

## A “Question of Name”: Merchant-Court Jurisdiction and the Origins of the *Noblesse Commercante*

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This wise prince, without stopping at the question of name, and without naming or baptizing them merchants . . . want[ed] that . . . [those] who traffic in merchandise be convened, called and judged by the judges and consuls [of the merchant courts].

—Toubeau, *Les institutes du droit consulaire, ou les elemens de la jurisprudence des marchands* (1700).<sup>1</sup>

Recently, historians seeking to make sense of revolutionary antinobility have rediscovered the writings of the Abbé Coyer, and the vociferous debate he engendered with his 1756 publication, *La noblesse commercante*.<sup>2</sup> In Coyer, and the debate to which his writings gave rise, historians have found an explanation for the antinoble sentiment that emerged in 1789, which had seemed so anomalous given the downfall of the Marxist interpretation of the Revolution as a rising of the bourgeoisie against the nobility. Consonant with the current understanding of 1789 as a revolution in political culture, these scholars argue that Coyer initiated a public discussion of one of the core problems facing the Old Regime—namely, the rise of commercial society and the concomitant disjunction between the increasingly commercial foundations of the French social order and its traditional corporate, hierarchical structure.

By proposing that the nobility undertake commerce, and thereby contribute to the prosperity of France, Coyer sought to open a new, previously forbidden avenue for the nobility's pursuit of honor, which would be more suited to contemporary life than its traditional (and now defunct) military role but would nonetheless justify the high status and privileges that the nobility continued to enjoy. As these historians argue, however, the new metric developed by Coyer to measure the nobility's worthiness of honor—namely, its utility, rather than its birth—was incompatible with the underlying structural principles of the Old Regime corporatist order. Once merit replaced birth as the appropriate basis for awarding status, the entire hierarchical structure of Old Regime society, and in particular, the longstanding privileges enjoyed by the nobility, suddenly appeared illegitimate. Accordingly, these historians conclude, the antinobility that emerged in 1789 had roots in a shift in social and political values that first emerged in the 1750s in the context of the debate generated by Coyer.

Contrary, however, to the assumption of such current scholarship, the notion of a *noblesse commercante*—and the concomitant transformation in political culture that this notion implied—arose more than a half century before the publication of Coyer's magnum opus, and it did so not in the discourse of the literary and noble elite, but in the writing of commercial jurists who had begun their careers as merchants. This legal discourse was initiated by the monarchy's issuance in March 1673 of a Commercial Ordinance, which for the first time, sought to establish

a single uniform system of commercial justice across France. In the treatises that soon issued explicating the ordinance (and French commercial law more generally), commercial jurists found themselves grappling with a question that was becoming increasingly difficult: How was merchant-court jurisdiction to be defined? It is in this juridical context that the idea of a *noblesse commerçante* first arose. And from this juridical perspective, unlike that of Coyer, the ultimate implication of a *noblesse commerçante* was not so much that in modern commercial society a noble caste born into privilege was illegitimate—though this was clearly implied—but more important, that every modern individual was in some sense a merchant.

### I. The Expanding Conception of the Merchant

When the first *juridictions consulaires*, or merchant courts, were officially established by the monarchy in the mid-sixteenth century,<sup>3</sup> they were generally understood to be courts of and for merchants and hence, in common parlance, were designated the “judges of merchants.”<sup>4</sup> This conception of the merchant courts as a specialized set of merchant-run institutions applying the law of merchants for merchant litigants reflected the prevailing view of the early-modern French social order as a fixed hierarchy of corporate entities, each of which possessed distinctive privileges—literally, its own private laws. Indeed, the merchant courts themselves were essentially extensions of the guild system, as typically it was the leading members of the leading guilds who elected one another for a limited term<sup>5</sup> to the post of merchant-court judge or consul.<sup>6</sup> The Edict of November 1563, which established a merchant court in Paris, neatly captured this conception of merchant-court jurisdiction, by providing simply that the court would adjudicate “suits and differences between merchants concerning merchandise only.”<sup>7</sup> In sum, the merchant courts, as adjuncts of the guilds, provided a forum in which merchants *qua* guild members could litigate disputes over merchandise.

Over the course of the seventeenth and eighteenth centuries, a series of interrelated commercial developments occurred, facilitated by state action, which undermined the traditional conception of the merchant, or *marchand*, as guild member. As a result of these developments, it came to seem that many individuals were merchants even though they did not belong to the established mercantile *corps* and thus were not merchants in the traditional sense. Because, pursuant to well-established custom (as enshrined in the Edict of November 1563), merchant-court jurisdiction was supposed to be based primarily on the merchant status of the litigants, the new lack of clarity regarding the foundations of merchant status resulted in like confusion regarding the basis of merchant-court jurisdiction.

One important development that undermined the traditional conception of the merchant was the emergence, beginning in the mid- to late-seventeenth century, of a new breed of commercial player, known as the *négociant*. As commercial markets, which had long been limited to the city and the surrounding countryside, expanded to encompass all of France and beyond, these *négociants* came to specialize in wholesale, often international trade, and banking.<sup>8</sup> While many *négociants* began as guild members, the nature of their commercial activity—because of the distances involved and the banking component—was not suited, nor had been traditionally subject, to guild regulation. Accordingly, those belonging to the ever-growing

cadre of *négociants*, while engaged in the trade of merchandise, were not merchants within the traditional meaning of the term.<sup>9</sup>

Another seventeenth- and eighteenth-century development that served to confuse the meaning of the term “merchant” was the growing participation of noblemen in commercial endeavors. As commerce became increasingly profitable, it began to attract members of the noble elite, who had long been prohibited from engaging in mercantile activity and who were, by definition, not merchants in the traditional sense. Land itself, which had been the foundation of noble status and wealth, came to be seen as yet another avenue to commerce, as agricultural methods were developed that would enable the large-scale production of goods for the market.<sup>10</sup> At the same time, a form of partnership known as the *société en commandite simple*, which came into increased use in Old Regime France, permitted noblemen to invest in commerce secretly, as hidden partners, and thus without jeopardizing their noble status under the law.<sup>11</sup> Furthermore, as part of its effort to expand commercial development and thus its tax base, the monarchy encouraged noblemen to invest in commerce by issuing a number of edicts specifying that they might engage in wholesale trade without losing their nobility.<sup>12</sup>

Yet another development that undermined the established conception of the merchant was the emergence of the negotiable instrument and the related practice of discounting.<sup>13</sup> Although bills of exchange dated back to the Italian city-states of the twelfth and thirteenth centuries, they were then used exclusively by merchants to make payments across large distances without transporting currency. It was only around the mid-seventeenth century that these simple contracts became negotiable instruments<sup>14</sup> and thus contributed to a vast increase in the rapid and secure transfer of credit.<sup>15</sup> Trade in negotiable instruments was given a further boost by the emergence of the practice of discounting in the early- to mid-eighteenth century, by means of which the holder of the instrument could sell it for less than face value before it fell due, thereby obtaining a loan at interest.<sup>16</sup> Facilitated by such institutional developments as the creation of the Parisian *bourse* in 1724,<sup>17</sup> bills of exchange, which had once been used only among merchants in the traditional sense, came to be employed by all sorts of people across the French social order who sought an easy and reliable means of obtaining credit or lending at interest.

Taken together, these developments suggested that it was possible, and indeed common, for people to engage in commerce without belonging to any of the traditional merchant *corps* and thus without possessing the formal status of a merchant. In fact, even those, such as noblemen, whose official status under the law was defined in part by a prohibition on mercantile activity might engage in commerce. This tremendous broadening of the types of people who undertook commercial activity manifested itself in a significant transformation in the law regarding merchant-court jurisdiction.

While the Edict of November 1563 stated simply that the merchant court would adjudicate “suits and differences between merchants concerning merchandise only,” the Commercial Ordinance of 1673 could not thus assume that the term “merchant” had a commonly understood meaning.<sup>18</sup> Accordingly, instead of identifying the merchant court as a forum for merchant disputes, the ordinance contained a series of articles, each of which addressed a particular aspect of merchant-court jurisdiction and which were integrated solely by their

location within Title 12 (titled “About the jurisdiction of the consuls”), rather than by any coherent conception of the underlying foundations of merchant-court jurisdiction.<sup>19</sup> To the extent that the Commercial Ordinance of 1673 retained any clear statement of jurisdiction, it was only through Article 1 of Title 12, which “[d]eclare[d] applicable to all the benches of judges and consuls, the Edict of their establishment in our good city of Paris, in the month of November 1563.”<sup>20</sup>

While Article 1 incorporated the Edict of November 1563, and thus its straightforward definition of merchant-court jurisdiction as encompassing all disputes between merchants regarding merchandise, the title’s remaining articles muddled the waters. Many of these articles indirectly acknowledged that, contrary to the implication of the Edict of November 1563, it was not necessary to be a merchant in the traditional sense to be subject to merchant-court jurisdiction. For example, Article 2 provided that “[t]he judge and consuls will hear disputes . . . between all persons concerning bills of exchange”<sup>21</sup> and Article 10 that “[c]lergymen, gentlemen and bourgeois, farmers, vintners, and others, may sue for the sale of wheat, wine, livestock, and other produce proceeding from their land, either before the ordinary judges or the judge and consuls, if the sales were made to merchants or artisans making a profession of selling.”<sup>22</sup>

Thus, while at first suggesting that only merchants as traditionally defined through their corporate status were subject to merchant-court jurisdiction, the Commercial Ordinance also stated that “all persons,” including even “[c]lergymen, gentlemen and bourgeois,” could be justiciable if they chose to engage in commercial activity. As described below, the problem of making sense of this morass plagued contemporary commercial jurists, who in their (ultimately futile) effort to develop a coherent jurisdictional schema arrived at the concept of a *noblesse commerçante*, long before Coyer.

## II. State Regulation and the Rise of the Perfect Trader

The contradictory conceptions of the term “merchant” evident in the jurisdictional provisions of the Commercial Ordinance of 1673 mirror those that appear throughout the ordinance. On the one hand, the Commercial Ordinance continues to identify merchants as guild members. Accordingly, Title 1, “About apprentices, *négociants*, and merchants, whether wholesale or retail,”<sup>23</sup> is devoted largely to listing detailed rules regarding guild membership.<sup>24</sup> On the other hand, it is clear from a broad historical perspective that the Commercial Ordinance of 1673 was key to setting in motion a process whereby, over the course of the following century, the long-standing corporate foundations of merchant identity were gradually undermined.<sup>25</sup>

Traditionally, French law had recognized a multitude of merchant *corps*, each devoted to a specific trade or located in a particular geographic area and deriving its rights and privileges from its own unique history and regulations. Such *corps* included not just guilds and confraternities but also the merchant courts, which, while transcending any particular trade, were local institutions with their own corporate governance structures, controlled by the established guild hierarchies of the towns in which they were located.<sup>26</sup> While the monarchy had issued

statutes prior to the Commercial Ordinance of 1673, these had been directed to particular corporate entities or were concerned with specific commercial practices implicating only those entities engaged in these practices. In contrast, the Commercial Ordinance of 1673 was not directed to any particular guild or merchant court but to merchant individuals as a whole, and it purported to regulate these individuals not as to any particular practice but as to the entirety of their professional lives. Thus, even Title 1, which set forth rules of guild membership, discussed guilds in general as a kind of abstraction, such that it was the regulation of the individual seeking to obtain his (generic) guild membership, rather than the guild itself, that was the title's focus. This effort to regulate the merchant individual—or what the ordinance's primary drafter, Jacques Savary, referred to as the perfect trader—was a radically new development for a social order that had traditionally constituted itself as a hierarchy of corporate entities, each of which jealously guarded its rights and privileges against all others. As described below, it played a pivotal role in making the notion of a *noblesse commerçante* conceivable.

The Commercial Ordinance of 1673 emerged when, under Colbert's direction, the monarchy sent letters to merchant courts and guilds throughout France directing them to submit their views on how “to suppress by regulation the abuses that are committed in trade.”<sup>27</sup> In August 1670, Jacques Savary, a successful merchant who had begun his career as a master in the Parisian haberdashers' guild,<sup>28</sup> submitted a paper describing the commercial abuses that required legal regulation, and the following month he presented a draft ordinance setting forth his proposed regulation.<sup>29</sup> Thereafter, the *Conseil de la Réforme* in charge of preparing the ordinance selected him, along with two other merchants, to assist in the drafting.<sup>30</sup> Although Savary was not solely responsible for drafting the ordinance, his role was predominant.<sup>31</sup>

In 1675, just two years after the issuance of the Commercial Ordinance, Savary published *Le parfait négociant, ou instruction générale pour ce qui regarde le commerce*. As suggested by Savary's preface to the first edition, the birth of the “perfect trader,” as book and concept, was a corollary to the promulgation of the Commercial Ordinance. According to the preface, the idea for the book arose when the drafting of the Commercial Ordinance was nearing its completion. At that time, explained Savary, several members of the *Conseil de la Réforme* “induced me to work on and produce some work on the subject of commerce, which could be useful to young people who would like to place themselves in the mercantile profession.”<sup>32</sup> In line with this request, Savary noted that he had adopted an approach designed to ensure that the book would “enter more easily into the spirit and memory of young people who would like to educate themselves about and enter the mercantile profession.”<sup>33</sup>

As its title suggests, Savary's book was directed not to any specific merchant *corps* but to a nonexistent ideal type—the individual “perfect trader.” The perfect trader lacked the particular features that served to differentiate between merchants belonging to various corporate entities—features such as the practice of a particular trade or residence in a particular town. Since the perfect trader did not, in fact, exist, it was the function of Savary's book to create him, by offering (in the words of the subtitle) a “general instruction about that which concerns commerce” and thereby assisting his readers to become perfect traders.

Accordingly, Savary structured his book as an instructional manual on how to become the

perfect trader. The first chapters, directed to parents, provide advice on how to raise the perfect trader, and the subsequent ones, addressed directly to the young merchant himself, describe the conduct becoming of the perfect trader. In Savary's words:

I take a child leaving his father and mother and beginning the instruction of his apprenticeship; I then lead him through the retail sale of merchandise, wholesale, exchange of currency, manufacturing, fairs; I take him even into foreign countries and to the most distant places through long voyages: and in thus leading him, I make him see all the maxims that he must observe, the things he must avoid; and I make him learn to the very end, to the extent that it presents itself, everything that might concern whatever type of commerce or trade that might be, directly or indirectly, down to the slightest circumstances, including the application of the royal ordinances, and especially the Ordinance of March 1673, so that he can conduct himself happily in this profession that is so useful and honorable.<sup>34</sup>

As this passage indicates, Savary's advice for "leading" the child to become the perfect trader cut across the corporate and geographic barriers that had long divided merchant entities, because it concerned "whatever type of commerce or trade that might be." Precisely because the instructional process he outlined transcended all such traditional barriers, the perfect trader who emerged would be, along with his fellow perfect traders, fully and equally subject to the monarchy's Commercial Ordinance. Thus, in Savary's account, the end result of such instruction would be the emergence of a perfect trader, who had learned how every type of commercial activity "directly or indirectly, down to the slightest circumstances" implicated "the application of the royal ordinances, and especially the Ordinance of March 1673." Indeed, it was this learning that ensured he would be able to "conduct himself happily" in this "useful and honorable" profession.

Engaged in no particular type of commerce, residing in no particular community, the perfect trader was defined instead by various innate qualities, such as imagination, strength, and attractiveness, which would be further developed and refined through appropriate training and guidance, including that contained in *Le parfait négociant*. According to Savary, the "natural disposition" of the perfect trader included, first, imagination, because this was the trait that enabled traders "to invent new materials, . . . ; to be subtle and prompt to respond with natural arguments when flaws are found; to know to write well, arithmetic and the other things necessary for the mercantile profession."<sup>35</sup> Second, the perfect trader was "strong and robust," because only an individual so constituted could "resist all the fatigues that are encountered in doing commerce."<sup>36</sup> Finally, the perfect trader had a "good look" because "most people would prefer to do business and deal with a good-looking man, since he always renders himself more agreeable than another who does not have the same external advantage."<sup>37</sup>

In sum, as Savary was well aware, the perfect trader was the antithesis of the long-standing Christian conception of those who pursue wealth as the embodiment of such cardinal sins as avarice and sloth. Thus, he bemoaned, "I would not know how to be sufficiently astounded when I hear said to fathers and mothers that they are obliged to make their children merchants because they are slow and stupid."<sup>38</sup> To the contrary, he insisted, "there is no

profession where the mind and good sense are more necessary than in that of commerce.”<sup>39</sup>

Predating Coyer’s famous portrait of the merchant as hero by more than three-quarters of a century, Savary’s inversion of the merchant stereotype was highly novel.<sup>40</sup> But despite Savary’s vision of an individual perfect trader defined by his innate virtues, he could not relinquish the traditional conception of “merchant” as a legally established status following from membership in particular corporate entities. Accordingly, he observed that one of his primary goals in *Le parfait négociant* was to take children “by the hand, to lead them . . . by degrees, until they are received as [guild] masters.”<sup>41</sup> To be a perfect trader without establishing roots in one of the Old Regime’s various merchant *corps* remained for Savary—as for the Commercial Ordinance he was largely responsible for drafting—essentially unthinkable. This would not be so for another merchant, Jean Toubeau, who along with Savary would soon assume his rightful place as one of the leading commercial jurists of the Old Regime. It was Toubeau who understood, long before Coyer, that the perfect trader led to a *noblesse commerçante*—and, even more radically, to an entire society of *commerçants*.

### III. From Perfect Trader to Noble Trader

In 1682, Jean Toubeau published the first major, comprehensive treatise on French commercial law, *Les institutes du droit consulaire, ou les elemens de la jurisprudence des marchands*, which was subsequently reissued in 1700, in a new edition augmented by his son.<sup>42</sup> As a successful merchant from Bourges who had served several times as judge of the local merchant court and who described himself as “a merchant . . . writing for merchants,”<sup>43</sup> Toubeau devoted much of his treatise to defending and seeking to expand merchant-court jurisdiction. Because of the many civil-law jurists anxious to ensure that merchant-court jurisdiction would not exceed its traditional bounds, as outlined in the Edict of November 1563, this was far from a theoretical exercise.

To give but one example, the civil-law jurist Pierre Guyot insisted that merchant courts had jurisdiction only over defendants with formal merchant status, as traditionally understood. According to Guyot, the large (and ever-growing) number of noblemen who chose to engage in commercial activity were not merchants and were therefore not subject to merchant-court jurisdiction. In support of this position, he cited the provision of the Edict of November 1563 that merchant-court jurisdiction extends to “suits and differences between merchants concerning merchandise only.”<sup>44</sup> The term “merchants,” Guyot argued, would be superfluous unless it was intended to limit jurisdiction to those parties having the formal, legal status of a merchant: “If the legislator had wanted judges and consuls to adjudicate every matter concerning trade, every stipulation concerning merchandise, it would have been easy for him to give them a general and indefinite competence: it is because he did not give them such an extensive authority that he restricted it to suits *between merchants and merchants* concerning merchandise. These words *between merchants* suppose that it is possible to have disputes concerning merchandise, without being a merchant.”<sup>45</sup> According to Guyot, that a nobleman happened to engage in some commercial activity did not make him a merchant and thus could not subject him to the jurisdiction of the merchant court: “[A]n individual who, exercising an occupation [*état*]

different from and even opposed to commerce, *accidentally* occupies himself with the negotiation of some merchandise, . . . must he for this reason be reputed a merchant, and as a result fall within the jurisdiction of the merchant court? We do not believe so.”<sup>46</sup>

In response to the respected and powerful voices urging that merchant-court jurisdiction be interpreted narrowly, consonant with the traditional conception of merchant status, Toubeau attempted to develop a theory of merchant-court jurisdiction that would sustain a more expansive interpretation.<sup>47</sup> Like his opponents (and indeed, perhaps in part because of them), Toubeau focused on the ordinance’s one seemingly general jurisdictional statement—namely Article 1 of Title 12, which incorporated the Edict of November 1563. Adding an “and” to the statutory language where there was in fact none, Toubeau asserted that the edict’s two requirements for merchant-court jurisdiction (merchant litigants and a dispute over merchandise) must not be read sequentially, as was suggested by both logic and tradition, but independently: “It is necessary to . . . remark that in the edict, where it is stated that the judges and consuls will hear all disputes between one merchant and another merchant *and* about merchandise, that this conjunction is not copulative in this place, but disjunctive; because by these terms it must be understood that the judges and consuls must hear disputes between one merchant and another merchant, but also disputes about merchandise, even if the two parties are not merchants, and involving any person that might be, when commerce is at issue.”<sup>48</sup>

In this way, Toubeau interpreted the edict as setting forth two independent and sufficient requirements for merchant-court jurisdiction: one personal (based on the merchant status of the persons before the court) and the other real (based on the fact that the *res* at issue in the disputed transaction is merchandise).<sup>49</sup> Although he never clearly identified the relationship between these two foundations of merchant-court jurisdiction, his somewhat confused exposition points to a framework in which the distinction between personal, status-based and real, transaction-based foundations of merchant-court jurisdiction would all but disappear. This framework was based on a new, expanded conception of the merchant, not as a member of certain mercantile *corps* but as an individual who freely chooses to undertake commercial activity.

Toubeau rejected the traditional definition of the merchant as guild member: “I consider that these words, *between one merchant and another merchant*, which our edict employs, should be understood to mean not only those who have completed an apprenticeship in merchandise, who are registered in a guild, who have an open shop, and who frequent fairs.”<sup>50</sup> According to Toubeau, the learned jurists who espoused this narrow conception of the merchant “are focused only on the surface of things and on proving that a man is not a merchant simply because he once made a purchase for the purpose of reselling.”<sup>51</sup> In contrast, he noted, Charles IX, who enacted the Edict of November 1563, was a “wise prince,” who “without stopping at the question of name, and without naming or baptizing them merchants . . . want[ed] that . . . [those] who traffic in merchandise be convened, called, and judged by the judges and consuls, regardless of claims of lack of jurisdiction and of transfer required because of their privileges.”<sup>52</sup>

In thus suggesting that merchant status was merely a “question of name,” likely to be of concern only to those, such as the civil-law jurists, who “focused only on the surface of things,” Toubeau departed radically from traditional, Old Regime conceptions of merchant as guild

member. Like Savary before him, Toubeau sought to reconceptualize merchant status as following not from corporate belonging and the positive law that regulated such belonging but instead from the individual's free choice to assume the name, and thus identity, of a merchant—to pursue, in other words, the commercial activities suited to his native talents. In line with this effort to reconceptualize merchant status, Toubeau made the striking claim that merchant-court jurisdiction over all litigants who participate in commercial activity, regardless of their formal status, is a form of *personal*, rather than real jurisdiction: “Merchant-court jurisdiction extends generally to all types of people who do commerce, trade, and merchandise . . . ; because the merchant courts hear actions that are purely personal, since the edict provides, between all merchants.”<sup>53</sup> Merchant status, in other words, derived from the individual's free choice to “do commerce, trade, and merchandise,” rather than from his legally established position in the hierarchical social order. And since the basis of this new merchant status was the commercial transactions in which the individual chose to participate, the two ostensibly independent grounds for merchant-court jurisdiction (personal, status-based and real, transaction-based) became essentially one and the same.

By thus distancing himself from the traditional, corporate conception of merchant status, Toubeau was able to argue that any number of nonmerchants—and especially the noblemen for whom not being merchants was a defining feature of their status—were justiciable within the merchant courts. Noblemen who undertook commercial activity, he claimed, were subject both to the merchant court's real jurisdiction and to its personal jurisdiction, as he himself had reconceptualized the latter. In so arguing, Toubeau advanced the novel proposition that mercantile activity would not result in a derogation of nobility and that, to the contrary, such activity was fully consonant with the honor, heroism, and patriotism that were the defining features of noble status.<sup>54</sup>

Anticipating by more than half a century Coyer's famous portrait of the *noblesse commerçante*, Toubeau observed that the laws and mores that prohibited noblemen from engaging in commerce developed during a feudal era that had long since passed, in which the state's survival depended on the nobility's wholehearted military service to the king. Such military service, however, was no longer required in the new commercial age that had arisen. Indeed, what was needed was a new set of laws and mores that would encourage the nobility to participate in commerce and thereby ensure the production and transfer of wealth across the social order. As Toubeau explained, “[O]ld ordinances that prohibited noblemen from undertaking commerce were enacted in a time in which all the forces of the nobility were necessary to drive out enemies from the state . . . : But now that the nobility is employed more in searching for its enemies outside the state than in driving them out . . . ; such great transformations in the state of our mores and affairs would be more than sufficient to introduce also some change in our laws.”<sup>55</sup>

Because the feudal age had passed, Toubeau continued, noblemen at present had no purpose or goal through whose pursuit they might seek to distinguish themselves. Indeed, they had literally nothing to do. As Toubeau observed, “To convince oneself easily [that noblemen should engage in commerce], it is necessary first to imagine what gentlemen who have nothing to do are like.”<sup>56</sup> Because “idleness cannot reside in great souls, gentlemen must not stay in their

castles, just like rats, . . . nor at court, languid and dull, behaving like children who run after butterflies.”<sup>57</sup> Given that the traditional paths to honor were now closed to the nobleman, “his status, which seems to constitute his entire glory, is a hindrance that opposes his happiness and his fortune, and that closes to him all the avenues that the laws open to commoners.”<sup>58</sup> It was therefore time for noblemen to abandon their ancient prejudice against commerce.

Noblemen could engage in commerce without derogation of their noble status, because commercial activity required just as much heroism, and was thus just as worthy of honor, as military service: “[C]ommerce . . . is a worthy enterprise for a gallant, because noblemen cannot maintain that they are more determined and brave than merchants.”<sup>59</sup> For example, in maritime commerce, “one does not have only men to fight but sometimes also the four elements together, which is the greatest test to which a man’s resolution can be put.”<sup>60</sup> Likewise, as Toubeau waxed in a particularly effusive piece of prose,

Can anything more determined and hardy be seen . . . than that which our illustrious merchants have undertaken and executed in the discovery of the new world? Is there anything more advantageous than these enterprises, since without them we would be deprived of the most beautiful things that we have? Can the nobility deny that to undertake such a great purpose it is necessary to be determined, to have a lofty soul; that to succeed in this purpose, it is necessary to have a lot of courage and to be above [fear of] the greatest perils? Would these great actions be unworthy of a gentleman, who prides himself on his bravery, generosity, hardiness, and heart?<sup>61</sup>

Indeed, those who possessed the qualities necessary to triumph on the battlefield were also likely to succeed in commerce, because “great voyages should be regarded more as conquests than as something mercenary.”<sup>62</sup>

Furthermore, because noblemen were innately superior to all others, there was every reason to believe that noblemen would prove themselves to be even better at commerce than those belonging to the traditional merchant *corps*: “[S]ince commoners do such praiseworthy and astonishing things in commerce, what should we not expect from those with whom nature, as well as birth, have been more generous?”<sup>63</sup> Just as Coyer would later attempt, Toubeau sought to reconcile a traditional conception of nobility founded on birth and privilege with one based on talent and utility. Thus, he explained, with perhaps just a touch too exaggerated a tone of protest, “[I]t is true, and I remain agreed, that the nobility easily distinguishes itself; that it is still more considerable than it is considered; that nature and birth really do give to gentlemen a certain *je ne sais quoi* of glory, honesty, civility, that even inspires respect for them.”<sup>64</sup> Indeed, he emphasized, he continued to believe in the innate superiority of the nobility, “even though noblemen do not now distinguish themselves from merchants through their great magnificence.”<sup>65</sup> Accordingly, Toubeau concluded, “noblemen can and must undertake commerce,”<sup>66</sup> and when they do so, they thereby make themselves subject to the jurisdiction of the merchant court. As commerce is a noble endeavor, however, “gentlemen must not fear jeopardizing their nobility by appearing before the judges and consuls, either as defendants or as plaintiffs, nor in undertaking commerce . . . .”<sup>67</sup>

Toubeau's somewhat confused conception of merchant-court jurisdiction as at once real and personal served his purpose of ensuring that merchant courts would hear the growing number of disputes involving the Old Regime elite. But his abandonment of the traditional definition of merchant status based on corporate belonging, in favor of one based on free choice, undermined the boundaries that had demarcated merchant from ordinary, nonmerchant courts and that justified the former as courts of limited, exceptional jurisdiction. Once merchant status was reconceived as the product of the individual's decision to undertake commercial activity—a reconceptualization that itself followed, as Toubeau explained, from a new perception that the modern social order was commercial at core—it suddenly became quite difficult to identify which members of society stood outside the network of commerce and thus beyond merchant-court jurisdiction.

Thus, while insisting that the term “merchant” must not be limited to “those who have completed an apprenticeship in merchandise, who are registered in a guild, who have an open shop, and who frequent fairs,”<sup>68</sup> Toubeau could never clearly identify the term's outer bounds. While arguing that the term should be construed more broadly than tradition had allowed, he also expressed concern that it might be interpreted in an overly expansive fashion: “One must not . . . make subtle distinctions regarding the terms of the law; but as it is necessary to observe only the spirit of the law, I would not like, on the authority of Plato . . . to maintain, like Themistius, that those who cultivate the spirit through literature and other means are as much merchants as those who furnish that which is necessary for the body, and in this way, to render a teacher of music or of grammar, and so on, justiciable before the consuls.”<sup>69</sup> Drawing on the long-standing Western distinction between the material and the spiritual—a distinction embodied in the hierarchical structure of the Old Regime—Toubeau insisted that however broad the term merchant might be, it could not possibly include those, such as teachers of music and grammar, whose only function is to “cultivate the spirit.” Merchants were members of the third estate, beneath the clergy and nobility, precisely because they dealt in the material or, in Toubeau's words, “furnish[ed] that which is necessary for the body.” Yet, despite his clear desire to identify a spiritual realm that would not be subject to commerce—to the merchant's craft—Toubeau's own choice of words betrays him. Rather than stating outright that “those who cultivate the spirit” are not merchants, Toubeau found himself saying instead that they are not “as much merchants.”

Elsewhere in the treatise, the specter of the commercialization of all social relations emerges yet again. After remarking that “the meaning and spirit of the word merchandise is extremely broad,” Toubeau returned to his earlier discussion of Plato and Themistius:

[J]ust as I would not want, like Plato and Themistius, to include in it [the term “merchandise”] music, mathematics, . . . grammar, and an infinite number of similar things, even though this divine philosopher, to sustain his opinion, says that one can count as a type of purchase the money that teachers are given for their teaching and count as a type of sale that which they teach, for which they receive payment. . . . I would not like to conclude that these types of merchants, if it is proper to name them such, should for their account appear and proceed before the judges and

consuls.”<sup>70</sup>

Here, as before, Toubeau insisted that a distinction must be drawn between those who are concerned with such spiritual endeavors as music, math, grammar, and the like, on the one hand, and “real” merchants on the other. And yet here as well, Toubeau found himself referring to those whose livelihood depends on these spiritual endeavors as “types of merchants,” while expressly noting his concern that it was unclear whether “it is proper to name them such.”

#### IV. A Society of Merchants?

In 1756, more than a half-century after Toubeau’s treatise first issued, the Abbé Coyer published *La noblesse commerçante*, a book that spawned an entire literature arguing for and against its claims. Coyer drew on a now well-established image of the individual merchant as heroic, honorable, and smart—an image first developed in the writings of such merchants as Savary and Toubeau. In so doing, he, like Toubeau before him, concluded that it was precisely those who had long disdained commercial activity—namely, noblemen—who were most likely to possess the traits necessary to become merchants.<sup>71</sup> Thus, Coyer pleaded for the nobility to abandon its long-standing prejudice against mercantile activity and to embrace the merchant life as fully compatible with traditional noble virtues.

According to Coyer, noblemen resisted becoming merchants because they mistakenly believed that commerce was incompatible with honor. Pursuant to the long-standing, prouder (as opposed to promonarchical) model of Old Regime government, most influentially articulated by Montesquieu, the genius of the French monarchy was that it trusted in a noble elite, motivated by the pursuit of honor to serve as a bulwark against despotism.<sup>72</sup> Noblemen, however, were denied the right to engage in commercial activity for fear that their pursuit of honor, and thus devotion to serving the state, would be overwhelmed by the self-interested pursuit of wealth. As Coyer noted: “Those among us who allow themselves to be frightened by the idea of a *noblesse commerçante* focus with M. de Montesquieu on the principle of monarchies, namely honor . . . A principle that is destroyed (they say) by a completely opposite principle that is found in commerce, namely interest.”<sup>73</sup> For this reason, Coyer bemoaned, “one would like . . . to distance monarchies [from commerce], as from a deceptive region that with beautiful appearances would devour its inhabitants, the nobility above all.”<sup>74</sup>

Coyer, however, rejected this traditional, Montesquieuan model of government in which commerce was deemed incompatible with honor. Like Toubeau, he argued that in the feudal era, the nobility had served the state and thereby attained honor by engaging in military battle, but that the modern era was an age of commerce in which military conquest itself was becoming increasingly dependent on successful commercial competition: “It is true that commerce loves peace . . . but as soon as war becomes necessary, it sustains it by finances, of which it is the principle source, and by the ship owners that emerge from its breast.”<sup>75</sup> In this new commercial age, claimed Coyer, it was primarily through commercial activity, rather than military battle, that the nobility could serve the state and gain honor. And while commercial activity might not entail quite the same heroism and glory as military action, it too required such honorable traits as duty,

intelligence, and strength. As Coyer explained, “[The *noblesse commerçante*] would content itself with this other, less brilliant honor that consists of the knowledge of needs, the perfection of the arts, application, economy, probity, public credit, enterprises that are peaceful but useful to the family and the state.”<sup>76</sup>

That Coyer’s arguments for a *noblesse commerçante* so clearly duplicate those already enunciated at length by Toubeau more than half a century earlier is a powerful reminder of the wisdom of Tocqueville’s teaching that the monarchy was responsible for creating the forces that led to the collapse of the Old Regime corporate order, and thus to its own destruction.<sup>77</sup> In enacting the Commercial Ordinance of 1673 and thereby centralizing the administration of commerce, the monarchy sought to augment its own power at the expense of traditional corporate interests, such as local guilds, by directly regulating the merchant individual. Beginning with Savary, the ordinance’s primary drafter, commercial jurists were quick to recognize this tectonic shift and came to vocalize a new understanding of the term merchant, not as a status based on fixed corporate belonging but instead as a freely chosen profession open to any individual with the necessary talent. From this reconceptualization of merchant status, there soon followed the idea of a *noblesse commerçante*. Accordingly, long before advocates of the noble elite, like Coyer, sought to defend the nobility’s status and privilege by carving out a role for it within the new commercial society, Toubeau, a merchant himself, articulated the notion of a *noblesse commerçante*—not for the purpose of preserving noble privilege but rather to expand the category of the “merchant” and thereby serve such interrelated purposes as attracting noble capital, elevating merchant status, and augmenting merchant-court jurisdiction.

Because Coyer’s goal in advocating a *noblesse commerçante* was to preserve noble privilege, he failed to recognize that his arguments pointed to a new social order in which, rather than commerce resulting in ennoblement, nobility would give way to commercialization. In contrast, Toubeau’s effort to expand the category of merchant enabled him to grasp its seemingly infinite elasticity. He perceived, in other words, how tremendously difficult it would prove in modern-day commercial society to isolate any sphere of social existence—even the ostensibly spiritual—from commercialization. As a prominent merchant and advocate of expanding merchant-court jurisdiction, Toubeau did not focus on the dangers of such commercialization, but he did recognize their existence. It was for later generations to explore these more fully.

Such exploration was given a boost by the collapse of Old Regime corporatism, which made the problem of reconciling the new commercial basis of the social order with the traditional, status-based foundations of merchant-court jurisdiction only more complicated. Once the modern conception of society as an association of equal individuals was enshrined in the law, the notion that merchants are governed by a special set of laws and courts became deeply troublesome.<sup>78</sup> Thus, the first draft of Napoleon’s *Code de Commerce*, issued for comment in December 1801, provided simply that “the competence of the *tribunaux de commerce* [namely, the commercial courts, which were largely identical to the *juridictions consulaires*, or merchant courts, that they had replaced] is determined by the matter that gives rise to the dispute.”<sup>79</sup> In other words, no mention was made of the litigants’ merchant status. As the ordinary, noncommercial courts commenting on the draft code were quick to observe, however, to ground the commercial court’s jurisdiction entirely in the commercial nature of the

disputed transaction was, in the modern commercial era, to risk transforming a court of limited jurisdiction into one of general jurisdiction.<sup>80</sup> In other words, as Toubeau had feared, every citizen might engage in commercial activity and thereby become subject to commercial-court jurisdiction.

As ultimately issued, the *Code de Commerce* rejected this exclusively real, transaction-based foundation of commercial-court jurisdiction in favor of a “mixed” approach that would also look to the merchant status of the litigants.<sup>81</sup> Although the process by which the code evolved from initial drafts through final enactment was a long one, involving extensive discussions that are beyond the scope of these pages, it is telling to recollect in this context the comments made by the member of the *Conseil d’État* responsible for presenting the final draft of the code to the legislature in September 1807. As these comments suggest, the reason why the code, as issued, resurrected personal status as a basis for commercial-court jurisdiction had much to do with the fear of commercialization initially articulated by Toubeau.

According to this councilor, the code’s main purpose was to address the problem that during the Revolution “[e]veryone was a merchant.”<sup>82</sup> As he elaborated, “Before 1789 . . . every fraction of society had its place marked, its tier assigned, its sphere traced by law, usage, or opinion,” but during the Revolution, “all classes were lowered or elevated to the same plane, the bonds of all corporate bodies were broken, the limits of all professions were obliterated.”<sup>83</sup> It was at this point that “the French[,] believ[ing] themselves first equal under the law” but in fact “soon feel[ing] equal under misery and . . . finally equal under the terror,” all became merchants.<sup>84</sup> In commerce, “each citizen[,] isolated by fear, and driven by need, searched for means of subsistence.”<sup>85</sup> Fortunately, however, the councilor observed, “[s]ince society has been reorganized on new foundations . . . everyone has resumed his former status; or has settled on the profession that he has embraced, or has entered a new career; finally, the citizens have been classed as themselves under the imperceptible impetus of the hand that directs them.”<sup>86</sup> “However,” he concluded, “traces of the evil are not erased.”<sup>87</sup> In particular, “[w]ealth has still not descended to its value, honor has still not risen again to its value.”<sup>88</sup> The new *Code de Commerce* would “bring a prompt, efficacious remedy to this evil”<sup>89</sup>—it would ensure that French men and women learned once again that there are nonmaterial values, like honor, that are more important than wealth—by reinforcing the newly emergent (yet unspecified) social framework in which citizens had ceased to be all merchants and were instead “classed as themselves.”

Though the councilor blamed the Revolution, the process that resulted in a society in which arguably “[e]veryone was a merchant” was, as described above, one with roots extending back much further than 1789, and even than midcentury. Once the Revolution swept away the hollow shell of corporatism, however, French men and women were left to grapple directly with the deeply perplexing problem of determining how “the imperceptible impetus of the hand that directs them”—be that divine will, the natural laws of political economy, or indeed both<sup>90</sup>—rather than the positive law of state and *corps*, intended that they be “classed as themselves.” One possibility, foreseen by Toubeau and enshrined in the draft code’s provision that commercial-court jurisdiction would be exclusively real, was that society would consist of an association of atomized merchant individuals, each pursuing his own self-interest. As the

councilor promoting the final draft of the code made clear, however, and as subsequent history has amply confirmed, French citizens were unwilling to embrace a society of merchant individuals, “isolated by fear, and driven by need.”

That this is so goes a long way, one suspects, to explaining the code’s “mixed” jurisdictional framework, which has long been criticized, along with the rest of the code’s provisions, as having been mindlessly adopted from times past.<sup>91</sup> Although the full story of the code’s drafting and enactment still awaits its telling, it should be noted here that, contrary to this standard account, there is good reason to believe that the code’s mixed jurisdictional framework was the product of a self-conscious choice to seek to contain commercialization by delimiting its sphere of operation—and the adjudication of any disputes arising therefrom—to a specified segment of society identified as merchants.

Whether this effort to delimit a special set of courts for merchants did indeed have the intended result of constraining commercialization is another, even more complex matter. Suffice it to say, however, that the decision to maintain a personal, status-based element in commercial-court jurisdiction does appear to have served an important expressive function. It enunciated, and thereby fortified, a commitment not to succumb to the tides of commercialization. But if it was clear that French men and women were not all to be merchants, the question of how exactly “the imperceptible impetus of the hand that directs” intended that they be “classed as themselves” would prove a far more complicated one, for which, even at the dawn of the twenty-first century, the answer remains elusive.

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1. Jean Toubeau, *Les Institutes du droit consulaire ou les elemens de la jurisprudence des marchands, d’un tres-grand secours au palais, utiles à tous marchands et négociants, et nécessaires aux juges et consuls* (Bourges, 1700). All translations in this paper are my own, unless otherwise noted.
  2. John Shovlin, “Toward a Reinterpretation of Revolutionary Antinobility: The Political Economy of Honor in the Old Regime,” *The Journal of Modern History* 72 (March 2000): 35–66; Jay M. Smith, “Social Categories, the Language of Patriotism, and the Origins of the French Revolution: The Debate over the *noblesse commerçante*,” *The Journal of Modern History* 72 (June 2000): 339–74.
  3. Romuald Szramkiewicz, *Histoire du droit des affaires* (Paris: Montchrestien, 1989), 142–43.
  4. For example, Title 16 of the Civil Procedure Ordinance of 1667, concerning litigation in the merchant courts, is titled: “About the manner of proceeding before the judges and consuls of merchants”; Philippe Bornier, *Conferences des ordonnances de Louis XIV, roi de France et de navarre, avec les anciennes ordonnances du royaume, le droit écrit et les arrêts, enrichies d’annotations et de décisions importantes, nouvelle édition* (Paris: Chez les associez choisis par ordre de sa Majesté, pour l’impression de ses nouvelles Ordonnances, 1760), 1:96.
  5. In the Parisian Merchant Court, on which other merchant courts throughout France were expressly modeled, electoral power rested primarily with the elders of the city’s six leading guilds, or the six corps de Paris; Szramkiewicz, 143; G. Denière, *La Jurisdiction consulaire de Paris, 1563–1792: Sa création, ses luttes, son administration intérieure, ses usages et ses mœurs* (Paris: Henri Plon, 1872), 45.
  6. Merchant courts typically consisted of one judge and several consuls, each of whom possessed full adjudicatory authority. The judge was simply the administrative head of the court.

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7. “Edit qui crée la juridiction consulaire des juges et consuls de Paris et règle leur compétence” (Paris, November 1563), in François André Isambert, Jourdan, and Decrusy, *Recueil général des anciennes lois françaises, depuis l’an 420, jusqu’à la révolution de 1789* (Paris: Berlin-Leprieur, 1829), 14:153–58; Szramkiewicz, 144.
8. See Charles Carrière, *Négociants Marseillais aux XVIIIe siècle: Contribution à l’étude des économies maritimes* (Marseille: Institut Historique de Provence, 1979), 1:239–43 for an overview of the rise of the *négociant* as a category distinct from the merchant, or *marchand*.
9. The emergence of the *négociant* over the course of the seventeenth and eighteenth centuries can be traced through a comparison of the 1694 edition of the *Dictionnaire de l’Académie française* with that of 1798. The 1694 edition includes an entry for the term *négociant* solely as a variant of trade, or *negoce*, and defines it simply as “[w]ho does trade”; *Dictionnaire de l’Académie française*, s.v. “Negoce” (Paris: Chez la veuve de Jean Baptiste Coignard, 1694), 2:115. A little over a century later, however, the 1798 edition of the same dictionary contains an independent entry for *négociant*, which it defines again as “[w]ho does trade,” but then goes on to elaborate as follows: “The word *Négociant* has a broader meaning than the word *Marchand*. The former does wholesale commerce; the latter sells retail”; *Dictionnaire de l’Académie française*, s.v. “Négociant” (Paris: Chez J. J. Smits et compagnie, 1798), 2:154. Thus, by the late eighteenth century, *négociants* were recognized to be traders, but not merchants of the traditional, retail-focused, guild-belonging sort.
10. The highly influential agronomic movement sought to introduce into France the new farming methods that had revolutionized English agriculture; Elizabeth Fox-Genovese, *The Origins of Physiocracy, Economic Revolution and Social Order in Eighteenth-Century France* (Ithaca, NY: Cornell University Press, 1976), 93.
11. Amalia D. Kessler, “Limited Liability in Context: Lessons from the French Origins of the American Limited Partnership,” *The Journal of Legal Studies* 32 (June 2003).
12. The Edict of December 1701 provided that “‘all subjects of the King, noble by descent, by office or otherwise, except those who are now holding positions in the magistracy, may freely undertake any type of wholesale commerce, whether inside or outside of the kingdom, for their own account or on commission, without losing their nobility’”; Edict of December 1701, in Daniel Jousse, *Nouveau commentaire sur les ordonnances des mois d’août 1669, et mars 1673: ensemble sur l’Edit du mois de mars 1673 touchant les épices, nouvelle édition* (Paris: Chez Debure l’ainé, 1775), 192. As Jousse explains, this edict differed from another issued in August 1669, primarily in that the earlier statute “accorded this privilege only for maritime commerce.”
13. For an overview of the rise of negotiability and discounting, see Amalia D. Kessler, “From Virtue to Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France” (Ph.D., Stanford University, 2001), 191–278.
14. Henri Lévy-Bruhl, *Histoire de la lettre de change en France aux XVIIe-XVIIIe siècles* (Paris: Recueil Sirey, 1933), 103; Raymond de Roover, *L’Evolution de la lettre de change: XVe-XVIIIe siècles* (Paris: A. Colin, 1953), 113.
15. The defining feature of the negotiable instrument is the security it provides to the individual who purchases it without knowledge of any defenses against its enforcement. This good-faith holder for value has a right to payment, even if turns out that the prior holder did indeed have a legitimate defense against enforcement. In contrast, in the case of a contract, the rights of the assignee are always identical, and thus no greater than, those of the assignor.
16. Roover, 133; Charles Carrière, “Escomptait-on les lettres de change au XVIIIe siècle?,” in Charles Carrière, Michel Gutsatz, Marcel Courdurié, and René Squarzoni, *Banque et capitalisme commerciale: la lettre de change au*

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XVIIIe siècle (Marseille: Institut Historique de Provence, 1976), 30–44.

17. Szramkiewicz, 99.

18. “Edit qui crée la juridiction consulaire des juges et consuls de Paris et règle leur compétence” (Paris, November 1563), in Isambert, 14:153–58; Szramkiewicz, 144.

19. Jousse, 347.

20. Ibid., 348–49.

21. Bornier, *Ordonnance de Louis XIV, sur le commerce, enrichie d’annotations et de décisions importantes* (Paris: Libraires-Associés, 1767), 570.

22. Ibid., 609. That these two articles address bills of exchange and noblemen, respectively, is hardly surprising since, as described above, the rise of the negotiable instrument and the increased participation of noblemen in commercial activity are two of the developments responsible for undermining the traditional conception of the merchant.

23. Ibid., 3.

24. For example, it provides that no one may be received as a “Master of Merchants” until he is twenty years old, has completed an apprenticeship for the precise amount of time specified by guild statutes, and has passed a test demonstrating knowledge of such matters as accounting books, bills of exchange, mathematics, and weights and measures; “Ordonnance du commerce du mois de mars 1673,” Title 1, Article 1, in Bornier, *Ordonnance de Louis XIV*, 3.

25. Indeed, Title 1’s reference to *négociants*, as well as merchants, or *marchands*, is in itself indicative of this process.

26. Confraternities were the religious brotherhoods with which guilds were typically associated; Emile Coornaert, *Les Corporations en France avant 1789*, 2d ed. (Paris: Éditions ouvrières, 1968), 224; Abel Poitrineau, *Ils travaillaient la France: Métiers et mentalités du XVIe au XIXe siècles* (Paris: Armand Colin, 1992), 59; William H. Sewell, Jr., *Work and Revolution in France: The Language of Labor from the Old Regime to 1848* (Cambridge: Cambridge University Press, 1980), 33.

27. Jacques Savary, *Le parfait négociant, ou instruction générale pour ce qui regarde le commerce des marchandises de France, et de pays étrangers; pour la banque, le change, et rechange; pour les sociétés ordinaires, en commandites, et anonymes; pour les faillites, banqueroutes, séparations, cessions et abandonnements de biens; pour la manière de tenir les livres journaux d’achats, de ventes, de caisse et de raison; des formulaires de lettres et billets de change, d’inventaire, et de toutes sortes de sociétés; comme aussi plusieurs pareres ou avis et conseils sur diverses matieres de commerce très-importantes, nouvelle édition* (Paris, 1800), 1:x.

28. “La Vie de M. Savary,” in *ibid.*, 1:xxi; Szramkiewicz, 134.

29. Savary, 1:xi.

30. *Ibid.*, 1:xi.

31. *Ibid.*, 1:xxii; Szramkiewicz, 134–35.

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32. Savary, 1:xi.

33. Ibid., 1:2.

34. Ibid., 1:2.

35. Ibid., 1:27.

36. Ibid., 1:27.

37. Ibid., 1:27.

38. Ibid., 1:27.

39. Ibid., 1:28.

40. Indeed, as late as 1786—long after Savary’s laudatory depiction of the merchant had become a commonplace—an edition of the famous law dictionary published by the civil-law jurist Jean-Baptiste Denisart stated: “The loyalty and frankness that are the distinctive character of the French nobility do not accord with the subtlety and the disguises which merchants so commonly employ, and which several among them view as indispensable to making their deals succeed. Such was without a doubt the primary reason that our former knights looked on commerce as entirely incompatible with nobility. This prejudice, which does not exist in England, continues still among the high nobility, despite the efforts of our kings to destroy it”; Jean Baptiste Denisart, Jean-Baptiste-François Bayard, and Armand-Gaston Camus, s.v. “Commerce,” *Collection de décisions nouvelles et de notions relatives à la jurisprudence, donnée par Me. Denisart, mise dans un nouvel ordre et augmentée par MM. Camus et Bayard*, 8th ed. (Paris: Chez la veuve Desaint, 1786), 4:645. For this leading Old Regime law dictionary, it remained, even at this late date, an undisputed fact that merchants “commonly” employ “subtlety and . . . disguises.”

41. Savary, 1:3.

42. I cite the 1700 edition. As demonstrated by Jacqueline L. Lafon’s analysis of the correspondence between the merchant deputies of the monarchy’s *Bureau du commerce* and merchants throughout France, Toubeau’s treatise was one of the primary resources to which contemporary merchants turned in seeking guidance on matters of commercial law; Jacqueline-Lucienne Lafon, *Les députés du commerce et l’ordonnance de mars 1673: Les Juridictions consulaires, principe et compétence* (Paris: Éditions Cujas, 1979), 50, n. 49.

43. Toubeau, 1:preface.

44. “Edit qui crée la juridiction consulaire des juges et consuls de Paris et règle leur compétence” (Paris, November 1563), in Isambert, 14:153–58; Szramkiewicz, 144.

45. Pierre Jean Jacques Guillaume Guyot, s.v. “Consul,” *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale* (Paris: Chez Panckoucke, 1777), 15:106.

46. Ibid. In contrast to Guyot, other noted civil-law jurists, like Jean-Baptiste Denisart and Daniel Jousse, recognized that, pursuant to Article 10 of Title 12 of the Commercial Ordinance of 1673, noblemen, among others, who sold agricultural products grown on their land were authorized to sue merchant buyers in the merchant courts. They insisted, however, that the article’s silence regarding claims brought by merchant buyers against these noble sellers indicated that jurisdiction did not lie in such cases. Noblemen, in other words, could be plaintiffs in the

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merchant courts, but not defendants. As Denisart explained, “Gentlemen (living nobly) have the privilege of not being sued in the merchant courts: but they have the right to sue there those to whom they have sold wheat, wine, livestock, and other produce proceeding from their land, according to Article 10 of Title 12 of the Ordinance of 1673”; Jean Baptiste Denisart, s.v. “Nobles, Noblesse,” *Collection de décisions nouvelles et de notions relatives à la jurisprudence actuelle*, 7th ed. (Paris: Chez la veuve Desaint, 1771), 3:414. Likewise, Jousse explicated Article 10 as follows: “But clergymen, gentlemen, bourgeois, farmers, vintners, etc. can be sued by merchants, for these sales [described in Article 10], only before ordinary judges”; Jousse, 365.

47. That this is so is suggested, in part, by Toubeau’s constant protests to the contrary. For example, he insisted, “It is necessary to judge . . . that I am sincere, and that I do not want to extend our jurisdiction beyond its bounds, nor to give occasion to judges and consuls to proceed rashly, nor to exceed their bounds and limits . . .”; Toubeau, 1:397.

48. *Ibid.*, 1:284–85 (emphasis added).

49. In accordance with this conception of merchant-court jurisdiction as based either on the merchant status of the litigants, or on the commercial nature of the transaction in dispute, Toubeau’s treatise contains two main “titles” concerning jurisdiction, one titled “About jurisdiction and competence regarding persons and statuses” (Title 15), and the other, “About competence and jurisdiction regarding matters” (Title 17).

50. Toubeau, 1:275.

51. *Ibid.*, 1:259.

52. *Ibid.*, 1:259.

53. *Ibid.*, 1:282.

54. Interestingly, while Toubeau concluded that it was possible for noblemen to be merchants, he did not extend this logic to priests. Although he argued that priests who chose to engage in commercial activity were subject to merchant-court jurisdiction, this was because they thereby foreswore their priestly status and its concomitant privileges, and not because they became a kind of *clergé commerçant*. *Ibid.*, 1:287–94. That Toubeau embraced the notion of a *noblesse commerçante* but not of a *clergé commerçant* likely followed from the continued force of religious prohibitions, and in particular, from the fact that the regulation of priestly activity remained (despite the monarchy’s efforts to the contrary) a prerogative of the Church.

55. *Ibid.*, 1:306.

56. *Ibid.*, 1:296.

57. *Ibid.*, 1:296.

58. *Ibid.*, 1:296.

59. *Ibid.*, 1:297.

60. *Ibid.*, 1:297.

61. *Ibid.*, 1:298.

62. *Ibid.*, 1:298.

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63. *Ibid.*, 1:299.

64. *Ibid.*, 1:302.

65. *Ibid.*, 1:302.

66. *Ibid.*, 1:299.

67. *Ibid.*, 1:315.

68. *Ibid.*, 1:275.

69. *Ibid.*, 1:275.

70. *Ibid.*, 1:398–99.

71. Whether Coyer was familiar with the extensive juridical debate over merchant-court jurisdiction, and with the writings of Toubeau, in particular, is unknown. That he might well have been, however, is not at all implausible. As a growing number of Old Regime noblemen participated in commercial activity (if only by signing bills of exchange), the question of where any lawsuits that resulted were to be heard was one with which they were quite likely to be preoccupied—particularly since this seemingly technical question of jurisdiction so directly implicated their noble status. Thus, for example, Denisart’s law dictionary includes a discussion of whether noblemen are subject to merchant-court jurisdiction directly under its definition of “Nobles, Nobility”; Denisart 1771, s.v. “Nobles, Noblesse,” 3:414.

72. Montesquieu, *The Spirit of the Laws*, trans. and ed. Anne Cohler, Basia Miller, and Harold Stone (Cambridge: Cambridge University Press, 1989).

73. Gabriel François Coyer, *Développement et défense du système de la noblesse commerçante* (Paris: Chez Duchesne, 1757), 136.

74. *Ibid.*, 10.

75. *Ibid.*, 64–65.

76. *Ibid.*, 137.

77. Alexis de Tocqueville, *The Old Regime and the French Revolution*, trans. Stuart Gilbert (New York: Doubleday, 1955).

78. The revolutionaries initially embraced the Old Regime merchant courts as consonant with their effort to dismantle a formal system of (state-operated) justice and to replace it with more informal methods of arbitration, by means of which citizens would submit their disputes to mediation by their peers. With the rise of Napoleon and the return to formal justice, however, the merchant courts (now titled commercial courts) appeared very out of place. For a general discussion of the revolutionaries’ commitment to arbitration and its abeyance after the coup of Brumaire, see Isser Wolloch, *The New Regime: Transformations of the French Civic Order, 1789–1820s* (New York: W. W. Norton & Co., 1994), 307–20.

79. *Projet de Code du Commerce* (Paris: Chez Giguet et Michaud, 1802), 186 (Title 11, Article 447).

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80. To give but a few examples, the *tribunal d'appel* of Nancy bemoaned, “[T]hese [commercial] courts would cease to be courts of limited jurisdiction, they would have everything to judge”; *Observations des tribunaux de cassation et d'appel, des tribunaux et conseils de commerce, etc. sur le projet de code du commerce* (Paris: L'imprimerie de la République, 1803), 1:203. Likewise, the *tribunal d'appel* of Poitiers worried that “the commercial courts will become ordinary courts, and the ordinary courts will be nothing more than courts of limited jurisdiction”; *ibid.*, 1:459.

81. Article 631 of Title 2 (“About the competence of the commercial courts”) specified: “The commercial courts will hear, 1. All disputes regarding engagements and transactions between *négociants*, merchants, and bankers; 2. Between all persons, disputes regarding acts of commerce”; Julien-Michel Dufour, *Le parfait négociant, ou code du commerce, avec instructions et formules* (Paris: Chez Léopold Collin, 1808), 1:373. See also the discussion of the code’s mixed jurisdictional framework in *International Encyclopedia of Comparative Law*, vol. 8, *Specific Contracts*, ed. Konrad Zweigert, ch. 2, “Civil Law and Commercial Law,” by Denis Tallon (Tübingen: J. C. B. Mohr; The Hague: Martinus Nijhoff Publishers, 1983), 29–41.

82. Regnaud de Saint-Jean d’Angély, “Discours prononcé au corps législative,” in *Code de Commerce, précédé des rapports faits au corps législatif par les orateurs du Conseil d’État* (Paris: Chez Buisson, 1807), v.

83. *Ibid.*, v.

84. *Ibid.*, v.

85. *Ibid.*, v.

86. *Ibid.*, v.

87. *Ibid.*, vi.

88. *Ibid.*, vi.

89. *Ibid.*, vi.

90. The councilor’s somewhat ambiguous reference to “the imperceptible impetus of the hand that directs” nicely captures the roots of eighteenth-century political economy (including, notably, Adam Smith’s theory of the invisible hand) in seventeenth-century natural-law theory, which sought to secularize Christian morality and thereby transcend the religious differences that had led to so many years of warfare.

91. Tallon, for example, reflects this common view of the code in his statement that, while “[t]he Civil Code was a truly modern work, based on new principles . . . the Commercial Code, drawing its inspiration from previous models, was more axed on the past,” such that even “[i]ts very wording was archaic, its layout not very well considered”; Tallon, 30.