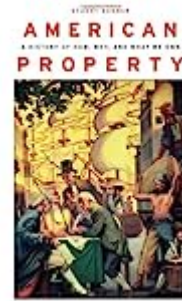


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Stuart Banner. *American Property: A History of How, Why, and What We Own.* Cambridge: Harvard University Press, 2011. 355 pp. \$29.95 (cloth), ISBN 978-0-674-05805-7.



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Stuart Banner's *American Property: A History of How, Why, and What We Own* is a rich addition to the discussion of the historical evolution in how Americans think about property. Property law has always had the quality of an empty container. One can make of it what one will. Few areas of the law have been so freighted with meaning. Questions such as what is property and when is government justified in limiting for the greater good the property rights of an individual are, for many Americans, at the heart of the foundational promises of the Constitution. Banner clearly demonstrates that the answers to these questions have always been highly contested and have had more to do with what Americans want to do with property than with any abstract understanding of the nature of property.

American Property is a welcome antidote to many standard discussions of property law which despite attention to iconic cases such as the 1805 matter of *Pier-son v. Post* are oddly ahistorical in their treatment of what constitutes property. A fox, a beehive, or—by implication—an entire continent are all treated in much the same manner. Banner historicizes the issue by looking beyond the perennial law school question of what one must do to claim a piece of property. He deals, instead, with what sorts of things are considered property

and how the interests competing for the monetary, ideological, or other value to be derived from these things shape the definition of property prevailing in any period. At the center of the book is Banner's thesis that much of this change over time has been driven by advances in technology.

An American in 1800 would, Banner explains, have defined property in a very different manner than his or her descendants in 1900 or today. Banner reveals how things which came to be worth a great deal of money such as the electromagnetic spectrum was without value and not considered property until the invention of radio and television, which converted wavelengths into something people wanted. Likewise, what is the monetary value of a heart in a society that lacks the medical technology to successfully transplant organs or the value of a sound which cannot be recorded and preserved for future enjoyment? In a series of chapters—many of which can stand alone as a discrete essay—Banner takes on the creation of property rights in intellectual property, news coverage, recorded sound, fame, apartments, wavelengths, body parts, and pollution.

In casting American ideas about property as the creation of particular individuals and groups with their com-

peting interests in the profits and, on occasion, the societal benefits that can be gained by particular uses or restrictions on property, Banner avoids the abstract and often sterile arguments common in legal scholarship as to whether rights in property are a product of natural law, legal institutions, or communities of users. Banner's work is not populated by the ahistorical, wealth-gathering automatons so often featured in the literature.[1]

Instead, Banner introduces readers to individuals like Abigail Roberson and Alton Parker. While Parker lived a public life as a judge and the 1904 Democratic presidential candidate, Roberson was an obscure teenager until her picture was sold by a photography studio without her knowledge or consent for use on posters advertising a local brand of flour. In an action heard before the New York Court of Appeals, Parker explained for the majority that Roberson did not enjoy a right of privacy and had no property right in her image. The public outrage that a young innocent such as Roberson would have no power to prevent the unauthorized distribution of her picture for crass commercial purposes pushed legislators and courts to recognize that individuals possess a right of property in their image. When Parker was thereafter besieged as a presidential candidate by press photographers and complained of the intrusion, Roberson publicly reminded Parker that his own ruling had precluded redress of that which he now felt aggrieved. Roberson's observation that Parker's complaint illustrated the old adage that one's position on an issue often depended upon whose ox is gored can also serve as a sort of epigram for one of Banner's primary arguments (p. 146). How people see property in a general sense is often the product of what they seek from the use of a particular type of property. The people that animate Banner's pages illustrate that those interests are often situational and even, on occasion, a bit idiosyncratic.

Banner also offers a useful corrective to the standard view that the conception of property moved from rights in exclusively tangible things in the eighteenth century like animals or plots of land to intangibles such as trademarks by the nineteenth century. While the years after 1800 certainly saw a wide array of new types of property, Americans in the seventeenth and eighteenth century were well acquainted with types of property that one could neither touch nor see. One need only consider notions of land tenure and incorporeal hereditaments that generations of American lawyers studied until well into the nineteenth century to understand the degree to

which there has always been a place in American property law for intangible forms of property. The tendency of scholars to see intangible forms of property as a creation of the nineteenth century has distorted the relationship between theories of property and legal change. The notion which swept the legal profession by the late nineteenth century that property rights were like a bundle was, Banner explains, neither new nor the driver of the powerful contemporary movement in American courts to protect owners of property from governmental takings or excessive regulation. The bundle theory certainly proved useful to judges seeking to limit government's ability to violate private property rights, but was merely one of a number of tools in the arsenal against what many Americans feared was a rising tide of socialism. Political ideology, not legal theory as to the nature of property, provides for a clearer understanding of late nineteenth-century interpretations of the Constitution.

The development in ideas about what constitutes property, Banner explains, has not been a straight line from simple to complicated or, to put it another way, from the tangible to the intangible as people have gained the ability to make use of more things. Rather, the history of American property law has—from the start—been a story of the creative ways in which people have seen opportunities in the intangible aspects of property.

American Property is a joy to read. Banner successfully uses entertaining episodes such as the encounter between Abigail Roberson and Alton Parker to illustrate how change has come in American ideas about property. While Banner correctly declares in an early footnote that the book "mostly stays at the level of practice" and does not venture much into the academic debates Americans have had about property, there is—in fact—much a reader can learn about the intellectual history of ideas about property (p. 295). It is a testament to the strength of Banner's argument that property law develops in response to human needs rather than revelations as to the true nature of property and his skill as a writer that *American Property* works so well on both levels.

Note

[1]. Arthur F. McEvoy memorably dubbed such figures "Homo economicus, a rational, individual, and wealth-maximizing creature." Arthur F. McEvoy, *The Fisherman's Problem: Ecology and the Law in the California Fisheries, 1850-1980* (Cambridge: Cambridge University Press, 1986), 13.

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