

# Tulsa Law Review

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Volume 48 | Number 2

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Winter 2012

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### Recommended Citation

Gregory S. Alexander, *Innovating Property, reviewing Stuart Banner, American Property: A History of How, Why, and What We Own*, 48 Tulsa L. Rev. 307 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol48/iss2/15>

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# INNOVATING PROPERTY

Gregory S. Alexander\*

STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* (2011). Pp. 355. Cloth. \$29.95.

We have never had a synthesis of the history of property in the United States. My own book, *Commodity & Propriety*,<sup>1</sup> was an intellectual history of American legal thought about property. It did not primarily focus on either legal doctrine or social changes affecting property. There are chapters on property in both volumes of Morton Horwitz's *Transformation of American Law*<sup>2</sup> and in Lawrence Friedman's *History of American Law*,<sup>3</sup> but the coverage of these chapters is very spotty. A comprehensive synthesis of the history of American property law has been a major gap in American legal historiography for a very, very long time. But no longer.

Stuart Banner's approach is refreshingly original. Rather than marching through doctrinal development in a strictly chronological fashion, he focuses on discrete areas of technological innovation or other exogenous changes resulting in new forms of property and traces the legal development of property law in response to those innovations.<sup>4</sup> Banner's choices of topics strike me as right on the mark. There are chapters on intellectual property interests, such as patents in genes<sup>5</sup> and copyrights in sound.<sup>6</sup> New sorts of intellectual property interests are obvious candidates. Everyone recognizes the novelty of them, and much has already been written about their origins. But Banner's panorama is far broader. Consider, for example, Banner's chapter on the right of publicity.<sup>7</sup> I cannot think of a better example that illustrates American property law's

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1. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970* (1997).

2. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 145–67 (Oxford Univ. Press 1992) [hereinafter *TRANSFORMATION 1870–1960*]; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 31–62, 63–108 (Harvard Univ. Press 1977).

3. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 167–88, 309–28 (3d ed. 2005).

4. See generally STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* (2011).

5. *Id.* at 245–56.

6. *Id.* at 109–29.

7. *Id.* at 130–61.

capacity to respond to new social needs and demands by creating new rights.<sup>8</sup> I also cannot think of a better example of how such rights, innocuous when first created, later develop over time in ways that threaten the very purposes and goals of its core legal institutions. The chapter on sound<sup>9</sup> is another coup. Banner's book tells the fascinating story of how the emergence of various technologies and industries, ranging from music composition to radio to recording,<sup>10</sup> led to pitched battles over whether to create new forms of property rights in the largely undeveloped area of copyright law.

### I.

I want to begin by situating Banner's book in American legal historiography. The first point to note is an obvious one, but important nevertheless. The book represents an unambiguous rejection of the notion of law as an autonomous discipline. To see this, consider what a book of this sort, a history of American property law, would have looked like had it been written eighty years ago. Unless it had been written by one of the Legal Realists,<sup>11</sup> who in truth constituted a small minority of law professors at the time, it would have been essentially a doctrinal history — a chronology of the development of major legal doctrines. There would have been little or no mention of social or economic changes, no use of the tools of economic analysis, no discussion of the general intellectual milieu within which new legal doctrines emerged. The story that would have been told is law as a black box, legal doctrines and rules developing through law's own internal logic with abstract concepts driving legal development. I exaggerate a bit here, of course, but not much. For, compared with legal change as Banner describes it, to the legal scholars of the early twentieth century law really was a black box. Not so for Banner. Throughout his book, legal changes, both in norms and in concepts, are responses to exogenous changes in society, economy, and perhaps most importantly, technology.<sup>12</sup> For Banner, law is epiphenomenal, responsive rather than effecting.<sup>13</sup> This leads to my second historiographical point, for this understanding of law and legal change places Banner well within the tradition of American legal historiography that we have come to call "Hurstian."<sup>14</sup>

Banner's book has all of the hallmarks that we associate with the socio-legal approach to legal history that was first developed by the great Willard Hurst and later continued by his disciples at the University of Wisconsin, notably Lawrence Friedman.<sup>15</sup> Hurst himself best expressed the view of law that guided this genre of legal history,

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8. See *id.* at 139 (describing the emergence of the right to privacy).

9. See *id.* at 109–29.

10. See *id.* at 202–19.

11. For a discussion of the definition and origins of legal realism, see TRANSFORMATION 1870–1960, *supra* note 2, at 169–92.

12. BANNER, *supra* note 4, at 2.

13. *Id.* at 3.

14. See, e.g., JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

15. See generally Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9 (1975) (providing an overview of Hurst's impact on American legal history); see also FRIEDMAN, *supra* note 3.

stating, “[i]n the interaction of law and American life the law was passive, acted upon by other social forces, more often than acting upon them.”<sup>16</sup> Hurst stressed, as William Novak wrote, the “interplay of law and social growth” and “law’s operational ties to other components of social order.”<sup>17</sup> All this is equally true of Banner’s book. But Banner doesn’t stop there. His book is not merely Hurstian. I think it represents the next generation in the Hurstian tradition — not a break with that tradition but an extension of it in ways that none of its previous practitioners, even the greatest of them, had imagined.

The great agent of change here is technology. There is nothing new in that, of course; consider the role of railroads in the development of tort doctrine in the familiar Hurstian story.<sup>18</sup> But Banner places technological change front and center in unmistakable ways, including organizing chapters around emergent technologies and the industries they spawned. For example, in chapter six, we learn how the development of sound technology beginning in the late nineteenth century prompted major changes in intellectual property law, such that sound could now legally be property.<sup>19</sup> In true Hurstian style, Banner tells the story of how the struggle over property rights in sound pitted various players in the music and recording industries — composers and publishers against manufacturers of player pianos and phonographs,<sup>20</sup> everyone driven by self-interest. More often than not, the law that emerged from such epic struggles was some sort of compromise of interests, struck in such a way as to assure that emerging technologies and industries would not be stifled but at the same time creating incentives for artists to continue to add to a young but already rich American culture.

Banner extends the Hurstian tradition in a second way as well. Although Hurst and his followers, such as Lawrence Friedman, certainly paid attention to economic conditions and their effects on the law, their understanding and analysis of economics was pretty rudimentary. The same certainly cannot be said of Stuart Banner. In previous books Banner displayed more than passing familiarity with microeconomic theory. In his masterful book *Possessing the Pacific*,<sup>21</sup> for example, we hear of monopsonies, bilateral monopolies, and transaction costs, all used in ways that immensely illuminated the complex story of two radically different land systems coming into conflict in colonial New Zealand.<sup>22</sup> Similarly, in his current book, Banner uses the tools of economics to shed light on a variety of topics ranging from patents<sup>23</sup> to broadcasting.<sup>24</sup>

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16. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 4 (1950).

17. William J. Novak, *Law, Capitalism and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 *LAW & HIST. REV.* 97, 99 (2000) (quoting James Willard Hurst, *The Law in United States History*, in *PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY* 518, 521 (1960)).

18. See HURST, *supra* note 14, at 23.

19. BANNER, *supra* note 4, at 111.

20. *Id.* at 111–15.

21. STUART BANNER, *POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA* (2007).

22. *Id.* at 52–127.

23. BANNER, *supra* note 4, at 24–28.

24. *Id.* at 215–19.

## II. QUESTIONS AND CRITICISMS

One uncertainty with which the book left me is Banner's conception of property. Banner states in the introduction that the "basic message of the book is that our ideas about property have always been contested and have always been in flux."<sup>25</sup> I have no quarrel whatsoever with that message; indeed, that was essentially the thesis of my own 1997 book.<sup>26</sup> But, I want to look at how Banner develops that message to see if he gives a clear understanding of property.

The way to do that is once again to compare his book with the work of Hurstian legal historians.

James Willard Hurst had a very clear conception of property which was abundantly evident in his canonical book *Law and the Conditions of Freedom*.<sup>27</sup> In that book Hurst told the story of the development of American property law as a conflict between two competing conceptions, one static and anti-developmental, the other dynamic and aggressively pro-development.<sup>28</sup> The book described how the conflict between these two conceptions played throughout American history in various contexts and how property law in the nineteenth century developed in such a way that permitted a "release of energy"<sup>29</sup> in the young American economy. Although his followers did not always share this essentially benign, even legitimating view of property's legal development, they certainly did share his understanding of property as strictly instrumental. This instrumental view fits squarely with the reason for his interest in property, which they also share: property is and has been throughout American history the locus for conflicts between interest groups in the economy. Now, as I have already indicated, Banner certainly shares with Hurstians the vision of property as a *mis-en-scène* of interest-group conflicts. But does he share with them their undilutedly instrumental conception of property? I wish that he had said something more along these lines, perhaps even referring to Hurst's own book.

This leads to a second shortcoming, at least as I see it — the book's silence regarding its position in the existing corpus of historical writing on American property law. Banner does not tell us how he situates the book among other leading historical analyses of American property law. How, for example, does his view compare with Horwitz's treatments of property in the two volumes of *The Transformations of American Law*?<sup>30</sup> His silence regarding my book is understandable given the fact that we had very different objectives; our two books are really apples and oranges. But Horwitz's treatment of property has enough in common with Banner's to enable a very interesting comparison between them.

Turning to some specific points, I want to take up first his claim that the "bundle-of-rights" conception of property,<sup>31</sup> — which Banner correctly claims originated in the

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25. *Id.* at 3.

26. See ALEXANDER, *supra* note 1, at 15–16.

27. HURST, *supra* note 14.

28. *Id.* at 23–29.

29. *Id.* at 75.

30. See sources cited, *supra* note 2.

31. BANNER, *supra* note 4, at 63.

late nineteenth century, not, as is common thought, with the Legal Realists — facilitated a reinterpretation of the takings clause in a much more property-protective direction than had previously been the case.<sup>32</sup> I do not challenge the assertion that the reconception of property had that effect, but I wish that Banner had discussed the very ambiguous nature of the bundles-of-rights conception. Consider, for example, the fact that Legal Realists like Hohfeld's colleague and admirer, Arthur Corbin, whose politics were strongly pro-regulatory, were quick to endorse and pick up the bundles conception.<sup>33</sup> Banner notes this,<sup>34</sup> but he does not discuss how the same idea could be used to virtually opposite effects by different groups of jurists. They were able to do so, I suggest, because the bundles conception was ambiguous (in multiple respects) and could be manipulated for politically diverse, even opposing ends.<sup>35</sup> Banner's discussion of the origins and development of the bundles conception would have been stronger, in my view, had he extended it to its later use by the Legal Realists, who gave it a very different political valence.

A second topic that, in my judgment, merited a deeper analysis was the so-called "New Property."<sup>36</sup> Banner devotes an entire chapter to the topic,<sup>37</sup> but there is no discussion about the very strong theoretical and conceptual criticisms leveled at Charles Reich's thesis. For example, the late Jim Harris pointed out that Reich's justificatory-analogy argument raises many problems.<sup>38</sup> Suppose, for example, that one rejects Reich's premise that the justification for private property lies in personal independence.<sup>39</sup> What, then, follows regarding the legal treatment of government largesse?<sup>40</sup> Moreover, Banner is silent about the failure of efforts to create anything resembling substantive property-related socio-economic rights. After all, Reich only sought to gain *procedural* due process protection for government largesse through his "New Property" theory.<sup>41</sup> In cases like *Lindsey v. Normet*<sup>42</sup> and *San Antonio Independent School District v. Rodriguez*,<sup>43</sup> the stakes were even greater — petitioners sought constitutional recognition of substantive socio-economic rights, specifically housing and education rights.<sup>44</sup> These efforts were squarely rejected and, as a result, this country has never had a scheme of constitutional welfare rights, although some of our

32. *Id.* at 63–72.

33. See Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 509 (1924).

34. BANNER, *supra* note 4, at 72.

35. Consider, for example, the fact that today although some strongly pro-property rights scholars oppose the bundles-of-rights conception, others endorse it. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001) (opposing the bundle-of-rights view and describing the growing sentiment "that property is simply a list of use rights in particular resources"); but see Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECON. J. WATCH 215, 216 (2011) (endorsing the bundle-of-sticks metaphor).

36. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

37. BANNER, *supra* note 4, at 220–37.

38. J.W. HARRIS, *PROPERTY AND JUSTICE* 151 (Oxford Univ. Press 1996).

39. Reich, *supra* note 36, at 771–74.

40. See HARRIS, *supra* note 38, at 151.

41. See Reich, *supra* note 36, at 739–42.

42. *Lindsey v. Normet*, 405 U.S. 56 (1972).

43. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

44. *Id.* at 4–6; *Lindsey*, 405 U.S. at 58.

greatest constitutional property commentators, such as Frank Michelman, have made strong attempts to achieve that goal.<sup>45</sup> In my view, this development is an important chapter in the story of the development of American constitutional property in the second half of the twentieth century.

My final comment is that I think the book would have benefitted from more welfare economics. There is a very real sense Banner's approach follows, or at least is compatible with, that of Harold Demsetz's famous article *Toward a Theory of Property Rights*.<sup>46</sup> You will recall in that article Demsetz argued that what generates the creation of private property rights is the emergence of new technologies or new markets, which alter the cost-benefit calculus in such a way as to make it worthwhile, i.e., wealth-maximizing, to create new property rights in resources that were previously held in common.<sup>47</sup> Similarly, Banner focuses on how the emergence of new technologies led to the creation of new property rights.<sup>48</sup> But he has little or nothing to say about the costs involved in these developments, and surely they were not negligible. Demsetz illustrated his thesis in the simplest of settings — a setting that bears no resemblance to the complex environments in which emergent twentieth and twenty-first century technologies have spawned more sophisticated intellectual property rights. The development of radio or the recording industry would have been far more interesting contexts in which to examine the cost-benefit dynamics of creating new property rights, even if only superficially. But, to be fair to Banner, as he himself states in the book's introduction, "[t]he full history of property is so broad that it cannot be encompassed in a single book. There is plenty of room for more."<sup>49</sup> So, I am waiting for Banner's next one.

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45. Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

46. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

47. *Id.* at 350.

48. BANNER, *supra* note 4, at 2–3.

49. *Id.* at 3.