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Recommended Citation
Saul Levmore, "Property's Uneasy Path and Expanding Future," 70 University of Chicago Law Review 181 (2003).

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Property's Uneasy Path and Expanding Future

Saul Levmore†

INTRODUCTION

How has law come to its present state and where is it going? These are two obvious questions to ask on the occasion of a great Law School's Centennial. In this Essay, I direct these questions at property rights, a centerpiece of the law and economics revolution that has itself been an important part of this last century of ideas. The law and economics literature has advanced the optimistic view that property rights have evolved in a way that promotes economic efficiency.[1] I suggest that alongside the conventional and optimistic view, which is essentially transaction cost, or efficiency, based, there is an alternative and skeptical view that is interest group, or politically, driven.[2] And if it is true that the evolution of property rights up to the present time is capable of conflicting explanations, then there is the question of predicting the future of property rights and, as we will see, the future of intellectual property in particular.

Part I begins by exploring two distinct stories about the evolution of property rights. Part II then applies the two evolutionary stories to assess the future of intellectual property rights. I suggest that we should expect interest group pressures to generate an expansion of intellectual property rights, perhaps even to include protection for abstract ideas. These expanding rights will shape much of our legal system in the coming years. The conclusion adds some hopeful comments about the limits of interest group politics.

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1 I should say that I normally subscribe to (and try to contribute to) the optimistic view. As we will see, the optimistic view about property rights is on solid ground when its focus is on particular pieces of property or government regulation regarding which we have detailed knowledge about evolutionary influences. In this Essay, I try to develop resistance to the natural but unsubstantiated claim that the evolution of property rights is quite generally, or nearly always, a thing to celebrate.

2 The conflicting stories are developed more fully in Saul Levmore, *Two Stories about the Evolution of Property Rights*, 31 J Legal Stud (forthcoming 2003).

I. EVOLUTIONARY STORIES ABOUT PROPERTY

A. Optimistic and Skeptical Stories

The conventional story of the evolution of property begins with hunters and gatherers in a forest or other commons. These protagonists develop customs and then laws about private property rights—mostly of the kind permitting an owner to exclude others—with respect to what they gather, kill, find, or fashion out of stone and wood to further these aims. There is a technological or transaction cost element to this phase because it is a mighty task to exclude competitors from a forest or ocean, but for the purpose of this Essay we can simply think of the driving force as one of wealth creation. Those who gather and hunt will work harder the more they can control the product of their labor, and the community might find it worthwhile to respect these ownership rules in order to maximize its total wealth.

As the population increases and intense agricultural production becomes critical, the evolution of property rights is yet more driven by consequences. Private property rights are now even more important in encouraging effort because of a lag between the effort and the return. A farmer will work hard if he knows that he will reap where he sowed. Laws about trespass, boundaries, and riparian rights come into their own, and even the more archaic of these rules have proved susceptible to fairly convincing efficiency explanations. One version of the larger story focuses on transaction costs; improvements (and lower costs) associated with fencing or irrigation or even recordation will raise the value of farmland relative to open hunting ground, stimulating the evolution toward private property rights. Another version focuses on demand or product prices; agricultural yield is likely to be greater with private plots than with a central planner or commons. In the interest of brevity, I will emphasize the association between production incentives (and thus wealth creation) and secure property rights. And, again, the conventional and optimistic story is that the emergence of property rights in personal and real property has been a story of evolutionary success. Indeed, legal systems and economies that have lagged, and experienced the gravest famines and rates of poverty, are almost invariably (and sensibly) counseled to establish secure private property rights.

There is room, however, for an alternative and more skeptical depiction of the evolution of these property rights. This story is one of interest groups, tribute, and grave market imperfections. For an appropriate beginning to this story about property rights, imagine (without pausing to ask how powerful authorities or governments come about in the first place) a lawmaker who gives a charter covering a large tract of land (previously claimed by the ruler or simply un-

tamed) to an individual. If the recipient performed some great service to the realm, then we might think of this land grant as part of an incentive system that is not so different from that which we associate with the benefits of private property. But perhaps the grant is to kin, to a comrade in arms, or to someone who pledges tribute. If private property emerges under such circumstances, we have no reason to think that it is to be celebrated as efficient or as providing socially superior incentives. When property rights are assigned because of political maneuvering (with less than unanimous agreement), there is the danger that the development of these rights promotes inefficient behavior either on the part of those who seek to obtain wealth as the recipients of these assignments or by those who hope to gain indirectly by redistributing rights to inefficient users from whom the lawmaker can more easily collect taxes. Even the grant in return for future tribute is troubling. An optimist might see this as the auctioning off of property to the highest valuing user, but the problem is that tax revenue is easier to extract from some uses of the property than from others.[3]

Property rights change over time either because the alterations maximize wealth, as the modern law and economics version would suggest, or, more skeptically, because an interest group has successfully brought about a new regime. Thus, the acquisition and addition of new land to a national park may reflect a decision to provide a public good in a way that yields or maintains the highest value of the land in question or it may represent the victory of snowmobilers, concessionaires, or hiking clubs, each capable of benefiting from a public subsidy of their interests while most citizens opposed to the park's expansion are too dispersed to do much about it. Similarly, new catch limits in a fishery may solve collective action problems and maximize the longterm value of the fishery—especially if they are transferable rights—but these limits may instead reflect the political power of nearby processing facilities or of those citizens who currently rely on the fishery for their income. Quite generally, the evolution of property rights and even their early emergence, as when Blackacre and Whiteacre are carved out of an uncharted forest, may represent the efficient allocation of property to users who will maximize value once they control output and access. But it is also possible that each evolutionary step reflects a bargain between the reigning authority and some of the owners. Blackacre and Whiteacre may simply be more easily taxed after their creation or in return for their creation than

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[3] The tax-and-property-rights authority might, for example, prefer a regime with a few easily taxed property owners over one with many dispersed owners who are difficult to capture in the tax system. And yet the latter scheme might produce more social benefit.

were their precursors. An arrangement that appeals to the new owners of these properties, and to the ruling authority, may come at the expense of the polity as a whole.

There are evolutionary pressures that prevent the interest group story from straying too far from the optimistic, efficiency-oriented one. Long-run survival is inconsistent with unfettered rent seeking and redistribution toward well-positioned interest groups, because in the long run, members of interest groups will be better off if the economy as a whole is more successful. But the interest group and efficiency stories are unlikely to converge. Evolution is path dependent, as each step plays something of an irreversible role in determining the future. For example, when parcels of private property are first carved out, public roads and even legal decisions may follow in ways that track these rights, and then new private investments and expectations will build on these foundations, so that it becomes unlikely that the original property boundaries and assignments will ever be completely obliterated.

B. Explaining Intellectual Property Rights

1. The optimistic efficiency story.

This rivalry between the efficiency and interest group stories continues in the realm of intellectual property. A first-in-time rule of the kind that has governed personal property, be it found (where there is no original owner in the picture), hunted, or even securitized, has carried weight with respect to intellectual property, so that law has protected creators against later appropriation by others. But this interest has been balanced, or somewhat weakened, by time limits and other devices that favor the dissemination of new inventions, literary works, and the like, if only to take advantage of the public good quality of most intellectual property, such that one person's use does not normally interfere with another's.

At the risk of serious oversimplification, the tradeoff is between private property rights that are granted in order to encourage innovation, and open access so as to maximize the gains from innovations that are already, or that would anyway be, developed. One intuition is that if we extend patent protection, copyright enforcement, and the like, we will get more and better miracle drugs, good music, and improved business processes, mostly because innovators will respond positively to the assurance of exclusive rights to profits—albeit for a specified number of years. The contrary intuition is that by weakening or eliminating these legal licenses to control and monopolize innovations, we will have not only wider and more efficient distribution of new things, because the innovator's monopoly will be denied, but also

more new things because successive innovators will freely be able to build upon earlier advances. Open access to new knowledge may hasten innovations to market, because innovators may rush in order to take advantage of their first-mover opportunities. Alternatively, open access may be associated with stagnation, as innovators try to maintain their secrets in the absence of a system with registration and protection. The case for weak property rights is hardly absurd, and, indeed, it is easy to point to areas where there have been impressive innovation in spite of the fact that those innovations were not protected with property rights. Insights about the "laws of nature" are unpatentable, and yet they seem to pour out of universities (a subsidized industry, to be sure) to the great benefit of society at large. No one was able to appropriate the idea of the drive-thru window or the secret of fire or the concept of (or recipe for) chocolate milk, and yet it is hard to believe that with more secure property rights we would have more or better such ideas.[4] Legal practice itself might offer a nice illustration of the promise of progress in spite of weak property rights. New legal arguments are cited, copied, and exploited as soon as the imitator likes, and yet there is no apparent shortage of brief writers or of talented persons entering the field of law.[5] Finally, there is the appealing and contemporary claim that we have experienced sustained and impressive innovation precisely where there has been open source software.[6]

It is thus easy to see that a society's progress may depend on finding the right balance between strong and weak property rights, but it is also easy to see that the optimal rules may be impossible to ascertain. In the fields of music and literature, for instance, the basic question is whether to make authors and publishers more or less secure against photocopying, downloading, and comparable uses. The argument for stronger copyright is like the argument for a farmer's secure right to Blackacre; a stronger claim on later profits is likely to induce investment and effort. The counterargument for open access, or knowledge, is that wider dissemination of new works might bring about yet more progress in the long run because each generation of creators will be able to draw freely on earlier work, and their own efforts will be re-

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4 Again, the pro-property rights view is that in the absence of legal protection, the secret of fire was probably withheld as a clan or trade secret. Protection of ideas might lead to more rapid dissemination. The drive-thru window, like the ambush, is thus interesting because it can hardly be kept secret.

5 These rules affecting legal practice might reflect the great value we attach to dissemination, where we want equal justice to prevail, and so forth. But the point in the text is that there is no striking shortage of new entrants and ideas despite the absence of property rights.

6 See Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 Yale L J 369 (2002) (associating creative incentives in an open source system with individual choice).

warded to the extent that they can capture audiences before others imitate them.[7]

2. The interest group story.

But all this can be recharacterized from the perspective of our alternative evolutionary story, which depicts property rights as the product of interest group pressures. In the case of intellectual property, at least, the evidence of interest group agitation for the statutory schemes we know, along with the indeterminacy of, or lack of empirical evidence underlying, the first evolutionary story give this second and more skeptical story special force.[8] Altogether, the efficiency diagnosis is probably less robust for intellectual property than it is for personal or real property. Continuing with the copyright example, the alternative evolutionary story is that copyright may have emerged because of the influence of publishers or well-connected authors who gained by acquiring and extending their exclusive right to profit from the compositions and materials they created and owned. And this property right may become more or less secure in the future because of the influence and (conflicting) efforts of trade groups, publishers, universities, chains of copy stores, libraries, and others. The ongoing possibility of legal and technological change has provided an incentive for the formation of these groups, and the regular "losers," if they are that, are likely to be the end users of these creations, who are widely dispersed, not in communication with one another, and thus disadvantaged in the political process except to the extent that their potential voting power matters. I return presently to this link between interest groups and the apparent expansion of intellectual property rights.

3. Examples of the conflicting stories.

The argument in Part II emphasizes areas in which new property is created, often because of technological change. In anticipation of the argument below, and in order to provide a concrete example of the idea advanced thus far, consider the development, or privatization as it were, of the broadcast spectrum, a domain that we might think of as sharing some characteristics with both real property and intellectual

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[7] The arguments are put forward in William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J Legal Stud 325, 348 (1989) (exploring other incentives for creation, pecuniary and non-pecuniary).

[8] Interest groups are associated with new intellectual property rights in this way (though without the asymmetry argument introduced in Part II.B). See William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* II.C (Mar 5, 1992), online at http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/iphistory.html (visited Dec 17, 2002) (concluding that "lobbying efforts have . . . been biased in favor of the expansion of intellectual property").

property. The optimistic argument about government involvement and the parceling of property on the spectrum is that some legal intervention was needed to prevent signal interference due to the overcrowding of the airwaves, much as regulation (or extensive and high transaction cost bargaining) might be needed to avoid over-fishing or pollution or traffic congestion in analogous settings where there looms a tragedy of the commons. Any initial allocation, followed by transferability and limited regulation (as there is for real property), could have produced a fairly decent result. In turn, the skeptical interest group story is that the government took control of the spectrum and then made allocation choices—and continues to regulate—not in the "public interest" but rather to appease interest groups that sought to censor the broadcast media or even to chill criticism of the government itself.[9] It is unlikely that anyone would make a serious claim that the evolution of these rights has been something to celebrate as an example of spontaneous efficiency. Similarly, the emergence of our patent system, our copyright law, and our Blackacres may give little reason for exultation.

Real property rights also respond to technological changes[10] such as new irrigation techniques, or to opening up new territory after exploration, but the changes that have come along recently in the world of intellectual property—such as photocopiers, compact disc burners, and peer-to-peer file sharing technologies that affect the value and dynamics of copyright—have been rather dramatic and rapid. Intellectual property rights are especially interesting because new technologies change the balance between inducements for the creators and dissemination to users. As new copying technologies come about, for example, the best default rules for copyright protection are likely to change; they may tilt toward allowing increasingly inevitable dissemination or instead towards protecting creators, as it becomes yet harder to appropriate a substantial portion of the gains from one's creation because controlling access becomes more difficult. At the same time, interest group dynamics change as firms and other entities adjust to new technologies. By way of illustration, courts have, in recent years, permitted home copying of commercial television and movies but then not permitted Napster to continue to facilitate the downloading

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[9] See Thomas W. Hazlett, *The Rationality of the U.S. Broadcast Spectrum*, 33 J L & Econ 133, 161, 164–70, 175 (1990) (noting that "self-interested rationality" of interest groups influenced the development of the broadcast spectrum).

[10] All property rights are likely to evolve with technological change, either because (from an efficiency perspective) the best default rules depend on technological realities as well as transaction costs (which themselves change with technological advances), or because political interests and the relative ability of groups to organize change with technology.

of music by users who paid nothing to the creators.[11] These evolutionary movements can be understood as twists and turns in response to changes in relative transaction costs but they can alternatively and rather plainly be attributed to interest groups and perceived political advantage.[12]

These examples illustrate the optimistic and the skeptical stories regarding the evolution of property rights. The optimistic one is of the standard law and economics variety, and it suggests alterations in rights in response to technological changes—especially where adjustments are not easily made through private bargains. To take an extreme but illustrative hypothetical, if technological change made it feasible for millions of citizens to live and work deep underground, we might expect some reshuffling of property rights in land—much as air rights were redefined when air travel became feasible. This is more likely if the underground construction involves coordinating the interests of many property owners, because otherwise simple bargains should be expected. The essential point, then, is that wealth-maximizing property rights are likely to adjust here and there with technological changes. In turn, the second story sketched here offers a more skeptical depiction of the evolution of property rights, as it focuses on interest groups and, therefore, the expectation that political (and litigation) power will not be distributed evenly across the population or even the economy. Technological changes play an important role in this story as well; a new technology (such as one associated with underground living) might create a powerful new industry, or an existing interest group might try to fight off a new technology with regulatory hurdles. But in each case, the new political bargain may or may not be socially beneficial.

With these alternative stories, I have not claimed that interest groups always generate inefficient property rights and assignments. Even a selfish ruler will be more inclined to favor interests that generate more wealth, because the greater the economic pie, the greater the slice that the ruler can extract. Correspondingly, interest groups may overachieve because they are better positioned to overcome collective action problems than are their competitors, but, other things equal, political effort and influence are likely to be associated with produc-

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11 See *Sony Corp of America v Universal City Studios, Inc*, 464 US 417, 456 (1984) (allowing home recording of commercial broadcasts); *A&M Records, Inc v Napster, Inc*, 284 F3d 1091, 1095 (9th Cir 2002) (upholding an injunction against the peer-to-peer file-sharing Napster system).

12 Note the implication, in accord with much of the positive political theory literature—but not explored here—that interest groups can work through courts as well as legislatures. I do not claim that these cases were perfectly predictable. Home recording pitted organized interest groups against one another, although by the time the case was decided there were also millions of voters strongly in favor of open access.

tive activity. It is for this reason that I label the interest group story skeptical rather than pessimistic. Property rights that emerge from such activity may or may not be socially desirable (even apart from the rent seeking that takes place in pursuit of these rights), but the picture is much less sanguine than the one usually painted with the commons receding in the background and hard-working tillers of land dominating the foreground.

Nor am I suggesting that we should always be agnostic about the relative merits of the two evolutionary stories. Interest group activity can be good, bad, or neutral. In a given situation, we might know enough about local history to regard the evolutionary process as efficient or, to the contrary, as sadly demonstrating the power of overachieving interest groups in the face of high transaction costs. For example, in areas where property rights have evolved to a congruent position in a variety of legal systems we might be fairly optimistic about the evolutionary path we have taken. But in many spheres it is probably difficult to know whether to rejoice or fret over the property rights that have emerged. And agnostic as we might be about property's path to the present, there is the question of what to expect of its future. It is to this subject that I now turn.

II. PROPERTY'S FUTURE AND THE BOUNDARIES OF IDEAS

A. The Idea/Device Distinction

All readers of law reviews know that a property right, in the form of a patent, is available to one who invents a machine or device or possibly a process that is new, useful, and nonobvious, but is not available to one who simply has a terrific idea for a machine, for social organization, for law reform, and so forth.[13] Similarly, we copyright expressions but not mere ideas. This idea/device (and, in the case of copyright, idea/expression) distinction, as I will call it, is occasionally fuzzy and certainly unstable.[14] For example, mathematical algorithms cannot be patented, but computer programs and some fairly abstract advances in chemistry can. More generally, current law offers new hope for the creators of ideas, so that one who designs a new financial practice or develops a new swimming stroke might gain a patent. Patentability, however, still requires the practice or stroke to be novel, nonobvious (to a person of ordinary skill in the art), and useful (so that it is not merely an abstract idea), though the creation of private property rights in this manner was once thought inconceivable.[15] The

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13 See Patent Act of 1952, 35 USC § 101 et seq (2000).

14 This distinction is one that might be explained based on incentives to creators, but I leave that topic for another day.

15 See *Diamond v Diehr*, 450 US 175, 192–93 (1981) (finding a process for curing synthetic

fuzziness and instability are exacerbated by technological change if only because change upsets settled conceptions of the line between ideas and devices. I draw attention to the treatment of ideas simply to lay the foundation for a claim that property rights will expand over the coming years. In particular, we should expect increased protection for the creators of ideas, abstract or not. This expansion comes not only because of technological changes, but also, and more interestingly perhaps, because of an asymmetry in interest group activity and likely success. As we will see, the argument applies with much greater force to intellectual than to real property.

B. Interest Group Asymmetry

My argument builds on the idea that interest groups will often defend existing rights or subsidies more aggressively and successfully than they will obtain new ones. There might be a psychological, or loss aversion, element to this, and there might be an element of capital market failure, because a right might produce revenue with which to defend it, while a potential right might require borrowed funds to acquire. But my central argument goes to the heart of interest group theory and builds on the notion that it is easier to organize a group that is identifiable than it is to organize one that is dispersed and less identifiable, or merely probabilistic. Interest group activity as to property rights is likely to be asymmetrical in the sense that groups will do better at protecting their rights than they will at organizing in order to obtain new ones. I begin with a stylized example from real property. Consider the prototypical example of a firm, F, that thinks of combining forces with like firms, G through J, in order to gain favorable trade treatment or gain the right to use public lands at low cost for their private purposes. We might imagine that success is plausible but uncertain. Consumers and competitor industries might rise up and oppose F's plan, and these interests do represent more voters and a greater economic stake (because of the presumed deadweight loss associated with the interest group grab), but these potential losers are also normally more dispersed and difficult to organize. Still, our political entrepreneur, F, can hardly be sure of success. Some members of F's in-

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rubber patentable in spite of the fact that the process involved the use of a computer program); *State Street Bank v Signature Financial Group*, 149 F3d 1368, 1375 (Fed Cir 1998) (overturning the "business method" exception to patentability); Dale D. Miller, *Method of Putting*, U.S. Patent No 5,616,089 (Mar 29, 1996) ("A method of putting features the golfer's dominant hand so that the golfer can improve control over putting speed and direction.") (abstract). See also John R. Thomas, *The Patenting of the Liberal Professions*, 40 BC L Rev 1139, 1143 (1999) (recommending excluding from patent protection subject matter based on "the aesthetic, social observations or personal skill"); Robert P. Merges, *As Many as Six Impossible Patents before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 Berkeley Tech L J 577, 581–82 (1999) (describing the history of these new developments).

tended group might hope to freeride and, therefore, not actively participate in the political activity, or they might decline to join forces for fear that the benefit produced by this political activity will redound to some of the firms in the group but not theirs. Even if the collective action problem among these firms can be overcome, the effort might simply fail; politicians might rather appeal to numerous voters than to a few sources of campaign funds, or consumer groups might get wind of the plan and make the defeat of this grab for power by *F* and the other firms a high priority issue. But if the stars are correctly aligned, political success is possible.

And what about the likelihood of a later campaign to undo this favorable treatment for one interest group, consisting of that handful of firms, *F* through *J*? These five firms will be enjoying a new property right and it is easy to see that once the new "right" is in hand, the group will have less trouble maintaining it than it had acquiring it, if only because the member firms will now perfectly identify themselves as beneficiaries of this regime of rights. Firm *G* might originally have feared that the acquired benefit would redound to *F*'s gain but not to *G*'s, but once *G* is in the winning coalition, it is obvious that the loss of the right will be costly to it. And it will continue to be the case that no small group of easily organized actors will have much incentive to take on the task of undoing this right because the benefits of such a reversal are likely to be widely dispersed. The most obvious losers are consumers or taxpayers, as they suffer from the most serious of collective action problems. In other settings, new property rights may be as easy to acquire as to maintain, but it will be quite rare for rights to be undone at a faster clip than they are created. This asymmetry, which obviously suggests the expansion of property rights over the long term, is more pronounced when the right is constitutionally protected, as when it is deemed to be a property interest that, if taken for public use (which may simply amount to its recapture into the commons), obliges the government to pay just compensation. In short, there is an endowment effect, or interest group asymmetry, as we might call it, which suggests an expansion of property rights over time.

With respect to real property, it will often be the case that new rights are effectively opposed by organized groups because most new rights come at the expense of old rights, in which case the potential losers are identifiable. If *F* seeks to bar imports of products that compete with *F*'s, then we can expect the affected importers to organize as well as *F*, but in opposition to the restriction. And if *F* and other firms aim to use public lands, but that land was previously open for logging, then we can expect the logging industry to do battle with *F*. If it is nevertheless the case that property rights expand, which is to say new rights are created out of old ones, then it is likely that transaction costs

play an important role. When air rights were made available to commercial air traffic, for example, they were in a sense carved out of fee simple properties down below, but the obvious transaction costs of bargaining with all these property owners made the emergence of these "new" air rights predictable and sensible.[16]

Interest groups that face organized opposition will do better to avoid battling over property rights, and turn their attention to incremental gains in the form of favorable regulations, deregulations, tax rates, government contracts, environmental rules, subsidies, and so forth. On occasion, there will be room to agitate for new property rights, as when a firm looks to exploit public land where there is no organized opposition. For the most part, the strategy will be to agitate where there is interest group asymmetry, which is to say where the costs of what they propose will fall on dispersed, unidentifiable, or disorganized interests—and this usually implies incremental regulatory changes rather than a re-carving of property rights. These regulatory changes do, of course, redefine property rights, and in some sense every property right is nothing more than what the law makes of it with various rules and taxes. But the essential point is that we should expect an expansion of property rights only until they mature, and identifiable owners control all available rights. Beyond that point, there will be occasional, dramatic responses to technological changes, but no particular reason to expect continuing expansion.

In the area of intellectual property, however, technological changes and ideas themselves create new economic pies and legal frontiers. As such, an expansion of property rights is to be expected because of the interest group asymmetry. If *K* develops an idea for a new product, it will often be the case that those who stand to lose from *K*'s gaining a legal right to this idea are unidentifiable. Over time, innovators like *K* will agitate for new and greater property rights through legislative channels and through litigation in which courts are asked to interpret existing statutes in ways that benefit new creators.[17] Groups that organize in favor of expanded intellectual property rights have the advantage of facing no clear efficiency argument for one level of rights or another. The basic and difficult tension between the goal of inducing creation and that of encouraging dissemination

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[16] See, for example, Clement L. Bouvé, *Private Ownership of Airspace*, 1 Air L Rev 232, 249–50 (1930) (discussing the absurdity of applying the *usque ad coelum* maxim, which is to say, trespass by acts above the surface, literally); Annotation, *Trespass by Acts Above Surface*, 42 ALR 945, 949 (1926) (collecting and discussing cases applying *usque ad coelum*).

[17] Organized groups may see the threat of legislation and litigation and rise up to do battle with the identifiable claimant of a new right. But the point in the text is that there is virtually always a well-organized interest guarding against the formation of new property rights at the expense of old, real property rights, while in the arena of intellectual property this is less so.

(where additional users of intellectual property normally take nothing away from inframarginal users) has produced no obvious optimum. In contrast, a good case can be made on wealth maximization grounds for a fee simple in Blackacre, because a single owner can internalize costs and benefits, has incentive to maximize value, and so forth. But no such case can be made for a simple and complete right to an invention or expression. Against an uncertain efficiency baseline, we might expect interest groups to have more success because decisionmakers can easily camouflage their handouts as efficient balancing decisions or simply award new property rights in the belief that more inducement for creation is better—with no organized opposition pushing the case for free knowledge and wider dissemination.

Nowhere are these arguments more likely to be true than with respect to ideas. The interest group asymmetry idea suggests that we should expect sporadic agitation for a property right in a (mere) idea—because the winners are identifiable and the exploitation of the idea will often not identifiably impede on an existing set of easily organized holders of property rights. And, of course, once there is a property right in an idea, abstract or otherwise, it will be harder to undo than to maintain because of the asymmetry discussed earlier. Over time, then, we should expect increasing protection for ideas. The expansion may slow if and when these protected ideas constitute a substantial barrier to new innovators who must bargain with the previous generations of innovators in order to use and advance their ideas.[18] But property rights can expand a great deal before there is substantial opposition on this (transaction cost) ground, and then it is also possible that some coordinated licensing scheme (as exists in the music industry) will develop by contract or through other means in order to deal with assorted, earlier creators of ideas.[19]

Put differently, we can think of ideas as a constant source of new frontiers. The opening position, or default rule, is that such frontiers as the deep seas, the Moon, and new ideas are unavailable for private exploitation; we do not expect our legal system to grant monopolies in

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[18] On the idea that numerous earlier rights holders will form an obstacle to later progress, see Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L J 1163, 1222 (1999) (indicating that resource fragmentation and judicial expansion of private property interests result in waste and inefficiency); Michael A. Heller and Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 Sci 698, 698–99 (1998) (arguing that "a spiral of overlapping patent claims in the hands of different owners" could diminish biomedical innovation). See also Clarisa Long, *Proprietary Rights and Why Initial Allocations Matter*, 49 Emory L J 823, 827 (2000) (exploring transaction costs as barriers to renegotiation of intellectual property rights).

[19] For an optimistic account, see Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal L Rev 1293, 1295 (1996) (exploring how privately-established organizations in different industries emerge to reduce the transaction costs associated with intellectual property licensing).

claims to these frontiers or to enforce the results of a spontaneous race to lay claim to these frontiers. But over time we should expect bits and pieces of each of these frontiers to become privatized. The optimistic story will be that the owner of Moonacre has optimal incentive to maximize its value. The skeptical story will be that the owner of Moonacre struck a deal with the government authority and that this owner was advantaged in the political process as compared to dispersed losing interests. And once Moonacre is in existence, the interest group asymmetry (buoyed by the right to just compensation) reminds us that this property right will be difficult to undo. The same is true of ideas, and of course it is these ideas, rather than pieces of the moon, which we can expect to come into play and to dominate our economy—and interest group activity—in the future.

CONCLUSION

There are signs that property rights in ideas are up for grabs where no such rights seemed possible before. Potential owners of rights in ideas may at first have an easier time through litigation (where expansion can easily proceed one step at a time) than through legislation, and we might optimistically expect property rights to emerge precisely where the idea/device distinction seems weakest. Each new right might be awarded where an idea was created through substantial investment, and not serendipity, so that an efficiency-minded judge was tempted to create a new property right so as to provide inducements to future creators who might expect like wisdom in the future. Over time the action will shift to the legislature, and here the two evolutionary stories will be tested.

I have suggested that in the realm of intellectual property we are in for dramatic changes of the sort that took place in the world of real property when new continents were "discovered" and where rights were otherwise made possible without powerful opposition. Our drama will take place where interest groups focus on previously unpatentable and otherwise unprotectable innovations and ideas. Perhaps the most optimistic thing to say about this potential explosion of intellectual property rights is that regardless of how apt the skeptical story of the history of property rights has been, we have not done so badly as a legal system, and economies governed by ours and related legal systems have fared well. Property rights may have been assigned, privatized, regulated, and even occasionally recaptured for a commons, but so long as these rights remain transferable there has been and will be decent opportunity for efficiency to win out in the long run.

Another ground for optimism is that when interest groups do much more harm than good, our political system encourages compet-

ing interest groups to form, and sometimes even encourages political entrepreneurs who can benefit from the affections of numerous voters or from the economic activity that is unleashed when sensible policies are pursued. If interest groups obtain property rights that are dramatically inefficient, there will be great wealth to be enjoyed from the dismantling of these rights, and we should expect our political system, and even our interest groups, to see us to this result. Similarly, whatever happens in the realm of ideas, and whatever evolutionary path our property rights take, we can rely on private bargains and our larger political and legal system to make the journey manageable if not downright attractive. The journey may go much better if we are careful as to how we characterize the path we have followed to the present.