

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.

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

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John Locke's phrase that "[t]hus in the beginning all the World was America."¹ 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, as it is in Thomas Cole's 1826 *Falls of Kaaterskill* (image 1). Sometimes when people are shown on the landscape, as in Frederic Church's *Hooker and Company Journeying Through the Wilderness from Plymouth to Hartford*, the landscape is, well, a wilderness. (Church's *Above the Clouds at Sunrise*, image 2, has no humans present.) 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 Literary Societies in Dartmouth College in 1843, "[t]he perpetual admonition of nature to us is, 'The world is new, untried. Do not believe the past. I give you the universe a virgin to-day,'"² 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.³

1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 301 (Peter Laslett ed., 1988) (1690). 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. *Id.*; 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 perceived to be inferior to that of common laborers in England. See generally, LOCKE, *supra*.

[S]everal 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*.

Id. at 296-97. 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?

What 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 inclosing, 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.

Id.

2. RALPH WALDO EMERSON, *Literary Ethics, in NATURE, ADDRESSES, AND LECTURES* 127, 138 (Cambridge, Riverside Press 1883) (1855).

3. Edward W. Emerson, *Introduction to NATURE, ADDRESSES, AND LECTURES*, *supra* note 2, at 11, 11-13.

Image 1

Thomas Cole. *Falls of Kaaterskill* (1826)

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Property of the Westervelt Company and displayed in the Westervelt-Warner
Museum of American Art in Tuscaloosa, AL



Image 2

Frederic Church, *Above the Clouds at Sunrise* (1849)

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I. THE AMERICAN SCHOLAR AND THE AMERICAN JURIST

Judges were among those Americans who sought that direct relationship between truth and modes of thought in the early nineteenth century. Judges frequently returned to original principles. Ralph Waldo Emerson's 1837 "The American Scholar" Address told of the life of the mind in America.⁴ 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

4. See generally RALPH WALDO EMERSON, *The American Scholar*, in NATURE, ADDRESSES, AND LECTURES, *supra* note 2, at 71.

inviolable seat pronounces on the passing men and events of to-day,—
this he shall hear and promulgate.⁵

American judges came to believe, with Emerson, that “[t]here are new lands, new men, new thoughts.”⁶ It was natural, then, for them to “demand our own works and laws and worship.”⁷ Americans looked around and saw, with Emerson, extraordinary technological, moral, and economic advances. Theodore Parker characterized the American people’s search for reasons as follows: “[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.”⁸ 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 original 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 deliberate assemblies.⁹

II. TENSION BETWEEN NATURE AND LAW

By the nineteenth century, Americans had become accustomed to thinking of nature as something, well, savage. 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

5. *Id.* at 86-87. Emerson drew on some common themes here, which stretched back to Joseph Stevens Buckminster’s *On the Dangers and Duties of Men of Letters*, 9 MONTHLY ANTHOLOGY & BOSTON REV. 145 (Sept. 1809).

6. Emerson, *supra* note 3, at 11, 11.

7. *Id.*

8. THEODORE PARKER, *The Political Destination of America*, in 2 SPEECHES, ADDRESSES, AND OCCASIONAL SERMONS 198, 214 (Boston, Horace B. Fuller 1867) (1855).

9. Hugh S. Legaré, *Kent’s Commentaries*, 3 S. REV. 72 (1828).

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.¹⁰

In political philosophy, we no longer thought freedom was greatest in the place where 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.”¹¹ 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. Lincoln thought that passions, which had served us so long, should rule us no longer. 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 molded into general intelligence, sound morality, and, in particular, a reverence for the Constitution and laws; and that we improved to the last . . .”¹²

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 hunted only when necessary¹³ (but also was not

10. See, e.g., DONALD MEYER, *THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC* (1972) (focusing on moral philosophy instruction in early America); LAWRENCE FREDERICK 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, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 126-31 (1965) (focusing on ideas of evolution in law); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35*, OLIVER WENDELL HOLMES DEVISE: *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 640-47 (1988); William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 *EMORY L.J.* 65, 71-75 (1990) (discussing conflicting ideologies in early America).

11. Albert Taylor Bledsoe, *Liberty and Slavery: Or, Slavery in the Light of Moral and Political Philosophy*, in *COTTON IS KING, AND PRO-SLAVERY ARGUMENTS* 269, 278 (E.N. Elliot ed., 1860). Many in the Antebellum Era thought in such terms. Boston Unitarian Frederic Henry Hedge spoke during his 1841 Harvard Phi Beta Kappa address, *Conservatism and Reform*, in such terms: “Law and Liberty are not adverse, but different sides of one fact.” See F. H. HEDGE, *Conservatism and Reform*, in *MARTIN LUTHER AND OTHER ESSAYS* 129, 135 (Boston, Roberts Brothers 1888).

12. Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield, Illinois (Jan. 27, 1837), in *1 COMPLETE WORKS OF ABRAHAM LINCOLN* 35, 50 (John G. Nicolay & John Hay eds., 1905).

13. And in this he seemed rather like Locke’s description of primitive people, who had the right to collect property for their own use.

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

constrained by private property, hunting laws, or other human constraints), believed law was now necessary. Upon meeting a young woman traveling on the prairie, Leather-stocking asked, “[w]hy 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. “[T]is 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 gifts of strength and wisdom are to be taken care of.”¹⁴ The hero observed that “[w]hen the law of the land is weak, it is right the law of nature should be strong.”¹⁵ The converse of this 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 law 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.”¹⁶

Literature, like philosophy, was beginning to show the inherently social nature of human beings, who need society and its accompanying law.

Some fictional literature illustrates the desire to improve over nature. Edgar Allan 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.¹⁷ 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

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 robb’d others. And indeed it was a foolish thing, as well as dishonest, to hoard up more than he could make use of.

See LOCKE, *supra* note 1, ¶ 46.

14. J. FENIMORE COOPER, *THE PRAIRIE* 22-23 (Cambridge, Riverside Press 1877) (1827).

15. *Id.* at 102.

16. *Id.* at 64-65.

17. See EDGAR ALLAN POE, *The Domain of Arnheim*, in 1 *THE WORKS OF THE LATE EDGAR ALLAN POE* 388 (New York, Redfield 1857).

been made to defeat the devise (and though they were ineffective, the state legislature prevented similar devises by statute).¹⁸ 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 artistic eye, looking steadily, will not find matter of offence in what is termed the “composition” of the landscape.¹⁹

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 were critical, indeed indispensable.

What is perhaps most exciting about the Domain of Arnheim is that it is based on the 1799 English case of *Thellusson v. Woodford*.²⁰ 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.²¹ 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 until the remote descendant became eligible to take the estate.²² That led to Parliament’s passage in 1800 of the Thellusson Act, which limited the accumulations that were permissible.²³ Thus, Poe’s short story was motivated by a case that itself was an 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.²⁴

18. *Id.* at 389-90.

19. *Id.* at 392-93.

20. 32 Eng. Rep. 1030 (1805).

21. See Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 504 (2006).

22. See *id.* at 504-05.

23. See *id.*

24. For more on *Thellusson*, 32 Eng. Rep. 1030, see GREGORY S. ALEXANDER, *COMMODITY & PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 120-21 (1997).

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.'"²⁵ And as society developed, as we moved from "a state of primaevial simplicity" seen in "the manners of many American nations when first discovered by the Europeans," there developed rights of property.²⁶ 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.²⁷ But then, as "mankind increased in number, craft, and ambition," other, more permanent rights emerged.²⁸

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 soil or ground was established.²⁹

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.³⁰ There was a biblical basis: "The Lord God sent him forth to till the ground."³¹ There were also practical reasons compelling property rules that promoted agriculture:

[C]ommon reason has discovered that from the goodness and benevolence apparent in the whole creation, and from that provision made abundantly for every 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.³²

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

25. WILLIAM BLACKSTONE, 2 BLACKSTONE'S COMMENTARIES 2-3 (London, A. Strahan & W. Woodfall 1791).

26. *Id.* at 3.

27. *Id.*

28. *Id.* at 4.

29. *Id.* at 4-5.

30. HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES 122 (Philadelphia, P. Byrne 1814).

31. *Genesis* 3:23.

32. BRACKENRIDGE, *supra* note 30, at 122.

populous, whose numbers overcharge the soil, . . . to demand territory from a nation in possession of a soil equally fertile, and less abounding with inhabitants.”³³ Brackenridge relied upon a crude utilitarian argument—one nation could make better use of property than another. In the nineteenth century, such arguments were more commonly linked with the belief 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 wast[e] of America left to Nature, without any improvement, tillage or husbandry, a thousand acres will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated?”³⁴

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*.³⁵ Judges and politicians developed a regime to regulate the acquisition of property and then its use. The rule, succinctly stated by Marshall in *Johnson*, 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 conne[ct]ion 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.³⁶

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.

III. IMAGES OF PROPERTY IN ANTEBELLUM LANDSCAPE ART

One might begin this examination of nature and humans through Thomas Cole’s *Notch of the White Mountains* (image 3) painted in 1839.³⁷ Thomas Cole

33. *Id.* at 126.

34. LOCKE, *supra* note 1, ¶ 37 (294).

35. 21 U.S. (8 Wheat.) 543 (1823).

36. *Id.* at 595.

37. See E. T. COOKE, A SUBALTERN’S FURLOUGH: DESCRIPTIVE OF SCENES IN THE UNITED STATES, UPPER AND LOWER CANADA, NEW BRUNSWICK, AND NOVA SCOTIA, DURING THE SUMMER AND AUTUMN OF

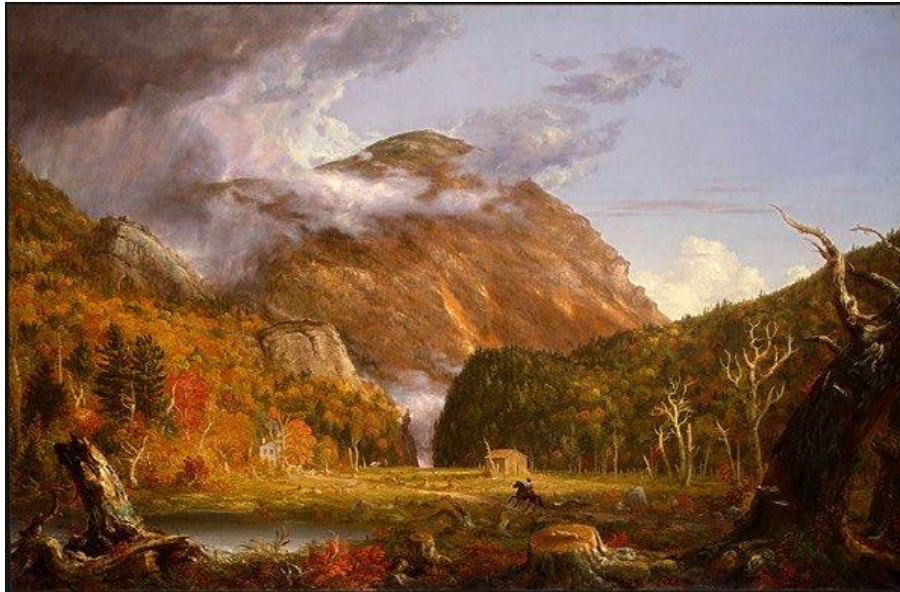
was born in 1802 in England, moved with his family to Ohio in his youth, and by the mid-1820s had established himself as a landscape painter.³⁸ He was one of the most famous and earliest of the landscape painters of the nineteenth century. In *Notch*, there is a scene of a rider on a horse following a road towards a house; a cut stump is in the foreground. This picture confirms the reach of property that Ralph Waldo Emerson spoke 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 me to show me that it is his.”³⁹ Property had extended its reach far indeed.

Image 3

Thomas Cole, *Notch of the White Mountains* (1839)

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1832 (1833); 1 CHARLES LYELL, A SECOND VISIT TO THE UNITED STATES OF NORTH AMERICA 56-70 (2d. ed. 1850) (discussing testate and intestate distribution of property); N. P. WILLIS, AMERICAN SCENERY 132 (1840) (discussing the discovery of “the Notch” by Nash and Sawyer).

38. See Christine Stansell & Sean Wilentz, *Cole’s America*, in THOMAS COLE: LANDSCAPE INTO HISTORY 3, 3-21 (William H. Truettner & Alan Wallach eds., 1994); Alan Wallach, *Thomas Cole: Landscape and the Course of American Empire*, in THOMAS COLE: LANDSCAPE INTO HISTORY, *supra*, at 23-111; ELLWOOD C. PARRY III, THE ART OF THOMAS COLE: AMBITION AND IMAGINATION 21-27 (1988); BARBARA NOVAK, NATURE AND CULTURE: AMERICAN LANDSCAPE AND PAINTING, 1825-1875, at 9-10 (1980).

39. RALPH WALDO EMERSON, *The Conservative*, in NATURE, ADDRESSES, AND LECTURES, *supra* note 2, at 239, 249.

The Notch was made famous by a landslide in August 1826 that—most tragically—killed the Willey family who lived in a house there.⁴⁰ As the landslide approached, 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 passed down in New England folklore for decades. For example, a ballad by T.W. Parsons recalled how rescuers became hopeful when, upon arrival, they saw that the Willey House was still standing. 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
Pursued the ruin of its path.

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.

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?⁴¹

40. See W. WILLIAMS, APPLETONS' RAILROAD AND STEAMBOAT COMPANION 56 (1849) ("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 backed 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.").

41. THOMAS STARR KING, THE WHITE HILLS: THEIR LEGENDS, LANDSCAPE, AND POETRY 201 (Boston, Crosby & Ainsworth 1866); see also BENJAMIN G. WILLEY, INCIDENTS IN WHITE MOUNTAIN HISTORY 110 (Boston, Nathaniel Noyes 1858).

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.⁴² Cole visited the Notch in the late 1820s, shortly after the slide, and then painted *The Notch of 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, such as lawyers, judges, and academics: they wrote of a constellation of ideas, of nature, of humans, of democracy, property, and progress.⁴³ And we can see the human divisions of property in their paintings.

Image 4

Thomas Cole, *Oxbow* (1836)

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42. ANGELA MILLER, *THE EMPIRE OF THE EYE: LANDSCAPE REPRESENTATION AND AMERICAN CULTURAL POLITICS, 1825-1875*, at 154 (1993). This Article draws heavily upon Miller's ideas and structure, as it moves from her linking of art with political and cultural ideas to linking of art with legal ideas.

43. See generally ALBERT BOIME, *THE MAGISTERIAL GAZE: MANIFEST DESTINY AND AMERICAN LANDSCAPE PAINTING C. 1830-1865* (1991); MILLER, *supra* note 42; NOVAK, *supra* note 38; William Cronon, *Telling Tales on Canvas: Landscapes of Frontier Change*, in *DISCOVERED LANDS, INVENTED PASTS: TRANSFORMING VISIONS OF THE AMERICAN WEST* 37 (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.

And we can see the human divisions of property in their paintings. In the vista of *The Oxbow* (image 4), 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, and 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 have wrought, and human deeds hallowed all around.⁴⁵

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, begin with 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.⁴⁶

In 1836, the same year that *Oxbow* appeared, Ralph Waldo Emerson published his first major work—a tiny volume called *Nature*, in which he provides 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.⁴⁷

45. Thomas Cole, *Essay on American Scenery*, 7 AM. MONTHLY MAG. 1, 3 (Jan. 1836).

46. *Id.* at 11-12; see also John Nagle, *The Spiritual Value of Wilderness*, 35 ENVIR. L. 956 (2005).

47. EMERSON, *Nature*, in NATURE, ADDRESS, AND LECTURES, *supra* note 2, at 15, 16; see also *In re Pea Patch Island*, 1 Wall. Jr. C.C. IX, 30 F. Cas. 1123, 1144 (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.”).

Emerson embraces the language of property (warranty deeds) to talk about property and nature. We see in *Oxbow* 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 Maria 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 completing his possession of the image of the falls of Trenton.⁴⁸ Talk about commodification and possession of beauty!⁴⁹ 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.⁵⁰

It was, indeed, the age of acquisition, of commerce, and of the market.

48. Fifty dollars might be a fair price for a landscape painting. See *Rose v. Thompson*, 17 Ala. 628 (1850) (affirming an 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 lawsuits, such as when a testator gave away two landscape paintings in *Walsh v. Mathews*, 11 Mo. 131 (1847). They were sometimes the subject of a bequest at death. See, e.g., *Pinckney v. Pinckney*, 2 S.C. Eq. (2 Rich. Eq.) 218 (1846) (gift of a Rubens painting). And sometimes paintings were the subject of mortgages. See, e.g., *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. See, e.g., *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 this 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, 237-38 (1857).

49. 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 Am. Art Union*, 7 N.Y. 240 (1852); *People v. The Am. Art Union*, 13 Barb. 577. (N.Y. 1852).

50. EMERSON, *The Conservative, in NATURE, ADDRESSES, AND LECTURES*, *supra* note 2, at 239, 250.

Others in that romantic age besides Emerson also wondered how a person could “own” nature. Thomas Jefferson described the Natural Bridge in western Virginia 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.⁵¹

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.”⁵²

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:

[W]e 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 in terra*, 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. . . . 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, we think, to find the task a *pons asinorum*.⁵³

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

52. Letter from Thomas Jefferson to William Caruthers (Mar. 15, 1815) (on file with author).

53. John R. Thompson, *Advertisement Extraordinary*, 15 S. LITERARY MESSENGER 664-65 (Nov. 1849).

Perhaps Frederic Church's 1852 painting *Natural Bridge* should be viewed alongside John Reuben Thompson's poem deriding 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!⁵⁴

Thompson, like other romantics, praised nature instead of human constructions. Yet, like many other southern intellectuals, Thompson also supported slavery.⁵⁵ The connection between romanticism and slavery is strange, to say the least, as were Americans' attitudes toward property.

54. *Id.* at 665-66.

55. See PETER S. 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: INTELLECTUAL LIFE AND THE AMERICAN 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:

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.

MILLER, *supra* note 10, at 65.

IV. LINKING PROPERTY LAW TO LANDSCAPE ART

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 for ideas about property.⁵⁶ 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.⁵⁷ We can also use it to understand more abstract ideas, like the centrality of property law in the advance of civilization—making it possible to purchase rights from the crown, secure society against upheaval, and facilitate commerce and industry. Thus, we have additional evidence of how central property was, from voting rights and 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 advance of civilization. Many 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 economic and legal change.⁵⁸

56. 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*, 20 Mass. (3 Pick.) 304, 313 (1825) (“[T]he common law has put a check upon the *licentiousness* of the press, and the expression of opinion by writing, painting, etc. 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 (Pa. 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*, 29 N.H. 482, 490 (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.

Pa. Acad. of Fine Arts v. Phila. County, 22 Pa. 496, 499 (1854). Still, the court held that the Pennsylvania Academy of Fine Arts was not a trade school for purposes of exemption from taxation. *Id.*

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

58. This Article 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 J. 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 America 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, such as St. George Tucker and Hugh Henry Brackenridge, were more concerned with the understandable aspects of law than its mysteries. In addition to Brackenridge's *Law Miscellanies*, his *Modern Chivalry* provides a distillation of ideas about law and culture that helps systematize American law. *See* H. H. CRACKENRIDGE, *MODERN CHIVALRY, OR THE ADVENTURES OF*

One of the key ideas of the Antebellum Era was a belief in divinely inspired progress. It was an era in which Americans told themselves that they were on a divinely sanctioned mission. That mission linked the market and law with the course of subduing nature. John Frederick Kensett, in *Beacon Rock in Newport*, used Rhode Island's harbor as one representation of that mission. Beacons had a religious significance.⁵⁹ In the beacon we get the imagery of the community setting a fire to warn of danger and provide guidance.⁶⁰ In the law of beacons we see the community's obligation to protect.⁶¹

CAPTAIN FARRAGO AND TEAGUE O'REGAN (Philadelphia, Carey & Hart 1846) (1804).

59. MILLER, *supra* note 42, at 176 (discussing Frederic Church's 1851 painting *Beacon off Mount Desert* and linking it to Puritan imagery of New England as a beacon).

60. *See, e.g.*, ICHABOD BARTLETT, SPEECH OF MR. BARTLETT OF NEW-HAMP. ON THE PROPOSITION TO AMEND THE CONSTITUTION OF THE UNITED STATES 28 (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 IN LIEU OF THE REPORT OF THE COMMITTEE 22 (Richmond, Shepherd & Pollard 1824); *see also* JAMES T. AUSTIN, AN ORATION, DELIVERED ON THE FOURTH OF JULY, 1829, AT THE CELEBRATION OF AMERICAN INDEPENDENCE, IN THE CITY OF BOSTON 18 (Boston, John H. Eastburn 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.").

61. Beacons were seen as central to the community's well-being, so that the erection of beacons was a charitable purpose. *See* *MaGill v. Brown*, 16 F. Cas. 408, 432 (E.D. Pa. 1833) (No. 8,952) (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* *Bridgeport v. Housatonic R.R. Co.*, 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, [etc.]."). 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*, 54 Va. (13 Gratt.) 541 (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, 221-22 (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 of action for loss of a ship. *See* *McArthur & Hurlbert v. Sears*, 21 Wend. 190 (N.Y. 1839). Indeed, beacons were part of a close to strict liability regime in early America. Precedent, of course, could also serve as a beacon:

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,

Let us start with some of the evidence of property ownership and the ways land is used in this art—specifically, the divisions of the land, including fences. In his *Lecture on the Times*, Emerson discussed how the attack on institutions such as marriage had turned into an attack on 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

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 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 may be liable to conduct us to the paths of error, yet, may be important aids in lighting our footsteps in the road to truth.

Leavitt v. Morrow, 6 Ohio St. 71, 78 (1856). The beacon might also warn of danger. See Williamson v. Beckham, 35 Va. (8 Leigh) 20, 24 (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. Toledo*, 1 Ohio St. 622 (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.

Id. at 630-31. In claiming that a trust to transport slaves to Africa and free them should not be enforced in Mississippi, counsel in *Ross v. Vertner* argued that North Carolina precedent—holding that the slaves could not be freed—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.

Boss v. Vertner, 6 Miss. (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) (“[I]t 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*, 4 Ky. (1 Bibb) 492, 492 (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.”).

thorough lights. Is all this for nothing? Do you suppose that the reforms, which are preparing, will be as superficial as those we know?⁶²

We see those divisions of the land in such paintings as Jonathan Fisher's *View of Blue Hill Maine*, (image 5) 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. More of these divisions appear in Jasper Frederick Cropsey's *American Harvesting* (1851) (image 6), in which the scene is divided into wild nature on one side of a fence and a cultivated field yielding the harvest on the other. At the time, fences were important because they defined private property; humans and animals had a general right to cross any rural property that was unfenced.⁶³

62. EMERSON, *Lecture on the Times*, in NATURE, ADDRESSES, AND LECTURES, *supra* note 2, at 211, 222-23 (stating that 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, and 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.

Id. at 222.

63. 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 Land: An Intellectual History of American Property Doctrine, 1776-1876*, at 141 (1991) (Ph.D. dissertation, Harvard University) (on file with the *McGeorge Law Review*) (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 Railroad Co. v. Peacock*, 25 Ala. 229 (1854); *Macon & Western Railroad Co. v. Lester*, 30 Ga. 911 (1860); and *Vicksburg & Jackson Railroad Co. v. Patton*, 31 Miss. 156 (1856).

Cropsey's 1850 painting, *Bareford Mountains, West Milford, New Jersey*, now at the Brooklyn Museum offers a similar depiction, with a fence at the center of the landscape.

Image 5

Jonathan Fisher, *View of the Blue Hill, Maine* (circa 1824)

Reproduced with permission of Gulf States paper Corporation. Tuscaloosa, AL

Property of the Westervelt Company and displayed

in the Westervelt-Warner Museum of American Art in Tuscaloosa, AL



Image 6

Jasper Frederick Cropsey, *American Harvesting* (1851)

Reproduced with permission of Indiana University Art Museum, Bloomington, IN

Gift of Mrs. Nicholas H. Noyes



It is not just human structures, such as houses, fences, or roads, that appear in the landscapes—machines appear as well. 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 as well. The hero in Herman Melville's short story "Tartarus of Maids" heard the sound of industry in nature. He was in the seed business, so he used an extraordinary amount of paper, often as envelopes for the seeds. He went in search of a paper-mill so that he might purchase paper more cheaply. The hero went on a sleigh during the winter in search of the mill and got lost in a valley. "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."⁶⁴

64. 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).

In describing a tort case brought by a young man who had lost a leg in an accident with a steam-powered paper mill in the 1830s, the Tennessee Supreme Court painted a picture of a very dangerous machine—one that a prudent owner would have tried to enclose, so that it would be safer:

The injury occurred in this way: The defendants were owners of a paper-mill in Nashville, on Water street, on the bank of Cumberland river, the machinery of which was propelled by steam. Connected with the mill, machinery had been constructed to draw up wood from the river, on a truck. This consisted of a shaft, proceeding from the engine-room of the mill, and extending through the wall of the mill-house. On the end of this shaft, and outside of the wall, some eight or ten inches, was fixed a cog-wheel, about twenty-six inches in diameter, which was geared in another cog-wheel, for the purpose of moving the truck. The wheels revolved from ten to twenty inches from the ground, and worked upwards and outwards. They were about twenty feet from the street, in an open space, entirely exposed without any cover, guard, or enclosure whatever.

Whirley v. Whiteman, 38 Tenn. (1 Head) 610, 614 (1858). The machines that look so natural in the landscape paintings certainly had the power to destroy as well as create progress. In *Wells v. Chapman*, 13 Barb. 561, 561 (N.Y. Sup. 1852), Judge Roosevelt of the New York Supreme Court found that an easement for supply of water, which had originally been granted for a paper mill, could not be expanded to supply a cotton mill. He did so by employing allusions to a romantic garden:

[S]uppose a beautiful, picturesque country residence, with a romantic stream, constituting its most attractive feature, coursing through its woods and lawns. An adjacent owner, not thus favored desirous of remedying by art the defect of nature, applies to his neighbor for leave to construct a canal, in the form of a mimic rivulet, to supply a fountain, throwing up its graceful jets, in view of the owners and visitors of both places. Having obtained a grant, in accordance with his wishes, he subsequently, in a moment of neighborly passion, (not an unusual disturber of rural felicity,) converts the cooling fountain, so pleasant to the eye and harmonious to the ear, into an unsightly, hissing steam engine. Would there be no remedy for such a wrong?

Id. Judge Roosevelt concluded that the owner of the beautiful garden could cut off the water to his neighbor:

The law respects the rights of parties, in matters of taste and imagination, as well as in matters of profit. It stays the wrongful destruction of ornamental trees, as well as the wrongful consumption of mere firewood. There may be injuries too fanciful for its jurisdiction; but that is no reason why it should not interfere in any case, where the rights of a refined and cultivated taste are violated. Here,

Others had similar experiences to Melville's fictional traveler who became lost in the wilderness; for, 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 gets lost in thought about the appearance of the landscape surrounding him:

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 beside the coachman.⁶⁵

In fact, that jumbled scene—populated with people and 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 depicted on the canvass runs parallel to the legal world, with its preferential treatment of the use of property for economically 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 mill owners built dams to generate power by increasing the vertical drop in water at their mill. The dams flooded neighbors' property and, in short order, led to nuisance and trespass suits by those neighbors. To limit the damage judgements against the mill owners, mill acts were enacted that gave owners the right to condemn neighbors' property and, in effect, purchase a permanent right to flood.⁶⁶ Neighbors also sought to enjoin the operation of mills, often

the owner of the water had a right to withhold a grant altogether. If he made one, then he had a right to impose conditions and restrictions on its use. There is nothing absurd in his confining the grant to a paper mill. He may have had very good reasons for so doing; they may have been substantial reasons of pecuniary advantage, or they may have been reasons, less real perhaps, but more elevated, of ideal association. It is not for the court to inquire into them. It is sufficient to know that he had a right to reserve, and that he did reserve, all his original ownership, except in the one particular of the use of the water for a paper mill.

Id.

65. CHARLES LANMAN, LETTERS FROM A LANDSCAPE PAINTER 133 (Boston, James Munroe & Co. 1845).

66. See generally John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation, 1719-1859*, 27 J. LEGAL STUD. 455, 455-71 (1998); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1099-1156 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. 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:

unsuccessfully. Courts recognized that some injuries were inevitable and minor; moreover, the benefits of the mill to the community often significantly outweighed the harm to individual neighbors.⁶⁷

As courts tried to reconcile the competing rights of neighbors to land, they realigned property rights between owners. Those realignments led to substantial conflict; often it was that industrial uses won out over older, more traditional rights. In other instances, the conflicts involved corporations seeking exclusive rights against members of the community. Some of the best known cases of

[Dams] 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.

Rogers v. Barker, 31 Barb. 447 (N.Y. 1860). A subplot of John Pendleton Kennedy's *Swallow Barn, Or a Sojourn in the Old Dominion* (New York, George P. Putnam 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 humoroussness

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.

67. *See, e.g.,* Wilder v. Strickland, 55 N.C. (2 Jones Eq.) 386 (1856).

If upon such evidence as is offered by the plaintiffs, the courts will interfere to restrain the building of a mill, it must be built in a wilderness where there is no one to be injured, either in health or property; for it must needs be, that in a thickly settled neighborhood, some one must be injured in one way or the other. We are satisfied, too, from the testimony of the defendant, that not only is such a mill required by the necessities and convenience of the neighborhood, but a very large portion of it desires its erection. It is not every slight or doubtful injury, that will justify the Court in exerting [its] extraordinary power of injunction in restraining a man from using his property as his interest may demand, when the benefit of such use[] is mutual to the public and to the owner.

Id. at 391.

antebellum property rights involved the interpretation of corporate charters relating to bridges. Private companies spent considerable sums of money constructing bridges and hoped to recover their costs by charging fees to cross these bridges. 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 1837 opinion in *Charles River Bridge v. Warren Bridge* crystalized the conflict, which pitted claims of vested rights against the community’s rights.⁶⁸ Chancellor James Kent wrote an article in response highlighting the fear many Whigs felt for the security of property rights.⁶⁹ Kent used imagery of nature in describing what was happening: The Supreme Court “cast deep shadows over our fairest and proudest hopes.” The change in leadership on the Supreme Court from Chief Justice John Marshall to Chief Justice Roger Taney cast “a gathering gloom . . . over the future.”⁷⁰ “We seem to have sunk suddenly below the horizon, to have lost the light of the sun and to hold on our way. . . .”⁷¹

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 adherents of 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”⁷² 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 [W]hig professes to cherish liberty, and he cherishes only his chartered franchises.”⁷³ 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

68. 36 U.S. (11 Pet.) 420 (1837).

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

70. *Id.*

71. *Id.*

72. GEORGE BANCROFT, AN ORATION DELIVERED BEFORE THE DEMOCRACY OF SPRINGFIELD, AND NEIGHBORING TOWNS, JULY 4, 1836, at 6 (Springfield, George & Charles Merriam 1836).

73. *Id.* at 7.

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, 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.⁷⁴

Webster saw equitable division of property as the key to the United States' 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.’"⁷⁵ 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 1688, a vast change had been wrought. It may be thought probabl[e], 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.⁷⁶

74. DANIEL WEBSTER, *First Settlement of New England. A Discourse Delivered at Plymouth, on the 22d of December, 1824*, in THE SPEECHES AND ORATIONS OF DANIEL WEBSTER 25, 44 (Edwin P. Whipple ed., 1914).

75. *Id.*

76. *Id.*

However, property not only shaped our nation's character, but it also provided power to democracy and to economic progress. The age was utilitarian and, according to many, it measured value by an idea or a person's contribution to wealth. 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 “[t]he spirit of the age is utilitarian in a high degree and we hail the publication of such useful and practical works, always with pleasure”⁷⁷—identified the fact that property was widely diffused as one of the great virtues of the United States. “There should be neither great riches secured to the few, nor great poverty fastened upon the condition of the many. In these respects, no nation on earth was ever more happily situated than our own.”⁷⁸ Jones, drawing upon James Kent's *Commentaries*, saw property as a central feature of human society and a key ingredient of civilization:

“The sense of property,” says Chancellor Kent, “is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its 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 was 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 brings all his faculties into exercise, and is enabled to display the various and exalted powers of the human mind.”⁷⁹

Those sentiments of acquisition and use of property extended into the wilderness. We see in paintings, like Thomas Cole's *Daniel Boone at His Cabin at the Great Osage Lake* (image 7) (a painting depicting the wilderness of Missouri), a place where humans carve out an existence amidst a wild nature.⁸⁰

77. *Notices of New Works, Silas Jones*, 8 S. LIT. MESSENGER 363 (1842).

78. SILAS JONES, AN INTRODUCTION TO LEGAL SCIENCE 44 (New York, John S. Voorhies 1842).

79. *Id.* at 166 (quoting 2 KENT, COMMENTARIES *318); see also E. P. HURLBUT, ESSAYS ON HUMAN RIGHTS AND THEIR POLITICAL GUARANTIES 63 (New York, Fowlers & Wells 1850). For further discussion of Kent's discussion of property, see Charles J. Reid, *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries*, 5 AVE MARIA L. REV. 47, 86 (2007).

80. 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). An Arkansas court held that people who used fire while hunting on open lands were not liable for the harm caused by the fire, for their hunting was not an illegal act. See *Bizzell v. Booker*, 16 Ark. 308 (1855).

Image 7

Thomas Cole, *Daniel Boone at His Cabin at the Great Osage Lake* (circa 1826)

Reproduced with permission of Meade Art Museum, Amherst College, Amherst, MA



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 such 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.⁸¹ Another, an 1812 statute, required

81. See *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 4-5 (1823).

claimants with superior title to land to pay those who were occupying it for the value of the land, as well as the improvement.⁸² These statutes, however, were challenged as an abrogation of the promise that Kentucky made to Virginia in 1789 to respect the private rights in land that had been ceded to Kentucky.

One such challenge occurred in 1821, when the heirs of one claimant sued on the theory that the Kentucky statutes violated the compact between Kentucky and Virginia and that they interfered with the claimant's property rights. Justice Story wrote an opinion in the case, *Green v. Biddle*, which upheld the right of the claimant over the statutes.⁸³ Justice Story's opinion was subsequently withdrawn when the Court granted a motion for rehearing.⁸⁴ Next term, however, Justice Bushrod Washington again invalidated the statutes.⁸⁵ For Justice Washington, the principle was that original property rights ought to be secured. He accomplished this by invalidating Kentucky'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 was inappropriate. He feared that in the name of upholding vested rights, Kentucky would be held to an unusual property regime. Why, Justice 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, set-offs, etc., appropriate to a state of society, and a state of property, having no analogy whatever to the actual state of things in Kentucky . . . [?]"⁸⁶ Johnson believed there might be a need to change Kentucky's real property law to respect "the ever varying state of human things, which the necessities or improvements of society may require."⁸⁷

The situation in *Green v. Biddle* was typical of the conflicts between properties' prior owners and newer users of property. These conflicts appeared frequently in antebellum America and were exemplified in the 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.⁸⁸

Yet, *Green v. Biddle* did not settle these issues. Courts and legislatures continued to struggle with mistaken improver legislation. When the Texas

82. See *id.* at 5-6.

83. See WHITE, *supra* note 10, at 641-48 (discussing the decision of *Green v. Biddle*); Theodore W. Ruger, "A Question Which Convulses a Nation": *The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 827 (2004) (discussing Kentucky's contest of *Green v. Biddle*).

84. See *Green*, 21 U.S. at 17-18.

85. See *id.* at 90-94.

86. *Id.* at 104 (Johnson, J., dissenting).

87. *Id.*

88. Alfred L. Brophy, "Necessity Knows No Law": *Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases*, 68 MISS. L.J. 1123 (1999) (discussing antebellum vested rights decisions, including *Charles River Bridge*, 36 U.S. (11 Pet.) 420 (1837)).

Supreme Court confronted similar issues in 1852,⁸⁹ it recalled the legislature's policy to protect those whom they had encouraged to settle the land. It was through the settlers "alone [that] the soil could be cultivated, houses built, improvements made, and the wilderness reduced to civilization."⁹⁰ Texas had two problems. First, questions about title to land and second, "the incursions of ferocious and hostile savages."⁹¹ 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.⁹²

Claims of adverse possession invoked similar questions about preferences for prior owners, current occupiers, and users of the property. Adverse possession, however, raises even more significant questions about reassignment of rights than Kentucky's mistaken improver legislation, as adverse possession can remove purchasers' entire interest in their property.⁹³ 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 knew they were not the owners of the property.⁹⁴

Boone proved a useful trope for artists and for those writing about the advance of civilization in the nineteenth century. George Caleb Bingham, like

89. See *Horton v. Crawford*, 10 Tex. 382 (1853).

90. *Id.* at 389 (1853).

91. *Id.*

92. *Id.*; see also *Emery v. Spencer*, 23 Pa. 271 (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.

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.

Hart v. Burnett, 15 Cal. 530, 547 (1860).

93. 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).

94. 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 permitted to further interfere with title. See Fisher, *supra* note 62, at 163, 178.

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!⁹⁵

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 primeval 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.⁹⁶

There is a conflict in some of this art about the law and the progress made possible by it. David Gilmour Blythe provides a direct conflict between property law and art in his 1859 painting *Art Versus Law* (image 8). Here an artist is locked out of his studio in Pittsburgh and he is told “[f]or further information

95. GEORGE ROBERTSON, SCRAP BOOK ON LAW AND POLITICS, MEN AND TIMES 164 (Lexington, A.W. Elder 1855). Indeed, Robertson's opinion in Maysville Turnpike turns on the private nature of a turnpike and thus denied the federal government the power to use a turnpike for the United States' mail unless it paid the standard fare. These issues of public and private arose in many places. *Id.* at 364-74. An Arkansas court commented in 1855 that there was a legislative policy favoring settlement:

The importance of, and the national and social advantages arising from, the opening, subduing and settlement of the uninhabited and wilderness districts of this country, and the hardships, deprivations and difficulties attending such settlements, have induced the policy of encouraging by legislation, the pioneer in the appropriation and occupancy of the public lands.

Hamilton v. Fowlkes, 16 Ark. 340, 366 (1855).

96. Cole, *supra* note 44, at 4-5 (quoting WILLIAM CULLEN BRYANT, *The Prairies*, in WILLIAM CULLEN BRYANT, POEMS 50 (New York, Harper & Brothers, 6th ed. 1840)).

apply way downstairs,” a euphemism, perhaps, for “go to Hades.”⁹⁷ The studio is to be relet in accordance with a landlord-tenant statute.

Image 8

David Gilmour Blythe, *Art Versus Law* (1859-60)

Reproduced with permission of the Brooklyn Museum, Brooklyn, NY



V. THOMAS COLE AND THE AMBIVALENCE OF PROGRESS

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

97. SARAH BURNS, *PAINTING THE DARK SIDE: ART AND THE GOTHIC IMAGINATION IN NINETEENTH-CENTURY AMERICA* 44 (2004).

progress.⁹⁸ The cut stumps that appear at various places in his art “like *Notch of the White Mountains* and *Daniel Boone’s at His Cabin at the Great Osage Lake*” suggest both human advancement over nature and the resulting losses. 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—⁹⁹

This skepticism of progress was a concern that appeared in literature as well. That celebration 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 of the evolution of human society. There is the evolution from the stage where people “[b]anded, and watched their hamlets, and grew strong” and “[g]rave and time-wrinkled men, with locks all white, /

98. Cole worried about the utilitarian sentiments of his age and opposed development in his 1841 Catskill Lyceum Address:

In this age when a meagre 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 N. LIGHT 25, 25-26 (May 1841); see also Alan Wallach, *Thomas Cole’s River in the Catskills as Antipastoral*, 84 ART BULL. 334, 334-50 (June 2002).

99. THOMAS COLE’S POETRY: THE COLLECTED POEMS OF AMERICA’S FOREMOST PAINTER OF THE HUDSON RIVER SCHOOL 67 (Marshall B. Tymn ed., 1972).

Gave laws, and judged their strifes, and taught the way of right.”¹⁰⁰ Over time, the barbarians of Europe were overthrown¹⁰¹ and in the west, hunters began to conquer the land.¹⁰² And then came the description of life in the United States, where the Indians had lived and fought against the settlers.¹⁰³ 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, disimbowered, 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
A limit to the giant’s unchained strength,
Or curb his swiftness in the forward race:
Far, like the comet’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,
Till the receding rays are lost to human sight.¹⁰⁴

If one wonders whether Bryant’s poem is connected to landscape art and property law, one might recall that Bryant was a lawyer and that he wrote a poem for Thomas Cole about the scenes that Cole would find when he visited

100. WILLIAM CULLEN BRYANT, *The Ages*, in WILLIAM CULLEN BRYANT, POEMS, *supra* note 95, at 17 (stanza 11).

101. Another of Bryant’s poems demonstrates the point:
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.

Id. at 22 (stanza 23).

102. *Id.* at 23 (stanza 27).

103. *Id.* at 24-25 (stanzas 30-31).

104. *Id.* at 25-26 (stanzas 32-33).

Europe.¹⁰⁵ Moreover, Asher Durand turned Bryant's most famous poem, *Thanatopsis*,¹⁰⁶ into a painting. To bring the connections together even further, one should 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 many themes running through Cole's work, and not all of them are aimed at economic and moral progress. Much of his work 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; one returns on his 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—Americans 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.¹⁰⁷ So in the anti-rent movement,

105. See WILLIAM CULLEN BRYANT, *Sonnet—to Cole, the Painter Departing for Europe*, in WILLIAM CULLEN BRYANT, *POEMS*, *supra* note 95, at 217. Robert Ferguson connected Bryant and Cole to the search for order in *Law and Letters in American Culture* 174 (1984).

106. BRYANT, *supra* note 95, at 31-33.

107. See Daniel Barnard, *The "Anti-Rent" Movement and Outbreak in New York*, 2 *WHIG REV.* 577, 577-98 (Dec. 1845); JAMES FENIMORE COOPER, *THE REDSKINS; OR, INDIAN AND INJIN* (New York, Burgess & 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 numbers increase, and farther accommodations are required?" Barnard, *supra*, at 589. 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.* 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 [C]ounty, 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

there was a conflict between vested rights and tenants' claims to property; they sought freedom 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.¹⁰⁸

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 (images 9 and 10). 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.¹⁰⁹

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.

108. Cole, *supra* note 44, at 12.

109. BENJAMIN PORTER, *THE PAST AND THE PRESENT: A DISCOURSE DELIVERED BEFORE THE EROSOPHIC SOCIETY OF THE UNIVERSITY OF ALABAMA* (Tuscaloosa: M. D. J. Slade. 1845).

Image 9 Thomas Cole, *Past* (1838)

Reproduced with permission of Meade Art Museum, Amherst College, Amherst, MA



Image 10 Thomas Cole, *Present* (1838)

Reproduced with permission of Meade Art Museum, Amherst College, Amherst, MA



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.¹¹⁰ Cole's image of the course of empire, which is grounded in evidence of

110. Cole's description of the scenes appears in *The Fine Arts*, 8 KNICKERBOCKER: OR, NEW-YORK MONTHLY MAG. 629-30 (1836):

No. 1., 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 is 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 censers. 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

the evolution of society, parallels antebellum thought about history, particularly the history of law.¹¹¹

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 of the future, a fear shared by many antebellum Americans. This is a depressing scene to be sure, and suggestive of the fear that many Whigs, from Chancellor Kent to Justice Story, had for America's future.¹¹² While some have emphasized the energetic optimism of Whigs, that optimism

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 past 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, and 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.

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-rown 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.

Id.

111. Thomas 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* (New York, A. Appleton & Co. 1853), which looks at evolution of law through western civilization. See also ERIC S. ROOT, ALL HONOR TO JEFFERSON? THE VIRGINIA SLAVERY DEBATES AND 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, *supra* note 54.

112. See Angela Miller, *Thomas Cole and Jacksonian America: The Course of Empire as Political Allegory*, 14 PROSPECTS 65 (1989). Still, *The Course of Empire* seems more than the indictment of Jackson than even Miller and Alan Wallach found. See Wallach, *supra* note 38, at 94. It is also an indictment of luxury, a theme that stretched back to the eighteenth century.

came to the Whigs in the 1840s.¹¹³ In the 1830s, they shared a fear of where the United States was headed.

VI. THE DEPICTIONS OF PROGRESS IN LITERARY ADDRESSES AND LANDSCAPE ART

One link between Thomas Cole's interpretation of the course of empire and the judiciary appears in United States Supreme Court Justice Levi Woodbury's 1844 oration at Dartmouth.¹¹⁴ 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 in the sequence of "Course of Empire"), but rather thought that it was modern society where "liberty and law, the arts and the securities of organized government, reign."¹¹⁵ Woodbury cataloged some of the changes, including the spread of literacy, more humane behavior in war, and the end of serfdom. Change in the law was an important part of the move toward humanity.¹¹⁶

113. 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 *THE POLITICS OF INDIVIDUALISM*, *supra* note 10, Lawrence Kohl depicts Whigs as optimistic and the Democrats as pessimistic, though he is dealing mostly with a somewhat later group from Cole.

114. See LEVI WOODBURY, *ON PROGRESS: AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF DARTMOUTH COLLEGE* 8 (Hanover, Dartmouth Press 1844), *reprinted in* 3 *WRITINGS OF LEVI WOODBURY* 75 (Boston, Little, Brown & Co. 1852)

115. *Id.* at 78. 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 or took "progress" as their subject matter. See, e.g., BENJAMIN FRANKLIN JOSLIN, *PRIVILEGES AND DUTIES OF MAN AS A PROGRESSIVE BEING* (S.S. Riggs, New York, 1833); George Bancroft, *Oration Delivered Before the New York Historical Society . . . November 20, 1854*, in *LITERARY AND HISTORICAL MISCELLANIES* 481 (1854) (discussing the "necessity, the reality, and the promise of the progress of mankind"). Treatises, too, looked to explain the meaning and origins of progress. See WILLIAM J. SASNETT, *PROGRESS: CONSIDERED WITH PARTICULAR REFERENCE TO THE METHODIST EPISCOPAL CHURCH, SOUTH* (T.O. Summers, ed., Nashville, Southern Methodist Publishing House 1856); see also ARTHUR ALPHONSE EKIRCH, *THE IDEA OF PROGRESS IN AMERICA, 1815-1860* (1951).

116. See 3 *WRITINGS OF LEVI WOODBURY*, *supra* note 113, at 80-81 ("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.").

The progress had been rapid, for until

the seventeenth century, scarcely any books existed 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*.”¹¹⁷

Earlier laws had corrupted society, but by Woodbury’s time,

[t]here [was] 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 [had] at last begun to practi[c]e 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.¹¹⁸

Even slavery was becoming extinct.¹¹⁹

Woodbury, a Democrat, emphasized the importance of popular education in the progress;¹²⁰ general education made it possible to emancipate Americans from ancient notions, which led to a focus on practical ideas and utility, as well as 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 of 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

117. *Id.* at 81.

118. *Id.* at 82.

119. *See id.*

120. *Id.* at 83 (“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, by various other aids, no less than these, have helped to push upward the social position of the whole.”).

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 subsistence, and the security of the rights of man, and a just knowledge of all the momentous duties and destinies of the human race.¹²¹

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.¹²²

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.¹²³

Now Woodbury had the task of turning Cole's pessimistic message into a more positive one. In keeping with other Democratic speakers, Woodbury emphasized that advancement was possible because a new and better society could 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

121. *Id.* at 84.

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

123. *Id.* at 77.

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; 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 man, not only here and through time, but in the whole universe, and through the endlessness of eternity.¹²⁴

Where did this progress come from? Woodbury's thoughts stemmed from commerce and religion. Others spoke of education, property, and the commerce that property rights made possible that led to this progress.¹²⁵ So schools were believed to be important vehicles of progress.¹²⁶ Jasper Cropsey's 1855 painting of the University of Michigan with buildings rising out of recently cleared fields is another sign of the linking of universities and progress.

124. *Id.*

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

126. 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 mortmain statute against holding property in trust.

[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 defen[se] 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.

Trs. of Davidson Coll. v. *Ex. rel. Chambers*, 56 N.C. (3 Jones Eq.) 253, 268-69 (1857).

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*?¹²⁷ (image at the beginning of the article) Beginning from the left, where a band of Native Americans look on, sweeping across the canvas to the right, there is seemingly every trope of progress—steam ships, a railroad, a church, a canal boat and lock, telegraph lines, a peddler, and the cattle being driven to market. It captures Americans’ excitement about the use of land, as 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, especially focusing on how the progression of law aided the progression of civilization. Justice Joseph Story’s 1826 Phi Beta Kappa address at Harvard linked progress in morals and the common law.¹²⁸ 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.”¹²⁹ 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.¹³⁰

127. See Kenneth Maddox, *Asher B. Durand’s Progress: The Advance of Civilization and the Vanishing America*, in THE RAILROAD IN AMERICAN HISTORY 51-69 (1988) (noting that 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. RENAISSANCE 261 (1992).

128. See JOSEPH STORY, SCIENCE AND LETTERS IN OUR DAY (Cambridge 1826), reprinted in REPRESENTATIVE PHI BETA KAPPA ORATIONS 36 (Charles S. Northup ed., 1927).

129. *Id.* at 49.

130. *Id.* at 48-49. 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*, 80 Mass. (14 Gray) 69 (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.

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 labour of a long and industrious life.¹³¹

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.¹³² 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, 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

Id. at 74. This was especially true in the case of property. See *Henderson's Adm'r v. Henderson*, 21 Mo. 379, 384 (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.").

131. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* 15 (Philadelphia, P. H. Nicklin & T. Johnson 1837).

132. See EDWARD EVERETT, *AN ORATION DELIVERED AT CAMBRIDGE ON THE FIFTEENTH ANNIVERSARY OF THE DECLARATION OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA* (Boston, Cummings, Hilliard & Co. 1826).

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 neighbour, 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.¹³³

Everett's lessons regarding law's place in 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."¹³⁴ 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."¹³⁵ 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.¹³⁶

Those who wrote in more depth on the history of property credited the institution with making human progress possible. New York politician Daniel Barnard's 1846 Phi Beta Kappa address at Yale, *Man and the State*, tells of the

133. *Id.*

134. EDWARD EVERETT, *Oration Pronounced at Cambridge, Before the Society of Phi Beta Kappa, August 26, 1824*, in ORATION AND SPEECHES 9, 15 (Boston, American Stationers' Co. 1836).

135. *Id.* at 15.

136. Bishop Berkeley's phrase "Westward the 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 Berkeley's poem and trip to America in the eighteenth century in his discourse to the New York Historical Society, to illustrate the opportunities for educational progress in America. Gulian C. Verplanck, *Historical Discourse*, in DISCOURSES AND ADDRESSES ON SUBJECTS OF AMERICAN HISTORY, ARTS, AND LITERATURE 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 C. Verplanck, *Address on the Fine Arts*, in DISCOURSES AND ADDRESSES ON SUBJECTS OF AMERICAN HISTORY, ARTS, AND LITERATURE, *supra*, at 134, 145.

relationship between individuals and the state.¹³⁷ This address represents conservative Whig politicians' defense of property rights 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.¹³⁸

Barnard also 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.¹³⁹

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 ownership 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.¹⁴⁰ Soon after

137. 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* (New Haven, B. L. Hamlen 1846).

138. *Id.* at 17.

139. *Id.* at 18.

140. DEW, *supra* note 110, at 465.

1066, the lords and king became 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 the king and lords. Parliament was the result of the king's need for money. "Some of the best laws of England, [even] Magna Charta itself . . . were *literally purchased with money*."¹⁴¹ 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."¹⁴²

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.¹⁴³ Commerce—meaning 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, including oppression of the poor.¹⁴⁴

Judges, too, in writing about property, understood the centrality of the security of property rights and trade to progress. Justice Henry Lumpkin of Georgia linked trade and Christianity together in 1853 in a way reminiscent of Emerson's celebration of trade.¹⁴⁵ 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 he analogized to the belief that free trade brings progress:

The chasm in the mountain at Tallulah, and in the Blue-ridge 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

141. *Id.* at 485.

142. *Id.* at 485-86.

143. See EMERSON, *The Young American*, in NATURE, ADDRESSES, AND LECTURES, *supra* note 2

144. *Id.* at 302.

[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.

Id. at 302-03.

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 free workers worry 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 255-91 (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, at 63-108 (1977) (proposing that limitations on tort liability promoted economic growth).

145. See *Haywood v. Mayor & Aldermen of Savannah*, 12 Ga. 404 (1853).

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 family of Adam.¹⁴⁶

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*.¹⁴⁷ 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 judge 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

146. *Id.* 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:

[C]ommerce, 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 fleetier 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!

Pa. R.R. Co. v. Commonwealth, 3 Grant 128, 130 (Pa.1860).

147. See JAMES FENIMORE COOPER, *THE PIONEERS* (New York, D. Appleton & Co. 1880) (1823).

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?¹⁴⁸

Yet, Natty Bumppo—the Daniel Day Lewis character in *Last of the Mohicans*—claimed a natural right to hunt on the land.¹⁴⁹ 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 two new ones.”¹⁵⁰ While Bumppo wondered, “what has a man who lives in the wilderness to do with the ways of the law,”¹⁵¹ the answer turned on the fact that law had extended its reach to the wilderness. The judge upheld the conviction for hunting out of season and resisting arrest. This demonstrates a classic conflict between nature and law. Law was rapidly winning, as civilization was advancing and the wilderness was receding. 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.”¹⁵² The judge’s world was that of Durand’s *Progress*.

* * *

There is in Durand’s canvass the progress of technology—from canals and steam engines that do everything from running factories to printing presses, to boats and railroads.¹⁵³ Some context for these machines appears in Henry David Thoreau’s *Walden*.¹⁵⁴ Thoreau records the gentle quiet of nature:

148. *Id.* at 99.

149. *See id.* at 121 (“[H]e has a kind of natural right to gain a livelihood in these 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.”).

150. *Id.* at 175.

151. *Id.* at 342.

152. *Id.* at 353.

153. Others employed a similar theme. William Sonntag’s now lost series *The 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 us of what legal historian Willard Hurst referred to in the 1950s as the “release of energy.” *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1958).

154. *See* MARX, *supra* note 63. LEONARD N. 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

As I sit at my window this summer afternoon, hawks are circling about my clearing; the tantivy of wild pigeons, flying by twos and threes athwart my view, or perching restless on the white-pine boughs behind my house, gives a voice to the air; a fishhawk 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 thither¹⁵⁵

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 travellers [sic] from Boston to the country.”¹⁵⁶ Thoreau doubted there was a place in Massachusetts that one could not hear the railroad whistle. Railroads were a symbol of the commercial republic. The railroad went everywhere and affected everything.

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

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 MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965). At other times, the law recognized gardens as a place of home. My books and my garden are the place of my home—or so thought a Florida court when determining residency for probate of a will. See *Smith v. Croom*, 7 Fla. 81 (1857).

When we think of how the legal system approached the machine in the garden, we might turn to the obscure but engaging case of *Guille v. Swan*, decided by the New York Supreme Court (the New York trial court) in 1822. See *Guille v. Swan*, 19 Johns. 381 (N.Y.Sup. 1822). In that case, a balloonist went up, then fell from his car. As his balloon dragged along the ground near where it went up, the balloonist called for help and a crowd of people stampeded into the garden, trampling crops along the way. The owner of the garden sued for damage and collected a judgment for the entire value of the damage, including that done by the bystanders who ran into the garden.

155. HENRY DAVID THOREAU, *WALDEN* 155-61 (New York, Thomas Y. Crowell & Co. 1983) (1854).

156. *Id.* at 151.

get to Boston by so prompt a conveyance, are on hand when the bell rings. To do things “railroad fashion” is now the by-word; and it is worth the while to be warned so often and so sincerely by any power to get off its track. . . .

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 snow-plow 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.¹⁵⁷

We see all of this in George Inness’ 1855 *Lackawanna Valley* (image 11)—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.¹⁵⁸ The railroad is the center of the land and ties it all together.¹⁵⁹

157. *Id.* at 154-56.

158. *See, e.g.*, *Ohio & Md. R.R. Co. v. McClelland*, 25 Ill. 140 (1860) (finding that an act requiring railroads to fence out cattle was 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.

Id. at 125-26.

159. 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).

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.¹⁶²

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. . . .

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 dispatch which steam alone can impart to matter, and before which space dwindles into a

162. EMERSON, *The Young American*, in NATURE, ADDRESSES, AND LECTURES, *supra* note 2, at 293, 296.

point, and the people of distant States are brought into daily communication.¹⁶³

And in other cases, judges took action to limit damages for decrease in property values by railroads.¹⁶⁴

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—yet 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, either because workers had assumed the risk of injury by working for the railroad, or because the railroad was not liable for the injuries due to fellow workers' negligence. Courts only imposed liability on railroads that were negligent.¹⁶⁵ Railroads were also central to remaking property rights. Judges were increasingly skeptical that railroads were nuisances and overturned injunctions against them. So even if a railroad were found to be a nuisance, a court would deny an injunction against its operation and leave plaintiffs to money damages alone,¹⁶⁶ representing an early manifestation of one of the key principles of injunctions and business development in the late twentieth century. Moreover, legislatures granted railroads—and before them canals—the right of private condemnation.¹⁶⁷ Judges routinely upheld the right to use eminent domain to construct railroads, even through a cemetery.¹⁶⁸ Judges' emphasis on utility was

163. See *Louisville & Nashville R.R. Co. v. County Court of Davidson*, 33 Tenn. (1 Sneed) 637 (1854).

164. *Proprietors of Locks & Canals v. Nashua & Lowell R.R. Corp.*, 64 Mass. (10 Cush.) 385, 389 (1852).

165. Justice Eugenius A. Nisbet of the Georgia Supreme Court rejected the principle of strict liability for a railroad in *Macon & Western R.R. Co. v. Davis*, 13 Ga. 68 (1853); he found the mere suggestion of liability without fault “a reproach to the civilization of the age.” *Id.* at 86. Nisbet 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.” *Id.*

166. See *Lexington & Ohio R.R. Co. v. Applegate*, 38 Ky. (8 Dana) 289 (1839).

167. Joseph Dorfman, *Chancellor Kent and the Developing American Economy*, 61 COLUM. L. REV. 1290 (1961); see also *Jerome v. Ross*, 7 Johns. Ch. 315 (N.Y. Ch. 1823) (upholding a private condemnation statute for construction of the Erie Canal).

168. See *Proprietors of Cemetery of Spring Grove v. Cincinnati, H. & D. R. Co.*, 10 Ohio Dec. Reprint 316 (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

remaking property law, and the larger society's celebration and wariness about the ever-present considerations of utility appeared in landscape art.¹⁶⁹

VI. CONCLUSION

Landscape art in the years leading up to the 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. Landscape art can help us understand more fully the ways that culture is connected to legal thought and how it both supports and critiques that thought. As we continue to develop a sophisticated understanding of the connections between legal culture and American society, landscape art may provide some important additional data points.

compensation in money, and has no other extent.

Id. at 258.

169. The utilitarian calculus that underlay changes in the common law of property 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, 1780-1860*, at 255 (1977) (noting the 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. 1161, 1171-72, 1207-12 (1999) (discussing the importance of considerations of utility in antebellum thought and private law); Alfred L. Brophy, *Thomas Ruffin: Of Monuments and Moral Philosophy*, 87 N.C. L. Rev. 799, 813-14, 833-34 (2009) (discussing considerations of utility in Justice Ruffin's private law decisions); Alfred L. Brophy, *Order and Complexity: Legal Thought in the Old South* (on file with author) (highlighting cases and treatises in the old South employing utility).

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