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### Book Review of American Property: A History of How, Why, and What We Own, by Stuart Banner

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## Book Review

### AMERICAN PROPERTY: A HISTORY OF HOW, WHY AND WHAT WE OWN, by Stuart Banner<sup>1</sup>

DOUGLAS C. HARRIS<sup>2</sup>

PROPERTY LAW IS ABOUT THINGS, but only secondarily. It is primarily about relationships between people as they pertain to things. As a result, although we commonly identify material and immaterial things as private, common, or state property, property law deals with the subset of human relationships that determines rights and responsibilities with respect to things. The institution of property law—the rules that define this subset of human relationships—arises in the context of scarcity. When things are scarce and accordingly hold exchange value, humans construct ideas of ownership. We have been doing so for millennia, or at least long enough that the subject of property law has acquired a reputation as antiquarian. Certainly in the common law tradition, many property law courses appear lost in the mist of English legal history. This need not be so. Property law deals with the allocation of scarce resources and therefore is also about the allocation of power. Understood this way, property law can be a lens through which to understand many of the most pressing social issues of the day. Similarly, the history of property law need not be dull. At least ten centuries of social change, economic transformation, technological innovation, and human drama can be seen in the customs and conventions, judicial decisions, and statutes that comprise the law of property in common law jurisdictions.

In *American Property: A History of How, Why and What We Own*, Stuart Banner, the prolific legal historian and property law scholar, sets out to describe contestation and change in ideas about property over several centuries in the United States.<sup>3</sup> The result is a beautifully and accessibly written book, stunning

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1. (Cambridge: Harvard University Press, 2011).

2. Nathan T Nemetz Chair in Legal History, Faculty of Law, University of British Columbia.

in scope, elegant in structure, and remarkably revealing in its detail about the debates over and the uses of property law doctrine and of the broader ideas that support the divergent interests and claims.

Banner provides a rough chronological structure for the book, devoting most of his attention to the nineteenth and twentieth centuries, although the fourteen chapters are not identified by decade or era. Instead, the individual chapters focus on specific themes and can be tied loosely into bundles, each animated by a set of shared questions. One thematic bundle addresses changing understandings of the idea of property.<sup>4</sup> In these chapters, Banner situates analyses of changing property doctrine in the politics of property and, more specifically, in the balancing of public regulation and private property.

In “A Bundle of Rights,” for example, Banner disputes the conventional account of the emergence of this metaphor for property, arguing that it appeared in the nineteenth century as part of an effort to enhance constitutional protection for private property—not in the early twentieth century in the service of a progressive effort to enhance state intervention in the economy, as has been conventionally understood. Banner also provides an engaging account of the Realist articulation of property as power in a later chapter, “People, Not Things.” Nevertheless, he maintains that the metaphor appeared earlier, in the service of those looking to enhance rather than diminish protection for private property: “In the late nineteenth century,” writes Banner, “the idea of property as a bundle of rights was a distinctly antiregulatory idea, one that served the specific purpose of justifying constitutional doctrines that would limit the power of legislatures to regulate in ways that would reduce the value of property.”<sup>5</sup>

Interspersed through these chapters on the idea of property are five chapters about “owning”—owning news, sound, fame, wavelengths, and life—in which Banner describes the efforts to reconfigure property in the face of new technologies. In many instances, new technology made existing property rights worthless, or at

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3. Stuart Banner’s earlier books include *Who Owns the Sky: The Struggle to Control Airspace from the Wright Brothers On* (Cambridge: Harvard University Press, 2008); *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge: Harvard University Press, 2007); *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005); and *Legal Systems in Conflict: Property and Sovereignty in Missouri, 1750-1860* (Norman: University of Oklahoma Press, 2000).
  4. This bundle includes five chapters: “A Bundle of Rights,” “People, Not Things,” “Law of the Land,” “The New Property,” and “Property Resurgent.” See Banner, *supra* note 1, ch 3 at 45; *supra* note 1, ch 5 at 94; *supra* note 1, ch 9 at 181; *supra* note 1, ch 11 at 220; *supra* note 1, ch 13 at 257 (respectively).
  5. *Ibid* at 71-72.

least much less valuable. In “Owning Sound,”<sup>6</sup> for example, Banner recounts how composers, music publishers, recording companies, musicians, and broadcasters responded to a series of technological changes—phonographs, player pianos, radios, vinyl records, Long Play records, and cassette tapes—that allowed humans to capture, broadcast, and mass distribute sound. Banner focuses on the changing coalitions of interest that sought to construct and then to preserve property rights, and therefore value, in the face of technological innovations that had the effect of undermining once-profitable activities. Those in the music industry focused their efforts on the law of copyright, and Banner reveals a mutually constitutive dynamic between that industry, technological change, and the law. The result in law is a royalty regime in which composers and music publishers earn money when their songs are recorded or played for audiences, but performers and record companies do not. How has this affected the making of music? Banner notes the disappearance of the once sharp line between composers and performers. In the 1950s, only seven per cent of popular songs were performed by their composers; in 2004, eighty-eight per cent of performers were playing their own songs.<sup>7</sup> Bob Dylan may well have inspired a generation of singer-songwriters, but Banner’s analysis also suggests that the outcome of disputes over the ownership of sound in the creative process of music making should not be ignored.

In addition to these thematically bundled chapters, Banner includes an introductory chapter on the forms of property that were lost in the trans-Atlantic migration of the common law (varieties of land tenures and estates, many non-possessory interests, rights of common, et cetera) as land was increasingly refashioned as “just another commodity to be bought and sold.”<sup>8</sup> There is also a chapter on “The Rise of Intellectual Property”<sup>9</sup> (a subject that figures prominently in most of the “owning” chapters) and a chapter on the changing legal architecture of home ownership as the introduction of cooperative and later condominium enhanced the possibility of owning single units in multi-unit developments.<sup>10</sup> In this chapter, Banner asks why condominium, which provided such an effective means of dividing ownership in multi-unit buildings, did not arrive in the United States sooner than the 1960s. He offers a number of “institutional obstacles”<sup>11</sup> as explanation, including the reticence of title insurers to insure single units in

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6. *Ibid*, ch 6 at 109.

7. *Ibid* at 128.

8. *Ibid* at 20.

9. *Ibid*, ch 2 at 23.

10. *Ibid*, ch 8 at 177 (“From the Tenement to the Condominium”).

11. *Ibid* at 176.

multi-unit buildings, the hesitation of mortgage lenders to take that property interest as security for a loan, the inability of municipal bureaucracies to impose and collect property taxes on individual units in multi-unit buildings, and the uncertainty around the drafting of instruments to define the individual units and the rights and responsibilities attached to them. Statutory provisions in the 1960s would help overcome most of these obstacles and, once surmounted, condominium as a legal form would proliferate rapidly, particularly where land prices were high.<sup>12</sup> Banner's analysis is a good example of his capacity to move between legal doctrine, broader ideas about property, and the social and institutional setting to explain shifts in the way that people own property.

*American Property* is not a comprehensive survey of the history of property law in the United States and was not written as one. Land and intellectual property receive most of the attention, personal property receives almost none. There is no discussion of family property or Aboriginal property,<sup>13</sup> and Banner has said that he wished he had been prescient enough about the collapse in American housing markets to include a chapter on mortgages.<sup>14</sup> Although the idea of common property is mentioned—once when Banner describes the stripping of various forms of property from the law in the transplanting of the English common law to North America, and again when he discusses private property as one response to the tragedy of the commons—it does not receive focused attention. Similarly, state property is the starting point for the chapter on the licensing of the radio wavelength spectrum,<sup>15</sup> but serves primarily as a backdrop for Banner's focus on the allocation of private rights.

In addition, Banner does not offer an overarching explanation or argument about the role of law, nor of property law in particular. Many chapters end with equivocal statements about the effect of the property regimes described: "there would be winners and losers from land use regulation";<sup>16</sup> "the new property was simply not as powerful a tool as its proponents hoped or its opponents feared";<sup>17</sup> "property remained an important value, but so did sound governance."<sup>18</sup> At several points in the book, including the final sentence, Banner suggests that

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12. See Douglas C Harris, "Condominium and the City: The Rise of Property in Vancouver" (2011) 36:3 *Law & Soc Inq* 694.

13. Banner has published extensively on property law and Aboriginal peoples. See *supra* note 3.

14. Stuart Banner, "Author Meets Critics" (Seminar delivered at the Third Annual Association for Law, Property and Society Conference, Washington DC, 2 & 3 March 2012), [unpublished].

15. *Supra* note 1, ch 10 at 211 ("Owning Wavelengths").

16. *Supra* note 1 at 201.

17. *Ibid* at 237.

18. *Ibid* at 275.

“property has always been a means rather than an ends.”<sup>19</sup> This is consistent with his overall message that property doctrine is a malleable and contested structure of ideas deployed for particular purposes, but Banner does not offer a larger framework in which to understand the outcome of those contests, nor does he evaluate attempts of others to do so. Willard Hurst’s argument that the property law regime created the conditions for American economic expansion in the nineteenth century is an indirect presence but is not directly engaged.<sup>20</sup> A discussion of Morton Horwitz’s class-inflected analysis is similarly absent,<sup>21</sup> as is an engagement with Harold Demsetz’s law and economics inspired account of the emergence of property rights.<sup>22</sup> Banner is certainly interested in the politics of property, but he does not use the material to develop a larger explanatory framework or to reveal his assessment of which ideas about property are to be preferred beyond the observation that property should not be understood as pre-political.

Although Banner might well have considered the interplay of private, common, and state property, or engaged explicitly with the attempts of some historians to develop larger explanatory frameworks, these and other absences are less shortcomings than simply reflections of the limits of this project. *American Property* is a model of historical legal scholarship and a pleasure to use in the classroom. A student in my legal history course admitted to enrolling only after he had spent the better part of an afternoon in the university bookstore reading *American Property*, the central text for the course. Banner’s work will resonate not only for legal historians of the United States, but also for those interested in changing ideas of property and the interplay of law with technological and social change.

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19. *Ibid* at 291.

20. James Willard Hurst, *Law and the Conditions of Freedom in Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

21. Morton Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977); Morton Horwitz, *The Transformation of American Law, 1870-1960* (Oxford: Oxford University Press, 1992).

22. Harold Demsetz, “Toward a Theory of Property Rights” (1967) 57:2 *Am Econ Rev* 347.