Book Review

Stuart Banner, *American Property: A History of How, Why, and What We Own*. Cambridge: Harvard University Press, 2011, pp. 355, cloth $29.95.

Reviewed by Laura S. Underkuffler

What is property? If we protect land, copyrights, and body parts as property, why do we protect them? Are the reasons that we do so matters of historical accident or considered policy?

This book tackles nothing less than these fundamental questions. In a sweeping, panoramic view of the history and development of American property law over the past two centuries, Professor Stuart Banner suggests answers to these questions. Each chapter of the book, elegantly and engrossingly written, presents the legal and political history of a different kind of property. The narratives are chock full of fascinating and previously unassembled details about the famous cases, political events, and personalities that have contributed to the rough and tumble history of American property law. In the process, Banner upends many conventional notions about the legal history of property in the United States.

Consider, for instance, the regulation of land use. The conventional wisdom is that the idea of comprehensive land-use controls was born with the enactment of a zoning ordinance by New York City in 1916. In fact, land-use controls were first imposed in colonial times (183). In the colonial period, owners were often required to improve or use their land, fence crops, drain wetlands, and build in particular locations to enhance collective goals such as security or the conservation of land (183). There were colonial limitations on the height of buildings, permitted building materials, and even external design ideas (183–184). After statehood, local governments continued these practices. "In Boston, for example, the fronts of new buildings had to form a straight line, while dwelling houses in one Virginia town had to exceed a minimum size" (184). As Banner notes, "[t]his tradition of piecemeal local land use regulation continued through the late nineteenth century and into the early twentieth…." (184). The movement to formal zoning schemes in the early 1900s, then, was "not from laissez-faire to regulation, but rather from

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piecemeal regulation to more comprehensive citywide regulatory schemes…" (184). (Incidentally—and perhaps most devastating to those of us who have taught to the contrary—the first citywide zoning ordinance was enacted not by New York City, as is commonly believed, but by Los Angeles in 1908) (184-185).

From another direction, the idea that zoning was fundamentally about the preservation of the physical character of neighborhoods, with only an occasional (darker) lapse into social and racial exclusion, is exploded by this book. Banner writes that "[f]rom the beginning, zoning was as much about excluding undesirable people as about excluding undesirable uses of land" (190). A treatise on the law of zoning written in 1922 discussed the "invasion of the inferior" (deliberately ambiguous, as to whether it referred to tenements or their inhabitants) when discussing the dangers that zoning was intended to prevent (190). Banner observes that "[i]n 1910, Baltimore enacted an ordinance establishing separate zones for blacks and whites. The idea was quickly copied in other cities, including Atlanta, Louisville, St. Louis, Oklahoma City, and New Orleans" (190). When the United States Supreme Court declared racially restrictive zoning unconstitutional in 1917,[1] its rationale was not that black residents were wronged, but that white owners who wished to sell to black purchasers were denied their right to alienate their property as they saw fit (190).[2]

Of course, what could not be done publicly could be done privately. Banner discusses a study of 84 housing subdivisions throughout the country, which was conducted in 1928. Approximately half of those subdivisions were governed by privately placed racial restrictions, including nearly all built after 1917 (193-194). The targets of racially restrictive covenants varied. In the South and East, blacks were the most frequently excluded group; in the West, it was "'Orientals'" (194). During this era, Andrew Bruce, a law professor at Northwestern University, opined that "[r]acial covenants were the only solution to 'the negro problem'…. Deprived of the ability to zone [blacks] out,…the best alternative available to cities [in Bruce's view] was what he called 'racial zoning by private contract'" (194). Perhaps most shockingly, Banner describes how the federal government promoted racial covenants in the 1930s through the home loan program of the Federal Housing Administration (FHA). The FHA recommended racial covenants for the properties that it insured, and even published a model covenant for developers to copy (195).

Banner describes early court challenges to racially restrictive covenants, and—in the process—illuminates this dark corner of American judicial and social history. For instance, he tells how, in a little-known case, the California Court of Appeals held a covenant that barred sale to "any person of African,

1. *See* Buchanan v. Warley, 245 U.S. 60 (1917).

2. *See id*. at 72-73.

Chinese, or Japanese dissent" to be invalid[33] (195). The reason was not its odious nature, per sé, but how the principle for which it stood might affect the availability of housing stock for majority groups. "Such a restriction might seem perfectly reasonable, the court explained, but if it were allowed, what would come next? There might be bars 'on selling or leasing to persons of Caucasian descent, or to any but albinos from the heart of Africa or blond Eskimos'"[44] (195). Rather ugly logic, but the result in the case—invalidating such covenants—was an advance. That advance was short-lived, however. A few months later, the California Supreme Court held that "[r]estraints on *sale* might be void,…but restraints on *occupancy* were not" (195). As a result, developers needed only to express covenants as restrictions on occupancy rather than sale in order to preserve all-white enclaves (195). It was not until *Shelley v. Kraemer,*[55] decided by the U.S. Supreme Court in 1948, that racially restrictive covenants were held invalid as a matter of national policy. By that time, it was estimated that "56 percent of [recently constructed] homes were off limits to African-Americans, and in the larger subdivisions, that figure was 85 percent" (195). Even today, racially restrictive covenants remain part of recorded deeds, particularly in the South.

In other chapters, Banner discusses the development of property ideas in more avant garde areas. For instance, the idea of "owning" radio wavelengths has been controversial from the beginning. After the invention of the radio, and "[n]ew broadcasters without existing licenses began crowding frequencies already allocated to others,…[o]ne possibility was to recognize property rights in particular wavelengths, rights that would allow existing users to stave off trespassers" (204-205). Opponents feared that "property in wavelengths" might eviscerate public control of a public resource, and lead to domination of broadcasting by a few corporate entities (205-211). As a result, "[a]s a formal matter…the Radio Act of 1927 created a system without property rights in wavelengths. In practice, however, things were not so clear" (212). Monetary interests shifted from "wavelengths as property" to "broadcasting stations and their licenses as property." "By the middle of the [20th] century, it was clear that beneath this layer of obfuscation the radio spectrum was governed by a de facto system of property rights. The Federal Communications Commission… routinely granted renewals of broadcasting licenses…[and] routinely approved the sale of stations, even when the sale price must have included some increment that represented the value of the license" (215).

In a chapter dealing with another sort of "new property," that of government-granted benefits and employment, Banner traces the ascendance of property ideas in the Supreme Court's jurisprudence of the 1960s and 1970s, only to be

3. Title Guarantee & Trust Co. v. Garrott, 183 P. 470 (Cal. App. 1919).

4. *Id*. at 473.

5. Shelley v. Kraemer, 334 U.S. 1 (1948).

abandoned (for most practical purposes) later (229–237). Currently, the law is rife with inconsistency: for instance, drivers' licenses and horse-training licenses are property, but a job as a probationary police officer is not (235). Even when a state-created interest of this type is property, only minimal procedures are required for its deprivation (235). (Among the tales of judicial infighting and discord in this field, we are also told little-known facts about Charles Reich, the author of the law review article, "The New Property,"[66] that arguably started it all. Although this article is (at last count) the fourth-most cited law review article ever written, Reich was left a "bitterly disappointed" man (236). He wanted more than personal fame; he wanted practical protection for welfare recipients and others dependent upon government largesse (236).)

Another avant garde area discussed by Banner is that of "owning life" (238). Reluctance to recognize the human body as property has led to bizarre results in American cases, such as one from South Carolina.[77] Banner describes how "a man was murdered and his body left on the railroad tracks. Trains ran him over three times before anyone noticed" (239). The administrator of the dead man's estate sued the railroad, but recovery was denied. "'[T]o entitle one to bring an action for an injury to any specific object or thing, he must have a property [interest] therein,' the court reasoned"[88] (240). Recovery was allowed for the deceased's clothing and watch, which were likewise mutilated (240). Our society's abhorrence of the idea of the body as property is, of course, highly situational. Human hair, skin, blood, sperm, eggs, and corneas have all been held by legislatures or courts—in some cases, for many years—to be property (241–248).

So what, in the end, do we make of all of this? Are the property interests that this book describes matters of historical accident, or considered policy? As a primarily historical account, this book's answer to this question must, necessarily, be limited. The book does not explore, for instance, whether any reasoned account could be given of the property interests that the law has recognized at any particular time. The book does argue, richly and convincingly, that the idea of property is malleable, and is contingent upon prevailing social and historical forces. Whatever abstract theories could be advanced for particular property rules, the explanation for the legal enforcement of those rules is undeniably a tale of political and legal power.

Before closing, Banner addresses one last question. If property is so malleable, does it have any "true nature"? (289) He is skeptical. Although "[p]hilosophers and law professors sometimes try to discern property's 'true' nature,…the stories in this book" suggest none (289). Property is simply a means to socially determined ends (291).

In a sense, Banner is undoubtedly right. If by property's "true nature," we mean that there is an enduring idea of content or configuration of rights that

6. Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964).

7. Griffith v. Charlotte, Columbia & Augusta R.R. Co., 23 S.C. 25 (1885).

8. *Id*. at 38.

property represents, then property largely (if not completely) fails this test. The "true nature" of property might be seen, however, in a different way. Property as an idea expresses the human need to control, appropriate, and protect the external, often physical, and usually finite resources that human beings value. Indeed, the very existence of this excellent book and the complex history it tells is a testament to the enduring power of this concept. Property's myriad of changing rules, their uses and abuses, speaks not of property's weakness but of its insistent and irrepressible strength. As long as the human need to appropriate and control exists, there will be claims of property, whether made by the affluent or by the homeless. The question is not whether property, as an idea, will reflect this truth; it is, rather, what values we—as a society—will bring to it.