old man who describes the mathematical figure— in the rude attempt of the boy in drawing— in the female figure with the distaff— in the vessel on the stocks, and in the primitive temple on the hill, it is evident that the useful arts, the fine arts, and the sciences, have made considerable progress. The scene is supposed to be viewed a few hours after sunrise, and in the early Summer.

In the picture No. 3, we suppose other ages have passed, and the rude village has become a magnificent city. The part seen occupies both sides of the bay, which the observer has now crossed. It has been converted into a capacious harbor, at whose entrance, toward the sea, stand two phari. From the water on each hand, piles of architecture ascend — temples, colonnades and domes. It is a day of rejoicing. A triumphal procession moves over the bridge near the fore-ground. The conqueror, robed in purple, is mounted in a car drawn by an elephant, and surrounded by captives on foot, and a numerous train of guards, senators, etc. — pictures and golden treasures are carried before him. He is about to pass beneath the triumphal arch, while girls strew flowers around. Gay festoons of drapery hang from the clustered columns. Golden trophies glitter above in the sun, and incense rises from silver censors. The harbor is alive with numerous vessels — war galleys, and barks with silken sails. Before the doric temple on the left, the smoke of incense and of the altar rise, and a multitude of white-robed priests stand around on the marble steps. The statue of Minerva, with a victory in her hand, stands above the building of the Caryatides, on a columned pedestal, near which is a band with trumpets, cymbals, etc. On the right, near a bronze fountain, and in the shadow of lofty buildings, is an imperial personage viewing the procession, surrounded by her children, attendants, and guards. In this scene is depicted the summit of human glory. The architecture, the ornamental embellishments, etc., show that wealth, power, knowledge, and taste have worked together, and accomplished the highest meed of human achievement and empire. As the triumphal fete would indicate, man has conquered man — nations have been subjugated. This scene is represented near mid-day, in the early Autumn.

No. 4. — The picture represents the Vicious State, or State of Destruction. Ages may have pasted since the scene of glory — though the decline of nations is generally more rapid than their rise. Luxury has weakened and debased. A savage enemy has entered the city. A fierce tempest is raging. Walls and colonnades have been thrown down. Temples and palaces are burning. An arch of the bridge, over which the triumphal procession was passing in the former scene, has been battered down, and the broken pillars, and ruins of war engines, and the temporary bridge that had been thrown over, indicate that this has been the scene of fierce contention. Now there is a mingled multitude battling on the narrow bridge, whose insecurity makes the conflict doubly fearful. Horses and men are precipitated into the foaming waters beneath; war galleys are contending; one vessel is in flames, and another is sinking beneath the prow of a superior foe. In the more distant part of the harbor, the contending vessels are dashed by the furious waves, aud some are burning. Along the battlements, among the ruined Caryatides, the contention is fierce; and the combatants fight amid the smoke and flame of prostrate edifices. In the fore-ground are several dead and dying; some bodies have fallen in the basin of a fountain, tinging the waters with their blood. A female is seen sitting in mute despair over the dead body of her son, and a young woman is escaping from the ruffian grasp of a soldier, by leaping over the battlement; another soldier drags a woman by the hair down the steps that form part of the pedestal of a mutilated colossal statue, whose shattered head lies on the pavement below. A barbarous and destroying country conquers and sacks the city. Description of this picture is perhaps needless; carnage and destruction are its elements.

empire–which is grounded in evidence of the evolution of society parallels antebellum thought about history and particularly the history of law.[87]

Cole saw progress and destruction, from the state of barbarism, through the pastoral age, to consummation–and, of course, to destruction (not just decline), and desolation. There was a fear for the future; lots of antebellum Americans shared this fear of the future. This is a depressing scene, to be sure and suggestive of the fear that many Whigs, from Chancellor Kent to Justice Story, for America's future.[88] While some have emphasized the energetic, optimism of Whigs, that optimism came to the Whigs in the 1840s.[89] In the 1830s, they shared a fear of where the United States was headed.

One link between Thomas Cole's interpretation of the course of empire and the judicary appears in United States Supreme Court Justice Levi Woodbury's 1844 oration at Dartmouth. Woodbury saw progress in individuals, as well as society. He did not celebrate ancient society (as Cole did in some ways in the second picture), but rather thought that it was modern society where "liberty and law, the arts and securities of organized government reign."[90] Woodbury

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The fifth picture is the scene of Desolation. The sun has just set, the moon ascends the twilight sky over the ocean, near the place where the sun rose in the first picture. Day-light fades away, and the shades of evening steal over the shattered and ivy-grown ruins of that once proud city. A lonely column stands near the fore ground, of whose capitol, which is illumined by the last rays of the departed sun, a heron has built her nest. The doric temple and the triumphal bridge, may still be recognised among the ruins. But, though man and his works have perished, the sleepy promontory, with its insulated rock, still rears against the sky unmoved, unchanged. Violence and time have crumbled the works of man, and art is again resolving into elemental nature. The gorgeous pageant has passed — the roar of battle has ceased — the multitude has sunk in the dust — the empire is extinct.

[87] Thomas R. Dew gave broad expanse to the evolution of law and society in *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations* (1853), which looks at evolution of law through western civilization. *See also* ERIC S. ROOT, ALL HONOR TO JEFFERSON? THE VIRGINIA DEBATE OVER SLAVERY AND THE DEVELOPMENT OF THE POSITIVE GOOD THESIS (2008) (focusing on Dew's philosophy and locating him as a follower of Hegel, emphasizing historical contingency in Dew's thought and individual setting more than universal truths). Root's interpretation of Dew places him in line with a number of other antebellum southern thinkers, who also focused on a particular historical setting–rather than universal truths. *See generally* ROLAND OSTERWEIS, ROMANTICISM IN THE OLD SOUTH (1949); O'Brien, Conjectures of Order, *supra* note ?.

[88] Angela Miller, *Thomas Cole and Jacksonian America The Course of Empire as Political Allegory*, 14 PROSPECTS 65-92 (1989). Still, *Course of Empire* seems more than the indictment of Jackson than even Miller and Alan Wallach found. *See* Wallach, *supra* note 29, at 94. It is also an indictment of luxury, a theme that stretched back to the eighteenth century.

[89] *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 900 n.26 (2005) (making the point about the pessimism in Cole's *Course of Empire*). In *Politics of Individualism, supra* note 9, Lawrence Kohl depicts Whigs as optimistic and the Democrats as pessimistic, though he is dealing mostly with a somewhat later group from Cole.

[90] LEVI WOODBURY, ON PROGRESS: AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF DARTMOUTH COLLEGE 8 (Hanover, Dartmouth Press 1844), reprinted in 2 WRITINGS OF LEVI WOODBURY 75 (1852). Two years later, Joel Parker returned to the theme of "progress" in his Dartmouth Phi Beta Kappa address. *See* JOEL PARKER, PROGRESS: AN ADDRESS BEFORE THE PHI BETA KAPPA SOCIETY OF DARTMOUTH COLLEGE, JULY 29, 1846 (Hanover, Dartmouth Press, 1846). Indeed, Parker began his address by noting how common was the discussion of progress:

> The present, is said to be an age of great progress. The assertion can hardly fail to be impressed upon our minds. It is iterated, and reiterated, as if it were danger that it should fail if being credited; or as if it were a particularly grateful theme on which to dwell. On every side it is a subject of exultation. It is borne to us from every point of the compass, and is wafted in every breeze. From the shop of the artisan, and the closet of the student; from the laboratory of the chemist, and the stump of the politician; from the newspaper press, and the congressional hall; on the fourth of July, and the annual thanksgiving; it is echoed, and re-echoed, until the sound of it pervades the whole land, and the conviction of its truth must be brought home to every understanding.

Id. at 3. Other literary addresses also bore "progress" in their title. *See, e.g.,* BENJAMIN FRANKLIN JOSLIN, PRIVILEGES AND

cataloged some of the changes—the spread of literacy and more humane behavior in war, the end of serfdom. Changes in law was an important part of the move toward humanity.[91] The progress had been rapid, for until "the seventeenth century, scarcely any books exited on the morals and rules that should govern the intercourse among, nations; and perhaps no stronger evidence could be cited of the progress made in this matter than the fact rather harshly expressed by a recent writer, that "the international law of Greece and Rome was the international law of New Zealand, with the exception of cannibalism."[92] Earlier laws had corrupted society, but by Woodbury's time, "There is a growing disposition to spare life and to reform by giving instruction and imparting habits of industry rather than to exterminate; and most of the world has at last begun to practice as if they believed man was not a fit subject for vengeance merely, from his fellow-man and possessed reason, conscience, a heart and soul to be improved, and if possible used for *nobler purposes than to be hung*, or made food for gunpowder."[93] Even slavery was becoming extinct.[94]

Woodbury, a Democrat, emphasized the importance of popular education in the progress.[95] That general education made it possible to emancipate Americans from ancient notions. That led to a focus on practical ideas, on utility, and a disdain for superstition:

> a gradual release, has been going on from the yoke of numerous antiquated ceremonies, obsolete ideas, systems, long since exploded by reason, and tests, fitted chiefly to encourage hypocrisy and ensnare or disfranchise the honest. Modern society has advanced so as to demand what has substance and vitality. It is no longer content with mere show words or forms—satisfied to clasp a cloud rather than Juno. But practical objects have taken the place more of speculative ones; life has become more a search for truth history, a chronicle of facts rather than romances by the growth of the social affections, home and the heart engrossing more of the attention formerly lavished on battles and dynasties-and the many, as well as the master spirits, engaged in traveling—not on holy pilgrimages to Mecca or Jerusalem—but to learn more of men and governments and the arts, and all exploring less verbal criticisms, abstractions and polemical controversies, but infinitely more — improvements in *the* great means of

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DUTIES OF MAN AS A PROGRESSIVE BEING (S.S. Riggs, New York, 1833).

[91] *Id.* at 13 ("Cultivated victors spare the vanquished; and, guided by more humane principles of national law, strive to introduce new means of livelihood—superior education and morality—better legislation and thus in the end often bring to the conquered, numerous blessings, rather than extirpation, or curses.").

[92] *Id.* at 14.

[93] *Id.*

[94] *Id.* at 15.

[95] *Id.* at 16-17 ("Because those improvements have increased to all classes, thus situated—not only greater facilities of intercourse and exchange of advantages but more opportunities for instruction of all kinds—better schools—Lyceums—institutes and Colleges-and more liberal endowments for the poor as well as retreats for the unfortunate and various other aids, no less than these, have helped to push upward the social position of the whole.").

> subsistence, and the security of the rights of man, and a just knowledge of all the momentous duties and destinies of the human race.[96]

Part of the progress came from sympathy for others, which historians commonly use as an explanation for legal changes and for the abolition of slavery. Woodbury credited education for the growth of sympathy.[97]

Perhaps most exciting for the current project, however, is that Woodbury brought Cole's *Course of Empire* into his speech. Woodbury, a Democrat, linked Cole, a Whig, to his mission of democracy and progress in both individuals and society.

> Viewing the advancement of man as a species -- and not of one individual or nation over another – it is highly probable, that his condition, in many respects, has gradually grown better, since creation. It is no refutation of this that some empires have perished, their mausoleums even been crumbled to dust, and the ivy again and again clasped their ruins. For they were but parts of a great whole and if, as in the firmament, some stars and planets should disappear, others break upon the eye, and, with the rest, move forward and sometimes with increased power and more than renovated beauty. In no mode has the course, usual with particular nations, been more finely shadowed forth than in Cole's imaginative landscapes-starting first in the rudeness of nature; then maturing to high refinement and grandeur-till, amid the ravages of luxury, time and war, sinking into utter desolation.

Now Woodbury has the task of turning Cole's pessimistic message to a more positive one. In keeping with other Democratic speakers, Woodbury emphasizes that advance that is possible, because a new and better society can arise from that desolation.

> [N]one can forget how frequently new nations arise on the ashes of others and in many things transcend their predecessors, like some of our own Western cities springing up in greater luxuriance and power, on the very mounds of a less civilized race. This is the analogy of nature in other matters. The brutes, such as the horse and ox, individually mature, decline and die. But others succeed and, by care in their reproduction as well – as growth, have been advanced much, both in beauty and strength. So the hound has been made more fleet, if not more acute -- the sheep, with a more golden fleece, while many plants, from noxious weeds or poisons, have been rendered highly medicinal; and others, whether for ornament, or food, are well known to have improved so as to unfold more lovely hues, as well as furnish richer nutriment -- even the earth, as a whole, is supposed to be much more habitable, healthy and productive than at first; and some of the other planets to have changed so as better to sustain life for worship to him, whose hand first put them in motion and continues so wonderfully to hold them in their orbits. Nay, more;

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[96] *Id.* at 18.

[97] *Id.* at 19. Woodbury's slavery discussion contained a limiting principle—that there should be only freedom when slaves are able to handle it.

> as creation itself was not an instantaneous, but progressive, work -- so the long preservation of it was likely to require new developments of power and to be accompanied by improvements as progressive, if not glorious as its first formation. Surely in regard to that portion of it displayed in man -- almost the whole philosophy of his existence will be found contained in the idea of his continued progress; and some, it is hoped, not groundlessly suppose that the power of Deity will more and more be unfolded by advances in -- not only here and through time, but in the whole universe and through the endlessness of eternity.[98]

Where did this progress come from? Woodbury thought from commerce and religion. Others spoke of education, property and the commerce that property rights made possible that led to this progress.[99] Jasper Cropsey painted the University of Michigan in 1855 with buildings rising out of recently cleared fields.[100]

Many saw, with Woodbury, whose Dartmouth Address was called simply "Progress" the continued upward progress of society. And that brings us to Asher B. Durand's 1853 painting. What else could it be called, but *Progress*?[101] Beginning from the left, where a band of Native Americans are looking on, sweeping across the canvas to the right, there is seemingly every trope of progress–steam ships, railroad, church, canal boat and lock, telegraph lines, a peddler, the cattle being driven to market.... It captures well how much Americans are excited about the use of land, and that's reflected in the optimism about economic and geographic expansion.

Durand's *Progress* contains two key lessons for linking art and property law. First, it correlates with the large theme of the progression in American society, from nature and barbarism to civilization. Many legal educators and jurists spoke or wrote about that progression as well. Law was progressing and that progression facilitated civilization. Justice Joseph Story's

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[98] *Id.*

[99] De Witt Clinton, *Address of Before the Phi Beta Kappa Society of Union College*, in LIFE AND WRITINGS OF DE WITT CLINTON 329 (William W. Campbell ed., New York, Baker and Scribner 1849).

[100] HENRY P. TAPPAN, EDUCATIONAL DEVELOPMENT: A DISCOURSE DELIVERED BEFORE THE LITERARY SOCIETIES UNIVERSITY OF MICHIGAN ON MONDAY EVENING, JUNE 25, 1855 (Ann Arbor, E. B. Pond 1855). Courts increasingly recognized the benefits of education and construed trusts and corporations for educational purposes broadly, even though they might have violated an English mortain statute against holding property in trust. *See, e.g.,* Trustees of Davidson College v. Chambers' Ex'rs, 3 Jones Eq. 253 (N.C. 1857):

> [T]he principles applicable to the construction of the [statute of mortmain], can have very little bearing upon that of [American charters of incorporation]. The former were intended for an age, and a condition of society, entirely unlike the political and social institutions of the American States. They were mainly aimed against the grasping power of the religious houses, in a semi-barbarous state of civilization, and were designed to rescue, from what has been quaintly called their death-clutch, the lands whose feudal services were the chief support and defense of the Kingdom. They fully accomplished their purpose by putting it into the power of the King and other feudal lords to enter upon, and seize, the lands when purchased without license from those whose rights were in danger of being invaded.

[101] Kenneth Maddox, *Asher B. Durand's Progress: The Advance of Civilization and the Vanishing America*, in THE RAILROAD IN AMERICAN HISTORY 51-69 (1988) (Charles Gould of the Ohio and Mississippi Railroad commissioned Durand); KINDRED SPIRITS: ASHER B. DURAND AND THE AMERICAN LANDSCAPE (Linda S. Ferber ed. 2007); DAVID B. LASWELL, ASHER B. DURAND: HIS ART AND ART THEORY IN RELATION TO HIS TIMES (1977); Charles Colbert, *Razors and Brains: Asher B. Durand and the Paradigm of Nature*, 16 STUD. AM. REN. 261-90 (1992).

1826 Phi Beta Kappa address at Harvard linked progress in morals and the common law. The common law had moved forward in keeping with the needs of commerce. For the common law "adopted much, which philosophy and experience have recommended, although it stood upon no text of the Pandects, and claimed no support from the feudal policy." Those changes occurred across a wide spectrum:

> Commercial law, at least so far as England and America are concerned, is the creation of the eighteenth century. It started into life with the genius of Lord Mansfield, and gathering in its course whatever was valuable in the earlier institutes of foreign countries, has reflected back upon them its own superior lights, so as to become the guide and oracle of the commercial world.[102]

Another treatise writer and teacher, Timothy Walker, the founder of the Cincinnati Law School (now the University of Cincinnati), wrote about the increasing sophistication of law, as society moved from barbarism to civilization. Walker's *Introduction to American Law*, one of the most popular law books of the era, identified the increase in the scope and sophistication of law:

> Barbarians need few laws, because they have few interests to be regulated by law, but every step in the progress of improvement gives occasion for adding to the body of law some new provision, until the aggregate becomes formidable to the boldest mind. What could once be written upon ten or twelve tables, anon spreads over thousands; until the practice of law becomes a distinct avocation; and a thorough comprehension of all its infinite details requires the labor of a long and industrious life.[103]

The progress in property law, the security that law gave to property, facilitated further progress. Harvard University President Edward Everett told an audience on the fiftieth anniversary of the Declaration of Independence, July 4, 1826, that it was a well-ordered state, where property rights were secure, that led to prosperity and to further moral and technological improvement. Moreover, Everett saw, as Durand depicted a generation later, that humans improved upon nature and needed the state (of which law is an important part) to do so:

> The greatest engine of moral power, which human nature knows, is an organized,

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[102] JOSEPH STORY, SCIENCE AND LETTERS IN OUR DAY (Cambridge 1826), *reprinted in* REPRESENTATIVE PHI BETA KAPPA ORATIONS 36, 48-49 (Charles S. Northup ed., 1927). Justices spoke in similarly broad terms from the bench as well. Chief Justice Shaw wrote about the evolution of the common law in *Commonwealth v. Ira Temple*, 14 Gray 69 (Mass. 1859):

> But it is the great merit of the common law, that it is founded upon a comparatively few broad, general principles of justice, fitness and expediency, the correctness of which is generally acknowledged, and which at first are few and simple; but which, carried out in their practical details, and adapted to extremely complicated cases of fact, give rise to many and often perplexing questions; yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require.

This was especially true in the case of property. *See* Henderson's Adm'r v. Henderson, 21 Mo. 379, 1855 WL 5171 (Mo. 1855) ("The progress of law, as a science, keeping pace, although not uniformly, with the advancement of civilization and wealth, has sanctioned modes of alienation and enjoyment of property, both real and personal, which were prohibited by the common law.").

[103] TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 15 (Philadelphia, P. Nicklin & T. Johnson 1837).

> prosperous state. All that man, in his individual capacity, can do—all that he can effect by his fraternities—by his ingenious discoveries and wonders of art—or by his influence over others—is as nothing, compared with the collective, perpetuated influence on human affairs and human happiness of a well-constituted, powerful commonwealth. It blesses generations with its sweet influence ;— even the barren earth seems to pour out its fruits under a system where property is secure, while her fairest gardens are blighted by despotism;—men, thinking, reasoning men, abound beneath its benignant sway,—nature enters into a beautiful accord, a better, purer asiento with man, and guides an industrious citizen to every rood of her smiling wastes;—and we see, at length, that what has been called a state of nature, has been most falsely, calumniously so denominated; that the nature of man is neither that of a savage, a hermit, nor a slave; but that of a member of a well-ordered family, that of a good neighbor, a free citizen, a well-informed, good man, acting with others like him. This is the lesson which is taught in the charter of our independence; this is the lesson which our example is to teach the world.[104]

Everett's lessons in the centrality of law to establishing order appeared in an oration to the Harvard Phi Beta Kappa Society a few years before. He recalled that one of the first acts of the pilgrims, even before they set foot at Plymouth, was drawing "up a simple constitution of government." That constitution was a basic need. "Society must be preserved in its constituted forms, or there is no safety for life, no security for property, no permanence for any institution civil, moral, or religious."[105] In short, nature is chaos; civilization is order, so we rely upon government to help us improve upon nature. And when we do, there is progress.[106]

Those who wrote in more depth on the history of property credited the institution with

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[104] EDWARD EVERETT, AN ORATION ON THE FIFTIETH ANNIVERSARY DECLARATION OF THE INDEPENDENCE THE UNITED STATES OF AMERICA (Boston, Cummings, Hilliard, and Company, 1826).

[105] Edward Everett, *Orations and Addresses: The Circumstances Favorable to Literary Improvement in America*, in IMPORTANCE OF PRACTICAL EDUCATION: USEFUL KNOWLEDGE: A SELECTION FROM HIS ORATIONS AND OTHER DISCOURSES 7, 15 (Boston, Marsh, Capen, Lyon, and Webb 1840).

[106] Bishope Berkeley's phrase "Westward Course of Empire" was in 1861, the year the Civil War began, turned into a landscape painting by Emanuel Leutze. Earlier, in 1818, lawyer Gulian Verplanck invoked the Berkeley's poem and trip to American in the eighteenth century in his discourse to the New York Historical Society, to illustrate the opportunities for educational progress in America. Gulian G. Verplanck, *Historical Discourse, in* DISCOURSES AND ADDRESSES 9, 47-49 (New York, J. & J. Harper 1833). Later, in 1824, he linked American progress with art and morality and with the westward progress then underway:

> We may read in it the fortunes of our descendants, and with an assured confidence look forward to a long and continued advance in all that can make a people great. If this is a theme full of proud thoughts, it is also one that should penetrate us with a deep and solemn sense of duty. Our humblest honest efforts to perpetuate the liberties, or animate the patriotism of this people, to purify their morals, or to excite their genius, will be felt long after us, in a widening and more widening sphere, until they reach a distant posterity, to whom our very names may be unknown. Every swelling wave of our doubling and still doubling population, as it rolls from the Atlantic coast, inland, onward towards the Pacific, must bear upon its bosom the influence of the taste, learning, morals, freedom of this generation. Such considerations as these give to the lasting productions of our Arts, and to our feeble attempts to encourage them, a dignity and interest in the eyes of the enlightened patriot, which he who looks upon them solely with a view to their immediate uses can never perceive.

Gulian G. Verplanck, *Address on the Fine Arts, in id*. at 123, 145.

making human progress possible. New York politician Daniel Barnard's 1846 Phi Beta Kappa address at Yale, *On Man and the State*, tells of the relationship between individuals and the state. It is a defense of property rights from a conservative Whig politician who at that point was in the midst of fighting against the Anti-Rent movement. Barnard locates the right of property in human sentiment.

> The idea of individual possession and property is aboriginal; it is a natural want which every one feels. And it has not been implanted in our nature in so marked a way, without having eminent uses to be answered by it. I believe it is idle to look for the origin of property in any thing else than the natural want felt by every man—felt in the heart of the first man, as it will be in the heart of the last man on the earth.[107]

Barnard sees protection of property as a key duty of the state:

> The first perception of property, and of the right of property, perhaps, is when a man seizes and appropriates what till then belonged to nobody; and this perception becomes clear and confirmed when he comes to possess any thing which he himself has produced. But the right of property is not necessary merely in reference to physical wants; it is necessary in reference to intellectual desires and to moral action; it is necessary to independent effort, and to freedom in moral agency. And this right must be assured to men. For otherwise the desire of property, and the possession of property, would be only a perpetual curse. It could only be held with perpetual apprehension, and only defended by perpetual war. But so far as we know, or can discover, this right can only be assured to men in the political state, where common Rules are established for this purpose, with a superior Will and Authority to give these rules force and effect. Moreover, the conception of property can only arise and exist in associated life; for the exclusion of others from the possession and use of what is our own, is a principal thing in that conception.[108]

Barnard left it to others to justify property on utilitarian grounds. William and Mary's President Thomas R. Dew was one of those who focused on the utility of property rights in bringing about political and economic progress. For instance, Dew told how property had purchased freedom from feudalism. In England freedom arose from the forced conjunction between the people and the feudal lords against the king, which led to the House of Commons.[109] Soon after 1066, the lords and king had been united against the natives—much as the whites in the South were united against the slaves—but as the fear of Revolution subsided, divisions emerged between king and lords. Parliament was the result of the king's need for money. "Some of the best laws of

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[107] DANIEL D. BARNARD, MAN AND THE STATE, SOCIAL AND POLITICAL. AN ADDRESS DELIVERED BEFORE THE CONNECTICUT ALPHA OF THE PHI BETA KAPPA AT YALE COLLEGE, NEW HAVEN, AUGUST 19, 1846 17 (New Haven, B. L. Hamlen 1846).

[108] *Id.* at 18.

[109] DEW, *supra* note 87, at 465.

England, [even] *Magna Charta* itself . . . were *literally purchased with money.*"[110] The rest of the story is one of gradual progress, "step by step, through toil and sacrifice, each generation adding something to the security of the work, until the whole fabric was completed."[111]

Property was closely allied to trade in helping preserve freedom. In his 1841 speech the *Young American,* Ralph Waldo Emerson identified the effect of commerce on law. Commerce–read in this point capitalism and property law–had brought down feudalism and Emerson thought it would do the same to the institution of slavery. Nevertheless, he recognized that trade brought with it a new aristocracy of wealth, with its own set of problems, oppression of the poor.[112]

Judges, too, in writing about property understood the centrality of security of property rights and trade to progress. Justice Henry Lumpkin of George linked trade and Christianity together in 1853 in a way reminiscent of Emerson's celebration of trade. Lumpkin thought that trade signaled and led to moral and economic progress. He used gaps in mountains, worn by water over the ages, as evidence of nature's law, which was analogous to the law that free trade will bring progress:

> The chasm in the mountain at Tallulah, and in the Blueridge at Harper's Ferry, are not more demonstrative of the natural law, that water runs and will run, than are the evidences all around, that Free Trade is destined to become the predominant principle-the permanent and paramount policy of the world. And I rejoice that it is so. It is the forerunner, as well as the fruit, of the rapidly advancing civilization of the nineteenth century. It is the adjunct and handmaiden of Christianity. May these "golden girdles" soon encircle the globe! Free Trade and the Bible, walking hand-in-hand together, will finally work out the problem of man's moral regeneration, and establish the reign of Peace on earth. For, talk as we may, about man's disinterested love of his brother, there is nothing after all, like self-interest, to bind together in indissoluble bonds, the factious

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[110] *Id.* at 485.

[111] *Id.* at 485-86.

[112] *Emerson,* note 3, at 307:

> [T]he historian will see that trade was the principle of Liberty; that trade planted America and destroyed Feudalism; that it makes peace and keeps peace, and it will abolish slavery. We complain of its oppression of the poor, and of its building up a new aristocracy on the ruins of the aristocracy it destroyed. But the aristocracy of trade has no permanence, is not entailed, was the result of toil and talent, the result of merit of some kind, and is continually falling, like the waves of the sea, before new claims of the same sort.

The process by which commerce would end slavery is the subject of substantial debate: did capitalism usher in a period of antislavery because it made consumers more sympathetic to the suffering of slaves or because it made non-slaves worried about competition from slave labor? *See* THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION (Thomas Bender ed. 1993). This debate has analogs in law. How, for instance, did tort law respond to the market? Did it make individuals liable to others because of a growing sense of the duties strangers owed to one another? Peter Karsten suggests this in *Heart versus Head: Judge-Made Law in Nineteenth Century America* 255-92 (1997). Or did it reduce liability by making individuals bear the costs of injuries. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 63-108 (1977) (proposing that limitations on tort liability promoted economic growth).

family of Adam.[113]

The fictional literature likewise explored the conflict between nature and law, though it was somewhat more ambivalent about the constraints that law imposed upon nature than Kent, Story, and Everett. One of the most famous conflicts between nature and law was James Fenimore Cooper's 1823 novel, *The Pioneers*. In it, Cooper created a judge, Marmaduke Temple, who brought law to the wilderness of rural New York. Temple owned 60,000–maybe 100,000 acres of land. With him came a new law, prohibiting hunting of deer out of season, which was of particular problem to the hero of the story, Leather-stocking (also known as Natty Bumppo), a man who lived in a small cabin and who represented the ideal American who hunted only when necessary, took no more from the land than he needed, and treated others with respect. Yet, the brought a different conception of the use of the land. As one of the judge's colleagues inquired, "Do you not own the mountains as well as the valleys? are not the woods your own? what right has this chap, or the Leather-stocking, to shoot in your woods, without your permission? Now, I have known a farmer in Pennsylvania order a sportsman off his farm with as little ceremony as I would order Benjamin to put a log in the stove. By the by, Benjamin, see how the thermometer stands. Now, if a man has a right to do this on a farm of a hundred acres, what power must a landlord have who owns sixty thousand—aye, for the matter of that, including the late purchases, a hundred thousand?"[114]

Yet, Natty Bumppo–the Daniel Day Lewis character in *Last of the Mohicans*–claimed a natural right to hunt on the land.[115] When told about the new law prohibiting hunting out of season and another one on its way prohibiting the cutting of timber, Bumppo cried, "You may make your laws, Judge, ... but who will you find to watch the mountains through the long summer days, or the lakes at night? Game is game, and he who finds may kill; that has been the law in these mountains for forty years, to my sartain knowledge; and I think one old law is worth

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[113] Haywood v. Mayor and Aldermen of Savannah, 12 Ga. 404 (Ga. 1853). Courts recognized that there were limits on the power of legislation to assist commerce. In construing a local tax, which was claimed to be an interference with the commerce clause, the Pennsylvania Supreme Court recognized that Congressional legislation was one small aspect of commerce and that nature, human ingenuity, and local laws necessarily affected it:

> commerce, in its very nature, is regulated much more by natural causes, and by civilization and its wants, and by the skill and customs of those engaged in it, than it can be by any possible legislation. Our mountains, lakes, rivers, and climates, and the winds and ocean currents, and the kind of motive power, and the skill in ship-building, and our railroads, and the energy and progress of our citizens, and the common law or customs, national and international, State and interstate, of trade, have much more regulating power than it is possible for Congress to exercise. It cannot exclude any of these from their legitimate influences in the regulation of commerce; and some of these causes, as well human as natural, are very direct in their operation. The man who builds a ship that is fleeter and safer than common, affects in some measure the regulations of commerce, and yet he may fix his own terms for the use of it; and surely a State may improve its own domains and thoroughfares as it chooses, and impose its own terms in the common use of these!

Pennsylvania R.R. v. Commonwealth, 3 Grant 128 (Penn. 1860).

[114] JAMES FENIMORE COOPER, THE PIONEERS 99 (New York W.A. Townsend 1859) (1823).

[115] *Id.* at 123 ("[H]e has a kind of natural right to gain a livelihood in thes'e mountains; and if the idlers in the village take it into their heads to annoy him, as they sometimes do reputed rogues, they shall find him protected by the strong arm of the law.").

two new ones."[116] While Bumppo wondered, "what has a man who lives in the wilderness to do with the ways of the law,"[117] the answer turned on the fact that law had extended its reach to the wilderness. The judge upheld his the conviction for hunting out of season and later resisting arrest; it was only later in the novel that Bumppo saved the judge's daughter. This was a classic conflict between nature and law. Law was rapidly winning, as civilization was advancing and the wilderness was receeding. To the judge's "eye, where others saw nothing but a wilderness, towns, manufactories, bridges, canals, mines, and all the other resources of an old country, were constantly presenting themselves...."[118] The judge's world was that of Durand's *Progress*.

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There is in Durand's canvass the progress of technology–from canals and steam engines that do everything from run factories to printing presses, to boats and railroads.[119] Some context for these machines appears in Henry David Thoreau's *Walden*.[120] Thoreau records the gentle quite of nature. "As I sit at my window this summer afternoon, hawks are circling about my clearing; the tantivy of wild pigeons, flying by two and threes athwart my view, or perching restless on the white pine boughs behind my house, gives a voice to the air; a fish hawk dimples the glassy surface of the pond and brings up a fish; a mink steals out of the marsh before my door and seizes a frog by the shore; the sedge is bending under the weight of the reed-birds flitting hither and thither."[121] It is a peaceful scene, which almost hypnotizes the reader....

Yet, there is a most unnatural noise, too: "[F]or the last half-hour I have heard the rattle of railroad cars, now dying away and then reviving like the beat of a partridge, conveying travelers from Boston to the country."[122] Thoreau doubted there was a place in Massachusetts that you could not hear the railroad whistle. Railroads were a symbol of the commercial republic. The railroad went everywhere and affected everything.

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[116] *Id.*. at 175.

[117] *Id.* at 342.

[118] JAMES FENIMORE COOPER, THE PIONEERS 353 (New York, W.A. Townsend 1859) (1823).

[119] Others employed a similar theme. William Sonntage's now lost series *Progress of Civilization* depicted the shift from nature inhabited by natives, to the settler cabins, to a house overlooking a river, with riverboats. It was the story of Cincinnati, where much progress was being made and people could celebrate that progress. WENDY JEAN KATZ, REGIONALISM AND REFORM: ART AND CLASS FORMATION IN ANTEBELLUM CINCINNATI 108 (2002). All of this progress reminds of what legal historian Willard Hurst referred to in the 1950s as the "release of energy." *See* WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM (1958).

[120] *See* MARX, THE MACHINE IN THE GARDEN, *supra note* 54. LEONARD NEUFELDT, THE ECONOMIST: HENRY THOREAU AND ENTERPRISE (1994). One writing about property law in early America ought to speak about "law in the garden," just as Marx wrote about the "machine in the garden." For law was yet another technology that was brought to the garden (America). Its appearance might seem just as jarring as the steamboat that suddenly appeared in Huck Finn and the technology that underlay Moby Dick. And while it might be outmoded in some places–like the ancient gun in Melville's Typee–law was yet another technology that was rapidly coming into the modern era and it was part of what was making yet further advances possible. *See also* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965).

[121] HENRY DAVID THOREAU, WALDEN, in THOREAU'S WRITINGS __ (Library Am. Ed., 1983).

[122] *Id.*

> Far through unfrequented woods on the confines of towns, where once only the hunter penetrated by day, in the darkest night dart these bright saloons without the knowledge of their inhabitants; this moment stopping at some brilliant station-house in town or city, where a social crowd is gathered, the next in the Dismal Swamp, scaring the owl and fox. The startings and arrivals of the cars are now the epochs in the village day. They go and come with such regularity and precision, and their whistle can be heard so far, that the farmers set their clocks by them, and thus one well-conducted institution regulates a whole country. Have not men improved somewhat in punctuality since the railroad was invented? Do they not talk and think faster in the depot than they did in the stage-office? There is something electrifying in the atmosphere of the former place. I have been astonished at the miracles it has wrought; that some of my neighbors, who, I should have prophesied, once for all, would never get to Boston by so prompt a conveyance, are on hand when the bell rings. To do things "railroad fashion" is now the byword; and it is worth the while to be warned so often and so sincerely by any power to get off its track.
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> What recommends commerce to me is its enterprise and bravery. It does not clasp its hands and pray to Jupiter. I see these men every day go about their business with more or less courage and content, doing more even than they suspect, and perchance better employed than they could have consciously devised. I am less affected by their heroism who stood up for half an hour in the front line at Buena Vista, than by the steady and cheerful valor of the men who inhabit the snowplow for their winter quarters; who have not merely the three-o'-clock-in-the-morning courage, which Bonaparte thought was the rarest, but whose courage does not go to rest so early, who go to sleep only when the storm sleeps or the sinews of their iron steed are frozen.[123]

We see all of this in George Inness' 1855 *Lackawana Valley*–the railroad cutting through the field that had recently been cleared of trees; the roundhouse, factories, telegraph lines, church, brick buildings, farms, roads, and those hauling goods to market, in the background. The tracks have been fenced to keep cattle out–a frequent subject of litigation.[124] The railroad is the center

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[123] *Id.* at __.

[124] *See, e.g.,* Ohio & Maryland R.R. v. McClelland, 25 Ill. 140 (Ill. 1860) (finding that act requiring railroads to fence out cattle is a valid exercise of the Illinois legislature's police power). The Illinois Supreme Court worried that railroads had to be subject to the legislature's police power:

> In this age of improvement, and rapid advance in material development of the wealth of the country, when incorporated bodies are created in such numbers, for the advancement of this end, and when legislative bodies grant corporate privileges with such freedom, for almost every conceivable purpose, and when they are created for purposes which, but a few years past, private enterprise or ordinary copartnerships were supposed to be fully adequate, it becomes a question of no small moment to ascertain and clearly define their general privileges, and the extent to which they may be controlled by legislative action. It never could have been the legislative will, that these bodies, when created, should be wholly independent of and irresponsible to the government. If such was the operation of their charters, then we have created in the heart of our government, an uncontrollable power, which must, sooner or later, become dangerous to our rights, if not to constitutional liberty itself. But if, on the other hand, they, like individuals, are under the reasonable control of the government, they may accomplish the purposes of their organization, and prove a blessing to civilization, and not destructive to government.

of the land and ties it all together.[125]

Railroads are a primary vehicle for bringing civilization–trade and law to the United States. Ralph Waldo Emerson, who was perhaps less skeptical of railroads than Thoreau, captured the power of railroads to bind our country together in his speech to the Boston Mercantile Association in 1844:

> I hasten to speak of the utility of these improvements in creating an American sentiment. An unlooked-for consequence of the railroad, is the increased acquaintance it has given the American people with the boundless resources of their own soil. If this invention has reduced England to a third of its size, by bringing people so much nearer, in this country it has given a new celerity to time, or anticipated by fifty years the planting of tracts of land, the choice of water privileges, the working of mines, and other natural advantages. Railroad iron is a magician's rod, in its power to evoke the sleeping energies of land and water.[126]

Judges employed similar language in talking about railroads. In an 1855 case, for instance, the Tennessee Supreme Court concluded that railroads were eligible for state loans for the construction of roads. The Court emphasized the centrality of railroads to this purpose.

> Roads which suffice for a population of hundreds concentrated at a few points, and making but a small amount for market, would not answer for thousands covering the whole face of the country, and rolling up millions of produce for transportation. The advance may be, and generally is, gradual in this, as in most other things; but it is as steady and sure as any other kind of improvement which results from the wants and urgent necessities of a people. ... Blessings innumerable, prosperity unexampled, have marked the progress of this master improvement of the age. Activity, industry, enterprise, and wealth seem to spring up, as if by enchantment, wherever the iron track has been laid, or the locomotive moved.
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> Here, then, is a road to pass through the county of Sumner, touching her seat of justice, bringing to the doors of her citizens all the necessaries and luxuries both of the North and South, transporting all their surplus productions to the best markets, and her people wherever interest, business, or pleasure may call; and all this with that great despatch which steam alone can impart to matter, and before which space dwindles into a point, and the people of distant states are brought into daily communication.[127]

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[125] Thomas Cole, however, painted a railroad going through the Catskills in 1843, *River in the Catskills*, which is not a celebration of progress. Kenneth W. Maddox, *Thomas Cole and the Railroad: Gentle Maledictions*, 30 ARCHIVES AM. ART J. 146, 148 (1990) (quoting Thomas Cole's "The Spirits of the Wilderness: A Poem," Part 8, NYSL; Archives of American Art, microfilm roll ALC-3).

[126] Emerson, *Young American*, in EMERSON, *supra* note 37, at 293, 296.

[127] Louisville & N. R. Co. v. Davidson County Court, 1 Sneed 637 (Tenn. 1854).

And in other cases, judges took action to limit damages for decrease in property values by railroads.[128]

Inness' painting is a celebration of sorts of technology; the railroad was central to thinking about property law, for it was a frequent point of contention on issues of eminent domain, nuisance, and trespass. Railroads promote and illustrate that progress--and how they disturb nature at the same time. They signaled the age of individualism, in which employers were not liable for the injuries to their workers, for workers had assumed the risk of injury by working for the railroad or because the railroad was not liable for the injuries due to the fellow workers' negligence. Courts imposed liability only on railroads that were negligent.[129] Railroads were also central to remaking property rights. Judges were increasingly skeptical that railroads were nuisances and overturned injunctions against them. So that even if a railroad were even found to be a nuisance, a court would deny an injunction against its operation and instead leave plaintiffs to money damages alone.[130] This is an early manifestation of one of the key principles of injuctions and business development in the late twentieth century. Moreover, legislatures granted railroads and before them canals the right of private condemnation.[131] Judges routinely upheld the right of use of eminent domain to construct railroads, even though a cemetery.[132] The considerations of utility that mattered in judges' minds were remaking property law and the larger society's celebration and wariness about the ever-present considerations of utility appeared in landscape art.[133]

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[128] Proprietors of Locks and Canals v. Nashua and Lowell R.R., 64 Mass. R. 385, 389 (1852).

[129] Justice Eugenius A. Nisbet of the George Supreme Court rejected the principle of strict liability for a railroad in *Macon & Western R. Co. v. Davis*, 13 Ga. 68 (Ga. 1853); he found the mere suggestion of liability without fault "a reproach to the civilization of the age." Nesbit thought he would never see such legislation in "any free State." It was both unjust and would drive railroads out of business. "Besides its oppressive injustice, it would be grossly inexpedient, inasmuch as it would deny to the public the incalculable benefits of Railroads, for no company would long exercise franchises thus encumbered."

[130] Lexington & Ohio v. Applegate, 38 Ky. (8 Dana) 289 (1839).

[131] Joseph Dorfman, *Chancellor Kent and the Developing American Economy,* 61 COLUMBIA L. REV. 1290-1317 (1961); Jerome v. Ross, 7 Johns. Chanc. 315 (N.Y. 1823) (Kent, Chan.) (upholding private condemnation statute for construction of Erie Canal).

[132] *See* Proprietors of Cemetery of Spring Grove v. Cincinnati, H. & D. R. Proprietors of Cemetery of Spring Grove v. Cincinnati, H. & D. R. Co., 7 West.L.J. 251 (Ohio Super. 1849). The court acknowledged sentimental considerations ought to play a role in eminent domain, but property rights still yield to progress in the form of eminent domain actions for the construction of canals and railroads.

> Thus the public exigency that would exhume the remains of a venerable citizen, whose friends and relations were living around him, should be higher than that which would plough up the grave of an Indian chief, whose tribe was extinct and whose name forgotten. The exigency that would root up the fruit trees and shrubbery about a man's dwelling, should be greater than that which would open a way through his corn fields or meadows. And the exigency that would open a railway through even the ornamental grounds of a cemetery, ought to be more important than that which would open it through a race course or bowling green, which had cost more money, and would be harder to replace. But these are questions of degree, and not of right. The right of eminent domain is co-extensive with the public wants, and has no other limit. The right of the property holder is a compensation in money, and has no other extent.

[133] The utilitarian calculus that underlay changes in the common law of property cite rarely appeared in public law, for considerations of utility in public law threatened to overturn vested rights. A public law based on utility might reassign property from those with much property to those in greater need. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW,

Conclusion

Landscape art in the years leading into Civil War often focused on Americans' rapid development of the land. The images show a progression from wilderness to a world filled with humans, stretching from rude cabins to brick houses, factories, mills, canals, even railroads and telegraphs. Some artists disclosed a wariness of the development of land; others revealed a celebration of the changes. Such sentiments appeared in American society more generally as well. In their writings, stretching from judicial opinions and treatises to orations, legal thinkers emphasized two aspects of property. First, that property rights were a central part of creating a culture of progress and second that property doctrine facilitated that progress as well. Landscape art can help us understand more fully the ways that culture was connected to legal thought and how it both supported and critiqued that thought. As we continue to recover a sophisticated understanding of the connections between legal culture and American society, landscape art may provide some important additional data points.

1780-1860 255 (1977) (noting absence of utility in public law); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. Rev. 1113 (1999).