TWO STORIES ABOUT THE EVOLUTION OF PROPERTY RIGHTS

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Abstract

This article shows that for virtually every move toward privatization or, moving in reverse, toward the reopening of access to property, there are conflicting explanations. One is transaction-cost based and optimistic, while the other implicates interest groups and arouses suspicions rather than celebrations. It will normally be difficult to know which explanation is more fitting. Examples range from highways, to intellectual property rights, to tennis courts, and then to licensing regimes. These examples draw attention to the possibility of an evolutionary path that runs from a commons to private property and then back to a commons. The normative ambiguity inherent in the dual stories about change infects most property right transformations, including the simplest cases of newly emerged property rights. The presence of competing stories creates problems for normative judgments about secure private property and about government intervention that opens or restricts access.

I. Privatization and Back Again

Why are recreation facilities, tracts of land, and many other assets and activities sometimes publicly owned but sometimes privately arranged? Should we rejoice or despair when the balance shifts a bit more one way or the other between the public and private sectors? I hope to cast new but indirect light on these questions and to suggest that the normative question of the proper level of private ownership is difficult. My starting point is the conventional story about the evolution or maturation of property rights. This maturation story emphasizes that, with increases in value and economic activity, property rights become secure, strong, well defined though malleable and divisible, and increasingly private. In turn, these secure property rights elicit further investment that then adds yet more value. A few hunters need rough, or no, property rights when they work or compete in a vast forest, the argument might go, but intensive farming requires (and is encouraged by) well-worked-out private property rights.

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There are, to be sure, newer strands to the basic argument and a variety of objections and counterarguments as well. We might focus on instances in which the process of privatization itself dissipates rents, so a rearrangement toward secure property rights might consume the gains associated with the end state of private property.[1] We might also be sensitive to instances of a cooperative and self-governed—but somewhat exclusionary—"liberal" commons, or of an anticommons—with overexclusion rather than overaccess—or of choices between government-controlled and uncontrolled commons.[2] If we search for variations in access,[3] we might recognize diverse ownership arrangements that can be ordered as including (*a*) "commons" with open access; (*b*) common-pool resources that are managed by a group or its agents, with restricted access—or, as we will see, with open access and restricted use—in what we might think of as a "semicommons" arrangement;[4] (*c*) single private property owners with virtually full control, who normally close access or charge for it; and perhaps most fashionably (*d*) multiple owners who overexclude in a way that generates an "anticommons." The conventional story explains the move from *a* to *c*, more or less. It also illuminates the occasional substitution of another arrangement in place of *c*, the prototypical owner of a piece of land or a patent or a dollar bill.

Secure property rights, which is to say the development of something resembling *c*, seem to play an important role in most histories of the successful deployment of scarce resources, but there are many examples that surprise the conventional storyteller. And there is a great deal to be said about resources that become less securely assigned over time. One particular pattern is of special interest here, as I explore the forces that bring about moves from private property "back to" open-access arrangements. Security or strength of property ownership may not always be synonymous with the right to restrict access, but it is often so. In any event, the argument developed here is easiest to see if we concentrate on a single attribute of property ownership, the degree of open access. I also focus on the conventional evolutionary story as already sketched, although the explanations developed here may fit a variety of broader theories about the evolution of property rights.

[1] Terry L. Anderson & Peter J. Hill, Privatizing the Commons: An Improvement? 50 S. Econ. J. 438 (1983).

[2] Hanoch Dagan & Michael A. Heller, The Liberal Commons, 110 Yale L. J. 549 (2001).

[3] Access is not the only way to slim down property rights to a single spectrum. At various points below, I suggest ways in which the central argument is affected by this choice. More generally, inasmuch as my theme requires me to distinguish between political activity and transaction costs, it is important not to put too much weight on the rhetorical device of thinking of property as consisting of rights of exclusion instead of political status or other things. See Carol M. Rose, Canons of Property Talk, or, Blackstone's Anxiety, 108 Yale L. J. 601 (1998). Still, for a variety of reasons discussed below, the emphasis here will be on access and either actual exclusion or the right to exclude.

[4] I continue to conflate instances of government and private ownership in this category and indeed in the next category, *c*, as well.

Thus, for purposes of exposition, the discussion proceeds as if the move from *a* to *c*, from open access to private property with closed access, is universally regarded as normal, so that devolution or reversal, from *c* back to *a*—or at least back to something falling in between *a* and *c*—is remarkable.

Section II sketches two stories about this normal evolution and its reversal. One is about transaction costs and is normally optimistic; the other is about interest groups and is potentially pessimistic or at least suspicious. Section III engages concrete examples on its way to suggesting that, absent local evidence, it is difficult to choose between these two tales. The difficulty has consequences inasmuch as legal rules and government intervention are normally brought to bear on these property rights rearrangements.

II. Transaction Costs and Interest Groups

A. Transaction Costs and Property Arrangements

Transaction costs can play an important role in explaining privatization, by which I mean the evolution from open access to property rights that include the right to restrict access. Transaction costs can also play a critical role in understanding any reversal, or reemergence, of open access. The simplest stories build around exogenous changes in relative prices, perhaps because of technological change. Consider the stylized example of an overhunted forest that becomes privately owned and farmed, with enforced exclusion of hunters and other users necessary to protect investments in farming or logging. Over time, the open-access forest might reemerge, to the benefit of hunters, once again, or perhaps to the pleasure of more familiar hikers. Deferring for a moment the very important question of identifying the evolutionary mechanisms, or institutions, that permit the two changeovers, or rearrangements, from open to closed and then to open access again, it is useful first to identify transaction-cost explanations of the three regimes.

It is possible that improved technology with regard to fencing, irrigation, or tree cutting stimulated the closing of the commons. Any of these three changes might have raised the value of the property as farmland relative to its value as an open hunting ground. Similarly, even if these technologies are static, or improve in unison, the relative price of farm produce might have increased (or the price of animals that could be hunted might have decreased) for exogenous reasons, so that again we can explain[5] the move from hunting to farming on newly privatized plots.

Some of these technological changes can be thought of as affecting trans-

[5] A true explanation needs more, and this is not the place to be especially careful about the difference between an explanation and a rationalization. We might take explanation to be a "means of understanding," without specifying what else is necessary for a complete understanding. I make no attempt here to fill in the holes with a theory about the motives of governments and interest-group leaders, for example.

action costs. Improved water meters might help neighboring farmers contract for mutually beneficial irrigation systems. Improved communication will help these farmers contract with one another. Written and then computerized land records might reduce the costs associated with maintaining peace among neighbors and so forth.

Put this way, it is easy to see how reversals can occur. It would even be surprising if there were a one-way evolutionary path from open to closed access. Input and output price changes might suddenly make farming in a given location quite unprofitable, and there would soon be no net gain from policing boundaries and denying access. If reversal is in fact rare where real property is concerned, it is likely to be so because enclosure, often an important tool in restricting access, normally entails some one-time costs such that the expense of maintaining (as opposed to constructing) a closed-access regime is relatively low. An owner or community that (ex post) regretted the expenditures associated with enclosure and privatization might nevertheless find it worthwhile to maintain a closed-access environment. Thus, we can imagine open hunting grounds that become farmland or restricted grazing grounds but then later revert to hunting, except that hunters or hikers are now charged for access because it is easy to do so given that fences have already been erected.

More generally, we might associate the infrequency of reversal to open access with the conjecture that an overwhelming number of the important technological advances have been in communication. The idea is that these improvements in communication reduce the cost of creating and enforcing private property rights. In turn, it is unusual to experience significant enough price changes or technological changes of the kind necessary to bring about a reversal in favor of open access where there has been closed access. Repeated advances in communication technology have nearly always favored private property and closed access, and this technology has dominated the era. Still, even small price changes might lead to some reversals at the margin of the commons.[6]

It goes almost without saying that these reversals, or devolutionary movements, may themselves be temporary. Privatization—again used here in the sense of a rearrangement toward more restricted access—brings on transaction costs even as it induces efficient use.[7] In different settings, these costs and benefits may increase at uneven rates, so one may overtake the other—and

[6] We might imagine that communications and global positioning devices will eventually lead to closed-access fisheries even in the deep seas. Optimal extraction might be economically encouraged by property rights with respect to all viable fisheries. But if the price of fuel then increases, for example, the gains from free movement might overwhelm the gains in extraction and even the costs of bargaining with the holders of fishing rights. But see note 13 *infra* on the possibility of evolution away from private property rights.

[7] For a set of interesting examples, see Gary D. Libecap, Contracting for Property Rights (1989).

then back again. Following some amount of investment or a change in transaction-cost technology, the cost-benefit calculus could change. Over time, access may open and close, with property rights appearing weaker and stronger at different moments. But because it is remarkable enough when that which has closed reopens, much less vacillates, I refer to the reopening with the expression of "reemerging commons." And as we have now seen, a reemerging commons may be the product of price or technology changes.

B. Interest Groups and Property Arrangements

Prior to engaging concrete examples, it is useful to sketch the normative ambiguity I intend to associate with reemerging commons and with privatization itself. Consider first that possibility of a "reversal" from closed access to something resembling the "original" open-access arrangement. I have already alluded to examples where this reversal might occur with little planning and as a matter of abandonment instead of collective action. Thus, a farmer might cease to maintain fences, and eventually hunters and hikers might have the run of the place; a serious price change or technological development might lead to the virtual abandonment of a town, and then this ghost town might be available to all who pass through with little thought of boundaries and deeds. Somewhat similarly, as soil erodes or farming otherwise declines, a government may take over land for recreational use; tax rates and other governmental decisions will affect the likelihood of such reversals.[8]

The same transformation might occur if the transaction costs associated with private property increased dramatically. Rampant crime might lead to, or be regarded as representing, very serious transaction costs, and citizens who depend on secure property arrangements might (again) abandon a town and leave it in a state that is accurately described as open access. In these cases, the move back to open access is so complete that there is no need for government supervision or enforcement of legal arrangements in the new open-access regime. The devolution to open access in these scenarios is fairly spontaneous and requires neither government action nor private collective action. It may have been a product of inefficient government inaction. In contrast, many privatization moves and most (partial) reversals in the direction of reemerging commons require some coordination and therefore entre-

[8] This is as good a place as any to note that the farmer's decision to allow more open access is not quite the same as either a decision by the government to buy the farmer's property and to reopen access or a decision by the farmer to give the land to a nature conservancy. To a point, the farmer who simply ceases to maintain fences retains the option of closing access in the future. The farmer can be described as holding an option on future transaction costs (or, as we will see, on future interest-group successes). But for the most part I will refer to actual access and uses of property instead of to an owner's ability to control access. In part, this is because there is a great deal of interest in the patterns of actual transformation from open to closed access. Moreover, the difference is not terribly important for the central aim of this article. I could show that there are competing transaction-cost and interest-group explanations for virtually all changes in the power to control access as well as for actual changes in access.

preneurial or governmental involvement, after a fashion. In turn, this often requires some capacity on the part of preexisting property owners or potential beneficiaries to overcome collective-action difficulties.[9]

For expositional purposes, we can think of coordinating owners or beneficiaries of this kind as interest groups. And because they often secure government action or form an important constituency for political actors who serve their needs, the label is appropriate. One starting point is the idea that even if transaction costs and prices and technologies are frozen, it is possible that commons will close and reopen because of the influence of different interest groups—which may in turn depend not on other transaction costs (although this is one possibility, to be sure) but on political boundaries, charismatic leaders, psychological reactions, and so forth.[10]

Imagine, for example, that long after some wilderness has evolved to a state of privately owned plots, citizens with recreational and environmental aims join to advance the cause of a "green belt" that will form continuous open space in and around a city. They may succeed in gaining legislation or administrative rules that make it difficult for private property owners to do much with certain lands other than very casual exploitation as blueberry plots and the like.[11] The green belt is likely to consist of some combination of public and private land; land will be purchased for the actual hiking paths and biking paths, but these paths will pass through privately held land that will be regulated into submission.

A green belt of the kind just described is unlikely to arise spontaneously.

[9] I recognize that the transaction-cost story can accommodate grassroots pressure for secure property rights, so that the rearrangement will be close to spontaneous. It is also possible that private interests will oppose such a rearrangement. See Leonid Polishchuk & Alexei Savvateev, Spontaneous (non) Emergence of Property Rights (IRIS Center Working Paper No. 241, 2001, at SSRN: http://papers.ssrn.com/paper.taf?abstract_id=260036) (inequality in resource ownership and relative inefficiency of production technologies could make wealthier agents favor less than full protection of property rights, so fully secured property rights may not emerge from the grassroots). Indeed, bandits might be seen as an interest group in favor of a reemerging commons. All these possibilities drive the transactions-cost and interest-group explanations toward convergence, and I try here to keep them distinct.

[10] The idea is to separate interest groups from transaction costs, even though the former has everything to do with the latter. A defensible position is to insist that everything is about transaction costs. See Steven N. S. Cheung, The Transaction Costs Paradigm, 36 Econ. Inquiry 514 (1998). But testable hypotheses and normative views about government intervention and judicial decisions suggest the value of differentiation. My claim is not that we can identify some political activity as inefficient, for that risks the label of impossibility or circularity (see Thrainn Eggertsson, Economic Behavior and Institutions 20–25 (1990)) but rather that our enthusiasm for some legal interventions might change if we thought more about the role of interest groups (or the transaction costs some groups face). In sum, when I refer to interest-group explanations here, I recognize that the successes of some of these groups over others are themselves the product of transaction-cost considerations. Some readers may prefer to think of the interest-group explanations offered here as a particular subset of transaction-cost explanations and, in turn, regard the transaction-cost stories as excluding disparate interest-group influences.

[11] As in Kinzli v. City of Santa Cruz, 620 F. Supp. 609 (N.D. Cal. 1985).

Politicians might develop and enable such land uses in order to appeal to some voters and contributors. A less cynical observer may note that some politicians will act on a genuine belief that they have found the best use for properties in their jurisdiction. In either case, the actors will realize that, without some central command-and-control regulation, contiguous properties of the kind necessary for urban recreation trails are unlikely to be preserved or dedicated through atomistic behavior. Some governmental intervention is probably required, and this intervention is unlikely without some interest-group activity.[12]

I began with an interest-group-based explanation for a reemerging commons because reversals seem more remarkable than privatization. But once we see that the prevailing arrangement of property rights may be the product of politics and interest-group activity, as opposed to changes in technology or exogenously determined prices, it becomes apparent that most movements along the access spectrum can be the product of either kind of force. Of course, interest-group influences might themselves be generated by changes in transaction costs or prices.[13] Thus, an interest group may suddenly succeed in gaining its green belt because the cost of raising money from interested citizens decreases or because the price of alternative recreation areas increases. This is not the place to explore the mystery of why some interest groups succeed while others do not.[14] If we like, we can avoid circularity, or the convergence of the two explanations offered here, by assuming that some set of beneficiaries is empowered because of good leadership, varying social norms about collective action, or any of a number reasons that are not easily translated into explanations based on transaction costs, exogenous prices, or technological changes.

It is probably too serious an overgeneralization to emphasize this point by describing the impact of interest groups in pejorative terms while describing other causes of property rearrangements in friendlier efficiency-oriented

[12] Somewhat similarly, fisheries, outer space, and the broadcast spectrum might evolve in the direction of secure private rights, requiring some government enforcement, but then it is possible for these properties to be reallocated through political means and in a way that makes individual investments less secure. A fishery can, for instance, move from commons to protected, transferable quotas, and then to more open rules once again. In these cases, both the interest-group and transaction-cost stories seem plausible.

[13] In this case, the two sets of influences on property rights, or on access in particular, converge. On the other hand, if lower transaction costs have empowered an interest group to impose external costs on a majority of the population, for example, the cost reduction has unfortunate consequences. The more conventional story of the evolution of property rights, or of movements along the access spectrum, has us thinking of cost reductions as welcome. Perhaps this is because transaction-cost reductions as they affect interest group, or political, activity are likely to empower previously dispersed interests and thus render traditional interest groups less powerful. Thus, the development of Internet communication lowers the organizing costs of domestic farmers who seek restrictions on imports, but it also lowers the costs of consumers who might oppose these restrictions. The discussion here emphasizes the difference between the explanatory tools instead of their nominal or occasional convergence.

[14] See Saul Levmore, Voting Paradoxes and Interest Groups, 28 J. Legal Stud. 259 (1999).

terms. We do not know that interest groups do more harm than good. Still, the optimism associated with the transactions-cost explanation is not easily transferred to the interest-group story. It is for this reason that I describe the interest-group explanation as one that raises suspicions; we are suspicious about legislation (and even judicial action) that flows from interest-group activity but much more optimistic about legal intervention that seems to facilitate or accelerate (otherwise) spontaneous rearrangements.

Returning to the green-belt example, I will continue to promote the intuition that private properties, with restricted access supporting various residential and commercial uses, might have turned into a contiguous green belt, with fairly open access but quite limited use, for one of two very different reasons. The first story is one of efficiency. Rising enforcement costs may have made closed access less attractive, technological change may have reduced the value of these properties when used in their previous activities, or increased transportation costs may have raised the value of urban recreational opportunities. This sort of story suggests that much as the evolution from a commons to closed access was likely efficient, with farmers or other actors investing in land and adding more value than could possibly have been forthcoming in an open-access regime, so too the reversal is now efficient.

The second type of story, however, raises suspicions and can easily be described in negative terms. The reversal to open access may have been the product of temporarily ascendant or well-organized interest groups representing a minority of citizens who preferred recreation or pristine environmentalism over other uses. And these citizens may not have been willing to pay enough to buy the property or the relevant rights from previous users. Instead, they may have enjoyed political advantage, perhaps because the property owners who lose from the green-belt plan were badly organized or suffered greatly from free riding and other collective-action problems.[15] We have no particular reason to think that politicians are perfect agents or indeed that majority votes on matters of preferences lead to efficient results.[16] Organized minorities (or majorities) may have brought about the reemergence of a commons even though transaction costs and technological change continues to favor evolution toward closed access. But there is no need to be this hostile to all changes (or to the baselines themselves). It is sufficient to

[15] In other contexts, it is possible that private property owners push for a reversal to the commons because they expect to gain from the terms of the rearrangement. They might, for example, convince the government to buy them out at very high prices and then open access to the property. Intense, small interests may in this way bring about moves to open access just as they might more obviously bring about rearrangements in favor of privatization (if they can secure private property at low cost).

[16] In this article, I emphasize the influence of interest groups without confronting the baseline question of what government would or should look like if no interest group had special advantage over another. Put differently, I do not here touch on voting rules and aggregation problems but instead proceed as if we could solve those problems.

note that the move to more open access may be the product of interest-group activity, and we can hardly be certain that it is wealth maximizing or otherwise something to celebrate. Interest-group influence simply raises suspicions.

C. Interest Groups and Closed Access

It is perhaps more heretical to suggest that the same sort of explanation or suspicions might be offered regarding the original evolution—though it may have been neither original nor evolutionary—from open to closed access. The Demsetz-style story about transaction costs,[17] as well as the related depictions of technological advances and price changes leading to closed access and private investment, is at root quite optimistic. The alternative, suspicious perspective is based on the idea that private property and closed access may in fact have emerged not because they were efficient, or not yet efficient, but instead because some of those who stood to gain from closed access could not buy out the losers but nevertheless succeeded in encouraging the government to close access on their behalf.[18] We can imagine a few farmers lobbying or offering tax revenues to a central government in return for roads[19] that benefit the few at the expense of the many. Quite similarly, this interest group might have lobbied for closed access itself. Government can be the agent of this group as it encourages recordation of smaller plots, bars hunting, enforces some contracts and not others, subsidizes farming, subsidizes ports so that the relative returns from (open-access) hunting and farming change, builds roads that favor farmers or that restrict access to commons (or reduce the population of hunted animals), and so forth.

Generally speaking, the (suspicious) interest-group story, as opposed to what I will now call the transaction-cost story, is more convincing when it describes privatization rather than reversals. This is so because it is easier to see how the interest group can offer to share the gains from change with the government. The story can be told either from the perspective of the

[17] Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. Proc. 347 (1967).

[18] See Clayton P. Gillette, Who Puts the Public in Public Good? A Comment on Cass, 71 Marquette L. Rev. 534, 539–43 (1988), for the ingenious idea that the logic of collective action suggests that there may be too much privatization inasmuch as it might be easier to organize interest groups in favor of privatization than it would be to find intense interests in favor of shifts to the public sector. The argument offered here might be seen as a corollary of that insight because Gillette's point about too much privatization is but a step away from the conclusion that we might be suspicious of privatization. On the other hand, privatization here refers to more tightly restricted access and the like, while Gillette's focus is on project control and ownership. Moreover, as suggested in note 15 *supra*, it is easy to imagine private interests gaining just as much from the (terms of the) shift to public ownership as from privatization.

[19] I use roads as a reminder of the example offered by James Buchanan and Gordon Tullock to demonstrate the problem of external costs. See James M. Buchanan & Gordon Tullock, The Calculus of Consent 135–43 (1962).

interest group or from that of the central authority. Beginning with the government, we need only think of a king who rules in the sense that he has good control over the use of force.[20] A primitive authority that seeks to maximize its economic well-being will surely prefer secure private property rights, including restricted access, over a commons. The users of the commons are harder to identify and very hard to tax. In contrast, atomistic farmers or other private property holders are quite identifiable; it is simple to tax their property and fairly easy to tax their output. A commons that produces annual income of 100 because 100 users extract a net gain of 1 each might be turned into 20 private plots yielding 4 to each owner. But the rate of return from the threat of force might be much greater with private property than it is with the commons. The wielder of force might need to spend 1, or even more than 1, for each 1 it can obtain in tax revenue from the economic activity associated with the commons. But it might need to spend but 5, for example, to exact a 25 percent tax on each private property owner for net tax revenue of 15.

The preceding example might presume that the king merely consumes the wealth he extracts. In this case it is easy to see that the move from *a* to *c*, from the commons to privately farmed plots, for instance, may well be inefficient. It may simply be the product of the fact that the economic activity associated with private property is easier to tax than a commons. If, on the other hand, the king spends the money on public goods, we might be tempted to see the evolution to private property as efficient even if the private property regime is associated with less value than the commons. After all, taxation may be desirable, and the lower transaction costs associated with extraction from private property owners is a real benefit of that sort of arrangement of property rights.

Alternatively, we can view the entire scheme from the perspective of interest-group formation. Returning, for example, to our hypothetical farmers, these farmers may see that they compete with other users of the commons, and the easiest way to clear the forest and to fence in their plots is to enlist the king as their ally. They exploit the fact that the hunters are difficult to organize, and they may also exploit their own vulnerability, by promising the king some tribute. They invite taxation, so to speak, as a means of paying for protection and for the transformation from *a* to *c*, and they will do this whether or not the transformation to their way of life increases or reduces social wealth.

There are complications. The interest group will be anxious about future tax rates and about the risk that the bargain with them will be breached,

[20] The argument here provides no particular theory of government, nor does it describe the agency costs that might bring about the sort of government depicted here or theorize as to why force may be monopolized more than other services. The open-ended reference to government will be sufficient if only because the "government" or ruler invoked here looks familiar.

because once they invest in their properties, the central authority will have power over them. On the other hand, the interest group wields the implicit threat that it will side with a competing power force, and the king has some interest in abiding by his deals in order to induce other parties to contract with the state. But this is obviously not the place for a full-blown theory of interest groups and government, and it may even be impossible to fashion such a theory. Much depends on the starting points. I have assumed, for instance, that there is a central authority with control over force, and I have assumed that this authority has some interest in attracting funds. Both of these matters could be made more endogenous, and things quickly become quite complex.

The conflicting stories sketched here suggest that it is a wonder that we have come to think of the emergence of private property in such rosy terms. Secure property rights may bring about investment and economic development, but it is difficult to know whether the gains to the private owners and their government sponsors exceed the losses suffered by those who enjoyed the commons. It is perhaps ironic that commentators who champion private property at every turn are often also quick to express disdain for government interventions, on the grounds that these are likely to be inefficient and the product of rent seeking. The irony is that the emergence of private property may itself be the inefficient product of interest-group activity. Purely spontaneous privatization is unusual.

But even where the evolution to private property is managed without active government participation, it is possible that the change is inefficient and that it simply reflects the advantage of one interest group over another.[21] Our farmers may band together and build fences or protect against invaders more effectively than hunters in the commons. Still, it is possible that the hunters could pay the farmers to stay away (or even to protect the hunters from the government), but even these farmers are unable to extract payment from the hunters because they are dispersed. A benevolent government might actually enter the fray on the side of maintaining the commons.

Note in passing that a new view of public finance emerges from this. Revenue-raising methods that seem inefficient might actually be efficient, not to mention predictable, because of their appeal to the central authority. Instead of thinking of tariffs as inefficient and as the product of powerful interest groups, we might also think of them as favored by the government because they are so easy to collect. If the tariff revenues are put to good use, the tariff may well be efficient because the proper comparison is to the next-best means of financing public goods, and other taxes may be quite expensive to enforce. All of this is familiar.

[21] Again, the advantage may itself be based on transaction costs. And of course the interest-group influence may foster efficient rearrangements. In most cases, we will not know whether to be anxious.

But what is less familiar is that this second-best taxation might itself require a shift to private property rights where commons previously were found. One regime may contain substantial commons with tariffs on some imports and perhaps some excise taxes on observable transfers in a marketplace. The competing regime is one with private plots in place of the commons and with property, income, or excise taxes collected from these owners. A government that cannot be trusted to maximize social welfare may well choose the wrong regime. Moreover, a self-serving government that prefers the inferior regime for its revenue-producing quality will have no trouble maintaining it even where it is inefficient, so long as it gives the property owners a rate of return that is significantly higher than what they could earn in the commons regime.[22] The idea is that we may find the choice of property rights regimes, and not just tax schemes, to be a function of tax administrability.

By and large, these two perspectives merge into one. The central authority will prefer property rights regimes that make tax collection easy, and in turn these regimes will tend to be those that make interest-group formation easier. The very transaction costs or other characteristics that make some interest groups succeed will also make revenue raising easier.

The enthusiasm displayed here for the idea that private property rights may emerge not because they are more efficient but rather because they are attractive to a self-serving, forceful ruler, or because they serve the interests of some well-organized group at the expense of others, need not obscure the fact that these property rights may in many circumstances and historical settings be something to celebrate. I aim not to make a claim against private property but rather to suggest that there is a pessimistic, or at least suspicious, story as well as an optimistic story to associate with the emergence of private property. The optimistic story, as we have seen, may be one of changing transaction costs, technologies, or exogenous prices, though I refer to it as "transaction-cost based." The less optimistic depiction also comes in several flavors, building on the self-interest of rulers or the power of organized interest groups. I will continue to refer to this second, suspicion-raising story, as "interest-group based."[23] Of course, interest groups may in fact work for what is efficient. Farmers may organize and accelerate a move toward efficient private property. Still, I label the interest-group-based description as suspicious because it stands in contrast to the usual transaction-cost story. And

[22] Similarly, a government could for political reasons or by mistake maintain a commons where private property rights would be wealth maximizing, but the point is that the government is unlikely to do so because it will be easier to collect taxes in a regime with private property owners.

[23] The ruler-centered stories are perhaps more convincing at this point, especially when it comes to privatization instead of (as we will see) the reemerging commons. But the interest-group line of analysis survives more completely as we think of examples with modern, elected governments in control. Interest groups and "ruler" self-interest converge yet more, and inasmuch as it is a bit awkward to think of a ruler, or an "it" instead of a "they," making political and legal decisions, the interest-group focal point is more manageable.

readers who are accustomed to assuming the worst about interest groups and governments may now wish to assume the worst about this unholy alliance when it comes to the evolution and rearrangement of property rights.

D. Property Rearrangements

With both the transaction-cost and interest-group explanations of privatization in place, we can turn once again to the possibility of a reemerging commons. It is tempting now to think of this as simply one of many alternative property arrangements, in order to emphasize the important role that government plays in most transformations and certainly in maintaining virtually any arrangement.

It is by now apparent that for virtually every transaction-cost story about changed access or other property rights there is a suspicious—or even pessimistic—interest-group explanation. In fairly primitive states, any reemerging commons is likely to be more readily associated with a transaction-cost story for the simple reason that taxation will be more difficult with a commons. But the modern state, with reduced transaction costs of many kinds, can extract gains from virtually any beneficiaries so that property right rearrangements can be easily associated with either transaction-cost or interest-group developments. The positive claim advanced here is that most changes in property right arrangements, such as the closing or reopening of access, can be associated with either transaction-cost or interest-group developments. The normative claim is that, absent a good deal of local evidence, we will generally be unable to distinguish between these two causes, so we will not know whether to regard rearrangements with favor or disfavor. In turn, the government interventions that normally support or bring about these rearrangements are difficult to evaluate.

III. The Normatively Ambiguous Semicommons

A. Introduction: Restricted Use and the Commons

Open-Access and Closed-Access Roads. As already suggested, there are numerous examples of devolution away from private property rights, especially if we include not only complete reversal to the commons but also steps in its direction. I referred to this movement as from *c*, conventional private property with the ability to restrict access, to something in the direction of the commons, *a*, and often to the intermediate category, *b*, a semicommons. It is useful now to acknowledge some ambiguity in these categories and sense of direction.

Consider first the development of roads, which will serve as a baseline example where there is little ambiguity because the devolution to the commons, *a*, is virtually complete. A walking path or horse path might emerge spontaneously through a forested commons for a variety of obvious reasons.

But atomistic users are unlikely to invest much in maintaining or improving such a path. If the road is used by a fairly closed community, then some cooperation might be forthcoming.[24] But especially where roads are used by occasional travelers or where toll collecting is barred by law, a seemingly more efficient (or conducive to investment and maintenance) ownership structure might evolve, perhaps with closed access and single ownership.[25] These private property rights might not be secure without occasional force or government intervention. In any event, an entrepreneur with the power to limit access may widen the path and eventually pave this road in return for access fees or tolls.[26] There are of course monopolistic pricing problems, so any optimistic story must leave room for doubt. But the immediate point is simply that the toll collector will succeed only by restricting access to the road, and this requires force, if only in the form of the government's acknowledging this property right and enforcing private contracts. In order to understand the timing of any particular privatization of this kind, we might look for local evidence of price changes (for substitutes perhaps) or for the development of new technologies in restricting access (such as fencing).

The optimistic reemergence story bears observation because it is so complete. Primitive paths were open to all, although there might have been some outcry or violence if someone tried to use the path for something other than travel or freight and in a way that interfered with the enjoyment of others. The private owner then restricts access somewhat, unless he can perfectly price discriminate, and it is likely that this owner allows the same uses as those that were supported by the commons. Finally, if the road returns to open access, as when a government buys out the private road entrepreneur and connects it to other public roads or enhances it further, access is now about as open as it was in the commons. The government may restrict use, but at least in this case the restrictions are likely to be identical to those imposed by the private property owner, and, again, they are not so different from what prevailed in the commons.

Local history and facts aside, an optimistic explanation for the reemerging commons might begin with the expenses associated with toll collection. The

[24] Bruce L. Benson, Are Public Goods Really Common Pools? Considerations of the Evolution of Policing and Highways in England, 32 Econ. Inquiry 249 (1994).

[25] See Daniel B. Klein & Chi Yin, Use, Esteem, and Profit in Voluntary Provision: Toll Roads in California, 1850–1902, 34 Econ. Inquiry 678 (1996). Note that where the evolution is from commons to government command and control, there is some ambiguity in classification. The government can of course own property, so we might think of *c* as including government ownership, so long as there is closed access. In any event, the example is supported by the record of many private toll roads.

[26] We can also imagine privately constructed speed limits and other rules of the road. It is possible that the content of these rules would look different if established by a private owner who was able to overcome transaction costs or who was disciplined by a perfect market. The speed limits we find on public roads are likely influenced by interest-group activity. Private owners might also deal with interest groups' bargaining for special deals and rules, so convergence is possible.

governing forces necessary to enforce the contract between users and owner may crumble if some prices change or transaction costs increase. Demand for the road may simply decrease for exogenous reasons, and the entrepreneur may exit. The most important use of transaction costs is perhaps in support of the realization that we are unlikely to maximize wealth or welfare by putting all property—including this road—in the hands of a private owner who then has the incentive to internalize costs and benefits and invest efficiently. The highest value of the land may indeed be as a road, but because toll collection is so expensive, a private profit maximizer might simply convert a road into factory space. The losers will be those who valued the road as a way of getting from one place to another, but the owner will find it difficult to capture that benefit and may therefore fail to internalize it. We may see a move from a private road to another private use, where the private returns are greater, but government intervention in favor of an open-access road is quite plausibly a good thing.

An alternative transaction-cost explanation for a reemerging commons focuses on the likely pricing strategy of a private road owner. The users of the road, or even their elected representatives, may perceive the costs of monopoly pricing or the costs of toll collection, and they may overcome collective-action problems and move to open access and government maintenance.[27] Changes in transaction costs may play some role in this transformation. User fees may be retained in less exact fashion, as through gas taxes or even special (real property) assessments, but these charges are unnecessary for the transformation, or reemergence, of the commons.

The transaction-cost story is thus plain enough, but so is its more suspect, interest-group-based, competitor. In this example, toll revenues are easily seen as a target for the purveyor of force or as a weapon of interest-group warfare. It is easy to imagine organized interest groups that benefit from the road improvement, but at the (even greater) expense of other users who much prefer the open-access, unimproved road. A potential entrepreneur may simply have formed an implicit partnership with the (private-regarding) officers of the state, so the move to the private toll road was itself inefficient but beneficial to these individual partners.[28]

We can also see unattractive interest-group maneuvers as behind the devolution from private property to the commons. Nor are these necessarily more attractive simply because the evolution to the commons may have been undesirable. The evolution to private property may have been efficient, and

[27] See Klein & Yin, *supra* note 25.

[28] On the taste of English kings for tolls, see David J. Gerber, Prometheus Born: The High Middle Ages and the Relationship between Law and Economic Conduct, 38 St. Louis U. L. J. 673, 732 & n.290 (1994). And on an attempt to restrict the king's monopoly-making power, see Michael Conant, Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined, 31 Emory L. J. 785, 791–97 (1982) (discussing the Statute of Monopolies purporting to prohibit issuance of domestic royal monopolies).

now its demise and the return to the commons inefficient—or the other way around. The point is that in the abstract, and often even in the particular, we are unable to distinguish between the two. Here, heavy users of the private toll road, who may have welcomed privatization or arisen because of it, may now outvote[29] or outinfluence the entrepreneur once the road is in existence. They may also have enlisted the monopolist's support by using other revenue to pay handsomely for this taking of the monopolist's license. Of course, interest-group politics may be good, as it may succeed in dismantling a monopoly or regulating it in a way that increases overall wealth. But it is plausible that the move from private road to public road, or from closed to open access, is undesirable. It may discourage private investment in the future, it may lead to overbuilding or overcare (or undercare) of the existing de-privatized road, and so forth.

Restricted Use. In most cases of evolution and devolution, the property in question is not used in the same manner irrespective of property arrangements. With each transformation, there is some change in permitted or actual uses. We might again imagine a forested commons that is transformed (because of transaction costs or interest groups) first into private farms and then eventually "back" into public park lands. But the public park is likely to restrict uses rather severely, barring both farming and hunting, which might have been the two dominant uses in the previous two property regimes. The third regime might therefore be described as offering more open access than the second, but at some point restrictions on use function as substitutes for closed access. If the public park permits nothing but dog running or hiking, then it is even possible that the public park is less commons-like (in many important ways) than the private-property regime.[30] This is obvious if the farmers allowed the public some access and some uses or if there was some degree of trespassing in the shadow of limited enforcement of property rights, as is sometimes the case.

In other cases, the degree of access or commonslike character will simply be ambiguous. Thus, private retail space might enclose a parklike area. The park comes with open access, but uses are severely limited. The profit-maximizing owner of the retail space might have limited access, at certain times of day or in certain portions of the property, but might have welcomed many uses in the hope that these users would also wander about or stay longer and spend some money. The point is simply that arraying property arrangements on the spectrum of closed to open access can be a bit messy or subjective in some instances. And even if we were to introduce some sort

[29] Again, I invoke the image of different kinds of governments and different stages of their development without making them endogenous.

[30] Similarly, if a government creates an open-access museum that shows a very particular art form, it is obvious that use, rather than access, is quite restricted, and we may be observing a closing of the commons or a serious wealth transfer to some interests.

of two-spectrum measure, with access and uses explicitly considered, we would still have difficulty,[31] first, because we have no objective means of comparing disparate uses, and, second, because two measures are not enough; there are other attributes of the commons on the one hand and conventional private property on the other. We might, for example, pay attention to the governance structure of ownership, to the right of transferability of interests, or, perhaps, to the ability of these owners to reverse decisions about use and access in the future.

For the most part, I will continue to focus on access but try to steer clear of this problem of gradation and classification. I do this in two ways and for at least two unrelated reasons. One way is by drawing on examples in which the reemerging commons permits the very same uses allowed in the previous, private property rights regime. Thus, to look ahead to an admittedly trivial example, think of a commons that is first privatized and eventually works its way into use as a private tennis club. Imagine next that this property is later transformed into a public, open-access facility. It seems quite fair to describe the second transformation as a step back in the direction of the commons. If uses are held constant while access is opened, we have an unambiguous move in the direction of *a*. It is for this reason that I emphasize moves not from *a* to *c* and back to *a* again, although roads may provide a nice example of that and of my ambiguity point as well,[32] but from *a* to *c* and then back in the direction of *a*. I emphasize the move back to *b*, some compromise point that is simply more commons-like than *c*.

Another avoidance strategy is to lump together in *b* private and public arrangements. The lumping draws attention away from ownership structure and away from real option value and focuses instead on the degree of open access, which once again is about steps away from open access but then back toward it. In the private sphere, the lobby of a cooperative apartment building might be shared by a hundred residents. These owners might establish some rules of decorum or use, and they certainly deny access to most outsiders, but within some range there is more of a commons than in their private apartments and certainly more than existed on the farm that might have occupied the space before this building was constructed. We might expect a resident to impose external costs by tracking mud through the lobby when this same actor might remove her boots or wipe them more thoroughly if obliged to clean the lobby herself or if the building were entirely hers.

[31] See Henry E. Smith, Exclusion versus Governance: Two Strategies for Delineating Property Rights, in this issue, at S453.

[32] Because the move is explained by more than simple price changes. Other easy examples of *a* to *c* and back to *a* again are provided by these price changes, or "mistakes" in the first transformation. Thus, a commons may become privatized as crop values rise, but if these prices decrease again, the private property may be abandoned so that a commons reappears. Transaction costs and interest groups are of course more interesting (although these too can fall and then rise again) than mere price changes.

There are, of course, terrific advantages to the semicommon lobby; the community can afford more luxurious fixtures, and it may be able to get by with much lower transaction costs than would be associated with some intermediating entrepreneur. The procedural or governance needs generated by the semicommons might also produce a sense of community. Some residents may gain utility (while others lose) from interacting with respect to this common asset. This sort of politics may be more manageable and fulfilling than that offered in what we normally think of as the political sector.

A comparable public example may be the town beach or swimming pool. Nonresidents might be excluded or charged for access. Residents who use the facility might enjoy both a sense of community and amenities far beyond what anyone would pay for if the beach were divided into hundreds of small private slips or if swimming pools were backyard affairs. The downside is that there might be more littering, more wasted effort in securing parking spaces, and perhaps even inefficient overspending because costs are shared with residents who are taxed but do not use the pool.

The town swimming facility may be more like the apartment lobby than is normally recognized, but there are differences. The pool is obviously more likely to be subject to occasional regulation by political intervention—though even the lobby may be subject to no-smoking and other ordinances. But the point here is that by identifying category *b*, falling almost anywhere in between the commons and conventional private property, and between open and closed access, we can find many paths that run from the commons to private property and then back toward the commons.

One nonobvious reason for the attention to access is that once we move away from roads and from ghost towns and think about examples of reemerging commons, the fact is that when government is part of the devolution—as is almost always the case—it nearly always restricts uses. In turn, we are especially interested in the pessimistic, interest-group story because we sense that the restrictions themselves are a prime subject for interest-group activity. This is not to say that there could not be an optimistic transaction-cost explanation for restrictions on newly deprivatized property. But restrictions on use must make interest-group activity apparent even to the most optimistic observer of property right rearrangements. Put slightly differently, when uses are left as before, or actually expanded, as might occur when the government buys out a private toll road or subsidizes art or education to the point of making it look like a public endeavor in the first place, we can more readily imagine that the government is actually serving the median voter or dispersed voters. In these situations, it is possible that narrow interest groups have carried the day, but the more we find equal treatment over a familiar baseline, the less nervous we get about interest-group stories and the more hopeful we might be about transaction-cost explanations.

This also suggests that a reason to focus on access is that it puts transaction-costs explanations in the best possible light. Interest-group influences are

most plain when we focus on use restrictions. Thus, when a green belt is formed through regulations that restrict most but not all conceivable private uses of land, we cannot help but notice the restrictions and the exceptions and how they might be geared toward specific interest groups. Inasmuch as my aim in this article is to cast some doubt on optimistic transaction-cost explanations, it seems fair to emphasize access because that is the attribute of property arrangements that is best linked to the transaction-cost story.[33]

In any event, the subject of a reemerging commons is more interesting if it is a recurring issue, and to meet this requirement, we need to include settings where there is merely a step toward the commons. Movements from *c* to unrestricted *a*—as when private property devolves into an open ghost town—are very rare and (unfortunately for the theory advanced here) are usually easily explained as following from mere price changes and the like. Moreover, the argument advanced here, that rearrangements in property rights should be associated with ambiguity instead of efficiency, does not collapse when the focus changes from access, or the right to exclude, to other attributes of property. The access spectrum is convenient, but the competing stories about transaction costs and interest groups are persistent.

B. Concrete Ambiguity

Tennis Courts (*and a Note on Nonprofits*). Private tennis facilities, in the form of clubs or entrepreneurial endeavors, are unsurprising. Of course, I use tennis here not because it is a critical industry or important subject of political activity but instead because it is one example of a large number of activities that exhibit modest public good qualities and economies of scale. Indeed, its political obscurity is a plus, because it permits us to see the optimistic and pessimistic stories where we might not have expected them.

It is somewhat forced to describe the private tennis club or facility as a semicommons, and I need not do so here. It is a small step away from *c* and toward *a* simply because it is plainly more commonslike than a single court in someone's fenced backyard. This is a forced categorization because many simple forms of property ownership, which are most naturally thought of as reflecting *c*, also involve engage numerous users who might suffer modest collective-action problems. A storeowner who sells corn to many consumers is not entirely different from a tennis entrepreneur, including the manager of a facility styled as a club. Access to both corn and tennis is restricted, but the tennis courts bring about some collective-action problems because of the sharing that takes place. But, of course, there are also some potential

[33] The right to exclude, which is to say to close access (or not), is of course famously thought to be at the core of property rights. The emphasis here can thus also be said to engage with the best of mainstream thinking. See, for example, Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 747–48 (1998) (describing right to exclude as central feature of property).

collective-action difficulties in the deceptively simple case of selling corn. Some consumers engage in comparison shopping, while others free ride and assume competitive prices. Moreover, the storeowner may engage in some market segmentation, differentiating the service or warranty to the benefit of some consumers and the bad luck of others, producing a result that bears a resemblance to tennis courts governed by a club's rules that are determined by active members or by those with free time or by those in a political majority. I suspect that most readers will be impatient with this caveat and will think of both the storeowner and private tennis club as firmly entrenched in category *c;* other readers will think of the tennis club members as leaning over the line toward *b* inasmuch as there is an impressive amount of sharing.

There is no need to push this point one way or the other inasmuch as the more noteworthy phenomenon is the step toward *a*, reflected in public tennis courts, often available for no charge in local parks. The degree of sharing is comparable to that found in the private club,[34] but now access is quite open. Use may be completely restricted or not; once the courts are built, the property may not appeal to users other than tennis players, roller skaters, dog owners in search of runs, and so forth, and in many locations, no effort is made to bar any of these uses. Either way, these public tennis courts represent a serious step to *b*.[35] If the property were acquired from the private sector, then we have a move from *c* back toward *a;* if this park property had been devoted to some other use, then we have a shift within *b*—which might itself be interesting on transaction-cost or interest-group grounds; and if the land has been taken from a commons, then we have a move from *a* to *b*, and we can imagine a future move further away from *a* or perhaps one back toward *a*, though with this particular illustration, this becomes difficult to imagine.

The stage is now set for exposing the competing explanations. The move from a commons long ago to a regime with closed access, or even eventually to an entrepreneurial tennis club, can be seen as the product of transaction-cost changes or interest-group successes. There is no need to rehearse these two stories. But what of the move to *b* when a local government builds tennis

[34] Except that the club is more likely to support a higher level of shared maintenance, while the public park will be maintained with public funds and in some competition with other public facilities and programs.

[35] For readers who resist this and other descriptions of moves to *b*, or back in the direction of *a*, I should point out that the categorization matches a piece of conventional wisdom, and is convenient but is unnecessary for the central thesis of this article. If, for example, one wishes to think of public tennis courts or green belts as bearing sufficient restrictions or options as to amount not to *b* but instead to *c*′, simply an arrangement distinct from—but no more commons-like than—*c*, it is still the case that each move (from *a* to *c* and from *c* to *c*′) can be associated with both a transaction-cost and an interest-group explanation. In each case, there is a range of explanations instead of a presumption of improvement.

courts? The optimistic explanation is attractive.[36] Tennis clubs require staffing in order to police access or control vandalism. Public courts economize on these costs by virtue of being free and perhaps by exploiting the economy of scale offered by the presence of other park services, local police protection, and so forth. Other things equal, increasing labor costs suggest a move from *c* to *b*—or at least an increase in the proportion of extant tennis courts that are public.[37]

Note that here (as elsewhere) I ignore the question of how this transaction-cost change is communicated and translated into the government's decision to build public courts. We might imagine the best of either interest-group politics or political agents. Politicians may observe an opportunity for efficient public goods; tennis players may come together to make the case for public courts and to show why on the margin this is a wise use of public funds and why it is difficult to impose the cost on present and future users of the proposed facility. There are problems with this story. It is, for example, hard to see why this interest group would be organized enough to affect politics but not organized enough to support a more private facility. A less technical but more important point is that when transaction costs or price changes cause a private facility to shut down, it seems unlikely that interested parties and well-meaning government officials will interpret this as a sign that they should enter or expand in this sector. Given that these parties cannot directly observe the transaction costs associated with alternative property right arrangements, we might imagine that they investigate the costs of new public programs where there seems to be high demand or some sort of public outcry. The contraction of the private sector in the provision of a nonessential good does not, therefore, seem like a precursor to government action.

The suspicious story is more straightforward, although my aim here is to keep both stories alive and certainly not to make some sort of normative case against public recreation facilities—which can be defended on several grounds. The obvious interest-group problem is that some tennis players or some tennis court construction companies may overachieve at the expense of other citizens, simply because these tennis court supporters are advantaged by a charismatic leader, by lower transaction costs, or by busy and dispersed opponents and taxpayers. The transaction-cost possibility is somewhat ironic; the advantage may come to these beneficiaries because of private property

[36] I will imagine an affluent locality in order to abstract from the question of why a redistributive motive might lead to tennis courts instead of some other program. Put differently, if open-access tennis courts should be thought of as redistributive, the question is why tennis courts emerged instead of other facilities such as higher teachers' salaries or progressive property taxes. This sets the stage for the optimistic and pessimistic explanations.

[37] Alternatively, the transaction costs associated with collecting taxes may have decreased, or perhaps the social norm of keeping public courts clean or leaving after 1 hour if other players are waiting has improved. All these things can be thought of as transaction-cost explanations for a reemerging (semi)commons.

rights, when they meet one another at a private tennis facility or retail establishment. Regime *c* may in this way bring about more and different movements to *b* than would occur in the absence of private property in which case there would likely be some rearrangements from *a* to *b*. Note, finally, that some of the private savings enjoyed by the successful beneficiaries can be captured by self-interested public officials.

When we see public tennis courts (or roads) emerging, it is difficult to assess the relative strength of the competing causal stories told here. My claim is that in the aggregate they are indistinguishable. If, for example, we observe the customers of a private facility organizing to encourage public courts, we do not know whether to ascribe their activity to their urge to push costs onto other taxpayers, to a reduction in the costs of organizing, to a relative increase in labor costs, or (most interesting, I think) to the network benefits of public courts. With this last expression I refer to the idea that an advantage of multiple-court clubs over single, "well-spaced" courts in the first place (mild or entrepreneurial *b* over *a*) reflects the fact that this activity is not practiced in isolation. Users gain from meeting one another, and where private clubs are concerned, there are tricky transaction costs involved in having players who belong to different clubs visit one another's sites. We might say that, as usual, in the presence of transaction costs, trade is encouraged by eliminating borders.[38]

It may be worth emphasizing that the rise of public facilities is not well explained by the short-run desire to eliminate the tax bite that falls on the private entrepreneur. In the first place, even if the beneficiaries can enjoy lower prices, they are part of the group that ultimately receives lower tax revenues. Second, if they organize as a club, they can qualify for nonprofit status. They cannot of course qualify to receive tax-deductible contributions (in lieu of or in addition to fees) unless they engage in substantial redistributive activity, but they can avoid the organizational-level tax paid by the entrepreneur.[39] We do in fact find many mutual benefit organizations in the business of providing recreational activities.

But when the activity is not athletic, but instead religious or educational, the lines are murkier and the law more generous, and we do find Section 501(c)(3) organizations alongside private and public suppliers. Competing

[38] In this particular case, the two explanations are tightly connected because I am imagining that an entrepreneur finds it difficult to satisfy the preference for a facility with many courts where players can meet. Transaction costs might, for example, prevent the entrepreneur from assembling a large piece of land, while the government has eminent domain power and existing park lands to convert. More generally, as the demand for an activity increases, it will often seem that private entrepreneurs should do better, but at the same time, increased demand may be associated with the rise of a formidable interest group that can impose its will.

[39] See, for example, Rev. Rul. 80-215, 1980-2 C.B. 174, for the idea that there must be some public benefit, such as redistribution or perhaps the intent to provide a recreational outlet to combat juvenile delinquency in order to qualify under § 501(c)(3) of the Internal Revenue Code.

day-care centers, for example, may be for-profit, nonprofit, and governmentally organized and operated. On the access spectrum, the government operation is likely to be somewhat more open access than the nonprofit operation (which must be somewhat open access to qualify for nonprofit status of the 501(c)(3) kind). But this takes us in the direction of the question of control and its inevitable effect on access, when the focus here is on the commonslike quality of different regimes and the question of why these regimes emerge when they do.

Intellectual Property. When we think of open access in terms of the right to enter an industry or profession, there is nothing novel about the suggestion that there are competing stories, optimistic and suspicious, about government intervention that restricts access and sometimes creates transferable private property rights. In many areas of activity, there is something of a wild beginning with no promise of secure property rights for one who develops new methods. In this sort of commons, one's ability to free ride on the invention of another threatens to destroy the incentive to innovate.

Evolution toward intellectual property rights seems sensible to the optimist, but again one question here is whether transaction costs explain the timing of the emergence of these private property rights (in common law or in statutory law). It is possible that some of these rights emerged following a reduction in the cost of record keeping (for a patent office, for instance) or of publishing, copying, or advertising, which in turn may be associated with technological developments.

On the other hand, intellectual property rights may have emerged because governments perceived that these rights could be taxed either directly (by valuing them and subjecting them to property taxes or by charging up front for their establishment) or through an income tax on royalties. This seems far easier than trying to impose an income tax on the imputed gain from exploiting an idea free of charge. And innovators, or at least those who claim to be innovators, may convince the government to give them monopoly powers. Just as we do not know what the optimal length of a patent or copyright is, we do not really know whether these property rights are efficient in the first place—or at least precisely when they first emerged. From an efficiency or welfarist perspective, it seems likely that intellectual property rights of some sort are a beneficial development, but they might well have come about too early and as the product of interest-group pressure or collusion with the state.

The same can be said of devolution toward the intellectual commons. We need only think of the recent history of the recording industry. Relatively secure copyrights have been threatened by such things as home audio and video recordings, computer memory, and more recently by Napster's sharing technology, by free and open-source software, and so forth.[40] Technological

[40] Napster's attempt to serve as an intermediary, promoting sharing among music users over

developments have a great deal to do with the rise and fall of these threats, but legal rules also play an important role. We can imagine a world in which courts would have left Napster alone, much as Sony lost the *Betamax* case.[41] These moves back toward a commons[42] might then have been described as following technological developments and a change in relative transaction costs, but they might also have been seen as attributable to interest groups or perceived political advantage, without necessarily improving social welfare.[43] The recording industry lobbies against Napster, while some politicians appeal to young voters by supporting Napster.[44]

Somewhat similarly, there is conflict regarding the right of an innovator to exclude competitors from their otherwise open computers or cyberspace. In one case, an Internet auction site, eBay, has been able to restrict the ability of another company, Bidder's Edge, which offered users quicker searches across several auction sites, to "trespass" on eBay with Bidder's Edge's very quick "spiders."[45] But in another case, a ticket brokerage company was less successful in warding off a ticket clearinghouse that also threatened the

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the opposition of originators (some record companies and artists), was dealt a severe blow in A&M Records, Inc., v. Napster, Inc., 239 F.3d 1004 (2001). For an overview of the copyright issues, see Jeremy U. Blackowicz, RIAA v. Napster: Defining Copyright for the Twenty-First Century? 7 B.U. J. Sci. & Tech. L. 182 (2001).

[41] Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 744 (1984) (hereafter *Betamax*). See also Margaret A. Burks, Is Copyright Law in Need of Congressional Action? 12 N. Ky. L. Rev. 157 (1985).

[42] I describe these as moves from *c* to *b* because the work becomes more accessible and because they make property rights less secure. In the extreme, sharing can make the original property right virtually worthless. But of course it is arguable that Napster (in the case of music) or photocopying (in the case of books) does not open access so much as it simply takes a new technology and allocates it not to the original secure private property owner but to more open use. The question is a bit semantic: if a commons turns into private farms, and the government suddenly allowed trespassers to take a new strain of corn from privately worked fields, we would have little trouble describing this as a move from *c* in the direction of *a*, even though it could be argued that the new strain of corn represents a new technology, so nothing previously closed has been opened.

[43] If there is a reopening of this commons (as in *Betamax,* or if *Napster* is reversed by statute), then we might say that the transaction costs associated with protecting private property have risen, but it might be more interesting to say that the transaction costs of buying privately are more obvious. Some consumer interest groups, some politicians, and a breakdown in social norms may all be fueled by the fact that a compact disc looks awfully expensive compared to its marginal cost of production.

[44] The argument here complements Larry Lessig, The Law of the Horse: What Cyberlaw Might Teach, 113 Harv. L. Rev. 501, 536 (1999), which develops the important idea that the commons might facilitate freedom while private property might actually constrain private actors because of the government's ability to regulate it or determine its architecture.

[45] eBay, Inc., v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (2000) (granting preliminary injunction on the basis of trespass-to-chattels theory). It should be noted that the constant searching by Bidder's Edge contributed somewhat (a bit less than 2 percent) to eBay's traffic, but it hardly created many jams. See Dan L. Burk, The Trouble with Trespass, 4 J. Small & Emerging Bus. L. 27 (2000).

innovator by offering customers a search device that mostly exploited the innovator's site but economized somewhat on overall searching.[46]

The cases are difficult. We can imagine some restaurants seeking to exclude reviewers—even as other restaurants welcome them—and the question is whether we enforce "contracts" (because a site might announce that certain search engines or shoppers or intermediaries are not welcome) or property rights with a doctrinal nod toward trespass and the right to exclude. Presumably, the case for closing access is much stronger the more we think it is necessary to encourage innovation and investment. We do not generally enforce landlords' or employers' contractual claims regarding the right to exclude tenants and employees whose real motivation was to test the host's fidelity to antidiscrimination law.[47] In these cases, it seems unlikely that an inability to exclude selectively will block socially useful innovation or investment. It is more likely, however, that a company like eBay will be discouraged if new entrants can create metasites that free ride on its work. The problem is in part about transaction costs; among other things, a host can selectively exclude at great cost by searching for the undesirable invaders.[48] It is also about interest groups; not only are statutory provisions at stake in these cases, but the judicial process is also responsive to various pressures (and capacities for litigation) applied by competitors and different types of customers.

Other branches of intellectual property law are not terribly different. In the case of book publishing, enforcement or the drafting of copyright law against those who deploy photocopy machines in a way that might be a substitute for the buying—or borrowing—of books is favored by most publishers but not by most college professors or manufacturers of copy machines. We cannot really know whether the lines we draw between legal and illegal copying, which is to say between private property rights (in the form of restricted access) and commonslike arrangements, reflect some sort of efficient equilibrium as influenced by various transaction costs or represent instead an accommodation of interest-group pressures or a sale to the highest bidder.

Again, in each of these areas, there is an optimistic story associated with transaction costs, as well as a suspicious one associated in turn with interest

[46] Ticketmaster Corp. v. Tickets.Com, Inc., 54 U.S.P.Q.2d 1344, 1346 (C.D. Cal. 2000).

[47] See, for example, Robert Thomas Roos, No Harm, No Fraud: The Invalidity of State Fraud Claims Brought against Employment Testers, 53 Vand. L. Rev. 1687 (2000).

[48] Thus, eBay can at substantial cost search its own space for these robotic, searching, invaders; it then changes the environment to weed them out, while the invaders then change the characteristics of their invaders. Somewhat similarly, a restaurant could at great cost identify reviewers, and employers could undertake substantial detective work in order to identify testers from an equal employment office.

groups.[49] It may be worth repeating that interest groups are not necessarily a cause for despair. They can obviously support that which is beneficial to social welfare, and they can provide useful information for such things as the efficient production of public goods and the reduction of inefficiencies in the regulation of industry and the collection of taxes. But their self-interest is often not in the public interest, so a move from *a* to *c*, or subsequently back to *b* or even to *c*, is often normatively ambiguous precisely because it was caused by these groups.

Although I am emphasizing the similarity between intellectual property and real property, there is an important difference that is not easily avoided.[50] In the case of real property, commons do not evolve into private plots everywhere at once; we may not know where private property was invented, but the stories of its emergence are usually local. The same king might maintain one commons arrangement while overseeing the rearrangement of another into private property. There are, of course, some large-scale transformations, as when an entire territory is opened up to homesteaders, but most rearrangements are the product of local history. Optimistic stories are likely to be consistent with the evidence in some places, while pessimistic descriptions seem more appropriate in other places or at other times.

But in the case of intellectual property, rearrangements often occur one (entire) industry at a time, without the luxury of local variation.[51] The law comes to recognize ownership in published work or inventions, for example, and then all who file as required become the owners of specific rights. Copyright, patent, trademark, and mining rights (which we might think of as intellectual property for this purpose) do not all become recognized at the same time, but once recognized, these rights generally come to those who qualify instead of to those who are lucky squatters, who are in the right place when a particular forest is given over to private use, or who pay when public

[49] Once again, the optimistic story can be about more than transaction costs, and the interest-group story can itself be about empowerment or debilitation as the result of transaction costs.

[50] Another difference is that real property might be described as fixed in quantity, while the amount of intellectual property is likely to change as a result of the property arrangements themselves. The very idea of these property rights is to stimulate their development. The reemerging commons, if it is that, is therefore likely to affect much more property than was ever in the pre-private-property stage. One can quibble with this distinction, inasmuch as the amount of corn grown on a farm will also, for example, be affected by the property arrangements that are available. But even if there is a difference, it has little bearing on the larger point made here.

[51] It is possible that third parties gain more from simplicity, which is to say from the presence of fewer building blocks, in intellectual property than in real or personal property or even in contracts. See Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L. J. 1 (2000).

property is auctioned off.[52] This difference is blurred somewhat by the fact that the basic building blocks of intellectual property rights are less deep than is the case for real property. All authors and publishers gain the power to become copyright holders, but since these rights are for a limited number of years and do not block lending libraries and so forth, the sliver of private ownership seems narrower than in the case of real property.

In any event, this difference, blurred or stark, does not much affect the central point about transaction-cost and interest-group stories. Both stories are plausible for both kinds of rearrangements. Moreover, the normative ambiguity is most striking at the margins where both kinds of private property are vulnerable and remarkably similar. Modern moves from *c* to *b*, from secure private property where restricting access is easy toward the commons, are in fact sometimes of broader applicability with respect to real property and sometimes quite local in the case of intellectual property. Thus, the expansion or contraction of the law of takings might be litigated with respect to one beachfront property, but it is of obvious importance to property owners of many stripes and in many locations.[53] These owners may inhabit properties that descended from various commons at many different times and as a result of many different (transaction-cost and interest-group) pressures, but the step back toward *a* or a bit further away from *a* is anything but local. And still, the marginal move toward or away from private property can be told in terms of transaction costs or interest groups.[54]

[52] To the extent that this is so, there is normative ambiguity once again. An innovator in one industry might need more protection than innovators in another, even though the intellectual property issues and doctrines are similar. This potential for doctrinal developments to spread a judicial decision across industries, even when the need to protect innovators differs across industries, is a central feature of the academic criticism of the reliance on trespass in eBay v. Bidder's Edge, 100 F. Supp. 2d 1058. See Burk, *supra* note 45, at 28–32; Maureen A. O'Rourke, Shaping Competition on the Internet: Who Owns Product and Pricing Information? 53 Vand. L. Rev. 1965 (2000).

[53] Students of property will want to think here of Mathews v. Bay Head Improvement Association, 95 N.J. 306, 471 A.2d 355, cert. denied, 469 U.S. 821 (1984) (adding to an earlier decision about the state's unrestricted right of access to its tidal waters an implication that the general public enjoyed an access right over nontidal beach property). See also Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970) (credited with beginning the trend); Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449 (1990). In this regard, we can think of the pattern of rearranging property rights on the beachfront as moving from *a* to the familiar *c* and now on occasion back to *a*—or really to *b* because of use restrictions—when a court decides that everyone has the right of access to the beachfront. There is a ready transaction-cost explanation; affluent citizens would pay for access, but the owner of adjacent land has holdout power, and there are serious collective-action problems (including collection problems) in reaching a bargain. There is also an obvious interest-group story, so long as we allow for the idea that judges might in the short run (because litigation needs to be funded) and in the long run (by social and political pressure) be influenced by interest groups. And note that a judicial taking of one owner's beachfront (right to control) access hardly means that all beachfront dwellers in the jurisdiction have lost their right to exclude.

[54] Some moves are a bit harder to categorize. Thus, the emergence of Article 9 security interests can be thought of as enhancing private property rights. In some sense, the development

Meanwhile, *Betamax* represents a move toward *a* and *Napster* a move away from *a*, but these are industry- and fact-specific moves.[55] Their application to other copying or sharing technologies is uncertain, perhaps because these cases involve guesses as to the impact of legal rules and potential technologies. In short, the major evolutionary steps from commons to private property look quite different where intellectual property is concerned. The moves seem to come in much larger leaps than for most real property transformations. But where further adjustments are made, the bigger leaps may be in real property. And in any event, these differences do not seem to have much to do with the central point of this article, namely, the competition between transaction-cost- and interest-group-based explanations for rearrangements of property rights toward closed access and then away from it.

Licensing and Deregulation. The most straightforward examples of industry-wide rearrangements of property rights involve licensing and regulatory regimes. These examples are often very different in feel from the classic, optimistic commons-to-private-property scenarios if only because the government is central to the story and not easily dismissed as a mere detail, enforcing a spontaneous change that was brought about by new technologies, transaction costs, and price changes. Nevertheless, it is not difficult to squeeze licensing schemes into the open-access spectrum and the competing-stories thesis.

Consider the "commons" of transportation services in a city. Vendors are free to enter as they like, and there is little regulation of prices or quality. There is some congestion, the possibility of free riding on another's clever strategy for advertising or creating expectations about regular routes and ride sharing, and perhaps some fear of crime and exploitation. There may then be some evolution toward a licensing scheme for taxis and buses. The licenses may be auctioned off by the state or awarded by queue or fiat, but these licenses bar access by unlicensed competitors and thus make license holders into relatively secure owners of private property rights. The right may be to stand in a given location, to service a given route or airport, or to operate quite generally, and it may impose some requirements about quality, safety, and prices.

The transaction-cost story (for this and many other restrictive licensing schemes) focuses on the possibility that consumers and reliable vendors have

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of security interests in personal property moved a great deal of (personal) property toward *c* all at once. And even though different kinds of personal property are treated differently, we can think of these rearrangements as industry specific. The evolution thus seems very much like that found in intellectual property and not at all like privatizing one forest at a time. Either way, it is noteworthy that there are ample interest-group and transaction-cost stories, pessimistic and optimistic, associated with security interests in personal property. See Hideki Kanda & Saul Levmore, Explaining Creditor Priorities, 80 Va. L. Rev. 2103 (1994); Robert E. Scott, The Politics of Article 9, 80 Va. L. Rev. 1783 (1994).

[55] Correspondingly, *Ticketmaster* is a move toward the commons while *Bidder's Edge* puts that industry firmly in *c*, at least for the time being.

difficulty gathering information and keeping promises. There may also be transaction-cost difficulties between the transportation sector and other industries that benefit from having reliable delivery of passengers. On the other side, there is the very familiar idea that the regulatory agency may be captured by the industry and that licensing begets monopolization (intentionally or otherwise) by restricting entry and fixing prices and qualities. The same sorts of competing arguments, with transaction costs and interest groups at their respective cores, are readily available for broadcast licenses, campaign finance reforms, environmental controls, and on and on. All of this is terribly familiar, except perhaps for the idea that we think of the onset of licensing as another example of commons-to-private-property evolution. Indeed, we are more likely to think of deregulation as a move to secure private property, but it is useful to think instead of licenses (which are of course part of a regulatory scheme) as closing access.

The process of deregulation is in any event a familiar thing to associate with interest groups. Indeed, in this setting the interest-group explanation is much more familiar than the transaction-cost alternative. If, for instance, airline routes or dental hygenists are deregulated, we are accustomed to looking for the influence of some airlines (start-ups perhaps, or even airlines that once benefited from the previous regulatory regime but now see gain from deregulation given their first-mover advantages) or customer groups or dental hygenists (who might defeat dentists in the political process) and so forth. The deregulation, or move from *c* to a kind of *b*, may be efficient or not, but there is no reason to think that it reflects an entirely optimistic story about transaction costs. On the other hand, an optimistic story is available. A populist uprising or new information about anticompetitive prices may have emerged because of the Internet. Similarly, the cost of mobility may have decreased, and increased mobility puts pressure on closed-access licensing regimes and on inefficient airline practices.

Once again, I do not mean to insist that we can never know whether a rearrangement, or change in regulation, is good or bad. When the rearrangement is about a given industry, or even a given commons that is on its way toward deeding, local history may give excellent clues about transaction-cost changes and about interest-group activity. These clues may give us confidence in an optimistic or pessimistic explanation for the rearrangement of property rights that is experienced. But I do think that it is the case not only that in the abstract we cannot know which way to lean but also that in many particular situations the evidence will be mixed. This is especially true for moves back toward the commons, because as an interest group gains critical mass, there will sometimes be transaction-cost or networking benefits.[56] A deregulated airline market may work better in a world with millions of savvy

[56] See Section III*B supra* (discussion of inseparability of explanations in the context of tennis courts).

travelers than it does in a world where there are few repeat travelers. The transaction costs of well-functioning markets decrease alongside the transaction costs in the political arena. The market works better, but so might the regulatory world because of political pressure from numerous travelers who can compare not only airlines but also different countries' regulatory systems.

IV. Conclusion

There are some normatively unambiguous rearrangements of property rights, but these turn out to be few and far between. A private owner might decide to open access, as when a copyright holder gives away samples or permits some copying (perhaps to increase demand for the full product) or when a building owner permits open access to its lobby. In these cases, it is hard to see anything but an optimistic story unless there has been a threat of inefficient political intervention.[57] My normative claim is in this way limited to our ability to say much about government intervention. Absent convincing local evidence about an industry, property, or community, we should be cautious before exalting rearrangements in property rights that make for more closed or more open access.

I have framed the argument here around the question of access to property. But much of the argument could have been structured around public versus private organization—although these categories come with their own ambiguities. Consider, for example, government interventions in favor of public universities (which do offer somewhat more open access than most private ones through residency requirements, programmatic stipulations, and other means) but then also away from these organizations. Public funding of research can be made on transaction-cost grounds. Private firms might face a collective-action problem when it comes to basic research, where intellectual property is hard to define and encourage. But public universities and their beneficiaries also comprise a formidable interest group. The growth and contraction of this sector is not easily attributed to one or the other explanation. In a sense, then, I have tried to show that open and closed access to property, most often accomplished through state action, is simply one style of regulatory activity. It is not surprising that the uncertainties we have about government intervention in general should extend to this area. Normative judgments about the role of government in maintaining and transforming property arrangements must depend on local evidence about given pieces of property, industries, and so forth. My claim is not that private property rights

[57] Thus, if the private owner completely gives up control, as by abandoning a property, there is normative ambiguity because interest-group-induced regulation may have driven down the value of ownership.

are suspect but rather that their emergence, as well as rearrangement, is as suspicious as their devolution. The content of private property is itself a function of government, and virtually all legal moves need to be analyzed in terms of both transaction costs and interest groups.