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The History of Intellectual Property as The History of Capitalism

Oren Bracha†

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Introduction

The field of the history of intellectual property that a quarter of a century ago was sparsely populated is a burgeoning one. A rich body of historical work of many methodological stripes examines many aspects of intellectual property in various periods.[1] The purpose of this essay is to pause and ask what is the point of writing the history of this field and how it should be approached. These questions are aimed not at methodology in the technical sense, but rather at the overarching purpose of the enterprise and the resultant proper organizing theoretical and orienting frame for its pursuit.

I argue that there is a strong drive in this subfield for producing scholarship within a frame of origin history. Origin history is geared toward uncovering the true and accurate meaning of a legal rule, concept, or practice at one discrete moment in the past. This may seem to be pure and simple history writing: discovering "what things were really like." Nevertheless, origin history, like all history writing, has a specific orienting frame. Its guiding principle is locating true and genuine meaning in a privileged past moment. Such perspective assumes constancy—that things are or at least should be as they were—or at

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1. *See* William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, *in* 1 Intellectual Property Rights: Critical Concepts in Law 72, § II (David Vaver ed., 2006).

the very least, takes little interest in change. The tacit claim of origin history is twofold: to explain and justify. The assumption is that the meaning discovered in the relevant past moment both offers a historical explanation and justifies present choices. Both are false, but my focus here is on the failure of the former.

Laying origin history aside, I discuss an alternative frame for writing intellectual property history: the, so called, new history of capitalism. Taking root in American history departments in the last two decades, this approach is fueled by a renewed interest in studying the history of economic relations with an emphasis on the new and distinct system of capitalism.[2] There is a close fit between this approach and historical research of intellectual property. This fit is rooted in the fact that the appearance of the field of intellectual property, a distinctly modern construct, coincided with and was an element of the rise of capitalism.[3] There is, however, also danger lurking in a common under–standing of several central features of the new history of capitalism approach. The danger is that overemphasis on contingency and constructivism is likely to lead to the conclusion that capitalism is simply whatever random collection of features that political struggles and historical accidents happened to produce. This, in turn, reduces history into description and denies it any explanatory force. By reducing a dynamic and developing set of relations into a constant thing, origin history reifies its object of study. By reducing it to a list of historical accidents, contingency history causes its object to disintegrate.

This essay concludes by suggesting that an attractive frame for studying the history of intellectual property is the history of capitalism shorn of its strong contingency drive. Within this frame capitalism, rather than seen as a random collection of accidental forms, supplies a structured and orienting framework. The rise of intellectual property was part of the creation of a new and distinctive set of social relations based on the commodity form and market exchange as a pervasive type of human interaction that radically transformed all aspects of society. I discuss three features that make intellectual property a particularly fitting, as well as somewhat distinctive, object of study within the organizing frame of the history of capitalism: the history of intellectual property understood as the study of the process of commodification applied to the unique subject matter of information; the structural role played by intellectual property in the development of capitalism; and intellectual property as an area where some of the naturalizing

2. My focus here is on the U.S. with respect to both the historiographical literature and the historical process of the rise of capitalism alluded to.

3. *See* Fisher, *supra* note 1, § II. A. (discussing that the transformation of the American economy contributed dramatically to the rise of intellectual property).

assumptions of a market society are prone to float to the surface and occasionally be challenged.

I. Origin History

Why write the history of intellectual property? A standard answer given to this question is the dramatic rise in importance of this field in recent decades.[4] In the modern "information society," this answer observes, informational resources of different kinds play an increasingly central economic, social, and cultural role. The legal field that governs the production and use of such resources, known as intellectual property, has experienced a matching upsurge in its importance. And as intellectual property rose to prominence as a socio-legal phenomenon, scholars in various academic disciplines, including economics, philos–ophy, and also history, have come to take greater interest in exploring it by deploying their various outlooks and methodological tools.[5] But this is no answer to the question posed here, which inquires not after a positive explanation for the rise of multidisciplinary interest in this area, but a purpose. The question, in other words, is: what does one seek to accomplish by researching, uncovering, and elaborating the history of the various legal fields that came to be known as intellectual property? And this leads to a second question that follows closely: given such a purpose, what is the preferred method or approach for writing this history?

Legal historians of intellectual property, especially those working in American law schools, are subject to a constant gravitational force applied to their work in the field. This force pulls toward scholarship that is focused on origin, constancy, or both. Origin orientation frames the purpose of history as discovering at some constitutive moment, hidden far in the past, the true and authoritative meaning of various present-day rules, concepts or practices within intellectual property law.[6] Was there common law copyright under eighteenth-century English common law?[7] Did juries decide questions of patent validity in

4. *Id.* § I.

5. *Id.* § II.

6. *See, e.g.*, Patrick Cronin, *The Historical Origins of the Conflict between Copyright and the First Amendment*, 35 Colum. J.L. & Arts 221, 221–222 & n.3 (2012) (noting that "[m]ost of the literature addressing the relationship between copyright law and the First Amendment approaches the question from either a doctrinal or an originalist perspective").

7. *See, e.g.*, Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 Wayne L. Rev. 1119, 1134 (1983); Ronan Deazley, *The Myth of Copyright at Common Law*, 62 Cambridge L.J. 106, 106 (2003) (arguing that the "House of Lords in *Donaldson* explicitly denied the existence of

England circa 1791?[8] What exactly did the framers of the U.S. Constitution mean in 1789 by the specific text of the intellectual property clause that empowers Congress to legislate in the areas of patents and copyrights?[9] And so on and so forth. There are two latent views mingled together in such a frame. The first is epistemological. It assumes that a historical explanation of something (a doctrine, an institution, a concept) is achieved by uncovering its true form or meaning at one particular moment, i.e. the moment of its origin. To explain what an injunction *is*, one has to focus on how seventeenth-century (or earlier) courts of equity understood and applied it. The second is prescriptive. It assumes that the original meaning or function of the thing enjoys authority, that it mandates how the thing *should* be. These views are further cashed out in two tacit assumptions that underlie origin inquiries in legal history. First it is assumed that the authoritative meaning of the relevant intellectual property rule or concept located in the deep past remained relatively constant. To be sure, some change is allowed, but this is usually relegated to the limited sphere of accommodating new technological, economic, or social circumstance while maintaining the underlying principle. Unless one could point at a sharp and direct change, usually in the form of explicit legislative "intervention." Second, it is assumed that this foundational past meaning is binding in the present simply by virtue of its existence:

any common law copyright"); H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 Conn. L. Rev. 1, 4–5 (2014).

8. *See, e.g.*, Mark A. Lemley, *Why Do Juries Decide if Patents are Valid?*, 99 Va. L. Rev. 1673, 1677 (2013); Brief for H. Tomás Gómez-Arostegui and Sean Bottomley as *Amici Curiae* in Support of Neither Party at 14–19, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365 (2017) (No. 16-712). This inquiry stems from the Supreme Court's position that the Seventh Amendment's right of trial by jury "is the right which existed under the English common law when the Amendment was adopted." Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). *See also* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (analyzing the question of a jury right in patent cases guided by the need "to preserve the substance of the common-law right as it existed in 1791").

9. *See generally* Edward C. Walterscheid, The Nature of the Intellectual Property Clause: A Study in Historical Perspective (2002) (analyzing contemporaneous debates regarding Article 1, Section 8). *See, e.g.*, Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754, 773–76 (2001); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution,* 52 Emory L.J. 909, 929–31 (2003); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1771 (2006).

how courts should analyze the grant of injunctions in patent cases is determined by what English courts of equity did in 1789,[10] and whether the Patent Office has power to engage in administrative review of patent validity hinges on the eighteenth-century practices of the Privy Council.[11] Within such a framework, history is the handmaid of a particular version of legal reasoning: it's role is to recover from the mists of the past the true and constant meaning of the law which holds authority over the present.

There are strong reasons for this pull toward history as a search for true and authoritative origin. Law is a field built on authority, often understood as content-independent reasons for applying a particular rule or reaching a certain result.[12] In a common-law system this authority is routinely identified with what the law or practice of courts about the law had been for a long period of time.[13] To be sure, the common law is also associated with incremental change, growth and adaptation. Nevertheless, the drive to portray legal decisions as based on "discovering" what the law had been for a long period (if not forever then since "time immemorial" or some other point sufficiently remote

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10. H. Tomás Gómez-Arostegui & Sean Bottomley, *The Traditional Burdens for Final Injunctions in Patent Cases* c.*1789 and Some Modern Implications*, 71 Case W. Rsrv. L. Rev. 403, 410–11 (2020). *See also* H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-At-Law Requirement*, 81 S. Cal. L. Rev. 1197, 1210–13 (2008). This inquiry is motivated by the Supreme Court's holding that "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)." Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting Armistead M. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)).

11. *See* Gómez-Arostegui & Bottomley, *supra* note 8, at 33–37. *See also* H. Tomás Gómez-Arostegui & Sean Bottomley, *Privy Council and* Scire Facias *1700–1883: An Addendum to the Brief for H. Tomás Gómez-Arostegui and Sean Bottomley as* Amici Curiae *in Support of Neither Party* 4 (last updated Nov. 6, 2017), http://ssrn.com/abstract=3054989.

12. H. L. A. Hart, *Commands and Authoritative Legal Reasons*, *in* Essays on Bentham: Studies in Jurisprudence and Political Theory 243, 261 (1982); *see also* Frederick Schauer, *Authority and Authorities*, 94 Va. L. Rev. 1931, 1935–40 (2008). *But see* P. Markwick, *Independent of Content*, 9 Legal Theory 43, 44–48 (2003) (arguing that legal reasons cannot be "content-independent").

13. *See* Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning 36 (2009) (observing in the context of precedent that "[l]aw characteristically faces backward").

in the past to bestow authority) remains strong.[14] Notwithstanding that central parts of intellectual property law are statutory, this common-law-induced search for authority in the distant past exerts its influence and indeed is often extended beyond the past practices of courts to those of legislatures and even administrative bodies.

In the U.S., the power of common-law-colored pursuit of past authority is greatly amplified by originalism. Originalism, in its narrow sense, is an approach to interpreting the Constitution.[15] It identifies the meaning of the constitutional text with its understanding by its drafters, ratifiers or a more inclusive group of people at the time it was originally given force.[16] Originalism has held sway over American constitutional thought for decades and has recently experienced a resurgence in its power.[17] The influence of the originalist impulse in the U.S., however, goes well beyond the constitutional realm. Intellectual property scholarship has its own domain of constitutional originalism centered around the so-called Intellectual Property Clause of the Constitution.[18] Yet within this field the originalist impulse informs and motivates a broader search for the true meaning of legal texts, concepts, and practices to be found at some foundational point in the past, be it the time of the ratification of the Constitution or the Bill of Rights, the legislation of an early statute, the assumed time of reception of English common law in American jurisdictions, or even the time of a foundational court decision. The overarching premise is that what law means and how it should be applied now must be traced to its meaning at that foundational past time.

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14. *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. Rev. 1, 4 (2009) (noting that proponents of originalism still consider it to be "dominant" and "inescapable").

15. The literature on originalism is vast. Some of the best comprehensive treatments are Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L.J. 1085 (1989), Dennis J. Goldford, The American Constitution and the Debate over Originalism (2005), and Berman, *supra* note 14.

16. There are many variants of originalism that differ from each other in various dimensions. *See* Berman *supra* note 14, at 8–16. The most common distinction is based on the source of the binding original meaning, with the standard positions identified being framers' intent, ratifiers' understanding, and public meaning. *See id.* at 9–10. These positions could be further broken down even with respect to this dimension.

17. Thus, it is not uncommon to find assertions, at least from proponents, that originalism is the leading approach to constitutional interpretation in the U.S. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611, 613 (1999) (claiming that "[o]riginalism is now the prevailing approach to constitutional interpretation").

18. U.S. Const. art. I, § 8. For examples of originalist studies of the clause's meaning see *supra* note 9.

The pull of these attitudes toward a true and singular past origin are further fueled by the drive to mobilize history in order to obtain immediate present results. At least within the field of intellectual property, the general interest of the legal community in the otherwise somewhat marginalized area of legal history surges in the opportune moments when an argument from history seems well poised to support this or that specific result in a particular high-stakes legal dispute of the day. Who would have thought, for example, that obscured eighteenth-century practices of the Privy Council in revoking letter patents would be a topic of general interest?[19] It would not, unless momentarily thought to be of potential consequence for a legal struggle over the constitutionality of a modern administrative procedure for reviewing the validity of patents.[20] Lawyers and judges often take the same attitude, suddenly recalling that "a page of history is worth volumes of logic"[21] when the particular page from the past, cast in

19. *See* Oren Bracha, Owning Ideas: A History of Anglo-American Intellectual Property 21–23, 21 n. 35 (June 2005) (S.J.D. thesis, Harvard Law School) (on file with author).

20. Oil States Energy Servs. LLC, v. Greene's Energy Grp., 138 S. Ct. 1365, 1377 (2018).

21. Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)). The point of the *Eldred* Court's quotation from Justice Holmes stands in considerable tension with another famous quip by him: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). Indeed, assuming that a legal norm's meaning at some past moment should determine its present application is a distortion of Holmes's views of the relationship between law and history. Even the views of the earlier Holmes, more sympathetic to the role of history in law, were colored by the German historical school and were quite different from the notion that past meaning must govern present outcomes. *See generally* Oliver Wendell Holmes Jr., The Common Law (1881). By the time of writing *The Path of the Law*, Holmes had become even more skeptical of history, assigning it the role of "the first step toward an enlightened scepticism" and providing his famous description of the relationship of law and history that sealed his turn to purpose: "[w]hen you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal." Oliver Wendell Holmes Jr., *supra*, at 469. For the changing views of Holmes on the role of history in law see Morton J. Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy 127 (1991) (emphasizing the change in Holmes's views of the role of history in law). *See also* David M. Rabban, Law's History: American Legal Thought and the Transatlantic Turn to History 260–68 (2013) (emphasizing the continuity between Holmes's early and later views, both

originalist terms, promises to support a present legal result at hand. This mobilization of history as a strategy for achieving a checkmate in concrete present legal disputes, especially in a legal environment saturated by the notions of the past as authority-conferring and original meaning, further orients legal history toward a search for true and constant meaning as it existed at a foundational historical moment.

What is wrong with this search of true origin as a guiding frame for the writing of legal history and the history of intellectual property in particular? There is nothing wrong with uncovering an accurate as possible picture of the law at a particular time. Any approach to legal history can benefit from this knowledge and some legal historians of intellectual property have engaged in painstaking and impressive archival research for piecing together such a picture.[22] To be of use, however, such information has to be an element of a broader account: an account that explains, or perhaps even helps prescribe, something. The trouble arises when the search for true origin to determine present legal analysis takes command as the overarching purpose of historical scholarship. On the prescriptive side, I will simply express deep skep–ticism about whether past practice or understanding can justify in any way present results.[23] Even if origin accounts could explain anything, one should not conflate that with justification. Focusing here on the explanatory ambitions of legal history: work produced under this framework of simply locating true origins at one static moment relies on a poor form of historical explanation. In fact, it yields no explanation at all.

One danger is that the yearning for retrieving authoritative meaning from the past may lead to flattening or even ignoring disagreement, contestation, and ambiguity, all of which are to be found in abundance in concrete historical moments. Thus, for example, mid-nineteenth-century Americans agreed that natural principles could not be owned[24] and that patents cover more than an exact mechanical

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of which subjected the role of historical analysis in law to purpose and policy evaluation).

22. *See, e.g.*, Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause*, 87 B.U. L. Rev. 689, 689 (2007); Gómez-Arostegui, *supra* note 7, at 414–28; Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 Yale L.J. 848, 848 (2016).

23. In other words, my skepticism is about whether originalism or quasi-originalism are desirable methods of legal analysis. *See generally* Berman, *supra* note 14 (arguing that the claims of originalism are too strong and that original intent can be considered without being treated as having absolute authority).

24. *See* Oren Bracha, Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909, at 261–65 (2016) [hereinafter Bracha, Owning Ideas]. *See also* Adam Mossoff, O'Reilly

design and protected the "principles of a machine."[25] Yet they fiercely disagreed on a fundamental level on the coverage and scope of patent ownership and engaged in decades-long debate over the ownership of principles.[26] Many lawyers and judges, however, turn to the past to find clear answers and therefore it is not uncommon for them to produce thin and sometimes distorted versions of legal history in support of a present agenda.[27] The good legal historian, even one working within the origin framework, can resist this temptation. In fact, the best scholar–ship in this vein often revisits previous monolithic accounts, by showing that certain aspects of intellectual property law assumed to be well settled and clear in particular historical moments were in fact heavily contested, undecided or subject to much ambiguity.[28]

A far greater and harder to evade danger is that of emphasizing stability, while downplaying or even ignoring change. This danger is

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v. Morse *and Claiming a "Principle" in Antebellum Era Patent Law*, 71 CASE W. RSRV. L. REV. 735, 744–46 (2020).

25. Whittemore v. Cutter, 29 F. Cas. 1123, 1124 (Story, Circuit Justice, C.C.D. Mass. 1813); *see also* BRACHA, OWNING IDEAS, *supra* note 24, at 256–58 (describing how Justice "Story was at the forefront of redefining the terms of the field" of intellectual property and "laid the foundation for a dramatic expansion of the concept of invention").

26. *See generally* BRACHA, OWNING IDEAS, *supra* note 24, at 261–73 (discussing the debate over the patentability of principles).

27. A good example is the argument made by some that the language in the 1909 Copyright Act that statutory damages "shall not be regarded as a penalty" means that such damages must be compensatory and not punitive and must be limited in accordance with this purpose. Copyright Act of 1909, Pub. L. No. 60–349, § 25(b), 35 Stat. 1075. *See, e.g.*, Opening Brief for the Defendant-Appellee/Cross-Appellant at 54, Sony BMG Ent. v. Tenenbaum, 660 F. 3d 487 (1st Cir. 2011) (Nos. 10–1883, 10–1947, 10–2052), 2010 WL 5623176; Betselot A. Zeleke, *Federal Judges Gone Wild: The Copyright Act of 1976 and Technology, Rejecting the Independent Economic Value Test*, 55 HOW. L.J. 247, 253 (2011); Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPY. SOC'Y U.S.A. 265, 293 (2009); Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1, 21 (2010). Some even argue that this limitation extends to statutory damages under the 1976 Copyright Act. *See* Opening Brief for the Defendant-Appellee/Cross-Appellant, *supra*, at 60. However, as persuasively showed by Tomás Gómez-Arostegui, when the relevant statutory language is understood in its proper historical context it is very unlikely that its meaning was precluding a punitive element to copyright's statutory damages. *See* H. Tomás Gómez-Arostegui, *What History Teaches Us About US Copyright Law and Statutory Damages*, 5 W.I.P.O. J. 76, 80–86 (2013).

28. *See, e.g.*, Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 959 (2007); Gómez-Arostegui, *supra* note 7.

almost inescapable with origin history because it is imprinted in its guiding principle. When one sets out to find original and constant meaning then that is what one is likely to find. What drops out of the picture is the myriad ways in which law, its meaning, and its social effect change, sometimes even when formal legal doctrines appear unaltered, and any causal explanation of this change. In other words, what is lost is the explanatory force of historical accounts. And what takes its place is a naturalization of one historical moment as a genuine or necessary state of affairs. Two examples may be helpful in demonstrating how suppressing change to find constancy may lead to serious distortions.

The fair use doctrine privileges certain uses of copyrighted works that otherwise would be infringing.[29] It is considered today the main and most important limitation on the scope of copyright.[30] While all acknowledge evolution and growth with respect to this doctrine, there is also a widespread narrative of constancy in this area.[31] In the U.S., the source of the doctrine is often traced to Justice Joseph Story's 1841 seminal decision in *Folsom v. Marsh*.[32] More informed versions point to the earlier eighteenth century English cases from which the doctrine evolved.[33] Either way, accounts of fair use are often laced with a remarkable assumption of stability stretching over three centuries. These accounts assume, as one commentator puts it, "substantial continuity between fair abridgment in the premodern era and fair use in the United States today."[34] This view is not without a grain of truth. The early English cases, while permitting various secondary uses of

29. *See* 17 U.S.C. § 107 (2018).

30. *See* 4 William F. Patry, Patry on Copyright § 10:1.50 (Thomson Reuters ed., 2020) (observing that "[f]air use is an important safety valve that acts as a bulwark against the monopoly power that inheres in an exclusive right"); Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990) (observing that fair use is "a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law").

31. *See, e.g.*, Leval, *supra* note 30, at 1105 (referring to decisions that have applied the fair use doctrine "for nearly 300 years"); Matthew Sag, *The Prehistory of Fair Use*, 76 Brook. L. Rev. 1371, 1393–1409 (2011); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (observing that "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copy–right's very purpose"); Threshold Media Corp. v. Relativity Media, LLC, 166 F. Supp. 3d 1011, 1020 (C.D. Cal. 2013) ("Fair use developed in English courts during the eighteenth century as an equitable exception to copyright protection.").

32. 9 F. Cas. 342 (Story, Circuit Justice, C.C.D. Mass. 1841).

33. *See infra* notes 34–36 and accompanying text.

34. Sag, *supra* note 31, at 1373.

works that fell short of complete reproduction, typically abridgments, also insisted that to avoid infringement, such uses must be "fair" or "bona fide."[35] In examining this question, English courts resorted to legal formulas and asked questions that appear very similar to those used in modern fair use analysis.[36] When Justice Story introduced the doctrine to American law in *Folsom* he drew on those formulas[37] and those later became the fundamental elements of the modern fair use doctrine, eventually codified in 1976.[38]

The trouble with the constancy narrative of fair use is that it obscures the process of deep transformation undergone by copyright of which the rise and development of the fair use doctrine in the U.S. was an important part.[39] During the nineteenth century the scope of copyright and, more importantly, the concept of copyright ownership had changed fundamentally.[40] In 1790 copyright still had its traditional institutional form of a narrow publisher's exclusive right to print and sell a specific book.[41] This underlying understanding was captured in the doctrinal formula that limited infringement to "copies" of the protected text including an additional penumbra of evasive reproduc–tion with colorable changes.[42] The focus on a restrictive notion of a copy meant that the baseline was that secondary uses, such as abridgments or translations, were allowed.[43] The traditional fair abridgment analysis pertained to the second element of evasive reproduction. Its guiding

35. *See, e.g.*, Burnett v. Chetwood (1721) 35 Eng. Rep. 1008, 1009, 2 Mer. 441; Gyles v. Wilcox (1740) 26 Eng. Rep. 489, 490, 2 Atk. 141; Dodsley v. Kinnersley (1761) 27 Eng. Rep. 270, 271, Amb. 403; Wilkins v. Aikin (1810) 34 Eng. Rep. 163, 164, 17 Ves. Jun. 422.

36. Sag, *supra* note 31, at 1393. Specifically, Sag identifies four "constants" of fair use connecting the eighteenth-century cases to the modern doctrine: case-by-case analysis, the amount taken, the effect of the use on the market of the copyrighted work, and the extent to which the secondary use constitutes a distinct and different work of authorship. *Id.* at 1393–1409.

37. *Id.* at 1376–77; *see also* R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses (Copyright)*, *in* Intellectual Property Stories 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

38. 17 U.S.C. § 107 (1976).

39. *See* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 Yale L.J. 186, 229–30 (2008) [hereinafter Bracha, *Ideology of Authorship*]; Bracha, Owning Ideas, *supra* note 24, at 166–70.

40. Bracha, Owning Ideas, *supra* note 24, at 166.

41. *See* Bracha, *Ideology of Authorship*, *supra* note 39, at 225–26.

42. Stowe v. Thomas, 23 F. Cas. 201, 206–07 (C.C.E.D. Pa. 1853); *see also* Bracha, Owning Ideas, *supra* note 24, at 146–49.

43. *See* Bracha, Owning Ideas, *supra* note 24, at 169–70.

principle was focused on the question of direct substitution in the primary market: one could not render the law's prohibition on making copies meaningless by reproduction with colorable change that would directly compete with the protected work.[44] By the beginning of the twentieth century a thoroughly different concept was on the rise, one under which copyright came to be seen as a broad right to extract value from all possible markets for an intellectual work which could take many concrete expressive forms.[45] Legal doctrine expressed this underlying concept: copyright now extended to any substantially similar reproduction of the work, including in various secondary markets, completely distinct from the work's primary one.[46] This broad right was restricted only by certain doctrinal safety-valves, of which the newly-shaped fair use analysis was a part.[47] The importation of fair use in the 1841 *Folsom* decision was an early stage of this process of abstraction and expansion. Through the craft of common law analysis Justice Story and later courts were pouring new wine into the eighteenth-century doctrinal bottles, even as they were studiously citing the same textual formulas.[48]

Emerging nineteenth-century fair use jurisprudence, in other words, was a vehicle for undermining the older framework of copyright embodied in the eighteenth-century fair abridgment cases.[49] When,

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44. *See id.* at 150–51.

45. *See id.* at 175–87.

46. *See, e.g.*, Maxwell v. Goodwin, 93 F. 665, 666–67 (C.C.N.D. Ill. 1899) (finding jury instruction correct in requiring substantial and material copying for a finding of piracy); Gilmore v. Anderson, 38 F. 846, 849 (C.C.S.D.N.Y. 1889) (holding no defense exists for copyright infringement that second work is written for different markets); Daly v. Palmer, 6 F. Cas. 1132, 1137–38 (C.C.S.D.N.Y. 1868) (same). *See also* Eaton S. Drone, A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States 385 (1879) ("The controlling question always is, whether the substance of the work is taken without authority.").

47. Bracha, Owning Ideas, *supra* note 24, at 165. The other safety valves alongside fair use were the requirement of substantial similarity and the idea expression dichotomy. *Id.* at 165–71, 174–75. In its early period as a safety valve mechanism, the fair use inquiry remained part of the copyright infringement test. *Id.* at 165–66. The formal legal understanding of fair use as an external restrictive principle and then as a defense, developed later in a process that extended well into the twentieth century. *See* Reese, *supra* note 37, at 288–90; L. Ray Patterson, Folsom v. Marsh *and Its Legacy*, 5 J. Intell. Prop. L. 431, 448–49, 452 (1998).

48. *See* Bracha, Owning Ideas, *supra* note 24, at 166.

49. *See* Bracha, Owning Ideas, *supra* note 24, at 169–70; *see also* Patterson, *supra* note 47, at 431–32; John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. Davis L. Rev. 465, 480 (2005).

however, the focus is on constancy, on the proposition that fair use is "as old as copyright itself,"[50] both the fundamental change of American copyright and the role played in it by the evolution and transformation of fair use disappear from sight. We are left with an empty dry pod of the remarkable similarity of form between the premodern and modern doctrinal formulas of fair use and miss altogether its substantive content: the actual radical transformation of American copyright.

Consider a second example. It used to be common to assert that the U.S. Patent system launched with the Patent Act of 1790[51] was an examination system.[52] Such assertions are occasionally still made in passing in more modern scholarship.[53] To be sure, many of those who describe the early patent regime as an examination system understand that its humble beginnings were very different from the extensive administrative framework of modern examination.[54] Nevertheless, the

50. Lauren Gorab, *A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation*, 87 FORDHAM L. REV. 703, 709 n.49 (2018).

51. Act to Promote the Progress of Useful Arts, ch. 7, 1 Stat. 109 (1790) [hereinafter 1790 Patent Act].

52. *See, e.g.*, M. F. Bailey, *History of Classification of Patents*, 28 J. PAT. OFF. SOC'Y 463, 465 (1946) ("When the act of April 10, 1790, authorized the grant of patents upon satisfactory evidence of novelty, utility, and invention, the examination system of patent grants was independently launched into the body of existing laws."); Frank D. Prager, *Examination of Inventions from the Middle Ages to 1836*, 46 J. PAT. OFF. SOC'Y 268, 289 (1964) (observing that the 1790 patent regime created "an examination practice similar to that of France."); H. Marans, *In the Beginning*, 39 J. PAT. OFF. SOC'Y 147, 148 (1957); Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 5, 26–27 (1966); John T. Roberts, *A Reappraisal of the American System of Patent Examining*, 48 J. PAT. OFF. SOC'Y 156, 161 (1966).

53. *See, e.g.*, Andrew P. Morriss & Craig Allen Nard, *Institutional Choice & Interest Groups in the Development of American Patent Law: 1790-1865*, 19 SUP. CT. ECON. REV. 143, 149 (2011) (the 1790 Patent Act created "an examination system"); Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law and Administration, 1787-1836 (Part I)*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 61, 63 (1997); George E. Hutchinson & Herbert H. Mintz, *William Thornton, Founder of Washington, D.C., Architect of the United States Capitol Building, and Superintendent of the Early United States Patent Office*, 5 J. FED. CIR. HIST. SOC'Y 45, 56 (2011); Megan M. La Belle, *Public Enforcement of Patent Law*, 96 B.U. L. REV. 1865, 1881 (2016). To be fair, these more modern writers who make such references typically do not engage in a deep inquiry with respect to the character of the early patent system and whether it was one of rights or privileges. Nevertheless, such casual references tend to perpetuate the assumption that the early patent system was based on examination in the modern sense.

54. *See, e.g.*, La Belle, *supra* note 53, at 1867–69 (describing the many layers of the current patent system).

resultant picture is that of continuity, only now with an unavoidable lapse: in 1790 the U.S. launched an examination patent system, rudimentary though it might have been, then in 1793 it switched to a registration system,[55] and finally in 1836[56] it went back to a more fully developed examination scheme.[57] A direct straight line connects 1790 to 1836 to the modern patent system, despite the fact that, in what one commentator describes as a "strange" development,[58] it fades away for a period of 43 years.

What is lost in this narrative is again the deep institutional and ideological transformation of patents not just between 1790 and 1836 but also beyond. In this case the relevant dimension is the transformation of privileges into rights. Calling the 1790 regime an examination system is a classic example of an anachronistic transplan–tation of the present in the past. To be sure, the 1790 Act created a three-person "Patent Board" and charged it with ascertaining that an invention or discovery is "sufficiently useful and important" as a precondition for lawfully exercising the power of granting a patent.[59] This, however, was part of a scheme characteristic of the English patent tradition since the 1624 Statute of Monopolies[60] and the seventeenth-century common law on the subject.[61] Premodern patents were privileges. They were overtly political acts of the crown that conferred discretionary monopolies on specifically chosen individuals under the official justification of promoting the public weal.[62] The concept of a patent "right" was foreign to this practice. The seventeenth-century struggle over the royal prerogative restricted the royal power. The

55. Act to Promote the Progress of Useful Arts, ch. 11, 1 Stat. 318 (1793).

56. Act to Promote the Progress of Useful Arts, ch. 357, sec. 7, 5 Stat. 117 (1836).

57. *See, e.g.*, Prager, *supra* note 52, at 289 (observing that in some respects the 1836 regime "returned to principles of 1790"); Michael Risch, *America's First Patents*, 64 Fla. L. Rev. 1279, 1282 (2012) (contrasting the 1793–1836 registration period with "two periods of examination" in 1790–1793 and post-1836); Morriss & Nard, *supra* note 53, at 144 (observing that American patent law "switch[ed] from an examination system to a registration system and back").

58. Prager, *supra* note 52, at 289.

59. 1790 Patent Act, *supra* note 51, at sec. 1.

60. Statute of Monopolies 1623, 21 Ja. 1, c. 3 (Eng.) [hereinafter Statute of Monopolies].

61. *See* Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 Loy. L.A. L. Rev. 177, 191, 194–200 (2004) [hereinafter Bracha, *Commodification*] (explaining the structure of early English patents as privileges under the common law and the Statute of Monopolies).

62. *See id.* at 198.

resultant legal framework allowed royal monopoly grants only in exceptional cases, designated patents for inventions as one of those exceptions and limited even such patent grants, most importantly through the requirement of novelty and a fourteen-year time cap.[63] The new legal framework created, however, neither patent rights nor a standardized set of entitlements granted under a patent.[64] The American colonies and later the states developed their own local variants of this patent privilege institution with ad hoc legislative grants taking the place of the royal prerogative.[65] Thus, it comes as no surprise, that in 1790 Americans who were steeped in these traditions created a republican version of the familiar royal privilege scheme.[66] The formal institutional features of the regime were firmly rooted in premodern patent privileges rather than modern patent rights. Unlike the modern Patent Office, the three high-ranking officials (Secretary of State, Secretary of War, and Attorney General) who formed the Patent Board were not directed to "examine" whether a petitioner satisfied a standard set of conditions that would then require the issuance of a patent as a matter of right.[67] The Board, just like the crown, had a discretionary power to grant a patent privilege when according to its judgment that served the public good, subject to various restrictions and requirements.[68]

As Kara Swanson shows in this volume, actual practice during the short period in which the 1790 regime existed was characterized by deep ambiguity.[69] While the formal regime was firmly rooted in the privilege tradition, the actual grant practices moved considerably toward a rights framework: the Board's work seems to have been focused on ascertaining the patentability requirements rather than assessing the social contribution of inventions and the trend was toward standard–

63. *See* Statute of Monopolies, *supra* note 60; *see also* Bracha, *Commodification*, *supra* note 61, at 197 (describing the Statute of Monopolies exception from its ban on monopolies for invention patents).

64. *See* Bracha, *Commodification*, *supra* note 61, at 192.

65. *See id.*, at 211–16; Camilla A. Hrdy, *State Patent Laws in the Age of* Laissez Faire, 28 Berkeley Tech. L.J. 45, 58–60 (2013); Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 Ariz. L. Rev. 263, 279, 282–83 (2016).

66. *See* 1790 Patent Act, *supra* note 51; Bracha, *Commodification*, *supra* note 61, at 222 (concluding that under the 1790 Patent Act, "the grant [of a patent] remained a matter of privilege . . . no enforceable individual right for a patent existed").

67. *See* Bracha, *Commodification*, *supra* note 61, at 220.

68. *See id.* at 220–27.

69. *See* Kara Swanson, *Making Patents: Patent Administration, 1790–1860,* 71 Case W. Rsrv. L. Rev. 784–85 (2020).

ization.[70] There were strong forces, both practical and ideological, pulling in this direction. The point here, however, is exactly that a narrative under which the 1790 regime was an examination system hides this dynamic and its importance from view: the process in which a premodern regime planted in a changing ideological and practical climate was subject to pressures and gradually began to change its orientation from privilege into right from the ground up.

The same applies to the registration period. When one no longer projects an examination framework—meaning a system of pre-certification of standard eligibility requirements for a patent right—onto the 1790 regime, the switch to a registration system no longer appears "strange." Issuance of patents upon satisfaction of the formal petition requirements and deferral of all substantive matters to ex-post institutional treatment[71] was the other readily available alternative at the time. In fact, this practice was reflective of the de facto situation in England during this period, where the privilege system degenerated to a practice of issuance on demand in most cases, but was not replaced by a patent rights scheme.[72] During the registration period in the U.S., the same process that started under the 1790 regime continued to unfold: a constant struggle between a privilege and a right understanding of patents and the gradual decline of the former. In this period, since, in the words of Jefferson, the U.S. following England "had given it to her judges," this process continued predominantly, but not exclusively, in the courts.[73]

The 1836 Patent Act[74] that launched the early form of modern examination and the administrative system to exercise it, was rooted

70. *Id.*; Bracha, *Commodification*, *supra* note 61, at 226.

71. In England this was the situation de facto since the late seventeenth century: patents were issued there largely on demand upon satisfaction of the relevant procedures and review happened ex post through revocation proceedings and validity challenges. *See, e.g.*, Christine MacLeod, Inventing the Industrial Revolution: The English Patent System 1660-1800, 46–47 (1988); Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 4)*, 78 J. Pat. & Trademark Off. Soc'y 77, 88 (1996). During this period the relative importance of the institutions in charge of ex post review changed with the role of the courts rising and that of the Privy Council declining. *See, e.g.*, E. Wyndham Hulme, *Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794 II,* 33 L.Q. Rev. 180, 181 (1917); Gómez-Arostegui & Bottomley, *supra* note 11 (discussing the Privy Council's role circa 1791).

72. *See* MacLeod, *supra* note 71, at 47.

73. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 The Writings of Thomas Jefferson, 336–37 (Andrew A. Lipscomb, ed., 1903).

74. Act to Promote the Progress of Useful Arts, ch. 357, 5 Stat. 117 (1836).

not only in the internal ills of the registration system[75] but in a new ideological environment. The 1836 Act was a product of a Jacksonian attack on special privileges and a demand for their replacement by standardized rights formally open to all.[76] The parallel between the new patent system and the Jacksonian shift from ad hoc corporate charters to general incorporation speaks volumes about the common ideological origins of the two as well as the intensity of the ferment and the depth of the change that took place at this time.[77] Thus the new 1836 regime was a more decisive move to a patent right framework. Even in the wake of this new regime, however, the struggle continued on a secondary level.[78] It would take decades more for the remnants of patents as privileges to be completely stomped out.[79] In short, once the distorting lens of continuity between 1790 and 1836 is removed, a central feature of the transition from premodern to modern patents that was previously obscured can come into sharp view, namely: the shift from privileges to rights.

The point of these two examples is not to reveal anything new to legal historians. Any serious student of the history of intellectual property is aware of the deep changes alluded to above with respect to the basic framework of the copyright and patent regimes. The point is that writing origin history about other aspects of intellectual property is likely to create the same distortions that are painfully apparent in these two examples. When the historian embarks on the lawyer's errand of finding the authoritative, constant meaning of the law at a distant point in time, the outcome will almost inevitably be a restrictive focus on that singular point in time, a narrow emphasis on a single rule or concept rather than broader understanding of its meaning within the system of which it was a part, and disregard for change and develop–ment. This is as true of the specific topics with which intellectual property historians are engaged with today as it is of the obvious examples of fair use and examination.

The history of intellectual property, however, was one of fundamental and deep change rather than constancy, especially in its formative era during the nineteenth century. There is a reason for that. The development of modern intellectual property was one facet of "the

75. *See* Report From the Hon. Henry Ellsworth to the Secretary of State, and transmitted to the Select Committee on the Patent Laws, *reproduced in* 1 J. AM. INST. 577, 578–81 (1836).

76. *See* Bracha, *Commodification*, *supra* note 61, at 236.

77. BRACHA, OWNING IDEAS, *supra* note 24, at 210.

78. *Id.* at 215.

79. *Id.* at 215–16.

great transformation:" the rise of modern capitalism.[80] At its infancy the U.S. was, largely, a pre-capitalist society.[81] By the same token, late eighteenth-century intellectual property still consisted of institutional forms and legal concepts forged in a pre-capitalist era of guild regulation and state patronage as imported from England and adapted in the colonial context. To be sure, in various ways intellectual property was starting to emerge beyond those traditional forms, but that change was just beginning. Once this is kept firmly in mind, it becomes apparent how strange it is to look for the timeless, authoritative meaning of the law at an early moment of pre-capitalist times and write static history that is focused in a single-minded way on such a point in time. In the remainder of this essay, I discuss what it might mean to write the history of intellectual property as part of the history of the fundamental transformation in which the emergence of this field was embedded: the rise of capitalism.

II. New History of Capitalism

Is there an alternative to writing the history of intellectual property in search of stable past meaning to resolve contemporary questions? One can find a variety of approaches and perspective within what has become a rich body of work in this area. Some scholars apply the lens of "cliometric" economic history, applying economic theory to episodes from the history of intellectual property to both explain these episodes and test the theory.[82] Others write contextual, intellectual history, elaborating the development of central concepts in the field by reference to more general intellectual trends in society.[83] Still others treat

80. Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time, at xix, 47 (Beacon Press 2001) (1944).

81. *See* James A. Henretta, The Origins of American Capitalism: Collected Essays, at xxi (1991) (observing that "there was a transition to capitalism during the generation following the American Revolution").

82. B. Zorina Khan, The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920, at 18 (2005); *see, e.g.*, Naomi R. Lamoreaux, Kenneth L. Sokoloff & Dhanoos Sutthiphisal, *Patent Alchemy: The Market for Technology in U.S. History*, 87 Bus. Hist. Rev. 3 (2013); Petra Mosser, Pirates and Patents: An Economic History of Intellectual Property and Innovation (forthcoming).

83. *See generally, e.g.*, Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 Hastings L.J. 1255 (2001) (discussing the trend of patent from royal privilege to common-law property right); Steven Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 Colum. J.L. & Arts 139 (2008) (discussing an attitude shift towards competition during the New Deal period); Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, 27 Cardozo Arts & Ent. L.J. 321 (2009)

intellectual property history as social history by focusing on the development of related social and institutional practices such as the emergence of professional fields or the actual practice of lower courts, sometimes taking a quantitative approach.[84] Meanwhile, critical history tries to uncover and historicize entrenched, taken for granted, ideological assumptions constitutive of the field.[85] I would like to focus here, not so much on an alternative to these various approaches, but on an overarching organizing frame within which each of those approaches and others can be pursued. This frame is writing the history of intellectual property as part of the history of capitalism.

Perhaps the most important recent development in American historiography is the rise of the "new history of capitalism."[86] The label is applied to the growing body of work done in the wake of resurgence of interest in the history of the economy. While economic history never disappeared from history departments, for a long period beginning in the 1970s interest in it dwindled.[87] Economic history largely migrated

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(discussing the change in conceptions of originality in copyright law); Barton Beebe, Bleistein*, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 Colum. L. Rev. 319 (2017) (discussing the revisionist account of a 1903 Supreme Court case and its decisive and damaging influence on modern copyright law).

84. *See generally, e.g.*, Kara W. Swanson, *The Emergence of the Professional Patent Practitioner*, 50 Tech. & Culture 519 (2009) (discussing the emergence of patent practice as a new occupation and field); Beauchamp, *supra* note 22 (discussing the "first patent litigation explosion" by drawing on data from two federal courts from 1840 to 1910); Will Slauter, Who Owns the News?: A History of Copyright (2019) (discussing the evolving attitudes toward viewing news as intellectual property).

85. *See generally, e.g.*, Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author*,*'* 17 Eighteenth-Century Stud. 425 (1984) (discussing the development of the meaning of "author"); Mark Rose, Authors and Owners: The Invention of Copyright (1993) (discussing the change of relationship between authorship and ownership); Brad Sherman & Lionel Bently, The Making of Modern Intellectual Property Law: The British Experience, 1760–1911 (1999) (discussing the gradual development of intellectual property law in Britain); Bracha, Owning Ideas, *supra* note 24 (discussing the American development of the concept of Intellectual property); Alain Pottage & Brad Sherman, Figures of Invention: A History of Modern Patent Law (2010) (retracing the emergence of the conception of the invention in modern patent law).

86. *Introduction, in* American Capitalism: New Histories 4–5 (Sven Beckert & Christine Desan eds., 2018).

87. Sven Beckert, *History of American Capitalism*, *in* American History Now 316–17 (Eric Foner & Lisa McGirr eds., 2011).

to economic departments,[88] while business and labor historians found themselves in increasingly narrow, cabined subfields as the core interest of historians shifted toward social and then cultural history.[89] This trend has gradually changed, however, in the last two decades.[90] The reversal was spurred by both external developments—such as waves of economic upheavals experienced on a global scale, concerns about rampant inequality or sustainability,[91] and the realization that declaring "the end of history" with respect to political and economic organization may have been premature[92]—and ones more internal to the history discipline.[93] The result is a renewed broad interest in studying the history of the economy with an emphasis on the origins and development of the unique system of capitalism and a rapidly growing body of work in this vein.[94] This trend is too new and the commitments, assumptions and methodologies of scholars working within it are probably too diverse to refer to it as a "school." One may identify, however, certain general characteristics that are loosely shared by the work comprising this new wave of the historical study of capitalism.

The first and most obvious feature of the new histories of capitalism is the fundamental one already mentioned: a renewed focus on the economy as a central object of historical study and a major explanatory force.[95] Underlying this trend is a growing sense that capitalism is "too important and complex a subject to be left to economists."[96] Put

88. Ron Harris, *The Encounters of Economic History and Legal History*, 21 L. & Hist. Rev. 297, 301 (2003); American Capitalism, *supra* note 86, at 7; Beckert *supra* note 87, at 316.

89. American Capitalism, *supra* note 86, at 7–8; Beckert, *supra* note 87, at 316–17.

90. American Capitalism, *supra* note 86, at 1.

91. *Id.* at 2; Beckert, *supra* note 87, at 315.

92. Francis Fukuyama, The End of History and the Last Man, at xi (1992). For Fukuyama's declaration being premature, see American Capitalism, *supra* note 86, at 2.

93. American Capitalism, *supra* note 86, at 1–2.

94. *Id.*

95. Jefferey Sklansky, *The Elusive Sovereign: New Intellectual and Social Histories of Capitalism*, 9 Mod. Intell. Hist. 233, 234 (2012) (observing that "capitalism has reemerged at the center of a rising generation of scholarship").

96. Richard F. Teichgraeber III, *Capitalism and Intellectual History*, 1 Mod. Intell. Hist. 267, 268 (2004) (quoting Jerry Z. Muller, The Mind and the Market: Capitalism in Modern European Thought, at ix (2002)). At the same time, one could argue that the subject is also too important and complex to ignore economists altogether. *See generally* Eric Hilt, *Economic History, Historical Analysis, and the "New History of Capitalism,"* 77 J.

differently, the core insight here is that the economic sphere is central for understanding human society and its development, and that it exists in symbiosis with and sends its tentacles into all other social spheres.[97] This focus on the economy and its centrality is accompanied by foregrounding the fact that the modern era is marked by the rise of a new mode of organizing economic life that embodies social relations radically different in their structure and dynamics compared to any–thing else in human history.[98] The assumption here is that capitalism has its own distinctive "logic" or set of dynamics, that within human history are new and transformative. This double focus on economic life and on uncovering the structure of capitalism as a radically new and distinct system is what gives the new trend both its central orientation and title.

A second feature, following closely on the heels of the previous one, is an emphasis on denaturalizing the market.[99] The commitment here is to push against a strong tendency generated by immersion in the practices of a market society to project these practices as natural, universal, or inevitable for any human society, a tendency that is reflected in scholarship. Perhaps the most famous version is Adam Smith's stipulation of "a certain propensity in human nature . . . to truck, barter, and exchange one thing for another."[100] Such assumptions about human nature usually lead to two versions of the inevitability of the market society: either it is assumed to always having been there from the dawn of human society or it is seen as the outcome of a necessary and linear economic and social development toward more

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Econ. Hist. 511 (2017) (arguing in support of a collaboration between the fields of economic history and history of capitalism).

97. *See* Michael Zakim & Gary J. Kornblith, *Introduction: An American Revolutionary Tradition*, *in* Capitalism Takes Command: The Social Transformation of Nineteenth-Century America 1–2 (Michael Zakim & Gary J. Kornblith eds., 2012) (observing that capitalism "reached far beyond the purview of capital, and even of the economy"). Beckert, *supra* note 87, at 319 (arguing that "historians of capitalism see the 'economy' as a category that cannot be isolated analytically or historically from the rest of American history"). Note that nothing in this realization requires accepting an orthodox Marxist distinction between an economic "base" that determines all other surface phenomena in society's "super–structure."

98. *See* Zakim & Kornblith, *supra* note 97, at 4 (arguing that "only in the nineteenth century did these societies with markets became market societies").

99. *See* Beckert, *supra* note 87, at 319–21 (discussing the new historians of American capitalist adopting denaturalizing approaches that emphasize the social, economic, and political influences).

100. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 16 (1776).

complex forms of market exchange.[101] New history of capitalism scholars start with the opposite premise that "there was nothing natural, preordained, or predictable"[102] in the rise of the market-based society. Indeed, some of them see the naturalization of the market, most prominently by neoclassical economics, as the source of the impulse by historians to reclaim the study of the economy.[103] Such historians denaturalize the market by historicizing it. By closely chronicling the emergence of the specific social relations of capitalism they show that these relations neither "came in the first ships"[104] nor were the outcome of an inevitable, linear development.

The focus on capitalism as a distinct economic system of recent vintage leads directly to a third common feature: an emphasis on the close historical study of what might be termed the "technologies" of capitalism.[105] Capitalism arose through the development of various new practices that together created a new social order. Debt and mortgages, the world of finance, incorporation, risk management, accounting and filing practices, to name just a few.[106] These constituted the bones and muscles of a new form of market society. The new history of capitalism is engaged in the cataloging and close study of these practices, the process of conflict, struggle, and adaptation from which they emerged and their consolidation into what we know today as "the market."[107]

Fourth, the new history of capitalism emphasizes the role of the state in constituting economic life.[108] This emphasis is a counterreaction to classical liberalism's representation of the economy as a sphere of the spontaneous private action of individuals free from state "intervention" unless such intervention is imposed by "external" governmental

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101. *See* American Capitalism, *supra* note 86, at 6.

102. Zakim & Kornblith, *supra* note 97, at 7.

103. *See* American Capitalism, *supra* note 86, at 6; *see also* Beckert, *supra* note 87, at 315–16.

104. Carl N. Degler, Out of Our Past: The Forces that Shaped Modern America 2 (1959).

105. *See* Zakim & Kornblith, *supra* note 97, at 7.

106. *Id.*

107. *See id.* at 7 (aiming to offer an "inventory of means by which capitalism took command of society"); Sklansky, *supra* note 95, at 238 (describing how historians examine the "foundational role" of the emergence of various financial methods and institutions).

108. *See* Beckert, *supra* note 87, at 322; Sklansky, *supra* note 95, at 247; Stefan Link & Noam Maggor, *The United States As A Developing Nation: Revisiting The Peculiarities Of American History*, 246 Past & Present 269, 298 (2020) (referring to "the deconstruction of received dichotomies between state policy and market development").

regulation.[109] Historians writing in this vein are committed to, some–times even obsessed with, showing that governmental action, rather than non-existent or being an external intervention, is a precondition for a capitalist market.[110] Government, they stress, creates and maintains the very institutions—such as property and contractual rights, a medium of exchange, financial and credit arrangements—that are the very fabric and lifeblood of the market.[111] One historian comments, with awe that cannot but seem amusing from the perspective of an American law school, that: "Even property rights, the quintessential foundational category of capitalism . . . are conventions formed by rules that are often articulated by the law, and thus the state."[112] Two sources of inspiration lead in this direction. One is the school of American political development in political science[113] and the more general trend of "bringing the state back" in social sciences.[114] The other comes from American legal history's immersion in the legal realist attack on the public/private distinction and its insistence that the supposedly private sphere is constituted through and through by governmental action in the form of law.[115] Together the two converge on one message: governmental action through law constitutes markets and therefore the latter cannot be studied or understood without the former.

Fifth, a stress on governmental action as constitutive of markets leads directly to a focus on the political sphere.[116] If governmental action constitutes the market then who controls governmental action in what way becomes an essential element of economic history. The insistence here is on politicizing the economy by showing that the institutions

109. Link & Maggor, *supra* note 108, at 5.

110. *See* Ajay K. Mehrotra, *A Bridge Between: Law and the New Intellectual Histories of Capitalism,* 64 Buff. L. Rev. 1, 15 (2016).

111. *See id.* at 14–15.

112. Beckert, *supra* note 87, at 319.

113. *See id.* at 322.

114. *See generally* Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, *in* Bringing the State Back (Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol eds., 1985) (discussing the return of "the state" into the discourse of social scientists).

115. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470, 474–75 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L. Q. 8, 12 (1927); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 Mich. L. Rev. 253, 254 (1947).

116. *See* Mehrotra, *supra* note 110, at 10; Link & Maggor, *supra* note 108, at 300 (referring to putting "politics and contestation squarely at the centre" of the analysis of capitalist development).

that constitute the market emerged not through a process of internal organic growth, but rather through the power struggles, strategies, compromises, and vagaries of the political process.[117] Hence, telling the story of the rise of capitalism requires devoting as much attention to politics as to economic institutions as well as an insistence on the inseparable connection between the two.[118]

There is much that is promising in the approach of the new history of capitalism as a framework for exploring the history of intellectual property. Before turning to that, however, some of the potential pitfalls of this approach must be highlighted in order to be avoided. The chief danger lies in the way that many historians working within this frame have understood the two last features of the role of the state and of politicizing the economy, and the way that this understanding can cause the core motivation of studying modern capitalism to unravel.

Starting with the emphasis on the role of government and law in constituting the market, these themes certainly have their proper role. A healthy reminder of the implausibility of a nineteenth-century version of liberalism in which the economy is conceptualized as a sphere of spontaneous private activity untouched by government involvement unless artificially imposed is useful.[119] More importantly, no account of capitalist institutions can be complete without an understanding of government's role in underwriting and maintaining these institutions, which applies to anything from currency to credit systems. By the same token, it is important to give law its due attention as the "substance" from which these institutions are actually made: market exchange, finance or debt (for example) are all constituted by law and operate through complex legal plumbing.[120] Understanding those institutions requires explaining their internal mechanics.[121] The trouble begins when proper attention to the role of government and law becomes an

117. *See* American Capitalism: New Histories, *supra* note 86, at 5 (referring to "markets as politically engineered").

118. *See* Beckert, *supra* note 87, at 319 (arguing that "states and markets, politics and business, cannot be understood separately from one another" and observing that "the rules of exchange are set politically" and are "influenced by the shifting power relations of various social groups").

119. Whether this assumption is pervasive today is a different question. Arguably neoliberalism is different from classical liberalism exactly by accepting the basic insight of state-created institutions as constituting the market and then proceeding to effortlessly assume that a particular set of market institutions are clearly preferable.

120. *See* David Singh Grewal, *The Laws of Capitalism*, 128 Harv. L. Rev. 626, 658 (2014) (reviewing Thomas Piketty, Capital in the Twenty-First Century (2014)).

121. *Id.* at 659 (calling upon scholars to "consider the way that law structures not just the particular bargains in capitalism . . . but also the broader social and political setting of the market").

overemphasis. At the end, capitalism is a set of social relations between people. A sole focus on what government does or does not do may distract from what should be the core question: what kind of social relations does capitalism institute? Things get worse when a sole focus on what the state does transforms into the proposition that capitalism is whatever the state does. At this point the initial motivating purpose of the inquiry may be lost altogether. To see how, consider the role of politics in the analysis.

As with the role of the state, politics deserves its proper attention in the study of both how capitalism came about and how it operates. The trouble begins once the guiding principle shifts from understanding the role of politics in the rise and operation of capitalism to the notion that capitalism is whatever hodgepodge set of institutional details that the power struggles of various interests happened to produce at a given moment. The fast transition here is from understanding markets as "politically constituted" to guiding one's inquiry with the proposition that "the market" is not "a discrete phenomenon."[122] Capitalism, in other words, loses any distinctive content or logic that could be analytically tracked since "markets are malleable and come in many forms because of variations in legal institutionalization" which are themselves the outcome of politics.[123] And from there are "no general laws of capitalism" the way is very short to "there is no such thing as capitalism."[124]

This unfortunate orientation runs backward to infect each of the features discussed above until it causes the basic driving force of historically explaining capitalism to unravel. If the market is any random set of arrangements generated by politics, then it is everything and anything the state or the law do about the market in a particular historical moment. The "technologies" of capitalism are, in turn, simply a haphazard laundry list, rather than a structured set of relations with a distinctive logic. Denaturalization, instead of rejection of the notion that capitalism is grounded in human nature or some timeless, universal feature of human society, becomes contingency, meaning simply the assertion that markets are "indeterminate" and can consist of any set of institutional arrangements. And at the final stage, an overemphasis of the—in itself correct—theme of law as constituting the market through politics ends up consuming the object of study and the core motivation of explaining the distinctive structure and dynamics of capitalism. If there is no such thing as capitalism, then what logic and dynamics is there to explain? And how can such an account explain anything? From this perspective capitalism is transformed into an

122. American Capitalism: New Histories, *supra* note 86, at 10.

123. Samuel Moyn, *Thomas Piketty and the Future of Legal Scholarship*, 128 Harv. L. Rev. F. 49, 53 (2014).

124. *Id.* at 55.

overcrowded warehouse (or many of them) where an endless multitude of dusty artifacts are piled in disarray. The history of capitalism, in turn, becomes a lengthy inventory of those artifacts with its only explanatory aspect being a chronicle of the struggles of those who dumped the artifacts there.

The way to avoid this disintegration is to resist the contingency urge that reduces capitalism into an endless collection of random and shifting institutional details. This does not entail the other extreme of insisting on the existence of universal "laws of capitalism"[125] understood as a uniform and stable form of social organization. The point is that to be explained, capitalism should be understood as a set of relations involving a distinctive structure (rather than anything goes) which at the same time is generative and dynamic, meaning capable of developing over time and assuming different variations in different places or moments.

III. Intellectual Property Within a History of Capitalism Framework

I have argued that to achieve fruitful historical analysis capable of generating explanatory knowledge two extremes should be avoided. One, of which origin history is a pristine example, is reification. Reification is the reduction of dynamic human relations into a monolithic and static object.[126] Origin history reifies by reducing dynamic legal relations into an unchanged essence that is supposedly revealed in the past. The second extreme is disintegration. A common understanding of the history of capitalism threatens to turn into disin–tegration by focusing on contingency that reduces the object of study to a random collection of accidental and malleable features. Neither reifying origin history nor contingency disintegration can supply a historical explanation. The former is focused on uncovering a uniform and stable object unchanged through time and thereby disables the very heart of historical explanation which is about change and development. The latter with its indeterminacy orientation allows only surface description, rather than explanation. The goal should be avoiding both of these extremes.

125. *Id.* (arguing that "those interested in bringing legal analysis to the moral and analytical problem of inequality . . . might be most interested in a style of analysis that broke with" the premise of general laws of capitalism to be discovered).

126. *See* Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. Cal. Interdisc. L.J. 401, 401 (2000). See generally 2 Georg Lukács, *Reification and the Consciousness of the Proletariat*, in History and Class Consciousness 83 (Rodney Livingstone trans., 1971) (1968).

What would the historical study of intellectual property as part of the history of capitalism that avoids these two dangers look like? How can one study intellectual property in a way that allows for development through time as well as variation in a given period but without a strong indeterminacy orientation that makes any explanation disappear as so much sand in one's hand?

As a starting point for such an undertaking, one needs an underlying conception of capitalism.[127] Here it is possible to offer only an extremely bare-bones version of such a conception, but one that may provide, nonetheless, some orientation in understanding what is meant by the "logic" of capitalism within which the history of intellectual property should be located.[128] Capitalism is an ensemble of social relations. Indeed, it is *the* distinctive social relation of modernity. Within human history, it is a new and distinctive system of social relations that first appeared under the unique circumstances of seventeenth-century England and spread and developed from there.[129] The basic constitutive unit within this system is the commodity form: the treatment of all human goods as subject to market exchange and therefore stripped from all their unique qualities and reducible to an assumed abstract and commensurable measure of value.[130] At the heart of the rise of capitalism was a process of commodification: the subjection of a growing array of goods to the commodity form through the practice of market exchange. It was also a process of a rise of markets in which markets became increasingly more generalized and disembedded.[131] As markets became generalized, people increasingly had to resort to market exchange to sell what they produce and obtain

127. Offering such a conception of capitalism to orient its study is, to some extent, swimming against the current. There is a strong trend of assuming that conceptualizing capitalism is impossible or purposefully avoiding it in the name of scholarly pluralism. *See, e.g.*, *Interchange: The History of Capitalism,* 101 J. Am. Hist. 503, 509 (2014) (observing that "no one [today] is clear about what capitalism is"); American Capitalism: New Histories, *supra* note 86, at 4–5 (arguing that "it has been an advantage, not a defect, to consider capitalism inclusively" but also conceding that it is possible "that the new history of capitalism eventually coalesces around a particular definition"); Moyn, *supra* note 123, at 55 ("[T]here is no such thing as capitalism.").

128. The extremely compact conception of capitalism offered here is based on extensive conversation with Talha Syed to whom I am indebted. The responsibility for the content is mine alone. See generally Talha Syed, *Capital as a Social Relation* (draft manuscript on file with author).

129. *See* Ellen Meiksins Wood, The Origin of Capitalism: A Longer View 106 (1999).

130. *See* Karl Marx, Capital: A Critique of Political Economy, Volume One 125 (Penguin Books ed. 1990).

131. *See* Polanyi, *supra* note 80, at 61.

everything else, including necessities.[132] Markets became dis-embedded as economic relations were no longer directly grounded in other social relationships or interests, left to their own logic and resulting in the "running of society as the adjunct of the market" rather than the other way around.[133] Generalized and dis-embedded markets unleashed their own dynamics: human action oriented toward the production and accumulation of "profit"—meaning abstract value—for the purpose of accumulation of profit.[134] As this emergence of the exchange relation–ship as "a dominant form of social intercourse"[135] unfolded in nineteenth-century United States, the result was no less than a revolution of all aspects of life and society, within but also far beyond "the economy."[136] Everything including government, the social order, the family and even the physical landscape of the land changed radically as part of this process. The main thrust of the generalization and dis-embedding of markets was thus "horizontal:" all members of society were caught in the unraveling and recreation of social relations and in the new logic imprinted in them. Yet there was also an interlaced "vertical" thrust: the rise of markets led to the accumulation of capital, the emergence of wage labor, and other forms of domination[137] resulting in increasing disparities of wealth and power.[138]

How can we locate the history of intellectual property within this frame? I discuss here three elements of understanding the evolution of intellectual property as part of the rise and development of capitalism, not meant to be exhaustive.

Most fundamentally, the history of intellectual property should be understood as part of the process of commodification. The appearance of the set of legal relations we call today intellectual property was, first and foremost, part of the relentless and all-encompassing process of expanding the commodity form, as applied to various kinds of infor–mation. This process happened on the ground in changing practices of

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132. *See id.*

133. *Id.* at 60. That is not to say, of course, that the market is or ever was a spontaneous realm not dependent on various institutions including those created and maintained by the state.

134. *Interchange*, supra note 127, at 511–12.

135. Zakim & Kornblith, *supra* note 97, at 1.

136. *Id.* at 1–2.

137. Most importantly slavery which new historians of capitalism insist must be understood as a central part of this system rather than its antithesis. *See* Beckert & Desan, *supra* note 86, at 325.

138. Critics of capitalism usually focus solely on its "vertical" dimension while defenders restrict their attention to the "horizontal" one. Often missed is how the two are closely intertwined. *See* Talha Syed, *The Vertical and Horizontal in Capitalism* (forthcoming, on file with author).

increasingly subjecting information to general market exchange. But it also involved a conceptual change—a new specific way of understanding information. Both the practice and the concept had a distinctive structure consisting of three different conceptual elements. First, to become a commodity, information had to become a "thing" or an object. In premodern times, various kinds of information were understood in fluid terms as living human knowledge, a dynamic process, or even as an aspect of persons.[139] Before information could become an object of market exchange, a thing to be bought and sold, this dynamic character had to be wrestled to the ground—it had to become an object. The first phase of creating intellectual property then was constructing the relevant informational objects. Second, these informational objects had to be "first transformed into bars in the head and in speech before they are exchanged for one another."[140] In other words, informational objects had to be understood as reducible to their abstract and commensurable exchange value and as produced in order to extract this value from any possible market. A third and last aspect was the question of drawing borders: what kinds of information were to be subjected to this form and what kinds had to be left outside it? The distinctive structure of commodified information gradually came to be embedded in the applicable legal forms. It is this embodiment of the commodity form as applied to information which distinguishes the unique phenomenon of intellectual property. Information was far from completely unregulated prior to the appearance of intellectual property, as attested by many premodern institutional arrangements such as guild regulation of craft secrecy, restrictions on the immigration of skilled craftsmen, patronage,

139. *See, e.g.*, Edgar A.J. Johnson, *The Mercantilist Concept of "Art" and "Ingenious Labour*," 41 Econ. J. 234 (1931), https://academic.oup.com/ej/article-abstract/41/Supplement_1/234/5267121?redirectedFrom=fulltext [https://perma.cc/7UBU-L8RK]; Pamela O. Long, *Invention, Authorship, "Intellectual Property," and the Origin of Patents: Notes toward a Conceptual History*, 32 Tech. & Culture 846, 870 (1991) (describing how the concept of intellectual property emerged out of medieval guilds' attitudes toward craft knowledge of their members); Sherman & Bently, *supra* note 85, at 47 (arguing that in its premodern form the intangible "was thought of . . . [as] a form of action or performance"); Carlo Marco Belfanti, *Guilds, Patents, and the Circulation of Technical Knowledge: Northern Italy during the Early Modern Age*, 45 Tech. & Culture 569, 570–71 (2004) (explaining that in the early modern era the regulation of the circulation of technical knowledge was closely related to controlling the movement of people). *See generally* Pamela O. Long, Openness, Secrecy, Authorship: Tech–nical Arts and the Culture of Knowledge from Antiquity to the Renaissance (2001) (discussing the culture of authorship with a specific focus on intellectual property).

140. Karl Marx, The Grundrisse: Fundamentals of a Critique of Political Economy 72 (2015), (https://www.marxists.org/archive/marx/works/1857/grundrisse/) [https://perma.cc/F9VW-BVRE].

and censorship.[141] What separates these and many other forms of regulating the production and dissemination of information from the later-coming intellectual property is exactly the commodity form.

Commodification, then, is a powerful concept for understanding the development of the distinctly modern phenomenon of intellectual property. At the same time, commodification was neither a preordained uniform structure nor an unchanging, static one once appearing. The process of development was rife with contestation and negotiation, rather than the progressive extension of a readymade structure. Each of the three conceptual dimensions of commodifying information gave rise to many puzzles such as what exactly was the object of exchange, how was its value to be measured, what exactly could be owned or bought and sold, and what constituted interference with property rights. There was also friction with deeply held ideological commitments, most prominently various forms of aversion to ownership of knowledge. And often there was resistance from various interested groups who resorted to both the conceptual loose ends and countervailing ideology. The result was specific and unique patterns of commodifying information, patterns that were not identical in all contexts or places and remained dynamic over time. This history accounts for both the conceptual unity and the internal diversity of the area of intellectual property: the field's overarching principle is the commodification of information while its different subfields are marked by the different patterns of commodification as those developed historically (with further variation within each field). The development of these patterns is a rich vein to be mined by historians. And the story to be told is threefold, encompassing the emergence of: the general, distinctively modern, framework of commodifying information, i.e., intellectual property; the carving out of the general sub-areas within it; and also the phenomenon of incomplete commodification. The latter refers to the fact that, in some contexts, ideological resistance and interest groups' tussles produced incomplete commodification: the demarcation of certain kinds of information as residing outside the

141. *See, e.g.*, Lyman Ray Patterson, Copyright in Historical Perspective 20–27 (1968) (discussing the government's involvement in controlling what was published by printing presses); Elizabeth L. Eisenstein, The Printing Press as an Agent of Change 636–82 (1979) (examining external regulation of scientific publications through sponsorship and censorship of religious institutions); Rose, *supra* note 85, at 16–17 (analyzing the patronage system and the printing privileges among guildsmen). *See generally* Long, Openness, Secrecy, Authorship, *supra* note 139 (exploring the history of intellectual property up to the Renaissance); Joseph Loewenstein, The Author's Due: Printing and the Prehistory of Copyright (2002) (examining the institutional and cultural history of printing and discussing the origins of copyright).

domain of commodification.[142] Some examples of this include news,[143] basic scientific research,[144] and what came to be known as "moral rights" that in the continental tradition emerged as extra-territorial islands deliberately designed to insulate certain human interests from market commodification.[145] Again, these different patterns of incomplete commodification, their negotiation and dynamic shift over time, as well as their geographical migration and cross-influence, holds promising prospects for historical exploration.

A second element of situating the history of intellectual property within the history of capitalism is uncovering the development of how this area came to play a constitutive role in important junctures of the structure of modern economic relations. The rise of intellectual property was not limited to the creation of a mechanism for the market exchange of information as a consumer good. In various ways, intellectual property rights acquired a deeper structural role in the organization of economic relations. As Michael Zakim observes: "The knowledge economy is not . . . a 'post-industrial,' and certainly not a 'post-capitalist,' development."[146] In other words, the growth and transformation of business in the nineteenth century was, in fact, the first information age with "the capital of mind" playing a major role in

142. *See* Oren Bracha, *Incomplete Commodification: Book Review of* Who Owns the News? A History of Copyright, 6 Critical Analysis L. 208, 211–12 (2019).

143. *See generally* Slauter, *supra* note 84 (arguing that the news is a primary example of incomplete commodification by detailing the effect of copyright in the industry); Brauneis, *supra* note 83 (discussing the parallels of the shift of the requirement of originality as it relates to copyright to the attempts to obtain legal protection for the news).

144. *See generally* Christopher Beauchamp, *Patenting Nature: A Problem of History*, 16 Stan. Tech. L. Rev. 257 (2013) (analyzing the history of the patentability of genetic material and laws of nature). *See also* Joseph M. Gabriel, Medical Monopoly: Intellectual Property Rights and the Origins of the Modern Pharmaceutical Industry 2 (2014) (describing how the American pharmaceutical industry shifted from resis–tance to an embrace of patents).

145. *See* Peter Baldwin, The Copyright Wars: Three Centuries of Trans-Atlantic Battle 126–98 (2014) (describing the rise of moral rights in continental Europe and Anglo-American resistance). In fact, the story is more complex than moral rights as simply an area of resistance to commodification. A central feature of the idea of moral rights is placing the protection of certain human interests in creativity outside the realm of market exchange. At the same time, however, the understanding of these human interests and the framework for their protection take exactly the forms characteristic of a market society.

146. Michael Zakim, *Intellectual Property in the Age of Capital*, 12 Theoretical Inquiries L.F. 6, 7 (2011).

it.[147] This was true of applied knowledge pertaining to the material world that was the basis of the physical infrastructure of capitalism: everything from innovations such as railroads, telegraphy, and telephony that constituted the transportation and communication revolutions, to the designs of the new machines and chemical processes that powered factories.[148] It was also true of new knowledge of manip–ulating the social and commercial spheres such as accounting and filing systems, business statistics, or financing schemes that constituted the business revolution.[149] Ownership under intellectual property rights was potentially relevant for all of those infrastructural assets. In some cases, this meant straightforward extension of proprietary rights, most commonly patents and trade secrets.[150] Other cases, such as business statistics[151] or accounting systems,[152] involved struggles, sometimes resulting in incomplete commodification. The point is that intellectual property rights came to play a structural role on this deeper level of the system's knowledge infrastructure. Commodification of information unfolded not just with respect to consumer markets but also as a regulative principle of the system's infrastructure.

Intellectual property rights also played a structural role with respect to business organization. Until after the Civil War, assignment of patent shares played a major role in structuring business partnership around innovative technologies.[153] In the absence of general incor–

147. *Id.*

148. *See generally* George Rogers Taylor, The Transportation Revolution, 1815–1860 (1951) (analyzing the changes in transportation infrastructure in the United States during the mid-1800s); Brooke Hindle & Stephen Lubar, Engines of Change: The American Industrial Revolution, 1790–1860 (1986) (discussing the importance of techno–logical transfer at the turn of the nineteenth century); Walter Licht, Industrializing America: The Nineteenth Century (1995) (analyzing industrialization both as a product and as an agent of change); Richard R. John, Network Nation: Inventing American Telecommun–ication (2010) (discussing how early access to telephone networks spread).

149. *See* Thomas C. Cochran, *The Business Revolution*, 79 Am. Hist. Rev. 1449, 1449–50, 1456 (1974); Michael Zakim, *Producing Capitalism: The Clerk at Work*, *in* Capitalism Takes Command, *supra* note 97, at 223–24.

150. *See* Zakim, *supra* note 146, at 7; Beauchamp, *supra* note 144, at 282.

151. *See, e.g.*, Slauter, *supra* note 84, at 117–42 (examining the ability to protect by copyright market news and business statistics).

152. *See, e.g.*, Pamela Samuelson, *The Story of* Baker v. Selden*: Sharpening the Distinction Between Authorship and Invention*, *in* Intellectual Property Stories, *supra* note 37 at 159–94.

153. *See generally* Lamoreaux et al., *supra* note 82 (analyzing nineteenth-century patent data and motivations for patenting); Adam Mossoff, *Patent Licensing and Secondary Markets in the Nineteenth Century*, 22 Geo.

poration that became available only around the mid-century, assigning patent shares was the direct vehicle for molding business structure.[154] Similarly, geographical licensing supplied the foundations for a form of territorial franchising in an age where nation-wide operation by a single business entity was rare.[155] Somewhat later, patent pools that created schemes for licensing a multitude of rights necessary for particular technologies began to play a broader organizational role in shaping and regulating the operation of entire industries.[156] Both share-assignments and pools, rather than limited to being mechanisms for overcoming transaction costs in transferring ownership or permissions from sellers to buyers, were more fundamental important instruments of structuring business. Around the turn of the twentieth century, business organization mushroomed dramatically in scope and scale with the corporate R&D lab becoming a central mode of innovation.[157] In this context, patents, which now were often held in portfolios, became instruments of corporate security.[158] Firms used such portfolios to try to obtain predictability and "rationality," draw the borderlines of their zones of operation and negotiate industry-wide arrangements.[159] As a top official of an AT&T subsidiary put it in 1926, referring to patent licensing arrangements:

Mason L. Rev. 959 (2015) (discussing patent licensing business models throughout the nineteenth century).

154. *See* Robert Merges, American Patent Law: A Business and Economic History (forthcoming) (manuscript at chapter 3).

155. *See* Sean M. O'Connor, *Origins of Patent Exhaustion: Jacksonian Politics, "Patent Farming," and the Basis of the Bargain* 8 (U. Wash. Sch. L. Research Paper No. 2017-05), https://ssrn.com/abstract=2920738 [https://perma.cc/D6B5-U6GL].

156. *See generally* Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 Ariz. L. Rev. 165 (2011) (detailing the story of the first patent pool and how it affected the overall business). *See* Bracha, Owning Ideas, *supra* note 24, at 280–83 (outlining several early patent pools).

157. *See generally* Leonard S. Reich, The Making of American Industrial Research: Science and Business at GE and Bell, 1876–1926 (1985) (discussing the formation of industrial research in the United States); Louis Galambos, *The American Economy and the Reorganization of the Sources of Knowledge*, *in* The Organization of Knowledge in Modern America, 1860–1920, at 269–84 (Alexandra Oleson & John Voss, eds. 1979).

158. *See* David F. Noble, America by Design: Science, Technology, and the Rise of Corporate Capitalism 10 (1977); Bracha, Owning Ideas, *supra* note 24, at 276–84.

159. *See* Bracha, Owning Ideas, *supra* note 24, at 274, 282.

> The regulation of the relationship between two such large interests as the American Telephone & Telegraph Co. and the General Electric Co. and the prevention of invasion of their respective fields is accomplished by mutual adjustment within "no man's land" where the offensive of the parties as related to these competitive activities is recognized as a natural defense against invasion of the major fields.[160]

In copyright, the structural role of rights in business organization was developed later. As relevant industries as well as the applicable copyright framework grew more complex, this structural role became more significant. One early example is the music industry, where early in the twentieth century right portfolios were the vehicle of maneuvers to try to control the industry[161] and where later organizational patterns of businesses and intermediaries came to revolve around the copyright framework.

One last structural role of intellectual property worth mentioning here pertains to trademark law. In this area, the structural role with respect to general patterns of economic activity is exactly the line dividing traditional trademark law as a form of anti-fraud protection from its gradual propertization, meaning its becoming truly a branch of intellectual property (which is still contested even today).[162] Goodwill, that elusive asset that shrewd businessmen began to sell and license around the mid-nineteenth century,[163] is a double abstraction. It is the commodification of business success. Commodification took here its usual two-step course: first, reducing the dynamic and evanescent character of everything that made a business successful into an object, securing it in place by mooring it to a symbol; then, making this new object the subject of market exchange. Through the market exchange of a new object called goodwill, commodification came to be applied not only to informational consumer goods and various elements of capitalism's infrastructure, but to business success itself. Trademark law built around goodwill supplied the constitutive legal forms.

The somewhat younger cousin of goodwill—the brand—and its legal form further extended this process to encompass a particular key

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160. Fed. Commc'ns Comm'n, Investigation of the Telephone Industry in the United States, H.R. Doc No. 340, at 210 (1st Sess. 1939).

161. See Stuart Banner, American Property: A History of How, Why, and What We Own 118 (2011); Gerardo Con Díaz, *Encoding Music: Perforated Paper, Copyright Law, and the Legibility of Code, 1880–1908*, 71 Case W. Rsrv. L. Rev. 627, 639–40 (2020).

162. *See* Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L.R. 547, 589–92 (2006).

163. *See id.*, at 576–79; *see also* Adam Mossoff, *Trademark as a Property Right,* 107 Ky. L.J. 1, 7–8 (2018).

feature of business success: the power to cultivate and channel human desire. To succeed, businesses needed to harness human desire to buy. A major development of capitalism, embodied in the rise of the adver–tisement industry, was erecting a systematic mechanism for cultivating and channeling preferences or "needs."[164] Brands emerged as semiotic receptacles for the product of this mechanism: petrified crystals capturing and mooring down the dynamic process of channeling human desire. The (incomplete) extension of trademark law to protect the value of brands and facilitate their market exchange was the process of commodifying the value of molded human desire as embodying selling power.[165] Commodifying selling power as captured by semiotic commer–cial devices laid, in turn, the foundation for yet another business organization form heavily reliant on intellectual property: the modern franchise.[166]

The third distinctive aspect of intellectual property studied as part of the history of capitalism is conceptual. The context of ownership of information had been one where basic latent assumptions characteristic of a market society that usually remain silent were often challenged, wrestled with, or at least momentarily forced to the surface. In other words, ownership of information is where naturalization tends to burst at the seams. The reason for this is that ownership of intangibles destabilizes one widespread strategy of naturalization, meaning: physicalization. Physicalization is the representation of a social relation between people as a physical (and hence "natural") relation between things or between things and people.[167] Property is an area where

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164. *See* Daniel Pope, The Making of Modern Advertising 234 (1983) (quoting Edwin G. Dexter, *The Psychology of Advertising*, 48 Printers' Ink, no. 8, Aug. 24, 1904, at 14) ("The modern advertisement is not intended for the man who wants the things already . . . . It's for the one who don't [sic] in order to make him.").

165. *See* Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813, 819 (1927) (observing that "[t]he mark actually *sells* the goods").

166. *See* Milton Handler, *Franchising and Business Independence, in* The Economics of Antitrust: Competition and Monopoly 153 (Richard E. Low ed. 1968) (noting that "[t]he central element of most franchises of entire enterprises is a license granted the franchisee to use the franchisor's trademark or trade name").

167. Anna di Robliant & Talha Syed, *Property's Building Blocks: Hohfeld in Europe and Beyond*, *in* The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries 4 (Shyam Balganesh, Ted Sichelman & Henry E. Smith eds.) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149768 [https://perma.cc/P7ZC-JKXW] (expounding the dephysicalized notion of property as "always and only" a social relation as one, indeed, the foundational, of three components of a fully dereified conception of property); Donald H. Gjerdingen, *The Politics of the Coase Theorem and*

physicalization abounds, where legal relations between people masquer–ade as physical relations between people and things.[168] But this has never worked smoothly with intellectual property. As the name implies, intellectual property, at least once understood as such, wears its non-physicalism on its sleeve. In the words of Justice Oliver Wendell Holmes Jr., these are rights "*in vacuo*" that create "a prohibition of conduct remote from the persons or tangibles of the party having the right."[169] And this obvious intangibility of the object of property tended to disrupt the disguise of the property relation as a physical one. The upshot of this dynamic was that in some moments intellectual property's disruption of the physicalist naturalization extended to all property rights[170] and indeed to all legal relations.[171] This is not to say that physicalization has ever been banished from the area of intellectual property. Nevertheless, it is less stable and more prone for disruption in the context of ownership of information. Thus, intellectual property has been an area where occasionally a window had opened offering a view beyond at least some of the naturalizing assumptions of a market society and forcing participants to wrestle with the questions that then came into view. It is therefore an opportune area of study for the historian of capitalism.

The above are three reasons why there is a remarkable fit between the frame of the history of capitalism—properly understood—and the subject of intellectual property. First, the history of intellectual

Its Relationship to Modern Legal Thought, 35 Buff. L. Rev. 871, 881 n.12 (1986) (describing physicalization as a "reification of rights").

168. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 21 (1913) (discussing the confusions that derive from the "association of ideas involved in the two sets of relations—the physical and the mental on the one hand, and the purely legal on the other"); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 720 (1917) (referring to "loose and misleading usages" in law and explaining that "[a] right in rem is not a right 'against a thing'").

169. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring). See also Talha Syed, *Reconstructing Patent Eligibility*, 70 Am. Un. L. Rev. (forthcoming 2021) (discussing "physicalist miscon–ceptions" in patent law).

170. *See* Horwitz, *supra* note 21, at 145–46 (referring to the dephysicalization of property); Syed, *supra* note 169 (tracing the distinct historical and conceptual roles played by property in intangibles and the understanding of property as a social relation in the emergence and status of the modern theory of property). *See also* Oren Bracha, *Give Us Back Our Tragedy: Nonrivalry in Intellectual Property Law and Policy*, 19 Theoretical Inq. L. 633, 669 (2018) (describing the challenge posed by property in intangibles to dominant theory of property both historically and today).

171. *See* Hohfeld, *supra* note 168, at 20 (emphasizing the importance of "differentiating purely legal relations from the physical and mental facts that call such relations into being").

property is a fascinating case study of capitalism's basic unit: commodification. It demonstrates both the general logic and how the specific context in which it unfolds matters a great deal. Second, in various ways, intellectual property has played an important structural role in the consolidation and development of capitalist economic organization. Finally, intellectual property is a context where some of the naturalizing assumptions of a capitalist society, at least in some specific moments, tend to float to the surface and be laid bare to contend with, both for the historical actor and the historian. Other reasons for this remarkable fit may occur to the reader.