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Adding Fuel to the Fire of Genius: Abraham Lincoln, Free Labor, and the Logic of Intellectual Property

by

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At Gettysburg, President Abraham Lincoln called for a "new birth of freedom." It was a call for both successful completion of the Civil War and for advancement of the propositions of liberty and equality set out in the Declaration of Independence. The significance and permanency of change to the nation's fundamental law formally achieved in the 1860s make it an essential reference point for any analysis of constitutional powers and rights. Accordingly, an analysis of the constitutional foundations of intellectual property rights likewise should be informed by the new birth of freedom.

The political and constitutional thought – and, of course, the actions – of Abraham Lincoln are central to understanding Civil War constitutionalism. Lincoln held to what has been termed a "two-track" view of the Constitution. One track involved "the written instrument of government adopted at the nation's Founding and intended to function as a supreme legal code." The other track consisted of "the principles, ideals, institutions, laws, and procedures tending toward the maintenance of republican liberty by which the American people agreed to order their political existence."

Applying this two-track framework to the subject of intellectual property yields important insights regarding the place of IP in our constitutional order. Antislavery thought concerning "free labor" offers a logical and compelling account for IP rights. The philosophical precept of "free labor" was placed in the context of an expanding and enterprising society. And it regarded hard work in useful vocations and social mobility as the means for obtaining economic independence.

Lincoln himself linked the concept of free labor to intellectual property rights. His thought concerning free labor was grounded in the Founders' understanding, and most particularly in the Declaration of Independence's affirmation of the natural right to life, liberty, and the pursuit of happiness. "[E]ach individual is naturally entitled to do as he pleases with himself and the fruit of his labor," Lincoln wrote in 1847. Or, as he put it, to the same effect, in a more colloquial Lincolnism: "I always thought the man that made the corn should eat the corn."

During his single term in Congress in the 1840s, Lincoln applied for a patent for his invention of "a device to buoy vessels over shoals." Lincoln assisted constituents with their own patent applications. And he voted for legislation modestly amending administration of patent laws in 1848 and 1849, thereby evidencing solicitude for securing IP rights. Moreover, Lincoln the lawyer was involved in at least five patent cases between 1850 and 1860.

Lincoln made the case for IP protections most emphatically in public lectures and speeches he delivered between 1858 and 1860. He delivered his lecture on "Discoveries and Inventions" in essentially the same form a half-dozen times. In it, Lincoln juxtaposed Western Civilization's 15th Century achievements in writing and printing press technology with the regrettable rise of human slavery. He concluded his lecture by extolling patent laws that "added the fuel of *interest* to the *fire* of genius, in the discovery and production of new and useful things."

Further, in his "Address to the Wisconsin State Agricultural Society" (1859), Lincoln expressed regard "for the profitable and agreeable combination of labor with cultivated thought" that captures the essence of intellectual property. By securing a return to free laboring authors and inventors for their pursuit of ideas and discoveries, copyrights and patents stimulated the drive for further self-improvement and achievement of personal independence.

In *Dred Scott v. Sanford* (1857), Chief Justice Roger Taney insisted "the right of property in a slave is distinctly and expressly affirmed in the Constitution." Through several speeches, Lincoln criticized Chief Justice Taney's opinion. Other Republican and antislavery proponents pointed to the lack of any expression of the words "slave" or "slavery" or the term "property in men" in the Constitution. They cited writings from the framers of the Constitution of 1787 for the proposition that the word "slavery" was kept out of the Constitution's text in order to avoid conferring legitimacy on the institution.

The Lockean concept that the core of property consists of self-ownership and the closely-related free labor concept that a person has a natural right to the fruits of his or her own labor – both of which are reflected in the Declaration of Independence – formed the principled basis for concluding, as Lincoln and other antislavery thinkers did, that slavery is wrong. Protecting intellectual property rights fit squarely within this idea of self-ownership, as an author or

inventor owned the productions of his or her mental labors and the returns those labors generated. The prevailing understanding during Lincoln's day, as it had been at the time of the Founding and the Constitution's ratification, was that copyrights and patents were the property of authors and inventors.

Antislavery thinkers countered the idea of property in men with a policy that came to be known as "Freedom National" – the position that a person's inalienable right to liberty was the prevailing or default position and that slavery existed only where the blackletter law of a state expressly provided for it. Military matters dominated political and administrative business during Civil War years that followed. However, the influence of the "Freedom National" policy had at least one important impact on IP rights during the Lincoln Administration.

In 1857, future Confederate President Jefferson Davis was summarily denied a patent for a riverboat propeller invention that was the idea of a slave on the plantation of his brother Joseph. Consistent with the *Dred Scott* decision, the U.S. Patent Office denied the patent on account of the fact that the slave inventor was not a "citizen" of the United States and therefore not legally competent to obtain a patent. Likewise, the slaveowners were not the genuine inventors so they were ruled ineligible.

In 1861, Senator Charles Sumner learned a patent application by a free black inventor had been denied based on the *Dred Scott* decision. Sumner introduced and the Senate approved by unanimous consent a resolution directing the Patent Office to consider if further legislation was "necessary to secure to persons of African descent, in our own country, the right to take out patents for useful inventions, under the Constitution." Attorney General Edward Bates's *Opinion on Citizenship* (1862), determining that free persons of color born in the United States were citizens, ultimately settled that free blacks would be issued copyrights and patents according to the terms of the applicable federal laws.

During Reconstruction, Congress had occasion to pass legislation that made minor adjustments to patent and copyright laws, including the Appropriations Act of 1868 and Copyright Acts of 1867 and 1868. Congress also passed and President Ulysses S. Grant signed the Copyright and Patent Acts of 1870. The Copyright Act transferred registration functions from federal district courts to the Library of Congress, centralizing and streamlining the process and thereby expanding the resources and resourcefulness of the Library. The Patent Act was a comprehensive measure gathering together the substance of preceding legislation and legal decisions. Among other things, it clearly established a first-to-file system for patent claims. Minor legislative amendments to the patent laws were also adopted in 1871 and 1874.

That pro-IP rights legislation was adopted contemporaneously with the Reconstruction Amendments gives rise to the inference that the IP rights were consistent with the antislavery principles and views of property vindicated by the Civil War and that influenced the framing of those amendments – namely, that property is rooted in a natural right of liberty and self-ownership, and that all persons are equally entitled to the fruits of his or her own labors, protected by the rule of law.

It does not appear that Reconstruction Amendments to the Constitution impose any express limitation on the scope of copyright or patent protections under the IP Clause. The clause's grant of power to Congress "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries" leaves little role for states. However, to the extent any state laws offer supplemental or tangential protections to authors or inventors, the 14th Amendment's Equal Protection Clause at least requires that any such protections be extended to all state citizens on an equal basis. Similarly, any rights of authors or inventors recognized under state law would be protected by the 14th Amendment's due process clause.

In sum, an examination of intellectual property in light of free labor thought, political action tied to the Civil War, and the Reconstruction Amendments, bolsters the logical case for protection of IP rights and for recognition of IP's connection to the underlying principles of the American constitutional order.

The Importance of the Civil War and Reconstruction to an Understanding of America's Constitutional Order

In his "Gettysburg Address" (1863), President Abraham Lincoln called for a "new birth of freedom." It was a call for the Union to bring the Civil War to a successful completion and to advance the causes of liberty and equality set out in the Declaration of Independence.

The new birth of freedom envisioned by Lincoln required the constitutional settlement arising out of the Civil War. That settlement was informed by antislavery arguments about the ideals of the Declaration and meaning of the Constitution. It was formalized in the adoption of the 13th, 14th, and 15th Amendments to the Constitution. The so-called Civil War or Reconstruction Amendments eliminated slavery, established citizenship for former slaves, and guaranteed basic social, legal, and political rights for all persons.

Exploration of constitutional meaning undoubtedly requires reference to the original meaning of the Constitution of 1787 and of the Bill of Rights. But any such exploration should not end there. The significance and permanency of change to the nation's fundamental law formally achieved in the 1860s makes the sectional crisis, Civil War, and Reconstruction an essential reference point for any analysis of constitutional powers and rights. Indeed, on account of remediating the Constitution's accommodation to sectional chattel slavery, both contemporaries and later thinkers have viewed the Reconstruction Amendments as the completion of the Constitution of 1787. Accordingly, an analysis of the constitutional foundations of intellectual property rights should be informed by Lincoln's call for a "new birth of freedom" and the political and legal measures which made the call meaningful.

The political and constitutional thought and actions of Abraham Lincoln are central to Civil War constitutionalism. Through his speeches and debates with Senator Stephen Douglas, Lincoln was a nationally-recognized expositor of the logic of antislavery constitutionalism in the years before the War. As President, Lincoln's public pronouncements and executive actions helped ensure the

survival of the Constitution. He was proactive in securing Congressional adoption of the proposed 13th Amendment and his actions set the stage for adoption of the 14th and 15th Amendments.

Constitutional historian Herman Belz described Lincoln's "two-track" view of the Constitution. One track involved "the written instrument of government adopted at the nation's Founding and intended to function as a supreme legal code." The other track consisted of "the principles, ideals, institutions, laws, and procedures tending toward the maintenance of republican liberty by which the American people agreed to order their political existence." On the one hand, Lincoln viewed the checks and balances expressed in the text of the Constitution as binding and regarded the original understanding of the text as authoritative. And on the other hand, Lincoln resorted to the constitutional background ideals and principles as a guide for wise policymaking. As Belz described it: "Lincoln adhered to the written Constitution of the framers—its forms, procedures, principles, and spirit—and was guided by it in political action aimed at achieving the ideals asserted in the Declaration of Independence."

This two-track framework is particularly useful for exploring constitutional concepts. In the sections below, this framework will be applied to the subject of intellectual property. First, certain principles, ideals, and logic of antislavery thought will be examined for the light they can shed on our understanding of copyrights and patents in the American constitutional order. Second, certain implications of the texts of the Reconstruction Amendments regarding the scope of copyright and patent protections provided for under the Article I, Section 8 IP Clause will be briefly considered. As will be seen, IP rights readily conform to, and are in important respects linked to, the logic of antislavery concepts and actions that were to a significant extent formalized in the Reconstruction Amendments.

The Free Labor Logic of Intellectual Property Rights

Antislavery thought concerning the role of "free labor" offers a logical and compelling account relevant to an understanding of IP rights. Antecedents to the Republican free labor outlook include the thought of the Founders and their understanding and acceptance of the political writings of John Locke. In his famous *Second Treatise of Government* (1689), Locke linked an individual's own labor to his property interest:

> [E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.

Following Locke, James Madison, the principal drafter of our Constitution, declared that individuals possess property rights "in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their Fatigues and soothe their cares."

Historian Eric Foner explored the basic contours of antislavery thinking in *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*. According to Foner:

> For the concept of 'free labor' lay at the heart of the Republican ideology, and expressed a coherent social outlook, a model of the good society. Political anti-slavery was not merely a negative doctrine, an attack on southern slavery and the society built upon it; it was an affirmation of the superiority of the social system of the North—a dynamic, expanding capitalist society, whose achievements and destiny were almost wholly the result of the dignity and opportunities which it offered the average laboring man.

The concept of free labor was placed in the context of America's expanding and enterprising society. This view regarded hard work in useful vocations and social mobility as the means for obtaining economic independence. Observed Foner, "[t]he aspirations of the free labor ideology were thus thoroughly middle-class, for the successful laborer was one who achieved self-employment, and owned his own capital—a business, farm, or shop...The key figure in the Republicans' social outlook was thus the small independent entrepreneur."

The flip side to the concept of free labor was its critique of slave labor and the ethic of slaveholding society. The new Republican party in the late 1850s and 1860s made criticisms of slave labor part of its appeal to voters in Northern states. As encapsulated by Eric Foner:

> The Republican critique of southern society thus focused upon the degradation of labor—the slave's ignorance and lack of incentive, and the laboring white's poverty, degradation, and lack of social mobility. The result was not only regional economic stagnation, but a system of social ethics entirely different from that of the North.

Lincoln and Free Labor

Abraham Lincoln's thought concerning "free labor" was grounded in the Founders' understanding, and most particularly in the Declaration's affirmation of the natural right to life, liberty, and the pursuit of happiness. In his opposition to slavery, but also in a more universal sense, Lincoln repeatedly articulated the Lockean view that all individuals, of whatever race or creed, possess a natural right to enjoy the fruits of their own labor, to make those fruits their own property. "[E]ach individual is naturally entitled to do as he pleases with himself and the fruit of his labor," Lincoln wrote in 1847. Or, as he put it in a more colloquial Lincolnism: "I always thought the man that made the corn should eat the corn."

Moreover, Lincoln understood that the intertwining of free labor and property rights was essential to securing and maintaining the liberty espoused by the Declaration and guaranteed by the Constitution – and that free labor, individual initiative, and property rights are essential elements of the American free enterprise system.

Finally, in extolling the virtue of labor and property, Lincoln frequently admonished those who would set one man or class against another. As he put it in 1847:

> [I]t has so happened in all ages of the world, that some have laboured, and others have without labour, enjoyed a large proportion of the fruits. This is wrong and should not continue. To [secure] each labourer the whole product of his labour, or as nearly as possible, is a most worthy object of any good government.

Lincoln would echo those sentiments as President in his 1864 reply to the New York Workingmen's Democratic Republican Association:

> Property is the fruit of labor...property is desirable...is a positive good in the world. That some should be rich shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another; but let him labor diligently and build one for himself….

Lincoln the Pro-Entrepreneur, Pro-IP Whig

It should come as no surprise that, as an enthusiast for free labor, Lincoln was also an enthusiast for securing the rights of intellectual labor. Securing copyrights for authors and patents for inventors fits squarely within the political and social outlook of the Whig party in which Lincoln the politician emerged. Daniel Walker Howe, the leading contemporary scholar of the Whig party, has shed important light on Whig thought that emphasized economic and social progress. The Whigs regard for progress—or "improvements"—included enthusiasm for manufactures and technological achievements in particular. Along with Whig luminaries such as Henry Clay and Daniel Webster, Lincoln promoted intellectual property rights in law and policy.

During his single-term as a Whig member of the House of Representatives (1847-1849), Congressman Lincoln applied for a patent for his invention of "a device to buoy vessels over shoals." As recounted by Jason Emerson in his monograph *Lincoln the Inventor*, Lincoln's idea for the device came after a flatboat on which he was a hired hand became stuck on the Rutledge milldam near New Salem, Illinois, in 1831. Congressman Lincoln toured the U.S. Patent Office with his son Robert, examining some of the approximately 200,000 invention models then on display in the office building's third floor. According to Emerson, the tradition that Senator Daniel Webster assisted Lincoln in getting the patent office to approve of Lincoln's application is bolstered by a February 1849 letter from Webster to Lincoln. Ultimately, on May 22, 1849, Lincoln's application was approved and assigned as Patent Number 6,469. While most scholars have concluded that Lincoln's device did not meaningfully contribute to riverboat navigation, Lincoln's patent award exemplifies the Whig promotion of self-improvement. Further, Emerson astutely observed that "[w]hile a Congressman, Lincoln assisted at least two of his constituents with applying for their own patents." Lincoln's votes in favor of legislation modestly amending administration of patent laws in 1848 and 1849 similarly evidence his solicitude for securing IP rights.

Following his service in Congress, Lincoln the lawyer also encountered IP rights. Emerson concludes that Lincoln was involved as a lawyer in at least five patent cases between 1850 and 1860. Acquaintance's recollections indicate that Lincoln took significant interest in the inventions and legal merits of his patent cases.

Lincoln the Pro-IP Republican

It was during the 1850s that the Whig party ultimately dissolved. As Howe has written of Lincoln, "[h]e remained an active and loyal Whig until the newly organized Republican party absorbed most northern Whigs in the mid-1850s. This new party represented for Lincoln a continuation of the same aspirations as the Whigs, for the modernization of American society and the creation of new opportunities for self-fulfillment."

Lincoln the Republican made the case for IP protections most emphatically in a handful of public lectures and speeches he delivered between 1858 and 1860. In the interval between his loss to Senator Douglas and his nomination for President by the Republican party, Lincoln would deliver a half-dozen times, in essentially the same form, his lecture on "Discoveries and Inventions." His lecture offered a cursory overview of the discoveries and inventions of human civilization, providing insights about the economic and social progress they facilitated. In his lecture, Lincoln juxtaposed Western Civilization's 15th Century achievements in writing and printing press technology with the regrettable rise of human slavery. He observed: "[I]n the world's history, certain inventions and discoveries occurred, of peculiar value, on account of their great efficiency in facilitating all other inventions and discoveries. Of these were the arts of writing and printing—the discovery of America, and the introduction of Patent laws."

Lincoln regarded the discovery of America as "an event greatly favoring and facilitating useful discoveries and inventions." And he concluded his lecture by extolling patent laws:

> Before then these, any man might instantly use what another had invented; so that the inventor had no special advantage from his own invention. The patent system changed this; secured to the inventor, for a limited time, the exclusive use of his invention; and thereby added the fuel of *interest* to the *fire* of genius, in the discovery and production of new and useful things.

In general, Lincoln's lecture on "Discoveries and Inventions" has received mixed reviews from scholars. More recent scholarship, however, has treated Lincoln's lecture more seriously. According to Emerson, "Lincoln's lecture on discoveries and inventions was not a passing whim or a half-hearted composition. It was something to which he gave long and deliberation attention and that he delivered at least six times." Lincoln's own abiding interest in his "Discoveries" lecture and the underlying ideas it contained is also reflected at a January 1865 meeting he had with Harvard professor Louis Agassiz. Wrote Emerson, in that meeting Lincoln "talked about his lecture on discoveries and inventions, saying it was not quite perfected and that after his presidency he planned to work on it some more and perhaps have it published."

Lincoln made his most direct connection between free labor and patent rights of inventors in his "Address to the Wisconsin State Agricultural Society" (1859). In the address, Lincoln gave a brief exposition of the free labor outlook, with its emphasis on self-improvement, upward mobility, and independence. He criticized the "mud-sill" theory of labor – the notion that "labor is available only in connection with capital," that "all laborers are necessarily either hired laborers, or slaves" and that "whoever is once a hired laborer, is fatally fixed in that condition for life." Lincoln answered that it was in error to assume that all labor must be either hired labor or slave labor and also in error that education and labor were incompatible. In further answer, Lincoln set out the more dynamic perspective of free labor advocates:

> The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land, for himself; then labors on his own account another while, and at length hires another new beginner to help him. This, say its advocates, is *free* labor -- the just and generous, and prosperous system, which opens the way for all -- gives hope to all, and energy, and progress, and improvement of condition to all. If any continue through life in the condition of the hired laborer, it is not the fault of the system, but because of either a dependent nature which prefers it, or improvidence, folly, or singular misfortune.

Moreover, as Lincoln memorably put it:

> Free Labor argues that, as the Author of man makes every individual with one head and one pair of hands, it was probably intended that heads and hands should cooperate as friends; and that that particular head, should direct and control that particular pair of hands. As each man has one mouth to be fed, and one pair of hands to furnish food, it was probably intended that that particular pair of hands should feed that particular mouth -- that each head is the natural guardian, director, and protector of the hands and mouth inseparably connected with it; and that being so, every head should be cultivated, and improved, by whatever will add to its capacity for performing its charge. In one word Free Labor insists on universal education.

In his "Wisconsin Address," Lincoln praised agricultural fairs for "improving the great calling of agriculture" through "mutual exchange of agricultural discovery, information, and knowledge." According to Lincoln, agricultural fairs serve a vital purpose:

> [N]ot only to bring together, and to impart all which has been *accidentally* discovered or invented upon ordinary motive; but, by exciting emulation, for premiums, and for the pride and honor of success -- of triumph, in some sort -- to stimulate that discovery and invention into extraordinary activity. In this, these Fairs are kindred to the patent clause in the Constitution of the United States; and to the department, and practical system, based upon that clause.

In the "Wisconsin Address," Lincoln's regard "for the profitable and agreeable combination of labor with cultivated thought" captures the essence of the meaning of intellectual property. By securing a return to free laboring authors and inventors for their pursuit of ideas and discoveries,

copyrights and patents stimulated the drive for further self-improvement and achievement of independence. And society also stood to benefit from the intellectual and material progress advanced by authors and inventors.

As illustrated by his experiences as a lecturer and inventor as well as his career as a legislator, candidate, and lawyer, Lincoln appreciated the conceptual foundations of intellectual property and the rationale for protecting IP rights. His respect for IP rights in securing the benefits of free labor constituted just one facet of the antislavery ideology that influenced Lincoln in his understanding of the U.S. Constitution and the laws of property. Of course, antislavery views about the Constitution and property were at the very heart of an unresolved dispute that divided the nation and that led to Civil War.

Property in Men as an Inversion of Liberty and Self-Ownership

Related to antislavery ideology's espousal of free labor were the sharp attacks such ideology leveled upon the ethical and constitutional propriety of the existence of property rights in human beings. As will be seen, the idea of property rights existing in men runs contrary to the Lockean natural rights understanding of the Founders and of antislavery thought that property consists principally in self-ownership. Indeed, IP rights had historically been premised on the self-ownership principle.

Historian James Oakes has brought renewed attention to divisiveness of the "chattel principle" – treating slaves as commodified property – in the ideological clash that precipitated the Civil War. As Oakes explained in *The Scorpion's Sting: Antislavery and the Coming of the Civil War*:

> What tore the nation apart was a dispute over two very different labor systems, and the crucial difference between them was, once again, the chattel principle. Here was the issue debated everywhere during the sectional crisis. To fight over slavery was to disagree about the moral, political, economic, and constitutional legitimacy of what Americans at the time called "property in man."

Writing about the conflict over "the right versus the wrong of 'property in man,'" Oakes recounted that "[i]n every major dispute over the appropriate relationship between slavery and the federal government, the debate was framed in these broader philosophical terms."

That debate began with at least one generally acknowledged principle. According to Oakes, "[i]t was a standard precept of Anglo-American political philosophy that the protection of property was a primary reason—arguably *the* primary reason—for establishing *any* form of government." Beginning in the 1830s, however, conflicting views emerged regarding the proper implications of that fundamental premise of the purpose of government. Pro-slavery ideology rejected the natural equality of all persons, claimed that a natural right of white men to own property in slaves preceded government, and that the Constitution thereby implicitly protected that property. In *Dred Scott v. Sanford* (1857), Chief Justice Roger Taney insisted "the right of property in a slave is distinctly and expressly affirmed in the Constitution." Other pro-slavery voices insisted a right of property in slaves was implicitly protected by the Constitution.

"But for slavery's opponents the concept of 'human property' was a self-contradiction," wrote Oakes. Moreover, "[l]ike nearly all Republicans, Lincoln believed that the conflict over slavery was, at bottom, a fundamental disagreement over property rights in human beings."

Lincoln expressed the underlying terms of the conflict in his "Speech at New Haven" (1860):

> Whenever this question shall be settled, it must be settled on some philosophical basis. No policy that does not rest upon some philosophical public opinion can be permanently maintained. And hence, there are but two policies in regard to Slavery that can be at all maintained. The first, based on the property view that Slavery is right, conforms to that idea throughout, and demands that we shall do everything for it that we ought to do if it were right… The other policy is one that squares with the idea that Slavery is wrong, and it consists in doing everything that we ought to do if it is wrong.

In several speeches, including his "Speech on the Dred Scott Decision" (1857) and his "Cooper Union Address" (1860), Lincoln criticized Chief Justice Taney's opinion. His criticism included the obvious fact that "neither the word 'slave' nor 'slavery' is to be found in the Constitution, nor the word 'property' even, in any connection with the language alluding to the thing slave, or slavery, and that whenever in the instrument the slave is alluded to, he is called a "person;"—and wherever his master's legal right in relation to him is alluded to, it is spoken of as "service or labor which may be due,"—as a debt payable in service or Labor." Lincoln also insisted that "contemporaneous history" established "that this mode of alluding to slaves and slavery, instead of speaking of them was employed on purpose to exclude from the Constitution the idea that there could be property in man." To Lincoln, the omission of the word was made intentionally by the Constitution's framers to accommodate the eventual extinction of slavery.

Other Republican and antislavery proponents pointed to the lack of any expression of the words "slave" or "slavery" or the term "property in men" in the Constitution. They cited writings from the framers of the Constitution of 1787 for the proposition that the word "slavery" was kept out of the Constitution's text in order to avoid conferring legitimacy on the institution. For instance, in an article published in the *New York Times* titled "Property in Men" (1860), James A. Hamilton, son of Alexander Hamilton, summarized the "contemporaneous history" evidencing the Founders earnest intent to keep the written Constitution free from any express endorsement of slavery. Among the references cited, Hamilton quoted from the posthumously published *Notes of Debates in the Federal Convention of 1787* (1840) that James Madison "thought it wrong; to admit in the Constitution the idea that there could be property in man. We intend this Constitution to be the great charter of human liberty to the unborn millions who may enjoy its protection, and who shall never see that such an institution was ever known in their midst." Summarizing Madison's *Notes*, Hamilton continued: "The Convention concurring in these opinions without debate, unanimously resolved that the words, 'Slave' and 'Slavery' should be stricken out; and the words "such person" and "other persons" should be substituted wherever they occurred. Hamilton would later enclose his article in a letter to Lincoln, explaining it was inspired by the "Cooper Union Address" that he so much admired.

The Lockean concept that the core of property consists of self-ownership and the closely-related free labor concept that a person has a natural right to the fruits of his or her own labor – both of which are reflected in the Declaration of Independence – formed the principled basis for concluding, as Lincoln and other antislavery thinkers did, that slavery is wrong. IP rights fit squarely within this idea of self-ownership, as an author or inventor owned the productions of their mental labors and the returns those labors generated. The prevailing understanding during Lincoln's day, as it had been at the time of the Constitution's ratification, was that copyrights and patents were the property of authors and inventors. The revenues and profits generated by written works and inventions were the fruits of their intellectual labors and thereby rightfully owned by the respective authors and inventors so long as the earnings were generated during the terms provided by law. Slavery inverted the concept of property and was self-contradictory.

"Freedom National" as a Policy Program for Liberty and Property

Antislavery thinkers such as Lincoln recognized that the Constitution's accommodation to slavery limited the ability of the federal government to interfere with that institution in the states where it existed. Nonetheless, as a matter of constitutional politics, antislavery thinkers countered the idea of property in men with the position that a person's inalienable right to liberty was the prevailing or default position and that slavery existed only where the blackletter law of a state expressly provided for it.

James Oakes traces the origin and eventual success of the antislavery movement's program for "denationalizing" the idea of property in men in *Freedom National: The Destruction of Slavery in the United States, 1861-1865*. Oakes recounts the contributions of Theodore Weld, Joshua Giddings, Salmon P. Chase, Charles Sumner, and William Seward to the antislavery legal and constitutional arguments for cordoning slavery off with free states and restricting it to those states where it already existed.

In Eric Foner's estimation, credit is primarily due to Salmon P. Chase in leading the transformation of the antislavery movement from a social cause to a political and legal cause. As an antislavery lawyer representing a fugitive slave in the *Matilda* case (1838), Chase explained:

> The right to hold a man as a slave is a naked legal right. It is [a] right which, in its own nature, can have no existence beyond the territorial limits of the state which sanctions it, except in other states whose positive law recognizes it and protects it.

Chase would serve as Ohio's Governor and a U.S. Senator prior to serving as Lincoln's first-term Treasury Secretary and to then serving as Chief Justice of the Supreme Court. As Foner summarized Chase's basic position, "the founders deplored the institution and hoped for its early abolition. They regarded freedom and equality as the natural condition of men, and viewed slavery as a temporary and abnormal state." On account of Chase's efforts, the "Freedom National" banner eventually formed "the constitutional basis of the Republican party program." Sumner would memorably appropriate Chase's arguments from the *Matilda* case and use them in his first major antislavery speech in the Senate, titled "Freedom National; Slavery Sectional" (1852). As Oakes summarized:

> For Republicans, freedom was the natural, default condition, the presumed status of everyone living under the protection of the Constitution, unless expressly overruled by a positive law enacted by a sovereign state. The doctrine was enshrined in the Republican party's 1860 platform resolution…declaring that 'the normal condition of all the territory of the United States is that of freedom.'

The 1860 election thus made "Freedom National" the policy program of the Administration of President Abraham Lincoln. To that end, Congress addressed the divisive issue of property in men. With Lincoln's signature, in the early 1860s Congress abolished slavery in the District of Columbia and banned slavery in all federal territories.

Emancipation by military means, as Oakes has written, "had never been central to the abolitionist agenda, much less to the Republican party platform." Of course, Lincoln's *Emancipation Proclamation* (1863) would ultimately become the chief antislavery measure of the Administration.

Overturning *Dred Scott*'s Rule on Intellectual Property Rights

To be sure, military matters dominated political and administrative business during the Civil War years that followed. However, the influence of the "Freedom National" program had at least one important impact on IP rights during the Lincoln Administration.

In 1857, U.S. Senator and future Confederate President Jefferson Davis summarily was denied a patent for a riverboat propeller invention that was the idea of a slave on the plantation of his brother Joseph. As recounted in a 2013 article by Sean Vanatta, the novel propeller was designed by Benjamin Butler. Davis's brother sought a patent on a more specific part of the invention but was similarly denied. Consistent with the *Dred Scott* decision, U.S. Patent Office Commissioner Joseph Holt denied the patent on account of the fact that the slave inventor was not a "citizen" of the United States and therefore not legally competent to obtain a patent. Likewise, the slaveowners were not the genuine inventors and ruled ineligible.

Although Lincoln denied that the decision in *Dred Scott* would bind the policy for his administration, the mere fact of Lincoln's inauguration did not automatically eliminate the court decision's impact. On December 16, 1861, Senator Charles Sumner reported that the federal district court in Boston had denied a patent application by an inventor who was a free black. The denial was apparently based on the *Dred Scott* decision that blacks were not citizens under the Constitution and therefore not entitled to patents. Sumner introduced and the Senate approved by unanimous consent a resolution declaring:

> Resolved, That the Committee on Patents and the Patent Office be directed to consider if any further legislation is necessary to secure to persons of African descent, in our own country, the right to take out patents for useful inventions, under the Constitution of the United States.

Sumner later remarked in his collected *Works*:

> The Committee made no report on the resolution. It was a case for interpretation rather than legislation, and the question, like that of passports, was practically settled not long afterwards by the opinion of the Attorney-General, that a free man of color, born in the United States, is a citizen. Since then patents have been issued to colored Inventors.

Although the Civil War preoccupied Congress from 1861 to 1865, during that same timeframe, Congress did adopt – and President Lincoln signed – modest revisions to federal laws regarding copyrights and patents. Copyright amendments made in 1865 were significant for extending protection to photographs and to photo negatives. Further technical amendments were made to copyright law in 1867. And amendments were made to patent laws in 1863 and 1865. Attorney General Edward Bates's *Opinion on Citizenship* (1862), accordingly settled that free blacks would be issued copyrights and patents according to the terms of those federal laws.

Intellectual Property Rights Under Reconstruction

Reconstruction is generally regarded as time between the surrender at Appomatox in 1865 and the hotly disputed Hayes-Tilden election of 1876. It was during this difficult period that the antislavery aims only partially achieved under the policy of "Freedom National" and precariously maintained under military emancipation and occupation were made permanent and more fully obtained in three crucial amendments to the Constitution.

During the final weeks of his life, President Lincoln urged Congress to pass the proposed 13th Amendment. Incorporating language nearly identical to Article 6 of the Northwest Ordinance, the Amendment declared: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Senate's final vote of approval for the proposed Amendment barring property in men and effectively constitutionalizing the reversal of *Dred Scott* was held on April 8, 1865. Lincoln was assassinated just six days later.

President Andrew Johnson's plans for rapid and easy Executive Reconstruction fizzled as his relations broke down with Congress. As Johnson became the first President ever impeached,only barely avoiding conviction and removal, Congress took an especially active role in reaching a constitutional and legal settlement to the recently concluded Civil War. In the face of Johnson's opposition, Congress proposed the 14th Amendment for ratification in 1865. Section 1 of the Amendment contained four critical clauses:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

According to Professor Michael Kent Curtis, the views of Republican Congressmen during this time "were shaped by their experience of the assault on civil liberties that occurred during the crusade against slavery and by a political ideology that emphasized the Declaration of Independence and the rights of the Individual." More particularly:

> Republicans accepted the following tenets of antislavery constitutional thought. First, after the passage of the Thirteenth Amendment abolishing slavery, blacks were citizens of the United States. Republicans held this view even though the Dred Scott decision was to the contrary. Second, the guaranties of the Bill of Rights applied to the states even prior to the passage of the Fourteenth Amendment. Most Republicans held this view even though the Supreme Court had ruled to the contrary in the case of *Barron v. Baltimore*, decided in 1833. Third, the privileges and immunities clause of the original Constitution protected the fundamental rights of American citizens against state action. Fourth, the due process clause of the Fifth Amendment protected all persons from enslavement in the District of Columbia and in the federal territories.

The 14th Amendment and related civil rights legislation were the critical campaign issues of the 1866 Congressional elections. The electorate resoundingly endorsed the actions of the 39th Congress, and the next Congress proposed the 15th Amendment for ratification. It provided "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

Amidst the conflict with Johnson over Reconstruction and related matters, the 40th Congress had occasion to pass legislation that made minor adjustments to patent and copyright laws: the Appropriations Act of 1868 and Copyright Acts of 1867 and 1868. That pro-IP legislation was adopted contemporaneously with the 14th and 15th Amendments gives rise to the inference that the IP rights were fully consistent with the antislavery principles and views of property vindicated by the War and that influenced the framing of those amendments – namely, that property is rooted in a natural right of liberty and self-ownership, and that all persons are equally entitled to the fruits of their own labors, protected by the rule of law. It also gives rise to the inference that the 40th Congress viewed its IP legislation as consistent with the textual provisions of the amendments as the specifically enforceable supreme law designed to protect rights informed by those principles. Had there been something illegitimate about IP rights or some sort of conflict between IP rights and antislavery principles, they almost certainly would have surfaced during those debates. Any perceived conflict would have at least made IP rights a candidate for curtailment or caused pro-IP legislation to be discarded.

The 15th Amendment was passed by Congress just prior to the inauguration of Ulysses S. Grant. Grant deserves credit alongside Lincoln for preserving the Constitution and thereby enabling the new birth of freedom. Historian and biographer H.W. Brands offered a valid point in writing:

> The Union victory wasn't simply or even chiefly an intellectual victory; it was a military victory. Southerners were no less certain than Northerners of the legitimacy of their interpretation of the principles of self-government; the South

> lost from lack not of conviction but ammunition. Grant didn't convince the South; he conquered the South.

As Josiah Bunting put it in his brief book about Grant's Presidency, Grant had "a commitment to uphold what he understood to be the legacy of victory in the Civil War: not [with] the aggressive zeal of the reformer but an implacable commitment to a principle already established." Moreover, Bunting added that:

> [T]he depth of Grant's commitment to Reconstruction seemed to grow stronger as resistance to the realization of what he believed itself became more determined. The identification of the Democratic party with the positions that seemed aimed on destroying the hard-won gains of black Americans seemed to the president a betrayal of all they had gained by the war and a betrayal of those who had labored to make its results permanent.

In his *First Annual Message* (1869), Grant identified "where all labor rightfully belongs—in the keeping of the laborer," and commended Congress for giving ample attention to "protecting and fostering free labor." Grant also described it essential to the nation's peace, prosperity, and fullest development "to secure protection to the person and property of the citizen of the United States in each and every portion of our common country." During his Presidency, Grant accordingly advanced the "new birth of freedom" by requesting from Congress legislation to enforce the Reconstruction Amendments. Historians acknowledge the civil rights laws as enforced by Grant were not particularly successful at the time in achieving their intended purpose. And subsequent rulings of the Supreme Court would unfortunately limit or strike down some of those laws for enforcing the Reconstruction Amendments.

Still, it is important to recognize that Grant's commitment to civil rights legislation also coincided with modest pro-IP legislation. In his *First Annual Message*, Grant praised manufactures for their role in furthering national economic independence and in providing employment opportunities. More importantly, Congress passed and Grant signed the Copyright and Patent Acts of 1870. The Copyright Act transferred registration functions from federal district courts to the Library of Congress, centralizing and streamlining the process and thereby expanding the resources and resourcefulness of the Library. Some slight amendments to copyright laws followed in 1874. The Patent Act was a comprehensive measure gathering together the substance of preceding legislation and legal decisions. Among other things, it clearly established a first-to-file system for patent claims. Minor legislative amendments to the patent laws were also adopted in 1871 and 1874. Here again, an inference is raised by the contemporaneous adoption and enforcement of Reconstruction rights legislation and pro-IP rights legislation. The two types of measures were on some level consistent, or at least there certainly was nothing inconsistent between them.

On January 11, 1870, Grant did veto a bill that would have specifically extended a patent for the inventor of improvements in repeat-fire pistols. The inventor had obtained a patent in 1855 but wanted patent protection beyond the initial 14-year term provided by law. Congress passed a bill

authorizing its extension. That Grant issued the veto can be explained by his perception that justification was lacking for affording special treatment to one particular inventor. Grant's record in signing general laws favoring IP rights suggests that veto was a special case.

Grant's favorable disposition toward IP rights is also evidenced by his role with respect to the Centennial Exhibition held in Philadelphia in 1876. In 1871, Grant signed legislation creating the Centennial Commission. The purpose of the legislation was to support an exhibition to be hosted for the 100th anniversary of American Independence that would celebrate and showcase the nation's progress in manufactures and the arts. On May 10, 1876, Grant delivered the opening address at the event, formally known as the "International Exhibition of Arts, Manufactures, and products of the Soil and Mine." In his *Eighth Annual Message* (1876), Grant declared the event "has proven a great success," and that "[i]t has shown the great progress in the arts, sciences, and mechanical skill made in a single century."

Finally, during the last year of his life, Grant would seek the potential financial rewards ensured by copyright protection. Though cancer-stricken, Grant labored to write an autobiographical account in order to save his wife Julia from the financial woes the couple encountered after leaving the White House. Grant pressed on until his final days of life to complete his *Personal Memoirs of U.S. Grant*, published in two volumes in 1885 and 1886. Mark Twain assisted Grant with the publishing arrangements, editing, and marketing. Grant's *Memoirs* generated approximately $450,000 for the benefit of Julia, and have been hailed as a classic.

Implications of the Civil War Amendments for Intellectual Property Rights

While the sectional conflict over slavery that led to the Civil War and the Constitutional Amendments ratified during Reconstruction involved critical matters regarding the basic principles, ideals, and institutions of the Constitution, the formal adoption of those amendments included specific textual additions to the nation's supreme legal code.

It does not appear that Civil War Amendments to the Constitution impose any express limitation on the scope of copyright or patent protections under the IP Clause. The clause's grant of power to Congress "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries" leaves little role for states. However, to the extent any state laws offer supplemental or tangential protections to authors or inventors, the 14th Amendment's Equal Protection Clause at least requires that any such protections be extended to all state citizens on an equal basis. Similarly, any rights of authors or inventors recognized under state law would be protected by the 14th Amendment's due process clause.

Conclusion

The significance and permanency of change to the nation's fundamental law formally achieved in the 1860s makes it an essential reference point for any analysis of constitutional powers and rights. Accordingly, an analysis of the constitutional foundations of intellectual property rights should be informed by the new birth of freedom.

The political and constitutional thought and actions of Abraham Lincoln are central to Civil War constitutionalism. Antislavery thought about free labor offers a logical and compelling account for IP rights. The Lockean concept that the core of property consists of self-ownership and the closely-related free labor concept that a person has a natural right to the fruits of his or her own labor – both of which are reflected in the Declaration of Independence – formed the principled basis for concluding, as Lincoln and other antislavery thinkers did, that slavery is wrong. IP rights fit squarely within this idea of self-ownership, as an author or inventor owned the productions of their mental labors and the returns those labors generated. The prevailing understanding during Lincoln's day, as it had been at the time of the Founding and the Constitution's ratification, was that copyrights and patents were the property of authors and inventors, respectively. Not surprisingly, Lincoln himself linked the concept of free labor with protection of IP rights.

The influence of the "Freedom National" program had at least one important impact on IP rights during the Lincoln Administration. Attorney General Edward Bates's *Opinion on Citizenship* (1862), effectively settled that free blacks would be issued copyrights and patents according to the terms of those federal laws.

And the fact that pro-IP legislation was adopted contemporaneously with the Reconstruction Amendments gives rise to the inference that the IP rights were consistent with the antislavery principles and views of property vindicated by the War and that influenced the framing of those amendments.

It does not appear that Civil War Amendments to the Constitution impose any express limitation on the scope of copyright or patent protections under the IP Clause. Moreover, securing IP rights is consistent with liberty of contract or the right to pursue a lawful calling – perhaps the two primary corollaries of historic economic substantive due process jurisprudence.

In sum, examination of intellectual property in light of antislavery thought, political action tied to the Civil War, and the Reconstruction Amendments, bolsters the logical case for intellectual property and its connection to the underlying principles of the American constitutional order.

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Further Readings

Declaration of Independence (1776).

Dred Scott v. Sanford (1857).

Northwest Ordinance (1789).

Edward Bates, *Opinion on Citizenship* (1862).

Ulysses S. Grant, *First Annual Message* (1869).

Ulysses S. Grant, *Veto Message* ("An act for the relief of Rollin White") (Jan. 11, 1780).

Ulysses S. Grant, *Eighth Annual Message* (1876).

Ulysses S. Grant, *Personal Memoirs of U.S. Grant* (1885-1886).

James A. Hamilton, "Property in Men," *New York Times* (1860).

Abraham Lincoln, "Lecture on Discoveries and Inventions (1858-1860).

Abraham Lincoln, "Speech on the Dred Scott Decision" (1857).

Abraham Lincoln, "Address to the Wisconsin State Agricultural Society" (1859).

Abraham Lincoln, "Cooper Union Address" (1860).

Abraham Lincoln, "Speech at New Haven" (1860).

Abraham Lincoln, *Emancipation Proclamation* (1863).

Abraham Lincoln, "Gettysburg Address" (1863).

Abraham Lincoln, "Reply to the New York Workingmen's Democratic Republican Association" (1864).

John Locke, *Second Treatise of Government* (1689).

James Madison, *Notes of Debates in the Federal Convention of 1787* (1840).

Charles Sumner, *The Works of Charles Sumner*, Vol. VI (1874).

# # #

Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Protection in the Civil War Era* (1998).

H.W. Brands, *The Man Who Saved the Union: Ulysses Grant in War and Peace* (2012).

Josiah Bunting III, *Ulysses S. Grant* (2004).

Walter Brown, *A Brief History of Patent Legislation in the United States* (1889).

Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986).

Jason Emerson, *Lincoln the Inventor* (2009).

Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (2d ed.) (1995).

Daniel Walker Howe, *The Political Culture of the American Whigs* (1979).

Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (2007).

James Oakes, *Freedom National: The Destruction of Slavery in the United States, 1861-1865* (2013).

James Oakes, *Scorpion's Sting: Antislavery and the Coming of the Civil War* (2014).

U.S. Copyright Office, "Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright," *Bulletin No. 3* (Rev. ed.) (1973).

Sean Vanatta, "How the Patent Office Helped to End Slavery," *Bloomberg* (February 8, 2013).

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Randolph J. May and Seth L. Cooper, "The Constitutional Foundations of Intellectual Property," *Perspectives from FSF Scholars*, Vol. 8, No. 13 (2013).

Randolph J. May and Seth L. Cooper, "Reasserting the Property Rights Source of IP," *Perspectives from FSF Scholars*, Vol. 8, No. 17 (2013).

Randolph J. May and Seth L. Cooper, "Literary Property: Copyright's Constitutional History and Its Meaning for Today," *Perspectives from FSF Scholars*, Vol. 8, No. 19 (2013).

Randolph J. May and Seth L. Cooper, "The Constitution's Approach to Copyright: Anti-Monopoly, Pro-Intellectual Property Rights," *Perspectives from FSF Scholars*, Vol. 8, No. 20 (2013).

Randolph J. May and Seth L. Cooper, "The 'Reason and Nature' of Intellectual Property: Copyright and Patent in *The Federalist Papers*," *Perspectives from FSF Scholars*, Vol. 9, No. 4 (2014).

Randolph J. May and Seth L. Cooper, "Constitutional Foundations of Copyright and Patent in the First Congress," *Perspectives from FSF Scholars*, Vol. 9, No. 18 (2014).

Randolph J. May and Seth L. Cooper, "Life, Liberty, and the Protection of Intellectual Property: Understanding IP in Light of Jeffersonian Principles," *Perspectives from FSF Scholars*, Vol. 9, No. 25 (2014).

Randolph J. May and Seth L. Cooper, "Intellectual Property Rights Under the Constitution's Rule of Law," *Perspectives from FSF Scholars*, Vol. 9, No. 31 (2014).

Randolph J. May and Seth L. Cooper, "Reaffirming the Foundation if IP Rights: Copyright and Patent in the Antebellum Era," *Perspectives from FSF Scholars*, Vol. 9, No. 38 (2014).