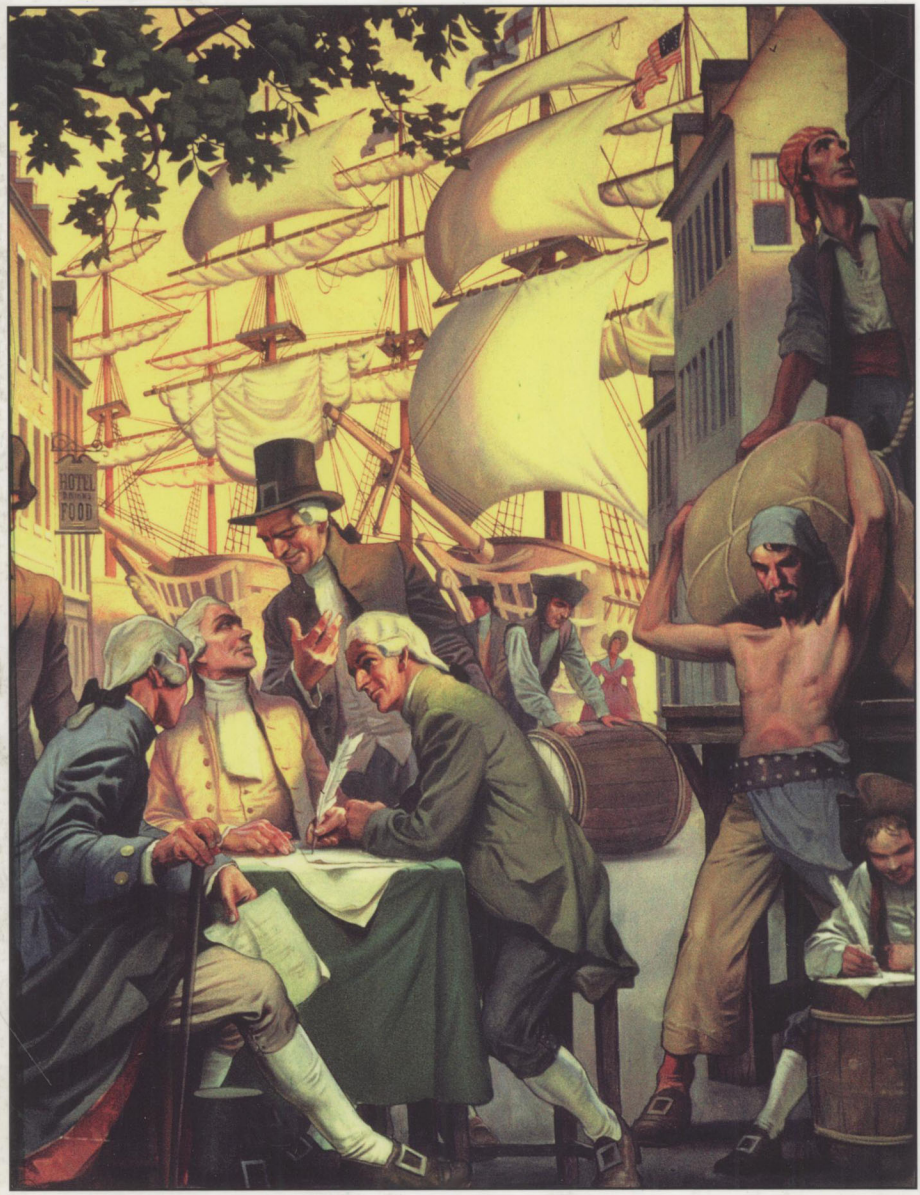
STUART BANNER

AMERICAN PROPERTY

A HISTORY OF HOW, WHY, AND WHAT WE OWN



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Contents

Introduction

WHEN Richard Newman died in Los Angeles in 1997, his body was taken to the county coroner's office for a routine autopsy. Two years later, Newman's father learned that during the autopsy the coroner had removed his son's corneas without asking the family's permission. At the time, this was the office's normal practice. It was the product of both high and low motives. There was a desperate shortage of corneas for transplant, and corneas must be transplanted very soon after death, often too soon to obtain the consent of the next of kin. On the other hand, this same shortage made corneas a valuable commodity, and the coroner's office earned $250 per pair by selling them to an eye bank. Newman's father sued the coroner's office for damages. The basis for the suit was that the coroner had violated the constitutional rights of Newman and his father by depriving them of property without due process of law. But were Newman's corneas a kind of property? And if they were, who was their owner once Richard Newman was dead?[1]

Many American Indian tribes are unhappy with the way aspects of their culture have been used by others, from the commercialization of traditional art forms and medicines to the use of stereotyped figures as the mascots of sports teams. These grievances are increasingly taking the form of property claims, arguments that the heritage of indigenous groups is something that belongs solely to them. Can something as amorphous as culture or heritage be a kind of property? If it can, who owns it?[2]

New technologies allow consumers to copy music and video and do all sorts of things they could never have done before. They can give

copies to friends or to millions of strangers, they can listen or watch at times and places different from the ones the producers intend, and they can even use a copy as the raw material for creative works of their own. When do such activities infringe the property rights of others? How far does the ownership of a song or a film extend?[3]

These current controversies, and many others one could add, all raise a basic question: what is property? To decide whether a dead man's cornea or an indigenous culture or a digital representation of a song is a kind of property, one has to develop, at least implicitly, some idea of what property means and some method of distinguishing what should count as property from what should not. To do that, in turn, requires some thought (again, at least implicitly) about the nature of property itself. How does it originate? What purposes does it serve? What are its outer limits?

This book is about the ways in which the answers to questions like these have changed over time. Property is, of course, an institution at the root of our political and economic life. The Constitution is just one of the many sources of law that protect the rights of property, and a market economy could scarcely exist without some kind of property. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property," the English judge William Blackstone wrote in the mid-eighteenth century, and his words are just as true today.[4] But the concept of property Blackstone and his contemporaries had in mind was in many respects very different from the one we hold today. We still rely heavily on the idea of property, but it is an idea whose content has constantly been changing.

One approach to understanding these changes is to look closely at the historical emergence of new forms of property in response to technological and cultural change. Several of the chapters in this book are about such episodes; they examine, for example, the development of property in news in the late nineteenth and early twentieth centuries, the emergence of property in fame in the early twentieth century, and the rise of property in sound, also in the early twentieth century. As with today's controversies over property rights in body parts and living organisms, these earlier battles were occasions for the elaboration of ideas about the nature of property more generally.

Another approach is to scrutinize changing ideas about the limits of appropriate government regulation of property. When, and how, may

the government interfere with the use of property? When does the use of public power unconstitutionally infringe the rights of property owners? As with the issue of what should count as property, one cannot form an opinion about the proper limits of the regulation of property without having, at least implicitly, some conception of the nature of property itself. What exactly *is* property? Is it a natural right or one created by law? Which of its attributes are essential and which are subject to alteration to advance some public goal? Some of the chapters in this book thus examine the rise of new kinds of regulation and the development of new ideas about the Constitution's protection of property rights.

The basic message of the book is that our ideas about property have always been contested and have always been in flux. Property is a human institution that exists to serve a broad set of purposes. These purposes have changed over time, and as they have, so too has the conventional wisdom about what property is really like. As new coalitions have formed around particular goals, they have pushed conventional understandings of property in one direction or another.

In focusing on our changing ideas about the nature of property, this book will have little to say about several topics that might loom larger in a history of property with a different emphasis. It does not address the acquisition of land from American Indians and the disposition of the public domain to settlers, or the methods by which property has been conveyed from one generation to the next, or the surveying of land and the recording of title, or mortgages, or the expansion over time of the property rights of women and African-Americans, or, no doubt, many other equally important subjects.[5] The omission of such topics is not meant to imply their insignificance. The full history of property is so broad that it cannot be encompassed in a single book. There is plenty of room for more.

1

Lost Property

IT HAD been "a complete revolution," one lawyer recalled in 1829, a transformation producing "a substantial improvement" in the lives of Americans. "What abundant reason have we to be satisfied with our condition," another exclaimed the following year, now that Americans had been "disencumbered from most of the burthensome and intricate legal regulations" that had fettered them in the past.[1] This was the language of July 4 speeches in the early republic, but these lawyers were not celebrating the Declaration of Independence or the successful outcome of the war. They were talking about the law of property.

American lawyers marveled at how quickly so many of the old rules had been cast aside. In Virginia, reported St. George Tucker, there had been "almost total change in the system of laws relative to property." William Blackstone's four-volume *Commentaries,* first published in the 1760s, had become the standard legal reference on both sides of the Atlantic, but forty years later the portions of the *Commentaries* about property were already out of date in the United States. "That celebrated work could only be safely relied on," Tucker counseled, "in apprizing the student of what the *law had been;* to know *what it now is,* he must resort to very different sources of information."[2] Entire categories of property familiar to English lawyers had ceased to exist in the United States. American judges and legislators were constantly replacing ancient doctrines with new ones. Few areas of the law, if any, were changing more rapidly than property.

Into Oblivion

The most basic change concerned the nature of land ownership itself. "The grand and fundamental maxim" of English real property law, Blackstone had explained, was that "all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown." In principle, no one in England except the king owned land outright. Land could be held by a variety of tenures, but all of them implied some form of obligation to someone else higher up the ladder. In the United States, by contrast, "the title of our lands is free, clear and absolute," the Connecticut judge Jesse Root declared. "Every proprietor of land is a prince in his own domains." American landowners still obtained their land from the sovereign—the federal or state government—but without any ongoing duties to render service or pay money. English property lawyers were accustomed to parsing the fine distinctions between different sorts of land tenure, but to American lawyers even their names sounded exotic. Words like *escuage, burgage, knight service, frankalmoin*—it was almost like a foreign language. The whole subject of land tenure was purely of historical interest, St. George Tucker remarked, the legal equivalent of "viewing the majestic ruins of Rome or Athens." Generations of English lawyers had learned the different tenures by studying the treatises of authors like Edward Coke and Thomas Littleton, but only the most historically minded of Americans ever would. Those "immense stores of learning," noted the New York judge James Kent, had "become obsolete."[3]

On paper the change had come shortly after independence, but in practice it had come long before. English land tenure was formally transplanted to North America in the colonial charters. It remained a feature of colonial law thereafter, but the enforcement of tenure obligations, uneven right from the start, generally declined over time. In colonial Connecticut, explained the congressman and future judge Zephaniah Swift, land was nominally held in a form of tenure called socage, but few ever had any occasion to notice. In practice, landowners were free of any of the obligations associated with socage. In the 1790s Connecticut passed a statute vesting absolute title in property owners—in effect abolishing socage—but the statute only brought the law into conformance with actual practice. The same was true in most of the other states, which enacted similar statutes shortly after independence,

statutes killing on paper what for most landowners had long been dead in everyday life. By the mid-nineteenth century, the old system survived only on the great manors of New York's Hudson River valley, where the resentment of the thousands of people still subject to archaic tenure obligations fueled decades of conflict and sporadic violence.[4]

No one lamented the loss of English land tenure, which was widely understood as a feudal relic unsuitable for the modern world. Swift was grateful Connecticut was not "embarrassed with the slavish principles of the system of feuds." James Sullivan, the attorney general and later the governor of Massachusetts, was relieved that his state's land had been "stripped of the clogs and incumbrances" characterizing land in England. American law still retained some of the vocabulary of the English system of tenures, Timothy Walker pointed out. There were still *tenants,* who might inhabit *tenements,* and Americans still spoke of *landlords,* even when there was nothing especially lordly about them. But Walker, a law professor in Cincinnati, was adamant that such words had lost their original meanings. One who studies the history of property, he instructed his students, "cannot fail to be thoroughly disgusted with the narrow, arbitrary, and mystifying spirit which dictated all the early doctrines; nor to be equally gratified with the bold, liberal and determined spirit which has since been manifested, to substitute new ones in their place." With the abandonment of English land tenure, Walker had "no doubt that the law of realty in Ohio, could be written in one-third of the space which would be required for the law of realty in England."[5] The old conceptual structure of land ownership had vanished.

Many of the forms of intangible property familiar to English lawyers had vanished as well, and many more were in the process of disappearing. These were what English lawyers called *incorporeal hereditaments*—nonphysical things connected, sometimes tenuously, with interests in land. "In England they make a very important part of real property," Timothy Walker told his students, but in the United States they scarcely existed, "and we are thus relieved from a great variety of perplexing questions." Blackstone had devoted an entire chapter to the incorporeal hereditaments, so aspiring American lawyers continued to read about them for decades, but, as one lawyer admitted in the early 1840s, "this subject is rather one of curiosity than practical utility."[6] An entire category of property was almost gone.

Some of these forms of intangible property had never caught on in the colonies. An *advowson* was the right to appoint a minister to a church. In England wealthy individuals owned advowsons and could pass them to others upon death, just like any other kind of property. A colonist from England might bring an advowson with him: Isaac Johnson, the richest of the early settlers of Boston, died with a large estate including substantial landholdings and an advowson attached to a church back in England. In his will he left the advowson to two fellow settlers. American churches, however, tended to be built and managed by congregations rather than individuals, so there was little occasion for individuals to have the power to select ministers. There was an advowson for Trinity Church in New York, for example, but it was not owned by any person; rather, it was vested in the church as a corporate body. By the early nineteenth century, neither St. George Tucker nor James Kent, perhaps the most learned lawyers in Virginia and New York respectively, could remember any instances of advowsons in their states.[7]

Differences in the financing of English and American churches caused other forms of intangible property to disappear as well. In England, the clergy had an inheritable property right in *tithes*, or one-tenth of the annual produce of the land within the parish. There had never been any such thing in Virginia, Tucker assured his readers. "The most litigious cases in the Exchequer Reports, are those relating to tithes," Kent observed; "and it is a great relief to the labours of the student, and a greater one to duties of the courts, and infinitely more so to the agricultural interests of the country, that the doctrine of tithes is unknown to our law." Some states still had established churches in the early republic, but even those states lacked tithes, and once they disestablished their churches there would never be any occasion for instituting them. "Here there are no benefices," declared Thomas Duncan of the Pennsylvania Supreme Court, "no church establishments of the state, no tithes." Nor were there any *corodies*. A corody was the right to receive food or money from a religious institution. Under English law corodies were yet another familiar form of nonphysical property, but, as an early American legal treatise put it, "the subject may be considered as entirely obsolete with us."[8]

If American lawyers were dismissive of the intangible property unique to the English church, they could grow positively indignant about *dignities*, a kind of property rooted in England's social structure. A

dignity, a property right in a noble title, "is of great importance in the English law," Kent explained, "though unknown to us." In a nation without titles of nobility, insisted Tucker, there could be no dignities, because no one could inherit special privileges. Thomas Bartley, chief justice of the Ohio Supreme Court, was even more emphatic. "The theory and foundation of the British government is essentially different from ours," he argued. "The sovereignty there, is said to be in the King instead of the people." The king, "as the original *source* or *proprietor* of honor," could grant "titles of nobility in such manner as to create vested rights of property in them. This, however, is upon the principle, that government is instituted for the benefit of the RULERS rather than the GOVERNED."[9]

Advowsons, tithes, corodies, dignities—these were forms of intangible property that never took root in the United States. There were others that were in the process of disappearing in the early republic, forms of intangible property that *had* been transplanted during the colonial period but began to fade away with independence.

In England, public office was a kind of property. There was a long tradition, in England as in much of Europe, of acquiring office by purchase. Sometimes the buyer just got the right to exercise the office (and collect the fees that went along with it) for a term of years, Blackstone explained, but sometimes he got that right for life, and sometimes he got it in perpetuity, so he could pass it along to an heir. Blackstone noted that statutes and court decisions had curtailed some of the powers of the owner of an office. Certain offices couldn't be sold to others, for example, and some offices weren't allowed to be granted for periods exceeding the life of the holder. It was nevertheless clear that English law counted offices as incorporeal hereditaments, intangible property that for most purposes was treated just like any other kind of property.[10]

Offices in the United States could not be acquired by purchase. But did American officeholders have a property right in their offices? Some distinguished American lawyers believed they did. "Let it not be said that an office is a mere trust for public benefit, and excludes the idea of a property or a vested interest in the individual," cautioned Alexander Hamilton. "Every office combines the two ingredients." Treating an office as property, even property that could be owned in perpetuity, provided the right incentives, in Hamilton's view. "The idea of a vested interest holden even by a permanent tenure," he reasoned, "so far from

being incompatible with the principle that the primary and essential end of every office is the public good, may be conducive to that very end by promoting a diligent, faithful, energetic, and independent execution of the office."[11] Hamilton, writing in early 1802, was criticizing the recent repeal of the Judiciary Act of 1801. The Judiciary Act had created new federal judgeships; its repeal abolished those judgeships, thus taking offices away from their holders. The judgeships were a form of property, Hamilton argued, and so the repeal amounted to an unconstitutional taking of property.

Hamilton had a political motive for classifying public office as a kind of property, because the judges deprived of office in 1802 were his political allies. But the issue also arose in many contexts less influenced by partisan politics, where it could be considered on its own merits. The most thorough statement of the pro-property position was authored by Thomas Ruffin, the long-serving chief justice of the North Carolina Supreme Court, in an opinion resolving a dispute between two men who both claimed to be the rightful clerk of the same county court. Lawson Henderson had been appointed as clerk in 1807, when North Carolina clerks had life tenure. In 1832 a new law made the position elective rather than appointive, and John Hoke won the election. But had the 1832 law deprived Henderson of property? The answer turned on whether a public office was a kind of property. Property was "whatever a person can possess and enjoy by right," Ruffin reasoned, and on that definition, an office was property. That didn't necessarily mean people could do with offices whatever they did with other sorts of property, he cautioned. One couldn't sell an office, or let it lie idle, the way one could with land. "But with these limitations," Ruffin concluded, "a public office is the subject of property, as every other thing corporeal or incorporeal, from which men can earn a livelihood and make gain." A man's office was his property "as much as the land which he tills, or the horse he rides or the debt which is owing to him." Lawson Henderson's position as clerk was his property, and the law that took it away from him was therefore invalid.[12]

By the 1830s, however, many lawyers found incongruous the notion that a public office could be a form of private property. "In a republic," the senator (and future Supreme Court justice) Levi Woodbury insisted, "office-holders have no property in their offices." Indeed, "liability to removal tends to increase industry and fidelity." In his *Commentaries,*

James Kent acknowledged that in England offices were a type of property, but he explained that the American practice was different, because "it would not be consistent with our manners and usages, to grant a private trust" in a public office. "*Property* in an office," agreed Francis Hilliard, "is for the most part inconsistent with republican constitutions and principles." By the 1840s and 1850s, American courts were unanimous in holding that public office was not a type of property.[13] Another kind of property had disappeared.

One very important form of property in rural England was the right of *common*, the right to use land belonging to another for certain defined purposes. Blackstone distinguished four different sorts of common: common of pasture, the right to feed one's animals on another's land; common of piscary, the right to fish in another's water; common of turbary, the right to cut turf on another's land; and common of estovers, the liberty of taking wood from the land of another. The land involved typically belonged to the wealthy, while the possessors of rights of common were often poor farmers who depended on them for subsistence. The steady enclosure of the English countryside meant the gradual disappearance of rights of common, but in the late eighteenth century, rights of common were still a vital part of the English rural economy.[14]

There was much more land per person in North America than in England, so American farmers had much less need of rights of common. St. George Tucker had never heard of any examples in Virginia. The right "does not exist in Virginia," he concluded, and "if it does, it can only be in a few cases." In Pennsylvania, remarked William Tilghman, the state's chief justice, "I know of very few instances of rights of common." "All these rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil," summarized one New York judge. "There is much learning in the books relative to the creation, apportionment, suspension and extinguishment of these rights, which fortunately in this country we have but little occasion to explain."[15] In the United States, rights of common were uncommon.

They did exist, particularly in the manors of New York, where grants of common from the colonial period lingered on and gave rise to litigation throughout the early nineteenth century. Occasional cases raising issues of common popped up in older towns in other northern states as well, like Marshfield, Massachusetts, where a 1645 grant had

included rights of pasture that were still being argued over in 1830. By then they were curiosities, of interest to historically minded lawyers precisely because of their rarity. "The change of manners and property, and the condition of society in this country, is so great," James Kent observed, "that the whole of this law of commonage is descending fast into oblivion, together with the memory of all the talent and learning which were bestowed upon it by the ancient lawyers." Related property rights lasted longer. Americans still had land they called "commons," often in the form of public squares in the center of towns, and many commons in this sense of the word still exist today. In the South, for much of the nineteenth century, the owners of animals had the right to pasture them on unfenced land owned by others, an echo of the old common of pasture.[16] But the right of common in Blackstone's and Kent's sense all but disappeared before the Civil War.

Meanwhile another kind of property was vanishing as well. In the eighteenth century, the labor of other people was understood as a kind of property. This was most obviously true of slavery and indentured servitude, both of which existed all over North America, but it was also true of labor in general. Blackstone referred to "the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages," and the idea was equally accepted on both sides of the Atlantic. Slavery and indentured servitude were thus less different from other forms of labor than they seem today. In legal contemplation, an employer owned his employee's labor just as much as a planter owned the labor of his slave.[17]

The labor of children, by the same token, was understood as the property of their father. "The child hath no property in his father or guardian; as they have in him," Blackstone explained. Fathers often bound their children out to other adults as apprentices in exchange for compensation to the father rather than to the child, transactions that could not have taken place had fathers not owned their children's labor. A father, like an employer, was a property owner.[18]

This whole complex of thought gradually crumbled away in the early republic. The northern states abolished slavery. Changing economic conditions caused indentured servitude to decline into insignificance. Ordinary employment relations were reconceived as voluntary transactions between juridical equals rather than the ownership by one person of another's labor. New ideas about the nature of the family