

September 2005

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Jedediah S. Purdy
Duke University Law School

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Recommended Citation

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The American Transformation of Waste Doctrine: A Pluralist Interpretation

Jedediah Purdy*

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* Assistant Professor of Law, Duke University School of Law. A.B., Social Studies, Harvard College. J.D. Yale Law School. I am grateful to James Boyle, Stuart Benjamin, Mary Campbell, Christopher Elmendorf, Owen Fiss, David Grewal, Anthony Kronman, Ralf Michaels, Carol Rose, Rich Schragger, and Jonathan Weiner for comments on earlier drafts. This article has also benefited from faculty presentations at Fordham Law School, Duke University School of Law, the University of Virginia Law School, Boston University Law School, Stanford Law School, and Northwestern University Law School. All errors and omissions are mine.

I. Introduction

This Article draws on an episode of nineteenth-century American doctrinal history to develop a pluralist approach to the explanation of change in property law. The question it addresses is explanatory: what causal forces account for the development of property regimes across time? The Article develops its answer through an examination of the nineteenth-century reform of the law of waste in American courts. A line of state supreme court cases beginning in 1810 transformed the doctrine, which governs the changes tenants may make in the estates they occupy, from the strict rule of English common-law to a flexible standard. Economic analysis helps to explain the change. The full story, however, emerges only upon consideration of the influence on waste doctrine of two other influences: republican political culture and the belief that European settlers were under a natural obligation to subdue the American wilderness and make it a fruitful, agrarian landscape.

A. Economic and Pluralist Approaches to Property Law

By a pluralist account, I mean one denying that a single answer can provide property regimes either empirical explanation or normative orientation. On a pluralist account, property regimes, like other legal and social institutions, reflect a plurality of values. On this account, plural values do in fact structure individual lives, the activity of societies, and even the diversity of cultures across humanity. These values are not only diverse, but sometimes competing and, past a point, mutually incompatible; sometimes, however, they are mutually reinforcing. Moreover, on a pluralist account diverse values are respectively legitimate: they do not reflect error, irrationality, or deviance, but rather the variety of actual human commitments and

aspirations.¹ The interweaving of the explanatory and normative dimensions of a pluralist account is straightforward. Explanatorily, people actually do pursue a variety of goods, and so it is possible to understand their behavior only in light of that variety. Normatively, if various goods are legitimate, then only a normative account that recognizes the variety of legitimate goods can be sufficient.²

Although economic accounts of property regimes are present in Aristotle,³ Locke,⁴ and Blackstone,⁵ the canonical contemporary account for legal scholarship is Harold Demsetz's in *Toward a Theory of Property Rights*.⁶ Demsetz proposed that property rights emerged and changed in response to the rational desire of economic actors to engage in self-interest-

¹ On pluralism in values generally, see JOHN GRAY, TWO FACES OF LIBERALISM (1999); ISAIAH BERLIN, *The Pursuit of the Ideal*, in THE PROPER STUDY OF MANKIND 1-16 (Henry Hardy ed.) (1997); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 495-521 (1989). Value pluralism has at least two lines of origin in modern thought. One is the skepticism of figures as diverse as Michel de Montaigne and David Hume, who rejected the medieval Aristotelian view that all goods are reconcilable in one highest good, and instead posited a world in which human reason gave us no reason to believe in a unified and universally available account of moral reasoning. See MICHEL DE MONTAIGNE, ESSAYS (Donald M. Frame, trans., 1958) (1588); DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPALS OF MORALS (L.A. Selby-Bigge, ed., 1975) (1777). The other is the romantic strand of thought associated with Johann Gottfried Herder, who proposed that each human culture creates a unique vocabulary and grammar of cultural expression and of value, which give sense and meaning to the lives of those who inhabit that culture, and which cannot be judged against any higher and independent standard. See JOHANN GOTTFRIED HERDER, PHILOSOPHICAL WRITINGS (Michael N. Forster, ed. & trans.) (2002).

² From a meta-ethical perspective, it is important to recognize that pluralism is in trouble if it implies surrender of all distinctions of value, and an unbounded embrace of whatever people do. Pluralism, if it is not to be pure relativism, must distinguish between values over which there is legitimate and enduring disagreement and values outside the pale of legitimate disagreement, such as a political culture's aspiration to genocide or slavery. Of course, any such boundary depends on some substantive values, such as equality and dignity, which then necessarily inform all the values brought within the legitimate plurality. Over these underlying values, then, it would seem that there can be no legitimate disagreement. How, if at all, are these non-negotiable values to be justified or explained?

Happily, a pluralist interpretation of legal history need not address this question. It is not a requirement, for the pluralist account to be accurate, that it must also solve all major problems or moral reasoning. The claim of my pluralist method is simply that there is a diversity of legitimate human goods that structure social activity, including the creation and reform of property regimes. "Accounting for" or "justifying" that plurality is not an obligation that this historical method takes on board.

³ ARISTOTLE, POLITICS 44 (E. Barker, ed., Clarendon Press, 1947).

⁴ JOHN LOCKE, SECOND TREATISE UPON GOVERNMENT Bk. V, §§ 39-42 (Peter Laslett, ed., Cambridge University Press 1960) (1690).

⁵ WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *4-10 (University of Chicago Press, 1979) (1766).

⁶ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAP. & PROC. 347 (1967).

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maximizing transactions. He proposed that property rights generally operate to internalize externalities by assigning rights to resources so that users of property absorb the benefits and costs of their uses, and parties bargaining over those resources take into account the same (anticipated) benefits and costs, so that both use and allocation tend to optimality. On this premise, people will demand property rights when the benefit to them of the potential internalization created by the right exceeds the cost of the transaction the right makes possible – that is, when they will in fact be able to reap the benefit that the right makes possible in principle.⁷ The creation or reform of property regimes, therefore, typically responds to events that change either the cost of transactions (including monitoring and other enforcement costs) or the benefit to be derived from them: changes, for instance, in technology or in the availability or price structures of exogenous markets.

Building on Demsetz's article, property scholars have devoted considerable energy to exploring the transition from one rights regime to another.⁸ Some have focused their attention on the economic-efficiency considerations that, on Demsetz's theory, spur the creation of property rights in response to exogenous shocks in prices, relative factor values, or technology.⁹ Others, however, have looked not just to efficiency, but also to problems of collective action, and have

⁷ As many commentators have noted, Demsetz gave no account of the governance structure that would translate individual desires for property rights into explicit, enforceable rights. His account is thus often associated with the pure form of a "bottom-up" theory of the origin of property rights, in which demand creates its own supply. See _____. Because this Article concerns the development of a regime that was already in existence, rather than the inception of the regime, I do not address the bottom-up/top-down debate. See _____.

⁸ See Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181 (2003); Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUDIES 359 (2002); David D. Haddock and Lynne Kiesling, *The Black Death and Property Rights*, 31 J. LEGAL STUDIES 545 (2002); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUDIES 421 (2002); Gary D. Libecap and James L. Smith, *The Economic Evolution of Petroleum Property Rights in the United States*, 31 J. LEGAL STUDIES 589 (2002); Thomas W. Merrill, *The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUDIES 331 (2002); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUDIES 453 (2002); Katrina M. Wyman, *From Fish to Fur: Reconsidering the Evolution Toward Private Property* (unpublished, manuscript on file with author).

⁹ See Haddock and Kiesling, *supra* n. X; Libecap and Smith, *supra* n. X; Dean Lueck, *The Extermination and Conservation of the American Bison*, 31 J. LEGAL STUDIES 545 (2002).

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concentrated on the mechanisms by which efficiency-driven desire for property rights may be translated into actual changes in property regimes.

Scholars concerned with collective-action issues in property regimes have generally concentrated on either of two ideal-typical scenarios for the reform of property rights. On the one hand, some explore the development of new norms among repeat players in close-knit groups.¹⁰ On the other hand, some scholars place more emphasis on the seizure of rights-creating political opportunities by interest groups that stand to benefit from new regimes.¹¹ The first type of story tends to suppose that apprehension of net efficiency gains spurs the consensual development, through norms, of new property rights, and so that changes will consistently be efficiency-enhancing.¹² The second type of story encompasses cases where benefits to the group that initiates reform of property rights will come at net cost to efficiency. The latter approach thus casts a less Panglossian lens across the retrospect of institutional history: it can take on board considerable deviations from the supposition that changes in property regimes will consistently enhance efficiency, rather than represent successful rent-seeking behavior in at least some cases.¹³

These approaches differ in their assessment of the relationship between individual self-interest and social optimality. The first approach, in keeping with Demsetz's original model, assumes that optimality follows from coordination among self-interested individuals, while the second accepts that self-interest may lead to successful rent-seeking and to inefficient arrangements that benefit powerful groups. The two approaches have in common, however, the

¹⁰ See Haddock and Kiesling, *supra* n. X; Henry E. Smith, *supra* n. X; Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315 (1993).

¹¹ See Banner, *supra* n. X; Levmore, *supra*, n. X (both pieces cited therein).

¹² See Henry E. Smith, *supra* n. X; Ellickson, *supra* n. X.

¹³ See Banner, *supra* n. X; Levmore, *supra* n. X (both pieces cited therein). Should also cite here to the piece on anti-commons in medical research.

view that (1) a model of human behavior as self-interested is a complete, or at least sufficient, basis for explanation, and (2) the pursuit of wealth is an adequate proxy for self-interest generally. It is in respect of the second assumption that a pluralist approach to property differs from both versions of the economic explanation: the account committed to efficiency enhancement and the account open to distortionary rent-seeking.

The pluralist approach need not engage the first assumption, that people behave in pursuit of their self-interest. That is a question more of definition than of substance. Any behavior can be described as self-interested, once self-interest is taken to include the satisfaction of preferences as various as fulfilling addictive cravings; regarding oneself as a good or virtuous person; being esteemed a good or virtuous person by others; and expecting salvation in the afterlife.

The second assumption is best engaged on a somewhat higher level of abstraction than the choice of wealth as a proxy for self-interest. The problem is best put this way: whether any single metric, such as wealth-maximization, will serve across time, place, and persons as an adequate stand-in for self-interest generally. On a pluralist account, the variety of goods with which people identify their self-interest is too diverse for a single such proxy to capture without significant distortion.¹⁴ Because (1) people care about the well-being of others, social status, their spiritual standing according to their religious systems, and a variety of relatively idiosyncratic goods, and have second-order preferences, or commitments, such as the

¹⁴ For examples of pluralist approaches to explaining property regimes, see GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997); MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996); CAROL M. ROSE, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, in *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 25-46 (1994); "Takings" and the Practices of Property: Property as Wealth, Property as "Propriety," in *PROPERTY AND PERSUASION* 49-70; *Ancient Constitution Versus Federalist Empire: Antifederalism from the Attack on "Monarchism" to Modern Localism*, in *PROPERTY AND PERSUASION* 71-102.

commitment to not being addicted to chemicals; and (2) the substance of such considerations varies from time to time and place to place, it is often difficult to account for behavior without a qualitative description of the goods people desire and the reasons they understand themselves to have for desiring those goods.¹⁵

On a pluralist account, to explain developments in property systems it will sometimes be necessary to attend in some detail to the values people believe themselves to be pursuing and the reasons they believe they have to pursue those values. If we do otherwise, we will lack a basic desideratum of explanation: understanding *why* people sought and achieved the developments in property law that they did.¹⁶

B. *The Law of Waste*

The doctrine I consider in this Article is a relatively minor one in the development of American property law: the law of waste. Waste law comprises a set of default rules governing the changes a tenant, for term or for life, may make to the estate she occupies. A tenant who uses the estate in prohibited ways is said to have “committed waste” in violation of the rights of the reversioner or remainderman, to whom the estate will pass in fee simple when the tenant’s

¹⁵ See AMARTYA K. SEN, *Rationality and Freedom*, in RATIONALITY AND FREEDOM 1-64 (2002); *Environmental Evaluation and Social Choice*, in RATIONALITY AND FREEDOM 531, 538 (2002) (“it is hard to judge what choices are or are not ‘consistent’ or ‘irrational’ without going in some detail into the way the choosers see the problem and what they think they are trying to achieve”).

¹⁶ It is worth noting that the conception of explanation that I employ here owes something to the work of Charles Taylor, who has stressed that in explaining human behavior, it may be important to give an account of motives of the actors involved in the situation described that would be, at least potentially, intelligible to them. See TAYLOR, *supra* n. __ at 53-90. See also Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29-67 (James Tully, ed.) (1988). It is of course possible to offer an account of social explanation that proceeds entirely in terms of testing prediction through the formulation of falsifiable hypotheses. While I would wish to take nothing away from this model, which needs only to claim that behavior can be predicted if predictions are modeled “as if” people were motivated in the way posited by the theory, I accept the view of Taylor, Skinner, and others that because human action is taken in the context of qualitative values, a full account of it requires interpretive engagement with those values. On this distinction, see SEN, *supra* n. __ at 26-37 (contrasting “externalist” approaches to those that take the agent’s experience of value seriously).

claim expires.¹⁷ The crux of the law is therefore the definition of *waste*, that is, the set of actions a tenant may not commit – and conversely, the set of actions she may commit – without express permission from the reversioner.

In the United States, it is generally said that a tenant may “make changes in the physical condition of the ... property which are reasonably necessary in order for the tenant to use the ... property in a manner that is reasonable under all the circumstances.”¹⁸ The touchstone of this reasonableness standard is the type of use contemplated in the creation of the tenancy: changes such as harvesting timber, erecting new buildings, and extracting minerals are permissible to the extent they are reasonably necessary to conduct the activity in which the parties understand that the tenant is to engage.¹⁹ Such a rule is a good example of what Alan Schwarz has called a gap-filling default, that is, a rule that seeks to complete the terms of an incompletely explicit contract in keeping with the intent of the contractors: to the extent that the contracting parties contemplate a particular use of the estate by the tenant, waste law assumes that they implicitly contemplate all the ordinary incidents of that use.²⁰ Assuming rational contractors, a gap-filling rule also promotes efficiency by assigning to each contractor rights which the parties are assumed to have had in mind in reaching their price (assuming a bargained-over lease arrangement), meaning that the value and detriment of the rights should be internalized in the bargain.

¹⁷ I will use the terms *reversioner* and *remainderman* synonymously in this Article, as their technical difference has no bearing on the Article’s argument. The person occupying this position is typically a member of either of two classes: a landlord from whom the tenant rents, or an heir whose inheritance vests fully only at the end of a life term in the tenant.

¹⁸ RESTATEMENT (2D) OF PROPERTY, LAND & TEN. § 12.2 (1977). I have omitted “leased” twice from the Restatement’s characterization, simply to avoid confusion because I am discussing both leased property and life estates, which were far more widespread in the nineteenth century than they are today, and thus contributed importantly to the formation of waste doctrine.

¹⁹ RESTATEMENT (2D) OF PROPERTY, LAND & TEN. § 12.2 (1977), Comment on Subsection (1).

²⁰ See Alan Schwarz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L. J. 389, 390-91 (1993). See also Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 5 (1993).

From an economic perspective, the problem that waste law addresses reflects the inefficient incentives faced by tenants for years or life. The efficient management strategy for an estate will be that which maximizes the present discounted value of its entire expected earnings stream.²¹ The tenant, however, will have incentive to maximize the value of earnings from the estate *during her tenancy*. This incentive will lead her to premature harvesting of renewable resources, such as timber, and non-renewable resources, such as minerals, and to neglect of resources whose incremental decay does not affect her earnings prospects but will affect the long-term value of the estate, such as soil, fences, and buildings. Richard Posner has suggested that the efficient solution to this problem would be to model the tenant *as if she were the owner*, authorizing her to do what a rational owner would have incentive to do, but not otherwise.²²

Indeed, this was the solution reached by the American law of waste in the early and middle decades of the nineteenth century. The doctrine had two formulations, which state supreme courts repeated across the country: first, the standard of husbandry, or of the prudent farmer, which held a tenant's action not to be waste if it were consistent with the actions a prudent owner would take,²³ and second, the standard of material injury, which held that a "material" or "permanent injury to the inheritance," that is, to the reversioner's legitimate interests, would count as waste.²⁴ The two were generally treated as synonymous, or the

²¹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d. ed.) 72-73 (2003).

²² *Id.*

²³ See *Jackson v. Brownson*, 7 Johns. 227, 232 (N.Y. 1810) (defining waste as "a permanent injury to the inheritance"); *Shine v. Wilcox*, 1837 WL 531 (N.C.), *1 ("the cutting of timber is not waste, unless it does a lasting damage to the inheritance"); *Davis v. Gilliam*, 1848 WL 1441 (N.C.), *2 ("the tenant may use the estate, but not so as to take from it its intrinsic worth"); *Pynchon v. Stearns*, 52 Mass. 304, 312 (1846), 1846 WL 4004 (Mass.), *5-6 ("no act of a tenant will amount to waste, unless it may be prejudicial to the inheritance"); *Owen v. Hyde*, 1834 WL 1026 (Tenn. Err. And App.), *3 (question to ask in a waste case is "did [tenant] materially injure the dower estate[?]"); *Clemence v. Steere*, 1850 WL 1798 (R.I.), *2 ("it is necessary to show that change is detrimental to the inheritance" to prove waste); *Keeler v. Eastman*, 1839 WL 2405 (Vt.) (tenant may act freely, but "not so as to cause damage to the inheritance").

²⁴ See *Pynchon v. Stearns*, *supra* n. __ at *5 (action consistently practiced by regional farmers is not waste); *Keeler v. Eastman*, *supra* n. __ (tenant does not commit waste by acting "in a prudent and husbandlike manner"); *Owen*

standard of husbandry was presented as constituting the inquiry following from the general principle set by the standard of material injury.²⁵ In either case, the relationship between the two was the one Posner deems appropriate: judging the tenant by the standard of a rational owner to ensure that she passes to the reversioner, the eventual owner in fee, an estate managed in a way consistent with its efficient exploitation.

To the extent attention is paid the law of waste, Posner's is the solidly mainstream view of the doctrine as efficiency-enhancing. Only a few other scholars have so much as paused over waste law in their accounts of property. Morton J. Horwitz has argued that the material injury standard was part of a general development in nineteenth-century American law toward (1) treating land exclusively as a commodity and (2) correspondingly, freeing it from both social controls and inconvenient existing claims (as by smallholders) in order to free it up as a capital-generating resource for the economic development of the continent.²⁶ John G. Sprankling has taken a similar tack, but with concerns motivated by ecological conservation, rather than the Marxist account of history that then motivated Horwitz.²⁷ Sprankling contends that an "instrumentalist" view of the natural world, coupled with a perceived imperative to bring the new continent under the axe and the plough, drove the American law of waste to calculate the interest of the reversioner exclusively in monetary terms (on the material injury standard), thus enabling the tenant to make changes in land use that furthered clearing and development.²⁸

v. Hyde, *supra* n. __ at *3 (no waste "if the proportion of wood land was such that a prudent farmer would have considered it best to reduce a portion of it to cultivation"); Clemence v. Steere, *supra* n. __ at *2 ("it is necessary [in proving waste] to show that the change is detrimental to the inheritance and contrary to the ordinary course of good husbandry").

²⁵ See cases cited *id.*

²⁶ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 54-58 (1977).

²⁷ See John G. Sprankling, *The Antiwilderness Bias in American Law*, 63 U. CHI. L. REV. 519, 532-36 (1996).

²⁸ *Id.*

It is worth noting that neither Horwitz's nor Sprankling's account needs be explanatorily incompatible with the conventional economic view of waste law that Posner propounds. On the contrary, they are distinguished by their normatively founded distaste for the efficiency-enhancing doctrine that Posner describes, which these scholars regard as reflecting, in Horwitz's case, the interests of the capitalist class, and in Sprankling's a lack of regard for the intrinsic worth of the natural world in its unspoiled state. Although both are in this respect heterodox, neither is properly called pluralist.

I contend that courts created the American law of waste for several reasons: to promote efficient use of resources that the English rule would have inhibited; to advance an idea of American landholding as a republican enterprise, free of feudal hierarchy; and perhaps to advance a belief that a natural duty to cultivate wild land underlay the Anglo-American claim to North America. The complex interaction of these values in a relatively minor doctrine is suggestive of the plurality of values at work in American land regimes generally.

In Part II of this paper, I trace the transformation of waste doctrine from a strict English rule to a broad American standard in the watershed 1810 New York case of *Jackson v. Brownson*.²⁹ In Part III, I consider several interpretations of the American standard. I argue that although it has a mixed profile as a standard promoting efficiency in contracting, its introduction can be convincingly (although non-exclusively) explained as an expression of the then-current commitments in American to republicanism and economic dynamism. I explore these ideas through the thought of Chancellor James Kent, who joined the *Brownson* majority, and argue that American waste law's promotion of these values adds to our understanding of how a default rule can have normative as well as efficiency-enhancing functions. Part IV concludes.

²⁹ *Supra* n. __.

II. The Transformation of Waste Doctrine

A. *The English Law of Waste*

The English law of waste, part of the common law of real property, approached these problems by way of a doctrine of landowners' prerogative. The doctrine set out the rights to land use of tenants for term of for life, relative to those of the reversioner: either the landlord or the heir who would succeed the tenant by taking the estate in fee simple. The first statement of waste law came in 1267, when the Statute of Marlborough set forth the following default rule:

Also fermors [farmers], during their terms, shall not make *waste*, sale nor exile of house, woods, and men, nor or anything belonging to the tenements that they have to ferm without special licence by writing of covenant, making mention they may do it.³⁰ As the meaning of the term *waste* developed, the English doctrine remained a close constraint on the actions that tenants could take without the express permission of the reversioner.³¹ A successful legal action in waste resulted in treble damages and forfeiture, and an injunction on conduct constituting waste was available in equity.³²

The most abstract account of the law had much in common with the direction American doctrine would take: "Whatever does a lasting damage to the freehold or inheritance is waste,"³³ wrote William Blackstone, who elsewhere termed it "a spoil and destruction of the estate . . . by demolishing not the temporary profits only, but the very substance of the thing; thereby rendering it wild and desolate."³⁴ Both Blackstone's account and that of Edward Coke, however, made clear that the law was much more narrowly drawn in its specific requirements. These more abstract statements arose from a disinclination in both branches of the courts to punish tenants for trivial actions brought in seeming harassment by landlords or reversioners, which was in

³⁰ St. 52 Hen. III, St. of Marlborough, 1267, c. 23, sect. 2 (emphasis added).

³¹ See generally COKE ON LITTLETON, 53a-b (18th ed. 1823).

³² See W.S. HOLDSWORTH, 7 A HISTORY OF ENGLISH LAW 277-79 (3d ed. 1923); see generally W.S. HOLDSWORTH, 3 A HISTORY OF ENGLISH LAW 121-22 (3d ed. 1923).

³³ 2 BLACKSTONE'S COMMENTARIES 281 (University of Chicago, 1979) (1768).

³⁴ 3 BLACKSTONE'S COMMENTARIES 223.

some tension with the narrow and exacting requirements of the doctrine.³⁵ The main lines of the law were as follows.

Unless explicitly excused, tenants could take from the land only the timber that was necessary for maintaining buildings, making tools, and warming themselves in winter, called respectively *house bote*, *tool bote*, and *fire bote*.³⁶ The tenant was required to use deadwood for these tasks unless none was available, in which case he could take living trees in ascending order of their quality as timber: beech and maple first, then oak, ash, and elm.³⁷ In places where finer woods grew widely, the tenant might be free to take such poorer trees as beech and maple without regard to bote, but nowhere in England could he harvest oak, ash, or elm outside the strict limits of waste doctrine.³⁸ Lesser trees, including willows and aspens, might also be protected where they served as windbrakes, shade trees, or ornaments, but were otherwise susceptible to the tenant's axe.³⁹

Tenants were equally restricted in their power to change the patterns of land use. They could not erect new buildings or fences without permission, but only repair what they received with the land.⁴⁰ Traditionally it was no defense that a new building increased the value of the property.⁴¹ Tenants could not allow arable land to grow up into forest, transform a meadow into a garden or the reverse, or otherwise change the uses the landowner had established.⁴² Two

³⁵ See 7 HOLDSWORTH 277-78 and cases discussed *infra*.

³⁶ COKE, 53a; 2 BLACKSTONE 281-82.

³⁷ COKE 53a; 2 BLACKSTONE 281.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ COKE 53a; 2 BLACKSTONE 282.

⁴¹ 2 BLACKSTONE 282. This restriction was largely dispensed with in the eighteenth century, as it was seen as anachronistic and onerous.

⁴² As Coke put it, "If the tenant convert arable land into wood, or e converso, or meadow into arable land, it is waste, for it changeth not only the course of his husbandry, but the proof of his evidence." COKE 53b. See also 2 BLACKSTONE 282 (quoting Coke).

reasons were given for this restriction: first, that changes in land-use patterns could cause confusion where deeds listed land according to its use rather than more enduring metes and bounds (a consideration that itself reveals the pervasive expectation of stability in land use); and second, that tenant initiative would “change the course of husbandry” without the permission of the landlord.⁴³ To do so was “an injury to the title of the reversioners,” to their claim on the land, and thus “a present damage to them.”⁴⁴ It was possible for a defendant to plead in defense that he had committed only “meliorative waste,” necessary to maintain or improve the property, but the pleading rules were strict and courts were clear that “meliorative waste” *was* waste.⁴⁵

Well after the American transformation of waste doctrine, English courts drew on their “injury to the inheritance” language to uphold not agricultural innovation, but the building of industrial structures on previously open land.⁴⁶ This embrace of the dynamism of manufacturing, though, came for quite distinct reasons, when the American law had long since completed its break from English doctrine and subsequent transformations. Moreover, the English industrial cases rhetorically displayed great regard for the old principle of stability in

⁴³ COKE 53b. See also 2 BLACKSTONE 282 (quoting Coke).

⁴⁴ *Provost and Scholars of Queens College, Oxford v. Hallett*, 14 East. 489, 491 (1811). In this case, the tenant “erected fences and banks . . . subdivided the same [land] into small enclosures . . . [and] ploughed up and converted great parts into tillage.” *Id.* at 490. The plaintiffs did allege that the value of the property was reduced, *id.* at 489, which was of course material to damages; but it was not the focus of the court’s inquiry.

⁴⁵ See *Simmons v. Norton*, 7 Bing. 639 (1831). In this case, the defendant had ploughed a meadow, and pleaded that “the meadow had become sour and mossy through age; that it had been ploughed according to the rules of good husbandry, sown with barley and clover, and laid down to grass again: such a process being occasionally necessary to restore old meadow to a healthy state.” *Id.* at 640. The court ruled that he had surrendered this defense by pleading no waste, rather than meliorative waste, and gave a narrow account of what could qualify as melioration: “to meliorate or restore it to its original quality.” *Id.* at 648. Two concurring judges added that, “with respect to the conversion of meadow into arable . . . or into orchard,” there could be no doubt that the action was *prima facie* waste, and must be defended as melioration.

⁴⁶ See *Jones v. Chappell*, 20 Eq. 539 (1875). In this odd case, a plaintiff who had no reversionary interest in the property concerned sought to bring an action of waste against the tenant of a neighboring site whose industrial activity had blocked the plaintiff’s air and light. Besides noting that such a case could not be brought as a matter of standing, the court held that “to prove waste you must prove an injury to the inheritance.” *Id.* at 541. See also *Meux v. Cobby*, 2 Ch. 253 (1892) (finding that where a lease explicitly permitted agricultural activity in keeping with that of the neighborhood, and other farmers had built greenhouses, the defendant tenant could not be liable for waste for doing the same).

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agricultural practice.⁴⁷ At the time of the American divergence, English waste law supported a system in which tenants' initiative was closely bounded, their decisions susceptible to veto, and their role on the land nearer a custodian's than a freeholder's.

B. The Meaning of the English Rule

What sort of rule was this? It was, to begin with, a default rule, always susceptible to contractual revision. Scholars have identified several kinds of default rules, usually classified by their functions.⁴⁸ The most commonly discussed is the *gap-filling* or *problem-solving* default, which seeks to embed in incomplete agreements a term to which the parties would have agreed under optimal bargaining conditions.⁴⁹ Where waste law prevented a tenant from taking actions that the parties would have agreed to forbid under optimal bargaining conditions, as was surely the case with the most destructive or opportunistic acts, it had this function. Also much discussed is the *equilibrium-inducing default*, or *bargaining default*, which provides a term that, if it is not optimal, focuses the attention of the parties on the issue it addresses and so induces them to agree to another, optimal term.⁵⁰ Where the strict requirements of waste doctrine

⁴⁷ See *West Ham Central Charity Bd. v. East London Waterworks Co.*, [1900] 1 Ch. 624, 636: "If the permanent character of the property demised is not substantially altered, as for instance, by the conversion of pasture land into plough land, by breaking up ancient meadows, or the like, I conceive that the law is that it is not now waste for the tenant to do things which within the covenants and conditions of his lease he is not precluded from doing." The case to which these decisions typically cite, *Doe v. Earl of Burlington*, 5 B. & Ad. 507 (1833), drew on *de minimis* exceptions to waste law to hold that a tenant's tearing down an ancient and ruined barn was not waste, and proceeded to say that "there is no authority for saying that any act can be waste which is not injurious to the inheritance." *Id.* at 517. Courts continued, however, to treat changes in the course of husbandry as injuries to the inheritance, and to look to the relevant covenant to avoid finding waste in cases of industrial development or improving buildings. See cases just discussed.

⁴⁸ See Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. Cal. Interdisc. L.J. 389, 390-91 (1993) (describing types of default rules). See also Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. Cal. Interdisc. L.J. 1, 5 (on approaches to formulating default rules).

⁴⁹ See Schwartz, *supra* n. XX at 390 (defining problem-solving defaults). As Schwartz notes, these defaults were the earliest identified by scholars, and have been the ones most studied. *Id.*, n. 1.

⁵⁰ See generally Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 Yale L.J. 729 (1992) (introducing the concept of an equilibrium-inducing default). Waste law only

induced parties to bargain expressly over, for instance, a tenant's power to improve the reversioner's land, the doctrine had this function. The default rule of waste law held that tenants could work to exhaustion mines that had already been opened before they came into possession, although they had no power to open new mines.⁵¹ This rule, potentially ruinous to a reversioner, focused the landlord or testator on the question of the tenant's right to minerals, thereby providing a strong incentive for explicit definition of that right. These two sorts of default rule have the same aims: enhancing the economic efficiency of agreements by leading bargainers to welfare-maximizing terms. They are distinguished by their strategies: on the one hand, providing terms to which the parties would optimally have agreed, and on the other, inducing the parties to specify those terms themselves.⁵²

had this character, of course, inasmuch as it averted a less than maximally efficient use of resources; simply preventing a transfer of resources from reversioner to tenant is not per se equilibrium-inducing (although widespread expropriation would erode the landlord-tenant relationship systemically, which might have counter-efficiency effects).

⁵¹ See discussion, *infra*.

⁵² The discussion of waste doctrine through the lens of contract law raises a basic question: What is the precise sense in which waste doctrine is *property* law? While the doctrine concerns the use of plots of land not so different from the Blackacre of law-school classes, defining "property" by its domain of objects is notoriously inadequate. See, e.g., LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 11 (2003) (so noting). For a founding statement of a more sophisticated conception tending to overwhelm the lines between property and other areas of law, see WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS* (1923). In a time when those objects are increasingly heterogeneous and intangible, that equation would be rather like identifying "law" with those events occurring in buildings designed by the architect Cass Gilbert. See, e.g., the extremely illuminating account of this trend and legal-theoretical responses to it in Thomas C. Gray, *The Disintegration of Property*, 69, 69-82 in *NOMOS XXII: PROPERTY* (eds. J. Roland Pennock and John W. Chapman) (1980). See CASS GILBERT, *LIFE AND WORK: ARCHITECT OF THE PUBLIC DOMAIN* (eds. Barbara S. Christen & Stephen Flanders) (2001).

As a source of default rules for agreements that were often bargained over (although not, of course, in cases involving dower rights or testamentary estates), waste doctrine has a claim to being regarded as an aspect of contract law; it is in that area that other discussion of default rules has appeared. Moreover, as a source of claims to damages based on economically injurious activity, waste law has often been classified by commentators with the law of torts. See Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, 28, 43 in *NOMOS XXII: PROPERTY* (eds. J. Roland Pennock and John W. Chapman) (1980) (so noting).

The problem is hardly unique to the law of waste. The rights of persons in things (relative to the corresponding rights of others) are not neatly arrayed under the unitary label "property." See, e.g., Laura S. Underkuffler, *supra* n. XX; Thomas C. Gray, *supra* n. XX. Without taking on this problem in a systematic way, I note that my investigation of waste law is premised on one response to the difficulty: a move toward greater specificity rather than greater generality in defining the scope of inquiry. Rather than rely on an *ex ante* definition of property or of legal rights in general, I have begun from a specific body of doctrine, which governs relative rights in

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Another function of default rules came to the fore when landlords used waste doctrine to pre-empt or punish actions that did not reduce the value or productivity of the land, and to which they might plausibly have agreed *ex ante*, but which nonetheless fell afoul of the reversioner's prerogative. Alan Schwartz has identified a "normative default" as one directing a result that "the decision maker prefers on fairness grounds but is unwilling to require."⁵³ Schwartz's definition requires a bit of adjustment to encompass the hierarchical character of the English property relations that waste law governed. "Fairness" suggests a standard for individualistic bargainers who merit the equal solicitude of the law, which was not the model of relations envisioned between tenants or widows in dower and their reversioners. If we instead take "normative" in a broader sense, encompassing, among other things, normative ideas about the basic character of social structure,⁵⁴ we can see that such a default is normative in the specific sense that it is *status-confirming*: it underscores the reversioner's superior claim to the land, and

a definite class of resources, and have sought to illuminate some of the values at work in that legal formation. Cf. Bruce A. Ackerman, *Four Questions for Legal Theory*, 351, 351 in NOMOS XXII: PROPERTY (eds. J. Roland Pennock and John W. Chapman) (1980). While I cannot claim, with Ackerman, that "[i]t was Wittgenstein who led me" to my inquiry, I have in common with Ackerman the methodological presupposition that it is valuable in seeking to understand concepts or principles to begin with the ways in which they are actually used. As Ackerman puts it, "Rather than begin a jurisprudential study of property by asking, 'What is law?' or 'What is property?' I wanted to ask how people *use* property talk." *Id.* On a parallel point, Amartya Sen notes that "it is hard to judge what choices are or are not 'consistent' or 'irrational' without going in some detail into the way the chooser see the problem and what they think they are trying to achieve." AMARTYA SEN, *Environmental Evaluation and Social Choice*, 531, 538 in RATIONALITY AND FREEDOM (2002). A good deal of what is valuable in that inquiry comes from the law of property, particularly its history in relation to political thought; some from the theory of contract law; and some from the environmental-management attempt to specify the character of sustainability. It seems plausible that other inquiry into the law of property and neighboring fields will benefit from similar heterogeneity. See Gray, *supra* n. XX at 71-73, 80-82 (sketching the overlap of property with other areas of law and proposing that a heterogeneous conception of property rights frees us for insight into productive ways of marrying traditional and non-traditional aspects of property rights in social arrangements). I would not insist, however, upon a too-rapid transition from a study of waste law to proclamations about property at large.

⁵³ Schwartz, *supra* n. XX at 391.

⁵⁴ For a discussion of the ways in which complex sets of considerations can enter into normative judgments regarding alternative social arrangements, or "social states," see AMARTYA SEN, *The Possibility of Social Choice* 65, 75-95 in RATIONALITY AND FREEDOM (2002). Sen considers the ways in which various measures of individual well-being may be assessed and combined, emphasizes the need for context-specific judgments of individuals' actual capacities to lead the lives they wish to lead, and stresses the appropriateness of regarding freedom as a multi-dimensional value to be weighed in both its concern for freedom from interference by others and its concern for affirmative capacity to live as one has reason to live. On these issues, see also AMARTYA SEN, DEVELOPMENT AS FREEDOM 14-159 (1999) (on the second theme).

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corresponding superior social status. In its status-confirming function, waste law also tended to meet Schwartz's definition of a "transformative default," which "is adopted to persuade parties to prefer the result the rule directs"⁵⁵ – in this case, a pattern of social relations of prerogative and deference, partly organized around claims to land. Corresponding to the broad understanding of "normative" that I have already proposed is a broad sense of "transformatory"⁵⁶: not just inducing bargainers to adopt a specific term within a particular transaction, but *educating* parties in the structure of social authority in which the prerogative of reversioners played a part.⁵⁷

C. *The American transformation of waste law in Jackson v. Brownson*

⁵⁵ Schwartz, *supra* n. XX at 391.

⁵⁶ Particularly informative on the possibility of meaningful "transformatory" activity in the law is Amartya Sen's caution against taking people's presently existing views of their own well-being as dispositive for the evaluation of their well-being. Sen points out, on the level of high theory, that a part of what we mean by regarding ourselves as free and rational is that we can evaluate, and potentially revise or replace, our present commitments and self-assessment; on the empirical plane, he likewise observes that those who are severely deprived are least likely to regard themselves as such, while those who have some command over resources or social esteem are correspondingly more likely to complain of their condition, because of a growing sense of empowerment and entitlement. See AMARTYA SEN, *Rationality and Freedom*, 3, 3-25 (on the first theme) and *The Possibility of Social Choice*, 65, 90-92 in RATIONALITY AND FREEDOM (2002) (on the second).

⁵⁷ Schwartz argues that normative and transformative rules are a bad idea. A normative default, he argues, will be incorporated into contracts only by those who already prefer it. Choice of a default rule, thus, cannot affect the content of agreements, but only the cost of bargaining, which increases when parties must contract around an unpopular default. *Id.* at 402. Transformative rules, he notes are likely to encounter the same difficulty, as they will more likely be resisted than accepted. *Id.* at 414. Moreover, transformative rules draw contract law away from the function it performs best and for which it has no good substitute, the facilitation of market transactions, into the realm of moral education, in which many other institutions, such as religion and family, are likely to have a comparative advantage. Finally, such putatively transformative standards as conscionability and good faith are not self-interpreting, but when adopted have their meaning filled in by courts; but this *ex post* specification of the standard cannot achieve its transformative purpose, which depends on the substance of the standard preceding the contract and its interpretation, becoming familiar in transactions, and being endorsed by the state. *Id.* at 413-15.

Schwartz's arguments strike me as highly illuminating, and probably dispositive for most cases in the context he addresses: agreements between "sophisticated contractors." *Id.* at 392. Later I draw on related arguments of Schwartz's to help explain the relative failure of the standard of sustainable use in American waste law. My concern here, however, is not to ask what default rules *should* do in markets made up of sophisticated contractors, but to argue about what certain default rules *did* do in transactions that were deeply embedded in a system of social hierarchy in which land had great importance, both economic and symbolic.

In 1810, the Supreme Court of New York⁵⁸ ruled in *Jackson v. Brownson*,⁵⁹ the key case in the American transformation of waste law. The plaintiff, an heir of the landholder Philip Schuyler,⁶⁰ was a lessor who sought to repossess the land of a tenant for life, who had allegedly violated a covenant in his lease forbidding him to “commit any waste.”⁶¹ The defendant, Brownson, had leased the land in 1790, at which time it was “wild and uncultivated and covered throughout with a forest of heavy timber.”⁶² In 1796, when the lessee sub-leased the northern portion of the land to another farmer, he had cleared all but 35 of the original 133 acres, leaving twelve acres of forest on the land he continued to lease.⁶³ Between then and the time of the suit, Brownson did not clear more land, although he cut timber for fuel, to build fences, and to raise a building on his farm.⁶⁴ The trial court found in Brownson’s favor on a technicality, and the plaintiffs appealed to the Supreme Court to determine whether Brownson’s clearing was waste as a matter of law.⁶⁵

Philip Schuyler, a general in the Continental Army and the father-in-law of Alexander Hamilton, was a scion of one the great landholding families of the Hudson Valley, whose tenant-inhabited property represented one of the great attempts to create a landed aristocracy in North America.⁶⁶ In a country whose popular self-image was of a nation of yeoman farmers,

⁵⁸ The Supreme Court was then the highest court of legal appeals in the state. The state’s highest court is now the Court of Appeals, while its trial courts have taken the name Supreme Court.

⁵⁹ *Jackson v. Brownson*, *supra* n. ___.

⁶⁰ The Schuyler manor sat on the eastern side of the Hudson River, about one-third of the way from Albany to New York City. See CHARLES W. MCCRUDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865* 3 (2001).

⁶¹ *Id.* at 228.

⁶² *Id.*

⁶³ *Id.* at 229.

⁶⁴ *Id.* There was some dispute on these facts, as the plaintiffs claimed that Brownson had entirely cleared his portion of the land. *Id.* at 228.

⁶⁵ The trial court held that the sub-lease had created a new lease between Brownson and his lessor, severing the old lease, and that his actions since the new lease began did not constitute waste. *Id.* at 229.

⁶⁶ Cite on Schuyler; and Friedman, Wood, on the landholding project.

craftsmen, and other independent smallholders,⁶⁷ the plaintiffs, heirs of Schuyler,⁶⁸ proposed to exercise a landlord's prerogative to repossess a small farmer's land. Facing a conflict between landlord and tenant that was reminiscent of English social relations, the court had to decide what form a doctrine of hierarchy and prerogative would take in American land law. The result was a 3-2 split in which James Kent, later author of *Kent's Commentaries*, sided with the majority in creating a new and distinctly American doctrine of waste.

The plaintiffs contended that the clearing of forest constituted waste under the English rule, while the defendant denied that clearing timber to make way for cultivation could count as waste. The majority gave the plaintiffs their result, but adopted the defendant's interpretation of the doctrine, seizing on Blackstone's formulation that waste comprised actions that did "a permanent injury to the inheritance."⁶⁹ In England harvesting timber or changing patterns of land use was deemed to make up such an injury, so a rule lent its crystalline lines to the nominal standard; in the United States, the doctrine would henceforth take its shape from the standard alone, and become a source of considerable latitude for tenants. Despite applying the more flexible standard, the court found that the clearing was waste as a matter of law, because Brownson had cut "nearly all" the wood on the estate and not left enough to supply timber for farm maintenance.⁷⁰

The dissenting justices⁷¹ recognized the significance of the movement from rule to standard, and reproached the majority for its embrace of vagueness. Justice Spencer, joined by

⁶⁷ Cite the same and also Foner, McCoy.

⁶⁸ *Id.* at 228.

⁶⁹ *Jackson v. Brownson*, supra n. __ at 232.

⁷⁰ *Id.*;

⁷¹ The advocates of a stricter definition of waste were in the dissent, despite the majority's agreement that waste had occurred in the instant case, because they agreed with the trial court that the defendant's sub-lease of a portion of his land to a third party had annulled the original agreement with Schuyler, with its provision for forfeiture upon waste. They accordingly contended that there was no basis for a forfeiture action, and that the plaintiffs should have sought damages instead.

Justice Yates, recited the specific rights of bote that English waste law preserved for tenants, and continued

I insist that, according to the common law of England, no tenant can cut down timber, &c., or clear land for agricultural purposes; and that the quantity of timber cut down never enters into the consideration whether waste has or has not been committed; but that it is always tested by the act of cutting timber, without the justifiable excuse of having done it for house-bote, fire-bote, plough-bote, or fence-bote. A single tree cut down, without such justifiable cause, is waste as effectually as if a thousand had been cut down. The reason is this, that such trees belong to the owner of the inheritance, and the tenant has only a qualified property in them for shade and shelter.⁷²

The dissenters did not propose that such restrictions would be desirable in the American setting; indeed they pointed out that the rule was “inapplicable to a new, unsettled country” – meaning by “inapplicable” not powerless, but unsuitable.⁷³ The dissenters’ point, rather, was that the common law rule, with its clear prerogatives and prohibitions, alerted all parties to their rights, while the new American standard required courts to engage in the uncertain business of distinguishing between appropriate and inappropriate uses of land. “The criterion set up by the plaintiff [and adopted by the court],” they argued, “is altogether fanciful and vague; and the case shows, that men differ very widely as to how much woodland ought to be left for the use of a farm.”⁷⁴ By contrast, “the rule provided by the common law is fixed and certain.”⁷⁵ That certainty created clear background conditions for bargaining: “If the parties before us intended that a sufficient quantity of timber should be left for the use of the farm, it was very easy to have inserted a covenant to that effect.”⁷⁶ Replacing a clear rule with a “fanciful and vague” standard, however, created undesirable uncertainty: “if a covenant not to commit waste is hereafter to be considered as a covenant to leave a sufficient quantity of land in wood, no lessee is safe” from

⁷² Id. at 236.

⁷³ Id. at 237.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

the shifting opinions of courts and juries on a matter better left to freely contracting parties.⁷⁷

The dissenters, however, had lost. The American standard of waste was now “permanent injury” or “material prejudice” to the inheritance.

D. The Formulations of the American Standard

Jackson v. Brownson was the progenitor of a line of state Supreme Court cases adopting the same standard, with some variation in the wording of the formula. In Massachusetts, the Supreme Court held that “In this country, it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder.”⁷⁸ In Tennessee, the question whether a widow with a life estate had committed waste reduced to this: “did she materially injure the dower estate thereby?”⁷⁹ In Rhode Island, to succeed in an action of waste, “it is

⁷⁷ Id. Morton Horwitz takes a different view of the dissent’s position in *The Transformation of American Law*. In Horwitz’s view, “[t]he dissenting minority wanted to go still farther in changing the law to suit the necessities of development[,] severing entirely the right to property from the right to prevent tenants from completely altering the estate.” HORWITZ, *supra* n. __ at 55 (1977). There is some ambiguity as to just what the dissent intended to propose. As Horwitz rightly notes, the dissent would have refused to apply the English rule of waste in an action for forfeiture, based on an interpretive principle: “in construing a covenant which is to work a forfeiture, courts adhere strictly to the precise words of the condition in order to prevent the forfeiture.” Because the dissent regarded the majority’s standard as vague and unreliable, they would have ruled that waste doctrine could not be invoked in actions of forfeiture or ejection. In an action for damages, however, the dissent observed that “then, indeed, we should have a right to give the covenant not to commit waste a greater latitude of construction.” This suggests that the dissent did not imagine such covenants to be void as to damages, but only as to forfeiture. It is in the context of this hypothetical discussion that the dissent rejected the majority’s standard as “fanciful and vague” and praised the clarity of the English common law rule.

Unfortunately, the nature of *Jackson v. Brownson* makes it difficult to discern what the dissent believed should be default rule of waste, since the case dealt not with defaults but with the interpretation of a contractual covenant. Although the dissent praised the clarity of the common law rule *and* denounced that rule as a basis for forfeiture, it did not say what it regarded as the appropriate default.

⁷⁸ *Pynchon v. Stearns*, *supra* n. __ at 312 (1846) (holding that cutting a new road through land and breaking up a meadow into cropland were not waste as a matter of law, while whether draining and raising a wetland constituted waste was a jury question).

⁷⁹ *Owen v. Hyde*, *supra* n. __ at *3 (holding a widow with a dower estate could cut timber for profit, even where it was not necessary to her support, where such cutting did not do a permanent injury to the estate and was consistent with the use a prudent person would make of the land – particularly where certain of the timbering brought land under cultivation to replace cleared land that had been exhausted by cropping).

necessary to show that the change is detrimental to the inheritance.”⁸⁰ In North Carolina, “the cutting of timber is not waste, unless it does a lasting damage to the inheritance, and deteriorates its value; and not then, if no more was cut than was necessary for the ordinary enjoyment of the land.”⁸¹ By Vermont’s law, the tenant could act freely, but “not so as to cause damage to the inheritance.”⁸²

The *Jackson v. Brownson* majority had made much of the space created by the ecological variation in the English doctrine, which protected trees in timber-poor areas that would have been free for the cutting in regions with better stocks of trees.⁸³ Because “[w]hat kind of wood in England is deemed to be timber depends on the custom of the country [and] [w]ood which in some counties is called timber is not so in others,” the court concluded that “the prohibition [on cutting timber], in principle, extends no further ... there than it does here.”⁸⁴ The principle which allegedly joined the two continents was “whenever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste.”⁸⁵ Bolstered by American precedent, the cases that followed displayed none of the pretense of *Jackson v. Brownson* that the American standard simply perpetuated the principle of the English rule. Instead, the opinions are studded

⁸⁰ *Clemence v. Steere*, *supra* n. __ at *2. The court in this case announced adherence to a standard of waste as what “injured the farm or was a change such as no good farmer would make,” and ruled that cutting timber for sale from an estate was ordinarily waste, although a jury might find it not so where, as here, the sale was to support a widow with a testamentary life-estate. The court ruled that cutting hoop-poles (timber in an early stages of growth) was waste unless it was the ordinary practice of the area; that permitting land to grow up in brush was not waste unless it met the abstract American standard, although it would have been waste in England, where land was at a relative premium; and, perhaps reassuringly, that a tenant could tear down a barn so dilapidated that it threatened to collapse on her cow. The court also noted that a finding of waste could lead to forfeiture, but only of the particular area of the land wasted, such as a woodlot or a meadow.

⁸¹ *Shine v. Wilcox*, 1837 WL 531 (N.C.), *1 (holding that a widow and her new husband had not committed waste by clearing some seventy acres of forest for cultivation, in light of the expectation that widows should be able to clear land for their support, and because clearing forest to replace exhausted land was customary in the vicinity).

⁸² *Keeler v. Eastman*, 1839 WL 2405 (Vt.) (holding that clearing timber to open land to cultivation is not waste, where it comports with husbandlike behavior, because it does no permanent injury to the estate).

⁸³ *Id.* at 233-34.

⁸⁴ *Id.*

⁸⁵ *Id.* at 234.

with such phrases as “the law must necessarily be varied in this country from the English doctrine ... it would be absurd to apply the rigid principles of the English law”;⁸⁶ “whatever may be [the] law of England, it is not in this Commonwealth waste, unless it may be prejudicial to the plaintiff”;⁸⁷ and “while our ancestors brought over with them the principles of the common law ... [i]t would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man was waste.”⁸⁸ The pretense to continuity of the majority in *Jackson v. Brownson* had no more use, since the change the dissenters objected to had triumphed.

1. The standard of material injury: What did it mean “materially to prejudice the inheritance,” in the words of *Jackson v. Brownson*’s “principle”?⁸⁹ The rule could not be so simple as that the property had to go to the reversioner with worth equal to or greater than its value at the time the tenant occupied it, for that would be both over- and under-inclusive, excusing tenants who increased the value of the estate yet committed waste, while sweeping in others who diminished the value of the estate, but were not deemed to have committed waste. On the one hand, in *Jackson v. Brownson*, the land when cleared was worth considerably more than as wild timber, yet the court found waste as a matter of law because the tenant had left less timber than was necessary for the upkeep of the place.⁹⁰ A tenant, then, could commit waste while increasing the value of the land, if he compromised the capacity of the reversioner to provide the needs of the place from its own soil. On the other hand, even under the English rule, a tenant who cut timber for fire-bote and then ended his tenancy would have diminished

⁸⁶ Owen v. Hyde, 1834 WL 1026 at * 3.

⁸⁷ Pynchon v. Stearns, *supra* n. __ at *5 (holding that breaking roads, cutting drainways, and filling in wetlands do not constitute waste, unless they do permanent injury to the estate, and observing that adopting the English rule would arrest “the progress of improvement” in the United States).

⁸⁸ Shine v. Wilcox, *supra* n. __ at *1.

⁸⁹ Jackson v. Brownson, *supra* n. __ at 234.

⁹⁰ Jackson v. Brownson, *supra* n. __ at 229, 234.

somewhat the value of the land, but not committed waste. A reduction in the value of the estate, then, was not always a necessary condition of waste, nor was it sufficient to constitute waste. The difference lay in something nearer an idea of *appropriate* use than in a strict measure of whether the estate's value had increased, decreased, or held constant.

There was particular judicial effort in North Carolina to formulate the standard of “material prejudice” as a general principle. In the passage presented earlier on the extent of a widow's life estate, the North Carolina Supreme Court in 1848 found that she could sometimes clear timber for cultivation, but could not undertake an operation of draining turpentine from living pine trees, because “the tenant may use the estate, but not so as to take from it its intrinsic worth.”⁹¹ The court continued by holding that turpentine production was analogous to mining, which “is not a thing yielding a regular profit in the way of production from year to year from labor, but it would be taking away the land itself.”⁹² In either turpentine production or excessive timbering, the tenant “takes ... not the product of the estate arising in his own time, but ... that, which nature has been elaborating through ages, being a part of the inheritance itself.”⁹³ This was a kind of usufructuary standard, and it recurred in the jurisprudence of North Carolina, as in the Supreme Court's 1888 dictum that “it may be proper to fix a limit to the denudation, that it do not exceed the annual increase from natural growth which replaces that portion of the trees removed.”⁹⁴ The formula was also quoted approvingly in the Supreme Court of Georgia.⁹⁵

⁹¹ *Davis v. Gilliam*, *supra* n. __ at *2.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *King v. Miller*, 6 S.E. 660, 666 (N.C. 1888) (holding that clearing land for cultivation was not waste where this was the ordinary practice of the neighborhood).

⁹⁵ *See Smith v. Smith*, 31 S.E. 135, 136 (Ga. 1898) (holding that a widow might not cut timber for sale where this was neither the ordinary practice of local farmers nor necessary to the enjoyment of the homestead). This case appears to be part of the retrenchment of waste doctrine in a conservative form in the later nineteenth century, which I discuss below.

2. *The Standard of Husbandry*

For reasons developed later, the principle of sustainable use tended in practice to remain abstract and vague, while courts resolved waste cases by another standard, which they presented as either synonymous or conjunctive with the prohibition on “permanent injury” or “material prejudice.” This was the standard of husbandry, or of the prudent farmer. By this standard, a tenant’s actions were not waste if they comported with the behavior of a prudent fee-owner using his land for profit. This standard appealed not to objective agronomic principles, but to the custom of the area where the dispute took place. To a substantial (although varying) degree, it was treated as a question for juries rather than courts.

While also reciting the standard that waste was prejudice to the inheritance, Massachusetts’ Supreme Court held that because “it has been the constant usage of our farmers ... to change the use and cultivation of their lands, as changes have required,” that action could not be waste.⁹⁶ Vermont’s Supreme Court, while claiming the “permanent injury” standard as law, found no waste where the court was “satisfie[d] ... that the farm ... has been managed by the tenant for life, in a prudent and husbandlike manner.”⁹⁷ In Tennessee, the standard of “material injury” was made specific thus: “if the proportion of wood land was such as that a prudent farmer would have considered it best to reduce a portion of it to cultivation,” then there was no waste in cutting timber.⁹⁸ In Rhode Island, in contrast to the strict English rule, “it is necessary [for waste] to show that the change is detrimental to the inheritance and contrary to the ordinary course of good husbandry.”⁹⁹

⁹⁶ Pynchon v. Stearns, *supra* n. __ at *5.

⁹⁷ Keeler v. Eastman, *supra* n. __.

⁹⁸ Owen v. Hyde, *supra* n. __ at *3.

⁹⁹ Clemence v. Steere, *supra* n. __ at *2.

III. The Meaning of the American Standard

What was the character of the American standard? Once again, it may be helpful to identify the mischief the changed doctrine was intended to prevent, and the functions it assumed in addressing that mischief. The core mischief remained the negligent, opportunistic, or larcenous acts of a tenant who lacked the incentive to maximize presently discounted long-term returns from the estate, and so took actions inconsistent with the interest of the reversioner in just such maximization. The question regarding this mischief was how to mediate between the reversioner and a troublesome tenant in a setting where land use was dynamic, in which few if any settled patterns could be expected to persist from decade to decade. The central intuition of the *Jackson v. Brownson* majority seems to have been that adopting the new standard would create sufficient flexibility to accommodate changing patterns of land use while protecting reversioners. The dissent objected that the new standard was unnecessary, because the old rule served perfectly well as a bargaining-inducing bargaining default, and counterproductive, because the content of the new standard was indefinite and likely to shift with the opinions of courts and juries.

A. Efficiency-enhancing Economic Explanation I: The American Standard as a Problem-Solving Default?

The argument in favor of the American standard as a problem-solving default – one that fills gaps in incomplete contracts with welfare-maximizing terms -- runs this way: the tenant is interested in maximizing his profit from the estate during his tenure, while the reversioner is interested in maximizing the value of the estate at the time he receives it. The overlap of the two sets of interests lies in improvements to the land that *both* increase the tenant's profit and

increase (or at least do not “materially” diminish) the value of the estate upon its transfer to the reversioner. The American standard is designed to embrace such improvements – the paradigm of which is the clearing of wilderness for cultivation – while preserving the English rule’s prohibition on tenant activity that violates the interests of the reversioner: either stripping the productive assets of the estate or, in the case of a tenant who values leisure over income, malign neglect. The facially reasonable assumption is that, under optimal bargaining conditions, tenant and reversioner should agree to activity in this zone of overlap. So far as this is true, the American standard should serve as an effective problem-solving or gap-filling default.

This flexibility is imagined in contrast to the fixity of the English rule, which is envisioned as – at least potentially – locking the tenant into existing land-use patterns and forbidding the mutually beneficial activity which the American standard embraces. Some courts warned in adopting or explaining the American standard that retaining the English rule might impose stasis on land-use patterns, even locking up portions of the country in wilderness. To view the matter in this way, however, is to neglect the distinction between a default rule, which is susceptible to contractual revision, and a mandatory rule, which withdraws certain questions from the discretion of the contracting parties. A good part of the function of the English standard lay in the fact that, as a default rule, it locked no one into anything, but served as a backdrop to bargaining, which parties could incorporate into their agreement only by declining to specify alternative terms. Indeed, despite its rhetorical currency, the image of a continent tied up in primeval forest was always a bogeyman. No one seems to have argued seriously that the clearing of frontier land should be regarded as waste. The plaintiffs’ attorneys in *Jackson v. Brownson* volunteered at trial that although “[t]here is no reason why the English rule should not be strictly applied to land under cultivation in this country ... in regard to wild lands it ought not

to be carried to the same extent.”¹⁰⁰ The jurists who defended the change in waste doctrine were protecting a westward movement of clearing and settlement that needed no protection. These facts comport with the earlier analysis: there would be no reason to expect a rationally self-interested reversioner to insist on keeping a plot of land in “wilderness” unless relative property values had shifted so that at least some of the land had become more valuable in timber than after clearing. Any invocation of the English rule would have been to prevent clearing of a plot of land in a manner that jeopardized future productive use (which the doctrine of husbandry tended to forbid in the American context), or as an opportunistic device to expropriate wealth from the tenant by damages or forfeiture (a possibility which I discuss shortly).

Moreover, there is some reason to believe that the American standard, despite its initial promise to capture the zones of overlapping interest shared between tenant and reversioner, functioned rather poorly as a gap-filling or problem-solving default. As Alan Schwartz has suggested, a problem-solving default should be assessed by three related considerations: whether it (a) solves a problem that a reasonable portion of contractors will face (b) in a way that is acceptable to those contractors and (c) in a manner that is guided by accessible or determinable information.¹⁰¹ A default that does not address any actually occurring problem is a waste of effort and other resources; one that addresses problems in a way not acceptable to the parties will not survive in the marketplace; and one whose application is not guided by accessible information cannot determine a solution that fulfills its problem-solving purpose.¹⁰²

Here I concentrate on the first criterion, although I take up the third later. Can the

¹⁰⁰ Jackson v. Brownson, *supra* n. __ at 230.

¹⁰¹ Schwartz, *supra* n. __ at 392-93.

¹⁰² *See id.*

problem be expected to arise in a way the American standard is particularly well suited to address? The problem of opportunistic tenants would of course arise anywhere, but the American standard was not superior to the English rule in stopping those tenants; its special capacity was meant to be *distinguishing* between such tenants and others whose changes in land use were beneficial or neutral to the reversioner. However, on the assumption that the parties negotiated rationally, there is every reason to expect that they would agree *ex ante* to changes they regarded as mutually beneficial, such as clearing wilderness or changing cropping patterns, and revisit the agreement (or contract around a will) to pursue mutually beneficial opportunities that arose after the initial agreement (or after the grant of a dower of life estate). This is the sort of bargaining the *Brownson* dissent envisioned as *induced* by retention of the English rule. On this account, the American standard may actually have tended to *produce* the problem it was meant to solve, by lulling imperfectly perspicacious parties into accepting its indeterminate principle rather than bargaining *ex ante*. That courts applying the standard had no special aptitude for solving the *ex post* problems it may have induced would only have exacerbated the difficulty.

The *Brownson* dissent was not alone in recognizing the value of the English rule in this respect, and the disutility of its American replacement. American courts retained the English law of waste for minerals, apparently as an equilibrium-inducing or bargaining default, just as the dissent proposed to do with the law of waste for renewable resources in land. In 1852, the Pennsylvania supreme court was invited to apply to mining the same standard that American courts had adopted for land use: that tenants' use "cannot seriously impair the inheritance," as determined by "the nature and condition of the estate and the circumstances of the parties."¹⁰³

¹⁰³ Neel v. Neel, 1852 WL 5864 (Pa.) at *4.

The court declined to do so, and preserved the English rule, not on grounds of traditionalism, but as a basis for bargaining among free parties. The testator of the land might not have envisioned that the tenant for life would exhaust the coal mine in question, the court noted, and its unexpected use to exhaustion might disadvantage the reversioner, but “when the donor did not see proper to restrain the gift, how shall it be done? Surely courts have no such control over the arrangements which people choose to make of their affairs. ... And I cannot see how the enterprise of the citizen is to be restrained by judicial process.”¹⁰⁴ The court continued by urging that “we get ourselves freer from notions derived from feudal subordination,” which clearly was how some exponents of free contract had come to regard the law of waste in land, with its imposition of a standard of appropriate land use. The Pennsylvania court’s means of advancing free contract, ironically, was through preservation of the older English rule, as a clear default rule for a society in which free agreement should be the governing principle.¹⁰⁵ I have found no American jurisdiction in which the English rule of waste for minerals underwent significant change. In sum then, reasons both general to defaults and specific to the development of waste doctrine give reason to doubt the worth of the American standard as a problem-solving or gap-filling default.

B. Efficiency-enhancing Economic Explanation II: Breaking bilateral monopolies

¹⁰⁴ Id. at *6.

¹⁰⁵ Pennsylvania’s supreme court followed this principle two years later in *Irwin v. Covode*, holding that if tenant use exhausted a mineral deposit, “it would be no more than occurs in every life estate in chattels which perish with the use. So long as the estate is used according to its nature ... it is no valid objection that the use is consumption of it.” 24 Pa. 162 at 167 (1854). Virginia’s supreme court upheld the right of a tenant for life to exploit without limit a reservoir of salt-impregnated water, and, because the salt-works required fireworks, to cut as much timber as was necessary. *Findlay v. Smith*, 8 Am. Dec. 733 (Va. 1818).

There is, then, some reason to doubt that the American standard was more efficient than its English predecessor at producing operative contracts that reflected the terms each party would have agreed to under optimal conditions. There is, however, a related economic explanation, which falls somewhat further from courts' account of the American standard, but which is nonetheless facially plausible. The standard might have worked to avoid certain transaction costs and unconsummated bargains (i.e., deadweight loss) that the English rule might produce.

¹⁰⁶ The English rule created a bilateral monopoly in which both tenant and reversioner enjoyed a kind of veto over improvements in the estate. The tenant, of course, could simply refuse to make an improvement. The reversioner could refuse to approve an improvement, then institute a waste action when the tenant, seeking the profit of the improvement, made it anyway. Even where the exercise of such a veto would reduce the value of the estate to each party, tenant and reversioner might reach an impasse in bargaining over the distribution of the added income from the improvement. (Imagine, for instance, that the improvement involved clearing land of salable timber: even if the reversioner were willing to let the tenant take the profit from the improvement during her tenancy, he might still insist on taking the income from the timber, and she might refuse.) The American standard fixed that problem (at least theoretically) by replacing the reversioner's veto with a trump for the tenant, who could make the improvement, collect the consequent income, and resist an action for waste on the ground that her change would not materially diminish the expected value of the estate to the reversioner.

At least two cases in particular are susceptible to this explanation, although only one has a result supporting the hypothesis. In *Pynchon v. Stearns*, the Massachusetts Supreme Court found no waste in the activity of a tenant who had cut drainage ditches, dug cellars, and filled in

¹⁰⁶ Richard Posner concentrates his economic account of waste doctrine on this explanation. See POSNER, *supra* n.

wetlands.¹⁰⁷ The court remarked that preventing such action, although it would accord with the “ancient doctrine of waste,” would “greatly impede the progress of improvement without any compensating benefit.”¹⁰⁸ This policy of approving tenants’ changes in land use was put to a sterner test in *Livingston v. Reynolds*,¹⁰⁹ an 1841 New York case, where it buckled. There the defendant, a life tenant whose lease expressly forbade waste, had built a brick kiln and cut all but ten of one hundred and eighty acres of forest to fire it, when the reversioner won an injunction to block his activity. New York’s Chancellor dissolved the injunction, ruling that building and firing a kiln was not contrary to husbandry. The Court for Correction of Errors reversed the Chancellor emphatically, remarking sarcastically that “*brick-bote* for sale is, I believe, unknown to the common law, as it is to all other law.”¹¹⁰ If the Chancellor considered brick-making compatible with husbandry, the court contended, “the peculiar ideas of the Chancellor of *good husbandry* . . . must differ from the generally received opinion of the world,” as must his idea of waste.¹¹¹ While there is no evidence in either opinion that the dispute arose from a conflict over the distribution of benefits between tenant and reversioner, the *Livingston* court did note whatever income the tenant took was, necessarily, income that could not later go to the reversioner.¹¹²

The overwhelming consideration distinguishing the two cases, however, appears to be

¹⁰⁷ 52 Mass. 304, 310 (1846), 1846 WL 4004 (Mass.), *4.

¹⁰⁸ *Id.* at 311, *5.

¹⁰⁹ 1841 WL 3902 (N.Y.)

¹¹⁰ *Id.* (emphasis original).

¹¹¹ *Id.* (emphasis original).

¹¹² *Id.*

judicial hesitation to permit a tenant to impose a qualitative change in land use on a reversioner, even where the change arguably improved the overall value of the estate.¹¹³ It was uncontroversial that clearing timber for cultivation represented improvement, at least to a point and during the early years of the doctrine; but the doctrine's originators seem not to have considered that it might be applied to more controversial changes, such as a tenant's erection of a semi-industrial facility on formerly forested land. Where the former type of change brought land from wilderness into the ambit of civilized activity, the latter may have seemed to impose too much on the reversioner, whose superior estate might at least have given him the expectation of some input in the question whether to abandon agricultural use or (at least) supplement it with something entirely different.¹¹⁴

Moreover, the situation in which the respective vetoes on improvements of the tenant and reversioner would not be symmetrical would be one in which the tenant could not make an adequate living from the land without installing the improvement in question – for instance, in the initial clearing of forest for cultivation. Because the *Brownson* court had such a situation in mind, it may have been deliberately making a distributive choice in favor of the tenant by removing the landlord's power to force a strapped tenant to hand over, say, any income from the sale of cleared timber, in the course of this initial cutting. To propose that courts had this distributive issue in mind would be to give a rather more restricted account of the “bilateral

¹¹³ It may be, of course, that the Chancellor simply botched his evaluation of the facts in this case, as the operation of a brick kiln on a mid-sized plot of land is not well characterized as a renewable use of resources, but instead imposes a drastic and rapid drain on those resources, which will likely require decades to restore themselves. This explanation would be compatible with the one I advance, although it would not require it.

¹¹⁴ I believe this is a more accurate characterization of the mood of courts in applying waste doctrine than Morton Horwitz's view that courts were inclined to strip reversioners of all say over changes in land use in the interest of promoting development. I explain my difference with Horwitz in the crucial case of *Jackson v. Brownson*, which he relies upon heavily for this argument, in the discussion at note XX, *supra*.

The hesitation to embrace tenants' changes from agricultural to industrial genres of land use, while endorsing improvements within genres, is compatible with the drift of the English cases from the late nineteenth century that I discuss *supra*.

monopoly” explanation than the one I suggested at the beginning of this section, and one concerned at least as much with fairness as with welfare maximization.¹¹⁵

C. The Pluralist Addition I: Republicanism

While the second efficiency-enhancing explanation, concerned with bilateral monopolies, has some force (particularly in its more restricted version focused on distributive issues), there is good reason to believe that it was not the whole story, and that courts were also motivated by distinct and complementary purposes.¹¹⁶ Recall the *status-confirming* function of the English rule in its aspect as a normative default, and its corresponding *educative* function as a quasi-transformative default. In light of the analysis above, with its suggestion that self-interested negotiators would tend to converge on the same zone of overlapping interests that the American standard sought to define and secure from the interference of reversioners, consider the circumstances under which the English rule would actually be invoked. Other than spoliation by an opportunistic or neglectful tenant (preventing which, to repeat, is not a point of difference between the English and American defaults) and cases of impasse or abuse arising from bilateral monopoly, reversioners would tend to invoke waste law as an expression of prerogative: to block changes in land use which did not comport with their aesthetic or other non-economic

¹¹⁵ In either a stronger or a weaker version, such an explanation is nicely complementary to the account of waste doctrine as reflecting a normative commitment to dynamism in land use, which I discuss below.

¹¹⁶ In terming an explanation founded in political values “complementary” to one founded in economic efficiency, rather than competing, I have in mind two related considerations. The first is that the explanation of behavior, including but not limited to that of judges and other public officials, can legitimately look both to those persons’ assessment of their self-interest and to their social and political values, and that the latter may be particularly important in explaining decisions affecting the basic terms of an area of law. On this point generally, see AMARTYA SEN, *Rationality and Freedom*, 3, 22-26, in RATIONALITY AND FREEDOM (2002). On certain specific ways in which the valuation of social states and their institutional arrangements may be distinct from market valuations, see SEN, *Environmental Valuation and Social Choice*, 531, 540-42 in RATIONALITY AND FREEDOM. The second consideration is that, despite the contrast just noted, economic systems are deeply implicated in certain social values, and are properly and without distortion viewed in relation to those values. I discuss this in some detail below. For an illuminating discussion of this issue in general, see SEN, *Markets and Freedoms*, 501, 501-527 in RATIONALITY AND FREEDOM.

preferences, or to underscore their social superiority to a tenant showing signs of excessive initiative and self-regard.

Consider now how the prospect of such a use of the doctrine might have looked to the judges in *Jackson v. Brownson*. As noted, the plaintiffs were the heirs of Philip Schuyler, a member of the landholding aristocracy of the Hudson Valley.¹¹⁷ The Hudson Valley landlords' relations to their tenants were characterized by pervasive social and political hierarchy:¹¹⁸ in the seventeenth century, some set up manorial courts in the manner of English lords;¹¹⁹ in the eighteenth century, they rallied their tenants against each other as private armies, again on the model of feudal lords, in their disputes over rival land claims;¹²⁰ well into the nineteenth century, they controlled their tenants' votes as blocs and confounded the newly introduced secret ballot by distributing pre-marked ballots folded into a distinctive shape for instant identification.¹²¹ The classic form of the Hudson Valley deed was the oxymoronic "lease-in-fee," which combined periodic rent with an open-ended, heritable claim on the land, which until its nineteenth-century judicial abolition included a payment to the landlord of one-quarter the price a tenant fetched by transferring his interest.¹²² Annual rent often included one day's labor with a horse and cart or a

¹¹⁷ See MCCURDY, *supra* n. __ at 10. Lawrence M. Friedman notes that the reform of American property law to eliminate "feudal" and "tyrannical" inheritances from the English common law seemed particularly urgent to New Yorkers, because of the presence of the Hudson Valley estates. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 210-11 (1973).

¹¹⁸ For a discussion of the difficulties faced by the Hudson Valley aristocracy in maintaining their social status, see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 113-15 (1992). Wood provides a rich description of the aristocratic cast of pre-revolutionary American society at 11-92. See generally, MCCURDY, *supra* n. __ at 1-31. See also Eric Kades, *The End of the Hudson Valley's Peculiar Institution: The Anti-Rent Movement's Politics, Social Relations, and Economics*, 27 *Law & Soc. Inquiry* 941 (2002).

¹¹⁹ See Kades, *supra* n. XX at 942.

¹²⁰ See Kades, *supra* n. XX at 947-48.

¹²¹ See Kades, *supra* n. XX at 950.

¹²² See MCCURDY, *supra* n. __ at 1. Two legal theories jockeyed to sustain this unorthodox form of leasehold. On one, Parliament's act of *Quia Emptores* in 1290, which established the free alienability of freeholders' land and

tribute of “four fat fowl.”¹²³ Although the record does not contain the term “lease-in-fee,” the majority opinion noted that Brownson’s lease was for life, and that “the lessee covenants for himself, *his heirs*, and his assigns,” strongly suggesting that it was such a deed.¹²⁴

Unsurprisingly, the heritable rental estate became the flashpoint of sustained legal, political, and sometimes paramilitary conflict in New York several decades after *Jackson v. Brownson*.¹²⁵ Consider how these property relations, with their distinct air of feudalism, must have looked from the point of view of the republican strain in early American politics. “Republican,” as a category of political thought, has been put to such varied uses by theorists, historians, and polemicists that one can hardly draw a definite meaning out of it,¹²⁶ although its broad outlines are uncontroversial: in politics, a rejection of monarchy, aristocratic government, and the dominance of dynastic families, in favor of the equal basic political rights of each citizen (or landholding citizen) and a vision of authority as ultimately founded on the consent of the governed;¹²⁷ in economics, rejection of feudal relations of authority and subordination in favor of independence, variously understood as the condition of the free laborer, the yeoman landholder,

forbade creation of new feudal obligations upon sale, had not been in force in New York at the time the lease-in-fee estates were created, because New York was won from the Dutch by conquest – meaning the law of England did not automatically travel there – and the state legislature did not adopt its own version of *Quia Emptores* until 1787, when it passed the Act Concerning Tenures. On the other account, which the New York Supreme Court adopted, the lease-in-fee deeds took the validity from the principle of freedom of contract, which authorized the deed-making parties to institute whatever terms they saw fit. *See id.* at 22-31. It is unmistakably paradoxical that on this account, the liberal doctrine of freedom of contract legitimated quasi-feudal arrangements and specifically limited the free alienation of land.

¹²³ *See id.* at 1.

¹²⁴ *Jackson v. Brownson*, *supra* n. ___ at 239.

¹²⁵ *See generally*, MCCURDY, *supra* n. ___.

¹²⁶ *See, e.g.*, WOOD, *supra* n. XX at 95-109 (describing the pervasive and sometimes hybrid and confused character of republican ideology in England); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22-54 (1992)(same); DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 48-75 (1980). *See also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 65 (noting that the term “republican” during and after the American Revolution better described the spirit of a political order than its institutions).

¹²⁷ *See, e.g.*, WOOD, *supra* n. XX at 77-92 (describing political order in aristocratic America) and 95-109 (describing the rise of republican ideas of political authority).

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or the merchant or entrepreneur;¹²⁸ and in culture, a regard for ordinary individuals, combined with a belief (in some cases half a tenuous hope) that they would prove to be the true repository of virtues long identified with aristocracy: honor, dignity, and courage.¹²⁹

To avoid the indefinite character of discussions of republicanism in general, I will give an account of something more circumscribed and germane: the republican ideas present in the *Commentaries* of New York's Chancellor James Kent, the conservative Federalist who joined the majority in *Jackson v. Brownson*.¹³⁰ I am particularly concerned here with Kent's view of the place of land in social and political relations.¹³¹ My point in seizing on Kent, besides his tie

¹²⁸ A very important distinction is present here between the early republican disdain for the craftsman or merchant in favor of the yeoman, a view derived in important respects from feudal values, and the later celebration of the free laborer and entrepreneur as the exemplary, independent bearer of modern liberty. See MCCOY, *supra* n. XX at 32-47, 67-75 (describing the first), and ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 11-39 (1970) (treating the later development of the second).

¹²⁹ See WOOD, *supra* n. XX at 229-43 (describing the uneasy relationship of egalitarian ideology and loyalty to ideas of virtue derived from aristocratic ideals) and MCCOY, *supra* n. XX at 48-75 (describing a more robust view of republican virtue).

¹³⁰ For a sketch of Kent's conservatism, see WOOD, *supra* n. XX at 269-70. Kent defended, for instance, a property qualification for voters. *Id.* See also ALEXANDER, *supra* n. __ at 127-57.

¹³¹ Gregory Alexander presents an illuminating and provocative account of Kent's legal, political, and social views in Chapter 5 of *Commodity and Propriety*. I part company with his characterization in one important respect. For Alexander, Kent is a man between worlds, a celebrant of the new commercial order, indebted to Adam Smith's political economy, and committed to the principle of the alienability of land; but at the same time, on Alexander's account, Kent was deeply ambivalent about the social churn of commercial society, its tendency to tear down social ranks and traditions and elevate in their place one sole principle of social order: the pursuit of material self-interest. As Alexander presents him, Kent was indebted to a conservative, Federalist brand of republicanism in his traditionalist aspect, but because he embraced the market, he was not republican: "His nonrepublican understanding of property is revealed by his treatment of land as an object of commerce," rather than as the basis of social and political virtue. ALEXANDER, *supra* n. XX at 148. For Kent, as a student of the Scottish school of political economy and of Smith in particular, this would not have been a sensible opposition. Alexander proposes that on Kent's view, "Land's function was essentially private, the means to create wealth for private enjoyment," a quality indicated by Kent's willingness to regard it as a commodity. *Id.* For Smith, however, the *social* function of market relations lay precisely in their commodifying aspect: by diminishing the prerogative attached to tradition and status, and requiring persons to bargain over the terms of their cooperative enterprises, commerce brought the mighty lower and elevated the poor, closing the cruel gap in sympathy and self-understanding that feudal and courtly hierarchy produced. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 70-88 (Prometheus Books 2000) (1759).

In Smith's view, commerce was not a matter of wealth-maximization by atomistic individuals, but a basically social activity. He explained, "It is chiefly from the regard to the sentiments of mankind that we pursue riches and avoid poverty." *Id.* at 70. "Nature," on this account, "taught [humanity] to feel pleasure in [others'] favourable, and pain in their unfavourable regard. She rendered their approbation most flattering and most agreeable to him for its own sake; and their disapprobation most mortifying and most offensive." *Id.* at 170. The question to ask of a social order, then, is what economy of esteem it sets in motion. In a society of inherited hierarchy, "success and preferment depend . . . upon the fanciful and foolish favour of ignorant, presumptuous, and

to the case itself and the ample written record of his views, is to make an *a fortiori* argument: if these ideas were present in the conservative Kent, they were indeed pervasive.¹³²

On Kent's account property in England had a double character: on the one hand, the English freeholder was the archetypal figure whose common law and constitutional rights formed the model of the liberty of the American citizen;¹³³ on the other hand, the prerogatives of landlords in relation to their tenants, along with the fee tail and other means of keeping land in powerful families, formed the backbone of a quasi-feudal system that the United States rejected.¹³⁴ American liberty rested partly on a process of stripping away feudal privileges and

proud superiors; flattery and falsehood too often prevail over merit and abilities." *Id.* at 87. The success of merchants and craftsmen – dealers in commodities – by contrast, “almost always depends upon the favor and good opinion of their neighbours and equals; and without a tolerably good conduct, these can very seldom be obtained.” *Id.* at 86. Egalitarian virtue, then, arose in the need to satisfy others within the reciprocal relations of bargaining over commodities.

One cannot, of course, simply assimilate Kent's thought to Smith's. That said, however, it is most important to appreciate that the tradition of political economy on which Kent was drawing did not take as its axiom that “commodity” and “propriety” were opposed, but rather treated them as interwoven. I believe this fairly characterizes the aspects of Kent's thought I am discussing here, as well. For a discussion of the Scottish influence on the American founding generation in general, see Samuel Fleischacker, *The Impact on America: Scottish philosophy and the American founding*, 316, 316-37 in *THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT* (ed. Alexander Broadie) (2003).

¹³² For a parallel argument, see WOOD, *supra* n. XX at 230: “All Americans believed in the Revolution and its goals. Conservatives like James Kent had wanted as much as any radical ‘to dissolve the long, intricate and oppressive chain of subordination’ of the old monarchical society” (citation omitted).

¹³³ Kent explains the significance of the status in what is, for him, fairly fulsome language: “An estate of freehold . . . denoted an estate held by a freeman, independent of the mere will and caprice of the feudal lord.” JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW * 23 (12th ed. 1873) (1823). He continues, “By the ancient law, a freehold interest conferred upon the owner a variety of valuable rights and privileges. He became a suitor of the courts, and the judge in the capacity of a juror; he was entitled to vote for members of Parliament, and to defend his title to the land . . . and he had the right to call in the aid of the reversioner or remainderman, when the inheritance was demanded. These rights gave him importance and dignity as a freeholder.” *Id.* at *24. It bears noting that Kent's definition of a freeholder includes a tenant for life; but it was precisely the doctrine of waste that threatened to bring such a tenant, in American conditions, back under “the mere will and caprice of the feudal lord.”

¹³⁴ As Kent put it, “In England the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectually removed from this country.” JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW * 329 (12th ed. 1873) (1823). He explained elsewhere the political theory of such restraints: “Entailments are recommended in monarchical governments as a protection to the power and influence of the landed aristocracy; but such a policy *has no application to republican establishment*, and under which every individual of every family has equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions.” KENT, 4 COMMENTARIES ON AMERICAN LAW *2 (12th ed. 1873) (1823) (emphasis added).

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constraints on the alienation of property, thus doing away with aristocracy while extending the status of freeholder, at least in potential, to every citizen: every man a landowner, voter, and juror. Kent was very far from an egalitarian visionary; indeed, he mocked ideas of the equal distribution of property as likely ruinous to economic initiative.¹³⁵ Nor did he have any sympathy with austere republican visions of frugal and upright citizens¹³⁶ maintaining their equality against the blandishments of luxury.¹³⁷ He was, instead, a believer in the marketplace as the arena of free men freely exchanging labor and acquiring land. In contrast to feudal England, he argued, “[e]very individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the reciprocal rights of others.”¹³⁸ Land made a person substantial, and it was in the marketplace that each man had an equal chance, in principle, at increasing and securing his substance.¹³⁹ The formal equality of the marketplace was contemporary liberty’s alternative to both the tangled hierarchy of feudal relations and the abject servitude of slavery, which Kent termed “a great public evil.”¹⁴⁰ Kent’s view, then, was very far

¹³⁵ See 2 KENT *328-29. “A state of equality as to property is impossible to be maintained, for it is against the laws of our nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life.”

¹³⁶ Rousseau, Letter to d’Alembert.

¹³⁷ See 2 KENT *329-30: “The notion that plain, coarse, and abstemious habits of living are requisite to the preservation of heroism and patriotism, has been derived from the Roman and classical writers. They . . . declaimed vehemently against the degeneracy of their countrymen, which they imputed to the corrupting influence of the arts of Greece, and of the riches and luxury of the world . . . No such fatal union necessarily exists between prosperity and tyranny, or between wealth and national corruption.” Kent cited as evidence the survival of English liberty amidst commerce and the arts, and of french patriotism despite “the effeminate luxury of her higher classes and of her capital.” *Id.* at * 330.

¹³⁸ 2 KENT *328-29.

¹³⁹ In this respect, Kent’s thought appears to have fallen within the band of Northern “free labor” opinion that Eric Foner describes in *Free Soil, Free Labor, Free Men*. See FONER, *supra* n. XX at 11-39. On Foner’s account, participation in the marketplace as free laborers was the first step in a conventional narrative that culminated in landholding.

¹⁴⁰ 2 KENT * 255. Kent’s characterization of slaves’ condition reveals something of the intensity of his conviction that property and economic relations formed much of a person’s substance: “They cannot take property by descent or purchase, and all they find, and all they hold, belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights.” *Id.* at 253. These conditions were among those making slaves

from the civic, martial, anti-commercial position commonly identified with republicanism.¹⁴¹ Kent was, however, anti-feudal, anti-aristocratic (at least in rejecting aristocracy as a social organizing principle), and committed to free commercial relations and landholding as both a cornerstones of, and catalysts for, the liberty and dignity of citizens. He shared these attitudes with a vast proportion of the political class.¹⁴²

From this point of view, there would have been distinct advantages to the American standard of waste law, both in its expressive significance and in its preclusion (at least notionally) of certain exercises of prerogative. The English doctrine was a law of prerogative, structured by its commitment to the protection of the superior estate. It enforced the presumptive veto of the reversioner against any initiative of the tenant, unless the reversioner's prerogative were explicitly surrendered. In short, it made the tenant directly answerable in his major economic and agricultural decisions to a social superior whose status was marked by the superior character of his estate in land.¹⁴³

“property, rather than persons.” *Id.*

¹⁴¹ See MCCOY, *supra* n. XX at 48-104. See also [TJ]

¹⁴² See WOOD, *supra* n. XX.

¹⁴³ Amartya Sen distinguishes between two types of values which he regards market relations as promoting, each one a dimension of freedom. The first, the “process aspect of freedom,” concerns non-interference from others in making, and acting on, one's choices. The second, the “opportunity” aspect of freedom, concerns the substance of the choices on which one is *in fact* able to act, that is, the actual scope of one's capacities. See AMARTYA SEN, *Markets and Freedoms*, 501, 501-27 in RATIONALITY AND FREEDOM (2002). On the account I have been giving, the American standard of waste can be regarded as promoting both types of freedom: the first by authorizing tenants to take decisions in the use of the land they occupy without interference from reversioners; and the second, directly, by enabling the tenant to act on such decisions with the resources of the estate; and indirectly, by contributing to societal wealth.

I would add that a third dimension of freedom is arguably present here, one with which Adam Smith (a muse for both Kent and Sen) was much concerned. One might call it liberal virtue, or, less contentiously, characterological capacity for freedom. I do not mean (although I do not intend to detract from) the familiar “republican virtue” ascribed to landholders by virtue of their alleged stability and investment in the social order. See Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, 3, 3-25 in NOMOS XXII: PROPERTY (eds. J. Roland Pennock and John W. Chapman) (1980) (remarking on the persistence of this “constitutional” value in property); THOMAS JEFFERSON, *Notes on the State of Virginia*, 123, 290-91 in THOMAS JEFFERSON, WRITINGS (ed. Merrill D. Peterson) (1984) (“Those who labour on the earth are the chosen people of

The new doctrine, however, put the two estates on equal footing in a critical sense: the reversioner no longer exercised ongoing authority over the use of the land, and could not invoke waste doctrine in its status-confirming normative aspect. Instead, his right was to receive at the end of the tenancy a property commensurate in value to the one surrendered to the tenant. That said, the property might have been timbered, rearranged in its patterns of cropping, or equipped with new fences and buildings. In principle the tenant was sovereign over the land for as long as he held it, with his liberty bounded by the requirement that he pass on, in John Locke's pregnant words, as much and as good at the end of his occupation. This revision in doctrine brought two essential changes. First, because the American standard steered by the market value of the land, and thus treated it as a commodity, it deprived land of one aspect of its status as a marker of social hierarchy, elevating some and binding others through interwoven and hierarchical claims on the same plot.¹⁴⁴ This was not, however, to eliminate the relation of land and status altogether, but rather to place land within a different logic of status: a formally egalitarian vision of market relations, in which each individual had, as Kent observed, an equal right and opportunity to acquire, use, and dispose of property, and so in which individuals enjoyed a new

God . . . whose breasts he had made his peculiar deposit for substantial and genuine virtue. . . . Corruption of morals in the mass of cultivators is a phaenomenon of which no age nor nation has furnished an example. . . . [T]he proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts, and is a good enough barometer whereby to measure its degree of corruption.”). I mean rather the predisposition, one might even say the psychic capacity, to assert one's own interests and convictions as legitimate considerations for others' reasoning and as legitimate motives for oneself. The presence or absence of this quality can run so deep as to determine where individuals can *identify* their own interests at all, as Sen has pointed out in the course of reporting that the poor, and particularly poor women, are much *less* likely to report ill health when asked than those somewhat more privileged. See SEN, *supra* n. XX. Part of the purpose of bolstering the legal claims of tenants relative to reversioners is to produce an American citizen who is the *sort of person* who will regard her own claims as legitimate and assert them even against a perceived social superior.

¹⁴⁴ This is Gordon Wood's account of the significance of Kent's argument for a property qualification for state senatorial election: it made property a mere “interest, to which everyone in principle had equal access, rather than a permanent marker of distinction.” See WOOD, *supra* n. XX at 269-70. I think, however, that Wood exaggerates the extent to which this was an unintended consequence of a rear-guard effort to preserve hierarchy: Kent's own language suggests that he regarded equal access to the acquisition of property as the right sort of egalitarian principle for republican America.

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type of equality (alongside inequality in wealth). As an educative, quasi-transformative default, then, the American standard of waste did not just abstain from the question of status, but hinted at a new, commercial and formally egalitarian form of status.

Two aspects of the structure of the American standard are particularly striking in this regard. First is the symbolic matter of the standard's expression: by the standard of husbandry, the tenant is modeled as an owner in fee, and held to a commensurate standard. On the one hand, this is simply an expression of the economically rational expectation that the owner in fee will use his land prudently, and thus that making his ideal behavior authoritative for the tenant will capture the principle of avoiding permanent injury to the land. On the other hand, however (in a fashion suggestive of the egalitarian implications of marketizing relations in land), this expression of the standard eliminates hierarchy from the language and imagery of waste law, as much as from its principle: the tenant is *envisioned* as an owner in fee, and his behavior is appropriate inasmuch as he lives up to that standard. This is quite a different matter from the imagery of the English default: a tenant who collects wood for maintenance under quasi-feudal rights, persists in inherited patterns of cropping, and seeks the permission of the socially superior reversioner for any undertaking outside these bounds.

The second aspect of republicanism in the American standard is more concrete, although its imaginative significance is also poignant. The decision as to the propriety of land use under the English rule belonged predominantly to the reversioner (although courts occasionally took the matter in hand). The initial formulation of the American standard placed determination of *what* constituted a permanent injury to the land in the hands of jurors, that is, citizens. Under the English rule, the decision reflected a prerogative evocative of feudal authority: command ran up the ladder of obligation, culminating in the crown, seat of power and theoretical owner of all

land.¹⁴⁵ The American standard reflected, by contrast, a horizontal image of political authority. On the republican account, all citizens were alike the source of consent that founded the legitimacy of government. By indicating the will (and custom) of the citizenry, a jury trial confirmed the political community's status as the source of authority, and checked the reversioner's prerogative with the judgment of that political community.¹⁴⁶

¹⁴⁵ This characterization may seem somewhat at odds with the earlier contention that the English rule probably played a large role as a bargain-inducing default. In the formulation presented here, I am less concerned with the actual operation of the English rule than with the American *idea* of that rule, which was powered by the great contrast of the republican imagination: the feudal Old World versus the republican New World. The question is not what the English rule did for the English, or even what it might have meant expressively to the English, so much as what it meant to Americans whose self-understanding was partly founded on a (partly imagined) contrast with England.

To understand the difference between the American conception of English law and the actual workings of property law in England, it is helpful to consider Lawrence M. Friedman's contention that much of the difference lay in the openness and rapid turnover of the American land market, and the relative lack of sophistication of American lawyers and conveyancers. In England, sophisticated legal devices enabled the gentry to circumvent such restrictions on alienation as the fee tail. In the United States, however, such devices were ill-understood, and the flurry of transactions that accompanied the westward movement of the population would have overwhelmed the legal system had each one required elaborate consultation and drafting. Thus a formalism that remained tolerable to the parties it affected in England would have severely inhibited American practice. The difference, however, was not that English property use was static and property relations feudal; rather, it was that England was rich, sophisticated, and unequal, with limited social mobility, and thus a relatively small landholding population was able to operate with the help of a refined bar; a country with considerable mobility and vast new tracts of land constantly entering the market could not negotiate arcane legal forms. See FRIEDMAN, *supra* n. XX at 205-11. Although Friedman does not mention it, I would suggest this pragmatic consideration became appended to republican ideology and to the caricature of "feudal" England in part because the feudal aspects of English property law represented everything that would have kept most Americans out of that land market: settled wealth, existing claims on land, and legal sophistication. Republican thought, along with its other attractions, provided a vocabulary of status that treated English wealth and refinement as evidence of corruption, and rough-and-ready American initiative as the mark of virtue.

¹⁴⁶This point helps to explain a seeming paradox in the "republican" account of waste doctrine. It may seem odd to advance an ideology committed to clarifying and consolidating the rights of the landholder (in the interest both of independence and of alienability) by strengthening the rights of the tenant, which strictly speaking pushed in exactly the opposite direction. The key here is that the concern of republican thought was not chiefly with the class of *landowners*, but rather with the class of *smallholders* who made productive use of their land and achieved personal independence thereby. Rentiers with manorial estates did not meet the republican image of a smallholder; on the contrary, the entrepreneurial tenant whose initiative was punished with a waste action looked like the archetypal subordinated feudal underling. Thus it might have been quite significant that the American waste law was early articulated in *Jackson v. Brownson*. For a similarly "paradoxical" development, see Lawrence M. Friedman's account of the concurrent rise of mechanics' liens (enabling an artisan to put a lien on the property of a client who failed to pay him) and homestead exemptions (protecting homesteads from creditors). While the latter consolidated the integrity of the small landholder's claims, the former introduced new and conflicting claims on the same piece of land; however, artisans were also a class of smallholders, and those who made most extensive use of them were large and wealthy landowners. FRIEDMAN, *supra* n. XX at 214-15.

D. The Pluralist Addition II: Progress and Land Use

It was a great theme of seventeenth and eighteenth-century polemics and juristic speculation on the European colonization of the Americas that the right to property originated in, and depended on, making productive use of it.¹⁴⁷ Those who failed to do so, who wandered over their territory like wild deer, created no exclusive claim which they might assert against new arrivals who proposed to settle, clear, and cultivate the land. John Donne preached, “all Mankinde must take care, that places be improv’d, as farre as may be, to the best advantage of Mankinde in generall.”¹⁴⁸ Rebutting Roger Williams’s defense of Native American interests in their land, John Cotton declared, “we did not conceive that it is a just Title to so vast a Continent, to make no other improvement of millions of acres in it, but onely to burne it up for pastime.”¹⁴⁹ This position was developed from John Locke’s famous theory of original acquisition,¹⁵⁰ which Emmerich de Vattel fashioned into a more specific defense of American colonization.¹⁵¹

As Chancellor Kent would later characterize those doctrines, our colonial ancestors ... seem to have deemed it to be unreasonable, and a perversion of the

See also John G. Sprankling's discussion of doctrines favoring entrepreneurial settlers' land claims over those of idle speculators with prior formal title, *infra* (next footnote).

¹⁴⁷ For a discussion of the pervasive effect of this idea in the development of United States common law in nineteenth-century, *see* John G. Sprankling, *The Anti-Wilderness Bias in American Property Law*, 63 U. Chi. L.Rev. 519 (1996). Sprankling surveys several areas of property law, including waste, nuisance, and adverse possession, and argues that judges revised each to encourage the clearing of wilderness by initiative-taking settlers. While I find Sprankling's historical discussion admirable and helpful, I am skeptical of his view that these common-law doctrines continue to constitute a significant impediment to conservation.

¹⁴⁸ JOHN DONNE, 4 THE SERMONS OF JOHN DONNE 274 (George R. Potter and Evelyn M. Simpson, eds.) 1959.

¹⁴⁹ ROGER WILLIAMS, THE COMPLETE WRITINGS 46 (1963).

¹⁵⁰ *See* JOHN LOCKE, SECOND TREATISE UPON GOVERNMENT §§ 25-51 (ed. Peter Laslett, Cambridge Univ. Press ed. 1960) (1688). For a discussion of the use of Locke in this polemical tradition, *see* JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 166-67 (1993).

¹⁵¹ Kent gives an account of Vattel’s view at 3 KENT at 387. *See also* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 191-96 (explaining Vattel’s ideas in relation to Locke’s). Vattel wrote, for instance, “The cultivation of the soil is . . . an obligation . . . imposed upon man by nature,” and “the savage tribes of North America have no right to keep to themselves the whole of that vast continent.” *Id.* at 195.

duties and design of the human race, to bar the Europeans, with their implements of husbandry and the arts, with their laws, their learning, their liberty, and their religion, from all entrance into this mighty continent, lest they might trespass upon some part of the interminable forests, deserts, and hunting-grounds of an uncivilized, erratic, and savage race of men.¹⁵² The specific “destiny and duty of the human race” as conceived by the first American settlers was, Kent explained, “to subdue the earth and till the ground.”¹⁵³

Most state courts adopting *Jackson v. Brownson* gave an account of the change from the English to the American rule that comported with these themes. They observed that North America was substantially uncleared, and populated by a westward-moving and economically dynamic population, which must be expected to rework the landscape in establishing itself. While finding waste in the defendant’s clearing of timber, the *Brownson* majority insisted, “The lessee undoubtedly had a right to fell some of the timber, so as to fit the land for cultivation.”¹⁵⁴ The dissent did it one better, conceding that, “The doctrine of waste, as understood in England, is inapplicable to a new, unsettled country.”¹⁵⁵ “Lands in general with us are enhanced by being cleared,” the Pennsylvania supreme court noted even before *Jackson v. Brownson*, adding that it would be “an outrage on common sense” to call such enhancement waste.¹⁵⁶ North Carolina’s highest court added, “It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man was waste.”¹⁵⁷ North America was “new and opening land, covered largely with primeval growth ... here, the clearing of the forest growth, and fitting the

¹⁵² 3 KENT at 386.

¹⁵³ *Id.* at 387.

¹⁵⁴ *Jackson v. Brownson*, XX at 233.

¹⁵⁵ *Id.* at 236.

¹⁵⁶ *Hastings v. Crunckleton*, 1801 WL 770 (Pa.), 3 Yeates 261.

¹⁵⁷ *Shine v. Wilcox*, *supra* n. __.

virgin soil which it covers for cultivation, is ordinarily an improvement.”¹⁵⁸

As strong as the courts’ insistence on the distinctiveness of American conditions was some courts’ explicit anxiety about what it might mean to maintain English waste doctrine. The Massachusetts Supreme Judicial Court found that old rule must be discarded because, “The ancient doctrine of waste, if universally adopted in this country, would greatly impede the progress of improvement, without any compensating benefit. To be beneficial, therefore, the rules of law must be accommodated to the situation of this country.”¹⁵⁹ In New York, the Chancery Court concluded that “to apply the ancient doctrines of waste to modern tenancies, even for short times, would in some of our cities and villages, put an entire stop to the progress of improvement.”¹⁶⁰ Progress and improvement were the aims, and forward movement across the continent was synonymous with betterment. The anxiety-producing contrasting image was of arrested movement, stasis, land locked into forest and the development of the continent brought to a halt.

Why anxiety? I have already argued that there is little reason, either in economic reasoning or in historical evidence, to believe that the English rule of waste risked reducing any part of the country to stasis. Two alternative reasons suggest themselves. First, the doctrine of the natural right and duty to cultivate the land was a doctrine of expropriation and conquest, with its roots in the theory of just war as much as in the theory of property, and it was offered for centuries as a defense of the European claim to North America.¹⁶¹ By the nineteenth century,

¹⁵⁸ King v. Miller, *supra* n. __.

¹⁵⁹ Pynchon v. Stearns, *supra* n. __ at 311.

¹⁶⁰ Winship v. Pitts, *supra* n. __.

¹⁶¹ As Richard Tuck explains, the conception of property that became foundational to European claims on North America originated in Hugo Grotius’ argument for Dutch access to the maritime trade routes of the East

jurists such as Kent and John Marshall declined to rely on, and were apt to disparage, such natural law claims.¹⁶² At the same time, however, their final resting point in defending the European claim was the fact of historical development: Europeans had settled the continent and made it their own, in a way that was ultimately incompatible with continued occupation and claims to ownership by Native Americans.¹⁶³ That settlement, they recognized, had proceeded on natural-law claims, and to base legitimacy on the settlement was to accept, even uneasily, the

Indies, then controlled by the Iberian powers. Grotius founded his case for freedom of the seas on an account of property, holding that one could have property only in those things which one could personally consume or transform. He further – and crucially – contended that a political community could assert jurisdiction over, and exclude others from, only those portions of the globe that had first been rendered private property. The sea, which famously rolls on forever, was thus ineligible to become either property or, consequently, the object of exclusive political jurisdiction. *See* TUCK, *supra* n. XX at 87-90. Iberian defense of the sea routes could therefore not constitute just war.

It was an unintended consequence of Grotius' theory, on Tuck's account, that nomadic and non-agricultural peoples, whom Europeans conceived of as passing over the land as traders and fisherfolk over the sea, without transforming it by labor or occupation, could have no property and thus no political jurisdiction over it. *See id.* at 104. Grotius' account shaped John Locke's view that property, acquired naturally by mixing one's labor with the natural world, is both chronologically and normatively prior to government, which propertyholders institute to remedy the inconveniences of living without civil law. From that view followed the conclusion, as for Grotius, that whatever form of community Native Americans had, it could not represent a form of sovereignty. For a discussion of the use of such property-based natural-law theories in seventeenth- and eighteenth-century British America, *see* TULLY, *supra* n. XX at 149-50.

One should note that Blackstone took a different view of Locke's thought, contending that Native Americans enjoyed a claim to their land premised not on sovereignty, but on self-preservation, which entitled them to hold the land in a manner compatible with their distinctive use of it. For a discussion of this issue in the interpretation of Locke, *see id.* at 169-75.

¹⁶² In *Johnson v. M'Intosh*, 21 U.S. 543 (1823), both parties cited Grotius and Samuel Pufendorf, and the defendants, arguing that Native Americans were legally incompetent to transfer land, also invoked Locke, Vattel, and the Baron de Montesquieu. The defendants argued that, "Not only has the practice of all civilized nations been in conformity with [the natural-law doctrine that Native Americans enjoyed neither property nor sovereignty], but the whole theory of their titles to lands in America rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states." *Id.* at 563, 567. Justice Marshall, however, declined to consider this tradition in his ruling, advertent instead to the practice of nations and of the United States in particular. Chancellor Kent, after a review of the role of the natural-law doctrines in justifying European expropriation of the Americas, contended that the colonists had not in fact relied upon, and that contemporary jurists could likewise not invoke, "whatever loose opinions might have been entertained, or latitudinary doctrines inculcated, in favor of the abstract right to possess and colonize America." 3 KENT, *supra* n. XX at 389.

¹⁶³ As Marshall put it, "[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness." *Johnson v. M'Intosh*, 21 U.S. at 590. Kent, also, accepted that the incompatibility of European and Native American ways of life made their clash, and the Europeans' triumph, inevitable: "The settlement of . . . the United States has been attended with as little and aggression, on the part of the whites . . . as were compatible with the fact of the entry of a race of civilized men into the territory of savages, and with it the power and the determination to reclaim and occupy it." 3 KENT, *supra* n. XX at 390-91. Particularly significant is Kent's use of "reclaim," suggesting a redemption of the land into its proper condition.

principles on which it had proceeded.¹⁶⁴ The productive use of land, therefore, had a special historical claim on Americans: whether or not it was everywhere and at all times the destiny of mankind, it was the destiny Americans had staked out for themselves, and to which they had made themselves answerable. To indulge or encourage stasis, even symbolically, in potential, or in a handful of exemplary cases, might have meant to some minds a break with American purpose. In the same fashion as republican values, values of progress and dynamism in land use might have shaped the American standard of waste as a *normative* doctrine, in this one concerned almost entirely with symbolic endorsement of an attitude toward the natural world to which the country's public and legal culture was committed.

Any tarrying with stasis might also have suggested an erosion of the republican spirit of liberty, at least in the moderate and commercial aspect that Kent gave it. Kent argued that a decent measure of equality in commercial societies came from the constant vicissitudes of the market:

When the laws allow a free circulation to property by the abolition of perpetuities, entailments, the claims of primogeniture and all inequalities of descent, the operation of the steady laws of nature will, of themselves, preserve a proper equilibrium, and dissipate the mounds of property as fast as they accumulate.¹⁶⁵

Social equality, in the sense of equal in-principle opportunity, depended in part on the dynamic operation of markets, which in turn depended on treating land as a commodity, so that it would move to its highest-value use and user. In this respect, economic dynamism and modest republican egalitarianism seemed mutually reinforcing principles, and the same considerations

¹⁶⁴ Marshall wrote, "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned." *Johnson v. M'Intosh*, 21 U.S. at 591.

¹⁶⁵ 2 KENT *supra* n. XX at * 329.

that encouraged a normative default against hierarchical land relations also encouraged a normative default against any legal enshrinement of stasis in land use.¹⁶⁶

E. Summary of the interpretive argument

My argument, then, is that the appeal of the American standard lay no more in its character as a problem-solving or equilibrium-inducing default than in its significance as a normative and transformative default. This argument involves several additions, or elaborations, to the concept of the normative default that Alan Schwartz has proposed. First, it involves the view that the concern of normative defaults may be broader than the issues of distributive fairness he suggests (quite appropriately in the context of bargains by sophisticated contractors and other participants in a fully developed commercial society) to include questions of basic political values and the social structures corresponding to those values. Who has political and legal authority? From what sources are those forms of authority derived? Relatedly, what are the social bases of dignity and self-respect, and how do the political and legal systems allocate them? These, too, are questions with which normative defaults may sometimes be concerned, particularly in transitional circumstances, where property and contracting rules are in flux, and the political and social relations to which they correspond are also in contest. In such

¹⁶⁶ I believe this account is in many respects complementary to that of Morton Horwitz in *The Transformation of American Law*. Horwitz's view, briefly summarized, is that the early nineteenth century was characterized by the judicial uprooting of previously well-established rights in smallholders – for instance, the right to veto certain uses of land by tenants – in favor of a systematic promotion of economic dynamism in furtherance of capitalist industrial development. The introduction of a default standard trumping the reversioner's veto with a criterion of economic value certainly fits that account. The view of the market as promoting an anti-“feudal” and socially meaningful kind of formal equality that I have drawn from the conservative Kent is another description of a process Horwitz portrays predominantly as replacing an earlier set of class privileges with a new one – that of proto-industrial and industrial capital. The advent of commercial relations at once emancipates persons from traditional hierarchy and prerogative and violently disrupts settled expectations and forms of sustenance, so that they may meaningfully said to be both better off and worse off, depending on the individual and the axis of evaluation. See JEDEDIAH PURDY, BEING AMERICA: LIBERTY, COMMERCE, AND VIOLENCE IN AN AMERICAN WORLD 145-47, 206 (2003).

circumstances, it is beyond dispute that mandatory rules, such as the abolition of the one-quarter tax on Hudson Valley tenants' transfer of fee rentals, or the presence or absence of property requirements for voting, have intense normative significance along the lines I have been describing. For purposes of illuminating American waste doctrine, my argument is that default rules may partake of that significance in several ways. First, as an expressive matter they may appeal to judges and other decisionmakers for their symbolic consonance with broad normative principles – especially when, as here, the symbolic associations of two doctrinal choices present a stark choice between quasi-feudal and broadly republican outlooks.¹⁶⁷ Second, a normative default may be selected for its significance in an action where bargaining has already taken place, but the terms of the bargain have yet to be interpreted, as in *Jackson v. Brownson* – particularly when, as seems likely to have been the case there, the facts crystallize an ongoing legal and political dispute. Third, the doctrine may be what we might call *norm-forcing*. By changing the default, the American standard required landlords who wanted to retain English-style prerogative to *propose* that term in bargaining, in a time when conventional attitudes increasingly disfavored it.¹⁶⁸ While not dispositive, the requirement of making a distasteful proposition explicit might lead the landlord to abandon the proposition altogether, or embolden

¹⁶⁷ For a classic discussion of the significance of the perception that the rules of a property regime comport with basic, shared ideas of fairness, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1218-25 (1967). Although Michelman does not use the rubric of "expressive" law, typically defined as the indication by a legal action of society's commitment to a value or attitude, that is what he has in mind. See, e.g., Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1506-08, 1531-33 (2000). For a discussion of the commitment of the legal reformers of the time to eliminating feudal remnants, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 209-10 (1973): reformers "eliminated . . . doctrines and institutions . . . which, whatever their impact, appeared to be 'tyrannical or feudal' Against the 'tyrannical' and 'feudal,' legislators slashed away with might and main."

¹⁶⁸ See Thompson, *supra* n. XX at 256-67 (explaining that people tend to regard the surrender of a privilege they now enjoy as the loss of right, which they will fight to resist, while they are much less likely to expend the same energy or take the same risks to acquire the same privilege if their baseline position is to lack it). For the significance of putting a question up for bargaining in general, see ADAM SMITH, *LECTURES ON JURISPRUDENCE* 186 (Liberty Fund Press, XXXX) (XXXX) (explaining the reluctance of the socially powerful "to condescend to bargain and treat with those whom they look upon as their inferiors."

the tenant to refuse it. It is a familiar point of political theory that the power to determine which principles are implicit in the background of debate, and which come to the fore as explicit questions, is an important form of power over others.¹⁶⁹ The same may sometimes be true in the context of private bargaining.

Those interested in the relationship between property and such basic political themes as power and freedom may be particularly struck by the attention in the law attending waste doctrine to relations of power among private persons. When American lawyers talk about property's relation to political theme, we are in the habit of imagining the individual on the one hand and the polity on the other. Takings law serves as a paradigm for this idea. To the libertarian, property secures the individual against the majority. The flip side of that attitude is the radical democrat, who sees American law's emphasis on private property as a fetish that inhibits egalitarian and experimental political decisions. But here, exemplified in a thinker as conservative as Kent, we find the idea that a major role of property law is to structure the relations of private persons, setting the terms on which they can enlist each other in their projects. On this view, property regimes set the starting point for any joint project that is not founded on either altruism or coercion. The nexus of waste doctrine with republicanism is a reminder that American property law is indebted to a tradition of political economy that regards liberal property regimes as valuable because they can increase the autonomy and dignity people experience in the dealings with each other. Where property regimes fail to achieve this, the failure is not something to be discovered from outside, but should be judged by a standard internal to the legacy of property itself.

¹⁶⁹ Lukes (from Grewal), Foucault.

IV. Conclusion

Study of the American transformation of waste law reveals three classes of values shaping the doctrine. One is the social interest in the economically efficient use of resources. The other two are less widely recognized; much of the analysis in this article has aimed at confirming their existence and illustrating their character. One comprises the organizing values of political society – in the instance of waste doctrine, rejection of hierarchical social relations founded on unequal claims to land and the embrace of a market in property which (as imagined by its advocates) makes land a vehicle for opportunity and mobility, rather than a marker of enduring social distinctions. The other is the idea of an appropriate relationship to the natural world – in the case of nineteenth-century waste doctrine, one of productivity and improvement, but in others settings perhaps founded on an ethics of conservation or stewardship.¹⁷⁰

What is the relation of default property rules to such interests? I have argued that, at least in the case of waste law, normative defaults promote these values in several ways. First, normative defaults have expressive value, affirming adherence to guiding values even when they have little or no practical significance.¹⁷¹ Second, even a few changed results may have great exemplary power: a Hudson Valley landlord's authority to turn out or fine a tenant for improving an estate without permission is a potent symbol of social relations in general. Third, a default

¹⁷⁰ In characterizing such values, it strikes me as helpful to have recourse to Charles Taylor's concept of "irreducibly social goods," values whose intelligibility and achievability *for* anyone depends on their being part of a cultural life in which they are recognized by some, if not all, relevant others, and in which concrete social practices do not thwart their realization in lived life. See CHARLES TAYLOR, *Irreducibly Social Goods*, in PHILOSOPHICAL ARGUMENTS 127, 139-40 (1995). I have added to Taylor's definition the idea that for a good to be achievable, it must be the case that prevalent social practices do not systematically thwart its realization – as, for instance, they would thwart attempts today to live the social life of an Elizabethan courtier or a Knight Templar. Taylor's argument strikes me as more concerned with the conditions of intelligibility than with those of achievability.

¹⁷¹ For a classic discussion of the significance of the perception that the rules of a property regime comport with basic, shared ideas of fairness, see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1218-25 (1967). Although Michelman does not use the rubric of "expressive" law, typically defined as the indication by a legal action of society's commitment to a value or attitude, that is what he has in mind. See, e.g., Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1506-08, 1531-33 (2000).

rule can retroactively interpret existing contracts as in *Brownson*, without ever shaping a prospective bargain. Finally, default rules may be *norm-forcing*: they make an issue explicit, which may help to displace once-assumed assignments of rights that have become contestable.

American waste doctrine embodies the *competing* values that inform the American relationship to property. The commitment to economic dynamism still informs the law of property.¹⁷² So does the independence-securing function of ownership, even if the formulation today has more to do with a libertarian ideal of individual autonomy, and less with the preconditions of political judgment and the dignity of citizens, than was once the case.¹⁷³ So also do ideas about the appropriate human relationship to the natural world, which now partake more of a conservationist spirit than of a belief in the duty to bring nature under the axe and the plough.¹⁷⁴ These strands of contemporary self-conception, for both political communities and individuals, are sometimes competing and sometimes complementary. Taken together, they present a serious challenge to any effort to present a unitary and harmonious account of the values that shape property regimes.¹⁷⁵

¹⁷² See, e.g., RICHARD A POSNER, *THE ECONOMIC ANALYSIS OF LAW* 27-31 (2d ed. 1977); Robert C. Ellickson, *Property in Land*, 102 *Yale L.J.* 1315 (1993). I do not, of course, intend to identify reasoning based on economics with a normative commitment to economic dynamism exclusive of other considerations. For a helpful discussion of the place of economic reasoning in thinking about the management of natural resources, see Barton H. Thompson, *What Use Is Economics?*, 37 *U.C. Davis L. Rev.* 175 (2003). Thompson emphasizes that while a maximizing calculus may not in practice provide a satisfactory comprehensive schedule of social welfare, the analytic tools of economics are invaluable for designing efficient means to ends however selected; weighing, if not finally evaluating, the tradeoffs implicit in selection of both means and ends; understanding the perennial threats to effective policy, such as externalities, commons tragedies, and collective-action problems; and presenting one's own commitments in a language generally available to other citizens in the public sphere.

¹⁷³ See, e.g., RICHARD PIPES, *PROPERTY AND FREEDOM* (1999); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); MILTON & ROSE FRIEDMAN, *FREE TO CHOOSE* (1980).

¹⁷⁴ See, e.g., ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1949); WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* (1977); GARY SNYDER, *THE PRACTICE OF THE WILD* (1990).

¹⁷⁵ See, e.g., ALAN RYAN, *PROPERTY* 122-25 (1987) (concluding a survey of theories of the relationship between property and freedom with a warning against any effort to produce a unified theory of these themes).