INTELLECTUAL PROPERTY:
A STUDY IN THE
FORMULATION AND EFFECTS OF LEGAL CULTURE

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Intellectual Property:
A Study in the Formulation and Effects of Legal Culture

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This historical and comparative dissertation shows that intellectual property – a legal category that encompasses patents, copyrights, trademarks, and trade secrets – emerged in the Eighteenth Century, in tandem with the emergence of the modern nation-state. The thesis of *semantic legal ordering* that I develop in the dissertation explicates the social process through which cultural understandings and practices rooted in legal traditions have contributed form and meaning to these quintessentially modern institutions. Drawing on contractual sources from the history of the telecommunications industry, and from diplomatic sources connected to intellectual property treaties, I also show how the process of semantic legal ordering has contributed form and meaning to the global expansion of intellectual property. Building on Robert Bellah's theory of cultural traditions, together with Max Weber's sociology of law and property, I argue that certain experiential characteristics of our modern, globalized economy – the mobilization of possessive love in the service of national economic growth – have been shaped, in very real ways, by legal traditions with deep historical roots, as seen in the case of intellectual property.

Biographical Sketch

Lauraleen Renae Ford was born in 1975, in Loma Linda, California. Laura grew up in Washington State, received a Bachelor of Arts degree from Pacific Union College (Angwin, California) in 1997, and attended Law School at Tulane University (New Orleans, Louisiana) from 1997-2000. After receiving her J.D., Laura practiced law in New York City, working as a bond lawyer for The Port Authority of New York and New Jersey from 2000-2004. From 2002-2004, she also attended evening classes in economics, finance, and accounting at Columbia University, earning an M.P.A. from the School of International and Public Affairs. In 2004, Laura returned to Washington State for two years. During this time, she received an LL.M. in Intellectual Property Law and Policy from University of Washington Law School, and began reading Max Weber. In 2006, Laura moved to Ithaca, and began her Doctoral studies in Sociology at Cornell.

Acknowledgements & Dedication

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This dissertation is dedicated to my parents – Robert Orland Ford and Blanche Elizabeth Ford – with deepest love and gratitude. Dad, thank you for your tireless support, and for teaching me the love of intellectual exploration. Mom, your gentle wisdom and grace are sorely missed.

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Introduction

"Intellectual property" (a legal category that includes patents, copyrights, trademarks, and trade secrets) is ever more frequently on people's lips and in their minds (*see* Appendix 1; Greenspan 2004). Politicians, economists, and thought leaders regularly declare as collectively-accepted fact that ours is the era of "knowledge-based economies" (*see, e.g.*, The World Bank 2007; Garrett 2004; Garner 2004; Krugman 2000).

Reflecting this economic and political consensus, in 2009 an international process was completed to include measures for the value of "intellectual property products" in the national accounts that measure national economic performance, including gross domestic product (GDP) (*see* United Nations et al. 2009; *see also* OECD 2010; OECD 2009; Stiglitz et al. 2009, at 105). On July 31, 2013, the United States Bureau of Economic Analysis released its revisions to GDP measures, dating back to 1929, including "intellectual property products" for the first time as nonresidential fixed investments, a change that significantly increased GDP measures (*see* McCulla et al. 2013).[1] According to the revised GDP measures, intellectual property products contributed $652.5 billion to U.S. GDP in 2013 (a figure that amounts to approximately 4% of total GDP for 2013).[2]

In its modern form, intellectual property protects innovative, creative, and distinctive ideational "assets" that are, in some way, embodied in physical matter and human activity (*see* Merges et al. 2012). Patents, for example, protect novel inventions that are embodied in machines, electrical switching algorithms (*i.e.*, software), or a delineated process of human

[1] For 2012, the increase in GDP attributable to including "intellectual property products" as a category of fixed investment was $471 billion. For 2007 and 1959, the comparable increases were $253 billion and $11 billion, respectively (*see* McCulla et al. 2013).

[2] *See* Bureau of Economic Analysis News Release, Gross Domestic Product, Table 3, Second Estimate of February 28, 2014, *available at* http://www.bea.gov/newsreleases/national/gdp/2014/pdf/gdp4q13_2nd.pdf (last accessed on March 26, 2014).

activity (*i.e.*, a business method). Copyrights, similarly, protect creative ideas that are given some kind of tangible form, such as a handwritten text, a painted canvas, or an electronic file encoded on a silicon chip. Trademarks protect the "branded" mental associations that consumers make between distinctive, embodied symbols (*e.g.* slogans and pictures) and a particular seller of products or services (*e.g.* Starbucks). Trade secrecy protects the embodied "know-how" of a business, which the business-owner has endeavored to keep secret.

With all these forms of property, the idea itself (*e.g.* the recipe for Coca-Cola) may be abstracted from physical matter, but the exchange or use of the property (legal or illegal) will always involve tangible physical objects and embodied human activity. This is important to recognize, because intellectual property is often discussed as an "intangible" property in ideas. Even as a matter of formal legal doctrine, this is an oversimplification. But from a sociological perspective, such a portrayal is very misleading, because it can cause us to miss the important implications of intellectual property in a materially-embodied social world.

Nevertheless, the relative abstraction of intellectual property, combined with its registration at the nation-state level, means that it does stake out, and support, a potentially-powerful position in national and global markets. A U.S. patent on a software algorithm, for example, creates an exclusive property in the making, use, or sale of that algorithm throughout the U.S. By operation of international treaties, the exclusive property also extends globally.

Intellectual property is a major legal institution, one that deserves careful attention from sociologists. In this historical and comparative dissertation, I contribute to sociological understanding of intellectual property by providing an account of its institutional origins, emergence, and expansion. Although this type of sociological investigation is no longer common (*see* Smith 2010, at 5; Halliday & Carruthers 2009, at 15-16; Steinmetz 2005, at 127), it

is very much within the spirit of classical sociology, and is ripe for return as part of the "Third Wave" of historical sociology (*see* Adams et al. 2005).

The following chapters show that intellectual property emerged as part of the modern nation-state. This means, as I point out in the Conclusion, that intellectual property is a "creature of modernity," a product of many of the same forces that have contributed to dimensions of modernity that have received greater attention from sociologists. To investigate the emergence and expansion of intellectual property, as it turns out, is to investigate processes of modernization, but to see them from another angle.

The accomplishments of this dissertation are modest, but nonetheless significant:

1. *I show that intellectual property emerged as part of the modern nation-state.* This conclusion is based on historical and comparative investigation of the following "cases": (1) precursors to modern intellectual property in medieval Europe (focusing on early modern Nuremberg), (2) the emergence of intellectual property in Seventeenth, Eighteenth, and early Nineteenth Century England, (3) Eighteenth, Nineteenth, and early Twentieth Century America, (4) Eighteenth and Nineteenth Century France, and (5) Eighteenth and Nineteenth Century Germany (focusing on Prussia). To try to rule out the possibility that I was missing important developments elsewhere, I made very limited investigations into developments in the Netherlands and Italy. The evidence acquired through this investigation is narratively presented in Chapters 1-7, which are roughly chronological in their ordering, and the interpretation of this evidence is revisited in the Conclusion.

2. *I provide a basic chronology of the emergence and expansion of intellectual property, which locates its institutional emergence in the Eighteenth Century, and traces its expansion through the Nineteenth and early Twentieth Century.* As far as I know, this is the first attempt to

provide such a basic chronology, while (1) accounting for intellectual property holistically – *i.e.* as a new type of legal property within Western legal systems, which eventually came to encompass patents, copyrights, trademarks, trade secrets, and other knowledge-based intangibles – and (2) clearly distinguishing early precursors (which were not legal *property*, or not the property of non-royal subjects) from the modern phenomena. Although this is a very modest accomplishment, and one that involves difficult, contestable judgments, it is essential to further work in sociological understanding and explanation.

3. *I show that precursors to modern intellectual property existed within early modern European Estate Society, but that Estate Society was generally not conducive to the emergence of intellectual property, at least in its modern, individualist forms.* In Chapter 1, I show that precursors to modern intellectual property did exist in early modern European city-states – societies organized on principles of legal status and rank – such as Venice and Nuremberg. However, these precursors were not treated as the property of individuals, at least not until very late. Instead, patents and privileges were granted for the benefit of the city, and were very carefully controlled by civic magistrates. This finding is consistent with what we see in Chapter 5, which traces developments in Eighteenth and early Nineteenth Century Prussia, in order to show counterfactual possibilities for intellectual property in a "Vocational Estate Society." Here again we see that analogues to intellectual property can exist within an Estate Society, but these tend to be communal forms of property, which are held and controlled by guilds or occupational corporations, not by individuals.

4. *I show that one very important way in which intellectual property expanded was through contracts and international treaties, and that this particular means of expansion was tied to the fundamental development – highlighted by many scholars, including Max Weber – of*

"freedom of contract." Drawing on Weber (1967) and more contemporary legal scholars (Zimmerman 1996; Atiyah 1979; *cf.* Horowitz 1977), I trace this development to a deep shift in legal culture, which I refer to as "proprietary voluntarism." The fundamental transition is one from a legal world in which obligations are tied relatively statically to social position (*e.g.* legal status or occupation), to a world in which obligations can be freely created through a formalized exercise of the will, in ways that impact both the contracting parties and third persons. In Chapters 6 and 7, I locate the roots of this development in the Protestant Reformation – more specifically, in legal dimensions of the Calvinist and Arminian traditions (*see* Witte, Jr. 2007; Gorski 2005, 2003) – and I show how it contributed, in turn, to the extension of intellectual property-related rights and obligations. In particular, I show how the development of America's telecommunications network depended on intellectual property-related contracts ("licenses"), and how the "public" counterpart to those contracts – international treaties – laid the foundation for a Globalized Intellectual Property Order.

5. *I offer substantial support for the following contention: the social and economic impacts of "Western" legal systems will not be fully understood until we account for the ongoing cultural impact of legal traditions resting at the heart of those legal systems, particularly the legal traditions rooted in medieval Europe's "rediscovery" of Roman law (i.e. the Roman and Canon law traditions).* The thesis of "semantic legal ordering" that I propose and defend in this dissertation points to the continued significance of such legal traditions for the interpretive activity of legal actors, and, accordingly, for the particular ways in which legal actors contribute to legal institutions. Building on Robert Bellah (2006) and Max Weber, I theorize legal traditions as "cultural traditions" (*see* Bellah et al. 1996) that contribute meaning and structural form to patterns of social closure, appropriation, and related social action. In Chapter 1, I

elaborate the thesis of semantic legal ordering to describe a social process through which legal traditions –interpreted under concrete social conditions – contribute form, meaning, and direction to institutions, organizations, and individual intentions, producing socially-significant outcomes in politics, civil society, and the economy. In this dissertation, I argue that this process of semantic legal ordering contributed to the formation of the modern nation-state, and to the "appropriation" of intellectual property, as part of the modern nation-state.

Semantic legal ordering, in other words, is a descriptive name for legal-interpretive practices that draw on legal traditions in addressing social conflicts and problems. The emphasis with this descriptive thesis is on the extent to which certain legal categories (*e.g.* property) acquire meanings that remain remarkably stable over time, and thereby lend stability to social institutions. To say that the legal categories have stable meanings is not to say that those meanings are static; after all, the story I am telling here is a story about how the meaning of property changed. However, it is to say that the meaning of the category continues to be informed by the legal tradition from whence it is derived, and that this *informing* from legal tradition provides a source of stability in meaning.

In Chapter 1, I show how the emergence of specialized legal study in the universities of the high middle ages contributed to a qualitative shift in legal professionalization, producing a new type of specialized legal actor: the European "jurist." The jurists were trained through the study of Roman legal traditions, primarily the Sixth Century codification of Roman law produced in Constantinople under the Emperor Justinian. The Roman law traditions that the jurists studied were primarily civil law traditions, rather than criminal law traditions, and the emphasis within the legal texts was very much on the Roman legal institutions of property and obligations, including contracts. These Roman legal traditions were influential throughout

Europe, including in England, although they everywhere became combined with other legal traditions, such as the English common law tradition.

In Weberian terms, a legal tradition may be seen as an "Order" to which jurists are trained to orient themselves, and which accordingly gives meaning to their legal activities. Where these jurists form part of the "staff" of an organization – such as the emerging nation-state, a city, or a corporation – this Order informs the social-relational structures of the organization, and informs the disciplining and sanctioning practices of the organizational staff. In this way, the Order becomes part of the basic meaning and structural form of the organization, as a whole, and influences the intentional activity of the organization's members (*cf.* Gorski 2003).

The thesis of semantic legal ordering, then, is a thesis about how legal traditions with ancient roots contribute form and meaning to social organizations and institutions, and to intentional activity within those organizations and institutions. Legal traditions, in particular, contribute form and meaning to the closure of social relationships, and hence to processes of appropriation (Weber 1978; *see also* Swedberg 1998; Ford 2011).

The emergence of intellectual property, I argue, occurred precisely as a new form of social organization (the nation-state) was replacing older forms of social organization, and it happened because jurists were drawing on legal traditions to address social conflicts and problems that raised questions about the legal status of patents and "copy-rights" in the developing organizational environment. The jurists drew on legal traditions, particularly Roman legal traditions, in transforming these legal privileges into property, and thereby created a new type of legal property.

The significance of the semantic legal ordering thesis can best be demonstrated by contrasting this culturally-based explanation for property-regime change with available alternatives. In the contemporary environment of "new institutionalisms," an illuminating contrast can be drawn with the theory of change in "property-rights regimes" offered by New Institutionalist economists, preeminently Douglass North (1981, especially at 158-70; *see also* Mokyr 2009; Barzel 2002, 1997). A very basic sketch of this type of explanation will suffice to reveal the contrast.

The architecture of a "new institutionalist" explanation for the emergence of property, including intellectual property, often tends to appear "functionalist" (*see* Mokyr 2009; Anderson & McChesney (eds.) 2003; North 1981).[3] Large-scale technological, military, and/or demographic changes give rise to a need for new institutional structures to solve an array of problems associated with economic externalities and overuse of public goods. "Property rights" emerge as a solution to these problems, "internalizing" the externalities, and transforming the previously-public goods into private goods, subjecting them to contractual exchange, and therefore enabling transfer to highest-value users, as long as "transaction costs" are not prohibitively high (*see* Demsetz 2003).[4]

The actual process through which "property rights" emerge, especially within legal doctrine, is typically not investigated, or is assumed to happen at the level of politics. In addition, property and contract are treated as universally-applicable categories, whose actual

[3] "Ownership structure adjusts to the available opportunities" (Demsetz 2003, at 287).

[4] The emphasis on "transaction costs" is due to Ronald Coase (1988), who paved the way for economic recognition of the importance of institutions, particularly property and organizations. The emphasis, in the study of transaction costs, is typically on contractual exchange (formal and informal) (*see, e.g.,* Williamson & Masten (eds.) 1999). However, to my knowledge Yoram Barzel's work (2002, 1997) is unique in focusing on the transaction costs involved in the "delineation" of "property rights" themselves.

meaning is unimportant. The specific content of intellectual property law, in other words, is very rarely considered.

For example, economists often treat the Statute of Monopolies (1624) – England's first patent law, which is discussed in Chapter 2 – as a case of intellectual property (*see, e.g.,* Mokyr 2009). But, from a legal-historical perspective, this is incorrect. The Statute of Monopolies, as its name implies, was a parliamentary *prohibition* of monopolies, which created a very narrow exception to the basic prohibition for a specific category of patents: patents for new inventions. This statute set limits on the Royal Prerogative; it did *not* provide for a "right" to patents on the part of the King's subjects, much less a "property right."

With new institutionalist explanations, in other words, the actual mechanisms by which legal categories like property come to be applied in a particular context are typically left unspecified. This lack of specification often results from legal imprecision, and from a tendency to assume that the efficiency-inducing "property rights" will spring into place when they are needed. This tendency is stronger, the closer the particular economist adheres to neoclassical assumptions about actors and their preferences.

My thesis of semantic legal ordering, on the other hand, is developed with very careful (some might say excruciating) attention to the ways in which legal actors applied legal categories in specific social contexts, and to the ways in which their application of legal categories impacted social actors, their social relationships, and their social activities. In Chapters 2-7 of this dissertation, I substantiate the thesis of semantic legal ordering by tracing the emergence and expansion of intellectual property in England, the United States, France and Germany. I show that each of these political organizations drew on legal traditions rooted in Roman law in institutionalizing intellectual property. However, I also show that differing social and historical

contexts for semantic legal ordering contributed to distinctive *property orders* within these political organizations, which were reflected in the earliest institutionalized practices of intellectual property.

A *property order*, as I am conceiving it, is an institutionalized mode of material existence, a way of relating to material things that is structured and patterned by the values, concepts, and beliefs embodied within social relationships and organizations. From a Weberian perspective, a property order is made possible by the closure of social relationships, a condition that is necessary for any type of appropriation to take place. However, that appropriation is given a particular meaning, in connection with the meanings attributed to the social relationships within which it takes place. The process of semantic legal ordering, as I present it in this dissertation, draws on legal traditions to give very particular meanings to social relationships, to appropriation, and to appropriated objects, thereby contributing to distinctive patterns of social activity vis-à-vis material things. These distinctive patterns of social activity vis-à-vis material things represent a particular property order: a particular, institutionalized pattern of materially-embodied existence.

When it first emerged, the intellectual property system was part of a national property order that linked rights and obligations vis-à-vis material things to *national legal status* within a territorial nation-state. In *Economy and Society* (1978 (1922)), Max Weber argued that processes of "appropriation" are a necessary counterpart to the social processes by which "closed social relationships" and "organizations" are created (*see also* Swedberg 1998; Ford 2011). As Rogers Brubaker (1992) has emphasized, nation-states are closed social relationships, which define the terms of their closure through their citizenship laws. It makes sense, then, that distinctive forms of appropriation would accompany the creation of the modern nation-state,

which is viewed by political sociologists (*e.g.* Calhoun 1997; Brubaker 1996) as a distinctively "nationalizing" form of political organization. As a creature of the modern nation-state, intellectual property is a quintessentially modern and "nationalistic" form of property. Paradoxically, however, I contend that this quintessentially modern and nationalistic form of property has very deep historical roots in legal culture and praxis.

The emergence of intellectual property did not occur as a single event. Rather, it occurred as a historical process, which was culturally shaped by the interpretation of legal traditions by legal actors, *i.e.* by the social process I am calling *semantic legal ordering*. However, variations in the particular social context contributed to differences in the ways that legal actors interpreted legal traditions, and to differences in the ways that their interpretive prescriptions contributed to institutionalized patterns of materially-embodied social existence. National property orders initially differed, then, even among nation-states drawing on very similar legal traditions.

In Chapter 2, I show that the creative, yet conservative, jurisprudence exemplified by William Blackstone and his contemporaries contributed to a distinctively-English *property order*, which recognized *particular property rights* (*e.g.* copyright) as being rooted in particular legal traditions, but hesitated to generalize beyond these particular legal rights and traditions. Due in part to the particular social and historical conditions under which it occurred, semantic legal ordering in 1770s England was particularist and rights-based. Accordingly, the English property order initially carried the stamp of this particularist and rights-based focus. This characteristically rights-based and particularistic approach helped to enable intellectual property to first emerge in England.

In 1787, the framers of the United States Constitution generalized from England's particularist legacy, embedding a universalist vision of intellectual property into the structural framework for a new nation-state. In Chapter 3, I will show how the American colonial and revolutionary experience contributed to a distinctively-American property order, which universalized English legal rights and legal traditions, while emphasizing the *structural conditions within the nation-state* under which those rights were to be recognized. Unlike their French revolutionary brethren, the Americans did not simply declare intellectual property to be a right. Instead, within a constitutional structure that achieved a precarious balance between state and federal governments, they empowered the Federal Congress to delineate intellectual property rights.

Catching hold of the American revolutionary fervor, France took the universalistic vision of intellectual property to its logical conclusion, declaring copyrights and patents to be "natural rights." However, the French National Assembly rooted these rights in an unstable national "will," ruthlessly destroying the corporate structures of *Ancien Régime* civil society that were seen as standing in the way. Following the Terror, Napoleon oversaw France's great national project in codification, which produced a nationally-uniform and enduring civil code that does not mention intellectual property. In Chapter 4, I will show how this experience of nation-building produced a distinctively-French property order, which combined a highly-charged rhetoric of intellectual property rights with weak structural protections for those rights.

Reflecting a deep ambivalence about the universalistic rhetoric of "natural rights," especially in the wake of French occupation, Germany tempered the urge to sacrifice its corporate structures on the altar of the nation. This resulted in a distinctive vision of civil society – seen clearly in Hegel's *Philosophy of Right* (1821) and in Prussia's General Law of the Land

(1794/1804) – which preserved the corporate structures and particularist traditions of guilds, estates, and cities, while subjecting them to constitutional control within a monarchist state. In Chapter 5, I will show how this experience of nation-building produced a distinctively-German property order, which rooted intellectual property rights in particular legal estates within the state.

Despite these differences in property orders, there is nonetheless an underlying similarity among these early political organizations that reveals the power of shared legal traditions. In all four cases, intellectual property came to be recognized, through processes of semantic legal ordering, as a form of property that is ultimately rooted in the nation-state. Seen together, the four *national property orders* also reveal a transition from the *personal property order*, which was characteristic of early modern, European civil society.

The institutional precursors to intellectual property are located in semi-autonomous European corporations (guilds and cities), and in the sovereign "prerogatives" that were granted as "privileges" by Emperors, Popes, and Princes. Sometimes these privileges were granted to corporations to bolster their monopolistic and regulatory powers. Other times, these privileges were offered to individuals to protect them from the monopolistic and regulatory powers of corporations. In both cases, the late-medieval legal traditions recognized quasi-proprietary rights relating to new inventions, printing-rights, and trademarks. However, because these rights were tied to personal legal status, they were particularistic and corporate, rather than universal and national. ***They were not, until the Eighteenth Century, formally categorized as the legal property of national citizens.***

For example, the City of Venice, occupying a highly-privileged, autonomous position between two Empires, is widely-acknowledged as the first to provide (in 1474), a precursor to a

modern patent regime, in the form of a statutory protection for new inventions (*see* Mandich 1960; Mandich 1948). However, although the Venetian statute speaks of a patent as being granted by right (rather than "grace"), it does not speak of the patent as property.

It was in the area of "copyright" that the language of property first began to be used. As I will show in Chapter 2, the language of property started to appear in Seventeenth and early Eighteenth Century England, emerging out of Parliament's revolutionary emphasis on rights, and the London Stationers Company, a highly privileged guild and royally-chartered corporation whose members, over time, came to regard their exclusive rights to print "copy" as a kind of property. Ironically, as Lyman Patterson (1968) has shown, and as we will see in Chapter 2, it was the *loss* of the Stationers' argument that helped to establish England's national property system for copyright.

In its modern form, intellectual property actually constitutes a hybrid between "classical" property and a regulatory grant (*see* Epstein et al. 2010). Like classical property, intellectual property is considered to belong to its "owner" in a way that gives him relative freedom over its disposition. On the other hand, unlike classical property, intellectual property is in some way "granted" by the nation-state to the owner, based on relatively-elaborate regulatory conditions that are determined by the nation-state.

In Chapters 1-5, I argue that this new type of property emerged through nationalization processes that relocated the source of property in the nation-state, rather than in a personal sovereign or corporate bodies. The process was most radical in France, which completely eliminated its personal sovereign and its corporations, while declaring intellectual property to be a "natural right" of its national citizens. However, the process ultimately occurred in all the political organizations that established early frameworks of intellectual property.

In this dissertation, I argue that semantic legal ordering contributed to this national transformation. Legal actors across Europe drew on shared legal traditions rooted in Roman law, interpreting them in the context of an emerging inter-national order that they were also helping to create. In so doing, they transformed the personal property orders of *Ancien Régime* civil society into national property orders. Despite the variations in these national property orders, the fact that the basic transformation took place everywhere testifies to the power of a shared legal culture.

In order to reveal the power of this shared legal culture, I first explicate the personal property order that formed a precursor to the emergence of intellectual property. I do this in Chapter 1, as part of the overall project to theorize semantic legal ordering. In Chapters 2-5, I then draw on this personal property order to elaborate "counterfactual" scenarios, which show how semantic legal ordering could have proceeded differently, contributing meaning and structural form to property orders other than the national property orders that actually emerged. In elaborating these counterfactual scenarios, I am endeavoring to drive home the point that intellectual property has not always existed, and did not emerge with historical necessity. Things could have gone differently, if semantic legal ordering had proceeded differently. Perhaps no actual historical case illustrates this better than the case of Germany, as described in Chapter 5.

Over the course of the late Eighteenth and early Nineteenth Centuries, intellectual property was gradually institutionalized throughout Western Europe and North America, as an essential, legal feature of a modern, inter-national economy. Over the course of the Nineteenth and Twentieth Centuries, through private contracts and international treaties, intellectual property has been developed into a foundation for national franchises (like McDonald's) and for globalized economic exchange. Today, intellectual property provides a legal foundation for

many of our everyday activities, including our utilization of networked digital computers and our consumption of electronic media. Without thinking twice, we regularly enter into intellectual property licenses with international economic actors. With a mere click of the mouse, we become legal participants in the globalized exchange of patents, copyrights, trademarks, and trade secrets.

Intellectual property's expansion in social and economic significance is a new development. Paradoxically, however, this a development rooted in an ancient cultural tradition. In this dissertation I show how cultural traditions rooted in Imperial Rome and Medieval Europe continue to structure our property orders, and the ways in which we experience our social world.

Methodology

The sociological method employed in this dissertation is historical and comparative. Although, at present, there is no clear consensus among historical sociologists about the proper standard for deriving sociological conclusions from historical data, there are emerging paradigms for historical sociology that provide methodological guidance (*see* Clemens 2007; Adams et al. 2005). The basic paradigm that I follow here involves an effort to narratively trace a cultural process ("semantic legal ordering"), which is conceived as causally significant, and to understand how that cultural process both reflects, and has contributed to, changes in the social context under which it occurred (*see* Steinmetz 2010; Clemens 2007). From this perspective, legal actors trained in Roman law traditions ("jurists") are seen as contributing causally-significant (albeit non-determinative) cultural dimensions to a "continual process of ordering and reordering" (Clemens 2007, at 532; *see* Sewell 1992; Giddens 1984) that, under specific historical conditions, produced the institutional social structures of intellectual property. The key

"foundational moment" that I am interested in is the moment at which patents and copyrights came to be seen as property. Examining this foundational moment from a number of different, comparative angles, I then examine processes of expansion, which involve both the duration of intellectual property "structures," and their extension into new domains.

Since the publication of Theda Skocpol's groundbreaking *States and Revolutions* (1979), use of a comparative method has often implied use of an inductive approach modeled on John Stuart Mill's "Method of Difference" (*see* Riley 2005; Lieberson 1991). However, I do not follow this method, but rather employ a counterfactual approach, which involves the analysis of "suppressed alternatives embedded in historical sequences" (Riley 2005, at 290).

Counterfactual methods, which have an established legacy in Max Weber's methodological work and are enjoying renewed attention among quantitative sociologists, draw inferences about explanatory causal relationships by examining how an ideally-localized "intervention" into a causal system would have changed an outcome of interest (*see* Bruun & Whimster, eds., 2012; Morgan & Winship 2007). One advantage of such methods, which makes them particularly suited to historical sociology, rests in the fact that they typically demand an account of the process according to which a cause produces an effect, *i.e.* an account of a causal "mechanism" (*see* Riley 2005; Hedström & Swedberg 1998). Even if the causal processes described by historical sociologists are closer to a "mechanism sketch" than a mechanism proper, the effort to draw a concrete connection between cause and effect imposes a methodological and empirical discipline that enhances the validity of causal generalizations.

Ideally, a counterfactual would reveal the way in which the social world *would* look different, if the causal process of interest had taken a different turn. My causal process of interest is semantic legal ordering, the interpretive activity of jurists who draw on legal traditions

in an effort to bring conceptual and social order into their contemporary social worlds. My counterfactual scenarios aim to show, then, how the social world *could* have been different, if semantic legal ordering had taken a different turn. Since I only conceive of semantic legal ordering as a contributing cause, not a determining cause, and since any counterfactual scenario posed in relation to history is, of necessity, an imaginative exercise, I do not purport to say how the social world *would* have been different. I do, however, pose counterfactual scenarios that stand close to historical reality, to the extent that reality can be known through empirical sources of data. All my counterfactual scenarios are based on actual historical cases.

Empirically, the validity of my analysis and my generalizations ultimately rests on my use of primary historical sources. Given the importance of primary sources for the validity of my sociological findings, I have listed my primary sources by chapter in Appendix 3. In selecting primary sources, I have generally proceeded by first identifying the legal texts relevant to intellectual property in a given historical and socio-political context. Working out from these legal texts, I have drawn on newspapers and autobiographies in seeking to understand how legal and social actors in that context understood the laws, their socio-economic implications, and their own interests in relation to the laws.

In order to understand how semantic legal ordering worked, as a causal process, I have drawn on social histories, legal history, biographies and autobiographies, seeking to understand how jurists were being educated, what roles they played in institutional structures, and, more broadly, how concrete proprietary social activity was linked to other institutional structures in the particular context. I have then endeavored to abstract from these understandings a general description that links semantic legal ordering to institutionalized patterns of social activity.

Contributions to the Sociological Literature

The narrow aim of this dissertation is to contribute to sociological understanding of intellectual property, as a legal institution. To date, there has been no sociological attempt to comprehensively address the phenomenon of intellectual property, and the need for a "sociology of intellectual property" has been noted (*see* Felin 2012; Carruthers & Ariovich 2004; Swedberg 2003). This dissertation, then, aims to contribute to a sociology of intellectual property, by contributing to an understanding of the social process by which intellectual property emerged and expanded, as a legal institution.

Sociologists have certainly touched upon the institution of intellectual property. Most recently, in an article published in the *American Sociological Review* (2012), Nitsan Chorev has contributed to an understanding of the ways in which global intellectual property norms are changing, within the context of the WTO-TRIPS regime, which is discussed in Chapter 7. Chorev examines the case of patent protection for AIDS medications, and utilizes this as a case study to refine sociological understanding of the social process that Terence Halliday and Bruce Carruthers (2009) have labeled "recursivity": the cyclical process by which the "law in books" is continually transformed as a result of tensions and agentive activities occurring in the social and institutional contexts of the "law in action."

In a similar vein, Amy Kapczynski (2008) has explored the "Access to Knowledge (A2K)" social movements – social movements that are opposed to particular intellectual property norms – contributing thereby to an understanding of "frame mobilization": the ways in which social actors draw on interpretive strategies in instigating and legitimating their collective action. Kapczynski's focus on the interpretive, "legal consciousness" (Ewick & Silbey 1998)

dimensions of intellectual property is shared by Mark Suchman, who has touched repeatedly on intellectual property-related phenomena in his body of work (*see, e.g.*, Suchman 1989).

Finally, it is important to note that organizational sociologists and economic sociologists, such as Walter J. Powell and Sigrid Quack, are taking an increasing interest in intellectual property. In his explorations of the "knowledge economy," Walter Powell and his co-authors have utilized patent data as an indicator of the knowledge economy's growth (*see* Powell & Snellman 2004; Powell & Owen-Smith 1998). In so doing, they are following the early lead of Robert Merton (1935). As an economic sociologist seeking to understand the links between economic and political phenomena, Sigrid Quack explores the ways in which transnational copyright institutions are being sustained and contested across national borders, and in private standard-setting sites (*see, e.g.*, Dobusch & Quack 2013).

These sociological forays into the domain of intellectual property have been relatively cautious, however. One particular area of intellectual property is typically singled out (*e.g.* copyrights or patents), and the focus is on the ways in which non-legal actors interpret and contest the intellectual property-related institutions. Such treatments do not attempt, at least directly, to answer genealogical questions about intellectual property: Where did these intellectual property institutions come from? Where, when, and why did they emerge? In this dissertation, I am endeavoring to contribute to an answer to these questions.

Economic, legal, and social histories of intellectual property have been written, and are being written. However, to my knowledge, this is the first sociological history of intellectual property, and the first attempt to holistically and comparatively address the emergence of intellectual property, as a new type of legal property.

The emergence of intellectual property in the United Kingdom has, understandably, received the most historical attention among English-speaking scholars. Lyman Ray Patterson's now-classic (1968) study of English copyright has been invaluable to me. Mark Rose's (1993) critical scholarship on the notion of "authorship" has been very influential in legal circles. Christine MacLeod's (1988) economic-historical investigation of the English patent system has also been very influential, and it is usefully complemented by Petra Moser's (2003) more recent work on the effects of patents on innovation. William Hyde Price (1906) and Harold Fox (1947) are classic and still-influential sources on the history of English patent law.

Although each of the foregoing treatments has focused on a particular intellectual property institution (patent or copyright), more recently, Brad Sherman and Lionel Bently (1999) have addressed the emergence of British intellectual property, as a whole. Their book, as well as the web-based collection of primary historical sources for the emergence of copyright (copyrighthistory.org) that Lionel Bently has supported, have provided crucial resources and support for this dissertation.

With respect to the emergence of intellectual property in the United States, Bruce Bugbee (1967) is the classic source. Robert Merges' *One Hundred Years of Solicitude: Intellectual Property Law*, 1900-2000 (2000) provides an important complement for the most recent period, especially in its focus on the explosive growth in trademark law. Within the domain of legal scholarship, there are myriad articles and books providing significant and complementary historical insight (*see, e.g.*, Fisk 2009). I cite many of these works throughout this dissertation.

The range of English language publications pertaining to the emergence of intellectual property in France and Germany is more limited, of course. However, important studies of the German and French book trades (Selwyn 2000; Hesse 1991) help to fill the gap. Elizabeth

Armstrong's study of the French book-privilege system (1990) provides invaluable insight into the period prior to intellectual property's emergence in France. For European patent history, Peter Kurz's *World-History of Invention-Protection* (2000) is a crucial German-language secondary resource.

There is, therefore, no shortage of secondary, historical sources on the emergence and expansion of intellectual property. However, no author to my knowledge has endeavored to explain the emergence of intellectual property, as a whole. Existing studies all focus on a particular country, and often focus on a particular intellectual property institution in a particular period of time. Even Peter Baldwin's forthcoming study of the *Copyright Wars* (2014), which may provide a more comprehensive view on copyright than has so far been found, does not address intellectual property as a whole, *i.e.* as a new type of legal property encompassing patents, copyrights, trademarks, and trade secrets.

In order to gain sociological insight into the institution of intellectual property, I believe we need to view that institution holistically. Only from this holistic perspective will we be able to see why and how a new type of legal property was created and institutionalized in the Eighteenth and early Nineteenth Centuries. And only from this holistic perspective will we be able to see the full range of social effects that continue to flow from this important institutional transition. The goal of this dissertation is to contribute to this kind of holistic, sociological understanding of the emergence and expansion of intellectual property.

Sociologists have largely gotten out of the business of explaining the origins of legal institutions (*see* Steinmetz 2005, at 127). As Terry Halliday and Bruce Carruthers have noted (2009, at 15-16), this means that sociologists have effectively ceded the field to political scientists and economists. I believe that this development represents an impoverishment in the

sociological tradition. Classical sociologists like Max Weber, Emile Durkheim, and Karl Marx did not hesitate to extend their sociological analyses to the "law in books"; I believe we should continue to follow their lead.

To cede genealogical explanations of legal institutions to political scientists and economists is to permit such institutions to be explained solely on the basis of political power and economic efficiency. Sociological perspectives provide an important balance and counterweight to such explanations. In this dissertation, I point out one way in a sociological perspective, which focuses on the contribution of legal culture, can provide such balance and counterweight.

A functionalist, economic explanation for the emergence of intellectual property argues that intellectual property emerged because it efficiently contributes to innovation and economic growth. The classical, "utilitarian" justification for the existence of intellectual property starts from the high costs and uncertainty involved in innovation. Intellectual property, from this perspective, is essentially a limited monopoly that allows a producer of innovation (*e.g.* a pharmaceutical company) to recoup the costs of innovation through a limited period of monopoly pricing (*see* Merges 2011; Landes & Posner 2003). Intellectual property is more efficient than a direct government-reward system, from this perspective, because it is market-based, and accordingly permits a wide range of property-based transactions to be effectuated that spread the costs and rewards of innovation around to their highest-value users.

As a matter of fact, however, economists are divided on the question of whether intellectual property really is economically efficient in incentivizing innovation (*see* Mokyr 2009). In 1958, the U.S. Senate Judiciary Committee published a report by the economist Fritz Machlup, which comprehensively evaluated the U.S. patent system from an economic

perspective. Machlup's conclusion was that, *ex ante*, it is very difficult to justify a patent system on an efficiency basis. However, *ex post*, it would be very inefficient to eliminate an existing patent system. Thus, given that the U.S. has a patent system, we should keep it. However, if we were deciding today, strictly on the basis of economic efficiency, whether to establish a patent system, we might want to think twice (*see also* Machlup 1962; Machlup & Penrose 1950).[5] Reflection on this debate has led the prominent legal scholar of intellectual property, Robert Merges (2011), to recently conclude that intellectual property cannot be justified, from a legal perspective, on the "utilitarian" basis of economic efficiency alone.

Even if intellectual property were clearly justifiable from an economic efficiency standpoint, however, this would not explain why it came into existence. A critique of such economically-functionalist forms of institutional explanation rests at the heart of the new economic sociology (Granovetter 1985), and remains pertinent, regardless of whether we consider the "embeddedness" paradigm an effective substitute (*see* Krippner & Alvarez 2007; Krippner et al. 2004). Crudely functionalist explanations teleologically confuse outcomes with efficient causality (*see* Elster 1990). Moreover, such explanations cannot adequately account for the historical time and place in which an institution emerges. If intellectual property emerged because it was efficient, why did it emerge in Europe, and why only in the Eighteenth and Nineteenth Centuries?

The answer that I offer to this question rests on the contribution of legal culture, through the agency of legal actors in particular political, economic, and social settings. I am, in other words, offering an explanation for the emergence of intellectual property that focuses on the

[5] "If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it." (Machlup 1958, at 80)

cultural and structural contributions of lawyers. I by no means claim that this represents the entire explanation. However, partly because I believe that legal culture – *i.e.* the culture of lawyers – remains relatively under-explored within the broad umbrella of cultural sociology, I am focusing my attention here.

As an economic sociologist, I seek to show how legal traditions, as cultural traditions, have contributed to fundamental meanings and structures of the socially-embedded economy, like property, contracts, and the corporation. As a cultural sociologist, I seek to show how legal traditions have contributed to fundamental meanings and structures of globalized political institutions, like the nation-state, international organizations, and intellectual property.

Chapter 1. Semantic Legal Ordering, Property Orders, and the Social Imagination

To the lawyer the past is alive in the present and history is contemporary history.
- J.G.A. Pocock

In his "Sociology of Law" (*Rechtssoziologie*), Max Weber argued that the organizational aspects of modern economies are strongly dependent on political factors, as well as the "internal structure of legal thought" (1967, at 61). Emphasizing the extent to which the formally-rational legal systems of Continental Europe are dependent upon unique features of Roman law, Weber nevertheless argued that abstract legal concepts like property ownership (*dominium*) in European law are actually the product of medieval jurists, who creatively re-interpreted late-imperial Roman laws (1967, at 221-22). In formulating abstract legal concepts like "property," "contract," "right," and "corporation," and in linking them together as part of a logically-coherent legal system, Europe's jurists contributed to a highly-rationalized economic order in which right-bearing individuals are guaranteed broad economic powers, including the power to impact third-parties through their contract-based exchanges of property.

Where Weber's sociology of law differs most from contemporary sociology of law is in its emphasis on the normative and conceptual force of cultural traditions rooted in Roman law and medieval jurisprudence. Like contemporary sociologists of law, Weber argued that political and economic power contribute significantly to legal institutions. However, he did not think that the contributions of political and economic power to legal institutions could be adequately accounted for without a consideration of historically-rooted, cultural factors, particularly the influence of Roman legal traditions.

In this chapter, I will build on Weber's legacy, and draw on Robert Bellah (2006) in theorizing legal traditions as "cultural traditions". I will formulate a thesis of semantic legal

ordering to show how legal actors ("jurists") have drawn on concepts and principles within legal traditions to formulate legal prescriptions that are meaningful in their contemporary social context. When translated through private and public officialdoms that enforce these prescriptions through sanctions, semantic legal ordering has contributed form and meaning to legal institutions, organizations, and to individual intentions. I will argue that one effect of this activity may be seen in distinctive "property orders": institutionalized patterns of materially-embodied social activity.

Before attempting to theorize semantic legal ordering in the abstract, I present it as a historically-situated social activity, which emerged in Twelfth Century Europe, and spread through the European universities of "Christendom". With the progress of the Reformation, semantic legal ordering was secularized, but ties to the Church's cultural traditions, particularly to the complex legacies of individual "free will", remained forceful into the Nineteenth Century, when intellectual property was institutionalized.

One very important product of a secularized Roman law tradition, which emphasized an individual property-owner's possessory and transactional "will" (*voluntas*), will be described in the pages that follow as "proprietary voluntarism." Despite differences in the national property orders within which intellectual property emerged, this proprietary voluntarism is a common thread running through the history of intellectual property. In Chapters 6 and 7, I will show the important effects that this proprietary voluntarism has had in contributing to contractual frameworks for intellectual property licensing, and to the global system of intellectual property treaties.

Weber (1967, at 141-54) argued that fully realized proprietary voluntarism ("freedom of contract") is only possible where law has been "unified and rationalized" within a particular type

of political organization: the modern nation-state. The basic historical process by which this proprietary voluntarism emerged was one in which the "special laws" of particular corporate communities and legal status groups were replaced by nationally-uniform laws. This, in turn, enabled a new type of special law, one that depended on the will of contracting parties, rather than on ascribed legal status.

The emergence and expansion of intellectual property comprises a historical process that can be seen as an empirical validation of Weber's argument. In the chapters that follow, I argue that the emergence of intellectual property was an important part of a broader transition from a "personal property order," rooted in Christendom's Estate Society, to national property orders. In Weber's view, the distinctive contribution of Europe's jurists to the modern nation-state lay in their systematization of abstract principles of law, which were logically organized on the basis of their legal meaning. This "formal rationalization" process enabled the "unified and rationalized" law of nation-states to replace the special laws of personal status.

Semantic Legal Ordering and the Personal Property Order: Intellectual Property Analogues in Christendom's Society of Estates

Europe's efforts at constitutional reform have a long and distinguished history. The Holy Roman Empire – which lasted from the end of the Fifteenth Century into the Nineteenth Century (1806) – is increasingly seen by historians as a long and relatively stable product of such efforts (*see* Whaley 2012; Wilson 2011). University-trained jurists took a very prominent part in the formation and maintenance of the Holy Roman Empire. They had been educated through the study of Roman and Canon law texts, a course of study that had been developing since the Twelfth Century in Northern Italy, and had spread across Europe. Serving in both public and

private roles, Europe's jurists brought their learning to bear on the problems and needs of their contemporary societies. In so doing, they contributed to the institutionalization of an Imperial "Society of Estates" (*Ständestaat*). In formulating property-related principles that were to operate in an Imperial Society of Estates, these jurists contributed to the institutionalization of a personal property order.

In a socio-legal world divided by national citizenship, the concept of an estate is very difficult to grasp. Nevertheless, a key to unlocking the meaning of this alien legal word comes when it is recognized that the English word "estate," like the German word *Stand*, evokes a position, act, or condition of being. An estate, we may say, is a mode of social being (*see* Bartlett 2011).

According to one of Germany's iconic constitutional historians, Johann Stephan Pütter, the concept of an estate was used in its earliest stages to distinguish clerics from lay-people (1790, at 20-21). A defining struggle in European political culture has centered on the differentiation of spiritual and secular estates. Europe's jurists contributed to this struggle, and to the definition of legal concepts and principles that have provided semantic foundations for European secularism. In defining these concepts and principles, Europe's jurists drew on the Roman law tradition, but within a very particular social context, that of medieval Christendom (*see* Keddie 2003).

Within the Catholic Church, Roman law traditions had survived in Canon law (*see* Brundage 2008). The great Popes and bishops were trained in this Canon law, drawing on it in the struggle to delineate their particular sphere of "sovereignty," and to differentiate the "spiritual" and "secular" estates (*see* Tierney 1988; Berman 1983; Ullmann 1975). The concept of two distinctive modes of social being, which constitute two essential parts of an overall social

whole, was formulated by the bishop Peter Damian (c. 1007-1073), a scholar of Canon law, as follows:

> ...Just as both powers, the royal and the priestly, are joined to one another in Christ by the special truth of a sacrament, so too they are mutually bound to one another in the Christian people by a kind of covenant. Each in turn needs the services of the other. The priesthood is defended by the royal protection while the kingship is sustained by the holiness of the priestly office. The king is girded with a sword so that he may go armed against the enemies of the church. The priest devotes himself to vigils of prayer so that he may win God's favor for king and people....The former is established to coerce evil doers and criminals with the punishment of legal sanctions; the latter is ordained for this, to bind some with the zeal of canonical rigor through the keys of the church that he has received and to absolve others through the clemency of the church's compassion (*quoted from* Tierney 1988, at 38-39).

In the great "investiture" struggle between Emperor (Henry IV) and Pope (Gregory VII), which played out from the Eleventh into the Twelfth Century, these two distinctive modes of social being were increasingly tied to two distinctive legal and jurisdictional spheres: "spiritual" and "secular" (*see* Tierney 1988; Berman 1983).

It was during this period that a dramatic revival of Roman law learning began in Northern Italy (*see* Brundage 2008, at 78-85; Berman 1983). The earliest shadows of evidence associate a learned practitioner of Roman law ("Pepo") with Countess Matilda of Tuscany (1046-1115), and credit Pepo with a decisive court victory, turning on Roman law, in a case heard before Henry IV (Brundage 2008, at 81). Clearer evidence relating to the legal career and teaching of Irnerius (c. 1055-1125), the legendary founder of Roman law studies at Bologna, also associates him with Countess Matilda, as well as Henry V, in whose court he served as a judge (*iudex*) (Brundage 2008, at 80-85). By the second half of the Twelfth Century, there is decisive historical evidence for the fact that learned scholars in Bologna were teaching Roman law to students from all over Europe, including the Archbishop of Canterbury, Thomas Beckett (c. 1118-1170); these

"doctors" of Roman law were also brought in as advisors to the German Emperor Frederick Barbarossa (1152-90) (Brundage 2008, at 85-89).

According to Cornell's distinguished medievalist, Brian Tierney (1988, at 97), Roman jurisprudence came to medieval intellectuals "with the force of a revelation" (*see also* Tierney 2008; Pennington 1993) What was particularly powerful, according to Tierney, was the idea that a "body of laws" (*corpus*) could be formed as a coherent intellectual system. This "revelatory" conception, tied to the renewed study of Justinian's Sixth Century codification of Roman law, electrified Europe. By the Thirteenth Century, universities with curricula modeled on Bologna's were popping up all over Europe, as far away as England (*see* Verger 2003). Organized into guild-like brotherhoods called "nations" and colleges, Europe's new jurists poured over Justinian's Sixth-Century texts, producing "glosses" that reflected interpretive application of Roman law principles to medieval social conditions.

One of the most important careers for a jurist trained in Roman law was to be found in Europe's growing cities (*see* Moraw 2003). Returning from their studies of Roman law at Bologna, well-born young men became "professional administrators" (*podestà*) of cities, often traveling from city to city with a coterie of judges, notaries, and secretaries. The jurists also became professional advisors to secular rulers, particularly the Emperor. At the same time, their fellow students were returning to the service of the church. Indeed, many graduates obtained a degree that signified their capacity to apply Roman law in both spiritual and the secular jurisdictions: *doctor utriusque juris* ("doctor of both laws").

The fact that the Roman law tradition formed a basis for both religious and secular law in Europe is enormously important. The belief that "the Church lives by the Roman law" (*ecclesia vivit lege Romana*) lent sacred legitimacy to this cultural tradition, and to the legal institutions

that could be founded upon it. Ironically, it was for this very reason that the Roman law tradition could be drawn upon to separate religious and secular institutions, including the Estates. Although there was a tremendous amount of conflict involved in this separation, the parties could draw upon a shared cultural tradition in their disputes and in the resolutions of their disputes (*see* MacIntyre 1988; MacIntyre 1981). These disputes and resolutions could then be given the status of legal "precedents", which could be viewed in retrospect as forming part of Europe's constitutional history.

The specialists in formulating and resolving Europe's legal disputes were the jurists trained in Roman law. They embodied this cultural tradition, drawing upon it to give meaningful form and content to sacred and secular legal institutions that they believed were needed under the circumstances of their age. Standing, as it were, between sacred and secular legal traditions, they tended to draw these traditions together, at the same time that they were differentiating them. In so doing, they contributed an aura of sacred legitimacy to the definition of legal institutions, like the Estates and, later, intellectual property.

By the end of the Fifteenth Century, Europe's jurists had been engaged in this process of semantic legal ordering for roughly three centuries. As advisors to Maximilian I (1459-1519) and to the Imperial Chancellor, they contributed to a set of constitutional reforms that aimed to bring coherence and certainty into the political and social institutions of the Holy Roman Empire. In so doing, they gave legal meaning and systematic institutional form to the Empire's "Society of Estates," and to intellectual property analogues that emerged within this Society of Estates.

Given the international character of the jurists, this institutionalized framework for Estate Society was influential throughout Europe, even in areas beyond the Emperor's jurisdiction

(such as England and France).[6] Contributing meaning and structural form to a "personal property order" that extended across early modern Europe, this Estate Society forms the historical background for the emergence of intellectual property.

The first set of Imperial reforms actually took place just before Maximilian became Emperor. These reforms pertained to the institution within which the Estates were represented and contributed to enacting Imperial law: the *Reichstag* (or Imperial Diet). Between 1486 and 1489, formal procedures for the enactment of laws were instituted, and the representatives to the Reichstag were organized into three corporate groups (*collegia*): the College of Electors, the College of Princes, and the College of Imperial Cities (*see* Whaley 2012, at 32). The inclusion of the Imperial Cities as a corporate Estate with a voice in the Reichstag represented a new step, one of great significance for Europe's cities.

In 1495 and 1500, the Reichstag met at Worms and Augsburg. Discussions were conducted on the basis of the new organization and procedures, and culminated in the publication of Imperial Decrees, which described the new constitutional settlements and immediately became Imperial law (*see* Whaley 2012, at 25-39; Pütter 1790, at 347-75). These Decrees formally recognized a reformed court of appeals, the Imperial Chamber Court (*Reichskammersgericht*), which would apply Roman law as the Imperial "common law" (*ius commune*). The judges of this court were to be supplied by the Collegial Estates, and were to be trained in Roman law. The Decrees also gave institutional recognition to six "Circles" (*Kreise*):

[6] The international character of the jurists can be seen in the life of Mercurino di Gattinara (1465-1530), Chancellor to Charles V. Gattinara was born in Italy and identified himself as Italian (*see* Headley 1983, at 5-6). Prior to serving as Imperial Chancellor, however, Gattinara served as President of Burgundy. Following his service as Chancellor, he would become a Cardinal of Rome.

"regional associations of territories" (Whaley 2012, at 35), which were responsible for on-the-ground administration of Imperial justice and military mobilization.

On the basis of these constitutional measures, the Imperial Society of Estates was given a coherent, systematic form. The Estates were recognized as corporate groups, which were differentiated from one another by their distinct modes of social and political being. The inclusion of the Imperial Cities as a separate Estate with a political voice in the Reichstag meant that their systems of urban law would become politically influential.

The specific terms of the relationship between the Emperor and his Imperial Free Cities were laid out in documents issued from an institution of great importance for the emergence of intellectual property: the Chancery. According to a careful historian of this institution (Headley 1983), the period of constitutional reform in the Holy Roman Empire comprised the period during which the Chancellery took on the shape of "a general European phenomenon" (16). The *cancellaria*, as a secular institution modeled on Ecclesiastical and Roman precedents, had existed throughout Europe since the end of the Twelfth Century (*see* Headley 1983, at 17; Berman 1983, at 415, 507-508). However, it was during the period just preceding the Reformation that legal practices within this institution were systematized and formalized to a new degree, a process that was led by the Imperial Chancellor Mercurino Gattinara (*see* Headley 1983).

As evidenced by legal memoranda collected by Gattinara from jurists throughout the Empire, the Chancellor oversaw the issuance of Imperial patents and charters of privilege (*see* Headley 1983). As custodian of the Imperial seal, the Chancellor ensured that patents, charters, and privileges were properly issued. This meant that the Chancellor oversaw the system of "special law" that gave privileged legal status to cities, as well as to particular individuals. The

type of personal property order that this system of special law tended to produce can be seen in operation in the City of Nuremberg.

Nuremberg was officially recognized as an Imperial Free City, together with 84 other cities, in records connected with the Diet of Worms (1521) (*see* Strauss 1976).[7] This status had been gradually attained through a series of charters issued by the Holy Roman Emperors, beginning with the Sicilian Norman, Frederick II (1194-1250). In 1219, Frederick had issued a charter recognizing Nuremberg as a *civitas*, whose citizens (*cives*, burghers) would have a right of direct appeal to the Imperial Court and would henceforth be taxed as a corporate body (*see* Strauss 1976, at 42-43).[8] Over the succeeding centuries, a number of additional privileges strengthened the "unmediated" relationship between Emperor and corporate City; these developments came at the expense of the Hohenzollerns, who owned the princely title of "Burggraf" (Margrave, castle-keeper) of Nuremberg (*see* Clark 2006; Strauss 1976).[9]

By the late Fifteenth Century, Nuremberg had a proud history of self-governance, which had resulted in a complex body of municipal law. Inspired by a Roman law-based idea of "Reformation" spreading across Germany, in 1477 Nuremberg undertook a project to codify its municipal laws (*see* Strauss 1976, at 218-24; Waldmann 1907). A committee of the City Council took responsibility for the codification project, with the assistance of jurists trained in Roman law. The code was adopted in 1479, and a printed edition was published in 1484.[10]

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[7] This was the Diet convened to try the case of Martin Luther.

[8] Although he strengthened the position of German cities vis-à-vis their territorial lords, Frederick weakened the position of Sicilian cities in his Roman law-based code for the Kingdom of Sicily (the *Liber Augustalis*), revoking all previous privileges and declaring that their elected consuls were to be executed (*see* Berman 1983, at 424-34).

[9] Losing the opportunity to develop a territorial kingdom based in Nuremberg, the Hohenzollerns purchased the Electorship of Brandenburg, and built up the Kingdom of Prussia (*see* Clark 2006).

[10] The printed title provides a foreshadowing of things to come in Germany: *The Reformation of Statutes and Laws Undertaken by the Honorable Council of the City of Nuremberg in the Service of the Common Need and Cause* (Strauss 1976, at 221; *see also* Waldmann 1907).

According to the social historian Gerald Strauss (1976, at 221), this was the first codification of municipal law to be printed in Germany, and would become a model for other municipal codes.

A description of Nuremberg's legal system in action was provided 32 years later (in 1516) by a jurist trained in Bologna, Christoph Scheurl.[11] In a letter to Martin Luther's mentor, Johann Staupitz, Scheurl described the operations and responsibilities of Nuremberg's Council and court system. In this description, Nuremberg comes into focus as a world organized on the basis of legal status.

The city's status as a legal body (a corporation) of citizens had come from the Emperor, but within the city, an all-powerful, paternalistic Council (the "Patrician Council") controlled the gradations and implications of status. At the top of the citizen status hierarchy were the ancient citizen-families, the *Geschlechter*. They controlled the Patrician Council, the administration, and the courts. Through the Patrician Council's lawmaking power, they determined who could own real estate in the city, and who could qualify for citizenship status. Their oversight of civic administration and military mobilization meant that their combined power was the ultimate guarantee of property and status within the city.[12]

At the other end of the legal status spectrum were the peasants (*Bauern*). The City owned about 25 square miles of surrounding territory, comprised of fields, forests, and villages (*see* Strauss 1976, at 7, 9, 51). On this territory, peasants raised animals and plants to feed the City, quarried stones for building, fired glass ovens, and worked over charcoal kilns. Although these peasants were subject to the authority of the City, they were not citizens of the City. They

[11] Scheurl was an early supporter of Martin Luther, and was among the first to print and circulate Luther's *95 Theses* (*see* Brecht 1993).

[12] Although Jews were able to acquire property and citizenship status in Nuremberg (unlike some other German cities), the episodic expropriation and Imperially-sanctioned mass executions to which they were subject testifies to the insecurity with which both were held (*see* Strauss 1976).

were not eligible for service in the Council, and they were tried in a special Peasant Court (*Bauerngericht*), which served as a legal training ground for the sons of *Geschlechter* families.

In between peasants and the *Geschlechter* families stood artisan and merchant burghers, the wealthiest and most respectable of whom might aspire to a seat in the Patrician Council. Male burghers were citizens, and, as such, owned real estate in the City, swore a citizen's oath, and paid taxes. They were also eligible for a Greater Council of 200 citizens, which annually participated in an electoral system for reconstituting the Patrician Council. Their primary role was economic, however. Through an apprenticeship or university training (in the case of clerics and lawyers), they had been trained in a particular craft or profession. By municipal law, they were required to adhere to this particular craft or profession, and they were allocated distinctive rights and obligations by virtue of their role in exercising this particular craft or profession.

With respect to property, this system was "personal" in several distinct, but related, senses. Most fundamentally, this was a system in which gradations in the legal capacity to exercise rights or incur legal obligations vis-à-vis material objects were determined by gradations in legal status. Under Roman law, gradations in legal status were sometimes referred to as *legitima persona*: legal personality (*see* Duff 1971). The late-Imperial Roman law texts that medieval lawyers studied differentiated among a wide array of legal statuses, delineating "legal personalities" for senatorial patricians, clerics, married women, children, citizens of cities (*municipes*), guildsmen (*collegia*), serfs (*coloni*), slaves, foreigners, and Jews. Beginning in the Third Century, treatises imposing systematic unity on this complex Roman law system gathered these distinctions together under one conceptual heading: "The Law of Persons" (*see* Buckland 1963, at 56-179).

The application of this Law of Persons to medieval society contributed to a society in which legal capacity vis-à-vis property and obligations varied widely, depending on legal personality. The social historian of Sixteenth Century Nuremberg, Gerald Strauss (1976, at 116-17), has described the operation of this system as follows:

> To be in society meant to be in possession of a body of rules and statutes defining one's life and actions. Society consisted, and was thought to consist, of groups and classes, each a legally provisioned component with stated rights and enumerated responsibilities toward itself, toward other groups, and toward society at large. Each constituent group had its law, as it had its distinguishing peculiarities of dress, habit, manner, style.

Prefiguring Strauss's description, but amplifying it powerfully, Max Weber (1967, at 144) described the operation of "special law" in medieval Europe in this way:

> The applicability of this type of special law was founded not on economic or technical qualities but on qualities derived from "corporate status" *i.e.*, birth, mode of life, or belonging to a circle of persons of certain qualities such as "nobleman," "knight," or "guild fellow," or on certain social relationships with respect to material objects such as a copyhold or a manor. The definition of all these qualities was indeed indirectly affected by certain "corporate status" relationships, and it has therefore always been the case that the applicability of a special law was conditional upon a particular quality of the person or upon his relationship to a material object. In marginal cases, the "privilege" could even adhere to a single individual or object and it did so in fact quite frequently. In that case, the right coincided with the law; the privileged individual could claim as his right that he be treated in accordance with the special law.

Within Nuremberg's personal property order, differences in legal personality meant that a citizen of Nuremberg had different property-related rights and obligations, as compared to a peasant, a cleric, or a territorial Lord. And, between themselves, Nuremberg's citizens had different property-related rights and obligations, depending on their professional occupation. If they had received a special "privilege" from the Emperor or the Patrician Council, they might even have unique property-related rights and obligations, corresponding to a unique legal personality.

Nevertheless, the primary legal mechanisms through which legal personality were acquired were birth and marriage. This meant that the personal property order was fundamentally rooted in that most personal of institutions: the family. Because marriage was governed by Canon law, this also meant that the personal property order constituted a point of contact between secular and religious law. The Canon law also governed the legal personality of clergy (*see* Helmholz 1996).

Precursors to intellectual property are not difficult to locate within this personal property order.[13] As one of the largest cities in Germany, Nuremberg had come to occupy a central position in a set of overlapping trade networks stretching from the Baltic to the Adriatic, and from the Atlantic into Poland (*see* Pfister 1996; Scott 1996; Scott & Scribner 1996; Strauss 1976). She had become a specialized producer of high-quality manufactured goods, and was particularly known for her metal wares. Operating through the Council, and interfacing with the Imperial Chancellery, Nuremberg's *Geschlechter* families oversaw a municipal system of privileges and quality controls that appear remarkably similar to modern intellectual property.

The most straightforward analogues to modern intellectual property may be found in the areas of trademark and trade secrecy. Nuremberg metal masters each had their own marks, which were registered with the *Rugsamt*, a five-member subset of the Patrician Council that governed Nuremberg's craftsmen and artisans (*see* Strauss 1976, at 65, 137-43). According to Christoph Scheurl, these *Rügsherren* performed the same tasks and bore the same responsibilities as guildmasters (in cities where the guilds had successfully achieved greater degrees of self-

[13] There were two other senses in which this property order was personal. In a city of roughly 25,000 people (*see* Scott & Scribner 1996; Strauss 1976), property-related activity would typically have involved frequent, face-to-face interaction. Moreover, the relationship to the Emperor was personal: he was the individual who personified the Imperial system, and whose legal grants held the whole, complex system together.

governance).[14] Only licensed masters were permitted to sell their products, and stamped marks served to identify the licensed artisans who had crafted a particular product. For certain products, an additional mark (an "N" or an eagle) certified inspection by a Nuremberg municipal officer. The forging of such trademarks was apparently quite common throughout medieval Europe (*see* Kießling 1996, at 165), and the Nuremberg *Rugsamt* was authorized to impose fines to protect against such forgeries.

Craft secrecy was maintained by limiting access to apprenticeships, and by limiting access to locations in the city from whence to observe craft techniques. Rules from Nuremberg's *Book of Handicrafts* prohibited foreigners from looking into workshops (*see* Strauss 1976, at 99-101). Distinctions were drawn between "open" and "closed" crafts. Foreign "journeymen" were only permitted to train in the open crafts, and limitations on the sociability of apprentices in closed crafts were aimed at preventing the secrets of such crafts from spilling out beyond the City. A strict registration system for all apprenticeships within the City enabled the Patrician Council to monitor the sharing of all craft information and skill.

In Nuremberg, as in the rest of Europe, an apprenticeship served to establish a burgher's legal personality as a craftsman or artisan. Inducted into a secretive world of industrial skill (*see* Long 2001; Long 1991), a craftsman could be transformed from a foreign journeyman into a citizen, thereby acquiring the legal status that set him apart from foreigners and peasants. As a new citizen of Nuremberg, he would participate in its personal property order, and would develop an interest in protecting the value of Nuremberg's industrial reputation. Or, as the son of a *Geschlechter* family, he might inherit his position. In either case, his legal capacity to

[14] Nuremberg was somewhat unique among medieval cities in the fact that artisan uprisings had been unsuccessful in establishing guild control. Instead, with Imperial help, Nuremberg's *Geschlechter* families had retained control of the city (*see* Strauss 1976, at 49-50).

exercise rights or incur legal obligations vis-à-vis material objects was determined by his legal status as a licensed craftsman, a legal status that was overseen by the Patrician Council.

Turning to the analogues to modern patents that operated in this personal property order, it is first important to note the possibility of Venetian influence. Evidence for Venetian influence on Nuremberg's administrative system can be seen in Scheurl's description of the Guardians of Widows and Orphans, administrative offices staffed by 3 members of the Patrician Council, which involved the execution of wills and provision for the care of family members after the death of a male head of household (*see* Strauss 1976, at 65). According to Scheurl, this office had been established "on the Venetian model" in 1504. Mercantile connections with Venice were extensive and well-established (*see* Kießling 1996; Scott 1996; Wright 1996; Strauss 1976), so there is every reason to believe that Nuremberg's Patrician Council was familiar with the Venetian patent statute enacted in 1474.

The possibility of Venetian influence on Nuremberg's patent system is significant because it helps to place Nuremberg's patent system in its historical context. Because Venice's patent statute is so widely cited as a "first" among patent laws, it has received a great deal of historical attention (*see* Kostylo 2008; May 2002; Long 2001; Walterscheid 1994; Long 1991; Mandich 1960; Prager 1952; Mandich 1948; Frumkin 1945; Prager 1944). Among recent historians, however, the tendency is to view Venice's patent statute as being very much in continuity with contemporary normative conceptions and practices, both in Venetian customary law and in privilege-granting throughout the Empire (*see* Kostylo 2008; *cf.* May 2002; Long 2001, at 88-96).

In Venice and in Nuremberg, proto-patent systems, combined with trademark protection and trade secrecy, functioned to protect industrial techniques and reputations that were seen as

being valuable *to the City*. The preamble to the Venetian statute of 1474 emphasized the "utility and benefit to our state (*stado*)" that would follow from a 10-year period of exclusivity, granted by the City to the "author and inventor," in making "any new and ingenious contrivances not made heretofore in our Dominion" (Kostylo (trans.) 2008). Furthermore, the statute provided that the City retained complete discretion to appropriate the invention at any time, without compensation. Nuremberg's even stronger proprietary attitude toward inventive "contrivances" can be seen in a 1532 ordinance, providing that "all artfully contrived devices and other works which in this city are found in the arsenal, city hall, or anywhere, shall be placed in a separate room, locked, under responsibility of the masters of the arsenal" (Pohlmann 1961, at 126; Hampe 1904 (I), at 273).

In later years, following the Reformation, a proto-patent system would begin to operate more straightforwardly for the benefit of individual inventors, and would begin to look more like a modern patent system.[15] However, the important thing to note about these early analogues to intellectual property in Christendom's Estate Society is the fact that they operate primarily for the benefit *of the City*, and comprise part of the wealth of the City. Individuals participate in this wealth primarily by virtue of their legal personality as corporate members of the civic association, not as individuals.

[15] In 1588, for example, Nuremberg granted a 10-year patent privilege to a "Claudius vom Creutz" (a French Huguenot?) for a new technique of grinding and mounting garnet jewels (*see* Hampe 1904 (II), at 172; Pohlmann 1961, at 129). The City enforced this privilege against infringers several times. One infringer was "put in chains," and, later, banished from the City (*see* Pohlmann 1961, at 133; Hampe 1904 (II)). Additional litigation by vom Creutz's heirs and licensees support the inference that Nuremberg's Patrician Council may have made his privilege inheritable and transferable (*see* Pohlmann 1961, at 133).

Claudius vom Creutz also received an Imperial patent in 1591, however, which was extended in 1600 (*see* Pohlmann 1961, at 129, 138). This no doubt improved his position vis-à-vis Nuremberg's Patrician Council, and may have been the patent forming the basis for his estate and licensing transactions. Vom Creutz's patent privilege was one among 111 Imperial patents for inventions that Hansjoerg Pohlmann (1961) has identified as issuing from the Imperial Chancellery between 1531 and 1700.

An Imperial privilege system operating for the benefit of individual authors and artists, *i.e.* as a precursor to a copyright system, was nevertheless beginning to emerge in the early Sixteenth Century, benefitting high-profile Nuremberg men like Conrad Celtis and Albrecht Dürer. In 1501/1502, Conrad Celtis' humanistic corporation (*sodalitas*) was granted an Imperial privilege, prohibiting for 10 years the reprinting of a scholarly edition of the Abbess, Hrotsvitha of Gandersheim's works. This is the first documented Imperial privilege applicable throughout the Holy Roman Empire (*see* Kawohl 2008b). Beginning in 1511, Imperial privileges were granted with increasing regularity to authors and artists with personal connections to the Emperor, such as Albrecht Dürer, whose woodcut impressions of religious and sacramental themes were in great demand, and hence subject to frequent piracy (*see* Kawohl 2008a-d).

The knowledge and skill of movable-type printing had come to Nuremberg from Mainz, the home of Johannes Gutenberg (*see* Kawohl 2008a; Strauss 1976, at 258-62). It is possible that one of Nuremberg's early printers received his citizenship as a reward for bringing his skills from Mainz to Nuremberg (*see* Strauss 1976, at 258). In any case, by the 1480s, Anthon Koberger had established a large and flourishing printing business in Nuremberg, which distributed books throughout the Empire (*see* Kawohl 2008a-b, 2008e; Strauss 1976). In addition to soliciting Imperial privileges, Koberger sought to protect his books from reprinting through contracts with his distributors, and through strategic limitations on his press runs (*see* Kawohl 2008a-b, 2008e).

The development of an Imperial privilege system benefiting authors and inventors coincided with Maximilian I's Imperial office (1493-1519) and Gattinara's Chancellorship (1518-1530). The privilege system was a legacy of Roman Empire, which Gattinara and his

contemporaries viewed as a living social and political entity (*see* Whaley 2012; Headley 1983).[16] As part of his far-reaching Imperial reforms, Justinian had vigorously reestablished the Imperial power to issue privileges (*rescripta*, *beneficia*) (*Codex Justinianus* I.14.12 (529); *see also* Jones 1964, Volume I, at 470-79). Believing himself to be the direct heir of Justinian, and participating at the same time in the humanistic recovery of classical learning that so celebrated human intellectual capacity, Maximilian began to exercise his Imperial powers for the benefit of authors and inventors (*see* Kawohl 2008a-f). In this he was supported by an ambitious and peripatetic Chancellor, Mercurino Gattinara, whose embrace of humanistic cultural values attracted the attention of Erasmus (*see* Headley 1983, at 82).[17]

With this humanistic shift in the Imperial Chancery practices, individuals advancing the cause of learning could be brought into the personal property order as bearers of a unique legal personality. As the individual bearers of Imperial privileges, they possessed unique legal rights and obligations vis-à-vis material objects, which extended across the Imperial universe. As the Imperial Estates began to emulate these Chancery practices, the practices extended across the emerging political organizations of pre-modern Europe, forming a part of Christendom's Estate Society on the eve of the Reformation.[18]

[16] Sixteenth Century "Germans" were convinced "that they were the heirs to the Roman Empire in a continuous constitutional tradition" (Whaley 2012, at 51).

[17] In 1529, Erasmus tried to obtain a position in Gattinara's retinue for one of his family-members, Francis Delfius (*see* Headley 1983, at 82).

[18] The position of authors and publishers prior to the establishment of an Imperial privilege system operating for their benefit can be seen from a 1493 contract between Conrad Celtis and Sebold Schreyer, a prominent citizen of Nuremberg. This contract relates to Celtis' scholarly work on the famous Chronicle of Nuremberg, and is reprinted as Appendix IV to Adrian Wilson's *The Making of the Nuremberg Chronicle* (1978). In this contract, Celtis promises to keep his manuscript secret, prior to handing it over to Sebold for publication, "so that it may not and shall not fall into other hands".

Semantic Legal Ordering and Institutions

Generalized from this historical narrative, semantic legal ordering may be defined as a set of interpretive practices that draw on cultural traditions rooted in Roman law to offer a prescription for resolving contemporary social problems. The practitioners of semantic legal ordering are *jurists*: individuals who have been educated in such a way that they orient their interpretive activity, particularly their conception of what is "right" (*ius*), to legal traditions rooted in Roman law. These jurists engage in an interpretive social activity that draws normative and descriptive meaning from these legal traditions, and that applies this meaning prescriptively to contemporary social relationships.

Viewed as a social process that occurs repeatedly over time, semantic legal ordering draws on cultural traditions rooted in Roman law to give very particular meanings to social relationships, to appropriation, and to appropriated objects. When translated through structures of political and economic power, this social activity contributes shape and direction to the institutions, organizations, and individual interests that pattern everyday social life. In particular, semantic legal ordering contributes to distinctive patterns of social activity vis-à-vis material things. These distinctive patterns of social activity vis-à-vis material things represent a particular property order: a particular, institutionalized pattern of materially-embodied existence.

In a recent, reflective essay, Robert Bellah (2006) described culture, and "cultural traditions," as operating in three interdependent, representative ways: theoretic, mythic, and mimetic. The theoretic dimension of a cultural tradition involves verbally-delineated concepts, principles, and "doctrines," which are logically related to each other in a systematic way. The mythic dimension of a cultural tradition, on the other hand, represents the narrative story "that tells the believing community who it is and what it is here for" (8). The mimetic dimension

represents the cultural tradition as it is actually practiced in bodily activity. In Bellah's view, all three of these dimensions are present, albeit perhaps in a dialogical tension, within a cultural tradition, even in the most "modern" traditions (such as modern science) that deny their mimetic and mythical dimensions.

Bellah's conception of cultural traditions builds on Alasdair MacIntyre's (1981, at 222) conception of a moral tradition as "an historically extended, socially embodied argument" about the nature of the moral and ethical "goods" that are conceived to stand at the center of the tradition. MacIntyre views institutions as the "social embodiments" of traditions: the social and material locations where individuals engage in debate and discussion with one another about the tradition, developing habits of practical social activity that are shaped by their engagements with the tradition, and with one another.

By linking MacIntyre with Bellah and Weber, an important perspective on institutions becomes possible, a perspective that links patterns of materially-embodied social activity with the theoretic, mythic, and mimetic dimensions of a cultural tradition. Trevor Pinch (2008) has emphasized the importance of accounting for materiality in theorizing institutions, particularly technology-related institutions. In order to facilitate this accounting for materiality in theorizing institutions, Trevor Pinch and Richard Swedberg (2008) have called for greater collaboration between economic sociology and science and technology studies. Echoing their call, Elizabeth Popp Berman (2008) has proposed that patents be studied as a "sociotechnical institution" with material effects.

A perspective on institutions that draws on Bellah, MacIntyre, and Weber does not only enable a greater emphasis on the materiality of institutions, particularly intellectual property. It also complements contemporary institutionalist theories by enabling greater understanding of the

role played by cultural traditions in facilitating perceptions of institutional legitimacy. In their now-classic article, John Meyer and Brian Rowan (1977) emphasized the extent to which formally-rationalized rules operate in mythical and ceremonial ways, enabling organizational legitimacy and survival. The thesis of semantic legal ordering helps to explain why formally-rationalized rules have this mythical power: they draw theoretic, mythical, and mimetic strength from legal traditions rooted in Roman law, a cultural tradition that has shaped "Western" understandings of sacred and secular legitimacy.

Beyond this specific contribution to institutional legitimacy, however, semantic legal ordering – the interpretive, social activity that draws on cultural traditions rooted in Roman law – may be understood as contributing a *formative meaning* to social relationships between people and material objects, and thereby to institutions. From a Weberian perspective, social relationships are given their observable patterns (or forms) by virtue of the meanings to which the social actors within those relationships are orienting themselves (*see* Weber 1978; Swedberg 1998). An *ongoing social relationship*, however, requires a certain mutuality in orientation among social actors, which is stable over some period of time. An order (*Ordnung*) that is seen as being legitimate by the participants to a social relationship can contribute to this ongoing mutuality by contributing stable meanings that inform social actors' understandings of the nature of the social relationship, and the normative forces at work in the social relationship. The semantic legal ordering thesis posits a conceptual and normative force derived from Roman law traditions, which is interpretively cemented by jurists into certain words (*e.g.* property, contract, right, corporation) and heuristic, normative principles built from these words, that become part of a legitimate order to which social actors orient themselves.

Semantic legal ordering, in other words, contributes a set of meanings derived from the Roman law tradition that inform ongoing social relationships between people and material objects, enabling those relationships to exhibit observable patterns (or forms) over time. These meanings operate both at the level of beliefs about the nature of reality and existence (*i.e.* ontologically) and at the level of normative commitments and obligations (*i.e.* deontologically). Legitimacy, after all, is only part of the story with institutions. People need to believe in the existence of an institutional entity, before they can begin to formulate positions about its legitimacy.

In Chapter 1 of *Economy and Society* (2004, at, 321), Weber pointed directly to the role of legal concepts in informing the ontological beliefs and normative commitments that shape organizations and institutions:

> [T]he *conceptions* associated with a collective construct – whether drawn from everyday thought or derived from some specialized discipline, such as the law – are related to things which real people (not just judges and officials, but also the wider 'public') think of as both positively and normatively existent. Their action is *oriented* in accordance with such conceptions, and they have a powerful, indeed often overwhelming, causal significance for the type and course of action on the part of real people. This is especially true of conceptions relating to what should or should not exist. (A modern 'state' is to a great extent of this sort – as a complex arising out of the mutual action of men – *because* specific men and women orient their action in regard to the *conception* that the state exists in this form, or *should* exist in this form; that in other words legally-oriented [*Ordnungen*] of this kind *have validity*.) (emphases in original)

In his Sociology of Law, particularly in his arguments about the causal force of legal thought, Weber elaborated these ideas substantially, focusing particularly on historical developments associated with the Roman law tradition. The thesis of semantic legal ordering that I am putting forward here is a thesis about how and why legal thought has this formative causal force: this causal force is derived from the conjoining of sacred and secular in the Roman law tradition that has shaped legal thought.

Despite the fact that today law is primarily seen in very instrumentalist terms, it is a historical fact that, for most of its history, Western law has operated in tandem with the religious traditions of Christianity. I believe that a full understanding of the social force of law will only come when we recognize it as a cultural tradition that maintains mimetic and mythic connections with quasi-sacred, Roman law roots, even where these roots are no longer recognized in legal theory.

The institution within which Roman law, as a cultural tradition, has retained its mimetic and mythic force is the university. To this day, Roman law is taught to lawyers around the world who are educated in the civil law tradition. Thus the theoretic dimension of the Roman law tradition is by no means gone. Even in England, the universities have remained a location where Roman law is taught; until the Eighteenth Century, in fact, an Englishman had to turn to independent guilds, the Inns of Court, in order to receive training in common law. And in America, education in Roman law traditions continued into the Nineteenth Century (*see* Hoeflich 1997). In order to understand Roman law as a cultural tradition, then, it is important to see how this cultural tradition has been propagated within the institutional setting of the university.

Until the Eighteenth Century, the University of Bologna provided the model for legal education throughout Europe, although this model was widely adapted to meet local conditions (*see* García Y García 2003). In contrast to the University of Paris, which provided the model for theological training in Europe, Bologna was organized as a cluster of student corporations, which were divided first by their discipline of study, and then into the "nations" of students' geographical origin; the teachers were organized into their own, separate corporation (*see* Gieysztor 2003).

Most law students were clerics, and financed their legal education by obtaining an ecclesiastical benefice (*see* Gieysztor 2003). Even non-clerical students enjoyed a privileged, quasi-clerical status, by virtue of the *Authentica Habita* issued by Frederick I Barbarossa in 1155 (*see* Nardi 2003, at 78). This Imperial grant ("constitution") extended to professors and students of civil law the *privilegium fori*: the privilege of being tried in a bishop's court, rather than a local court. It also gave them protected status, so that they could freely move among, and live securely in, seats of learning throughout the Empire, with freedom from vicarious liability for the debts of their fellow nationals. Frederick ordered that this constitution be placed in Justinian's Code, to be studied alongside the earlier Imperial constitutions in that Code. This Imperial privilege was succeeded by a number of important papal and Imperial constitutions, issued for the purpose of regulating and encouraging the study of canon and civil law in universities across Europe, particularly in France and Italy (*see* Nardi 2003).

Enjoying a privileged, quasi-clerical status, and living on the revenues of their benefices, the students called themselves "clerks," adopting the clerical tonsure and *cappa clausa*: the cape and hood of the secular clergy (*see* Gieysztor 2003, at 109, 139). They lived in the air of academic freedom, safe in the knowledge that their freedoms from taxation, military service, and arbitrary legal process were protected by a right of final appeal to the pope, who might very well be a fellow alumnus (*see* Gieysztor 2003, at 109). Within their corporate nations and colleges, they lived according to statutes, governed and judged by a *rector* whom they had elected (*see* Gieysztor 2003; Schwinges 2003).

Substantively, students' education proceeded through their contractual attachment to "masters" or "doctors" of civil and/or canon law, who held scheduled morning readings from the canon and civil law texts (*lectiones*), and oversaw periodic "disputations" in which the

interpretation and application of these texts were debated according to Aristotelian patterns (*see* García Y García 2003). In the afternoons and evenings, students engaged in exercises and repetition work, which facilitated memorization of the texts, and gave them practice in applying the "authorities" that they were learning (*see* Schwinges 2003, at 233; Verger 2003, at 41-45).[19]

Although there were some differences in the curriculum of canon law and civil law students, all European law students received a basic grounding in the combined Roman-canon law (*ius commune*) (*see* García Y García 2003, at 393-94). On the civil law side, the focus was on Justinian's codification (the *corpus iuris civilis*), which was divided into four separate textual collections: (1) the *Institutes*, which was essentially an introductory educational text providing a précis of Roman law concepts and principles; (2) the Digest, which was a selection of excerpts from highly-regarded jurists of the classical period of Roman law (c. 3d Century C.E.); (3) the Codex, which was a collection of Imperial "constitutions" (privileges and general orders issued by Roman Emperors); and (4) the Novels, which were new Imperial constitutions. These texts were supplemented by medieval Germanic constitutions and codes, referred to as the "Feudal Books" (*Libri feudorum*) or "Feudal Customs" (*Consuetudines feudorum*). On the canon law side, the focus was on papal and episcopal "decretals": Gratian's Twelfth-Century collection, known as the *Decretum*, supplemented by additional decretals issued by great popes, and finally collected together in a Paris edition of 1500 (the *corpus iuris canonici*).

[19] To see how such mnemonic rituals impact the interpretive habits of an individual, we need only consider the internal effects of the imaginative skill required to remember large amounts of material over long periods of time. Describing the understanding of these imaginative skills and their internal effects borne by the "art of memory" tradition, Frances Yates (1966) points out that such skills were traditionally practiced by building a structural image in the mind (*e.g.* a building with many rooms), then associating the words or things to be remembered with elements of that image. Equipped with these internal images, the individual (*e.g.* the orator or rhetorician) enters the actual social situation while keeping in his mind's eye the image to be remembered, traveling through its structure as he travels through the social situation.

Such practices imply a capacity to shape the "mind's eye" in processes of memorization (*see also* Lear 1988, at 7). Where the tradition provides the systemic structure and content of what is being memorized, the mind's eye is being shaped by the tradition. We can see how it is that this type of education would shape the "lenses" through which an individual sees the world, as well as her habits, emotions, knowledge and practices.

Over the period of time stretching from the Twelfth to the Sixteenth Centuries, three basic "schools" of commentary on these texts emerged to shape the ways the texts were interpreted by jurists (*see* García Y García 2003, at 390-92). The earliest school was that of the Glossators, based in Bologna and Orléans, who "regarded Justinian's texts as sacred and ascribed to them almost biblical authority" (Stein 1999, at 46). They assumed that the texts reflected general principles that were just, applicable to their societies, and logically coherent with one another; their interpretive practices aimed at drawing these general principles and logical relations out of the texts (*see* Wieacker 1995, at 38-46). They focused on word-by-word interpretation, writing "glosses" in the margins and between lines of text to expound the meaning of important words (*e.g. proprietas*) (*see* García Y García 2003, at 391). Over time, these glosses were extended into exegetical treatises aimed at elucidating basic interpretive principles and intentions standing behind a particular legal text. In the Thirteenth Century, one collection of these extended glosses became particularly authoritative: the *Glossa ordinaria* of Accursius. The practical significance of the Accursian Gloss is reflected in the maxim: "What the Gloss does not recognize, the Court does not recognize" (Stein 1999, at 49; *see also* Wieacker 1995, at 46).

After the Glossators, a related school of interpretation developed, which drew on Aristotelian logic in interpreting the Roman law texts (*see* García Y García 2003, at 391; Stein 1999; Wieacker 1995). This school is known as the *mos Italicus*. The scholars identified with this school tended to produce a different type of interpretive text: treatises or monographs that aimed at elucidating a more general, overarching meaning from the Code. What the *mos Italicus* shared with the Glossators, however, was a non-critical, non-historical reading of Roman law. They assumed that the Roman law applied directly to their contemporary social worlds, and drew

on the interpretive techniques they had learned to fill gaps, "stretching the sense of the old legal texts to fit medieval conditions" (García Y García 2003, at 392)

With the spread of humanist learning, a new school of interpretation associated with the French law schools (the *mos Gallicus*) began to develop, which applied more critical readings to the Roman law texts, identifying "interpolations" and distinguishing the genuine sources of authentic Roman law from distasteful "medieval" ideas (*see* Stein 1999; Wieacker 1995). These scholars did not assume that the Roman law applied directly to their contemporary social conditions, studying the texts instead from historical and philological perspectives (*see* García Y García 2003, at 393-94). At the same time, however, humanistic legal education built on Platonist idealism, and aimed to lead the student to general principles of law by enabling him to recognize his "inborn ideas of law" (Wieacker 1995, at 64, 173). Since the process by which the student came to "recognize" these inborn ideas involved critical engagement with the texts of Roman law, students naturally came to associate *universal ideals of law* with the critically-purified concepts and principles of *Roman* law.

If the university represented an institutional location within which students were inducted into the cultural tradition of Roman law, and trained to orient themselves to that tradition in resolving contemporary social problems, the Chancery represented the institutional location where legal practices relevant to the emergence of intellectual property took shape and developed. As preeminent legal advisors to Emperors, Popes, Kings, and princes, the Chancellors of Europe contributed to the formalization of an institution (the Chancery) that was founded on the Imperial traditions of Rome. In asserting the preeminence of their own authority, and of the civil authority over military authority, they bore a particular responsibility for defining the "public sphere" (*chose publique*) (*see* Headley 1983, at 8-10). In overseeing and interpreting

a vast and complex system of "special law" for different corporate groups, the gaps of which were to be filled by Roman law, the Chancellors also bore a particular responsibility for establishing the "personal property order" of Christendom's Estate Society.

In the process, a basic pattern forming an institutional precursor to intellectual property developed. This basic pattern involved the grant of a privilege (a special law) by a ruler to create an exceptional legal status that was economically-valuable to a corporate group or an individual. The content of this grant varied widely. It could be a grant of corporate status, an exemption from customary law, or it could involve an exclusive right to practice a particular trade or print a book. In Venice, as we have seen, this pattern was generalized into a statutory protection for new inventions.

As social embodiments of Roman law traditions, the university and the Chancery provided important institutional locations for semantic legal ordering. To reiterate, semantic legal ordering is an interpretive social activity, engaged in by jurists, that draws normative and descriptive meaning from legal traditions rooted in Roman law, and that applies this meaning prescriptively to contemporary social relationships. Translated through structures of political and economic power, this social activity contributes shape and direction to the institutions, organizations, and individual interests that pattern everyday social life, particularly in relation to material objects. To sum up the effect of semantic legal ordering, we can say that it cements a legal meaning, backed by the sanctioning power of church and state, into social relationships and material objects.

Drawing on the theoretical concepts and doctrines of legal traditions rooted in Roman law, jurists see the contemporary social world through the lenses of property, contract, corporations, and right. Drawing on the mythology of the Roman law tradition, jurists think of

themselves as part of a living Roman law tradition that stretches back to antiquity. Engaging in mimetic habits of interpretation, jurists live out the Roman law tradition in their daily, practical activity.

The Process of Semantic Legal Ordering

Semantic legal ordering, viewed as a contemporary process, begins with the presentation of a social problem. This may be a dispute between two individuals, an experienced need by an individual for social help, or it may arise from a generalized perception of problems in the law, in society, or in a subset of society. Whatever the origin of the social problem and whatever its nature, semantic legal ordering begins when the problem is placed before a jurist. The initial activity of the jurist is to "name and frame" the social problem in the language and categories of a legal tradition rooted in Roman law (*see* Suchman 2003; Suchman 1997; Felstiner et al. 1980-81; Mather & Yngvesson 1980-81; *see also* Hart 1958, at 607; Weber 1967 [1922], at 219-22, 275).

Where the legal tradition is formulated purely in terms of abstract doctrines and systemic principles (*e.g.* a legal code or a constitution), the authoritative interpreter must determine which of such doctrines and principles apply to the concrete social problem, naming and framing the problem in the language of those doctrines and principles. This is the logical process that Max Weber referred to as "subsumption" (*see* Weber 1967 [1922], at 59, 62, 202; *see also* Zippelius 2008): the "facts" of the concrete social problem are subsumed under general doctrines and principles. Where, on the other hand, the legal tradition is formulated through principles articulated to resolve concrete social problems (*e.g.* judicial or administrative decisions,

piecemeal legislation), the authoritative interpreter may have to first inductively-formulate the relevant doctrines and principles before arguing by analogy that these apply to a different social problem (*see* Burton 2007, at 25-41; Levi 1949; *see and compare* Weber 1967 [1922], at 201-203; Weber 1978 [1922], at 406-407).

In both cases, the legal tradition is used to give semantic legal order to the social problem; in other words, the legal tradition is used to give an initial, language-based shape and coherence to the understanding of a social problem (*e.g.* as a violation of "property rights") which is at the same time directed toward an anticipated type of legal solution for the problem (*e.g*. a particular type of judicially-ordered remedy, new legislation, or an administrative remedy) (*see also* Suchman 2003; Suchman 1997).

Once an initial, language-based shape and coherence directed toward an anticipated legal solution has been given to the social problem, the actual legal solution must be determined and formulated in accordance with the legal tradition. In an "adversarial system" (where the judge does no investigating), multiple such solutions will be proposed and advocated, and a final arbiter (the judge and/or jury) must decide between them. On the other hand, in an inquisitorial system (where the judge conducts the investigation), the progress from initial, language-based shape and coherence to formulated solution may be more seamless (*see* Rheinstein n.12 *in* Weber 1967 [1922], at 46-7). In an administrative setting (*e.g.* immigration or social security disability determinations in the U.S.), advocates may propose a solution to be accepted, modified, or alternately resolved by an "administrative law judge," who possesses broad discretion to decide the case in accordance with concrete factors, such as perceived credibility.[20] In a transactional setting (*e.g.* drafting contracts, financial transactions, or wills), the interests of

[20] The United States Supreme Court (citing a jurist and a prior case) has held that Social Security Administration proceedings (*e.g*. by an administrative law judge) "are inquisitorial rather than adversarial" (*see* Sims v. Apfel, 530 U.S. 103, 110-11 (2000); *see also* Richardson v. Perales, 402 U.S. 389, 400-401 (1971); Dubin 1997).

the parties and their respective bargaining-positions will be controlling, except to the extent that these interests and bargaining-positions are themselves given shape and direction by semantic legal ordering (*see also* Weber 1967 [1922], at 98-100). In all these cases, however much they differ from one another, the legal tradition is drawn upon to give semantic legal order to the formulation of the determined solution.

Once a solution has been formulated, it may be communicated to "officials" who are responsible for implementing it, to any parties who may be disputing the nature of the remedy to be offered or the contract to be concluded, and often to the general public. Here the solution will be communicated in accordance with the legal tradition. For example, a judge may set forth the facts of the social problem, then present the logical subsumption of those facts under general doctrines and principles, showing by a process of formal, syllogistic "demonstration" the logically-necessary conclusion (*see* Zippelius 2008; Steiner 2002, at 131-47). Or a judge may inductively-derive controlling precedents from prior decisions, present the social problem as fitting under those controlling precedents by analogy, then demonstrate the logically-necessary conclusion (*see* Burton 2007, at 25-41). A final, polished contract may be signed by negotiating parties, a final piece of legislation may be presented to the public as a solution to previous social problems, or an administrative decision may be presented as following the rules for such decision-making. In all of these cases, the final, resulting texts will be communicated in terms of and in reference to the legal tradition, both in language and logic.

The challenge of integrating particular formulated solutions into a legal tradition that is conceived as being logically-coherent makes the challenge of meaning-making primarily a challenge of legal language, logic, and imagination, secondarily a challenge of substantive policy implementation and fact-gathering (*see also* Weber 1967 [1922], at 204-5, 274-9, 301-21; Weber

1951, at 147-50). It is this primary orientation to logical coherence in semantic legal ordering that Weber emphasized in distinguishing formal from substantive rationality (*see* Weber 1967 [1922], at 61-4, 224-55, 274-9, 284-321; Weber 1951, at 147-50).

According to this Weberian terminology, semantic legal ordering is a species of formal rationality: despite the fact that substantive social policy or ethical goals will always be at stake during the process of semantic legal ordering, and may indeed be primary in the mind of the jurists, the formulation and communication of legal solutions will be given in the language and logic of the legal tradition, which may disguise or distort any substantive policy or ethical goals. Whether the primary form of logic is analogy and distinction (as is typical in common law reasoning) or syllogistic deduction and "subsumption" (as in the ideal-typical interpretation of a Continental code or perhaps an American statute), the language and logical formulation of a communicated legal solution will draw primarily from the legal tradition (*see* Burton 2007).

At the same time, in this activity of semantic legal ordering, jurists are sustaining the legal tradition by drawing new external facts into the tradition, creating written legal authorities for the future or creating the written documents (*e.g*. contracts) that will be interpreted in order to create such written legal authorities (*see* Levi 1949). These jurists are helping to ensure the vitality of the legal tradition, then, at the same time that they frame solutions to contemporary social problems within it.

Learning to "think like a lawyer," then, crucially involves learning how to see a formal order in the apparent chaos of a legal tradition, and to rely on the systemic categories and doctrinal principles of this formal order in drawing together elements of the accreted legal tradition with elements of the factual circumstances involved in a social problem to formulate

and communicate legal solutions (*see* Weber 1967 [1922], at 274-9).[21] The webs of traditional and factual elements that will be woven together each time this happens will be new, and this is one way that semantic legal ordering is creative. A new sense of the legal tradition is made, as elements from different periods in its accretion are woven together with new social circumstances. However, for the legal actor this sense-making depends on his perception that there is a systemic coherence to the semantic legal order, which he is elucidating (*see* Weber 1967 [1922], at 320).

Semantic Legal Ordering, Estate Society, and the Protestant Reformation

The thesis of semantic legal ordering can help us to understand how the personal property order of Christendom's Estate Society emerged and was maintained. Within the Roman law tradition, a founding conception is that of justice (*iustitia*). This was defined in the *Institutes* (1.1) – the basic educational text through which all medieval lawyers, secular and clerical alike, received their first initiation into the world of Roman law – as "the constant and perpetual will to render to each person what is his own by right" (*iustitia est constans et perpetua voluntas ius suum cuique tribuens*). Legal wisdom (*iuris prudentia*) entailed the knowledge (*scientia*) of justice, both in the realm of human affairs and in the realm of God. The jurists, in other words, were men who were endowed with the capacity to determine what belonged to each person by right.

In the legal world of the *corpus iuris civilis* and the *corpus iuris canonici*, what belonged to a person by right belonged to him by virtue of his legal personality, his legal estate. In this legal world, distinct rights, obligations, and material objects belonged to distinct legal

[21] According to this argument, because structuring principles are not as evident in common law (in the absence of a code that provides them) they may have to be constantly recreated by legal actors and therefore may have an even stronger force in their minds.

personalities. Certain rights, obligations, and material objects belonged to nobles, others to clerics, still others to burghers and peasants, married women and Jews. Semantic legal ordering contributed a formative meaning to the personal property order of Christendom's Estate Society, because it drew on the gradations of legal personality spelled out in the Roman law traditions.

Like the nation, the estate is an imagined community. But it is non-territorial. Rather than being determined by the location of birth, an individual's estate is determined by the mode of social being into which he is born or educated (as in the case of clerics and jurists). On the Eve of the Reformation, as we have seen, new modes of social being (those of inventors and authors) were being delineated on the basis of humanistic adaptations to Imperial and Chancery privilege-granting practices, which bear a resemblance to modern intellectual property.

It is impossible to know how the Imperial and Chancery privilege-granting practices working for the benefit of inventors and authors would have worked if Europe had remained a Society of Estates. The Protestant Reformation ripped that Society of Estates apart. Recent historical scholarship has shown that the reception of Protestant ideas did not differ primarily between estates, as would have been the case, for example, if it had been primarily burghers who became Protestant (*see* Gregory 2001). Rather, Protestant ideas were received differentially within estates, dividing Christendom's Estate Society from within.

In the wake of the civil wars of religion, semantic legal ordering would call upon the resources of legal traditions rooted in Roman law to formulate new, territorial principles for the organization of European society. A new school of interpretation, that of natural law, universalized concepts and principles from the Roman law tradition (*e.g.* property and contract), positing them as part of the very nature of human beings and human societies. Within this new school of interpretation, Roman law-based principles of property-acquisition and transfer,

operating in a “state of nature,” would contribute to the creation of national property orders, and would eventually contribute to the view that patents and copyrights are the rightful property of their creative inventors and authors.

This did not happen immediately, however. Conceptions derived from natural law had to compete and coexist with older, more established legal traditions. As we will see in the case of England, these older legal traditions also contributed to national property orders, and to the legal foundations for intellectual property.

Chapter 2.
Particular Rights Rooted in Particular Legal Traditions:
The English National Property Order

> *There is still another species of property, which, being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own literary compositions: so that no other person without his leave may publish or make profit of the copies.....The Roman law adjudged, that if one man wrote any thing, though never so elegantly, on the paper or parchment of another, the writing should belong to the original owner of the materials on which it was written....Neither with us in England has there been any direct determination upon the right of authors at the common law. But much may be gathered from the frequent injunctions of the court of chancery....Much may also be collected from the several legislative recognitions of copyrights; and from those adjudged cases at common law, wherein the crown hath been considered as invested with certain prerogative copyrights; for, if the crown is capable of an exclusive right in any one book, the subject seems also capable of having the same right in another.*
>
> - William Blackstone, *Commentaries on the Law of England*, Volume II *(1766)*

Immanuel Wallerstein has famously distinguished between "periphery" and "core" in World Economic Systems. In Wallerstein's portrait of the Early-Modern (Sixteenth Century) World-Economy (2011), England forms part of the core. However, as Max Weber repeatedly emphasized in his Sociology of Law (1967), England stands very much at the periphery of the Roman law tradition. This meant, as Weber noted, that English law was much less systematized, compared to Continental European law. England was also peripheral to the Estate Society of the Holy Roman Empire.

In this Chapter, I will argue that England's peripheral status with respect Empire, Estates, and Roman law played an important role in enabling intellectual property – in its national legal form – to first be recognized there. As is widely known, English common law developed in ways that differed significantly from Continental, civil law traditions. Nevertheless, Roman and canon law (*ius commune*) did significantly influence English law, introducing the abstract legal concepts of property and contracts, and shaping University education and Chancery practice (*see*

Helmholz 2001; Pollock & Maitland 1952). In addition, the natural law school – which, as has been pointed out, drew very heavily on universalized concepts from Roman law – was enjoying the high-point of its influence, just at the moment when questions about intellectual property were being raised in England.

During the Eighteenth Century, questions about the legal status of printing-rights ("copyrights") would finally culminate in rulings by England's highest courts: the Court of King's Bench (*Millar v. Taylor*, 4 Burrow 2303, 98 Eng. Rep. 201 (1769)) and the House of Lords (*Donaldson v. Beckett* (1774)). Although these cases only addressed the status of copyrights, they also drew parallels with the situation of patents for new inventions, and therefore implicated the legal status of those inventions. In surveying and synthesizing a number of legal traditions relevant to the legal status of patents and copyrights, the judges and Law Lords laid the foundation for recognizing both as a form of property.

However, as recognized by the English courts, patents and copyrights represented a rather peculiar form of property. In historical practice, they had emerged as part of the Royal Prerogative to grant privileged status to favored individuals or corporations. This made their legal status as property much more difficult to establish, since Prerogative grants were issued as a matter of grace, not as a matter of right, and the property involved was that of the sovereign, not of the subject. However, as we will see, the English judges and Law Lords drew on a set of English legal traditions, including the common law tradition and the Roman law tradition, that, interpreted together, enabled recognition of patents and copyrights as a form of property.

Semantic legal ordering in England drew on concepts and categories from the Roman law tradition, but in ways that were fundamentally shaped by uniquely-English legal traditions, particularly the common law tradition. One key feature of the English common law tradition

rested in its tendency to derive rights from actions: according to traditional common law, a right could only be recognized if a particular action existed to enforce it. This represented both a limitation and a basis for flexibility. If no action had been established, no right could be recognized. However, so long as a right could be connected to an established action, the right itself need not be backed by precedents. New rights could emerge on the basis of old actions. As we will see, the emergence of English intellectual property happened in precisely this way.

I. The Cases of *Millar v. Taylor* (1769) and *Donaldson v. Beckett* (1774)

According to the legal records,[22] the *Millar* case presented the Court of the King's Bench with a dispute between two men: Andrew Millar, member of a London corporation known as the "Stationers Company," and Robert Taylor, a bookseller from Berwick-upon-Tweed, who made a regular practice of purchasing books in Scotland for resale in England (*see* 98 Eng. Rep. at 202-5; Sher 2006, at 305, 512).[23] The dispute concerned poems written by James Thomson, which were being printed and sold by both parties under title of *The Seasons by James Thomson*. The justices were called upon to determine whether Andrew Millar was indeed a "proprietor" of this poetic work, a determination that would render Robert Taylor's publication and sale of the work to be unlawful. The legal question to be decided by the Court of King's Bench concerned the

[22] Sir James Burrow's *Reports of Cases Adjudged in the Court of the King's Bench* (Volume IV (1769)), canonized (together with other early law reports in a massive project of standardization) in Volume 98 of *The English Reports* (1909). Hereinafter, cases will be cited according to the conventional format by citing the original law report first, *English Reports* second, specifying the volume and initial page reference for the reporters, followed by the year of decision. E.g., *Millar v. Taylor*, 4 Burrow 2303, 98 Eng. Rep. 201 (1769). Once a full citation has been given, succeeding citations will only "pinpoint" the particular page(s) referenced using the *English Reports* citation. *E.g.*, *Millar*, 98 Eng. Rep. at 201.

[23] Andrew Millar was among the most prominent publishers of his day, and was known for his generosity to the authors (including David Hume) whose works he published. He had become "free" of the Stationers Company in 1738. *See* Hugh Amory, "Millar, Andrew (1705-1768), *bookseller*," *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Online Edition 2008).

nature of "literary property": was it really a form of property recognized and protected by common law in perpetuity, as was being claimed by the Stationers Company?[24]

The jury was persuaded that Mr. Millar had complied with customary practice by purchasing (for "valuable and full consideration") the "copy-right" to James Thomson's poetic work, and had complied with Stationers Company by-laws by entering his copy-right into the Company's "registers" (account books). For these reasons, the jury concluded that Mr. Millar had been wronged ("damnified") by Robert Taylor's unlicensed publication of that work.[25] However, the jury professed ignorance as to whether this wrong was one recognized and remedied by the common law.

Mr. Millar died the morning of June 7, 1768, one day after the second set of oral arguments in his case (98 Eng. Rep. at 202). The *Donaldson* case concerned a portion of Mr. Millar's estate: the copy-rights to literary works by James Thomson, including the *Seasons* poems, which had been transferred to Mr. Millar's heirs pursuant to the terms of his will.[26] As reported in the *Donaldson* case, these copy-rights had been acquired by Mr. Millar over a number of years, beginning in 1729 with a purchase of the tragedy *Saphonisba* and the poem

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[24] As noted by the court reporter Burrow (98 Eng. Rep., at 201), the case in controversy was one of "first impression" for the English common law: the subject of authors' "literary property" had never before been ruled upon by a common law court, *i.e.* a court with the jurisdictional authority to determine whether such property was recognized and protected by English common law. Nevertheless, there were a number of relevant legal authorities that the justices considered and interpreted in rendering their decision. At the same time, the justices had to consider the argument (made by the lawyers for the plaintiff) that well-established English common law principles relating to other forms of property already covered the case of literary property. According to this argument, the case was not a matter of first impression after all.

[25] The jury also determined that the purchase of copy-rights from authors "in perpetuity" (for an infinite duration), as well as the subsequent transfer of such copy-rights as sources of wealth – either by contractual "assignment" to other printer-publishers in exchange for "valuable consideration," or through inheritance to provide for dependent family-members – had been a customary practice since before the beginning of Queen Anne's reign (1702). It was in accordance with this customary practice, according to the jury, that Andrew Millar had in 1729 "purchased the said work called 'The Seasons' for a valuable and full consideration, from the said James Thomson, the said author and proprietor, to him [Andrew Millar] and his heirs and assigns for ever" (98 Eng. Rep., at 203-204).

[26] Canonical records of this dispute and its resolution are found in multiple legal texts: (1) an appendix to Burrow's report of the *Millar* case, 98 Eng. Rep. at 257; (2) Josiah Brown's *Reports of Cases Upon Appeals and Writs of Error in the High Court of Parliament* (Volume VII (1774)), 1 Eng. Rep. at 837; and (3) William Cobbett's *Parliamentary History of England* (Volume 17 (1771-1774)) (1813), at 953-1003.

Spring from Mr. Thomson "in consideration of £137 10s" (~$19,000) (1 Eng. Rep. at 837-38).[27] In 1738, Mr. Millar purchased the rights to a number of additional poems by James Thomson – including *Summer*, *Autumn*, and *Winter* – from a Mr. Millan for £105 (~$14,500), who had in turn purchased them in 1729 from Mr. Thomson at the same price. The rights to all these works were sold in 1769, at an auction held in St. Paul's churchyard, to fellow members of the Stationers Company, including one Thomas Beckett.

Meanwhile, in 1768 Alexander Donaldson and an unnamed partner began printing and selling a volume titled *The Seasons, by James Thomson* in Edinburgh. Having paid £505 (~$52,000) for their copy-rights, Beckett and his Stationers Company associates sought an injunction to prevent Donaldson and his partner from further printing. Beckett and his associates filed their bills in the Chancery court in 1771, obtaining a perpetual injunction from the Chancellor in 1772. A special master was appointed to determine how much Donaldson and his partner had profited by their sales, and thereby to determine the damages payable to Beckett and his associates, but before this determination could be made the case was appealed to the House of Lords (1 Eng. Rep. at 837-39).

Taken together, the *Millar* and *Donaldson* cases presented the English courts and Lords with a social problem triggered by a clearly-identifiable set of disputants: the Stationers Company and its would-be competitors. This was, fundamentally, a dispute among publishers (*see* Sher 2006; Patterson 1968). Yet the facts of the cases pointed to two additional interested parties: authors, and the heirs to estates ("widows and orphans," as the Stationers Company

[27] By an indenture dated January 16, 1729, Mr. Thomson assigned to "Mr. Millar, his executors, administrators, and assigns, the true copies of the said tragedy and poem, and the sole and exclusive right and property of printing the said copies for his and their sole benefit, and also all benefit of all additions, corrections, and amendments which should afterwards be made in the said copies" (1 Eng. Rep. at 837-38).

In order to provide very approximate conversions between Eighteenth Century British currency and contemporary U.S. dollars, I utilized The National Archives currency converter, a web-based tool available at http://www.nationalarchives.gov.uk/currency/default0.asp#mid.

evocatively labeled them). Litigation would highlight additional interests on the part of "Crown" and "Public."

The "Company of Stationers of London" was, at the time of the *Millar* and *Donaldson* cases, a Corporation of the City of London composed primarily of book printers and publishers. In the words of Edward Arber, who painstakingly oversaw the transcription and publication of Stationers Company internal records from 1554 onward, the Company was comprised of "a few large Capitalists in books and some minor Speculators in the same, with the journeymen and apprentices employed by them," along with some bookbinders and paper-makers (I Arber 1875, at xvi).

The Stationers' corporate charter had been first granted by Phillip and Mary in 1556, and it was from this time forward that the Company acted as a corporate body within the light of historical record (*see* I Arber 1875). There are earlier records of a less formal organization (a "Craft" or "Brotherhood") of London "Stacyoners" engaging in the printing and selling of books, along with the training of apprentices in these arts, dating back to the early Sixteenth Century.[28] However, it was from the time of their incorporation that the Stationers began to keep regular annual accounts, and to indicate within these accounts their own understandings of the Company's history, as well as its sources of power and wealth. As we will see, the Stationers Company accounts played a particularly important role in the emergence of English copyright.

[28] Among these early records is a report from London's Court of Aldermen dated October 24, 1525, which addresses a request by one Richard Nele "Citezen and stacyoner of London" to be translated from the "Craft of Stacyoners" into the "Craft of Ire[n]mongers" (transcribed by Arber 1875, at xxi). Because this record indicates that Richard Nele was "admitted into the liberties" (*i.e*. granted citizenship) of the City in 1510, and because a grant of free citizen status in London typically took place in conjunction with the transition from apprentice to full member of a guild, Edward Arber (1875, at xxi) concluded that the Stationers Company must have existed in something close to its organized, corporate form since at least 1510. Prior to the late Fifteenth Century "printing revolution" (*see* Eisenstein 1983), manuscript text writers and illuminators had also plied their trades through the structures of London craft guilds, and connections have been drawn to the later Stationers Company (*see* Arber 1875, at xix-xxiv).

II. Semantic Legal Ordering and Intellectual Property in 1770s England

The *Millar* Court, with one vociferous dissent, decided that English common law did indeed recognize literary property as a form of property, which exists in perpetuity. In arriving at this resolution, however, the justices struggled at great length to make a coherent whole out of the relevant legal authorities. Drawing on many of the same legal authorities, the House of Lords (acting in its judicial capacity) came to a different conclusion in the *Donaldson* case. A majority of the Lords decided that literary property is only a temporary form of property, created and limited by statute, analogous in certain ways to a patent for a new invention.

Patents had not previously been treated as "property" under the law, but rather as "privileges" granted pursuant to the English sovereign's prerogative authority. By concluding that copyrights are a form of "intellectual" property, limited in time and created by statute in a manner analogous to patents, the *Millar* and *Donaldson* decisions laid a foundation in the English legal tradition for fusing them together under a common category of "intellectual" property.[29]

In litigating their cases, the plaintiffs Millar and Beckett (and, behind them, the Stationers Company) had invoked the legal concept of property, drawing on authorities in the English legal tradition. The defendants Taylor and Donaldson, on the other side, had invoked the legal concept of a "monopoly," also drawing on authorities in the English legal tradition. Sacred property or profane monopoly: hardly a starker conflict in the English legal tradition can be imagined.

[29] The fusing of patent and copyright together under the heading of intellectual property would be completed as a result of future semantic legal ordering activity. At this point, the outcomes were more limited. They were: (1) that copyrights are a form of literary property created by statute, limited in time, and vested in authors, and (2) that patents are analogous to copyrights because they also are created by statute, limited in time, and vested in another type of intellectual laborer: inventors.

To facilitate understanding of the English legal tradition interpreted by Bar, Bench and Lords, I will identify and pull apart the multiple strands of legal tradition that they perceived to stand as precedential authorities in relation to questions of property and monopoly. I will also show how these authoritative interpreters wove the strands back together, extending the concept of property into a new arena of intangible property: intellectual creations (new inventions and original products of authorship).

The Prerogative Tradition

The case for copyrights as property was, as a matter of case-law precedent, strongest, if it could be based upon the "prerogative tradition" of privileges, freedoms, and immunities granted from monarch to subject. This strength was rooted in the prerogative tradition's long-standing position that the granted privileges, freedoms, and immunities are the property of their monarchical grantors. According to the authorities of this legal tradition, when the king by means of "open letters" (*letters patent*) or charters granted to his favored subjects "privileges and immunities" to incorporate cities, or "liberties" in forming corporate guilds for the exclusive exercise of a particular trade, he was granting something that originally belonged to him by divine right. This beneficent king or queen was bestowing upon the favored subject some element of his patrimony, her property.

In the *Millar* case, the prerogative tradition was discussed by all of the judges, albeit with ambivalence. One senses that the justices would have preferred not to draw in the tradition at all, since the monarchical prerogative was highly distasteful to Englishmen only a few generations removed from the Stuart Kings, the Civil Wars, the Restoration, and the Glorious Revolution.

Justice Willes, for example, looked back critically on the age of Charles II and his predecessors as "times when the prerogative ran high" (98 Eng. Rep. at 209).

However, the earliest legal authorities relevant to the issue of literary property were unquestionably part of this prerogative tradition. Moreover, by referencing its royal Charter of incorporation, particularly the by-laws and usages constructed pursuant to that Charter, the Stationers Company had invoked the prerogative tradition. There was, therefore, no way to avoid addressing that tradition.

The same Justice Willes who looked critically upon the times when prerogative "ran high" in England took responsibility for painstakingly assembling the legal authorities relevant to the question of literary property, and addressing them in his written opinion. The earliest of these authorities were proclamations, decrees, and usages from the times of "high" prerogative, along with cases relying for their outcome on the prerogative tradition. In discussing these authorities and constraining his interpretation according to their import, Justice Willes acknowledged them as having a binding force. Acknowledging at the same time, however, a line of authorities expressing limitation of – and even outright revolution against – the royal prerogative, Justice Willes construed these authorities together as establishing the existence of a common law copyright prior to the statutory framework created by the Statute of Anne, which I will discuss below.

Treating the year 1640 as a significant moment of division between lines of authority within the prerogative tradition, Justice Willes looked to three decrees of the Star Chamber preceding his moment of division.[30] These decrees (or "ordinances") were addressed to "disorders" in the printing and selling of books; the first two (dated 1566 and 1586) were issued

[30] This court had been abolished by Parliament in 1640 (5 Stat. 110, effective in 1641), but prior to its abolition had served in conjunction with the Privy Council, alongside the increasingly-independent Chancery, as part of the *curia regis* – council (or "court") of the king (*see* Baker 2002, at 97-124).

under Elizabeth, and the last (dated 1637) under Charles I. These decrees built upon one another, creating a framework for censorship and regulation of printing, at the same time that they sanctioned the Stationers Company's exclusive rights in printing and publishing.[31]

As far as substantive regulation of content was concerned, the 1586 Star Chamber decree shifted to a licensing regime. Previously, a law, statute, ordinance or patent would have been required to prohibit a book or manuscript from being printed or imported, bound and sold. However, from 1586 forward, only prescriptively sanctioned and licensed books could be printed or sold. Moreover, the 1586 decree added the following category of legal prohibition: any book or copy "contrary to any allowed ordinance set down for the good governance of the Company of Stationers within the City of London" (II Arber 1875, at 810). From this time forward, in other words, Stationers Company by-laws were elevated to the status of law, effective to prohibit the printing or selling of books. Beginning in 1637, the Stationers Company registry books became official records of the assignment of licenses to print: no book could be printed or sold unless

[31] The 1566 Star Chamber decree (I Arber 1875, at 322) was primarily aimed at establishing an enforcement regime for censorship. Incorporating by reference any substantive prohibition of content established pursuant to statute, law, ordinance, injunction, or letters patent, the decree proscribed the printing, binding, or sale of any "Booke or copie" covered by substantive prohibition, and specified penalties for violation. The penalties, especially for printers, were steep: the books or copies themselves were to be forfeited, while the offender was to pay a fine, suffer 3 months imprisonment ("without baile or mainprise"), and be thenceforth prohibited from practicing the trade of printing. The Wardens of the Stationers Company, or their named deputies, were authorized to enforce the decree by searching any suspect imports and domestic shops, seizing any books or copies they deemed illegal. Overseeing this regulatory regime were the "High Commissioners in Causes Ecclesiastical" (prominently including the Archbishop of Canterbury and the Bishop of London) and the Privy Council.

The 1586 and 1637 Star Chamber decrees (II Arber 1875, at 807-23; IV Arber 1876, at 528-36) built substantially on this foundation, while adding considerable detail and force. The Wardens of the Stationers Company (or their deputies) retained their search and seizure powers; these were strengthened by provisions requiring registration of printing presses with the Company, and prohibiting presses from being maintained anywhere other than London (excepting the monarch's own presses, and those of Oxford and Cambridge University). Furthermore, the number of licensed printers was limited to a number fixed by the Archbishop of Canterbury and Bishop of London (fixed at 20 in the 1637 decree), with positions in these slots to be filled by individuals selected from within the Stationers Company and approved by the High Commissioners. To limit the number of individuals learning the "arte or mysterye" of printing and bookselling, the number of apprentices was fixed: no more than three for the master and upper wardens of the Stationers Company, no more than two for lower wardens and those having achieved Livery status, and no more than one for the "yeomen" Stationers. Penalties for violation of these regulatory provisions were substantially increased.

first licensed by specified officials and "first entered into the Registers Booke of the Company of Stationers" (IV Arber 1876, at 529-30).

Substantively, these decrees were important in strengthening the Stationers Company exclusive rights in printing and publishing, and in establishing a regulatory framework for censorship that, to some extent, carried over into copyright regulation, as will be seen below. From a more formal perspective, however, these decrees – along with the Stationers Company charter – were primarily significant as an exercise and manifestation of royal prerogative, in accordance with the legal authorities of the prerogative tradition. This prerogative tradition, while limited and unpopular, continued to be treated as authoritative after the Restoration and Glorious Revolution. Indeed, the earliest cases cited in *Millar* and *Donaldson* as precedents for a common law copyright were cases interpreting the prerogative tradition, as it related to printing patents and the Stationers Company corporate charter.

The earliest cases raising the question of "rights" to print and publish involved conflicts between recipients of royal privileges granted by means of letters patent. Acting on the basis of their charter and additional printing patents granted to them, the Stationers Company sought to clarify and strengthen their exclusive printing rights in relation to other patent recipients, as well as foreign importers. The resulting line of cases established a specific interpretation of the prerogative tradition, applied to the social problems and conflicts surrounding rights to print books.

The first case – *The Stationers v. The Patentees about the Printing of Roll's Abridgment*, or "Atkins' Case" – involved a patent to print "all law books that concern the common law" (124 Eng. Rep. 842 (1666)). The patent had been granted to a non-member of the Stationers Company, transmitted through inheritance and marriage, and was being enforced against the

Company, which had printed a common law treatise by an eminent judge – Henry Rolle's *Abridgment des Plusieurs Cases* – in violation of the patent.[32] Judgment had been given in Chancery on behalf of the patentees (Colonel Atkins, through his heiress wife, "and his assigns"), and an injunction was issued to prevent the Stationers from selling the *Abridgment*. The Stationers appealed the case to the House of Lords, and judgment in favor of the patentee was there given on the basis of the royal prerogative underlying the patent grant (*see also* Bacon 1793, at 208).

The subsequent case of *Roper v. Streater* (House of Lords 1672) was viewed as definitively resolving the question: the exclusive printing and publishing of law books was within the royal prerogative, and could therefore be granted by means of letters patent and enforced, even against the Stationers Company (*see* 86 Eng. Rep. at 865-66 (1677); 90 Eng. Rep. at 107-108 (1685); Bacon 1793). Although multiple arguments were originally given to support this printing prerogative in law books (*see* 124 Eng. Rep. at 842-44), the consolidation of these arguments relied on the monarch's special role as issuer and overseer of the law: "matters of law and religion ought and always was [sic] under the immediate care and government of the King" (90 Eng. Rep. at 107).

In the *Company of Stationers v. Seymour* (86 Eng. Rep. 865 (1677)), this prerogative was held to extend to almanacks, partly due to their religious content and partly due to the fact that, as compilations, they had no particular author. By implicit analogy, just as tangible things belonging to no one belonged to the monarch according to the prerogative tradition, so the copies of a text without an author belonged to the monarch (*see also* Bacon 1793, at 208-209; Blackstone Vol. 2, 1979 [1766], at 410). Thus almanacks, Psalters, Bibles, Year-Books, and Books of Common Prayer were all within the royal prerogative, and, along with law books,

[32] The publication of Rolle's *Abridgment* was delayed by this litigation until 1668 (*see* Baker 2002, at 185-86).

subject to grant by letters patent. In fact, with the exception of the patent pertaining to common law, all these patents were held and enforced by the Stationers Company.[33]

Matthew Bacon's *New Abridgment of the Law* (1763-66) provides insight into the legal understanding of these cases as they related to the prerogative tradition, and into the relation of the prerogative tradition to the broader English legal tradition. This *Abridgment*, like other abridgments before it, was written to facilitate a more systematic understanding of English law, and to enable legal actors to find the relevant, applicable law (*see* Baker 2002, at 184-86). It was organized alphabetically by subject-matter, beginning with "Abatement" and ending with "Sherriff," which was the last entry Bacon lived to complete (*see* Bacon 1832, at xvi, 1). Subsequent editors painstakingly annotated, added to, and edited the text, enabling it to provide guidance to American and English lawyers well into the Nineteenth Century; an edition was published in Philadelphia as late as 1876 (*see* Prefaces to Bacon 1832; Baker 2002, at 186 n.38).

Bacon dedicated a lengthy section of his Abridgment to the prerogative, and began by defining it as "a Word of large Extent, including all the Rights and Privileges which by Law the King hath, as head and Chief of the Commonwealth, and as instructed with the Execution of the *Laws*." The doctrine that the monarch has these prerogative rights and privileges "by Law" was emphasized, particularly through footnote references to Sir Edward Coke's *Institutes*, cited as authority to support the doctrine that "the King's Prerogative is Part of the Law of England, and comprehended within the same" (Bacon 1793, at 149 (emphases in original)).

From this definition and the annotated discussion, we might infer that the prerogative tradition provides the foundation for effectuating the monarch's activity in the "business of rule" (Poggi 1978). Accordingly, it would seem to be a body of doctrine pertaining to public law and

[33] In *The Stationers Company v. Lee* (89 Eng. Rep. 927 (1681)), certain of the Stationers Company's prerogative-based patents were upheld as enforceable against "Hollander" importers.

politics. And so it surely is, since it defines the monarch's relationship with his subjects, his jurisdiction and his courts, and his capacities to create offices, make war, and effectuate peace (*see* Bacon 1793, at 149-202).

But then we are immediately confronted with the statement that, according to the prerogative tradition, the monarch is "universal Occupant, and all Property is presumed to have been originally in the Crown" (Bacon 1793, at 153). We are told that the monarch inherits his rulership according to the same rules governing private inheritances, and that the English sea, seabed, fisheries, navigable rivers, wild swans, whales, light-houses, goods floating ashore from wrecked ships, abandoned ("derelict") goods, waifs and strays, "treasure trove" and "escheats" (property passing post-mortem without an heir), all are the property of the monarch according to the prerogative tradition (Bacon 1793, at 151-66).

What strikes the reader of Bacon's *New Abridgment* entry on "Prerogative" is the fusion of proprietorship with rulership conceptions. This fusion of proprietary and rulership conceptions is, in fact, characteristic of the prerogative tradition, according to legal historians (*see* Baker 2002, at 9, 381, 472-3; Pollock & Maitland 1952, at 511-26; Holdsworth 1921). Seeking evidence of this within the tradition itself, we see it reflected very early. One particularly clear expression of the fusion of property and rulership in the prerogative tradition can be seen in a thirteenth-century legal treatise attributed by later tradition to "Henry of Bracton," a cleric and "justiciary" under Henry III: *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England, hereinafter "*Bracton*").[34]

[34] On the authorship of *Bracton*, see Baker 2002, at 176-77; *see also* Harvard Law School's "Bracton Online" webpage: http://hlsl5.law.harvard.edu/bracton/Common/index.htm (viewed on December 16, 2010). My quotes are from Samuel E. Thorne's translation, which is published on Harvard Law School's website. However, I also reference Sir Travers Twiss' edition (Bracton Volume I 1878).

Justice Blackstone in his *Commentaries* classified *Bracton* (together with the treatises of five other authors) as a preeminent authority in evidencing "that cases have formerly happened in which…points were determined, which are now become settled and first principles" (1979 [1765]), at 72). It is also notable in this context that

In *Bracton* we read that "dominion" (*dominium*) over things belonging to no one (*res nullius*), which according to "natural law or the law of all peoples" belong to the first person to take or "occupy" them (by *occupatio*), belongs to the king under the English "civil law" (*jus civile*) (II:1).[35] These things belonging to no one include the same "derelict" things, treasure trove, and "waifs" that Bacon discusses in his entry on the royal prerogative (I:12). Similarly, an island in a public river "belongs to the first occupier, and consequently to the king in virtue of his prerogative (*privilegium*)" (II:2). And finally, we read that certain things belonging to the king by virtue of his prerogative may be granted to certain of his subjects; these include the "liberties" relating to the taking of "wrecks of the sea," treasure trove, great fishes and royal fishes (II:5). These privileges and liberties can be granted to favored subjects, because to do so would not harm the "public interest," as would a grant of the other prerogative attributes, which include responsibility for peace and justice (II:5).

This entire doctrine is summarized in a section of *Bracton* (II:24) addressed to questions about who may grant liberties, and to whom. Who?

> It is the lord king himself who has ordinary jurisdiction and power over all who are within his realm. For he has in his hand all rights belonging to the crown and the secular power and the material sword pertaining to the governance of the realm. Also justice and judgment and everything connected with jurisdiction, that, as minister and vicar of God, he may render to each his due. Also everything connected with the peace….He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium*. By the *jus gentium* things are his which by the *jus naturale* ought to be the property of the finder, as treasure trove, wreck, great fish, sturgeon, waif, things said to belong to no one. Also by virtue of the *jus gentium* things [are his] which by *jus naturale* ought to be common to all…

Which of these liberties may be transferred?

Bracton's influence extends to Nineteenth-Century America. Thomas Jefferson prescribed the reading of *Bracton*, along with Justinian's *Institutes*, for the education of American lawyers. This was to supplement the primary task of studying, among others, Coke's *Institutes*, Matthew Bacon's *Abridgment*, and Blackstone's *Commentaries* (*see* Jefferson 1900 [1826], at 487-88).

[35] In another place, *Bracton* states that these things belonging to no one belong to the "sovereign" (*princeps*) according to the *jus gentium* (I:12).

> Those concerned with jurisdiction and the peace…cannot be transferred to persons or tenements, neither the right nor the exercise of the right, nor be possessed by a private person unless it was given him from above as a delegated jurisdiction, nor can it be delegated without ordinary jurisdiction remaining with the king himself. Those called privileges, however, though they belong to the crown, may nevertheless be separated from it and transferred to private persons, but only by special grace of the king himself.

Here we see the fusion of proprietary and rulership conceptions in an early, potent form. And it is in addressing the issue of transfer that *Bracton* leads us to the strand of prerogative tradition most relevant to the grant of privileges, liberties, and immunities by means of letters patent and charters.

In *Bracton*, permissible grants of privilege include exemptions from tolls and customs dues, and powers to levy tolls and customs dues. In particular, they include grants "to a *universitas*, as to citizens or burgesses or others, that they may have a market and fair in their vill, city or borough, and may take customs and tolls and be quit of rendering toll or any other customary due throughout the whole of his realm" (II:24). By the Eighteenth Century, these early foundations had become a developed, royal prerogative tradition addressing the grant of privileges by letters patent.

In his *New Abridgment*, Bacon wrote that "the Law hath inseparably annexed to the Crown a Power of granting and disposing of diverse Rights and Privileges, which cannot be granted or established by any less Authority; of these there are some that have no Existence 'till created, such as Franchises, Liberties, Fairs, Markets…" (Bacon 1793, at 203). The means of granting these rights and privileges was by letters patent, and so this sub-section of the treatise was titled "Of the King's Grants and Letters Patent" (203).

As in *Bracton*, there is a distinction between powers of the Crown that can be granted and powers that cannot. In contrast to *Bracton*, however, there is now a distinction between grants of the Crown's "Prerogative of Power" and grants of the Crown's "Interest," which include "any

Branch of his Revenue, in which he hath an Estate of Inheritance, as also his Lands in Fee-Simple" (205). These grants of the Crown's "interest" include "Estates in Offices," Offices which the king may grant but may not himself occupy (206).

Two special categories of prerogative grant by means of letters patent are given their own sub-section in Bacon's *New Abridgment*. The first is an exception to "Grants tending to a Monopoly": this is the grant, "for a reasonable Time," of the "sole Use of any Art first invented" by the grantee (Bacon 1793, at 206-207). The second sub-section is addressed to "Grants of the sole Liberty of Printing" (207). Here, then, are two categories of royal prerogative, two legal categories of royal privilege and patrimony granted by means of letters patent: the patent for a new invention, and the printing patent.

William Blackstone's *Commentaries*, quoted in the epigraph to this Chapter, show how the prerogative tradition was interpreted to support the case for literary property. As a participant in both the *Millar* and *Donaldson* cases, Blackstone's views were an influential part of the English legal debate surrounding intellectual property.[36] In the *Commentaries*, we can take in Blackstone's views as they were expressed prior to the *Millar* and *Donaldson* outcomes. Indeed, it seems no stretch to think that he followed something close to what appears in his *Commentaries* in arguing the *Millar* case, and in his discussions with fellow peers in the *Donaldson* case.

For Blackstone, the most important aspects of the prerogative tradition, taken as a whole, were its documented limitations on the rights and powers of the monarchy (Vol. 1, 1979 [1765],

[36] The persuasiveness of Blackstone's rhetoric on behalf of Andrew Millar can be inferred from Justice Willes' favorable references to his arguments (98 Eng. Rep. at 207-08), and from Justice Yates' unfavorable reference to their fallacious but "captivating" sound (98 Eng. Rep. at 231). Moreover, as the first professor of English common law at Oxford, Justice Blackstone played a vital role in establishing a foundation for scholarly analysis of the English common law tradition, which was enormously influential in the United States. It was partly for this reason that Stanley N. Katz (legal scholar and President Emeritus of the American Council of Learned Societies) labeled Blackstone's *Commentaries* "the most important legal treatise ever written in the English language" (*Introduction to* Blackstone, Vol. 1, 1979 [1765]).

at 230-326). Nevertheless, he accepted that, within the boundaries established by the prerogative tradition, the prerogative existed as a special, preeminent "character and authority," which consists in a bundle of "rights and capacities" held by the monarch (*see* Blackstone Vol. 1, 1979 [1765], at 232-34). Among these "rights and capacities" vested in the crown were "prerogative copyrights," exclusive rights to print particular works belonging to the king and granted to favored subjects (*see* Blackstone Vol. 2, 1979 [1766], at 410).

While preferring to base his arguments in favor of intellectual property on natural law and chancery precedents, Blackstone nevertheless considered the case for literary property to be significantly bolstered by "those adjudged cases at common law, wherein the crown hath been considered as invested with certain prerogative copyrights" (Blackstone Vol. 2, 1979 [1766], at 407). The argument proceeded by way of analogy: "if the crown is capable of an exclusive right in any one book, the subject seems also capable of having the same right in another."

Lord Mansfield, Chief Justice of the King's Bench, regarded this argument by analogy from the prerogative tradition as decisive, although he gave it a very different twist. Examining the precedents carefully, Lord Mansfield drew a line between the cases decided before the Restoration and those decided after.

> There were no questions in Westminster-Hall, before the Restoration, as to Crown copies. The reason is very obvious: it will occur to everyone that hears me. The fact, however, is so: there were none, before the Restoration. Upon every patent which has been litigated since, the counsel for the patentee (whatever else might be thrown out, or whatever encouragement they might have, between Restoration and Revolution, to throw out notions of power and prerogative,) have tortured their invention, to stand upon property. (*Millar*, 98 Eng. Rep. at 254)

Conceding that the cases decided before the Revolution had been decided partly on the basis of the prerogative tradition, Lord Mansfield distinguished royal property from royal prerogative, arguing that the former basis for the decisions continued to survive after a post-Revolution case – *Stationers Company v. Partridge*, 88 Eng. Rep. 647 (1709) – that he regarded as decisively

rejecting the doctrine of prerogative as a basis for printing patents, even while it was never actually decided.

Lord Mansfield, in other words, excised the proprietary conception of the prerogative tradition away from the rulership conception, equated the prerogative tradition to the rulership conception alone, and argued that only this had been destroyed as a legitimate foundation for the "crown copyright." The common law precedents establishing the crown copyright over lawbooks, statute books, English bibles, year-books and prayer-books were valid, according to this interpretation, because they did not solely depend on royal prerogative (as equated with the rulership conception alone), but also depended on the "power" that "rests in property" (98 Eng. Rep. at 256). The proprietary basis underlying these valid precedents, according to Lord Mansfield, derived from the king's payment, which operated as a transfer of property. Whatever the origin of this property, it was paid for by the king and transferred to him, and he could therefore grant it by means of letters patent to any of his subjects.

Having interpreted these precedents as providing an exclusively proprietary basis for the crown copyright, Lord Mansfield then made the argument by analogy: "Whatever the common law says of property in the King's case, from analogy to the case of authors, must hold conclusively, in my apprehension, with regard to authors." (98 Eng. Rep. at 2405) Having thus reinterpreted the prerogative tradition as a proprietary tradition, Lord Mansfield argued that it survived the dramatic political events and legal authorities drawing that tradition into question and controversy after the Interregnum and Revolution. Surviving to support the crown copyright, this reinterpreted tradition must also support an author's copyright, since the king could have no greater proprietary right than his subjects. This argument, alone, was

"conclusive," in Lord Mansfield's opinion, in determining that literary property existed as a matter of common law.

Justices Aston and Willes seemed to agree with this conclusion (*see* 98 Eng. Rep. at 205-17, 224-25). The former focused primarily on arguments from natural law, while the latter primarily restricted himself to outlining and summarizing the relevant legal authorities. Nevertheless, both Justices argued that literary property existed at common law, and acknowledged the prerogative tradition as the earliest common law tradition pertaining directly to the issue. Both used language indicating a discomfort in relying upon the prerogative tradition to support the case for literary property, and did not address the question as explicitly as Lord Mansfield and Justice Blackstone.

Justice Yates, dissenting from the conclusion that literary property existed as a matter of common law, rejected Lord Mansfield's argument by analogy from the proprietary interpretation of the prerogative tradition (*see* 98 Eng. Rep. at 229, 243-45). Acknowledging the existence of the legal authorities establishing the crown's "prerogative property" in Bibles, year-books, books of common prayer, statute books, etc., Justice Yates accepted the existence of "prerogative copyrights." However, in analyzing the legal authorities establishing these acknowledged rights in the crown, he interpreted them as basing the right entirely on the crown's "national or public concern" for the established religion and legal governance.

Interestingly, then, Justice Yates also excised the rulership conception from the proprietary conception in the prerogative tradition, arguing that the prerogative copyright existed on the basis of the *rulership conception*, not the proprietary. Any argument that the king's property subsisted on the basis of his purchase was undermined, in his opinion, by the fact that the purchase money was public money. The prerogative copyright was a "public" copyright,

according to Justice Yates, and thus could provide no foundation for the "private" rights of authors.

> It is mentioned as one ground of the King's right to print them, "that some of these prerogative books were printed at his expence." But in fact, it is no private disbursement of the King, but done at the public charge, and part of the public expences of the government. It can hardly be contended, that the produce of expences of a public sort are the private property of the King, when purchased with public money. He cannot sell nor dispose of one of those compositions. How, then, can they be his private property, like the private property claimed by an author in his own compositions? The place or employment of the King's printer is properly an office…From these authorities, therefore, I say, it seems to me, that the King's property in these particular compositions called prerogative copies stands upon different principles than that of an author; and therefore will not apply to the case of an author. (98 Eng. Rep. at 244-45)

From these discussions among the Justices of the King's Bench, we see that the legal authorities of the prerogative tradition were universally regarded as being of importance in deciding the question about literary property. We also see, however, that the tradition could be interpreted in very different ways, not only between Justices who came to opposite conclusions regarding the existence of literary property at common law, but even among Justices who agreed that literary property existed at common law.

In the House of Lords, the prerogative tradition was discussed, albeit with stronger rhetoric and less careful attention to specific legal authorities (*Donaldson*, 1 Eng. Rep. 837 (1774); 98 Eng. Rep. at 257; 17 *Cobbett's Parliamentary History* 954). Undoubtedly recognizing that any argument from the prerogative tradition would be unpopular in a Parliament that had so recently rebelled against it, counsel for Thomas Beckett and the Stationers Company did nonetheless invoke it, attempting to give it the most palatable possible interpretation by combining Lord Mansfield's interpretation with Justice Yates':

> It is a point too well established to be denied, that at common law the sole and exclusive right of multiplying for sale, the copies of acts of parliament, proclamations, and other papers of a public nature, belongs to the King and his patentees; not in consequence of any prerogative over the art of printing but on account of his particular interest, as the executive power, in all publications and acts of state, flowing from himself or parliament. This shows that an interest or property similar to that claimed by authors, may subsist at

> common law; and though the reasons on which authors claim an interest in their own private copies are not precisely the same as those from which the interest of the crown in public copies is derived, yet they are not less forcible; but give to authors a title to property as well founded in justice, as the title of the crown is founded in policy, and one equally consistent with public utility. (1 Eng. Rep. at 846)

Eleven peers acted as judges in the *Donaldson* case, while Justice Mansfield refrained "for Reasons of Delicacy" from supporting his previously-expressed opinion.[37] Of the eleven Law Lords, a majority agreed that a good case had been made for the existence of literary property at common law. However, a narrow majority also agreed with the argument that the common law right had been taken away by the Statute of Anne, which will be discussed below (98 Eng. Rep. at 257-62; 1 Eng. Rep. at 847).

Because the legal reports of the *Donaldson* case do not contain the judges' reasons for their decisions, and because the majority decision turned on the effect of the Statute of Anne, it is impossible to determine exactly how the prerogative tradition was interpreted by each Lord. However, we can infer something from the fact that Baron Adams, who was part of the minority refusing to grant that literary property had existed prior to the Statute of Anne, nonetheless affirmed the existence of a prerogative copyright. Like Justice Yates, he denied its relevance to the case for a general author's copyright by emphasizing its "public" aspects, *i.e.* the aspects connected with rulership rather than proprietorship (17 *Cobbett's Parliamentary History*, at 985). It would seem that the Law Lords ultimately concluded that the prerogative copyright was distinguishable from an author's copyright.

In general, with respect to patents, theoretical dimensions of the surviving prerogative tradition may be distilled in the following propositions: (1) privileges granted through letters

[37] Five additional peers voiced their opinions on the issue, albeit without legal effect (17 Cobbett's Parliamentary History, at 992-1003).

patent carry with them something of the fusion of property, power, and rulership that they have in the hands of their grantor; and *therefore* (2) privileges granted through letters patent may be viewed as the property of the grantee. Mythically, the prerogative tradition was part of the monarchy, sharing in the narrative pageantry of the English royal houses. Mimetically, the prerogative tradition had been lived out through the exercise of official sanctioning powers, up to the Eighteenth Century.

We have seen from *Bracton* and from Bacon's *New Abridgment* that offices themselves were conceived as proprietary objects granted by means of letters patent (and charters) from the Crown pursuant to the prerogative tradition. This is enormously significant, because it means that the same fusion of proprietary and rulership conceptions that held for the Crown also held for lower "Offices" and their officials.

Among the oldest and most significant of the offices endowed by royal prerogative with proprietary rights and rulership obligations was that of "sheriff" (shire-reeve). This office predated the Norman Conquest (1066), and its tradition thus contains residues from pre-Norman, Anglo-Saxon writings, and from British oral traditions.[38] After the Conquest, the sheriff played an essential role in helping the Norman and Angevin kings to establish a unified system of rule in England. He did so by executing, within his territorial "county," the king's writs, which were the early procedural formulae for invoking the king's justice. He also executed judicial writs issued after a legal process had been originally initiated, and accompanied the king's justices as they traveled in circuit. The sheriffs' responsibility for the English system of "gaols," as well as

[38] Over the centuries of this pre-Norman period, England had been divided into a number of "shires" under the command of "ealdormen" (earls). Together with fortified "boroughs", these shires comprised a system of defense against England's numerous, aggressive invaders. At the same time, the shires served as the basis of a system of internal rule, which included assemblies of the "folk" exercising undifferentiated judicial, administrative, and legislative authorities under the oversight of the earl, or his deputy. In order to centralize their authority, the Anglo-Saxon kings established positions for their officers ("reeves") in these shires and boroughs. One of the important obligations of the Anglo-Saxon sheriff was to visit the local assemblies to ensure that the "king's justice" was being implemented there. (*See* Baker 2002, at 1-12.)

their execution of writs involving the seizure of persons and things, and their authority to summon a *posse comitatus* to aid in these activities, made them primary enforcers of English law. (*See* Baker 2002; Bacon 1793, at 429-64.)

In bringing the sheriff's office under their control, the English kings limited its term to one year, and made the sheriff accountable in the Court of Exchequer for liabilities incurred during a term in office (*see* Baker 2002; Bacon 1793, at 429-64).[39] At the same time, however, the kings sanctioned the continuance and development of certain proprietary practices in the legal and official traditions. The sheriff could, for example, lease his office to another (*see* Bacon 1793, at 436). Subject to the limitations and obligations imposed, the sheriff held his office as a matter of right, through a transfer from the king formalized in letters patent sealed with the "great seal" of the Chancellor (*see* Bacon 1793, at 430, 432).

Mimetically, then, the prerogative tradition was part of the Chancery tradition, with its deep roots in Roman law. Under the particular conditions of English monarchical and feudal society, this tradition had become part of the basic exercise of political power underlying the establishment of the rule of law in England. However, abuses of the prerogative tradition helped to bring about the development of another tradition: the anti-monopoly tradition.

[39] According to Matthew Bacon (1793, at 430), the office of sheriff was "anciently" granted by the king "in Fee," *i.e.* as an object of property inheritable by the ancestors of the grantee. Such a conception of public office, as an object of an inheritable and permanent proprietary relationship, strikes us as being distinctly "feudal" (*see* Poggi 1978, at 16-37; Weber 1978, at 231-41, 255-66, 1010-69). Ensuring the preservation of certain proprietary conceptions in the legal tradition pertaining to the office, while bringing it under his control and making it subject to a limited grant accompanied by specific conditions, the king effected a "patrimonial" expropriation: he made the office an object of his patrimony, granted in a proprietary sense to a qualified and favored subject, but returnable always to him. The prerogative tradition of offices, therefore, is a patrimonial tradition (*see* Weber 1978, at 231-41, 255-66, 1010-69).

The Anti-Monopoly Tradition

The anti-monopoly tradition was developed by seventeenth century legal actors in response to liberal reliance by the English crown on the prerogative tradition, in granting exclusive privileges to favored subjects via letters patent and charters. It may be seen as part of a broader response in English society to the growth of absolute rule in Continental Europe, and the perception that the Stuart monarchs were attempting to implement such absolute rule domestically (*see* Merriman 2004; Poggi 1978). However, it can be more precisely understood as a response to the patrimonial rulership of the Stuart monarchs.

As we have seen, the prerogative tradition addressed the rights and powers of the monarch, and, as a subsidiary matter, the rights and powers of crown officials. These rights and powers specifically pertained to the creation of offices and the implementation of justice, thus providing a legal framework empowering and legitimating the monarch's judges and officials. The prerogative tradition provided, in other words, a legal framework for conceptualizing and legitimating the creation of offices within an English royal administration. At the same time, the tradition carried with it a proprietary conceptualization of offices, and of any rulership rights, powers, or exclusive privileges granted by means of letters patent. The royal use of letters patent and charters to grant exclusive privileges ("monopolies") to favored subjects may be seen as part of an official, patrimonial tradition that drew on the legal, prerogative tradition.

In *The Religion of China* (1951, at 137), Weber wrote that the grant of "monopolistic privileges" is "habitual to patrimonialism everywhere." In English patrimonialism, the grant of exclusive privileges by means of letters patent operated as a legal vehicle to create an administration and judiciary, to facilitate the development and growth of industries, to administratively control industries, and to provide financial rewards to favored individuals.

Public and private goals were not clearly distinguished, as they were not distinguished in the prerogative tradition that fused proprietary and rulership conceptions. Where patents created exclusive rights to practice a particular trade, they might incentivize the development of that trade, but they also choked off access to the trade by other individuals. An entire industry could be made the "monopoly" of a single individual or a guild, creating great wealth for the individual or guild at the expense of all other Englishmen. Hence arose that hatred of monopolies that burned in the hearts of Englishmen, and passed to their American heirs.

The issue of monopoly patent grants came to a head during the reign of James I, and resulted in Parliamentary legislation ("The Statute of Monopolies" (1624)) articulating the modern conception of a patent for invention as an exception to the general prohibition of monopolies. This legislation was repeatedly referred to in the *Millar* and *Donaldson* cases, and the parallels between patents for new inventions and copyrights were repeatedly discussed. At a rhetorical level, the Stationers Company was castigated as a "monopolist" by the barristers, justices, and peers opposed to literary property. The future monopolies that a perpetual form of literary property would potentially create constituted a chief basis for arguing that the common law could never sanction such a species of property.

In the *Millar* and *Donaldson* cases, the anti-monopoly tradition provided a legal framework within which to analogize patents and copyrights to one another, and a common basis from which to critique them. In this respect, the anti-monopoly tradition provided a crucial contribution to the development of "intellectual property," conceived as encompassing both patents ("industrial property") and copyrights ("literary property"). In order to understand how this happened, we must examine the English patrimonial and anti-monopoly traditions more closely.

As shown in Chapter 1, the granting (or recognition) of exclusive privileges by means of letters patent and charters, for purposes that we may broadly conceive as economic and administrative in nature, was an official practice widespread throughout medieval Europe. Examples include a number of early privileges for mining and manufacturing techniques (glass-making, cloth-dying, wool-working and weaving, silk-making, paper-making, salt-making), as well as Venice's Fifteenth Century statute elaborating a general framework for the granting of such privileges for new inventions (*see* Walterscheid 1994; Prager 1952; Frumkin 1947; Prager 1944; Hulme 1896). Patents for the printing of particular works also became widespread, as the art of printing had itself spread across Europe (*see* Armstrong 2002; Prager 1952, at 134-35; Prager 1944).

Classic studies by Harold Fox (1947) and William Price (1906) have shown that, beginning in the Fourteenth Century, English monarchs used variations of the patrimonial patent tradition to encourage and control the development of particular industries within their territory (*see also* Walterscheid 1994; Prager 1952; Prager 1944; Hulme 1896). Early on, these patents seem to have been primarily for the importation of arts already developed on the Continent (*e.g.* cloth-working and dying); occasionally, they were granted in secret, rather than as "open" (*i.e.* public) charters (*see* Fox 1947; Price 1906; Hulme 1896). It is important to understand that these early patent grants provided special exemptions against the local, civic monopolies of guilds and cities (*see* Price 1906). They were special, royally-protected freedoms from the local regulatory and monopolistic traditions that operated through cities and guilds.

By the reign of Elizabeth, however, the patrimonial patent tradition was being developed and altered; it was being relied upon to create *national* monopolies and thereby to break down the local regulatory framework of cities and guilds (*see* Nachbar 2005; Davies 1932; Price 1906).

As a means of financing the encouragement and control of industrial development, the patent system had the obvious advantage of requiring no payment on the part of the crown: patent-holders were compensated, instead, through their ability to charge high prices, and their self-enforcement privileges obviated the need for an extensive administrative apparatus. Some patents even provided a revenue-stream to the crown (*see* Nachbar 2005; Price 1906, at 14-16). Moreover, as we have seen, the official patent tradition was supported by a legal tradition (*i.e.* the prerogative tradition) that could be drawn upon to legitimize the organization and development of industry on a national scale, an objective that was increasingly seen as necessary to national "policy."

However, as it developed during the Elizabethan period, this patrimonial patent tradition began to be relied upon to support practices that were increasingly perceived as abusive: multiple patents were granted for the same methods and arts; patent terms grew longer, and were renewed multiple times; patents were granted to royal favorites, and for "arts" touching the lives and livelihoods of many Englishmen (*see* Nachbar 2005; Davies 1932). Moreover, the self-enforcement methods of patent holders could be destructive and punitive (*see* Nachbar 2005; Price 1906). The English anti-monopoly tradition emerged as a reaction to these perceived abuses. As a legal tradition, it delineated the legitimate purposes for which trade-related patents might be issued, and distinguished these legitimate purposes from illegitimate monopolies.

The legal actor whose name is most closely connected to the early English anti-monopoly tradition is Sir Edward Coke. As Queen Elizabeth's Attorney General, Coke had argued the "Case of Monopolies" – *Darcy v. Allein* (1602) – on behalf of the Queen's patentee and Groom of the Privy Chamber, Edward Darcy. Although Coke had argued in support of the patent, his report of the case, appearing alongside another anti-monopoly case (concerning the Tailors of

Ipswich guild) in the Eleventh Volume of his reports (1615), provided a conceptual framework for opposing monopoly patents. Coke drew on this framework 9 years later in drafting and supporting The Statute of Monopolies (1624) in Parliament.

The *Darcy* case involved a patent on playing-cards. It included three specific types of privilege, allocating each of them to the patentee Edward Darcy (along with his agents and assigns): (1) the exclusive right to domestically manufacture cards and sell them, (2) the exclusive right to import cards and sell them, and (3) the right to enter and search buildings where it was suspected that cards imported in violation of the patent were being held, and to seize and carry away any cards found (*i.e.* a right to self-enforcement).[40] (*See* 77 Eng. Rep. 1260; Nachbar 2005; Corré 1996; Davies 1932.) The defendant in the *Darcy* case, Thomas Allen, was a London "haberdasher", who admitted to manufacturing a small number of cards in violation of the patent. In his defense, he alleged that, as a freeman of the "society of Haberdashers," he was a citizen of the City of London and entitled to its ancient liberties, which included the manufacture and sale of playing cards (77 Eng. Rep. 1261).[41]

The Court ruled against Edward Darcy, but gave no reasons for its holding. In his exhaustive study of the ruling, Jacob Corré (1996) has shown that the actual reasons for the Court's holding may have been procedural: the Court may have considered Darcy's reliance on the "action on the case" an impermissible extension of this form of action, especially given the specification of remedies provided in the patent itself. Be that as it may, due to the influence of Coke, the case has come to stand as a precedent establishing the invalidity of monopoly patents.

[40] The second type of privilege involved an exception to the general statutory prohibition against importing cards established during the reign of Edward IV. The privilege was delineated using language of exception to a statute: a "notwithstanding" or "*non obstante*" clause. Such *non obstante* privileges would in future years be a source of constitutional contention, because they involved an assertion of royal prerogative (a "dispensation power") over Parliamentary legislation. (*See* 77 Eng. Rep. 1260; Nachbar 2005; Corré 1996; Davies 1932.)

[41] Allen later alleged that he had deliberately violated the patent, with the encouragement of the Mayor, Aldermen, and Council of London, so that the challenging of the patent in court might secure a favorable ruling concerning the liberties of London (*see* Davies 1932).

Coke reported the case in 1615, in a form that makes it appear as if the judges gave an extended set of reasons for their holding, reasons that articulated distinctions between valid and invalid patents (*see* Corré 1996). According to Coke's report, the grant of an exclusive right to practice a particular trade, by excluding all others from practicing the trade, violated the ancient rights of Englishmen to practice their respective trades and thereby to contribute to the English commonwealth. Moreover, Coke argued, all such monopolies on the practice of a particular trade have three inevitable effects on the product of the trade: the price of the product is increased, the quality of the product is reduced, and the tradesmen who previously practiced the particular trade are impoverished, along with their families (77 Eng. Rep. at 1262-65).

If, as Corré argues, the court's actual holding was premised on a procedural basis, the ruling may have avoided confrontation with the royal prerogative: the court may never have reached the question about the patent's validity. However, as Coke reported the *Darcy* case, it presumes the power of a court to declare limits on the royal prerogative, limits premised on certain trade-related rights of Englishmen and on the legal sovereignty of Parliament (vis-à-vis the monarchy) in addressing trade-related issues (*see* Nachbar 2005; Corré 1996; Davies 1932). According to Coke, only Parliament has the legal power to restrain an Englishman from practicing his trade by granting a trade-related monopoly (77 Eng. Rep. at 1264). The granting of trade-related monopolies, Coke later argued in Parliament, was an exercise of the royal prerogative that implicated what is "mine and thine" (*meum et tuum*); this meant that, unlike other exercises of the prerogative, it could be legally challenged in courts and in Parliament (*see* White 1979, at 119-20, 122-25, 139-40).

The use of English courts to challenge trade-related patent grants was an innovation of the Seventeenth Century, premised of course on the innovative uses to which the grants

themselves were being put by the monarchy (*see* Corré 1996, at 1297-1302; Price 1906). In 1601, when vociferous challenges to the use of royal prerogative to grant trade-related "monopolies" were raised in the House of Commons, Elizabeth had promised her subjects the right to seek remedy under "Her Highness's laws of this realm" against vexatious exercises of patent privileges (*see* Price 1906, Appendix J). This promise was made in a Proclamation following Elizabeth's "Golden Speech," which had closed out the Parliament of 1601 and extensively addressed the issue of monopoly grants (*see* Price 1906, Appendix K; 1 *Cobbett's Parliamentary History* 940-42).

However, Elizabeth's proclamation had not authorized invalidation of the grants, only the legal review of their execution and manner of exercise. The notion that courts had the power to declare legal limits on her prerogative, and thereby to invalidate her patents, was tactfully resisted by Elizabeth and her advisors.[42] A compromise position adopted between the monarchy and the courts seems to have been to determine that the monarch had been "deceived" in a patent grant, believing it to be for the public (common) good, perhaps on the basis of misrepresentations made by the applicant. In this way, a patent could be reviewed and invalidated without directly attacking the prerogative. Coke's report indicates that this was one basis for invalidating Edward Darcy's playing-card patent (77 Eng. Rep. at 1264).

Elizabeth's successor, James I (Catholic House of Stuart), continued the patrimonial patent traditions established during her reign, and extended them in ways that were even more resented by his subjects. Lacking Elizabeth's ability to win the love of her subjects, James

[42] "So her Majesty doth notify and signify by these presents that if any of her subjects shall seditiously or contemptuously presume to call in question the power or validity of her prerogative royal, annexed to her imperial crown, in such cases all such persons so offending shall receive severe punishment, according to their demerits." (Price 1906, Appendix J) In the previous Parliament of 1597, Elizabeth's language had been more conciliatory, but less had been conceded: "touching the monopolies, her majesty hoped that her dutiful and loving subjects would not take away her Prerogative, which is the chiefest flower in her garden, and the principal and head pearl in her crown and diadem; but that they will rather leave that to her disposition….they shall all be examined, to abide the trial and true touchstone of the law" (1 *Cobbett's Parliamentary History* 905).

resorted to naked assertions of royal power in order to effectuate his objectives. Unfortunately for him, he needed money to finance his activities; the king had no choice but to call parliaments, and in these parliaments the monopolies were discussed with ever-increasing ferocity. (*See* Nachbar 2005; White 1979; Fox 1947; Price 1906.)

In 1621, Coke drafted a bill to address the issue. The bill referenced James' "Book of Bounty" (1610), which had declared monopolies to be "things contrary to our lawes" (*see* Fox 1947, Appendix VII). Drawing on this legal support, the bill proceeded to "declare and enact" that all grants of monopoly were "utterly void," and should be tried "by the laws of this realm in the King's courts of record"; the bill also prescribed treble damages and double costs against anyone who would attempt to exercise the monopolies prohibited by the act (*see* White 1979, at 128-29). This bill was debated in the Parliaments of 1621 and 1624, and in the course of this debate, particularly in conference with the House of Lords, a number of provisos were added in the attempt to delineate the difference between an illegal "monopoly" and a legal trade-related patent or charter. The final result of this debate and drafting was the Statute of Monopolies, enacted in 1624.

Before turning to the contents of the Statute of Monopolies (1624), it is important to note that the involvement of Parliament in matters of trade was not entirely new. Statutes passed during the reigns of Edward III and Richard II had aimed at freeing merchants from the interference of "Charters and Franchises" disturbing their ability to profit from trade (*see* Fox 1947, at 59). However, many of these statutes were piecemeal, and indeed the general state of English statute law was approaching confusion; a number of statutes addressed the same subject-matter, and some were no longer in force but had not been repealed (*see* White 1979, at 46-85). Moreover, the earlier statutes did not specifically address the new uses to which the patent

tradition had been put during the reign of Elizabeth, or the new economic conditions resulting from the development of entirely new industries on English soil and new trades abroad (*see* Fox 1947; Price 1906).

The goal of the Statute of Monopolies (1624) was to clearly declare certain exercises of the patrimonial patent tradition illegal, and to separate these from legal patents and charters, which did in fact restrain trade and create monopolies, but which were nonetheless viewed as perfectly legal and acceptable exercises of prerogative power. During the debate, some had even suggested defining the word "monopoly," since "the etymology of the word may be larger than the true definition or civil description of the thing" (White 1979, at 133). However, Coke successfully resisted such efforts, while at the same time compromising on the insertion of specific provisos, which preserved certain existing patents and charters, and declared certain future patents and charters to be legal (*see* 4 Stat. 1212-14; White 1979, at 129-35).

First among these provisos were the exceptions for "any Patente and Graunte of Priviledge…of the sole workinge or makinge of any manner of newe Manufacture within this Realme, to the first and true Inventor or Inventors of such Manufactures" (4 Stat. 1213). The terms of these patents and grants of privilege were explicitly limited: 21 years (or under) for patents already granted, and 14 years (or under) for future patents. These exceptions provided a clear statement of the belief, held certainly by Coke and apparently by many of his contemporaries in Parliament and in the courts, that the common law sanctioned such patents as legitimate exercises of prerogative power (*see* White 1979, at 129-35; Fox 1947, at 125).

According to this belief, Parliament was only declaring in the Statute of Monopolies what had always been true under common law, while perhaps adding some clarity in delineating specific patent terms. Nevertheless, it remains true that this is the first clear statement of the

principle that patents for new inventions are legally sanctioned, and distinct from illegal "monopolies". As such, it is the first canonical text in the English legal tradition pertaining to patents of invention (as opposed to the older, patrimonial patent traditions and the prerogative tradition). Occupying this prime position in the English patent tradition, the Statute of Monopolies also became a canonical text in the American, Canadian, and Australian patent traditions.

Analogies and contrasts between patents for new inventions and copyrights had been explored in an unreported case immediately preceding *Millar* (*see Millar*, 98 Eng. Rep. at 210-12); these comparisons established certain forms of argument that were drawn into the *Millar* and *Donaldson* cases. From the narrowest perspective, these analogies and contrasts concerned the issue of statutory interpretation. The question was whether, and to what extent, the interpretation of the Statute of Monopolies could shed light on the interpretation of the Statute of Anne (1710), which vested the "sole Right and Liberty" of printing books in their authors for a period of 14 years (a period that would be automatically extended to 28 years if the author remained alive at the end of the first 14-year term) (*see* 9 Stat. 256-58).

The Statute of Anne, and the issues relating to its interpretation, will be discussed below. However, it is important to note here that certain of the analogies drawn to the Statute of Monopolies were drawn with a narrow reference to the issue of statutory interpretation. For the legal actors who referred to the Statute of Monopolies in this way, it provided a degree of authoritative guidance as to how the Statute of Anne should be interpreted, particularly in deciding whether the Statute of Anne was to be interpreted as precluding the possibility of common law rights and remedies for authors.

Nevertheless, most of the arguments referencing the Statute of Monopolies as a legal authority in the *Millar* and *Donaldson* cases went beyond the narrow question of statutory interpretation. These arguments were directed more to the nature of the rights themselves: to what extent did the patent for new inventions, sanctioned by the Statute of Monopolies, provide a framework for understanding what kind of right a "copyright" might be? Was it common law property, some strange new kind of property, or was it rather an abhorrent monopoly?

The judge who addressed this question most extensively was Justice Yates, author of the dissent in *Millar*. For Justice Yates, analogies to the patent for new inventions showed that there could be no property in literary compositions, other than in the manuscript itself (*i.e.* the physical paper/parchment). He argued that, just as patents cannot give inventors proprietary rights to the ideas underlying their inventions, but only grant temporary privileges with respect to the particular invention itself, copyrights cannot constitute a proprietary right to the author's ideas, even the ideas underlying the particular style and presentation of the author (*i.e.* the specific composition).

> [W]e all know, whenever a machine is published, (be it ever so useful and ingenious,) the inventor has no right to it, but only by patent; which can only give him a temporary privilege….The [literary property] claim is to the style and ideas of the author's composition. And it is a well-known and established maxim, (which I apprehend holds true now, as it did 2000 years ago,) 'that nothing can be an object of property, which has not a corporeal substance.' (98 Eng. Rep. at 232)

Where no patent had been granted, the inventor's only option was to keep his invention secret; once he made his invention public by selling it, there was no further right in the invention. Thus the exercise of the royal prerogative (as limited by the Statute of Monopolies) provided the only rights for inventors, just as a statutory regime (the Statute of Anne – the "universal patent for authors") provided the only rights for authors. In neither case was there an underlying,

proprietary right to incorporeal ideas invented or written, which emerged with the invention or writing itself.

> Both original inventions stand on the same footing, in point of property; whether the case be mechanical, or literary; whether it be an epic poem, or an orrery. The inventor of the one, as well as the author of the other, has a right to determine 'whether the world shall see it or not:' and if the inventor of the machine chooses to make a property of it, by selling the invention to an instrument-maker, the invention will procure him benefits. But when the invention is once made known to the world, it is laid open; it is become a gift to the public: every purchaser has a right to make what use of it he pleases. If the inventor has no patent, any person whatever may copy the invention, and sell it. Yet every reason that can be urged for the invention of an author may be urged with equal strength and force, for the inventor of a machine. The very same arguments 'of having a right to his own productions,' and all others, will hold equally, in both cases: and the immorality of pirating another man's invention is full as great, as that of purloining his ideas. (98 Eng. Rep. at 2386-87)

By seeking to establish rights going beyond the recognized framework for patents, the Stationers Company was seeking to establish nothing other than an odious monopoly.

> Can this exclusive right of publication, this monopoly which claims an entire dominion over it, and puts an absolute prohibition on every other person, be deemed an encouragement to learning, and to tend to the advancement and propagation of it? There is another light too, in which the consequences of this claim may be highly injurious to the public: and that is the restraints it will lay upon the natural rights of mankind in the exercise of their trade and calling. It is every man's natural right, to follow a lawful employment for himself and his family. Printing and bookselling are lawful employments. And therefore every monopoly that would entrench upon these lawful employments is a restraint upon the liberty of the subject.

Many of these themes were reiterated and developed in the *Donaldson* debates.

But now, having mentioned the Statute of Anne (1710), it is important to discuss how this legislation impacted the debate concerning literary property. This statute, along with the Statute of Monopolies, must be seen in the broader light of an emerging "parliamentary tradition": a developing series of legal authorities addressing the privileges of parliament vis-à-vis the royal prerogative, as well as the legal status of parliamentary acts. Viewed from this perspective, the Statute of Anne and the Statute of Monopolies provide early articulations of a legislative conception of intellectual property, which is often taken for granted today.

Parliamentary and Statutory Traditions

The capture of royal power and prerogative by the Seventeenth Century English parliament is part of a broader story of English constitutional change that cannot be told here; it is a story that has been told by others (*see* Nachbar 2005; Keir 1936; Maitland 1908). However, there are specifically legal dimensions of this development that relate very directly to the emergence of intellectual property.

Thus far, the traditions we have seen addressing the transfer of exclusive privileges to trade in objects derived from the exercise of the mind (craft methods and literary productions) have been primarily royal traditions: the prerogative (legal) tradition and the patrimonial (official) tradition. The anti-monopoly tradition, as we have seen, emerged from the courts and parliament, but it was primarily aimed at delineating limits on the exercise of royal prerogative. However, during the long series of political events now identified with the English "revolution" against the Stuart dynasty – beginning, perhaps, as early as the Parliament of 1621, in which Coke introduced the Statute of Monopolies (*see* Holdsworth 1936; *cf.* White 1979) – an important shift took place in the legal and official traditions pertaining to the issuance of trade-related privileges: these traditions came to be rooted in the interpretation of parliamentary (statutory) enactments and judgments.

The "Long Parliament" – parliaments held in defiance of Charles I during the English civil war, which began in 1640 and continued after Charles' beheading to 1660 (*see* Hobbes 1990 [1682]) – took over the royal prerogative tradition pertaining to printing, thereby continuing the basic framework for censorship and regulation that had sanctioned and strengthened the Stationers Company's exclusive rights in printing and publishing since 1566.

However, the parliament made two important changes to the regulatory framework: (1) they substituted themselves, as overseers of the regulatory regime, for the "High Commissioners in Causes Ecclesiastical" and the Privy Council, and (2) they introduced the Justices of the Peace, as well as other secular "officials," into the framework for official enforcement, as a support to the Stationers Company's own deputies, which had been the primary enforcers under the Elizabethan framework.

These developments, along with the retention of the basic framework of regulation under the aegis of the Stationers Company, are first evidenced in the "Ordinance for the Regulation of Printing," issued under the authority of the "Lords and Commons in Parliament" in June 1643. They are also reflected in the much longer "Act Against Unlicensed and Scandalous Books and Pamphlets, and for Better Regulation of Printing," issued in September 1649.

Most significantly, the parliament began referring to the Stationers Company members as "***Owners*** of the Copies" of books registered in their names in the registry books of the Company. Since the 1637 Star Chamber decree discussed above did not use the language of "ownership" when referring to the members of the Stationers Company registered as rightful printers of the copy, we can pinpoint the shift in legal language – from the language of registered licensing to the language of "ownership" – to this exact moment in time: 1637-1643. At the same time, we see in 1637 and 1649 the first regulatory discussions of the "mark" of the Stationers Company, in prohibitions against "counterfeiting" the "name, title, marke or vinnet" of the Company.

So Parliament was in some ways continuing the framework in place since 1566, while it was in other ways introducing changes. For our purposes the most important continuity relates to the Stationers Company: excepting the Universities of Oxford and Cambridge, the king's printer(s), and the few independent holders of printing patents, the Stationers Company remained

the sole authorized printer in England, and the primary enforcer of this privileged status. Most significantly, the Stationers Company's registry books remained the sole record of licenses to print: they indicated which individuals were the holders of copy-rights. From a semantic perspective, the important change introduced by parliament was the legal description of these holders of copy-rights as "owners."

According to Stephen White (1979), a decisive shift in parliament's self-conception, *i.e.* its conception of its constitutional role and relationship to the monarchy, occurred in the late 1620's, after the enactment of the Statute of Monopolies. In the parliaments of 1625 and 1628, leaders in the House of Commons (prominent among them Edward Coke) began to lose confidence in the monarchy; they increasingly believed that more explicit recognition of parliament's privileged role in protecting the rights of citizens and the common good would be required, if such rights and the common good were to be preserved at all. Significantly, among the rights of citizens Commons leaders focused upon, the rights of property were particularly emphasized. Parliament began to conceive of itself as the primary guardian of citizens' rights, especially their property rights and personal liberties.[43]

Parliamentary speeches, bills, and negotiations with the king began to focus specifically on the establishment of parliament's constitutional privileges and roles (*see* White 1979). Crucially, these privileges and roles were not presented as new; they were rather presented as having been established and continued through ancient precedents, traceable ultimately to the Great Charter (Magna Carta) of 1215. However, even when both sides conceded these precedents, the question of their legal interpretation still remained. For the king, established

[43] Resolution of the House of Commons, 1628: "the ancient and undoubted right of every free man is that he hath a full and absolute property in his goods and estate, and that no tax, tallage, loan, benevolence, or other like charge ought to be commanded or levied by the King, or any of his minister [sic], without common assent by act of parliament" (quoted in White 1979, at 229).

parliamentary privileges (*e.g.* freedom of speech without fear of arrest) were interpreted as being based on beneficent "grace", *i.e.* royal prerogative grant, which meant that they could be retracted. For parliament, especially the Commons, it became increasingly important to establish that these privileges could not be retracted, that they existed as a matter of ancient "rights," vested in parliament, independent from and of equal weight with the royal prerogative.

With this as background, we can better understand how the changes introduced by the Long Parliament into the framework for regulation of printing and publishing may have been linked. Parliament was substituting itself for the monarchy (and the ecclesiastical powers) as the overseer of the regulatory framework implemented by the Stationers Company and the justices of the peace. At the same time, parliament was rhetorically elevating the legal position of the holders of copy-rights. In its position as guardian of the rights of citizens, particularly their property rights, parliament was elevating the Stationers' copy-rights from (1) temporary privileges vested by operation of the royal prerogative to (2) property recognized as such by parliamentary act.

This rhetorical elevation of copy-rights to the status of property continued after the Restoration under Charles II. In 1662, Charles II "by and with the Consent and Advise of the Lords Spiritual and Temporal & Commons in this present Parliament assembled" enacted an "Act for preventing the frequent Abuses in printing seditious and unlicensed Bookes and Pamphlets and for Regulating of Printing and Printing Presses" (hereinafter the "Licensing Act of 1662"; 5 Stat. 428). This bill shows remarkable similarity to the 1637 Star Chamber decree, and it again continues the basic regulatory framework established since 1566.[44]

[44] The Stationers Company registers serve as the record of licensed printers and holders of "copy-rights"; the Stationers Company is the primary enforcer of the regulatory regime, with broad search and seizure powers; the Stationers Company registers printing presses; with the exception of the Universities and other specifically licensed

While retaining the basic regulatory framework, the Licensing Act of 1662 reverted to the overseers established in the 1637 Star Chamber decree: parliament was displaced by the Archbishops as the licensor of content and overseer of the regulatory regime. Nevertheless, the proprietary language of copyright introduced during the Long Parliament was continued: the Act prohibited the printing or importing of any copy, with respect to which another had a right by virtue of a patent or an entry in the Stationers Company registry books, without the consent of the "Owner or Owners Proprietor or Proprietors of such Copy" (§V). Here we see the entry in the Stationers Company registry books placed on parity with a printing patent, and the rights established by either method being referred to in the language of property.[45]

In addition to the rhetorical use of proprietary language, the important thing to see here is the extent to which parliament was taking over aspects of the prerogative and patrimonial traditions, and introducing changes in the process. The "rules and rights" relating to the printing of copies and to patents were increasingly being delineated by parliament, which means that legal interpretation of these rules and rights was increasingly a matter of statutory interpretation.

This shift was noted in 1681 by the Court of King's Bench in *The Company of Stationers v. Lee* (98 Eng. Rep. 927). The court in that case noted that the remedies for violation of a printing patent were prescribed by the Licensing Act of 1662 (98 Eng. Rep. at 928). Since the patent at issue had been granted by the monarch pursuant to the prerogative and patrimonial traditions, this case reveals an understanding that the source of a right might be provided by a legal tradition distinct from the legal tradition that prescribes the penalties for violating the right. This potential for a separation in the legal basis for a right and the remedies for its violation

printers, the Stationers Company remains the sole licensed printer in England; the number of licensed printers with the Company is limited to 20; and the transmittal of the knowledge and capacity to engage in printing is limited the requirement that a printer, bookseller or bookbinder serve a proper apprenticeship.

[45] The Act also continued the prohibition against counterfeiting the "mark" of a licensed printer, along with the use of the justices of the peace as a supplement to the enforcement powers of the Stationers Company.

provided the grounds for debate over the interpretation of the Statute of Anne (9 Stat. 256 (1710)); it was this parliamentary Act that established the statutory basis for debate over literary property in *Millar* and *Donaldson*.

The Statute of Anne – titled an "Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned" – was passed in the eighth year of Anne's reign, a reign that marked the end of the Stuart dynasty, as well as the monarchy of England.[46] The Act that bears her name testifies to the transitional nature of her reign: the Statute of Anne is commonly cited as the precursor to modern Anglo-American copyright acts. However, as Lyman Ray Patterson has shown in his history of copyright law, the Statute of Anne "descends directly" (1968, at 143) from the earlier legal traditions, particularly the parliamentary tradition. In continuing the parliamentary tradition, the Statute of Anne continues the pattern established by that tradition: it takes over aspects of the prerogative and patrimonial traditions, changing them in the process.

With the Statute of Anne, the transition to a proprietary concept of copyright is complete: the Act explicitly declares its intention to "secure" to the "Proprietor" the "Property in every such Book" addressed by the Act (§2). The "Proprietor" whose security is provided for under the Act may be an author, or the purchaser of the copyright from the author. However, the Act makes it clear that copyrights are vested first in the authors of books, and only secondarily in purchasers (*i.e.* printers and booksellers). The term of copyright provided under the Act was 14 years, extended for another 14 years if the author was alive at the end of the first 14-year period (§§ 1, 11). The maximum term of copyright provided under the statute of Anne, therefore, was 28 years.

[46] Following the Acts of Union (1707), Scotland and England became the "united kingdom" of Great Britain.

However, the question was as follows: did the Statute of Anne merely "secure" copyrights that already existed by virtue of the common law, independent from statutory law, providing for certain explicit penalties unavailable under common law in the event the law was violated? We have just seen from *The Company of Stationers v. Lee* how such an interpretation of the statute might be possible, if one considered the basis for the right to be separate from the basis for its remedy. On the other hand, one might decide to interpret the Statute of Anne as providing a solely statutory basis for the right itself. According to this interpretation, copyright was solely a creature of statute: some kind of proprietary right was born with the act of authorship, but it died at the end of 28 years, the birth and death occurring by operation of statute. The second interpretation prevailed in the *Donaldson* case, while the first interpretation prevailed in *Millar*.

It is important now to recall that the literary works at issue in *Millar* and *Donaldson* had been written and sold by their author roughly 40 years before the cases were being litigated. There was therefore no possibility of claiming under the Statute of Anne. The only hope for the Stationers Company was to claim that the copyrights at issue were protected under common law, which would provide an independent basis for the rights, and an independent set of remedies for their violation.

The Justices of the King's Bench concluded in 1769 that the common law did provide this independent basis for copyright, while the House of Lords concluded in 1774 that the statutory basis for copyright was the sole basis for that right. Much of the debate turned on the import of the word "secure". For some, its implication was that a right must precede it; one can only "secure" something that already exists. For others (namely Justice Yates), the Statute of

Anne positively vested the rights to copy, thus excluding any other legal basis for those copyrights, even granting that such a basis had existed prior to the Statute of Anne.

The debate became a debate over statutory interpretation, with authorities being cited to provide basic maxims of statutory interpretation. Thus, for example, Justice Aston cited Coke's *Institutes* and Rolle's *Abridgment* as authorities for the legal proposition that "if a statute gives a remedy in the affirmative, (without a negative, expressed or implied) for a matter which was actionable before by common law; the party may sue at common law, and waive his remedy by statute, if he pleases" (*Millar*, 98 Eng. Rep. at 227).

Prior cases interpreting the Statute of Anne could also be adduced as authorities for a particular interpretation of the Statute. The cases of *Millar v. Kincaid* (1750), *Baskett v. University of Cambridge* (1758), and *Tonson v. Collins* (1761 & 1762) had all involved extensive discussion as to the proper interpretation of various parts of the Statute of Anne. They therefore left records of authoritative interpretations of the Statute, which could be distinguished or followed, but which had to be addressed in the *Millar* and *Donaldson* cases.

The important point for our purposes is that the question as to whether literary property was a form of property turned to a large extent on statutory interpretation. In the parliamentary tradition of intellectual property, the legal authorities are parliamentary acts, cases interpreting parliamentary acts, and treatises stating basic principles for the interpretation of parliamentary acts. The parliamentary tradition makes legal interpretation (the activity of semantic legal ordering) a matter of statutory interpretation. As the *Millar* and *Donaldson* cases show, statutes are subject to varying interpretations. Therefore, as we see here, the basic process of semantic legal ordering that follows the enactment of a statute is as follows: strands of legal tradition emerge, providing legacies of authoritative interpretation for future generations of legal actors.

With the parliamentary tradition, we have seen an emerging legal conception of authors and their publisher-assignees as "owners" of copyrights. However, we have also seen that the Stationers Company was playing a very significant role in the legal developments. What, precisely, was their role, and why was it that the jury's special verdict placed such heavy emphasis on their articles of incorporation and by-laws? In order to answer these questions, we must turn to another legal tradition referenced in the *Millar* and *Donaldson* cases: the *lex mercatoria* (law merchant) tradition.

Lex Mercatoria and Usages of Trade: Traditions of Commerce, Industry, and Economic Incentives

At the same time that the English monarchs were relying upon patrimonial traditions (letters patent and charters conveying exclusive trade privileges) to encourage the development of industries within their territories, they were also relying on these traditions to encourage and control the development of cities and other civic bodies within their territories. In fact, this latter use of the patrimonial traditions was older, as can be seen from the foregoing discussions of *Bracton* and the anti-monopoly tradition.

Indeed, the traditions of Europe's local communities and associations – her cities, guilds, manors, counties, and hundreds – are so ancient that they disappear into the mists of the early medieval period. Nevertheless, records have been preserved, some of which have been incorporated into later legal traditions (*see generally* Sewell 1980; Brentano 1927; Gierke 1913; Unwin 1908; Smith 1870).[47]

[47] The publication and careful study of these early records, along with the fierce debates concerning their proper interpretation, are due in large part to the efforts of Nineteenth Century scholars, including Lujo Brentano, Otto Gierke, William Friedrich Maitland, Toulmin Smith (along with his daughter, Lucy Toulmin Smith), and George Unwin. Max Weber's writings on the guilds are scattered throughout his corpus. In his economic-historical

From the perspective of social history, these communities and associations are significant because they reveal the life of the "middling sort" (Merriman 2004), the countless individuals whose names have not been transcribed in history books, who nonetheless made history through their day-to-day activities (*see also* Sewell 1980). From the perspective of legal history, these communities and associations are also significant because they include the earliest European "corporations"; as such, they contributed to later legal developments of the corporate concept, including its extension to the nation-state and the limited-liability "firm" of modern, rational capitalism (*see* Weber 2003 [1889]; Williston 1888).

As local associations providing mutual help, collective guarantees of orderly behavior, and revenue-collection, these communities and associations could be an invaluable support to weak monarchies. In exchange for assistance in revenue-collection and governance, the early European monarchs were willing to recognize broad powers of self-governance on the part of these communities and associations, which were sometimes memorialized in the form of written charters. Even in the absence of such formal recognition, they tended to develop strong, local traditions of self-governance, which were characterized as binding "custom" among their members, and in relation to outsiders. Sometimes these traditions of self-governance were formally recorded in by-laws, while at other times they remained unwritten, oral traditions. Whether written or unwritten, these traditions of local self-governance gradually came into tension with emerging national laws, and questions as to their legal status were periodically raised. (*See* Berman 1983; Brentano 1927; Gierke 1913; Unwin 1908; Smith 1870.)

In England, many of the decisions recording the legal resolution of such questions date from the Seventeenth and Eighteenth Centuries. One solution was to allow local custom (or

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writings, he drew a distinction between the "merchant guild" (*Gilde*) and the older, "craft guild" (*Zunft*) replaced by the merchant guilds (*see* Weber 2003 [1927], at 136-61, 230-35; Weber 1991, at 110-48, 203-208).

"usage") to be pleaded as a "particular" law applicable to the case and the parties (*see* Blackstone 1979 [1765], at 74-9), even where the custom would not be sanctioned under current law. In *The Case of the City of London* (8 Coke's Reports 121b; 77 Eng. Rep. 658 (1610)), for example, a custom prohibiting any "foreigner" – any person who hadn't become "free" of the city, a status which was typically granted after serving an apprenticeship in a guild – from having a shop or carrying on any trade in the city was determined to be valid as a matter of custom, even though it would not be valid as a matter of "grant" (*i.e.* if then granted through a charter or patent) (*see also* Holdsworth 1927). Recognizing that this determination sanctioned a significant restriction on trade, thus running contrary to the recent holding in *Darcy v. Allen*, Coke penned the following words of the court:

> And it is true, trade and traffic cannot be maintained or increased without order and government; and, therefore, the King may erect *guildam mercatoriam*, *i.e.*, a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance or diminution of it (77 Eng. Rep. at 663).

The legal tradition recognizing that corporate bodies (cities and guilds) might adopt rules and customs for their own internal governance, allowing these rules and customs to be pleaded as binding law in disputes concerning such corporate bodies, will be referred to here as part of the "law merchant" (*lex mercatoria*) tradition (*see* Prager 1952, at 129; *cf.* Baker 1973). "Usages" will refer to the specific customary practices within these corporate bodies, which are pleaded as governing law. Recognizing the existence of this *lex mercatoria* tradition, we are in a much better position to understand why Blackstone and the other advocates for the Stationers Company introduced the Company's charter and by-laws as evidence in the *Millar* and *Donaldson* cases.

The Stationers Company's corporate charter – which, the reader will recall, had been granted by Philip & Mary in 1556, and confirmed by Elizabeth in 1559 – contained several

provisions of particular relevance to the question of literary property. The language of incorporation was as follows:

> [W]e ordain, create, erect, make, and appoint by these presents the foresaid Master Wardens and community in deed and in name one body by themselves for ever, and one commonalty for ever incorporated of one Master and two Keepers or Wardens and the community of the same mistery or art of Stationary of the foresaid city of London, and we incorporate the Master, Keepers or Wardens and community, and we will, grant, create, erect, ordain, make, declare and appoint them by these presents to be a corporate body by the name of "The Master and Keepers or Wardens and Community of the mistery or art of Stationary of the City of London," for ever to endure really and in full; and that the same Masters, Keepers or Wardens and community may have for the future perpetual succession. (I Arber 1875, at xxix)

By this act, the Stationers Company was erected as a corporate community with "perpetual succession," meaning that Company would henceforth have its own property, which would be held in its name for as long as it endured, *i.e.* forever. The Company was endowed with the capacity to sue and be sued under its name in any court, and to make "ordinances, provisions, and statutes" for "the good and sound rule and government" of the incorporated community (I Arber 1875, at xxix-xxx). Most significantly, the Articles of Incorporation provided further that:

> No person within this our realm of England or the dominions of the same shall practise or exercise by himself or by his ministers, his servants or any other person the art or mistery of printing any book or any thing for sale or traffic within this our realm of England or the dominions of the same, unless the same person at the time of his foresaid printing is or shall be one of the community of the foresaid mistery or art of Stationary of the foresaid City, or has therefore license of us, or the heirs or successors of us the foresaid Queen by the letters patent of us or the heirs or successors of us the foresaid Queen. (I Arber 1875, at xxx-xxxi)

By its act of incorporation, then, the Stationers Company was set up as a community of members exclusively privileged, to varying degrees, to practice the "art or mystery" of printing. At the same time, the Company was given broad search and seizure powers to enforce this exclusive privilege (I Arber 1875, at xxxi).

Beginning in 1557, the Company recorded the internal allocations of "Copyes as be licyensed to be printed by the master and wardyns of the mystery of stacioners" (I Arber 1875, at

74). Next to an individual's name and the "copy" allocated to the individual (*e.g.* "To William pekerynge a ballet called *a Ryse and wake*") the records present a monetary figure, which indicates the fee paid by that individual to the Company for the license of the copy (*e.g.* 4 pence). These records were placed alongside annual records of expenses, which were regularly incurred for the annual dinner connected with livery pageantry, and periodically incurred to provision the monarchy (*e.g.* with grain or ships). Regular accounts were also kept of fines imposed on members, which prominently included fines for printing without license (*see generally* I Arber 1875).

Given this method of accounting for the internal allocations of the printers' "copy" in books, which corresponded to a legally-sanctioned exclusivity vis-à-vis that copy, it is not surprising that the Stationers Company regarded their exclusivity vis-à-vis copies (*i.e.* their copy-licenses or "copy-rights") as valuable, seeking to enforce and enhance that exclusivity to the greatest extent possible (*see generally* Patterson 1968; I Arber 1875). A valuable contribution to the wealth of a Company with perpetual succession, these copy-rights were soon described using the language of property. As there is evidence of early involvement of legal actors in the affairs of the Company (I Arber 1875, at 32),[48] it is very possible that the use of proprietary language was suggested by legal actors. However it was first suggested, the use of proprietary language was included in the Company's legal documents, which prominently included its by-laws and other "ordinances" (see I Arber 1875, at 3-26).

Thus, in the Company's by-laws of August 17, 1681, fines for printing any copy allocated to another within the Company were prescribed on the basis that:

> Whereas several Members of this Company have great part of their Estates in Copies; and by ancient Usage of this Company, when any Book or Copy is duly Entred in the Register Book of

[48] "Anno 1550, the 13 of march, Maister Sholmeley of Lincolns inne promised to be of counsaile with the companie of Sationers when they shuld conueniently Desyre him" (I Arber 1875, at 32).

> this Company, to any Member or Members of this Company, such Person to whom such Entry is made, is, and always hath been reputed and taken to be Proprietor of such Book or Copy, and ought to have the sole Printing thereof; which Priviledg[e] and Interest is now of late often violated and abused (I Arber 1875, at 22)

In these same by-laws, the language of "ownership" was used in relation to the printing patents granted to members of the Stationers Company and others (*see* I Arber 1875, at 23-4).[49]

In by-laws adopted May 14, 1694, an even more strongly evocative proprietary language was used (certain altered language is emphasized):

> Whereas *divers* members of this company have great part of their estates in copies, duly entered in the register-book of this company; which, by the ancient usage of this company, is, are, or always hath or have been *used*, reputed, and taken to be *the right and property of such person and persons (members of this company)* for whom or whose benefit such copy and copies are so duly entered in the register-book of this company; *and constantly bargained and sold, amongst the members of this company, as their property; and devised to children and others, for legacies, and to their widows for their maintenance*; and that he and they to whom such copy and copies are so duly entered, *purchased, or devised*, ought to have the sole printing thereof (Millar, 98 Eng. Rep. at 204)

These by-laws of 1681 and 1694 were read into the jury's special verdict in the *Millar* case, thus becoming part of the "facts" upon which the justices based their decision (see 98 Eng. Rep. at 203-204). At a minimum, it was clear from these by-laws that the Stationers Company had claimed copy-rights as property, and were treating them as such in their legal relations with one another. This practice, which gave rise to the *Donaldson* case and its dispute over Andrew Millar's estate, can, according to the terminology given above, be labeled a "usage".

Beyond seeking recognition of this proprietary usage as a matter of fact, however, counsel for the Stationers Company argued in *Millar* and *Donaldson* that, according to the *lex mercatoria* tradition, the usage established the law applicable to these cases. In other words, the Stationers Company lawyers were arguing that the Company's proprietary usages established a

[49] The by-laws also prohibited Company members from revealing the Company's "lawful secrets, conferences, or consultations" (*see* I Arber 1875, at 14).

customary proprietary law, according to which copyrights were the legal property of the Company's members.

At this point, the reader might be wondering how, after the Statute of Monopolies, the *lex mercatoria* tradition could have been coherently used in the Stationers Company's attempt to sanction apparently-monopolistic usages. The answer is simple: the Statute of Monopolies contained a number of specifically-negotiated exceptions (*see* 4 Stat. 1213-14) applicable to the Stationers Company. All letters patent and grants of privilege relating to printing were excepted out of the statute by proviso, as were grants of office by means of letters patent or charter. The biggest exception, however – an exception that fueled development of the antimonopoly tradition during the reign of Charles I – was that provided for guilds, cities, and other "corporations":

> Provided also, and it is hereby further intended, declared, and enacted, That this Act or any thing therein contained shall not in any wise extend or be prejudicial unto the City of London, or to any City, Borough, or Town Corporate within this Realm for or concerning any Grant, Charters, or Letters Patent to them or any of them made or granted, or for or concerning any Custom or Customs used by or within them or any of them, or to any Companies or Societies of Merchants within this Realm, erected for the maintenance, enlargement, or ordering of any Trade of Merchandise, but that the same Charters, Customs, Corporations, Companies, Fellowships, and Societies, and their Liberties, Privileges, Powers, and Immunities, shall be and continue of such force and effect as they were before the making of this Act, and of none other; Any thing before in this Act contained to the contrary in any wise notwithstanding. (4 Stat. 1213)

Treating their copy-rights as property, while documenting this treatment in their by-laws, the Stationers Company sought to establish a legal basis for copy-rights as property pursuant to the *lex mercatoria* tradition. This attempt was ultimately unsuccessful. In the wake of an anti-monopoly tradition gaining strength, as well as the Statute of Anne, which provided statutory rights for authors and their assignees, the Stationers Company's arguments appeared to be mere pleas for a continuation of monopoly. Justice Yates completely dismissed the Company's *lex mercatoria* arguments, stating that if a common law right to property in copyright "existed by the

common law of the land, it could not be spoken of as subsisting only by usage of the company" (98 Eng. Rep. at 237; *see also* Baker 1973).

Nevertheless, while it may not have succeeded in obtaining legal recognition for the full extent of its proprietary usages, the Stationers Company's legal agitation on behalf of its proprietary "interests" had been sustained for long enough to secure some proprietary language in the Statute of Anne (*see* Patterson 1968). Furthermore, the Stationers Company's proprietary usages were reflected in the legal transactions giving rise to the *Millar* and *Donaldson* cases (the contracts and the will purporting to transfer the "literary property" at stake in these cases). Therefore, the fact that the Stationers Company treated its copyrights and patents as property was legally-significant.

Treating the Stationers Company copy-rights as property, formalizing this treatment in Company by-laws and legal documents customarily used for property transfers (contracts and wills), transactional lawyers within the Stationers Company were able to compel judges and parliamentarians to consider this extension of the property concept. While the Company was unsuccessful in getting its customary proprietary claim adopted wholesale into English common law by means of the *lex mercatoria* tradition, it was successful in showing that intangible objects like copy-rights could be treated as property. Pursuant to the parliamentary tradition and the Statute of Anne, this property would belong to authors in the first instance, but it was transferable to publishers by means of contract; for authors desiring a broad-based readership, such transfers could indeed be compelled on terms that were favorable to the publisher. The Stationers Company may have lost the battle, but until authors had independent means of publication, the war had been won (*see generally* Patterson 1968).

Property in Tangible and Intangible Things:
Actions, Rights, and the Common Law Tradition

Regarding the question of literary property as a matter of "first impression" for the English common law, the jurists in *Millar* and *Donaldson* had no directly-relevant case-law precedents from which to draw. The closest case-law precedents were those from the prerogative tradition, which have been already discussed. Additional case-law precedents were available from the Chancery courts, but these did not purport to address the common law question directly. Rather, these Chancery precedents drew on Roman and natural law traditions, which will be discussed momentarily. Nevertheless, the jurists involved in the *Millar* and *Donaldson* cases, especially Justice Aston, drew on the common law tradition in formulating and communicating their positions with respect to the question of literary property.

As has already been mentioned, a distinctive aspect of the common law tradition is to be found in the extent to which it originally focused on forms of action, rather than substantive rights. The earliest English legal treatises involved commentary on the writs (*breve*) that could trigger application of the King's justice, as well as the procedures according to which the King's justice was to be carried out (*see Bracton*; *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (12th Century; Hall 1965). Following this pattern, the late medieval English common law tradition became a tradition centered around forms of pleading and procedure, and it was here that English legal actors primarily focused their "casuistic" attention (*see* Baker 2002).

The importance of the common law tradition's emphasis on forms of action can be seen in the way it contributed to a distinctive mode of legal reasoning, which drew inferences as to the existence and boundaries of substantive rights from the existence of forms of action to enforce

such rights.[50] Given the limited number of forms of action, this mode of legal reasoning could be very constraining: where there are few forms of action, and they are interpreted strictly, there will be few rights. The Chancery courts, with their application of "equity" principles, provided an important corrective for the formal strictness of the common law, and this helps to explain their popularity (*see* Baker 2002).

Nevertheless, English legal actors revealed their creativity in the ways that they managed to extend the forms of action of the common law tradition. Where a form of action was extended, rights were also extended. Significantly, however, the formal casuistry of legal thought would be primarily focused on the form of action, rather than the right itself. The result was a relative fluidity in the concept of a right, and in the categories of rights addressed by the common law. The "rights" of the common law tradition, in other words, tended to be less clearly delineated and bounded, and therefore easier to extend, so long as the forms of action seen as giving rise to the rights could be extended.

For intellectual property, the significance of the common law tradition's fluid conception of rights can be seen in the arena of "torts": social wrongs addressed in "private law" actions between persons, which typically give rise to compensation obligations. An important common law form of action based on tort is the action for "trespass," which was actually a family of actions in the early common law tradition (*see* Baker 2002, at 60-64).

Andrew Millar brought his claim against Robert Taylor as an action for "trespass on the case" (*see* 98 Eng. Rep. at 202), which had by the Eighteenth Century been distinguished from the closely-related action for trespass, on the basis of the indirectness of causation leading to the

[50] There is a reversal of this mode of legal reasoning in *Marbury v. Madison*, where Justice Marshall drew an inference from the existence of a right to the existence of a form of action to enforce the right.

injury (*see* Baker 2002, at 60-64). The *Millar* case had, therefore, related the question of literary property to the common law tradition of tort-based actions.

Among the four justices who decided the *Millar* case, only Justice Aston focused particular attention on the common law concept of trespass, as it related to Andrew Millar's claim to literary property. However, he did so in a way that was very significant. Admitting that the type of property being claimed was new, Justice Aston went back to the earliest foundations of the common law tradition to argue that the tradition had always been willing to draw new objects of property into its ancient grasp.

> In respect to the several species of property; though the rules touching them must ever have been the same, yet the objects of it were not all at once known to the common law, or to the world: and many have been disputed, as not being objects of property at common law, which yet are now established to be such; as, gunpowder, &c, &c, &c (98 Eng. Rep. at 223).

Drawing on cases from the time of Henry VIII and Elizabeth, which addressed the question as to whether an action would lie to recover stolen dogs, along with the legal treatises of Coke and Brooke, Justice Aston argued that the common law tradition permitted the use of the action of trespass, even where the property at issue was new. From the common law authorities adduced, Justice Aston concluded that the action for trespass on the case was appropriate, since all that was requisite was that there be some "distinguishable property" with a "determinate owner" (98 Eng. Rep. at 223-24). This standard was clearly met in the present case, "for, I confess, I do not know, nor can I comprehend any property more emphatically a man's own, nay, more incapable of being mistaken, than his literary works" (98 Eng. Rep. at 224).

Despite this argument from the common law tradition, Justice Aston's opinion drew primarily from the natural law tradition. It is to this tradition, and its connections to the Roman law tradition, that I finally turn.

Roman Law-Based Legal Traditions

Traditions of immanent and transcendent law always had a place within the broader English legal tradition. The earliest practices manifesting such traditions were straightforwardly "charismatic" (*see* Weber 1978 [1922]; Weber 1967 [1922]): ordeals and battles were relied upon to reveal divine justice, and the "rightness" of an individual's cause. The early written traditions preserve memories of these older, unwritten traditions. Even after the Norman conquest, as the king's justice was advancing against the older traditions, trial proceeded by battle in many cases (*see Bracton*; *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (12th Century; Hall 1965).

However, as in Continental Europe, many of the early royal officials were clerics, especially the judicial and chancery officials. As can be seen in *Bracton*, these legal actors personified traditions of Roman law and canon law. They had been educated in universities modeled to varying degrees on those of Paris and Bologna.

Justinian's educational treatise in Roman law, the *Institutes*, followed an earlier tradition in dividing the basic subject-matter of Roman law into three fundamental categories: persons, things, and actions (1987 [533], at I.2.12; 1988 [~160], at I.8). "Things" (*res*) were, in turn, divided into two basic categories: those of "private wealth" (*patrimonium*) and those not of private wealth. Further categorical divisions of "things" were made based on their "modes of acquisition" and their ontological "nature"; this ontological nature of things might, in turn, affect their modes of acquisition and determine whether they could be within the category of private wealth, or not. Certain things, for example, by their very nature belong to everyone: the air, flowing water, the sea, and the sea-shore (1987 [533], at 2.1). Certain other things are

"corporate" (*universitatis*), belonging not to an individual but to a town or a community of citizens (1987 [533], at 2.1.6).

One very important ontological, categorical division between things was based on their physical nature: some things are corporeal, and can therefore be touched, while other things are incorporeal, and cannot be touched. According to the *Institutes*, the incorporeal things that cannot be touched are "constituted by legal rights" (*in iure consistunt*): inheritance, usufruct (rights to use and profit from a thing), "obligations however contracted," and servitudes (which are similar to easements) (1987 [533], at 2.2.2). These rights relate to corporeal (tangible) things, as for example would be the case with an inheritance. However, they are nonetheless intangible things.

As for the legal modes of acquiring things, some of these were based on the law of nature (*ius naturale*), some of them were based on the law of all peoples (*ius gentium*), and some of them were based on "state law" (*ius civil*). The first two were considered to be much older than the civil law, and were seen as being roughly equivalent.

> Things become the property (*dominium*) of individuals in many ways, some by the law of nature, which, as we have said, can be described as the law of all peoples, and others by our state law. It is easier to begin with the older law. Obviously natural law is earlier. It is the product of the natural order, as old as man himself. Systems of state law did not start to develop until cities were founded, magistracies were established, and law began to be written. (Justinian 1987 [533], at 2.1.11)

From this brief quote, we can see how the "natural law" and the "law of all peoples" ("law of nations") were presented as being immanent in a discoverable source of "order" within nature and society. This was a source of law not dependent upon any sovereign, and it provided the basis for two closely-related modes of acquiring property: occupation and accession.

One acquired property by occupation (*occupatio*) by acquiring it under circumstances indicating that it had no owner, or at least no legitimate owner. Wild animals could be captured

and acquired by occupation, as could things captured from an enemy in war. Principles of accession followed a somewhat analogous process of reasoning, and applied to the following question: "Suppose one man makes something out of another's materials. Who is it reasonable to see as owner, the maker or the owner of the materials?" (Justinian 1987 [533], at 2.2.25)

This question had apparently generated debate among schools of jurists during the classical period of Roman law. According to Justinian's drafters, the "middle view" finally adopted was: "if the thing can be turned back into its materials, its owner is the one who owned the materials, if not, the maker" (2.2.25). On the other hand, if something had been made from materials belonging partly to the maker and partly to another owner, "ownership vests, without a doubt, in the maker," since he has contributed "not only his work but also even part of the material" (Justinian 1987 [533], at 2.2.25).

With the rise of the medieval universities, the categories of "natural law" and the "law of nations," especially the categories of property and property-acquisition, became part of the basic language in which transcendent matters of divine justice, ethics, and law were discussed. Because the individuals engaging in these discussions tended to share a foundational training in the texts of Roman and canon law, the connections that they drew among concepts tended to reflect the connections drawn in the texts of Roman law, especially the *Institutes*. Thus, for example, the debates over monastic poverty were conducted in the language of *ius*, *dominium*, and *occupatio* (*see* Tierney 1997).

The result, enhanced by the rise of humanism, was a "natural law" tradition that was applied to many different types of social problems and conflicts, and in ever-creative ways. Thomas Aquinas is an important early figure interpreting this tradition, and Thomas Hobbes is an important later figure interpreting this tradition. The differences between these two writers

reveal the wide range of social problems in response to which the tradition could be deployed, and the wide range of meanings that could be made through interpreting this tradition.

During the Seventeenth Century, this scholarly *ius commune* tradition of commentary on Roman law was developed in new directions to respond to the horrific social problems generated by the Thirty Years War, and the aggressive behavior of emerging nation-states. Through the scholarship of Hugo Grotius and John Selden, among others, the "law of nations" (*ius gentium*) was transformed into a law applying between nation-states in the conduct of war, in the acquisition of new territory, and in claims of sovereignty to the seas. The law of nations thus became an *inter*-national law, consideration of which was relevant to questions not addressed by positive, national laws (*see* Neff 2012 [1625]; Tuck 1999; Tierney 1997; Tuck 1979).

At the same time, the language of natural law became part of a broader debate over ethics and morality, a search for moral principles rooted not in particular religious faiths, but in universal principles of reason that can be agreed to by all rational individuals. Through the scholarship of John Locke, David Hume, and Immanuel Kant, among many others, the language and concepts of natural law became part of a broader rhetoric of enlightened morality, which could be broadly deployed to address social problems, including problems rooted in the law itself (*see* Buckle 1991). Thus, John Locke's natural law theory of property, with its labor theory of value, strongly echoes the *ius commune* themes of accession and occupation, while purporting to reflect only the result of natural reason (*see* Locke 1988 [1698]).

These Roman law-based traditions of *ius commune*, natural law, and the law of nations, were drawn upon heavily in the *Millar* and *Donaldson* cases. In wide-ranging, general discussions, they supported "principles of justice and morality" that were asserted as helping to decide the case. Thus, for example, Justice Mansfield argued that literary property should be

upheld as a legitimate type of property under English common law "because it is just, that an author should reap the pecuniary profits of his own ingenuity and labor" (98 Eng. Rep. at 252). Justice Aston, relying heavily on William Wollaston's recent treatise on "The Religion of Nature" – which featured lengthy discussions on the nature of property – also considered general criteria of justice and rightness as decisive for the case of literary property.

Justice Yates, who was similarly liberal in his reliance on the *ius commune* and natural law traditions, interpreted them as decisive against the case for literary property. Focusing heavily on the incorporeal nature of "intellectual" property, Justice Yates argued that an extension of property in this incorporeal direction would undermine the basic principles of property acquisition and ownership that had sustained the English legal system up to that time. He also argued that the monopolies such a physically-unlimited form of property would enable would produce great injustices, and harms to innovation.

The language of justice was, as we have seen, partly a product of the Roman law tradition, and the concept had been extensively developed in the *ius commune*, natural law and law of nations traditions. Justinian's *Institutes* had defined justice as "the constant and perpetual will to render to each person his own right"[51] (1987 [533] at I.1). Due in no small part to the scholarly efforts of Thomas Aquinas, discussions of justice within the broader natural law tradition were heavily influenced by interpretations of Aristotle's writings. In England, the concept of "equity," upon which Aristotle had laid particular emphasis in his legal and ethical works, came to be seen as an important corrective to the rigidities of the common law tradition, which could result in injustice in particular cases. Over time, the Chancery courts became juridical locations within which application of equity principles could be sought (*see* Baker 2002).

[51] Iustitia est constans et perpetua voluntas ius suum cuique tribunes.

A number of chancellors applying equity principles had ruled in favor of Stationers Company members, as well as others seeking enforcement of rights relating to printing patents or copyrights. Therefore, a number of Chancery precedents were relevant to the *Millar* and *Donaldson* cases. Although relevant, however, these cases did not provide authoritative precedents as to the interpretation of English common law. Rather, they were adduced to show how the Chancellors had treated claims to literary property. If it could be shown that the Chancellors had assumed the existence of such a property, this might provide support for a conclusion that such a property did, in fact, exist. Unfortunately, however, many of the Chancery decisions were unpublished, and those that were published did not always state the reasons for a decision.

Although they were not decisive, the Chancery decisions provided a link to the broader *ius commune*, natural law, and law of nations traditions, *i.e*. to the Roman law tradition. The decisions demonstrated that English law, too, considered questions of "justice" to be relevant to the question of literary property. Since, on the whole, the chancery decisions came down on the side of individuals seeking to enforce copy-rights (whether derived from printing patents or from entry on the Stationers Company registers), the chancery decisions tended to support the argument that justice was on the side of copy-right.

III. Intellectual Property and England's National Property Order

Ultimately, the *Millar* and *Donaldson* cases addressed a categorical question: did the English legal category of property include "literary property" within its conceptual boundaries? The answer was a complicated yes.

The final ruling as to the question of "literary property" was given by the Court of Parliament (*i.e.* the House of Lords, acting in its judicial capacity, see Holdsworth 1922) in the *Donaldson* case. A narrow majority of the Lords concluded that the effect of the Statute of Anne had been to substitute its statutory framework for the common law basis of literary property that existed prior to 1710. However, the Lords left no official record of the specifically-legal reasons for their decision, and the *Millar* case was not "overruled," in the narrow sense of that term. Furthermore, the legal traditions discussed above each contained a number of legal authorities that continued in force, unaffected by the *Donaldson* holding. Thus, while it was clear from *Donaldson* that an author's published literary property would endure only for the period prescribed by statute, there was room to argue that some form of common law copyright continued to exist, at least with respect to an unpublished manuscript, even after the Statute of Anne (*see, e.g., Felter v. Columbia Pictures Television*, 523 U.S. 340 (1998)).

Moreover, because the Statute of Anne used the language of property, drawing as we have seen from the prerogative, parliamentary and *lex mercatoria* traditions, the *Donaldson* case did sanction the extension of the property concept to literary products. The protracted discussions as to the nature of literary property, seen especially in the opinions of Justices Aston and Yates, fortified the conclusion that the property sanctioned was in some way new, an object of property distinctively "intellectual" in nature. Because the *Donaldson* and *Millar* cases both sanctioned the analogy drawn between patents and copyrights, they left a legacy for future generations of legal actors, according to which these two statutory regimes could be drawn together under the label for a new concept of property: an "intellectual property."

Many tasks of semantic legal ordering were left for future legal actors. Standing together, the *Donaldson* and *Millar* cases, along with the other legal authorities from the legal

traditions discussed above, left an ambiguous legacy. What they left were lines of tradition, drawn alongside one another, woven together in distinctive ways by each legal actor involved in the *Millar* and *Donaldson* case. Prerogative and patrimonial traditions, the anti-monopoly tradition, the parliamentary tradition, the *lex mercatoria* tradition, the common law tradition, and the Roman law-based traditions comprising natural law, the law of nations, and equity: all of these traditions would be relevant to the future of intellectual property.

At a minimum, however, two things were clear after the *Millar* and *Donaldson* cases. First, the "intellectual" objects at issue were, in some new sense (however limited), property. Second, this property was basically created pursuant to statute, and it would come to an end pursuant to statute. *It was, in other words, "statutory property", rather than "common law property," a distinction that was new to English legal traditions.* Intellectual property would, henceforth, be a creature of legislation and, later, of "regulatory policy".

The recognition of a new, "statutory" property in England may be seen as part of a broader phenomenon: the emergence of a national property order. This national property order constituted a transformation of the personal property order characteristic of European Estate Society.

To reiterate the discussion in Chapter 1, Europe's personal property order made differentiated legal rights and obligations with respect to material objects dependent upon differentiated legal personalities. Under this personal property order, rights and obligations with respect to material objects depended on legal status, which was determined primarily according to ecclesiastical law (through marriage and legitimate birth) and secondarily by receipt of special legal privileges from an Imperial or ecclesiastical sovereign, through education, or through an apprenticeship.

As a transformation of this personal property order, a national property order is one in which all other gradations in personal legal status are subordinated under a single distinction: that of *national status* as a citizen or legal resident. Membership in the nation-state organization, which is designated by national status, becomes the criterion that determines rights and obligations vis-à-vis material objects. The nation-state is the organization that "encloses" property, that closes off access to the property to all potential takers, enabling exclusive rights and obligations to be granted to nationals, whether these be individuals or corporate legal persons. A national property order is one in which property is derived, fundamentally, from the nation-state.

Unlike their American counterparts, which were soon to emerge, English patent and copyright statutes did not explicitly discriminate against foreign nationals. However, English courts interpreting the Statute of Monopolies did decide that novelty was only to be determined on the basis of novelty *in England* (*see* Fessenden 1810, at 47-48, 187). This interpretation was supported by the fact that the Statute of Monopolies allowed patents to be granted for "any manner of new manufacture *within this realm*" (§5, emphasis added). A foreigner who brought with him a "manner of manufacture" that was commonplace, or protected, in another land could patent it in England, so long as it had not previously been known in England. This is analogous to a failure to recognize foreign patents, and creates an incentive to import techniques from abroad, which would have been seen to be of benefit to English national production.

Likewise, the Statute of Anne created an exception for the importation of books printed in Greek, Latin, or any foreign language (§ 7). These books could be freely imported and sold, regardless of whether they might have been copyrighted in their country of origin. Until 1838, a foreigner who had first published his book in another country had no copyright protection in the

United Kingdom (*see* Deazley 2008). The Court of King's Bench (*Clementi v. Walker*, 2 B&C 861, 867-68 (1824)) had, in fact, decided that the Statute of Anne was intended by Parliament to operate for the benefit of *British* publishers.

> [T]he British Legislature must be supposed to have legislated with a view to British interests and the advancement of British learning. By confining the [copyright] privilege to British printing, British capital, workmen, and materials would be employed, and the work would be within the reach of the British public. By extending the privilege to foreign printing, the employment of British capital, workmen, and materials might be suspended, and the work might never find its way to the British public. Without very clear words, therefore, to shew an intention to extend the privilege to foreign publications, I should think it [the copyright provided by the Statute of Anne] must be confined to books printed in this kingdom, and instead of there being any such clear words to shew that intention, there are provisions which strongly imply the latter.

In 1828, the Vice-Chancellor's court (in an equity proceeding) extended this reasoning to a blanket prohibition against copyright protection for foreigners: "this Court does not protect the copyright of a foreigner" (*Delondre v. Shaw*, 2 Sim. 237, 238 (1828)).

Intellectual property, as it emerged in England, was part of a national property order. The property was based in national legislation, and this legislation was interpreted to operate primarily for the benefit of British national interests. National legal status, the criterion of membership in a national political organization, was the primary determinant of access to British patents and copyrights, pursuant to this system. British citizens and legal residents were the primary beneficiaries of this national property order. By virtue of their national legal status, their potential rights and obligations vis-à-vis material objects (*e.g.* printers' copy or a machine) were categorically different.

The closed social relationship standing behind intellectual property, enabling this new form of property to exist as a matter of social reality, was the nation-state. Semantic legal

ordering contributed to the emergence of this new type of legal property by enabling this new type of legal property to be legally recognized as property, by rooting this new form of property in nationally-uniform legislation, and by making national legal status a significant determinant of access to this new form of property.

Semantic legal ordering had, first of all, contributed to a weakened version of Estate Society in England. On the secular side, the main divide in medieval English law was between free and unfree; relatively few legal privileges distinguished between classes of nobility (*see* Pollock & Maitland 1952, at 407-526). In essence, there were fewer gradations of legal status in England, relative to France and Germany, although noble status was certainly important.

Moreover, in non-criminal cases, the clerical privilege (the privilege of being heard in an ecclesiastical court, or *privilegium fori*) was not recognized in England (*see* Helmholz 2001, at 187-239). This meant that "in England the division in jurisdiction between spiritual and temporal would be based strictly upon the subject matter at issue in each case, not upon the status of the litigants" (Helmholz 2001, at 193). In general, then, the First and Second Estates (the clergy and nobility) enjoyed fewer legal privileges in England, relative to their Continental counterparts. This made it easier to subordinate graduations in legal status to national legal status.

During the English Reformation, semantic legal ordering contributed to the centralization of all jurisdiction, and capacity to grant privileges, within the Royal Prerogative. Henry's Reformation was a "Reformation from Above," a Reformation that made the King head of both Church and State. Henry's early objections to the exercise of papal jurisdiction over the legitimacy of his marriage to Catherine of Aragon, and his eventual assertion of sovereignty over the English church, were expressed in the language of the prerogative tradition (*see* Bernard

2005). Semantic legal ordering, drawing upon the prerogative tradition, gave legal meaning to Henry VIII's incorporation of ecclesiastical jurisdiction within the Royal Prerogative, and therefore to making clerical status and privileges dependent upon the King's legislation and courts.

As we have seen, Parliament's assertion of its privileges vis-à-vis the monarchy was also given meaning through processes of semantic legal ordering. Parliament essentially stepped into the shoes of the King, exercising the functions that had been part of the Royal Prerogative by means of statutory legislation. Working with an Estate system that had been weakly established to begin with, and that had been further weakened during the Reformation, Parliament encountered fewer hurdles in enacting nationally-uniform legislation.

Eighteenth Century England was by no means free of legal status distinctions. Volume I of Blackstone's *Commentaries* (1765) drew a number of distinctions between legal categories of persons. However, although he acknowledged the existence of rights and duties flowing from a person's position in society ("relative" rights and duties), Blackstone considered "absolute" rights and duties, rights and duties flowing from laws that pertained to all Englishmen alike, to be primary. Among these absolute rights, which were shared by all Englishmen, was the right of "private property" (Blackstone 1765, at 125-26): this absolute right, "inherent in every Englishman...consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land," *i.e.* by national laws.

However, in Volume II of his *Commentaries*, Blackstone also acknowledged that these "absolute rights" to private property were tied to very particular legal traditions, and could only be invoked on the basis of those particular legal traditions. With respect to landed property in England, the most important legal traditions were the "feodal" traditions relating to "tenure": the

"holding" of property, subject to a military lord, who was himself subject to the king (*see* Blackstone 1979 [1766], at 44ff.). When it came to patents and copyrights, however, the most important legal tradition was the Roman law tradition, which recognized the acquisition of title to property by "occupancy" (*occupatio*) (*see* Blackstone 1979 [1766], at 258, 405-407). Under this "head" the complex strands of English legal tradition supporting, to various degrees, a temporary right of property in literary works and inventions, could be brought together and synthesized.

Blackstone's use of the Roman law tradition to synthesize English legal traditions makes perfect sense, given his training. Blackstone studied Roman law at Oxford University, receiving a Bachelor's in Civil (*i.e.* Roman) Law (BCL) in 1745 (*see* Prest 2008, at 40, 61-62). He owned a copy of Justinian's *Institutes*, and studied an edition of the *Codex* produced by a Spanish humanist, which was held at the Bodleian Library. References to Roman law sources are liberally sprinkled throughout Blackstone's *Commentaries*, and evidently influenced his basic classification of English law into the law of persons, things, and actions.

Like many of his contemporaries,[52] however, Blackstone's reading of the Roman law tradition was heavily influenced by the natural law school of interpretation. From this perspective, Roman law concepts and principles, especially from the *ius gentium*, were seen as basic reflections of human social nature and reason. Particular rules from the Roman law tradition, which might have produced very "unnatural" outcomes, could be ignored in favor of general categories and principles, which were much more interpretively malleable. These general categories and principles could then be utilized to draw together disparate strands of the

[52] Lord Mansfield, who was born and educated in Scotland, has been described by Lawrence Friedman as an "ardent admirer of Roman-flavored civil law" (1985, at 109).

English legal tradition, enabling a synthesis of that tradition that pointed in new institutional directions.

This semantic legal ordering, by jurists like Blackstone, Mansfield, and countless others, contributed to the institutionalization of intellectual property within an English national property order. Standing between Parliament and the King's courts, writing influential treatises and representing numerous private parties, these jurists drew on categories and principles from the Roman law tradition to give new meaning to social relationships, to appropriation, and to appropriated objects, thereby contributing to new patterns of social activity vis-à-vis material things. As we have seen, the new intellectual property system that they thus helped to form was distinctively national, in that it linked rights and obligations vis-à-vis material things to *national legal status* within a territorial nation-state. Because it heavily emphasized rights, while rooting those rights in particular legal traditions, this English national property order was both "rights-based" and "particularist."

To see how this semantic legal ordering made a difference, we can consider two possibilities, both of which were very real possibilities. First, the argument that patents and copyrights constituted a form of *property* recognized and protected by English law could have been rejected. As we have seen, one of four of the King's judges (Justice Yates) did in fact reject the argument. Second, intellectual property could have been recognized as a form of property, but seen as being rooted in corporate organizations like the Stationers Company, rather than in national law and the nation-state organization.

If England had failed to recognize intellectual property as a form of legal property, it is possible that this form of legal property might never have emerged at all. As we will see, developments in America, France, and Germany built in successive ways upon this early English

transformation. England's peripheral status, relative to the Imperial Estate System, made the emergence of intellectual property, as a new type of legal property, easier, relative to France and Germany. If France and Germany, facing more entrenched Estate Systems and more systematized legal frameworks, had not had the opportunity to witness, in England and America, the powerful effects this new form of legal property could have in mobilizing a national economy, it is possible that the property would never have been recognized and institutionalized in those nation-states. If intellectual property had not formed a vital part of the early, paradigmatic nation-states, it seems unlikely that it would have emerged as the nation-state paradigm diffused.

If intellectual property had emerged in England as a corporate form of legal property, rather than a national and individual form, intellectual property might have followed the basic pattern of Estate Society. Copyrights would have been the perpetual property of the Stationers Company, while particular patents might belong to other guilds. Intellectual property in England, in other words, could have looked very much like the intellectual property analogues in pre-Reformation Nuremberg, which were explored in Chapter 1.

IV. Conclusion

On November 18, 2010, the Federalist Society hosted a panel discussion amongst legal scholars prompted by the following question: is intellectual property ("IP") a "property right," or is it rather a creature of regulatory policy (*i.e.* legislation)?[53] The panelists gave differing responses to the question, but their consensus was that intellectual property is a "hybrid" of

[53] The discussion can be viewed at http://www.fed-soc.org/publications/pubid.2033/pub_detail.asp (last viewed December 15, 2010). The question seems to be perennial. F.D. Prager (1952, at 111): "The main question is whether the principles of general property law *are* applicable, or whether current views are correct in assuming that patents and copyrights are entirely based on written statutes." (*See also* Carrier 2004.)

property and regulatory policy. Legacy of proprietary prerogative, limited monopoly, tort-based remedy, incentive to invent and write, creature of pragmatic Parliamentary compromise and of the common law, as well as natural law-based "right" and justice: Anglo-American intellectual property was fused together from all of these. As the Federalist Society's 2010 panel discussion shows, intellectual property remains all of these today.

In this chapter, I have attempted to trace the first stages in which the intellectual property "hybrid" was institutionalized in Eighteenth Century England, and to show how semantic legal ordering made a difference by weaving a number of legal traditions together to enable that hybrid. In so doing, I have identified six legal traditions that were referenced and interpreted by the legal actors in the *Millar* and *Donaldson* cases.

Among the oldest of the legal traditions, supplying some of the closest case-law precedents, was the prerogative tradition, which had been translated through official traditions exemplified in charters, letters patent, and enforcement by sheriffs. With its fusion of proprietary and governance conceptions, this prerogative tradition provided strong, early precedents for regarding the privileges granted through charters and letters patent as property, albeit a temporary property ultimately adhering in the sovereign. Manifested in the official traditions of printing patent grants, this prerogative tradition provided the legal foundation for the monarch's "prerogative copyright" in legal and religious publications. Writing in a time when memory of the Seventeenth Century's "revolution" against monarchical prerogative was still fresh, William Blackstone had argued that, if such a copyright adhered in the monarch, it must surely also adhere in his subjects.

Arising in response to perceived abuses in the prerogative tradition, the anti-monopoly tradition laid the basis for modern patent law by delineating a category of legally-valid patents,

namely patents for any "new manner of manufacture". Reflecting a broader growth in parliamentary legal traditions, the Statute of Monopolies and the Statute of Anne were interpreted as providing a uniquely statutory basis for intellectual property, implying that future semantic legal ordering activity relating to intellectual property would heavily involve statutory interpretation. Intersecting these prerogative and parliamentary traditions, the *lex mercatoria* tradition provided a strong legacy of proprietary corporate custom, while the Roman law tradition provided a categorical head (occupancy) under which to synthesize all the relevant legal traditions, as well as a rhetorical and legal basis for arguing that the right to intellectual property was "just". Operating somewhat on the periphery, the common law tradition supplied the forms of action according to which claims to intellectual property could be litigated and adjudicated, while at the same time leaving the English judges with flexibility in delineating the categories of substantive rights relevant to intellectual property.

These legal traditions, while old, are living traditions; they continue to stand behind the intellectual property systems of England and her former colonies.[54] In Eighteenth Century England, jurists drew on these traditions to recognize a new type of legal property, an "intellectual" property, which would henceforth be rooted in national legislation and in the political organization of the nation-state.

[54] As recently as 1998, the U.S. Supreme Court returned to them, in order to determine whether a jury trial may be requested in determining damages for copyright infringement under the current U.S. copyright act (*Felter v. Columbia Pictures Television*, 523 U.S. 340 (1998)). Among other authorities discussed in this chapter, the Court cited "Atkin's Case" (*The Stationers v. The Patentees about the Printing of Roll's Abridgment*, Carter 89, 124 Eng. Rep. 842 (House of Lords, from Chancery, 1666)), which was discussed above as part of the prerogative tradition (523 U.S. at 349).

Chapter 3.
Universalized Rights and Legal Traditions:
The American Constitutionalization of Intellectual Property

> *The Congress shall have the Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*
>
> *- U.S. Constitution, Article I, Section 8, Clause 8 (1787)*

> *This Constitution, and the laws of the United States which shall be made in pursuance thereof…shall be the supreme law of the land….*
>
> *- U.S. Constitution, Article VI, Section 2 (1787)*

Semantic legal ordering, as I am presenting it in this dissertation, is an ongoing, interpretive social activity that, as it occurs over time, may be viewed as a social process. In this interpretive social process, legal actors ("jurists") draw on concepts and principles within legal traditions rooted in Roman law to formulate legal prescriptions that are meaningful in their contemporary social context. When translated through private and public officialdoms that enforce these prescriptions through sanctions, semantic legal ordering contributes normative and conceptual form to closed social relationships (including organizations), and to the social activity that takes place within those relationships. I have argued that one effect of this activity may be seen in distinctive "property orders": institutionalized patterns of materially-embodied social activity.

In the previous Chapter, I argued that England's peripheral status with respect to Roman law, to Empire, and to Estate Society enabled a new, national property order to emerge first in England. *Intellectual property emerged as part of this new, national property order.* As we saw, this new form of property occupied a very uncertain place within English legal traditions. Nevertheless, a number of English legal traditions – the prerogative tradition, the anti-monopoly tradition, the parliamentary tradition, the *lex mercatoria* tradition, the common law tradition, and

the Roman law-based traditions manifested in English chancery practice and natural law – were interpretively drawn together, synthesized, and reinterpreted so as to provide a foundation for recognizing patents and copyrights as a new, statutory form of property. As we saw, this new, statutory form of property offered special protections to British nationals, and was seen as benefitting the British national economy.

Although analogies were drawn between patents and copyrights, and although both were described as an "intellectual" property by some jurists, a general category of "intellectual property," encompassing both forms of property, was not yet being discussed. Patents and copyrights could both be argued to constitute property, and this property could be seen as being rooted in certain common legal traditions, like the prerogative tradition. Nevertheless, the "rights" connected with these two forms of property were separately linked to very particular English legal traditions, which had been only partially systematized and synthesized. It is for this reason that I have characterized England's national property order, as it related to intellectual property, as particularist and rights-based.

The American Revolution inaugurated a new national property order, one which generalized many of England's legal traditions, elevating them to the status of universal legal principles and cementing them into an enduring constitutional structure. As we will see, a Congressional power to provide for the grant of *Federal* patents and copyrights came to be established as part of America's Constitution.

The United States of America could have remained a confederation of sovereign states. That they should do so was a principled conviction of some "Anti-Federalist" resisters to ratification of the Constitution. Public endorsement and state ratification of the 1787 Constitution was by no means assured. The Constitution's drafters nearly abandoned hope at

various points over the summer of 1787, and during the lengthy, contentious ratification process (*see* Maier 2010).

Nevertheless, from the time of its ratification, the Federal Constitution was (and has remained) the Supreme Law of the United States of America. The granting of patents and copyrights by Congress is explicitly enabled by this Supreme Law, and Congress acted nearly immediately after ratification to set these grants on a secure legislative foundation. As a result, intellectual property has, since 1790, been placed on a squarely national and Federal basis in the United States of America. In this Chapter, I trace the processes of semantic legal ordering by which this occurred, and seek to show the importance of this development for early American industrialization.

In his Sociology of Law, Max Weber (1967, at 292) presented America's revolutionary law as forming part of a broader, semantic shift in the legal meaning of "natural" law. Within the Roman-Canon law tradition, a distinction had been drawn between law that owed its origin to divine will (*ius divinum*) and law that had been laid down by human beings (*ius positivum humanum*). The "positive" law, which is laid down by human beings, is part of "civil" law: "what each people and each commonwealth establishes as its own law" (Gratian, *Decretum*, Distinction 1, Chapter 8). The "natural" law, by contrast, was seen as a law that exists by virtue of the natural and logical order, a law that determines what is *reasonable* and legally-legitimate for human beings, in the absence of positively-ordained, divine or human law. However, at the time of the American Revolution, a new consequentialism was creeping into the concept of "reasonableness", and hence into the natural law tradition.

According to Weber, English legal traditions had contributed to a different sense of the word "reasonable," as that which is "practically appropriate." This enabled a shift in American

legal thought, from treating natural law as an immutable, logical standard according to which human behavior must conform (a "formally rational" approach), to a process of logic by which practical consequences determine the content of reasonability, and hence of the "natural" law (a "substantively rational" approach). If absurd practical consequences would follow from a legal principle, that principle cannot be natural. On the other hand, if good practical consequences would follow from a legal principle, there is good reason to believe that the principle is natural, and therefore a part of the legitimate legal order, wholly apart from legislation or precedent.

In Weber's view (1967, at 289), this semantic shift was tied to the Radical Reformation: to the "rationalistic sects" and the Anabaptists. More recently, Harold Berman (2003) has drawn attention to the legal significance of the Protestant Reformation. In Berman's view, the Reformation should be understood as a legal transition, as well as a religious transformation. Given the semantic connections we have seen between Roman and Canon law in European legal traditions, including English legal traditions, it makes sense that the Reformation would constitute a transformation in law, as well as in religion.

What we will see in this Chapter is that many of the individuals who played important roles in establishing American intellectual property law were jurists who had received their formative legal educations within communities shaped by a "New School" of Reformed theology, one that drew heavily on classical Republicanism and Scottish common sense philosophy (*see* Noll 2002). This New School of Reformed theology was influential at Yale and Princeton Universities, in particular (*see* Noll 2002; Noll 1999). As we will see, the most influential figures in the emergence of American intellectual property were educated in these institutions, or maintained close social relationships with individuals who had been educated here.

New School Reformed theology maintained many of the traditional forms of Congregationalism and Presbyterianism, while substituting the semantics of Scottish common sense philosophy and American Republicanism (*see* Noll 2002; Noll 1999). According to this interpretive approach, what seemed ethically "obvious" by virtue of ethical consequences could be deemed to be "natural" (or unnatural) and, hence, universal. Applied to legal problems and legal texts, this interpretive approach enabled Americans to universalize legal traditions they had inherited as British colonies, and injected a consequentialism into their understanding of natural law.

As part of a British colonial organization, the Americans had inherited British legal traditions, including the legal traditions that stood behind English patent and copyright law. Their social relationships, including their relationships vis-à-vis material things, had been given legal content and form through processes of semantic legal ordering that made the British legal traditions meaningful in the American context. Due to this habituation to British legal traditions, Americans viewed the legal concepts and principles transmitted through these legal traditions as being intuitively obvious. Influenced by the Scottish common sense tradition, it was but one step further for these Americans to infer that the legal concepts and principles transmitted by British legal traditions, which seemed intuitively obvious to them, especially by virtue of their practical consequences, constituted principles of natural law.

In this Chapter, we will see English legal traditions relating to intellectual property elevated into universal principles, which emphasize the beneficial consequences of intellectual property for individuals and for the nation-state. The American national property order within which intellectual property emerged was one in which English legal traditions were universalized, through the aid of the newly-consequentialist natural law tradition, and posited as

the legitimating foundation for a constitutional structure that cemented intellectual property protection into place.

Within this American national property order, we will see a new style of proprietary imagination (*cf.* Anderson 2006) beginning to emerge: one which links the individual self with abstract, "intellectual" objects, and posits those objects as part of the subjective "natural right" of the individual. What seems to have been particularly powerful about this new style of proprietary imagination is the extent to which it linked national benefit with Federally-uniform protection of individual rights.

Early American Industrialization

By 1845, a factory-based system of production was firmly established in New England, and was spreading. The earliest and fullest development of the American-style factory system had occurred in the Massachusetts textile industry, led by the Boston Manufacturing Company (Waltham) and the Lowell manufacturing companies. The "Waltham-Lowell System" pioneered by these companies became a model for American factory production that was widely followed, and adapted to other regions and industries (*see* Howe 2007, at 132-36; Perrow 2005; Appleby 2000, at 76-77; Weil 1998, at 1349; Nettels 1962, at 274-88; Clark 1916, at 448-55, 529-77).

In a comprehensive treatise that is still widely-cited and followed, Victor Selden Clark (1916, at 450) described the American-style factory system, as exemplified in the Boston Manufacturing Company, as follows:

> It differed from previous establishments of equal size, either here or abroad, in performing all operations of cloth-making by power at a central plant. Labor was specialized and workers were organized by departments. Wages were paid in cash, output standardized, cost accounting introduced, and buying and selling systematized. In a word, the commercial, technical, and operative elements of a factory were brought together in accordance with an intelligent plan so

> coordinated as to make a more efficient producing unit than had hitherto existed in this country. Manufacturing was specialized completely and no longer retained even subordinate relations with household industry or general merchandising. The idea of the factory, as we know it, was conceived and demonstrated so that its application at other places and to other industries was a mere matter of adjustments.

What made this American factory system distinctive, according to Clark (1916, at 450-51), was the degree of its concentration around machinery. All productive activities necessary to transform raw cotton into finished textiles were carried out in the factory. In this concentrated space, human labor was harnessed to machinery, enabling high-volume transformation of water power and cotton fibers into finished cotton textiles.

What made this American factory system possible was proprietary control. This proprietary control was rooted in "mill privileges," which gave preferential access to water for powering mills, and in landed property. It was also rooted in patents, which enabled control over the making, use, and sale of innovative machinery. Mill privileges and landed property enabled the Waltham and Lowell companies to harness river power to run their machines, and to control the physical space around their machinery. Patents, however, enabled the companies to create a zone of exclusivity and control around their innovative machinery that extended beyond localized, physical space to newly-emerging markets for machinery and finished textiles.

The wealth invested to make Waltham and Lowell was mercantile wealth, which had been earned primarily through seafaring trade before the War of 1812. The individual whose name is most closely associated with the Waltham-Lowell System is Francis Cabot Lowell. By all accounts, Lowell was the "informing spirit," but he was joined by a cohort of Boston merchants, including Nathan Appleton and Patrick Tracy Jackson (*see generally* Rosenberg 2011; Howe 2007, at 132-36; Dalzell 1987; Gibb 1950; Appleton 1858).

In shifting from commerce to manufacturing, Lowell and his cohorts were seeking greater security for their investments (*see* Howe 2007, at 132-36; Dalzell 1987). Proprietary control gave them this security. Rather than suffering the vagaries of seaborne commerce, the Boston merchants could concentrate their wealth in manufacturing activity carried out on their own property. The concentration of productive activity around machinery characteristic of the Waltham-Lowell System was, in part, therefore, a desired effect flowing from proprietary control.

Effort to secure this proprietary control is particularly evident in the formative period of the Waltham-Lowell System. Between 1810 and 1812, Francis Cabot Lowell traveled through England and Scotland with his family, systematically observing the textile factories and machinery in operation there (*see* Rosenberg 2011, at 167-95; Dalzell 1987, at 5-25; Appleton 1858). Committing his observations to memory, and thus evading British prohibitions on the export of technological know-how, Lowell was able to reverse engineer a power loom and make it functional by 1814. On February 23, 1815, a U.S. patent "in looms" was issued to "F.C. Lovell and P.T. Jackson" of Boston (Commissioner of Patents 1872, at 150).[55]

Lowell had experience with patents from his days as a merchant (*see* Rosenberg 2011, at 92-96). As an importer of sugar and molasses from the West Indies, and as a seller of rum to Northern Europe, he saw an opportunity to produce rum himself. He purchased a Boston distillery in 1801, and began experimenting with distillation methods. In May 1802, he wrote to Alexander Anderson, who had patented a "steam still" in 1794 (Rosenberg 2011, at 93-94;

[55] The Directory of American Tool and Machinery Patents (www.datamp.org) identifies this patent as patent number X2,271, and identifies its issuance date as February 21, 1815, rather than February 23. In 1836, a fire destroyed U.S. Patent Office records, so patents issued before this time have not been completely recovered. The Patent Office only began assigning unique patent numbers in 1836.

Commissioner of Patents 1872, at 9).[56] In this letter, Lowell gave a detailed description of his unsuccessful efforts to conform to Anderson's patented method of steam distillation, and requested Anderson's advice about how to make improvements. Lowell also wrote to his brothers Charles and John, who were in Scotland, seeking their aid in discovering the Scotch secrets of distillery. Although his brothers were not able to help him, Lowell continued experimenting, and by 1804 was able to write to Anderson that he had developed an improved method for steam distillery. According to biographer Chaim Rosenberg (2011, at 95), Lowell was seeking a patent-sharing arrangement with Anderson. Nothing came of this, apparently, but the incident shows that Lowell was well aware of the benefits to be gained from patents, including on methods imported from abroad. The incident also shows that he knew how to gain access to patent specifications.

Prior to obtaining their patent for the power loom, Francis Cabot Lowell and Patrick Tracy Jackson had petitioned the Massachusetts General Court for an act of incorporation for a manufacturing company; this petition was granted on February 23, 1813 (*see* Rosenberg 2011, at 232-33; Dalzell 1987, at 244 n.7). Although Massachusetts law of the time did not limit the liability of manufacturing corporation shareholders, it did enable concentration of property and decision-making within a unitary corporate structure (*see* American Jurist & Law Magazine, Vol. II, 1829, at 92-118). The act of incorporation for the "Boston Manufacturing Company" authorized the company to raise up to $400,000 from shareholders, and to use this money to carry out its projected textile manufacturing activities (*see* Rosenberg 2011, at 232-33).

[56] Between 1790 and 1802, at least 5 patents were issued for distillery-related inventions. The fourth U.S. patent was issued to Aaron Putnam for an "improvement in distilling" (Jan. 29, 1791). Thereafter, patents were issued to Joseph Simpson for an improvement in "distilling spirituous liquors" (Mar. 4, 1794); Alexander Anderson for his steam still (Sept. 2, 1794); Fitch Hall for a "combinn. of astringt. woods and vegetables, in distilling, &c" (Apr. 17, 1797); and Benjamin Henfrey for "increasing the surface of evaporation for the purpose of distilling" (Mar. 2, 1801) (Commissioner of Patents 1872, at 4, 8-9, 14, 24).

In September 1813, Patrick Tracy Jackson purchased the land, buildings, and water rights to a paper mill on the Charles River at Waltham (*see* Rosenberg 2011, at 240; Gibb 1950, at 23). Just over a month later, the shareholders of the Boston Manufacturing Company held their first meeting, authorizing $100,000 to be raised through the sale of 100 company shares (*see* Dalzell 1987, at 26-27). Once the company had raised a sufficient amount of money, it purchased the mill property from Jackson.

Over the next decade, the Boston Manufacturing Company established itself as a highly-successful cotton-cloth manufactory (*see* Gibb 1950, at 23-62). Patented inventions played a vital role in this early period of success. In addition to the power loom, a number of patents were issued to Paul Moody, the chief machinist of the Boston Manufacturing Company.[57] Indeed, the "machine shop" at Waltham became, according to George Sweet Gibb (1950, at 12, 23-62), "the heart of the new enterprise," enabling the company to profit from sales of machinery and patent licenses, as well as sales of finished cloth. A mill-related patent was also acquired in this early period: a share in Jacob Perkins' patented "machine for removing backwater" was purchased, and Perkins himself was hired to install it in the Waltham Mill; Perkins' former employee, Paul Moody, also designed a "governor" to control waterwheel speeds (*see* Malone 2009, at 15-18).[58]

By 1821 a basic business pattern had been established at Waltham, which would be adapted for transfer to Lowell. Every phase of productive activity centered around machines (*see* Gibb 1950, at 29-33). Opening and picking machines were used to tear and loosen the cotton fibers, and to remove dust and other unwanted matter remaining after the "ginning"

[57] Between 1816 and 1821, 9 textile machine-related patents were issued to Paul Moody. This may represent only a portion of the total machine-related patents held by the Boston Manufacturing Company, since it is possible that patents were issued to other employees in the machine shop.

[58] Francis Cabot Lowell had hoped to hire Perkins as his chief engineer, but his inventive needs were well-supplied by Paul Moody, Perkins' former employee. Between 1795 and 1813, at least 14 patents were issued to Jacob Perkins, including 3 patents relating to pumps and mills. A patent for a water mill was dated June 26, 1913, and is numbered 1955X in the DATAMP database (*see also* Commissioner of Patents 1872, at 124, 127).

process.[59] Then "carding" machines combed out the cotton fibers into parallel strips of "sliver." After this, "drawing" and "roving" machines rolled the slivers of cotton together, stretched them, twisted them, wound them onto bobbins, and transformed them into a soft string ready for spinning. "Spinning" was the process whereby soft cotton "rovers" were wound and twisted into a firm cotton yarn ready for weaving on the power looms. Additional machinery inventions (*e.g.* "dressing" machines to keep yarn moving smoothly through the power looms) helped to ensure that each phase of the weaving went smoothly and efficiently (*see* Gibb 1950, at 32-39; Marsden 1888). Printing machines would later be added to the process, transforming simple, white cotton cloth into colorful, patterned textiles (*see* Rivard 2002; Dalzell 1987; Gibb 1950).

The machines needed skilled operators to function properly. Moreover, laborers had to be brought to the machines, whose location was determined by capacities for water-power production, not proximity to large population centers. The response of the Boston Manufacturing Company to these two challenges resulted in a distinctive labor policy, which became the model for the much larger-scale development at Lowell: medium-term employment of young farm women, who were paid in cash and boarded on site (*see* Moran 2002; Gibb 1950, at 51-55; Clark 1916, at 397; Robinson 1898).

In order to persuade Massachusetts farm families to surrender their daughters to the factories, the mill towns and boarding conditions had to be upstanding: Sundays were a mandatory day of rest and church attendance, and boarding houses were strictly controlled. For the young women, the opportunity for cash wages and the relative freedom of life outside the family farm were powerful incentives.[60] In addition, for women with a desire for education, the

[59] "Ginning" is the process whereby the husk and seeds are removed from the cotton plant; it was usually carried out at or near the plantation (*see* Marsden 1888, at 74).

[60] As remembered by Harriet Robinson (1898, at 68-9): "A woman was not supposed to be capable of spending her own or of using other people people's money....She was a ward, an appendage, a relict. Thus it happened, that if a

textile mills offered opportunities that would have been otherwise unavailable. *The Lowell Offering* – a literary publication edited by former factory women – and organized labor movements were only two of the products of the extraordinary New England "mill girls" (*see* Moran 2002; Eisler 1977; Robinson 1898).

The machines also needed skilled mechanics. Paul Moody became the chief mechanic at Waltham and Lowell, and under him a cadre of skilled machinists built and maintained the machines, and contributed to further mechanical invention (*see* Gibb 1950, at 33-62; *see also* Rosenberg 2011, at 231-57; Dalzell 1987, at 26-73). Through these mechanics, relationships with other New England machine shops were forged, enabling the spread of mechanical know-how and invention (*see* Meyer 2006). From such circulating cadres of mechanically-skilled employees, the American "engineering" profession gradually developed (*see* Meyer 2006; Clark 1916).

An expertise in machine-building accumulated within the Waltham and Lowell Companies, which enabled those Companies to profit significantly from sales of machines and licenses of patented inventions, especially in the period 1817-1824 (*see* Gibb 1950, at 39-70). After 1824, patents were less aggressively pursued, and the Lowell Machine Shop became primarily a licensee of patents and a producer of machinery.[61] However, it was during the early period at Waltham that the pattern for the Waltham-Lowell system was forged. And, in this

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woman did not choose to marry, or, when left a widow, to re-marry, she had no choice but to enter one of the few employments open to her, or to become a burden on the charity of some relative. In almost every New England home could be found one or more of these women, sometimes welcome, more often unwelcome, and leading joyless, and in many instances unsatisfactory, lives. The cotton factory was a great opening to these lonely and dependent women. From a condition approaching pauperism they were at once placed above want; they could earn money, and spend it as they pleased; and could gratify their tastes and desires without restraint, and without rendering an account to anybody. At last they had found a place in the universe; they were no longer obliged to finish out their faded lives mere burdens to male relatives."

[61] Between 1823 and 1825, a series of agreements between the Boston Manufacturing Company and the Merrimack Manufacturing Company at Lowell resulted in the transfer of all patents rights, and of the employees of the Waltham Machine Shop, to the Merrimack Company. Subsequently, the patents and machine shop operations were transferred to another Lowell company owned by the Merrimack shareholders: the Proprietors of the Locks and Canals on the Merrimack River (*see* Gibb 1950, at 55-70).

early period, continuous invention and patent licensing policies were central elements of the system (*see* Clark 1916, at 515-21).[62] Formal patent licensing agreements were legal vehicles through which enduring relationships were forged between New England mills, enabling an increasing volume of machines to be produced and sold over a widening geographical area (*see* Gibb 1950, at 42-44).[63]

In short, patents rested at the heart of the Waltham-Lowell System, which became a paradigm for the early American factory system and for early American industrialization. But this is somewhat ironic, because the Waltham-Lowell System was created at a time when American patents were much weaker than they are today. After 1793 and before 1836, patents were not examined for novelty, as they are today. Instead, as will be discussed further below, prospective patentees only had to meet certain minimal, formal requirements in order to register a valid patent. A review of patents issued prior to 1836 (*see* Commissioner of Patents 1872) reveals that multiple patents were issued for very similar (if not identical) inventions.

The lack of a rigorous examination prior to issuance of a patent meant that a patentee, who wished to enforce his patent against a competitor, had to aggressively litigate the patent (*see* Khan 1995). Only through litigation would it be possible to show that one inventor, rather than another, was truly the first to invent. Once this "priority" of invention had been shown, the

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[62] Speaking of New England machine shops generally, and of the Lowell machine shops in particular, Clark (1916, at 519-20) writes that "Inventors and owners of patents exercised a large control over the development of this industry."

[63] "The Waltham licensing agreements constitute an early example of a business technique which did much to hasten the industrial development of the country. The practice of selling manufacturing rights enabled small machine shops to get their machines produced in greater volume and over a wider area than would have been possible had they utilized only their own manufacturing facilities....There is no evidence to show that the licensing of inventions to other manufacturers in the cotton textile industry was practiced on any significant scale before the time of the Boston Manufacturing Company. Widespread knowledge and use of Samuel Slater's machinery in the 1790s came about as a result of actual theft of machine plans by workmen. The fact that two decades later Waltham machinery was made available to the industry largely through legitimate channels of sale and patent leasing indicates, not that Americans were becoming more scrupulous, but that patent rights and laws had now come to carry weight." (Gibb 1950, at 44)

competing patent would be declared invalid by the court, and judicially repealed. Any production system built on patents, then, required effective litigators of those patents.

There is very clear evidence that the Waltham-Lowell companies understood the importance of effectively litigating their patents. An illustration of this may be seen in an early and foundational patent case bearing Francis Cabot Lowell's name: *Lowell v. Lewis*, 15 F. Cas. 1018 (C.C. D. Mass. 1817). In this case, Francis Cabot Lowell sought to enforce, as assignee, Francis Perkins' water pump patent against a later patentee of a water pump. The case was ultimately decided by a jury, but the doctrines of law involved in the case were decided by Joseph Story. In his instructions to the jury, Judge Story laid down a number of doctrines – doctrines relating to the "utility" requirement for patents, and to the requisites for a legally valid patent specification – that have been of enduring significance in patent law.[64]

One of the attorneys for the defendant in this case was Daniel Webster. Despite their opposition in the *Lowell v. Lewis* case, however, Webster and Lowell had great mutual respect. The previous year, Webster and Lowell had worked together on the Tariff Act of 1816 (*see* Rosenberg 2011, at 264-65). Lowell had travelled to Washington, D.C. in support of measures for protecting fledgling American industries against foreign competition, including a tariff on cotton cloth imported from India by British merchants. Webster, then a Congressman for New Hampshire, later wrote of Lowell, "I was much with him & found him full of exact practical knowledge on many subjects" (*quoted in* Rosenberg 2011, at 265). After his term in Congress ended, Daniel Webster moved to Boston and became a leading attorney for prominent Bostonians, including Francis Cabot Lowell and the Boston Manufacturing Company (*see* Rosenberg 2011, at 264-65, 268-69; Curtis 1893, at 156 et seq.).

[64] Regarding Joseph Story's influence on American patent law, patent historian Frank Prager (1961, at 264) wrote: "Even if more recent judges and legislators have modified the ideas of Story, such ideas are nevertheless present in the law. Some of them have in fact proven stronger than the written word of the statute."

According to data compiled by B. Zorina Khan (1995, at 63), 36 patent cases were litigated in the U.S. from 1820-1829. The Boston Manufacturing Company alone accounted for 22% of this litigation. Between 1820 and 1822, the Boston Manufacturing Company initiated eight patent infringement cases (*see* Fisk 2009, at 40). Daniel Webster represented Moody or the Company in six of these cases (*see* Rosenberg 2011, at 269). Two of these cases vindicated patents on foundational Company technology: the double-speeder for roping cotton, and the cotton spinning machine.[65] Based on this evidence, it seems clear that the Boston Manufacturing Company understood the importance of litigating its patents, and acted on this understanding by drawing on the extraordinary rhetorical skills of Daniel Webster.

The pattern of social activities exhibited in the "Waltham-Lowell System" represents a pattern of social activities that was made possible, and more likely, by virtue of patent-based proprietary control. In its details, of course, this pattern of proprietary activity was shaped by a myriad of additional social and individual factors. However, the legal recognition of patents as property was of decisive importance in opening up a possibility-set within which other social and individual factors could operate to bring about the historical effects observed.

Patents were now a Federally-uniform property bounded by legislation and by the terms of the patent specification. Within these boundaries of verbal specification and legislation, the patent created a zone of control over an emerging national market: no one else within that emerging national market could make, use, or sell the invention described in the patent. For a company prepared to accumulate and enforce this property in the newly-created Federal courts,

[65] *See* Boston Manufacturing Company v. Fiske, 2 Mason 119 (C.C. D. Mass. 1820); Moody v. Fiske, 2 Mason 112 (C.C. D. Mass. 1820). The *Moody v. Fiske* case involved a nominal defeat, since the patent as specified was ruled to lack novelty and thus to be void. However, the ruling permitted Moody to withdraw his patent and obtain replacements that would address the specification problems. Moody did so, and obtained a verdict against the defendants the following year (*see* Khan 2005, at 94; Commissioner of Patents 1872, at 218, 223-24).

such patents enabled a degree of dispositional control that was unimaginable in traditional, sea-based mercantile exchange.

Historical evidence supports a conclusion that such proprietary control, within an emerging national market, enabled some early movers, like Francis Cabot Lowell, to make the shift from commerce to manufacturing, and to do so on an unprecedented scale and scope (*see* Sokoloff 1988; Clark 1916). The success and durability of the Waltham-Lowell System, in turn, impressed observers across the country, and inspired attempts to emulate and vary the system (*see* Howe 2007, at 132-36; Appleby 2000, at 76-77; Weil 1998, at 1349; Nettels 1962, at 274-88; Clark 1916, at 448-55, 529-77). This is an important part of the much larger story of early American industrialization.

Things could have gone very differently, however. Patents might not have been treated as a nationally-uniform property, but might instead have been allowed to vary from state to state, thus opening up the possibility that some states might not recognize them as property at all. By making patents and copyrights part of the Federal Constitution, and, hence, part of the "supreme law of the land," the drafters of the Constitution created a structural framework within which the proprietary powers exercised in a newly-emerging national market by early American industrialists like Francis Cabot Lowell became possible. In the remainder of this chapter, I will show how this structural framework was created, and how things could have gone quite differently in the creation of the framework.

Semantic Legal Ordering and Organized Social Closure: Patents and Copyrights in the New American Republic

With the success of their revolution cemented into place in the 1783 Treaty of Paris, 13 British colonial corporations, provinces, and proprietary holdings had been transformed into

independent, sovereign states.[66] But the precise form these states would take, particularly in relation to one another, remained an open question. Semantic formulation and structural formation had begun, however, even before independence was declared, especially with the 1774 congress of colonial delegates held in Philadelphia (the "First Continental Congress"). From this time forward, according to Joseph Story, the United States began to act as a "national organization" (1987 [1833], at 85).

One of the most consequential results of this First Continental Congress was the formation of an "Association" to boycott British goods. Economic historians view this association as the first stage in the emergence of America's national economy (*see* McCusker & Menard 1991; Nettels 1962; Clark 1916). Pursuant to the "Articles of Association" voted on by the colonial delegates, an association of twelve colonies was created to pursue and enforce a "non-importation, non-consumption, and non-exportation agreement" against Great Britain and Ireland. To compensate for the absence of British imports of finished goods, the contracting colonies agreed to "encourage frugality, economy, and industry, and promote agriculture, arts, and the manufactures of this country, especially that of wool" (Ford et al. 1904 (Vol. 1), at 74-80).[67]

If the United States were to become a "national organization", however, something beyond the legal framework of "association" would be required. To call the United States an "association" was to conceive of the States as members of a partnership, joined together for particular purposes, perhaps even holding some property and obligations in common, but not as unified into a single entity with the legal capacity to act and dispose of property under a single

[66] At the time of the Revolution, there were seven royal provinces (New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia), three proprietary holdings (Maryland, Pennsylvania, and Delaware), and three colonial corporations (Massachusetts, Rhode Island, and Connecticut) (*see* Story 1987 [1833], at 67-83).

[67] President Abraham Lincoln, in his First Inaugural Address of 1861, described the 1774 Continental Association as the origin of the Union.

name. Lest it be doubted that the drafters of the Articles of Association had in mind such a technical, legal view, it should be emphasized that the committee of five tasked with drafting the Articles included two distinguished American jurists: Thomas Johnson of Maryland and Thomas Cushing of Massachusetts (*see* Ford et al. 1904 (Vol. 1), at 53).

During the revolutionary period from 1776 to the 1783 Treaty of Paris, the operating framework for the national association was "confederacy" (*see* Story 1987 [1833], at 92-162): a political alliance of sovereign states, prominent models of which were to be found in Ancient Greece and Rome, as well as in continental Europe.[68] However, to certain members of the assembled Continental Congress, including James Madison, it was very quickly apparent that an organizational structure of mere alliance was insufficient (Madison 1900, Vols 1 & 2).[69]

Commerce and industry, in particular, had been found to suffer under the confederated organizational structure (*see* Story 1987 [1833], at 99-101). Shortly after military peace had been agreed, imports from Great Britain flooded into American ports, leading to cash-shortages and economic depression (*see* Nettels 1962; Clark 1916; Bagnall 1893). Some interpreted this flood of British imports as an intentional strategy to destroy fledgling American industries and "manufactures," which had sprung up during the Revolutionary War (*see* Madison 1900, Vols 1 & 2).

[68] On the salience of Ancient Greek and Roman organizational models to the thinking of Revolutionary Americans, see Wood 1998; Bailyn 1992; Madison 1900.

[69] *See especially*: (1) in Volume 1 of Madison 1900: (A) Letters from Madison, as Continental Congressman from Virginia, to Thomas Jefferson, as Governor of Virginia, particularly that of April 16, 1781; (B) Letter to Edmund Randolph, fellow Congressman of Virginia, of May 29, 1782 (describing the threat to commerce from the absence of a unitary treaty power); (C) Notes of a Speech delivered to the Continental Congress on January 28, 1783 concerning the impossibility of timely payment of national debts with "13 separate and independent governments"; (2) in Volume 2 of Madison 1900: (A) Letter of August 7, 1785 to James Monroe (concerning the impossibility of uniform regulation of trade by the confederated states); (B) Letter of August 20, 1785 to Thomas Jefferson (concerning the need for a uniform regulatory basis of trade in order to retaliate against Great Britain); (C) Notes for Speech in the Virginia House of Delegates, November 1785; (D) Letter to Thomas Jefferson of March 18, 1786 (regarding attempts by the confederated states to retaliate against Great Britain).

Due in no small part to the advocacy of James Madison, the State of Virginia issued a call for a "convention" of state delegates to discuss whether the States' commercial relations should be placed on the foundation of a "uniform system" (*see* Story 1987 [1833], at 105-106; Madison 1900, Vol. 2; *see also* Stewart 2007). The recommendation of the delegates to this convention, held at Annapolis in 1786, was a constitutional convention, to be held at Philadelphia in May 1787. Once the State of New York had signed onto the program for a constitutional convention, the Continental Congress issued a recommendation for a convention "for the purpose of revising the articles of confederation" (*see* Story 1987 [1833], at 106-107).[70]

Delegates from a small number of states began their discussions in Philadelphia on May 14, 1787, and all 12 signatory states had representatives at the convention by June (*see* Farrand 1911, Vol. 1; Madison 1900, Vol. 3).[71] Over the course of the summer, 55 men participated in drafting, oratory, and debate (*see* Appendix 2). The result of their semantic endeavors was a written text, signed by 39 delegates on September 17. The text of their written Constitution provided a semantic formulation for a new form of Union ("a more perfect Union"), one that allocated substantial powers to a "Federal" government and broadened its electoral base to a

[70] Contemporary social historians view "Shay's Rebellion" – an agrarian insurrection centered in rural Massachusetts – as an event that was crucial in generating support for the 1787 convention (*see* Leonards 2002; Szatmary 1980). Joseph Story evidently shared this view, stating that the "alarming insurrection then existing in Massachusetts, without doubt, had no small share in producing this result" (1987 [1833], at 107). The importance of New York's endorsement is evidenced by the Congressional Resolution of February 21, 1787, which records that "several of the States and particularly the State of New York" had instructed delegates to attend the Convention (Farrand (Vol. 3) 1911, at 13-14).

[71] Rhode Island did not send delegates, due to a veto by its lower legislative house. However, a panel of Rhode Island merchants sent a letter of support to the convention, which was read aloud on May 28. In this letter, the merchants stated: "It is the general Opinion here and we believe of the well-informed throughout this State, that full power for the Regulation of the Commerce of the United States, both Foreign & Domestick, ought to be vested in the National Council. And that Effectual Arrangements should also be made for giving Operation to the present powers of Congress in their Requisitions upon the States for National purposes." (Farrand (Vol. 3) 1911, at 18-19)

Two of the signatories to this letter were John Brown and Nicholas Brown, presumably the brothers of Moses and Joseph Brown and therefore two of the "Four Brothers" who became "the leading mercantile house of Providence" and "one of the foremost of New England" (Bagnall 1893, at 147). Their brother Moses would enter into a partnership with Samuel Slater, who covertly exported his knowledge of the patented "Arkwright System" of cotton spinning to the United States, enabling the Rhode Island firm of "Almy, Brown & Slater" to become the pathbreaking American industrial textile producer, a pioneer of the American factory system (*see* Clark 1916, at 357, 448-49; Bagnall 1893, at 135-65).

"national" citizenry. Among the powers allocated to the lawmaking body of that Federal government (the "Congress") was the power to "secure for limited times to authors and inventors the exclusive rights to their respective writings and discoveries," *i.e.* to grant Federal copyrights and patents.

Early American Copyright and Patent Traditions

The allocation of power to grant patents and copyrights to the Federal Congress constituted a consolidation and transfer of that power from the States. Long prior to becoming States, however, the colonies had exercised lawgiving powers to encourage "new manufactures." In 1620, for example, the stockholders of the Virginia Company had elected to "draw" a patent to a "Mr. Somerscales," who was considered to be "very skillfull" in curing Tobacco, and who, as a result of the patent, would presumably apply his skill "in curinge that Plant wherby itt may be made more profitable then itt is" (*quoted in* Bugbee 1967, at 58). Less than 20 years after the enactment of the Statute of Monopolies in England, the Massachusetts Bay colony also enacted an "Act Against Monopolies" (1641), which followed the English statute in prohibiting monopolies, and in carving out an exception for monopolies granted to protect "new inventions that are profitable to the country" (Commonwealth of Massachusetts 1814, at 170).

Following the well-established European pattern, and drawing particularly on the English anti-monopoly and parliamentary traditions, the North American colonies granted "privileges" and "bounties" to "encourage" the development of particular industries, especially textile manufactures (*see* Clark 1916, at 31-72; Bagnall 1893). The exercise of this pre-revolutionary lawgiving power by the colonies may have been influenced by the 1720 opinion of two eminent

British jurists, expressing doubt that the king's prerogative power to grant patents extended to the colonies (*see* Chalmers 1814, at 202-204). In any case, by the revolutionary period, the colonies had the beginnings of a patent tradition, centered in Massachusetts and South Carolina, a hybrid of English statutory law, caselaw, and colonial legislation and practice. Existing alongside a number of other efforts to encourage industry and manufacture in the colonies, this patent tradition was legitimated on the basis of its capacity to encourage inventive and industrial activity (*see* Bugbee 1967, at 57-83; Clark 1916, at 31-72). A very limited tradition for protecting printer-publishers against the reprinting of literary works, based evidently on English precedents, had also been established in Massachusetts Bay and Connecticut (*see* Bracha 2008; Bugbee 1967, at 65-67).

With the exception of a singular reference to the printer as "owner" in the Massachusetts colonial law just mentioned, there is no evidence that the monopolistic privileges granted to "encourage" industry were conceived in proprietary terms. It was only after the Revolution, during the early 1780s, that a proprietary conception emerged. Constituting, until recently, part of the British Empire, the Americans were very likely influenced by the *Millar* (1769) and *Donaldson* (1774) decisions discussed in chapter 2, and by Justice Blackstone's *Commentaries*, which reached the colonies in the early 1770s (*see* Nolan 1994). Even before their Revolution had formally ended, prominent Americans were beginning to use proprietary language in referring to patents and copyrights. Within the Confederacy framework established after the war, however, protection for this property could only be anchored in individual states.

Benjamin Franklin provides an interesting example of the transition to a proprietary conception of patents and copyrights. In January 1782, he wrote a letter from Passy, France (1818, at 100-101) to some unknown "manufacturers," responding to their inquiry about a proposed emigration to Pennsylvania. Franklin wrote that it was not customary in the colonies to provide funding for the passage of skilled immigrants, but promised that "a special law might be easily obtained to give you a property for seven years in the useful inventions you may introduce" (100). This expresses a proprietary conception in relation to "inventions" during the early period when it was first emerging in relation to literary works.

It should be remembered that Benjamin Franklin lived in London between 1765 and 1775 (*see* Isaacson 2004, at 219-89; Campbell 1999, at 1-36, 176-97), the period of the *Millar* and *Donaldson* decisions, when proprietary conceptions and principles were being formulated in relation to copyrights and extended to patents by analogy (*see also* Fessenden 1810). Franklin was, moreover, a printer by profession, and a close friend and regular correspondent of William Strahan, London Stationer and royal printer. It is quite probable, then, that Franklin was aware of the *Millar* and *Donaldson* decisions – which had, after all, been decisions about Stationers' Company property – including (perhaps) the analogies drawn in those decisions between literary property and patents. In 1784, Franklin wrote to Strahan (1818, at 168-73) that

> the rapid growth and extension of the English language in America must become greatly advantageous to the booksellers, and holders of copy-rights in England. A vast audience is assembling there for English authors, ancient, present, and future, our people doubling every twenty years; and this will demand large and of course profitable impressions of your most valuable books. I would, therefore, if I possessed such rights, entail them, if

> such a thing be practicable, upon my posterity; for their worth will be continually augmenting (172-73).[72]

Franklin does not seem to have regarded his own inventions in a proprietary light. In his *Autobiography* (Bigelow, ed., 1868), he described his 1742 invention of the "Franklin Stove," noting that he was offered a patent "for the sole vending of them for a period of years" by Pennsylvania Governor George Thomas (273-74). Franklin stated that he declined the patent "from a principle which has ever weighed with me on such occasions, viz., *That, as we enjoy great advantages from the inventions of others, we should be glad of an opportunity to serve others by any invention of ours; and this we should do freely and generously*" (274, emphasis in original). According to Franklin, a London ironmonger slightly modified his design, obtained an English patent for it, "and made, as I was told, a little fortune by it" (274). Stating that he had "no desire of profiting by patents myself," Franklin asserted that a number of his inventions had been patented by others.[73]

When his statements pertaining to patents and copyrights are viewed together, Benjamin Franklin helps to reveal the transitional pattern: a proprietary conception manifesting itself in North America in the early 1780s, shortly after the *Millar* and *Donaldson* decisions, and just as the Revolutionary War was drawing to a close.[74]

Looking beyond the elder statesman Franklin and his connections to English legal traditions, however, we should examine the law of the early American States. The State of Connecticut enacted the first general copyright statute in January 1783, and Massachusetts followed soon thereafter; one year later, New England's developing literary property traditions

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[72] There are strong tones of irony and jest in this letter, which was written by an American citizen to a British friend shortly after the Revolution had been won.

[73] According to the editor John Bigelow, this description appeared in a part of the manuscript written by Franklin around 1789, near the end of his life (Franklin 1868, at 15).

[74] Another exemplar of these early proprietary conceptions is Thomas Paine (see his Introduction to the 1782 Letter to Abbé Raynal).

would be extended to patents by South Carolina (*see* Bracha 2008; Patterson & Joyce 2003; Crawford 1975; Bugbee 1967, at 104-108, 110).

New England Copyright Traditions, the Continental Congress, and South Carolina Patents

Titled "An Act for the Encouragement of Literature and Genius," and evidently modeled on the English Statute of Anne (1710), Connecticut's copyright statute provided for a 14-year period of protection (which could be extended to 28 years) for the "author, assignee, or proprietor" of a literary work (*Acts and Laws of the State of Connecticut 1796,* at 282-84). The preamble to the statute stated its underlying principles as follows:

> [I]t is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the Profits that may arise from the sale of his Works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honour to their Country, and Service to Mankind… (282).

In this Connecticut statute, we see striking evidence that the Americans were drawing on English legal traditions in formulating their proprietary doctrines of copyright. The influence of the English parliamentary tradition can be seen in the fact that formulation and communication took place through the vehicle of a general statute modeled to a very great extent on an English statutory precedent: the Statute of Anne (1710). That English statutory precedent had emphasized the social benefits of a temporary grant of property in "encouraging" literary production, while also naming authors the initial "proprietors" of their literary works. This fusion of proprietary and "consequentialist" frameworks evident in the English Statute of Anne was carried over by the Americans into their first copyright statute. At the same time, however, the preamble just quoted reveals the potent influence of the newly-consequentialist, natural law

tradition. A nationalistic motive for the statute may also be seen in the language of "honour to country" (*see* Pelanda 2011).

Shortly after Connecticut enacted its copyright statute, on March 10, 1783, the Continental Congress nominated a three-man committee to consider "the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works" (*quoted in* Bugbee 1967, at 112, 189). This three-man committee consisted of Ralph Izard (South Carolina), James Madison (Virginia), and Hugh Williamson (North Carolina) (*Journals of the American Congress*, Vol. 4, 1823, at 219; Bugbee 1967, at 113, 189). On April 28, 1783, the committee submitted an initial report, declaring in rhetorically-powerful language that "nothing is more properly a man's own than the fruit of his study", and determining that "the protection and security of literary property would greatly tend to encourage genius, [and] to promote useful discoveries…" (*quoted in* Patterson & Joyce 2003, at 932; Donner 1992, at 373). On May 2, 1783, this committee, "to whom [had been] referred sundry papers and memorials on the subject of literary property," reported the following resolution:

> That it be recommended to the several states, to secure the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to the executors, administrators and assigns, the copy-right of such books for a limited time, not less than 14 years from the first publication; and to secure the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copy-right of such books for another term of time not less than 14 years, such copy or exclusive right right of printing, publishing and vending the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws and under such restrictions as the several states shall seem proper (*Journals of the American Congress*, Vol. 4, 1823, at 219; Bugbee 1967, at 113, 189).

Within one year, eight states had enacted copyright statutes (Connecticut, Massachusetts, Maryland, New Jersey, New Hampshire, Rhode Island, Pennsylvania, and South Carolina; *see*

Crawford 1975, at 13). By 1786, four additional states (Virginia, North Carolina, Georgia, and New York) had enacted copyright statutes, bringing the total number to twelve; Delaware remained the lone state without a copyright statute on the eve of the Constitutional Convention (*see* Crawford 1975, at 13).[75]

Massachusetts had enacted its statute on March 17, 1783, more than a month before Madison and his fellow Congressmen proclaimed that "nothing is more properly a man's own than the fruit of his study." The preamble to the Massachusetts statute proclaimed in stirring rhetoric as follows:

> Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the effort of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, *there being no property more peculiarly a man's own than that which is produced by the labor of his mind*: Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind…(*Laws of the Commonwealth of Massachusetts*, 1780-1800 (1801), at 94, emphasis added)

The similarity in the "no property more a man's own" language is striking, especially when placed alongside Justice Aston's words in *Millar v. Taylor* (1769): "I confess, I do not know, nor can I comprehend any property more emphatically a man's own, nay, more incapable of being mistaken, than his literary works" (98 Eng. Rep. at 224; *see* Chapter 2, at p. 114). In light of the striking parallels in this "no property more a man's own" language, it seems likely that the Massachusetts legislature drew on the "great case" of *Millar v. Taylor*, particularly Justice Aston's interpretation of the English common law and natural law traditions, in formulating the

[75] The dates of the statutes are as follows: Connecticut (January 1783), Massachusetts (March 17, 1783), Maryland (April 1783), New Jersey (May 27, 1783), New Hampshire (November 7, 1783), Rhode Island (December 1783), Pennsylvania (March 15, 1784), South Carolina (March 26, 1784), Virginia (October 17, 1785), North Carolina (November 19, 1785), Georgia (February 3, 1786), New York (April 29, 1786) (Crawford 1975, at 13; *see also* Appendix 2).

legal foundations for "literary property" in their state. Madison and his fellow Congressmen may have also picked this up in their April recommendation.

However, there was an earlier New England precedent for the "no property more a man's own" language, which points to deep social connections between the legal communities of Connecticut and Massachusetts. These deep social connections, which will be discussed momentarily, parallel clear connections in legal culture, which can be seen in substantive provisions of the Connecticut and Massachusetts copyright laws.

As we saw with the English legal traditions discussed in Chapter 2, the Massachusetts statute reflected a strongly nationalistic element in the newly-emerging American copyright tradition. The law provided protection for "authors, *being subjects of the United States of America*, their heirs and assigns" (*Laws of the Commonwealth of Massachusetts*, 1780-1800 (1801), at 94, emphasis added). While the Connecticut legislature had spoken more softly, in terms of "honor to country," that state also reflected a nationalistic element, as was previously noted (*see Acts and Laws of the State of Connecticut 1796*, at 282; Pelanda 2011). This nationalistic element was further reinforced by the Continental Congress, which recommended that the states offer protection to "authors or proprietors" who were "citizens of the United States" (*Journals of the American Congress*, Vol. 4, 1823, at 219). Following the lead of Massachusetts and the recommendation of Congress, 6 states (of 12) limited their copyright protections to U.S. citizens or "subjects."[76] Of the 6 remaining states, all except Maryland and South Carolina limited their copyright protections to U.S. inhabitants or residents (*cf.* Crawford 1975, at 17).[77]

[76] Massachusetts, New Hampshire, Rhode Island, Pennsylvania, Virginia, North Carolina. Interestingly, however, both Virginia and North Carolina also prohibited the importation of foreign (*i.e.* British) copyrighted works.
[77] Connecticut, New Jersey, Georgia, New York.

Following the lead of Connecticut, moreover, Massachusetts restricted the benefits of its copyright protections to its *own* "citizens," and the citizens of other states with similar copyright protections.[78] Connecticut had provided a precedent for this by restricting the benefits of its copyright protections to *residents* of Connecticut and states with similar copyright protections.[79] These may be seen as "reciprocal treatment clauses," which make certain legal protections conditional on the provision of similar protections by another state. One intended effect of such a clause is to induce the legislature of another sovereign state to grant the desired protections. Once Connecticut and Massachusetts began providing copyright protection to their citizens or residents, authors living in other states who became aware of these protections would presumably become interested in acquiring similar protections, but would be foreclosed from such protection until their home states began providing similar protection. They would then have an interest in "lobbying" the legislatures of their home states for copyright provisions, as would Connecticut and Massachusetts residents who wished to receive copyright protection in other states.[80]

The earliest and best-documented advocacy – social activity that has been labeled "lobbying" (*see* Bracha 2008) – for an author's "natural right" to his writings came from men of Connecticut. Connecticut's precocious copyright statute had been a direct response to a request by one John Ledyard for an "exclusive right of publishing" his account of a "voyage around the

[78] "This act shall not be construed to extend in favour or for the benefit of any author or authors, subject or subjects of any other of the United States, until the State or States of which such authors are subjects, shall have passed similar laws, for securing to authors the exclusive right and benefit of publishing their literary productions" (*Laws of the Commonwealth of Massachusetts*, 1780-1800 (1801), at 94-5).

[79] "This act shall not extend, or be construed to extend in favour, or for the benefit of any author or persons residing in, or inhabitant of any other of the United States, until the State or States, in which such person or persons reside or dwell, shall have passed similar laws in favour of the authors of new publications, and their heirs and assigns." (*Acts and Laws of the State of Connecticut 1796*, at 284)

[80] It is interesting and important to note that Maryland (the only other state to adopt a copyright provision prior to the Congressional resolution of May 2, 1783) included a different type of reciprocity requirement. The Maryland statute made protection of its own authors conditional on adoption of copyright protections in all states. This means that the Maryland statute never actually went into effect. Pennsylvania included a similar provision in its legislation (Library of Congress 1906; *see also* Bracha 2008; Crawford 1975, at 34-35).

world" (Connecticut 1783; *see* Bracha 2008). Ledyard's petition made no reference to a "natural right" of authors, emphasizing instead his need for legislative "patronage," and the usefulness of his account to America and her "northern States by opening a most valuable trade across the north pacific Ocean to China & the east Indies" (Connecticut 1783, at 3). Rather than simply granting the privilege, however, the Connecticut Assembly named a committee under Samuel Huntington to examine the petition and make a recommendation (Connecticut 1783, at 3).

The very same day (January 6, 1783), 24-year-old Noah Webster sent a package of materials from Goshen, New York to John Canfield, a Connecticut attorney and assemblyman (Unger 1998, at 58-9; Webster 1953, at 3-4). This package of materials included a preliminary manuscript of Webster's *American Spelling Book*, a primary-school textbook intended to provide basic instruction in reading, writing, and spelling to American children, and to replace the then-dominant British "spellers" that Webster believed were inadequate (*see* Unger 1998, at 33-58). Appended to the manuscript were letters of recommendation, including a brief letter from law instructor Tapping Reeve, whom Webster may have met while studying law in Litchfield, Connecticut – possibly through his Yale friend Oliver Wolcott, Jr., who studied law under Reeve (*see* Unger 1998, at 34-40; Webster 1793, at vii). Also included was a letter to Canfield, which urged the assemblyman to "procure my request at the Assembly" (Webster 1953, at 3). This "request" was for a special copyright enactment, which Webster had sought from the Connecticut Assembly the previous fall.

On October 24, 1782, Webster had written to the Connecticut Assembly seeking a law that would "vest" in him and "his assigns the exclusive right of printing, publishing, and vending" the Speller (Webster 1953, at 2). In this 1782 letter, Webster had described the Speller, particularly emphasizing its benefits to the "interest of literature and the honor and dignity of the

American empire" (Webster 1953, at 2). He had also emphasized his desire to "prevent spurious editions and…have the book under his own correction, and especially to secure to him the pecuniary advantages of his own productions to which he conceives himself solely entitled" (Webster 1953, at 2). In his January 6 letter to John Canfield, Webster pressed the urgency of his request, asserting that financial constraints would not permit him to continue work on the Speller unless that work received the "encouragement" and "security" of copyright protection (Webster 1953, at 3).

Noah Webster's "lobbying" efforts in the fall of 1782 and thereafter to secure copyright protection for his Speller have received considerable attention from legal and cultural historians (*see* Pelanda 2011; Bracha 2008; Bugbee 1967). The general consensus is that Webster's contributions have been overemphasized; while his labors were significant in drawing attention to the national benefits of copyright protection, it goes too far to call him the "prime mover" of copyright, as his granddaughter did (*see* Ford 1912, at 53; Webster 1843; *compare* Pelanda 2011; Bracha 2008; Bugbee 1967). Webster's efforts in the fall of 1782 to secure copyright protection – while extending beyond Connecticut into New York, New Jersey and Pennsylvania – were generally consistent with the colonial pattern of "encouragement" seeking. Although there are hints at a proprietary attitude in Webster's October letter to the Connecticut Assembly, he did not attempt to ground this proprietary attitude in legal concepts, principles, or justifications.

Nevertheless, Webster's fall 1782 journey did yield a letter from Samuel Stanhope Smith, a professor of moral philosophy – which at that time included jurisprudence – and future president of Princeton College (then the College of New Jersey); Smith's letter would help Webster to ground his "entitlement" claim in conceptions and principles of property, as well as benefit to the nation-state.

Webster met with Smith at Princeton in September 1782, and they discussed his Speller (*see* Unger 1998, at 51-52; Webster 1989, at 136-7). Smith suggested some changes, which Webster adopted. In return, Smith recommended Webster's Speller, and "expressed his opinion in favor of copyright laws" (Webster 1843, at 173-4). In the letter of endorsement that he sent with Webster, Smith asserted that:

> Men of industry or of talents in any way, have a right to the property of their productions; and it encourages invention and improvement to secure it to them by certain laws, as has been practiced in European countries with advantage and success. And it is my opinion that it can be of no evil consequence to the state, and may be of benefit to it, to vest, by a law, the sole right of publishing and vending such works in the authors of them (Webster 1843, at 173-4).[81]

Taking this letter with him, Webster proceeded to Trenton and Philadelphia, and then on to Hartford, before eventually returning to Goshen, New York (*see* Webster 1989, at 136-39; *cf.* Webster 1843, at 173-74). He very likely included Smith's letter in the package he sent to John Canfield on January 6, 1783 (*see* Webster 1953, at 3).

The day after Noah Webster sent his letter and manuscript to John Canfield (January 7, 1783), an unsigned essay was published on the front page of the *Connecticut Courant*, a widely-circulated Hartford newspaper, extolling the national benefit and "natural justice" of copyright protection for authors (*see Connecticut Courant*, Jan. 7, 1783; Pelanda 2011, at 437-42). The

[81] Smith (who would serve as President of Princeton College from 1795-1812) began a series of lectures on moral and political philosophy in 1795, and published them in 1812. In his jurisprudence lectures pertaining to the acquisition of property by "occupation" and labor, Smith wrote the following:

> Labor forms another, and still juster title to property. By it is intended any exertion of our talents, or any effort of industry, corporeal or mental, by which a thing is discovered that was not known before – fabricated that did not exist before – or receives, from some change in its form, an augmented value. The title acquired by this means is a necessary result of the natural right which every man possesses to the use of his own faculties, and the enjoyment of their fruits. The productions of a man's ingenuity and skill are his property, which he may employ or dispose of for his own benefit. (196-97)

The influence of John Locke is evident in these lectures, and they clearly draw on Roman law and natural law traditions. For example, in the sentences following the quoted language, Smith drew on the category and principles of "accession" to address to the use of another's materials in creative labor (197).

essay was evidently intended to persuade the people of Connecticut and their Assembly that this "property" should be "secured" by statute (*see Connecticut Courant*, Jan. 7, 1783; Pelanda 2011, at 441).[82] The essay primarily emphasized the discouragements to literary production connected with the absence of copyright protection for authors, appealing to the national interest in protecting authors to facilitate literary and cultural production (see *Connecticut Courant*, Jan. 7, 1783). However, in language strongly echoing Justice Aston in *Millar v. Taylor*, the anonymous author closed by appealing to his readers to agree that "there is no kind of property, in the nature of things, so much our own, as the writings which we originate meerly from our own creature imaginations" (*Connecticut Courant*, Jan. 7, 1783).

Cultural historian Christopher Grasso (1999, at 319; 1995, at 6, 22-23) has identified the author of this anonymous letter as John Trumbull, a Hartford author and lawyer (*see also* Pelanda 2011, at 438 n.21; Cowie 1936, at 187-88). Educated at Yale College, Trumbull published a series of hortatory and satirical essays in New Haven's *Connecticut Journal* during the early 1770s under the name of "Correspondent" (*see* Grasso 1995; Trumbull 1820). During this same period, he served with Timothy Dwight as Tutor of Yale College, and began studying law (*see* Trumbull 1820, at 14-15). In 1773, he was admitted to the bar of Connecticut, "but immediately went to Boston" to study law under John Adams (Trumbull 1820, at 15-17). While in Boston studying law, Trumbull lived with Thomas Cushing, the Massachusetts jurist who had participated in drafting the 1774 articles of association that helped lay a national foundation for the American economy (Trumbull 1820, at 15-17). Cushing was now Speaker of the Lower House of the Massachusetts General Court, a position that necessitated regular correspondence

[82] "An application on this subject will be made at the next sessions of our legislature, and I have that opinion of the public spirit and natural equity of my countrymen, that I can hardly doubt its success." (*Connecticut Courant*, Jan. 7, 1783). The January Session of the Assembly began on January 8 and went through February 8 (*see* The Public Records of the State of Connecticut for the Years 1783 and 1784 (Volume 5) (Leonard Labree ed. 1943).

with his friend Benjamin Franklin, who was acting as agent for Massachusetts and Pennsylvania in London (*see* Isaacson 2004). Whether through conversations with Cushing, study with Adams, or both, it is probable that Trumbull became familiar with the English legal traditions woven together in the *Millar* decision, and with Blackstone's *Commentaries*, during his year in Boston.[83]

Returning to Connecticut, Trumbull spent several more years in New Haven before moving to Hartford in 1780 to establish a legal practice (*see* Cowie 1936, at 208; Trumbull 1820, at 18).[84] In Hartford, he became an active member in the "Friendly Club", which assembled weekly to discuss "subjects, legal, philosophical and political" (Trumbull 1820, at 18; *see* Cowie 1936, at 211). This club came to be seen as an assembly of the "Hartford Wits," a group that included Yale classmates Noah Webster and Joel Barlow (*see* Cowie 1936, at 211; Parsons 1922).

Trumbull remembered Barlow from his days as a Tutor at Yale, and probably met Webster after his return from Boston to New Haven in 1774 (*see* Cowie 1936, at 208; Trumbull 1820, at 15). As Tutor of Yale College during a very unsettled period, both in the history of the nation and in the history of that educational institution, John Trumbull had worked with Timothy Dwight to raise the pedagogical status of fine literature and literary work (*see* Trumbull 1820, at 12-15; *see also* Unger 1998, at 12-20). These efforts were advanced under the Presidency of Ezra Stiles, which commenced in 1777/1778 (*see* Unger 1998, at 28-32). Joel Barlow and

[83] In his *Memoir*, Trumbull mentioned another, indirect connection to the *Millar* case. Describing his early education, he discussed his attempts "to imitate, both in prose and verse, the style of the best English writers, whose works he could procure in his native village [Watertown, Connecticut]. These were of course few. The Paradise Lost, Thompson's Seasons, with some of the poems of Dryden and Pope, were the principal." (Trumbull 1820, at 11) Thompson's *Seasons* was the work that had generated the litigation leading to the *Millar* decision.

[84] While establishing his legal practice, Trumbull also established a relationship with the Hartford printer-publishing firm of Hudson and Goodwin, which printed his poem *M'Fingal* as well as the *Connecticut Courant*. In 1783, Hudson and Goodwin, with financial support from Trumbull, would publish Noah Webster's Speller (*see* Unger 1998; Grasso 1995, at 22).

Noah Webster were, in different ways, products of Yale's new literary emphasis, determined to pursue literary vocations upon their graduation in 1778.

On January 10, 1783, three days after Trumbull's essay had appeared in the *Connecticut Courant*, Joel Barlow sent an influential letter from Hartford to the Continental Congress. The letter was addressed to Elias Boudinot, President of the Congress; in it, Barlow urged Congress to recommend legislation to the states modeled on English copyright law. Echoing Trumbull's essay, the letter emphasized the benefits of copyright law to author and nation, while also asserting that "[t]here is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his creative imagination" (Barlow 1783). In order to illustrate the harm to authors occasioned by the absence of copyright protection, Barlow drew on the unfortunate case of an unnamed "Author of *McFingal*" (*i.e.* the former Yale Tutor, his friend and fellow Hartford resident, John Trumbull). He also asserted that "[t]he same Gentleman has by him a number of original Poems, of equal merit with those he has already given to the Public; which cannot be brought forward [in the absence of copyright protection]" (Barlow 1783).

Joel Barlow waited until 1787 to publish his epic poem, *The Vision of Columbus*, having observed the widespread "piracy" of Trumbull's *M'Fingal* after its initial publication in 1782 (*see* Pelanda 2011, at 442; Trumbull 1820, at 18-19).[85] Later he would depart for France, become a French citizen and revolutionary writer, and serve as a delegate to the French National Assembly (*see* Unger 1998, at 177-78). Meanwhile, his friend Noah Webster spent substantial portions of 1783-1787 traveling throughout the states, peddling his Speller (which had expanded

[85] "The whole [of *M'Fingal*] was finished, and the first edition published at Hartford, before the close of the year 1782. As no author, at that period, was entitled by law to the copyright of his productions, the work soon became the prey of every bookseller and printer, who chose to appropriate it to his own benefit. Among more than thirty different impressions, one only, at any subsequent time, was published with the permission, or even the knowledge of the writer; and the poem remained the property of newsmongers, hawkers, pedlars and petty chapmen." (Trumbull 1820, at 18-19)

into a three-volume *Grammatical Institute of the English Language in America*), lecturing on the need for a "national" American language and government, and lobbying for copyright protection. During this period, Webster conversed and corresponded with a number of influential American statesmen, including George Washington and James Madison (*see* Unger 1998, at 58-153; Webster 1989; Webster 1953; Ford 1912; Webster 1843).

There is little doubt, then, that the younger generation of "Connecticut Wits," particularly Joel Barlow and Noah Webster, played a significant role in spreading a proprietary conception of copyright. However, if we focus our attention on the source of that proprietary conception, particularly on the Connecticut and Massachusetts laws themselves, the evidence provides better support for the conclusion that it was an older generation of established jurists and lawyers who played the crucial, formative role. It was, after all, Samuel Huntington who had chaired the Connecticut committee that recommended enacting a general law to provide for copyright, rather than merely granting John Ledyard's request for a special copyright privilege (Connecticut 1783, at 3). Indeed, according to biographer Larry Gerlach (1977, at 78), Huntington drafted the Connecticut copyright law.

Best known as a signer of the 1776 Declaration of Independence, Samuel Huntington had risen from a respectable "yeoman" family in Northeastern Connecticut to the highest legal, political, and social circles surrounding the Connecticut Governor, Jonathan Trumbull (*see* Gerlach 1977). In 1775, he left a successful legal practice in Norwich to serve as a member of the Governor's Council, a small body "Assistants" who advised the Governor and functioned as an Upper House of the Connecticut Assembly. The following year, he was delegated by the Assembly to represent Connecticut in the Continental Congress. Between 1776 and 1783, Huntington would serve every year in the Congress, except 1777 and 1782, and would serve as

President of the Congress between 1779 and 1781. Bringing extensive experience on Congressional committees back with him to Connecticut, he would afterward serve on a number of legislative committees in the Connecticut Assembly, chairing the committee that deliberated and recommended the nation's first copyright law in January 1783 (*see* Gerlach 1977).[86]

Between Samuel Huntington and John Trumbull there were strong, albeit indirect, familial, social, and professional connections. Huntington was connected by the marriage of his second cousin, Jabez Huntington, to John Trumbull's cousin Faith (daughter of Governor Trumbull) (*see* Gerlach 1977, at 21; Cowie 1936, at 11). This familial connection through John's uncle, Governor Trumbull, was solidified through multiple professional and social bonds: throughout his terms in Congress, Huntington regularly corresponded with the Governor, and, as one of the Governor's 11 Assistants, advised him on a range of legal and policy matters (*see* Gerlach 1977).

As a member of his uncle's "inner circle," a jurist who had resigned the Presidency of Congress only a year before returning to serve in the Connecticut Assembly, Huntington would surely have earned the respect and admiration of the younger lawyer, John Trumbull. Therefore, it is less than surprising that, one day after Samuel Huntington took on a decisive legislative role in debating and drafting Connecticut's copyright law, John Trumbull issued a stirring rhetorical appeal to the public supporting its enactment. We will perhaps never know whether these two men explicitly coordinated their activities, or whether John Trumbull simply seized an opportunity open to him through a conjunction of social locations (knowledge of pending legislation and access to the *Connecticut Courant* through his publishers, Hudson & Goodwin). We may conclude, however, that the conjunction of their semantic activities, anchored as these

[86] Huntington returned to Congress in July 1783 (*see* Gerlach 1977, at 79).

were in a shared social and legal background, laid an initial foundation for proprietary conceptions and principles vis-à-vis copyright in America.

Evidence has not been located to show exactly which Massachusetts men played a decisive role in that state's copyright legislation. However, there are indications of a connection to John Trumbull, this time through Timothy Dwight, Trumbull's fellow Tutor at Yale. Noah Webster believed that Dwight was responsible for the Massachusetts copyright legislation (*see* Ford 1912, at 57; Webster 1843, at 174), and this view has been echoed by recent historians relying on Webster (*see* Unger 1998, at 60).[87] After his time as Tutor at Yale, the future Yale president had returned home to Northhampton, Massachusetts, and had been elected in 1781 and 1782 to represent that city in the lower house of the Massachusetts General Court (*see* Fitzmier 1998, at 40). Unfortunately, very little evidence has been located to reveal Dwight's activities as a Massachusetts legislator (*see* Fitzmier 1998, at 191 n. 53). In the absence of such evidence, it is impossible to determine what Dwight's role may have been in the enactment of Massachusetts' copyright law.

Whatever role the "Connecticut Wits," particularly the future Yale President Timothy Dwight, played in securing the enactment of Massachusetts' copyright statute, the inference is justified that, between January and March, some processes of influence were at work between Connecticut and Massachusetts lawyers. Close social connections between the legal communities of Massachusetts and Connecticut have been seen in the fact that John Trumbull traveled to Boston to receive additional legal training. Massachusetts and Connecticut together formed the heart of New England, a regional identity that was rooted in the common institutional nexus of the Massachusetts Bay colony, and in the Puritans' covenantal patterns of social

[87] "Timothy Dwight, the tutor and poet he [Webster] and his classmates had revered at Yale…pushed Webster's copyright legislation through the Massachusetts legislature" (Unger 1998, at 60).

organization (*see* Noll 2002; Dalton et al. 1984; Story 1987 [1833]). That Massachusetts' copyright law went further and used stronger proprietary rhetoric is consistent with general cultural patterns prevailing between the two states: Connecticut was the land of "steady habits," while Massachusetts was a primary locus of revolutionary activity and popular appeals to "natural rights" (*see* Toth 2011; Haw 1997, at 58-82).[88]

Even before James Madison, Ralph Izard, and Hugh Williamson took up the question of "literary property" in Spring 1783, then, distinctively American state legal traditions vis-à-vis copyright were being formulated and communicated. These legal traditions universalized English legal traditions, with the help of a consequentialist understanding of the natural law tradition. In asserting that "nothing is more properly a man's own than the fruit of his study," the Continental Congressional Committee drew on these English legal traditions, but may very likely have done so as a result of potent New England legal traditions in development. Blending English legal traditions and North American colonial traditions, particularly those developing in New England, the committee determined that "the protection and security of literary property would greatly tend to encourage genius, [and] to promote useful discoveries." In so doing, the committee endorsed a paradoxical blend of proto-utilitarian, nationalistic, and natural law traditions that has, ever since, provided a foundation for the American institution of intellectual property. Echoing Joel Barlow, John Trumbull, the Massachusetts Assembly, and Justice Aston, the Confederate Congress endorsed a sweeping extension of the property concept, rooted in the natural law tradition, to products of the creative human mind. At the same time, emphasizing the "usefulness" of this property to America, and recommending that it be limited to her citizens,

[88] According to John Tebbel (1972 (Vol. 1), at 138), Massachusetts' lower house had adopted copyright legislation in 1772, as a response to a request for copyright protection from William Billings, but Governor Hutchinson refused to endorse the legislation, arguing that English law was sufficient to provide copyright protection in the colonies.

Congress endorsed a consequentialist and nationalistic justification for the existence of "intellectual" property that would ultimately limit its term and extent.

At this point, however, property concepts and principles had only been endorsed as extending to "literary property," *i.e.* to copyright. Those property concepts and principles would be further extended to patents by South Carolina in 1784. As the first Southern state to enact a copyright law and the only state to statutorily extend the principles of literary property to patents, South Carolina played a significant role in the emergence of intellectual property in the United States. This influence is also reflected in the important roles played by John Rutledge and Charles Pinckney in formulating the Constitution's "intellectual property clause," which will be discussed below.

In common with all the other state copyright laws that preceded it, South Carolina's "Act for the encouragement of arts and sciences" limited the term of copyright protection, while also endorsing the extension of property concepts and principles to copyright (*see* Library of Congress 1906; Patterson 2003; Crawford 1975). In common with 5 of the 7 state copyright laws that preceded it, South Carolina's act made copyright protection conditional upon "registration" of the works for which protection was sought.[89] Unlike any of the state copyright laws that preceded or succeeded it, however, the South Carolina law extended all of its protections and restrictions to patents:

> *And be it further enacted by the authority aforesaid*, That the inventors of useful machines shall have a like exclusive privilege of making or vending their machines for the like term of fourteen years, under the same privileges and restrictions hereby granted to, and imposed on, the authors of books (Library of Congress 1906, at 23).

[89] Neither New Hampshire nor Rhode Island required registration; Connecticut, Massachusetts, Maryland, New Jersey, and Pennsylvania did require registration (*see* Library of Congress 1906; Crawford 1975).

Registrations of copyrights and patents pursuant to this statute have been preserved, and were published in *The South Carolina Historical and Genealogical Magazine* (Volume 9, January 1908). Between 1785 and 1789, 6 books were copyrighted, and 3 patents were granted in South Carolina pursuant to this statute (Historical Notes 1908). [90] As a powerful and ominous sign of things to come, the patents were for cotton picking ("or Ginning") and spinning machines, and for a steam engine (Historical Notes 1908, at 57-58).

Within one year of formally securing their independence and sovereignty, then, the confederated states of North America had established distinctively American patent and copyright traditions. These were anchored in universalized English legal traditions, colonial legal traditions, and a consequentialist understanding of natural law. These legal traditions were, however, state traditions, which varied substantially from state to state, as we have seen. The determination to consolidate and unify these legal traditions at the Federal level would come toward the end of the 1787 Constitutional Convention in Philadelphia, and would be endorsed without debate by the delegates. Key roles in the semantic formulation leading up to this endorsement were played by two committees: the Committee of Detail, chaired by John Rutledge of South Carolina, and the Committee on Postponed Parts, chaired by David Brearley of New Jersey.

[90] (1) "The Honorable David Ramsey Esquire Registers a Work Called the History of the Revolution in South Carolina from a British Province to an Independent state between the years 1774 and 1783" (April 20, 1785); (2) Henry Osborne Registers an original Work Entitled 'An English Grammar Adapted to the Capacities of Children'" (April 21, 1785); (3) "Noah Webster Registers an Original Work Entitled 'An Institute of the English Language in three parts'" (June 30, 1785); (4) "Robert Squibb Registers a Work called 'The Gardener's Calendar for South Carolina, Georgia and North Carolina, Containing an account of Work necessary to be done….'" (February 5, 1787); (5) "Nicolas Pike of Newberry Port in the State of Massachusetts…Registers a Work intitled 'A New and Complete System of arithmetic Composed for the Use of the Citizens of the United States" (February 14, 1787); (6) "The Honorable John Faucheraud Grimke Esq[r] Registers an original Work entitled 'The South Carolina Justice of the Peace….'" (October 11, 1788) (Historical Notes 1908).

By the end of July 1787, a series of debates and compromises triggered by Virginia's initial proposals had enabled a hazy form of "Union" to begin taking shape in front of Philadelphia's assembled state delegates (*see* Stewart 2007).[91] This hazy form was decidedly "national" *and* "federal" – rather than "merely federal" – which meant that substantial legislative, executive, and judicial authorities would be transferred from the states to the Federal government, while a degree of electoral power would be transferred from the states to individual members of the nation. This electoral power would be "proportional" to state population in the "lower" legislative assembly, but would ignore population in apportioning representatives to the "upper" legislative body.[92] An individual President, selected by state electors, would exercise the executive power for a limited term, and there would be a national judiciary. The states, in other words, would be emptied of substantial powers and authorities, in order that these might fill a national electoral base and a "consolidated" Federal government.

Given their shared sense of an impending confederate crisis, the delegates accepted that some transfers of state power and authority were necessary. Nevertheless, their beliefs varied substantially concerning the extent to which power and authority should be relinquished by the states. [93] Even more fundamentally, however, their basic conceptions about the meaning of

[91] The "Virginia Plan" was submitted by Edmund Randolph on May 29, 1787, in the form of 15 resolutions and an accompanying speech (*see* Farrand (Vol. 1) 1911, at 15-28; Matthews 2004, at 41). The Virginia delegates, including James Madison, had arrived earliest, taking advantage of their early arrival to discuss plans for the "American Union" amongst themselves, and with arriving delegates from other states (*see* Farrand (Vol. 3) 1911, at 20-26; Stewart 2007, at 27-45). Their delegation was the largest and most impressive (*see* Scarinci 2005; Appendix B).

[92] This compromise was secured by counting African slaves as 3/5 of a person, thus swelling the population of slave-owning states and enabling an "unholy alliance" of large states and slave-owning states (*see* Farrand (Vol. 1) 1911, at 192-208 (June 11), 444-606 (June 28-July 13); Farrand (Vol. 2) 1911, at 1-20 (July 14-16); Stewart 2007, at 75-81, 101-26).

[93] With the exception of Alexander Hamilton, the New York delegates had withdrawn from the Convention in early July (*see* Farrand (Vol. 1) 1911, at 536). They believed that the Convention was going too far in transferring power

words being used to evoke institutionalized locations of social power and authority – national, federal, republican, supreme – differed. The "force and extent" of such words was an important focus of thought, writing, and discussion amongst the delegates, as can be seen from the notes and letters written by debaters and observers (*see particularly* Farrand (Vol. 1) 1911, at 20 n.12, 29-44, 185, 263-65, 281-353).

Drawing on Greek and Roman legal traditions, as well as their own colonial and state legal traditions; drawing on their experience with British government and their understanding of English legal traditions; occasionally referencing Montesquieu's *Spirit of the Laws*, the "Law of Nations," and European legal history; drawing on all these traditions, the assembled delegates wrote, debated, and discussed their way toward a shared language for conceiving and disagreeing over their new nation-state.

The hazy form of "national and federal" union that had taken shape by the end of July was the result of substantial negotiation and compromise. What these negotiations and compromises fully meant, however, was yet to be worked out in writing. On July 26, the Convention adjourned to enable this task to be performed by a Committee of Detail (Farrand (Vol. 1) 1911, at xxii; Farrand (Vol. 2) 1911, at 85-87, 95-98, 106, 116-75). The Committee was comprised of five members: John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania. Together, these five men produced the first draft of the United States Constitution, a draft that would give direction to the remaining constitutional debates. Up until this point, much of the debate had focused on issues relating to electoral representation. One

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and authority to a national government, and that their mandate from the New York legislature "did not warrant them in countenancing, even by their presence, the action which the Convention was taking" (Farrand 1911 (Vol. 1), at xiv). In his journal entry for May 29, New York delegate Robert Yates wrote that Randolph had "confessed" that the 15 resolutions of the Virginia Plan "were not intended for a federal government – he meant a strong *consolidated* union, in which the idea of states should be nearly annihilated" (Farrand 1911 (Vol. 1), at 24).

effect of the Committee's draft was to shift the debate from representation in Congress to the powers of Congress.

Prior to the drafting activity of the "Committee of Detail," Congress had been allocated the power to legislate "in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by individual legislation" (Farrand (Vol. 2) 1911, at 21-36, 131-32).[94] However, the draft constitution that the Committee of Detail produced significantly limited Congress' powers by explicitly enumerating them. Such explicit enumeration, together with the carefully limited expansion of the "necessary and proper clause," would implicate, for a well-trained lawyer, a traditional principle of statutory interpretation: "express inclusion of one thing excludes all others" (*expressio unius est exclusio alterius*) (*see* Black 1910, at 468; *A Law Grammar, or an Introduction to the Theory and Practice of English Jurisprudence* 1791, at 58-59). [95]

And the Committee of Detail was full of well-trained lawyers. The actual drafters were Edmund Randolph (first round of drafting), James Wilson (second round of drafting), and John Rutledge (final emendation and Chairmanship of the Committee) (Farrand (Vol. 2) 1911, at 129-75; Stewart 2007, at 163-89). Randolph had served an apprenticeship under his father, a preeminent Virginia lawyer, after studying philosophy at the College of William and Mary; he was admitted to practice before Virginia's highest court in 1774, and was building a successful

[94] The Virginia Plan had allocated to Congress the power to "enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation" (Farrand (Vol. 1) 1911, at 21). Having survived debate in the Committee of the Whole, similar language was reported on June 13 (*see* Farrand (Vol. 1) 1911, at 225).

[95] James Wilson's awareness of the *expressio unius* principle is revealed by a statement that he made in the Pennsylvania ratifying convention on November 28, 1787. Arguing that it would be too difficult to fully enumerate all the rights of the people in a Bill of Rights, he added: "and when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted" (Farrand (Vol. 3) 1911, at 143-44).

legal practice in Williamsburg when he was elected as attorney general for the state in 1776 (*see* Reardon 1974). James Wilson received his early education at St. Andrews University in Scotland, before immigrating to the U.S. and serving an apprenticeship under John Dickenson; he was admitted to the Pennsylvania bar in 1767, and established a successful legal practice in Carlisle (*see* Smith 1956). Wilson would go on to lay the jurisprudential foundations for University of Pennsylvania's law school. John Rutledge, like many South Carolina lawyers, had traveled to London to study law at the Middle Temple before being admitted to the bar in 1761; he maintained one of the most successful legal practices in Charleston (*see* Haw 1997).

Oliver Ellsworth, the fourth lawyer on the Committee of Detail, was also at the height of his legal career. Following the typical path of New England lawyers, he "read law" while serving apprenticeships under Matthew Griswold and Jesse Root (*see* Toth 2011, at 23). He was admitted to the Connecticut bar in 1771, and maintained a successful legal practice in Hartford (*see* Toth 2011, at 23-24). Noah Webster boarded with Ellsworth in 1779 while Webster was teaching in Hartford, and managed to receive some legal training under "the eminent jurist" (Webster 1989, at 134). Rutledge, Wilson, and Ellsworth would all go on to become justices of the United States Supreme Court.

The draft produced by the Committee of Detail was circulated to the other delegates on August 6 (*see* Farrand (Vol. 2) 1911, at 176-89). The first article of the draft declared the name of the social entity being formed by the assembled states: "The United States of America" (Farrand (Vol. 2) 1911, at 177). Article III "vested" the "legislative power" in "a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate" (Farrand (Vol. 2) 1911, at 177). The tenth article of the draft vested the "Executive Power of the United States" in a "single person," specifying his name, title, manner of election, and powers

(Farrand (Vol. 2) 1911, at 185-86). And the eleventh article of the draft vested the "Judicial Power of the United States" in "one Supreme Court," empowering the Congress to constitute "inferior" Federal courts, as necessary (Farrand (Vol. 2) 1911, at 186-87). Article II declared that these legislative, executive, and judicial powers of the United States government would be "supreme" (Farrand (Vol. 2) 1911, at 177).

This draft Constitution prepared by the Committee of Detail helped to lay the semantic foundations for remaining debate in Congress. The social bodies of the Federal government, as well as the individual "citizens" of the nation, had been named and formulated in relation to one another, and in relation to the existing states. Henceforward, the hazy shape of Federal "union" previously contemplated would come into bolder relief, as the commitments entailed by written formulation enabled delegates to see implications and the foreclosure of possibilities. Consistent with the compromises achieved by the Convention, but also going well beyond these compromises, the draft provided a concrete formulation of the organizational structure and basic operating principles for a nation-state. Succeeding debate in the Convention would, for the most part, follow the order laid out by this draft, and would be shaped by the commitments it entailed, including the alliance it enabled between a slaveholding South and a mercantile North.[96]

Two commitments entailed by this draft are of particular significance for intellectual property: (1) the enumerated powers of Congress, and (2) the "supremacy" of Federal law. The seventh article of the draft enumerated Congress' powers (Farrand (Vol. 2) 1911, at 181-83). These enumerated powers included many of the powers that would ultimately be allocated to Congress, including powers to tax and to regulate commerce; they did not, however, include the power to grant copyrights and patents. In his second round of drafting, James Wilson had specified that "All Commissions, Patents and Writs shall be in the name of the 'United States of

[96] Article VII Sections 4, 6.

America','" and John Rutledge had allowed this language to stand (Farrand (Vol. 2) 1911, at 172). There is, therefore, some indication that the Committee contemplated a Federal legislative power to grant patents (perhaps including patents of invention), but this language was excised before the draft was presented to the Convention on August 6.

Another power not given to Congress in the Committee of Detail's draft was the power to override state legislation. The original Virginia Plan had proposed that Congress be given the power to "negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union" (Farrand (Vol. 1) 1911, at 21; *see also* Farrand (Vol. 3), at 23-24). This power had survived substantial debate on May 31 and June 8, but on July 17 was replaced by a clause specifying that Federal law is "supreme" (*see* Farrand (Vol. 1) 1911, at 53-54 (May 31), 162-73 (June 8), 164 n.3, 225; Farrand (Vol. 2) 1911, at 21-36).[97] The debates accompanying this change indicate that several of the delegates preferred judicial to Congressional review of state legislation (*see* Farrand (Vol. 2) 1911, at 27-29).[98] Consistent with the Convention's resolutions, the Committee of Detail specified that U.S. legislation and treaties would be the "supreme law of the several States, and of their citizens and inhabitants" (Farrand (Vol. 2) 1911, at 183).

A "supreme" Federal law that did not recognize patents and copyrights could raise questions about their legal validity. As long as Congressional powers were broadly and generally enabled, questions about the legal status of copyrights and patents could be left for

[97] Charles Pinckney attempted to reintroduce similar language on August 23, but was defeated by a narrow margin (6-5) (*see* Farrand (Vol. 2) 1911, at 382, 390-92). It is worth pausing for a moment to consider what the Congressional veto might have portended for patents and copyrights, had they never been enumerated as a Congressional power. State legislatures would presumably have continued to grant patents and copyrights, but these grants would be subject to Federal veto whenever sufficient majorities were obtainable in Congress. One can imagine that this veto would frequently occur, as patents and copyrights might be seen to privilege the citizens of particular states over others. Grants of patents and copyrights would likely have involved highly politicized fights between states and economic regions within Congress, and would have been drawn into the divides marking America's emerging political parties.

[98] Farrand Volume 1, at 97 (power of judicial review involves deciding as to constitutionality, Gerry).

another day. By replacing a broad and general enablement of Congressional powers with enumerated powers, while also providing for the supremacy of Federal law, the Committee of Detail created a set of circumstances in which the range of possibilities for intellectual property in the United States became much narrower: either Congress would now be given the explicit authority to grant Federal copyrights and patents, or copyrights and patents would be the creatures of state law.

On August 18, two delegates stepped forward to propose amendments to Congress' powers that would enable Congress to grant patents and copyrights: James Madison of Virginia and Charles Pinckney of South Carolina (*see* Farrand (Vol. 2) 1911, at 321-33; Stewart 2007, at 197). Madison had experience with copyrights and patents from his time in the Continental Congress and in the Virginia House of Delegates. As previously discussed, he had served on the Congressional Committee that recommended to the states that they provide copyright protection for "literary property". He had also served on committees in the Virginia House of Delegates that, between 1785 and 1786, considered (and rejected) a patent application for a steamboat engine by John Fitch, and that drafted and presented Virginia's copyright law (*see* Bugbee 1967, at 96-97, 121). Just prior to the Constitutional Convention, Madison had noted the need for national uniformity in matters of commerce, including in relation to "literary property" (*see* Madison 1900 (Vol. 2), Observations by J.M., #5, dated April 1787).

In considering John Fitch's Virginia patent application, Madison would have learned about the fierce competition for state patents on steamboat engines that was playing out between Fitch and James Rumsey. Rumsey had beaten Fitch to a Virginia patent by approximately one year, and had secured the powerful backing of George Washington for his steamboat engine (*see*

Bugbee 1967, at 95-96).[99] He subsequently obtained patents from Maryland and Pennsylvania. However, Fitch obtained patents from New Jersey, Delaware, and New York (*see* Bugbee 1967, at 96-97). On August 22, 1787, Fitch (whose patents had secured the exclusive right to drive his steamboat along the Delaware River) would be given the opportunity to display his steamboat to the delegates assembled for the Constitutional Convention (see Stewart 2007, at 200-201; Sutcliffe 2004). The efforts by Fitch and Rumsey, among others, to obtain state patents in the years leading up to the Constitutional Convention likely contributed to a belief on the part of assembled delegates (and ratifying state representatives) that it made sense to grant patents at a Federal level.

Charles Pinckney's experience with state copyrights and patents is a little bit harder to trace. His plans to study law at the Middle Temple had been interrupted by the Revolutionary war with Britain, but he managed to obtain admission to the South Carolina bar, and practiced law for a brief period in Charleston after the hostilities with Britain had ended (*see* Matthews

[99] James Madison mentioned Rumsey's patent application in a letter to Thomas Jefferson (then Governor of Virginia) dated January 9, 1785. In this letter, Madison summarized the activity of the Virginia House of Delegates, including its review of Rumsey's application:

> J. Rumsey by a memorial to the last Session represented that he had invented a mechanism, by which a boat might be worked with little labour at the rate of from 25 to 40 miles a day, against a stream running at the rate of 10 miles an hour, and prayed that the disclosure of his invention might be purchased by the public. The apparent extravagance of his pretensions brought a ridicule upon them, and nothing was done. In the recess of the Assembly, he exemplified his machinery to General Washington and a few other gentlemen, who gave a certificate of the reality & importance of the invention, which opened the ears of the Assembly to a second memorial. The Act gives a monopoly for ten years, reserving a right to abolish it at any time by paying £10,000. The inventor is soliciting similar Acts from other States, and will not I suppose publish the secret till he either obtains or despairs of them (Madison 1900 (Volume 2)).

George Washington issued a certificate to Rumsey dated September 7, 1784, which stated as follows:

> I have seen the model of Mr. Rumsey's Boats constructed to work against stream; - have examined the power upon which it acts; - have been an eye witness to an actual experiment in running water of some rapidity; & do give it as my opinion (altho' I had little faith before) that he has discovered the art of propelling Boats, by mechanism & small manual assistance, against rapid currents: - that the discovery is of vast importance – may be of the greatest usefulness in our inland navigation - &, if it succeeds, of which I have no doubt, that the value of it is greatly enhanced by the simplicity of the works; which when seen & explained to, might be executed by the most common Mechanic's (*quoted in* Bugbee 1967, at 96).

2004, at 11-27). Charleston had well-established mercantile communities, so it is possible that Pinckney became familiar with South Carolina's patent tradition in this early period. He was elected to serve in South Carolina's House of Representatives in 1784, and was delegated from there to the Continental Congress (*see* Matthews 2004, at 26-38). Pinckney served as a South Carolina representative to the Congress from 1784 to 1787. He does not appear to have played direct roles in South Carolina's adoption of its copyright/patent law of 1785, and had been delegated to Congress too late to play a role in the Congressional recommendation vis-à-vis copyright. However, his service in Congress impressed him with the need for national uniformity in regulation of commerce, and he favored giving "encouragement" to American industry (*see* Matthews 2004, at 30). Moreover, he was connected by marriage to Hugh Rutledge, who had presided over South Carolina's enactment of its copyright/patent law in 1785.

During the Constitutional Convention, Pinckney and Madison both stayed in a boarding house run by Mary House (*see* Stewart 2007, at 28, 30, 36-37, 43; Matthews 2004, at 40). The Virginia delegates had held meetings there while waiting for the other delegates to arrive, so it seems possible that additional meetings were held there that would have involved discussions between Madison and Pinckney. At the same time, Noah Webster was staying two streets away, at Mrs. Ford's on Walnut Street (*see* Ford 1912, at 171). In his diary entry for August 4, 1787, Webster records meetings with James Madison, Benjamin Franklin, Roger Sherman, Oliver Ellsworth, William Livingston, and David Brearley ("Mr. Chief Justice of N Jersey") (*see* Ford 1912, at 218). It is difficult to believe that these meetings did not, at some point, touch on Webster's desire to secure copyright protection for his books, and his belief (given a powerful juristic formulation by Samuel Stanhope Smith and John Trumbull) that such protection was sanctioned by natural law.

Whether acting in agreement or not, on August 18 Madison and Pinckney both submitted proposals to add grants of copyrights and patents to Congress' powers (*see* Fenning 1929). The official journal of the Convention, kept by the secretary William Jackson, simply records a list of "additional powers proposed to be vested in the Legislature of the United States" and their referral to the Committee of Detail (Farrand (Vol. 2) 1911, at 321-22). These included the following proposed powers:

> To grant charters of incorporation in cases where the public good may require them, and the authority of a single state may be incompetent
> To secure to literary authors their copy rights for a limited time
> To establish an University
> To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries
>
> To establish seminaries for the promotion of literature and the arts and sciences
> To grant charters of incorporation
> To grant patents for useful inventions
> To secure to authors exclusive rights for a certain time
> To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures

Madison's journal helps to explain the obvious overlaps: the first group of four powers (among others) was proposed by Madison, while the second group of five (among others) was proposed by Pinckney (*see* Farrand (Vol. 2) 1911, at 324-26). Prior to editing his journal in conformance to the official journal, Madison also recorded introducing a power "[t]o secure to the inventors of useful machines and implements the benefits thereof for a limited time" (Farrand (Vol. 2) 1911, at 324 n.3). According to Madison's records, these proposals were moved unanimously and referred to the Committee of Detail without debate (*see* Farrand (Vol. 2) 1911, at 324-33).

The following Monday, August 20, Charles Pinckney submitted a number of additional proposals, which were also referred to the Committee of Detail without debate. One of these was a proposal that "[t]he United States shall be for ever considered as one Body-corporate and

politic in law, and entitled to all the rights, privileges, and immunities which to Bodies Corporate do, or ought to appertain" (Farrand (Vol. 2) 1911, at 335, 340-42). At the same time, Gouverneur Morris submitted a detailed proposal for a "Council of State" comprised of specified "Officers" to assist the President in his capacity as executor of United States laws (*see* Farrand (Vol. 2) 1911, at 335-37, 342-44). This early proposal for cabinet-like offices included provisions for secretaries of Commerce and Finance, and of "domestic affairs"; the duty of the latter would be "to attend to matters of general police, the state of agriculture and manufactures, the opening of roads and navigations, and the facilitating communications through the United States" (Farrand (Vol. 2) 1911, at 335-36). This proposal was also submitted to the Committee of Detail without debate (*see* Farrand (Vol. 2) 1911, at 342).

Meanwhile, John Rutledge had voiced concern over "the length of the Session, the probable impatience of the public and the extreme anxiety of many members of the Convention to bring the business to an end" (Farrand (Vol. 2) 1911, at 328). Although the delegates continued to work systematically through the Committee of Detail's draft, debates began to take on an explosive quality. On August 21 and 22, debates over Congress' taxing powers focused on the power to tax imported slaves (*see* Farrand (Vol. 2) 1911, at 352-79). The debates were framed in terms of a divide between North and South, with the Southern States (South Carolina in particular) threatening collapse of the Convention if their interests weren't recognized and protected. The compromise coming out of these debates favored the mercantile North by permitting protectionist "navigation acts" to be enacted by simple majority vote, while sanctioning the South's continued import of African slaves through 1808 and the Fugitive Slave Clause (*see* Farrand (Vol. 2) 1911, at 396-421, 434-56; Stewart 2007, at 195-204).[100]

[100] On September 10, John Rutledge secured a provision protecting these provisions against amendment through 1808 (*see* Farrand (Vol. 2) 1911, at 555, 559).

Consideration of the additional matters assigned to the Committee of Detail had been postponed while these high-stakes compromises were negotiated (*see* Farrand (Vol. 2) 1911, at 368, 376). However, on August 31, faced with additional threats to abandon the Convention, the delegates approved a motion by Roger Sherman to create a committee to deal with all the parts of the Constitution that had been postponed (*see* Farrand (Vol. 2) 1911, at 473, 481). This "Committee on Postponed Parts," chaired by David Brearley of New Jersey, included delegates from each of the remaining ten participating states: Nicholas Gilman of New Hampshire, Rufus King of Massachusetts, Roger Sherman of Connecticut, Gouverneur Morris of Pennsylvania, John Dickenson of Delaware, Daniel Carroll of Maryland, James Madison of Virginia, Hugh Williamson of North Carolina, Pierce Butler of South Carolina, and Abraham Baldwin of Georgia.

No records are available to indicate how the Committee on Postponed Parts worked (*see* Scarinci 2005, at 197). As Chairman and reporter of the Committee's work, David Brearley probably took final drafting responsibility. However, he would have been ably assisted by the considerable legal skills of Roger Sherman, John Dickinson, Gouverneur Morris, Abraham Baldwin, and Rufus King (*see* Appendix 2). And there can be little doubt that James Madison contributed significantly to the final draft.

The Committee on Postponed Parts worked quickly, issuing partial reports between September 1 and September 5 that proposed language for remaining sections of the Constitution (*see* Farrand (Vol. 2) 1911, at 483-516). A substantial focus of their efforts was the Presidency. However, they also addressed the proposals for Congressional powers, which had been offered by Madison and Pinckney. In place of those wide-ranging proposals was a single provision defining Congressional powers to grant copyrights and patents:

> To promote the progress of science and useful arts by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries (Farrand (Vol. 2) 1911, at 505, 509).

This proposed language was adopted without debate, and was left untouched by the Committee of Revision (often referred to as the "Committee on Style"), which produced a final, polished draft of the Constitution (*see* Farrand (Vol. 2) 1911, at 505, 509-10, 595).[101] During the final debates on the draft Constitution, Madison and Pinckney attempted to reintroduce Congressional powers to create national corporations and universities, but these were voted down (*see* Farrand (Vol. 2) 1911, at 610-11, 615-16, 620). The final, "enrolled" Constitution, which included the authorization for patents and copyrights in the language adopted by the Committee on Postponed Parts, was signed by 39 delegates on September 17, 1787, and transmitted to Congress (*see* Farrand (Vol. 2) 1911, at 641-67).[102]

However, the signing of the Constitution, while it can be seen as marking the end of one cycle of semantic legal ordering, marked only the beginning of another cycle. The Constitution was not yet legally effective. Indeed, the debates of the Continental Congress, triggered by receipt of the signed Constitution, reveal deep questions as to the legal validity of the steps the Convention had taken (35 *Journals of the Continental Congress*, at 540-44, 548-49; Maier 2010, at 52-59). The Convention delegates had, after all, only been authorized to revise the Articles of Confederation. A very good argument could be made that the delegates had unconstitutionally

[101] The Committee on Revision was selected on September 8, and was comprised of William Samuel Johnson (Connecticut), Alexander Hamilton (New York), Gouverneur Morris (Pennsylvania), James Madison (Virginia), and Rufus King (Massachusetts) (*see* Farrand (Vol. 2) 1911, at 547, 553-54 565-603). It is generally accepted that Gouverneur Morris was the primary drafter for the Committee of Revision, and thus that the final constitution is a product of his pen. The fact that he left the Intellectual Property enabling language alone could indicate his contribution, as a member of the Committee on Postponed Parts, to the style of its drafting.

[102] Interestingly, Farrand's transcription of the enrolled and signed version of the Constitution contains some slight revisions to the Intellectual Property Clause. Capitalization was added, and "limited times" was changed to "limited Time" (*see* Farrand (Vol. 2) 1911, at 655).

exceeded the scope of their delegated powers in drafting a Constitution that would, to a large degree, diminish the Confederated States in establishing a "national and Federal" Union.

According to its own terms, the Constitution would only become effective once nine states had ratified it (Article VII). The Constitution's drafters had recommended a process of ratification that, by design, would involve the establishment of ad hoc ratification Conventions for each State. It was believed by some that a ratification process left to the established State legislatures would probably be a failure: sufficient numbers of legislators could never be persuaded to undermine their own positions and responsibilities (*see* Farrand (Vol. 2), at 478-79). And the delegates agreed that a Constitution drafted in secret could never be implemented without some process of deliberative endorsement by the American public.

During the ratification process, jurists and lawyers who had participated in drafting the Constitution stepped forward to present their interpretations of the text, and to debate the interpretation of legal traditions and social conditions supporting their interpretations of the text. Interestingly enough, the allocation of a power to grant patents and copyrights to the Federal Congress generated very little debate, even during the contentious ratifications of Pennsylvania, Massachusetts, Virginia, and New York (*see* Maier 2010). Nevertheless, the limited discussions that are recorded shed light on then-developing concepts and principles related to intellectual property – and of the nation-state within which that property was to be enclosed – which would begin to shape the proprietary social imagination of the new American republic.

Authoritatively Interpreting the Constitution

The first State to schedule a ratification convention was Pennsylvania (*see* Kaminski et al. (Vol. II), at 20). As a primary drafter of the Constitution and a Pennsylvania jurist, James

Wilson undertook a central and early role as advocate for ratification. On October 6, at a meeting held by the City of Philadelphia to elect delegates to the Pennsylvania ratifying convention, Wilson gave a lengthy commentary on the Constitution, a summary of which was published three days later in the *Pennsylvania Herald* (*see* Kaminski et al. (Vol. II), at 167-72). By December 29, this Commentary had been republished in 34 newspapers ranging from Vermont to Georgia (*see* Kaminski et al. (Vol. XIII), at 337-43). Wilson's Commentary thus became the first nationally-communicated, authoritative interpretation of the Constitution, and, as such, a prime focus for later interpretations, defenses, and critiques.[103]

Although he never actually mentioned them, Wilson was responding to 16 Pennsylvania Assemblymen, who had published their objections to the Constitution – and to the strong-arm tactics used in scheduling Pennsylvania's ratification convention – in Philadelphia's *Independent Gazetteer* (October 3, 1787, p. 2). Among other things, the dissenting Assemblymen worried that the new "Legislature consisting of three branches" threatened to annihilate their State, or to reduce it to a "mere corporation." They also argued that a "declaration of rights," particularly to protect the "liberty of the press," was necessary.

Wilson responded by relying on a variation of *expressio unius* principle discussed above: Congress' powers were explicitly enumerated in a positive, written grant, and, therefore, "every thing which is not given is reserved" (Kaminski et al. (Vol. XIII), at 339). There was no reason to fear for the liberty of the press, according to Wilson, because no power to regulate the press had been given to Congress in the Constitution.

This argument was countered, however, by a pseudonymous New York "Republican," who had read a reprint of Wilson's Commentary in the *New York Daily Advertiser* (*see* Kaminski

[103] Alexander Dallas, the editor of the *Pennsylvania Herald*, declared Wilson's Commentary to be "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION" (Kaminski et al. (Vol. XIII), at 337).

et al. (Vol. XIX), at 130-33). "A Republican" took issue with Wilson's argument, inquiring rhetorically:

> Does this constitution possess, as you assert, *no influence whatsoever on the press*? Is there not a provision in it 'to secure for a limited time to authors and inventors the exclusive right to their respective *writings* and discoveries'? I do not mean to call in question the propriety of this provision, but I would ask, whether under it the press may not be considered subject to the *influence* and controul of this government? – Will it be denied that this power includes in it (in some measure) *that of regulating literary productions*? (Kaminski et al. (Vol. XIX), at 132 (emphases in original))

This response to Wilson was reprinted (among other places) in Philadelphia's *Independent Gazetteer* on October 30 (*see* Kaminski et al. (Vol. XIX), at 130).[104] Robert Whitehill, a drafter of Pennsylvania's 1776 Constitution and one of the dissenting Pennsylvania Assemblymen, would draw on the "Republican's" argument in bolstering his case that a constitution without a Bill of Rights posed a threat to fundamental liberties, including liberty of the press (*see* Kaminski et al. (Vol. II), at 454, 468).[105]

Apparently, the "Anti-Federalist" opponents of the U.S. Constitution did not question the legal foundations of copyright protection, and were primarily concerned about its implications for a free press. They were also concerned about "monopolies," however, as would become clear in the Massachusetts ratifying convention. Before turning to the Massachusetts convention, however, one other argument in James Wilson's October 6 Commentary should be emphasized.

Wilson had also responded to the concern that the Constitution's provisions for a strengthened Federal Union would reduce the States to "mere corporations." His response

[104] A similar argument was made several weeks later by another pseudonymous New Yorker ("Philopoemen") (*New York Daily Advertiser*, 16 November 1787; Kaminski et al. (Vol. XIX), at 266).

[105] Despite being defeated in the Pennsylvania Convention, Whitehill and 20 other men sharing his concerns published a lengthy "Dissent of the Minority of the Pennsylvania Convention" on December 18, 1787; this "Dissent" was republished and circulated widely throughout the States, and helped generate significant momentum behind the movement to amend the Constitution with a Bill of Rights (*see* Kaminski et al. (Vol. XV), at 7-36).

reflects the significance of corporate legal traditions for a newly-forming United States of America:

> Those who have employed the term corporation upon this occasion, are not perhaps aware of its extent. In common parlance, indeed, it is generally applied to petty associations for the ease and conveniency of a few individuals; but in its enlarged sense, it will comprehend the government of Pennsylvania, the existing union of the states, and even this projected system is nothing more than a formal act of incorporation (Kaminski et al. (Vol. XIII), at 342).

Wilson, in other words, agreed with Charles Pinckney that the United States of America was, from a legal perspective, a corporate entity.

Historians of the American Revolutionary Period have drawn attention to the power of republican traditions in shaping American understandings of the new society they were building (*see* Noll 2002; Wood 1998; Bailyn 1992). These same historians have also noted, however, that the "republican" concept was not a formal concept – it did not primarily evoke a particular form of society and government, but rather the qualities (or "spirit") of the people making up the society and government (*see* Wood 1998, at 49; Bailyn 1992, at 181-84). Granted, as the Americans knew from reading Montesquieu and Plutarch, a republican conception did imply some dispersion of power and authority throughout the social collectivity. However, the important point was that the people holding power and authority would be virtuous and reasonable. Their primary orientation would be to the public good (the common wealth, or *res publica*), rather than to private gain or selfish interest (*see* Wood 1998, at 46-90). Otherwise, the republic would collapse into a monarchical tyranny, as Rome had. To be a "republican" in this sense was to embrace a heroic virtue-ethic, to be supremely "value rational" in partaking of the commonwealth's resources and responsibilities. American "republicanism" was, therefore, a very particular type of idealism (Wood 1998).

But within this framework of virtuous idealism, there was a wide range of possibilities for the formal structure of society and government. Semantic legal ordering, I am arguing, contributed concepts and principles for this formal structure. For two primary contributors to the text of the Constitution – Charles Pinckney and James Wilson – the concepts and principles giving meaningful form to the Federal government's formal structure were drawn from corporate legal traditions, traceable ultimately to Roman legal traditions, but interpreted in relation to colonial corporations and state-granted charters (*see particularly* Kaufman 2008). From this perspective, the Americans would, through their new constitution, move from a structure of partnership to a corporate structure, from an unincorporated "association" of states to an incorporated "Union" of states, which would hold property and incur obligations under its own name (*cf.* Wood 1998, at 53-65). Among the first obligations that this Union would incur under its own name were the states' crippling debts.

But for jurists trained in English common law, corporate legal traditions were closely related to anti-monopoly traditions. The English Statute of Monopolies (1624) had prohibited monopolies, while creating exceptions for corporate charters and patents for "new manufactures." Several of Sir Edward Coke's famous reports delineating the prohibition of monopoly under English common law had involved corporate charters. Indeed, as we have seen, the English charters incorporating guilds (like the Stationers Company) and colonial companies often granted monopolies explicitly – monopolies of trade, and, in the case of the colonies, monopolies of landed territory. Although the English anti-monopoly tradition carried with it a great deal of hostility to monopolies, it also enabled certain types of monopoly to be viewed as positive exceptions. Corporations (of certain types) and patents were, for jurists trained in this

tradition, two such exceptions. As we can see, early interpretations of the Constitution of the United States of America reflected these legal traditions.

But we can also see why Revolutionary Americans, whose "rights" and "liberties" had become so salient in their struggle with Britain, might have had concerns about that Constitution. The Massachusetts delegates, who ultimately voted 187 to 168 to ratify the Constitution, expressed pointed concern about the Constitution's potential to sanction Congressionally-created monopolies. However, their concerns did not focus on the Congressional power to create patents and copyrights, but rather on Congress' potential to create monopolistic corporations, either pursuant to its power to regulate commerce or its power to make all laws "necessary and proper for carrying into Execution" the other powers given in the Constitution. Elbridge Gerry had raised this concern at the end of the Constitutional Convention, and the concern echoed in Massachusetts newspapers during the period leading up to that state's ratifying convention (*see* Kaminski et al. (Vol. IV), at 14, 288-90, 426-28; Kaminski et al. (Vol. V), at 576-80, 653-54, 720-26, 770-72, 797-98).[106] This concern was addressed by proposing an amendment to the Constitution that would prohibit Congress from erecting a "company of merchants with exclusive advantages of commerce" (*see* Kaminski et al. (Vol. VI), at 1382, 1414, 1470, 1478).

Concerns about mercantile monopolies were also raised in the Virginia and New York ratification conventions, as were concerns about liberty of the press (*see* Kaminski et al. (Vol. X), at 1191, 1316-17, 1325-26; Kaminski et al. (Vol. XXII), at 2110-12). However, in neither convention were these concerns provoked by the Constitutional clause authorizing the Federal Congress to issue copyrights and patents. Indeed, in conventions marked by contentious debate over Congressional powers, the absence of debate in Virginia and New York over the clause

[106] Most of the newspaper articles were published in the *Massachusetts Gazette* under the pseudonym "Agrippa." Some have argued that "Agrippa" was, in fact, Elbridge Gerry (*see* Kaminski et al. (Vol. IV) at 303-306).

authorizing Congress to issue copyrights and patents is striking (*see* Kaminski et al. (Vol. IX), at 672-73; Kaminski et al. (Vol. XXII), at 2069).

A letter from James Kent to Nathaniel Lawrence dated November 9, 1787 may help to shed light on the apparent acceptance of a Congressional power to issue copyrights and patents, even among opponents to the Constitution concerned about its potential to sanction mercantile monopolies. Although he would become the first Professor of Law at Columbia University, and would attain preeminence as a New York jurist for his work as Chancellor and for his *Commentaries on American Law*, James Kent wrote this letter as a young, practicing attorney. Lawrence was a delegate to the New York convention, and Kent's letter indicates that the two lawyers were engaged in a courteous debate about the Constitution's potential to foster "aristocracy" in the United States. Seeking to persuade his friend that the Constitution would not foster aristocracy, Kent closed his letter by inquiring about Lawrence's professional success,[107] and mentioning that he had just finished reading Adam Smith's *Wealth of Nations* (1776). Kent wrote that Adam Smith "has taught me to look with an unfavorable eye on monopolies – But a monopoly of the mental kind I take to be laudable & an exception to the Rule" (Kaminski et al. (Vol. XIX), at 247).

It seems clear that the "mental monopolies" to which Kent was referring were patents and/or copyrights, and that is how he has been interpreted by others (*see* Oliar 2006, at 1803 n. 164). Such monopolies, according to Kent, are not only an exception to the general "Rule" against monopolies, but positively praiseworthy. James Madison would echo and elaborate this view as "Publius" in "The Federalist" No. 43, which was first published in the *New York Independent Journal* on January 23, 1788 (*see* Kaminski et al. (Vol. XV), at 439). Addressing

[107] "I hope your professional affairs are promising….I wish I could know what your general Employment is, & whether you are silently preparing to undermine the reputation of Coke by setting him below the top of his Profession" (Kaminski et al. (Vol. XIX), at 246-47).

Congress' "miscellaneous" Constitutional powers, Madison wrote of the power to grant copyrights and patents:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

In arguing that "the public good fully coincides" with private benefit in the case of patents and copyrights, Madison was articulating the principle that underwrote their exceptional status. Consistent with the anti-monopoly tradition of English law, patents and copyrights were viewed as exceptions to the general prohibition, as beneficial monopolies granted for a limited time to "encourage" invention and cultural production, which would ultimately be for the public good.

In arguing that the individual States "cannot separately make effectual provision for" patents and copyrights, Madison was echoing an argument that Thomas McKean, Chief Justice of Pennsylvania, had made during the Pennsylvania ratification process. According to McKean, the effective granting of patents and copyrights could only be accomplished by the Federal Congress:

> For, sir, the laws of the respective states could only operate within their respective boundaries, and therefore, a work which had cost the author his whole life to complete, when published in one state, however it might there be secured, could easily be carried into another state in which a republication would be accompanied with neither penalty nor punishment – a circumstance manifestly injurious to the author in particular, and to the cause of science in general (Kaminski et al. (Vol. II), at 415).

Roger Sherman had formulated a similar argument during Connecticut's ratification, in an article published in the *Connecticut Courant* on January 7, 1788 (*see* Kaminski et al. (Vol. III), at 524-27).[108]

In saying that copyright had been "solemnly adjudged…to be a right of common law," Madison was no doubt referring to the *Millar* case discussed at length in Chapter 2. His familiarity with the *Millar* decision, and with state patent and copyright traditions, dated from his time in the Continental Congress and the Virginia House of Burgesses. His recent conversations with Noah Webster and his awareness of the struggle to secure steamboat patents within several states would have made the public and private benefits, as well as the "utility," of Congressionally-granted patents and copyrights very salient to him.

Although Madison ultimately decided against a professional legal career, he had engaged in deep study of the law as a young man, and had spent his years as a legislator in dialog with jurists like Thomas Jefferson and Edmund Randolph (*see* Ketcham 1990). He had, moreover, engaged in collegiate study at Samuel Stanhope Smith's College of New Jersey (Princeton), which formed the center of a powerful interweaving of Reformed (Calvinist) Christian and Scottish Common Sense traditions (*see* Noll 1989). Building on the strength of these Reformed and Common Sense traditions, Madison and his fellow Americans reinterpreted legal traditions inherited from Britain and her colonies, producing the foundation for vigorous and distinctively-American intellectual property traditions.

[108] "These powers appear to be necessary for the common benefit of the states and could not be effectually provided for by the particular states" (Kaminski et al. (Vol. III), at 525).

After 1788, the American Constitution would be equated with a particular written text. For the drafters and interpreters of that written text, however, its meaningful coherence depended, in part, on the inheritance of legal traditions. Drawing on these legal traditions – interpreting them in the light of current social, political, and economic circumstances – the drafters of the Constitution formulated concepts and principles that laid the semantic legal foundation for an economic and political organization: the United States of America. Through the ratification process, this semantic foundation was endorsed and legitimized by the American public, and it was publicly interpreted by jurists and lawyers who had participated in the drafting of its language.

The organization thus given semantic form was a nation-state, or, rather, a "national and Federal" state. This nation-state would have privileged members: in accordance with legal traditions dating back to Ancient Rome, they would be called "citizens." And it would be an appropriator of resources, that is, it would provide the social conditions necessary to render resources rival and exclusive, subject to the material control of particular groups and individuals.

This is most easily seen in the case of land. Article IV, Section 3 of the Constitution provided that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory *or other Property* belonging to the United States" (emphasis added; *see also* Farrand (Vol. 2), at 459, 466). This phrasing implied that "Territory" was property "belonging to the United States." Of course, a Federalist interpreter of the Constitution would be quick to reassure nervous American landowners that such language did not imply ownership of *their* lands by the United States. However, everyone recognized that, to some

degree, ultimate control of those lands was being handed over to the United States. This was probably a factor contributing to the major "Anti-Federalist" concerns about who would control the state militias, about whether there would be standing armies, and about the degree to which representation in Congress would be delegated to individuals with localized knowledge and commitments (*see* Maier 2010).

By extension and analogy, we can see that, in giving Congress the power to "secure" to authors and inventors the "exclusive right to their respective writings and discoveries," the drafters of the Constitution were making the United States itself the ultimate appropriator of these "knowledge-based intangibles." Copyrights and patents would be time-limited grants from the United States of America. At the same time, however, they would be treated as grants "by right," rather than discretionary grants "by grace," as they had been in the older prerogative tradition.[109]

[109] Although their rebellion had initially been against Parliament, the Americans had finally rebelled against the Royal Prerogative, too. In formulating organizing principles for their nation-state, the Constitution's drafters had been careful to apportion prerogative-like powers among the three different branches of the Federal government; and some prerogative-like powers had been left with the states. Many of the prerogative-like powers had been allocated to Congress, and some drafters (*i.e.* Madison) wished that a prerogative-like veto over state legislation had been left with Congress, as had been proposed in the Virginia plan. Instead, the Constitution, treaties, and Federal law had been declared "the supreme Law of the Land" (Article VI; *see also* Farrand (Vol. 2), at 381-82, 389, 409, 417). At the time of drafting, some already believed that this, interpreted together with the Constitution's provisions for a Federal judiciary, could result in prerogative-like powers being exercised by the Supreme Court (*see* Farrand (Vol. 2), at 428-430).

For discussions of Constitutional powers using the language of "prerogative," and drawing (at least to some degree) on the English prerogative tradition, see Federalist 26 (Hamilton); Federalist 46 (Madison); Federalist 58 (Madison?); Federalist 69 (Hamilton); Federalist 71 (Hamilton); An Old Whig V, Philadelphia Independent Gazetteer, November 1, 1787; Letter from Roger Sherman to unknown addressee dated December 8, 1787; A Farmer, Philadelphia Freeman's Journal, April 23, 1788 (Kaminski et al.). "A negative [by the Federal legislature] *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions" (emphasis in original). James Madison to George Washington, April 16, 1787 (Crackel (ed.) 2008).

Translation Through Political Power Structures:
Early Intellectual Property Administration

On March 12, 1811, Dr. William Thornton published a lengthy notice in the *National Intelligencer*, a Washington, D.C. newspaper with national circulation. The notice was issued by Dr. Thornton from the Patent Office, and was addressed to "The Citizens of the United States of America." Referring to himself as "directing or superintending the important duties" of the Patent Office, Dr. Thornton was undertaking to explain to U.S. citizens how they might obtain patents and copyrights.

As Dr. Thornton explained, his duties had previously been carried out by the Secretary of State, the Secretary of War, and the Attorney General. This was the administrative structure laid out by the Patent Act of 1790 (1 Stat. 109, April 10, 1790). Pursuant to that short-lived Act, Thomas Jefferson, Henry Knox, and Edmund Randolph had – as Secretary of State, Secretary of War, and Attorney General, respectively – reviewed patent applications, made out letters patent in the name of the United States, certified their conformity to law, presented them to the President, sealed them with the Great Seal of the United States, recorded them, delivered them, and recorded their delivery (1 Stat. 109, § 1; Dobyns 1994).

Not surprisingly, the administrative structure established by the Patent Act of 1790 had been found to be unwieldy. This unwieldiness was due, not only to the involvement of three cabinet-level officials in the issuance of patents, but to the strictness with which patent applications were reviewed. According to Thomas Jefferson, he and his fellow "Commissioners" established a number of rules for determining whether inventions were sufficiently new to merit a patent (Letter to Isaac McPherson, August 13, 1813). Careful application of these rules imposed a significant burden on Jefferson and his colleagues, and limited the number of patents issued (*see* Dobyns 1994, at 23-26, 35).

In 1793, a new administrative framework was established, which would not be substantially revised until 1836. The Patent Act of 1793 (1 Stat. 318) established a registration framework for the administration of patent law. Under this administrative framework, the Secretary of State was primarily responsible for issuing patents, sealing them, and delivering them. The Attorney General retained responsibility for reviewing the issued patent, and certifying its conformity to the law, but this did not require a review of the patent's subject-matter. The Secretary of State was required to review the paperwork submitted by the patent applicant, to ensure that the specification of the patented subject-matter was sufficiently detailed and included the appropriate supporting materials, and that the applicant had duly sworn that he was the true inventor. Ultimately, however, the task of determining whether patents had been issued for inventions that qualified as "new and useful" under the Patent Act was to be left with the courts.

The Copyright Act of 1790 (1 Stat. 124), as amended by an 1802 Act (2 Stat. 171), had established a similar registration framework. Under this framework, the Secretary of State was to maintain a library of copyrighted books, maps, charts, and engravings. The primary responsibility for registration, however, rested with the clerks of Federal district courts. The Copyright Act prescribed a particular form of affidavit, which the clerk was to record, certifying the date on which the person seeking copyright protection had deposited a copy of the particular work with the court. The person seeking to secure his copyright was required to deposit this copy, to obtain the clerk's affidavit, and to note it according to a particular form in or on the copyrighted work. He was also required to publish the clerk's affidavit for four weeks in a newspaper. If he failed to comply with any of these formalities, including the deposit of a copy with the Secretary of State, his copyright would be unenforceable.

In 1802, James Madison, as Secretary of State under Thomas Jefferson, had established a "Patent Office" as a separate unit within the Secretary of State's Office, and had hired his polymath neighbor, William Thornton, to discharge the duties of the Office (*see* Dobyns 1994, at 41; Ketcham 1990). It was, then, as an officer who for nine years had been administering the patent system and participating in the administration of the copyright system, that Dr. William Thornton published his instructions in the *National Intelligencer* on March 12, 1811. Praising American "genius," even among the "unlettered inhabitants of the forest," Dr. Thornton sought to teach his readers how they might participate in this "system of protection for the property of talent, mind, and genius."

Noting that he had no discretion, by virtue of his office, to refuse a patent because an invention lacked novelty or practical value, or because it interfered with another patent, Dr. Thornton nevertheless advised patent seekers to "examine well the Dictionaries of the Arts and Sciences, the Repertory of the Arts, and other publications that treat of the mechanical arts, to endeavor to ascertain if the invention be new." He also recommended that inventors "make enquiry of scientific characters whether or not the invention or discovery be practicable." He explained the purposes of the Patent Act, which were, in his view, not only to encourage the progress of useful arts, but also to prevent valuable inventions from being kept secret. He instructed his readers about where they might locate the patent and copyright laws, and he discussed several important amendments to the laws. The primary purpose of his publication, however, was to describe the method to be followed in obtaining a copyright or a patent. Dr. Thornton cautioned his readers that inattention to "legal forms" could result in a patent being declared null and void by a court.

Dr. Thornton prescribed a step-by-step process for patent applications and copyright registrations. At times he paraphrased copyright or patent legislation, while at other times he quoted and cited the legislative language. However, he also introduced his own interpretations of the patent and copyright laws through suggested forms and customary practices. Examples of the former can be seen in his detailed prescriptions for the forms of a patent application and oath of novelty. An example of the latter can be seen in his custom of examining patent applications for novelty, and seeking to persuade applicants to withdraw their applications where, in his opinion, the invention lacked novelty (*see* Dobyns 1994, at 70-71). He also developed a custom of requiring written permission from a patent-holder before showing his patent specification to another (*see* Sutcliffe 2004).

Dr. William Thornton "superintended" the Patent Office for 26 years, from 1802 until his death in 1828 (*see* Dobyns 1994, at 79). Interpreting Congress' patent and copyright acts, and drawing on his own experiences as an artist and inventor, Dr. Thornton contributed to the administrative frameworks that were maintained by the Patent Office, the Library of Congress, and the Copyright Office. Thus he helped to shape the public perception of the patent and copyright system.

The Patent Office was not the only source of official traditions pertaining to patents and copyrights, however. Given their vital role in registering copyrights, and in policing the validity of patents and copyrights, the Federal courts would become another important source. Under the Constitution, Congress had been given the power to establish the institutional framework for the Federal court system, and Congress had acted decisively and early on this authority. Important features of Federal court jurisdiction and procedure were established through this early legislation, which have been continued in subsequent legislation.

Beyond the official traditions of the Patent Office and the Federal courts, a third type of officer would play a vital role in shaping public perceptions of the patent and copyright system: specialized attorneys and agents. Even before one William Blagrove had advertised his services as an agent to secure patents and copyrights (*see* Dobyns 1994, at 73), specialized practitioners of patent and copyright law were beginning to establish themselves (*see* Fessenden 1810, at 175). These specialized practitioners would play a vital role in semantic legal ordering, but they would also establish professional traditions for the translation of patent and copyright law, thereby contributing to public perceptions of the patent and copyright system (*see* Swanson 2009).

It is through a focus on these official translators of patent and copyright law that we return, full circle, to Francis Cabot Lowell and the Boston Manufacturing Company. As the reader will recall, Francis Cabot Lowell received his patent for a power loom in 1815, approximately 4 years after Dr. William Thornton published his instructions for obtaining patents in the *National Intelligencer*. The patents that we saw contributing to the establishment of the Waltham-Lowell System of factory production were issued by the patent office of Dr. William Thornton, and, in all likelihood, were written by Dr. Thornton himself.

Within the next decade, Daniel Webster would become an early specialist in patent litigation, representing the Boston Manufacturing Company and its inventors in six patent cases. Once Daniel Webster had returned to Congress, his cousin Noah Webster would seek his help in strengthening copyright protections for authors (*see* Webster 1843).[110] In 1834, Daniel Webster would argue the case of *Wheaton v. Peters* before the U.S. Supreme Court, and would in this way contribute to an authoritative interpretation of American copyright law.

[110] The result of these efforts was the "Act to amend the several acts respecting copy rights," enacted on February 3, 1831. Webster (1843) provides a detailed description of the process through which this Act was drafted and enacted.

Ten years earlier, however, Daniel Webster had argued another case before the U.S. Supreme Court, a case whose name is familiar to all First-Year American law students: *Gibbons v. Ogden* (1824). This case is studied in law schools as a foundation for Dormant Commerce Clause jurisprudence, a complex tradition of constitutional doctrine establishing limits on protectionist state legislation. What is not always mentioned in these discussions is the fact that this case involved a New York State patent on steamboats. In holding that such state patents are an unconstitutional form of state protectionism, the Court helped to bolster the supremacy of Federal (Congressional) law in governing a national economy. The Court's opinion, and the historical facts underlying the case, return us to the fight between John Fitch and James Rumsey over state steamboat patents; that fight and its aftermath reveal a range of counterfactual possibilities, which could have resulted if semantic legal ordering had taken a different turn between 1787 and 1790.

Conclusion:
Semantic Legal Ordering and Possible Alternatives for early American Industrialization

How might things be different if the Constitutional Convention had not empowered the Federal Congress to protect patents and copyrights through national legislation? States very likely would have continued to grant patents and copyrights to their own residents. And, in a world where everything else remained the same, the state patents (and possibly the state copyrights) would have been found to be unconstitutional in 1824. America might have had no Federal intellectual property order, or might have had a much weaker intellectual property order, during the Nineteenth Century. How much of a difference this would have made for American

industrialization cannot be known with certainty, but there is reason to believe the difference would have been significant.

Even if state intellectual property protection had been allowed to continue, it would not have enabled the degree of proprietary control that was exercised in the "Waltham-Lowell System" of early American industrialization. As we saw, patents and patent licenses enabled the Boston Manufacturing Company to create a zone of exclusivity and control around its innovative machinery that extended beyond localized, physical space to newly-emerging markets for machinery and finished textiles. The degree of proprietary control that Francis Cabot Lowell and his fellow merchants were able to obtain through patents – as well as mill privileges and landed property – enabled them to make a transition from seagoing commerce to factory-based manufacturing. In so doing, the Waltham and Lowell factories helped to establish a foundational model and a corporate institutional framework for early American industrialization.

State patents, which would have rested on a much more insecure basis (being subject to modification at any time by a single state) and which would have had an uncertain effect outside of the granting state, may not have been enough to provide the desired proprietary control. Francis Cabot Lowell might not have found it to be worth his time and energy to painstakingly reverse engineer an British power loom, if all he might hope to obtain for his trouble was a Massachusetts state patent. As we saw previously, only three patents were granted between 1785 and 1789 in South Carolina. And it should be remembered that this was the only state to provide a legislative patent guarantee. In all other states, prior to 1790, patents were granted as a matter of privilege and patronage, not as a matter of property or right.

The effect of a "state patronage" type of patent regime can be clearly seen in the tragic-comic life of John Fitch. Fitch's autobiographical *Life* and *Steamboat History* have been edited

and published by patent historian Frank Prager. The resulting *Autobiography of John Fitch* (1976) is a precious resource of social and economic history, allowing us to see through the eyes of a frustrated and embittered inventor. Fitch ended by drinking himself to death, but, before dying, he left behind a record for posterity, a record of repeated frustrations in an ultimately unsuccessful effort to secure patent protection and financial backing for his steamboat.

Fitch did manage to obtain several state patents for his steamboat, but these were rendered much less valuable by the fact that his competitor, James Rumsey, had also secured patents for a competing steamboat from other states (*see* Sutcliffe 2004; Fitch 1976). In Fitch's unsuccessful efforts to obtain patronage from powerful figures like George Washington and Benjamin Franklin, we see how badly a patronage system can go for someone who lacks personal charm and sophistication. Fitch was a desperately poor Connecticut Yankee, prone to extreme statements, and subject to an explosive, rigid temper. He was literate, but his writing style reveals his poor education.

That Fitch managed to obtain a large measure of legislative and personal support for his steamboat is a testimony to his work and his efforts. However, despite patent "superintendent" Thornton's firmly-held belief that Fitch was the first to invent a steamboat (*see* Sutcliffe 2004; Dobyns 1994), Fitch's priority of invention was never sanctioned by a Federal patent. Jefferson and his fellow patent Commissioners decided to resolve the dispute between Fitch and Rumsey by granting patents to all the steamboat inventors, without deciding who was truly the first to invent. Fitch had been too poor to finance his steamboat work himself, so had formed a company to provide backing. Although this company did not abandon him immediately after the Patent Commissioners' decision, they offered only nominal continued support; Fitch was severely limited by a lack of funds, and by 1792 had determined to abandon his steamboat hopes

altogether (*see* Sutcliffe 2004; Fitch 1976).[111] Robert Fulton would eventually pick up where Fitch and Rumsey left off, would obtain several Federal patents for his efforts, and would be credited by history as the inventor of steamboats (*see* Sutcliffe 2004).

Extrapolating from the historical evidence of Fitch's life, we can envision a counterfactual alternative: Congress is not explicitly empowered under the U.S. Constitution to provide for Federal patents and copyrights through operation of a uniform, Federal law. Possibly a Federal Congressional power to provide for Federal patents and copyrights would have been found under the Commerce Clause, as it was eventually for trademarks. However, the effort to provide for Federal trademarks did not come until the end of the Nineteenth Century, and to this day trademark legislation does not displace state legislation to the same degree that patent and copyright legislation do, given their constitutional sanction.

Without a Federally-uniform law in the realm of copyrights and patents, state copyrights and patents would have very likely continued to differ from one another, and to privilege their own residents. As we have seen, this is in fact what happened with state copyrights between 1783 and 1790. A uniform Federal law defining specific, narrow conditions under which patents and copyrights are to be granted, would never have emerged. Patents and copyrights would very

[111] Fitch's discouragement is reflected in the following poem, written sometime around 1792:

> For full the scope of seven years
> Steam boats excited hopes and fears
> In me, but now I see it plain
> All further progress is in vain
> And am resolved to quit a scheming
> And be no longer of patents dreaming
> As for my partners *damn them all*
> They took me up to let me fall
> For when my scheme was near perfection
> It proved abortive by their defection
> They let it stop for want of rhineo ["rhino"]
> Then swore the cause of failure mineo ["mine-o"].

(quoted in Sutcliffe 2004, at 129-30, emphasis in original). According to Andrea Sutcliffe, "Rhino" was early American slang for cash.

likely have continued to be granted for a range of things (e.g., non-novel manufacturing techniques) and on a scale (*i.e.* as a much broader monopoly to privilege state residents over out-of-state competitors) that we take for granted today as illegitimate. The states would use these powers to try to benefit their own residents at the expense of non-residents, an effort that would be found unconstitutional by the Supreme Court in 1824. Thereafter, unless some alternative was found, there might be no intellectual property in America.

It has recently been argued (Rosen 2010) that the patent system was an essential causal factor in England's precocious industrial revolution, an argument that *The Economist* (August 14, 2010, at 70) has pronounced "plausible" (*cf.* Mokyr 2009; North 1981). If this is plausible for England, it is also plausible for America. But, as I have endeavored to show in this and in the previous chapter, the "patent system" that we know today is partly the product of a long, multi-stage, interpretive social process I have called semantic legal ordering.

In the case of American intellectual property, one crucial stage of the semantic legal ordering process was the stage at which a new, Federal and National union was forged between the states. At this stage, a nation-state was given semantic and social-relational form, as was the allocation and protection of property within that national organization. With a constitutional sanction for intellectual property (patents and copyrights) cemented into place, as a "right" to which the members of the new American national organization were entitled, Congress could step in to formulate uniform rules under which those rights would be recognized. Officials within the administrative apparatus (like Dr. Thornton), as well as newly-emerging specialized professionals (like Daniel Webster) could establish traditions for administering the rights and rules, which could then shape the intentions and interests of American citizens and residents.

Social patterns reflecting repeated social action on the basis of these intentions and interests could be established by people like Francis Cabot Lowell, who could take advantage of the possibilities for proprietary control over newly-emerging national markets offered by intellectual property. This is what actually happened. But it is important to remember that things could have gone very differently.

Chapter 4.
Universalized Rights, Rooted in the National Will:
The Nationalization of Intellectual Property in France

> *[W]ith the aid of legal and philosophic argument was laid the doctrinal foundation upon which in the course of time the towering Modern State (absorbing meanwhile into itself the feudal and patrimonial rights of the Middle Age) could take, and actually took, its stand. There arose the doctrine of a State Power, precedent and superior to all Positive Law, founded by the very Law of Nature, possessing an immutable sphere of action: of a State Power which, being an aboriginal and essential attribute of the Community, was the correlate of the inborn rights of individual men.*
>
> *Otto Gierke*

In the previous Chapter, the interpretive social process that I am calling semantic legal ordering was shown to have contributed to the establishment of intellectual property, as a constitutionally-recognized type of legal property, in the national property order of the United States of America. In this Chapter, I will show how semantic legal ordering contributed to the establishment of intellectual property in the French national property order. The story will be very different.

In Eighteenth Century France, Roman Catholic Estate Society remained entrenched. The establishment of intellectual property as a type of legal property that was available to all French citizens on a nationally-uniform basis could only occur as part of a process by which a nationally-uniform legal order was created, *i.e.* through the breakdown of the personal property order of Estate Society. To reiterate, a personal property order is one in which differentiated legal rights and obligations vis-à-vis material objects are rooted in differentiated legal personalities. As was shown in Chapter 1, analogues to intellectual property can exist within a personal property order, but they are connected to particularistic legal privileges, not to a nationally-uniform framework for recognizing legal property.

Intellectual property emerged in France as part of the French Revolution. Indeed, France in 1791 and 1793 went further than either England or the United States in declaring inventions and literary property to be part of the "natural rights" of their authors. To this day, French intellectual property is traced back to these Revolutionary declarations. However, the actual legal basis for French intellectual property rests in ever-changing legislation – today in the Intellectual Property Code of 1992, as amended – and in the authoritative interpretations of that legislation given by French courts and jurists ("jurisprudence" and "doctrine").

In contrast to the United States, France's constitutional framework has undergone a series of transformations, some of them quite radical, since the moment at which intellectual property was first recognized. The source of overall legal stability in France has therefore not rested in its public law, but rather in its Civil Code, which was instituted in 1804 under Napoleon. Although that Code did not mention intellectual property, it did provide foundational legal principles for the recognition and protection of property, which constitute the basis for France's national property order.

As a creature of Revolutionary national legislation, French intellectual property is fundamentally rooted in the "national will," rather than a Constitutional framework. However, over the course of French history, that "national will" has proven to be quite unstable. Partly because of the basically unstable character of national legislation, especially during periods of Revolution, French courts have of necessity taken on the function of ensuring stability in French intellectual property law. As we will see, French caselaw (especially that of the *Cour de Cassation*) actually played a crucially-important role in the "institutionalization" of intellectual property in Nineteenth Century France.

However, because caselaw is not a formal source of law within the post-Revolutionary French legal system, a caselaw basis is not secure. Formally speaking, there is no requirement to adhere to prior decisions, and a judge is completely free to depart from prior rulings. Thus, although, as a matter of fact, France's courts maintained intellectual property principles during the Nineteenth Century, mid-century legislation would be required in order to fully institutionalize intellectual property within the French national property order.

During its formative period, then, the intellectual property system of France reflected a paradoxical blend of radical rights-based rhetoric – which declared intellectual property rights to be rooted in the nation, equally available to all French citizens – with weak structural foundations. As a creature of Revolutionary national will, intellectual property was subject to change, even elimination, at any moment. Although the caselaw of French courts maintained the rhetoric and practices of intellectual property protections, the weak structural position of that caselaw meant that doctrinal principles underpinning the cases were not developed, at least early on.

When intellectual property was finally placed on a more secure legislative foundation, during the 1840s, France had been reconstituted as a constitutional monarchy, one in which jurists played very prominent roles as ministers, judges, and advocates. Under their oversight, Nineteenth-Century French intellectual property-related legal activity would emphasize trademark-related protections, deploying such protections as a means for shoring up French regional identities, declaring the names of towns and regions associated with distinctively-French commodities (*e.g.* "champagne") to constitute the collective property of manufacturers in those regions. As we will see in Chapter 7, the French emphasis on trademark-related protection would soon be brought to bear on the United States.

Counterfactually, the French case is interesting for two reasons. First, as far as the emergence of intellectual property is concerned, we can consider how things might have gone differently in France, if French courts had not sustained intellectual property principles during the period when those principles were not securely rooted in legislation. Second, the French emphasis on trademark and deployment of trademark-related principles to afford protection to distinctively-French commodities helps us to see more wide-ranging and collectivist possibilities within the intellectual property system. These possibilities will be recalled in Chapter 7, in relation to recent Pan-African efforts to utilize intellectual property-related principles in protecting forms of "traditional knowledge."

La Propriété Littéraire, Artistique, et Industrielle

In 1774 – the year *Donaldson v. Beckett* was decided in the British House of Lords – the young French king Louis XVI opened his reign with a daring attempt at reform, nominating Anne-Robert-Jacques Turgot, a leading exponent of Physiocratic ideas (Sewell 1980, at 72), to head up his royal administration in the post of Comptroller General. Within the space of two short years, Turgot undertook a series of radical reforms, which included the abolition of guilds throughout France. Although the unpopularity of Turgot's reforms quickly led to his replacement, and to the temporary reinstatement of the guilds, the reforms would ultimately be rendered permanent by the Revolution (*see* Sewell 1980; Shepherd 1903). Turgot's ill-fated reforms and the Revolutionary decrees that followed reveal a radically "nationalized" alternative to Christendom's Estate Society: "natural rights," rooted fundamentally in a grant from the nation, which are subject to conditions precedent imposed by the nation and returnable to the nation upon the completion of their defined term.

Upon taking the position of Comptroller General, Turgot had focused at first on the legal framework governing purchases and sales of "grain" (an expansive concept that included wheat, rye, flour, peas, beans, lentils, and rice). Having served for over twelve years as chief royal administrator (*Intendant*) in the agrarian province of Limousin, Turgot had been sensitized to the need for agrarian reforms throughout provincial France, especially in the supply of food for Paris. Painfully aware of the monarchy's dire financial situation, Turgot also undertook a number of financial reforms. However, it was his attempt at industrial reform that generated the greatest opposition to his ministry. This opposition was expressed through the *Parlements*, the preeminent judicial institutions of prerevolutionary France (*see generally* Dakin 1939; *see also* Shennan 1998; Sewell 1994; Stone 1986; Stone 1981; Sewell 1980; Brissaud 1915; Brissaud 1912).

Turgot's industrial philosophy was cogently expressed in his preamble to the 1776 decree abolishing guilds and their privileges, issued under the name of the King. This preamble declared the purpose of the decree to be the assurance of full and complete "rights" to the King's subjects, especially the rights to labor and "industry" among those who have none but these to sell. The preamble inveighed against the "monopolies" and "domination" of the guild-masters, recounting the history of growth in strength and exclusiveness of French guilds. It declared "the right of labor the property of all men," and identified a chief evil of guild monopolies to be this: they "retard the progress of the arts by the difficulties which inventors find multiplied by the guilds" (Shepherd 1903, at 182-92; *see also* Sewell 1980, at 72-73).

Turgot's commitment to "natural rights" and innovation were shared by a younger man, who would extol Turgot's mentorship and friendship as "the sweetest perhaps I ever felt": Condorcet (1787, at 3; *see also* Williams 2004, at 17). In his *Life of Turgot* (1787), Condorcet

undertook to elaborate the thoughts and activities of his late mentor, and, in so doing, expressed his views on Turgot's policies in their pre-revolutionary social context. Condorcet's perspectives on pre-revolutionary French legal administration reveal patterns that would be significant to revolutionary lawmaking, and would contribute in a fundamental way to the legal paradigms for French patent and copyright law. Indeed, Condorcet contributed to the drafting of the 1793 decree declaring writings to be the "property" (*propriété*) of their authors (Hesse 1991; *see also* Ginsburg 1990). Furthermore, as a member of the Royal Academy of Sciences, Condorcet would have observed first-hand the examination processes for "new and useful" inventions submitted to the King for royal privileges (*see* Williams 2004; Prager 1944).

Condorcet did not initially embrace a concept of *propriété intellectuelle*. He wrote with approval of his mentor Turgot that he (Turgot) "never…bestowed a patent" during the period of his ministry, choosing instead to reward inventors with gifts, pensions, or a guaranteed purchase of their inventions ("machines") in substantial quantities (Condorcet 1787, at 144-45). Condorcet also expressed regret that Turgot had been compelled to carve out an exception for booksellers and printers in his decree abolishing the guilds. The advantages of "rendering free the trade of the printer and bookseller" to authors and to the French nation would, in his judgment, have been substantial (Condorcet 1787, footnote at 117-19).

Indeed, in his *Fragments sur la liberté de la presse* (1776) Condorcet had argued that "[literary property] is not a property derived from the natural order and defended by social force, it is a property founded in society itself. It is not a true right, it is a privilege" (quoted in Hesse 1991, at 103). In his *Life of Turgot*, Condorcet stated flatly that "a privilege can never be property" (Condorcet 1787, at 140). Nevertheless, as Carla Hesse (1991, at 105-106) discusses, by 1790, Condorcet had apparently been persuaded to join with the Abbé Emmanuel Sieyes in

declaring that "the progress of enlightenment, and consequently the public good, [unite] with notions of distributive justice to necessitate that the property of a work should be guaranteed to the author by law" (Bouchez and Roux (eds.) 4:283).

Just what were the circumstances that led Condorcet to shift his position? As Carla Hesse (1991) convincingly argues, Condorcet may have been influenced by the social and economic conditions that resulted from the revolutionary decree of August 4, 1789, implicating the abolition of all guilds and corporations throughout France. Bringing Turgot's brief measure to fruition, and indeed going further than Turgot had dared, this decree effectively nationalized all the privileges that had been so jealously guarded by France's powerful guilds, including privileges relating to the printing of written works (*i.e.* the sphere of later literary property) and to the making, use, and sale of inventions (*i.e.* the later sphere of patent protections).[112]

The economic and social instability following in the wake of this decree appears to have been a factor in Condorcet's ambivalent embrace of literary property. However, unlike Denis Diderot – who had elevated the individual's property "right" flowing from authorship, even to the extent of making it superior to the right flowing from physical labor – Condorcet insisted on the superior right of the French nation. He seems to have been finally persuaded that it was for the good of the French nation to permit a limited property right to authors, in order to incentivize creativity and innovation. However, this was no absolute property right: it was derived from the nation, subject to the will of the nation, and would return to the nation upon the expiration of its term. This was, after all, the same Condorcet who had approved of his mentor Turgot's argument that "the whole nation is the true proprietor of the wealth" (Condorcet 1787, at 35; *see also* Condorcet 1787, Appendix 1).

[112] The final abolition of the guilds was effectuated in 1791, through the Allarde Law (*see* Kessler 2007, at 241).

It was quite naturally in Revolutionary France that the Eighteenth Century rhetoric of "intellectual property" was most fully articulated. In January 1791, the National Assembly's "will and order" was ratified by the ill-fated king, making it the case that:

> any new idea, the manifestation or development of which may become useful to society (*la société*), belongs basically to the one who has conceived it, and…it would be a violation of the *rights of man* (*droits de l'homme*) in their essence, not to regard *an industrial discovery* (*une découverte industrielle*) as the property (*propriété*) of its author (*auteur*) (emphases in original, Lois et Actes du gouvernement, Tome II, L'Imprimerie Impériale (1806); *reprinted in* Kurz 2000, at 242; *English translation in* Prager 1944)

German historian Peter Kurz, in his thorough *World-History of Invention-Protection* (2000, at 238), has identified this French revolutionary law as the first codification of the principle of "intellectual property" (*geistiges Eigentum*) vis-à-vis industrial inventions. The law was drafted by the Marquis Stanislas de Boufflers, a representative of the Noble Estate from the province of Nancy (Lorraine). It was adopted by the National Assembly on the 31st of December, 1790, after only a brief discussion (*see* Kurz 2000, at 236-51; *see also* Prager 1962).

To persuade his fellow assemblymen to vote for his proposed law, de Boufflers presented a memorandum "On the property of authors of new discoveries and inventions in every type of industry." In this memorandum, de Boufflers drew on the natural law tradition to argue that "discovery" is the original source of ownership.[113] At the same time, however, he drew on Rousseau's "social contract" theory (itself rooted in a particular interpretation of the natural law tradition) to argue that exclusive rights, limited in time, are granted to the inventor through a kind of "reasonable agreement" (*pacte raisonnable*) with the sovereign state. By analogizing the discoverer/inventor of industrial techniques to the "author" of a book, de Boufflers drew strength from the support for authors' rights among adherents to the natural law tradition in the National

[113] « L'invention…est la source…de la propriété: elle est la propriété primitive, toutes les autres ne sont que des conventions. » (*quoted in* Kurz 2000, at 238).

Assembly. At the same time, he avoided all references to "monopolies" and "privileges," which were now held in opprobrium by so many members of the revolutionary Assembly (*see* Kurz 2000, at 238-41).

Indeed, it is clear from the law itself, and from de Boufflers' memorandum, that, where the inventor's "natural right" comes into conflict with the "rights" of the French nation, the latter is in the superior legal position: "it is in no way the goal of society to enrich the inventor, but rather to enrich itself through the invention" (*quoted in* Kurz 2000, at 240).[114] The clearest indication of this is, perhaps, the limitation in time: at the expiration of the patent (*les patentes*) – which would occur within 5, 10, or 15 years – the discovery or invention would become the property of "the society," *i.e.* of all French citizens (*tout citoyens*) (§§ 8, 15). Furthermore, the first importers into France of new inventions or discoveries were to be treated as if they were the actual inventors or discoverers (§3); the French national interest in obtaining the industrial techniques clearly trumped any "original rights" of the actual (foreign) inventor(s).

Returning to the Condorcet-Sieyes proposal for the treatment of literary and artistic works, we see the same basic paradigm prevailing there. This proposal had been placed before the National Assembly by Sieyes on January 20, 1790 (*see* Hesse 1991, at 97, 105). The proposal (in Article XIV) recognized a proprietary right in authors of literary works, but restricted the term of this right to the author's life plus ten years, a period that was calculated to ensure sufficient time to complete and sell an edition (*see* Hesse 1991, at 106). The recognition of this authorial right was, as has already been discussed, justified on the basis of the "public good" (*l'utilité publique*). Moreover, importers of works from abroad were explicitly permitted to engage in the "counterfeiting" of foreign works (Article XV). Five years after the death of a playwright, his works were to be deemed a "common good" (*bien commun*) of all theaters

[114] « Le but de la société n'est pas d'enrichir l'inventeur mais de s'enrichir de l'invention. »

(Article XVIII). While this proposal was never enacted, it formed a basis for the 1791 law enacted to govern the "property" of playwrights, and the 1793 law enacted by the National Convention, which applied to writings, musical compositions, paintings, and engravings (*see* Hesse 1991).

France's 1793 law relating to literary and artistic property is generally regarded as the foundation of contemporary French copyright law (*see* Hesse 1991; Ginsburg 1990). In order to secure its enactment, Joseph Lakanal proclaimed to the Convention:

> Of all properties, the most incontestable, the one whose increase is in no way injurious to Republican equality and which gives no offence to liberty, is undeniably the work of genius; it is if anything surprising that it should have proved necessary to recognize this property and secure its free exercise by a positive law, and that a great Revolution like ours should have been required to return us, in this as in so many matters, to the simplest elements of common justice….It is after careful consideration that this Committee advises you to create dedicated legislative provisions which will form, in a sense, the declaration of the rights of genius (*quoted in* Ginsburg 1990, at 992).

Lakanal's sweeping rhetoric of the "work" and "rights of genius" has supported an interpretation of France's 1793 law as a proclamation of absolute "authorial" (*i.e.* individual) proprietary rights rooted in a creative "workmanship" (Shapiro 2003) model of natural law, analogous to, but more radical than, that advocated by John Locke (*see* Ginsburg 1990, at 991-92).[115]

And yet, despite its proprietary rhetoric, the law itself (like the Condorcet-Sieyes proposal) limits the proprietary right to the lifetime of the author plus ten years (Arts. 1 & 2). Moreover, in order to obtain enforceable proprietary rights, authors are required to deposit copies of their works with the National Library or the "Cabinet des Estampes"; absent compliance with this requirement, authors lack standing to enforce their rights (Art. 6). By imposing a "condition precedent" to obtaining an effective proprietary right, and by limiting the term of that right, even

[115] Jane Ginsburg (1990, at 992) quotes "France's leading modern exponent of copyright theory", Henri Desbois, as follows: "The author is protected as an author, in his status as a creator, because a bond unites him to the object of his creation. In the French tradition, the Parliament has repudiated the utilitarian concept of protecting works of authorship in order to stimulate literary and artistic activity."

this most revolutionary of laws reveals the national origin of the rights being granted (*see* Hesse 1991; Ginsburg 1990).

Limited proprietary rights are granted by the nation, subject to conditions imposed by the nation, and this is all for the benefit and enrichment of the nation (*see generally* Ginsburg 1990). Ultimately, then, the French nation is the source of the Revolutionary « *Propriété Littéraire, Artistique, et Industrielle* « .

In the Declaration of the Rights of Man and Citizen, issued on the eve of the Revolution in August 1789, the Assembly had forthrightly declared the nation to be the source of all sovereignty: "no body (*corps*) nor individual may exercise any authority which does not proceed directly from the nation" (Art. 3). Despite declaring property to be an "inviolable and sacred right," the Declaration had also acknowledged that "public necessity" might override this right, so long as the process was legal and the owner was "justly indemnified" (Art. 17).

As we have seen, "sovereignty" and "property" are not so easily distinguished: even in our time, the concept of "dominion" (*dominium*) evokes both ownership and sovereignty. In the process of French nationalization, both sovereignty and property were located fundamentally in the nation. The fact that the individual's proprietary right is, at root, derived from the nation, is revealed by the fact that the nation can decide, albeit not arbitrarily, to remove that right. The nation-state is the bearer of "eminent domain"; this is simply more obvious in the case of intellectual property, which is limited in time, and subject to conditions precedent imposed by the nation-state.

Semantic Legal Ordering in the Early Revolutionary Period

With the exception of the 1793 law relating to literary and artistic property, all the laws I have discussed were enacted before the Revolution, or in its earliest, least radical period: the period between August 1789 and September 1791, when the *Assemblée Nationale Constituante* was governing in conjunction with the king (*see* van den Berg 2007; Tackett 2006; Doyle 1989). Furthermore, as Carla Hesse (1991) has argued, the basic framework for the 1793 law relating to literary and artistic property had been worked out in this early period through the draft of Condorcet and Sieyes. Thus, in seeking to understand the role of legal thought and action vis-à-vis the emergence of intellectual property in France, we can initially concentrate our attention on the roles and positions of jurists and lawyers in the period just preceding the Revolution, and during the first two years of the Revolution (from 1774-1791).

Recent historical scholarship on the French Revolution has pointed to a significant shift in juristic orientation and practice that occurred precisely during this period (*see* Tackett 2006; Maza 1995; Bell 1991; *see also* Karpik 1988). Reacting to Chancellor Maupeou's efforts to tame the *Parlements'* resistance to attempted reforms – which culminated in the temporary banishment of the *Parlements* and their replacement with a "council of state" (*conseil d'état*) – prominent jurists intensified their publication of legal memoranda (*mémoires judiciaires*) connected with cases they were arguing in the *Parlements* (reinstated under Turgot in 1774), linking their legal arguments to interests of the broader, literate French "public" and positioning themselves as advocates for that broader "public" and "nation" (*see* Maza 1995; Bell 1991; Karpik 1988). According to David A. Bell, these jurists ("barristers," *avocats*) used the *mémoires judiciaires* "to present their clients as universal paradigms whose experiences had

relevance to society as a whole"; the *mémoire judiciaire* was "implicitly democratic and universalistic" because it "addressed itself to a socially indistinct 'public', and by the very fact of publicizing the details of trials, implied that 'public opinion' should have a supervisory role over justice, traditionally the prerogative of the king alone" (1991, at 110, 117).

Through their quasi-corporate "Order" the Parisian jurists had obtained an exemption from censorship rules; thus they were in the unique position of being able to publish their memoranda without preliminary review by a censor. After Maupeou's attempted reforms, moreover, the traditional discipline of the Order began to break down, such that more radical jurists began to question the importance of "erudition, deference and respect for the law codes," advocating instead that the juristic role be opened to all men who displayed "genius" and the capacity to persuade (Bell 1991). In the wake of Maupeou's reforms, according to David Bell (1991, at 123), "the men who had led the Order, represented its institutional continuity, and enforced its unwritten code, remained absent from the courts." This break in institutional continuity at the highest level of the judiciary, according to Bell, contributed to a significant change in the style of legal practice, which was remarked upon by jurists and ministers of the time. In place of the sustained study of French and Roman legal traditions, premised on the belief that authority resided in these traditions, French jurists began to turn toward the "public" and the "national will" as the source of legal authority, and to view themselves as advocates for this "public" and "nation" (*see* Bell 1991, at 134; Tackett 2006; Karpik 1988).

The constitutional conflict between monarchy and ministry, on the one hand, and the *Parlements*, on the other, has long been discussed as a contributing factor in the French Revolution (*see* Stone 1986; Stone 1981; Doyle 1970). Contemporary historians trace an important strand of this discussion back to Alexis de Tocqueville, who pointed to the influence

of the *Parlements* on "the pattern of French life" on the eve of the Revolution (1955 [1856], at 117) and to their pre-Revolutionary role as protectors of "liberty" vis-à-vis the ministers (115-20).[116] David Bell (1991) and Lucien Karpik (1988) add to this discussion by pointing to the role that this constitutional conflict played in transforming French legal culture and practice: rather than primarily acting as advocates for particular clients, jurists came to envision themselves as advocates on behalf of the "society" or "nation" as a whole. More recently, Amalia Kessler (2007) has pointed to a parallel development in French commercial law: responding to conflicts adjudicated in the Parisian merchant courts, judges in these courts came to articulate a vision of "commerce" as a sphere of social activity functioning within "society" as a whole, rather than as the preserve of particular, "corporate" bodies. Putting these studies together with Timothy Tackett's (2006) detailed study of the National Assembly between 1789 and 1790, we can begin to get a picture of the semantic legal ordering that was occurring on the eve of the Revolution, and in its earliest period when the laws pertaining to intellectual property were drafted.

Witnessing the dismantling and collapse of legal traditions and institutions that had sustained the social world that they knew, and witnessing at the same time the expanding possibilities for communication with a broader, more abstract, national public, French jurists drew on the natural law tradition to articulate their vision for a national property order. According to this vision, the fundamental social relationship would be national, with property rights allocated to individual members of the nation-state. No corporate bodies or privileges would stand between the individual and the nation. While individual proprietary rights would be

[116] "The practices of the law courts had entered in many ways into the pattern of French life. Thus the courts were largely responsible for the notion that every matter of public or private interest was subject to debate and every decision could be appealed from; as also for the opinion that such affairs should be conducted in public and certain formalities observed." (Tocqueville 1955 [1856], at 117)

sacralized with the language of natural, "workmanship-based" rights, the national origin of such rights would be revealed in the nation's rights of eminent domain, in the term-limits placed upon certain of such rights, and on the conditions precedent enabling such rights. Proprietary legal capacities would be the result of laws and policies framed at the national level, and would be justified on the basis of the benefit to the nation.

In Chapter 1, I described the activity of semantic legal ordering as involving responses to social conflicts and problems. In the case of pre-Revolutionary France, the "social problems" facing men in positions of legal and administrative responsibility were dire and overwhelming. For jurists, the natural law tradition represented a source of legal teaching concerning the most fundamental legal requirements for social order, legal requirements that were fundamental precisely because they were shared by all "nations" and therefore could be witnessed across social and cultural contexts. Because the natural law (and "law of nations") traditions were interpreted to address social relationships at this basic level of humanity, they were more open to interpretation by all men exercising "reason". Therefore, it makes a great deal of sense that this tradition would be drawn upon as jurists sought to "name and frame" the social problems they were confronting, and to communicate proposed solutions to a "national public" in the days leading up to the Revolution.

As Timothy Tackett's (2006) detailed study of the Constituent National Assembly shows, the men who gathered for the meeting of the "Estates General" in the Spring of 1789, and who had transformed themselves into a National Assembly by the Summer of that year, were predominantly jurists. Although there were few men with legal training among the "Second Estate" (the nobility), the "First Estate" (the bishops and clergy) contained a sizable number with training in canon law, and approximately 2/3 of the "Third Estate" were jurists. Among those

who spoke with the greatest frequency in the Constituent National Assembly, the vast majority were jurists (*see* Tackett 2006, Appendix III).

Like their American predecessors, these men were gathered together to reformulate France's constitution (*see* Tackett 2006, at 211-39). However, as traditional sources of authority collapsed around them, the deputies were forced to also take on administrative and legislative responsibilities. With the abolition of the guilds and the elimination of privileges, the institutional structures for incentivizing and regulating industrial, literary, and artistic production had broken down (*see* Kessler 2007; Hesse 1991; Sewell 1984). Thus, the deputies must have perceived themselves to be responsible for providing an alternative. Consistent with their proclamation of national sovereignty, and with an eye to developments in England and the fledgling United States of America, the delegates elected to constitute a "national" framework for intellectual property. This "national" model permitted them to sacralize the rights granted to individual authors and inventors as "natural," while at the same time fundamentally rooting those rights in the nation (*see also* Ginsburg 1990).

Roman Law Traditions in France

In Chapter 1, I drew on Robert Bellah's theory of cultural traditions to posit universities and the chancellery as social locations within which Roman law traditions were theoretically, mythically, and mimetically maintained, and applied to contemporary social conditions. I also noted some basic geographical and historical differences in the way jurists were taught to regard and interpret the texts of Roman law. I discussed the fact that French law schools embraced humanism to a much greater extent than the Italian law schools: the great teachers of Roman law

in French law schools taught their students to study the historical conditions under which the Roman law had been originally applied, and to read the texts with an eye to "interpolations" that might make the texts seem more contemporarily-relevant than they actually were (*see* García Y García 2003; Stein 1999; Wieacker 1995).

Following Franz Wieacker (1995), however, I also noted that the humanism of the *mos Gallicus* encouraged jurists to universalize their beliefs about law, which had been shaped by their study of Roman law. Humanistic legal education built on Platonist idealism, and aimed to lead the student to general principles of law by enabling him to recognize his "inborn ideas of law" (Wieacker 1995, at 64, 173). Since the process by which the student came to "recognize" these inborn ideas involved critical engagement with the texts of Roman law, students naturally came to associate *universal ideals of law* with the critically-purified concepts and principles of *Roman* law.

In France, the Roman-Canon law was divorced from the study of Roman-Civil law to a much greater extent than anywhere else in Europe. In 1219, in a papal bull (*Super Speculam*), Pope Honorius III forbade the teaching of Roman-Civil law in the University of Paris, and confirmed a conciliar decree forbidding canons regular from studying Roman-Civil law (*see* Garcia Y Garcia 2003, at 389; Levillain 2002 (ed.), at 734). The goal of this papal constitution, according to Philippe Levillain (2002, at 734), was to strengthen the study of theology at the University of Paris, and thereby to enable the enhancement of clerical literacy.[117] However, the effect was to make the University of Paris – the preeminent university of France – a location for the transmission of Roman-Canon law traditions, divorced from Roman-Civil law. From this

[117] This had been one of the aims of the Fourth Lateran Council of 1215 (Canon 11) (*see* Levillain 2002, at 734).

time forward, Montpellier, Orléans, Toulouse, and Avignon were the French centers of Roman-Civil law study (*see* Garcia Y Garcia 2003, at 389).

The divorce of Roman-Canon law from Roman-Civil law in France meant that humanism could have a differential impact in France: civilian legal scholarship was strongly impacted by humanism, while theological scholarship (including the study of Roman-Canon law) was impacted much less strongly (*see* Hammerstein 2003).[118] This, combined with the unusually close connection between the French monarchy and the church, provides the basis for a hypothesis about one source of division between the monarchy and the *Parlements*, which was also a division between the Chancery and the *Parlements*. Beginning in the Sixteenth Century, a license or doctorate in civil law was required for legal officers in the *Parlements* (*see* Frijhoff 2003, at 372); the *Parlements*, therefore, would have been a center of legal humanism. Clerics trained in the non-humanistic Roman-Canon law, on the other hand, would have been the primary officers with legal training in the Chancellery (*see* Ridder-Symoens 2003, at 179; Hammerstein 2003).

Studying Roman law traditions from a historically-critical perspective, the "secular" (civilian) French jurists, working with particular influence in the *Parlements*, would have transmitted a mythology of national separation from the Roman empire: unlike their German counterparts, they could not have viewed themselves as living in a political community that had existed continuously since the days of Cicero. Likewise, building on their humanistic interpretive training, they could be much more selective in the ways that they applied Roman law traditions to the social conflicts and problems that they addressed in the *Parlements*. At the same time, however, as we have already seen, they drew on Platonic roots within humanism to

[118] In 1679, Colbert re-introduced the teaching of Roman law in the University of Paris (*see* Pedersen 1996, at 455).

universalize their understandings about law, building a universalist legal worldview, centered upon national law and natural rights.

Semantic Legal Ordering and the French National Property Order

Aside from the Declaration of the Rights of Man and Citizen of 1789, which is incorporated by reference into the 1958 French Constitution, the basis for French property law is the *Code Civil*, which was issued in 1804 under Napoleon.[119] The French Civil Code, in other words, established the foundations for French property law that are still in force today (*see, e.g.*, Steiner 2002; West et al. 1992). It also established a model for modern civil codes that has been emulated or referenced in many other nations (*see, e.g.*, Stein 1999; Wieacker 1995 [1967]; Weber 1967 [1922], at 284-5; *see also* La Porta et al. 2008). At the time of its drafting, the Code was intended to provide for the people of France a uniform set of laws governing their relations with one another (*see* Portalis 2005 [1801]; *see also* Halperin 2006).

Previously, French civil law had been divided between regions (primarily in the North) that relied on customary law (*coutume*), and regions (primarily in the South) that relied on a "written law" (*droit écrit*) derived from Roman law; on top of these were layered a variety of Royal ordinances and Parliamentary determinations (*see* Halperin 2006, at 2-5; Crabb 1977). Seeking to provide a uniform, written source of civil law to "govern the relationships…that bind every individual to one or more individuals" (Portalis 2005 [1801], at 13), Napoleon and his four legal draftsmen represented their goals as stabilization and unification of the French nation (*see* Halperin 2006; Portalis 2005 [1801]).

[119] "The Civil Code is…the most fundamental and pervasive single element of all French law" (Crabb 1977).

Aside from Napoleon and his draftsmen, no other individual was more responsible for the enactment of this Code than the Abbé, Emmanuel Sieyes, whom we have already encountered as a key figure in the establishment of Revolutionary literary property. As an Abbé, Sieyes was a member of the clergy, *i.e.* the First Estate. However, on the eve of the Estates General, he had written a powerful pamphlet articulating a vision for a unitary nation, based in the "national will" and the Third Estate (*see* van den Berg 2007; Sewell 1994; Campbell 1963). He had also written a number of pamphlets advocating the establishment of a uniform code of law (*see* van den Berg 2007).

In 1799, Sieyes was appointed to membership in the *Directoire*, the executive body governing post-Revolutionary France (*see* van den Berg 2007, at 204-205). Together with one of his allies in the *Directoire*, Sieyes recruited the help of Napoleon – at the high point of his popularity, in the wake of military victories against France's European enemies – in staging a *coup d'etat*. For the sake of establishing a nationally-uniform legal framework for France, Sieyes helped bring Napoleon to power.

The French Civil Code represents the supremacy of legislation over judicial authority, an expression of law-making power vested in the common "will" of the people (*see* Halperin 2006; Bell & Boyron 1998; Tocqueville 1966 [1850], at 101; Rousseau 2002 [1762]). Article 5 of the Code (2006), indeed, expressly prohibits judges from pronouncing their decisions as "general or regulative dispositions", and from a formal perspective the case law of French courts is a merely persuasive source of law (*see, e.g.*, Bell & Boyron 1998).

As a fundamental restatement of French private law, self-consciously elaborating the foundations for that law, and as the product of a legislative process, the Code did not provide citations to its legal sources. Moreover, once the Code was finally promulgated in 1804, all

previous law pertaining to the subject-matter of the Code was formally revoked (*see* Halperin 2006, at 15). Nevertheless, the drafters of the Code explicitly acknowledged their reliance on prior legal sources in drafting the Code. Indeed, Jean-Étienne-Marie Portalis, writing on behalf of all four draftsmen, stated that the Code would not have been possible had its draftsmen not drawn from "the experience of the past and from that tradition of good sense, rules and maxims which has come down to us and informs the spirit of centuries" (Portalis 2005 [1801]).[120]

In 1973, Tulane Law Professor Rodolfo Batiza undertook a systematic study of the contents of the French Civil Code (*see* Batiza 1973). This study examined the language of the Code title by title, comparing the language of the 1804 promulgated text to the 1801 draft, and to texts by two prominent French jurists: Robert Joseph Pothier (1699-1772) and Jean Domat (1625-1696). On the basis of this systematic study, Batiza confirmed that the contents of the Code had been substantially influenced by French customary law (primarily the *Coutume de Paris*) and Roman law (particularly in relation to the regimes of property ownership, obligation, and contracts), with additional influences from royal ordinances, revolutionary legislation, Canon law, and French parliamentary determinations. Batiza also showed, however, that these sources (other than the revolutionary sources) were primarily indirect, *i.e.* that they were mediated through the writing of the two French jurists Pothier and Domat. From this study, Batiza drew the conclusion that "most provisions of the French Civil Code trace their source to doctrinal texts rather than to customary, historical, and enacted laws, as respectively represented by French customs, Roman law, and royal ordinances" (Batiza 1973, at 4).

[120] This "Preliminary Discourse" was not included in the final Code, and it accompanied an 1801 draft of the Code that was substantially revised prior to promulgation. Nevertheless, it is generally regarded by scholars as representing the jurisprudential perspective of the drafters of the Code. (*See* Halperin 2006, at 10-15). Moreover, while the 1801 draft was substantially revised, those revisions primarily pertained to specific matters addressed in the Code, *i.e.* family law and succession (*see* Halperin 2006, at 12-14, 17-51). With respect to general principles of property, obligations, and procedure, the revisions were far less significant, and indeed scholars regard the 1801 draft as "unquestionably the matrix of the Code" (Halperin 2006, at 10; *see also* Batiza 1973).

The concepts of property articulated in the French Civil Code are deeply rooted in the Roman law tradition (*see* Bell 1998, at 277). Since 1804, that Code has provided the foundation for French property law, and for property law in the nation-states that have drawn on French law, either as colonies or as emulators. Ironically, however, despite the Revolution's enthusiastic embrace of *propriété intellectuelle*, that property is neither recognized nor mentioned in the Civil Code of 1804. In fact, the Code's traditional treatment of *accessio*, together with its reformation of *occupatio*, point to a retreat from the Revolutionary embrace of intellectual property.

As discussed in Chapter 2, principles of "accession" (*accessio*) governed cases where a workman created something new out of materials that were owned by another person. Justinian's Fifth-Century *Institutes* recognized debate among the Classical Jurists about who should own the resulting creation, in such a case. According to Justinian's drafters, the "middle view" finally adopted was: "if the thing can be turned back into its materials, its owner is the one who owned the materials, if not, the maker" (2.2.25). On the other hand, if something had been made from materials belonging partly to the maker and partly to another owner, "ownership vests, without a doubt, in the maker," since he has contributed "not only his work but also even part of the material" (Justinian 1987 [533], at 2.2.25).

Napoleon's Eighteenth Century Code contained even stronger presumptions in favor of original owners, particularly of landed property, but also of movable property, in cases of accession. According to Napoleon's drafters: "If an artisan or any person whatsoever has employed a material which did not belong to him, in order to form something of a new description, *whether the material can or cannot be restored to its original shape*, the proprietor thereof [*i.e.* the original owner of the materials] has a right to claim the thing which has been formed from it, on paying the price of the workmanship" (Book II, Title II, § 570, emphasis

added). An exception, however, was recognized in cases where the workmanship was so valuable, as to surpass "by much," the value of the material employed; in such a case, "the labor shall then be deemed the principal part, and the artificer shall have a right to retain the thing wrought, on paying the price of the material to the proprietor" (Book II, Title II, § 571).

This embrace of traditional principles of accession, which heightens the presumption in favor of an original owner of materials (rather than the "invention" or "genius" of the artist), subject to exception only where a creation can be shown to be very valuable, hardly amounts to an enthusiastic embrace of intellectual property. The pressure against intellectual property-related conceptions is heightened by the Code's treatment of *occupatio*, which formed such an important foundation for Blackstone's defense of intellectual property. In place of the individualistic principle that the first occupant is the owner of a thing that previously belonged to no one (a *res nullius*), the Napoleanic Code declared that "property having no owner belongs to the nation" (Book II, Title II, § 713).

This declaration that "property having no owner belongs to the nation" (rather than the individual discoverer, or the king by Regalian Right) neatly captures the nationalizing force of France's new property order. To reiterate, a property order, as I am conceiving it, is an institutionalized mode of material existence, a way of relating to material things that is structured and patterned by the values and beliefs embodied within social relationships and organizations. From a Weberian perspective, a property order is made possible by the closure of social relationships, a condition that is necessary for any type of appropriation to take place. However, that appropriation is given a particular meaning, in connection with the meanings attributed to the social relationships within which it takes place. The process of semantic legal ordering, as I am presenting it, draws on legal traditions to give very particular meanings to social

relationships, to appropriation, and to appropriated objects, thereby contributing to distinctive patterns of social activity vis-à-vis material things. These distinctive patterns of social activity vis-à-vis material things represent a particular property order: a particular, institutionalized pattern of materially-embodied existence.

In the Napoleanic Code, we see a process of semantic legal ordering at work: Roman legal traditions are being adapted in nationalistic directions. The nation, rather than an individual or the sovereign, has become the primary owner of property, which is enabled by the organized social closure of the nation-state. The nation-state is, after all, a closed social relationship. Membership as a French citizen was not available to all seekers, as French women and free African men of color from the colonies had recently discovered (*see* Desan 2013). Semantic legal ordering, the interpretation of legal traditions under Revolutionary socio-economic circumstances, contributed to the organizational formation of this new closed social relationship, and to the values and beliefs embodied within this organizational structure. The appropriation of property, which followed from the formation of this closed social relationship, was given meaning in accordance with these values and beliefs. As these values and beliefs emphasized the primacy of the "nation", so did property-related legal concepts, which contributed to the structuring and patterning of social activity vis-à-vis material objects.

In the case of land, we see a dramatic illustration of this new national property order in the nationalization of Church property, effected by the National Assembly in late Fall 1789 (*see* Doyle 1989, at 131-34). The motion was made by Talleyrand, the Bishop of Autun and future Foreign Minister who would negotiate on behalf of France in the Congress of Vienna. Talleyrand, who had received his legal training from the Church, argued that Church property was actually the property of the nation, the body of the Catholic faithful, which had assigned the

property to the Church and clergy as compensation for their spiritual labors, while retaining the ownership and the corresponding right to recover the property if it was needed (*see* Greenbaum 1970; Blennerhassett 1894, at 114-17). Under the present circumstances, faced with crippling debts, the French nation needed its property, and could legally recover a portion of that property, leaving the remainder to the clergy. The proposal was radicalized by Mirabeau, who argued that all of the property should be nationalized, subject only to an obligation to compensate the Church and clergy for the loss of their property. This proposal was voted into law on November 3, 1789, and the Church's property – including roughly 7% of France's landed territory – became security for a new paper currency, the *assignats*, which would finance France's upcoming war efforts (*see* Doyle 1989, at 132-34).

In the case of literary property and inventions, we have seen that France's Revolutionary national property order was deeply ambivalent. On the one hand, the National Assembly had gone farther than either Britain or America in endorsing universalist rights to intellectual property. On the other hand, the institutional structures established by the Civil Code of 1804, which continue to this day to pattern property-related social activity in France and around the world, seemed to offer no place or recognition to intellectual property. In the absence of secure structural foundations for intellectual property, French courts would be forced to step into the breach. However, as we have seen, their legal rulings offered a very insecure foundation, since they were not a source of law and could be overruled at any time.

The Ironies of Revolutionary National Will:
Jurisprudence and French Intellectual Property Law

In 1810, principles of intellectual property were given a brief statutory recognition in the newly-enacted Penal Code (§§ 425-29). Section 425 of this Code declared that "Every edition of writings, of musical compositions, of drawings, paintings, or any other production, wholly or in part, printed or engraved, in contempt of the laws and regulations relative to the property of authors, is a counterfeiting; and every counterfeiting is a delict." This provision, in other words, recognized literary and artistic property, and defined the theft of such property as a tort of "counterfeiting." By acknowledging "laws and regulations relative to the property of authors," the Code gave statutory recognition to the Revolutionary principles articulated in 1793, relative to copyrights.

But what about patents? In 1810, the American attorney Thomas Fessenden stated that, in France, "no patent is now granted without a special decree from Napoleon" (212). Fessenden also noted "tedious and complex formalities to be fulfilled in obtaining a patent" in France (1810, at 212). Thus, despite the fact that the 1791 law still nominally recognized the natural right of inventors to their property in patents, the reality appeared quite different. As Emperor, Napoleon had elevated himself into the personification of France's national will. And, in keeping with the Roman Imperial traditions that he emulated, he arrogated to himself the discretion to award patents, as a matter of Imperial Grace, rather than as a matter of property right.[121]

It would not be until 1844 that the French patent system would be structured through legislative recognition and provision (*see* Barclay 1889; French Patent Law of 1844). Even then,

[121] Fessenden also transcribes an Imperial decree of May 7, 1810, promising a reward to the inventor of a new machine for spinning flax (1810, at 212-13). The need to issue such a decree signals the weak incentive for invention provided by an Imperial patent system overseen by an unpredictable figure like Napoleon.

France would elect to create a relatively weak patent system, one without an examination to determine whether the alleged invention was actually new (Article 11).[122] Indeed, patentees were required by the law to state, in all advertisements or public descriptions of their patent, that it had been awarded "without guarantee of the Government" (Article 33).[123] Shortly afterward, in 1848 and 1850, this patent system would be exported to the French Colonies and to Algeria (*see* Barclay 1889, at 160-66).[124]

During this same period, and extending into the Second Empire under Napoleon III – in 1844, 1852, 1854, and 1866 – legislation would place French literary and artistic property on a more secure legal foundation, explicitly acknowledging is inheritability, and connecting that inheritance to provisions of the 1804 Civil Code.[125] However, by the 1850s, the impetus for these changes, which placed the French intellectual property system, as a whole, on a more secure structural foundation, was already beginning to come from the international developments discussed in Chapter 7: treaties rooted in the Concert of Europe System.

During an earlier period, between 1815 and 1840, France had gone through a period of conservative retrenchment, followed by liberal reform. In 1814, France's lawyers had succeeded in reestablishing their juridical Order, winning the right to once again govern admission to the "bar" themselves (*see* Young 1869, at 130-31). Shortly thereafter, two prominent Parisian jurists proposed that Paris consider a return of the Bourbon monarchy, and the Council General of the Seine adopted this proposal (*see* Karpik 1988; Young 1869, at 131).

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[122] As we saw in Chapter 3, in reference to the U.S. patent system prior to 1836, such patents necessitate aggressive litigation in order to be truly effective and valuable. This implicit requirement, of course, increases their expense substantially.

[123] It become conventionally acceptable, indeed "universal," to use the abbreviation "s.g.d.g." (for *sans garantie du gouvernment*) (*see* Barclay 1889, at 56).

[124] In 1888, the French patent system was extended to Tunis (*see* Barclay 1889, at 167-85). The French Patent Law of 1844 remains, to this day, the foundation of Comoros' patent system (*see Comoros Loi sur les brevets d'invention*, enacted July 5, 1884, available at WIPO Lex).

[125] Act on the property right of playwrights' widows and children (1844); French International Copyright Act (1852); Literary and Artistic Property Act (1854) (*see* Barclay 1889).

In May 1814, the Bourbon monarchy returned to the throne of France, in the person of Louis XVIII, who paused to acknowledge his debt to France's jurists before assuming the throne (*see* Karpik 1988; Young 1869, at 131). In 1830, France's younger, liberal-leaning jurists played a prominent role in supporting the transfer of monarchical power to Louis XVIII's nephew, Louis-Philippe, who prioritized industrial development, supported manufacturers and merchants, and oversaw a dramatic extension of the franchise (*see* Merriman 2004, at 649; Karpik 1988; Young 1869, at 141).

Under the Restored Bourbon monarchs, French jurists began to emphasize something new within intellectual property law: regional identity. In 1824, a law was enacted to prevent the fraudulent marking of goods, the attempt to make goods appear as though they had been produced by different manufacturer (*see* Barclay 1889, at 97; Law of July 28, 1824). This in itself was not new, and merely extended the provisions of the 1810 Penal Code. However, what was new about the 1824 law came in the emphasis that it gave to the *place* of manufacture: it was now a fraud to misidentify the *place* of manufacture, even if the *name* of the manufacturer was correctly stated.

In 1845, the *Cour de Cassation* held that the name of a locality renowned for a particular style of manufacture or artistry "constitutes a collective ownership by the manufacturers of the district," which can be enforced through litigation by those manufacturers (Barclay 1889, at 98; Ruling of July 12, 1845). In 1887 and 1888, this principle was held to apply to use of the names "champagne" and "cognac" (*see* Barclay 1889, at 98). Likewise, in 1886, France's 1857 trademark law was interpreted by the City of Lyons to extend to a municipal mark ("Woven at Lyons"), attesting to the Lyons origin of silks produced within the borders of the *commune* (*see* Barclay 1889, at 73). Moreover, beginning in 1857, France aggressively enforced new legal

provisions prohibiting the passage through France of all "foreign articles" bearing the trademarks of French producers, or the names of French places of manufacture (*see* Barclay 1889, at 99-103).

This distinctively-French deployment of intellectual property-based principles to protect the regional identities of French manufacturers, as collective property, represented a new development within the intellectual property system, one that reveals collectivist possibilities within intellectual property institutions. More broadly, the French emphasis on trademark protections, during a period when intellectual property was assuming international importance through colonial extension and bi-lateral treaties, brought trademark into greater prominence as part of the intellectual property system. During the Nineteenth Century, trademarks and patents would be brought together under the more general category of "Industrial Property." Under pressure from France, the United States would transform its trademark principles from a backwater area of state common law into a domain of ever-increasing Federal legislation.

These developments signal the extent to which intellectual property institutions can be transformed to accomplish new objectives. Such "counterfactual possibilities," resting within intellectual property institutions, will be considered again in succeeding chapters. They will be of particular contemporary interest when we consider recent, Pan-African efforts to deploy intellectual property-related principles in the protection of "traditional knowledge."

Retrospectively, however, a different set of counterfactual possibilities is worth considering. Despite considerable legislative activity, no comprehensive legislation governing intellectual property was enacted during the Nineteenth Century in France. In the area of copyright, especially, the absence of comprehensive legislation to define the object of property, and to securely establish its legal foundations, was keenly felt (*see* Bently & Kretschmer eds.

2014). In the absence of such comprehensive legislation, French courts and treatise-writers stepped into the breach, making French intellectual property law, in many ways, a creature of jurisprudence, rather than positive legislation. What could have been the result for French intellectual property law, indeed for world intellectual property law, if French jurisprudence had not assumed this role?

One area in which French jurisprudence played a game-changing role is in the area of "moral rights." Unlike the Anglo-American tradition of copyright, which came to emphasize almost exclusively the economic (or "pecuniary") dimensions of copyright, the French tradition of literary property adopted the view that, beyond economic interests, authors and artists have a moral, personality-related interest in their artistic creations. This means that certain uses of their artistic works can be prohibited, even if there is no identifiable economic harm, and even if all of their strictly property-related rights have been transferred (*e.g.* through an assignment).

More than any other country, France is seen as the progenitor of this tradition of moral rights, which was incorporated into the Berne Convention of 1886, and is now enshrined in the international intellectual property framework. However, in France, the concept of moral rights did not receive legislative recognition until 1957 (*see* Sirvinskaite 2011, at 267). In fact, the concept developed entirely through French caselaw,[126] and was maintained through caselaw until 1886, when the Berne Convention gave it a treaty-based recognition.

During the "Long Nineteenth Century," French jurisprudence assumed a crucially-important role in elaborating the conceptual and institutional foundations for intellectual property

[126] 1845 is seen as an important turning-point in the jurisprudential development of moral rights (*see* Sirvinskaite 2011). Two important cases decided in this year, *Marle c. Lacordaire* and *Marquam c. Lehuby* (Tribunal de Commerce), laid the foundation for recognizing moral rights alongside pecuniary rights, and protecting the former. In *Marle*, the Court held that, in addition to his pecuniary right to profit from his work, the author has a right by virtue of his "moral personality" (*personnalité morale*) to "revise and correct his own work, to survey the fidelity of the reproduction and to choose the time and mode of publication" (Court of Appeal on Right of Publication (1845), Bently & Kretschmer eds. 2014).

in France. If the French courts and treatise-writers had not assumed this role, French intellectual property would have lacked important institutional foundations, and at least one vibrant area of contemporary intellectual property (moral rights) could be missing altogether from the international intellectual property framework.

Chapter 5.
Intellectual Property in a Vocational Estate Society

> *The era of Stein, Hardenberg, Humboldt, Queen Louise and Scharnhorst is one of the great might-have-beens of history. Their work was great in its accomplishments and great in its failures. Over it there shines a light unlike that which illumines any other pages of the history of Prussia. For once she was the hope of Germany and of a continental Europe dominated by the empire of Napoleon.*
>
> - Guy Stanton Ford (1922)

> *The rational state described [by Hegel] in the* Philosophy of Right *does closely resemble Prussia; not as it ever was, but Prussia as it was to have become under the reform ministry led by Chancellor Karl August von Hardenberg.*
>
> - Allan Wood (1990)

By 1800, a categorical shift had occurred across Europe and North America. "Copyrights" (or "literary property" – exclusive rights to print copies of a literary work) and inventors' "patents" (exclusive rights to make, use, and sell a newly-invented machine or process of manufacture) were spoken of, and thought of, as a type of property in Britain, France, and the United States of America. This categorical shift had not yet taken place across all German-speaking lands, but a transition toward viewing copyrights and patents as property was occurring there, too. In Prussia, as we will see, analogues to copyrights and patents were recognized in 1794 as printers' rights, guild monopolies, and privileged exceptions to guild monopolies.

However, in this Chapter I will argue that the analogues to intellectual property that were recognized in Prussia present us with an alternative set of possibilities for the development of semantic legal ordering. Drawing on Hegel's *Philosophy of Right* (1821) – which was articulated in Heidelberg and Prussia, influenced by Prussian law, and embraced the idea of intellectual property – I will describe ways in which intellectual property might have differed if Germany had continued to develop as an Estate Society (*Ständestaat*), rather than developing into a national state.

In contrast to the French national property order, with its nationally-centered universalism, this would be a property order in which rights and obligations vis-à-vis material objects are determined by vocational corporations: organizations endowed with rights and responsibilities pertaining to particular occupational vocations, and empowered to allocate those rights and responsibilities to their members, who hold intellectual property as common property. As an Estate Society, this would be a property order in which rights and obligations vis-à-vis material objects differ according to differentiations in legal personality. As a *vocational* Estate Society, this would be a property order in which vocationally-differentiated organizations are given primary responsibility for overseeing the legal personalities that are relevant to intellectual property. In this counterfactual scenario, intellectual property is vocationally-specific *common property*, rather than individual property.

Intellectual Property Analogues in the Late Holy Roman Empire

In the same year (1774) that the British House of Lords ambiguously resolved the question as to the legal status of British copyrights, Johann Wolfgang von Goethe published his *Sufferings of Young Werther* in the City of Leipzig. The publisher was Weygand's Booksales (*Weygandische Buchhandlung*), an important publisher in the book trade of the Holy Roman Empire. Together with Weimar, Leipzig had become a center for the "Storm and Pressure" (*Sturm und Drang*) of a newly-emerging "German" literature (*see* Goschen 1903).[127] Goethe's *Werther*, along with Friedrich Schiller's *Robbers* (1781) and other publications of the *Sturm und*

[127] *Sturm und Drang* is usually translated "Storm and Stress," but I have translated it as "Storm and Pressure" under the influence of Viscount Goschen, As someone who had reviewed countless letters between his grandfather Georg Goschen and Goethe, Schiller, Wieland, and others, he writes that "*Drang* in connection with *Sturm* signified a forward, active pressure, not 'stress' in its usual sense. The period in question was the era of storming the citadels of custom, conventionality and orthodoxy in the realms of government, of social order, of literature, of philosophy and criticism." (Goschen 1903, at 14).

Drang writers, facilitated something of singular importance: they gave expressive form to the restless impressions and emotions of a generation, enabling that generation to engage in a new type of self-conscious reflection and to consider what it might mean to be a "a modern German" (Pinkard 2002, at 14).

But "Germany," as we know it, did not exist, and neither did German "patents," "copyrights," or "intellectual property." Indeed, the patronage and protection that Goethe and his fellow authors received depended very much on the personal relationships they maintained with printers and princely benefactors (*see* Goethe 1882, at 108-10; Goschen 1903, at 40-55; Selwyn 2000, at 299-374; Woodmansee 1984).[128]

Goethe's life provides important insight into the legal and institutional position of authors and printers within the socio-legal architecture of the late Holy Roman Empire. He grew up in Frankfurt (am Main), an Imperial Free City that had been an early center for the medieval book trade. He studied law in Strasburg, another Imperial Free City (until its annexation by France in 1681); Strasburg had sustained Johannes Gutenburg prior to his return to Mainz, where the movable-type press was invented.

Goethe's university years were spent in Leipzig, a thriving commercial city in the Electorate of Saxony, which had assumed ascendancy over Frankfurt as a publication center in the post-Reformation period. His later years would be spent in Weimar, a city in the Duchy of Saxony from which authors were recruited and nurtured by ambitious printers. Together with so many of his generation, Goethe looked north with expectant hope to the City of Berlin (which

[128] "Authors and publishers stood in the strangest reciprocal position. Both appeared, accordingly as it was taken, as patrons and clients. The authors, who, irrespectively of talent, were generally respected and revered by the public as highly moral men, had a mental rank, and felt themselves rewarded by the success of their labors: the publishers were well satisfied with the second place, and enjoyed a considerable profit. But now opulence again set the rich bookseller above the poor poet, and thus every thing stood in the most beautiful equilibrium. Magnanimity and gratitude were not infrequent on either side….Stinginess and meanness, especially that of piracy, were not yet in vogue….Nevertheless, a general commotion had arisen among the German authors…" (Goethe 1882, at 108-109).

was itself becoming a center of publication and commerce), wherein sat King Frederick of Prussia, Elector of the Holy Roman Empire (*see* Goethe 1882; Goschen 1903).

Goethe's "Germany" still consisted of a complex conglomerate of overlapping, interrelated, status-based "fellowships" (*Genossenschaften*). This language of "fellowship" was put to powerful effect by an older contemporary of Max Weber's: Otto von Gierke. In his massive history of "fellowship-law" (*Genossenschaftsrecht*), as well as in his other works, Gierke sought to uncover the "native" Germanic forms of social organization, and to show how these had been influenced over the course of Germanic history by the reception of Roman law (*see* Gierke [1990]; Gierke [1977]; Gierke [1950]; Gierke [1913]).

Gierke's language of "fellowship" is reflected in the Prussian *Allgemeines Landrecht* (hereinafter the "General Code," cited as "ALR"), which was promulgated in 1794 and remained in effect in parts of Prussia until the effective date of the newly-enacted the "German Civil Code" (*Bürgerliches Gesetzbuch*) in 1900 (*see* Wieacker 1995, at 263). Christopher Clark (2006, at 281) has written that "no single text" better captures the transitional character of Prussia in the late Eighteenth Century than the General Code.

Initiated in 1780 under Frederick II ("Frederick the Great") and completed under his successor Frederick William II, this Code was championed and drafted by jurists anxious to bring order and cohesion to Prussian politics, economy, and society (*see* van den Berg 2007, at 67-74). They sought to accomplish this goal by drawing concepts and principles from the Roman law and natural law traditions together with particular legal traditions and "privileges" of Prussia's diverse status-groups: peasant-farmers (*Bauern*), serfs (*Untertanen*), city-residents (*Bürger*), craftsmen/manufacturers and guildsmen (*Handwerken und Zünften*), nobles (*Adel*), clerics and laymen affiliated with churches, schools and universities, civil servants, military men,

and the "servants" of the state itself (*see* van den Berg 2007, at 69-74; ALR Part II). By codifying in extensive detail the general principles (*Grundsätze*) and specific rules to be applicable to different status-based "fellowships" within Prussian society, the Code articulated a much more particularist vision for social relationships, a vision in which legal rights and obligations vary depending on legal status: an "Estate Society" (*Ständestaat*).

In the Prussian General Code, the political community as a whole is conceptualized as a "civic association" (*bürgerliche Gesellschaft*). This civic association consists of a multitude of smaller associations and status-groups (*Gesellschaften und Ständen*) which are "bound together through nature or law, or both together" (ALR Part I, Title 1, § 2). These include household associations (consisting of married persons, their children, and their servants) and the wider family-structures comprising "clans" (*Stämme*) (ALR Part I, Title 1, §§ 3-5).

Beyond participating, as members (*Mitglieder*), in family-based fellowships, individuals belong to a status-group and, very likely, to one or more associative and corporate groupings (*e.g.* a city or a village). A status-group is comprised of persons who share – by virtue of birth, regulation, or occupation – the same rights in the political community (the "civic association") (ALR Part I, Title 1, § 6). The members of a status-group have, as individuals, certain rights and duties particular to their status-group (ALR Part I, Title 1, §7). Associations and corporate groupings also have certain rights and duties specific to their legal status, which their members participate in to various degrees and in various ways; these are determined partly internally and partly by virtue of their legally-defined relationship to "the head of the state" (ALR Part I, Title 1, §8). Part II of the Code elaborates these varying status-based, associative, and corporate rights and duties.

The relevance of all this for the emergence of intellectual property starts to become apparent when we observe that there is no provision within the Code for "patents of invention" (*Erfindungspatenten*). The closest we come to this within the Code is in a provision addressing the industrial monopolies of guilds (*Zunftzwang*). Section 225 of Part II, Title 8 of the Code refers to craftsmen/manufacturers "who have obtained a particular privilege (*Privilegium*) from the state"; these "Freemasters" (*Freimeister*) are enjoined to correctly observe the legal limits of their privileges.

Through this provision, and its context within the Code, we catch a glimpse into a world in which monopolies over the making, using, and selling of particular types of goods (*i.e.* the analog to a modern "patent") are possessed primarily by guilds; these guilds, in turn, are required to coexist with Freemasters, who have obtained a special privilege from the state. The fact that certain of these privileges were issued to reward the invention, improvement, or importation of new industrial techniques can be inferred from annotations in later editions of the Code, which reference an 1815 "Supreme Cabinet Order" governing the issuance of patents for industrial "discoveries" (*see* below).

The "*Zunftzwang*" resulted from the obligation to join a guild in order to engage in a particular type of industrial activity (*e.g.* metalworking or linen-weaving); its effect was an exclusive, guild-based right to engage in an industrial activity, the consequence of which was an exclusive, guild-based right to make, use, or sell particular types of goods (ALR Part II, Title 8, § 224; Walker 1971; Wendel 1918). Throughout Germany, the degree to which guilds were able to accomplish this "organized social closure" depended on the cities within which the guilds were formed. The degree to which the cities were able to effectuate this "organized social closure" depended, in turn, on their relationships with regional and imperial overlords.

In Brandenburg-Prussia, cities and guilds had historically been very weak (*see* Walker 1971, at 22-26). Furthermore, an Imperial Guild Ordinance of 1731 (renewed in 1772) had provided Prussia with a legal basis for exercising absolutist control over the guilds (*see* Whaley 2012b, at 144, 506). The fact that the Prussian General Code involves itself so extensively in the minutiae of city and guild organization may be seen as partly reflecting a distinctive Prussian effort to support the civic and guild structures that, elsewhere in Germany, had facilitated industrial and cultural development, while also controlling them through generalized law and administration. In order to incentivize the importation of highly-developed craft knowledge, immigrants needed to be permitted to participate in the privileges of the guilds and cities. At the same time, however, the monopolistic organizational structures of the cities and guilds had to be supported. These twin goals were achieved by allowing the *Zunftzwang*, within established limits, while also permitting certain privileged individuals (as "Freemasters") to exercise their trades alongside the guilds (ALR Part II, Title 8).

Within the social framework envisioned by the drafters of the Prussian General Code, guildsmen and Freemasters alike are members of the "burgher-status-group" (*Bürgerstande*). This *Bürgerstand* is defined negatively to include all residents of the state who, according to birth, belong neither to the nobility-status-group (*Adelstande*) nor to the peasantry-status-group (*Bauerstande*) (ALR Part II, Title 8, § 1).[129] Members of the *Bürgerstand* are judged according to a special law, which means that they have a particular Right, and particular duties, in virtue of their status: this is the *Bürgerrecht*.

[129] Technically, the *Bürgerstand* is itself divided into three classes: (1) those who have acquired the freedom of a city, which would typically occur through acquisition of mastership status within a guild (these are the *Bürger* in the strictest sense), (2) persons from outside the city who are freemen within their hometown jurisdiction and are permitted to behave as freemen within the city, albeit subject to the laws of their hometown jurisdiction (these are the *Eximirte*), and (3) persons who, in one way or another, acquire some degree of "protection" according to city law (these are the *Schutzverwandte*) (ALR Part II, Title 8, §§ 2-5).

This special law or Right consists in all the privileges and legal capacities accorded by the state to the members of city-communities (ALR Part II, Title 8, § 13). These are privileges and capacities that can be lost (ALR Part II, Title 8, §§ 42-58). Among them are the rights to engage in civic self-administration and to engage in a variety of economic activities: to hold markets, to exercise trades, and (within certain limits) to create local monopolies in the making, using, or selling of certain goods; connected with each of these rights of civic self-administration and economic activity are particular duties (ALR Part II, Title 8). Furthermore, because city-communities are privileged corporations, as are guilds, members of the *Bürgerstand* are also members of corporate groups, which, as legal beings, hold property, incur debts, and impose obligations on their members (ALR Part II, Title 6; ALR Part II, Title 8, §§ 108, 191 et seq.).

This is a social world in which legal status remains legally-significant. The opportunity to partake in certain kinds of activities (*e.g.* making, using, or selling certain kinds of goods; voting for civic magistrates; owning real property within the boundaries of a city or village community) is explicitly tied to a specific legal status, which in turn is explicitly tied to membership in overlapping corporate bodies that, as corporate bodies, have the authority (within clearly circumscribed limits) to determine the conditions for membership and legal status. This is a case of social closure that is explicitly organized ("ordered") on the basis of legal status. Different status-groups have different rights and obligations vis-à-vis particular objects.

So what does "intellectual property" look like in a social world that is "ordered" on the basis of status? In the Prussian General Code, the closest analog to the patent for new inventions is the "privilege" granted to an individual enabling him or her to practice a particular industrial art – thus to make, use, or sell particular types of goods – which would otherwise be the exclusive right of a guild by virtue of the *Zunftzwang*. Despite existing in some degree of

tension with the guild-based status structure, such privileges nevertheless are viewed as being part of this structure: when they are granted to anyone, they are granted to Burgers (or, perhaps, they constitute Burgers in some cases). The language of property is not used with respect to such privileges. These exist solely by the "freely-given gift" (grace) of the sovereign (*Oberhaupt*). Like the prerogatives that we encountered in Chapter 2, these are a temporary allocation of property belonging to the sovereign: they are part of the sovereign's "regalia" (*Regalien*) or "magisterial right" (*Majestätsrecht*) (*see* ALR Part II, Title 13 et seq.; *see also* Kawohl 2008b; Huebner 1918, at 225-316).

Even more strange to our modern eyes is the fact that Imperial "letters-patent," which apply in Prussia as well as in other German "states," are being granted to *confer* legal status (*e.g.* as a prince or a notary). Incidentally, this capacity to confer status was considered by the constitutional historian Johann Pütter to be, in his time, one of the few remaining sovereign regalia of the Holy Roman Emperor (*see* Pütter Vol. III, Book XIV, Chapter IV (1788)).

The analog to copyright in the Prussian General Code is comparable to a status-based right, albeit closer to a modern copyright. Title 11 of Part 1 of the Code addresses "the title to acquisition of ownership, which grounds itself in contracts between living persons." The eighth chapter of this Title, in turn, addresses itself to "contracts whereby things are described as being exchanged for activities, or activities for activities." Section 7 of this Chapter addresses "printing contracts" (*Verlagsverträge*). The "printing-right" (*Verlagsrecht*) delineated in this section of the Code is said to "consist in the authority to copy a written work through printing, and exclusively to sell it at fairs, to booksellers, and the like" (ALR Part I, Title 11, § 996). The right extends beyond written works to encompass maps, copper engravings, topographical drawings, and musical compositions (ALR Part I, Title 11, § 997).

To be sure, a "right of authors" (*Recht des Verfassers*), which extends to their heirs, is mentioned in the Code. However, this is only a "negative" right: the publisher cannot undertake a new edition of a written work without the contractual consent of the author. This right does not extend to reprints of the same edition: absent contractual provisions to the contrary, the publisher can continue reprinting the author's work, although he does have to pay the author a fee. The author has no rights (in the absence of a contract) with respect to "derivative works" (translations, commentaries, etc.). Furthermore, the right of the author to produce a new edition of his own work is limited by the right of the publisher to sell remaining copies of the prior edition (ALR Part I, Title 11, §§ 1011-20). Finally, even the author's limited, "negative" right is eliminated if the initial conception for the work was the publisher's, rather than the author's (ALR Part I, Title 11, §§ 1021-22).

This is primarily a *printers'* right. Therefore, it is primarily a right that belongs to persons in virtue of their *occupational status* as printer-publishers. Like the sections of the Code that govern the activity of guilds, this section of the Code governs the activity of printer-publishers, and in so doing articulates certain limited rights possessed by authors. The rights and obligations of authors, pursuant to the Prussian General Code, are inextricably linked to the status-based rights and obligations of printer-publishers.[130]

What we do not see in the case of Prussian printer-publishers, or their authors, are guilds. Thus, the corporate entities that help to determine status in the case of other status-based rights and obligations seem to be missing. In Prussia, unlike England and France, there was no single,

[130] It is important to note that the printer-publisher Friedrich Nicolai significantly influenced the sections of the Code addressed to printing contracts (*see* Selwyn 2000). That he was allowed to exercise this degree of influence is, I believe, consistent with a legal order rooted in legal status: Nicolai was a well-established printer-publisher, and as a privileged member of the particular status-group at issue was given a privileged opportunity to speak to the manner of its regulation. However, it is also true that Nicolai's son was married to the daughter of a preeminent drafter of the Code: Carl Gottlieb Svarez. Nicolai had also published legal texts by Svarez (*see* Selwyn 2000). Beyond his status as a printer-publisher, then, Nicolai had a certain degree of *personally* privileged access to the drafting of the Prussian General Code.

corporate guild that had historically dominated publishing (*see* Selwyn 2000). This means that there was no concrete social group that bound Prussian printer-publishers together and made them think of themselves as sharing an identity or interests.

The one concrete institution that brought Prussian printer-publishers together, alongside their status-fellows from the wider "German" world, was the Leipzig Book Fair. This was a primary locus for the enforcement of printer-publisher rights of exclusivity, and therefore it was primarily here that these abstract rights were rendered concrete. The Fair was not continuous, however. For most of the year, printer-publishers and their authors operated at a more atomistic level. Theirs was a world of stiff competition, a world free from the protective embrace of guilds (*see* Selwyn 2000).

Semantic legal ordering in Prussia, as seen in the Prussian General Code of 1794, drew on legal concepts of status in order to name and frame, formulate, and communicate a set of rights that we can see as being analogous to patents and copyrights. Because these rights were ordered on the basis of status, they were explicitly allocated only to certain types of person: to Burgers holding guild-based privileges (together with holders of special exceptions to those privileges) and to printer-publishers (together with their contracting authors).

What we find missing in the case of these status-based privileges are the language, the associated legal concepts, and the universalism of property. Within a property order that is organized on the basis of legal status, patterns of social activity vis-à-vis material objects differ among persons on the basis of their legal status. Such patterns do not conform to our expectations about how property works because they are not universal.

We think of property as being something that, in theory, is available to anyone, protected by the state against all potential encroachers. Some may have more than others as a matter of

fact, but there is no *legal* barrier standing in the way of any person acquiring a given type of property. The *Ständestaat*, as this is formally presented in Part II of the Prussian General Code, presents us with the formulation for an alternate set of possibilities: status-based social closure and social patterns of proprietary activity.

It is important to acknowledge that arguments were made for authors' proprietary rights in Prussia and in the broader "German" culture. Indeed, persons associated with such arguments are among the most culturally-influential Germans of the Eighteenth Century: Immanuel Kant (in his 1785 work *On the Wrongfulness of Unauthorized Publication of Books* [Gregor (ed.) 2006]) and Johann Gottlieb Fichte (in his 1793 work *Proof of the Unlawfulness of Reprinting* [Woodmansee trans. 2008]) (*see also* Woodmansee 1984). As early as the Sixteenth Century, Martin Luther (1545) had inveighed against the immoral activity of printers who were "pirating" his German translation of the Bible. Moreover, efforts in Eighteenth Century Saxony and Prussia had been put into the organization of guilds for the protection of authors and printers (*see* Selwyn 2000; Göschen 1903; Frederick 1766). Despite such arguments and activities, however, semantic legal ordering in Eighteenth Century Prussia took an alternative path toward industrial and literary monopolies rooted in legal status.

Roman Legal Traditions in Germany

During the Eighteenth Century, a cluster of new German university disciplines, which can be labeled together as the "Cameral Sciences," emerged within the older law faculties. In 1691, the University of Halle was founded within the Duchy of Magdeburg, which the Prince-Elector of Brandenburg (Frederick William) had acquired through the Treaty of Osnabrück

(1648) (*see* Clark 2006, at 38-66, 127). The University of Halle became a model for other Prussian universities (*see* Clark 2006, at 127). It was here that the famous jurist Christian Thomasius "formulated a curriculum, centered in the law faculty, designed to make nobles both cosmopolitan and competent to rule" (Lindenfeld 1997, at 13). This would become the discipline known as "cameralism," which may be conceived as a "science" (*Wissenschaft*) of public administration encompassing public finance (*Kammer*), economic "stewardship" (*Wirtschaft, Oeconomie*), and effective governance (*Polizei*) (*see* Lindenfeld 1997, at 11-22; *cf.* Tribe 1995, at 8-31).

During the second half of the Eighteenth Century, these Cameral Sciences, which combined training in law with finance, "economy", and policy-implementation, spread throughout Brandenburg-Prussia. In 1770, Frederick the Great made the training in Cameral Science a requirement for his administrative officials (*see* Lindenfeld 1997, at 22).

What I wish to draw attention to here is the way that "cameralism" and "administration" were linked to juristic ways of thinking and acting in Eighteenth Century Prussia (*see also* van den Berg 2007, at 264; Blanning 1974, at 1-38). In Chapter 1, I argued that semantic legal ordering has its most powerful institutional effects when it is translated through private and public officialdoms with sanctioning powers. In the case of Prussia, this translation occurred because Prussian administrative officials were trained as jurists, or at least were trained in a discipline (cameralism) that drew on juristic foundations. Prussia's official traditions, then, were very directly impacted by its legal traditions, and these, in turn, had been very deeply influenced by Roman legal traditions.

The influence of Roman legal traditions in shaping the administrative discipline of cameralism was only the most recent manifestation of a very deep and lasting influence. In

Chapter 1, I noted the extent to which Roman law formed the basis for the Holy Roman Empire's legal reformations, which occurred in the late Fifteenth and early Sixteenth Centuries. These reformations, which occurred at the local, regional, and Imperial levels, may be seen as strengthening the institutional influence of Roman law. On the eve of the Protestant Reformation, then, Roman law had become an integral, official component of German legal institutions.

Prior to the late Fifteenth Century's wave of legal reforms, the influence of Roman law in German lands had been less formalized, and more diffuse. Ecclesiastical administration had continued to have a strong impact in Germany, even after its hold was weakening in favor of secular structures in other countries, such as France (*see* Wieacker 1995, at 51-53, 84-90). At the most practical level, Germany did not develop lay institutions for training notaries until very late in the medieval period, and even when lay notaries began to appear, church officials retained responsibility for public documents (*e.g.* treaties, letters patent). This meant that Roman-Canon law had a particularly strong influence on German legal practices connected with the drawing up of legal documents transferring property and legal status: contracts, wills, and letters patent. However, the influence of Roman-Canon law was strong elsewhere, as well: in marriage law, in economic exchange (interest and usury), and in cases involving special privileges (*privilegium fori*, *e.g.* for Jews).

Substantively, Roman-Canon law had been received differently in Germany, as compared to France. Humanism and the historical-critical *mos Gallicus* had a much weaker impact; instead, it was the *mos Italicus* that was influential in pre-Reformation Germany (*see* Garcia Y Garcia 2003; Wieacker 1995, at 32-67). As discussed in Chapter 1, this meant that jurists and legal practitioners tended to approach the Roman-Canon law sources under the assumption that

they provided valid principles applicable to their contemporary societies. Justinian's Sixth Century codification – the *Corpus Iuris* – was viewed as "written reason" (*ratio scripta*), a precious resource to be drawn upon in resolving conflicts and solving problems within Christendom (the *Corpus Christianum*) (Wieacker 1995, at 32-67).

The authority of academic jurists trained in Roman law was also much stronger in Germany, due to the institution of the *Aktenversendung*, the practice of referring difficult legal questions for resolution by a scholarly faculty of law (*see* Wieacker 1995, at 136-42). By the beginning of the Sixteenth Century, the practice had become "ubiquitous" (Wieacker 1995, at 136; *see also* Berman 2003, at 143). In 1532, the Imperial Reichstag under Charles V endorsed the *Aktenversendung*, as part of a wide-ranging reform of Imperial criminal law, codified in the *Constitutio Criminalis Carolina* (Article 219; *see* Berman 2003, at 138). This institutionalized legal practice would bring Germany's law faculties directly into the resolution of legal disputes and problems, albeit in a way that was relatively distant from the actual parties and the presentation of facts at trial. By the middle of the Sixteenth Century, the published opinions of legal scholars had come to be seen as authoritative sources of law, on par with decisions of the Empire's highest court, the *Reichskammersgericht* (*see* Wieacker 1995, at 137).

At the time of the Reformation, then, the influence of Roman-Canon law in Germany was highly-institutionalized, pervasive, and entrenched. This phenomenon of strong Roman law influence in Germany is referred to as the "Reception." Referring to the impact of the Reception on territorial German rulers of the Sixteenth Century, Joachim Whaley (2012, at 492) writes that "Roman law, with its clarity and authority, now seemed more attractive than ever to rulers and officials seeking to establish, at the regional and local level, the kind of rule of law that many believed at been achieved in the institutions of the Reich." Over the course of the Sixteenth

Century, Roman law became the foundation for German law at all levels of administration, from the Empire to the estates, princes, regional rulers, and cities (Whaley 2012, at 492-93; Wieacker 1995).

In this context, it should be remembered that the Reformation was a rebellion against the power of Rome. This was a rebellion against the *legal* power of Rome, just as much as it was a rebellion against the *religious* power of Rome (*see* Berman 2003). On December 10, 1520, Martin Luther and his supporters symbolized their break with the legal power of Rome by burning several editions of Canon law, together with the papal bull of excommunication that had been issued in June (*see* Brecht 1985, at 423-26). In a written apology for this symbolic act, published in December 1520, Luther elaborated 30 criticisms of Canon law, all of which were rooted in his distinctive understanding of the Biblical "Gospel" (*see* Brecht 1985, at 425). As Harold Berman (2003) has argued, Lutheranism involved a distinctive theory of law, as well as a distinctive theology.

Roman-Canon law did not disappear in the Lutheran principalities and cities, however. Instead, it was reformulated, and placed to a greater extent under the "will" of divinely-ordained Protestant rulers (*see* Berman 2003; Wieacker 1995). Philip Melanchthon, Luther's Wittenberg colleague and vocal defender, shared the scholastic view of Roman law as "written reason," elevating its principles to "beams of divine wisdom" (Berman 2003, at 86). His lectures on Roman law nevertheless provided the basis for a distinctively-Lutheran "philosophy of law," which synthesized Lutheran theology with Roman-Canon law in a new way. This new Lutheran philosophy of law influenced, in turn, a younger generation of legal scholars, who would develop and extend its application (*see* Berman 2003, at 71-99).

In many ways, indeed, Lutheran theology *was* a philosophy of law. It should be recalled that Luther's original "calling" was to the law. He obtained a master's degree from the University of Erfurt, and matriculated to the Law Faculty of that University in May 1505 (*see* Brecht 1985, at 44-46). He elected to study Roman civil law (rather than Canon law), and owned a copy of the *Corpus Iuris*; he also studied the *Glossa ordinaria* of Accursius, which was discussed in Chapter 1 (*see* Brecht 1985, at 44-5). However, shortly after beginning his legal studies, Luther experienced a personal crisis, which led him to renounce the legal calling, and enter the Order of Augustinian Hermits (*see* Brecht 1985, at 46-51).

Luther's biographer, Martin Brecht (1985, at 44-6), persuasively argues that Luther's crisis was rooted partly in disillusionment with law. Luther found the uncertainty of law profoundly disappointing. Unlike theology, which Luther believed could be a demonstrative science, law is only dialectical, always subject to variation in application to concrete circumstances. This made it an ineffective resource for the Christian seeking a fixed source of righteousness and justice (*Rechtigkeit*). In the face of the Devil's assaults, the Christian's only hope was to trust faithfully in the Righteousness of Christ, and to believe the Gospel's promise that, in so trusting and believing, the Christian would be reckoned (adjudicated) Righteous by God. Luther's doctrine of "Justification by Faith" is, after all, *forensic, i.e.* legal.

A fundamental theme in Luther's theology is the relationship between Law and Gospel (*see* Schneewind 1998, at 26-31). The Law makes commands that we cannot obey, leading us in despair to the promises of the Gospel, which, if believed, enable Christ's Righteousness to be attributed to us (*see* Luther 1962 [1520]). This ever-repeating process of Justification by Faith is the source of Christian freedom and unity, for Luther (1962 [1520], at 64-5). Since it is the

fundamental source of Righteousness for King and Peasant alike, it eliminates all status-differences in the spiritual realm, making us a "Priesthood of all Believers."

However, this spiritual realm is limited to the "inward" dimension of men (*see* Luther 1962 [1520], at 66-7). In their "outward" dimension, Christians are called to servitude, and to humble participation in status-differences. These outward, behavioral requirements for Christian character do not make us Righteous, but instead follow from our love of God, and our desire to purify ourselves from laziness and overweening desire (*see* Luther 1962 [1520], at 68). By so purifying ourselves, bringing our bodies "into subjection," we become able to serve others (*see* Luther 1962 [1520], at 73). As servants, we are called to submit ourselves to divinely-appointed authorities, and to hard work in our appointed vocations.

> Christians should be subject to the governing authorities and be ready to do every good work, not that they shall in this way be justified, since they already are righteous through faith, but that in the liberty of the Spirit they shall by so doing serve others and the authorities themselves and obey their will freely and out of love....Although tyrants do violence or injustice in making their demands, yet it will do no harm as long as they demand nothing contrary to God (*see* Luther 1962 [1520], at 78-9).

In Luther, the will is a profoundly arbitrary and inscrutable force, particularly the will of God (*see* Schneewind 1998, at 29-31).[131] And, because God's will is the source of all law, law itself is basically arbitrary and inscrutable. God's revealed law, as seen in the Bible, as well as the natural law that flows from God's creative will, are good and right because God made them so, not because they participate in any kind of comprehensible quality or standard that makes them good and right. Since there is no comprehensible standard that makes Divine and Natural

[131] "God is He for Whose will no cause or ground may be laid down as its rule and standard; for nothing is on a level with it or above it, but it is itself the rule for all things. If any rule or standard, or cause or ground, existed for it, it could no longer be the will of God. What God wills is not right because He ought, or was bound, so to will; on the contrary, what takes place must be right, because He so wills it. Causes and grounds are laid down for the will of the creature, but not for the will of the Creator – unless you set another Creator over him!" (Luther 1962 [1525], at 196).

Law "just," that Justice – God's Justice – is basically inscrutable to us, inaccessible to the human intellect.

> If His justice were such as could be adjudged just by human reckoning, it clearly would not be divine; it would in no way differ from human justice. But inasmuch as He is the one true God, wholly incomprehensible and inaccessible to man's understanding, it is reasonable, indeed inevitable, that His justice also should be incomprehensible (Luther 1962 [1525], at 200).

Strictly positive human law, in turn, owes its source to the often-arbitrary choices of human rulers, who govern according to God's inscrutable will.

Natural law, for Luther, may be seen as the "positive," volitional law of God. And the principles of this divine volitional law are basically inscrutable to us. In contrast, then, to the Thomistic tradition of natural law, which saw in the intellect a capacity to grasp the underlying principles of law, and in the "conscience" a capacity to apply those principles to concrete circumstances, Luther saw the application of law to facts as an act of faith, dependent fundamentally on divine grace (*see* Berman 2003, at 75). Conscience, for Luther, is a means through which divine revelation speaks to human souls, and it is a superior, as well as transformative, force in relation to human reason and will. Reason, in other words, is subordinate to inspiration and revelation in the application of law to facts.

A crucially-important source of law for the Lutheran philosophy of law, the revealed law of God, is the Hebrew Bible, particularly the Decalogue ("Ten Commandments"). Luther's colleague Melanchthon, in fact, built on this foundation in developing a new method of organizing and systematizing law (*see* Berman 2003, at 77-87, 111-13). Melanchthon's "topical method" was developed in order to systematize theology, to articulate its fundamental categories and classify its truths as part of an overarching system. The foundation for Melanchthon's legal categories, which comprised part of his theological system, was the Decalogue.

Jurists who were drawn to the Lutheran revolution, like Johann Apel, extended Melanchthon's method, synthesizing Biblical law, Roman law, natural law, customary law, and "positive" law to an unprecedented degree (*see* Berman 2003, at 113-30). The new topical method, combined with the new degree of comprehensiveness in synthesis, enabled a reformulation of legal categories. The law of things (*res*) became centrally focused on property and ownership, subordinating the law of "persons," while "obligations" became a new general category under which "actions" and "contracts" were subordinated.

To reiterate, the Lutheran jurists did not reject Roman law. However, the theological and political transformations of the Lutheran Reformation created a space in which the interpretive social activity of jurists – semantic legal ordering – could draw on the Roman legal tradition in novel and newly-comprehensive ways. The *Ordnungen* ("orderings") that they would draft on behalf of Lutheran princes drew inspiration from Melanchthon's topical method in fundamentally transforming entire areas of law, including property law and the law of personal status (*see* Berman 2003, at 131-97).

The voluntarism that Lutheran legal philosophy injected into legal scholarship would be particularly significant for later developments in the area of intellectual property, as we will see in Chapters 6 and 7. In the wake of the Wars of Religion, this voluntarism would lend support to *raison d'etat* principles, and to a corresponding reformulation of "natural law" principles by Thomas Hobbes and Samuel Pufendorf. It would also lend support to the "Enlightened Absolutism" and "Cameralism" of the emerging Prussian state.

Semantic Legal Ordering and the Prussian Property Order

Coming out of the Thirty Years' War, Prussia was not a territorially-contiguous state. Its patchwork territories stretched from the Neman (Memel) River, in the Northeast (now a border of Lithuania), to the Rhine River in the Southwest (*see* Holborn 1964, at 55). The peoples and regions comprised within these territories had been governed under widely-varying customs and laws, and accordingly had widely-varying conceptions as to their legal properties, rights, obligations, and status (*see* van den Berg 2007, at 59).

Legal reforms inspired by the Lutheran legal philosophy emphasized generality, conceptual clarity, and uniformity in property relationships (*see* Berman 2003, at 166-74). An important first step was to distinguish proprietary concepts from rulership concepts, which were simultaneously evoked by *dominium* (*Herrschaft*).[132] At the same time, efforts were made to draw sharper conceptual boundaries between "property" and "obligations." At a practical level, these reforms contributed to a transformation in the legal relationships between nobles and peasants: "feudal" relationships, under which vassals held possessory rights (not ownership) through investiture by a Lord, and in turn exercised Lordship rights over their peasants, were transformed into lease arrangements. Under leasehold arrangements (*emphyteusis* and *hypotheca* in Roman law), complex combinations of personal services, jurisdictional privileges, and non-ownership-based rights to use and profit from land were transformed into rental arrangements between a property-owner and his tenant.

The application of Roman-law-based concepts and principles, under the influence of the new Lutheran legal philosophy, to practical problems involved in post-Westphalian recovery and economic transformation in Germany is often referred to as the "*usus modernus*" (*see* Wieacker

[132] Compare England's struggles to distinguish proprietorship and rulership, discussed in Chapter 2.

1995, at 159-95). It was manifested in the application of "customary" law (*ius commune*), but it also often came through newly-issued *Ordnungen* of German princes, *i.e.* through positive law (*see* Berman 2003, at 170-72). As we have seen, the Lutheran legal philosophy, with its emphasis on submission to the lawgiving will of a divinely-ordained ruler, provided strong support for absolutist legal reformation through positive law. Political realities and socio-economic conditions could place strong limitations on a prince's capacity to enact legal reforms, however, as can be clearly seen from the case of Prussia.

Under Frederick William (the "Great Elector," r. 1640-88) and his successors, Prussia's post-war economic recovery had been primarily agricultural and militaristic (*see* Clark 2006; Meinecke 1977; Holborn 1964; Ford 1922). This was by necessity, since commerce into the Baltic and North Seas was dominated by the English and the Dutch. This economic fact carried very important political implications for the East Prussian nobility, the *Junkers*, who were both large-scale agricultural producers and suppliers of the military officer class.[133]

Because of their crucial economic position in Prussia's dramatic post-war recovery, the *Junkers* were in a unique position to resist the property-based legal reforms being carried out elsewhere in Germany (*see* Clark 2006; Meinecke 1977; Holborn 1964; Ford 1922). The fact that they had originally settled their lands as colonizers meant that their relations with the original Slavic inhabitants were legally structured as the "feudal" relations of Lord and serf (*colonia*). However, their economic and political significance in the post-war recovery enabled them to tighten their authority over the peasants working on their lands (*see* Holborn 1964; Ford 1922).

[133] According to Christopher Clark (2006, at 155-56), the term "*Junker*" derived from "*jung Herr*" (young Lord), the younger sons of German noble families who established colonial outposts on Slavic lands during the middle ages.

Especially east of the Elbe River, the position of a peasant working on the estate of a *Junker Herr* was seen as being only nominally better than slavery (*see* Clark 2006; Meinecke 1977; Holborn 1964; Ford 1922). The *Junkers* were both landlords and legal rulers: proprietary concepts and rulership concepts were most emphatically not distinguished in their case. And the *Junkers* fought hard to preserve the legal jurisdiction that they exercised over the peasants, resisting any efforts to "mediatize" the peasants, so that they would become subjects of the Prussian king.

Legally-speaking, the *Junkers* had few (if any) formal constitutional powers. Prussian rulership was exercised through committees of ministers tied directly and personally to the King, and any formal recognition of the political role of Prussia's "Estates" was limited (*see* Clark 2006; Meinecke 1977; Holborn 1964; Ford 1922). However, the belief that Prussia's officer class should come from the nobility was a deeply-entrenched tradition, which carried great weight, especially with Frederick William III (r. 1797-1840) (*see* Ford 1922). As Prussia's preeminent agricultural producers, and as the traditional suppliers of military officers in a militaristic state, the *Junkers* were therefore able exert considerable informal pressures in retaining and intensifying their legal control over the peasants on their estates.

However, Prussia's devastating defeat by Napoleon in 1806 – which was followed by an economically-predatory period of occupation and reparation – altered the political dynamics considerably (*see* Meinecke 1977; Ford 1922). A cycle of debate and reflection on Prussia's constitutional structures was initiated, and a window of opportunity was opened for wide-ranging reforms to be directed by enlightened jurist-administrators, preeminently the Baron Heinrich vom Stein (*see* Lee 2008; Meinecke 1977; Ford 1922).

This reformist period in Prussian politics lasted until the end of 1819, when Frederick William III symbolized his refusal to continue the discussion by dismissing William Humboldt, together with several other reformers (*see* Lee 2008, at 627). A central question of the reformist period, one on which all of the specific proposals for reform hung in one way or another, concerned the position of Prussia's legal Estates (*see* Lee 2008; Meinecke 1977; Ford 1922). The *Junkers*, as Prussia's preeminent nobles, were the most vocal opponents of liberalizing reforms that would eliminate the Estates altogether (*see* Lee 2008). However, the *Junkers* were not the only Prussian Estate. Proposals for constitutional structures that would include the Estates in one way or another carried implications for peasants and Burghers, as well.

In 1672, the influential German jurist, Samuel Pufendorf, had described corporate legal Estates as "moral persons": persons united by a "moral tie" to the extent that they form a single will (On the Law of Nature and Nations, Book I, Chapter 1, §§ XII-XIII). The belief that such "moral communities" should continue to play a role in Prussia's constitutional society was widely-shared, even by reformers such as Stein (*see* Meinecke 1977). As we will see, Hegel also shared this view.

The continued commitment to Estate Society, even on the part of early Nineteenth Century Prussian reformers, may be partly explained by the fact that Lutheran legal philosophy had retained the "three estates doctrine" (Berman 2003, at 177-78), albeit in a significantly revised form. In the revised, Lutheran form, the family became a kind of foundational estate, "the source of the economy and the polity and the seed-bed of the Church" (*quoted in* Berman 2003, at 446). The clergy also remained an important estate, although, by virtue of the radical equality of Luther's "priesthood of all believers", they were now a "secular" estate of church officers (*kirchliche Beamten*), rather than a "spiritual" estate (*see* Berman 2003, at 178).

The problem for reformers like Stein, who were committed to retaining some place for the Estates, lay in the fact that the Estates did not sit easily alongside the liberal forms of thought that inspired many of the reforms. The 1807 Edict of Emancipation, which eliminated the legal status of personal servitude, is a case in point (*see* Ford 1922, at 199-220).

This Edict (§ 10) abolished all "servility-relationships" (*Untertänigkeits-Verhältniß*), and thus eliminated the legal status of serfdom, regardless of how it was acquired, whether through birth, marriage, or contract. The Edict also established the basis for free exchange of property (§ 1), by eliminating any connection between possession of certain types of property and legal status. From this time forward, for example, nobles could own peasant lands, without thereby losing their noble status. Finally, the Edict (§ 2) established freedom of choice in occupational industry: nobles, without any loss of noble status, could work in Burger occupations; peasants and Burgers also became free to move between these two status-groups.

The Edict, in other words, retained the basic framework of Estate Society, maintaining the legal status-groups of noble, Burger, and peasant. However, it transformed the property-relations that had previously underpinned that Estate Society, eliminating both the restrictions and the protections those property-relations had embodied (*see* Meinecke 1977; Ford 1922). The fact, for example, that nobles were now free to acquire peasant properties without suffering a loss in legal status meant that peasants had become much more vulnerable to becoming mere wage-laborers. *Junker* nobles, whose economic bargaining-position was much stronger, could now simply buy up the lands that had previously been used for farming-plots by their peasants.

Moreover, the conception of legal status as something that would be elective, rather than ascribed, seemed to pose a fundamental threat to the concept of legal status. Who, for example,

would choose peasant status? And what principled basis limited the free election to peasant and Burger status, while leaving nobility as an ascribed status?

In the years following the 1807 Emancipation Edict, a number of additional edicts and regulations would limit its concrete effects, insofar as peasant liberation in East Prussia was concerned (*see* Meinecke 1977; Ford 1922). However, the Edict did effectuate a significant change in the property-relations between *Junker Herren* and their peasant tenants. The *Junkers* substantially increased the size of their agricultural estates, taking over many of the peasant holdings in free ownership, and ejecting the peasants from the soil that had been the source of their enslavement and protection. Some of these peasants remained on the estates as wage-laborers, and many moved to cities.

A similar tension between liberal forms of thought and Prussian Estate Society can be seen in Prussia's first general patent regime. Toward the end of the reform period (in October 1815) the Prussian Finance Minister issued a Cabinet Order instituting a system of patents for new inventions and discoveries. This Order created a framework for the granting of patents, to inventors or importers of inventions, so long as the inventors were Burgers or voting members of a community (*Gemeinde*) forming part of the Prussian state (§1). Patent requests were to be registered with provincial governments, and were then to be subjected to an examination by experts, to determine whether a patent should issue, and for how long (§3). Patent durations varied from six months to 15 years, under this patent regime (§4), which was reformed and incorporated into the Zollverein in 1842.[134]

Five years earlier, in 1810 and 1811, Prussia's guilds had been radically transformed (*see* Meinecke 1977, at 86-7). Guild membership had become voluntary, rather than compulsory, and guilds accordingly lost their monopoly control over particular industries. Industrial techniques

[134] *See* Appendix 3.

and craft knowledge could no longer be the property of guilds, pursuant to these reforms. A general patent system enabling individual inventors to control new industrial techniques for a period of up to 15 years would have only intensified the weakening of the guilds, under these circumstances.

But the guilds had formed a very important part of European Estate Society, as we have seen. Reformers like Stein, who wanted to retain the moral bonds of Estate Society while liberalizing agriculture and industry, seem to have believed that the Estates could continue to play a role in the political sphere, without playing a role in the economic and legal spheres. What the period of Prussian reform showed, however, is that the Estates could not continue to function, if their proprietary foundations were undermined. Those proprietary foundations were essentially rooted in the communal property structures of the medieval manor and guild. When these communal property structures were individualized, the Estates were doomed.

Communal Intellectual Property in a Vocational Estate Society? Hegel's Counterfactual Alternative

From Nuremberg and Heidelberg, Hegel watched these developments with great interest (*see* Lee 2008; Wood 1991). In 1818, he accepted an invitation to the newly-created University of Berlin (*see* Wood 1991). At this time, he was working on a manuscript, and giving lectures, on the philosophy of law and ethics, a statement of which would be published in 1821 as the foundation for a Philosophy of "Right" (*Recht*), or Natural Law (*see* Beiser 2005; Peperzak 2001; Wood 1991; Wood 1990). Hegel seems to have believed that his philosophical system could contribute to the Prussian legal reforms being carried out under Stein and Hardenberg (*see* Lee 2008). Although the system was never translated into concrete legal proposals for reform, it

can provide a very intriguing basis for an imagined counterfactual alternative (*see* Wood 1990, at 13): communal intellectual property in a vocational estate society.

Hegel was perhaps the first major philosopher to give intellectual property (*geistiges Eigentum*) a prominent place in his philosophy of law (*see* PR §§ 43, 64, 68-9, 319). Legal scholars have discussed Hegel's philosophy of intellectual property, focusing on the ways in which his "Personality Theory" of property carries significantly different implications for intellectual property rights, as opposed to utilitarian or "Lockean" approaches (*see* Hughes 1988). In contrast to the legal scholarship, I wish to connect Hegel's discussion of property to his discussions of Estate Society, drawing on this link to imagine what intellectual property might look like in a vocational Estate Society.

In his *Philosophy of Right*, Hegel addresses property primarily as a dimension of "Abstract Right." This dimension of Abstract Right is the first of three modes of ethical development, which culminate in the Ethical Life of family, civil society, and the state (*see* Hegel 1991; Wood 1990). Following Wood (1990, at 22), I view the modes of Abstract Right and Morality as portraying aspects of the individual human person that are valid, but "one-sided." Like the morality (*Moralität*) of the individual, viewed one-sidedly as "Subject," the property-related entitlements of an individual, as "Person," become significantly qualified, once we move into the realm of actual social institutions and relationships, *i.e.* the mode of Ethical Life (*Sittlichkeit*).

In the mode of Abstract Right, the focus is very much on individual, private property. Because the will of a person is made "objective" in property, and because the will of a person is an "individual" will, property is primarily "private property" (§46). However, Hegel notes here that significant qualifications to this initial position will come in the sphere of Ethical Life: in the

family, in communities of corporate persons, and in the state. Once we move into the Ethical Life of the family, Hegel is explicit about the fact that we have moved from private property to communal property, under the dispositional control of the husband, as head of the family.

> Not only does the family have property; as a *universal* and *enduring* person, it also incurs the need for possessions which are determined as *permanent* and *secure, i.e.* it needs resources. Abstract property contains the arbitrary moment of the particular need of the *single individual* [*des bloß Einzelnen*]; this is here transformed, along with the selfishness of desire, into care and acquisition for a *communal purpose*, i.e. into an *ethical* quality....The family as a legal [*rechtliche*] person in relation to others must be represented by the husband as its head. In addition, he is primarily responsible for external acquisition and for caring for the family's needs, as well as for the control and administration of the family's resources. These are common property, so that no member of the family has particular property, although each has a right to what is held in common. (§§ 170-71)

Estate Society, in turn, is part of the Hegelian realm of "civil society," which encompasses families, connecting individuals and families to one another through their economic needs, through the administration of justice, through policy, and through "the corporation" (§ 188). Estates in civil society contribute to a reciprocal relationship between work and the satisfaction of needs. Hegel recognizes three basic types of Estate in civil society: (1) the "substantial" Estate which cultivates the soil, (2) the Estate of trade and industry, encompassing craftsmanship, manufactures, and commerce, and (3) the "universal" Estate, *i.e.* the Estate of state officers (§§201-205). Reflecting the spirit of Stein's reforms, Hegel made the individual free to choose his Estate (§206; Lee 2008, at 632; Wood 1991, at 445). However, once chosen, the individual's continued commitment to her Estate constitutes an ethical duty, which is a necessary requirement for healthy social life (§§207-208). It is only through this committed participation in a particular Estate that an individual finds social fulfillment.

A characteristic of the Estate of trade and industry is its division into corporations, which encompass all practitioners of a particular trade (§251). These corporations "assume the role of a second family" for their members (§252). Under the supervision of the public authority, they are to be self-governing, admitting members according to "skill and rectitude," protecting members against contingencies, and educating members. Through a legally-recognized corporation, an individual finds "honour in his estate" (§253), and he moreover learns how to practice his trade ethically, seeking success and resources within recognized boundaries, rather than in a destabilizing and unlimited way (*compare* Durkheim 1957; 1893).

Although Hegel does not discuss the property of corporations as explicitly as he does the property of the family, the clear analogies that he draws between the two spheres of civil society lend credence to the argument that he views corporations as another location where common property displaces private property. Like the family, the corporation holds common property for its members. This includes "privileges" (§252). Extending Hegel's argument about the transition from the one-sidedness of Abstract Right to the social fulfillment that comes in Ethical Life, we can say that intellectual property might also become the common property of the corporation, held for the use of its members.

Building on Hegel's argument in this way allows us to see a counterfactual set of possibilities for intellectual property. Rather than the property of individuals, intellectual property becomes the common property of vocational corporations, which operate within Estate Society.

Chapter 6.
The Power of Proprietary Voluntarism Part I:
Intellectual Property Licensing and the American Telecommunications Network

Be the common law what it may, the parties have a right to alter or modify it by special contract, and when they have done so, the question is, what is the construction of the contract?

- Supreme Court of Pennsylvania, Chief Justice Tilghman, 1822 (Gordon v. Little)

But one morning he made him a slender wire, as an artist's vision took life and form,
While he drew from heaven the strange fierce fire that reddens the edge of the midnight storm;
And he carried it over the Mountain's crest, and dropped it into the Ocean's breast;
And Science proclaimed, from shore to shore, that Time and Space ruled man no more.

- Rossiter Johnson, "The Victory" (1883)

On November 10, 1879, a contract was executed between The National Bell Telephone Company ("National Bell") and The Western Union Telegraph Company ("Western Union"). Pursuant to this contract, Western Union and National Bell offered to one another exclusive "licenses" of company "goodwill," together with a number of their respective telephone and telegraph-related patents, in exchange for royalty payments and stock shares. The contract enabled settlement of protracted litigation over telephone patents, and partitioned the American telephone and telegraph business between the two companies.

In the wake of this agreement, National Bell would complete an already-ongoing process to establish a national "system" of telephone service, while Western Union would (temporarily, at least) ensure its national dominance in the provision of telegraph services, including the valuable "ticker" and wire news services offered by its wholly-owned subsidiary, The Gold and Stock Company (*see* Hochfelder 2012; Israel 1992; Thompson 1947; Reid 1886).

Both Western Union and National Bell, as well as the national networks in wire-based telegraph and telephone services that they built, had been legally founded on patents and contractual licenses of those patents. Samuel Morse received the first electro-magnetic telegraph

patent in 1840 (U.S. Patent No. 1,647; *see also* Thompson 1947).[135] As will be discussed further below, this patent became the basis for the contractual formation of the Magnetic Telegraph Company, which expanded its telegraph lines and operations through contractual licenses and assignments. Western Union, which had been founded on a competing telegraph patent – Royal House's "printing telegraph patent" of 1846 (U.S. Patent No. 4,464) – also expanded through contractual organization and licensing practices, as well as the contractual absorption of competitors, a process that culminated in the absorption of the Morse companies (*see* Thompson 1947; Reid 1886).

By 1877, when the Bell Telephone Association was formed on the basis of Alexander Graham Bell's patents (U.S. Patent Nos. 161,739, 174,465, and 178,399), nearly 40 years of experience had been gained in telegraph-related patent acquisition and licensing practices aimed at national organization and operational control. A succession of Bell companies would draw on this experience to build up, in the 1939 estimation of the Federal Communications Commission ("FCC"), "the largest aggregation of capital and resources that has ever been controlled by a single private company at any time in the history of business" (1974 [1939], at xxiii). Indeed, the FCC attributed the growth and success of the Bell System in "occupying almost the entire telephone field in the United States" primarily to patent acquisition and licensing practices (1974 [1939], at xxiv, 213-46).

The Nineteenth Century has been labeled the era of "Freedom of Contract" (*see* Horwitz 1992; Friedman 1985; Atiyah 1979; Horwitz 1977). It was during this period that basic patterns, which prevail to the present day, were established for the contractual "licensing" of intellectual

[135] Samuel Morse's patent was titled "Improvement in the Mode of Communicating Information by Signals by the Application of Electro-Magnetism." It was preceded by several other telegraph-related patents, the earliest of which dated back to 1800 (U.S. Patent No. 305X, issued to J. Grout, Jr. on October 24, 1800). These earlier telegraphs, including that patented by Jonathan Grout in 1800, were "semaphore telegraphs," which relied on visual signals sent between tall poles (*see* Thompson 1947, at 11 n.18; Reid 1886, at 3-5).

property. The establishment of these basic patterns depended on the fundamental assumption that contracts represent a reciprocal exchange of promises, and reflect a basic capacity on the part of individuals (and other legal actors, such as corporations) to voluntarily create rights and obligations (*see* Atiyah 1979). This, broadly speaking, is the "will theory" of contracts, a doctrinal perspective that provides legitimating foundations for the creation of rights and obligations through the exercise of contractual free will by property-owning persons ("proprietors").

In this chapter, I will show that this will theory of contracts, when added to the legally-established categories of intellectual property, enabled intellectual property to dramatically expand in its scale and scope of impact on everyday social life. I will ground this argument in the empirical cases of Western Union and the American Telephone & Telegraph Company ("AT&T"), companies whose strategic use of patent licenses enabled the creation of a national telecommunications network.

Semantic Legal Ordering and the Will Theory of Contracts

In 1871, a newly-appointed Harvard Law Professor named Christopher Columbus Langdell published a textbook for use in teaching contract law to American law students. The second edition of this textbook, published in 1879, concluded with a "Summary" of the contract "doctrines" that Langdell believed were revealed by the selected cases. This Summary came to be seen as a treatise in its own right, and was published separately in 1880 (*see* Sheppard 1999, Vol. I, at 24-28; *see also* Sheppard 1997).

The opening paragraph of Langdell's *Summary of the Law of Contracts* (1880, at 1) is extraordinarily revealing. Under the heading "Acceptance," Langdell wrote:

> According to the popular apprehension of the term, a promise is the act of the promisor alone; but in truth it requires also an act of the promisee. Before any act by the promisee, the so-called promise is in law only an offer, ***called by the Romans a pollicitation***. It is not until it is accepted that it becomes in law a promise. A promise is in this respect like a gift of property, which is commonly supposed be the act of the donor alone, but which requires the acceptance of the donee to pass the title to the property (emphasis added).

With this opening, Langdell was stating that the fundamental basis for a legally binding contract is a promissory offer that is accepted. This may seem blindingly obvious, but, in fact, as Patrick Atiyah (1979) has painstakingly shown, this way of thinking about contracts represented a new development for the Anglo-American common law tradition (*see also* Horowitz 1977, at 160-210).

During the first decade of the Nineteenth Century, an event of great significance for both English and American contract law had occurred: Robert Joseph Pothier's treatise on the Law of Obligations was published in English. The first English translation was completed in 1802 by a Marseillaise North Carolinian, Francoise-Xavier Martin, who would go on to serve for 31 years (1815-46) as a justice of the Louisiana Supreme Court (*see* Billings 1999). The popularity of Martin's edition of Pothier was quickly supplanted, however, by William David Evans' translation, which was published first in London, then in Philadelphia (*see* Billings 1999; Atiyah 1979, at 351-52, 399-400).[136] In 1843, Luther Stearns Cushing, the Boston editor of a prominent legal periodical (*The American Jurist and Law Magazine*) pronounced Pothier's treatise to be a

[136] Atiyah and Billings differ regarding the precise year in which Evans' translation appeared in London. Billings gives the date as 1804, while Atiyah gives the date as 1806. According to Billings, Evans' translation was first published in 1826 in Philadelphia, and went through 3 successive editions.

"standard work, without which even a moderately sized law-library would scarcely be considered complete" (Volume 12, at 455; *see* Billings 1999, at i).[137]

According to Patrick Atiyah (1979, at 351-52), Pothier's treatise was "avidly seized upon" by English jurists because it supplied "general principles" of contract law, which could be drawn upon in systematizing and developing the English common law. The general principles supplied by Pothier's treatise were the Roman law principles of consensual contracts, as these had been reinterpreted for a unifying French nation. Pothier's emphasis on the abstract nature of contracts, as consensual agreements constituted by reciprocal promises, enabled English lawyers to begin formulating a generalized law of contracts that was viewed as operating uniformly, regardless of person, type of transaction, or subject-matter (*see* Atiyah 1979, at 400).

In America, Pothier's influence was also powerful and widespread. Between 1800 and 1870, Pothier's treatise on obligations was cited as an authority in over 30 Federal court opinions, 2/3 of which were Supreme Court opinions (Westlaw). Pothier was also cited extensively by the early American treatise writers. Joseph Story, for example, relied heavily on Pothier in his treatises, citing him with approval and relying on his definitions of basic legal concepts, such as partnership (1841, at 2):

> Pothier says that partnership is a contract whereby two or more persons put, or contract to put, something in common to make a lawful profit in common, and reciprocally engage with each other to render an account thereof.

[137] *The American Jurist and Law Magazine* was first published in 1829, and continued in publication until 1846 (from 1843 as *The American Law Magazine*). According to a recent assessment, it "represented a forum for opinion, a repository for summaries of new cases and legislation and a place where gossip and opinion could be traded" (Legal Reference Services Quarterly, Volume 2, Issue 3, at 113 (1983)). Volume 1 opened with an 1821 address by Joseph Story to the Suffolk County Bar Association, and contained a lengthy article on copyright ("Literary Property").

In his widely-read *Commentaries on the Constitution* (1833, Vol. I at 291), Story relied on Pothier's definition of a contract, in order to reject the argument that the Constitution was itself a contract.

> Pothier distinguishes between a contract and an agreement. An agreement, he says, is the consent of two or more persons to form some engagement....An agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing, or to do or abstain from some particular act, is a contract; by which he means such an agreement, as gives a party the right legally to demand its performance.

Through Pothier, but also through his independent study, Story came to greatly admire Roman law. In the preface to his treatise on the law of partnership (1841), Story highly recommended the study of Roman law, and pronounced its contractual principles to be "well adapted to the convenience and policy of commercial nations in all ages." Chancellor Kent (1873 (1826), at 547), in his *Commentaries on American Law*, likewise extolled Roman law for its clarity and brevity in defining and illustrating "the rights and duties flowing from personal contracts, express and implied, and under the infinite variety of shapes which they assume in the business and commerce of life."[138]

This American embrace of the Roman law tradition, as being well adapted to a "commercial nation," signals a process of reception that went beyond Pothier and the law of contracts. Through incorporation of the "law of nations" into American law, particularly mercantile law and commercial law, the Roman law tradition was exercising a very deep influence.

[138] This text went through 12 editions between 1826 and 1873. The 1873 edition was edited by Oliver Wendell Holmes.

According to Chancellor Kent, the U.S. became subject to the law of nations at the moment she gained independence from Britain (1873 (1826), at 1). This meant that, in situations of international commerce, war, treaty-making, etc., the U.S. was bound by this law of nations, or "international law." Congress had actually acknowledged subjection to this law in 1781, according to Kent. Even more fundamentally, perhaps, this law of nations was part of the common law heritage from England.

> The English judges have frequently declared that the law of nations was part of the common law of England...and it is well settled that the common law of England, so far as it may be consistent with the constitutions of this country and remains unaltered by statute, is an essential part of American jurisprudence (1 n.a).

As Kent was well aware, the law of nations had been heavily influenced by the Roman law tradition, particularly through the Natural Lawyers. In his history of the law of nations, Kent cited the opening sections of Justinian's Digest and Institutes, noting that Justinian's codifiers had taken an important step toward the modern law of nations in equating the law that they applied between tribes with "the natural reason of mankind" (7). Despite its imperfections,

> The Roman law was destined to obtain the honorable distinction of becoming a national guide to future ages, and to be appealed to by modern tribunals and writers, in cases in which usage and positive law are silent, as one authoritative evidence of the decisions of the law of nations (7).

Thus, according to Chancellor Kent, the Roman law tradition was part of American law, both through its impact on public international law, and through its impact on common law.

The importance of this Roman law influence, by means of the law of nations, can be seen if we return, once again, to Langdell's treatise on contracts. Langdell cited two authorities for

his pronouncement that a contract consists in a consensual agreement (*i.e.*, an accepted offer). One of these authorities was Robert Joseph Pothier. The other was Hugo Grotius, an early Seventeenth Century legal scholar from Holland, who is widely seen as a "founding father" of international law, and whose views on natural law decisively influenced Pothier (*see* Roelofsen 2002, at 95; Atiyah 1979, at 406; *cf.* Kingsbury & Roberts 2002).

Langdell's citation was to Grotius' most famous book, *On the Law (Right) of War and Peace*, which was first published in 1625, while the wars over imperial religion were tearing Europe apart (*see* Neff 2012; Vervliet 2009). Langdell's specific citation was to Chapter 11 of Book II, a section of the treatise addressing the principles according to which promises create binding obligations (*see* Langdell 1880, at 1). In Grotius' text, this was part of an extended narrative detailing the circumstances under which parties acquire rights according to the principles of natural law, as supplemented by the law of nations and the positive (or "municipal") law of states (*see* Neff 2012 [Grotius 1625], at 92-268). Grotius' stated purpose was to provide a basis for determining when rights had been violated, such that war is justified (*see* Neff 2012 [Grotius 1625], at 81-91). In Langdell's text, however, Grotius' natural law framework became the foundation for basic principles of contract law.

Grotius' system of natural law wove basic principles from the Roman law tradition together with Biblical, theological, and philosophical traditions. Although it was heavily reliant on Scholastic traditions, Grotius' system of natural law is seen as a point of departure, pointing the way toward principles of international law that emphasized much more strongly the sovereign power of states, and the will of contracting parties (*see* Rommen 1998; Atiyah 1979).

Like his Scholastic predecessors, Grotius emphasized the role of human reason in grasping basic principles of law that are rooted in Divine Order and human nature. On the other

hand, in emphasizing the sovereign power of states to institute, through positive law, departures from natural law principles, and in emphasizing the role of will – both of states and of individuals – in instituting these legal departures, Grotius pointed forward to a legal future in which positive law would overtake natural law, and will would overtake reason as the defining capacity for determining law (*see* Rommen 1998 [1947]).

Grotius equated positive law – law that is instituted by God or by states – with "volitional law," law that originates in the will (*see* Neff 2012, at 32 [Book I, Chapter 1, Section 13]). Likewise, the activities connected with acquiring and exercising both sovereignty (*imperium*) and ownership (*dominium*) – closely related concepts for Grotius – are rooted in the will; it is because they are lacking the capacity to exercise their will, under the subjection of reason, that infants and insane people cannot dispose of property (*see* Neff 2012, at 106-8 [Book II, Chapter 3, Sections 4-6]). A legally-recognized transfer of property or sovereignty is "an act of will, which is expressed by a sign" (Neff 2012, at 138 [Book II, Chapter 6, Section 1]). Likewise, a promise rooted in the will to transfer a right to another person, which is accompanied by an outward sign of this intention, gives rise to a legally-enforceable obligation on the part of the promisor (*see* Neff 2012, at 189, 238 [Book II, Chapter 11, Section 4; Book II, Chapter 16, Section 1]).[139]

For Grotius, then, legally-enforceable obligations, particularly those involving the transfer of property, arise fundamentally from an act of will. This emphasis on will in relation to property was rooted in the Roman law tradition, going back to Classical Roman Law, particularly in the area of possession (*possessio*).

[139] "Contracts" are simply a subset of such obligations involving the reciprocal exchange of promises (*see* Neff 2012, at 202-14 [Book II, Chapter 12]).

The Roman law recognized and enforced rights to possession of property, which were distinct from full-scale ownership on the one hand, and actual physical possession, on the other hand. Acquisition of legally-protected possession required both a physical element – a bodily act of holding or taking (*corpus*) – and a mental element: the will to possess (*animus*) (*see* Digest 41:2:3; *see also* Buckland 1963, at 199). Continuation of the will to possess, even when physical possession was lost, ensured that a legal remedy for recovering the property would continue. On the other hand, loss of will to possess was sufficient, by itself, to eliminate the legal right to possession.

> Again, for the loss of possession, the possessor's mental attitude must be considered; if you are on a piece of land and lose the will to possess it, you immediately cease to possess it. Hence, possession can be lost, thought it cannot be acquired, by will alone. (Digest 41:2:3)

In the area of obligations, including contracts, emphasis on will was a post-Classical development, the seeds of which are associated with the influence of Christian-Byzantine jurisprudence, particularly under Justinian (*see* Zimmerman 1996, at 565, 624-25). Despite initial shifts toward a focus on shared will (*consensus*) in later Roman contract law, however, obligations were nonetheless still predominantly seen as arising out of the legal status of persons, or the nature of their activities, not their particular intention as manifested in words; the decisive emphasis on will, as expressed by words, as the basis for contractual obligation came only in the late Sixteenth and early Seventeenth Centuries, in the Protestant natural law jurisprudence, beginning with Hugo Grotius (*see* Zimmerman 1996, at 544, 656-69, 636; Atiyah 1979).

The jurisprudence of Hugo Grotius, then, constitutes a turning-point. In his famous treatise, emphasis on will in relation to both property and contracts is heightened and made the source of basic social obligations: obligations to respect proprietary possession, and to keep

contractual promises. As we have seen, both directly and indirectly through French legal scholarship (Pothier), Grotius' basic framework became foundational for American contract law in the Nineteenth Century.

Grotius developed his framework within a social context in which the will had become a focus of great attention. Grotius was born in Delft in 1583, into a society in which extreme forms of Calvinist doctrine had contributed to a Revolution against Imperial Spain, and to increasing divisions within Dutch society (*see* Bangs 1985; Masselman 1963). During Grotius' youth, these divisions were reflected in a fierce theological dispute between a friend of Grotius and his family, Jacob Arminius, and the proponents of Theodore Beza's interpretations of Calvinist predestination.

At the heart of these disputes were questions about divine and human will, particularly the capacities of the human will to choose a path of Christian repentance, belief, and perseverance. According to Beza's theology, divine will is reflected in an utterly mysterious plan of predestination, according to which God decreed, from *before* the time of creation and the human "Fall" into sin, that some would believe and be saved, and others would not. According to this decree, some are given God's Grace, a process that heals their will and enables them to repent and believe. Likewise, according to this decree, God wills that some humans continue in a state of fallen will, remaining incapable, through lack of Grace, to repent and believe (*see* Bangs 1985).

Arminius' theology, on the other hand, provided a much more optimistic picture of the divine and human will. According to Arminius, God wills and effectuates only good for human beings, offering to everyone through Christ's death a grace that makes the human will capable of faith, *i.e.* truly free (*see* Bangs 1985, at 191, 214-16). The sinful will is capable only of evil;

however, a capacity to believe remains in human beings, such that they can cooperate with grace and receive a healing power that enables their will to freely choose good or evil. Arminius did not dispute the doctrine of predestination directly, but viewed it as operating quite differently from Beza's doctrine.

Arminius died in 1609 (*see* Bangs 1985, at 330). However, his theological perspectives continued to provoke controversy. Moderate Calvinists, especially those connected with the Holland magistracy, supported Arminius' views, or argued that they should at least be tolerated. Prominent among such supporters was Johan van Oldenbarnevelt, Advocate-General (Chief Magistrate) of the States of Holland, a mentor and patron of Hugo Grotius. However, the extreme Calvinists, represented particularly by Petrus Plancius, were also powerful in the magistracy and in the Dutch East India Company, a potent economic force in the Netherlands (*see* Bangs 1985; Masselman 1963). In 1619, these forces succeeded, in the Synod of Dort, in having Arminius' views declared heretical. Shortly thereafter, Oldenbarnevelt was executed for treason, and Grotius, because of his association with Oldenbarnevelt and Arminius, was committed to life imprisonment (*see* Neff 2012, at xviii).

Grotius escaped from prison in 1621, and began writing his famous treatise on the *Law (Right) of War and Peace* one year later, under the protection and support of Louis XIII of France (*see* Neff 2012, at xviii). Written in the context of such intense debate over divine and human will, by a lawyer and theologian associated closely with Arminianism, it is perhaps not surprising that the emphasis on will – in relation to sovereignty, property, and contracts – is heightened in Grotius' treatise. Developing an emphasis that was already present in the Roman law tradition, due to Christian influence, Grotius transformed it into an organizing principle that would become a staple of the natural law tradition.

The emphasis on proprietary and contractual will in Grotius and Pothier may help to explain their appeal in Nineteenth Century America. Methodism – an English import that drew heavily on Arminian theology – was one of the fastest-growing Christian denominations (*see* Noll 2002). At the same time, the emphasis on will resonated with American individualism and mercantile capitalism.

Looking back on his legal education at Harvard, Roscoe Pound wrote:

> A general will theory of the science of law – a general reduction of everything to the manifested individual will – got currency in the eighteenth and fore part of the nineteenth century. It was generally adhered to in doctrinal expositions of Anglo-American law until the present century, although the courts still held to many rules here and there which had come down from older modes of thought. In *Parsons on Contracts*, which went through nine editions from 1853-1904 and was the standard American textbook used by lawyers and courts for two generations, the willed assumption of duties was put at the foundation of all law....When I was a law student in 1889 I read Pothier....Reading of French treatises on natural law was part of the training of the well-read American lawyer from the eve of the American Revolution in the last third of the eighteenth century till the American Civil War (Pound 1954, at 18-19).

The will theory of contracts was popularized for American businessmen through legal manuals written especially for them. One very popular such manual was published by Theophilus Parsons, mentor to Christopher Columbus Langdell at Harvard, whom Pound identifies in the above quote as a standard authority. Parsons' *Laws of Business for Business Men* (1857) laid out basic principles of commercial and contract law, and provided forms for a variety of legal transactions. The treatise was organized around a will theory of contracts: binding contracts are formed when a promissory offer is accepted, and interpreted based on the intention of the parties, as manifested in their words. Included among the forms for legal transactions were forms for the contractual assignment of patents and copyrights (*see* Parsons 1857, at 453-54).

Proprietary Voluntarism and its Counterfactual Import

The will theory of contracts gave to private parties an extraordinary power to create institutions, obligations, and rights: a private, law-making power, a power to make "special law" (Weber 1967). However, this power can be seen as ranging along a continuum, depending on the nature of the contract.

The power is strongest when it is exercised by a property-owner over his own property. As we have seen, the Roman law tradition placed great stress on the power of a property-owner to dispose of his own property, according to the determinations of his will. This deeply-entrenched conception of a property-owner as lord and master (*dominus*) over that which is his own, when joined to an expanded conception of contractual capacities to create special law, meant that parties viewed as property-owners under the law were capable of exercising very broad powers to create rights and obligations, impacting third parties, as well as themselves.

On the other hand, the power was weaker when it pertained merely to future activity (*e.g.* repayment of a debt). A basic principle of Roman law held that contractual obligations incurred between two parties were fundamentally personal, as between those two parties, and therefore not capable of giving rise to rights on the part of third parties (*see* Zimmerman 1996, at 34 ff.; Digest 45.1.38.17). This *in personam* character of contractual obligations meant that, in most cases, they could not be assigned or otherwise transferred to third parties (*see* Zimmerman 1996, at 58-9). This default rule placed great limitations on the development of negotiable instruments, the forerunners to paper money and securities.

Rights and obligations that are non-transferable have much less potential for impact on third parties, and for the creation of special law. In particular, they cannot be accumulated

through assignment and transfer to a single party, and they cannot be used as creatively and purposefully to structure institutions. As we will see, it was through very purposeful strategies of accumulation and partial licensing of intellectual property (particularly patents) that Western Union and AT&T built up their telecommunications networks. These strategies would have been impossible if the rights and obligations connected with the intellectual property had been non-transferrable.

Not all rights are transferable, even today. Broadly speaking, in America most "social rights" (Marshall 1992 [1950]) are non-transferable. Social Security benefits, for example, are explicitly non-transferable by statute: "the right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity" (42 U.S.C. § 407). Such transfer restrictions prevent objects from being fully monetized (sold in exchange for their present value), and therefore impede the formation of market exchange with respect to the objects (*see* Simon 1991, at 1341-42). By paternalistically prohibiting individuals from bargaining away their rights, transfer restrictions prevent the large-scale accumulation of such rights that enables the purposeful exercise of economic power and capital-formation.

The categorization of patents and copyrights as property, which took place in the Eighteenth Century, strongly contributed to their transferability, due to the Roman law tradition's emphasis on the powers of a property-owner to exercise his proprietary will in relation to his property. However, the fact that this new category of property emerged alongside a will theory of contracts meant that large-scale accumulations of intellectual property could occur with relative ease; purposeful exercises of the economic power enabled by this accumulation, according to strategies that were learned through a long sequence of trial and error, enabled the institutionalization of America's telecommunications network.

During the Nineteenth Century, intellectual property became subject to the proprietary voluntarism – the purposeful exercise of proprietary will through contracts – of companies like Western Union and AT&T. In the conclusion to this chapter, I will show how outcomes pertaining to the development of America's telecommunications network could have differed, if intellectual property had not been legally subject to the proprietary voluntarism of Western Union and AT&T.

Seeing the Impact of Contracts: The Magnetic Telegraph Company and the O'Reilly Contract

The economic historian Victor Selden Clark has stated that organizations involved in the electronic industry "crystallized around patent rights" (1929, at 381).[140] However, as we will see, these organizations relied on patent licenses in order to effectuate their organizational "crystallization," and to develop into a national presence. Early patent licensing practices by the Morse patentees involved poorly-drafted contracts, and hampered organizational development. Western Union would build on much more systematic patent acquisition and licensing practices, and would become a much stronger national organization, eventually absorbing the Morse patents. The Bell System,[141] likewise, would expand through systematic patent and trademark

[140] It is important to recall that the telegraph represented "the earliest practical application of electricity" (Clark 1929, at 377). From these early applications, often housed within the same companies and involving the same inventors, would emerge other early electronic inventions in lighting and power. Therefore, as will be discussed further below, the patent acquisition and licensing patterns that emerged in the telegraph and telephone industries have clear implications for other industries that relied on electronic technology.

[141] Given our contemporary perspectives, it might seem odd to treat the growth of the Bell System as an extension of the telegraph industry. However, once it is recalled that Alexander Graham Bell's inventions were seen initially as improvements in *telegraph* technology, this treatment may seem more natural. Perhaps the best evidence for the fact that Bell's inventions were initially seen as improvements in telegraphy comes from the titles of Bell's patents: "Improvement in Transmitters and Receivers for Electric *Telegraphs*" (U.S. Patent No. 161,739); "Improvement in *Telegraphy*" (U.S. Patent No. 174,465); and "Improvement in Telephonic *Telegraph*-Receivers" (U.S. Patent No. 178,399). Archival evidence also shows that the early understanding of Bell's associates was that his inventions should be pursued as potentially-lucrative improvements in telegraph technology (*see* Tosiello 1979, at 11-13). In any case, the fact that a contract seemed necessary in order to partition the telephone and telegraph industries

licensing practices, and would grow into a national organization that endured through the 1980s. To see how this happened, we must return to the early Nineteenth Century, beginning with Samuel Morse and the telegraph.

Prior to patenting his electro-magnetic telegraph, Samuel Morse had experience with the patent system, having patented a fire-engine pump with his brother, Sidney, in 1817 (U.S. Patent No. 2843X; *see also* Thompson 1947, at 6; Reid 1886, at 33-34). Working toward electro-magnetic telegraphy in 1832, Morse found it necessary to bring in partners more experienced than he in electro-chemistry and practical machinery (Leonard Gale and Alfred Vail). The fact that a patent was a significant goal of their collective work is first evident from September 1837, when Morse and Vail entered into a partnership contract. Pursuant to this contract, Morse and Vail agreed to joint ownership of U.S. patent rights, and Morse agreed to transfer a portion of his patent rights, if Vail incurred expenses in obtaining English and French patents (*see* Thompson 1947, at 10; Reid 1886).

By early October 1837, Morse had filed a "caveat" with the U.S. patent office, in order to preserve his patent rights for one year while he worked to "perfect" a working model of the electro-magnetic telegraph (*see O'Reilly v. Morse*, 56 U.S. 62, 75-76 (1853)).[142] The following year, 1838, Morse filed his patent application, and entered into a much more detailed partnership agreement with Vail, Gale, and Francis Smith, chairman of the House Committee on Commerce. Pursuant to this contract, the partners divided their prospective domestic and foreign patent rights into 1/16 shares, allocating these shares partly on the basis of their respective responsibilities for obtaining the patents (*see* Thompson 1947, at 13-14).

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between National Bell and Western Union in 1879 indicates the close connections that originally existed between these industries.

[142] The caveat procedure was an innovation of the 1836 Patent Act, which was designed to enable inventors to preserve patent rights in advance of their ability to survive the Act's new inspection procedures.

In May 1845, the Magnetic Telegraph Company was formed to control Morse's telegraph patent, and to construct and operate telegraph lines. The Company was initially organized on the basis of a trust agreement: by contract, the patent "Proprietors" granted their patent rights to two trustees, who were authorized to hold the patent in trust, and to exercise certain powers on behalf of the Proprietors and the other joint-stock "Subscribers."[143] Samuel Morse and another of his early partners, attorney Amos Kendall, had hoped that the U.S. Congress would authorize the U.S. government to develop the telegraph, and to purchase the patent. However, although Congress appropriated $30,000 to finance the construction of the first telegraph line between Washington, D.C. and Baltimore, most Congressmen were decidedly uninterested in U.S. government ownership or control of the telegraph (*see* Hochfelder 2012; Israel 1992; Thompson 1947). This meant that development of the telegraph would henceforth depend on "private" organization and investment.

One month later (on June 13, 1845), the co-owners of Samuel Morse's telegraph patent (Morse, Leonard Gale, Alfred Vail, and Francis Smith) entered into a contract with Henry O'Reilly, an Irishman from Rochester, New York, who was to undertake a westward expansion of telegraph lines.[144] Pursuant to this contract, the Morse patentees agreed to convey their patent rights to O'Reilly, once he had procured funds to build lines of wire that would extend from

[143] This agreement is transcribed in full in Thompson 1947, at 447-51. Among the subscribers to this Company was Ezra Cornell, whose work had been essential in developing the basic technology for the first telegraph lines (*see* Israel 1992; Thompson 1947; Reid 1886, at 102-104). Cornell was brought into the telegraph business through his acquaintance with Congressman Francis Smith. During a time of economic depression, following the Panic of 1837, Cornell lost his work as a mechanic in Ithaca. He purchased rights to a patent on a plow, and set off to Maine and Georgia to sell these rights. In Maine, Cornell met Smith (*cf.* Reid 1886, at 104), whose Congressional district included Portland. Cornell's ability to develop a plow to lay telegraph lines underground impressed Smith, and resulted in Cornell's employment by the Telegraph Company. Cornell's involvement in the telegraph business is extensively described in his biography, *True and Firm* (1884), written by his son, Alonzo B. Cornell, who was himself a telegraph operator and, later, director of Western Union.

[144] Throughout his book, which has become a standard reference for U.S. telegraph history, Robert Luther Thompson follows O'Reilly's preference in spelling his name "O'Rielly". Thompson acknowledges (1947, at 39 n.6), however, the that family spelling was O'Reilly. This spelling is much more common, and is more likely to be seen in official records, including litigation records.

Philadelphia ("or at such other convenient point" nearer to Harrisburg on a projected "great Seaboard Line") through Pittsburgh, and then onward to cities further west, including (but not limited to) Cincinnati and St. Louis (*see* Thompson 1947, at 452-54).[145] Loosely drafted and poorly specified, this contract (hereinafter the "O'Reilly Contract") would provide the basis for a fragmented, materially-shoddy, and deeply contested westward expansion of Morse telegraph lines (*see* Thompson 1947; Reid 1886).[146]

The O'Reilly Contract can be seen as contributing a legal formulation to the interpretive framework within which the initial westward expansion of the telegraph would take place. By delineating rights and obligations between Henry O'Reilly and the Morse patentees, the contract contributed to the parties' understandings about the ways in which they could legitimately take action in extending telegraph lines and establishing Morse telegraph operations. By failing to establish any conditions, other than time and access to funding, under which O'Reilly was to conduct his westward expansion, the contract created a very wide interpretive space within which O'Reilly could believe that he was acting in accordance with his contractual obligations. On the other hand, by becoming "null and void," within six months, on the basis of ambiguous conditions, the contract enabled the Morse patentees (Smith in particular) to legitimately believe, by the end of 1845, that the patent was being infringed by O'Reilly's activities (*see* Thompson 1947, at 80-89; Reid 1886, at 152-65).[147] Although it was probably intended to enable

[145] The contract is transcribed in full in Thompson (1947, at 452-54). The goal of this contract was to facilitate western expansion of the telegraph, a goal that formed part of Amos Kendall's early and powerful vision for a national telegraph network (*see* Thompson 1947, at 39-40).

[146] "The O'Rielly contract with the patentees was a masterpiece of ambiguity. This famous document...was to lead to more dissension and prove the source of more litigation than any other single agreement associated with the early lines. For years the controversy growing out of it lay like a malignant growth on the new enterprise, sapping its vitality, and bringing the telegraph into disrepute generally" (Thompson 1947, at 75).

[147] The contract contained a provision specifying that it would become "null and void" within six months if O'Reilly had not constructed a line to Harrisburg from an unspecified eastern point of connection with the "Great Seaboard Line" (*see* Thompson 1947, at 453).

flexibility, the ambiguous contract actually contributed to misunderstandings and disagreements between O'Reilly and the Morse patentees.

Furthermore, because the O'Reilly Contract contained no specification with respect to the organizational form under which Henry O'Reilly should undertake his westward expansion, he was free to decide this for himself.[148] Fatefully, O'Reilly decided to form a separate company for each route, envisioning a vast confederacy that would be loosely held together by a "Telegraph Association" (*see* Thompson 1947, at 73-75; Reid 1886, at 164-65). O'Reilly's early partner, James Reid (1886, at 164), regarded this decision as "the source of much mischief, and the cause of final extinction" for the O'Reilly companies.[149]

Despite being served with notice by the Morse patentees that his contract was "null and void,"[150] Henry O'Reilly and his Rochester-based partners pressed forward with their plans in forming telegraph companies and laying telegraph lines. A series of letters between the Morse patentees and the O'Reilly partners document the O'Reilly partners' position that they were acting pursuant to a contract that remained valid. Nevertheless, in order to satisfy the Morse patentees, the O'Reilly partners offered additional payments for the patent, which would secure their right to western and southern development of the telegraph. The Morse patentees, however, remained insistent that the contract was void, and entered into contracts with alternative developers (*see* Thompson 1947, at 86-89).

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[148] The O'Reilly Contract did state that the patent would be conveyed according to the terms of the Articles of Association creating the Magnetic Telegraph Company (*see* Thompson 1947, at 452). Essentially, the latter contract, which did specify certain organizational matters, was incorporated by reference. However, this did not result in any explicit conditions being placed on the organizational form (one company versus several companies) under which westward expansion could take place.

[149] "And so it came to pass that the field of the O'Reilly contract was divided among six distinct companies, absolutely independent of each other. They were so independent that, in coming days, when Sibley and Wade, the great line gobblers [*i.e.* Western Union], commenced their western campaign, they found these companies as Napoleon used to delight in finding his enemies, in detached armies, whom he fell upon and demolished in detail." (Reid 1886, at 165)

[150] By letter dated November 4, 1846 (*see* Thompson 1947, at 86 & 86 n.54).

The conflict between the Morse patentees and the O'Reilly developers culminated in competition over development through the Ohio River Valley, a route that would connect Philadelphia (and the Atlantic seaboard) to Louisville, Kentucky, via Pittsburgh. During the 1840s, increasing uses of steam power in manufacturing, combined with the development of metal smelting industries, were cooperating to transform Louisville – "situated directly on the great coal highway afforded by the Ohio River" (Clark 1929, at 190) – into a leading industrial city of the (then) American Southwest (*see* Clark 1916, at 331-32). As the first part of their plan to construct and operate a route to Louisville, the O'Reilly developers formed the Atlantic & Ohio Telegraph Company, opening a line from Philadelphia to Pittsburgh on December 26, 1846 (*see* Thompson 1947, at 81, 98; Reid 1886, at 163-78).[151] Five days earlier (on December 21, 1846), the Morse patentees (led by Smith) had formed their own company – The Western Telegraph Company – to develop the route to Louisville (*see* Thompson 1947, at 89, 99; *cf.* Reid 1886, at 147-51).

By 1847, the conflict between the Morse patentees and the O'Reilly developers had erupted into litigation. In early January, the Morse patentees applied for an injunction in Federal court to prevent the O'Reilly developers from proceeding (*see* Morse v. O'Reilly, 4 Pa. L.J. 75 (Circuit Court, E.D. Penn. 1847)). The basis for the application was breach of contract, and, in consequence, infringement of the Morse patent. The court refused to grant the injunction, despite recognizing that injunctions are normally available to protect against patent infringement. Reasoning that the injunction was actually being sought to enforce the termination of the O'Reilly Contract, the court held that this would be an unwarranted extension of an equitable remedy. As in normal cases of a breached contract, the remedy should come through monetary

[151] The first message to be sent along this line was a war dispatch to U.S President Polk, indicating the readiness of Mexican War troops to march from Pittsburgh (*see* Thompson 1947, at 98).

damages, rather than judicial interference.[152] According to James Reid (1886, at 182), this decision "gave great joy to Mr. O'Reilly and his friends," enabling completion of the line through Louisville,[153] along with the organization of a new company – The Pittsburgh, Cincinnati and Louisville Telegraph Company – to operate the lines from Pittsburgh to Louisville.

James Reid, Superintendant of the Cincinnati-based Company, recalled in his memoirs that the ultimate significance of the Ohio River Valley connection to Louisville was seen in its potential to connect the Eastern Seaboard to New Orleans (1886, at 197; *see also* Thompson 1947, at 139-65).[154] Having already been served with notice that his contract with the Morse patentees was terminated, Henry O'Reilly decided to form a new company – formally the Southwestern Telegraph Company, but, more popularly, the "People's Telegraph Company" – to develop telegraph lines extending from Louisville to New Orleans, via Nashville, with an extension west to Memphis (*see* Thompson 1947, at 74, 147-48; Reid 1886, at 197-98). In order to avoid patent litigation, two of O'Reilly's partners (Ed Barnes and Samuel Zook) constructed telegraph transmission machinery that they claimed as an independent invention, calling it the

[152] "The case came before me, and has been discussed, as a motion for a special injunction at the instance of the proprietors of a patent right....Essentially [however], the application is for the aid of the summary process of the court to enforce a forfeiture [the termination of the contract, due to breach of its terms]. I am not aware that such an application has been sustained by a court of equity in any case; and though called on by me, the counsel for the [Morse] complainants have not found one. I am warranted in assuming, therefore, that the uniform chancery practice has been against such an exercise of jurisdiction, and this is certainly not a case of which the merits are so obvious as to invite innovations in its favor....The exclusive rights of a patentee are specially guarded from intrusion; but the contracts which he makes to share them with third persons are interpreted and enforced just as other legal engagements." (*Morse v. O'Reilly*, 17 F. Cas. 867, 870 (Circuit Court, E.D. Penn. 1847)

[153] The line to Louisville was completed on December 29, 1847, and an operational office was opened on the same day (*see* Reid 1886, at 180).

[154] "Louisville, Ky, has always been, to a vast region north, the gateway of the south. Located at what is practically the head-waters of the lower Ohio, she has long held an important hold on the immense trade of New Orleans, and the cities of the Mississippi. It is even more marked now, since, in addition to her river traffic, Louisville has become the entrepot of the great railway routes to the southern seaboard. For the telegraph, especially, it is one of the natural radiating points of southern commercial intercourse with the north and west. While, therefore, Mr. O'Reilly was welcomed heartily to Louisville, and the connection established with the east gave much satisfaction, it was natural that the merchants who grasped his hand with true southern warmth, should regard the work, so quickly and happily accomplished, as only an earnest of the extension of the wires to Memphis and New Orleans." (Reid 1886, at 197)

"Columbian Telegraph" (*see* Thompson 1947, at 147-48; Reid 1886, at 197-98; *O'Reilly v. Morse*, 56 U.S. 62 (1853)). At the same time, however, the Morse patentees were developing two separate lines – one along the Southeastern Seaboard, and one running right alongside O'Reilly's route – to connect to New Orleans (*see* Thompson 1947, at 139-65).[155]

On March 7, 1848, the People's Telegraph Company began operating its line to Nashville, Tennessee, using the Columbian Telegraph machinery (*see* Reid 1886, at 199). Shortly thereafter, the Morse patentees, acting through Amos Kendall, filed for an injunction, claiming that the Columbian Telegraph violated Morse's patent. At one level this litigation brought victory for the Morse patentees: they obtained a Federal injunction (September 1848) against further use of the Morse telegraph by O'Reilly (*Morse v. O'Reilly*, 17 F.Cas. 871 (Circuit Court, District of Kentucky, 1848)), and the U.S. Supreme Court ultimately ruled that Samuel Morse was the first inventor of the electro-magnetic telegraph (*O'Reilly v. Morse*, 56 U.S. 62 (1853)). However, the Morse patentees' failure to adequately provide for development of their telegraph through contract was, at a deeper level, more important.

In parallel with his efforts to enjoin the Columbian Telegraph, Amos Kendall was also fighting a losing battle to eliminate potential competition from another telegraph machine – the "Electro-Chemical Telegraph" invented by the Scotsman, Alexander Bain (*see Bain v. Morse*, 2 F.Cas. 394 (Circuit Court, District of Columbia, 1849); Stansbury 1849). Bain had received an English patent for his invention in December 1846, and applied for a U.S. patent in April 1848. The Commissioner of Patents, after reviewing the application, declared an interference with a pending application by Samuel Morse (filed in January 1848), and determined that Morse's

[155] The line connecting Washington, D.C. to New Orleans by way of the Carolinas, Georgia, Alabama, and Mississippi was completed in 1848 (*see* Thompson 1947, at 142-43; Reid 1886, at 144). It was operated by the Washington and New Orleans Company, which licensed the Morse patent. According to James Reid, the licensing contract between the Morse patentees and the Washington and New Orleans Company was a model of clarity, due directly to lessons learned from the O'Reilly Contract (*see* Reid 1886, at 144).

application had priority (*see* Stansbury 1849, at 4-5). However, Bain successfully appealed this decision, obtaining a patent for his Electro-Chemical Telegraph the following year (U.S. Patent No. 6837, dated October 30, 1849; *see Bain v. Morse*, 2 F.Cas. 394 (Circuit Court, District of Columbia, 1849); Stansbury 1849).[156]

In June 1849, Henry O'Reilly obtained judicial permission to reopen his Louisville line, swearing to install Bain's Electro-Chemical Telegraph in place of the Columbian Telegraph (*see* Thompson 1947, at 159 n.61). By 1850, the line to New Orleans was open, operating with Bain telegraphs (*see* Thompson 1947, at 162; Reid 1886, at 203-206). At this point, the Morse patentees could only reassert their control over the lines to New Orleans by buying out the People's Telegraph Company. In 1853, a consolidated organization was formed, and the threat of the Bain telegraph was neutralized (*see* Israel 1992, at 50; Reid 1886, at 206-209).

The chaotic early development of the telegraph that followed in the wake of the O'Reilly Contract taught the parties involved a painful lesson: carefully considered and clearly specified contracts would be essential to further telegraph development (*see* Reid 1886, at 144, 244). Henry O'Reilly had been defeated, but at great cost to the Morse patentees. And, in the wake of the ill-fated O'Reilly Contract there remained a number of semi-independent telegraph companies, which were continuing to expand westward. One of these companies – the Illinois and Mississippi Telegraph Company – was credited by James Reid with perfecting a contractual step that would prove vital in the westward expansion of the telegraph: railroad protection contracts.

[156] According to George Prescott (1875, at 127), Bain was persuaded to appeal the decision by Henry O'Reilly.

Railroad Protection Contracts and Westward Expansion

The value of alliance between telegraph and railroad companies become apparent with the completion of the lines to New Orleans, and in their extensions to nearby southern cities (*see* Reid 1886, at 209). Beginning in 1854, the newly-consolidated New Orleans & Ohio Telegraph Company undertook a program of systematically rebuilding its lines, running them along newly-built railroad lines. The advantages of this arrangement for construction and maintenance of the telegraph lines were obvious. However, railroad companies were slow to see the advantages that telegraph technology could bring to them (*see* Thompson 1947, at 203-16; Reid 1886, at 243-44).

According to James Reid, the credit for developing a contractual structure of benefit to both telegraph and railroad companies was due to John Dean Caton, Chief Justice of the Illinois Supreme Court (*see* Reid 1886, at 243-44; *see also* Thompson 1947, at 130-35). Judge Caton had become a director of Henry O'Reilly's newly-formed Illinois and Mississippi Company almost by accident, encountering a meeting of potential stockholders in an Ottawa courthouse, agreeing to represent their interests, and playing a leadership role in the organizational meeting that created the Company.[157] In 1852, Judge Caton was elected President of the Company, drawing on his legal expertise and position to obtain special legislation that would rescue the Company from financial ruin. As President, Judge Caton dedicated himself to establishing contractual relationships with railroad companies, working out very precise terms for these

[157] This meeting occurred on April 10, 1849 (*see* Thompson 1947, at 130; Reid 1886, at 235). O'Reilly had opened Morse telegraph service to St. Louis – through the Ohio & Mississippi Company – on December 10, 1847 (*see* Reid 1886, at 220). From there, he intended to expand northward to Chicago, and Westward to Dubuque, Iowa. The lines constructed for these routes were to be owned and operated by the Illinois and Mississippi Company (*see* Thompson 1947, at 127, 263; Reid 1886, at 233).

contracts that enabled them to work for the advantage of both the railroads and the telegraph (*see* Reid 1886, at 238-40).

Pursuant to the contracts developed by Judge Caton, railroads were given priority in sending telegraph messages, and were allowed to share in the profits from commercial messages. In return, the railroad companies contributed to the construction of telegraph lines along their railroad lines, monitored these lines, and staffed telegraph offices in their railroad stations. The railroads also committed to exclusive use of the Company's telegraph machinery and services (*see* Reid 1886, at 243-45; *see also* Thompson 1947, at 212-14).

The basic benefit obtained by the Telegraph Company under these contracts was protection, both for its physical infrastructure and for its patent. The contract protected the patent by extending its sphere of legal exclusivity: beyond the Federal government's time-limited guarantee, the railroads added their own physical exclusivity and enforcement-power to the legal exclusivity of the patent. For the railroads, the basic benefit was communicative: making use of the telegraph, the railroad companies could coordinate their activities much more effectively and precisely. In addition, both parties were able to split the profits from commercial telegraph business, which was beginning to be substantial.

At roughly the same time that Judge Caton was developing his railroad protection contracts, the company that would become Western Union was also contracting with railroads to build telegraph lines that would extend an existing line – connecting New York City with Buffalo and Cleveland – to Louisville, Kentucky. This company (the New York & Mississippi Valley Printing Telegraph Company) had been originally formed, in 1851, to incorporate a group of Rochester-based lawyers and businessmen led by Samuel Selden and Hiram Sibley (*see* Thompson 1947, at 264-74, 454-503). These men collectively owned and managed a third

competitor to Morse's patent: the "printing telegraph" patent of Royal E. House (U.S. Patent No. 4,464, dated April 18, 1846).[158] The Company was formed under New York's newly-permissive framework for incorporation, which included a law authorizing the contractual "self-incorporation" of telegraph companies (*see* Freedland 1957; Freedland 1956).[159]

In February 1854, the New York & Mississippi Valley Printing Telegraph Company executed the first stage in what would become a "career of conquest" (Thompson 1947, at 275), entering into a contract with three railroad companies to extend its existing telegraph lines from Cleveland to Chicago.[160] There were five parties to this contract: (1) the New York & Mississippi Valley Printing Telegraph Company, (2) the Trustees for the House patents,[161] (3) the Cleveland and Toledo Railroad Company, (4) the Michigan Southern and Northern Indiana

[158] According to Robert Luther Thompson (1947, at 54), House's patent was actually issued in 1848, after modifications to the specification had been made in order to avoid infringing on Morse's patent. The patent, which is dated April 18, 1846, was therefore backdated, according to Thompson's account. Thompson relies on secondary sources, and I have not been able to review patent office records that would confirm this.

[159] New York's 1846 Constitution (Article 8, Section 1) had enabled corporations to be formed "under general laws", specifying that corporations (other than municipal corporations) were no longer to be created through special legislation, as had been previously required. In 1848, New York enacted a general authorization for the incorporation of telegraph companies. Pursuant to this law, telegraph operators and investors would become a corporation once they had executed a "certificate" specifying the firm's name, the route of the telegraph lines, the capital stock and number of shares into which that stock was to be divided, the names and addresses of the stockholders, and the date upon which the corporation would terminate. *See* Laws of the State of New York, 71st Session, Chapter 265 (April 12, 1848). This law was amended in 1851 to facilitate the extension of telegraph lines, and to enable the combination of telegraph companies. *See* Laws of the State of New York, 74th Session, Chapter 98 (April 8, 1851). The law was amended again in 1853, specifying limits to the liability of shareholders and empowering telegraph companies to further extend and develop their lines. *See* Laws of the State of New York, 76th Session, Chapter 471 (June 29, 1853); *see also* Thompson 1947, at 270-71. New York had provided a favorable legislative environment for telegraph development since 1845, when it enacted "the first general easement and protective telegraph act in the country" (Thompson 1947, at 67 n.46). *See* An Act to facilitate the construction of Morse's Electro-Magnetic Telegraph, Laws of the State of New York, 68th Session, Chapter 243 (May 13, 1845).

[160] Contract of the New York & Mississippi Valley Printing Telegraph and the New York State Printing Telegraph Companies with the Cleveland and Toledo, the Michigan Southern, and the Northern Indiana Railroad Companies, dated February 7, 1854. This contract is printed in Thompson 1947, Appendix 10 (482-91).

[161] The trust was provided for under a contract dated April 18, 1853. This contract is reprinted in full in Thompson 1947, Appendix 8 (473-78). The contract pertained to House's 1846 patent, as well as a patent granted in 1852 for improvements to the Magnet Letter Printing Telegraph (U.S. Patent No. 9505, reissued on September 28, 1858 as Reissue No. 605). This contract refers to an assignment by House (and two co-patentees) of "all their interests in and to the exclusive right of constructing lines of [House's telegraph], and of using the same within and throughout the United States and its Territories" (Thompson 1947, at 474). By virtue of this and several other assignments, the House patents had collectively been divided into 40th shares, and allocated among 8 men. Pursuant to the Trust Agreement, all the existing rights were re-collected, divided into 320 shares apportioned among the 8 men, and transferred to 3 Trustees, who would henceforward be authorized use their best judgment in disposing of the patents.

Railroad Companies, and (5) the New York State Printing Telegraph Company.[162] Pursuant to this contract, the Trustees of the House patents granted exclusive rights to operate and use House's patented telegraph, in exchange for a commitment on the part of the railroad companies to construct the telegraph lines pursuant to detailed specifications, and to exclusively use House's patented telegraph along their railroad lines.[163]

Railroad protection contracts like this one provided the basis for Western Union's eventual dominance of the field of telegraphy (*see* Hochfelder 2012; Thompson 1947; Reid 1886). By 1881, approximately 800 such contracts were in place (Hochfelder 2012, at 39), extending the exclusivity of Western Union's patented telegraph technology well beyond the terms of the patents, and permitting a unity of organizational control over the telegraph industry that had been missing in the early days of the telegraph. In 1883, the infamous Jay Gould testified to the importance of these contracts before Congress, contending that they made competition in the field of telegraphy "perfectly impracticable" (Hochfelder 2012, at 39). In conjunction with contracts of alliance between competing telegraph companies, these railroad protection contracts constituted the legal framework for the telegraph industry's "Era of Consolidation," which began in the mid-1850s and extended through the Civil War (*see* Thompson 1947).

[162] This was a company formed by Samuel Selden in 1849 to develop House telegraph lines extending along the Hudson River Valley from New York City to Albany, and then along the Mohawk River Valley to Buffalo. Although Selden and O'Reilly had originally worked together in developing the telegraph, the formation of this company marked a rupture between O'Reilly and Selden, and between Selden and the Morse patentees (see Thompson 1947, at 185).

[163] Very precise and detailed specifications for the construction, which was to be overseen by The New York & Mississippi Valley Printing Telegraph Company, were laid out in the contract. Once the lines were built, they were to be staffed by Telegraph Company employees. Priority, within legal limits, was to be given to railroad company messages.

Contracts of Alliance, Geographic Exclusivity, and Consolidation

By 1866, the Magnetic Telegraph Company, the O'Reilly companies, and the Rochester-based New York & Mississippi Valley Printing Telegraph Company had all been absorbed into the powerful Western Union Corporation (*see* Thompson 1947, at 328-30, 424-26; Reid 1886, at 141, 534-35). From a single line connecting Washington, D.C. and Baltimore, the telegraph system had been expanded to connect all major American cities, and to connect North and South America with Europe (*see* Thompson 1947; Reid 1886). With the 1866 absorption of its two remaining major competitors (the American Telegraph Company and the United States Telegraph Company), Western Union became the dominant telegraph service provider in the United States, handling, according to a recent estimate, at least 80% of the nation's telegraph traffic (Hochfelder 2012, at 3). As "the first corporation to operate on a nationwide scale" (Israel 1992, at 2), Western Union built on aggressive patent acquisition and licensing practices to "web the world in a net-work of throbbing life" (Reid 1886, at 876).

An important early step in Western Union's post-Civil War ascendancy came in April 1854, with a contractual alliance between the House patent-holders and two significant Morse patent-holders: J.J. Speed, Jr. and J.H. Wade. In exchange for $50,000 in cash and promissory notes, Speed and Wade transferred to The New York & Mississippi Valley Printing Telegraph Company all their "rights and interests" in Morse's telegraph patents, including any future rights in renewed, reissued, or extended patents (*see* Thompson 1947, at 493-97).[164] As a result of this contract, the Company claimed exclusive control of all telegraph patents in the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, and the Territory of Minnesota (Thompson 1947,

[164] Agreement of the New York & Mississippi Valley Printing Telegraph Company with J.J. Speed and J.H. Wade, April 29, 1854; and Certain Supplemental Agreements (reprinted in Thompson 1947, Appendix 12).

at 281). However, as Ezra Cornell promptly protested, this claim was unfounded: outstanding "rights and interests" in the Morse patents for those states were still held by Cornell, Judge Caton, and the companies they directed (*see* Thompson 1947, at 280-85; 493-97).

Final patent consolidation for western telegraph development came the next year, with the formation of the Western Union Telegraph Company out of the union of Cornell's Erie & Michigan Telegraph Company and The New York & Mississippi Valley Printing Telegraph Company (*see* Thompson 1947, at 279-85; Reid 1886, at 280-81, 455-71). This consolidation was legally effectuated by means of a consolidation agreement, which recognized a patent assignment (Thompson 1947, at 497-503).[165] Pursuant to this contract, the entirety of the House and Morse patent rights for the States of Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, and the territory of Minnesota, together with the existing telegraph lines of both companies, became part of the property standing behind the "capital" of Western Union, the value of which was named at $500,000 (approximately $12 million in 2012 dollars).[166]

Writing 30 years later, with the benefit of hindsight, James Reid pronounced the assignment of the Morse patent rights as "the most valuable item in the entire conveyance" (Reid 1886, at 469). Building on the strength of this consolidation, Western Union (in concert with Judge Caton and his Illinois & Mississippi Company) promptly began to enter into a series of protection agreements with railroads, extending Western Union's lines ever further westward, and gradually acquiring (through lease or purchase) the remaining O'Reilly companies (*see* Thompson 1947, at 293-97; Reid 1886, at 174-75, 472-81).

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[165] Consolidation Agreement Between the New York & Mississippi Valley Printing Telegraph Company and the Erie & Michigan Telegraph Company, October 19-20, 1855 (reprinted in Thompson 1947, Appendix 13).

[166] Judge Caton's Illinois and Mississippi Telegraph Company, together with two other telegraph companies controlled by Ezra Cornell (the Wisconsin State and Ohio, Indiana & Illinois companies) were recognized as continuing to exist as licensees of Cornell's Morse patent rights. The contract specified a non-competition agreement with these companies (§8).

In the meantime, however, a new player had entered the field, holding a new patent. On May 20, 1856, David E. Hughes of Louisville, Kentucky had received a patent for an "Improvement in Telegraphs" (U.S. Patent No. 14,917). Even before receiving his patent, Hughes had assigned all rights to its use in North America to Daniel Craig, entrepreneurial agent of the New York Associated Press ("NYAP"), in exchange for $100,000 (*see* Blondheim 1994, at 107-108; Thompson 1947, at 303-305; Reid 1886, at 405-407). On the same day (November 1, 1855), a new telegraph company was incorporated under New York's press-friendly telegraph law: The American Telegraph Company.[167] The nominal capitalization of this Company was $200,000, half the value of which was rooted in Hughes' patent, which Craig had assigned to his partners in the new company.

With the entry of the American Telegraph Company into the field of competition, the dynamics of competition were fundamentally altered. Aside from the railroads, the press represented by far the most important consumer of telegraph services (*see* Hochfelder 2012, at 73-100; Blondheim 1994; Thompson 1947, at 47, 217-39; Rosewater 1930; Reid 1886, at 191, 196). The initial formation of the NYAP had come at the opening of the Mexican War (1846), when six New York daily papers (*The New York Journal of Commerce*, *The New York Courier and Enquirer*, *The New York Express*, *The New York Sun*, *The New York Herald*, and *The New York Tribune*) agreed to coordinate their efforts in obtaining and transmitting war news from the South, as well as European news coming off ships in the Eastern harbors, and to share the costs of telegraph transmissions in furtherance of these goals (*see* Blondheim 1994, at 47-67).[168]

[167] *See supra* note 162. New York's 1848 telegraph company incorporation law specified that telegraph companies were to transmit messages in the order they were received, but provided an exception for the public press, which was to be given priority in transmission. According to Menahem Blondheim (1994, at 85, 243n.60), New York was the only state to provide for such an exception.

[168] *The New York Times* joined the association when it emerged in 1851 (*see* Thompson 1947, at 225 n.31). The conventional date for NYAP formation is 1848 (*see* Thompson 1947, at 225; Rosewater 1930, at 66). However, Menahem Blondheim (1994, at 47-67) draws on extensive primary sources to argue for the earlier date.

Having grown into a dominant purchaser of telegraph services by 1855, the NYAP had pursued a policy of "divide and rule," patronizing competing telegraph companies on an equal basis (*see* Blondheim 1994, at 96-106). However, the formation of the American Telegraph Company by NYAP agent Daniel Craig (in conjunction with a group of New York merchants) represented a new development: henceforth, NYAP business would be given only to the American Company, in the East, and to Western Union in the West (*see* Blondheim 1994, at 106).

Recognizing that the dynamics of their industry had changed, the Morse patent-holders proposed a meeting among the leading telegraph companies "for the purpose of devising a plan for harmonizing all interests and protecting existing lines" (Thompson 1947, at 311).[169] Side-stepping the Morse patent-holders, the House and Bain patent-holders entered into an alliance with the Hughes patent-holders. This alliance was effectuated on August 10, 1857 through a "Six Party Contract," which purported to partition the entirety of telegraph business within the United States among six contracting "nations": The American Telegraph Company; The Atlantic & Ohio Telegraph Company; The New York, Albany & Buffalo Telegraph Company; Western Union; The New Orleans & Ohio Telegraph Lessees; and the Illinois & Mississippi Telegraph Company (*see* Thompson 1947, at 311-330, Appendix 14).

The basis for the Six Party Contract was a license of the Hughes telegraph patent, the cost of which was shared by the contracting parties (*see* Thompson 1947, at 504-15).[170] Pursuant to Article III of the Contract, the parties mutually agreed that each party would have exclusive ownership of the Hughes patent rights within the territorial boundaries set forth in the contract (*see also* Article V). In addition, the parties agreed that each party would have "exclusive

[169] This language is quoted from a letter written by Amos Kendall to Samuel Morse on August 27, 1857 (*see* Thompson 1947, at 311).

[170] Articles of Agreement for the Union, Protection and Improvement of Certain Telegraph Lines in North America, August 10, 1857; and Certain Supplemental Agreements (reprinted in Thompson 1947, at 504-15).

enjoyment of all telegraph business within the territory in which the patent right has been allotted" (Article IV, Section 2). In this way, the license of the Hughes patent became the basis for dividing the entire telegraph business, regardless of which particular patented technology was being used (Morse, House, Bain, or Hughes). Adding strength to the territorial division of business, the Contract obligated the parties not to enable third-party competition, for example through the sale of patents or telegraph lines to third-party competitors.

The Morse patentees reacted to this "perfidy" (Thompson 1947, at 317, 320) by forming their own alliance. Given their strength in the Northeast and along the Atlantic Seaboard, the Morse patentees were able to hold out for two years against the Six Parties. Nevertheless, by early 1860, the combined forces of the North American Telegraph Association (the Six Parties plus the Montreal Telegraph Company) had persuaded the Morse patentees to give in, and to sell their patents. At the opening of the Civil War, therefore, the telegraph industry had been nationally organized and partitioned on the basis of patent licenses (*see* Thompson 1947, at 323-30).[171]

Although competitive skirmishes – especially over fractious relations with the NYAP – did undermine the solidity of the North American Telegraph Association, it was ultimately the War itself that fatally weakened the American Telegraph Company, enabling Western Union to achieve dominance (*see* Thompson 1947, at 335-42, 373). Stretching from North to South, the American Telegraph Company was severed in half by the Civil War. Western Union, on the other hand, stretched from the Northeast to the Northwest, and gained enormous strength from the Wartime services it provided to the Press and to the Union government. Western Union also controlled the Overland Telegraph Company, which – pursuant to U.S. legislative privileges and

[171] Robert Luther Thompson (1947, at 326) notes that part of the impetus for settlement was the upcoming expiration of Morse's patents, which was scheduled to occur in April 1860 and June 1861.

subsidization – by October 1861 had completed a telegraph line connecting Chicago to San Francisco (*see* Thompson 1947, at 348-371).

From November 1861 to the close of the War in 1865, Western Union's General Manager, Anson Stager, also served as the Union Government's Superintendant of Military Telegraphs. In this capacity, Stager oversaw the development of an "extensive government-owned-and-operated military telegraph system" (Thompson 1947, at 393; *see also* Reid 1886). At the same time that Stager was overseeing this expanding military telegraph system, his colleagues at Western Union were hard at work to acquire the other members of the North American Telegraph Association (*see* Reid 1886). By the close of the War, Western Union possessed approximately 44,000 miles of telegraph wire, and over a thousand telegraph offices, vastly outdistancing its nearest rival, The American Telegraph Company (*see* Thompson 1947, at 407-408).

On June 12, 1866, the American Telegraph Company gave in, and entered into a merger agreement with Western Union (*see* Thompson 1947, at 424). One month later, a secure cable was finally laid across the Atlantic Ocean, linking Europe and North America; telegraph messages between the two Continents began running on August 26, 1866 (*see* Thompson 1947, at 434; Reid 1886). From its position of dominance, particularly in relation to the vital news link between Europe and the U.S., Western Union was now in a position to compel a settlement between the NYAP and the Western Associated Press, which had been fighting one another for control of telegraphic news service (Hochfelder 2012, at 85). In 1867, the Associated Press emerged from Western Union's crucible (*see* Blondheim 1994).

In his Pulitzer Prize-winning history of Nineteenth Century America, Daniel Walker Howe (2007) has pointed to the telegraphic "communications revolution" as an essential force

behind America's transformational shift into the Reconstruction Era. In Howe's estimation, the electric telegraph played a role of singular importance in drawing the United States of America together into a national economic entity and "imagined community" (Anderson 2006). As we have seen, patent licenses played a vital institutional role in linking together the telegraphic network that transmitted national news and financial quotes. As we have also seen, a considerable amount of experience was required before the contractual structure of these patent licenses began to serve their signatories effectively.

Learning from the failures of early patent licensing efforts, such as the O'Reilly Contract, Alexander Graham Bell's partner, Gardiner Hubbard, would insist on retaining complete control over Bell's telephone patents, laying the foundations for a national framework of "agency agreements" that set Bell on a trajectory toward national dominance of the telephone industry. Bell's framework of agency agreements comprised the institutional foundations for its dominant position (*see* FCC 1974 [1939]), and helped to constitute a model for franchising arrangements (*see* Dicke 1992), which have become ubiquitous in the modern economy.

The Alternative to Contractual Alliance: The Bell Telephone System

It is important to recall that the tele*phone* emerged out of sustained and widespread efforts to patent improvements on the tele*graph* (*see* Hochfelder 2012). Alexander Graham Bell's early patents – even the patent whose claim so controversially secured control over the marketing and sale of telephone technology to Bell and his partners – were conceived and described as improvements to the telegraph (*see* U.S. Patent Nos. 161,739 (March 1875); 174,465 (January 1876); 178,399 (March 1876)). Letters from Bell and his partners, as well as

early AT&T records, support this conclusion; Bell and his partners even tried, unsuccessfully, to sell their invention to Western Union (*see* Hochfelder 2012; Tosiello 1979).

David Hochfelder (2012, at 138-75) has spoken of the technological transition from telegraphy to telephony as a case of "industrial succession." With the hindsight of historical vision, it is possible to see (as Hochfelder does) Bell's telephone beginning to displace Western Union's telegraph at the moment when the two parties entered into their 1879 contract to partition the U.S. market. According to Hochfelder, the drafters of this contract made two fundamental mistakes,[172] which enabled AT&T to continue competing with Western Union in the field of telegraphy, while monopolizing the emerging market for telephones. These contractual mistakes, combined with Western Union's technological complacency, helped to enable the telephone to replace the telegraph, relegating Western Union to an increasingly marginal position in the telecommunications industry.

The context for the 1879 contract between Western Union and Alexander Graham Bell's company (at the time, "National Bell") was a patent priority dispute between Bell and another inventor, Elisha Gray, along with a basic question about which company's patent portfolio was stronger (*see* Hochfelder 2012; Baker 2000). Scholars, patent lawyers, journalists, and technology enthusiasts continue to debate whether Bell should have received his telephone patent, especially in light of a very close race with Elisha Gray to establish priority of invention, coupled with evidence of Patent Office improprieties (*see* Finn 2009; Shulman 2008; Baker 2000; Evenson 2000).[173] However, a narrow focus on the priority dispute between Bell and

[172] These mistakes involved a failure to completely foreclose Bell from involvement in the telegraph industry, and a failure to secure royalties on transactions involving local exchanges (*see* Hochfelder 2012).

[173] Elisha Gray filed a "caveat" with the Patent Office on the same day that Bell's patent application was filed, and there is some question about which document was actually filed first (*see* Baker 2000).

Gray does not enable sufficient understanding of the role that patents played in the settlement between Western Union and National Bell.

The basic technological problem to which the "harmonic" (or "acoustic") telegraph provided a solution was the need for greater capacity on telegraph wires (*see* Hochfelder 2012; Finn 2009; Baker 2000; Israel 1998; Israel 1992; Tosiello 1979). Thomas Edison had patented a "quadruplex" telegraph system in 1874, which enabled four messages to be sent at the same time along a telegraph wire, and had assigned this valuable patent to an upstart telegraph company formed by Jay Gould to compete with Western Union: the Atlantic and Pacific Telegraph Company (*see* Hochfelder 2012, at 140; Israel 1998, at 79-80, 97-102).

Within this context, pressure to invent alternative high-capacity telegraph technologies only increased, and people like Bell, Gray, Edison, and others began experimenting with methods to utilize a range of musical scales and pitches to simultaneously send multiple messages along a wire at different frequencies. The discovery that the sound of a human voice could be transformed into an electrical signal, conveyed along a telegraph wire, and transmitted as audible sound through a receiver was an outgrowth of these experiments. However, at the time, a higher-capacity telegraph was seen as the much more important application of these technological developments (*see* Finn 2009; Israel 1998; Tosiello 1979).

From 1875 to 1879, Western Union employed its former operator, Thomas Edison, to discover and patent as many methods of multiplex telegraphy as possible (*see* Hochfelder 2012, at 142; Israel 1998, at 108-41). Edison had already proved his value to Western Union's managers through his patents on a printing telegraph design, which contributed to the commercialization of the financial "ticker" by Western Union's subsidiary, The Gold and Stock

Telegraph Company (*see* Hochfelder 2012, at 105; Israel 1998, at 49-65).[174] In 1877, when Western Union decided to directly compete in the field of telephony, a new contract with Edison was drawn up to cover telephone-related inventions (*see* Israel 1998, at 129-41).

During the period leading up to the November 1879 contract between Western Union and National Bell, Edison successfully applied for at least 45 patents relating to multiplex telegraphy and telephony (*see* Rutgers University, Thomas Edison Papers Online). Nearly all of these would have been assigned to Western Union pursuant to the company's contracts with Edison (*see* Israel 1998, at 129-41). In addition, Western Union acquired Elisha Gray's telephone patents, together with his inventive activity, through the purchase of Gray's Harmonic Telephone Company on November 17, 1877 (*see* Israel 1998, at 139).

Western Union was clearly approaching its negotiations with Bell from an aggressive patent position, employing Edison, Gray, and others to build up an arsenal of patents covering the entire field of harmonic and acoustic telegraphs, including the telephone. Indeed, since 1870 Western Union had pursued an explicit policy "to control all improvements which may present themselves and by the possession of which we can more surely control our business, perfect our system, extend its usefulness, and render it the most complete in the world" (*quoted in* Israel 1998, at 53). This involved a strategy of "covering the field" with patents, employing inventors like Edison and Gray to work closely with patent attorneys in patenting every conceivable permutation of a particular telegraph or telephone-related technology (*see* Israel 1998, at 53, 56, 67, 72, 78-80).[175]

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[174] Edison patented approximately 150 telegraph and telephone-related inventions between 1869 and 1894 (*see* Rutgers University 2013). Of these, 41 were labeled as covering, or related to, "printing-telegraphs." Many of these patents were assigned at the time of issuance to The Gold & Stock Telegraph Company, which Western Union had acquired in 1871. The remainder were probably assigned pursuant to Edison's contracts with The Gold & Stock Company (*see* Israel 1998, at 49-65).

[175] The impact of this strategy on inventors like Thomas Edison has been noted by Edison's biographer, Paul Israel, who documents Edison's use of his notebooks to set boundaries around the extent to which his inventions would

Compared to Western Union's arsenal of patents, Bell only possessed a handful.[176] How was it, then, that a relatively new company with far fewer patents was able to negotiate a contract allocating to it the entire U.S. market in telephone sales? Part of the answer to this question surely lies in the belief – shared by most of the major players – that the telephone was really only a sideshow, relative to the telegraph (*see* Hochfelder 2012; Israel 1998; Israel 1992; Tosiello 1979). From this perspective, Western Union was willing to renounce all of its market share in telephone production, distribution, and sales – in exchange for a 20% royalty payment – because it believed the sacrifice to be relatively minimal, relative to the benefit it secured in relation to a primary competitor for the exclusive production, distribution, and sales of telegraph technology.

However, an equally important answer to this question rests upon Bell's relatively strong negotiating position, a strength that was rooted in two things: the breadth and perceived validity of Bell's telephone patent, and the contractual strategy that Bell had already begun employing in producing and distributing the telephone.

The claim that ultimately secured patent protection of telephone technology to Bell was claim number 5 in the March 1876 patent for an "Improvement in Telegraphy" (U.S. Patent No. 174,465). This claim was for "the method of, and apparatus for, transmitting vocal or other sounds telegraphically...by causing electrical undulations, similar in form to the vibrations of the air" that constitute the sound of a human voice. Bell had mentioned this possible application of his basic invention – a new method of "multiple telegraphy" employing continuous, "vibratory or undulatory" electrical currents, rather than "intermittent or pulsatory" electrical currents – toward

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belong to his employer (1998, at 67). On the first page of the notebook he used to record his inventions for The Gold & Stock Company Edison explicitly "reserved" ownership to himself of "any ideas contained in this book which I do not see fit to give said "G & Stock Telegraph" (67). In another notebook recording his inventions relating to a system of rapid telegraphy, Edison stated that a particular system was "Invented for myself exclusively, and not for any small brained capitalist" (67).

[176] Alexander Graham Bell had secured three patents, and Thomas Watson (Bell's colleague in National Bell's early "research and development" efforts) had secured several more (*see* Tosiello 1979, at 148).

the end of his description, as something of an afterthought to the basic invention, which was essentially a higher-capacity telegraph system.

Nevertheless, this claim came to be seen as covering the telephone, even by Western Union's patent attorneys (*see* Hochfelder 2012, at 150-51; Tosiello 1979). This one claim was therefore broad enough to provide a powerful counter to Western Union's arsenal of telephone-related patents. In 1888, the U.S. Supreme Court (*The Telephone Cases,* 126 U.S. 1) determined that this claim covered the entire "art of transferring to or impressing upon a current of electricity the vibrations of air produced by the human voice in articulate speech, in a way that the speech will be carried to and received by a listener at a distance on the line of current."

However, the broad scope of the patent was not sufficient, on its own, to enable National Bell to stand up to Western Union. Bell had also made an early and very explicit decision to maintain complete control of its patents in its licensing and distribution arrangements. Rather than selling its telephones to wholesalers or retail customers, Bell leased the telephones, retaining title to the instruments and collecting royalties for their use by customers (Tosiello 1979; Langdon 1935). In creating a national system for distributing its telephones, and for setting up local exchanges, Bell offered exclusive licenses to regional "agents," who were permitted to retain a portion of the royalties on leased instruments, while being subjected to strong centralized control of their manufacturing and organizational decision-making (*see* Smith 1985; Tosiello 1979). Eventually, AT&T would acquire Elisha Gray's Western Electric Company, transforming it into a centralized manufacturer and developer of telephone-related exchange technology and instruments (*see* Smith 1985).

This strategy of maintaining centralized control of patents through a clearly-specified licensing policy is attributed to Bell's early partner and father-in-law, Gardiner Hubbard, who

was a close observer of Western Union's rise to national power, and who had previously served as an attorney for a manufacturer of shoe-making machinery (*see* Hochfelder 2012; Tosiello 1979; Langdon 1935).[177] The effect of Bell's broad patent, combined with its centrally-controlled licensing and distribution policy, was to ensure that the telephone industry was firmly controlled by a single company from the very beginning.

From 1879 to 1900, National Bell would undertake a series of corporate reorganizations, culminating in its organization under a publicly-owned New York holding company, the American Telephone & Telegraph Company ("AT&T") (*see* FCC 1974 [1939], at 1-10). During this period, extensive managerial attention was focused on formalizing and standardizing AT&T's exclusive licensing arrangements (*see* Tosiello 1979, at 403 ff.) In addition, an organizational infrastructure was established to enable continuous research and development (*see* Tosiello 1979, at 427-32). The explicit goal of this research and development program, as outlined in a letter to corporate president William H. Forbes, was to "apply for patents...to cover all that is patentable" (*see* Tosiello 1979, at 430). During this period AT&T also began to stamp its retail products with distinctive logos, and to protect these as its "trademarks" (*see* Tosiello 1979).

In 1939, the Federal Communications Commission looked back on the period from 1879-1937 as the period during which the "Bell System" was established and consolidated (1974, at 1-18). Crucial to the establishment of this System, in the FCC's view, were AT&T's patents, licensing arrangements, and the 1879 contract with Western Union, which gave AT&T control over all telephone-related patents, and the entire U.S. market in telephone-related transactions and services (*see generally* FCC 1974 [1939], especially chapters 6-8). During the period

[177] Sewing machine and shoe-making industries were early locations in which policies of centralized agency contracts were utilized to enable institutional precursors to "franchising" (*see* Dicke 1992).

leading up to the outbreak of the Second World War, AT&T focused on consolidating this System by acquiring majority shareholder interests in its licensees. This was accomplished through extensions of patent licensing terms, in exchange for shares of stock (*see* FCC 1974 [1939], at 18-26).

In order to provide further consolidation to its patent-acquisition activities, in 1924 AT&T incorporated Bell Laboratories to house Western Electric's engineering and patent departments. Among other things, this enabled exploitation and development of vacuum-tube-related patents, which were acquired in the years leading up to World War I. These were of central importance to the development of "wireless" communications (radio), and to further development of telephony and telegraphy (*see* FCC 1974 [1939], at 188-89).

Conclusion: Intellectual Property Licensing and the Institutionalization of a Telecommunications Network

When the newly-created Federal Communications Commission undertook its investigation of AT&T in 1937, nearly 100 years had passed since Samuel Morse applied for his first telegraph patent. Recognizing the importance of licenses in establishing an international network of wire-based telecommunications, Congress empowered the FCC to oversee "all contracts, agreements, or arrangements" between telecommunications carriers (1934 Communications Act § 211). Pursuant to the requirement that regulated carriers register such contracts with the FCC, that agency was able to detail the extent to which contractual arrangements had helped to enable "the largest aggregation of capital and resources that has ever been controlled by a single private company at any time in the history of business" (1974 [1939], at xxiii).

In this chapter, I have endeavored to show that the American telecommunications network was created through contractual licenses of intellectual property. The legal capacity to effectuate these contractual structures was premised on the proprietary voluntarism of Nineteenth Century American law. Patent-holders, as property owners, were viewed as being free to create forms of "special law," through a formalized exercise of the will, which had very significant impacts on third parties, as well as on the parties themselves.

We can imagine counterfactual alternatives by considering the possibilities if intellectual property had been treated like Social Security benefits: as a non-transferable right. None of the contractual structures that have been discussed in this chapter would have been possible. All were premised on transfers of intellectual property through contractual licenses.

In short, America's telecommunications network could not have developed, in the way that it did, if intellectual property had not been treated as transferable. The fact that intellectual property was categorized as a type of property contributed significantly to the presumption that it was transferable, within a context of proprietary voluntarism.

Chapter 7.
The Power of Proprietary Voluntarism Part II:
Globalizing Intellectual Property

Those parts of the international system which refer to dominion, its nature, its limitations, the modes of acquiring and securing it, are pure Roman Property Law.
- Sir Henry Summer Maine

On January 28, 2013, the African Union closed its 20th Ordinary Session with a decision to create a Pan-African Intellectual Property Organization ("PAIPO") (*see* AU Press Release No. 20/20th AU Summit, January 28, 2013, Addis Ababa). The role of this Pan-African organization will be to centralize and coordinate protection of intellectual property throughout Africa (*see* Final Draft Statute of PAIPO, AU/STRC/522). If implemented effectively, this organization will add tremendously to the force of Africa's contribution to the development of globalized intellectual property law.

Until recently, African countries have primarily been the recipients of established intellectual property institutions, institutions that have been directly imposed through colonial rule, or adopted under conditions of economic coercion (*see* Kongolo 2013). Today, there are two primary legal vehicles through which African countries receive and implement intellectual property institutions. The first of these is an Annex (1C) to the 1994 Marrakesh Treaty that established the World Trade Organization ("WTO"): the Agreement on Trade-Related Aspects of Intellectual Property Rights, or "TRIPS" (WTO 1999).[178] The second important legal vehicle through which African countries receive and implement intellectual property institutions is the "World Intellectual Property Organization (WIPO)," an organ of the United Nations established

[178] The World Trade Organization published a collection of all the primary legal texts coming out of the Uruguay Round of Multilateral Trade Negotiations in 1995. An edition of this collection was published by Cambridge University Press in 1999, which I will cite collectively as "WTO 1999."

in 1967, which currently administers 26 intellectual property treaties, and serves as a coordinating agent for global intellectual property-related policy discussion and implementation.

All countries that wish to participate in the WTO system for international trade are required under TRIPS to implement specified, substantive provisions for the protection of intellectual property. These "minimum standards of protection" were to be implemented in phases: by January 1996 for developed countries, by January 1999 for developing countries, and by January 2005 for "Least-Developed Countries" (*see* TRIPS Arts. 65-66). For Least-Developed Countries, however, the requirement to implement minimum standards of protection has now been extended to July 2021, unless the country has first passed out of Least-Developed Country status (*see* WTO, TRIPS Council Decision IP/C/64, June 11, 2013).[179]

Nevertheless, all WTO Member States, regardless of development status, are required to follow the TRIPS principles of National Treatment and Most-Favored Nation Status with respect to intellectual property, treating the nationals of other Member States the same as their own citizens, and automatically extending to all Member State nationals any additional intellectual property rights that are extended to particular countries through additional treaties. As of today, all but 13 recognized African Nation-States are WTO-TRIPS signatories.[180]

The second important legal vehicle through which African countries receive and implement intellectual property institutions, to reiterate, is the "World Intellectual Property Organization (WIPO)," an organ of the United Nations established in 1967, which serves as a coordinating agent for global intellectual property-related policy discussion and implementation.

[179] 34 African Nation-States are categorized as Least-Developed Countries, according to the United Nations Development Policy and Analysis Division. Equatorial Guinea is to pass out of Least-Developed Country status in 2017.

[180] The non-signatories are Algeria, Comoros, Republic of Congo (Congo-Brazzaville), Equatorial Guinea, Eritrea, Ethiopia, Liberia, Libya, Sao Tome and Principe, Seychelles, Somalia, South Sudan, and The Sudan.

WIPO comprehensively oversees the intellectual property frameworks that are in place in each of its 197 Member States, which include all but 2 recognized African Nation-States.[181]

As Members of WTO-TRIPS, WIPO, and a host of other multi-lateral treaties, African nation-states have adopted and implemented comprehensive intellectual property protection frameworks, albeit to varying degrees. Ghana, for example, is a member of both WTO-TRIPS and WIPO, as well as 13 other WIPO-administered treaties, 30 other IP-related multilateral treaties, and 5 regional intellectual property treaties. Ghana currently has domestic laws in force providing substantive protection for patents, industrial designs, geographical indications, trademarks, integrated circuit layouts, and copyrights. Additional protections for intellectual property have been declared through a series of Executive Orders (*see* WIPO-LEX, Ghana Country Profile, as of February 2014).

Both WIPO and the WTO are successors to older multilateral treaty arrangements. WIPO was created in 1967 to administer international "Unions" created in 1883 and 1886 to ensure international protection of patents, industrial designs, and copyrights. As a reformed organizational apparatus for administering the "Paris Union" (created by the 1883 Paris Convention for the Protection of Industrial Property) and the "Berne Union" (created by the 1886 Berne Convention for the Protection of Literary and Artistic Works), WIPO is the successor to the United International Bureaux for the Protection of Intellectual Property (known as "BIRPI"), which was created in 1893 to administer both the Paris and the Berne Union (the "IP Unions"). The Convention Establishing the World Intellectual Property Organization – signed in Stockholm on July 14, 1967, and amended in September 1979 – established WIPO as an agency of the United Nations, for the purpose of promoting intellectual property throughout the world,

[181] The Republic of Congo and South Sudan. The Sahrawi Arab Democratic Republic is not a member of WTO-TRIPS or WIPO; however, its status as a nation-state is contested by Morocco, and is not recognized by the United States.

and to ensure cooperation between the IP Unions (*see* WIPO-LEX, Convention Establishing the WIPO, Art. 3).

The WTO, of course, is the successor to the General Agreement on Tariffs and Trade (GATT), a multilateral trading framework created in the wake of World War II. Unlike the GATT, however, the WTO has been constituted by the 1994 Marrakesh treaty to be an organization with legal personality, *i.e.* as an organizational entity that exists independently of the signatory nation-states (*see* WTO 1999, Marrakesh Treaty Art. 8). Moreover, the WTO encompasses a substantive dispute-resolution regime, while also specifying Member State rights and responsibilities for implementing sanctioning measures and procedures for failure to adhere to its Dispute Settlement Body decisions (*see* WTO 1999, Marrakesh Treaty Arts. 41-50, 63). This combination of effective dispute-resolution and sanctioning power has enabled WTO Members to exert considerable pressure upon one another to bring domestic law and enforcement into line with evolving interpretation of TRIPS minimum standards.

An early example of the law-changing pressure that can be brought to bear on a Member State through the WTO can be seen in the case of *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50). This was the first TRIPS-related dispute resolution process to be conducted within the WTO, and it established important principles that would be drawn upon in future TRIPS-related disputes (*see* India – Patent Protection, WTO Appellate Body (WT/DS50/AB/R, 19 December 1997, at 11).

The dispute pertained to obligations on the part of developing countries, like India, to establish transitional arrangements for patent protection of pharmaceutical products and agricultural chemicals (WTO 1999, Marrakesh Treaty Art. 70.8). The dispute resolution process was initiated by the United States, based on the argument that “India’s legal regime appears to be

inconsistent with the obligations of the TRIPS Agreement" (U.S. Request for the Establishment of a Dispute Resolution Panel, WT/DS50/4, 8 November 1996). The European Communities sided with the United States, supporting US arguments and reserving third-party rights (*see* Note by the Secretariat, WT/DS50/5, 5 February 1997; WTO Appellate Body, WT/DS50/AB/R, 19 December 1997). The European Communities also filed a separate but similar complaint in 1998 (WT/DS79).

The final decision of the WTO Dispute Settlement Body was that India had indeed failed to implement domestic laws adhering to its obligations under the TRIPS agreement (*see* India – Patent Protection, WTO Appellate Body (WT/DS50/AB/R, 19 December 1997)). Although the United States lost a significant argument about the interpretation of TRIPS,[182] it did successfully trigger a change in India's domestic law through the WTO Dispute Settlement process.

In March 1999, under the pressure of potential trade sanctions, India's Parliament enacted an amendment to its 1970 Patents Act, which implemented a filing system and exclusive marketing rights for pharmaceutical products and agricultural chemicals, to operate during the transitional period prior to full implementation of patent protections, *i.e.* until 2005 (*see* Patents (Amendment) Act of 1999, The Gazette of India, Extraordinary, Ministry of Law, Justice, and Company Affairs, March 26, 1999; *Novartis v. Union of India* (India 2013)). In 2005, India implemented a complete regime of substantive patent protection for pharmaceutical products and agricultural chemicals, in keeping with its obligations as a WTO-TRIPS Member State (Patents

[182] The United States had argued that the "legitimate expectations" of WTO-TRIPS Member States, *and private parties* (such as pharmaceutical companies), should shape the interpretation of obligations under the TRIPS agreement. The Dispute Resolution Panel that initially decided the case accepted the US argument, but the Appellate Body overruled this determination, holding that it was based on a mistaken conflation of analytically-separate interpretive principles, rooted in the GATT framework and carried over into WTO-TRIPS (*see* India – Patent Protection, WTO Appellate Body (WT/DS50/AB/R, 19 December 1997)).

(Amendment) Act of 2005, The Gazette of India, Extraordinary, Ministry of Law, Justice, and Company Affairs, April 5, 2005).[183]

The use of the WTO-TRIPS Dispute Settlement process to exert law-changing force has by no means been limited to developing countries. Developed countries and regional bodies also exert law-changing pressure upon one another in this way. For example, the European Communities have used this process to trigger changes in US trademark law (*see* United States – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R, 2002). And the United States has used this process to trigger changes in Canadian patent law (*see* Canada – Term of Patent Protection, WT/DS170/AB/R, 2000).

The creation of an international body with effective power to legitimately punish trade violations, including those relating to intellectual property, was a central objective coming out of the GATT's Uruguay Round of Multilateral Trade Negotiations (1986-1994) (*see* Narlikar 2005). With the creation of the WTO-TRIPS framework, an effective supra-national legal body has been established, which oversees the maintenance of national intellectual property frameworks, and sanctions deviations from supra-national standards for intellectual property protection. In combination, WTO-TRIPS and WIPO constitute a truly supra-national intellectual property order (*see* May 2007).

The creation of this supra-national intellectual property order (hereinafter the "Global IP Order") would not have been possible, in the absence of crucial legal foundations. In particular,

[183] Notably, however, in its 2005 patent law, India included a patentability exclusion for "the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance" (India Patents Act of 1970, as amended, Section 3(d)). On April 1, 2013, India's Supreme Court held that this provision represented a legally-valid limitation on patentability under India's patent law, which operated in conjunction with TRIPS-compliant standards of "Invention" to establish a higher inventive bar for pharmaceutical products under Indian patent law. The Court determined that these legal provisions represent a legally-valid protection for India's generic drug manufacturing business, a business that provides life-saving drugs at relatively low cost to many developing and Least-Developed countries around the world (*see* Novartis v. Union of India (India 2013)).

the "will theory" of contracts, which was discussed in the previous chapter, played a foundational role in enabling the deliberate creation of supra-national institutions through treaties. Once states came to be seen as legal personalities exercising their proprietary will in the global arena, they could benefit from the same proprietary voluntarism that enabled individuals to create legal institutions through their contractual exchanges of property.

As we have seen, foundations for the contemporary Global IP Order extend back into the Nineteenth Century. Students of the Global IP Order commonly point to the year 1873 as a crucial turning-point (*see, e.g.* May 2007). Refusals on the part of American inventors to attend the World Exposition in Vienna, due to their fears about ineffective protections for their intellectual property, prompted a series of international Congresses and Conferences, which ultimately led to the Paris and Berne Unions (*see* May 2007, at 15-19). However, the lobbying for an effective Global IP Order that erupted around the 1873 Vienna Exposition, which may be seen as a proximate contributing factor in the establishment of a Global IP Order, depended on beliefs and interests pertaining to the effectiveness of treaties in establishing international institutions for the protection of intellectual property. As I will argue below, those beliefs and interests were dependent, in turn, on an earlier turning-point: the Congress of Vienna.

Treaties as Contracts: The Will Theory Revisited

Until 1891, America's copyright statutes limited copyright protection to American citizens and residents (*see* Khan 2005; Givens 1949). Prominent English authors, such as Charles Dickens, repeatedly sought to awaken their American brethren to the injustice of such legislation. Some American authors were indeed persuaded that a world in which popular

English literature could be published so cheaply was a world in which their own works tended to redundancy. However, Congress remained unmoved. Despite repeated legislative efforts, bills always died in committee, or were voted down.

In 1853, it had looked like things might change. In that year, the American Secretary of State, Edward Everett, signed a treaty with the United Kingdom on behalf of President Fillmore. This treaty, if ratified, would have created a system of "national treatment" of copyright between the U.K. and the U.S.: British authors would have been entitled to the same copyrights as Americans in America, and American authors would have been entitled to the same copyrights as Britons in the U.K.[184] However, the treaty was not ratified in the Senate (*see* Givens 1949, at 28-29).

In 1854, the British Ambassador to the U.S., John Crampton, raised a question about the Constitutional effect of the treaty, relative to U.S. domestic law. Assuming it was ratified, would the treaty alone be sufficient to secure national treatment for U.K. citizens, or would a U.S. statute to amend the copyright law be required? The Attorney General, Caleb Cushing, gave his opinion that, pursuant to Article VI of the Constitution (the "Supremacy Clause"), the treaty alone would be sufficient to amend U.S. copyright law, such that the principle of reciprocal national treatment would be established. What is interesting about Cushing's opinion is the way he describes the legal nature and operation of the treaty.

> The convention *being a contract between the two nations*, duly entered into and ratified by the President of the United States, by and with the advice and consent of the Senate, it thereby is a law of the United States, without any further action by the Government of the United States (6 Op. Att'y Gen. 292-93, emphasis added).

[184] "[T]he authors of works of literature or of art, to whom the laws of either of the two countries do now or may hereafter give the right of property, or copyright, shall be entitled to exercise that right in the Territories of the other of such countries for the same term, and to the same extent as the authors of works of the same nature, if published in such other country, would therein be entitled to exercise such right" (Article 1)

In just the way that contracts create legal bonds between private parties, Cushing says, treaties create legal bonds between sovereign nation-states. Under Article VI of the U.S. Constitution, these contractual legal bonds become operative as domestic law.

The conception of treaties as legal contracts between nation-states had received forceful explication by jurists of the "natural law" school, who were interpreting the Roman law tradition. Among the most influential of these natural law scholars was the same Hugo Grotius discussed in Chapter 6. According to a preeminent contemporary scholar of Roman law and South African law, Reinhard Zimmerman (1996), Grotius and his successors were responsible for making the law of consensual contracts a linchpin of the international law system (*see also* Neff 2012).

Grotius viewed treaties as contracts made by order of the sovereign (2012, at Book II, Chapter 15). Such contracts, like their private counterparts, create enforceable rights and obligations, so long as they are made voluntarily and involve reciprocal promises. Failure to conform to the obligations incurred through any contract, including a treaty, constitutes an injury to the other party, giving rise to a right of reparation, which, in the case of sovereign states acting vis-à-vis one another, means a lawful "public" war (Book II, Chapter 1).

Grotius elaborated this legal theory of treaties as part of a general framework of natural and international law (*ius gentium*, or "law of nations"). Writing during the culmination of Europe's wars of religion, Grotius relied extensively on the Roman law tradition to articulate a comprehensive framework of international order, "a common law among nations" (Prolegomena), rooted in sovereign legal actors who would behave toward one another in a manner analogous to Roman property-owners.[185] The resulting body of law was to govern the

[185] "So deeply was most of European scholarship in thrall to Roman law in Grotius's time (and for long before and long after as well) that it was well-nigh impossible for any legal writer to avoid thinking in terms of that received

"mutual relations among states, or rulers of states," in their conduct of war, their peaceful interaction, and their alliances.

In order to understand Grotius' framework of international order, it is necessary to first understand his theory of sovereignty: Grotius' international order was, fundamentally, an orderly arrangement of relations among sovereign entities. Sovereignty, for Grotius, is the "moral faculty" of governing a state, which is not subject to the legal control of another (Book I, Chapter 3, §§ 6-7). A "moral faculty" – an enforceable "right" (*ius*) – is the qualitative attribute of a person, which enables that person to take legal actions, *i.e.* to have or do something lawfully (Book I, Chapter 1, §§ 4-5). This "civil power" of sovereignty, just like any other intangible object – such as an easement or right of way over land – is an object of property, which may be possessed in full ownership, or in something less than full ownership, and which may be transferred, depending on how it is possessed (Book I, Chapter 3 § 11). And, just like any other object of property, it may be possessed by a single individual (as in a monarchy) or by a group of people in common (as in a republic) (Book I, Chapter 3, § 8).

The state is a public association, which is the "common subject" of sovereignty (Book 1, Chapter 3, § 7; Book II, Chapter 5, §§ 17, 23). The possessor of sovereignty on behalf of the state, on the other hand, is the "special subject" of sovereignty. The state is conceived as a kind of corporate body, which may be composed of one or more peoples, and which may also combine with other states to form a confederate "system."

The overall conception of interaction between states and their sovereigns is one of law-abiding autonomy, punctuated by occasional cooperation and limited partnership. Grotius'

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framework. In this, Grotius was no exception. Considerations of Roman law are most apparent in his discussions of the acquisition and extinction of title to property, as well as in his expositions of promises and contracts in Book II....Perhaps most significant of all – though not very apparent on the surface – is the influence of Roman law on his treatment of the nature of political sovereignty." (Neff 2012, at xxii)

primary goal is to establish a framework that will impose legal conditions on the initiation and conduct of war. While he is seeking to articulate legal constraints on the exercise of war, he clearly does not envision anything like a permanent organization standing over sovereign states, and placing legal limits on their behavior. From his perspective, the moment such an entity came into existence, sovereignty would cease to reside in the states, and would instead reside in the organization standing above them. The commercial and military alliances that he envisions are much more limited and temporary.

Crucially, the language that Grotius uses to describe commercial and military alliances between sovereign states, which arise out of their contractual agreements, is that of partnership (*societas*), not incorporation. In the chapter addressing contracts in general (Book II, Chapter 12), Grotius notes that contracts can create partnerships (*societates*), whereby certain actions or things become common property (*res*) held jointly between partners for their common advantage (*utilitas*) (§4). In his chapter on treaties (Book II, Chapter 15) – *i.e.* on contracts between sovereigns of states – Grotius notes that such treaties can be used to create partnerships (*societates*) between states, either for the sake of commerce or for the sake of war (§6).

There is one important, exceptional instance in which Grotius uses the language of incorporation (*universitas*), in characterizing the relationships between states. This is in the *Prolegomena*, where he is echoing Aristotle in discussing the basic principles of human sociability that underlie natural law. Grotius introduces a distinction between laws that arise purely on the basis of human, social nature (natural law), and laws that derive from the exercise of human will. The exercise of will, whether through unanimous agreement or through imposition and acquiescence, is the source of positive, domestic ("municipal") law, as well as the "volitional law of nations" (Neff 2012). And, just as the exercise of will for the sake of creating

domestic law "has in view the advantage (*utilitas*) of that state," so also the exercise of will for the sake of creating international law has in view an advantage. In the latter case, however, the advantage (*utilitas*) in view is that of the "great body (*universitas*) of states" (§17).

Grotius does not say what he means by the "great university of states." Available translations (Neff 2012; Morrice 1715) do not highlight Grotius' use of corporate language here, emphasizing instead the universalism of Grotius' language.[186] However, it is possible that Grotius has in mind the nebulous, quasi-corporate concept of "Christendom." The diplomatic historian Vejas Gabriel Liulevicius (2007) has noted that the symbolism of Christendom, tied very closely to the Holy Roman Empire, provided a powerful evocation of European collective unity and universalism until well into the Sixteenth Century. Henry Kissinger (1994, at 56) argues that the "concept of world order" tied to the symbolism of Christendom (with its associated "medieval aspiration to universality") held on into the Seventeenth Century, when it was finally replaced by the "Balance of Power" system.

In any case, Grotius appears, in this particular instance, to envision a larger whole of cooperating states, as *operating to define interests that serve the whole*, rather than one particular state. Laws created between states, including those that establish enduring alliances and partnerships, should serve those broader, holistic interests, rather than a particular state's interests. Nevertheless, actual treaty structures are viewed as creating nothing more than partnerships, and certainly nothing like an actual corporate entity standing over the contracting parties.

[186] Neff's translation (2012, at 5): "But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states." Morrice's translation (1715, at 17): "But as the laws of each City principally respect the Benefit of that City; so amongst all or most Cities, there might be, and in Fact there are, some Laws agreed on by common Consent, which respect not the Advantage of any particular Societies, but of all in general."

Just as we saw in Chapter 6, Grotius stands as a transitional figure in the natural law tradition. Unlike Hobbes, he places sharp limits on *raison d'etat* calculations. This places him squarely within the older natural law tradition, traceable back to Thomas Aquinas. Moreover, the absence of corporate organizational models for international cooperation between states demonstrates his distance from the Nineteenth Century developments that will be discussed momentarily.

Nevertheless, in emphasizing the role of will in effectuating international arrangements, particularly in portraying treaties as consensual contracts between property-owning states, Grotius prepares the way for a new legal understanding of the international order. According to this new legal understanding, sovereigns of states are very closely analogous to Roman property-owners. Like the ancient Romans, these sovereigns (whether they be a king or a "people") acquire ownership of landed territories through the method of physical possession, coupled with an externally-symbolized will to possess (*occupatio*) (Book II, Chapter 2, §4). The landed territory of a state, in other words, is quite literally the property of the sovereign, subject to the sovereign's disposition by contract, at least to the extent that it is not otherwise controlled by operation of succession and inheritance.

Through their consensual contracts, the sovereigns of states may transfer property between themselves, and they may voluntarily create partnerships, in which their property is shared jointly for the benefit of all the partners. These contractual structures are created through an exercise of sovereign will, and, once created, they bind sovereign states to their maintenance. Violations of the contractual promises underlying the contractual structures constitute a just cause for war.

This vision of the international order, which received its first Protestant articulation in the person of Hugo Grotius (see Neff 2012, at xxvi), and which is so clearly rooted in the Roman law tradition, is a vision of *proprietary voluntarism*: a vision of sovereign states as bearers of the capacity to purposefully create rights and obligations, rooted in their property, through a formalized exercise of the will, and thereby to create contractual structures that operate between themselves, while also impacting states that are not party to their agreements. Two hundred years later, this vision endured, providing a foundation for American jurists' conceptions of the international order, as seen in James Kent's *Commentaries on American Law* (1873 (1826), at 167):

> There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without reserve, the right of treating and contracting with other states, it is considered as having invested it with all the power necessary to make a contract. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. (Kent 1873 (1826), at 167)

As the Swedish ambassador to France during the Thirty Years War, through a period (1634-45) in which French-Swedish alliance shaped the course of the war, Grotius concretely impacted the inter-state relations of the Westphalian system (*see* Lee 1945).[187] That system, as is well known (*see* Lieulevicius 2007), was in many ways a reversion to the *cuius regio, eius religio* framework of the Augsburg Settlement (1555), with two important exceptions: principles of state sovereignty were significantly emphasized and enhanced, and the Reformed religion was

[187] Grotius did not himself act as a negotiator on behalf of Sweden in Osnabrück. However, until 1645, he was in regular correspondence with John Oxenstierna (son of the Chancellor, Axel Oxenstierna) and John Adler Salvius, who conducted the Westphalian negotiations on behalf of Sweden (*see* Preamble, Treaty of Osnabrück, 1648; Lee 1945). It was a common diplomatic practice of the time to bring in special negotiators to wrangle over the language of treaties (*see* Anderson 1993).

officially recognized, alongside Catholicism and Lutheranism (the faith of the "Augsburg Confession").

The Westphalian emphasis on state sovereignty was of particularly dramatic import for the Holy Roman Empire. The treaties of Münster and Osnabrück both contained articles affirming all "rights, prerogatives, liberties, privileges" and territorial powers of the Electors, Princes, and States of the Holy Roman Empire (Osnabrück (IPO) Article 8, §1; Münster § LXIV). In addition, however, each of these Electors, Princes, and States was explicitly granted the power to conclude alliances and execute treaties, as an independent entity (Osnabrück (IPO) Article 8, §2; Münster § LXV). Despite the proviso that such treaties and alliances were not to be made against the Empire, these articles recognized an essential mark of sovereignty, the power to independently conduct foreign policy, henceforward to be located in over 300 political entities within the Empire (*see* Kissinger 1994, at 65).

If the Westphalian emphasis on state sovereignty implicated a decisive shift in "Balance of Power" calculations, due to its fragmentation of the Holy Roman Empire, it also maintained a longstanding tradition of dispute resolution, rooted in the Church's mediating role within Christendom: third-party arbitration (*see* Anderson 1993, at 204-5; Treaty of Münster § 5). This traditional approach to dispute resolution fit very well within an overall conception of states as sovereign actors, acting with proprietary voluntarism. As sovereign actors, states would voluntarily select a third-party arbitrator, naming that arbitrator in their contractual treaties. The third party would be a sovereign, like themselves, but would act as a neutral party in enabling resolution of a dispute. In practice, it was understood, the sovereign would typically delegate the dispute-resolution to jurists, who would draw on the shared cultural tradition of *ius commune* (rooted in Roman-Canon law) in arriving at a conclusion.

At the same time, however, the Westphalian system both effectuated and reflected the ultimate demise of Christendom, with corresponding implications for the international order. Beyond their official recognition of Christian denominational fragmentation, the treaties excluded any possibility that the pope's objections would carry legal force (*see* Treaty of Osnabrück (IPO) Article 5 §1).[188] Accordingly, the objections of Pope Innocent X were ignored (*see* Holborn 1964, at 4). With the demise of Christendom, the sense of a universal interest, operating as an effective check on individual state interests, declined in favor of *raison d'etat* calculation in the Balance of Power system (*see* Kissinger 1994; Holborn 1964).

In the absence of an overarching organizational Order, principles of proprietary voluntarism contributed to instability in the Balance of Power system. The concept of proprietary voluntarism points our attention to a formalized exercise of will (*voluntas*) on the part of an individual or entity with capacities for material and interpersonal power, which are rooted in property. The will, as Hannah Arendt has masterfully argued, is a human capacity "to bring about something new and hence to 'change the world'" (1978, at 7). As such, it can be a profoundly unruly force, which, when unchecked by principle, produces instability and unpredictability.

The Balance of Power System, premised as it was on the exercise of proprietary will by sovereign states in pursuit of their *raison d'etat* interests, offered only the conflict of national and sovereign wills as a security against this destabilizing force. According to the diplomatic

[188] "That the Transaction settled at Passau in the Year 1552, and follow'd in the Year 1555, with the Peace of Religion, according as it was confirm'd in the Year 15[6]6, at Augsburg, and afterwards in divers other Diets of the sacred Roman Empire, in all its Points and Articles agreed and concluded by the unanimous Consent of the Emperor and Electors, Princes and States of both Religions, shall be maintain'd in its Force and Vigour, and sacredly and inviolably observ'd. But those things that are appointed by this Treaty with Consent of both Parties, touching certain Articles in the said Transaction which are troublesome and litigious, shall be look'd upon to have been observ'd in Judgment and otherwise, as a perpetual Declaration of the said Pacification, until the Matter of Religion can, buy the Grace of God, be agreed upon***, and that without stopping short for the Contradiction and Protestation of any one whatsoever, Ecclesiastical or Secular, either within or without the Empire, in any time whatsoever: all which Oppositions are by virtue of these Presents declar'd null and void*** (emphasis added)."

historian Paul Schroeder (2004), such a balancing system can only work when guiding principles and goals of *raison d'etat* are identifiable and comprehensible between international actors. As long as international actors are able to see a meaningful pattern in the actions taken by another international actor, they can comprehend this pattern in terms of guiding principles and goals of *raison d'etat* action that are being pursued by the other, make their own *raison d'etat* calculations accordingly, and operate as effective counterweights to the will of the other. Under these conditions, a "balance" of powers is possible.

However, a meaningful and comprehensible pattern of *raison d'etat* action is conditional upon guiding principles and goals actually affecting the action of international actors, as limitations to the purely arbitrary exercise of will. Where no such principles and goals are effective, there is only the emptiness of a demand that others stay out of the way, that the will be left free to pursue an entirely spontaneous course of action. In Schroeder's view, this was precisely the threat that Napoleon posed to European stability. According to Schroeder (2004, at 33):

> Napoleon's great service to European international politics was to be a very efficient scourge of God. He convinced European princes and statesmen that an alternative to eighteenth century politics had to be found because playing the old game with him was intolerable....And so they had to end this game of poker and invent a new post-1815 game of contract bridge. Napoleon contributed nothing positive to this outcome. Nevertheless, lawless to the end, a law unto himself, he drove Europe into a new system of international politics bounded by law.

This new system emerged out of the Congress of Vienna (1814-15), a series of diplomatic meetings and agreements among the European powers, in which principles of intellectual property protection received inter-national attention.

Early Copyright Treaties in the Concert of Europe

In the wake of the formal abolition of the Holy Roman Empire (1806) and the Napoleanic wars, a diplomatic system was established at the Congress of Vienna (1814-1815), which held firm until the Crimean War of 1854, and which continued to structure international diplomacy until the closing decades of the Nineteenth Century.[189] This diplomatic system is often referred to as the "Concert of Europe," or, alternatively, the "Metternich System" (*see* Kissinger 1994, at 78-102).

From a legal perspective, the creation of the Concert of Europe was embodied in a number of treaties, which were bundled together as appendices, and summarized in a "General Treaty" of June 9, 1815 (hereinafter the "General Vienna Treaty"). Fundamentally, the General Vienna Treaty created an institutional framework for "Great Power" consultation and cooperation (*see* Lieulevicius 2007). The bulk of the Treaty aimed to accomplish this by resolving territorial conflicts between the Great Powers. In very much the same way that a modern title to real property would do, the treaty articulated new territorial boundaries for the states of Europe, declaring each title-owner, together with his "heirs and assigns," as possessor of "full sovereignty and property" in the delineated territories (*see, e.g.*, Article II).[190] In the

[189] The last great Congress to be held under the Concert of Europe system was the Berlin Congress of 1878, which was called to resolve problems connected with the collapse of the Ottoman Empire, together with rising Balkan nationalisms (the "Eastern Question"); the resolution of the Congress held until 1913 (*see* Taylor 1971). The demise of the Concert system can be seen from the fact that calls for a Conference in 1914 fell on deaf ears (*see* Liulevicius 2007).

[190] Article II of the General Vienna Treaty summarized the provisions of Annex II, a Treaty between Russia and Prussia, which divided Polish territory between these two powers, and created the Grand Duchy of Posen. Article II of the General Vienna Treaty summarized the provisions of Annex II, insofar as they operated to create the Grand Duchy of Posen, as follows: "The part of the duchy of Warsaw ***which his majesty the King of Prussia shall possess in full sovereignty and property, for himself, his heirs, and successors***, under the title of the Grand Duchy of Posen, shall be comprised within the following line: Proceeding from the frontier of Eastern Prussia to the village of Neuhoff, the new limit shall follow the frontier of Western Prussia, such as it subsisted from 1772 to the Peace of Tilsit, to the village of Leibitsch, which shall belong to the duchy of Warsaw.....From this point it [the line] shall re-ascend the course of the river Prosna to the village of Koscielnawies, to within one league of the town of Kalisch. Then leaving to that town...a semi-circular territory....the line shall return to the course of the Prosna, and shall

words of Edward Hertslet (1875, at v-vi), librarian of the English Foreign Office from 1842-1896, the General Vienna Treaty "settled the Territorial Arrangements of Europe," and thereby laid a foundation for the "Title Deeds of the European Family."

Building upon this institutionalized framework for territorial property and sovereignty, the Treaty also articulated a regulatory framework (a "police") for river-borne commerce (*see* Articles CVIII-CXVII; Annex XVI). The Regulatory Treaty of March 1815, which was incorporated into the General Vienna Treaty, declared a commitment on the part of all the signatory states to a cooperative arrangement for the governance of shared rivers, particularly the Rhine, but in principle extending to all rivers along which they shared borders. In an era of waterborne transport, rivers were the highways of commerce. However, traditional legal frameworks of "staple right," and inconsistencies in regulatory framework from one state to another along the course of a river, significantly raised the costs of river-based transport (*see* Kießling 1996).[191]

In the Treaty of Paris (May 1814, *in* Hertslet 1875, at 1-28), which ended the war between France and Britain, together with her allies, the parties had agreed that "the Navigation of the Rhine...shall be free," and had committed to the establishment of principles according to which the taxes to be raised by states bordering the river should be raised (Article V). A parallel commitment had been made with respect to the Scheldt River, and the parties had also declared that extension of these principles to other rivers in Europe might "facilitate the communication between Nations, and continually render them less strangers to each other" (Article V).

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continue to follow it, reascending by the towns of Grabow, Wiruszow, Boleslawice, so as to teriminate near the village of Gola, upon the frontier of Silesia opposite Pitschin. (emphasis added)"

[191] Staple rights, combined with the *Bannmeile*, constituted the power of a city (*e.g.* Cologne on the Rhine, Vienna on the Danube) to require that mercantile goods be unloaded and offered for sale exclusively in the city, prior to being reloaded and transported further down the river (*see* Kießling 1996, at 149). Such rights offered a significant economic benefit to cities located along European rivers, but were a source of great expense and delay for merchants.

The Regulatory Treaty of March 1815 began the process of laying down these principles, in particular with respect to the Rhine, but more generally in establishing the framework for a Commission that would implement regulations applicable to all rivers bordering the states of the contracting parties. With respect to the Rhine River, the signatory states endorsed "the principle, that *their true interest* consists in encouraging the Commerce of their States, and that the Duties on Navigation should chiefly be appropriated to defraying the expenses of its preservation" (Article IV, emphasis adeed). In order to accomplish this goal, and the related goal of ensuring uniformity of regulation and taxation along the river, they established a regulatory commission, a judicial authority, and an official body of inspectors to govern commerce along the river. Although the states bordering the Rhine maintained some direct controls over this regulatory framework, for example in naming Commissioners and in providing an optional avenue for judicial appeals, they were also agreeing to renounce much of their day-to-day control of river-based commerce, agreeing instead on basic principles for a shared, multistate regulatory framework that would render this commerce "free."

Although successive treaties would significantly amend this regulatory framework,[192] it remained the basis for Rhine commerce until the 1860s, when it was replaced by a new framework that maintained its basic commitment to multistate regulatory uniformity and "free commerce."[193] Additional treaties would extend these regulatory principles to the Elbe,[194]

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[192] *See* Convention between the Riverain States of the Rhine; and Regulations for the Navigation of that River, signed at Mayence March 31, 1831 (Hertslet 1875, at 848-55).

[193] In the wake of the collapse of the Concert of Europe system, a new Convention between Baden, Bavaria, France, Hesse-Darmstadt, Netherlands, and Prussia, relative to the Navigation of the Rhine, was signed at Mannheim on October 17, 1868 (*see* Hertslet 1875, at 1847-52).

[194] *See* (1) Convention between Prussia, Austria, Saxony, Hanover, Denmark, Mecklenburg-Schwerin, Anhalt-Bernburg, Caethen and Dessau, and Hamburg, relative to the Free Navigation of the Elbe, signed at Dresden June 23, 1821 (Hertslet 1875, at 671-92); (2) Convention between Austria, Prussia, Saxony, Hanover, Denmark, Mecklenburg-Schwerin, Anhalt-Coethen, Anhalt-Dessau, Anhalt-Bernburg, Lubeck, and Hamburg, relative to the Regulation of the Brunshausen (or Stade) Toll, signed at Dresden, April 13, 1844 (Hertslet 1875, at 1036-40); (3) Treaty between Great Britain, Austria, Belgium, Brazil, Denmark, France, Mecklenburg-Schwerin, the Netherlands, Portugal, Prussia, Russia, Spain, Sweden, Norway, and the Hanse-Towns, on the one part, and Hanover, on the other

Weser,[195] Neckar,[196] and Danube Rivers.[197] An analogous approach was adopted for the Po River in 1849.[198]

The utilization of multilateral treaties to establish a multistate system of regulation and adjudication of river-borne commerce, which began under the Concert of Europe, marked a significant turning-point in the history of diplomatic relations (*see* Liulevicius 2007). Previously, treaties had primarily been used to settle arrangements between states in the wake of wars, and had been premised on the legal autonomy of states. Now treaties were being used to establish free-standing regulatory frameworks, which intentionally limited the legal autonomy of states, in order to effectuate shared, long-term goals that would be difficult (if not impossible) to accomplish purely domestically, due to entrenched domestic interests (*cf.* Moravcsik 2000).

Having settled the boundaries of their territorial "property and sovereignty," European states could address, in the manner of Roman property-owners, the governance of rivers bordering their properties. According to the concepts of proprietary voluntarism, associated with the Roman law tradition, they correspondingly possessed the capacity to purposefully create rights and obligations, rooted in their property, through a formalized exercise of the will, and thereby to create contractual structures that would operate between themselves, while also

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part, for the Redemption of the Stade Toll, signed at Hanover June 22, 1861 (Hertslet 1875, at 1471-78); (4) Treaty between Austria and the North German Confederation, for the Abolition of the Elbe Dues, signed at Vienna June 22, 1870 (Hertslet 1875, at 1875-76).

[195] *See* (1) Convention between Prussia, Hanover, Hesse-Cassel, Brunswick, Oldenburgh, Lippe, and Bremen, concerning the Free Navigation of the Weser, signed at Minden, September 10, 1823 (Hertslet 1875, at 707-10); (2) Supplementary Convention between Prussia, Hanover, Hesse-Cassel, Brunswick, Oldenburg, Lippe, and Bremen, relative to the Navigation of the Weser (Hertslet 1875, at 738).

[196] *See* Convention between Baden, Hesse-Darmstadt, and Wurtemberg, for the Navigation on the Neckar, signed at Carlsruhe, July 1, 1842 (Hertslet 1875, at 1027-28).

[197] *See* (1) Convention between Austria and Russia, relative to the Navigation of the Danube, signed at St. Petersburg, July 13, 1840 (Hertslet 1875, at 1016-20); (2) General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, signed at Paris March 30, 1856, Articles XV-XVIII (Hertslet 1875, at 1250-65).

[198] *See* (1) Treaty between the Governments of Austria, Modena, and Parma, on the Free Navigation of the River Po, signed at Milan July 3, 1849 (Hertslet 1875, at 1095-1103); (2) Treaty between Austria and Modena respecting the Navigation and Regulation of Limits on the Po, signed at Milan August 8, 1849 (Hertslet 1875, at 1112-14); (3) Act of Accession of His Holiness the Pope to the Treaty Concluded 3rd July, 1849, between Austria, Modena, and Parma, relative to the Free Navigation of the River Po, signed at Portici February 12, 1850 (Hertslet 1875, at 1123).

impacting states that were not party to their agreements. But now they were drawing on this capacity to create freestanding regulatory structures, embracing fixed principles that would define and accordingly limit their interests, together with their legal autonomy, and creating legal institutions in the process. Under the Concert of Europe, states scarred by the experience of the Napoleanic wars consciously began to use international treaties to create an international, legal order of positive law (Grotius' "volitional law of nations").

The creation of a multistate institutional framework for river-borne commerce had important implications for international trade. However, another multistate institutional framework created under the Concert of Europe was arguably of greater significance, both economically and morally: antislavery courts. The operation of these courts between 1817 and 1871 has been carefully described by Jenny Martinez (2008), and will not be reiterated here. However, the practical effect of these courts, as documented by Martinez, does warrant emphasis. According to her calculations, nearly 80,000 individuals were freed from slavery by these courts, and 225 empty slave-ships were seized and condemned. Clearly, these courts, created through treaties that had been sanctioned by the Congress of Vienna's commitment to anti-slavery measures, had real, institutional effects.

In the case of anti-slavery commitments, the Congress of Vienna provided a venue through which British domestic pressures could be brought to bear on the other major Colonial powers, particularly France.[199] During the Napoleonic wars, Britain had been legally empowered to seize French and American slave-ships, according to Grotian principles of international law that were upheld by British courts (*see* Martinez 2008). However, once the

[199] *See* Protocol of Conference between Great Britain, Austria, Prussia, and Russia respecting the Abolition of the Slave Trade by France, Paris, July 26, 1815 (Hertslet 1875, at 294-95). France had abolished slavery in the Colonies during the Revolution, but Napoleon reinstituted it in 1802 (*see* Hunt 2007, at 165-66). In an appendix to the Treaty of Paris, France agreed to abolish the trade once again, but only gradually (over 5 years) (*see* Hertslet 1875, at 21). This was seen domestically in Britain as a blow to the abolitionist cause, and sparked the mobilization of pressure on Castlereagh to obtain an anti-slavery commitment in the Congress of Vienna (*see* Martinez 2008, at 569-70).

state of war ceased, British courts no longer upheld the legitimacy of such action, which meant that anti-slavery efforts would have to be negotiated with other states. The Congress of Vienna provided the perfect opportunity for such negotiations, and it was during these negotiations that the idea of creating an *international* court to enforce suppression of the slave trade was first discussed (see Martinez 2008, at 574).

On February 8, 1815, the Congress of Vienna delegates signed a Declaration of the Universal Abolition of the Slave Trade, which was incorporated at Annex XV to the General Vienna Treaty (*see* Hertslet 1875, at 60-61). Pursuant to this treaty, the signatories committed themselves to the "prompt suppression" of the slave trade, in accordance with a timetable to be established in future deliberations, declaring the slave trade to be "repugnant to principles of humanity and universal morality." Under the sanction of this commitment, Britain negotiated bilateral treaties with the Netherlands, Portugal, and Spain, which created free-standing regimes for the seizure of slave-ships, together with a system of judicial panels to try the ship-owners, condemn their ships, and free the slaves they were carrying on board (*see* Martinez 2008, at 576-78; Darby 1904, at 286-93).

As we have seen, the international institutions created pursuant to these treaties functioned from 1817 to 1871, with very real effects on the lives of nearly 80,000 individuals, indeed more if we consider the effects that condemned slaving ships would otherwise have had. Although these institutions cannot bear responsibility for abolition of the slave trade, they certainly contributed (*see* Martinez 2008). Here again, then, we see the impact that proprietary voluntarism can have, empowering contracting states to create free-standing institutional frameworks that diminish their legal autonomy, and impact the rights and obligations of third parties.

For Germany, the Congress of Vienna was most significant in creating a constitutional substitute for the Holy Roman Empire. The General Vienna Treaty, together with Annex IX, created the legal framework for a "perpetual, Germanic Confederation," composed of Prussia, Austria, Bavaria, Saxony, Hanover, Württemberg, Baden, Hesse-Cassel, Hesse-Darmstadt, four remaining free cities (Lübeck, Franfort, Bremen, and Hamburg), and a number of smaller principalities (*see* Hertslet 1875, at 200-77). Article XIII of the Annexed Federative Treaty established basic rights that would be possessed by the individual "subjects" of the confederated states. National treatment in property taxes was laid down as a principle, together with a right to emigrate from one state to another within the Confederation. And, finally, Article XVIII(d) of this Federative Treaty declared that the newly-created Diet for the Confederation would, upon its first meeting, "adopt such measures as may secure authors and editors against the piracy of their works."

This treaty-based commitment to copyright principles was prompted by an 1814 petition from six German book-publishers, one from Württemberg (Stuttgart) and five from Saxony (Leipzig and Weimar) (*see* Bently & Kretschmer (eds.) 2014). The publishers drew on the Treaty of Paris commitments to establishing a regulatory framework for the free navigation of rivers, arguing that:

> [T]he task of the blessed Congress at Vienna is to facilitate communication between the various peoples so that they cease to look upon each other as strangers. This facilitation, this bringing [of peoples] closer together, by freeing Europe's navigable rivers, can equally be encouraged by safeguarding rights of ownership....The question is whether it will continue to be tolerated that a citizen of a German state should be able to appropriate the rightfully acquired property of a citizen in another German state.

In short, the publishers wanted "a law, valid throughout all Germany, against the reprinting of books" (Bently & Kretschmer (eds.) 2014). Such a law could only come from the German

Confederation, and the publishers were hopeful that the Federative Treaty provision would help them to secure it (*see* Kawohl 2008h).

During the late Eighteenth Century, the southwestern German states of Baden and Württemberg had become centers of unauthorized book-publishing, much to the frustration of publishers based in Saxony (*see* Kawohl 2008g). In the wake of French occupation, Baden had enacted a Civil Code modeled on that of France, with additional provisions that explicitly recognized literary property (*see* Baden Civil Code (1809) § 577 d; Kawohl 2008g). This left Württemberg as a remaining center of re-publication, which Saxony's publishers clearly hoped could be eliminated through a law of the German Confederation.

Although it took much longer than they hoped, the publishers got their law in 1837. On November 9 of that year, the Confederation Diet passed a directive, articulating principles for the protection of literary and artistic works throughout the Confederation (*see* Bently & Kretschmer (eds.) 2014). According to these principles, authors of literary and artistic works held a "property" in such works from the moment of their creation and publication, which was subject to inheritance and transfer, for a period of at least 10 years. Although individual German states had some flexibility in determining the form through which to implement these principles, they were required to include certain penalties and prohibitions, and they were accountable to the Confederation Diet to show how they had implemented the principles. Pursuant to this Confederation directive, Württemberg enacted a copyright act the following year (*see* Kawohl 2008i).

Prussia, meanwhile, had observed the effectiveness of treaties in establishing legal institutions, and had grown frustrated in waiting for the Confederation Diet to act. In 1827, Frederick William issued a Supreme Cabinet Order authorizing negotiations with other German

states, for the purpose of establishing reciprocal ("national") treatment in the area of copyright protection (*see* Bently & Kretschmer (eds.) 2014). Between 1827 and 1829, Prussia executed 30 of these bilateral treaties, establishing reciprocal copyright arrangements with nearly all of the big German states – including Hanover, Saxony, Bavaria, Baden, and Württemberg – with the exception of Austria (*see* Bently & Kretschmer (eds.) 2014; Kawohl 2008j). According to Friedemann Kawohl (2008j), these treaties effectively established the minimum standards for copyright protection throughout the German Confederation.

In 1840, Austria and Sardinia built on this momentum to establish a literary and artistic property framework for operation between Northern Italy and Austria. In their bi-lateral treaty, Austria and Sardinia agreed to "guarantee writers and artists the lifetime right of ownership to those works of theirs which appear in either of both of these States," and to secure the rights to their heirs, for a fixed period of time (Bently & Kretschmer (eds.) 2014). As the Kingdom of Sardinia only included regions in Northern Italy, Article 27 of the treaty contemplated inviting other Italian governments to accede to its provisions.

In 1846, Prussia and Britain followed suit, executing a Convention for the Establishment of International Copyright (Hertslet 1850, at 943-54). This Convention established a regime of reciprocal ("national") treatment between Prussia and Britain, which would apply to works of "literature and fine art"; as a result of this agreement, British authors would receive the same protections in Prussia as Prussian authors, and vice versa.

Because Prussia had recently enacted a new copyright law, which set the international standard for protection of "ownership" (*Eigentum*) in "works of science and art" (*see* Act of 1837; Bently & Kretschmer (eds.) 2014), Britain was pressured to "modernize" her copyright law, as part of the diplomatic negotiations leading up to the signing of the 1846 Convention (*see*

Sherman & Bently 1999, at 111-18). The result was the British Copyright Act of 1842, which provided Britain's first statutory definition of copyright as "personal property," and brought together all the varied strands of copyright-related caselaw and legislation that had developed since 1774 (*see* Deazley 2008b; Sherman & Bently 1999, at 116). This followed the International Copyright Act of 1838, which provided a statutory basis for recognizing the copyrights of foreign authors (*see* Bently & Kretschmer (eds.) 2014).

By the mid-1840s, then, copyright had become a multistate institution, which was founded on a web of treaty-based frameworks, and rooted in the Concert of Europe System. During the 1850s, the Concert of Europe System would break down, and the framework of treaties rooted in it would become insecure. However, the experience provided by nearly two decades of copyright treaties, together with a host of other international institutions created under the Concert of Europe System, had persuaded all parties that effective international institutions for the protection of intellectual property could be created this way. During the 1860s, provisions for the protection of patents, copyrights, and trademarks would become a relatively standard component of commercial treaties, and would be included in the German Constitutions of 1867 and 1871.

The Global IP Order and its Counterfactual Possibilities

By 1872, *i.e.* one year prior to the International Exhibition in Vienna, intellectual property was already established as an international institution. Empirical support for this statement is clearly evident in the pages of *Scientific American*, an enormously popular American periodical, which, since 1847, had been published by America's dominant firm of

patent attorneys, Munn & Co (*see* Lipman 1968). However, the complexity of a system rooted in multiple, free-standing treaty arrangements lent force to the American inventors' complaints that their inventions were not adequately protected for display at the Vienna Exhibition.

In the wake of this Exhibition, as we have seen, the Paris and Berne Unions were created to administer a framework of international treaties for the protection of patents, copyrights, and, later, trademarks. In the area of trademarks, not surprisingly in view of what we saw in Chapter 4, it was the French who pressed hardest to ensure international uniformity. In 1869, a treaty was executed between France and the U.S. on the subject of trademarks. After the U.S. Supreme Court struck down, as unconstitutional, Federal trademark statutes anchored in the Intellectual Property Clause, France exerted considerable pressure on the U.S. to enact new Federal legislation (*see* In re Trademark Cases, 100 U.S. 82 (1879); Preliminary Report of the Commissioners to Revise and Amend the Statutes Relating to Patents, Trade and Other Marks....(1899), at 71, 136).

Even after the Paris and Berne Conventions were signed, bilateral treaties continued to be signed between states. However, through the Paris and Berne Conventions, together with the periodic negotiations taking place between states under their purview, intellectual property had a free-standing institutional structure. By 1900, a Global IP Order had been created.

The impact of this Global IP Order can be seen in the case of International Business Machines (IBM). IBM, like Western Union and AT&T, was built on intellectual property, especially patents (*see* Pugh 1996). However, IBM was also international from its very beginnings. IBM was successor to the Tabulating Machine Company of Herman Hollerith, which, through licensing arrangements, had spun off international partnerships with British and German counterparts (*see* Pugh 1996; IBM Annual Reports). As a result of these international

foundations, international patents constituted an important line-item on IBM's balance sheets until the 1940s (IBM Annual Reports).

As we have seen, throughout the first half of the Nineteenth Century, intellectual property was a very nationalist form of property. States protected residents and citizens, to the detriment of non-residents and non-citizens. If intellectual property had continued to function this way, a company like IBM, built as it was on international intellectual property, would not have been possible. However, by the end of the Nineteenth Century, intellectual property had become an international institution, a development that made IBM possible.

The creation of a Global IP Order, structured on the basis of international treaties, was made possible by the proprietary voluntarism of the international legal order. This proprietary voluntarism recognized states as property-owning subjects, and treated their treaties as contracts, formalized exercises of the will that consensually create free-standing legal bonds and institutional structures. With the WTO, that proprietary voluntarism has extended so far as to enable the creation of an entity with legal personality, which stands over the states of most of the world.

The proprietary voluntarism of the Roman law tradition also contributes a capacity to alter the Global IP Order. In recent years, developing countries have been contributing new conceptions of intellectual property, conceptions that are rooted in their own distinctive national property orders. For example, arguments that the "traditional knowledge" of Ghanaian communities of cloth weavers should be protected through new forms of intellectual property (*see* Boateng 2011) are beginning to have an institutional impact through the World Intellectual Property Organization ("WIPO"). Just this past December, South Africa enacted a law that

recognizes forms of “indigenous knowledge” as intellectual property (Law of December 9, 2013).

Although Africa is already shaping the Global IP Order, that impact will be significantly heightened if the proposal for creating a Pan-African Intellectual Property Organization (“PAIPO”) is realized. When and if that day comes, the proprietary voluntarism of the Roman law tradition may enable African nation-states to shape the Global IP Order in new and unforeseeable ways, ways that will undoubtedly add to the complexity of a form of property that is now over 200 years in the making.

Conclusion.
Intellectual Property:
A Creature of Modernity

And the end of all our exploring will be to arrive where we started, and know the place for the first time.

- T.S. Eliot ("Little Gidding")

I opened this dissertation by noting recent revisions to GDP measures, which reflect the inclusion of "intellectual property products" as part of the annually-measured national product. Today it is no metaphor to say that intellectual property comprises part of the "Wealth of Nations" (Smith 2000 (1776)). Although the accounting rules have only recently been changed, I have shown here that intellectual property has, in fact, been part of the wealth of nation-states from the moment of their inception as an institutional form. Intellectual property emerged in tandem with, and as an important component of, the first, paradigmatic nation-states.

This correlation in emergence between the modern nation-state and intellectual property is seen most clearly in two of the cases presented in this dissertation: the United States and France, discussed in Chapters 3 and 4. In the United States, provision for intellectual property – in its earliest forms of patent and copyright – was made as part of the same basic process that legally constituted the nation-state. Although the language of property was not actually used in the "Intellectual Property Clause" (Article 1, Section 8, Clause 8) of the U.S. Constitution, the discussion and debate surrounding the Constitution's drafting and ratification, which are documented in Chapter 3, clearly demonstrate the use of proprietary language in relation to patents and copyrights, beginning almost from the very moment that the United States achieved independence from Britain. As shown in Chapter 4, the French use of proprietary language vis-à-vis patents and copyrights ("literary property") was strong and straightforward, and occurred in

Revolutionary legal documents produced as part of the basic effort to constitute a new French nation-state.

The U.S. and French cases, as these are documented in Chapters 3 and 4, offer substantial empirical evidence for concluding that intellectual property emerged as part of the modern nation-state. These are, however, relatively easy cases, because they are cases in which the nation-state and intellectual property were formed relatively suddenly, as parts of a revolutionary process. The cases of England and Germany are more difficult empirically, because they are messier. In these cases, the nation-state did not emerge suddenly, and neither did intellectual property.

The English case, which is discussed in Chapter 2, is really the crucial "turning-point" case, because the later developments in the U.S., France, and Germany are clearly somewhat dependent on the English developments. But the difficulty comes in identifying a specific point at which England (or "Britain") became a nation-state, and a point at which intellectual property emerged. Although the reality is that both transitions happened gradually, I believe that, for analytical purposes, specific turning-points can be identified.

With respect to the emergence of intellectual property, on the basis of the evidence adduced in Chapter 2, I believe we should locate the turning-point in the Long Parliament of the Seventeenth Century, in the shift to a semantics of property in relation to copyrights, which first occurred in 1643 (see pp. 98-9). At this point, copyrights made the crucial transition in legal categorization from being part of the Royal Prerogative, and hence the property of the monarch, to being the property of his subjects (the Stationers Company). A long process of legal development was then set in motion, which would culminate in Eighteenth Century rulings by the Court of Kings Bench and House of Lords: the cases of *Millar v. Taylor* (1769) and

Donaldson v. Beckett (1774), which were extensively discussed in Chapter 2. These rulings gave full recognition to copyrights, as a form of statutory property, and laid the foundation for similar treatment of patents, by way of analogy.

With respect to the emergence of the modern English nation-state, Steve Pincus (2009) makes a persuasive case that a crucial turning-point is marked by the Glorious Revolution of 1688-89 (*see also* North 1981). Pincus argues that the Glorious Revolution was the "first modern revolution," one that marked the emergence of a modern, English nation-state. In this revolution, Parliamentary power to control the monarchy and its prerogative was cemented into place, and an enduring Bill of Rights became a transformative part of the English Constitution (*see also* Witte, Jr. 2007). Tellingly, this Constitutional document records a semantic shift in the character of Parliament between the Spring and Fall of 1689. In the "Convention Parliament" of early 1689, Parliament represented "all the Estates of the People of this Realme," whereas, in late 1689, the Parliament of William and Mary represented "the Nation" (Chapter 2, 1 William & Mary, Session 2).

In the English case, therefore, the first emergence of intellectual property slightly preceded the emergence of the nation-state. However, as we saw in Chapter 2, questions about the proprietary status of copyrights and patents would not be fully resolved until the late Eighteenth and early Nineteenth Centuries. Thus, while recognizing a certain degree of precocity in the emergence of English intellectual property, we can with full confidence state that intellectual property emerged in tandem with the English nation-state, as part of a process that began in the Seventeenth Century, and extended into the Nineteenth Century.

This dissertation has shown, then, that intellectual property emerged as part of the modern nation-state in England, the United States, and France. For simplicity's sake, we can

locate this development in the Eighteenth Century, while recognizing that the English developments actually extend from the Seventeenth into the Nineteenth Centuries.

The case of Germany, as discussed in Chapters 1, 5, and 7, helps to confirm this finding, although the picture is again complicated. As long as Germany remained an Estate Society (*Ständestaat*), intellectual property, in its modern, individualist forms did not emerge. While we did see Prussia providing for patents in 1815, this provision came at the tail end of a peculiar period of liberal reform, and rested uneasily within the Prussian "Constitutional" structure (Chapter 5). As we saw in Chapter 7, the early impetus for intellectual property protection in German-speaking lands came primarily through intellectual-property-related treaties, which were rooted in the Concert of Europe system. This institutionalized, treaty-based system created a framework within which emerging nation-states, led by Prussia, could establish intellectual property protections at an international level, then leverage these international commitments into domestic law (*see* Moravcsik 2000). When Prussian Germany fully emerged (in 1867/1871) as a powerful, national state, however, intellectual property provisions were included in her constitution (Chapter 7).

The question, then, is why? What is it that links intellectual property to the nation-state, such that this particular type of property would emerge within this particular type of political community?

Max Weber's historical and comparative sociology, as this is set forth in his unfinished work *Economy and Society*, has provided the foundation for this dissertation. Therefore, it is fitting to return to him in these concluding pages. If the emergence and expansion of intellectual property, as a new type of legal property, is somehow bound up with the emergence and

expansion of the nation-state, as a new type of political community, Weberian sociology provides a valuable starting-point for explaining the connection between these two phenomena.

The emergence of the nation-state, as a specific type of political community, constituted a phenomenon of central importance to Weber, from the beginning to the end of his academic career (*see* Mommsen 1984 (1959)). The nation-state was deeply significant to him, not only as a lawyer and a social scientist, but also in the "sphere of values" (*see* Weber 2004a-c; Weber 2001 (1922); Weber 1978). Indeed, it may not go too far to say that, in the "sphere of values," Weber's personal "ethic of responsibility" was fundamentally oriented toward serving the cause of the Imperial German nation-state, which had emerged under the leadership of Bismarck during his own lifetime (*see* Mommsen 1984 (1959)).

The nation-state is, according to Weber, a very particular type of political community, which is, in turn, a very particular type of social organization, one that has not always existed, does not exist everywhere, and, hence, one that does not exist with "necessity" (*see* Weber 2001 (1922); Weber 1978)). This means that, to live in "A World of Nations" (Keylor 2009), is to live in a very specific type of social world, one that has not always existed, and one that will not necessarily continue.

What is characteristic of the nation-state, according to Weber, is its mass mobilization of sentiment and emotion (*Gefühl*) in the direction of expansion (*see* Weber 2001 (1922), at 218-47; Weber 1978, at 910-26). This powerful mobilization of feelings stimulates citizens to vigorous action, even to the point of death, on behalf of the nation-state. These feelings have two powerful sources. The first source of emotion is the belief that the citizens somehow "belong together," as fellow members of a community. The second source of emotion is a belief in the "power-prestige" of the nation.

It is the emotive force of belief in the power-prestige of the nation that is the most distinctive aspect of the nation-state, according to Weber. The emotive force of belief in "belonging-together" may also be very significant, but this is common to all political communities, and indeed to all communities, like the family. The reasons for the belief in "belonging-together" may be many and various, and may be rooted in historical fictions about the origins of the community. However, the reasons for belief in the "power-prestige" of the nation-state will be much more immediate and clearly-identifiable. They will be caught up in the struggle of the nation-state to competitively exert its power in relation to other nation-states.

In Weber's day, the struggle of nation-states for power-prestige centered around territorial expansion and militaristic prowess, especially for Imperial purposes. Today, although territorial expansion and militaristic prowess have by no means disappeared as foci for inter-state struggle, economic struggle has arguably assumed the center-stage. The existence of an institutionally-regulated global market means that the struggle for power-prestige between nation-states can now take the form of peaceful competition. And the existence of a Global IP Order – the foundations for which were documented in Chapter 7 – combined with the seemingly-unlimited possibilities for expansion within the sphere of human inventiveness and creativity, means that the struggle for power-prestige between nation-states can play out, in all its glory, in this social arena.

Potent evidence for concluding that the struggle for power-prestige between nation-states constitutes a significant dynamic in our contemporary Global IP Order came very recently in the protracted "smartphone" litigation that is ongoing between Apple and Samsung. On February 7, 2014, Judge Lucy Koh issued an order denying a motion by Samsung for a new trial in one phase of the overall litigation (*Apple, Inc. v. Samsung Electronics Co.*, 2014 WL 549324 (2014) ("Koh

Order")). Samsung's motion was based on statements made by Apple's lawyers in their closing arguments to the jury, which, according to Samsung's lawyers, were designed to elicit "national origin" prejudice on the part of the jury. Although Judge Koh did not grant the motion, she expressed strong disapproval of the arguments made by Apple's lawyers, stating that they "clearly suggested an us-versus-them, American-versus-non-American theme to the jury," and admonishing the lawyers "to be mindful of the important role that lawyers play in the actual and perceived fairness of our legal system as they prepare for and litigate the next round of this patent dispute" (Koh Order 2014, at 13, 16).

Although the dispute over whether a new trial should be granted was framed in terms of "national origin prejudice" – since that is the legal basis upon which Samsung might have obtained a mistrial – the statements by Apple's lawyer actually seem to be much better categorized as an appeal to national (and local) "power-prestige":

> We are extremely fortunate to live in what I'll call the Greater Bay Area. Not only is it beautiful, but we live in the center of one of the most vibrant economies in the world. Intel, Yahoo, Oracle, Facebook, eBay, and hundreds and hundreds of other companies, including Google, and including Apple, and these companies attract talented employees at every level. Even, we heard, Samsung has opened a research center here so that they can take advantage of the talent in this area.
>
> The companies provide jobs. They create technology that improves the way people work. And the company – and this economy supports an education system that is second to none in the world, Berkeley, Stanford, San Jose State, U.S. [sic] Santa Cruz, even Santa Clara where I went to school.
>
> These educational institutions interact with this economy, interact with these companies and create a place that the whole world knows as Silicon Valley.
>
> But let's be equally clear about one thing. Our vibrant economy absolutely depends on fair competition. It depends on a patent system that encourages inventors to invent, it encourages investors to invest, and it encourages employers to hire.

> If we allow that system of law to decay, investors will not invest, people will not take risks, and our economy will disappear.
>
> When I was young, I used to watch television on televisions that were manufactured in the United States. Magnavox, Motorola, RCA. These were real companies. They were well known and they were famous. They were creators. They were inventors. They were like the Apple and Google today.
>
> But they didn't protect their intellectual property. They couldn't protect their ideas. And you all know the result. There are no American television manufacturers today (Koh Order 2014, at 11).

Apple's lawyer is not appealing to stereotypes about South Koreans. He or she is appealing to Americans' pride in their national economy, their fears of economic collapse, and their jealousy at the growing power-prestige of other national economies. In Weberian terms, this is an appeal to American power-prestige, not an appeal to racial, ethnic, or national-origin prejudice.

Weber helps us to see the nation-state as a political community that mobilizes the passions of its members in a particular way (*see* Berezin 2002, 1999; *see also* Calhoun 1997; Brubaker 1996, 1992). Following Martha Nussbaum (2013) and Benedict Anderson (2006 [1991]), we can conceptualize nationalist "power-prestige," in this emotional sense, as a kind of love (*see* Berezin 1999), albeit one that has been corrupted by fear, jealousy, and national pride.

Nussbaum's theory of emotions, as articulated in *The Therapy of Desire* (2009 [1996]) and *Upheavals of Thought* (2003), draws extensively on Hellenistic Moral Philosophy, especially Greek and Roman Stoicism (*see* Nussbaum 1999; Sorabji 1999). Within this tradition, there are important distinctions to be drawn between different kinds of love. Nationalist power-prestige is decidedly not *agape* or *philia*; it is *eros*, an exclusivist and possessive love of one's own political community (*cf.* Fromm 1956).

Seeing nationalist power-prestige, in Weber's sense, as a kind of erotic love – an exclusivist and possessive love of one's own political community, which is also expansionist in

its ambitions – points toward an answer to the question about what connects the nation-state and intellectual property. For property often also involves a love of one's own. In the case of intellectual property, we might say, the possessive love of inventors, authors, creators, corporate communities, and innovators for their projects and productions, as their own property, is mobilized in the service of economic growth. As we see in Chapters 2-4, and as I will discuss further below, a recognition of this basic dynamic has been present from the earliest phases of intellectual property's emergence.

The nation-state, then, is distinctive as a political community in its mobilization of possessive love for national purposes. In order to mobilize possessive love, the nation-state gives a legal warrant to certain objects of love. Intellectual property, as a type of legal property, provides a legal warrant to the author's possessive love of his written work, to the inventor's possessive love of her new machine, to the corporation's possessive love of its catchy slogan, and to the craftsmen's possessive love of their secret techniques. In warranting these objects of possessive love, the nation-state mobilizes this love, and harnesses it in the service of innovation and economic growth. At the same time, the nation-state places firm limits on when, how, and to what extent, these objects can be possessively loved.

The nation-state's warranting of these objects of possessive love is not simply about legal recognition, at the level of a speech act. It is also a guarantee that the nation-state's organizational power and authority will support the possessive relationship between lover and beloved, and will defend it with violence, if necessary. Weber's sociological theory of property is perhaps most valuable in the way it constantly reminds us that some form of organized, social-relational closure must stand behind property. Otherwise the language of property is empty

rhetoric, and a possessive love that is grounded on this will endure only as long as all people are altruists, or at least virtuous, which is to say, not very long.

The nation-state, as a political community monopolizing the legitimate exercise of force, is a type of organized, social-relational closure, which provides the guarantee that can *effectively* warrant possessive love. In effectively warranting this love, the nation-state mobilizes its power in the service of growth and expansion.

To mobilize is to move: to evoke and to manipulate. This is causal language (*see* Woodward 2003). The nation-state, then, is a political community that wields causal powers in relation to its members, partly by evoking and manipulating their love. Its effective warranting of possessive love mobilizes that love in directions that are, to some degree, predictable. In the case of intellectual property, the warranting of possessive love mobilizes that love in directions that may contribute to innovation, economic growth, and nationalistic power-prestige.

Scholars like Martha Nussbaum, who draw on Hellenistic Moral Philosophy in theorizing emotions, argue that emotions involve cognition and judgment, as well as experience. Emotions, in other words, move the human being both at the level of a conscious, meaning-making agent, and as an experiential recipient of causal forces (*cf.* Berezin 2009, 2005, 2002). Culture plays a crucially important role here, both in contributing to the initial experience, and in contributing to the mental categories through which action-possibilities on the basis of that experience are formulated and determined (*see* Nussbaum 2013; Hochschild 2012; Berezin 2009, 2005, 2002; Sorabji 1999).

Without speculating on the precise social-psychological, cognitive, and moral processes involved, we can say, on the basis of the evidence adduced in this dissertation, that legal culture and legal institutions do impact emotional experience and judgment. In the tragic

disappointment of John Fitch (Chapter 3), we saw a case where possessive love was not given an effective legal warrant by the nation-state. By way of contrast, in the cases of Noah Webster (Chapter 3), Alexander Graham Bell (Chapter 6), and Thomas Edison (Chapter 6), we saw the powerful mobilizing effect that legally-warranted possessive love can have. The pages of *Scientific American*, especially in its earliest years, testify to this mobilizing effect on nearly every line.

The intimate connection between this possessive love and the love of nation was seen very early in the case of Dr. William Thornton, who, as the self-styled "Superintendant" of the U.S. Patent Office, addressed himself "The Citizens of the United States of America" in the *National Intelligencer* (March 1811) (Chapter 3, pp. 198-201). Praising American "genius," even among the "unlettered inhabitants of the forest," Dr. Thornton sought to teach his readers how they might obtain patents and copyrights, and thereby participate in America's newly-created "system of protection for the property of talent, mind, and genius." This is emotionally-evocative language, aimed to move both hearts and minds, and to mobilize the possessive love of artists, writers, and inventors.

It is probably not possible to know whether Francis Cabot Lowell read Dr. Thornton's stirring call. But we do know that, in 1802 (the same year that James Madison established the nation's first Patent Office, and nominated Thornton to run it), Lowell began reading patent specifications and seeking patents for himself. By 1810, Lowell had developed his patent-seeking into a carefully-devised plan, which he executed between 1810 and 1812 by traveling through England, systematically observing the machinery in English textile-factories, committing these observations to memory, and reverse-engineering a power-loom. As we saw in Chapter 3, Lowell built on the proprietary control over a newly-emerging national market that

his 1815 patent in power-looms gave him to develop an early and prototypical pattern for American industrialization.

By 1877, when the Bell Telephone Association was created to hold Alexander Graham Bell's telephone patents, over six decades of experience had been gained in the strategic uses of intellectual property (Chapter 6). As we saw in the employment of Thomas Edison by Western Union, one strategy involved very deliberate efforts to patent every conceivable permutation of a particular technology, and then to wield the resulting arsenal of patents as a weapon in licensing negotiations with competitors. Another strategy, which was developed to perfection by the Bell patentees, was to hold patents and trademarks ("industrial property") as the basis for a nation-wide "agency" system, licensing the underlying technology and the "brand," while retaining fundamental manufacturing and distributional control, together with a nice share of the profits.

Very fundamental legal capacities underlie these industrial and economic developments: (1) proprietary control and exclusivity, which is rooted in property ownership that is nationally-registered and enforced; and (2) the capacity to strategically transfer elements of this proprietary control through contracts, which are backed by the enforcement power of the nation-state.

In this dissertation, I have endeavored to demonstrate that cultural traditions stretching back to medieval Europe and Imperial Rome have contributed in significant ways to the formation of these legal capacities. Through the process of semantic legal ordering, I have argued, the interpretive, social activity of jurists made a difference, by categorizing patents, copyrights, trademarks, and trade secrets as a type of property. I have shown that the legal category of property has a complex history, one that is traceable ultimately to Imperial Rome, but one that was given a new shape and character in medieval Europe. Through the interpretive activity of jurists, the Roman-law-based tradition of property "ownership" (*dominium* &

proprietas) was drawn upon to give legal meaning to the idea that patents, copyrights, trademarks, and trade secrets could be a type of property.

This would not be a type of property that was simply "held", subject to the ultimate control of a Lord. Rather this would be a type of property that was "owned" by an individual or a corporate community, subject to free disposition according to the will of that individual or community. Semantic legal ordering made a difference, I have argued, because these specific legal categories and concepts were brought to bear on a set of objects that had previously not been conceived of in these terms. A change in *legal* conception and categorization – which depended, in turn, on legal understandings of property rooted in legal traditions – contributed to a much broader change in *social* conception.

From the Eighteenth and Nineteenth Century onward, patents, copyrights, trademarks, and trade secrets became a kind of property. This ideational and institutional shift, I have argued, made a very important difference in our social world.

The primary purpose of this dissertation has been to show how legal culture works in contributing to property-related patterns of social relationship and social activity. In the Introduction and in Chapter 1, I proposed the thesis of semantic legal ordering to explicate a process through which legal culture impacts property-related social relationships and social activities. In this interpretive social process, legal actors ("jurists") draw on concepts and principles within legal traditions to formulate legal prescriptions that are meaningful in their contemporary social context. When translated through private and public officialdoms that enforce these prescriptions through sanctions, semantic legal ordering contributes normative and conceptual form to closed social relationships (including organizations), and to the social activity that takes place within those relationships.

Having focused in this Conclusion on the distinctive characteristics of the nation-state, as a political community, this process can be further specified. Semantic legal ordering contributed conceptual form to the nation-state, by envisioning it as a kind of corporate entity, one that is capable of owning and disposing of property under its own name. Chapters 3 and 6 showed that this is particularly important with respect to the territorial dimensions of the nation-state. In the international legal arena, nation-states are conceptualized essentially as owners of their landed territories, a conceptualization that lends normative force to their claims to exclusivity in the legitimate exercise of force within those territories. It is this conceptual and normative backing to the legitimate exercise of force within national territorial boundaries that, in turn, lends effectiveness to the legal warrant of the property-owner's possessive love. As we have seen, this possessive love is intimately connected to the power-prestige of the nation-state.

With respect to intellectual property, semantic legal ordering contributed to this possessive love by adding to the kinds of objects toward which it might be legitimately directed. From the Eighteenth Century onwards, in ever-increasing numbers of nation-states, this possessive love has been directed toward patents, copyrights, trademarks, and trade secrets, and therefore mobilized in the direction of invention, artistic and literary creativity, branding, and business know-how. These property-related social activities contribute, in various and distinctive ways, to innovation and economic growth (*cf.* Mokyr 2009), which is tied to the expansive, economic power-prestige of the nation-state.

Because they are legally-warranted and guaranteed by the power and authority of the nation-state, these property-related social activities may be seen as being "institutionalized." At the same time, as I emphasized in the Introduction, it is important to remember that these

property-related social activities always take place through human bodies, and always have material implications, not only for human beings, but also for animals and the natural world.

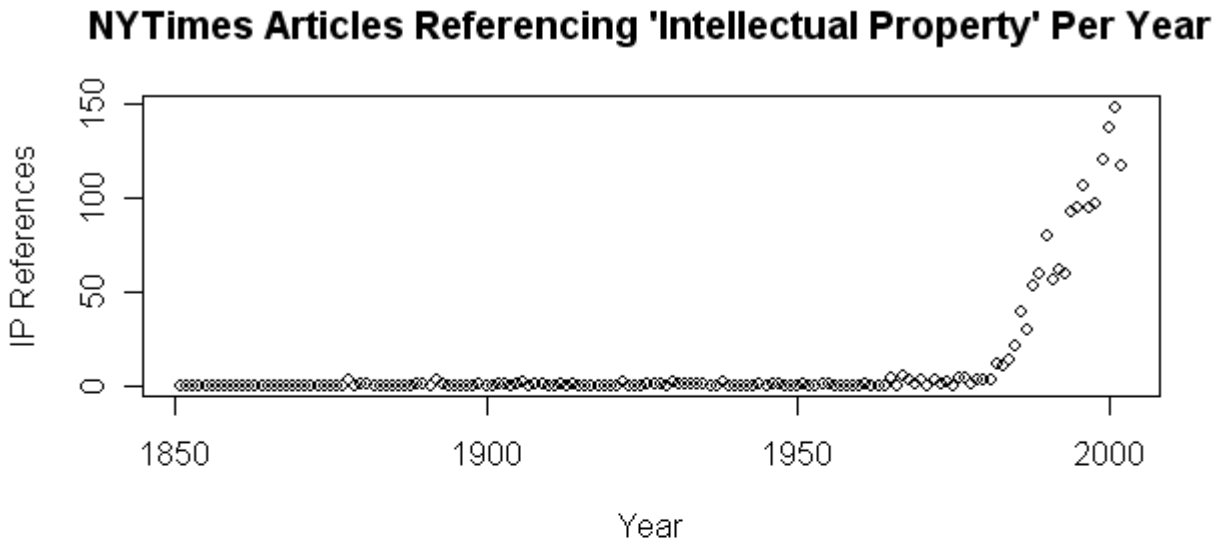
A property order, as I am conceiving it, is an institutionalized mode of material existence, a way of relating to material things that is structured and patterned by the values, concepts, and beliefs embodied within social relationships and organizations. The process of semantic legal ordering, as I have presented it in this dissertation, draws on legal traditions to give very particular meanings to social relationships, to appropriation, and to appropriated objects, thereby contributing to distinctive patterns of social activity vis-à-vis material things. These distinctive patterns of social activity vis-à-vis material things represent a particular property order: a particular, institutionalized pattern of materially-embodied existence.

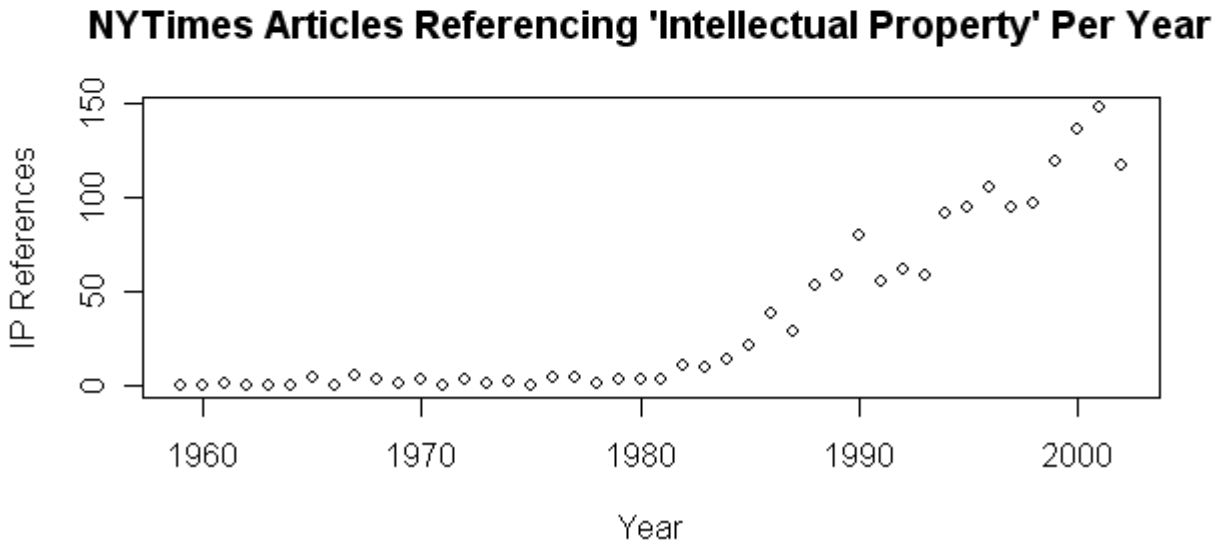
Emerging as part of the modern nation-state, intellectual property emerged as part of a new type of property order, a national property order. In this type of property order, as we have seen, property-related social activity and possessive love are mobilized in the service of national economic growth and power-prestige.

Appendix 1

Annual Count of *New York Times* Articles
Referencing "Intellectual Property"

Graphical Representation of Data
Gathered using the ProQuest Electronic Database





Appendix 2

Delegates to the Constitutional Convention of 1787
(Listed by State, according to the order in which the states enacted copyright laws)

Name & Age[200]	Congressional Biography,[201] & Additional Information
Connecticut Formed from the Massachusetts Bay Colony, Governed under the "Fundamental Orders" (Hartford, 1638/39) & Fundamental Agreement (New Haven, 1639), Chartered by Charles II in 1662 Continued Governance under the Fundamental Orders after 1776 (until 1818) 1790 Population: 238,000 (including 6,000 Africans & 7,000 urban residents)[202]	
Roger Sherman (67)	born in Newton, Mass., April 19, 1721; surveyor of New Haven County in 1745; studied law; admitted to the bar in 1754 and practiced; member, Connecticut assembly 1755-1756, 1758-1761, 1764-1766; justice of the peace for Litchfield County 1755-1761, and of the quorum 1759-1761; moved to New Haven, Conn., in June 1761; justice of the peace and member of the court 1765-1766; member, State senate 1766-1785; judge of the superior court 1766-1767, 1773-1788; member of the council of safety 1777-1779; Member of the Continental Congress 1774-1781, and 1784; a signer of the Declaration of Independence and a member of the committee which drafted it; member of the committee to prepare the Articles of Confederation
William Samuel Johnson (60)	born in Stratford, Conn., on October 7, 1727; graduated from Yale College in 1744 and from Harvard College in 1747; studied law; admitted to the bar and practiced in Stratford; member, colonial house of representatives 1761, 1765, and of the upper house 1766, 1771-1775; served as a delegate to the Stamp Act Congress held in New York City in October 1765; was Connecticut agent extraordinary to the court of England to determine the State title to Indian lands 1767-1771; judge of Connecticut Supreme Court 1772-1774; member of the Continental Congress 1785-1787; served as the first president of Columbia College of New York City 1787-1800
Oliver Ellsworth (42)	born in Windsor, Conn., April 29, 1745; attended Yale College and graduated from the College of New Jersey (now Princeton University) in 1766; studied law; admitted to the bar in 1771 and commenced practice in Windsor; moved to Hartford, Conn., in 1775; member, State general assembly 1773-1776; appointed State attorney in 1777; Member of the Continental Congress 1778-1783; from 1780 to 1785 was a member of the Governor's council; judge of the Connecticut Superior Court 1785-1789
Massachusetts Formed out of the Plymouth Company (under James I) Chartered by Charles I in 1629 Chartered as a "province" by William and Mary in 1691 First State Constitution adopted on June 16, 1780 1790 Population: 379,000 (including 5,000 Africans & 51,000 urban residents)	
Nathaniel Gorham (49)	born in Charlestown, Mass., May 27, 1738; attended the public schools; engaged in mercantile pursuits; member of the provincial legislature 1771-1775; delegate to the Provincial Congress in 1774 and 1775; member of the board of war 1778-1781; delegate to the State constitutional convention in 1779; served in the State senate in 1780 and 1781; Member of the Continental Congress in 1782, 1783, 1786, 1787, and 1789, and was its president from June 6, 1786, to February 2, 1787; delegate to the State constitutional convention which ratified the Federal Constitution in 1788
Caleb Strong (44)	born in Northampton, Mass., January 9, 1745; studied under private tutors; graduated from Harvard College in 1764; studied law; admitted to the bar and commenced practice in 1772; Northampton selectman; member of the committee of correspondence and safety throughout the Revolution; member, State house of representatives 1776-1778; member, State senate 1780-1788; county attorney 1776-1800; elected to the Continental Congress in 1780, but did not attend; member of the

[200] Names of Jurists/Lawyers are in bold. Sources: Farrand (Vol. 3) 1911, at 557 et seq.; Stewart 2007, at ix-x.

[201] Source: The Biographical Directory of the United States Congress (http://bioguide.congress.gov/biosearch/biosearch.asp, last accessed April 8, 2014).

[202] Source: U.S. Census Bureau, Historical Statistics of the United States, Series A 195-209 (1973).

	Massachusetts constitutional convention which ratified the Constitution of the United States
Elbridge Gerry (43)	born in Marblehead, Mass., July 17, 1744; pursued classical studies and graduated from Harvard College in 1762; engaged in commercial pursuits; member, colonial house of representatives 1772-1775; Member of the Continental Congress 1776-1780 and 1783-1785; a signer of the Declaration of Independence; refused to sign the Constitution, but subsequently gave it his support
Rufus King (32)	born in Scarboro, Maine (then a district of Massachusetts), March 24, 1755; attended Dummer Academy, Byfield, Mass., and graduated from Harvard College in 1777; served in the Revolutionary War; studied law; admitted to the bar and commenced practice in Newburyport in 1780; delegate to the Massachusetts General Court 1783-1785; Member of the Continental Congress from Massachusetts 1784-1787; delegate to the Federal constitutional convention at Philadelphia in 1787 and to the State convention in 1788 which ratified the same
Maryland Granted by patent from Charles I to Lord Baltimore in 1632, Chartered as a "Proprietary Province" First State Constitution adopted November 11, 1776 1790 Population 320,000 (including 111,000 African slaves & 14,000 urban residents)	
Daniel of St. Thomas Jenifer (64)	born in Charles County, Md., in 1723; member of the provincial court in 1766; member of the Governor's council in 1773; member and president of the council of safety 1775-1777; president of the State senate 1777-1780; Member of the Continental Congress 1779-1781
Daniel Carroll (57)	born in Upper Marlboro, Prince Georges County, Md., July 22, 1730; educated at the Jesuit School at Bohemia Manor, Md., and at St. Omer's College, France; returned to Maryland in 1748; Member of the Continental Congress, 1781-1783, signing the Articles of Confederation on March 1, 1781
Luther Martin (39)	born in Piscataway, New Jersey, 1748; educated at Princeton; began reading law in 1770 and was admitted to the Virginia bar in 1771; practiced law in Virginia for several years, and was then admitted to the Maryland bar; established a very successful law practice in Maryland; Attorney General of Maryland from 1778-1811; refused to sign the Constitution and played an important role in securing a Bill of Rights; a leading Anti-Federalist writer and speaker (Reynolds 1988)
James McHenry (34)	born in Ballymena, County Antrim, Ireland, November 16, 1753; pursued classical studies; immigrated to the United States about 1771 and settled in Philadelphia, Pa.; attended Newark Academy in Delaware; studied medicine under Dr. Benjamin Rush, Philadelphia, Pa.; during the Revolution was appointed assistant surgeon in 1776 and later surgeon in the Fifth Pennsylvania Battalion; secretary to General Washington 1778-1780; appointed in 1780 on the staff of General Lafayette and served in that capacity until the end of the war; member of the State senate 1781-1786; Member of the Continental Congress 1783-1785
John Francis Mercer (28)	born at "Marlborough," Stafford County, Va., on May 17, 1759; after receiving his education at home from private teachers was graduated from the College of William and Mary, Williamsburg, Va., in 1775; studied law; was admitted to the bar and commenced practice in Williamsburg, Va., in 1781; Delegate from Virginia to the Continental Congress 1783-1784; moved to West River, Anne Arundel County, Md.
New Jersey Proprietary provinces granted by Charles II to the Duke of York in 1664, Divided from New York by transfers among proprietors into West-Jersey and East-Jersey Combined under a Governor by Queen Anne in 1702 First State Constitution adopted on July 2, 1776 1790 Population: 184,000 (including 14,000 Africans)	
William Livingston (64)	born in Albany, N.Y., November 30, 1723; graduated from Yale College in 1741; studied law; was admitted to the bar in 1748 and commenced practice in New York; established and edited the Independent Reflector in 1752; a commissioner to adjust the boundary lines between New York and Massachusetts in 1754 and New York and New Jersey in 1764; member of the provincial assembly from Livingston Manor 1759-1761; moved to Elizabethtown (now Elizabeth), N.J., in 1772; Member of the Continental Congress from July 23, 1774, to June 22, 1776; commissioned a brigadier general of the New Jersey Militia on October 28, 1775, and served until August 31, 1776, having been elected Governor; served consecutively as Governor of New Jersey from August 31, 1776, until his death in 1790
William Paterson (44)	born in County Antrim, Ireland, December 24, 1745; immigrated to the United States in 1747 with his parents, who settled in New Castle, Pa.; moved about through the colonies before settling in Princeton, N.J., in 1750; attended private schools; graduated from the College of New Jersey (later Princeton University) in 1763; studied law; admitted to the bar in 1768 and commenced practice in

	New Bromley, N.J., in 1769; delegate and secretary to the Provincial Congress 1775-1776; member, State legislative council 1776-1777; delegate to the State constitutional convention in 1776; attorney general of New Jersey 1776-1783, when he resigned; moved to Raritan, N.J., in 1779; elected as a Delegate to the Continental Congress in 1780, but declined, owing to his duties as attorney general; moved to New Brunswick, N.J., in 1783; delegate to the Federal Constitutional Convention in Philadelphia in 1787 and one of the signers of the Constitution; again elected as a Delegate to the Continental Congress in 1787, but declined; elected to the United States Senate and served from March 4, 1789, to November 13, 1790, when he resigned, having been elected Governor of New Jersey; reelected Governor and served until 1793, when he resigned to become an Associate Justice of the Supreme Court of the United States and served until his death in Albany, N.Y., September 9, 1806
William C. Houston (41)	born in Sumter District, South Carolina, around 1746; pursued classical studies; was graduated from Princeton College in 1768; professor in the same college from 1769 to 1783, when he resigned; member of the New Jersey Provincial Congress in 1776; member of the New Jersey house of assembly 1777-1779; member of the council of safety in 1778; Member of the Continental Congress 1779-1781; studied law; was admitted to the bar in 1781 and commenced practice in Trenton, N.J., in 1783; elected as the first Comptroller of the Treasury in 1781, but declined to serve; receiver of Continental taxes 1782-1785; clerk of the supreme court of New Jersey 1781-1788; again a Member of the Continental Congress in 1784 and 1785; member of the Annapolis Convention in 1786
David Brearley (42)	born in Maidenhead Township (now Lawrence Township), New Jersey, June 11, 1745; probably read law around Princeton in 1765/1766 (Scarinci 2005); admitted to the New Jersey bar in 1767; established a successful legal practice in Allentown, New Jersey, which he maintained despite extensive militia service during the Revolution (Scarinci 2005); Chief Justice of New Jersey from 1777 to 1789; judge for the Federal District Court of New Jersey 1789-90 (nominated by George Washington); died 1790 (Scarinci 2005)
Jonathan Dayton (26)	born in Elizabethtown (now Elizabeth), N.J., October 16, 1760; graduated from the College of New Jersey (now Princeton University) in 1776; studied law; admitted to the bar; member, State general assembly 1786-1787, 1790, and served as speaker in 1790; delegate to the Federal Constitutional Convention in 1787 and signed the Constitution; Delegate to the Continental Congress 1787-1788
New Hampshire[203] Formed from grants by the Plymouth Company of their territory in 1629 & 1635 First State Constitution adopted on January 5, 1776 1790 Population: 142,000 (including 1,000 Africans & 5,000 urban residents)	
John Langdon (44)	born in Portsmouth, N.H., June 26, 1741; served an apprenticeship as a clerk, went to sea, and engaged in mercantile pursuits; a prominent supporter of the revolutionary movement and active in the Revolutionary War; a representative in the general court; Member of the Continental Congress in 1775 and 1776; resigned in June 1776 to become agent for Continental prizes and superintended the construction of several ships of war; served several terms as speaker of the State house of representatives, and during the session of 1777 staked his fortune to equip an expedition against the British; member, State senate 1784; President of New Hampshire 1785, 1788; again a Member of the Continental Congress in 1787; member of the State ratifying convention
Nicholas Gilman (32)	born in Exeter, Rockingham County, N.H., August 3, 1755; employed as a clerk in his father's countinghouse; served in the continental army during the Revolutionary War; Member of the Continental Congress 1787-1789
Pennsylvania Formed on the basis of a patent granted by Charles II to William Penn in 1681, Constituted as a Province under Penn as Proprietary First State Constitution adopted September 28, 1776 Population 484,000 (including 10,000 Africans & 44,000 urban residents)	
Benjamin Franklin (81)	born in Boston, Mass., January 17, 1706; employed in a tallow chandlery for two years; learned the art of printing, and after working at his trade in Boston, Philadelphia, and London established himself in Philadelphia as a printer and publisher; founded the Pennsylvania Gazette in 1728, and in 1732 began the publication of Poor Richard's Almanac; State printer; clerk of the Pennsylvania general assembly 1736-1750; postmaster of Philadelphia in 1737; a member of the provincial assembly 1744-1754; a member of several Indian commissions; elected a member of the Royal Society on account of his scientific discoveries; deputy postmaster general of the British North

[203] Delegates didn't arrive until July.

	American Colonies 1753-1774; agent of Pennsylvania in London 1757-1762 and 1764-1775; Member of the Continental Congress 1775-1776; signed the Declaration of Independence; president of the Pennsylvania constitutional convention of 1776; sent as a diplomatic commissioner to France by the Continental Congress and, later, Minister to France 1776-1785; one of the negotiators of the treaty of peace with Great Britain; president of the executive council of Pennsylvania 1785-1788; president of the trustees of the University of Pennsylvania
Robert Morris (53)	born in Liverpool, England, January 20, 1734; immigrated to the United States in 1747 and settled in Oxford, Md.; attended school in Philadelphia; became a merchant in Philadelphia in 1748; signed the non-importation agreement of 1765; member of the Pennsylvania Council of Safety 1775; Member of the Continental Congress 1775-1778; signer of the Declaration of Independence; settled upon the Manheim estate; member, State assembly 1778-1781; national superintendent of finance 1781-1784; established the Bank of North America; member, State assembly 1785-1787
George Clymer (48)	born in Philadelphia, Pa., March 16, 1739; engaged in mercantile pursuits in Philadelphia; captain of a volunteer company at the outbreak of hostilities with Great Britain and a member of the committee of safety; Member of the Continental Congress 1776-1777 and 1780-1782; a signer of the Declaration of Independence; member of the State house of representatives 1785-1788
Thomas FitzSimons (46)	born in Ireland in 1741; immigrated to the United States and entered a counting-house in Philadelphia, Pa., as clerk; commanded a company of volunteer home guards during the Revolutionary War; Member of the Continental Congress in 1782 and 1783; member of the State house of representatives in 1786 and 1787
James Wilson (46)	born in Carskerdy, near St. Andrews, Scotland, September 14, 1742; attended the University of St. Andrews; immigrated to the United States in 1765; tutor in the College of Philadelphia (now the University of Pennsylvania) from 1765-66; studied law under John Dickinson; admitted to the bar in 1767; practiced in Reading and Carlisle, Pa., and for a short time, during Howe's occupation of Philadelphia, in Annapolis, Md.; also engaged in literary pursuits; member of the Provincial Convention of Pennsylvania in 1774; Member of the Continental Congress 1775-1777, 1783, and 1785-1786; advocate general for France in America and guided that country's legal relations to the Confederation; a signer of the Declaration of Independence; a delegate from Pennsylvania to the Federal Convention in 1787 and a delegate to the State ratification convention; settled in Philadelphia in 1778 and resumed the practice of law; Associate Justice of the United States Supreme Court 1789-1798; first professor of law in the College of Philadelphia in 1790 and in the University of Pennsylvania when they were united in 1791
Thomas Mifflin (43)	born in Philadelphia, Pa., January 10, 1744; graduated from the University of Pennsylvania at Philadelphia in 1760; member of the American Philosophical Society 1765-1799; member of the colonial legislature 1772-1774; Member of the Continental Congress 1774-1775 and 1782-1784, and was its president in 1783; trustee of the University of Pennsylvania 1778-1791; served as speaker of the state house of representatives 1785-1788; president of the supreme executive council of Pennsylvania October 1788 to October 1790; president of the state constitutional convention in 1790
Jared Ingersoll (38)	born in New Haven, Conn., October 24, 1749; received a classical education; was graduated from Yale College in 1766; settled in Philadelphia, Pa., in 1771; studied law and was admitted to the bar in 1773; finished his legal education at the Middle Temple, London, England, in 1774, and then went to Paris in 1776; returned to Philadelphia in 1778 and commenced practice; Member of the Continental Congress in 1780
Gouverneur Morris (35)	born in Morrisania (now a part of New York City), N.Y., January 31, 1752; graduated from King's College (now Columbia University), New York, in 1768; studied law; admitted to the colonial bar in 1771 and commenced practice in New York City; member, New York provincial congress 1775-1777; member of the committee to prepare a form of government for the State of New York in 1776; member of the first State council of safety in 1777; member, first State assembly 1777-1778; Member of the Continental Congress in 1778 and 1779; signer of the Articles of Confederation in 1778; moved to Philadelphia in 1779; appointed assistant superintendent of finance 1781-1785; returned to live in New York in 1788; went to Europe on business in 1789; Minister Plenipotentiary to France 1792-1794
South Carolina Chartered (together with North Carolina) to Proprietaries by Charles II in 1662 & 1665 Constitution drawn up by John Locke (as Secretary to the Proprietor, Lord Ashley) in 1669, abrogated in 1693 Charters surrendered by Proprietors to the British Crown in 1729, partly recognizing division between North & South Carolina From 1732 onwards North & South Carolina were separate Crown Provinces First State Constitution adopted on March 26, 1776 (new Constitutions in 1778 & 1790) 1790 Population: 249,000 (including 109,000 African slaves & 16,000 urban residents)	
John Rutledge (48)	born in Christ Church Parish, S.C., in 1739; pursued classical studies; studied law in Charleston

	and later at the Middle Temple in London; returned to Charleston, S.C., and commenced practice in 1761; elected to the provincial assembly in 1762; attorney general pro tempore in 1764 and 1765; delegate to the Stamp Act Congress at New York City in 1765; continued the practice of law; Member of the Continental Congress 1774-1775; served as president and commander in chief of South Carolina 1776-1778 and as governor 1779-1782; again a Member of the Continental Congress in 1782 and 1783; elected one of the state chancellors in 1784
Pierce Butler (43)	born in County Carlow, Ireland, July 11, 1744; came to America in 1758 as an officer in the British Army; resigned his commission prior to the Revolutionary War and settled in Charles Town (now Charleston), S.C.; planter; aided the American cause during the Revolutionary War
Charles Cotesworth Pinckney (43)	born in Charles Town (now Charleston), S.C., February 25, 1746; studied law in England at Oxford and the Middle Temple; admitted to the bar in 1769; established a legal practice in Charleston in 1770
Charles Pinckney (29)	born in Charles Town (now Charleston), S.C., October 26, 1757; pursued classical studies; admitted to the bar and commenced practice in 1779; member of the State house of representatives 1779-1780, 1786-1789, 1792-1796, 1805, 1806, 1810-1814; Member of the Continental Congress 1785-1787; member of the State constitutional conventions in 1788 and 1790 and served as president
Virginia Original Settlement under Trading Company Charter granted by James I in 1606, Quo Warranto proceeding dissolved the Charter in 1624, Governed as a Royal Province until 1776 First Constitution adopted on ___, 1776 1790 Population: 692,000 (including 306,000 African slaves & 12,000 urban residents)	
George Mason (62)	born in Fairfax County, Virginia, December 11, 1725; studied under private tutors, including his uncle John Mercer; Member of the Ohio Land Company; member of Virginia's 1776 Constitutional Convention, and drafter of Virginia's Constitution and Declaration of Rights; refused to sign the Constitution believing that it gave too much power to the Federal Government
George Wythe (61)	born near Back River, Elizabeth City County, Va., in 1726; privately instructed by his mother and attended the College of William and Mary, Williamsburg, Va.; studied law; was admitted to the bar in 1746 and commenced practice in Elizabeth City County in 1755; moved to Williamsburg about 1755; member of the house of burgesses 1758-1768; appointed a member of the committee of correspondence in 1759; moved to his estate in Elizabeth City County in 1763 and returned to Williamsburg in 1768; clerk of the house of burgesses 1768-1775; Member of the Continental Congress 1775-1776; a signer of the Declaration of Independence; speaker of the house of delegates in 1777; judge of the Virginia Chancery Court in 1777; appointed sole chancellor of Virginia in 1778; professor of law at the College of William and Mary from 1779 to 1791, when he resigned and moved to Richmond, Va.; conducted a private school in Richmond and continued teaching until his death
John Blair (55)	born in Williamsburg, Virginia, 1732; studied at the College of William and Mary from 1752-54; studied law at the Middle Temple from 1755-56; member of the convention that drew up Virginia's 1776 Constitution; member of the Committee of 28 that drew up Virginia's 1776 Declaration of Rights; Judge of the Virginia General Court from 1778; Judge of Virginia's High Court of Chancery from 1780; Member of Virginia's first Court of Appeals; Member of the Committee for revising Virginia's laws from 1786; Associate Justice of the U.S. Supreme Court 1789-1795 (nominated by George Washington)
George Washington (55)	born at "Wakefield," near Popes Creek, Westmoreland County, Va., February 22, 1732; raised in Westmoreland County, Fairfax County and King George County; attended local schools and engaged in land surveying; appointed adjutant general of a military district in Virginia with the rank of major in 1752; in November 1753 was sent by Lieutenant Governor Dinwiddie, of Virginia, to conduct business with the French Army in the Ohio Valley; in 1754 was promoted to the rank of lieutenant colonel and served in the French and Indian war, becoming aide-de-camp to General Braddock in 1755; appointed as commander in chief of Virginia forces in 1755; resigned his commission in December 1758 and returned to the management of his estate at Mount Vernon in 1759; served as a justice of the peace 1760-1774, and as a member of the Virginia house of burgesses 1758-1774; delegate to the Williamsburg convention of August 1774; Member of the First and Second Continental Congresses in 1774 and 1775; unanimously chosen June 15, 1775, as commander in chief of all the forces raised or to be raised; commanded the Continental armies throughout the war for independence; resigned his commission December 23, 1783, and returned to private life at Mount Vernon; was delegate to, and president of, the Federal Convention in Philadelphia in 1787; unanimously elected as the first President of the United States, being inaugurated April 30, 1789, in New York City; unanimously reelected in 1792 and served until

	March 3, 1797
James McClurg (41)	born near Hampton, VA, in 1746; attended the College of William and Mary, and graduated in 1762; studied medicine at the University of Edinburgh and received his degree in 1770; pursued postgraduate medical studies in Paris and London and published Experiments upon the Human Bile and Reflections on the Biliary Secretions (1772) in London
James Madison (37)	born in Port Conway, King George County, Va., March 16, 1751; studied under private tutors and graduated from the College of New Jersey (now Princeton University) in 1771; member of the committee of safety from Orange County in 1774; delegate in the Williamsburg (Va.) constitutional convention of May 1776; member of the First General Assembly of Virginia in 1776, and unanimously elected a member of the executive council in 1778; Member of the Continental Congress 1780-1783 and 1787-1788
Edmund Randolph (34)	born in Williamsburg, Va., August 10, 1753; was graduated from the College of William and Mary, Williamsburg, Va.; studied law; was admitted to the bar and commenced practice in Williamsburg; served in the Revolutionary Army and was aide-de-camp to General Washington; attorney general of Virginia in 1776; Member of the Continental Congress in 1779, 1781, and 1782; elected governor of Virginia in 1786 but resigned in 1788 to serve in the state house of delegates in order that he might participate in the codification of the laws of Virginia in 1788 and 1789
North Carolina Chartered (together with South Carolina) to Proprietaries by Charles II in 1662 & 1665 Constitution drawn up by John Locke (as Secretary to the Proprietor, Lord Ashley) in 1669, abrogated in 1693 Charters surrendered to the British Crown in 1729, as part of division between North & South Carolina From 1732 onwards, North & South Carolina were separate Crown Provinces First Constitution adopted on December 18, 1776 1790 Population: 394,000 (including 106,000 African slaves)	
Hugh Williamson (52)	born on Oterara Creek, in West Nottingham Township, Pa., December 5, 1735; attended the common schools; prepared for college at Newark, Del., and was graduated from the University of Pennsylvania at Philadelphia in 1757; studied theology, and was licensed to preach in 1758; professor of mathematics in the College of Philadelphia; studied medicine in Edinburgh, Scotland, and Utrecht, Holland; returned to Philadelphia and practiced medicine; engaged in business; member of the American Philosophical Society, and a member of the commission to observe the transits of Venus and Mercury in 1773; at the time of the "Boston Tea Party" he was examined in England by the privy council regarding it; returned to America in 1776 and settled in Edenton, N.C.; engaged in mercantile pursuits; during the Revolutionary War was surgeon general of the North Carolina troops 1779-1782; Member of the State house of commons in 1782 and 1785; member of the Continental Congress 1782-1785, and 1788
Alexander Martin (47)	born in Hunterdon County, N.J., in 1740; attended the common schools; graduated from the College of New Jersey (now Princeton University) in 1756; moved to Salisbury, N.C., and became a merchant, justice of the peace, and judge; represented Guilford County, to which he had moved, in the State house of commons 1773-1774, and in the provincial congress 1775; member, State senate 1778-1782, 1785, 1787-1788, and served as speaker; Acting Governor of North Carolina 1781-1782, Governor 1782-1784, 1789-1792; elected to the Continental Congress in 1786 but resigned
Richard Dobbs Spaight (39)	born in New Bern, N.C., March 25, 1758; received his early schooling in Ireland and attended the University of Glasgow in Scotland; returned home in 1778 and joined the Continental Army as aide-de-camp to General Caswell; member of the North Carolina House of Commons 1779-1783; Member of the Continental Congress 1783-1785; delegate to the Constitutional Convention at Philadelphia in 1787 and to the state ratification convention in 1788
William Blount (38)	born near Windsor, Bertie County, N.C., March 26, 1749; pursued preparatory studies in New Bern, N.C.; paymaster of the Continental troops, North Carolina Line, in 1777; member, State house of commons 1780-1784; Member of the Continental Congress in 1782, 1783, 1786, and 1787
William R. Davie (31)	born June 20, 1756 in England; immigrated to South Carolina in 1763; graduated from the College of New Jersey (now Princeton) in 1776; studied law in North Carolina under Spruce Macay; prominent circuit court lawyer and orator after the Revolution; member of the North Carolina House of Commons at various times between 1786 and 1798; sponsored the bill chartering the University of North Carolina (1789)

Georgia Chartered by George II in 1732, Charter surrendered to the Crown in 1751, Royal Province from 1751-1776 1790 Population: 83,000 (including 30,000 African slaves)	
William Pierce (48)	born in Georgia in 1740; completed preparatory studies; engaged in mercantile pursuits in Savannah, Ga.; member of the state house of representatives in 1786
William Few (39)	born near Baltimore, Md., June 8, 1748; moved with his parents to Orange County, N.C., in 1758; completed preparatory studies; studied law; admitted to the bar and commenced practice in Augusta, Ga., in 1776; member, State house of representatives 1777, 1779, 1783, 1793; member of the State executive council in 1777 and 1778; engaged in the expedition for the subjugation of east Florida in 1778; presiding judge of the Richmond County court and surveyor general in 1778; Member of the Continental Congress 1780-1782 and 1786-1788; original trustee for establishing the University of Georgia in 1785; delegate to the Georgia convention that ratified the Federal Constitution in 1788
Abraham Baldwin (33)	born in North Guilford, Conn., November 22, 1754; moved with his father to New Haven, Conn., in 1769; attended private schools; graduated from Yale College in 1772; subsequently studied theology at the college and was licensed to preach in 1775; served as a tutor in that institution 1775-1779, when he resigned to enter the Army; chaplain in the Second Connecticut Brigade, Revolutionary Army, from 1777 until 1783; studied law during his service in the Army; admitted to the bar in 1783 and practiced at Fairfield; moved to Augusta, Ga., in 1784 and continued the practice of law; member of the State house of representatives 1785; originator of the plan for, and author of, the charter of the University of Georgia and served as president 1786-1801; member of the Continental Congress 1785, 1787, and 1788
William Houstoun (32)	born in Sumter District, South Carolina, around 1746; pursued classical studies; was graduated from Princeton College in 1768; professor in the same college from 1769 to 1783; deputy secretary of the Continental Congress in 1775 and 1776; member of the New Jersey Provincial Congress in 1776; member of the New Jersey house of assembly 1777-1779; member of the council of safety in 1778; Member of the Continental Congress 1779-1781; studied law; was admitted to the bar in 1781 and commenced practice in Trenton, N.J., in 1783; elected as the first Comptroller of the Treasury in 1781, but declined to serve; receiver of Continental taxes 1782-1785; clerk of the supreme court of New Jersey 1781-1788; again a Member of the Continental Congress in 1784 and 1785; member of the Annapolis Convention in 1786
New York Part of the patent granted by Charles II to the Duke of York & Albany in 1664 Possession of the Dutch territories confirmed by the Peace of Breda in 1667 New charter granted in 1674 Governed without a charter after 1688 as British subjects First State Constitution adopted on April 20, 1777 Population 340,000 (including 26,000 black residents & 39,000 urban residents)	
Robert Yates (49)*	born in Schenectady, New York, January 27, 1738; studied law and clerked for William Livingston; admitted to the New York bar in 1760; 1776-1777 served on the committee that drafted New York's first constitution; New York State Supreme Court judge from 1777; delegate to the New York state ratifying convention in 1788
John Lansing (33)*	born in Albany, N.Y., January 30, 1754; studied law in Albany and in New York City; was admitted to the bar in 1775; secretary to General Schuyler 1776 and 1777; engaged in the practice of law in Albany in 1778; member of the State assembly 1781-1784, 1786, and 1789, and served as speaker in 1786 and 1789; Member of the Continental Congress in 1785; delegate to the Federal Constitutional Convention in 1787 but withdrew July 10, 1787; delegate to the state convention in June 1788 to ratify the Federal Constitution
Alexander Hamilton (32)	born on the island of Nevis, British West Indies, January 11, 1757; immigrated to the United States in 1772, where he received educational training in the schools of Elizabethtown, N.J., and King's College (now Columbia University), New York City; studied law; was admitted to the New York bar in 1783 and practiced in New York City; Member of the Continental Congress in 1782, 1783, and 1788; member of the Annapolis Convention of 1786; served in the New York State assembly in 1787; member of the New York State ratification convention in 1788

* Walked out of the Convention in early July.

* Walked out of the Convention in early July.

Delaware Formed from part of the Duke of York's grant, purchased by William Penn in 1682, Separated from Pennsylvania in 1703 First State Constitution adopted September 1776 1790 Population: 59,000 (including 13,000 African slaves)	
John Dickinson (55)	born on his father's estate, "Crosiadore," near Trappe, Talbot County, Md., November 8, 1732; moved with his parents in 1740 to Dover, Del., where he studied under a private teacher; studied law in Philadelphia and at the Middle Temple in London; was admitted to the bar in 1757 and commenced practice in Philadelphia; member of the Assembly of "Lower Counties," as the State of Delaware was then called, in 1760; member of the Pennsylvania Assembly in 1762 and 1764; delegate to the Stamp Act Congress in 1765; Member from Pennsylvania to the Continental Congress 1774-1776 and from Delaware in 1779; brigadier general of Pennsylvania Militia; President of the State of Delaware in 1781; returned to Philadelphia and served as President of Pennsylvania 1782-1785
George Read (54)	born near North East, Cecil County, Md., September 18, 1733; completed preparatory studies; studied law; admitted to the bar and began practice in New Castle, Del., in 1752; attorney general for lower Delaware 1763-1774; member, provincial assembly 1765-1777; Member of the Continental Congress 1774-1777; a signer of the Declaration of Independence; president of the State constitutional convention in 1776; vice president of the State under this constitution; member, State house of representatives 1779-1780; judge of the United States Court of Appeals in admiralty cases 1782; representative at the Annapolis convention 1786
Richard Bassett (42)	born in Cecil County, Md., April 2, 1745; pursued preparatory studies; studied law; admitted to the bar and practiced in Delaware; member of the State constitutional conventions in 1776 and 1792; member, State senate 1782; member, State house of representatives 1786; member of the Delaware convention which ratified the Federal Constitution in 1787
Gunning Bedford (Jr.) (42)	born in Philadelphia, Pa., in 1747; graduated from Princeton College in 1771; studied law in Philadelphia; admitted to the Delaware bar in 1779 and commenced practice in Dover, Del.; moved to Wilmington, Del.; Member of the Continental Congress 1783-1785; appointed attorney general of the State on April 26, 1784, and served until September 26, 1789; appointed a commissioner to the convention held at Annapolis, Md., in September 1786 but did not attend; delegate to the State convention that ratified the Federal Constitution in 1787
Jacob Broom (35)	born October 17, 1752; prosperous farmer, surveyor, and local politician in Wilmington

Appendix 3

Primary Sources by Chapter

(Listed Chronologically)

Introduction

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