

Property and Freedom

Commentary for William and Mary's Brigham-Kanner Property Rights
Conference Honoring Richard Pipes' *Property and Freedom*

Alfred L. Brophy,
Reef C. Ivey II Professor of Law
University of North Carolina, Chapel Hill
abrophy@email.unc.edu
919.962.4128

Draft of remarks as of August 24, 2009



Jasper Cropsey, University of Michigan, 1859

Where to begin? ... After a lifetime of distinguished scholarship and action on Russian and Soviet history and policy--during which he led our country towards the successful conclusion of the Cold War--Richard Pipes engages in some meta-history ... real meta-history, asking why some societies are free and others are not. He gracefully sweeps across half a millennium--from England in the era of Protestant reformation, as it is emerging from feudalism, to the Soviet Union, to the United States, with nods to a lot of other places in between. Even some stuff that isn't in between, like non-human animal societies' property, too. His primary thesis is that a legal regime that respects property rights is necessary--and indeed an important contributor to--personal freedom. He establishes this through a comparative study of the United Kingdom as it emerged from feudalism with the Soviet Union.

This is the kind of meta-history that lay people love to read--and that one can only write well after a distinguished career. If the rest of us were to try something this big, we'd be (appropriately) considered taking on too much. But speculation about meta-history is great fun and very important. For I think there are lessons that history can teach us--and ought to teach us. Where some, notably the distinguished historian of early America Gordon Wood, argue that historians should be rather detached from contemporary questions, I hope that we will speak to big questions: the role of government in promotion of social welfare policy, the hazards of extraordinary inequality of wealth and opportunity, the dignity of freedom, how our religious and legal institutions promote human freedom, the reasons why our values of religious and ideological pluralism make it possible to triumph over fascism and communism. The list of lessons and insights that history has for us are legion. And I'm grateful for the opportunity to engage with Pipes' theory. I am particularly grateful because I think a primary purpose of history is to expose us to ideas we hadn't thought about before--and may disagree with now. That's how learning takes place and I have learned from Pipes and from his intellectual predecessor Frederick Hayek and his counterparts in the legal academy, like Bernard Siegen¹ and previous Brigham-Kanner Property Rights Prize Winners Richard Epstein and James Ely.²

A *lot*, as Pipes tells us, has been written about property and even more has been written about liberty, but we less frequently hear about the relationship between those two ideas. And just as it appeared when David Davis opened up the question of the relationship between capitalism and antislavery thought, the relationship between those two ideas may not be quite what you would think at first. Davis' idea is that capitalism led to antislavery by making people believe in the market. Ralph Waldo Emerson supported this idea that the market (he didn't call it capitalism) undermined slavery. Of course the Republican party was founded on opposition to slavery and on support for the market. And it's a fascinating debate--though we really have to leave that for another time.

¹ Bernard Siegen, *Economic Liberties and the Constitution* (1980); Bernard Siegen, *Property Rights: From Magna Carta to the Fourteenth Amendment* (2001).

² I would add Calvin Massey here, too, for Pipes cites Massey in the text at 239 (questioning whether progressive taxation is legitimate constitutionally). That there are some important distinctions between Massey and Epstein, which Eric Claeys highlighted in his discussion of Epstein here a few years ago, merely illustrates the diversity of opinion among our leading scholarly defenders of property rights. *See also* Tom Bethell, *The Noblest Triumph: Property and Prosperity Through the Ages* (1990); David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (1999).

The story here is that property promotes freedom--and not just of those who own property. In Pipes' phrasing: "there is an intimate connection between public guarantees of ownership and individual liberty: that while property in some form is possible without liberty, the contrary is inconceivable."³ The basic principle behind Pipes is that freedom and privacy are important and they are infringed when private property is insecure, and that private property has to be really secure to protect freedom. Pipes' thesis is incredibly important to legal thought, and he's been rewarded with a lot of citations (including by me) but not the close attention his book has earned by virtue of his wide learning and keen insights. That is unfortunate because the story he tells is central to how we should approach property law.

There are three pieces here--the historical piece, which focuses particular attention on the seventeenth century and the emergence from feudalism; the modern, twentieth-century piece, which owes a great deal in its theory to Hayek; and the forward-looking prescription about just how to balance property and regulation/taxation, so that we preserve the optimum of freedom.

I. The Historical Piece: Property Theory and the Fulcrum of the Seventeenth Century

Pipes' story is a complex one, which links respect for property in England to the development of the common law's protections for property and then for the idea of freedom--individual liberty. This is in contrast to France around the time of the Revolution, where ideas of equality triumphed. France appears as a place where in the eighteenth century the philosophers remade the world: so now we have a place where philosophical ideas control, even if they don't alter a people's behavior?⁴ Thus, Pipes critiques the French Revolution and utopian ideas. He puts it in grand terms, "Aristotle has triumphed over Plato."⁵

When we are thinking about property and the great sweep of history at William and Mary there is someone else we should be talking about--Thomas Dew. Dew was one of our nation's leading theorists of slavery--and a critically important person, though that is not the center of my remarks today. For Dew (who was president here from 1842 to his death in 1852) gave lectures on the legal history of western civilization. They were published posthumously under the title *Laws, Customs, Manners, and Institutions of Ancient and Modern Nations*. The upshot of Dew's work was that property had purchased freedom from feudalism; Christianity set the stage for this. Here Dew drew upon a number of other his contemporary historians. Property occupied a very specific place in Dew's thought--the process of historical development produced additional freedom. It is an institutional explanation and there is a very definite place for property in the evolution of freedom. That is, the process of historical influence is mapped directly: property purchased freedom. Dew maps correctly the process of evolution. But Dew's purpose was not to suggest that everyone should have property--it was a story to invoke Alexander Pope's adage, "that whatever is, is right." And Dew was not interested in an expansion of the rights of property or even of the rights of citizenship. He thought the people who were qualified for property had risen to that stage. Others should continue to serve, perhaps for

³ Pipes, *Property and Freedom*, at xiii (subsequent references are to Pipes).

⁴ Pipes at 39.

⁵ Pipes at 63; see also his critique of Rawls, at 60.

generations. If we followed Dew, we'd not have advanced to a stage of heightened freedom. In fact, he was perhaps the single most important and effective defender of slavery that our country produced.

Pipes goes beyond Dew, however. Pipes has a more amorphous--even grander--theory: that property rights condition a people for freedom. I am even tempted to remark that Pipes has a theory like Hegel, but he has replaced providence with property.

What to make of this? First, you have to take a really long view to see the emergence from feudalism as the road to freedom--and here I think we can raise some questions about causation. Because England was a long way from free in the era of feudalism. So there was lots of dominion of the little people by the great commercial interests. This was especially evident during the Industrial Revolution. It is easy for some people to say others are free--but that's the question, isn't it? And then there's the question of what freedom consists of? France sets in motion the Haitian Revolution, which sought to remake society. There is always some fear that the world will be remade too quickly.

What do we think when people are ultimately liberated from the tyranny of feudalism? Do we credit the feudal era for that liberation? The moral arc of the universe tends towards justice and freedom, I believe. And we do this by harnessing the virtues of the market. Though we can see the excesses of the market as well. Pipes is wary of attempts at education, but yet we can learn traditions of respect for property over time. It's culture and law and tradition together that teach us about law.

Pipes criticizes equality--though there are some obvious places where equality is important. It's not just around July 4 that we're led to believe that "we hold these truths to be self-evident that all men are created equal" has something to do with our national character. Equality has something to do--in addition to property--with creating a culture of individual rights. The sense of Constitutionalism and the Enlightenment, the Fourteenth Amendment, the Declaration of Independence--these all contribute to the idea of the rule of law and equal treatment. One could, of course, derive the right of property from the equal protection principle (as long as we had a sufficiently high level of scrutiny for economic rights). The Fourteenth Amendment is a sort of secular "Golden Rule."

Our religious tradition--particularly evangelical Protestantism--has more than a little to do with all of those political and legal and cultural changes. To attribute the end of feudalism solely to property--and not also to the rule of law, which supports a sense of fairness (what is the equal protection principle other than Matthew 7:12, the Golden Rule)? And one might note the centrality of the Golden Rule from early American legal thought through its secular versions in the Fourteenth Amendment and in Rawls' formulation. The antebellum south was one of the great bastions of private property rights; they were respected like you wouldn't believe. But it's a society we see in little way free. Why in the world would we celebrate that? Free labor, anti-feudalism, a wholesale attack on property, sentiment (empathy) brought that system down, along with the market.

Property and voting and rule of law all work together; I think it's hard, if not impossible, to separate out one and say this is what led to freedom. And we ought to recall that this struggle lasted hundreds of years. During that time a whole lot of people weren't free. Black people, women, landless white men--this is a struggle for a long time. I'm not sure that freedom was purchased so exclusively through property rights; I think the Revolution and the burst of Enlightenment ideas preceding and following it, the constitutional conventions of the 1820s and 1830s, the Civil War and the Reconstruction amendments had a lot to do with making us a freer nation. Yet, the Civil War occupies no place in Pipes' book. Now, one might certainly say that the market led to increased competition

between free and slave labor and led the North to try to restrict slavery. In that way, concern over property led to the end of slavery. But property rights also supported slavery. And if the south had won--a distinct possibility if the northern Democrats had been just a little more successful--we'd have a very different story. In short, I'm not sure that we can say "property rights" points in one particular way or the other. We can say respect for property--as for other aspects of the rule of law--are critical in releasing our nation's (or any nation's) energy. And one might note that there is more talk about *Regents of University of California v. Bakke*⁶ than *Brown v. Board of Education*. Moreover, the voting rights cases that led us towards freedom receive no attention here.

So property rights have a great deal to do with the road to freedom--as do some other elements, like the development of a market economy, a religious tradition that emphasizes individual autonomy and choice, a religious and political tradition that emphasized individual rights, and a common law tradition of liberalism, too, I should suppose. Generations of historians of religion in English-speaking North America have suggested that the idea that salvation is within the hands of individuals lead to a focus on individual choice--this is true for both the American Revolution and the antebellum era, I should imagine--where individuals were told that they could contract for salvation. Moreover, the political ideas, which correlated with the Revolution, had much to do with property and individual rights, but not just property and maybe not even first and foremost property.

Property is about freedom--independence from those who would withhold property and those who would coerce, whether corporations, individuals, or the state. But property's also about ownership, including ownership of others--of exclusion.

And so there must be some talk of the down sides of property as well, the dark ways in which the tradition of property rights has, through excesses, led us astray. Pipes rejects Edmund Burke's speculation that slavery in America made the slaveholders more likely to respect their own freedom, even as they were enslaving other people.⁷ Pipes does not believe this. He hypothesizes that property and freedom grow together. Yet, as we know, slavery also grows up with property. Property--and the market--may break slavery, but I'm not convinced there is a law of human nature that requires this. There's a lot of injustice that gets worked under the name of property; but we're willing to accept those injustices for the overriding benefits of property, as we've told ourselves repeatedly over generations.⁸

⁶ Pipes at 277.

⁷ Pipes at 119 (discussing Burke on slavery and freedom).

⁸ William Paley, an early nineteenth century English moral philosopher whose work was widely read in the United States at the time, emphasized the need for protections of property. He acknowledged the seeming unfairness of property with a parable about birds collecting food and giving the food to their leader, who did no work:

If you should see a flock of pigeons in a field of corn; and if (instead of each picking where and what it liked, taking just as much as it wanted, and no more) you should see ninety-nine of them gathering all they got into a heap; reserving nothing for themselves

Emerson constructed a dialog of sorts in his essay “The Conservative,” between one who attacks property and one who defends it--the reformer and the conservative. The reformer complains that the world is already possessed; there is no land left. “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. Now, though I am very peaceable, and on my private account could well enough die, since it appears there was some mistake in my creation, and that I have been mis-sent to this earth, where all the seats were already taken.” That reformer wants property--and wants it given to him. “All your aggregate existences are less to me a fact than is my own; as I am born to the earth, so the Earth is given to me, what I want of it to till and to plant; nor could I, without pusillanimity, omit to claim so much. I must not only have a name to live, I must live. It is God's world and mine; yours as much as you want, mine as much as I want.” And the owners of property have more property than they need. “The world is not enough,” to invoke the title of Zoe Oldenbourg's stunning 1946 novel about France in the twelfth century--not the 1999 James Bond film, though there might be something to that as well. “Your want is a gulf which the possession of the broad earth would not fill. 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.”⁹

Yet, yet ... the conservative has an apt and powerful response: that the laws, imperfect as they may be, and the distribution of property, unfair to the new generation as it may be, work well. “They really have so much flexibility as to afford your talent and character, on the whole, the same chance of demonstration and success which they might have, if there was no law and no property.” Or more, we

but the chaff and the refuse; keeping this heap for one, and that the weakest perhaps, and worst pigeon of the flock ; sitting round and looking on all the winter, whilst this one was devouring, throwing about, and wasting it; and if a pigeon, more hardy or hungry than the rest, touched a grain of the hoard, all the others instantly flying upon it, and tearing it to pieces: if you should see this, you would see nothing more than what is every day practised and established among men. Among men, you see the ninety and nine toiling and scraping together a heap of superfluities for one; getting nothing for themselves all the while, but a little of the coarsest of the provision which their own labour produces (and this one, too, oftentimes the feeblest and worst of the whole set,—a child, a woman, a madman, or a fool); looking quietly on, while they see the fruits of all their labour spent or spoiled; and if one of them take or touch a particle of it, the others join against him, and hang him for the theft.

William Paley, *The Principles Of Moral And Political Philosophy* 68-69 (1821).

The upshot of Paley’s vignette is that property confers more benefits (and perhaps fewer harms) than is at first apparent.

⁹ Ralph Waldo Emerson, *The Conservative*, in *Ralph Waldo Emerson: Lectures and Addresses* 171, 180 (Joel Porte ed. 1983).

are likely to add.¹⁰ Though people may want more than they need, that desire and the rules we have set up encourage yet more for everyone. That's the genius of property, to harness the individual's energy and motive to produce, so that there is more for the entire society.

II. The Freedom that Property Protects -- The Twentieth Century: Regulation of Property and the Road from Freedom

Near the end of the volume, in an epilogue, Pipes crystalizes what's at stake in the protection of property: dependence is the absence of freedom. Of course, dependence comes in a great many ways--in the form of an employer who has arbitrary power over individuals, as well (and I would say even more so) than a government that can regulate property or withhold benefits.¹¹ At the center of Pipes' theory is a concern for individualism and freedom from the government--it's an extreme individualism, which is concerned about government's interference, but not bothered by private interference. This is something we've been hearing about for a *long* time--back to the nineteenth century, the heyday of classical liberalism. This is further confirmed in that Pipes chose to conclude his book with a page from Tocqueville.

What I want to propose, then, is that Richard Pipes is--and I think he'll like this comparison--a modern-day Thomas Carlyle. Carlyle's "Sign of the Times" spoke eloquently about individualism--and opposed what Carlyle saw as the fatalism of that machines and the modern era brought, of the seeming uniformity of humans.¹² We might even contemplate Carlyle's book *The Past and the Present*. And that leads to another comparisons, to Thomas Cole's series of paintings "The Past" (depicting a feudal landscape) and "The Present" (a pastoral scene--peaceful, but not wildly prosperous). For Pipes has an affection, a nostalgia for the past--and a concern over the present. This despite the fact that in a lot of ways our country is in the best shape we've ever been in--high standards of living, relatively low poverty rate, the voting rights of people are well-protected.

What I wonder about is whether the property rights--and I'd add constellation of other rights along with it--that led us from feudalism towards classical liberalism--is so connected to the restrictions on property we're dealing with now. It's sort of like looking at the bones of giant dinosaurs

¹⁰ Emerson's "The Conservative" continues:

On the other hand, precisely the defence which was set up for the British Constitution, namely, that with all its admitted defects, rotten boroughs and monopolies, it worked well, and substantial justice was somehow done; the wisdom and the worth did get into parliament, and every interest did by right, or might, or sleight, get represented; -- the same defence is set up for the existing institutions. They are not the best; they are not just; and in respect to you, personally, O brave young man! they cannot be justified. They have, it is most true, left you no acre for your own, and no law but our law, to the ordaining of which, you were no party. But they do answer the end, they are really friendly to the good; unfriendly to the bad; they second the industrious, and the kind; they foster genius.

¹¹ Pipes at 256.

¹² Leo Marx' *The Machine in the Garden* juxtaposes Carlyle with Timothy Walker.

and being told that the modern chicken is its descendant. Yes; I suppose there's some connection, but I just don't live in a world where I see government's taxation to provide free lunches to the children who live in poverty in my neighborhood (or over in Durham, anyway) as part of the road to serfdom. Now I know that Pipes is making a moral rather than a legal argument here. But we're talking about two entirely different sets of issues--just as I think the interrogation of prisoners in Guantanamo Bay bears little resemblance to the war crimes the Axis powers engaged in during World War II. I see property as having great liberating benefits and I also see generations of regulation and taxation stretching out behind us, validating our current welfare state.

So the modern regulatory state comes in for focus as the cause of a limitation in our freedoms. One of my favorite examples along these lines is the 1926 opinion in *Euclid v. City of Ambler*, in which Justice Sutherland--no socialist by any stretch of the imagination (he was one of the four horsemen of the anti-New Deal Court) upheld a regulation that reduced the value of property by 75%! Sutherland also made two most unusual moves in that opinion. First, he cited *Dred Scott* as a valid proposition of law--the first and only time in the twentieth century. The proposition: we should care about the original intent of the Constitution. Second, he cited--among other people--the socialist historian Charles Beard's *Economic Interpretation of the Constitution* for the proposition that the Constitution was the result of a conspiracy of monied interests. So there are people whose bona fides are unquestioned believed in some pretty serious regulation.

Later Pipes' questions the legitimacy of common interest communities' power over property owners in their community.¹³ Pipes is unhappy with all the restrictions on property in the communities--so am I. Annoying as such covenants are, I'm not so sure tyranny is going to come through the medium of my common interest community's complaint about whether my satellite dish is visible from the street or not, or whether it prohibits me from having pet ducks and peacocks, or whether it limits my ability to put a hot tub in my (tiny) backyard, or whether it controls how often I have to cut the grass in yard of my house.⁴¹

But I'd add to this, as Richard Epstein reminds us, these are private contract rights, which Epstein thinks should be enforced. This isn't government regulation--this is private regulation, private property owners agreeing among themselves about how property should be used. So Pipes is now on the side of those who would limit contract rights. He is also against forfeiture of property for commission of a crime--another interest on which people on the left are more bothered (it seems) than those on the right. Hey, Chief Justice Rehnquist authored a key opinion validating forfeiture for crime.¹⁵

This makes me think that Pipes is selecting a bunch of things that he sees as interferences with his property and opposes them, whether they come from private individuals or the government. That is a noble and quintessentially American attitude. I have the vision of James Fenimore Cooper's hero, who is known by various names in Cooper's novels depicting different stages of his life--scout, hawkeye, Natty Bumppo--the character played by the Daniel Day Lewis in *Last of the Mohicans*. That

¹³ Pipes at 252-253.

¹⁴ See Southern Village Restrictive Covenants, available at <http://southernvillage.org/wp-content/post-files/svmastercovenantsconditionsrestrictions.pdf>

¹⁵ Pipes at 254-56.

character opposes law throughout most of Cooper's novels. He doesn't like government regulation (in the form of hunting seasons) nor private individuals telling him that he can't hunt on "their" property.¹⁶ Pipes doesn't like minimum wage laws, nor some other things that have a lot to do with "freedom" but comparatively less to do with property, such as affirmative action and school busing. But it's really the redistribution of wealth that Pipes is concerned about.¹⁷

III. The Future: The Complex Relation Between Regulation and Freedom

Well, are we really to believe that our modern United States welfare state is the end of freedom? There is a distinguished intellectual lineage to thinking that the welfare state's either leading us to slavery or has already put us in it. Judge Janice Rogers Brown's 2000 speech to the University of Chicago Federalist Society proclaimed that

In fact, it now appears that human nature is so constituted that, as in the days of empire all roads led to Rome; in the heyday of liberal democracy, all roads lead to slavery. And we no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is *the* opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens.¹⁸

While at moments it appears that Pipes may favor abolition of the welfare state entirely and return "the responsibilities for social assistance to the family or private charity,"¹⁹ he rejects the position that the welfare state is the end of freedom in a balanced epilogue. As Pipes argued in a 1984 editorial about ... George Orwell's *1984*, we're not headed in that direction any time soon. Human nature is more resilient than this:

To the extent that one wishes to predict human affairs, it seems to me, one must proceed from what are known to man. It may, perhaps, be possible to automate individuals but it is difficult to see how this can be done to mankind. Mankind ceaselessly regenerates itself as children come into the world, fresh, ignorant of what has preceded them and what is expected of them, keen to observe, and averse to acting as they are told. To create a uniform world, one would have to

¹⁶ See G. Edward White, *The Marshall Court and Cultural Change* 71-72 (1988).

¹⁷ <http://www.census.gov/hhes/www/income/histinc/f01AR.html>

¹⁸ Janice Rogers Brown, "A Whiter Shade of Pale": Sense and Nonsense —The Pursuit of Perfection in Law and Politics, The Federalist Society University of Chicago Law School (April 20, 2000), available at http://www.constitution.org/col/jrb/00420_jrb_fedsoc.htm

¹⁹ Pipes at 284.

devise a way of making acquired characteristics inheritable: something that the charlatan biologist, Trofim Lysenko, promised Stalin, who desperately desired such power.²⁰

But elsewhere Pipes recognizes that culture is critically important. "Freedom," he says, "cannot be legislated: it has to grow gradually, in close association with property and law. For while acquisitiveness is natural, respect for property--and the liberty--of others is not. It has to be inculcated until it sinks such deep roots in the people's consciousness that it is able to withstand all efforts to crush it."²¹ This turns, then, on finding the right balance between property and regulation and equality? These are shades of gray and it is not exactly clear where the lines need to be drawn. How much regulation is permitted? Even Pipes accepts some of the welfare state.²² The question, as so frequently in property law, is what's reasonable. In two consecutive sentences he shows the problem:

the state has the duty to ensure for all citizens "a minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work." But to say this is not to grant the estate the authority to use the powers at its disposal to interfere with the freedom of contract, to redistribute wealth, or to compel one part of the population to bear the costs of the self-defined "rights" of special constituencies.²³

At one point he implies that the American social welfare state may be leading us towards a loss of freedom. Property and freedom and democracy. So he wants higher scrutiny for economic legislation: what level of scrutiny would that be? How would this be implemented? And so he draws a couple of bright lines -- at regulatory takings and at taxing for redistribution of wealth (whatever that means and however you'd distinguish that from general welfare, which he's already said was desirable and necessary reform during the Great Depression). For he follows those two sentences with a statement that implies all regulatory takings should require compensation.²⁴ And certainly anything that has redistributive effect is beyond the government's control, perhaps even the Civil Rights Act of 1964?

Bentham and Thomas Paine are the anti-heroes here--Bentham because he introduced the idea that legislation might be used to improve and perfect humans. Bentham, one might recall, taught that Blackstone's defense of the present was not as good as the desire to improve. But Bentham is one of the results of a parliamentary system that respects the wishes of the majority--that we should improve and get a government that works for the people. Then there's Thomas Paine, who's criticized for the second volume of *Rights of Man* for saying that human rights include things like social welfare

²⁰ Richard Pipes, *Nineteen Hundred and Eighty-Four: Keeping a Sense of Humor*, Harvard Crimson, January 11, 1984.

²¹ Pipes at 208.

²² Pipes at 284.

²³ Pipes at 287 (quoting Hayek).

²⁴ "Limitations on the use of property imposed for public good should surely be interpreted as 'takings' and adequately compensated." Pipes at 287.

support. This is a struggle over the boundaries between community and individualism, and probably no side has a monopoly on right (or truth, if you prefer).²⁵

Pipes concludes this sweeping study with a page from Tocqueville, about the loss of independence--that's not my greatest fear.²⁶ But ... but at base, Pipes and I differ on human nature.²⁷ I agree acquisitiveness is human nature, though a lot of us are willing to stop at some point. But I think we can have progress--and I'd say we have progressed--over time. We're a more moral people than when we pushed natives out of Georgia and Alabama and when we enslaved Africans and told ourselves that we were doing right. Our country has gotten better, though education, through the printing press, through respect for the rule of law, through property, through religious tolerance. That is why I chose Jasper Cropsey's landscape of the University of Michigan on the eve of the Civil War to illustrate these comments.²⁸

Pipes' fear is of equality, even though we're a long, long way from equality. Tocqueville's fear was equality, too--and that's how Pipes ends the book, with an invocation of Tocqueville and a picture of everyone acting alike.

One area where Pipes and I certainly agree is that “the trouble is that because schools fail to teach history, especially legal and constitutional history, the vast majority of today's citizens have no inkling to what they owe their liberty and prosperity, namely a long and successful struggle for rights of which the right to property is the most fundamental.” Well, at least I agree with all but the last clause--and that only I'd say it's very important, but perhaps not the most important. Democracy being in my mind, a greater right. But they certainly work in conjunction. How else could two legal historians think that our subject needs more attention in school--and that if our students would only get that instruction, they'd agree with us!

²⁵ “The assault on property rights is not always apparent, because it is carried out in the name of 'common good,' an elastic concept, defined by those whose interest it serves.” Pipes at 225. Just as, one might add, the virtues of property aren't always so apparent.

²⁶ Pipes at 291-92.

²⁷ Pipes at 285.

²⁸ For more on antebellum Americans' thinking about the role that property rights play in human progress – and how that is depicted in landscape art – see Alfred L. Brophy, “Property and Progress: Antebellum Landscape Art and Property Law,” 40 *McGeorge Law Review* 602-49 (2009).