

Intellectual Property & Roman Law: Old Legal Histories & New Efforts in Harmonization

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Roman Law, Diplomatic History & Intellectual Property



- The older Roman law....
History of “diplomats”
 - Charters & diplomas
 - Letters patent
 - **Formal legal instruments granting *privileges* & *property***
- Classical Roman jurisprudence (c. 2d century)
 - Doctrinal theories of property acquisition
 - *Res nullius, occupatio, accessio*
 - Become basis for late medieval & early modern natural law theories
 - Hugo Grotius et al.

Cristoforo di Geremia (1410-1476), *un imperatore e la concordia*,
image by Sailko, Wikimedia Commons

Roman Law & The Natural Law Tradition

John Locke on Property (c. 1688)

“[E]very Man has a *Property* in his own *Person*....

Whatsoever then he removes out of the State that Nature hath provided.....

Occupatio

...he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.”

Accessio

Justinian's *Institutes* (533)

“Things become the property of individuals in many ways, some by the law of nature, which, as we have said, can be described as the law of all peoples....

Where something has no owner, it is reasonable that the person who takes it should have it....

If someone makes something partly out of his own material and partly out of another's...ownership vests, without a doubt, in the maker. He **contributes not only his work**, but also even part of the material.”

The Natural Law Tradition & Intellectual Property (Copyright)

William Blackstone (1723-1780)



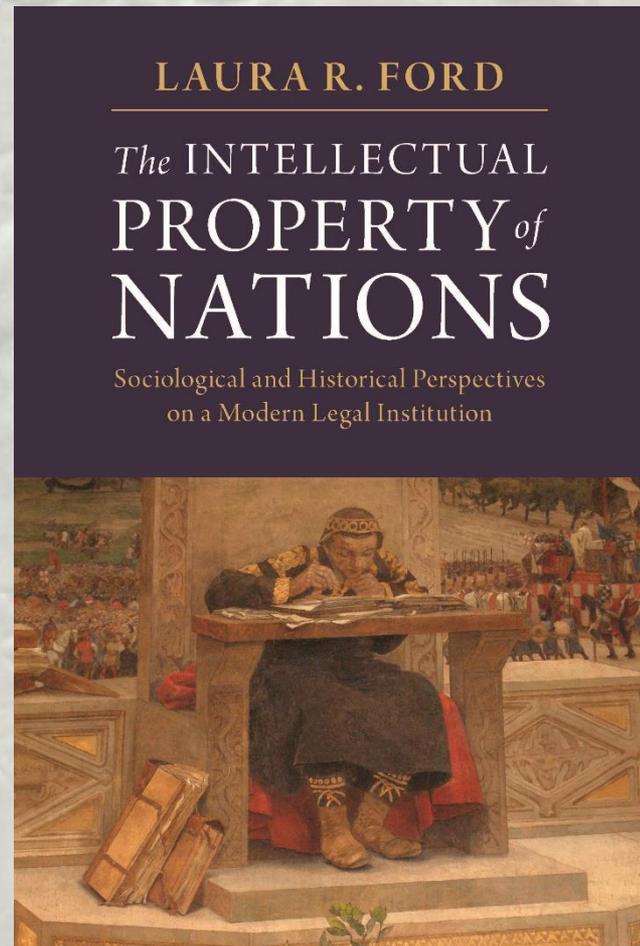
Commentaries on the Laws of England, Volume II (1766)

“There is still another species of property, which, **being grounded on labour and invention**, is more properly reducible to **the head of occupancy** than any other; since **the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant.**

And this is **the right, which an author may be supposed to have in his own literary compositions:** so that no other person without his leave may publish or make profit of the copies....”

A Sociological History of IP

- **IP Emerged as part of the Modern Nation-State System**
 - Expansion with globalization of the nation-state system (19th-20th Centuries)
- **IP as an “infrastructure of state power” (Michael Mann)**
 - Links public and private spheres of social life
- **Narrative account, connecting**
 1. Max Weber’s theory of property
 - Property as “Organized social closure”
 2. Thesis about the influence of legal culture on social action & social power
 - “Semantic legal ordering”



Semantic Legal Ordering



Irnerius (c. 1050-1125)
Jurist
University of Bologna

A *social process* through which

Enduring legal meanings
Received through *legal traditions*

Inform and influence social-relational action,

Contributing to *stable organizational relationships*

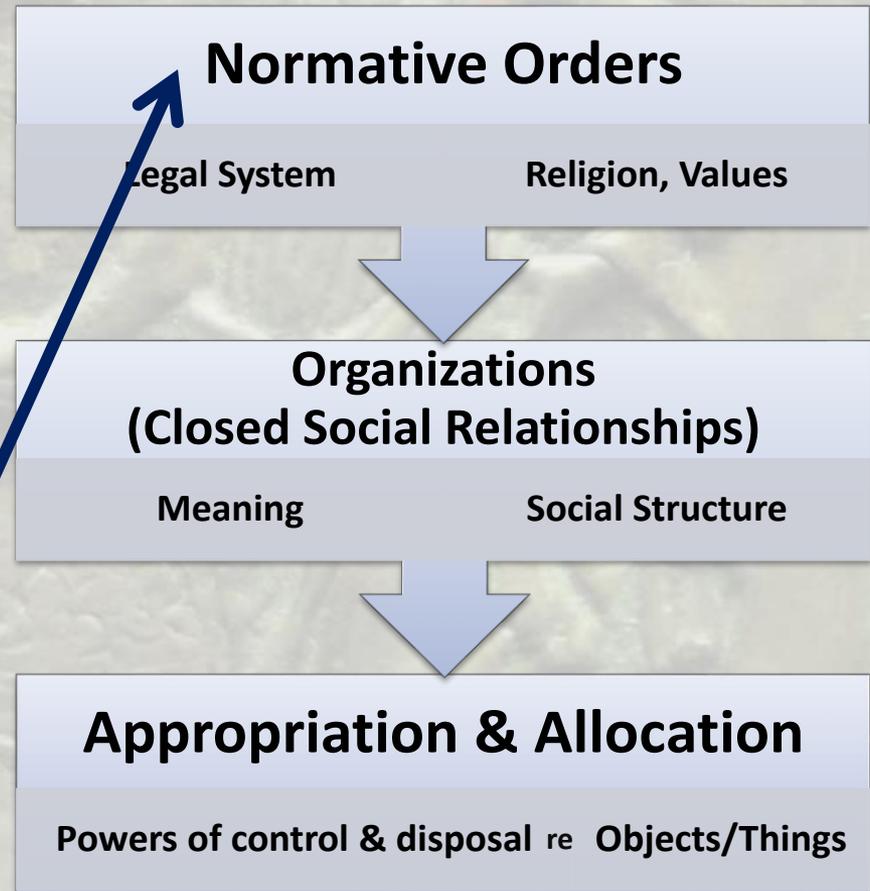
And thereby contributing to *social power*

Property, Organizations, and Orders

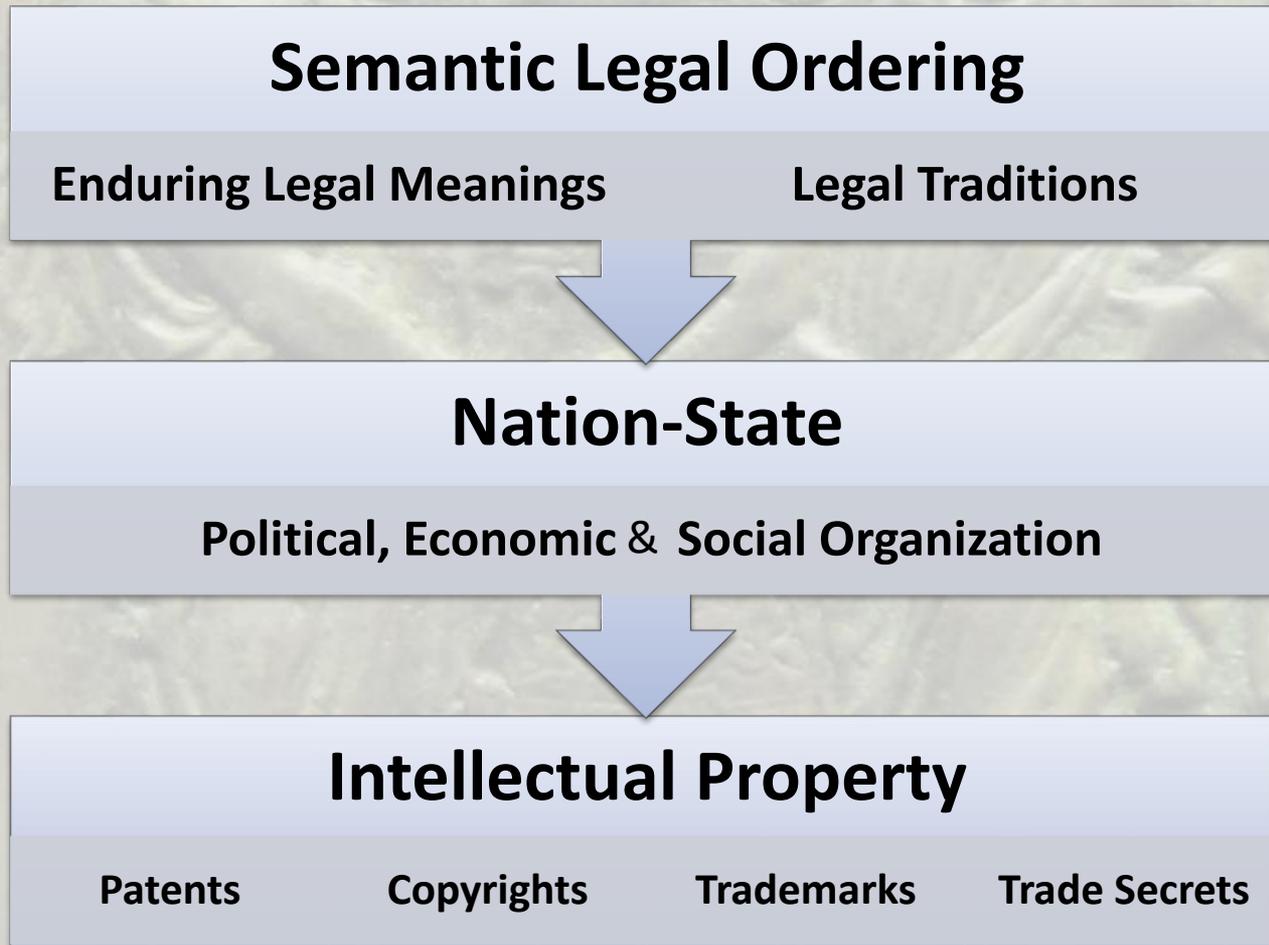
Max Weber



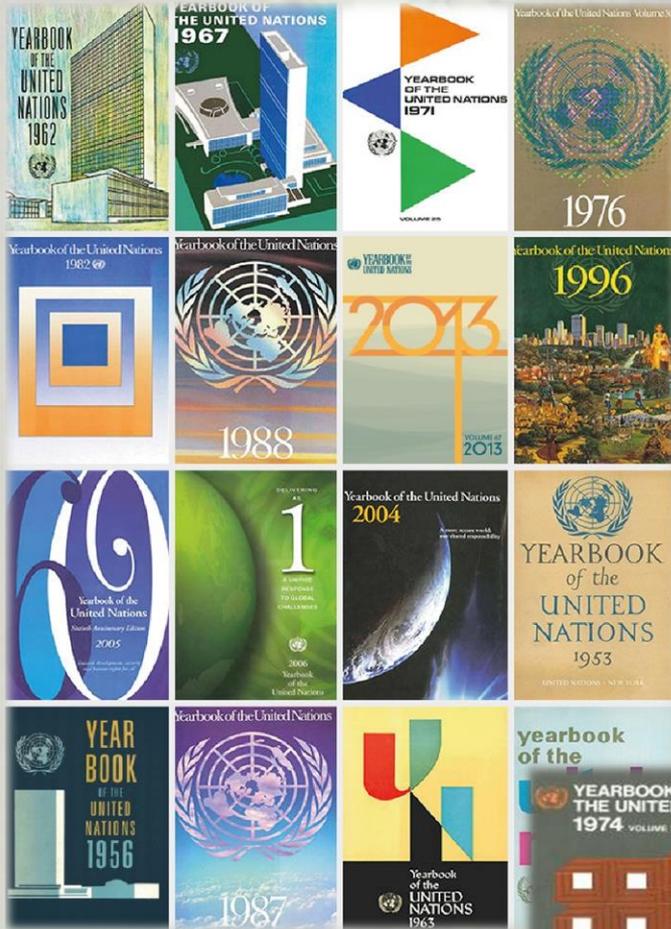
Semantic Legal
Ordering



Semantic Legal Ordering, Nation-States, & IP

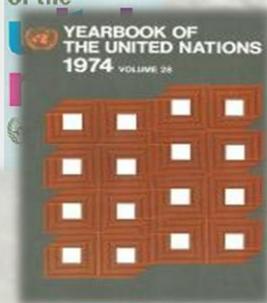


IP in the United Nations (WIPO)



*“Regarding the promotion of the protection of intellectual property throughout the world, WIPO encourages the conclusion of new international treaties and the **harmonization** of national legislation.....”*

1974 UN Yearbook, p. 1033



Harmonization of Nations & the UN

- The Dumbarton Oaks Conversations (1944)

- Purposes of the new “general international organization” (UN) include:

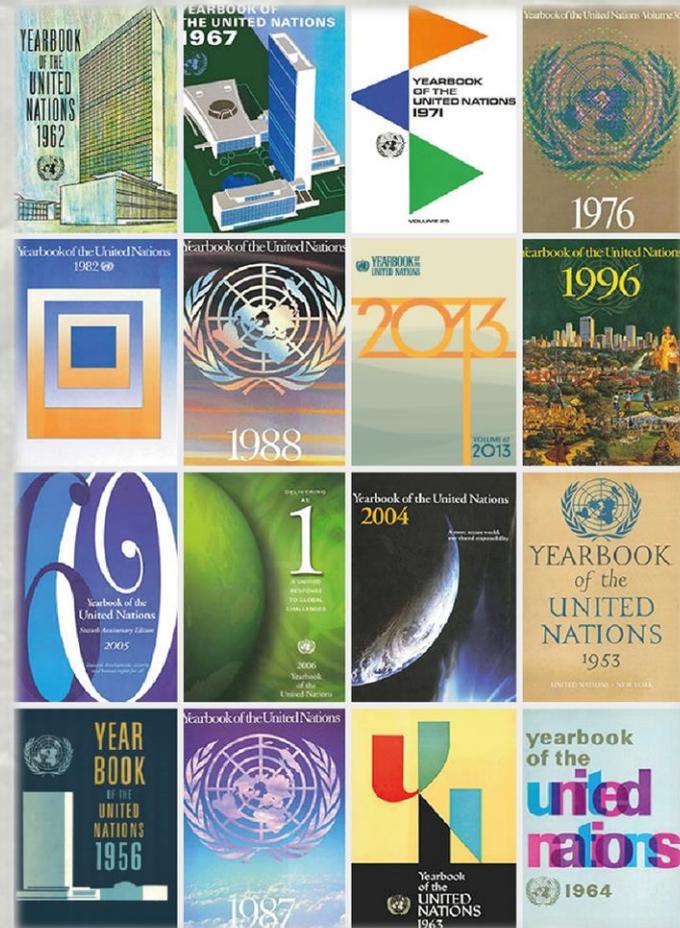
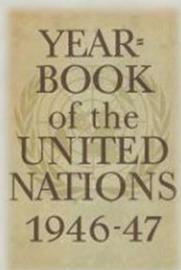
- Maintain international peace & security
 - Achieve international co-operation in solution of international economic, social and humanitarian problems
 - Serve as a “centre for *harmonizing the actions of nations* in the achievement of these tasks”

- Specialized “economic and social” agencies are contemplated, with permanent staff

- “experts”

- Harmonization (legal → social) as *leitmotif*

Jewish & Arab aspirations; Greek & Albanian collaboration; Food & Agriculture Organization; International Labor Organization; World Health Organization



Harmonization & the League of Nations



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CAN HE PRODUCE THE HARMONY?
From the *Citizen* (Brooklyn, N. Y.)



*The Signing of Peace in the Hall of Mirrors,
William Orpen, 1919*

“Our thought was always that the key to the peace was the guarantee of the peace, not the items of it; that the items would be worthless unless there stood at the back of them a permanent concert of power for their maintenance.”

- Woodrow Wilson, December 1918, London

IP in the Paris Peace Negotiations

Old v. New Diplomacy



- **French Plan of Procedure for Negotiations, 1918**

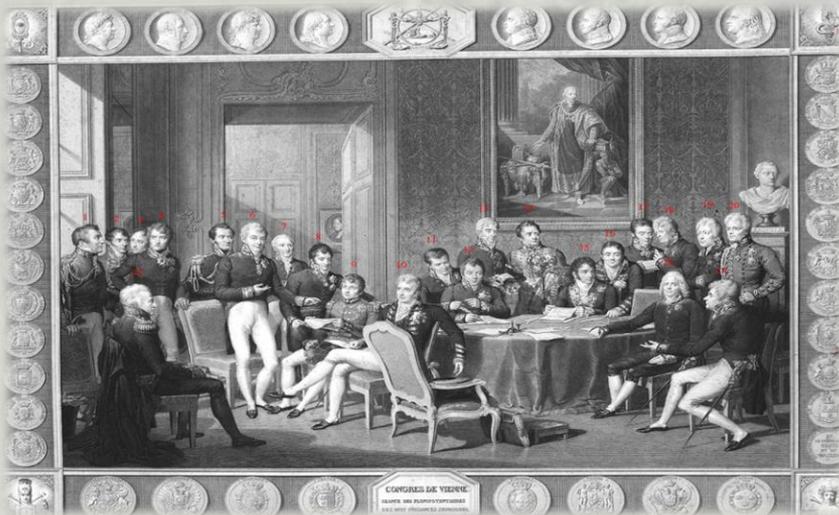
- Proposal for the “organization of the society of nations”
 - *To be negotiated AFTER basic peace terms (contra Wilson)*
- Committee on law relative to **patents & trademarks**
- *Document identifies the Congress of Vienna (Concert of Europe), 1814-15 as precedent*

Official French Plan for the League of Nations, 1919

- Legal sanctions to be enforced by the League include “conventions relating to the protection of author’s **copyright** and **industrial property**”

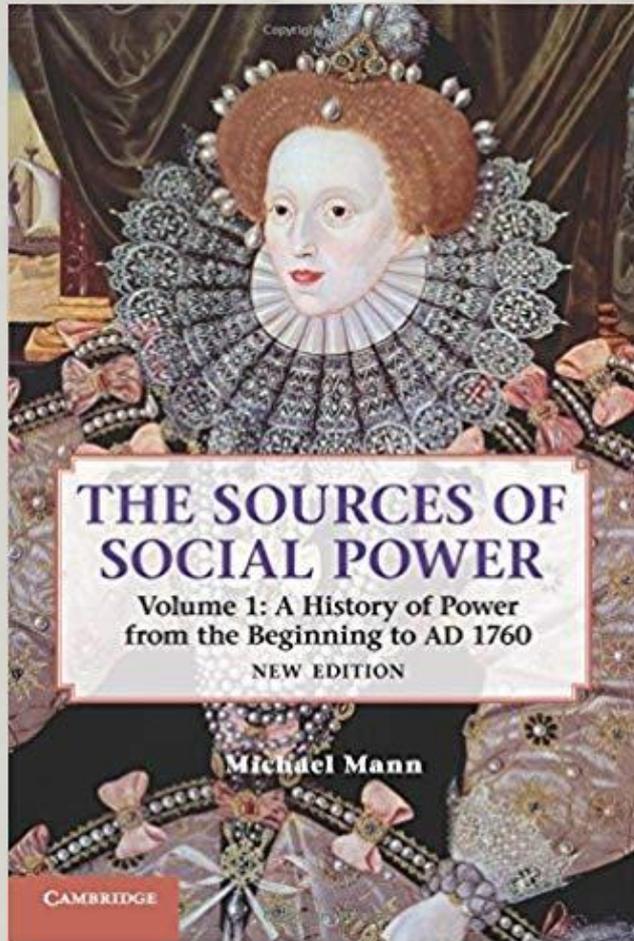
French Memo to Economic Commission

- Proposal that the “**new economic state**” should include protections for source identification (“marks of origin”)



What is New in the New Diplomacy?

“Organizational Materialism” (Mann)

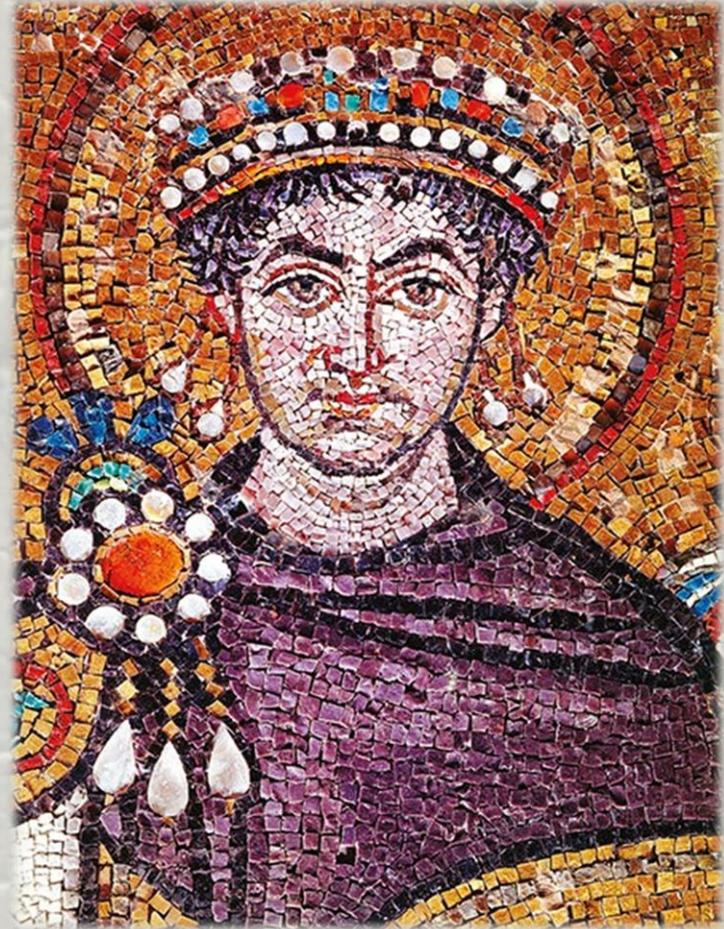


- Substantive Sources of Social Power
 - I = Ideological – organizing power in ideas
 - E = Economic – o.p. in resource control
 - M = Military – o.p. in lethal force
 - P = Political – o.p. in state
- IEMP Model of Power Organization
 - “Organizational materialism”
- Ideal types – in reality they mix & blend
 - “Regimes” – alliance of IEM under P
- “Societies” consist of cross-cutting “networks” of social power
 - Societies as unitary entities do not exist
 - “Societies are confusing battlegrounds on which multiple power networks fight over our souls.” (Vol. 2, p. 28)

Social power organizes and connects people to enable achievement of goals

Roman Law & Harmonization Projects

- ***Constitutio Deo Auctore* (530)**
 - Announcing the Digest project & dictating terms (to Tribonian)
 - Section 8: “Consequently, in all parts of our aforesaid work there is to be no place for any antinomy (as it is called, from old times, by a Greek word [*antinomia*]), but there is to be **total concord (*concordia*)**, total consistency, with no one raising any opposition.”
- **Codex Book I, Title 17**
 - 17.1 – Codifies *Deo Auctore* – “there shall be one harmony, one logic, with no one to oppose it...”
 - 17.2 – Codifies Tanta (constitution promulgating the Digest in 534)
 - Prologue: “It was indeed astounding **to bring into uniform harmony (*unam reducere consonantiam*)** Roman legislation from the founding of the city into the time of Our reign...”



Justinian I (527-65), Ravenna Mosaic
(Church of San Vitale)

Imperial Privileges for the Arts



Emperor Constantine Augustus, to Felix (Praetorian Prefect).

There is need of as many **architects** as possible, but because they do not exist, Your Sublimity shall urge to this study those youths in the African provinces who are about eighteen years old and have had a taste of liberal studies. In order that this study may be attractive to them, it is Our will that these students, as well as their parents, shall be exempt from those services which are customarily enjoined upon persons, and that an adequate salary shall be established for those who are students.

- Posted in the year of the consulship of Optatus and Paulinus, 334

Constantine, Byzantine Mosaicist (Hagia Sophia)

c. 1000

Legacies of Versailles



Front Row: Dr Johannes Bell (Germany) signing with Herr Hermann Muller leaning over him.

Middle row (seated, left to right): General Tasker H Bliss, Col E M House, Mr Henry White, Mr Robert Lansing, President Woodrow Wilson (United States); M Georges Clemenceau (France); Mr D Lloyd George, Mr A Bonar Law, Mr Arthur J Balfour, Viscount Milner, Mr G N Barnes (Great Britain); The Marquis Saionji (Japan).

Back row (left to right): M Eleutherios Venizelos (Greece); Dr Affonso Costa (Portugal); Lord Riddell (British Press); Sir George E Foster (Canada); M Nikola Pachitch (Serbia); M Stephen Pichon (France); Col Sir Maurice Hankey, Mr Edwin S Montagu (Great Britain); the Maharajah of Bikaner (India); Signor Vittorio Emanuele Orlando (Italy); M Paul Hymans (Belgium); General Louis Botha (South Africa); Mr W M Hughes (Australia).