The American Transformation of Waste Doctrine: A Pluralist Interpretation

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INTRODUCTION

This Article draws on an episode of nineteenth-century American doctrinal history to develop a pluralist approach to explaining changes in property law. It addresses the question: What causes account for the development of property regimes across time? The courts' answer emerges from examination of nineteenth-century...
American reform of the law of waste, which governs the changes tenants may make in the estates they occupy. A line of state supreme court cases, beginning in 1810, transformed the doctrine 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 two other influences on waste doctrine: republican political culture, and the belief that European settlers were under a natural-law 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 theory can provide property regimes either adequate empirical explanation or normative orientation. From a pluralist perspective, property regimes, like other legal and social institutions, reflect a number of different values. In this view, plural values structure individual lives, the activity of societies, and even the diversity of human cultures. These values are not only diverse, but sometimes competing and, past a point, mutually incompatible. Sometimes, however, they are mutually reinforcing. Moreover, in a pluralist approach, diverse values may all be legitimate; they need not reflect error, irrationality, or deviance, but rather may express the variety of 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 vari-

¹ On pluralism in values generally, see ISAIAH BERLIN, The Pursuit of the Ideal, reprinted in THE PROPER STUDY OF MANKIND 1 (Henry Hardy & Roger Hausheer eds., 1997); JOHN GRAY, TWO FACES OF LIBERALISM 34-68 (2000); 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 line embodies 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 DAVID HUME, An Enquiry Concerning the Principles of Morals, in ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 169, 169-75 (L.A. Selby-Bigge ed., 1975) (1777); MICHEL DE MONTAIGNE, Apology for Raymond Sebond, in THE COMPLETE ESSAYS OF MONTAIGNE 318, 318-457 (Donald M. Frame trans., Stanford Univ. Press 1958) (1588); MICHEL DE MONTAIGNE, Of Cannibals, in THE COMPLETE ESSAYS OF MONTAIGNE, supra, at 150, 150-59. The other line embodies the romantic strand of thought associated with Johann Gottfried von Herder. He 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 or independent standard. See JOHANN GOTTFRIED VON HERDER, How Philosophy Can Become More Universal and Useful for the Benefit of the People (1765), reprinted in PHILOSOPHICAL WRITINGS 3, 3-39 (Michael N. Forster ed. & trans., Cambridge Univ. Press 2002).
ous 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 account in contemporary legal scholarship is Harold Demsetz’s Toward a Theory of Property Rights.⁶ Demsetz proposes that property rights emerged and changed in response to the rational desire of economic actors to engage in self-interest-maximizing transactions.⁷ He further proposes that property rights generally operate to internalize externalities by assigning rights to resources—which means 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 toward optimality.⁸ On this premise, people will demand property rights when the benefit of the potential internalization created by the right exceeds the cost of the transaction—that is, when they will in fact be able to reap the benefit that the right makes possible.⁹ The creation or reform of property regimes is typically a response to events that change either the cost of transactions (including monitoring and other enforcement costs) or the ben-

² From a metaethical 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 those values over which there is legitimate disagreement and those 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 nonnegotiable values to be justified or explained?

Happily, a pluralist interpretation of legal history need not address this question. For the pluralist account to be accurate, it does not necessarily have to solve all major problems of 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 assumes.


⁵ 2 WILLIAM BLACKSTONE, COMMENTARIES *4-10.


⁷ See id. at 350.

⁸ See id.

⁹ 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. See, e.g., Thomas W. Merrill, Introduction: The Demsetz Thesis and the Evolution of Property Rights, 31 J. LEGAL STUD. S331, S333 (2002). 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 id. at S338. 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.
benefit to be derived from those transactions, such as changes in technology or in the availability or price structures of exogenous markets.\(^\text{10}\)

Building on Demsetz’s article, property scholars have devoted considerable energy to exploring the transition from one rights regime to another.\(^\text{11}\) 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.\(^\text{12}\)

Others, however, have looked not just to efficiency, but also to problems of collective action, and have concentrated on the mechanisms by which efficiency-driven desire for property rights may be translated into actual change in property regimes. Scholars concerned with collective-action issues in property regimes have generally concentrated on one of two 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.\(^\text{13}\) This scenario tends to suppose that apprehension of net efficiency gains spurs the consensual development of new property rights, so that changes will consistently enhance efficiency.\(^\text{14}\) 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.\(^\text{15}\) This second scenario encompasses cases in which benefits to the group that initiates reform of property rights will come at a net cost to efficiency.\(^\text{16}\) This approach casts a less Panglossian lens across the retrospect of institutional history; it can account for considerable devia-

\(^\text{10}\) See Demsetz, supra note 6, at 350.
\(^\text{12}\) See Haddock & Kiesling, supra note 11; Libecap & Smith, supra note 11; Dean Lueck, The Extermination and Conservation of the American Bison, 31 J. LEGAL STUD. S609 (2002).
\(^\text{13}\) See Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1335–62 (1993); Haddock & Kiesling, supra note 11; Smith, supra note 11, at S478–83.
\(^\text{14}\) See Ellickson, supra note 13, at 1397–98.
\(^\text{15}\) See Banner, supra note 11, at S360; Levmore, Property’s Uneasy Path, supra note 11, at 183–84.
\(^\text{16}\) See Banner, supra note 11, at S360–61.
tions from the supposition that changes in property regimes will consistently enhance efficiency, rather than represent opportunistic behavior.\(^{17}\)

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 inefficient arrangements that benefit powerful groups.\(^{18}\) The two approaches, however, both hold 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.\(^{19}\) It is with respect to the second assumption that a pluralist approach to property differs from both versions of the economic explanation.

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, or 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. One may put the problem this way: whether any one metric, such as wealth-maximization, will serve across time, place, and persons as an adequate stand-in for self-interest generally. In a pluralist approach, the variety of goods with which people identify their self-interest is too diverse for a single such proxy to capture without significant distortion.\(^{20}\) 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 commitment to not

\(^{17}\) See id.; Levmore, Property's Uneasy Path, supra note 11, at 183–84.
\(^{18}\) See supra notes 13–16 and accompanying text.
\(^{19}\) See id.
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 believe they have for desiring those goods. 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.

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 claim expires. 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

21 See Amartya Sen, Introduction: Rationality and Freedom, in Rationality and Freedom 3, 4–7 (2002) [hereinafter Sen, Introduction]; Amartya Sen, Environmental Evaluation and Social Choice, in Rationality and Freedom, supra, at 531, 538 [hereinafter Sen, Environmental Evaluation] (“[I]t 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.”).

22 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 the motives of the actors involved in the situation described that would be, at least potentially, intelligible to them. See Taylor, supra note 1, 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, 56–67 (James Tully ed., 1988) (exploring how one must have an appreciation for a variety of values to understand the meaning of a work of art). 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, Introduction, supra note 21, at 19–33 ( contrasting “externalist” approaches with those that take the agent’s experience of value seriously).

23 I will use the terms “reversioner” and “remainderman” synonymously in this Article, as the technical difference between these terms 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.
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.” 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 activities that the parties understand that the tenant may undertake.

Such a rule is a good example of what Alan Schwartz has called a gap-filling or problem-solving default. This type of rule seeks to complete the terms of an insufficiently explicit contract, while preserving 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. Assuming rational contractors, a gap-filling rule also promotes efficiency by assigning to each contractor rights which the parties to a bargained-over arrangement are assumed to have had in mind in reaching their price; thus, the rule should internalize the benefits and detriments of the rights exchanged in the bargain.

From an economic perspective, waste law addresses the problem of inefficient incentives faced by tenants for years or life. An efficient management strategy for an estate will maximize the present discounted value of its entire expected earnings stream. The tenant, however, will have an 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 nonrenewable resources, such as minerals, and to neglect of resources whose incremental decay does not affect her earnings prospects but

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24 Restatement (Second) of Prop.: Landlords & Tenants § 12.2(1) (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.

25 See id. § 12.2(1) cmt. c.


27 See Ayres, supra note 26, at 5; Schwartz, supra note 26, at 390.

28 See discussion infra Part II.A.

29 See Ayres, supra note 26, at 5; Schwartz, supra note 26, at 390.


31 See id. at 73.
will affect the long-term value of the estate, such as soil, fences, and buildings.\textsuperscript{32} Richard Posner has suggested that an efficient solution to this problem would be to model the tenant \textit{as if she were the owner}, authorizing her to do only what a rational owner would have incentive to do, not any more or less.\textsuperscript{33}

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;\textsuperscript{34} 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.\textsuperscript{35} Either the two formulations were treated as synonymous, or the standard of husbandry was presented as constituting the inquiry following from the general principle set by the standard of material injury.\textsuperscript{36} 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 an estate managed in a way consistent with its efficient exploitation.\textsuperscript{37}

To the extent that scholars and commentators pay attention to the law of waste, Posner’s efficiency-enhancing doctrine accords with the mainstream view. Only a few other scholars have so much as paused over waste law in their accounts of property. Morton J. Hor-

\textsuperscript{32} See id. at 71-74.
\textsuperscript{33} See id. at 72-73.
\textsuperscript{34} See Pynchon v. Stearns, 52 Mass. (11 Met.) 304, 311 (1846) (stating that an action consistently practiced by regional farmers is not waste); Owen v. Hyde, 14 Tenn. (6 Yer.) 334, 339 (1834) (explaining that the tenant did not commit waste “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”); Keele v. Eastman, 11 Vt. 293, 293-94 (1839) (stating that tenant does not commit waste by acting “in a prudent and husbandlike manner”).
\textsuperscript{35} Jackson v. Brownson, 7 Johns. 227, 232-34 (N.Y. Sup. Ct. 1810); see Pynchon, 52 Mass. (11 Met.) at 312 (“[N]o act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance . . . .”); Davis v. Gilliam, 40 N.C. (1 Ired. Eq.) 308, 311 (1848) (“The tenant may use the estate, but not so as to take from it its intrinsic worth.”); Shine v. Wilcox, 21 N.C. (1 Dev. & Bat. Eq.) 651, 632 (1837) (“[T]he cutting down of timber is not waste, unless it does a lasting damage to the inheritance . . . .”); Clemence v. Steere, 1 R.I. 272, 274 (1850) (noting that “it is necessary to show that change is detrimental to the inheritance” to prove waste); Owen, 14 Tenn. (6 Yer.) at 339 (arguing that the question to ask in a waste case is, “[D]id [the tenant] materially injure the . . . estate[?]”); Keeler, 11 Vt. at 294 (stating that the tenant may make changes to the land, but “not so as to cause damage to the inheritance”).
\textsuperscript{36} See, e.g., Clemence, 1 R.I. at 274 (stating that “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”); supra notes 34-35.
\textsuperscript{37} See Posner, supra note 30, at 72-73.
witz has argued that the evolution of waste law was part of a general development in nineteenth-century American law toward (1) treating land exclusively as a commodity, and (2) freeing land from both social controls and inconvenient existing claims, held by smallholders, in order to make it available as a capital-generating resource for the economic development of the continent.\textsuperscript{38} 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.\textsuperscript{39} Sprankling contends that an "instrumentalist" view of the natural world, coupled with a perceived imperative to bring the new continent under the axe and plough, drove the American law of waste to develop a good husbandry standard, which allowed tenants to clear and develop land in the interest of advancing cultivation.\textsuperscript{40}

Neither Horwitz's nor Sprankling's account is explanatorily incompatible with the conventional economic view of waste law that Posner propounds. They may be distinguished, however, by their normatively founded distaste for Posner's efficiency-enhancing doctrine. Horwitz would believe Posner's doctrine tends to reflect the interests of the capitalist class,\textsuperscript{41} while Sprankling sees in waste doctrine a lack of proper regard for the land's intrinsic worth in an unspoiled state.\textsuperscript{42}

Against this background, 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 I of this Article, I trace the transformation of waste doctrine from a strict English rule to a broad American standard articulated in the watershed 1810 New York case of \textit{Jackson v. Brownson.}\textsuperscript{43} In Part II, 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 explained as an expression of the then-current commitments in America.

\textsuperscript{40} See id. at 534–36.
\textsuperscript{41} See Horwitz, supra note 38, at 54–62.
\textsuperscript{42} See Sprankling, supra note 39, at 533–36.
\textsuperscript{43} 7 Johns. 227 (N.Y. Sup. Ct. 1810).
to republicanism and economic dynamism. I explore these ideas through the thoughts of Chancellor James Kent, who joined the Jackson majority, and argue that the promotion of these values in American waste law adds to our understanding of how a default rule can have normative as well as efficiency-enhancing functions.

I

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 focused on the prerogative of landowners. The doctrine set out the rights to land use of tenants who occupied the land for a term of life. They held these rights 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: “[Farmers], during their terms, shall not make waste, sale nor exile of [house,] woods, men, nor of any thing belonging to the tenements that they have to [farm] without special licence had, by writing of covenant, making mention they may do it.”

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. A successful legal action in waste resulted in treble damages and forfeiture, and an injunction on conduct constituting waste was available in equity.

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,” 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.” Both Blackstone and 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 by landlords.

44 Statute of Marlborough, 1267, 52 Hen. 3, c. 23, § 2 (Eng.) (emphasis added).
45 See generally 1 EDWARD COKE, A COMMENTARY UPON LITTLETON 53a–53b (18th ed. 1823) (detailing the numerous and intricate restrictions on tenants' land use under waste law).
46 See 2 BLACKSTONE, supra note 5, at *283.
48 2 BLACKSTONE, supra note 5, at *281.
49 3 id. at *223.
or reversioners only to harass, which was in some tension with the narrow and exacting requirements of the doctrine. 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.” Tenants were required to use deadwood for these tasks unless none was available, in which case they could take living trees in ascending order of their quality as timber: beech and maple first, then oak, ash, and elm. In places where finer woods grew widely, tenants might be free to take such poorer trees as beech and maple without regard to bote, but nowhere in England could they harvest oak, ash, or elm outside the strict limits of waste doctrine. 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.

Waste law similarly restricted tenants’ power to change patterns of land use. They could not erect new buildings or fences without permission, but could only repair what they received with the land. Traditionally, it was no defense that a new building increased the value of the property. Tenants also committed waste if they opened new mines on the land to search for hidden minerals, but they could continue using open mines for their own use. 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. Two reasons were given for this restriction: First, 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, tenant initiative would “change the

50. See 7 Holdsworth, supra note 47, at 277–78 (noting the strictness of the common law rule); infra notes 62–64, 66.
51. See 2 Blackstone, supra note 5, at *281–82; 1 Coke, supra note 45, at 58b.
52. See 2 Blackstone, supra note 5, at *281; 1 Coke, supra note 45, at 53a.
53. See 2 Blackstone, supra note 5, at *281–82.
54. See 1 Coke, supra note 45, at 53a.
55. Id.
56. See id.
57. See 2 Blackstone, supra note 5, at *282. This restriction was largely dispensed with in the eighteenth and nineteenth centuries, as it was seen as anachronistic and onerous. See 7 Holdsworth, supra note 47, at 277–78.
58. See 2 Blackstone, supra note 5, at *282; 1 Coke, supra note 45, at 53a.
59. See 2 Blackstone, supra note 5, at *282.
60. As Coke put it, “If the tenant convert arable land into wood, or è converso, or meadow into arable, it is waste, for it changeth not onely the course of his husbandry, but the proofe of his evidence.” 1 Coke, supra note 45, at 53b; see also 2 Blackstone, supra note 5, at *282 (quoting this language from Coke).
course of... husbandry” without the permission of the landlord.\footnote{1 C. Coke, supra note 45, at 53b.} 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.”\footnote{The Provost and Scholars of Queen’s College, Oxford v. Hallett, (1811) 14 East. 489, 491 (K.B.). In this case, the tenant “erected fences and banks[,]... subdivided the same [land] into small inclosures[,]... [and] ploughed up and converted great part into tillage.” Id. at 490. The plaintiffs did allege that the value of the property was reduced, which was of course material to damages, but it was not the focus of the court’s inquiry. See id. at 489-90.} 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.\footnote{Simmons v. Norton, (1831) 7 Bing. 639, 646-48 (KB.). In this case, the defendant had plowed a meadow and pleaded that “the meadow had become sour and mossy through age; that it had been ploughed up 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 [land]... or into orchard,” there could be no doubt that the action was prima facie waste, and must be defended as melioration. See id. at 648-49.} 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.\footnote{See Jones v. Chappell, (1875) 20 L.R.-Eq. 539 (Ch.). 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. See id. at 539-41. 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. Cobley, [1892] 2 Ch. 253, 262-63 (1891) (finding that where a lease explicitly permitted agricultural activity in keeping with that of the neighborhood and where other farmers had built greenhouses, the defendant tenant could not be liable for waste for doing the same).} This embrace of the dynamism of manufacturing, though, came for quite distinct reasons, and long after American law had completed its break from English doctrine.\footnote{By “distinct reasons,” I mean that the English law’s embrace of manufacturing reflected neither the republicanism nor the imperative to clear wilderness that motivated the American change.} Moreover, the English industrial cases rhetorically displayed great regard for the old principle of stability in agricultural practice.\footnote{See W. Ham Cent. Charity Bd. v. E. 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, (1833) 5 B. & Ad. 507, 59 R.R. 549, 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
time of the American divergence, English waste law supported a system in which tenants' initiative was closely constrained, 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 the English law? It was, to begin with, a default rule, always susceptible to contractual revision. As noted previously, scholars have identified several kinds of default rules, with the most commonly discussed being 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. 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 focuses the attention of the parties on the issue it addresses and induces them to agree to another term if the default term is not optimal. Where the strict requirements of waste doctrine induced parties to bargain expressly over a tenant's power to exploit the reversioner's land, the doctrine had this function. For example, the default rule of waste law governing the tenant's rights to minerals in the land, 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 types of default rules have the same aim: enhancing the economic efficiency of agreements by leading bargainers to welfare-maximizing terms. These default rules are distinguished, however, by their strategies: On the one hand, the gap-filling default provides terms to which the parties would optimally have agreed, and on the other, the bar-
gaining default induces the parties to specify those terms themselves.\footnote{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 \textit{property} law? While the doctrine concerns the use of plots of land not so different from the Blackacre examples used in property-law classes, defining \textit{"property"} by its domain of objects is notoriously inadequate. \textit{See}, \textit{e.g.}, \textsc{Laure S. Underkuffler}, \textit{The Idea of Property: Its Meaning and Power} 11–15 (2003). In a time when those objects are increasingly heterogeneous and intangible, such an object-oriented equation would be rather like identifying \textit{"law"} with those events occurring in buildings designed by the architect Cass Gilbert. \textit{See} \textsc{Cass Gilbert}, \textit{Life and Work: Architect of the Public Domain} (Barbara S. Christen & Steven Flanders eds., 2001) (providing perspectives on the life of Cass Gilbert and exploring the dimensions of his work and influence). See, for example, the extremely illuminating account of this trend and legal-theoretical responses to it in Thomas C. Grey, \textit{The Disintegration of Property, in} \textsc{Nemos XXII: Property} 69, 71–82 (J. Roland Pennock & John W. Chapman eds., 1980).

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 within the law of torts. \textit{See} \textsc{Charles Donahue, Jr.}, \textit{The Future of the Concept of Property Predicted from Its Past, in Nemos XXII: Property}, \textit{supra}, at 28, 43 (noting that the first \textit{Restatement of Property largely relegated waste to tort}).

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." \textit{See}, \textit{e.g.}, \textsc{Underkuffler, supra}, at 11–15; Grey, \textit{supra}, at 81. 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 \textit{ex ante} definition of property or of legal rights in general, I have begun from a specific body of doctrine that governs relative rights in a definite class of resources, and I have sought to illuminate some of the values at work in that legal formation. \textit{Cf} \textsc{Bruce A. Ackerman}, \textit{Four Questions for Legal Theory, in} \textsc{Nemos XXII: Property}, \textit{supra}, at 351, 351 (beginning his exploration of how lawyers construct property arguments using environmental litigation as the vehicle for that exploration). While I cannot claim that \"[i]t was Wittgenstein who led me\" to my inquiry, as Ackerman does, I do 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. \textit{See id.} As Ackerman puts it, \"Rather than begin a jurisprudential study of property by asking, \textit{What is law?} or \textit{What is property?} I wanted to ask how people \textit{used} property talk.\" \textit{Id.} In a similar vein, \textsc{Amartya Sen} notes that \"it is hard to judge what choices are or are not \textit{consistent} or \textit{irrational} without going in some detail into the way the choosers see the problem and what they think they are trying to achieve.\" \textsc{Sen}, \textit{Environmental Evaluation, supra} note 21, at 538. A good deal of what is valuable in that inquiry comes not only from the law of property (particularly its history in relation to political thought), but also from the theory of contract law. It seems plausible that further inquiry into the law of property and neighboring fields will benefit from similar heterogeneity. \textit{See} \textsc{Grey, supra}, at 71–73, 80–81 (outlining various specialized usages of the term \"property\" and suggesting that a heterogeneous conception of property rights frees us to gain insight into productive ways of marrying traditional and nontraditional 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.}
prerogative. Schwartz has identified a "normative default" as one directing a result that "the decision maker prefers on fairness grounds but is unwilling to require."\textsuperscript{71} 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; this 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,\textsuperscript{72} 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 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"\textsuperscript{73}—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"\textsuperscript{74}: 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 dominant role.\textsuperscript{75}

\textsuperscript{71} Schwartz, \textit{supra} note 26, at 391.

\textsuperscript{72} 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, in \textit{Rationality and Freedom}, \textit{supra} note 21, at 65, 76-97 [hereinafter Sen, Social Choice]. 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 multidimensional 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 this third issue, see also Amartya Sen, Development As Freedom 27 (1999) [hereinafter Sen, Development] (arguing, for example, that a person may prefer to live under a free system rather than an "unfree" system even if both systems provide the same commodities and income).

\textsuperscript{73} Schwartz, \textit{supra} note 26, at 391.

\textsuperscript{74} Particularly informative on the possibility of meaningful "transformatory" activity in the law is 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. See Sen, \textit{Introduction}, \textit{supra} note 21, at 14-19. On the empirical plane, Sen 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. See Sen, Social Choice, \textit{supra} note 72, at 90-92.

\textsuperscript{75} Schwartz argues that normative and transformative rules are ill-advised ideas. A normative default, he argues, will be incorporated into contracts only by those who already prefer it. See Schwartz, \textit{supra} note 26, at 402. Choice of a default rule cannot affect the content of agreements, but only the cost of bargaining, which increases when parties must contract around an unpopular default. See id. Transformative rules, Schwartz notes, are
C. The American Transformation of Waste Law in Jackson v. Brownson

In 1810, the Supreme Court of New York\(^7\) decided Jackson v. Brownson,\(^7\) the key case in the American transformation of waste law. The plaintiffs, heirs of the landholder Philip Schuyler,\(^7\) were lessors seeking to repossess the land of a tenant for life who had allegedly violated a covenant in his lease forbidding him to "commit any waste."\(^7\) 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."\(^8\) By 1796, when the lessee subleased the northern portion of the land to another farmer, Brownson had cleared all but thirty-five of the original 133 acres, leaving twelve acres of forest on the land he continued to lease.\(^8\) 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.\(^8\) The trial court ruled in Brownson's favor on a technicality, and the plaintiffs appealed to the New York Supreme Court to determine whether Brownson's clearing was waste as a matter of law.\(^8\)

likely to encounter the same difficulty, as they will more likely be resisted than accepted. See id. at 414. Moreover, transformative rules draw contract law away from the function it performs best and for which there is 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. See id. Finally, such putatively transformative standards as conscionability and good faith are not self-interpreting, but require the courts to supply their meaning. See id. at 415. An ex-post specification of a standard, however, cannot achieve its transformative purpose, because that purpose requires the parties to be familiar with the substance of the standard—as well as the state's endorsement of the standard—before they contract. See id. at 413-15.

Schwartz's illuminating arguments are probably dispositive for most cases in the context he addresses: agreements between "sophisticated contractors." See id. at 392. Later in this Article, I draw on related arguments of Schwartz's to help explain the relative failure of the standard of sustainable use in American waste law. See infra Part II.A. 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 economically and symbolically.

76 The Supreme Court was then the highest court of legal appeals in the state.
77 7 Johns. at 228. 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. McCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865, at 3 map.1 (2001).
78 Id. at 228. See id., at 229. There was some dispute over these facts, as the plaintiffs claimed that Brownson had entirely cleared his portion of the land. See id. at 228.
79 Jackson, 7 Johns. at 228.
80 Id. at 227-28.
81 See id. at 227-29.
82 See id. at 229. The trial court held that the sublease 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. See id. at 229.
Philip Schuyler, a general in the Continental Army and the father-in-law of Alexander Hamilton, was a scion of one of the great landholding families of the Hudson Valley; together these families’ tenant-inhabited property represented one of the great attempts to create a landed aristocracy in North America.\(^8\) In a country that saw itself as a nation of yeoman farmers, craftsmen, and other independent smallholders,\(^8\) the plaintiffs, heirs of Schuyler, 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 three to two split in which James Kent, who would later author *Kent’s Commentaries*, joined the majority in creating a new and distinctly American doctrine of waste.\(^8\)

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.\(^8\) The majority ruled in favor of the plaintiffs, but adopted the defendant’s interpretation of the doctrine, seizing on Blackstone’s formulation that waste was comprised of actions that did “a permanent injury to the inheritance.”\(^8\) In England, the common law deemed harvesting timber or changing patterns of land use to be 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.\(^8\) Despite applying the more flexible standard, the *Johnson* court found that the clearing was waste as a matter of law, because Brownson had cut nearly all the wood on the estate and did not leave enough to supply timber for farm maintenance.\(^9\)

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\(^8\) See Eric Foner, *Free Soil, Free Labor, Free Men* 11–39 (1970) (discussing the Republican Party’s Civil War–era platform advocating for the nation’s laborers, a group that northern society at the time defined to include farmers, small businessmen, and independent craftsmen); Drew R. McCoy, *The Elusive Republic* 62–70 (1980) (recounting the hopes of Benjamin Franklin and other revolutionaries that Americans would remain a “virtuous” people of farmers, artisans, and other independent laborers); Wood, *supra* note 84, at 271–86 (describing a second, social revolution against the American aristocracy).

\(^8\) See Jackson, 7 Johns. at 227.

\(^8\) See id. at 229–32.

\(^8\) See id. at 232–35.

\(^8\) See discussion *infra* Part I.D.

\(^8\) See Jackson, 7 Johns. at 232–33.
The dissenting justices\textsuperscript{91} recognized the significance of the movement from rule to standard, and reproached the majority for its embrace of vagueness. Justice Spencer, joined by 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; and 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.\textsuperscript{92}

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.\textsuperscript{93} 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."\textsuperscript{94} By contrast, "[t]he rule furnished by the common law is fixed and certain."\textsuperscript{95} 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."\textsuperscript{96} Replacing a clear rule with a "fanciful and vague" standard created undesirable uncertainty: "[I]f a covenant not to commit waste is here-

\textsuperscript{91} 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 sublease of a portion of his land to a third party had annulled the original agreement with Schuyler, which provided for forfeiture upon waste. They accordingly contended that there was no basis for a forfeiture action and that the plaintiffs therefore should have sought damages instead. See id. at 235–37 (Spencer, J., dissenting).

\textsuperscript{92} Id. at 236–37.

\textsuperscript{93} Id. at 237.

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} Id.
after to be considered as a covenant to leave a sufficient quantity of land in wood, no lessee is safe" from the shifting opinions of courts and juries on a matter better left to freely contracting parties.97

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. The Massachusetts Supreme Court held that "[i]n 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."98 In Tennessee, when determining whether a widow with a life estate had committed waste, the supreme court asked, "[D]id she materially injure the dower estate thereby?"99 In Rhode Island, to succeed in an action of waste, the supreme court

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97 See id. Morton Horwitz takes a different view of the dissent's position. In Horwitz's view, "[t]he dissenting minority wanted to go still farther in changing the law to suit the necessities of development[,] . . . [hoping to] sever[ ] entirely the right to property from the right to prevent tenants from completely altering the estate." Horwitz, supra note 38, at 55. 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: "[I]n 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." Jackson, 7Johns. at 235 (Spencer, J., dissenting). Because the dissenters 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 ejectment. See id. 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." Id. at 237. 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. See id.

Unfortunately, the nature of Jackson v. Brownson makes it difficult to discern what the dissent believed should be the 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.

98 Pynchon v. Stearns, 52 Mass. (11 Met.) 304, 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 the issue of whether draining and raising a wetland constituted waste was a jury question).

99 Owen v. Hyde, 14 Tenn. (6 Yer.) 334, 339 (1834) (holding that 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).
held that "it [was] necessary to show that the change [was] detrimental to the inheritance." In North Carolina, "the cutting down of timber [was] not waste, unless it [did] a lasting damage to the inheritance, and deteriorate[d] its value; and not then, if no more was cut down than was necessary for the ordinary enjoyment of the land." Under Vermont law, the tenant could act freely, but "not so as to cause damage to the inheritance."

The Jackson majority did take care to connect its interpretation of the doctrine with the English common law rule, and tried to show that its articulation of the doctrine did not vary from the common law. The majority 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 cutting in regions with better stocks of trees. Because "[w]hat kind of wood in England is deemed to be timber depends upon the custom of the country[, and] wood which in some counties is called timber is not so in others," the court concluded that "the prohibition [on cutting timber in England], in principle, extends no further . . . there than it does here." The principle which allegedly joined the two continents was the following: "[W]henever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste."

Bolstered by American precedent, however, the cases that followed displayed none of Jackson's pretense that the American standard simply perpetuated the principle of the English rule. Instead, the opinions are studded with such phrases as "the law must necessarily be

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100 Clemence v. Steere, 1 R.I. 272, 274 (1850). The court in this case adhered to a standard in which waste was that which "injured the farm, or was such a change as no good farmer would make." Id. The court ruled that cutting timber for sale from an estate was ordinarily waste, but that a jury might find it not so where, as here, the sale was to support a widow with a testamentary life estate. See id. at 275. The court ruled that cutting hooppoles (timber in the early stages of growth) was waste unless doing so was ordinary practice in 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. See id. at 274-76. 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. See id. at 276-77.

101 Shine v. Wilcox, 21 N.C. (1 Dev. & Bat. Eq.) 631, 632 (1837) (holding that a widow and her new husband had not committed waste by clearing some seventy acres of forest for cultivation because there was an 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).

102 Keeler v. Eastman, 11 Vt. 293, 294 (1839) (holding that clearing timber to open land to cultivation is not waste if it comports with husbandlike behavior, because it does no permanent injury to the estate).


104 Id.

105 Id. at 234.
varied in this country from the English doctrine . . . [as] it would be absurd to apply the rigid principles of the English law to a state of things wholly variant from theirs”;106 “whatever may be [the] law of England, it is not in this Commonwealth waste, unless it may be prejudicial to the plaintiff”;107 and “[w]hile our ancestors brought over to this country 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.”108 The Jackson majority’s pretense of continuity could end because the change to which the dissenters objected had triumphed.

1. The Standard of Material Injury

What did it mean, in the words of Jackson v. Brownson’s principle, “materially to prejudice the inheritance”?2109 The rule could not be so simple as to require that the property 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, the cleared land was worth considerably more than the land as wild timber,110 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.111 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 somewhat the value of the land, but not committed waste.112 A reduction in the value of the estate, then, was not always a necessary condition of waste, nor was it sufficient to constitute waste. Whether waste had occurred depended more on a concept of appropriate use than on whether the estate’s value had increased, decreased, or held constant.

In 1848, the North Carolina Supreme Court made a particular effort to formulate the standard of “material prejudice” as a general principle. The court found that a widow holding a life estate could sometimes clear timber for cultivation, but could not undertake an

107 Pynchon v. Stearns, 52 Mass. (11 Met.) 304, 311–12 (1846) (observing that adopting the English rule would arrest “the progress of improvement” in the United States).
109 Jackson, 7 Johns. at 234.
110 See id. at 229.
111 See id. at 234.
112 See supra note 51 and accompanying text.
operation of draining turpentine from living pine trees, because "[t]he tenant may use the estate, but not so as to take from it its intrinsic worth." The court held 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." In either turpentine production or excessive timbering, the tenant "takes ... not the product of the estate arising in his own time, but he takes that which nature has been elaborating through ages, being a part of the inheritance itself." This was a kind of usufructuary standard, and it recurred in the jurisprudence of North Carolina, as in the state 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." The formula was also quoted approvingly by the Supreme Court of Georgia.

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 comport 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 degree, it was treated as a question for juries rather than courts.

While also reciting the standard that waste was prejudice to the inheritance, the Massachusetts Supreme Court held that because "it has been the constant usage of our farmers ... to change the use and

113 Davis v. Gilliam, 40 N.C. (5 Ired. Eq.) 308, 311 (1848).
114 Id.
115 Id. at 312.
116 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).
117 See Smith v. Smith, 51 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.
118 See, e.g., Owen v. Hyde, 14 Tenn. (6Yer.) 334, 339 (1834) ("[I]f 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 ... such clearing would not be waste.")
119 See, e.g., Shine v. Wilcox, 21 N.C. (1 Dev. & Bat. Eq.) 631, 632 (1837) (holding that the question of waste depended partly on "the ordinary use made of the trees in the part of the country where the land is situated").
cultivation of their lands, as occasions have required," that action could not be waste.\textsuperscript{121} 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."\textsuperscript{122} Tennessee made the standard of "material injury" specific thus: "[I]f the proportion of wood land was such as a prudent farmer would have considered it best to reduce a portion of it to cultivation," then there was no waste in cutting timber.\textsuperscript{123} In Rhode Island, in contrast to the strict English rule, "it [was] necessary [for waste] to show that the change [was] detrimental to the inheritance and contrary to the ordinary course of good husbandry."\textsuperscript{124}

II
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 incentive to maximize presently discounted long-term returns from the estate, and so took actions inconsistent with the interest of the reversioner. The question was how to mediate between the reversioner and a troublesome tenant in a setting where land use was dynamic and few, if any, settled patterns could be expected to persist from decade to decade. The \textit{Jackson} majority seems to have believed that the new standard would create sufficient flexibility to accommodate changing patterns of land use while protecting reversioners.\textsuperscript{125} The dissenters objected that the new standard was unnecessary, because the old rule served perfectly well as a bargain-inducing default, and counterproductive, because the content of the new standard was indefinite and likely to shift with the opinions of courts and juries.\textsuperscript{126}

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

The argument in favor of the American standard as a problemsolving default—one that fills gaps in contracts with welfare-maximiz-

\textsuperscript{121} Pynchon v. Stearns, 52 Mass. (11 Met.) 304, 311 (1846).
\textsuperscript{122} Keeler v. Eastman, 11 Vt. 293, 293 (1839).
\textsuperscript{123} Owen, 14 Tenn. (6 Yer.) at 339.
\textsuperscript{124} Clemence v. Steere, 1 R.I. 272, 274 (1850).
\textsuperscript{125} See \textit{Jackson}, 7 Johns. at 235 (holding that, given "the different state of many parts of our country, timber may, and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner").
\textsuperscript{126} See \textit{id.} at 237 (Spencer, J., dissenting).
ing 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 when 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 diminishes the estate’s value through action or neglect. Under optimal bargaining conditions, the assumption goes, 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.

American courts envisioned this flexibility in contrast to the fixity of the English rule, which they saw as potentially locking the tenant into existing land-use patterns and forbidding the mutually beneficial activity that the American standard embraces. Some courts asserted 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. An important function of the English rule was that, as a default rule, it locked no one into anything, but served only as a backdrop to bargaining. Parties incorporated the rule into their agreements only by declining to specify alternative terms.

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 volunteered at trial that although “[t]here is no reason why the English rule should not be strictly applied to lands under cultivation in this country[,] . . . in regard to wild lands it ought not to be carried to the same extent.” The jurists who defended the American reform of waste doctrine were protecting a westward movement of clearing and settlement that

\[127\] See supra Part I.C-D.
\[128\] See, e.g., Pynchon v. Stearns, 52 Mass. (11 Met.) 304, 311 (1846) (“That the principle of [the English rule] under consideration was . . . inapplicable to the condition of the country is obvious . . . .”); Jackson, 7 Johns. at 233 (contrasting the inflexible English rule with the need for adaptability in the race to tame the American wilderness).
\[129\] See Schwartz, supra note 26, at 390–91 (discussing a number of defaults, as opposed to immutable rules).
\[130\] Jackson, 7 Johns. at 230.
needed no protection: A rationally self-interested reversioner would not insist on keeping a plot of land in wilderness unless relative property values 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 by 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 (1) solves a problem that a reasonable portion of contractors will face (2) in a way that is acceptable to those contractors and (3) in a manner that is guided by accessible or determinable information.\(^{131}\) 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.\(^{132}\)

Here I concentrate on the first criterion, although I take up the third later. Can the 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 distinguish between such tenants and others whose changes in land use were beneficial or neutral to the reversioner.\(^{133}\) Assuming that the parties negotiated rationally, however, there is every reason to expect that they would agree \textit{ex ante} to changes they regarded as mutually beneficial, such as clearing wilderness or changing cropping patterns, and revisit the agreement to pursue mutually beneficial opportunities that arose after the initial agreement. This is the sort of bargaining the Jackson dissenters envisioned as \textit{induced} by retention of the English rule.\(^{134}\) Under this view, the American standard may actually have tended to \textit{produce} the problem it was meant to solve by lulling inattentive parties into accepting

\(^{131}\) See Schwartz, supra note 26, at 392.

\(^{132}\) See \textit{id}.

\(^{133}\) See, \textit{e.g.}, Pynchon, 52 Mass. (11 Met.) at 311 (advocating a standard that distinguished between harmful acts of waste and acts that changed the state of the property but did not cause injury to the reversioner's inheritance).

\(^{134}\) See Jackson, 7 Johns. at 237 (Spencer, J., dissenting).
its indeterminate principle rather than bargaining *ex ante*. That courts applying the standard had no special aptitude for solving the *ex post* problems the American standard may have induced would only have exacerbated the difficulty.

The *Jackson* dissenters were not alone in recognizing the value of the English rule, and the disutility of its American replacement, in this respect. American courts retained the English law of waste for minerals,\textsuperscript{135} apparently as an equilibrium-inducing or bargaining default, just as the *Jackson* dissenters proposed to do with the law of waste for renewable resources in land. In 1852, plaintiffs invited the Pennsylvania Supreme Court to apply the same standard to mining that American courts had adopted for other forms of 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."\textsuperscript{136} 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.\textsuperscript{137} The testator 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.\textsuperscript{138}

The court continued by urging that "we . . . get ourselves freer from the notions derived from feudal subordination,"\textsuperscript{139} which evidently was how some exponents of free contract had come to regard the doctrine of waste, with its judicial imposition of a standard of appropriate land use.\textsuperscript{140} 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.\textsuperscript{141} I have found no American jurisdiction in

\textsuperscript{135} See supra notes 58–59 and accompanying text.

\textsuperscript{136} Neel v. Neel, 19 Pa. 323, 326 (1852).

\textsuperscript{137} See id. at 327–29.

\textsuperscript{138} Id. at 328.

\textsuperscript{139} Id.


\textsuperscript{141} The Pennsylvania 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 using. 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, 167 (1854). The Virginia Supreme Court upheld the right of a tenant for life
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 cause to doubt the utility of the American standard as a problem-solving or gap-filling default.

B. Efficiency-Enhancing Economic Explanation II: Breaking Bilateral Monopolies

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 to which each party would have agreed under optimal conditions. A related economic explanation exists, however, 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 that the English rule might have produced. The English rule created bilateral monopolies, in which both tenants and reversioners enjoyed a kind of veto over improvements to the estate. The tenant, of course, could simply refuse to make an improvement. The reversioner could refuse to approve an improvement, and then institute a waste action if 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 both parties, tenant and reversioner might reach an impasse in bargaining over the distribution of the added income from the improvement. The American standard theoretically fixed that problem by replacing the reversioner's veto with a trump for the tenant, who could make the improvement, collect the resulting 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 wetlands. The court remarked that preventing such action, though it would accord with the "ancient doctrine of waste," would

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142 Richard Posner concentrates his economic account of waste doctrine on this explanation. See Posner, supra note 30, at 72-73.
143 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, the reversioner might still insist on taking the income from the timber, and the tenant might refuse.
144 52 Mass. (11 Met.) 304, 310 (1846).
“greatly impede the progress of improvement, without any compensating benefit.”

This policy of approving tenants’ changes in land use was put to a sterner test in *Livingston v. Reynolds*, 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 eight or 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 good husbandry. The Court for the 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.” If the Chancellor considered brick-making compatible with good husbandry, the court contended, “the peculiar ideas of the Chancellor of good husbandry . . . must differ materially from the generally received opinion of the world,” as must his idea of waste. The overwhelming consideration distinguishing the two cases, however, appears to be judicial hesitation to permit a tenant to impose a qualitative change in land use on a reversioner, even when the change arguably improved the overall value of the estate. It was relatively uncontroversial that clearing timber for cultivation represented improvement, at least during the early years of the American standard, but the standard’s originators seem not to have considered the potential application to more controversial changes, such as a tenant’s erection of a semi-industrial facility on formerly forested land. While the former type of change brought land from wilderness into the ambit of civilized activity, the latter may have imposed too much on the reversioner, whose superior estate might have given him the expectation of some input in deciding whether to abandon agricultural use or supplement it with something entirely different.

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145 *Id.* at 312.
146 26 Wend. 115 (N.Y. 1841).
147 *See id.* at 115–16.
148 *See id.* at 116–17.
149 *Id.* at 121 (opinion of the President of the Senate).
150 *Id.* at 121–22.
151 It may be, of course, that the Chancellor simply botched his evaluation of the facts in this case, as operating 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 is not required.
152 I believe this to be a more accurate characterization of the mood of courts in applying waste doctrine than Horwitz’s view that courts were inclined to strip reversioners of any say respecting changes in land use in the interest of promoting development. For an explanation of my difference with Horwitz regarding *Jackson*, which he relies upon heavily for this argument, see *supra* note 97 and accompanying text.

The hesitation to embrace tenants’ changes from agricultural to industrial genres of land use, while endorsing improvements within general categories of use, is compatible...
Moreover, the respective vetoes of the tenant and reversioner regarding improvements would not be symmetrical in a situation 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 Jackson court had such a situation in mind, it may have deliberately made 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 monopoly” explanation than the one I suggested at the beginning of this subpart, and one concerned at least as much with fairness as with welfare maximization.153

C. The Pluralist Addition I: Republicanism

The second efficiency-enhancing explanation, concerned with bilateral monopolies, has some force, particularly in its more restricted version focused on distributive issues. But there is good reason to believe that it was not the whole story, and that distinct and complementary purposes also motivated the courts.154 Recall the status-confirming function of the English rule in its aspect as a normative default,155 and its corresponding educative function as a quasi-transformative default.156 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 in-

with the drift of the English cases from the late nineteenth century that I discuss in note 64, supra.

153 In either a stronger or a weaker version, such an explanation nicely complements the account of waste doctrine as a reflection of a normative commitment to dynamism in land use, which I discuss below. See infra Part II.D.

154 In describing an explanation founded in political values as “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’ assessments 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 Sen, Introduction, supra note 21, at 22–26. For specific ways in which the valuation of social states and their institutional arrangements may be distinct from market valuations, see Sen, Environmental Evaluation, supra note 21, at 540–42. 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, as I discuss in some detail below. For an illuminating discussion of this issue, see generally Amartya Sen, Markets and Freedoms, in Rationality and Freedom, supra note 21, at 501, 501–27 [hereinafter Sen, Markets].

155 See supra notes 72–73 and accompanying text.

156 See supra notes 74–75 and accompanying text.
voked. In addition to spoliation by an opportunistic or neglectful tenant, which the English and American defaults both prevent, 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 noneconomic preferences, or to underscore their social superiority to a highly ambitious and excessively self-regarding tenant.

Consider how the judges in Jackson might have viewed such a use of the doctrine. As noted,\textsuperscript{157} the plaintiffs were the heirs of Philip Schuyler, a member of the landholding aristocracy of the Hudson Valley.\textsuperscript{158} The Hudson Valley landlords’ relations to their tenants were characterized by pervasive social and political hierarchy:\textsuperscript{159} In the seventeenth century, some set up manorial courts in the manner of English lords;\textsuperscript{160} well into the nineteenth century, they controlled their tenants’ votes as blocs and confounded the newly introduced secret ballot by distributing premarked ballots and asking tenants to fold the ballots into a distinctive shape for instant identification.\textsuperscript{161} 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;\textsuperscript{162} until its nineteenth-century judicial abolition, such a deed included a payment to the landlord of one-quarter the price a tenant fetched by transferring his interest.\textsuperscript{163} Annual rent included

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\textsuperscript{157} See supra note 78 and accompanying text.
\textsuperscript{158} See McCurdy, supra note 78, at 10. Lawrence M. Friedman notes that eliminating the “feudal” and “tyrannical” aspects of the English common law from American property law was particularly urgent for New Yorkers because of the presence of the Hudson Valley estates. See Friedman, supra note 84, at 210–11.
\textsuperscript{159} For a discussion of the difficulties faced by Hudson Valley aristocrats, among others, in maintaining their social status, see Wood, supra note 84, at 113–15. Wood provides a rich description of the aristocratic cast of pre-revolutionary American society. See id. at 11–92; see also McCurdy, supra note 78, at 1–31 (describing the aristocracies that controlled the Hudson Valley and the political and social forces that would lead to their demise); 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) (detailing the social, political, and economic forces that led to the weakening of the Hudson Valley aristocrats’ hold over tenants).
\textsuperscript{160} See Kades, supra note 159, at 942.
\textsuperscript{161} See id. at 950.
\textsuperscript{162} See id. at 942; McCurdy, supra note 78, at 22–23.
\textsuperscript{163} See McCurdy, supra note 78, at 1. Two legal theories jockeyed to sustain this unorthodox form of leasehold. See id. at 24–31. Parliament’s act of Quia Emptores in 1290 established the free alienability of freeholders’ land and forbade the creation of new feudal obligations upon sale. See id. at 25–27. This act, however, 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. See id. at 27. Under the other theory, which the New York Supreme Court adopted, lease-in-fee deeds took their validity from the principle of freedom of contract, which authorized the deed-making parties to institute whatever terms they saw fit. See id. at 28–31. It is clearly paradoxical that on this account, the liberal
such feudal remnants as one day’s labor with a horse and cart or a
tribute of “four fat fowl.”\textsuperscript{164} Although the record in \textit{Jackson} does not
contain the term “lease-in-fee,” the majority noted that Brownson’s
lease was for life, and that “the lessee covenants for himself, \textit{his heirs}
and assigns,” strongly suggesting that it was such a deed.\textsuperscript{165}

Unsurprisingly, as a result of these restrictions, the heritable
rental estate became the flashpoint of sustained legal, political, and
sometimes paramilitary conflict in New York several decades after \textit{Jackson}.\textsuperscript{166} Consider how the republican strain in early American politics
must have viewed these distinctly feudal property relations. “Republic-
an,” as a category of political thought, has been put to such varied
uses by theorists, historians, and polemicists that one cannot draw a
highly specific meaning out of it.\textsuperscript{167} Nonetheless, the broad strokes of
the position are clear: In politics, republicanism signified 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.\textsuperscript{168} In economics, republicanism rep-
resented rejection of feudal relations of authority and subordination
in favor of personal independence, and was variously understood as
the condition of the free laborer, the yeoman landholder, or the
merchant or entrepreneur.\textsuperscript{169} Finally, in culture, republicanism emb-
odied a regard for ordinary individuals, combined with a belief (in
some cases half a tenuous hope) that they would prove to be the true

\textsuperscript{164} See \textit{id. at 1.}
\textsuperscript{166} See \textit{McCurdy}, \textit{supra} note 78, at xiii, 1–31.
\textsuperscript{167} See, \textit{e.g.}, \textbf{BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION}
22–54 (enlarged ed. 1992); \textit{McCoy, supra} note 85, at 48–75 (considering the attempts of
Americans at the time of the Revolution to reconcile views of republicanism based on
classical antiquity with the realities of American society); \textit{Wood, supra} note 84, at 95–109
(describing the pervasive, and sometimes hybrid and confused, character of republican
ideology in England); \textit{see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC}
1776–1787, at 65 (noting that the republicanism of the American Revolution and the time
shortly after was more the spirit of a political order than its institutions).
\textsuperscript{168} See, \textit{e.g.}, \textit{Wood, supra} note 84, at 77–92 (describing political order in eighteenth-
century America), 95–109 (describing the rise of republican ideas of political authority).
\textsuperscript{169} See \textit{Foner, supra} note 85, at 11–39; \textit{McCoy, supra} note 85, at 32–47, 67–75. A very
important distinction is present here between the early republican disdain for the crafts-
man or merchant in favor of the yeoman, a view derived in important respects from feudal
values, \textit{see McCoy, supra} note 85, at 39–40, and the later celebration of the free laborer and
entrepreneur as the exemplary, independent bearer of modern liberty, \textit{see Foner, supra}
note 85, at 11–39.
repository of virtues long identified with aristocracy: honor, dignity, and courage.170

The republican ideas present in the Commentaries of New York's Chancellor James Kent, the conservative Federalist who joined the Jackson majority, are relevant here171—particularly his view of the role of land in social and political relations.172 My point in examining

170 See McCoy, supra note 85, at 48-75 (describing a more robust view of republican virtue); Wood, supra note 84, at 229-43 (describing the uneasy relationship of egalitarian ideology and loyalty to ideas of virtue derived from aristocratic ideals).
171 See Wood, supra note 84, at 268-70 for a sketch of Kent's conservativism, which included a defense of property qualifications for voters. See also Alexander, supra note 20, at 127-57 (examining Kent's contributions to early American property law).
172 Gregory Alexander presents an illuminating and provocative account of Kent's legal, political, and social views in Chapter 5 of Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970. See Alexander, supra note 20, at 127-57. 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. See id. at 130-33. At the same time, according to Alexander's account, Kent was deeply ambivalent about the social churn of commercial society and 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. See id. 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 no 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. Id. at 148.

For Kent, as a student of the Scottish school of political economy and of Adam Smith in particular, this would not have been a sensible opposition. Alexander proposes that on Kent's view, "[l]and's function was essentially private: the means to create wealth for individual enjoyment," a quality indicated by Kent's willingness to regard land as a commodity. Id. For Smith, however, the social function of market relations lay precisely in their commodifying nature: 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 1 Adam Smith, The Theory of Moral Sentiments 120-46 (1792).

In Smith's view, commerce was not a matter of wealth-maximization by atomistic individuals, but instead a social activity. He explained, "[I]t is chiefly from this regard to the sentiments of mankind, that we pursue riches and avoid poverty." Id. at 120. "Nature," according to this account, "taught [man] 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 292. 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 proud superiors; flattery and falsehood too often prevail over merit and abilities." Id. at 151-52. In contrast, the success of merchants and craftsmen—dealers in commodities—"almost always depends upon the favour and good opinion of their neighbours and equals; and without a tolerably regular conduct these can very seldom be obtained." Id. at 151. Egalitarian virtue, then, arose from the need to satisfy others within the reciprocal relations of bargaining over commodities.

Though one cannot, of course, simply assimilate Kent's thoughts to Smith's, it is most important to appreciate that the tradition of political economy that Kent relied upon did not presume that "commodity" and "propriety" were opposed, but rather treated them as interwoven. I believe this fairly characterizes the aspects of Kent's thought that I am dis-
Kent, aside from his tie to the case itself and the ample written record of his views, is to make an a fortiori argument: If a conservative such as Kent propounded these ideas, then they were indeed pervasive.\textsuperscript{173}

According to Kent, 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 American citizen's liberty.\textsuperscript{174} 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.\textsuperscript{175} American liberty rested partly on a process of stripping away feudal privileges and constraints on the alienation of property, thus doing away with aristocracy while extending the status of freeholder, at least potentially, to every citizen—every man a landowner, voter, and juror.\textsuperscript{176} Kent was very far from an egalitarian visionary; indeed, he mocked ideas of the equal distribution of property as likely ruinous to economic initiative.\textsuperscript{177} Nor did he have any sympathy for austere republican visions cussing here, as well. For a discussion of the Scottish influence on the American founding generation in general, see Samuel Fleischacker, \textit{The Impact on America: Scottish Philosophy and the American Founding}, in \textit{The Cambridge Companion to the Scottish Enlightenment} 316 (Alexander Broadie ed., 2003).

\textsuperscript{173} \textit{Cf. Wood, supra} note 84, 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.").

\textsuperscript{174} Kent explains the significance of this status in what is, for him, fairly fulsome language: "An estate of freehold . . . denoted anciently an estate held by a freeman, independently of the mere will and caprice of the feudal lord." 4 \textit{JAMES KENT, COMMENTARIES ON AMERICAN LAW} *23. 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 a 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." \textit{Id.} at *24. It bears noting that although Kent's definition of a freeholder included a tenant for life, 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." \textit{See id.} at *23.

\textsuperscript{175} 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 in this country." 2 \textit{id.} at *327. He explained 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 establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions." 4 \textit{id.} at *20 (emphasis added).

\textsuperscript{176} \textit{See 4 id.} at *20; 2 \textit{id.} at *327.

\textsuperscript{177} \textit{See 2 id.} at *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.").
of frugal and upright citizens maintaining their equality against the blandishments of luxury. Kent 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." 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. Kent envisioned the formal equality of the marketplace as supplanting both the tangled hierarchy of feudal relations and the abject servitude of slavery, which Kent termed "a great public evil." Kent's view, then, was very far from the civic, martial, and anticommercial position commonly identified with republicanism. However, like a vast proportion of the political class, Kent was antifeudal, antiaristocratic (at least in rejecting aristocracy as a social organizing principle), and committed to free commercial relations and landholding as both cornerstones of, and catalysts for, the liberty and dignity of citizens.

From Kent's perspective, 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 exer-

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178 Jean-Jacques Rousseau reflected such austere visions in a letter that harshly rejected the idea that Geneva was better off for having a theater and encouraged the citizens of Geneva to eschew aristocratic ways for virtuous ones. See 10 Jean-Jacques Rousseau, Letter to d'Alembert on the Theater (1758), reprinted in The Collected Writings of Rousseau 253, 261-352 (Allan Bloom et al. eds. & trans., Univ. Press of New England 2004).

179 See 2 Kent, supra note 174, at *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 . . . decried 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.

180 See id. at *329 ("When the laws allow a free circulation to property . . . 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.").

181 Id. at *328.

182 In this respect, Kent's thoughts parallel Eric Foner's description of the integral role played by "free labor" in the ideology of the early Republican party. See Foner, supra note 85, at 11-39.

183 See 2 Kent, supra note 174, at *256. Kent's characterization of slaves' status reveals something of the intensity of his conviction that property and economic relations formed much of a person's substance: "[S]laves 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 . . . . Their condition is more analogous to that of the slaves of the ancients, than to that of the villeins of feudal times." Id. at *255. These conditions were among those making slaves "property, rather than persons." Id. at *253.

184 See McCoy, supra note 85, at 48-104.
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 explicitly surrendered her prerogative. 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 her estate in land.

In contrast, the American doctrine 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

185 See supra Part I.D.
186 See supra Part I.A.
187 Amartya Sen distinguishes between two types of values that he regards market relations as promoting, each one a dimension of freedom. See Sen, Markets, supra note 154, at 506. The first, the "process aspect of freedom," concerns noninterference from others in making, and acting on, one's choices. See id. 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 id. On the account I have been giving, the American standard of waste can be regarded as promoting both types of freedom. It promotes the first by authorizing tenants to take decisions in the use of the land they occupy without interference from reversioners. It promotes the second both 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. See, e.g., 1 Smith, supra note 172. 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 because of their alleged stability and investment in the social order. See Thomas Jefferson, Notes on the State of Virginia, in Thomas Jefferson: Writings 123, 290-91 (Merrill D. Peterson ed., 1984) ("Those who labour in the earth are the chosen people of 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."); Kenneth R. Minogue, The Concept of Property and Its Contemporary Significance, in Nomos XXII: Property, supra note 70, at 3, 7-9, 21 (remarking on the persistence of this "constitutional" value in property).

Instead, I mean 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. See 1 Smith, supra note 172, at 71. The presence or absence of this quality can run so deep as to determine whether individuals can identify their own interests at all. Sen has pointed out that the poor, and particularly poor women, are much less likely to report ill health when asked than those somewhat more privileged. See Sen, Social Choice, supra note 72, at 90-92. Part of the purpose of bolstering the legal claims of tenants relative to reversioners is to produce an American citizen who will regard her own claims as legitimate and assert them even against a perceived social superior.
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, enough and as good at the end of his occupation. This revision in waste doctrine brought two essential changes: First, because the American standard was guided by the market value of the land, and thus treated land 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. This did not, however, eliminate the relation of land and status altogether. Rather, the standard served to place land within a new 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. 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 form of status—one that was commercial and formally egalitarian.

Two structural aspects of the American standard are particularly striking in this regard. First is the symbolic matter of the standard's expression: Through 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 that making that ideal behavior authoritative for the tenant will capture the principle of avoiding permanent injury to the land. On the other hand, in a fashion suggestive of the egalitarian implications of marketizing relations in land, this expression of the American standard eliminates hierarchy from both the language and the imagery of waste law; 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.

188 See, e.g., LOCKE, supra note 4, at 309.
189 This is Gordon Wood's account of the significance of Kent's argument for a property qualification for state senatorial election: It makes property a mere "interest," to which everyone in principle had equal access, rather than a permanent marker of distinction. See WOOD, supra note 84, 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. Indeed, 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. See 2 KENT, supra note 174, at *329.
190 See id.
The second aspect of republicanism in the American standard is more concrete, but its imaginative significance is equally poignant. The decision as to the propriety of land use under the English rule belonged predominantly to the reversioner. 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: the seat of power and theoretical owner of all land. The American standard reflected, by contrast, a horizontal and republican image of political authority, in which all citizens equally possessed the power 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.

\[191\] See supra Part I.D.2.

\[192\] 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 \textit{perception} of that rule, which the great contrast of the republican imagination, the feudal Old World versus the republican New World, helped to power. 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 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. \textit{See Friedman, supra} note 84, at 206–07. 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. \textit{See id.} at 210. Thus, a formalism that remained tolerable to the parties it affected in England would have severely inhibited American practice. \textit{See id.} The difference, however, was not that English property use was static and property relations feudal. Rather, it was that England was rich, sophisticated, and hierarchical, with limited social mobility, thus allowing a relatively small landholding population to operate with the help of a refined bar. \textit{See id.} at 207. A population with considerable mobility and vast new tracts of land constantly entering the market, however, could not negotiate arcane legal forms. \textit{See id.} at 206–07. Although Friedman does not mention it, I would suggest that 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.

\[193\] This 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 of both independence and alienability) by strengthening the rights of the tenant, which strictly speaking pushed in exactly the oppo-
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 America that the right to property originated in, and depended on, making productive use of it. Those who failed to do so created no exclusive claim that they might assert against new arrivals who proposed to settle, clear, and cultivate the land. John Donne preached, "[A]ll Mankinde must take care, that places be emprov'd, as farre as may be, to the best advantage of Mankinde in generall." 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." This position developed from Locke's famous theory of original acquisition, which Emmerich de Vattel later fashioned into a more specific defense of American colonization.

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 thereby achieved personal independence. 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, 7 Johns. 227 (N.Y. Sup. Ct. 1810). For a similarly "paradoxical" development, see Friedman's account of the concurrent rise of mechanics' liens, which enabled an artisan to put a lien on the property of a client who failed to pay him, and homestead exemptions, which protected homesteads from creditors. Friedman, supra note 84, at 213-15. 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. See id. at 215; see also Sprankling, supra note 39, at 537-47 (discussing doctrines favoring entrepreneurial settlers' land claims over those of idle speculators with prior formal title).

For a discussion of the pervasive effect of this idea in the development of United States common law in nineteenth-century, see Sprankling, supra note 39. John G. 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.


John Cotton, A Reply to Mr. Williams (1647), in 2 The Complete Writings of Roger Williams 9, 47 (1963).

See Locke, supra note 4, at 303-20. 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).

Kent gives an account of Vattel's view in 3 Kent, supra note 174, at *387 (writing that Vattel "observed that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless regions through which they might wander"); see also Richard Tuck, The Rights of War and Peace 191-96 (1999) (explaining Vattel's ideas in relation to Locke's).
As Chancellor Kent would later characterize those doctrines, our colonial ancestors . . . seem to have deemed it to be unreasonable, and a perversion of the 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.\(^{199}\)

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.”\(^{200}\)

Most state courts adopting Jackson’s rationale gave an account of the change from the English rule to the American standard that conformed with these themes. These courts observed that America was substantially uncleared and populated by a westward-moving and economically dynamic population, which had to rework the landscape to establish itself. Despite finding waste in the defendant’s clearing of timber, the Jackson majority insisted, “The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation.”\(^{201}\)

The dissenters did the majority one better, conceding, “The doctrine of waste, as understood in England, is inapplicable to a new, unsettled country.”\(^{202}\) Even before Jackson, the Pennsylvania Supreme Court noted that “[l]ands in general with us are enhanced by being cleared,” adding that it would be “an outrage on common sense” to call such enhancement waste.\(^{203}\) 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.”\(^{204}\)

America was “a new and opening land, covered largely with primeval growth . . . . [H]ere, the clearing of the forest growth, and fitting the virgin soil which it covers for cultivation, is ordinarily an improvement most valuable to the property.”\(^{205}\)

Complementing courts’ insistence on the distinctiveness of American conditions was explicit anxiety about the implications of maintaining the English waste doctrine. The Massachusetts Supreme Judicial Court found that the old rule must be discarded because “[t]he 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

\(^{199}\) 3 Kent, \textit{supra} note 174, at *386.
\(^{200}\) \textit{Id.} at *386–87 (emphasis removed).
\(^{202}\) \textit{Id.} at 237 (emphasis removed).
\(^{204}\) \textit{Shine \textit{v. Wilcox}}, 21 N.C. (1 Dev. & Bat. Eq.) 631, 632 (1837)
\(^{205}\) \textit{King \textit{v. Miller}}, 6 S.E. 660, 666 (N.C. 1888).
be accommodated to the situation of the country."²⁰⁶ In New York, the chancery court concluded that "to apply the ancient doctrines of waste to modern tenancies, even for short terms, would in some of our cities and villages, put an entire stop to the progress of improvement."²⁰⁷ Progress and improvement were the courts' aims, and westward movement across the continent was synonymous with betterment. The contrasting, and anxiety-producing, 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.²⁰⁸ Two alternative reasons for the anxiety suggest themselves: First, the doctrine of the natural right and duty to cultivate the land was a doctrine of expropriation and conquest, with roots in the theory of just war as much as in the theory of property, and commentators offered it for centuries as a defense of European claims to America.²⁰⁹ By the nineteenth century, jurists such as Chancellor Kent and Chief Justice John Marshall declined to rely on, and were apt to disparage, such natural law claims.²¹⁰ At the same time, however, their defense

²⁰⁷ Winship v. Pitts, 3 Paige Ch. 259, 262 (N.Y. Ch. 1832).
²⁰⁸ See supra Part II.A..
²⁰⁹ As Richard Tuck explains, the conception of property that became foundational to European claims on North America originated in Hugo Grotius's argument for Dutch access to the maritime trade routes of the East Indies, then controlled by the Iberian powers. See Tuck, supra note 198, at 89–90. Grotius founded his case for freedom of the seas on an account of property, arguing that one could have property only in those things that one could personally consume or transform. See id. at 90. 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. See id. at 90–91. The sea, which famously rolls on forever, was thus ineligible to become property or, consequently, the object of exclusive political jurisdiction. See id. Portuguese defense of the sea routes could therefore not constitute just war.

²¹⁰ In Johnson v. M'Intosh, both parties cited Grotius and Samuel Pufendorf, and the defendants, arguing that Native Americans were legally incompetent to transfer land, also
of 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. That settlement, they recognized, had proceeded on natural law claims, and to base legitimacy on the settlement was to accept, even uneasily, the principles on which it had proceeded. 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. To indulge or encourage stasis, even symbolically or in a handful of exemplary cases, might have signified to some minds a break with American purpose. Much like republican values, values of progress and dynamism in land use might have shaped the American standard of waste as a normative doctrine 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. He argued that a decent measure of equality in commercial societies came from the constant vicissitudes of the market:

invoked Locke, Vattel, and the Baron de Montesquieu. See 21 U.S. (8 Wheat.) 543, 563, 567-71 (1823). The defendants argued, "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 567. Chief Justice Marshall, however, declined to consider this tradition in his ruling, advertting instead to the practice of nations and of the United States in particular. See id. at 572-77. Chancellor Kent, after a review of the role of natural law doctrines in justifying European expropriation of America, 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 note 174, at *388-89.

As Chief Justice 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, 21 U.S. (8 Wheat.) 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 violence 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 the power and the determination to reclaim and occupy it." 3 Kent, supra note 174, at *390-91. Particularly significant is Kent's use of the word "reclaim," suggesting a redemption of the land into its proper condition.

Chief Justice 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, 21 U.S. (8 Wheat.) at 591.
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.\textsuperscript{213}

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. Thus, the same considerations that encouraged a normative default against hierarchical land relations also encouraged a normative default against any legal enshrinement of stasis in land use.\textsuperscript{214}

E. Summary of the Interpretive Argument

My argument 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 Alan Schwartz's concept of the normative default.\textsuperscript{215} My argument implies that the concern of normative defaults may be broader than the issues of distributive fairness that Schwartz suggests,\textsuperscript{216} including 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, in which property and contracting rules are in

\textsuperscript{213} \textit{Kent}, supra note 174, at *329.

\textsuperscript{214} I believe this account is in many respects complementary to that of Horwitz. 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. See \textit{Horwitz}, supra note 38, at 31–62. 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 the process Horwitz portrays. 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 be meaningfully said to be both better off and worse off, depending on the individual and the axis of evaluation. See Jedediah Purdy, \textit{Being America: Liberty, Commerce, and Violence in an American World} 145–47, 206 (2003).

\textsuperscript{215} See supra notes 71–73 and accompanying text.

\textsuperscript{216} See Schwartz, supra note 26, at 591–93 (discussing distributive fairness quite appropriately in the context of bargains between sophisticated contractors and other participants in a fully developed commercial society).
flux and the political and social relations to which they correspond are contested. In such 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,217 or the presence or absence of property requirements for voting218—have intense normative significance along the lines I have been describing.

For purposes of illuminating American waste doctrine, my argument is that default rules also may partake of that significance in several ways. First, as an expressive matter, default rules may appeal to judges and other decision-makers for their symbolic consonance with broad normative principles—especially when the symbolic associations of two doctrinal choices present a stark choice, such as the choice between quasi-feudal and broadly republican outlooks.219 Second, a normative default may be selected for its significance in an action in which 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.220 While not dispositive, requiring a landlord to make a distasteful proposition explicit might lead her to abandon the proposition altogether, or embolden 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

217 See supra note 163 and accompanying text.
218 See supra note 168 and accompanying text.
219 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, 1218-24 (1967). Although Michelman does not use the rubric of "expressive" law, typically defined as a legal action's indication of society's commitment to a value or attitude, that is what he has in mind. See generally Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1506-33 (2000). For a discussion of the commitment of the legal reformers of the time to eliminating feudal remnants, see Friedman, supra note 84, at 209-10 (noting that 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").
220 See Barton H. Thompson, Jr., Tragically Difficult: The Obstacles to Governing the Commons, 30 Envtl. L. 241, 256-57 (2000) (explaining that people tend to regard the surrender of a privilege they now enjoy as the loss of right, which they will 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 lacks it); see also Adam Smith, Lectures on Jurisprudence 186 (R.L. Meek et al. eds., Liberty Classics 1982) (1762-66) (discussing the reluctance of the socially powerful "to condescend to bargain and treat with those whom they look upon as their inferiors").
of debate, and which come to the fore as explicit questions, is an important form of power over others. 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 of waste to relations of power among private persons. When American lawyers talk about property's relation to political themes, 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 by which they may enlist each other in their projects. From this perspective, 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 their dealings with one another. When 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.

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 makes

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224 See *supra* notes 180-82 and accompanying text.
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 other settings perhaps founded on an ethics of conservation or stewardship.\textsuperscript{225}

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.\textsuperscript{226} 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 rule can retroactively interpret existing contracts, as in \textit{Jackson}, without ever shaping a prospective bargain. Finally, default rules may be norm-forcing because they make an issue explicit, which may help to displace once-adopted 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.\textsuperscript{227} 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

\textsuperscript{225} 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 depend on 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. \textit{See} \textbf{Charles Taylor, Irreducibly Social Goods}, in \textbf{Philosophical Arguments} \textbf{127}, 138–40 (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 the good’s realization—for instance, social practices today would thwart attempts to live the social life of an Elizabethan courtier or a Knight Templar. Taylor’s argument strikes me as more concerned with the conditions for intelligibility than with those for achievability.

\textsuperscript{226} \textit{See}, e.g., Anderson & Pildes, \textit{supra} note 219, at 150–08, 1531–33; Michelman, \textit{supra} note 219, at 1218–24.

\textsuperscript{227} \textit{See}, e.g., Posner, \textit{supra} note 30, at 32–34. 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, Jr., \textit{What Good Is Economics?}, \textbf{37 U.C. Davis L. Rev.} \textbf{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 in the following contexts: designing efficient means to ends, however selected, \textit{see id.} at 179–86; understanding the perennial threats to effective policy, such as externalities, commons tragedies, and collective-action problems, \textit{see id.} at 186–90; and presenting one’s own commitments in a language generally available to other citizens in the public sphere, \textit{see id.} at 194–95.
dignity of citizens, than was once the case.\textsuperscript{228} 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.\textsuperscript{229} 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.\textsuperscript{230}

\textsuperscript{228} For such libertarian accounts of the independence-securing function of ownership, see, for example, Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985); Milton & Rose Friedman, Free to Choose: A Personal Statement (1980); Richard Pipes, Property and Freedom (1999).

\textsuperscript{229} For conservationist perspectives on the appropriate relationship of humans to the natural world, see, for example, Wendell Berry, The Unsettling of America: Culture & Agriculture (1977); Aldo Leopold, A Sand County Almanac and Sketches Here and There (1949); Gary Snyder, The Practice of the Wild (1990).

\textsuperscript{230} See 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).