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Property in Law: Government Rights in Legal Innovations

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Property in Law: Government Rights in Legal Innovations

STEPHEN CLOWNEY*

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I. INTRODUCTION

One of the most enduring themes in American political thought is that competition between states encourages legal innovation.¹ Despite the prominence of this story in the national ideology,² there is growing anxiety

¹ Justice Brandeis made the case most famously: “Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The *Federalist Papers*, too, make the case that one benefit of the federalist system is that the diversity constituted by the states will protect against the tyranny of the majority. *THE FEDERALIST* NO. 10, at 71 (James Madison) (Clinton Rossiter ed., 2003); see also Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416, 418, 422 (1956) (arguing that competition among jurisdictions creates varying packages of local laws and services). For a more recent take on the benefits of federalism, see Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 79 (2005) (arguing that competition between states creates a fertile ground for experimentation).

² Corporate law has been the scene of a remarkably vigorous debate over inter-jurisdictional competition. See, e.g., Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 210 (2006); see also Baher Azmy, *Squaring the Predatory Lending Circle*, 57 FLA. L. REV. 295, 392 (2005) (recapping the argument that “federalism allows for more and better opportunities for innovation and experimentation”); Daniel O. Conkle, *Free Exercise, Federalism, and the States as Laboratories*, 21 CARDOZO L. REV. 493, 494 (1999) (arguing that states served as laboratories of innovation during the debate over the Religious Freedom and Restoration Act); James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 476–88 (1996) (tracing the origin and rise of states as laboratories idea); Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg’s Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593, 1600, 1603 (2008) (making the case that Oregon served as laboratory on end of life issues). For an international perspective, see Wolfgang Kerber, *Institutional Change in Globalization: Transnational Commercial Law From an Evolutionary Economics Perspective*, 9 GERMAN L.J. 411, 420 (2008). Kerber argues that a similar dynamic plays out at the international level. Specifically, “[i]f skilled labor, capital, and firms are mobile between jurisdictions, then the jurisdictions have incentive to improve their institutions” *Id.* at 420–21. The United States Judiciary has also absorbed the message about the benefits of competition between local jurisdictions. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (federalism “allows for more innovation and experimentation in government”); *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 780 P.2d 1282, 1306 (Wash. 1989) (Utter, J., concurring) (“Federalism allows the states to operate as laboratories for more workable solutions to legal and constitutional problems.”).

that state and local governments innovate at a socially suboptimal rate.³ Academics have recently expressed alarm that the pace of legal experimentation has become “extraordinarily slow,”⁴ “inefficient,”⁵ and “less than ideal.”⁶ Ordinary citizens, too, seem concerned that government has been leeches of imagination and the dynamic spirit of experimentation; both talk radio programs and newspapers remain jammed with complaints about legislative gridlock and do-nothing politicians who cannot, or will not, solve basic problems.⁷ Frank Knight, a leading Chicago School economist, succinctly captured the current angst: “The real trouble with [public officials] is not that they are rash, but the opposite [T]hey universally show a tendency to ‘play safe’ and become hopelessly conservative.”⁸ What can reverse the stagnation?

In this Article, I argue that granting state and local governments some form of intellectual property protection in the text of their statutes would ignite a socially beneficial upsurge in legal experimentation. The idea is simple. Intellectual property theory posits that innovators take bolder risks and produce better ideas when the law hands them exclusive control over their creations.⁹ Pharmaceutical companies, for example, are more likely to

³ Susan Rose-Ackerman’s critique of federalism remains the gold standard. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 593 (1980) (pointing out that jurisdictions have few incentives to innovate); see also Michael Abramowicz, *Speeding Up the Crawl to the Top*, 20 YALE J. ON REG. 139, 157–59 (2003) (laying out five reasons why states do not innovate enough); Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 349 (2008) (arguing there might be “inefficiently little” innovation); John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 4 (2007) (demonstrating that the timetable of legal change is strikingly slow).

⁴ Duffy, *supra* note 3, at 71.

⁵ Ian Ayres, *Supply-Side Inefficiencies in Corporate Charter Competition: Lessons from Patents, Yachting and Bluebooks*, 43 U. KAN. L. REV. 541, 550 (1995).

⁶ Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U.C. DAVIS L. REV. 1829, 1870 (2008).

⁷ See, e.g., *Emigration from California: Go East or North, Young Man*, THE ECONOMIST, Aug. 29, 2009, at 64, 64 (blaming legislative gridlock for the slowdown of the state’s economy); Paul Greenberg, *End Arcane Tax System*, THE GRAND RAPIDS PRESS, Apr. 16, 2007, at A7 (describing politicians as “unimaginative”). See generally Robert P. Riggins, Letter to the Editor, *California Legislature Overpaid, Not Willing to Share the Pain*, OAKLAND TRIB., Jan. 16, 2009 (complaining about do-nothing politicians); Editorial, *Show Useless Politicians the Door*, CHI. SUN-TIMES, July 4, 2008, at 22 (same); Gary Walker, *The Golden State Will Overcome This Too*, THE FRESNO BEE, Aug. 10, 2009, at B5 (describing “interminable” legislative gridlock).

⁸ FRANK H. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* 361 (1964).

⁹ See Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L.J. 1693, 1696 (2008) (observing that the intent of the intellectual property system

invest in costly research if they can prevent rivals from copying and selling the medical advances they engineer.¹⁰ Artists, too, can pour years of work into the development of a new technique, confident that only they will have the right to display, distribute, and adapt any work produced by their risk-taking.¹¹ This same principle—that exclusive rights induce optimal levels of innovation—should be applied to the legal experiments generated by local legislatures.

The drafting and implementation of an untested legal scheme—like the invention of a new commercial product—may consume substantial resources and entail considerable financial risks for the innovating government.¹² Yet, unlike artists or scientists, legislative bodies currently lack the ability to fully internalize the benefits of their innovations; states and municipalities have no property rights in the text of their laws and cannot prevent rivals from free-riding on the information produced by their experiments. In this landscape, legislators asked to approve risky but potentially transformative legislation will often fail to act.¹³ The rational elected official knows that casting a vote for a chancy law that offers no guarantee of exclusivity amounts to playing a

“is to provide incentives to innovate by allowing innovators to restrict the use of the knowledge they produce by allowing the imposition of charges on the use of that knowledge, thereby obtaining a return on their investment”).

¹⁰ See Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761, 831 (2002) (observing that patent incentives in the pharmaceutical industry are “critical”); Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of Biomedicine*, 66 LAW & CONTEMP. PROBS. 289, 289 n.1 (2003) (noting that “[v]arious empirical studies have underscored the critical role played by patents on end-stage pharmaceutical products”).

¹¹ L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USER’S RIGHTS* 49 (1991); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009) (“Copyright law is thus thought to exist primarily to give authors (that is, creators) an incentive to create and thereafter disseminate their works publicly.”); Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 310 (2005) (arguing that the theory underlying copyright is to induce production of creative works).

¹² See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 409 (3d ed., 2001) (stating legislative drafting is “one of the most difficult legal writing skills”); Robert A. Hillman, *How To Create a Commercial Calamity*, 68 OHIO ST. L.J. 335, 343 (2007) (“lawmaking is time-consuming and costly”); A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1095 (2005) (noting that drafting legislation is “tedious” and “time-consuming”).

¹³ Rose-Ackerman, *supra* note 3, at 594 (discussing politicians’ incentives to innovate).

lottery that fails to offer a large prize; the potential rewards do not justify the gamble.¹⁴

Of course, experience shows that the lack of intellectual property protection does not stifle all legal innovation. A government will, occasionally, have incentives to craft pioneering legislation without the benefit of any exclusive rights in its reforms. The jurisdiction that invents a new and useful legal scheme may, for example, reap an important set of first-mover advantages: increased goodwill from constituents, an enhanced national reputation, or a sudden flood of additional residents seeking to benefit from recently-introduced laws.¹⁵ Competing jurisdictions, however, gain two significant second-mover advantages that tip the scales in their favor. First, slow-acting rivals do not have to bear the expense of developing original legislative materials.¹⁶ Second, competitors can easily and quickly copy the innovator's successful advances without repeating any of the missteps that typically accompany legal change.¹⁷ Thus, it seems that the risks of legal experimentation are distributed unevenly. The benefits that result from bold statutory changes are shared with play-it-safe, non-innovating jurisdictions, whereas the consequences of failed experiments fall squarely on the shoulders of the entrepreneurial state.

Intellectual property rights can help reduce the asymmetry. Increased protection for legal innovators could raise social welfare by maximizing incentives to produce reform. For example, a municipality that enacts a new and effective zoning scheme—and has intellectual property rights in its work—might attract new residents or choose to sell its handiwork to nearby jurisdictions. Just as copyright protects the spoils of the artist who fashions a commercially successful product, intellectual property rights in the content of the law would amplify the rewards for a jurisdiction that enacts an untested but potentially beneficial statutory scheme.

¹⁴ See Abramowicz, *supra* note 3, at 154 (stating that “innovation is likely to greatly reduce . . . job security”); Cleveland, *supra* note 6, at 1868 (arguing that if an “innovator cannot capture all of the gains that flow from her innovation, she will be more reluctant to bear the costs of innovation, and as a result, she will innovate less than is socially optimal”).

¹⁵ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 41–42 (2003) (discussing first-mover advantages in a world without copyright); Ayres, *supra* note 5, at 548 (showing that “the possibility of free-riding . . . does not destroy the incentive to innovate first”); Ronald J. Daniels, *Should Provinces Compete? The Case for a Competitive Corporate Law Market*, 36 MCGILL L.J. 130, 149 (1991) (discussing reputational benefits that accrue from consistent innovation).

¹⁶ See Abramowicz, *supra* note 3, at 157 (describing how the “benefits of a state’s innovations are largely externalized”); Rose-Ackerman, *supra* note 3, at 604.

¹⁷ See Ayres, *supra* note 5, at 545.

Despite the seemingly obvious parallels between legal experimentation and other forms of innovation, academics have not yet explored the implications of the similarity.¹⁸ This Article attempts to fill the gap. Part II presents the case that local legislatures have few incentives to pass bold, transformative statutes. Admittedly, little empirical data exists to support this view—it remains impossible to measure experiments that do not occur and legislation that never finds its champion. There are, however, persuasive theoretical arguments to explain the drought of legal innovation. The major problem, as canvassed above, is that legislatures cannot prevent rivals from capturing and using their ideas. Moreover, political scientists have recognized that individual elected officials often have inadequate motivation to propose and enact creative reforms.¹⁹ The problem, in a nutshell, is that politicians focus on short-term election cycles, while the benefits of needed legislation often accrue over the course of years or decades.²⁰

After identifying the problem of sub-optimal legal change, I turn toward crafting a solution. Part III argues that supplying local governments with intellectual property rights would overcome institutional barriers to legal experimentation. Foremost, a property-in-law scheme would allow risk takers to more fully capture the benefits of their good ideas. This Part also demonstrates that intellectual property would improve not only the incentives of legislatures as a whole, but also boost the motivation of individual elected officials to remodel the law. One need look no farther than Delaware to realize the power of incentives; the state's history of innovation in corporate law shows that when states have a financial stake in the content of their statutes, the pace of legal change surges.²¹

¹⁸ The idea that intellectual property could stimulate legal innovation was mentioned briefly by Susan Rose-Ackerman and Ian Ayres. See Ayres, *supra* note 5, at 549; Rose-Ackerman, *supra* note 3, at 604–05. Ron Daniels and Michael Abramowicz have applied the insight to corporate law. See Abramowicz, *supra* note 3, at 194–205; Daniels, *supra* note 15, at 150. No one has fully explored the theoretical or practical implications of the idea.

¹⁹ Hans Gersbach, *Incentive Contracts and Elections for Politicians and the Down-Up Problem*, in ADVANCES IN ECONOMIC DESIGN 65, 65–66 (Murat R. Sertel & Semih Koray eds., 2003) [hereinafter Gersbach, *Down-Up Problem*]; Hans Gersbach & Verena Liessem, *Incentive Contracts and Elections for Politicians with Multi-Task Problems*, 68 J. ECON. BEHAV. & ORG. 401, 401 (2008); Hans Gersbach, *Incentive Contracts for Politicians and Binding Election Promises: Reform Ideas for Democracy*, 27 ECON. AFF. 87, 87–88 (2007) [hereinafter Gersbach, *Incentive Contracts*].

²⁰ HANS GERSBACH, DESIGNING DEMOCRACY: IDEAS FOR BETTER RULES 11–27 (2003); Abramowicz, *supra* note 3, at 158 (“According to public choice theory, politicians privilege short-term results over long-term gains.”).

²¹ See generally Roberta A. Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 278–79 (1985).

In Part IV, I attempt to answer a significant potential objection to the idea of granting local governments a stake in the content of their statutes. Some critics will surely worry that a property-in-law system would slow the transmission of legal reforms between jurisdictions.²² The potential problem is easy to spot; creative local governments, armed with intellectual property rights, may simply refuse to share their innovations with rival municipalities. This is a formidable, but not fatal, objection. Both theory and anecdotal evidence suggest that neighboring cities—entities locked in long-term, repeat-player relationships—have strong motivation to negotiate to mutual advantage. Moreover, government could overcome holdout problems by establishing a mandatory licensing system that would require jurisdictions to share the content of their laws for predetermined fees.

Part V—the final section of this Article—explores what a system of government-held intellectual property might look like. Patent law might seem the most obvious vehicle for integrating the claims of government entities into the existing regime: patents provide expansive protection for ideas and the patent system has successfully extended coverage to other unusual candidates for intellectual property protection, including gene sequences and business methods. Despite these advantages, I argue that if the government chooses to extend IP rights to local governments, copyright would be a greatly superior vessel to patent. Copyright, admittedly, does not protect wide-ranging ideas, only their specific expression. This narrower set of rights would reduce the concerns about government control over the law and impose fewer costs than a system of patent protection, while still providing states with improved incentives to innovate.

In sum, the goal of this Article is to show that granting states and municipalities some form of exclusive rights over their creations would improve the efficiency of the legal system without undermining any of its core values.

II. THE CURRENT LANDSCAPE: SUBOPTIMAL INNOVATION

Intellectual property skeptics will assuredly frown upon any proposal that grants state governments exclusive rights in the text of their statutes. The most basic critique is, perhaps, that legislatures already innovate at a socially optimal rate—that expanded government intellectual property is a cure in search of a disease. Indeed, there is a common refrain in legal scholarship

²² See, e.g., Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information*, 45 SYRACUSE L. REV. 999, 1022 (1995); Shubha Ghosh, *Copyright as Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653, 703–04 (2004); Andrew A. Schwartz, *The Patent Office Meets the Poison Pill: Why Legal Methods Cannot Be Patented*, 20 HARV. J.L. & TECH. 333, 335 (2007) (intellectual property would encourage “legal innovators to keep their ideas secret”).

that likens the American states to a group of restless scientists, each making rapid-fire discoveries for the good of all mankind.²³ The states, so the story goes, respond to similar social and economic pressures with a variety of legal solutions. As each tries to outdo the other, a kind of experimental process ensues; inefficient rules falter, while beneficial changes spread from one region to the next.²⁴ This competitive federalist model, we are told, rewards creative jurisdictions, and produces legal advances at an “almost dizzying pace.”²⁵

The aim of the following section is to demonstrate the weakness of these arguments.²⁶ Stitching together intellectual threads from law, political science, and economics reveals that state and local legislatures have far too few incentives to pass innovative statutes or craft legal inventions. The problem, first and foremost, is that in the absence of exclusive rights, state

²³ As alluded to in an earlier footnote, the metaphor of states as laboratories of invention first appeared in 1932 in an opinion authored by Justice Brandeis. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Azmy, *supra* note 2, at 397 (“[T]he existence of varying local conditions in the states is a contributing cause of legislative action and experimentation.”); Bell & Parchomovsky, *supra* note 1, at 74 (“The existence of multiple jurisdictions creates a potential for competition over property forms. Competition over property forms, in turn, leads to innovation in property doctrine. Examples are legion.”); Daniels, *supra* note 15, at 144–45; Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1335 (2009); Romano, *supra* note 2, at 210 (“For the most part, this is a laboratory that has worked reasonably well.”).

²⁴ Azmy, *supra* note 2, at 397 (“[T]he existence of varying local conditions in the states is a contributing cause of legislative action and experimentation.”); John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 689 (2002) (arguing that inter-jurisdictional competition checks inefficient government behavior); Kerber, *supra* note 2, at 417–18, 427 (providing many examples of parallel experimentation and mutual learning); Romano, *supra* note 2, at 210 (“The law-making pattern we observe indicates a dynamic process in which legal innovations originate from several sources, creating a period of legal experimentation that tends to identify a principal statutory formulation that is thereafter adopted by a majority of states.”). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1998).

²⁵ Nuno Garuopa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1633 (2008) (arguing that the United States is responsible for most of the world’s legal innovations); Romano, *supra* note 2, at 216 (mapping out the diffusion of corporate law innovations). See generally Robert F. Blomquist, *Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law*, 30 WHITTIER L. REV. 119 (2008).

²⁶ Note, however, that there are many other reasons to support federalism. In theory, small, divided government enhances democracy and better protects individual rights. Azmy, *supra* note 2, at 301 (“Scholars have long posited that state governments enjoy the advantages of responsiveness, flexibility, and innovativeness”); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 21 (2006); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1768 (2006).

governments must share their advances with competitors.²⁷ A rational jurisdiction, confronted with such a legal backdrop, will wait for a neighbor to undertake costly experiments and then promptly copy the results. Moreover, even if a state, as a whole, would benefit from increased statutory reform, individual elected officials have little motivation to vote for controversial new policies. Incumbents, especially those in safe seats, have few reasons to pursue brave legal change.

A. *The Freerider Problem*

The strongest and simplest reason to believe that state and local governments will not experiment at a socially optimal rate is that legislatures cannot prevent rivals from copying their innovations. A state that enacts a risky but ultimately beneficial statute will find that its competitors can quickly enact their own version of the same law without paying any compensation.²⁸ At the same time, of course, when an innovating state's legal changes prove unwise, it must bear the costs of failure alone—even though its mistakes may produce information that other jurisdictions find lucrative.²⁹ Confronted with the inability to internalize the benefits of its risk-taking, and offered no way to spread the cost of its misfortunes, a rational jurisdiction will underinvest in legal experimentation.³⁰

A simple model may illuminate the problem. Imagine, for example, that a handful of states are each considering a reform measure that would legalize the use of widgets. Leading economists cannot agree on the statute's impact. The best data suggest that there is a 50% chance the law will attract new industry and generate a \$20 billion boom in the local economy. On the other hand, an equal chance exists that legalizing widgets will infuriate current residents and cost the innovating state \$1 billion.

In a world without intellectual property protection, no state will take the lead in widget legalization. If the reform fails, the innovating state will lose \$1 billion. And, if the reform measure succeeds, other jurisdictions will quickly copy the innovator's strategy, compete for the new widget-friendly industries, and filch the overwhelming majority of the \$20 billion in profit.³¹ The ex-ante risks of legal change swamp the potential benefits, and no jurisdiction ends up with proper incentives to develop the law. In contrast, if the original adopter received exclusive rights in the content of its statutes, widget legalization would occur rapidly. Stout intellectual property rights

²⁷ Galle & Leahy, *supra* note 23, at 1337.

²⁸ Rose-Ackerman, *supra* note 3, at 604.

²⁹ See Abramowicz, *supra* note 3, at 157.

³⁰ See Rose-Ackerman, *supra* note 3, at 605.

³¹ See Ayres, *supra* note 5, at 546–47.

would prevent rivals from passing copycat legislation and allow the experimenter to reap the full \$20 billion in revenue, if the law proved successful.³² Faced with a twenty-to-one bet at 50% odds—a wager even a drunken gambler knows to take—states would scramble to innovate.

The problem of free-riding is not confined to the world of widgets. A concrete example of the troubles created by the lack of intellectual property recently played out in the interstate competition to attract trust funds. In the late 1980s, demand grew for a new kind of trust that could take advantage of a loophole in the generation-skipping transfer tax.³³ To legalize these “perpetual trusts,” a state first needed to abolish some cardinal provisions of its Rule Against Perpetuities, a storied and well-settled provision of property law.³⁴ Any jurisdiction that hoped to innovate had to weigh the costs of unleashing a dose of uncertainty into its legal code against the potential upside of attracting increased trusts assets—keeping in mind that a rival jurisdiction could instantly imitate the core of any worthwhile advance.

Unsurprisingly, such mimicry swept through law books at breakneck pace. In 1995, Delaware—a traditional trust fund hegemon—made a decision to innovate, rolling back parts of its Rule Against Perpetuities and establishing perpetual trusts.³⁵ Within months, imitators pounced with a coiled potency; Alaska, Arizona, Illinois, Maine, Maryland, New Jersey, Ohio, and Rhode Island quickly authorized similar trusts.³⁶ And by the end of 2005, Colorado, Florida, Missouri, Nebraska, Nevada, New Hampshire, Utah, Virginia, and Wyoming had also fallen into line.³⁷ Delaware, the state that had studied the legal problem, crafted new legislation, and assumed the

³² Of course, no innovator can ever hope to capture all of the benefits of their creation. New inventions often inspire a second creator to think in novel ways “not previously contemplated, and the inspired party may originate a second innovation without any violation of the original innovator’s rights.” Cleveland, *supra* note 6, at 1868. Nonetheless, intellectual property rights drastically increase the payoff for profitable inventions.

³³ See Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373–76 (2005).

³⁴ *Id.*; see also Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097 (2003) (noting that the Rule has existed for over 300 years).

³⁵ See Sitkoff & Schanzenbach, *supra* note 33, at 376. A considerable amount of scholarly literature emerged on the race to abolish the Rule. See, e.g., Ira Mark Bloom, *The GST Tax Tail Is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569, 569–70 (2000); Verner F. Chaffin, *Georgia’s Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1, 1–2 (2000).

³⁶ Joshua C. Tate, *Perpetual Trusts and the Settlor’s Intent*, 53 U. KAN. L. REV. 595, 603 n.44, 604 n.45 (2005); see also Sitkoff & Schanzenbach, *supra* note 33, at 376.

³⁷ Sitkoff & Schanzenbach, *supra* note 33, at 376.

substantial risk of upsetting settled law, gained only a fraction of the assets that poured into perpetual trusts across the country.³⁸

Ultimately, Delaware's drive to abolish the Rule Against Perpetuities did not hinge on a desire to accumulate new trust fund dollars. The state was, instead, trying only to "maintain[] its role as a leading jurisdiction for the formation of capital and the conduct of trust business."³⁹ That Delaware found the motivation to innovate in this particular alchemy of circumstance should give no assurance that there is adequate incentive for states to introduce legal changes in other areas. To cite some examples among many, repeated calls to reform foreclosure sales,⁴⁰ zoning rules,⁴¹ housing discrimination laws,⁴² and child representation standards⁴³ have all gone

³⁸ *Id.* at 391–98. Admittedly, Delaware still seems to have benefited from its decision to abolish the Rule Against Perpetuities. The point here is only to demonstrate that it was not able to harness all of the goodies that resulted from its innovation.

³⁹ *Id.* at 376 (quoting H.R. 245, 138th Gen. Assemb. (Del. 1995) (bill synopsis)). The bill also stated: "Delaware's repeal of the rule against perpetuities for personal property held in trust will demonstrate Delaware's continued vigilance in maintaining its role as a leading jurisdiction for the formation of capital and the conduct of trust business." *Id.*

⁴⁰ Editorial, *Finally Getting a Little Help to Homeowners*, CLEVELAND PLAIN DEALER, Feb. 23, 2009, at A9 (calling for legislature to pass foreclosure reform bill); Monica Hatcher, *Housing Crisis: Push Continues for Aid to Condos*, MIAMI HERALD, July 10, 2009, at C3 ("Condo owners are meeting to demand that lawmakers take up condo foreclosure reform."); Jim Weiker, *Delinquent Loans Rise to Record Number*, COLUMBUS DISPATCH, Nov. 20, 2009, at A1 ("The Ohio Senate needs to take up foreclosure reform immediately."). See generally Monica Hatcher, *Florida Lawmakers Tap Condo Fund as Owner's Complaints Rise*, MIAMI HERALD, May 27, 2009 (noting that a major foreclosure reform bill failed).

⁴¹ Pleas to reform the worst abuses of the zoning system have consistently fallen on deaf ears. See, e.g., Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061, 1081–86 (outlining the effect of zoning on black business formation); Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1210, 1228 (2001); Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 261, 263 (2006); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 837–38, 848 (1999).

⁴² See, e.g., Jeffery D. Dillman, *New Strategies for Old Problems: The Fair Housing Act at 40*, 57 CLEV. ST. L. REV. 197, 197, 200 (2009); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 58, 77 (2009); Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 242, 244 (2009).

⁴³ See, e.g., Sarah Gerwig-Moore & Leigh S. Schrope, *Hush, Little Baby, Don't Say a Word: How Seeking the "Best Interests of the Child" Fostered a Lack of Accountability in Georgia's Juvenile Courts*, 58 MERCER L. REV. 531, 531–33 (2007); Hollis R.

unheeded, despite general consensus that change is needed. At best, it seems that the lack of intellectual property slows the speed of innovation to a crawl and, at worst, it may prevent some socially valuable changes from ever occurring.

Critics could argue that my critique thus far has wrongly assumed that jurisdictions can easily copy the innovations of their neighbors. Indeed, some evidence has emerged that imitation is a rather messy endeavor. For example, economists who study industrial organizations have demonstrated that businesses often have trouble absorbing the breakthroughs of their rivals.⁴⁴ A firm that lags well behind its competitors may lack the know-how or resources to implement a beneficial change. Many retailers, for example, have failed to adopt Walmart's innovations in supply chain management because they lack the necessary technology.⁴⁵ Government bodies with limited resources may also struggle to pluck advances from their wealthier neighbors.⁴⁶ As one scholar noted, "Using direct-deposit payroll technology as a tool for curtailing government corruption is unlikely to succeed in nations without widespread use of computerized banking."⁴⁷

However, it seems unlikely that the same dynamics govern competition between the individual American states. Unlike the "dramatic disparities" that exist between nations and business firms, the states remain similar enough that legal innovations can spread easily from place to place.⁴⁸ Even the poorest states have the savvy and technological capacity to implement the successful statutory schemes developed by outsiders.⁴⁹ Literature from

Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1091, 1097-98 (2006); *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Recommendations of the Conference*, 64 FORDHAM L. REV. 1301, 1302 (1996).

⁴⁴ See Morten T. Hansen, *The Search-Transfer Problem: The Role of Weak Ties in Sharing Knowledge Across Organization Subunits*, 44 ADMIN. SCI. Q. 82, 87 (1999); Eric von Hippel, "Sticky Information" and the Locus of Problem Solving: Implications for Innovation, 40 MGMT. SCI. 429, 431 (1994).

⁴⁵ See Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 765 (2002).

⁴⁶ See Barbara Wejnert, *Integrating Models of Diffusion of Innovations: A Conceptual Framework*, 28 ANN. REV. SOC. 297, 302-05 (2002) (arguing that poorer countries cannot emulate some policies put in place by resource-rich nations); Note, *When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing*, 119 HARV. L. REV. 1467, 1477 (2006) (noting that national governments face large information gaps about the policies of other national states).

⁴⁷ Galle & Leahy, *supra* note 23, at 1347.

⁴⁸ *Id.* at 1348.

⁴⁹ There is good evidence that states are most likely to adopt the policies of their immediate neighbors. See Frances Stokes Berry & William D. Berry, *Innovation and*

corporate law scholars on patterns of policy diffusion offers some empirical support for this position. Professor Romano has shown, quite persuasively, that states with comparatively modest resources have managed to copy and integrate the leading corporate law innovations into their statutory codes.⁵⁰ Places like Alabama and Mississippi take liberally from wealthier jurisdictions like Delaware, Pennsylvania, and New Jersey.⁵¹ Such borrowing certainly does not stifle all legal creativity but, as shown above, when states can easily and cheaply copy the innovations of neighbors, governments will experiment at a rate far below the socially desirable benchmark.

B. *The Agency Problem*

Naked self-interest among politicians also contributes to the lack of imagination in state and local politics. It is a somber fact that individual legislators often vote against innovative statutes, even in jurisdictions that, as a whole, would benefit from increased experimentation.⁵² Although the details of this point become rather technical,⁵³ the underlying issue is straightforward. To be reelected, politicians must offer tangible proof of their accomplishments before the following campaign season. This makes for a difficult motivation problem, however, as many socially desirable policies may cause a noticeable dip in the standard of living before generating any long-term growth.⁵⁴ Rational politicians will snub such “down-up” policies, fearing that voters will not have time to observe the full panoply of benefits before making their reelection decisions.⁵⁵ Elected officials’ short time-

Diffusion Models in Policy Research, in THEORIES OF THE POLICY PROCESS 169, 175–77 (Paul A. Sabatier ed., 1999). Recent scholarship argues that geographical proximity matters because leaders are more likely to know about and trust information gleaned from neighbors. See EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 34, 86–91 (2003).

⁵⁰ See Romano, *supra* note 2, at 218.

⁵¹ Delaware, Pennsylvania, and New Jersey are traditionally innovative jurisdictions. *Id.* at 216, 218 tbl. 2.

⁵² Rose-Ackerman, *supra* note 3, at 596–603.

⁵³ *Id.*

⁵⁴ Gersbach & Liessem, *supra* note 19, at 2.

⁵⁵ Cleveland, *supra* note 6, at 1880–81; Gersbach, *Down-Up Problem*, *supra* note 19, at 66 (“[V]oters cannot provide appropriate incentives by reelection decisions to motivate politicians to implement down-up policies. If they constantly elect a new policy maker, the incentive for the incumbent to undertake short-term policies is high because he will not be reelected anyway and he derives private benefits from the short-term policy.”); see also Clayton P. Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. REV. 1030, 1059–66 (1983) (explaining the effect of elected officials’ short time horizon on local government decisions to issue bonds); William Leblanc et al., *Majority-Rule Bargaining and the Under Provision of Public Investment*

horizon and need for certainty leaves whole constellations of valuable ideas unexplored.⁵⁶ Indeed, political scientists have identified “tax reforms, reforms of the labor market, pension reform, reduction of CO2 emissions, as well as . . . funding . . . new technologies” as examples of worthy initiatives that have gone ignored because they impose short-term costs and generate benefits only slowly, over the term of years or decades.⁵⁷

Politicians may shun needed innovations for other reasons beyond the down-up problem. For example, the benefits of some potentially beneficial regulations are difficult to measure or reduce to easily understood figures.⁵⁸ If voters fail to grasp the impact of a new law they are unlikely to reward politicians who implemented the switch. Climate change legislation, for example, has found few advocates largely because the benefits remain so diffuse and difficult to quantify.⁵⁹

The incentives of politicians become further distorted by the prevalence of uncompetitive elections at the state and local level. In the United States, the outcomes of most elections remain reassuringly predictable; as a result of gerrymandering, fund-raising advantages, and greater name recognition, incumbents consistently—and often easily—defeat challengers.⁶⁰ Incumbent

Goods, 75 J. PUB. ECON. 21, 22 (2000) (discussing that politicians seeking reelection favor short-term returns).

⁵⁶ Abramowicz, *supra* note 3, at 158; Hans Gersbach, *Competition of Politicians for Incentive Contracts and Elections*, 121 PUB. CHOICE 157, 157–58 (2004) (arguing that politicians behave in short-term ways); Gersbach, *Incentive Contracts*, *supra* note 19, at 87 (“[M]any political projects fail to materialise in democracies, often due to the fact that their implementation, together with the expected beneficial return, takes longer than one period of office.”).

⁵⁷ Gersbach, *Incentive Contracts*, *supra* note 19, at 87.

⁵⁸ Gersbach, *Down-Up Problem*, *supra* note 19, at 74; *see also* Evan J. Ringquist et al., *Salience, Complexity, and the Legislative Direction of Regulatory Bureaucracies*, 13 J. OF PUB. ADMIN. RES. & THEORY 141, 141–64 (2003).

⁵⁹ Professor Buzbee encapsulates the issue: “For politicians sensitive to electoral cycles, the focus is often on short-term meeting of interest group demands in ways inuring to the politicians’ credit,” rather than “risk-reducing actions with benefits that are splintered among many.” William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1534–35 (2009). Buzbee also notes that this problem is especially acute in local government elections, where immediate economic concerns, like unemployment, remain the key indicator of political success. *Id.* at 1535.

⁶⁰ *See, e.g.*, David Breaux & Malcolm Jewell, *Winning Big: The Incumbency Advantage in State Legislative Races*, in CHANGING PATTERNS IN STATE LEGISLATIVE CAREERS 87, 91–103 (Gary F. Moncrief & Joel A. Thompson eds., 1992); John M. Carey et al., *Incumbency and the Probability of Reelection in State Legislative Elections*, 62 J. POL. 671, 682, tbl. 1 (2000); Robert E. Hogan, *Challenger Emergence, Incumbent Success, and Electoral Accountability in State Legislative Elections*, 66 J. POL. 1283, 1290–91 (2004); Malcolm E. Jewell, *State Legislative Elections: What We Know and*

state legislators, for example, win reelection in over 90% of the races they enter.⁶¹ And in many districts, it is not uncommon for seated politicians to run uncontested in both the primary and the general election.⁶² In essence, these elected officials get a “free pass.”⁶³

Political science research demonstrates that politicians ensconced in such safe seats generally refuse to introduce bold legislation.⁶⁴ Aggressive innovation, it seems, risks upsetting a politically important constituency or deep-pocketed interest group that could recruit and fund a credible challenger.⁶⁵ Imagine, for example, a candidate with a 99% chance of winning reelection—no rational actor in that circumstance would cast a vote that offers equal chances of a 10% positive or 10% negative change in the odds of victory. Such a politician benefits “relatively little from the added upside but is still vulnerable to the downside.”⁶⁶ Rather than campaign for legal novelties, legislators in secure seats tend to focus their energy on fundraising or solving the problems of individual constituents.⁶⁷ The system, it seems, encourages purposeful timidity. The individuals with the most power to set policy—safe incumbents—have the strongest incentives to resist changes that could prove socially beneficial.

Admittedly, not every scholar believes that legislators lack incentives to push for innovative policies. A handful of academics insist that individual elected officials—driven by ambition—can push an otherwise reluctant jurisdiction into advancing the law. A recent paper by Professors Kotsogiannis and Schwager makes the case thoughtfully.⁶⁸ The authors

Don't Know, 22 AM. POL. Q. 483, 487 (1994) (discussing the proportion of nominated incumbents who are reelected).

⁶¹ Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592–93 (2009).

⁶² Since 1960, roughly 10% of incumbents have faced no opposition during their reelection bids. BARBARA PALMER & DENNIS SIMON, *BREAKING THE POLITICAL GLASS CEILING: WOMEN AND CONGRESSIONAL ELECTIONS* 40–41 tbl. 2.1 (2d ed., 2008).

⁶³ *Id.*

⁶⁴ Cleveland, *supra* note 6, at 1879; Rose-Ackerman, *supra* note 3, at 603, 614; Note, *When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing*, 119 HARV. L. REV. 1467, 1471 (2006) (arguing that political leaders “facing more competitive electoral environments” are more likely to innovate).

⁶⁵ Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006) (noting “politicians’ desire to duck blame for unpopular choices”).

⁶⁶ Galle & Leahy, *supra* note 23, at 1372.

⁶⁷ See Cleveland, *supra* note 6, at 1878–79.

⁶⁸ Christos Kotsogiannis & Robert Schwager, *On the Incentives to Experiment in Federations*, 60 J. URB. ECON. 484, 485 (2006); see also Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 22–24 (2007).

contend that incumbents will “value a risky experiment, not because it improves her odds of immediate reelection, but rather because it offers her an opportunity to appeal to future voters.”⁶⁹ For example, a county commissioner may lay the groundwork for a gubernatorial campaign by compiling a record of successful legal innovations at the local level. The common desire to win higher office, so the argument goes, incentivizes at least some politicians to champion trailblazing policies that look beyond the preferences and immediate concerns of their constituents.

On close inspection, however, this argument rings hollow. First, it seems doubtful that a politician would risk losing a current election for uncertain benefits in a later race. The ambitious politician typically ascends to national prominence by consistently winning local and then statewide elections. Second, the argument put forth by Hills and his colleagues assumes that elected officials accrue some political premium for innovation beyond the rewards available for copying the successful policies of others.⁷⁰ If voters valued thoughtful experimentation, some candidates should advance politically after backing good bets that ultimately fail. However, no scholar has discovered a scintilla of evidence that the electorate rewards officials who take wise but unsuccessful bets; voters, it seems, care less about ex-ante probabilities and more about actual, on the ground, results.⁷¹

In sum, the dense thicket of academic writing on innovation reveals that any proof that the state legislatures experiment at optimal levels is much like a comet; its existence in theory has been frequently recognized, but its observed passages are few. It also merits attention that politicians’ “abiding conservatism” and “reluctance to make any change without clear evidence [of] significant benefits” wreaks havoc beyond the chalkboards of academics and philosophers;⁷² unthinking devotion to ancient regimes imposes steep costs on everyday people. When legislators get caught in the swirl of political life and ignore potentially transformative ideas, important areas of the economy may go unregulated, citizens may end up living under second-best legal schemes that do not address their core needs, and outdated norms may

⁶⁹ Galle & Leahy, *supra* note 23, at 1382.

⁷⁰ Galle & Leahy, *supra* note 23, at 1382–83.

⁷¹ Alberto Alesina & Alex Cukierman, *The Politics of Ambiguity*, 105 Q. J. ECON. 829, 842 (1990) (arguing that politicians are judged on outcomes); Galle & Leahy, *supra* note 23, at 1383; Howard Raiffa, *Decision Making in the State-Owned Enterprise*, in *STATE-OWNED ENTERPRISE IN THE WESTERN ECONOMIES* 54, 54–55 (Raymond Vernon & Yair Aharoni eds., St. Martin’s Press, Inc. 1981) (1980) (making the case that managers in state-funded enterprises are assessed on the results of their decisions, not the ex-ante wisdom of their bets).

⁷² Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1787 (2006).

not change. It remains essential, therefore, that the law engage in a continual process of review and adjustment.

III. THE CASE FOR PROPERTY IN LAW

A. *Why Intellectual Property?*

Up to this juncture, I have argued that there are strong reasons to believe that state and local governments experiment at a sub-optimal rate. This Article now pivots and tries to craft a solution to the knotty problem of under-innovation. I argue, in a nutshell, that expanded property entitlements could help spur socially useful risk-taking in statehouses and city government offices. More specifically I put forth that creating some form of intellectual property rights in the content of local laws would infuse legislatures with a burst of creative energy.

But why intellectual property? The broad theory is, by now, familiar. Conventional wisdom holds that absent some form of government intervention, innovators of all stripes will lack proper incentives to introduce new ideas, materials, and services into the marketplace.⁷³ Intellectual property is the most widespread and, arguably, the most powerful corrective for this “appropriability” problem.⁷⁴ Intellectual property schemes, at base, grant innovators a limited period of exclusive control over the creations of the mind.⁷⁵ Although variations exist, this bundle of entitlements generally includes the power to prevent copycats from reproducing, adapting, or

⁷³ An inventor who labors to create an original product, for example, will find her concept quickly copied by competitors. Cheap knock-offs and reproductions will then lower prices and absorb market share, making it difficult for the original experimenter to appropriate a large enough fraction of the profits to justify her initial expenses. Aware of this risk, would-be creators will focus their energy on more profitable endeavors, and levels of innovation will droop below socially optimal levels. This argument is not new. See Jeremy Bentham, *A Manual of Political Economy*, in 3 THE WORKS OF JEREMY BENTHAM 31, 71 (John Bowring ed., 1843); JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY VOL. I 114–46 (Sir William Ashley ed., 1909). For a more recent take see generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

⁷⁴ See Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software*, 24 J. LEGAL STUD. 321, 333 (1995) (“The fundamental justification for creating property rights in the results of innovation is to deal with the appropriability problem.”).

⁷⁵ See U.S. CONST. art. I, § 8, cl. 8 (empowering Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

distributing a creator's handiwork.⁷⁶ Both theory and empirical evidence suggest that such monopoly rights spur innovators to take sharper risks and produce braver ideas.⁷⁷ Novelists, for example, are more likely to spend years crafting delicate sentences and fully realized characters if they can prevent rivals from stealing their words and appropriating their heroines.

I argue that this principle—that exclusive rights induce innovation—applies with equal force to local legislatures. States and municipalities, like authors or inventors, would craft more socially useful innovations if they had exclusive rights to use, sell, or reproduce the laws they create. Entitlements of these sorts would, for example, enable local legislatures to charge rivals for access to their handiwork, and thereby dramatically increase the potential rewards of a clever innovation. Put another way, a system of property-in-law would encourage optimal levels of experimentation by amplifying the spoils available to successful lawmakers.

It is worth noting up front that such a proposal runs afoul of much recent legal scholarship. Throughout the last decade, a cadre of thoughtful academics has attempted to poke holes in the notion that strong intellectual property rights spark innovation.⁷⁸ Some of these scholars insist that the legal system plays little role in the creative process, and that intangible incentives—love, passion, and desire—suffice to inspire creators.⁷⁹ Others make a more limited critique, highlighting the many unfortunate side effects created by intellectual property regimes that claim to promote innovation.⁸⁰ Indeed, evidence continues to accumulate that copyrights and patents impose affirmative harms on society in the form of higher prices, deadweight loss, the sterilization of culture, and overinvestment in unnecessary technology.⁸¹

⁷⁶ See, e.g., Shubha Ghosh, *The Market as Instrument: A Response to Professor Harrison*, 59 SMU L. REV. 1717, 1730–31 (2006).

⁷⁷ Studies of the drug business have determined that intellectual property rights have been crucial to nurturing innovation in that field. Edwin Mansfield, for example, found that 60% of pharmaceuticals developed between 1981 and 1983 would not have reached consumers in the absence of intellectual property protection. Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173, 174 (1986).

⁷⁸ See, e.g., Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1672 (2009); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 282 (2004) ("Many copyright scholars object to the way Congress deals with their subject. With good reason, they feel Congress wields a copyright ratchet: terms get longer, and the scope of rights gets wider, but never the reverse.").

⁷⁹ Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 513 (2009).

⁸⁰ Abramowicz & Duffy, *supra* note 3, at 362.

⁸¹ See, e.g., Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 925–30 (2010) (explaining the economic argument against intellectual property); Mark A. Lemley, *Property, Intellectual Property*,

Whatever these thinkers' differences, nearly all share one base desire: to roll back—not expand—the reach of copyright and patent protections.

The crowd of opinion aligned against intellectual property suggests that governments should not casually create or expand entitlements over the realm of ideas. Instead, the weight of scholarly opinion holds that intellectual property rights should be established only in environments in which their benefits in terms of stimulating experimentation clearly outweigh their attendant social costs.⁸² Would a system of property-in-law clear this hurdle? I argue in the affirmative, and begin by demonstrating how entitlements over the content of the law would push local governments to innovate at socially optimal levels.

The argument is easily summarized. As the preceding section makes clear, attempts to promote legal innovation must respond to two distinct challenges. First, any lasting solution must allow states to appropriate a larger slice of the social good generated by their innovations. And, second, reform efforts must provide individual legislators with enough motivation to introduce and campaign for bold legal experiments. Intellectual property does both. A carefully crafted scheme of exclusive rights in the law would furnish both government entities and individual elected officials with substantial incentives to revamp, remodel, and develop the law.

B. The Effect of Intellectual Property on Governments

At heart, my proposal turns on the power of property rights to boost legislatures' incentives to innovate. Yet, thus far, I have left a basic question unexplored: How, exactly, would a city or state benefit from exclusive rights in the text of its statutes? In the following subsection I enumerate three benefits that would accrue to jurisdictions with monopoly power over their statutes, and argue that the additional incentives provided by property-in-law would stimulate a wave of new reforms. First and foremost, intellectual property protection would generate substantial new revenues for the most creative states. Second, a property-in-law scheme would draw attention to overlooked nooks and crannies of the law, improving the health and welfare of citizens. Finally, a period of exclusive control over a statutory scheme would allow creative jurisdictions time to develop expertise in specific subject areas—an advantage that could last well beyond the limited period of exclusive control over the law.

and Free Riding, 83 TEX. L. REV. 1031, 1058–60 (2005) (noting that patent rights lead to inefficient overinvestment in research and development). *See generally* Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961 (arguing that strict copyright rules are stifling cultural development).

⁸² *See, e.g.*, DAVID G. POST, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE 198–200 (2009).

1. *Raising Revenue*

The cardinal virtue of a system of property-in-law is that it would boost the revenues of creative governments by eliminating the threat of free riders. As mentioned above, the ability of copycat jurisdictions to freely reproduce the innovations of their neighbors remains the root cause of under-experimentation at the local level.⁸³ A rational state or town confronted with the current landscape—a free market in legal ideas—will generally prefer to copy existing laws rather than bear the cost of developing a risky new statutory scheme.⁸⁴

It takes little imagination to see that intellectual property in the content of the law can help right the ship. A legislature flush with intellectual property rights could preempt sibling states from imitating its statutory innovations and better internalize the value derived from its legal breakthroughs. To illustrate, a city that labors to enact a zoning scheme designed to attract young professionals would have assurance that Portland, Oregon—often cited for its progressive land use policies—could not swoop in and parrot the idea.⁸⁵ Similarly, a state that invested much time and treasure in a thoughtful set of banking regulations could use intellectual property rules to prevent South Dakota from reproducing its work, at least until the period of monopoly rights expired.⁸⁶

It is worth pausing to flesh out the consequences of such a shift on a jurisdiction's incentives to develop the law. Suppose, for instance, that the hypothetical zoning scheme or banking rules ultimately prove successful at luring new residents and investments. Under an intellectual property regime, the innovating jurisdiction—and not a pack of copycats—would capture all of the resulting influx of tax revenue and capital. Families that wanted to take advantage of the novel zoning rules, for example, would need to locate in the trailblazing city—no other municipal entity or county government would

⁸³ See *supra* Part II.

⁸⁴ *Id.*

⁸⁵ See, e.g., Rachael Rawlins & Robert Paterson, *Sustainable Buildings and Communities: Climate Change and the Case for Federal Standards*, 19 CORNELL J.L. & PUB. POL'Y 335, 368 (2010) (demonstrating that “the Portland, Oregon, metropolitan region stands out as a national model for complementary land use and transportation policies”).

⁸⁶ South Dakota is an acknowledged leader in banking law. See Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 819 (1995). “With nearly \$500 billion, South Dakota’s banks have the fourth-highest amount of total banking assets in the country[] . . . lift[ing] South Dakota’s banking profile from an industry serving a small rural state to a national [financial] leader.” Peter Harriman, *State’s Banks 4th in Nation*, ARGUS LEADER, Sept. 18, 2006, at A1.

have the authority to implement an identical law. Similarly, firms could not lobby South Dakota or New York to swipe the innovator's banking insights; for the first time they would need to conduct business within the enterprising jurisdiction. Like a farmer with a fence around her field, innovative local governments would still bear the risk of failure, however, they could finally reap the full rewards of their own labor.

Importantly for this discussion, the benefits of successful legal change remain significant. That is, jurisdictions that seized on the power to exclude would have much to gain under a system of property-in-law. Researchers from UCLA, for example, have argued that millions of dollars will pour into the tourism and retail sectors of states that legalize same-sex unions.⁸⁷ More dramatically, professors Sitkoff and Schanzenbach have demonstrated that over \$100 billion in assets moved across state lines in response to changes in the architecture of trust law.⁸⁸ Still other scholars stress that the first state to revamp its narcotics laws or instill more enlightened sentencing policies could reap billions of dollars in additional budget savings and tax revenue.⁸⁹ If it remains true that states, like companies, need some sort of incentive to offer new legal products, the opportunity for a single jurisdiction to lasso such significant windfalls should push all states and cities into a race to innovate.

Wrapped in the shroud of intellectual property, pioneering states could also profit from property-in-law by licensing their legal breakthroughs to outside jurisdictions. Licensing—the practice of granting others permission to use patents and copyrights—is “as old as intellectual property itself” and remains an essential cog in the IP system.⁹⁰ Most modern copyright and patent owners monetize their discoveries through various licensing regimes.⁹¹ Although some subtle variations exist, in most cases an innovator receives a fee from a licensee in exchange for authorizing the use of an invention according to certain terms and conditions.⁹²

⁸⁷ Melissa Castro, *Same-Sex Marriage Could be Boon to D.C. Tourism*, WASH. BUS. J., Oct. 9, 2009, available at <http://www.bizjournals.com/washington/stories/2009/10/12/story2.html>.

⁸⁸ See Sitkoff & Schanzenbach, *supra* note 33, at 356.

⁸⁹ The RAND corporation recently released a study on the economic effects of California's proposal to legalize marijuana. RAND estimates the state would save \$300 million in enforcement costs and could generate over \$1.5 billion a year in tax revenue on sales. For a brief summary of the RAND study, see *The Law of Weed*, ECONOMIST, July 17–23, 2010, at 31–32.

⁹⁰ Robert W. Gomulkiewicz, *The Federal Circuit's Licensing Law Jurisprudence: Its Nature and Influence*, 84 WASH. L. REV. 199, 204 (2009).

⁹¹ Tanya M. Woods, *Working Toward Spontaneous Copyright Licensing: A Simple Solution for a Complex Problem*, 11 VAND. J. ENT. & TECH. L. 1141, 1146 (2009).

⁹² *Id.*

Examples abound. ConocoPhillips originally became wealthy by selling the use of its advances in rubber making and petroleum processing to foreign companies.⁹³ More recently, HTC—a cellphone maker—agreed to pay millions in royalties to Microsoft in exchange for access to technology described in Microsoft’s vast patent library.⁹⁴ The same basic principles could apply to legal innovations. If Colorado had a property interest in its statutes it could sell the use of, say, its water laws to Arizona.⁹⁵ Inventive Oklahoma could export its oil and gas schemes to Texas. California could license environmental regulations to Maine. The fees generated from such authorizations would then flow back into a state’s treasury to fund other, necessary projects like infrastructure updates, public safety upgrades, and teacher training.

The sudden financial bounty available to local jurisdictions through licensing should push reluctant states to innovate and swell the public’s bounty of effective new laws.⁹⁶ The greater the rewards produced by a state’s licensing efforts, the greater incentive they have to create additional new innovations; and the greater the incentive to create new innovations, the greater number of legal experiments states will undertake. Even proposals to alter previously sacred government programs might take hold if innovators depict legal changes as opportunities to raise funds for schools and police. Private corporations have already found this strategy useful. The petroleum industry, for example, recently advertised its plan to repeal an offshore drilling ban as a method of generating “more than a trillion for federal, state, and local budgets—money for better schools, better safety, and community needs.”⁹⁷

⁹³ PHILLIPS COMPANY HISTORY, http://www.conocophillips.com/EN/about/who_we_are/history/phillips/Pages/index.aspx (last visited Feb. 4, 2010).

⁹⁴ Ilinca Nita, *Microsoft to get \$20 to \$40 from every HTC Android Phone Sold?* UNWIRED VIEW.COM, Apr. 29, 2010, <http://www.unwiredview.com/2010/04/29/microsoft-to-get-20-to-40-from-every-htc-android-phone-sold/>.

⁹⁵ Such agreements would not seem to implicate the Compact Clause of the U.S. Constitution. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .”). Under current Supreme Court jurisprudence, only agreements “tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States” need the consent of Congress. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

⁹⁶ See Ku et al., *supra* note 78, at 1671 (describing the justification for increasing intellectual property rights).

⁹⁷ Energy Tomorrow TV Campaigns, *The Benefits of Increasing U.S. Oil & Natural Gas Production*, YOUTUBE (Jan. 28, 2009), http://www.youtube.com/watch?v=rj6jYchguoM&feature=youtu_gd%20ata.

2. *Attention for Ignored Fields of Law*

In addition to boosting across-the-board incentives to experiment, the ability of states to license their innovations might focus particular attention on long-overlooked areas of public policy. Recall that the reelection cycle—the current mechanism of stimulating legal innovation—encourages legislatures to concentrate their efforts on solving problems that are quickly fixed and easily measurable. These tasks, however, are not always socially useful or even minimally important.⁹⁸ The potential rewards of licensing could shift legislatures' attention, at least slightly, toward less conspicuous but perhaps more material problems. For example, although the regulation of sewers, sidewalks, and electrical grids remains essential to the functioning of nearly every modern polity, such issues currently receive little attention from local officeholders.⁹⁹ Under a system of property-in-law, however, municipal governments should scramble to reexamine how they administer these overlooked and often underfunded resources, as the first jurisdiction to uncover a more efficient statutory scheme could license its innovation to hundreds of other cities and towns. Thus, changing the incentives of governments through intellectual property would not only result in more innovation, but would create more innovation along a wider horizon of policy areas.

3. *Gaining Expertise*

Finally, it is worth noting that a property-in-law scheme offers cities and towns yet another incentive to innovate—the benefits derived from successful new laws would extend well beyond the temporary period of exclusive control. As professor Ayres has articulated, a jurisdiction that can prevent rivals from quickly replicating its legal innovations may produce opportunities for its citizens and government officials to develop lasting expertise in a particular field.¹⁰⁰ In the corporate law context, for example, Delaware has labored to create a scheme of business regulations that “other

⁹⁸ Timothy Besley, *Paying Politicians: Theory and Evidence*, 2 J. EUR. ECON. ASSOC. 193, 197 (2004).

⁹⁹ The history of Lexington, Kentucky provides a prototypic example. Historians note that the city has experienced problems with the sewer system “since the founding of the town.” Yet, the town continues to postpone action on funding a solution. See JOHN D. WRIGHT JR., *LEXINGTON: HEART OF THE BLUEGRASS* 174 (1982); see also Stephen Clowney, Note, *A Walk Along Willard: A Revised Look at Land Use Coordination in Pre-Zoning New Haven*, 115 YALE L.J. 116, 119 (2005) (“[S]tories about street grids, subdivision regulations, and building codes rarely make the front page . . .”).

¹⁰⁰ Ayres, *supra* note 5, at 548.

states cannot readily duplicate.”¹⁰¹ Any jurisdiction hoping to compete with Delaware must first match its carefully crafted statutes, well-developed case law, and its specialized court system—an expensive and protracted endeavor.¹⁰² As many other scholars have explained, when Delaware executes new innovations, its attorneys and courts have time to “develop familiarity with [the] law before their competitors in other states.”¹⁰³ This advantage often persists even if other states eventually manage to imitate Delaware’s behavior, as Delaware actors use their head start to cultivate both authentic expertise and a reputation of providing excellent legal products and services.

A recent article from Professors Bronnenberg, Dhar, and Dubé demonstrates the enduring power and importance of such head starts. In an innovative study, the authors gathered data on the success of forty-nine brands of consumer goods in different geographic markets dating back to the late 1800s.¹⁰⁴ They found a striking correlation between when a brand entered an area and its current market share and reputation for quality in that region.¹⁰⁵ The authors argue that nationally distributed brands have stronger “market shares in markets that are geographically close to their city of origin and smaller market shares in markets far away from the city of origin, where they were typically launched later.”¹⁰⁶ What is, perhaps, most surprising about the Bronnenberg, Dhar, and Dubé article is how long the advantages of “being first” often last. Heinz Ketchup started in Pittsburgh in 1876 and it still holds an edge there, relative to other cities.¹⁰⁷ Similarly, Miller Beer first came to Chicago in 1856 (a very early entry date) and maintains a market share advantage there, again, relative to other cities.¹⁰⁸

Intellectual property in the content of the law could provide all trailblazing states and municipalities with a similar advantage. Property-in-law would, in effect, create an artificial head start period for legal innovators, an advantage they currently lack because statutes remain so easy to reproduce. During the period of exclusive control over a statutory scheme, experimenting jurisdictions would have time to develop detailed knowledge of a law’s shadings and nuance, its subtleties and contradictions. Such

¹⁰¹ Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 Mo. L. REV. 299, 340 (2004).

¹⁰² *Id.*

¹⁰³ Galle & Leahy, *supra* note 23, at 1363.

¹⁰⁴ Bart J. Bronnenberg, Sanjay K. Dhar & Jean-Pierre H. Dubé, *Brand History, Geography, and the Persistence of Brand Shares*, 117 J. POL. ECON. 87, 89 (2009).

¹⁰⁵ *Id.* at 90.

¹⁰⁶ *Id.* at 110.

¹⁰⁷ *Id.* 99–100.

¹⁰⁸ *Id.* at 100.

expertise—developed during the course of months or years—could not be quickly or easily copied by rivals. As a result, even after the limited period of monopoly rights expired, innovative states would hold at least a temporary edge over outside jurisdictions that choose to reproduce the text of their laws.¹⁰⁹ To the degree that reputational effects endure, this advantage of “being first” may last longer than the time in which the creative state’s actual expertise remains superior.¹¹⁰

Thus, looking at the sweep of evidence, it seems that intellectual property rights in the content of the law would offer states and municipalities three broad advantages that should stimulate innovation. First, during the period of exclusive control, trailblazing states could generate new revenues by choosing to prevent others from replicating their advances or selling the use of their statutory schemes to others. Of equal import, property-in-law would give jurisdictions motivation to focus attention on previously underserved areas of the law. Finally, the artificial “head start” imposed by intellectual property would grant an innovator adequate time to establish a reputation for providing first-rate legal products. The opportunity to develop stature as a legal pioneer—perhaps becoming the jurisdiction with the most sophisticated small business regulations—could draw investment well after a period of monopoly control.

4. *Are the States Rational Economic Actors?*

My argument that property rights will boost the number of legal experiments presumes that local governments are rational economic actors that will respond to increased monetary incentives. Perhaps unsurprisingly, this assumption remains hotly contested. Some scholars—especially those working out of the law & economics tradition—agree that cities and states relentlessly pursue the economic self-interest of existing community residents.¹¹¹ On the other side of the debate, academics schooled in public

¹⁰⁹ See William W. Bratton & Joseph A. McCahery, *An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition*, 54 WASH. & LEE L. REV. 629, 679 (1997).

¹¹⁰ Galle & Leahy, *supra* note 23, at 1363.

¹¹¹ For example, in his influential article, *A Pure Theory of Local Expenditures*, Charles Tiebout contends that municipalities act according to welfare-maximizing principles. “[C]ommunities below the optimum size,” Tiebout says, “seek to attract new residents to lower average costs. Those above optimum size do just the opposite.” Tiebout, *supra* note 1, at 419; see also Dennis Epple & Allan Zelenitz, *The Implications of Competition among Jurisdictions: Does Tiebout Need Politics?*, 89 J. POL. ECON. 1197, 1204 (1981) (assuming a profit-maximizing local government); Michelle J. White, *Fiscal Zoning in Fragmented Metropolitan Areas*, in FISCAL ZONING AND LAND USE

choice theory contend that the economists' argument is naïve, and that any model that treats a jurisdiction as a single rational economic actor is immediately suspect.¹¹²

This critique is worthy of serious consideration. Are states actually rational decisionmakers that pursue opportunities to maximize revenue and aggregate welfare? At first glance, the skeptics' position appears to have some theoretical vigor. As Professor Sterk explains, "[t]he public officials who make municipal decisions are politicians, not automatons."¹¹³ Although some of these elected officials will surely seek to maximize the aggregate wealth of their communities, many opportunistic and career-motivated representatives will choose to pursue other agendas, such as satisfying personal vendettas or promoting the interests of wealthy campaign donors.

It is important, however, to keep the system's faults in perspective. Although state governments may differ in some respects from the rational actors that economists normally envision, in most jurisdictions the goal of attracting new revenue is shared by enough of a community's various stakeholders to ensure that legislatures will pursue opportunities for economic gain.¹¹⁴ The proof is scattered throughout the academic literature. Multiple studies across different disciplines have demonstrated that jurisdictions will innovate, often quickly and decisively, in response to economic incentives similar to those offered by intellectual property. I now offer three quick examples.

The interstate competition for business and industry is, perhaps, most instructive. Local governments are intensely motivated to secure the siting of industrial factories within their borders; the opening of a major new plant comes swaddled in promises of increased employment, brisk local growth, and enduring prosperity.¹¹⁵ Faced with such strong incentives to act, state

CONTROLS 31, 38–44 (Edwin S. Mills & Wallace E. Oates eds., 1975) (discussing municipal incentives to engage in revenue-maximizing zoning).

¹¹² Nobel Laureate economist George Stigler makes the point that "no matter how disinterested the goal of public policy, the policy is bent to help politically influential groups at the cost of the less influential." GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 119 (1988).

¹¹³ Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 835 n.19 (1992).

¹¹⁴ Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 531–32 (1991).

¹¹⁵ See, e.g., William J. Barrett VII, *Problems With State Aid to New or Expanding Businesses*, 58 S. CAL. L. REV. 1019, 1028 (1985) (noting that "states immediately acquire new industry and jobs"); Mark Taylor, *A Proposal to Prohibit Industrial Relocation Subsidies*, 72 TEX. L. REV. 669, 670 (1994); *AEHI's Second Nuclear Site Continues to Move Forward in Idaho*, IDAHO BUS. REV., Apr. 6, 2010, available at <http://idahobusinessreview.com/2010/04/06/aehis-second-nuclear-site-continues-to-move-forward-in-idaho/> (describing the promise of new jobs brought by nuclear reactor).

and local governments have created a dizzying array of inducements to draw businesses: property tax abatements, wage subsidies, infrastructure improvements, below-market loans, and outright grants of land.¹¹⁶ Regulatory concessions, especially the rollback of environmental standards, are also commonly included in these bundles of goodies.¹¹⁷ The varied and creative responses to the problem of attracting jobs, I argue, lends credence to the argument that intellectual property in the text of the law would spark innovation. It appears that states behave rationally; as the density of incentives to innovate increases, they become more and more willing to experiment.

This conclusion is furthered by municipal struggles to attract new residents. Just like retailers compete for customers by offering lower prices or better customer service, cities and states must “compete” for citizens by offering particular levels and combinations of public goods.¹¹⁸ Local legislatures that fail to provide attractive bundles will steadily lose tax revenue, as mobile citizens go in search of better deals.¹¹⁹ Confronted with a sharp incentive—the threat of population loss—states and cities have once again rushed to innovate. Numerous studies have demonstrated that municipal governments have created a “wide variety” of “significantly different” revenue/expenditure patterns.¹²⁰ Determined to lure new citizens and retain longtime residents, jurisdictions offer a creative range of public services, especially those relating to spending on education, public health, housing, park maintenance, libraries, and welfare.¹²¹

Before moving the argument along, I offer one final example to cement the point that governments will innovate aggressively if offered the correct incentives. Corporate law scholars have discovered a correlation between the

¹¹⁶ See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271, 319 (1997); Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 383–84 (1996).

¹¹⁷ Engel, *supra* note 116, at 279.

¹¹⁸ The idea that municipalities compete for residents stems, in large part, from the work of Charles Tiebout. See generally Tiebout, *supra* note 1. Although Tiebout’s observations have come in for much criticism, his core insight “enjoys wide acceptance.” Been, *supra* note 114, at 517.

¹¹⁹ Some strong evidence suggests that consumers examine a community’s tax and expenditure package when choosing a place to live. See, e.g., Wallace & Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957, 959 (1969) (showing that all other things being equal people choose a place to live based on tax and service package).

¹²⁰ Been, *supra* note 114, at 513, 520.

¹²¹ *Id.* (discussing Mark Schneider, *Resource Reallocation, Population Movement and the Fiscal Condition of Metropolitan Communities*, 61 SOC. SCI. Q. 545, 559 (1980)).

percentage of revenue a state generates from its franchise tax and the responsiveness and speed of a state in designing and enacting legal innovations that affect business.¹²² Put differently, the more a state's treasury depends on attracting business incorporations, the more corporate law innovations it will craft. Delaware, for example, raises more than \$500 million per year—over 15% of its total revenue—from the corporate franchise tax.¹²³ Unsurprisingly, the state has been a “consistent innovator”¹²⁴ and holds an “unrivalled position for speedy implementation of innovative legal rules.”¹²⁵ Conversely, states that fail to generate significant sums from the franchise tax are often among the last jurisdictions to modernize their corporate laws.

Each of these three examples—the competitions for factory sittings, residents, and incorporations—bolsters the theoretical foundation of the property-in-law proposal; states rationally weigh the risks of legal change and will alter their behavior in response to strong incentives to innovate. Thus, if property-in-law provides lush enough bouquets of incentives, cities and states will begin to reach for them.

C. The Effect of Intellectual Property on Local Legislators

The previous section demonstrated that local governments, as a whole, would benefit from intellectual property rights in the text of their statutes. Although vital to my argument, this insight—without more—fails to ensure the efficacy of the property-in-law idea. Getting out of Egypt is different than getting out of Egypt and into Canaan; any scheme that hopes to boost the level of innovation among local governments should also boost the incentives that individual politicians have to innovate.

Recall that elected officials are not perfect agents of the public—they often shun legal experiments even when the communities they represent would benefit from increased risk-taking. Of course, this principal/agent problem is not unique to local government.¹²⁶ Corporate law scholars have long recognized that managers, anxious about retaining their salaried positions, assume far fewer risks than diversified shareholders would

¹²² Romano, *supra* note 21, at 240–42.

¹²³ Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125, 135 (2009) (stating that Delaware earned \$543 million in franchise taxes during 2008); Romano, *supra* note 21, at 240.

¹²⁴ Romano, *supra* note 21, at 246.

¹²⁵ *Id.* at 260.

¹²⁶ For a discussion of agency relationships in local politics, see Edward C. Banfield, *Corruption as a Feature of Governmental Organization*, 18 J.L. & ECON. 587, 587 (1975).

prefer.¹²⁷ A traditional solution to this dilemma is to design compensation packages that reshape the interests of managers and direct their energies toward socially optimal tasks.¹²⁸ Stock option plans, for example, expose managers to the same risks and rewards as shareholders, and provide incentives to maximize shareholder wealth and stock prices.¹²⁹ I now argue that a property-in-law scheme could serve a similar function in local government law. A properly devised system of intellectual property rights could transform the behavior of politicians by providing additional incentives for individual legislators to introduce new legal ideas.

1. *The Strong Form Approach*

The ideal plan to boost innovation would grant creative legislators some added share of the spoils when their handiwork proves successful. Property-in-law offers an obvious and direct means to accomplish this end. As discussed earlier, the crux of my proposal is that states earn fees by selling their legal innovations to rivals. Without much fuss, the law could extend the benefits of such a system to individual politicians; legislators could receive a small percentage of the licensing fees generated from any statute or regulatory scheme they help design. For example, if Pittsburgh sold a land use innovation to both Portland and Poughkeepsie, the politician who drafted the legislation would garner a royalty from each transaction. The availability of market-based rewards would, almost certainly, enhance every elected official's motivation to produce socially useful legal ideas, and then invest the time, staff, and capital needed to push those innovations through the legislative process. Put simply, the more successful innovations a legislator created, the richer she would become.

The use of monetary levers to produce desirable policy outcomes is not as foreign a concept as it may initially seem. The historical record provides ample precedent. In ancient Athens, for example, politicians were financially liable for their failed policy experiments.¹³⁰ And in medieval Venice, upon the death of the city's leader—the doge—an appointed committee could levy

¹²⁷ Henry T.C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1351–52 (2007).

¹²⁸ See Randall S. Thomas & Kenneth J. Martin, *The Effect of Shareholder Proposals on Executive Compensation*, 67 U. CIN. L. REV. 1021, 1031 n.40 (1999).

¹²⁹ Larry E. Ribstein, *The Uncorporation and Corporate Indeterminacy*, 2009 U. ILL. L. REV. 131, 136 (2009) (relating that “corporate managers and directors get most of their incentive compensation in the form of stock options”).

¹³⁰ On the rare occasion, Athenian officials even faced execution when the assembly of citizens deemed their performance in office unsatisfactory. HANS GERSBACH, *DESIGNING DEMOCRACY: IDEAS FOR BETTER RULES* 8 (2003).

finer on his heirs for any failure to uphold the oath of office.¹³¹ Of course, the attempts of these societies to induce successful innovations are not on all fours with the property-in-law idea. Both Athens and Venice incentivized action through monetary threats—politicians (or their kin) received punishments when they performed poorly. The property-in-law approach builds on this idea but takes the opposite tack, rewarding legislators for excellent performance rather than penalizing their follies. Nonetheless, the survival of both the Athenian and Venetian systems for centuries provides a clear historical parallel for using market incentives to shape modern political behavior.

It is also worth noting that the use of monetary incentives has begun to gain traction in modern democracies as well. In Germany, the head of the Liberal Party of Baden-Württemberg, proposed that the members of the cabinet should suffer a pay cut of 10%–30% if they fail to meet certain objectives promised during the campaign season.¹³² Similarly, in Canada, the federal government has set up a program that compares government accomplishments to politicians' promises; the earnings of certain officials are then pegged to this performance measure.¹³³

Despite the original success and recent revival of market-based incentives,¹³⁴ some scholars will surely have doubts about the wisdom of monetizing the work of elected representatives. Two very practical objections leap to the fore. First, skeptics could charge that the plan is, at best, ineffectual. Politicians, so the argument goes, are not primarily motivated by the desire to advance their own economic self-interest, but rather by the opportunity to promote the public interest or their political

¹³¹ FREDERIC C. LANE, *VENICE: A MARITIME REPUBLIC* 95 (1973).

¹³² Gersbach & Liessem, *supra* note 19, at 410 (citing Birgit C. Homburger, Speech at Traditional Three Kings Rally (Jan. 6, 2005)). Homburger argued that members of the cabinet should sign contracts that lay out the aims of the government. *Id.* A failure to meet those goals would result in a loss of 10%–30% of their salary. *Id.*

¹³³ In the province of Manitoba the salary of each member of the Executive Council is dependent on the exercise of fiscal discipline during prescribed periods. Gersbach, *Incentive Contracts*, *supra* note 19, at 87. Also, a growing literature exists on incentive contracts for central bankers. See Gersbach & Liessem, *supra* note 19, at 402.

¹³⁴ Any policy that raises the wages of legislators can have other salubrious effects on the political system. Empirical evidence is weakly encouraging that higher pay rates attract higher quality candidates, create a more diverse set of officeholders, and lead to higher quantities of legislation. See Besley, *supra* note 98, at 199, 207; David L. Sollars, *Institutional Rules and State Legislator Compensation: Success for the Reform Movement?*, 19 LEGIS. STUD. Q. 507, 517 (1994) (showing that "improved wages might attract better candidates").

ideology.¹³⁵ Therefore, any plan that relies on monetary incentives to change politicians' behavior will fail. An overwhelming volume of recent literature demonstrates that this critique is naïve. Economists, political scientists, and legal academics all agree that politicians respond to a complex stew of incentives, including a strong desire to feather their own nests.¹³⁶ Academics have even argued that "self-interest is the exclusive causal agent in politics."¹³⁷ That statement is perhaps putting it a bit strongly. However, it remains "no secret or surprise" that elected leaders often attempt to maximize personal gain while acting in a legislative capacity.¹³⁸ Property-in-law would channel such narrow, self-interested energy into socially useful behavior—the production of needed legislation.

The second criticism is more substantial. Doubters may argue that rewarding individual elected officials for their ingenuity would spark a volley of strategic behavior among state and local legislators. Politicians in search of monetary gain could, conceivably, ram new statutes through the legislature without regard to the wisdom or effectiveness of their ideas. This concern, however, eventually runs aground on the facts. Any legislator hoping to benefit from property-in-law must overcome two hurdles that limit the potential for quick profits and strategic lawmaking. First, under a property-in-law regime, elected officials would only benefit if another jurisdiction purchased a statute they created. The market system created by intellectual property would, in theory, only reward truly thoughtful and novel concepts—not jerry-rigged, quickly enacted legal ideas. The structure of the market would also effectively bind the hands of potential colluders; wrongdoers would not only need to manipulate their own legislature, they would have to illicitly secure the votes of politicians from a distant, outside

¹³⁵ The notion that "political service is a calling and that money is a distraction" is an old idea. Besley, *supra* note 98, at 195. An article from a 1945 edition of *The Idaho Statesman* captures the feeling well:

The best of our public officials [sic] don't seek their positions for the money. There are other and infinitely [sic] greater rewards. For a senator who can win it, there is the respect of his ablest colleagues, and that is something no money-chaser has ever had. There is his own respect to win and keep, and his conscience to live with, while devoting himself faithfully to the welfare of his country.

Vardis Fisher, *Salaries of Politicians*, THE IDAHO STATESMAN, Jan. 16, 1945, available at <http://library.boisestate.edu/special/fishercolumn/number8.htm>.

¹³⁶ See, e.g., Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 797 (1995) (explaining how state officials often act in a self-interested manner).

¹³⁷ Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 893 (1987).

¹³⁸ Guy Halfteck, *Legislative Threats*, 61 STAN. L. REV. 629, 646 (2008).

jurisdiction as well—a difficult task for even the most well-funded corporate interests.¹³⁹

A second trap awaits legislators hoping to manipulate the system—all politicians would continue to face the pressure of periodic election campaigns. Voters could punish officials who devote time and effort to enacting unnecessary or impractical laws in the pursuit of personal gain. To illustrate, imagine a politician from a landlocked state who drafts maritime legislation in hopes of selling the idea to coastal rivals. Such obviously strategic and self-interested actions would invite mocking from political opponents, and could ignite the anger of voters concerned about the waste of public resources. Similarly, any legislator who endorsed the purchase of unneeded legislation as part of some quid pro quo with an outside jurisdiction would risk kindling the scorn of their constituents and losing their next bid for reelection.

In short, greater commoditization of the law would significantly expand elected officials' incentive to innovate without imposing significant social costs. Both the threat of reelection and use of market-based principles to reward elected officials would mitigate the threat of strategic lawmaking.

2. *The Weak Form Approach*

For observers with serious concerns about granting elected officials a monetary stake in legislation, property-in-law could also offer a weak form approach to ensure that politicians have sharper incentives to innovate. The basic idea is that property-in-law would give ambitious politicians another accomplishment to highlight during their election campaigns. Recall that “[b]ecause politicians are concerned with getting reelected, they have limited time horizons, leading them to ‘prefer policies that yield tangible benefits for constituents in the near term.’”¹⁴⁰ Property-in-law would incentivize additional innovation from legislators by making the benefits of complex

¹³⁹ Capturing multiple local jurisdictions is difficult for two reasons. First, local jurisdictions have very different sets of interest groups, exerting different pressures on elected officials. A potential influencer would need to master all of these relationships in multiple areas. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 22–23 (2007) (explaining that disparate jurisdictions have very different sets of interest group pressures). Second, it is the case that the residents of local governments have greater capacity to prevent capture by special interest groups. See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297 (2007) (explaining that constituents of local jurisdictions can ensure responsiveness by monitoring local officials and exercising exit).

¹⁴⁰ Ben Depoorter, *Horizontal Political Externalities: The Supply and Demand of Disaster Management*, 56 DUKE L.J. 101, 111 (2006) (quoting RICHARD A. POSNER, CATASTROPHE 137 (2004)).

legislative achievements more easily digestible to the average voter. Imagine, for instance, a politician who devises an inspired but rather byzantine plan to create a default investment standard for trust instruments—a plan so effective that other jurisdictions will insist on copying it but that few voters will easily grasp. In a world without property-in-law the legislator may not make the effort to convert her good idea into a bill—a statute that cannot be cogently explained to constituents does not create any lasting goodwill from voters or increase the odds of victory in subsequent elections.¹⁴¹ In short, the time, effort, and costs required to shepherd the idea through the legislative gauntlet vastly outweigh any potential benefit to an individual elected official, leaving the imaginative proposal abandoned.

Intellectual property in the text of the law, however, could change the calculus and upend the hunger for minor—but easily visible—achievements. Under a property-in-law regime, rather than needing to explain the benefits of a complicated regulatory scheme, politicians could boast of the abundant licensing fees generated by their successful innovations. Low-information voters might not grasp the details of trust investment standards or property exemptions in bankruptcy proceedings, but even the least sophisticated citizens can understand and appreciate a tabulated list of earnings generated by a politician's creativity. Moreover, just as law professors use citation counts as a shorthand method of measuring the influence of their ideas,¹⁴² licensing fees would give voters a proxy for evaluating and comparing the quality of elected officials.¹⁴³ In theory, every state legislature and individual elected official could be rank-ordered on an "inventiveness index." Such an index would not only reveal to voters the inventiveness of state officials, but it would demonstrate how much their state innovates compared to its neighbors. If we assume that no one wants to end up at the bottom of the list, an "inventiveness index" based on licensing fees could further push individual legislatures to innovate at a socially optimal level.¹⁴⁴

¹⁴¹ Sollars, *supra* note 134, at 509 (arguing that it is difficult to measure a legislature's effectiveness when inputs and outputs are vaguely defined).

¹⁴² See J. M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843, 844 (1996) (noting the irresistible lure of citation counts).

¹⁴³ Professor Gerken has suggested that "[t]here's no reason that state[s] and localities, with adequate financial support and the help of nonprofit groups" could not collect information and put together a "democracy index," ranking how well states run their elections. HEATHER K. GERKEN, *THE DEMOCRACY INDEX* 141 (2009). The same would seem true of an inventiveness index.

¹⁴⁴ For better or worse, the *U.S. News* annual rankings of law schools shows the power of such lists. See generally Stephanie C. Emens, Comment, *The Methodology & Manipulation of the U.S. News Law School Rankings*, 34 J. LEGAL PROF. 197 (2009).

IV. THE SPREAD OF LEGAL INVENTIONS

Skeptics of property-in-law still have several bridges to defend their fortress. Most notably, this Article has yet to fully address the consequences that would result from granting local governments intellectual property in the content of their laws. One criticism looms large. Opponents may charge that government ownership of the law would slow the spread of successful legal reforms from one jurisdiction to the next.¹⁴⁵ For instance, in a market for legal ideas, a creative jurisdiction like California might hesitate to sell its breakthroughs to Nevada and Washington—places that routinely compete with the Golden State for residents, tourist dollars, and industry relocations.¹⁴⁶ Conversely, copycats may refuse to pay expensive fees for the use of newly developed statutes. A real danger is apparent. In the aftermath of property-in-law, important legal innovations may fail to reach all jurisdictions, coagulating instead in little oases, like drops of water on a hot surface. Such clustering of legal ideas would then impose a throng of harsh consequences on the citizens of less innovative jurisdictions—in the aftermath of intellectual property they may find themselves denied access to regulatory schemes that would improve their health, boost their educational opportunities, and safeguard their persons.

I acknowledge this criticism—that property-in-law prevents the quick broadcast of legal advances—merits close scrutiny. Yet, in the end, I argue that the complaint does little to derail the case for property rights in law. First, the critique roundly ignores the states' ability to bargain to mutual advantage. There are both strong practical and theoretical reasons to believe that creative jurisdictions will strike agreements with copycats to ensure the spread of successful procedures. Second, if private ordering among the states fails, the federal government could step in and establish a mandatory licensing system to guide property-in-law. Finally and importantly, even if the skeptics' position does hold water, property-in-law remains defensible. The benefit of creating new incentives for innovation outweighs any slowdown in the dissemination of statutory inventions; it is preferable to produce a great idea that travels slowly, rather than no idea at all.

¹⁴⁵ See, e.g., Gellman, *supra* note 22, at 1007–09 (arguing that “political criteria could be used to decide who may obtain a license”); Ghosh, *supra* note 22, at 704–05; Marvin J. Nodiff, *Copyrightability of Works of the Federal and State Governments Under the 1976 Act*, 29 ST. LOUIS U. L.J. 91, 93 (1984); Schwartz, *supra* note 22, at 335.

¹⁴⁶ See, e.g., Evan Halper, *Officials Find Nevada Ads ‘un-Bear-able’*, L.A. TIMES, Mar. 30, 2008, at B1; Andrew Sirocchi, *Washington Remains Popular Place to Live*, TRI-CITY HERALD, Apr. 20, 2006, at A1.

A. State Agreements

The singular difficulty with the argument that property-in-law dams the free flow of ideas is that it misjudges states' ability to negotiate with their peer jurisdictions. Commentators assume far too quickly that state and local governments will act parochially and refuse to sell their innovations to competitors, stalling the efficient movement of the law.¹⁴⁷ Although this assumption has some intuitive appeal, it seems based on a naïve understanding of how governments interact, and flounders when confronted with the steel of evidence. To illustrate, imagine that Suburbville recently composed a law that has vastly reduced the murder rate within its borders. Impressed with the dramatic results, Urbansburg—a neighboring metropolis with few resources—asks to license use of the advance. What will transpire? Both theory and the observed behavior of municipalities suggest that such jurisdictions will quickly reach an agreement, assuring that all polities have access to the statutory breakthroughs they need.

Geography provides a partial explanation. Neither Suburbville nor Urbansburg can vacate its physical position. Like a set of conjoined twins, they remain stuck in a permanent relationship that encourages compromise.¹⁴⁸ This strongly encourages deal-making, as a refusal to bargain in any one interaction exposes the un-neighborly actor to retaliation in subsequent situations.¹⁴⁹ For example, if Suburbville declines to offer the criminal law reform at a price Urbansburg can afford, the poorer neighbor might seek revenge through self-help measures; it could sit a garbage dump on the border, spread rumors about Suburbville's finances, or encourage its citizens to give money to more pliable politicians.¹⁵⁰ In the jargon of game theory, governments are locked into long-term, repeat player relationships with little opportunity to exit. In plain English, cities and states have sharp incentives to compromise with rivals; they either sell their legal inventions to others, or brace themselves for a cycle of needless reprisal and retribution.

¹⁴⁷ Professor Gillette has noticed a thread in the local government literature pushing the position that "localities self-interestedly attempt to exploit each other." See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 236 (2001).

¹⁴⁸ *Id.* at 247–48 ("Suburbs, fixed in their geographical position, must deal with their neighbors into the infinite future."); see also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 27–54 (1984) (describing the incentives for working together in a Prisoners' Dilemma).

¹⁴⁹ Gillette, *supra* note 147, at 247–48.

¹⁵⁰ See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 734 (3d ed., 2005) (suggesting that nonresident individuals can induce their own local officials to pressure outside jurisdictions to follow their preferences).

The growing interdependence of local governments also weighs in favor of deal-making that spreads legal innovations.¹⁵¹ Recently, a surge of scholarly literature has put forth that failures in one jurisdiction often impose negative spillover effects on nearby localities.¹⁵² Studies observe, for example, that poor governance in a central city can reduce housing prices in nearby suburbs.¹⁵³ Similarly, mediocre school performance in one county can mar an entire region's capacity to attract industrial enterprises.¹⁵⁴ This observed intertwining suggests that creative jurisdictions will scramble to ensure that beneficial innovations reach their neighbors "if not out of altruism, then out of a desire to protect their own financial well-being."¹⁵⁵ Grosse Pointe will work to provide Detroit with up-to-date public health

¹⁵¹ For scholarship on the interdependence of jurisdictions, see LARRY C. LEDEBUR & WILLIAM R. BARNES, NAT'L LEAGUE OF CITIES, "ALL IN IT TOGETHER": CITIES, SUBURBS AND LOCAL ECONOMIC REGIONS (1993). In this report, the authors discovered that in the twenty-five metropolitan regions that experienced the most rapid income growth, central city incomes also improved. *Id.* at 6. Conversely, in the eighteen metro areas that experienced falling incomes, central city income declined in all but four places. *Id.* On the basis of this evidence, the authors put forth that "the economic fate and fortunes of cities and suburbs are inextricably intertwined." *Id.* at 4; see also NEAL R. PEIRCE ET AL., CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD 131–32 (1993); H.V. Savitch et al., *Ties That Bind: Central Cities, Suburbs, and the New Metropolitan Region*, 7 ECON. DEV. Q. 341, 341–52 (1993). The intertwining has not escaped the Judiciary. As then-Justice Rehnquist observed, "[t]he imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978).

¹⁵² See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1133 (1996) (noting that "local governments are sure to generate externalities"); Abigail R. Moncrieff, *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, 109 COLUM. L. REV. 844, 870 (2009) (noting that crime and environmental issues create significant spillover problems at the local level); Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537, 589 (2009) (arguing that nearly all local activities create spillovers); Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 495 (2009) (noting that localities produce pervasive negative spillovers).

¹⁵³ See Richard Voith, *City and Suburban Growth: Substitutes or Complements?*, BUS. REV. (Fed. Res. Bank of Phila.), Sept.-Oct. 1992, at 21 (discussing housing prices and competition between central cities and suburbs). A recent study using Chicago-area data found that allowing a cluster of foreclosures can affect property values a kilometer away. Zhenguo Lin et al., *Spillover Effects of Foreclosure on Neighborhood Property Values*, 38 J. REAL EST. FIN. & ECON. 387, 403 (2009).

¹⁵⁴ See, e.g., Natalie Cohen, *Business Location Decision-Making and the Cities: Bringing Companies Back* 15 (Brookings Inst., Working Paper No. 00:3, 2000), available at <http://www.brookings.org/ES/URBAN/cohen.pdf> (discussing commercial enterprises).

¹⁵⁵ Gillette, *supra* note 147, at 246.

codes; the prosperity of Towson, Maryland depends on lowering crime rates in West Baltimore; and Minneapolis can ill afford massive layoffs in St. Paul.¹⁵⁶

The argument that jurisdictions will work with rivals to spread their beneficial innovations does not rest upon theory alone. Empirical scholarship on interlocal agreements between cities and suburbs confirms that similar deal-making happens with surprising regularity.¹⁵⁷ In a recent article, Anita Summers examined twenty-seven large metro areas and discovered that (with the exception of Houston) each city achieved a notable degree of cooperation with its outlying suburbs.¹⁵⁸ More specifically, every area reached an agreement to coordinate the provision of some public services and engage in some form of regional tax sharing.¹⁵⁹ The frequency with which jurisdictions strike deals over these hotly contested issues suggests rather strongly that state and local governments will find accord over the provision of legal innovations—creative jurisdictions have both the proper incentives and the deal-making knowhow to get useful laws under the control of even the neediest government bodies.

B. *Compulsory Licensing*

Some scholars may complain that my analysis still leaves the health and welfare of ordinary citizens at the whim of markets and social norms. One bad actor—one rogue state—could, conceivably, curtail the transmission of

¹⁵⁶ See ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 51–59 (1994) (making the case that the welfare of suburbs is closely tied to central cities' ability to provide social and economic goods).

¹⁵⁷ See Gillette, *supra* note 147, at 234–36; Amnon Lehari, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 944 (2006) (noting that “[i]nterlocal agreements are prevalent for contracts for services”); Roger B. Parks & Ronald J. Oakerson, *Comparative Metropolitan Organization: Service Production and Governance Structures in St. Louis (MO) and Allegheny County (PA)*, 23 *PUBLIUS* 19, 27 (1993); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and The New Regionalism*, 78 WASH. L. REV. 93, 156 (2003) (“Intergovernmental cooperative endeavors are flourishing in metropolitan areas.”); Anita A. Summers, *Regionalization Efforts Between Big Cities and Their Suburbs: Rhetoric and Reality*, in *URBAN-SUBURBAN INTERDEPENDENCIES* 181–90 (Rosalind Greenstein & Wim Wiewel eds., 2000).

¹⁵⁸ Summers, *supra* note 157, at 181.

¹⁵⁹ *Id.* at 188–90. A notable example of a voluntary revenue-sharing scheme is the sales tax agreement between the City of Modesto and Stanislaus County. See *City & County Encourage Good Land Use Through Tax Sharing*, ASSOCIATION OF BAY AREA GOVERNMENTS (1998), <http://www.abag.ca.gov/planning/theoryia/cmprmodesto.htm>.

new laws by refusing to sell its advances to other jurisdictions.¹⁶⁰ Fortunately, the American intellectual property system provides a tool that can unlock the problems created when monopolists attempt to hoard innovations that benefit the public; the Federal Government has authority to establish systems of compulsory licenses.¹⁶¹

Under a compulsory license scheme, the government alters intellectual property rules to permit infringers to access works without the explicit consent of the intellectual property holder.¹⁶² The infringer, in exchange, must pay adequate compensation—normally a fee or royalty determined by federal statute.¹⁶³ Although compulsory licenses are often criticized for undermining innovators' absolute right to exclude,¹⁶⁴ they remain an established feature in American law. The current copyright statute, for example, applies mandatory licenses to a variety of genres: songs played on coin-operated jukeboxes,¹⁶⁵ cable television transmissions,¹⁶⁶ non-commercial broadcasting,¹⁶⁷ and the recording of cover songs.¹⁶⁸ Moreover, the Atomic Energy Act provides that the government may license any patents

¹⁶⁰ The looming fear is that California might refuse to share its innovations. "California has a record, probably unique in the number and subject-matter range, of legal innovations . . . that have broken new paths." Harry N. Scheiber, *California: Laboratory of Legal Innovation*, EXPERIENCE, Winter 2001, at 4; see also Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue*, 26A STAN. ENVTL. L.J. 181, 205–06 (noting that California is a leading innovator).

¹⁶¹ For a concise summary of the history of compulsory licenses, see Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L.J. 853, 857–64 (2003).

¹⁶² Terry K. Tullis, *Application of the Government License Defense to Federally Funded Nanotechnology Research: The Case for a Limited Patent Compulsory Licensing Regime*, 53 UCLA L. REV. 279, 307 (2005).

¹⁶³ See, e.g., 17 U.S.C. § 111(d)(1)(B) (2006) (discussing royalty fees for cable compulsory licenses); 17 U.S.C. § 119(c) (2006) (discussing royalty fees for satellite compulsory licenses).

¹⁶⁴ See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM L. REV. 1865, 1924 (1990) (discussing the compulsory license as a form of price regulation); William Henslee, *Marybeth Peters Is Almost Right: An Alternative to Her Proposals to Reform the Compulsory License Scheme for Music*, 48 WASHBURN L.J. 107, 118 (2008) (pointing out that a compulsory license limits a creator's bargaining power); Darlene A. Cote, Note, *Chipping Away at the Copyright Owner's Rights: Congress' Continued Reliance on Compulsory License*, 2 J. INTELL. PROP. L. 219, 232 (1994) (outlining criticisms of compulsory licensing).

¹⁶⁵ See 17 U.S.C. § 116 (2006); see also Scott M. Martin, *The Berne Convention and the U.S. Compulsory License for Jukeboxes: Why the Song Could Not Remain the Same*, 37 J. COPYRIGHT SOC'Y U.S.A. 262, 315 (1990).

¹⁶⁶ See 17 U.S.C. § 111(d) (2006).

¹⁶⁷ See 17 U.S.C. § 118 (2006).

¹⁶⁸ See 17 U.S.C. § 115 (2006).

related to the production of nuclear materials,¹⁶⁹ while the Clean Air Act allows for compulsory licensing of technology relating to the control of air pollution.¹⁷⁰

If the federal government replicated the insights of these programs in the property-in-law context, it could stave off the objection that intellectual property would halt the spread of worthy ideas. Congress could, for example, look to the recording industry for inspiration. Under 17 U.S.C. § 115, once a musician has recorded and released a song, any performer can craft a cover version, so long as they pay a statutory fee.¹⁷¹ The royalty rate for recordings is currently 9.1 cents per copy for songs under five minutes or 1.75 cents per minute, per copy for songs over five minutes.¹⁷² A similar, graduated fee structure—based on the word count of the statute or the resources of the copying jurisdiction—could determine the cost of using legal innovations.

Prescribed rates would have two positive effects. First, it would reduce transaction costs associated with the property-in-law scheme.¹⁷³ Inventive local jurisdictions would not need to invest significant resources in negotiating fees with each government that hoped to use its insights. A single, efficient clearinghouse—like the Harry Fox Agency, which controls most licensees in the music industry—could index and process all the intellectual property transactions.¹⁷⁴ Second, and more important for this discussion, a compulsory license scheme would guarantee that every state and local government had access to all of the legal innovations generated

¹⁶⁹ See 42 U.S.C. § 2183(b) (2006).

¹⁷⁰ See 42 U.S.C. § 7608 (2006) (stating that when a patent is needed to execute certain provisions of the Clean Air Act, a court “may issue an order requiring the person who owns such patent to license it on such reasonable terms and conditions as the court, after hearing, may determine”); see also Plant Variety Protection Act, 7 U.S.C. § 2404 (2006) (allowing for the denial of injunctive relief when the public good commands use of a protected plant); 35 U.S.C. § 203 (2006) (handing the federal government “march-in rights” on patents developed under a federal funding agreement).

¹⁷¹ See 17 U.S.C. § 115(a) (2006).

¹⁷² See U.S. Copyright Office, Copyright Royalty Rates, Section 115, the Mechanical License (2006), <http://www.copyright.gov/carp/m200a.html>.

¹⁷³ For more on compulsory licenses and transaction costs, see Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers, and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1137–38 (1977).

¹⁷⁴ For an explanation of the Harry Fox Agency, see Andrey Spektor, *How “Choruss” Can Turn Into a Cacophony: The Record Industry’s Stranglehold on the Future of Music Business*, 16 RICH. J.L. & TECH. 1, 30–31 (2009). In essence, songwriters allow publishers to administer their copyrights. Publishers, in turn, have “agents,” that issue licenses on their behalf. For a charge of 6.75% of the money collected, the Harry Fox Agency accounts to the publishers for the royalties it collects on their behalf. *Id.*

across the country.¹⁷⁵ The moment any legislature, from Bangor to San Diego, enacted a statute, any other jurisdiction could access and exploit the law, so long as they paid the statutory fee. Although this approach would mar legislatures' ability to charge monopoly prices for their innovations,¹⁷⁶ the use of compulsory licenses seems the best hope for compromise between parties that seek to increase incentives to innovate and those concerned about the easy movement of ideas.

C. Putting Benefits Onscreen

The preceding paragraphs defended property-in-law from the charge that it would slow the transmission of new legal concepts. However, the efficacy of the property-in-law proposal does not hinge on my defenses. One may accept the critics' claim that property-in-law temporarily encases legal advances in amber, yet still recognize that intellectual property rights over statutes produce valuable society-wide benefits.

A reminder of the costs and benefits of the existing system may help explain. Recall that under a system without intellectual property, useful legal ideas can quickly jump between jurisdictions; however, state and local governments have little incentive to produce creative statutes or new regulatory regimes. The scarcity of innovations then creates abundant trouble for so-called ordinary people: unjust legal regimes linger, problems go unsolved, and the law fails to adapt to new circumstances and technologies. A property-in-law regime changes—almost reverses—the cost-benefit calculus. Jurisdictions would craft new innovations in rapid-fire succession, but the most successful ideas might spread slowly from place to place. Arguably, the cost of the current system—a genuine scarcity of innovation—far outweighs the costs of a property-based regime. That is, a culture ripe with inventive ideas that spread slowly is preferable to a legal landscape that consistently fails to produce beneficial innovations.¹⁷⁷

¹⁷⁵ See Ginsburg, *supra* note 164, at 1926 (stating that the “real purpose of a compulsory license is to reduce the extent to which copyright ownership of the covered work conveys monopoly power”).

¹⁷⁶ Compulsory licenses are a “form of price regulation, and price regulation is generally considered administratively cumbersome, unlikely to arrive at a ‘correct’ rate, and contrary to [the law’s] overall free market philosophy.” *Id.* at 1924 (alteration in original).

¹⁷⁷ Take the case of zoning. While one example proves little, I hope that a brief review of the history of land use regulation will breathe some life into the discussion of the costs and benefits of the current system. Euclidian zoning—the most widespread method of land use control in the United States—has faced continued criticism from commentators of all political stripes since its inception. See Stephen Clowney, Note, *A Walk Along Willard: A Revised Look at Land Use Coordination in Pre-Zoning New*

Summing up, skeptics will likely suggest that property-in-law stalls the transmission of legal ideas—that it privileges the economic wellbeing of a few creative states over the health and welfare of citizens from less innovative jurisdictions. The charge, I argue, is faulty. But even if true, the benefits of increased innovation would overwhelm any damage caused by a slowdown in the spread of ideas.

V. THE CONTOURS OF GOVERNMENT INTELLECTUAL PROPERTY

The final part of this Article steps gingerly away from the world of theory and begins to sketch what a system of government-held intellectual property rights might look like. Ideally, the federal government would bake from scratch *sui generis* rules tailored to the particular needs of the property-in-law idea. Congress, however, “is not in the business of regularly creating novel intellectual property regimes,” and formulation of new rules seems especially unlikely here, given politicians’ risk aversion, general ignorance of the problem of underinnovation, and the lack of vested interests to lobby for new legal structures.¹⁷⁸ It is far more likely that state and local governments would seize current intellectual property paradigms to protect their legal advances.

With these constraints in mind, this section will focus on which available IP paradigm—copyright or patent—would better regulate government-held intellectual property claims. On first glance, patent protection seems the

Haven, 115 YALE L.J. 116, 123–24 (2005) (outlining the case against zoning). Despite the universal dissatisfaction with traditional zoning, local jurisdictions have produced remarkably few revisions to the basic land use system first implemented in the early twentieth century. Commentators describe conventional Euclidian zoning as “ubiquitous,” “virtually universal,” dominant,” and “remarkab[ly] persisten[t].” David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 881 (2009) (“Single-family zoning laws are ubiquitous . . .”); see also Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 648 (2006) (single-use zoning is the “dominant” paradigm); Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1018 (1996) (“remarkable persistence”); Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 263 (2006) (“[S]ingle use zoning . . . became virtually universal.”). Sifting through the comments from land-use scholars suggests jurisdictions concerned about zoning issues would have been better served by property-in-law. A system that encouraged innovations in the 1940s, 50s, and 60s—when the costs of zoning first became evident—and then let those changes slowly seep across the country, would have far outperformed the current legal regime that has proved so tentative and devoid of imagination and risk-taking. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 784–85 (2003) (“Practitioners and academics became aware of the failures of traditional zoning as early as the 1940s, while zoning was still in its infancy.”).

¹⁷⁸ Abramowicz, *supra* note 3, at 200.

more obvious choice. American courts (and the Patent & Trademark Office) have already recognized that many unconventional products and processes deserve patent protection—legal schemes should fold easily into the doctrine. Patents, moreover, offer a more robust set of rights than rival systems. Despite these advantages, I put forth that protecting legal inventions with some variant of copyright rules would create vastly better outcomes. Copyright is cheaper, simpler, more politically tenable, and still provides local jurisdictions with strong incentives to innovate.

A. *The Patent Paradigm*

A legislature that decides to claim intellectual property over the text of its statutes would, most likely, look instinctively to patent law to protect its legal inventions. Broadly speaking, the U.S. patent code provides that innovators may prevent rivals from making or using any new, useful, and non-obvious invention they devise.¹⁷⁹ This basic structure offers three primary advantages for jurisdictions seeking intellectual property in their statutory innovations.

First and foremost, patent would present local governments a broader set of protections than any other branch of intellectual property. It is a well-worn axiom that patents embrace entire ideas, whereas copyright merely protects the particular expressions of an idea.¹⁸⁰ The expansive set of rights provided by patent law would seem a boon to property-in-law and the mission of providing legislatures with strong incentives to innovate. A jurisdiction's greater control over the frequencies of the legal spectrum would allow it to engage in more exclusionary activity and, potentially, reap more licensing dollars.¹⁸¹

¹⁷⁹ See 35 U.S.C. §§ 101, 103(a) (2006).

¹⁸⁰ See, e.g., *Assessment Techs. of Wis., LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003) (stating “that patents tend to confer greater market power on their owners than copyrights do, since patents protect ideas and copyrights, as we have noted, do not”). This shorthand, though often invoked, is not technically correct. Patents do not protect ideas, rather, they protect inventions that manipulate ideas. See *Diamond v. Diehr*, 450 U.S. 175, 185 (1981). The underlying point, however, is correct; patents generally offer a broader set of protections than copyright. See, e.g., Maureen A. O'Rourke, *Striking a Delicate Balance: Intellectual Property, Antitrust, Contract, and Standardization in the Computer Industry*, 12 HARV. J.L. & TECH. 1, 32 (1998). But see Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN. L. REV. 439, 449 n.40 (2003) (making the case that in some circumstances copyright offers broader protection than patents).

¹⁸¹ Imagine, for example, that a state developed a new method of conducting foreclosure sales—the legislature required banks to hire real estate agents to sell foreclosed homes. Patent protection would grant a state ownership of the entire concept, not just the word-by-word expression of the technique. In short, the use of patent

The contours of patent law offer a second key advantage over copyright as a means of securing the handiwork of state and local governments. The startling range of newly issued patents suggests, strongly, that courts would uphold the validity of patents on legal innovations.¹⁸² The Patent and Trademark Office has, for example, already issued patents that cover a golf swing,¹⁸³ a method of administering a mortgage,¹⁸⁴ and a technique for fighting cancer¹⁸⁵—subjects that all seem unlikely candidates for intellectual property protection. Legal innovation patents could fit snugly within this menagerie. Indeed, coverage of statutory inventions would seem much less troublesome than the growing protection of gene sequences—the fundamental building blocks of human life.¹⁸⁶

The final significant advantage of patent over copyright as the lens to analyze property-in-law claims is that patent law generally requires inventors to reduce their creations to practice before commencing a lawsuit against copycats. This prerequisite seems entirely proper within the framework of property-in-law. After all, the anxiety driving this Article is that states and local jurisdictions will fail to implement new legal innovations, even when those innovations seem like good bets. A requirement that jurisdictions must enact the laws they propose before enforcing intellectual property claims ensures that cities and states will not only craft new legal concepts, but that they will possess the force of will to bring those ideas into practice.¹⁸⁷

B. Patent Problems

Despite the general vitality of patent law, it is a weak foundation to support the property-in-law apparatus. Employing patents to regulate legal ideas threatens to swamp local communities with needless costs—costs that

protection would increase the payoff for states that take risks in developing their laws and, hopefully, encourage more jurisdictions to experiment.

¹⁸² See John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139, 1139 (1999). Patent law has famously been described as protecting “anything under the sun” and currently seems “to embrace the broadest reaches of human experience.” *Diamond*, 450 U.S. at 182; Thomas, *supra*, at 1139.

¹⁸³ Method of Putting, U.S. Patent No. 5,616,089 (filed Mar. 29, 1996).

¹⁸⁴ System and Method for Implementing and Administering a Mortgage Plan, U.S. Patent No. 4,876,648 (filed Jan. 12, 1988).

¹⁸⁵ Drugs and Methods for Treating Diseases, U.S. Patent No. 5,456,663 (filed June 18, 1991).

¹⁸⁶ See, e.g., DNA Sequences Encoding Erythropoietin, U.S. Patent No. 4,703,008 (filed Nov. 30, 1984). Gene sequences have been identified by some scholars as an area in which “protection may create more harm than benefit.” Abramowicz, *supra* note 3, at 201.

¹⁸⁷ See Abramowicz, *supra* note 3, at 195–96.

may overwhelm any benefits generated by greater legal innovation. The dangers posed by patent-like rights break along two primary paths. First, government regulators seem likely to misapply patent rules to statutory innovations, lacing the lawmaking process with confusion and complexity. Second, patent law would require each jurisdiction in the country to conduct a “law patent” search before passing any new statute. This would, obviously enough, increase the cost of crafting laws and slow down the development of novel legal ideas.

1. *Patent Doctrines v. Property-in-law*

I begin my critique of patent-like rights by arguing that the process of filing and obtaining a patent is ill-suited to the property-in-law system. In contrast to copyright, patent protection is not self-executing. That is, inventors do not automatically acquire patent rights when they produce a new product or process. Instead, the law mandates that they apply for a patent through the United States Patent and Trademark Office (PTO). Patent examiners then review the applications and decide if the claimed inventions meet the new, useful, and non-obvious standards embedded in U.S. law.¹⁸⁸ The trouble for a property-in-law system is that these federal bureaucrats are likely to botch the application of the United States patent code to legal inventions. Specifically, the officials at the hub of this system will struggle to apply both the “new” and “non-obvious” prongs of the patentability standard to legal innovations, ultimately undermining the property-in-law system.

First, there are sound reasons to believe that the PTO will labor to separate truly new legal ideas from recycled concepts. Even in the best of circumstances, evaluating the novelty of an invention remains a tricky endeavor.¹⁸⁹ Typically, patent examiners compare prior inventions against the patent application, and then comb through the publicly available literature in their respective fields looking for references to similar processes or

¹⁸⁸ 35 U.S.C. §§ 102–103, 131 (2006). “During prosecution of a patent, a Patent Office examiner reviews an application to determine what is patentable. To be patentable an invention must meet all the statutory requirements for patentability: novelty, utility and non-obviousness.” Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 844 (1990). In addition, “[w]hile decisions regarding what [claims] to allow are constrained by a number of legal principles, and by the invention itself, in many cases the Patent Office has considerable room for discretion.” *Id.* at 840.

¹⁸⁹ As one commentator noted, “evaluating inventions in light of the statutory standards of patentability is a difficult and uncertain business, fraught with serious information problems and with shifting legal tests and frameworks, and it must take place against a backdrop of limited resources.” R. Polk Wagner, *Understanding Patent-Quality Mechanisms*, 157 U. PA. L. REV. 2135, 2146 (2009).

products. The difficulty for the property-in-law scheme is that the PTO has little prior experience with legal scholarship and lacks the institutional knowledge to properly evaluate which innovations meet the standard for novelty. As the PTO strains to familiarize itself with the long history of American jurisprudence and the statutes of all fifty American states, it seems likely that the office would issue intellectual property rights over a handful of stale legal techniques and reject genuinely new approaches to the law.

This concern has a sound footing in history. When the Federal Circuit Court approved “business method patents” in 1998, the PTO was suddenly tasked with evaluating the originality of business strategies.¹⁹⁰ Lacking a well-organized body of documents that described prior innovations, the Patent Office approved intellectual property protection for some antiquated and “shockingly mundane” business inventions.¹⁹¹ The most notorious example is probably Priceline’s Hotel Price Matcher patent, which inspired the following comment from a reader of *Forbes Magazine*: “Cool! [Priceline] has apparently patented the ‘business method’ know as a Dutch auction—a method by which the U.S. treasury sells hundreds of billions of dollars’ worth of securities each year.”¹⁹² A similar dynamic unfolded in the mid-

¹⁹⁰ See Kevin Schubert, *Should State Street be Overruled? Continuing Controversy over Business Method Patents*, 90 J. PAT. & TRADEMARK OFF. SOC’Y 461, 463–64 (2008). In a controversial decision, *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, the Federal Circuit accepted the validity of patents over new methods of doing business, including strategies for improving data management, e-commerce, and tax compliance. 149 F.3d 1368 (Fed. Cir. 1998). In a more recent decision, the Supreme Court has accepted that at least some business method patents remain eligible for patentability. See *Bilski v. Kappos*, 130 S. Ct. 3218, 3228–29 (2010). So-called “business method patents” have received much criticism from scholars. However, the Court determined that there was no sound reason to exclude business advances from the reach of patentable subject matter if they met the normal requirements of usefulness, novelty, and non-obviousness. *Id.* at 3229 (plurality opinion).

¹⁹¹ Rochelle Cooper Dreyfuss, Essay, *Are Business Method Patents Bad for Business?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 263, 268 (2000); see also John R. Allison & Emerson H. Tiller, *The Business Method Patent Myth*, 18 BERKELEY TECH. L.J. 987, 1013 (2003) (stating that much that qualifies as prior art for business method patents was located “outside the areas” in which the PTO had traditionally looked); Lois Matelan, *The Continuing Controversy over Business Methods Patents*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 189, 203 (2007). But see John R. Allison & Starling D. Hunter, *On the Feasibility of Improving Patent Quality One Technology at a Time: The Case of Business Methods*, 21 BERKELEY TECH. L.J. 729, 735 (2006) (arguing that, over the long term, business method patents have been “no more problematic than patents in other fields”); Allison & Tiller, *supra*, at 1004 (making the case that business method patents were “no worse than patents in general in the late 1990s”).

¹⁹² Byron L. Winn, *Readers Say*, *FORBES*, May 31, 1999, at 18, 18.

1990s during the rise of software patents.¹⁹³ Concerned onlookers claimed that the PTO struggled to identify relevant prior art and issued poor-quality patents.¹⁹⁴ In short, it seems that in the PTO, unfamiliarity encourages incompetence.

Second, patent examiners may struggle to apply the non-obvious standard to legal breakthroughs.¹⁹⁵ Under the patent code, the PTO must judge whether a particular invention would have been developed without the efforts of a specific inventor—obvious breakthroughs do not receive monopoly protection.¹⁹⁶ The difficulty, of course, is that such determinations are inherently subjective and infused with hindsight bias.¹⁹⁷ Many revolutionary insights appear foreordained when viewed through the prism of time,¹⁹⁸ increasing the probability that the PTO will improperly deny valid patent applications.

¹⁹³ For a definition of software patents, see John R. Allison & Ronald J. Mann, *The Disputed Quality of Software Patents*, 85 WASH. U. L. REV. 297, 309 (2007) (arguing that “a software patent is one in which at least one claim element covers data processing—that is, the act of manipulating data—regardless of whether the code carrying out that data processing is on a magnetic storage medium or embedded in a chip”). For a brief history of the rise of software patents see John R. Allison et al., *Software Patents, Incumbents, and Entry*, 85 TEX. L. REV. 1579, 1581–93 (2007).

¹⁹⁴ See Allison et al., *supra* note 193, at 1623 (noting concern that the PTO had difficulty identifying prior art in areas like software patents); Arti K. Rai et al., *University Software Ownership and Litigation: A First Examination*, 87 N.C. L. REV. 1519, 1521 (2009) (noting that many observers believe “the poor quality of prior art documentation and patent examiner training in the area of software” results in low-quality patents). *But see* Allison & Hunter, *supra* note 191, at 758–89 (suggesting that the PTO’s failures are systematic rather than confined to any one particular area).

¹⁹⁵ 35 U.S.C. § 103(a) (2006); *see also* *Graham v. John Deere Co.*, 383 U.S. 1, 17–19 (1996) (setting forth the nonobviousness analysis).

¹⁹⁶ Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1393, 1403 (2006) (arguing that the “reasons for the non-obvious requirement are evident: trivial advances will be achieved without the necessity of a patent incentive, and trivial advances do not benefit society enough to warrant imposing the costs of a patent monopoly on the public”).

¹⁹⁷ *See id.* at 1403 (concluding that hindsight bias has a surprisingly strong grip over patent disputes—juries, judges, and patent examiners all seem to lack the cognitive tools necessary to make equitable decisions on the nonobviousness prong of the patent test); *see also* Gregory N. Mandel, *Another Missed Opportunity: The Supreme Court’s Failure to Define Nonobviousness or Combat Hindsight Bias in KSR. v. Teleflex*, 12 LEWIS & CLARK L. REV. 323, 324 (2008).

¹⁹⁸ As the Supreme Court has noted: “Knowledge after the event is always easy, and problems once solved present no difficulties, . . . and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready . . . to be seen by a merely skillful attention.” *Diamond Rubber Co. of*

There are reasons to believe that the problem of hindsight bias that infects the nonobvious standard would pose an especially pernicious obstacle for patent officials assigned to cover legal issues. Unlike examiners tasked with evaluating the obviousness of scientific breakthroughs, officials designated to appraise legal innovations would not have the benefit of a clear set of technological standards to assess prior inventions, nor could they rely on the assumption that the profit motive drives most innovators. Instead, patent examiners would need to wade through the complex soup of factors that propel legal innovation—voter preferences, circumstance, self-interest among politicians, and special-interest-group politics—to determine whether a particular innovation would have occurred in the absence of property protection. The lack of a clear metric seems certain to leave examiners adrift and allow their inherent biases to control the outcome of contentious patent cases.

All in all, the difficulties of applying patent law standards to legal inventions threaten to undercut the property-in-law scheme. Risk-takers need assurance that the law rewards making good bets. Patent-in-law, however, seems likely to grant intellectual property rights to unworthy advances and ignore statutorily deserving breakthroughs and bestow protection on unworthy advances. In such an uncertain legal environment, a state drafting an innovation would face not only the danger that their idea might fail, but also the additional risk that the PTO may deem their successful ideas unpatentable.¹⁹⁹

2. Search Costs

Even assuming that the PTO perfectly applies the law and grants intellectual property rights to all statutorily deserving inventors, a patent framework still seems beset with problems. Perhaps the most obvious

N.Y. v. Consol. Rubber Tire Co., 220 U.S. 428, 435 (1911); *see also* Harries v. Air King Prods. Co., 183 F.2d 158, 162–63 (2d Cir. 1950). In that case, Judge Learned Hand observed that nonobviousness is “as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts.” *Id.* at 162.

¹⁹⁹ Moreover, uncertainty in any patent system “obviously makes business decisions based on patents (whether by patentees, prospective licensees, investors, etc.) more difficult and costly.” R. Polk Wagner, *Understanding Patent-Quality Mechanisms*, 157 U. PA. L. REV. 2135, 2140 (2009). Markets, after all, thrive on well-defined rights. Carol M. Rose, *Property in All the Wrong Places*, 114 YALE L.J. 991, 1004 (2005) (book review). A jurisdiction hoping to purchase laws from a rival, for instance, might feel the need to conduct its own investigation on the originality of a potential purchase if it believes the seller has fuzzy, ill-defined property rights. The attendant doubts about the validity and breadth of issued patents may also drastically increase litigation costs, as rivals turn to courts to settle disputes over their intellectual property rights rather than rely on the judgments of low-information government bureaucrats.

consequence of patent protection for legal innovations is that the cost of all lawmaking would increase. Under a patent-in-law regime, every legislature attempting to craft beneficial rules for its citizens would be obligated to conduct “due diligence” searches for already existing patents; U.S. patent offers no protection to inventors who independently create breakthroughs that others have previously patented. Commentators agree that these searches are a “difficult,”²⁰⁰ “time consuming,”²⁰¹ and “expensive”²⁰² endeavor. According to PTO guidelines, there are seven steps involved in conducting a proper patent search:

- (1) identifying a field of search that would cover the disclosed invention;
- (2) selecting the proper tools and art collections to perform the search;
- (3) determining the appropriate search strategy for each of the selected search tools and art collections;
- (4) searching the art collections using the selected search tools and search strategy, and using any additional strategy suggested by the art that is found;
- (5) retrieving sufficient information from art that is identified during the search to evaluate the pertinence of the art;
- (6) selecting the art that is most pertinent to the claimed subject matter; and
- (7) recording the results of the art that is selected according to the criteria set forth in the guidelines.²⁰³

To comply with the byzantine search requirements, jurisdictions will need to hire more bureaucrats to conduct the patent searches and additional attorneys to review the findings and issue patentability opinions. It seems a safe prediction that legal bills would mount and the speed of lawmaking would slacken. More perniciously, these costs would unduly burden the poorest jurisdictions. The most impoverished states, and especially the most impoverished cities, could ill-afford to divert resources from necessary social programs into the wallets of expensive patent attorneys. If smaller states—fearful of being sued for using the innovation of another jurisdiction—begin to shy away from legislating, a patent law regime may chill the very spirit of experimentation it hopes to promote.²⁰⁴

²⁰⁰ Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1298–99 (2008).

²⁰¹ Kathryn T. Ng, *Tax Strategy Patents: Close Pandora's Box on Patenting Criminal Defense Strategies*, 34 U. DAYTON L. REV. 253, 272 (2009).

²⁰² Simson L. Garfinkel, *Patently Absurd*, WIRED, July 1994, at 105, 142.

²⁰³ *Certification of Searching Authorities*, U.S. PAT. & TRADEMARK OFF., http://www.uspto.gov/web/offices/com/strat21/action/q8p07_01.htm. (last modified Sept. 20, 2007).

²⁰⁴ See Michael J. Meurer, *Business Method Patents and Patent Floods*, 8 WASH. U. J.L. & POL'Y 309, 310 (2002) (arguing that the threat of patent litigation may deter potential innovators from entering the market).

3. *A Comment on the Political Economy*

Before moving on, I will briefly note one final pitfall of using patent-like rights to administer a property-in-law system. As the previous section of this paper detailed in some depth, many commentators strenuously object to the notion of property rights in the law. Among legal academics who have addressed the issue, the opinion is nearly universal.²⁰⁵ In the face of such sustained scholarly pressure, applying such expansive protections as patent-like rights to legal advances begins to seem politically untenable. Rather than tilting at patent-shaped windmills, those concerned about the lack of experimentation at the local level may better serve their cause by focusing on more attainable solutions that would garner some support from opponents.

C. *The Copyright Compromise*

The principles of U.S. copyright law may provide the scaffolding for just such a compromise. Indeed, if intellectual property protection were granted to state and local government innovations, some spinoff of copyright would produce vastly better outcomes than patent-like rules. A copyright-centered scheme, like the patent-based approach, would produce strong enough incentives to encourage jurisdictions to innovate. However, the slightly narrower scope of copyright protection would also alleviate some of the lingering concerns about government control of the law. Copyright, moreover, has the benefit of lower administrative costs and seems more in line with the settled expectations of state and local governments.

1. *The Incentive Structure*

Of utmost importance for the property-in-law scheme, copyright would produce enough incentives to induce jurisdictions to innovate. This is not an obvious conclusion. As a general matter, copyright holders have a narrower

²⁰⁵ See generally Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005); Gellman, *supra* note 22; Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387 (2003); Nick Martini, *Veeck v. Southern Building Code Congress International, Inc.*, 18 BERKELEY TECH. L.J. 93 (2003); Katie M. Colendich, Note, *Who Owns "The Law"? The Effect on Copyrights when Privately-Authored Works Are Adopted or Enacted by Reference into Law*, 78 WASH. L. REV. 589 (2003); Irina Y. Dmitrieva, Comment, *State Ownership of Copyrights in Primary Law Materials*, 23 HASTINGS COMM. & ENT. L.J. 81 (2000); Jessica C. Tones, Note, *Copyright Monopoly v. Public Access—Why the Law Should Not Be in Private Hands*, 55 SYRACUSE L. REV. 371 (2005).

set of rights than those afforded to patent-holders.²⁰⁶ A copyright, unlike a patent, only prevents the copying of a protected work.²⁰⁷ The independent creation of similar or even identical work does not constitute infringement.²⁰⁸ Thoroughgoing skeptics, with their axes sharpened, may charge that jurisdictions simply do not copy enough law from their neighbors to make a system of copyright-in-law worthwhile.

Although this criticism has some surface appeal, it evaporates when confronted with the sunlight of evidence. Modern scholars agree that nearly all jurisdictions rely heavily on word-for-word borrowing; thus, the market for legal innovations would seem robust under a copyright regime.²⁰⁹ Professor Glendon succinctly captures the view. “Legal history,” she says, “is replete with instances of imitation and borrowing. Indeed, copying from another system is more frequent in legal evolution than is true invention.”²¹⁰

The tradition of direct copying continues with surprising vigor in the contemporary United States. Perhaps most famously, states routinely copy large chunks of Delaware’s corporate law. Over half of the states have adopted Delaware’s: (1) “safe harbor” provision for dissenter’s rights in asset

²⁰⁶ Duffy, *supra* note 3, at 8 (stating that patent rights “protect at a much broader and more conceptual level”); *see also* ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 23 (2d ed., 2000); MELVILLE B. NIMMER & DAVID NIMMER, 1 *NIMMER ON COPYRIGHT* § 2.01[A] (1998) (noting that “the scope of a copyright owner’s protection is considerably more limited than that of a patent owner”).

²⁰⁷ *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974) (noting that patent “protection goes not only to copying the subject matter . . . but also to independent creation”). To determine whether actual copying has occurred, a court typically looks to the degree of similarity between the works and evidence of whether the alleged infringer had access to the protected work. *See Olufunmilayo B. Arewa, The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 484 (2007).

²⁰⁸ *See Kewanee*, 416 U.S. at 478.

²⁰⁹ The many academic tomes of Alan Watson, in particular, have advanced the argument that direct borrowing drives the course of legal development. *See, e.g.*, ALAN WATSON, *FAILURES OF THE LEGAL IMAGINATION* (1998); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974); ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* (1991); ALAN WATSON, *SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY* (1984); ALAN WATSON, *THE EVOLUTION OF LAW* (1985).

²¹⁰ Mary Ann Glendon, *A Beau Mentir Qui Vient de Loin: The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569, 570 (1989). There are dozens of prominent examples of legal borrowing in history. The long arc of history reveals, for example, that Germany imported much Roman law, and large swaths of the Napoleonic Code found new homes across South America. *Id.* For an example from American history, *see* Bradley J. Nicholson, *Legal Borrowing and the Origins of Slave Law in the British Colonies*, 38 AM. J. OF LEGAL HIST. 38, 52–53 (1994) (arguing that slave laws of many American states were directly copied from the Slave Code of Barbados).

sales,²¹¹ (2) limited liability charter amendment,²¹² and (3) appraisal exemption provisions.²¹³ Beyond these well-known cases of parroting, on issues both large and small, states flock to deploy legal experiments that have proven successful.²¹⁴ Even state constitutions have not escaped from the copying fever.²¹⁵ Historian Joan Wells Coward remarked that “the history of American constitutionalism is a story of massive plagiarism”²¹⁶

The prevalence of copying augers well for the ability of copyright-in-law to generate revenue for creative jurisdictions. Intellectual property in the text of the law, as discussed above, relies on the promise of licensing fees to induce states to innovate. That so many jurisdictions seek to faithfully adopt the good ideas of other law systems suggests that any state that generates admired legal breakthroughs will find active markets for their advances.

2. *The Spread of the Law, ctd.*

In addition to generating substantial incentives to innovate, the use of copyright could mollify those critics who remain steadfast in their concern that intellectual property would cloister successful legal ideas. Copyright, as explained above, only protects the particular expression of an idea, not the idea itself. For instance, the broad concept of rebels struggling against a galactic empire is not copyrightable—any author could craft a story around

²¹¹ See William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95, 111 n.81 (2009) (forty-two states).

²¹² Romano, *supra* note 2, at 215–18 (noting that forty-six states have adopted this provision).

²¹³ *Id.* (twenty-six states).

²¹⁴ More than twenty-five states have “carefully copied” Georgia’s death penalty statute. Alex Lesman, *State Responses to the Specter of Racial Discrimination in Capital Proceedings: The Kentucky Racial Justice Act and the New Jersey Supreme Court's Proportionality Review Project*, 13 J.L. & POL’Y 359, 390 (2005). South Dakota, Montana, West Virginia, and Tennessee have borrowed portions of North Dakota’s oil drilling regulations. Andrew M. Miller, Comment, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461, 471 n.61 (2003). Maryland’s Shield Law, designed to provide news reporters with the right to refuse to testify about information obtained during newsgathering, has settled into the law books of at least thirteen other states. Dean C. Smith, *Price v. Time Revisited: The Need for Medium-Neutral Shield Laws in an Age of Strict Construction*, 14 COMM. L. & POL’Y 235, 245 (2009).

²¹⁵ See, e.g., Paul Gillies, *Not Quite a State of Nature: Derivations of Early Vermont Law*, 23 VT. L. REV. 99, 99–131 (1998).

²¹⁶ JOAN WELLS COWARD, *KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING* 166 (1979).

the basic plotline. But the expression of the idea in an intricate story arc, such as *Star Wars*, fits snugly within the harbor of copyright protection—imitators cannot lift George Lucas’s characters or dialogue.²¹⁷

Similarly, under a copyright-in-law regime, no jurisdiction could copy the precise content of a neighbor’s statute. That would remain taboo. A legislature could, however, sidestep enforcement of the Copyright Act by taking a broad idea formulated by a rival—like the privatization of public-sector pensions—and rewriting the particular text of their law. Of course, reconfiguring the details of a statutory scheme would not be a simple task. Laws often contain numerous sections and subparts that fit together precisely, like the gears in a Swiss watch. Altering a single word or grammatical construct in one section may create aftershocks that change the meaning and interpretation of the entire regulatory scheme.²¹⁸ Despite these difficulties, the limits of copyright protection should give comfort to those who turn a scornful eye at the “proptertization” of the law. No jurisdiction willing to roll up its sleeves and work through the drafting process could be denied the general use of a legal concept or technique. Copyright—unlike patent—makes that impossible.²¹⁹

3. *Costs of Compliance*

Copyright’s advantage over patent comes into full focus when the costs of the two systems are compared. Quite simply, for a jurisdiction that develops a novel legal insight, the expense of obtaining copyright protection is radically lower than the expenses associated with prosecuting a patent

²¹⁷ More technically, the holder of a copyright has the exclusive power to make copies of the work, distribute the work, prepare derivative works, and display or perform the work publicly. See 17 U.S.C. § 106 (2006).

²¹⁸ William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 (1999) (discussing the importance of language in statutory interpretation).

²¹⁹ The independent creation defense inlaid in copyright law further ensures that essential legal advances will reach the neediest jurisdictions. Legal changes—when they do occur—often emerge in reaction to sudden technological shifts or unexpected disasters. In the aftermath of such large-scale events, numerous legislatures—fueled by the frustration and concern of their constituents—may scramble to pass substantially similar laws at roughly the same time. Under a copyright regime, multiple jurisdictions could simultaneously develop responses to a problem—like the regulation of offshore drilling—without the gnawing worry that they need to race to the patent office to preserve their legal rights. This creates two beneficial outcomes. First, it allows governments to prioritize judicious lawmaking over speedy legal drafting. Second, it guarantees that quick-moving innovators cannot hold the law hostage in times of crises. So long as trailing jurisdictions pursue their own course and avoid copying, they have authority to implement the policies and legal regimes of their choosing.

application.²²⁰ In fact, it costs nothing—zero dollars—to secure basic copyright protections.²²¹ Copyright subsists in a work from the moment the author fixes it into a tangible medium.²²² There is no requirement to obtain approval from any bureaucrat, conduct any search for similar prior art, or secure approval with any agency—although many authors and artists do voluntarily elect to register their creations with the United States Copyright Office at a cost of \$35.²²³ In contrast, the average cost of obtaining a patent, including both administrative fees and the cost of hiring an attorney to navigate the examination process, falls somewhere between \$3,000 and \$7,500.²²⁴ The most complex patents may rack up expenses over \$25,000.

In light of these facts, it should not be a major wonder that I believe copyright is the obvious medium to carry the property-in-law scheme. The lower cost structure and lack of formalities allow all jurisdictions, no matter how strapped or unsophisticated, the opportunity to bring their innovations under the protection of the intellectual property system. The same cannot be said for patent.

4. History and Settled Expectations

Copyright has a final strength to recommend it. Governments have a long history of claiming copyright in some of their published works; a system of copyright-in-law should graft easily onto this foundation. Pennsylvania and Nevada, for example, assert copyright over all publications distributed by the

²²⁰ See Himanshu S. Amin, *The Lack of Protection Afforded Software Under the Current Intellectual Property Laws*, 43 CLEV. ST. L. REV. 19, 22 (1995) (comparing the cost of patent and copyright); Ron Corbett, *IP Strategies for Start-up Ecommerce Companies in the Post-Dot-Bomb Era*, 8 TEX. WESLEYAN L. REV. 643, 648 (2002) (“The costs of obtaining a patent are substantially higher than copyright registration, taking two to three years and costing several thousand dollars.”); Yoshifumi Fukunaga, *Enforcing TRIPS: Challenges of Adjudicating Minimum Standards Agreements*, 23 BERKELEY TECH. L.J. 867, 926 n.327 (2008) (arguing that the “administrative costs of copyrights are much smaller”).

²²¹ Fukunaga, *supra* note 220, at 926 n.327 (pointing out that “there is no registration requirement for copyrights”).

²²² See Gellman, *supra* note 22, at 1034.

²²³ *Circular 4: Copyright Office Fees*, U.S. COPYRIGHT OFF., 1, 6 (Sept. 2009), <http://www.copyright.gov/circs/circ04.pdf>. Authors must complete three steps to register a copyright. The registrant must: (1) complete a registration form; (2) deposit two copies of each work to be registered; and (3) pay the registration fee. See 17 U.S.C. §§ 409, 407(a)(1), 708(a) (2006).

²²⁴ See 35 U.S.C. § 41 (2006); Amin, *supra* note 220, at 22 (“The approximate cost of obtaining a software patent exceeds \$10,000.”); T. Randolph Beard et al., *Quantifying the Cost of Substandard Patents: Some Preliminary Evidence*, 12 YALE J. L. & TECH. 240, 265 n.64 (2009).

state.²²⁵ Other jurisdictions make smaller-scale claims. Kentucky retains a copyright over a machinists' handbook.²²⁶ North Dakota registered a consumer rights manual.²²⁷ Suffolk County in New York holds a valid copyright over its tax maps.²²⁸ And the City of Pittsburgh maintains claims over a math test,²²⁹ a science exam,²³⁰ and artwork for its annual 5K race.²³¹ Scrolling through the federal records reveals that state, county, and city governments have registered thousands of creative works with the United States Copyright Office. This suggests, with some certainty, that jurisdictions would have little trouble navigating the copyright system or adjusting to the idea that they own the text of their law.

D. Copyright Complications

In light of my copyright boosterism, it may behoove us to pause and briefly recognize that no intellectual property system comes free of costs. The opponents of increased intellectual property, of which there are many, will surely highlight that copyright-in-law cannot escape the shortcomings that plague all IP systems. Like any regime that protects the creations of the mind, copyright-in-law would result in deadweight losses, higher prices, and "lower than optimal quantity of the innovative good."²³² Moreover, there is no reason to assume that the 95-year monopoly period currently engraved in U.S. law would be appropriate for legal inventions.²³³ I accept these criticisms, but stand firm in the belief that the problem of underinnovation at the local level merits intervention, and that the case for property-in-law is at least as strong as the case for the protection of books, movies, and plays.

Other potential critiques of my copyright proposal, however, seem less meritorious. Before wrapping up, I will briefly attempt to clear the Augean stables of some of these remaining complaints. To start, some hardliners may push the claim that the Supreme Court long ago barred states from claiming copyright in the text of their law. This seems, at best, an aggressive reading

²²⁵ Dmitrieva, *supra* note 205, at 100.

²²⁶ U.S. Copyright No. TX0001006780 (filed Nov. 3, 1982).

²²⁷ U.S. Copyright No. TX0000458649 (filed Feb. 5, 1980).

²²⁸ See *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 187, 195 (2d Cir. 2001).

²²⁹ U.S. Copyright No. TX0002759616 (filed Jan. 30, 1990).

²³⁰ U.S. Copyright No. TX0002759615 (filed Jan. 30, 1990).

²³¹ U.S. Copyright No. VA0000219082 (filed Sept. 13, 1985).

²³² Abramowicz, *supra* note 3, at 198.

²³³ See 17 U.S.C. § 302(c) (2006).

of dicta. In *Wheaton v. Peters* and *Banks v. Manchester*,²³⁴ the two cases most often cited for the proposition that copyright law does not protect statutes, the Court's decisions only analyze judicial opinions—not the content of state or local statutes.²³⁵ Additionally, the reasoning in the cases focuses on author incentives and public policy issues—leaving the door firmly ajar to recognize copyright in law.²³⁶ Furthermore, even if we accept the critics' interpretation of the case law,²³⁷ nothing in the Constitution prevents Congress from expanding the scope of the Copyright Act.

Others may posit that any proposed scheme based on copyright will run headlong into problems with the troublesome merger doctrine. The merger doctrine rests on the by-now familiar notion that copyright protects expressions of ideas, but not the underlying ideas themselves.²³⁸ From this axiom, courts have ruled that if there are only a few ways to express an idea, the idea and expression merges, and the expression is not protectable. An example may illuminate this murky principle. The first artist to depict the Crucifixion could not claim a copyright over all images of the upright cross and a bereaved Mary. In such a circumstance, protecting the expression (a cross and weeping mother) would control the idea (Crucifixion); it would be nearly impossible to depict the death of Jesus without these elements.²³⁹ As professor Nimmer explains, "The numerical limits on the means of expression create a bottleneck that would prevent follow-up creators from being able to express the idea without seeking permission from a copyright owner."²⁴⁰

A scholar looking to attack property-in-law may claim that many valuable laws—especially vital civil rights laws—would fall under the ambit

²³⁴ *Banks v. Manchester*, 128 U.S. 244 (1888); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

²³⁵ *Banks*, 128 U.S. at 253–54; *Wheaton*, 33 U.S. at 668.

²³⁶ See *Banks*, 128 U.S. at 253–54.

²³⁷ The critics' positions strike me as rather odd. Nearly everyone seems to accept the idea that a legal hornbook, which explains the significance of the law, can receive copyright protection. Yet, many charge that copyright cannot apply to the actual words of a statute, no matter how confusing. Thus, under the critics' worldview, the text of the law must remain a common resource, but the meaning and explanation of the law can be privately owned.

²³⁸ For an explanation of the merger doctrine, see Michael D. Murray, *Copyright, Originality, and the End of the Scènes À Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 784–88 (2006).

²³⁹ Morgan M. Stoddard, *Mother Nature as Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature*, 86 N.C. L. REV. 572, 582–83 (2008).

²⁴⁰ Shubha Ghosh, *Legal Code and the Need for a Broader Functionality Doctrine in Copyright*, 50 J. COPYRIGHT SOC'Y U.S.A. 71, 101–02 (2003) (paraphrasing Nimmer).

of the merger doctrine. After all, how many ways could legislatures express the idea that “the right of citizens . . . to vote shall not be denied or abridged . . . on account of sex”?²⁴¹ Although lodged as a critique, I see the existence of the merger doctrine as more of a feature than a bug. Used sparingly, the merger doctrine would function as a safety valve for a copyright-in-law scheme, allowing judges to put society’s most enduring values beyond the reach of property rules. Such a policy would be very consistent with other realms of property law. Just as the judges and legislatures prohibit the commoditization of organs and a market for newborns, the merger doctrine could ensure that the handful of laws most essential to human flourishing remain available to all.²⁴²

VI. CONCLUSION

The value of legal innovation does not lack for champions. Justice Brandeis, for example, famously avowed that “[t]here must be power in the States . . . to remold, through experimentation, our economic practices and institutions.”²⁴³ Brandeis understood that a legal system that refuses to experiment will accumulate inefficiencies as the needs of human society subtly shift beneath the weight of the law.²⁴⁴ Yet, for all the importance of innovation, academics and politicians have not fully examined whether current institutions produce a socially optimal number of legal advances or explored how the system could be improved.

This Article has attempted to fill the scholarly void with two insights. First, the country has relied too heavily on the trappings of federalism to serve as the vector of legal change. The inability of jurisdictions and individual elected officials to internalize the benefits of their risk-taking produces inefficiently low incentives to enact new and imaginative law; too many forward-thinking ideas lay orphaned in the pages of law review articles and the notebooks of legislators. Second, granting governments intellectual property rights over the text of their law is an efficient mechanism to reverse the stagnation. A system of property-in-law would invite experimentation by ensuring, for the first time, that trailblazers—and not copycat states—receive most of the gains from a new legal idea. Put simply, the potential benefits of risk-taking would finally outweigh the cost of failure.

²⁴¹ U.S. CONST. amend. XIX.

²⁴² For more on commodification of babies and organs, see *RETHINKING COMMODIFICATION* (Martha M. Ertman & Joan C. Williams eds., 2005).

²⁴³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁴⁴ *See id.*

I close here on a note of caution. There can be little doubt that the pace of social, economic, and technological change has quickened. The kudzu-like growth of the Internet, escalating life-expectancies, the eruption of complex financial instruments, and the increasing diversity of family arrangements all portend the dawn of dramatic cultural shifts. The law must keep pace. In a rapidly changing world, I believe that intellectual property offers the best hope; but even those who disavow the use of copyright or patent must confront the serious problem of under-innovation in the evolution of the law.