

Jefferson's Taper

How America's Revolutionaries Imagined Cultural Wealth

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I took a look at the Constitution of the Commonwealth of Massachusetts as I began to think about this talk. That document was largely the work of John Adams, and especially a section entitled "The Encouragement of Literature, Etc." which we know to have been entirely Adams's creation. It reads, in part:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties..., it shall be the duty of legislatures..., in all future periods of this commonwealth, to cherish the interests of literature and the sciences [and]...to encourage private societies and public institutions...for the promotion of...arts [and] sciences

Amusingly, there's also a section dedicated wholly to praise and support of Harvard University, which I presume has been since broadened to a more general support of learning. But it is Adams's language not his loyalties that interest me: the Constitution charges the legislature with the duty to act always in a manner "conducive to...the republic of letters." I'll come back to this before I'm done, but for now the point to remember is this: for John Adams, the encouragement of art, science, and literature was somehow linked to the preservation of liberty, and to the creation of a particular kind of republic, a "republic of letters."

This is the "Forum on Social Wealth," and the form of wealth I will be speaking of is now called "intellectual property." That's a hateful phrase, in many ways. It implies that symphonies, poems, paintings, and so forth are the products of "intellect" rather than of a wider array of human powers. And it implies that they are "property" in the same way that

cars and shoes are "property." Moreover, it is a phrase unknown to the generation that founded this nation, and the period of our founding is what I want to focus on. How did the Framers of this Republic imagine this material we now call "intellectual property"? What was a man like Adams thinking about when he wrote about "The Encouragement of Literature, Etc."?

In answering this question I'll be borrowing from the linguist George Lakoff the handy notion that the way we frame our political questions in large part determines how our arguments will end. Framing problems of public finance as being about "tax relief" will lead the discussion one way; framing them as being about owing debt to Chinese banks will lead another. When it comes to intellectual property, of course, the entertainment industry has become very good at framing, always casting the debate in terms of private property and theft. Here's a typical assertion: "There is no difference in our mind between stealing a pair of shoes in a shoe store and stealing music on-line. A theft is a theft is a theft."

The question is, would such an assertion have made sense to the Framers and, if now, how might they otherwise have framed the issue? What would be an American-revolutionary image for the things that artists and scholars create, and for the institutions--like the University of Massachusetts or this Political Economy Research Institute--that support such creativity?

I'll give my answer briefly, then I'll build it up more slowly: for the Framers, these would have been *civic republican estates*. To show how I come to this conclusion, and what exactly it means, let me begin by rehearsing the images or frames for creative work that the founders themselves might have inherited. The oldest of these is the notion that human creativity is a gift of the gods or the ancient ones. *Scientia Donum Dei Est, Unde Vendi Non Potest* was the dictum of Medieval Christians, "Knowledge is a gift from God, consequently it cannot be sold." Reformation Protestants were little different. Martin Luther said of his own created works, "Freely have I

received, freely I have given, and I want nothing in return." For Luther, as for the Medieval Church, to sell knowledge was to traffic in the sacred and thus to commit the sin of simony. No one should copyright a hymn and demand royalty payments when it is reproduced. For that matter, no one can properly be thought of as "stealing" a hymn. After all, simony is simony is simony.

It's worth noting, by the way, that these themes are not confined to Europe. In *The Analects*, Confucius writes, "I have transmitted what was taught to me without making up anything of my own. I have been faithful to and loved the Ancients." To honor the past was a consistent virtue for a thousand years in Imperial China, and thus to copy the work of those who came before was a matter of reverence rather than theft. Said the fifteenth-century artist Shen Zhou, "if my poems and paintings...should prove to be of some aid to the forgers, what is there for me to grudge about?"

But to come back to the European tradition, by the seventeenth century the idea of divine origins begins to be augmented by the humanist idea that creativity builds on a bounty inherited from the past, or gathered from the community at hand. Now we get Sir Isaac Newton who famously spoke of himself as having stood "on the shoulders of Giants." The phrase comes from a letter Newton wrote to Robert Hooke in 1675, the context being a debate about who had priority in arriving at the theory of colors. Newton manages to combine humility with an assertion of his own achievement, writing: "What Des-Cartes did was a good step. You have added much several ways, & especially in taking the colors of thin plates into philosophical consideration. If I have seen further it is by standing on the shoulders of Giants."

As the sociologist Robert Merton has explained at great length, this famous phrase did not originate with Newton; it was coined by Bernard of Chartres in the early twelfth century, the original aphorism being "In comparison with the ancients, we stand like dwarfs on the shoulders of giants." The image was a

commonplace by the time Newton used it, his one contribution being to erase any sense that he himself might be a dwarf.

Regardless of Newton's sources, we are here at the beginning of the age of heroic individualism, but it should be noted that even as individualism rises the idea of divine influence persists. The heroic individual, in the emerging Romantic conception, is animated by a spark of divinity. Listen, for example, to this 1774 fragment of British Parliamentary debate over the question of literary property. The speaker is Lord Camden, and his assertion is this:

If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris* [belonging to the public by right], and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits....

Those great men ... are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not ... hoard up for themselves the common stock.

Note that Camden, in his conflation of individual genius and Providential powers, gives us another way of framing the matter of intellectual property: it belongs to "the common stock." This also is a very old image. In Roman law those things whose size and range make them difficult if not impossible to own--all the fish in the sea, the seas themselves, the atmosphere--belong to a category of *res communes*, common things. To that list Camden is adding the fruits of science and learning (once they have been made public), and thus produces a frame that has descended into our own times as, for example, in this remark from Supreme Court Justice Louis Brandeis: "The general rule of law is, that the noblest of human productions--knowledge, truths ascertained, conceptions, and ideas--become, after voluntary communication to others, free as the air to common use."

The useful category of *res communes* still endures, then, one of the inherited frames for the kind of social wealth we now call intellectual property. Intellectual property is a common asset, not private estate; and the risk to it is not theft--the risk is that it will be enclosed, turned into private preserves into which the public may not wander without charge or permission.

Now, because the general topic of this forum is "social wealth," let me pause here to interrogate one plausible opposite, *individual* wealth. How are we to imagine the individual who deals in material that is like air, like water, like light? Picasso famously remarked that "All artists borrow, great artists steal." In that conceit, the great artist seems to be a heroic thief. But is that right? Is there any way to switch lenses here and look at the great artist not as a thief but as, well, a commoner working in a common field? By way of answer, I'll expand on one specific and contemporary example, Bob Dylan.

Dylan's recent autobiographical *Chronicles* is a long testimony to his own reception of a vast inheritance from the cultural commons. If one ever wanted to know where to look for Dylan's debts, the book provides a detailed roadmap. He tells us, for example, that John Hammond at Columbia Records introduced him to Robert Johnson's music. When Dylan arrived in New York in the early 1960s, Columbia had just bought Johnson's recorded work from an old label and was about to issue an LP. Hammond gave Dylan an acetate copy.

Over the next few weeks I listened to [the record] repeatedly, cut after cut, one song after another, sitting staring at the record player.... The songs were layered with a startling economy of lines....

I copied Johnson's words down on scraps of paper so I could more closely examine the lyrics and patterns, the construction of his old-style lines and the free association that he used....

Exactly the same thing had happened in Minneapolis a few years earlier when Dylan first heard Woody Guthrie's songs. He also describes large debts to Hank Williams, and to the old English ballads as collected by Child. He had been schooled in these in Minneapolis by an English professor at the University.

I could rattle off all these songs without comment as if all the wise and poetic words were mine and mine alone. The songs had beautiful melodies and were filled with everyday leading players like barbers and servants, mistresses and soldiers, sailors, farmhands and factory girls...."

In this way we come to the first time that Dylan recorded songs for Leeds Music, his initial publisher. The day he went to the Leeds offices, he writes,

I didn't have many songs, but I was making up some compositions on the spot, rearranging verses to old blues ballads, adding an original line here or there, anything that came into my mind--slapping a title on it.... I would make things up on the spot all based on folk music structure....

About the old song, "Sixteen Tons," he says: "You could write twenty or more songs off that one melody by slightly altering it."

Perhaps the most striking example Dylan gives of his schooling concerns a time that his girlfriend took him to hear an evening of Bertolt Brecht/Kurt Weill songs. "They were like folk songs in nature, but unlike folk songs, too, because they were so sophisticated.... The song that made the strongest impression was a show-stopping ballad..., 'Pirate Jenny'...."

Later, I found myself taking the song apart, trying to find out what made it tick, why it was so effective. I could see that everything in it was apparent and visible but you didn't notice it too much. Everything was fastened to the wall with a heavy bracket, but you couldn't see what the sum total of all the parts were, not unless you stood way

back and waited 'til the end. It was like the Picasso painting Guernica....

In the end, Dylan offers a list of his own early songs--"Mr. Tambourine Man," "Lonesome Death of Hattie Carroll," "A Hard Rain's A-Gonna Fall," and others--and then says:

If I hadn't ... heard the ballad 'Pirate Jenny,' it might not have dawned on me ... that songs like these could be written. In about 1964 and '65, I probably used about five or six of Robert Johnson's blues song forms, too, unconsciously, but more on the lyrical imagery side of things. If I hadn't heard the Robert Johnson record when I did, there probably would have been hundreds of lines of mine that would have been shut down--that I wouldn't have felt free enough or upraised enough to write.

In the same context Dylan writes of reading Rimbaud's line, *Je est un autre*, "which translates into 'I is someone else.' When I read those words the bells went off. It made perfect sense. I wished someone would have mentioned that to me earlier." Here we have the Rimbaud-Dylan version of Isaac Newton's "shoulders of giants." "If I am anything," Dylan seems to me to be saying, "it is because I have allowed others to inhabit me." The opposition between the commons and the individual is not as marked as it might seem if we fail to penetrate the surface, fail to notice how in fact great artists work. It's witty to say, as Picasso does, that they are all thieves, but it may be closer to the truth to say that they are commoners, working with the inherited materials that, as Lord Camden said, have been given them "as free and general as air or water."

As I was saying before this digression into the modern, the America's revolutionary generation inherited and, as we'll see, spoke in terms of a "common stock" frame. They inherited two others as well, to which I will now turn, the frame of "the landed estate" and the frame of "monopoly privilege." The first of these arose in the late seventeenth and early eighteenth

centuries in the context of artists and scholars beginning to free themselves from dependence on patronage. To put the same thing another way, the context was the beginnings of what we now call the public sphere, a realm of thought and deliberation independent of the government, the aristocracy, and the church.

No matter how we conceive of these changes retroactively, early in the eighteenth century we begin to hear from authors who don't speak of their work in terms of air and water but in terms of a commercial book trade. An author without a patron needs to earn his keep and might not trouble himself so much with rumors about God's position on selling the fruits of imaginative labor. The German dramatist Gotthold Lessing knew the rule Martin Luther had declared; Lessing reproduced it as "Freely hast thou received, freely thou must give!" and then dismissed it: "Luther, I answer, is an exception in many things." Lessing himself was involved in early movements to free the middle class, and writers especially, from subservience to the nobility. Why, he asks, should "the writer...be blamed for trying to make the offspring of his imagination as profitable as he can? Just because he works with his noblest faculties he isn't supposed to enjoy the satisfaction that the roughest handyman is able to procure?"

In England, partisans of individual rights to cultural property turned to farming for their metaphors, a man of genius being pictured as the owner of an estate from which he harvests a marketable crop. Joseph Addison said of an author friend, "His Brain, which was his Estate, had as regular and different Produce as other Men's Land." This metaphor--of created work as arising from a kind of landed estate--was soon an eighteenth-century commonplace. A line in Edward Young's 1759 *Conjectures on Original Composition*--"The mind of a man of Genius is a fertile and pleasant field, pleasant as *Elysium*..."--is typical.

The estate metaphor splits nicely at one point during late eighteenth-century Parliamentary debate over literary property. One participant in those discussions articulated his case

against perpetual ownership of created work by saying that while an author could surely own his own manuscript, publication made the work a gift to the public. "When an author prints and publishes his work, he lays it entirely open to the public, as much as when an owner of a piece of land lays it open into the highway." In this instance, created works are not like private estates but like public highways (or, more precisely, like land made public for having been used as a highway). They are not shoes in a shoe store but rather the sidewalks and roadways that enable the store to be in business in the first place. As such they belong to yet another Roman category of property, *res publicae*, things such as roads and harbors, bridges and ports that belong to the public and are open to them by operation of law. This phrase, *res publicae*, is also of course the root of *republic*, that form of governance in which the government belongs to the people as roads might belong to the people.

For the founding generation, the frames I've rehearsed so far--the commons and the landed estate (with its subset, the republican estate)--were usually thought of in opposition to a third frame, that of monopoly privileges. The question of monopoly had a marked historical meaning for early theorists of intellectual property, seventeenth-century Puritans having begun their argument with royal power over exactly this issue. As the historian and statesman Thomas Babington Macaulay explains in his *History of England*, Puritans in the House of Commons long felt that Queen Elizabeth had encroached upon the House's authority to manage trade having, in particular, taken it "upon herself to grant patents of monopoly by scores." Macaulay lists iron, coal, oil, vinegar, saltpetre, lead, starch, yarn, skins, leather, and glass, saying that these "could be bought only at exorbitant prices."

Macaulay doesn't list printing in his *History*, but it was the case that in the late sixteenth century the Queen's printer, Christopher Barker, held monopoly rights to the Bible, the *Book of Common Prayer*, and all statutes, proclamations, and other

official documents. And Macaulay does mention monopoly in his 1841 Parliamentary speech in opposition to a proposed extension to the term of copyright. "Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly," he said, asking rhetorically if the Parliament wished to reinstate "the East India Company's monopoly of tea, or ... Lord Essex's monopoly of sweet wines"?

The understanding of copyright as monopoly was not Macaulay's invention; it was as old as copyright itself. In 1694 John Locke had objected to copyrights given by government license as a form of monopoly "injurious to learning." Locke was partly concerned with religious liberty, the laws in question having been written to suppress books "offensive" to the Church of England, but mostly he was distressed that works by classic authors were not readily available to the public in well-made, cheap editions. "It is very absurd and ridiculous," he wrote to a friend in Parliament, "that any one now living should pretend to have a propriety in ... writings of authors who lived before printing was known or used in Europe." Regarding authors yet living, Locke thought they should have control of their own work, but for a limited term only. As with Macaulay, his framing issue was monopoly privilege, not property rights.

The point is that, when it came to trade in general and printing in particular, the opposition to monopoly was linked to a nonproprietary view of intellectual property so that, as Adams wrote in the Massachusetts constitution, "knowledge" will be "diffused generally among the body of the people." Self-governance itself demanded that no monopoly powers be allowed to constrain the free flow of ideas. Such was the view our founders assumed, as can be seen clearly in the letters that James Madison and Thomas Jefferson exchanged as the Constitution was being written. Jefferson was in Paris at the time, and several of his letters to Madison insist that the emerging document needed a Bill of Rights and that these must include clear "restrictions against monopolies." Madison himself wrote

an essay many years later in which he declared that "perpetual monopolies of every sort are forbidden ... by the genius of free Governments," and in which he expressly makes the link between that prohibition and religious liberty.

And, when it comes to intellectual property, what alternative might these founders have to monopoly privileges? For Jefferson the alternative was a version of the "common stock" frame that I've already outlined. Here is the key citation from a famous 1813 letter of Jefferson's:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me.

Ideas, Jefferson wrote, are "like fire...and like the air..., incapable of confinement, or exclusive appropriation."

In sum, at the time the Constitution was written, the ideal of commonwealth that Jefferson so eloquently describes was taken to lie in opposition to the monopoly privileges we now know as copyright and patent. The landed estate metaphor that I spoke of earlier lay, in a sense, between these two, a kind of unsettled third option. If we might say of an author that "his Brain...was his Estate," we might still ask, well, what kind of an estate? Is this to be a commons, like the old agricultural commons, or is this to be a private preserve, a field enclosed in the name of individualism and efficiency?

To answer I need here to say a few words about "civic republicanism." We have two republican traditions in this country, the civic and the commercial. The commercial comes later in our history and is the one most of us are familiar

with. It values above all on the private individual seeking his own self-interest. Commercial republicanism assumes that property exists to benefit its owners and that owners gain virtue or respect in one another's eyes by increasing the market value of the goods that they command. The government in such a republic leaves each citizen alone to follow his or her own subjective sense of the good life. Liberty is negative liberty, a lack of all coercion. Where questions of social well being or the common good arise, government is given little role in answering them, the assumption being that if answers are to be had at all they will arise automatically if paradoxically from the summed activity of private actors seeking private ends.

All of these things--self-interest, property, virtue, liberty, the public good--are situated differently in civic republicanism. Here autonomous individuals and private property are also valued, but property is assumed to exist in order to free the individual for public service. Liberty in this instance is positive liberty, citizenship being directed toward acknowledged public ends, above all toward creating and maintaining the many things that must be in place before there can be true self-governance (a diverse free press, for example, literacy, situations for public deliberation, and so forth). Social well being in this view cannot arise simply by aggregating individual choices; private interest and public good are too often at odds. Citizens acquire virtue in the civic republic, therefore, not by productivity but by willingly allowing self-interest to bow to the public good.

An early moment in the life of John Adams well illustrates this civic model, and will point us toward imagining what a civic republican estate might look like. Adams's father died in the spring of 1761 and left his son John one of three family farms. This inheritance made the younger Adams a freeholder and a taxpayer in the town of his birth, Braintree, Massachusetts, and it consequently empowered him to vote at town meetings, something he had not been allowed to do until then, even though he was twenty-five years old, a Harvard graduate, and a

practicing lawyer. In colonial Braintree, only the owners of property could have political agency. Along with that agency came civic obligation: as soon as Adams was empowered to vote he was also elected the surveyor of highways (an unpaid office) and asked to attend to a local bridge that needed to be replaced. Adams complained that he knew nothing of such work, but his elders said that didn't matter; everyone had to take a turn at the town offices. So Adams learned what he needed to know about bridges and oversaw the construction of a new one. Civic virtue is not something anyone is born with; it is acquired through civic action and, by getting a town bridge built, Adams began to have it.

A civic republican estate, in this literal case, combines individual autonomy with public service. With that in mind, remember now the lines from the Constitution of this Commonwealth: the reason to have a "republic of letters" is so that "wisdom and knowledge, as well as virtue" can be "diffused generally among the body of the people" and that the diffusion of these is needed, in turn, for the preservation of liberty.¹ Adams's farm was, as I say, a literal estate, but the pattern I wish to describe belongs as well to the more figurative estate of the public sphere in a democracy. The pattern addresses the puzzle of how to square private wealth and social wealth, individual agency and public duty. It solves the puzzle by creating a double law, one that apportions or balances these two demands.

Here we may turn from the constitution of the Commonwealth to that of the nation, wherein we find Congress given the power "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In this grant of power over intellectual property, the requirement that there be

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The New Hampshire Constitution puts the point even more boldly: "Knowledge and learning... being essential to the preservation of a free government... it shall be the duty of the legislators... in all future periods ... to cherish the interest of literature & the sciences ...[and] to encourage... institutions ... for the promotion of ... arts, sciences"

"limited times" is what matters: it is an antimonopoly provision, and it is there in order to create a republic of knowledge. It is there because these "IP rights" are not actually rights, they are privileges granted for limited purposes and thus limited times. The larger goal, the one envisioned by the limit, is the creation of a commons of knowledge.

I like to call the structure of the Constitution's intellectual property clause "The Republican Two Step." Authors and inventors receive a monopoly privilege, but the privilege is limited, not perpetual. The limit provides a structure of law such that a public domain might grow out of the private, or such that private selves might create social wealth, a wealth of learning for social ends. First something for the individual self, then something for the public good. First a contraction on behalf of the few, then a dilation on behalf of the many. This is the heartbeat of knowledge in a free republic.

Let's now return to that old image of the poet whose brain is his estate (producing like other men's land) so as to say clearly, in closing, what kind of estate men like John Adams might have thought this would be in a newly-minted democracy. In a civic republican America, the fruits of human creativity will not be feudal estates, nor will they be commercial, land-speculator estates. The creative self will be a civic republican estate, and the institutions that support their talent, these too will be civic republican estates.

Or to say the same thing in some of the terms I used earlier in this talk, in a civic republic the self is known to be inventive, but it stands on the shoulders of giants; it doesn't *steal* from those who came before (Robert Johnson, Woody Guthrie, Bertolt Brecht), but rather *inherits* their wealth and can say, therefore, *Je est un autre*. Or let us say that in the republic of art and scholarship, creative selves and the institutions that support them must be lit by the flame of Jefferson's taper. And if we wish to preserve that republic, and especially its institutions of self-governance, if we wish

to be good ancestors for the generations that follow us, we must preserve the flame of that taper, and this understanding of it.