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2000

Review of Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970, by Gregory S. Alexander

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Recommended Citation

James Kainen, *Review of Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970*, by Gregory S. Alexander, 44 *Am. J. L. Hist.* 109 (2000)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/754

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five of fifteen Supreme Court nominees had been federal appeals court judges. (Such nominees were even scarcer prior to 1945.) Since then, sixteen of nineteen nominees have had federal appellate experience. Federal appeals judges have become “the ‘darlings’ of the selection process in modern times,” according to Yalof (p. 170). Presidents prefer them because their appellate opinions offer insights into their judicial philosophies. In addition, appellate judges “also make for less controversial nominees before the U.S. Senate” because they have already been confirmed by the Senate at least once and have survived reviews by the Federal Bureau of Investigation and the American Bar Association (p. 171).

Curiously, Yalof pays no attention to the partisan aspects of his three models of judicial selection. Yet a pattern seems to exist. Of the five nominees chosen through an open process, four were picked by Democratic presidents. Democrats also selected six of the nine single-candidate nominees. In contrast, all fourteen products of the criteria-driven process were nominated by Republican presidents. An alternative explanation of this pattern, of course, is that it is temporal rather than partisan: of the fifteen nominations between 1945 and 1968, only three were criteria-driven, while of the thirteen nominations between 1969 and 1987, eleven were. Evidence that the partisan interpretation is the more accurate one, however, may be found in the nominations made by Bush and Clinton. In Yalof’s provisional assessment, the Republican Bush used a criteria-driven process in making both of his nominations. The Democrat Clinton used an open process for both of his.

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GREGORY S. ALEXANDER, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970*. Chicago: University of Chicago Press, 1997. x, 486 pp. \$39.95.

In this impressive volume, Gregory Alexander analyzes property in American legal thought as a dialectic between conceptions of commodity and propriety. As commodity, property’s primary purpose is to enable individuals to satisfy their personal preferences. Law maximizes social wealth (and ultimately individual satisfaction) when it allows those preferences to be freely expressed in the marketplace. As propriety, property’s primary purpose is “the material foundation for creating and maintaining the proper social order” (p. 1). Property as propriety rejects the subjectivity of value undergirding property as commodity. For example, property as commodity privileges freedom of disposition and exchange to satisfy individual preferences. However, property as propriety “is always committed to some particular substantive view” (p. 3) from whose perspective property legitimately prohibits the satisfaction of preferences. Moreover, propriety and commodity cannot collapse into each other. A proprietarian defense of the social order resulting from unimpeded market transactions would have to provide a justification besides the mere increase in social wealth or satisfaction of individual preferences.

Alexander rightly appreciates that he is working with very broad conceptions that function largely as ideal types since “few, if any, American legal writers were consistently and exclusively committed to one or the other” (p. 3). His narrative recounts progressive accommodation of inconsistent visions that lawyers did not necessarily perceive in competition. Jefferson, for example, was proprietarian when he urged widespread agricultural holdings to secure the economic

independence necessary to allow citizens to practice virtuous self-governing. Yet, Jefferson failed to reject property as commodity. He relied upon symbolic attacks on primogeniture and entail as the civic republican program of property "reform" instead of considering public restraints on freedom of disposition. Restrictions upon market exchanges and donative transfers were necessary to prevent real estate speculation and dynastic holdings from undermining property's primary role in securing ordinary citizens' economic independence.

Meanwhile Hamilton, although more responsible than any other American before him for developing property as commodity, was also proprietarian since he redefined virtue as consistent with, rather than opposed to, self-interest. In an environment where secure public debt securities functioned as capital, he argued, unleashing individual ambition, creativity, and innovation would create a commercial elite whose virtue lay in talent and accomplishment. Freed from the feudal vestiges of English property law, which fostered hierarchical economic dependency and an aristocracy of wealth rather than talent, Hamilton's commercial meritocracy would, like Jefferson's agrarian republic, reward virtue—differently conceived—rather than wealth *per se*.

From this overall perspective, the book dissects the visions of property held by exemplary legal thinkers during the ages of American property law identified as civic republican (1776-1800), commercial republican (1800-1860), industrial (1870-1917), and late modern (1917-1970). Each period's discussion begins with a prologue about its characteristic legal writing. The prologues provide context for the sources on which the book relies to trace evolving property discourse. Rarely does that discourse unambiguously translate into decisions on concrete property issues, but it sheds new light on how legal thinkers conceived the connection between those issues and normative conceptions of property. The book treats the reader to subtle and original analyses of such luminaries as James Kent, John Chipman Gray, Oliver Wendell Holmes, Morris Cohen and Robert L. Hale, which illustrate important themes in lawyers' evolving property theory.

The explanatory framework provided by the dialectic between propriety and commodity, however, is more problematic than the book's compelling analyses of more particular property theories employed in exemplary works of legal scholarship and in public debates over concrete property issues. The argument is in constant danger of falling victim to the book's appreciation of the nuances of the historical texts because the categories appear so malleable that shifts *within* each approach threaten to overwhelm the significance of affinities between proprietarian or commodificationist approaches. Alexander appreciates the potential problem. He characterizes the commodificationist approach as essentially "empty" (p. 3), since very different property regimes may satisfy its criteria. Meanwhile, that proprietarian approaches may reject values' subjectivity hardly means that they agree on the values that property law ought to protect. Uncovering proprietarian strands in lawyers' property theory emphasizes similarly between justifications of such disparate policies as slavery, strict limitations on inheritance, paternalist limits to married women's property rights, constitutional protection of welfare entitlements, permission of spendthrift trusts, elimination of spendthrift trusts, broad constitutional protection of vested rights, and narrow constitutional protection of vested rights.

Consequently, the historical significance of the opposition between commodity and propriety is broader than its role in any particular theory or policy debate. Alexander offers his account to correct those who portray property's consistent role as protecting the market from democratic attempts to use property law in aid

of the proper social order. In this, the book is successful. Although property as propriety explains only the broadest outlines of how legal thinkers identified legitimate goals of property law, it successfully rebuts the claim that Americans' historical commitment to property comprises the belief that wealth creation and individual preference satisfaction are its only legitimate goals.

That American property law has not been exclusively concerned with facilitating the market, however, does not necessarily support Alexander's normative claim for the significance of the propriety/commodity dichotomy. He argues that modern, economic libertarian conceptions of property represent an unprecedented rejection of the historical dialectic because they entirely forsake the proprietarian tradition. As exemplars, Alexander identifies Friedrich Hayek and Justice Scalia's *Lucas* opinion, one of several recent Supreme Court decisions resurrecting moribund federal constitutional protection for property. Nevertheless, the book does not show that their views are necessarily any more lacking in subtle proprietarian influence than those of previous jurists whose property jurisprudence economic theory and fear of majoritarian restrictions on liberty also shaped. Hayek's defense of the market, for instance, was partly moral, and the book does not adequately explain how *he* forsakes proprietarianism while Hamilton, who conceived of the market as rewarding entrepreneurial virtue, merely transformed it. Similarly, the book does not undertake to explain how Justice Scalia's resurrection of constitutional protection of property reflects a completely commodified view. So one cannot tell how Justice Field's defense of similar constitutional protection, which justified market outcomes partly as an alternative to economic dependence upon government, is importantly different from Scalia's. That is not to say that Alexander cannot make the case, but one must be careful to recall that even Milton Friedman grounded his defense of free markets in their relationship to political freedom and not merely in their ability to generate wealth.

Although not yet proved, Alexander's normative thesis is bound to have an impact upon property scholarship. It challenges the existing wisdom that modern constitutional protection of property rights is vulnerable since it is similar to late nineteenth and early twentieth century substantive due process. Alexander potentially turns that wisdom on its head by suggesting that the Court's resurrection of property rights' protection is vulnerable for precisely the opposite reason; its break from proprietarian ideas still alive within "Lochnerism" undermines its historical legitimacy. To prove that challenging thesis, however, Alexander must fortify the boundary between propriety and commodity. If a fully commodified conception of property is empty because equally consistent with profoundly different markets, every attempt to use commodity to support particular property rules has to rely, at least implicitly, on assumptions about the proper social order that do not follow merely from the goals of wealth creation or preference satisfaction. As even fully commodified conceptions make implicit concessions to propriety when promoting particular property rules, Alexander must further explain their departure from earlier visions.

Sharpening the distinction between commodity and propriety also requires comparing those descriptive categories with others rooted in historical changes *within* economic conceptions of property. The emptiness of the wholly commodified conception of property is an artifact of the marginalist revolution in economic thought and the transition from the classical to the neoclassical paradigm. The latter sharply distinguishes between allocation efficiency and wealth distribution. It concedes that efficiency analysis presupposes, but cannot itself justify, a distributional starting point defined by property entitlements. The neoclassical paradigm

enables discourse about fully commodified property by abandoning any sense of a proper social order besides that suggested by maximization of wealth and individual satisfaction. Still, it does so only by acknowledging its limits as a normative framework for evaluating property's distribution. The neoclassical paradigm represents a shift within economic thought away from the classical paradigm in which market outcomes were not merely efficient, but also just because they rewarded people for the "true" commercial value of their labor. However, there is no break from tradition in lawyers' borrowing ideas about property from prevailing economic paradigms. Lawyers whose economic assumptions required no choice between wealth creation, individual satisfaction, and the material foundation for the social order could not have viewed the distributive consequences of those assumptions as embodying concessions to propriety.

It remains to be seen, therefore, whether Alexander's demonstration that the proprietarian conception of property is part of our historical discourse supports its overt revival. Those who advocate a commodified view may properly understand that their progenitors were partial proprietarians only by virtue of earlier economic paradigms' limitations. Nonetheless, the book requires modern commodificationists to confront proprietarian discourse when considering their view's historical legitimacy. Reminded that earlier commodificationists considered property from a normative perspective that allocational efficiency alone cannot support, their modern counterparts should confront the limitations of their own perspective. Surely today's lawyers who conceive of property as commodity are apt to forget or deny that claims about property's efficient allocation presuppose, rather than justify, property's pre-existing distribution.

Even if the book does not provoke lawyers to appreciate the limits of modern economic analysis, it will have a profound effect. By asking whether Americans have been content to conceive property as mere commodity, subjecting the material foundation for the proper social order to the agnosticism of the marketplace, *Commodity and Propriety* establishes an important agenda for property scholarship. Moreover, by tracing the view that "the purpose of property is not to satisfy individual preferences or to increase wealth but to fulfill some prior normative vision of how society and the polity that governs it should be structured" (p. 2), the book outlines an important alternative that legal historians ignore at their peril.

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