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On Owning Ideas in Our Time

1.1. STATEMENTS OF INTEREST

On February 18, 2009, Dr. Marc Maurer, President of the National Federation of the Blind, wrote that more ebooks should be posted to Google for use by Americans who are visually disabled or otherwise in need of accessible ebooks. Copyright cases dragging on for half a decade had kept out-of-print books away from the public, limiting access to ebooks for the blind, the physically handicapped, the dyslexic, and other readers.¹ A settlement between Google and authors' and publishers' representatives created a vast new digital service for reading and marketing books, subject to the right of authors and publishers to control whether they participated in it at all. A coalition of publishers, technology companies, and nonprofit organizations had come together to resolve to their mutual benefit the most important copyright dispute of our lifetime.²

The settlement would have delivered millions of books to the 30 million Americans affected by visual impairment. The primary source of book lending for the blind, prior to the settlement, was the 70,000 books available through the National Library Service for the Blind and Physically Handicapped of the Library of Congress. Out of the millions of Americans who are blind, fewer than 41,000 used the digital download service of the National Library during the period when the Google settlement

¹ Press Release, National Federation for the Blind, National Federation of the Blind Supports Google Settlement in Court, PRNewswire-USNewswire (February 18, 2009), www.prnewswire.com/newsreleases/national-federation-of-the-blind-supports-google-settlement-in-court-84708377.html.

² Jonathan Band, The long and winding road to the Google Books settlement, 9 *John Marshall Review of Intellectual Property Law* 227 (2009) at 233; Settlement Agreement, *The Authors Guild v. Google, Inc.*, No. 05 Civ. 8136 (S.D.N.Y. filed Oct 28, 2008); US Department of Justice, Statement of Interest of United States of America with Respect to Amended Settlement, *Authors Guild v. Google, Inc.*, No. 05 Civ. 8136 (S.D.N.Y. statement filed February 4, 2010) at 2–3, 21–3; US Department of Justice, Statement of Interest, *Authors Guild* (S.D.N.Y. statement filed Sept 18, 2009).

was being considered.³ Fewer than 50 percent of blind Americans graduated from high school. Estimates of the unemployment rate in the blind community were greater than 70 percent.⁴

Although digitization of major library holdings and the creation of audiobooks from them would not be a cure-all, these steps might help close skills gaps for the visually impaired. Unlike printed books, websites are accessible by the visually impaired using voice-navigation, voice-dictation, and magnification software.⁵ Aging populations in developed countries like the United States will increase the numbers of the visually impaired, who may suffer from dementia and depression more often.⁶

Authors' groups also defended the settlement. It would benefit authors because they would have a new outlet for selling books that are no longer carried on store shelves, and that may only exist in a few libraries at elite colleges and universities. Even authors of chapters or other portions of larger works could each earn hundreds of additional dollars. Scholarly works would receive an outsized benefit, as the lack of marketing and shelf space for these titles could be corrected by an online presence.⁷ Meanwhile, authors retained the right to tell Google to remove their books from the service.⁸ Readers would benefit tremendously from terminals at public and university libraries where large numbers of out-of-print

³ NLS implementing advances in its digital talking-book system, 43 NLS News No. 4 (October–December 2011), <http://loc.gov/nls/newsletters/news/2011/oct-dec.html>.

⁴ National Federation for the Blind, Letter to the United States District Court for the Southern District of New York Re: The Authors Guild ..., *Authors Guild* (S.D.N.Y. letter filed January 19, 2010) at 2–3, www.thepublicindex.org/wpcontent/uploads/sites/19/docs/amended_settlement/NFB_request_appear.pdf.

⁵ *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1315 (SD Fla. 2002).

⁶ Oriel Spierer, et al., Correlation between vision and cognitive function in the elderly: a cross-sectional study, 95 *Medicine* e2423 (2016), http://journals.lww.com/mdjournal/subjects/Ophthalmology/Fulltext/2016/01190/Correlation_Between_Vision_and_Cognitive_Function.13.aspx; Verena Cimarolli, et al., Anxiety and depression in patients with advanced macular degeneration: current perspectives, 10 *Clinical Ophthalmology* (Auckland, NZ) 55 (2016). Vision loss may cause dementia or cognitive impairment by making reading (and other mental and physical activities) more difficult.

⁷ Michael Hirschorn, The hapless seed: publishers and authors should stop cowering; Google is less likely to destroy the book business than to slingshot it into the twenty-first century, *The Atlantic Monthly*, June 1, 2007, at 134.

⁸ Society of Authors, Letter to the United States District Court for the Southern District of New York Re: The Google Book Settlement, *Authors Guild* (S.D.N.Y. letter filed Jan. 22, 2010), www.thepublicindex.org/wpcontent/uploads/sites/19/docs/amended_settlement/Society_of_authors.pdf; Plaintiffs' Supplemental Memorandum of Law, at 12–22, *Authors Guild* (S.D.N.Y. brief filed Feb. 11, 2010), www.thepublicindex.org/wp-content/uploads/sites/19/docs/amended_settlement/Supplemental_memorandum_of_law.pdf; Declaration of Tiffany Allen, ¶ 10, *Authors Guild* (S.D.N.Y. declaration filed Feb. 10, 2010); Competition and Commerce in Digital Books: Hearing Before the House Committee on the Judiciary, 111th Cong., 1st Sess. (Sept. 10, 2009) (statement of Paul Aiken, Authors Guild), http://judiciary.house.gov/f_files/hearings/pdf/Aiken0909100.pdf.

books could be searched, browsed, and perhaps printed out or saved to mobile devices.⁹

In 2010, a judge postponed this promising future of greater knowledge accessible to all. Microsoft, leading a rival group of data licensing corporations, wanted to block the settlement, as did the Obama administration, foreign publishers and their governments, and allied nonprofit organizations. Legal briefs deluged the judge with claims that Google would monopolize knowledge and block competition for out-of-print books.¹⁰ Various technicalities and international foreign/law issues emerged, often treated summarily.¹¹

The judge accepted the argument that the digital library would give Google too much economic power in the Internet search market. He ignored the arguments of many antitrust and copyright experts that there was little to no existing competition regarding these books, which had largely been abandoned by publishers and companies like Microsoft that focus on selling current titles at a considerable mark-up, along with many public domain books, leaving a gap for copyrighted but out-of-print volumes.¹² Several decades would pass before something akin to Google's search engine, but for most published books, could exist lawfully. The government claimed that it would table legislation to provide the public with access to these books, and their authors with new markets for them, but it did not do so.¹³ In Chapter 7, I will return to this case and the theories and evidence underlying various interest groups' positions on the settlement.

1.2. CLASS STRUGGLE IN THEORY AND PRACTICE

The varying interests that vied for recognition in the Google Books settlement included, on both sides, representatives of different economic sectors and strata.

⁹ Einer Elhauge, Why the Google Books settlement is procompetitive, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series No. 629 (2009) at 43, http://lsr.nellco.org/harvard_olin/629.

¹⁰ Brief Amicus Curiae of the French Republic, *Authors Guild* (S.D.N.Y. brief filed Sept. 8, 2009); Memorandum of the Federal Republic of Germany in Opposition to Proposed Settlement, *Authors Guild* (S.D.N.Y. brief filed Sept. 1, 2009); Objections of Amazon.com to Proposed Settlement, *Authors Guild* (S.D.N.Y. objections filed Sept. 1, 2009); Objections of the Japanese Publisher's Association on Book Distribution (Ryutaikyo), *Authors Guild* (S.D.N.Y. objections filed June 5, 2009); Objections of Microsoft Corporation to Proposed Settlement, *Authors Guild* (S.D.N.Y. objections filed Sept. 1, 2009); Objections of Open Book Alliance to Proposed Settlement, *Authors Guild* (SDNY objections filed Sept. 4, 2009). Cf. Letter of Academic Authors in Opposition to Settlement, *Authors Guild* (S.D.N.Y. objections filed Sept. 3, 2009). All of these documents may be available at www.thepublicindex.org/filings/ag-v-google/original-settlement.

¹¹ Plaintiff, Supplemental Memorandum, note 8, at 80–137, 158–68.

¹² *The Authors Guild, Inc., et al. v. Google, Inc.*, 770 F. Supp. 2d 666, 683 (S.D.N.Y. 2011). See also Amicus Brief of Antitrust Law and Economics Professors, *Authors Guild* (S.D.N.Y. brief filed Sept 8, 2009).

¹³ US Department of Justice, Statement of Interest, note 2, at 2–3, 18, 20–1.

This book is about the ways in which different communities within an economy articulate their interests in new creative possibilities, and in controlling new expressions of ideas.

In sociology, classes initially represented distinct economic roles, such as (1) wage laborers, (2) small business and proprietors of small farms (the petty bourgeoisie), (3) the managerial and technical experts (the intelligentsia), and (4) the owners of valuable aggregations of capital (the elite). Society, in this way, is divided into economic tiers, or strata.¹⁴ A class difference is a process of humans experiencing and expressing their differences with other strata in society, notably those with opposing interests.¹⁵

The most influential extended analyses of social class may have been those of Simon Kuznets from an economic point of view, and those of E. P. Thompson from a historian's vantage point. Kuznets portrayed class distinctions as a temporary phase of capitalism that results from nascent, frustrated, and imperfect competitive environments. The French economists Thomas Piketty and Emmanuel Saez point to a cleavage in the upper class between the "working rich" and the "rentier", or the purely ownership-based class.¹⁶ The rise of the corporation on the one hand, and the increased income share of business executives and lawyers on the other, has "blurred" the labor-capital dynamic.¹⁷

Thompson's work portrayed another overlap between labor and capital: the artisanal or elite laborer, often better-paid, routinely owning at least some means of production.¹⁸ Similarly, Richard Florida grouped together seemingly disparate workers in globalized capitalism into a "creative class" of 38 million highly educated people who come up with ideas and expressions, from "designs" to texts, products, and music:

The super-creative core of this new class includes scientists and engineers, university professors, poets and novelists, artists, entertainers, actors, designers, and architects, as well as the "thought leadership" of modern society: nonfiction writers, editors, cultural figures, think-tank researchers, analysts, and other opinion-makers ...

Beyond this core group, the creative class also includes "creative professionals" who work in a wide range of knowledge-based occupations in high-tech sectors, financial services, the legal and health-care professions, and business management.

¹⁴ Nicholas Gane, Max Weber as social theorist: "class, status, party", 8 *European Journal of Social Theory* 211 (2005) at 213, citing Stephen Edgel, *Class: Key Ideas* (Abingdon and New York: Routledge, 1993) at 13.

¹⁵ E. P. Thompson, *The Making of the English Working Class* (New York: Vintage, 1963).

¹⁶ Thomas Piketty and Emmanuel Saez, Income inequality in the United States, 1913–1998, 118 *Quarterly Journal of Economics* 1 (2003) at 3; Simon Mohun, Class structure and the US personal income distribution, 1918–2011, Paper Presented to the 2013 Analytical Political Economy meeting at the University of Massachusetts Amherst, updated 2015 version, at 4–5, <https://thenextrecession.files.wordpress.com/2015/09/classstructure1918to2011wmf.pdf>.

¹⁷ Mohun, note 16, at 17.

¹⁸ E. P. Thompson, *The Making of the English Working Class* (Pantheon, 1966) at 234–68.

These people engage in creative problem-solving, drawing on complex bodies of knowledge to solve specific problems.¹⁹

In analyzing capital and wealth formation, economists often use the division of households into three categories based on their place in the economy, called classes for shorthand rather than based on a conceptual definition. The “lower class” is the group containing the bottom 20–50 percent of households by income or wealth, the “middle class” contains the next 40–75 percent, and “upper class” the remaining 5–10 percent.²⁰ Within classes, moreover, there are gender and age differentiations, with women and children frequently being denied control of resources available to the household as a whole.²¹ There are also racial disparities, creating “extreme case[s]” of exploitatively low wages.²²

Marx and Engels conceived of class struggle as a relationship of domination based on differentials in power. They refer to this struggle as an “uninterrupted, now hidden, now open fight, a fight that each time ended, either in a revolutionary reconstitution of society at large, or in the common ruin of the contending classes.”²³ Max Weber argued that economic power grows out of other sources of inequality, such as the power to allocate land or to conquer a territory and establish its form of government.²⁴ Thus, Native American and African Diaspora enslavement and dispossession contributed to disparate economic power across populations seen historically as “races.”²⁵

Socialist theory predicted that inequality of condition between the owners of capital and those selling their labor would grow. To this theory’s pioneers, private property was a system of “class antagonism” forged so that the owners of land could exploit the landless classes.²⁶ The idea went back at least to the Digger movement in

¹⁹ Richard Florida, *Cities and the creative class*, 2(1) *City and Community* (2003) at 8.

²⁰ Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014) at 250–1. Piketty states that class is measured by “level of wealth or income.”

²¹ E.g. Richard America, *The Wealth of Races: The Present Value of Benefits from Past Injustices* (Greenwood Press, 1990); Harriet Fraad, Children as an exploited class, in Antonio Callari, Stephen Cullenberg, and Carole Biewener (eds.), *Marxism in the Postmodern Age: Confronting the New World Order* (Guilford Press, 1994) at 375–84; Lisa Vogel, *Marxism and the Oppression of Women: Towards a Unitary Theory* (Brill, 2013); Andre L. Smith, *Tax Law and Racial Economic Justice: Black Tax* (Lexington Books, 2015).

²² Patricia Hill Collins, Learning from the outsider within: the sociological significance of Black Feminist thought, 33 *Social Problems* S14 (1986) at S27–S28; Guadalupe Luna, The dominion of agricultural sustainability: invisible farm laborers, 2014 *Wisconsin Law Review* 265 (2014) at 269–81.

²³ Alvin So and Suwarsono, Class theory or class analysis? A reexamination of Marx’s unfinished chapter on class, 17 *Critical Sociology* 35 (1990) at 39, citing Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin, 1967) at 79.

²⁴ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1978) at 926.

²⁵ Smith, note 21, at 69, 71–2, 82, 91, 94; Robert Wesley, Many billions gone: is it time to consider the case for Black reparations? 40 *Boston College Law Review* 429 (1998).

²⁶ Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, Marxists.org (1848), <https://www.marxists.org/archive/marx/works/1848/communist-manifesto>.

England, and to Pierre-Joseph Proudhon's *What Is Property?* The Norman conquest of England turned the natives into virtual slaves, enclosing their common lands and forcing them into servitude under tyrannical laws implemented with jails, torture, and hangings.²⁷ The eloquent Digger, Gerrard Winstanley, theorized that:

A ruling class began violently to appropriate what had hitherto been common property. The earth was bought and sold ... So the earth ceased to be a common treasury and became "a place wherein one torments another." Private appropriation was "the cause of all wars, bloodshed, theft and enslaving laws that hold people under misery."²⁸

Two centuries later, Proudhon predicted that as economies developed, inequalities in the ownership of land dating to violent conquest and racial struggle would translate into vast wealth gaps. Proudhon explained that the first-occupation principle in land law leads to injustice, extreme poverty, and struggle on the part of the poor, who risk starvation and may resort to selling their children to other families.²⁹ In between Winstanley and Proudhon, the American Enlightenment writer and publicist, Thomas Paine, wrote of a capitalist regime as "government by terror," and to the poor as a "class dispossessed of their natural inheritance" by the private property system.³⁰

For both sociology and Marxist economics, class cuts across societies, and carries the potential of changing history through class struggle.³¹ In the early nineteenth century, most famously, the capital-trading or bourgeois class achieved the disenfranchisement of the workers and marginalization of the feudal lords and hereditary monarchs.³² The modern state wields an "all-embracing" power, penetrating and shaping family life as well as associations formed for purposes of political, religious, or cultural speech or action.³³

Marx wrote that his own innovations involved theorizing class struggle as being related to eras in the relations of production, and as requiring transitions from one

²⁷ Gerrard Winstanley, John Barker, and Thomas Star, *An Appeal to the House of Commons, Desiring their Answer; Whether the Common-People shall have the Quiet Enjoyment of the Commons and Waste Land* (n.p., 1649) at 6–7, 14–15; Gerrard Winstanley, *Fire in the Bush* (Giles Calvert, 1650) at 25.

²⁸ Christopher Hill, *Winstanley's "The Law of Freedom" and Other Writings* (Cambridge University Press, 2006) at 36 (quoting *ibid.*, at 77–80, 99–101, 281–2, 290). My block quote is from Hill's introduction, a passage which quotes from Winstanley's works, *The True Levellers' Standard Advanced*, *A Declaration from the Poor Oppressed People of England*, and *The Law of Freedom in a Platform*.

²⁹ Pierre-Joseph Proudhon, *What Is Property? An Inquiry Into the Principle of Right and of Government* (Benjamin Ricketson Tucker trans., John Wilson & Son, 1876) at 87, 118, 133, 178–83, 192, 200–1, 309, 327–31, 336–9, 341, 344–5, 425.

³⁰ Thomas Paine, *Agrarian Justice, Opposed to Agrarian Law, and to Agrarian Monopoly, etc.* (R. Folwell, 1800) at 23. See also Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* (Oxford University Press, paperback reissue ed. 1998) at xix, 209 304, 410–11, 470.

³¹ So and Suwarsono, note 23, at 40.

³² So and Suwarsono, note 23, at 43, citing Marx and Engels, note 26, at 94.

³³ So and Suwarsono, note 23, at 47 (quoting Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in Karl Marx (ed.), *Surveys from Exile* (Pelican, 1973) at 143–249).

system of production to the next due to contradictions between classes that develop within each era of development.³⁴ Antiquated relations of production, or political economies, must be abandoned when the means of production becomes too powerful for them and requires new social patterns.³⁵ Marx argued that Proudhon's proposal for equality of wages, meanwhile, did not go far enough to challenge the property relation.³⁶

Analytical Marxism begins with the observation that there is a conflict of interests between the owners of the means of production (capital) and those employed by them (labor).³⁷ A neo-Marxian analysis of law and legislation deals with struggles relating to class, in which members of a social stratum coalesce in rivalry with members of another stratum or strata. Thus, it is not reducible to the "vulgar" observation that every law is written for the benefit of the dominant class, or that every legal controversy will end in a capitalist victory whether in the court or in legislatures.³⁸ One or more classes may choose to reach an accommodation with other classes, even when the class that surrenders in this way sacrifices its short-term interests. A class may grow more organized and "militant," or be deradicalized or dispersed because of prior victories, collective action problems, propaganda and "double consciousness," etc.³⁹

Class struggle is therefore often a struggle between those who own little or no property and those who own the product of labor as property to a degree that their ownership rights serve as a bottleneck on further labor, because labor requires capital to thrive.⁴⁰ Class struggle may also occur between laborers and those consuming the produce of their labor. In media studies, scholars construct a model of "receiving" and "transmitting" classes struggling as "consumers" and "producers,"

³⁴ Karl Marx, Social classes in America: Letter to Joseph Weydemeyer, Mar. 5, 1852, in Frank Mecklenburg and Manfred Stassen (eds.), *German Essays on Socialism in the Nineteenth Century* (Continuum, 1990), 65–6. See also Marx and Engels, note 26, at 3–14.

³⁵ Marx and Engels, note 26, at 7. See also Friedrich Engels, *The Origin of the Family, Private Property and the State* (Charles Kerr & Co., 1902) at 56–217.

³⁶ Marx and Engels, note 26.

³⁷ Philippe van Parijs, *Marxism Recycled* (Cambridge: Cambridge University Press, 1993) at 110.

³⁸ "Vulgar Marxism" is described as an economic reductionism that rejects the influence of non-economic factors on history, culture, or politics, or that deterministically discounts the possibility of a free or collective response to economic and historical forces that might shape their trajectories (or, as the flip side of the same process, deterministically predicts that the working-class will be radicalized by the contradiction between capitalist economic forces and relations of production into greater class consciousness, so that it would be impossible to tame its energies with beguiling rhetoric, the threat of brute force, or government largesse). Gyorgy Lukács, History and class consciousness, in Robert Daniels (ed.), *Documentary History of Communism* (I.B. Tauris, 1986) at 39–40; Alasdair MacIntyre, Herbert Marcuse (Viking Press, 1970) at 45; Herbert Marcuse, The foundations of historical materialism, in Andrew Feenberg and William Leiss (eds.), *The Essential Marcuse: Selected Writings of Philosopher and Social Critic Herbert Marcuse* (Beacon Press, 2007) [1930] at 101.

³⁹ Adam Przeworski, *Capitalism and Social Democracy* (Cambridge University Press, 1985) at 28, 47, 53, 77, 99–102.

⁴⁰ Herbert Marcuse, *Reason and Revolution* (Routledge, 2013) at 381.

in a “social division of labor” that makes economies of mass communication and cultural production possible.⁴¹

The existence of “classes” is a theory that may help explain changes in infrastructures, machines, and legislative frameworks characteristic of a productive system. At contrasting times, class theory may indicate that government policy serves as an instrument of one class at the expense or against the wishes of another, as in Marx’s analysis of labor legislation in England (1530–1871). At other times, the state may maintain its distance and freedom of action with respect to the most powerful class or classes. At still others, the state may exploit the tension among classes, and balance various classes’ political forces so as not to be vulnerable to a dominant class.⁴²

Twentieth-century legal and political theory has echoed Marx and Proudhon on some occasions. “Critical legal studies” (CLS) was a movement that gained prominence in the 1980s for its analysis of legal rules and cultures, and of their relationship to economic and social inequalities. For Singer, CLS is a theory that modern law works by “creating and legitimating configurations of economic and political power.”⁴³ This book will draw on CLS as explicated by Singer and other scholars to examine key controversies in copyright law, especially as they impact digital media.

In the late 1990s, political science developed its own version of CLS. Thomas Ferguson’s “investment theory of politics” argued that the two major political parties are mechanisms for wealthy elites to buy friendly politicians in order to seize and deploy government agencies for class purposes.⁴⁴ As three scholars recently explained, “In our new Gilded Age,” campaign contributions, the revolving door between corporations and government agencies, stock speculation by and the rising private incomes of members of Congress, etc. suggest “the dominance of the superrich” over politics.⁴⁵ The accumulated capital of the upper class or classes constitutes a barrier to effective political participation by the poor and middle-classes, because the latter may not generate the liquid savings needed to mobilize politicians to serve them.⁴⁶ Such a theory would not have to posit that there can never

⁴¹ Alexander Galloway, *Protocol: How Control Exists After Decentralization* (Massachusetts Institute of Technology Press, 2004) at 56.

⁴² Paul Wetherly, *Marxism and the State: An Analytical Approach* (Springer, 2015) at 17–22. See also Karl Marx, *Capital*, in Robert Hutchins et al. (eds.), *Great Books of the Western World*, vol. 50: Marx (Samuel Moore et al. trans., Encyclopedia Britannica, Inc., 1964) at 364–7.

⁴³ Joseph William Singer, *The player and the cards: Nihilism and legal theory*, 94 *Yale Law Journal* 1 (1984) at 7.

⁴⁴ Thomas Ferguson, *Golden Rule: The Investment Theory of Party Competition and the Logic of Money-Driven Political Systems* (University of Chicago Press, 2nd ed. 2011) [1995].

⁴⁵ Thomas Ferguson, Paul Jorgensen, and Jie Chen, *How money drives US congressional elections: more evidence*. Paper Presented to Institute for New Economic Thinking Annual Conference (April 2015), at 1–2, www.ineteconomics.org/uploads/papers/How-Money-Drives-US-Congressional-Elections-More-Evidence.pdf.

⁴⁶ Ferguson, note 44, at 24–30, 36, 41–3, 52, 99, 362, 382–4; Ferguson et al. note 45, at 16. Eric Williams also pointed to the disproportionate access to Parliament enjoyed by the British planters, beneficiaries of the slave trade. Eric Williams, *Capitalism and Slavery* (University of North Carolina Press, new ed.

be political outcomes that aid labor against capital or the poor against the rich. Initiatives like the abolition of US slavery (or its transformation into convict labor and sharecropping), Reconstruction, the New Deal, and the Great Society served many investors' interests as well.⁴⁷

The "investment theory of politics" may help us understand why 80 percent of Americans surveyed in the 1990s opined that government is "run for the benefit of the few and the special interests, not the people," why a similar proportion called the economic order "inherently unfair," and why most of them concluded that "[b]usiness has gained too much power over too many aspects of American life."⁴⁸ In 2003, the US Supreme Court concluded that large donations to political parties cause corruption.⁴⁹ By the summer of 2012, two-thirds of Americans surveyed stated that "elections are usually for sale to the candidate who can raise the most money," while an even higher share stated that most decisions by Washington politicians result from influences by "campaign contributors."⁵⁰ By 2015, three-quarters of Americans told pollsters that corruption in government was "widespread," compared with only 14 percent in Sweden.⁵¹ In law-and-economics terms, on the other hand, these perceptions may flow from the fact that the general public confronts higher costs in organizing, compared with small interest groups.⁵²

2014) [1944] at 94. Ferguson's "Golden Rule" is "to see who rules, follow the gold." Ferguson, note 44, at 391. See also James Galbraith, The importance of being sufficiently equal, in Ellen Frankel Paul et al. (eds.), *Should Differences in Income and Wealth Matter?*, vol. 19, pt. I (Cambridge University Press, 2002) at 218.

⁴⁷ Eric Williams argued that the slave trade and eventually slavery itself began to be seen as inefficient by some capitalists in the nineteenth century. See Williams, note 46, at xvi, 6, 49, 92, 94, 149, 154, 189. The US economy grew more rapidly after the Thirteenth Amendment, Reconstruction, and the New Deal, including in the South. Robert Friedland and Laura Summer, *Demography is not Destiny*, revisited, Commonwealth Fund No. #789 (2005), at 94, <http://ccp.ucr.ac.cr/creles/pdf/georget.pdf> (about 5 percent growth in real GDP per capita in United States, 1933 to 1939, and more than 12 percent growth averaged from 1939 to 1944); Angus Maddison et al., *New Maddison Project Database* (2013), www.ggdc.net/maddison/maddison-project/data.htm; Clayne Pope, Social mobility, free labor, and the American dream, in Stanley Engerman (ed.), *Terms of Labor: Slavery, Serfdom, and Free Labor* (Stanford University Press, 1999) at 248 (1.7 percent growth of GDP per capita in South, 1840 to 1860, and only 1.3 percent in North). The Great Society may in part have grown out of the near-recession of 1959 through 1961, and the fear that the Vietnam War and Civil Rights Movement could have resulted in revolutionaries seeking alternatives to capitalism itself. Ferguson, note 44, at 151–3, 348; Melvin Small, *Johnson, Nixon, and the Doves* (Rutgers University Press, 1988) at 103.

⁴⁸ Noam Chomsky, "Consent without consent": reflections on the theory and practice of democracy, 44 *Cleveland State Law Review* 415 (1996) at 416–17. See also Noam Chomsky, *Hopes and Prospects* (Penguin, 2010) at 32, 108, 208.

⁴⁹ *McConnell v. Federal Elections Commission*, 540 U.S. 93, 154 (2003).

⁵⁰ CNN Opinion Research Corporation, Poll: June 3–7, 2012, CNN.com (June 9, 2011) at 2, <http://i2.cdn.turner.com/cnn/2011/images/06/09/rel10d-2.pdf>.

⁵¹ Gallup, 75 percent in US. See Widespread Government Corruption (September 19, 2015), www.gallup.com/poll/185759/widespread-government-corruption.aspx.

⁵² Richard Posner, Economics, politics, and the reading of statutes and the constitution, 49 *University of Chicago Law Review* 263 (1982) at 265; Rachel Sachs, The new model of interest group representation in patent law, 16(3) *Yale Journal of Law and Technology* (2014), at 348–52, 388–9.

Class antagonism is fueled by the growing ranks of those who sell their labor to earn a living grow resent the outsized incomes of those who buy labor with accumulated capital. At times, the productive forces in an economy will be held back, at least in part, by relationships developed to protect and promote the interests of a class that may not represent the economy's future. There is some macroeconomic evidence to support this theory from twentieth-century Russia, China, and the Middle East regions where economic growth was much faster in socialist times than under feudalism or early capitalism.⁵³ More recent theories focus on how democratic processes may be hijacked to satisfy the dictates of economic elites, contrary to the public interest.⁵⁴

1.3. CLASS STRUGGLE AND INTELLECTUAL PROPERTY

Reflecting on several decades of copyright legislation starting in 1976, L. Ray Patterson observed in 2001 that the system censored the freedom of speech.⁵⁵ The system was irrationally prioritizing corporations over employee – authors, and creating monopolies lasting three or four generations.⁵⁶ In both the copyright and trademark areas, courts and legislatures often dispensed with careful balancing of the

⁵³ During the first half of the Soviet period in Russia, economic output per person grew by an average of 4.6–6 percent, as compared with less than one percent per year from 1880 to 1885. E.g. Alex F. Dowlah and John E. Elliott, *The Life and Times of Soviet Socialism* (Greenwood Publishing Group, 1997) at 29–135; Vitali Meliantsev, *Three Centuries of Russia's Endeavors to Surpass the East and to Catch Up with the West: Trends, Factors, and Consequences*, Paper presented to Havighurst Colloquium in Russian and Post-Soviet Studies, Miami University, Oxford, Ohio (2002) at 2, 6, 11, 16–19, 23–4, 39, 42, www.cas.miamioh.edu/havighurstcenter/; Manuel de Molina Navarro and Victor Toledo, *The Social Metabolism: A Socio-Ecological Theory of Historical Change* (Springer, 2014) at 11; Adam Szirmai, *Socio-Economic Development* (Cambridge, 2nd ed. 2015) at 30. China, which had not only been stagnant, but which had lagged behind Russia in the nineteenth century, exceeded Soviet economic growth rates after the 1949 revolution, hitting growth of 7 or 8 percent per year. E.g., Chris Bramall, *Chinese Economic Development* (Routledge, 2009) at 292; US National Intelligence Estimate, NIE 13-2-59 (February 10, 1959), in *Foreign Relations of the United States, 1958–1960*, vol. XIX: China (US Government Printing Office, 1996) at 523; World Bank, *Reshaping Economic Geography* (World Bank, 2009) at 113. Iraq, Libya, and Syria experienced unprecedented growth under socialism or a mixed economy. Their output increased by more than 300 percent between 1974 and 1999. Levant: Modern Syria in Joel Mokyr (ed.), *The Oxford Encyclopedia of Economic History*, vol. 1 (Oxford University Press, 2003) at 321; Matthew Shane, *Real Historical Gross Domestic Product (GDP) and Growth Rates of GDP*, US Department of Agriculture (November 2, 2009), www.ers.usda.gov/data-products/internationalmacroeconomic-data-set.aspx; Bassam Yousif, *Human Development in Iraq: 1950–1990* (Routledge, 2013), at <https://books.google.com/books?id=LXTegI-f1VEC&pg=PT21>.

⁵⁴ Ferguson, note 44; Fred McChesney, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* (Harvard University Press, 1997) at 41; Fred McChesney, Rent extraction and rent creation in the economic theory of regulation, 16 *Journal of Legal Studies* 101 (1987) at 101–2; David Yosifon, The public choice problem in corporate law: corporate social responsibility after Citizens United, 89 *North Carolina Law Review* 1197 (2011) at 1209.

⁵⁵ L. Ray Patterson, Copyright in the new millennium: resolving the conflict between property rights and political rights, 62 *Ohio State Law Journal* 703 (2001) at 704, 706–7, 723.

⁵⁶ Patterson, note 55, at 723.