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American Property: A History of How, Why, and What We Own

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The slipperiness of just what Stuart Banner is addressing in *American Property* is one of his key themes. Property has meant different things to different people in different times; ideas about it 'have always been contested and have always been in flux' (p. 3). Similar things could be said of sugar, coal, and cotton.(1) In structure and tone, Banner's book fits quite comfortably into the genre of commodity history. It is anecdotal, vernacular, and sometimes polemical. It alternates between specific interests, e.g. chapters on 'Owning the news' and 'Owning fame', and broader reflections. But property, of course, is not exactly like sugar or coal. It is an enduring and flexible concept, which bears a strong if not always strongly-determined relation to the material world. In this sense, *American Property* might fit more happily alongside anthropologist David Graeber's recent *Debt: The First 5,000 Years*. Not altogether happily though. The singularity of Banner's book raises some methodological questions to which I will return. Such questions might be inevitable when an author chooses to take on such an ambitious and elusive subject.(2)

Banner's main achievement is to historicise that subject. We can easily make mistakes about the nature of property if we see it without historical perspective, or rather, if our historical perspective is insufficiently deep. In the book's first chapter, one of its most compelling, Banner makes this point through an examination of intangible property. Most of us, if we haven't much thought about it, might assume that intangible property is a quite new invention. The world today is full of copyrights, trademarks and licenses, not to mention financial instruments, that we can't touch or hold, but that we can buy, sell, and own like other property. In the past, we imagine, things were different. One owned land, or a ship; gold coins, or livestock. Gradually the progress of technology and institutions changed things: our property became less tangible.

Banner gives the lie to this story. He recounts the many types of nonphysical property held in pre-modern England – '*incorporeal hereditaments*' like '*advowsons*' ('the right to appoint a minister to a church') and '*dignities*' ('a property right in a noble title') – and in the American colonies (pp. 6-8). Property included things like public offices and the labour of slaves, servants, and employees. There was indeed a change in Americans' understanding of property in the 19th and 20th centuries. 'The transition', argues Banner, 'would not be from physical property to nonphysical property, but rather from one group of nonphysical property rights to another' (p. 13).

As we suspected, though, technology and institutions are important. *American Property* pays a great deal of attention to developments like telegraphy, photography, radio and television. These breakthroughs changed not only the way people communicated, but the kinds of things they could or might want to own. The Associated Press in the 19th century, for example, wanted to own not just the form of words used to write up a news story, but the actual news itself, which was gathered by its reporters and sent via its cables. News should be property, the AP argued, because otherwise competitors could take information and rewrite it for themselves, free-riding on the AP's hard work and infrastructure. Property rights, and the legal protection they implied, seemed necessary to maintain the right balance of incentives for business in the face of changing technology.

On the other hand, property could help protect individuals from business. When New York teenager Abigail Robeson had her photograph used on a poster for flour, a series of court cases resulted in a new law to protect a person's property in her own name and image. This precedent, as Banner shows, developed into the whole world of image licensing and paid celebrity endorsements that we know today. Property rights, even when they seem to start out as non-economic protections, imply financial opportunities. Whether in images, radio wavelengths, or body parts, there are always ways to make property pay.

Two historical questions emerge over the course of *American Property*. The first is, in the formation and use of property ideas, what has been the relationship between law, politics, and rhetoric? Banner consistently demonstrates that such a relationship is central. Lawyers and judges are not the only actors; interested parties, legislators, scholars, and the public all have important parts to play. 'What one thinks property *is* depends on what one wants property to *do* – that is, what goals one is trying to advance by thinking of property in a particular way' (p. 289). That point, frequently restated at different moments in the book, is clearly crucial. But Banner's account of property is more complex than the quotation implies. He is not only concerned with actors' intentions and interests. 'Conventional notions of property did place substantial constraints on the sorts of assertions that would have been deemed reasonable', he writes. 'Property was an instrumental value, but it was not so malleable that it could be put to any old use' (p. 93). In other words, the concept of property was embedded in discourse.

Property as a rhetorical strategy appears early on, in the chapter on the development of intellectual property. 'Proponents of longer or stronger [copyright] protections could cast themselves as upholders of property rights, and they could depict unauthorized users as pirates or thieves. When legislators are asked to choose between property owners and thieves, the thieves will very rarely win' (p. 28). Of course, this defers the question of where the rhetorical strength of property as a concept came from. But that is outside this book's remit.(3) The dynamic of law and politics, or of law and legislation on the other hand, is a recurring theme.

Does the state make property by making law, or is property an already-existing phenomenon that demands legal protection? This problem not only involves the initial creation (or final abolition) of property. It also involves changes to, and interpretations of, existing concepts of property. In some of the episodes recounted here, property is transformed by the interpretative power of the courts. The Supreme Court's decision in *Goldberg v. Kelly* (1970), making welfare entitlements a form of property, is one example. That decision and others like it involved a degree of philosophical reasoning about the nature of property; as Banner discusses, the court's thinking was influenced by the radical legal scholarship of Charles Reich, and his idea of 'the new property' (p. 224).

Changes in the concept of property did not always rest on judicial decisions. Abigail Robeson ended up losing her case against Franklin Flour Mills, but her public support was such that the New York legislature made a new law to uphold her claim. In other scenarios, the relationship between judiciary and legislature was more complex. It was through judicial decisions like that of *Eaton v. Boston, Concord, and Montreal Railroad* (1872) that, in the second half of the 19th century, property 'came to be understood as a bundle of rights in a thing' rather than the thing itself (p. 58). But at the same time 'many states were amending their constitutions to make this transformation more explicit' (p. 64).

Law as interpreted by judges, and legislation as passed by politicians, had dynamic effects on each other. Each was also subject to influence by scholarship and popular opinion. 'Of course', Banner writes, 'judges were motivated by more than their conception of property. The bundle-of-rights metaphor was surely a less important cause of the shift [in judicial interpretation] than the fear – one that judges were not shy about expressing – that the nation would slide into socialism unless something was done to reinforce the constitutional right of property' (pp. 69–70). The same political reasoning applied to the idea of a 'natural right' to property (p. 95). *American Property* contributes some powerful examples of this nexus between law, politics, and rhetoric.

The second, related historical question is, how powerful or how significant has this changing concept of property been? We might expect the whole onus of Banner's project to lead him to overemphasise the role of property ideas. He seems rather to go the other way. There are moments, for example the remarks quoted above about the rhetoric of owners and thieves, when we are asked to take property's power for granted. But Banner in fact frequently undermines that assumption. It's not that property doesn't matter, but that often our ideas about it don't seem to have had much effect on our practice.

'Judges and legislatures reached decisions, not by inquiring into the true nature of property, but by considering the practical consequences that would flow from a decision one way or the other' (p. 93). On the other hand, 'conventional notions of property' did constrain such decisions. Such conventional notions, at least, must have power. Banner suggests that the 'change in the relationship between government power and private property rights' between 1870 and 1940 was influenced by 'changes in the way Americans thought about property'. The latter change is 'a causal factor' in the former (p. 94). What is presumably meant here is that a shift in the normally-constricting 'conventional notions' allowed the shift in government's relationship to property to take place. Ideas here have a negative, but not a positive power.

Similarly, Charles Reich's 'new property' idea, despite its impact on the *Goldberg* decision, 'in practice ... had little effect on the way claimants experienced the welfare system ... In the end, the new property was simply not as powerful a tool as its proponents hoped or its opponents feared it would be' (pp. 236–7). And when in 2005 a group of homeowners lost their case – and hence, their homes – to a coalition of developers and local government, the public outrage meant that 'for a while people were talking about property rights more than they had before, but when the moment passed it was not clear whether they had done much to make them stronger' (p. 275). Rarely does Banner discuss how conceptions of property influenced historical processes. The burden of his narrative is fundamentally the other way around.

This leaves us finally with methodology. What kind of history is *American Property*? Banner offers hardly any clues. He writes that 'this book is about the ways in which answers to questions like [what is property] have changed over time'. To me, this suggests more than an account of relevant court cases. It implies an intellectual history that would deal with the intersections between public, legal, and scholarly understandings. As we have seen, Banner frequently verges on this approach. A note to the introduction acknowledges that 'the book mostly stays at the level of practice, below the intellectual debates so well laid out in Gregory S. Alexander, *Commodity and Propriety* ...' (p. 295).(4) But Banner does comment on intellectual debates. Since law is an intellectual pursuit, he can hardly avoid it. Some of his best chapters deal with these kinds of questions, from the 'bundle of rights' to 'the new property.'

Yet *American Property* does not draw on resources that would have been helpful. It does not, for example,

make use of the theories of discourse and conceptual change developed over many decades by Quentin Skinner, Terrence Ball, and others.(5) Neither, more surprisingly, does it refer to Richard Posner's work, nor his opposite numbers in the Critical Legal Studies tradition, both of which speak to Banner's overtly pragmatic approach to law.(6) Banner offers no theoretical or analytical framework for his insights, and no conclusions other than those he began with: property is a human institution that changes over time. The book hints towards some interesting historical questions, which I have tried to excavate and outline above, but without pausing to give them clear definition. Its four pages of introduction and three pages of conclusion do scant justice to the impressive scholarship contained in the main chapters. These factors make *American Property* a frustrating book, but perhaps an exciting starting point for further work.

Notes

1. Elizabeth Abbott, *Sugar: A Bittersweet History* (Toronto, 2008); Barbara Freese, *Coal: A Human History* (Jackson, TN, 2003); Stephen Yafa, *Cotton: A Revolutionary Fiber* (London, 2006).Back to (1)
2. It is also worth mentioning that while all these books are transnational and comparative, Banner's is resolutely American, except in its early references to English law. Attention to other property regimes might have helped to uncover what is 'American' about American property.Back to (2)
3. Readers interested in a more focused analysis of the rhetoric of property should see Carol M. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO, 1994).Back to (3)
4. Gregory S. Alexander, *Commodity and Propriety: Competing Vision of Property in American Legal Thought* (Chicago, IL, 1997); Alexander, whose influence is prevalent, is also thanked in the acknowledgements.Back to (4)
5. Skinner's theoretical essays are handily compiled in *Vision of Politics, Volume I, Regarding Method* (Cambridge, 2002); see also *Political Theory and Conceptual Change*, ed. Terrence Ball, James Farr, and Russell Hanson (Cambridge, 1989).Back to (5)
6. Richard Posner, *Economic Analysis of Law* (Boston, MA, 1972); Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, MA, 1983); both strands themselves stem from 20th-century legal realism.Back to (6)

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