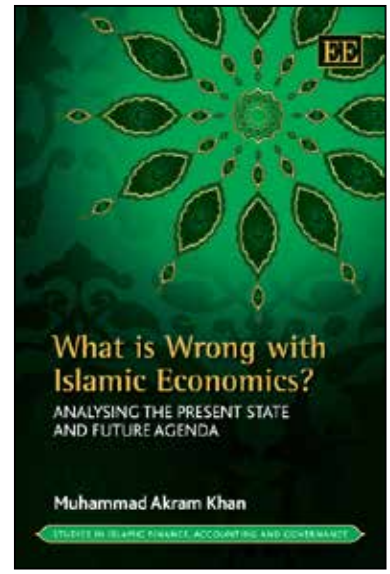
WHAT IS WRONG WITH ISLAMIC ECONOMICS? ANALYSING THE PRESENT STATE AND FUTURE AGENDA

BY MUHAMMAD AKRAM KHAN

Edward Elgar Publishing, Inc., Northampton, MA, 2013. 503 pages, $185.00.

Reviewed by Christopher C. Faille



Muhammad Khan, a former deputy auditor general for Pakistan and former chief resident auditor of U.N. Peacekeeping Missions, has written a work of renunciation or, as he puts it, self-rebuttal. He has been "actively involved in thinking about, writing about, and advocating Islamic economics as a distinct branch of knowledge for over four decades." He has been part of an intellectual establishment in this field. But in recent years his thinking has led him to inferences that contradict those for which he pleaded in that capacity.

He now believes that much of what goes by the name of Islamic economics, and a special concern of it—Islamic finance—amounts simply to the dressing up of theology and devotional practices with economic jargon. He would like to see a new Islamic economics, one that is inspired by Islam but that is also a true empirical social science offering hypotheses that can be verified or falsified by evidence. Islamic theology has been a cocoon, and it is time for the butterfly to burst free.

One example of Khan's efforts to break through that cocoon arises in the context of the doctrine of *zakah*, which he defines as "a tax on the wealth and income of the rich for transfer to the poor and the needy." Contemporary social science has much to tell us about how tax systems do or don't work and about how poverty may best be addressed. Unfortunately, Khan contends, too many Muslim scholars limit their own consideration of *zakah* to the "form in which it was in vogue in the days of the Prophet [Mohammad] and his first four Caliphs (up to AD 662)."

The First Four Caliphs

In the Sunni tradition, the first four Caliphs, who all lived in the seventh century, were Abu Bakr, Umar ibn al-Khattab, Uthman ibn Affan, and Ali ibn Abi Talib. It was the first of these, Abu Bakr, who is said to have discovered a letter written by the then-deceased prophet, setting out his instructions about *zakah*. Those instructions, and the practices that developed over the next few years, up to 662, have defined what Islamic economics has regarded as a proper social welfare system ever since.

One of Kahn's specific grievances against the resulting system is that, although farmers have to pay *zakah* on their income, non-farmers, however wealthy, only have to pay *zakah* against their wealth as defined by year-end savings in cash, jewelry, and stock-in trade. A very wealthy Muslim in a society enforcing *zakah* so conceived can, as Khan puts it, earn salaries, rents, and dividends, live in a great mansion, drive a fancy new-model car, spend holidays at high-end resorts, and avoid paying any *zakah* simply by being a spendthrift, so that he has nothing put away at year's end. This is both lousy as an incentive structure and lousy as redistribution.

Khan looks forward, then, to the development of a more empirical Islamic economics that could help devise a more sensible and properly progressive system of taxation on the one hand, and of the alleviation of poverty on the other. Part of this process of emerging from the cocoon of theology and theologically freighted history will require coming to see *zakah* as a matter of prudence and policy rather than as a devotional practice like the five daily obligatory prayers. Khan is happy, then, to report that, according to one scholar, Mahmoud Abu Saud, the letter from the Prophet Mohammad that Abu Bakr discovered should be considered advice that the prophet passed along "as ruler of the Islamic state and not as Apostle of God." The prescriptions of that letter were offered as temporal and practical maxims, then, and the believers of the 21st century should be able to make their own way.

The Empirical Qur'an

However far he has moved from the establishment of which he was once a part, Khan clearly remains a believing Muslim. We can tell this not merely because he is concerned about how that letter ought to be classified—an issue that would trouble a non-believer not at all!—but from the way in which he cites the Qur'an to validate the practice of empirical social science itself. That book tells believers, for example, that they should "go then around the world and see the fate of those who rejected the Truth" (3:137). This, to Khan, suggests that the normative theories derived from the Qur'an have real-world consequences that should be tested.

Likewise, the same source says, "Behold, conjecture can never be a substitute for truth" (10:36). Thus, truths must be derived from facts—the essence of empiricism.

Let us turn now to Khan's treatment of another big issue in Islamic economics, and specifically in Islamic finance: the meaning of *riba.* This word is often translated as "interest" or "usury." *Riba* is always a negative. Whatever exactly *riba* is, it is bad. Thus, any devout Muslim who believes as an empirical matter that interest is a critical part of a successful financial system will have to have an understanding of *riba* that allows him to support the charging of interest while still condemning *riba*.

Khan says that *riba* refers to interest on a loan, but he understands by a "loan" in the relevant sense only the sort of money that one gives to a friend or relative in trouble. In that situation, one gives the money and expects only the same back (if that), with no

interest. One doesn't help out a friend in the expectation of profit. The prohibition on any lending with that expectation was an effort to encourage "the norms of fraternity, fellow-feeling, mutual help and cooperation" among the early Muslims, Khan says.

But, he also says, banks aren't in the business of making loans in that sense. They are in the business of selling financing. If a bank advances money to, say, an oil exploration company, the bank is selling financing, that is, access to capital. From this, it can rightly seek profit.

The predominant opinion among Islamic economists today (among that orthodoxy that Khan hopes to challenge) is very different. The usual view defines *riba* as interest earned by creditors only if they don't share in the risk. If a bank advances money to an oil exploration concern in return for a partnership or equity interest, and the company's holes come up dry, the bank shares in the risk and the loss. But if a bank has an enforceable right to the stream of interest payments and the return of the principal notwithstanding the failure of the company's operations, then it avoids the risk and that, on this view, is *riba*, and forbidden.

The Way Forward

In fact, Islamic banking—banking in accord with that particular understanding of what *riba* means—has become an important industry in several countries. Khan's home, Pakistan, has a dual chartering system for banks. The government charters some banks specifically to provide dedicated Islamic banking services.

The evolution of Islamic banks, especially those that exist side-by-side with conventional banks in the same countries, and thus face the same economic climate, the same depositor base, and so forth, creates a continuing empirical test of the consequences of prohibiting *riba* when the creditor fails to share in the risk.

As Khan portrays them, such banks often get their start at the urging of idealists who believe they can run the institutions receiving only *musharaka* and *mudaraba* (the two approved sorts of profit-and-risk-sharing arrangements). But, with a little practical experience, they almost immediately lose their enthusiasm, and they start to look for "modes of finance that would bring a safe and fixed predetermined return on their funds." Thus, Islamic banking has seen the development of a range of ways of receiving compensation for the service of offering financing that look much more like interest, under such names as *bai' al-dayn* or *tawarruq*.

Through this development, Muslims end up with "a mechanism of banking that does exactly what conventional banks are doing but in more inefficient and riskier ways," Khan writes. Though he would allow those committed to Islamic banking to "continue with their business if they so desire," he would also encourage the idea that as a matter of empirical science, interest from the sale of financing—or something so similar as to be in principle indistinguishable—is unavoidable. He would "open the door to guilt-free dealings with conventional financial institutions."

Further, he cautions that the existence of two parallel systems of banking—one system recognized by religious persons as more pious than the other—creates opportunities for embezzlement and fraud. "Islamic rhetoric" can be employed to induce the pious to part with their savings, putting it in the hands of financial institutions that soon thereafter pull up stakes and disappear. Such fraud hit Egypt on a massive scale in 1985-1988, and Egyptian would-be savers lost $3 billion in that period.

The way forward, Khan is confident, consists in a return to the original meaning of *riba.* Loans as they were understood in the days of the composition of the Qur'an weren't commercial loans between one business and another, because such arrangements barely existed yet in the seventh century.

At the risk of seeming presumptuous (I am not a Muslim and should probably stay out of the domestic quarrels of other families), I applaud Khan's effort to open the door to empirical inquiries among a group of highly educated people who until now have walled themselves off from such inquiries. ⊙

Christopher Faille graduated from Western New England College School of Law in 1982 and became a member of the Connecticut bar soon thereafter. He is at work on a book that will make the quants of Wall Street intelligible to sociology majors.

FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865

BY JAMES OAKES

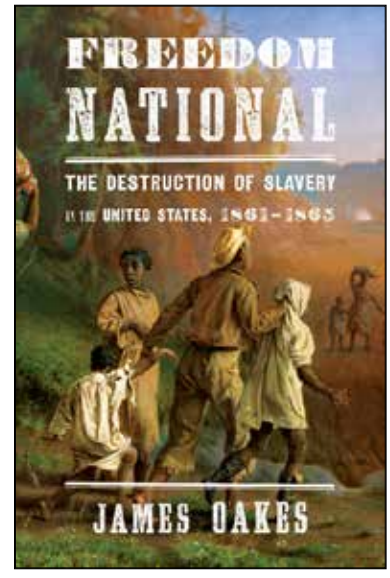
W.W. Norton & Company, Inc., New York, NY, 2013. 595 pages, $29.95.

Reviewed by Henry Cohen

In *Freedom National: The Destruction of Slavery in the United States, 1861–1865*, James Oakes writes that "most scholars agree that the South seceded to protect slavery, but [some] commonly deny that the North was animated by any impulse to destroy it." They believe, instead, that the North fought solely to restore the Union. Yet 750,000 people died in the Civil War. "It would indeed be difficult," Oakes writes, "to excuse so much bloodshed if it served no purpose other than the restoration of the Union, since that could have been accomplished had there been no fundamental disagreement over slavery."

In Lincoln's first inaugural address, he said that he had no purpose, inclination, or lawful right "to interfere with the institution of slavery in the States where it exists." But Lincoln would not budge in his opposition to allowing slavery to expand into the territories. Prohibiting slavery in the territories would lead to additional free states being admitted to the Union, which would weaken the national dominance that the slave states had held since the founding of the republic. It would likely eventually lead to the abolition of slavery. That was why the South seceded.

Ironically, secession greatly sped up the demise of slavery, as the North warned that



it would. There were several reasons for this. First, as an Indiana newspaper wrote, the North would be constitutionally freed from protecting slavery thanks to secession: "No more protection then, no more fugitive slave laws, no more right of transit, no more suppressing of slave insurrections by Federal troops." In his first inaugural address, Lincoln said that, after secession, "fugitive slaves, now only partially surrendered, would not be surrendered at all."

A second reason that secession accelerated the end of slavery was that, as Oakes writes, it "gave Republicans the congressional majorities that allowed them to ban slavery from the territories, abolish slavery in the District of Columbia, and withdraw federal protection of slavery on the high seas—long the basic elements of antislavery politics."

A third effect of secession is that it led to war, and the law of war had always allowed governments to emancipate slaves as a military necessity. The British had done it to the Americans twice, during the War of Independence and then in the War of 1812. Emancipation was a military necessity because slaves contributed to the Confederate war effort not only by building Confederate fortifications, but by working on their owners' plantations, which helped to feed and clothe Confederate soldiers. In addition, freed slaves who joined the Union army were crucial to winning the war and thereby ending slavery.

In *Freedom National*, James Oakes seeks to "resuscitat[e] the antislavery origins of the Civil War." He "traces the development of antislavery policy from its prewar origins to the ratification of the Thirteenth Amendment." In speaking of the antislavery origins of the Civil War, Oakes is not referring so much to the fact that the South, as it acknowledged, seceded to protect slavery. He is referring to the fact that the North—from the beginning of the war—fought to destroy slavery. Oakes refutes the common view that, on Jan. 1, 1863, when Lincoln issued the Emancipation Proclamation, the North's goal shifted from restoration of the Union to emancipation of the slaves. To the contrary, Oakes writes, "Republicans did not believe that the Constitution allowed them to wage a war for any 'purpose' other than the restoration of the Union, but from the very beginning they insisted that slavery was the cause of the rebellion and emancipation an appropriate and ultimately indispensable means of suppressing it." If the abolition of slavery was not the purpose of the war, it was recognized from the start as its inescapable consequence.

As soon as the South started the war by firing on Fort Sumter on April 12, 1861, Republicans, many Democrats, and much of the press recognized it as "the death-knell of slavery." A Democratic editor in Wisconsin explained, "With the first gun from the rebels in arms perished every sympathy at the North with slavery. The war cannot now end but with the total extinction of slavery, which was the cause of the war." Democrats in Columbus, Ohio, Oakes writes, "suddenly sounded like radical Republicans. 'The South is doomed, and with it slavery,' they declared." These comments and others that Oakes quotes were made in the spring of 1861, not after the Emancipation Proclamation.

The title of this book comes from the title of an 1852 speech by abolitionist Senator Charles Sumner: "Freedom National; Slavery Sectional." Antislavery advocates had for decades asserted that, although the U.S. Constitution recognized slavery, it did not recognize slaves as property; it recognized them as persons—as "Person[s] held to Service or Labour ... under the Laws [of a State]" (to quote the Fugitive Slave Clause in Article IV, section 2). In the *Somerset* case of 1772, in Britain, Lord Mansfield had ruled that slavery was a violation of natural law, and could exist only where positive law permitted it. The Southern states could by statute designate slaves as property, but that did not render them property under the U.S. Constitution, because the Constitution was a natural-law document. The Constitution also incorporated the "Law of Nations" (as in Article I, section 8, clause 10), with its natural law of freedom.

These facts, according to the abolitionists, "obliged Congress to do everything it could—short of outright abolition in the slave states—to make freedom 'national.'" Congress, for example, could prohibit slavery in the territories and in the District of Columbia, and it could refuse to admit new slave states into the Union. Slaveholders argued, to the contrary, that the Constitution protected property rights, including in slaves, and that those rights included the right to take their property into the territories. Justice Taney, in *Dred Scott*, upheld their position.

The North won the argument, of course, and Oakes shows how. In clear and engaging prose, he discusses the following steps, among others, taken toward the abolition of slavery:

1. General Benjamin Butler's decision (May 24, 1861) that slaves who fled to the Union lines were "contraband" of war that would not be returned to their former masters.
2. The First Confiscation Act (Aug. 6, 1861), which freed the slaves who were employed "against the Government and lawful authority of the United States."
3. The Second Confiscation Act (July 17, 1862), which freed slaves "within any place occupied by rebel forces and afterwards occupied by the forces of the United States."
4. The preliminary Emancipation Proclamation (Sept. 22, 1862), which announced that, on Jan. 1, 1863, all slaves in any state then in rebellion would be free.
5. The admission of West Virginia to the Union on the condition that it gradually abolish slavery (Dec. 31, 1862).
6. The Emancipation Proclamation (Jan. 1, 1863), which declared the slaves free in all states and parts of states then in rebellion.
7. The recruitment and conscription of slaves, including in the border states, into the Union army.
8. Lincoln's announcement that rebel states had to emancipate their slaves to be readmitted to the Union (Dec. 8, 1863), and the abolition of slavery by Arkansas, Louisiana, and Maryland in 1864, and by Missouri and Tennessee in January 1865.
9. The Thirteenth Amendment, which abolished slavery (Dec. 6, 1865).

Freedom National is distinctive not only for its thesis that restoration of the union and the abolition of slavery were inseparable from the start, but for Oakes' descriptions of how, as a practical matter, slavery collapsed. He examines, for instance, the upheavals in the four border states, where slaves fled to Union lines in large numbers and were not returned to their owners, despite the fact that these states were not subject to the Confiscation Acts or the Emancipation Proclamation. He discusses the "self-emancipation" of slaves who stayed behind when their owners fled their plantations upon the arrival of Union troops. He reports how, in 1862, "[a]fter decades of reluctance the Americans finally signed a slave-trade treaty that would

allow the British to search American ships suspected of engaging in the illegal transatlantic slave trade." He discusses how, after Congress abolished slavery in the District of Columbia in 1862, thousands of Maryland slaves fled to the District. He discusses how slaveholders moved their slaves to plantations farther inland in order to distance them from Union lines to which they could flee, and how the Union established "contraband camps" to accommodate the large number of slaves who did flee. He discusses how Union officers dealt with slave mothers who fled to Union lines with their children but could not be put to work as the men were.

In April 1864, Lincoln wrote, "When the war began, three years ago, neither party, nor any man ... anticipate[d] that domestic slavery would be much affected by the war." In his second inaugural address, Lincoln said that, despite the fact that slavery "was, somehow, the cause of the war," neither side "anticipated that the *cause* of the conflict might cease with, or even before, the conflict itself should cease." James Oakes responds: "This was nonsense. When Lincoln was inaugurated [on March 4, 1861], it was hard to find anyone who did *not* anticipate that slavery would be very much 'affected' by the war. Lincoln's own actions belie his memory. Within weeks of the South's capture of Fort Sumter, his cabinet approved [General Butler's] policy of refusing to return fugitive slaves in the seceded states. ..." In 1864, despite the wishes of even some war-weary Republicans, Lincoln refused to negotiate a peace that would allow slavery to survive. Nevertheless, because the Constitution protected slavery in the states where it existed, Lincoln always insisted that the abolition of slavery was not the purpose of the war. It was only a means to restore the Union. *Freedom National* shows that this distinction made little difference. ⊙

Henry Cohen is the book review editor of The Federal Lawyer.

THE LAWYER BUBBLE: A PROFESSION IN CRISIS

BY STEPHEN J. HARPER

Basic Books, New York, NY, 2013. 251 pages, $26.99.

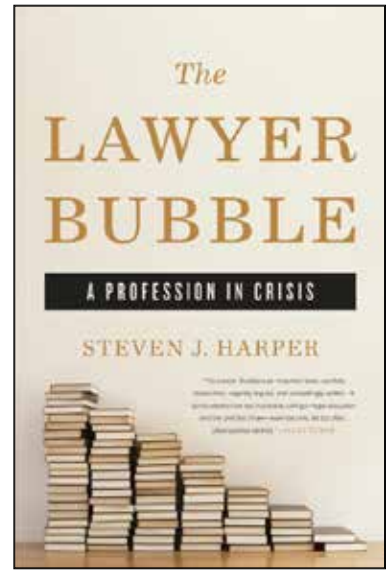
Reviewed by Michael Ariens

Stephen J. Harper's, *The Lawyer Bubble: A Profession in Crisis,* is the latest iteration of the "institutional failure" or "business disaster" story. A number of such books were published about 1990, including the classic *Barbarians at the Gate: The Fall of RJR Nabisco*, which told a tale of corporate excess. The equivalent in the law field at the time was *Shark Tank*, the subtitle of which, in case anyone browsing in a bookstore was unclear about the title, is *Greed, Politics, and the Collapse of Finley Kumble, One of America's Largest Law Firms*. Business disaster books have been quite popular since then, for businesses (such as Enron and Tyco and Lehman Brothers) keep failing in such spectacular fashion.

The Great Recession that began in December 2007 led to another round of business disaster books, including *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System—And Themselves*; *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers*; and *House of Cards: A Tale of Hubris and Wretched Excess on Wall Street*. Like their forebears, these books make a hard sell for the claim that the disaster was of a titanic nature. And, where the business disaster book is found, the legal disaster book is sure to follow.

The Lawyer Bubble has an important point to make: The legal profession suffers from major problems and is in a crisis. Unfortunately for its author, these problems do not include a bubble of lawyers, making the catchy title inapt. American law schools will continue to enroll fewer students than the 50,000-plus enrolled shortly after the Great Recession struck, and some law schools are likely to fail, creating significant economic uncertainty for universities and academics who have benefitted from a formerly impervious market for legal education. Nevertheless, the claim that, for the foreseeable future, the number of law graduates will far outweigh the number of law graduates, is unconvincing, though it is likely true in some parts of the United States. I am convinced, however, that the debt that law students have taken on is too large for the incomes new lawyers will earn. Further, I am convinced that large law firms will continue to hire fewer new law graduates than they have in the recent past. But even if these two beliefs are true, it does not mean that a bubble exists and is about to pop.

Harper writes well, and his passion for the profession of law and those who hope to enter it comes through clearly. His research is thorough, and he has thought deeply about the modern American legal profession, and,



in particular, the modern large law firm. But the structure of *The Lawyer Bubble*, and its quite modest proposals for reform, leave me wondering for whom Harper believes he is writing. *The Lawyer Bubble* requires too much background knowledge to be of much use to undergraduates thinking about entering law school, offers little new for academics worried about their students, and proposes few things that most big law firm managing partners will readily accept. And, of other lawyers, from those employed by the government to in-house counsel to those in private practice in mid-sized and small law firms, Harper speaks not.

Thus, the approach taken in *The Lawyer Bubble*, as well as its title, results in hiding rather than highlighting serious structural problems within the legal profession. *The Lawyer Bubble* is divided into three parts: "Law Schools," "Big Law Firms," and "Deflating the Bubble." The problem with Part I is not Harper's diagnosis: Too many law school administrators believed that students could take on an extraordinary amount of debt because high-paying jobs would always await new graduates, and so law schools raised tuition with little or no regard for the possibility that the merry-go-round might stop. Further, the annual *U.S. News & World Report* ranking of law schools is based in part upon how much money they spend per student, regardless of whether the expenditures benefit the students. As Harper notes, the more a school "charges for tuition, the more it can spend—and the more students have to borrow." But this critique of legal education has already been done, and done better, by law professor Brian Tamanaha in *Failing Law Schools*.

Part II criticizes big law firms, and here Harper shines. As a retired former partner at the large law firm of Kirkland & Ellis, he knows where the bodies are buried. Lawyers at big law firms are dissatisfied, he writes, because of "the transformation of most such institutions into businesses focusing on the bottom line." That large law firms exist solely to maximize profits for partners is a theme that Harper discusses in illuminating detail and with fury and passion. "The central features of the prevailing big-firm model—leverage, hourly rates, and billable hours—create conditions that decrease opportunities for advancement and are hostile to any attorney's search for a balanced life. ... Meanwhile, partner profits and attorney dissatisfaction have risen in tandem as big firms' lawyers make more money and enjoy it less."

Harper traces the history of profit maximization by big law firms. He explains how partners became independent contractors looking to take "their" clients to the highest bidder, and how the "eat what you kill" ethos (see Milton C. Regan Jr., *Eat What You Kill: The Fall of a Wall Street Lawyer*) stratified "partners," created enormous income disparities, and made it easy for big law firms to layoff associates and "unproductive" partners by the hundreds (more than 5,000 total) when the Great Recession occurred. After discussing the bankruptcies of the firms of Heller Ehrman, Thelen Reid & Priest, and Howrey, Harper discusses, in his finest chapter, the 2012 bankruptcy of Dewey & LeBoeuf. For those interested in the frailties of the ethos and economics of the very large law firm, this case study is exceptional.

Part III of the book, on deflating the bubble, proposes reforms of law schools and of big law firms, and concludes with a chapter titled "Prospective Lawyers." Harper's proposed reforms for law schools make sense, but none is original or particularly insightful. Law schools have been talking for years about what to do with the third year, including efforts to provide practical learning for students, and many academics accept that law schools should be more accountable for the debts that their students incur.

Harper's discussion of reforming the big law firm mixes the trite with the profound. Revising the billable hour system was an *ABA Journal* cover story; Harper offers little new about the pernicious consequences for lawyers and clients of equating time and money. His belief that big law firms will eliminate non-equity partnership status or reduce the income disparity among equity partners appears fantastical. On the other hand, his assessment of the harmful consequences to law firm culture through extreme leveraging of the associate-partner ratio, and his concern that big law firms fail to evaluate and provide meaningful work to associates, are ideas that some big law firms might embrace to differentiate themselves in the marketplace. He extols the efforts of Munger, Tolles & Olson to create "a strong identity, loyal clients, and happy lawyers," and offers it as a model to others.

The chapter titled "Prospective Lawyers" recounts the tragic suicides of several lawyers and the death, due to unclear causes, of a 32-year-old associate. Although bracing, this chapter can hardly be said to be relevant to deflating the bubble or to be about prospective lawyers.

In his epilogue, Harper discusses a former Kirkland & Ellis colleague, Fred H. Bartlit Jr. When Harper was a young attorney, Bartlit gave Harper's phone number to a client, who, Harper writes, "contacted me directly with a request to handle all of its cases in Chicago and Washington, D.C." Harper lauds Bartlit as one of several mentors from whom he learned how to practice law honorably and successfully. Harper then notes that, 20 years ago, Bartlit left Kirkland & Ellis to form his own litigation boutique firm, one that billed based on results rather than by time.

Harper's encomium to Bartlit is well deserved. But I wonder why Harper's answer to the transformation of the big law firm is reform rather than abandonment. Bartlit was the manager of the Kirkland & Ellis litigation department when he left the firm. If a lawyer as happy and successful as Bartlit decided, 20 years ago, that, on balance, abandonment was better than reform, then why would Harper believe otherwise? Harper has cogently and clearly shown that the intervening years have exacerbated the trend of transforming big law firms into businesses focused solely on maximizing profits. Can they really be reformed? Or is another transformation needed—one that doesn't see the big law firm as elite, but as obsolete. ⊙

Michael Ariens is a professor of law at St. Mary's University in San Antonio, Texas, where he teaches American legal history, constitutional law, evidence, and other courses. He is the author of Lone Star Law: A Legal History of Texas *(2011) and other books.*

AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN

BY STUART BANNER

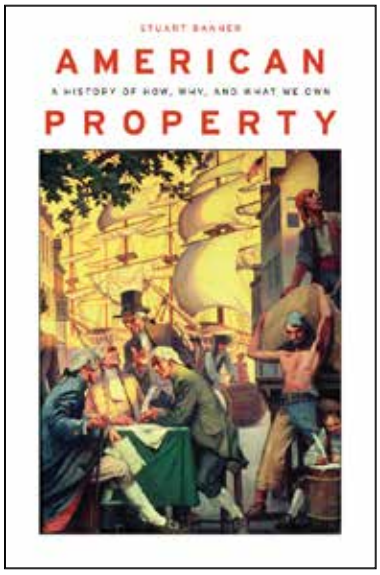
Harvard University Press, Cambridge, MA, 2011. 355 pages, $29.95.

Reviewed by Harold L. Burstyn

We lawyers mostly suffered through first-year property law, with its endless recitations of types of conveyances, one after another. We hoped never again to think about the vicissitudes of ownership, even if we practiced the law of real estate or of estates and trusts. Stuart Banner's almost 300 pages of clear and graceful prose should change our minds.

In a series of exceptionally readable chapters, supported by extensive endnotes, Banner's *American Property* takes us through the changes in our views of property from colonial times to the present. He begins by discussing the abandonment of what the English called incorporeal hereditaments, each a right that went with an estate in land or an office. Some of these rights never came to the United States: *advowson:* "the right to appoint a minister to a church"; *tithes*: "one-tenth of annual produce of the land within the parish"; *corodies*: "the right to receive food or money from a religious institution"; *dignities*: "a property right in a noble title." Other rights disappeared not long after our independence from Britain: rights of common, the right to hold a government office, primogeniture, entail. The English tradition of presuming a tenancy to be joint became a presumption of tenancy in common. The doctrine of *ancient lights*, which limited development in favor of not allowing new construction to restrict the light that fell on a property, soon disappeared.

Successive chapters in *American Property* follow other changes over time. First is the rise of intellectual property, a term that in the 18th century "meant something closer to the sum of knowledge possessed by a person or a society." Patents and copyrights originated in monopolies granted by the ruler. No longer discretionary by early in the 19th century, they became "property rights in information." Trademarks and goodwill became property by the last third of the 19th century. In the second half of the 19th century, property began to be understood as a bundle of rights, rather than as a thing, "in order to argue for *greater*



constitutional protection for property rights, and thus less regulation." Soon the news, previously freely copied from one newspaper to another, became property, belonging to whomever published first. Once music could be recorded, sales of sheet music no longer supported its authors and composers. An attempt to dominate the sale of piano rolls led to a compulsory license that was extended to include phonograph records. After "a century of power struggles," "property rights in sound were divided in a complex way among a host of players—composers, music publishers, performers, record companies, and broadcasters." The nature of popular music changed when musicians found it more rewarding to write their own songs than to perform what others wrote. Soon, the rights of privacy and publicity extended a performer's rights to his or her own person. A current campaign, successful in California but not in New York, extends these rights beyond the lifetime of the individual.

Banner also follows changes in the law of real estate. With land prices rising "[a]s the country gradually urbanized in the nineteenth century," the United States became a nation of tenants. A "tenement," originally any piece of realty, by 1850 became the term describing urban multifamily rental housing, with the implication that the government should set minimum standards or go so far as to subsidize housing for the poor. Soon, increasing density of population led the rich also to live in multiple dwellings. Apartment houses began in New York City in the early 1870s. Eventually one could own the apartment in which one lived: in a cooperative starting in the 1910s and 1920s, or in a condominium since the 1960s. Once the elevator arrived late in the 19th century, regulations on the height of buildings followed. Then, in the 20th century, what had been piecemeal regulation turned into comprehensive zoning, upheld by the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.* (1926). Building whole subdivisions, rather than one house at a time, led to covenants that restricted what one could do with one's property or even who could live there. In *Shelley v. Kraemer* (1948), the Supreme Court held unconstitutional those that restricted by race.

American Property concludes with four chapters on disparate subjects. First comes the electromagnetic spectrum. Though in 1927 and 1934 Congress said clearly that there could be no property in a wavelength, in fact the system that governs the spectrum is "a de facto system of property rights." Second, with the Supreme Court's decision in *Goldberg v. Kelly* (1970), "the new property"—"a theory of property rights elaborated a few years earlier by the law professor Charles Reich"—came into being. This decision held that the right to receive government benefits for the poor is a kind of property that cannot be terminated without due process. Third, is there property in the human body or its parts? Hair, skin, breast milk, blood, sperm, and eggs, all renewable, were the first products of living people to be sold. How about organs for transplant? Property in living organisms has led to the booming biotechnology industry based on "patents on living things." Fourth, the proposals for a market in pollution suggest that property may become "a tool for protecting natural resources."

Banner concludes *American Property* by emphasizing how the electronic world we live in is changing our notions of property. But, he writes, "[t]he Internet was not the first technological change that threatened to upset established notions of property. ... Sound was never property until the invention of sound recording; fame was never property until the invention of the camera; the electromagnetic spectrum was never property until the invention of the radio. ... Our conceptions of property have changed over time, to match the changes in the goals we think are worth pursuing. ... Property has always been a means rather than an end." ⊙

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WE HAVE THE WAR UPON US: THE ONSET OF THE CIVIL WAR, NOVEMBER 1860-APRIL 1861

BY WILLIAM J. COOPER

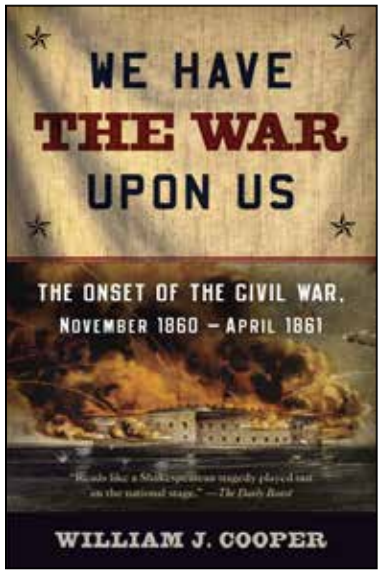
Albert A. Knopf, New York, NY, 2012. 332 pages, $30.00 (cloth), $16.00 (paper).

Reviewed by David M. Ackerman

On Nov. 6, 1860, Abraham Lincoln was elected President with only 40 percent of the popular vote and the support of not a single slaveholding state. By Feb. 1, 1861—more than a month before he even took office—seven states of the Deep South had seceded and begun creating a new Confederate government. In mid-April 1861, after Fort Sumter had been bombarded and Lincoln had called for 75,000 state militiamen to "maintain the honor, the integrity, and the existence of our National Union," four states from the Upper South seceded and joined the Confederacy. The Union had been dismembered, and the Civil War had begun.

Did this have to happen? During these five months could the Southern states—all, perhaps, or at least those in the Upper South—have been persuaded to remain in the Union? Was there a compromise within reach that might have forestalled secession? This is the subject of William Cooper's *We Have the War Upon Us*. A historian at Louisiana State University who has written several well-received books about the South in the mid-19th century, Cooper lays out in detail the extensive efforts that were made in these few months to forge an agreement that would maintain the Union. Drawing on diaries, letters, memoirs, newspapers, official records, and the almost overwhelming scholarship that has developed around the Civil War, he humanizes the events of these months while never losing sight of the broader influences at work. Despite a sometimes too-critical view of President Lincoln and the Republican Party and a too-uncritical view of the secessionist states, Cooper has penned an eminently readable and at times even engrossing book.

The crisis arose, according to Cooper, because many in the South, and especially



in the Deep South, had come to believe their way of life to be profoundly threatened by the increasing tumult over slavery and by the growing political power of the North. "Fire-eaters" (radical secessionists) in their midst had been raising Southerners' anxiety and urging secession for years, and they eagerly used Lincoln's election to fuel the belief that the only choices were submission, which would mean the eventual abandonment of slavery, or secession. Cooper notes that on the issue that had repeatedly divided the nation in the 1850s, namely, whether slavery could be extended beyond the states where it was legally established into U.S. territories in the West, the Republican Party was absolutely clear. Its platform in 1860 asserted that "the normal condition of all of the territory of the United States is freedom," specifically denied that slavery could *ever* be allowed to legally exist in U.S. territories, and denied as well the validity of the *Dred Scott* decision, which stated that Congress has no power over slavery in the territories. Many Southerners, in stark contrast, were equally adamant in claiming that their liberty as Americans included the right to own slaves and to take their property with them wherever they went.

The presidential election campaign of 1860 had deepened this sectional divide. The Democratic Party had split into northern and southern branches, with each fielding its own candidate for President. The Republican Party was basically a northern party (Lincoln was not even on the ballot in 10 Southern states); and the appeal of a fourth party, the Constitutional Union Party, was limited largely to former Whigs in the border states. Moreover, Cooper notes, the rhetoric of the campaign had inflamed public passions. The fire-eaters, as well as more moderate Democrats in the South, used apocalyptic rhetoric to describe the dangers posed by the possibility of a Lincoln victory and routinely advocated secession if he won. At the same time, the abolitionist wing of the Republican Party vigorously attacked the evils of slavery throughout the campaign, and many made clear that they had no interest in keeping the Southern states from seceding if the extension of slavery into the territories was to be the price of the Union's existence.

But Cooper makes clear that in the midst of this turmoil many, and perhaps most, remained deeply attached to the Union and wanted, if at all possible, to find a way to keep it together. Compromises that prevented secession, after all, had been forged in the past, and some thought could be again. In these efforts Cooper gives prominence especially to the "Border Conservatives" from the Upper South—most of them former Whigs—and to Sen. William Seward of New York.

Cooper devotes considerable attention to Seward. A two-term governor of New York, a Whig senator and then a Republican senator since 1849, and a highly respected antislavery advocate, Seward was, in Cooper's words, "the most notable figure in the [Republican] Party prior to the nominating convention of 1860." Expecting to be chosen as the party's nominee at that convention but passed over in favor of Lincoln, he nonetheless campaigned vigorously for Lincoln and was the first person whom Lincoln invited to be part of his cabinet (as secretary of state) after the election. But, until Lincoln's inauguration, Seward remained a senator. As such, and even after he became secretary of state, Seward, according to Cooper, used his prestige and his numerous political associations in repeated efforts to calm the waters and to find a way to keep the Union intact.

Prior to the inauguration, Congress was the primary—although not the only—forum for efforts to resolve the crisis. As soon as the second session of the outgoing 36th Congress convened on Dec. 3, 1860, President Buchanan, who above all else wanted the country to remain at peace at least until the end of his term, sent a message to Congress proposing a three-part constitutional amendment. A day later the House created a Committee of Thirty-three consisting of one representative from each state to consider the situation and make recommendations. The Senate, two weeks later, created its own Committee of Thirteen, drawn not from each state but from the most distinguished members of the Senate, including such luminaries as the Republican Seward, the Illinois Democrat Stephen A. Douglas (who had received nearly 30 percent of the popular vote in the 1860 presidential election), Sen. John Crittenden, who was a "Border Conservative" from Kentucky, and Jefferson Davis of Mississippi.

What is striking about the various initiatives that Cooper describes is how far pro-Unionists thought they had to go in order to prevent the entire South, or at least the Upper South, from seceding. President Buchanan's proposed amendment to the Constitution, for instance, in Cooper's words, "would state unequivocally the right of property in slaves; declare the right to hold slaves in a territory, until the territory became a state, when it could decide for or against the institution; [and] make clear the right of a master to have a runaway slave returned to him."

Even more sweeping was what became the primary focus of the Committee of Thirteen in the Senate. To that body Senator Crittenden of Kentucky proposed a package of six constitutional amendments that he hoped would keep the Union intact—the "Crittenden Compromise." The first would have extended the line of the Missouri Compromise of 1820 not only to the existing territories but also to all territory "hereafter acquired." (The latter phrase was highly significant because many Southerners talked openly about the United States eventually acquiring Mexico, Central America, Cuba, and the Caribbean islands.) The first constitutional amendment would also have prohibited Congress from interfering with slavery during the territorial period and allowed each territory, when it reached the requisite population, to choose for itself whether to seek admission as a slave state or free state. The next three proposed amendments declared that Congress could not abolish slavery on federal property within a slaveholding state, that it could not end slavery in the District of Columbia as long as slavery existed in Virginia and Maryland, and that Congress could not interfere with the interstate slave trade. The fifth proposed amendment would have empowered Congress to compensate slave owners where officers failed to capture fugitive slaves, and it allowed local officials to sue those who prevented such apprehension. Finally, and amazingly, the last amendment provided that none of these provisions could

ever be affected by any future constitutional amendment and that the Constitution could *never* be amended to give Congress the power to interfere with slavery in any state that permitted it. Various aspects of this proposal came up in the Committee of Thirty-three in the House as well.

When the Crittenden Compromise failed to find acceptance in the Committee of Thirteen, an ad hoc gathering of congressmen from the border states came up with a more modest package—the Border State Plan. Elements of this plan varied from time to time, but it always included a constitutional amendment forbidding congressional interference with slavery in the states, an extension of the Missouri Compromise line into the territories (albeit without the "hereafter acquired" language of the Crittenden Compromise), a requirement for supermajorities in the House and the Senate for the acquisition of any new territory, and more effective enforcement of the fugitive slave laws.

Yet another initiative came from Virginia, which called for a meeting of the states in Washington in early February 1861. This extralegal body, which came to be known as the Peace Convention, had representation from only 21 of the 34 states (including the newly admitted Kansas). But it vigorously debated various proposals and in late February—just a week before Lincoln's inauguration—recommended to Congress a single constitutional amendment containing the following elements: (1) an extension of the Missouri Compromise line to the existing territories, with a provision that neither Congress nor territorial legislatures could interfere with slavery south of the line; (2) a requirement that new territory could be acquired only with the approval of half of the senators from both slave and free states; (3) a prohibition on federal interference with slavery in the District of Columbia or a slave state; (4) a requirement that any future constitutional amendment regarding slavery could be adopted only with the approval of all of the states; (5) a permanent prohibition on the foreign slave trade; and (6) a provision to compensate slave owners for escaped slaves unable to be apprehended and returned because of violence or intimidation.

Cooper makes clear the increasingly desperate nature of these initiatives and the increasingly tenuous state of the Union during these few months. While Congress discussed and debated, the seven states of the Deep South held elections and conventions in December and January to consider the question of secession, and all enthusiastically chose secession. As a result, their elected representatives immediately withdrew from Congress. By early February their leaders were at work in Montgomery, Ala., creating a government for a new nation separate from the United States. Also repeatedly complicating the search for a solution was the status of federal installations in these seceding states, and especially of Fort Sumter in Charleston, S.C. Cooper reports that pro-Unionists in Virginia, Kentucky, and other states in the Upper South made clear that their position would become untenable if the federal government used coercion in any form in the seceded states. But the vulnerability of these federal entities necessitated that decisions be made about resupply, reinforcement, and evacuation, if necessary—decisions first by Buchanan, and then by Lincoln. Inevitably, they proved inflammatory.

Cooper describes in remarkable detail the debates and political machinations that accompanied the foregoing initiatives. With the exception of one proposed constitutional amendment protecting slavery, all of them ultimately went down to defeat or failed to receive a vote in Congress. Cooper lays the blame for this primarily on Lincoln and the Republican Party. Lincoln, he says, lacked understanding of the South, failed to appreciate the seriousness of the threat of secession, "approached the crisis not as president-elect of the United States but as leader of the Republican Party," and was tone-deaf to how the South heard his "house-divided" speech in 1858—oft-repeated by his opponents in 1860—when he proclaimed that "this government cannot endure, permanently half *slave* and half *free*." Cooper also bemoans the fact that, despite repeated entreaties from numerous sources, Lincoln refused to make any public pronouncement, until shortly before his inauguration, that might help to allay the fears of the South about what his administration intended to do. Most seriously, according to Cooper, in his private conversations and correspondence with fellow Republicans, Lincoln forbade compromise on the issue that most vexed the South, namely, whether slavery could be extended to the territories. "On the territorial question," Lincoln wrote one correspondent from the Upper South, "I am inflexible." The Republican Party, Cooper says, consequently remained inflexible as well and generally voted as a bloc against the various initiatives detailed above.

Cooper portrays Seward, though he ultimately fell into line with Lincoln, as one who thought the Republican Party should give in on the territorial issue. Seward, he says, believed that the issue had accomplished its political purpose of getting a Republican elected President and that, because the climate of the Southwest was inhospitable to slavery, the party could compromise on this issue while actually losing nothing. Lincoln, according to Cooper, rejected such a concession for several reasons. First, he thought it would split and possibly destroy the Republican Party. Second, he believed that allowing slavery to extend into the territories would invite a renewal of extralegal Southern efforts to acquire territory in Mexico, Central America, and the Caribbean such as had already occurred in the 1850s. Third, he believed that such a compromise would "acknowledge that slavery has equal rights with liberty," a status he could never accept. Cooper says Lincoln "had a much deeper, more visceral hatred of slavery than did Seward." Although Lincoln believed that the federal government had no power to interfere with slavery in the states where it already existed, he could never countenance its extension.

Even after Lincoln's inauguration, Cooper reports, hope for a solution to the nation's crisis persisted. Pro-Unionists, he says, remained in control in the Upper South and border states; and he notes that the official convention in Virginia to consider secession rejected that option on April 4 by a vote of 88-45. Virginia had also called for a convention of all the states to meet in June to try to find a resolution. But these efforts stumbled because of Fort Sumter. The Deep South, Cooper states, felt Fort Sumter to be a standing insult to its honor and independence that had to be removed; and he describes in detail Lincoln's extensive search for a peaceful solution. But he seems to fault Lincoln for his eventual decision to resupply rather than evacuate Fort Sumter. He describes Lincoln as fully aware—because he had been repeatedly warned—that any forceful action on his part to maintain Fort Sumter would undermine pro-Unionists in the Upper South and likely push their states into secession. Lincoln also knew, Cooper says, that even a decision to resupply rather than reinforce Fort Sumter would not be seen as a peaceful act by the seceded states, and that the Confederacy would likely react

violently. Yet Lincoln attempted to resupply it anyway. Perhaps, Cooper allows, Lincoln came to believe he had no other choice. But he says that Lincoln also knew that making the Confederacy the aggressor would unify the North and "weld the Republican Party behind him." That, of course, is exactly what happened. The Confederacy bombarded Fort Sumter and forced its surrender; Lincoln summoned state militias into federal service and Congress into special session; pro-Unionists in the Upper South were quickly overwhelmed and four more states chose to secede; and the North and the Republican Party united behind Lincoln's efforts to restore the Union. A civil war more costly than any of its protagonists expected had begun.

The display of scholarship in this book is remarkable; and, even though every reader knows the eventual outcome, Cooper ably communicates a sense of the hopefulness, desperation, and ultimately anguish that attended efforts to keep the Union intact. As noted, the book suffers at times from a pro-Southern bias. According to Cooper, the primary responsibility for the failure of the various efforts to maintain the Union during the five months between Lincoln's election and the firing on Fort Sumter lay with Lincoln and the Republican Party; the irrational extremism of many pro-slavery Southerners and the persistent intransigence of the seven Deep South states seemingly played only secondary roles. Notwithstanding this caveat, however, *We Have the War Upon Us* vividly illuminates a crucial segment of our history and is well worth reading. ⊙

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and evidence. A significant misstep in any of these areas may lead to unintended and unfortunate consequences.

As the Federal Circuit has put it, the road to apportionment is "exceedingly difficult and error-prone." Fraught with peril as it is, the complexities of IP valuation underscore the importance of qualified financial and legal counsel in IP transactions and litigation. ⊙

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Endnotes

[1]*See ResQNet.com, Inc. v. Lansa, Inc.,* 594 F.3d 860, 869 (Fed. Cir. 2010); *Wordtech Systems, Inc. v. Integrated Networks Solutions, Inc.,* 609 F.3d 1308 (Fed. Cir. 2010); and *Lucent Techs., Inc. v. Gateway, Inc.,* 580 F.3d 1301, 1324 (Fed. Cir. 2009).

[2]317 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir. 1971).

[3]*Hanson v. Alpine Valley Ski Area*, 718 F.2d 1075, 1078 (Fed. Cir. 1983).

[4]*Rude v. Westcott*, 130 U.S. 152 (1889).

[5]*Trell v. Marlee*, 912 F.2d 1443 (Fed. Cir. 1990).

[6]*ResQNet.com Inc. v. Lansa, Inc*., 594 F.3d 860 (Fed. Cir. 2010) (affirming district court finding of patent infringement but reversing and remanding as to damages based on the plaintiff's expert's reliance on improper evidence—in the form of past licenses *not* reasonably related to the claimed invention—in the calculation of the proper royalty rate).

[7]*TWM v. Dura*, 789 F.2d 895 (Fed. Cir. 1986), represents a patent case example.

[8]*Ibid.*

[9]For example, see *IP Innovation, LLC. et al v. Red Hat Inc. et al*., No. 07-447 (E.D. Tex. March 2, 2010, Order) (Rader sitting by designation), and *ResQNet v. Lansa*, 594 F.3d 860 (Fed. Cir. 2010).

[10]*Uniloc v. Microsoft*, 632 F.3d 1292 (Fed. Cir. 2011).

[11]*Georgia-Pacific Corp. v. United States Plywood*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir. 1971).

[12]No. 09-290 (W.D. Pa. Dec. 26, 2012).

[13]*See TWM Mfg. Co., Inc. v. Dura Corp*., 789 F.2d 895 (Fed. Cir. 1986)

[14]580 F.3d 130 (Fed. Cir. 2009), *and on remand, Lucent Tech., Inc. v. Microsoft Corp.*, No. 07-2000H (S.D. Cal. July 13, 2011).

[15]The infringing "date-picker" function characterized by the CAFC as a "tiny" portion of one feature of a much larger software program" (i.e., Microsoft Outlook®)—allows users to select and view particular dates or dates ranges from within an Outlook calendar. 580 F.3d at 1332.

[16]2011 WL 2728317, at *9.

[17]No. 11-8540 (N. D. Ill. May 22, 2012).

[18]Citing *i4i Ltd. Partnership v. Microsoft Corp*., 598 F.3d at 855–56; *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1333–34 (Fed. Cir. 2009).

[19]No. 10-230, Dkt # 200 (W.D. Wash. Aug. 21, 2012).

[20]694 F.3d 51 (Fed. Cir. 2012).

[21]*Id*. at 69.