THE RIGHT TO INCLUDE

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Abstract

Recent scholarship has created new interest in the right to exclude. But there is comparatively little analysis of an owner's right to include. An owner may include others via nonenforcement or waiver of exclusion rights; division of existing rights by contract or property forms (such as easements, leases, or trusts); or creation of new rights (like security interests, condos, and other forms of co-ownership). Inclusion is socially beneficial insofar as it enables sharing and exchange, facilitates financing and risk-spreading, and promotes specialization. Yet inclusion entails costs, including conflicts over use, excessive utilization or inadequate maintenance, and fragmentation. The law authorizes competing institutional arrangements—not only informal and contractual inclusion but also proprietary inclusion—to reduce opportunism, minimize disputes, and ensure the private incentive to include does not diverge from what is socially optimal. Understanding how the law promotes the social use of property provides insights into debates about the property/contract interface, *numerus clausus*, and right to exclude itself.

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INTRODUCTION

This Article contends that the ability of owners to "include" others in their property is a central attribute of ownership and fundamental to any system of private property. Too easily overlooked in debates about the right to exclude, or the rights of others to be included, is that owners frequently include others in the use, possession, or enjoyment of their property. The ability to include others—through nonenforcement or waiver of the right to exclude, the division of existing rights by contract or forms of property, and the creation of new rights and forms—is critical for coordinating economic activities and organizing social relationships.

Owners include in different ways, with different legal implications. Much inclusion is informal, e.g., a dinner invitation or a gratuitous license, in which an owner decides not to enforce or to waive the right to exclude. With *informal inclusion*, social norms, rather than law, usually govern the parties' interactions. Inclusion also may be contractual, e.g., an agreement not to withdraw a waiver or license. With *contractual inclusion*, the parties have legal remedies, typically damages, if the owner breaches by revoking a waiver or if the non-owner breaches by exceeding the scope of a license. In addition to waiving exclusion, informally or contractually, owners may rely on property forms that facilitate inclusion. With *proprietary inclusion*, each form not only binds third parties to a particular division of property but also provides the original parties with a unique mix of anti-opportunism devices, such as mandatory rules, fiduciary duties, and supracompensatory remedies.

In the absence of contracts or property forms, an owner's incentive to include others might be inadequate. Although some division of property might still occur, parties would include too little, fearful of opportunism and conflicts over use. To combat such fears and increase cooperation, the law authorizes formal devices like contracts and the forms of property by which owners include others. As a result, contracts and property forms function as assurance mechanisms, diffusing the risk of strategic behavior and minimizing conflicts over use.

The Article contends that, in light of uncertainty and the risk of opportunism, a proliferation of forms helps to ensure that the private incentive to include converges with the socially optimal level of inclusion. The law facilitates cooperation because each form of inclusion entails different costs and benefits, and owners may choose among forms of inclusion in deciding whether to include others in their property.

Generally, informal inclusion (gratuitous licenses, nonenforcement) is less costly than formal inclusion because it relies on social norms rather than law. However, if there is a danger of "high-value" opportunism, informal inclusion may provide parties with too little certainty. If an owner decides to withdraw a license or enforce its rights, the non-owner may have no legal remedy. Therefore, while including others via waiver or non-enforcement is an important "flip side" of exclusion,[1] as Robert Merges contends, it is inadequate to maximize the social use of property.

Contractual inclusion (formal waivers of exclusion rights, intellectual property licenses) can be more costly than informal inclusion, but contracts provide more certainty and deter many kinds of opportunism.[2] If an owner withdraws a contractual waiver or terminates a license, the licensee may sue for breach. Similarly, if a licensee exceeds the scope of an inclusion, the owner may sue to vindicate her rights. Knowing that legal remedies are available, both parties may be less inclined to act strategically at the outset as well as during performance of the contract.

Owners also may include others using property forms. Such forms, from easements and leases to trusts and corporations, are similar to contracts; but the forms may provide more certainty and protection against opportunism. Specifically, because property rights are *in rem* and run with the land, these forms provide more certainty for successive owners and users. Moreover, while contracts deter opportunism, property provides additional protection through mandatory rules and fiduciary duties. Finally, unlike contracts, which rely primarily on compensatory damages, property forms often entail supracompensatory remedies like specific performance, punitive damages, and restitution, which may help deter strategic behavior.

A handful of scholars have mentioned inclusion and hinted at its importance.[3] But they have not yet developed a theory to justify a property owner's right to include,[4] or compared various forms of inclusion, including

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[1] ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 295 (2011).

[2] *See* Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 762 (2000) (discussing how contracts deter opportunism).

[3] *See* MERGES, *supra* note 1, at 295 ("supposedly exclusive right of property is actually bound up with various forms of inclusion"); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 449 (2d. ed. 2012) ("important not only to be able to exclude other persons from the thing, but also to be able to include other persons in the use and enjoyment of the thing"); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 75 (1997) ("understanding the social use of property . . . must be as fundamental to understanding property as understanding the way in which property excludes").

[4] *Cf.* James Penner, *Ownership, Co-Ownership, and the Justification of Property Rights*, *in* PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS 166, 166 (Timothy Endicott et al. eds., 2006) (arguing "justification of ownership *per se* depends upon the premise that property will generally be shared or co-owned").

contractual and proprietary inclusion, in much detail.[5] This Article systematically analyzes the right to include by assessing the benefits and costs of inclusion. It then compares institutional arrangements by which owners include others: from nonenforcement and waiver of the right to exclude to contracts and various property forms.

Finally, the literature emphasizes two social dimensions of property: how using property may generate social costs,[6] and how owning it entails social obligations.[7] This Article highlights another social dimension of property, one that is often overlooked. Ownership can be inclusive, rather than exclusive; it can facilitate cooperation, not just result in conflict, and it frequently promotes sociability, not atomistic individualism.

Part I surveys recent debates about exclusion and distinguishes the non-owner's right to be included from an owner's right to include. Part II discusses why it is difficult to achieve inclusion's benefits—sharing, exchange, financing, risk-spreading, and specialization—while preventing opportunism and costs of inclusion. Part III compares the ways in which owners include others: informal, contractual, and proprietary inclusion. In distinguishing among these alternatives, Part III explores why the forms are instrumental in facilitating the social use of property. Each form has a unique role in deterring opportunism and facilitating cooperation. Part IV suggests that understanding inclusion helps to illuminate several debates in property theory.

I.
EXCLUSION AND INCLUSION

A. Excluding Others From Property

One justification for property is that, by creating exclusive rights, property promotes the efficient use of resources. This justification has several aspects. First, property may provide individuals with incentives to work. Without property rights, the incentive to work may diverge from

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[5] *Cf.* Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1856-57, 1860 (2012) (delineating several types of "governance property" but noting analysis "provides only a brief look at . . . some of the major GP institutions in modern society").

[6] *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); *see also* J.J. Laffont, *Externalities*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 192 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

[7] *See, e.g.*, Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009).

what is optimal because a person considers that her output may be taken.[8] By contrast, with property rights, a person receives the output she produces and has an incentive to work the optimal amount. Second, property provides incentives to maintain and improve things. If a person obtains the gains of maintaining and improving her property, she will do so consistent with what is socially desirable.[9] Third, without a right to exclude, a person will devote resources to prevent the taking of her things, and others will waste time and money attempting to take these things.[10] Thus, exclusion promotes the optimal use of resources and prevents wasteful disputes.[11]

Historically, in analyzing property, many jurists emphasize the role of exclusion. For example, Blackstone's understanding of property—a right to a thing good against the world—involves a robust concept of exclusion.[12] For Blackstone, property was useful in preventing disputes as well as for providing incentives to work.[13] Given Blackstone's influence on American law, an emphasis on exclusion was predominant among lawyers and judges until the early twentieth century. Understanding property as a thing is also consistent with how most non-lawyers conceptualize ownership.[14]

This idea of property as a right to a thing good against the world in which exclusion is central declined during much of the twentieth century. The writings of Hohfeld,[15] and the advent of legal realism,[16] contributed to its decline and to the rise of the "bundle of rights" view of property.[17]

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[8] *See* SHAVELL, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 11-15 (2004) (providing numerical example).

[9] *See id.* at 16-18; Dean Lueck & Thomas J. Miceli, *Property: Leases*, *in* HANDBOOK OF LAW AND ECONOMICS, vol. 1, at 192 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("private ownership . . . creates incentives for optimal asset maintenance and investment").

[10] *See* SHAVELL, *supra* note 8, at 20.

[11] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348, 354-56 (Pap. & Proc. 1967); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322-32 (1993).

[12] *See* 2 WILLIAM BLACKSTONE, COMMENTATORS ON THE LAWS OF ENGLAND *2.

[13] *See id.* at *7.

[14] *See* BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 98-100 (1977); Tom Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Pennock & J. Chapman eds., 1980).

[15] On Hohfeld, *see* J.E. Penner, *Hohfeldian Use-Rights in Property*, *in* PROPERTY PROBLEMS: FROM GENES TO PENSION FUNDS 164-74 (J.W. Harris ed., 1997); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986-94, 1056-59.

[16] On legal realism, *see* Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261-79 (Dennis Patterson ed., 1999).

[17] On property as a "bundle of rights," *see* ACKERMAN, *supra* note 14, at 26-29; Grey, *supra* note 14, at 69-71; Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360-66 (2001); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996).

Ultimately, the bundle-of-rights view became "a kind of orthodoxy" in law schools.[18] Moreover, Coase and other early figures in law and economics "did not question the realists' conception of property as a contingent bundle of rights."[19] Even with the ascendancy of this view, most courts, including the U.S. Supreme Court, continue to acknowledge the "right to exclude" as one of the most important rights in the bundle.[20]

Recently, there has been renewed interest in the nature of property and the right to exclude. Penner argues that "the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things."[21] Likewise, Merrill and Smith have attempted to revitalize the idea that "property at its core entails the right to exclude others from some discrete thing."[22] As these property theorists emphasize, exclusion is "not an end in itself"[23] but rather the "practical means" by which an interest in the "use of property" is protected."[24]

Consequently, there is a now a robust debate over the significance of exclusion. Many scholars disagree over whether the "right to exclude" is the organizing principle of property, one right within the "bundle of rights," or something else.[25] Despite such disagreements, the unifying feature of this literature is its focus on the relative importance of *exclusion* as the basis of property rights, with little discussion of an owner's right to include.

B. Including Others In Property

Property not only involves exclusion but also entails inclusion. Inclusion may be *involuntary*, i.e., a non-owner's right to be included, or *voluntary*, i.e., an owner's right to include.[26]

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[18] Merrill & Smith, *supra* note 17, at 365.

[19] *Id.* at 366; *see also* Emily Sherwin, *Two-and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1078 (1997) ("[F]rom Hohfeld and Coase it is an easy step to say that property rights are simply rights, to which the term 'property' adds nothing at all.").

[20] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("fundamental element of the property right"); Loretto v. Teleprompter Manhattan CATV Corp.458 U.S. 419, 435 (1982) ("one of the most treasured strands in an owner's bundle").

[21] PENNER, *supra* note 3, at 71 (emphasis deleted).

[22] MERRILL & SMITH, *supra* note 3, at vii; *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 742-43 (1998); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Merrill & Smith, *supra* note 17.

[23] Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 964 (2009)

[24] PENNER, *supra* note 3, at 69-74 (discussing connection between exclusion and use).

[25] *See, e.g.*, Symposium, *Property: A Bundle of Rights?*, 8 ECON. J. WATCH 193 (2011).

[26] *Cf.* Robert C. Ellickson, *Two Cheers for the Bundle of Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECON. J. WATCH 215, 218 (2011) ("A well-designed private

1. *Involuntary Inclusion*

Several criticisms of the right to exclude focus on competing claims by others to use, possess, or enjoy an owner's property. For example, in *Property: Values and Institutions*, Hanoch Dagan argues against the "trend of exclusion-centrism in property."[27] In a chapter entitled "Exclusion and Inclusion in Property," Dagan contends that "property neither is nor should be solely about exclusion or exclusivity and that, at times, inclusion is part of what property is rather than external to its core."[28] Dagan is correct in saying that exclusion is not the end of the story. But what Dagan means by "inclusion" is different than what this Article means by the right to include.

Dagan is investigating the non-owners' right of access, i.e., a right to be included.[29] He illustrates his argument with examples drawn from public accommodations law, fair use in copyright law, and the Fair Housing Act.[30] Each of his examples, like access in general, is a vital topic within property. Accordingly, there is a fairly well-developed literature examining situations in which a rule of exclusion conflicts with policies favoring inclusion.[31]

As Blackstone himself acknowledges, an owner's right to exclude is not absolute.[32] For example, a person may enter upon another's land based on necessity to preserve human life.[33] Hunters in pursuit of wild animals have long held a right to enter unenclosed lands,[34] a right that continues to exist in most states.[35] Airlines fly planes over millions of parcels,[36] even

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property system . . . must enable many forms of consensual, and sometimes even nonconsensual, decomposition.").

[27] HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 38 (2011).

[28] *Id.* at 48.

[29] *Id.* at 44-45 (discussing "The Right to be Included" and "categories of cases where property law vindicates the right of nonowners to be included").

[30] *See id*. at 48-54.

[31] *See, e.g.*, EDUARDO M. PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); Alexander, *supra* note 7; Singer, *supra* note 7.

[32] *See* J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CAL. L. REV. 277, 290 (2010) (noting that, "after describing property rights as exclusive," Blackstone utilizes "five hundred pages describing various situations in which property rights properly yielded to community interests")..

[33] *See, e.g.*, Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908); Vincent v. Lake Erie Transp. Co, 124 N.W. 221, 222 (Minn. 1910).

[34] *See, e.g.*, McConico v. Singleton, 9 S.C.L. 244, at *1 (1818).

[35] *See* Mark R. Simon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 558-64 (2004) (describing current laws regarding hunting on private land).

[36] *See* Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936).

though doing so would be a trespass under the *ad coelum* rule.[37] Moreover, in two cases, *State v. Shack* and *PruneYard v. Robins*, courts privileged the interests of non-owners in access over the owner's interest in exclusion.[38] And public accommodations and antidiscrimination law are recognized as vital limitations on the right to exclude.[39]

Similarly, in IP law, non-owners often assert a right to be included. In copyright law, the fair use exception is a limitation on an author's right to exclude others from copying an original work.[40] In patent law, compulsory licensing is premised on a claim that a potential licensee has the right to be included in using a drug or invention.[41] More broadly, in advocating for an expansion of the public domain, many IP scholars emphasize the rights of users to be included.[42]

Overall, the right of access is central in many areas of property and IP law. Moreover, several leading property scholars, including Alexander, Dagan, and Singer, outline theories that explain, justify, and promote inclusion in this sense.[43] However, there are clear differences between a non-owner's right to be included and the owner's right to include.

2. *Voluntary Inclusion*

Owners often include others. Yet, unlike the rights to exclude or be included, neither courts nor commentators have focused much on this right to include. In delineating the "bundle of rights" that characterize property, courts have not identified the right to include as a distinct attribute of ownership.[44] In defining property, many casebooks do not mention, or only

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[37] *See* MERRILL & SMITH, *supra* note 17, at 58.

[38] State v. Shack, 277 A.2d 369 (N.J. 1971); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[39] *See* 42 U.S.C. § 2000a (public accommodations); 42 U.S.C. §§ 3601-3619 (housing).

[40] *See* Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21 INT'L REV. L. & ECON. 453 (2002); *see also* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1812 (2007) ("doctrine of fair use is another limitation on copyright").

[41] *See, e.g.*, Donald Harris, *TRIPS After Fifteen Years: Success or Failure, As Measured By Compulsory Licensing*, 18 J. INTELL. PROP. L. 367 (2011); Jerome H. Reichman, *Compulsory Licensing of Patent Pharmaceutical Inventions: Evaluating the Options*, 37 J. L. MED. & ETHICS 247 (2009).

[42] *See, e.g.*, L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints in Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

[43] *See* DAGAN, *supra* note 27; SINGER, *supra* note 31; Alexander, *supra* note 7.

[44] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting U.S. v. General Motors Corp., 323 U.S. 373, 378 (1945))); Kafka v. Montana Dept. of Fish, Wildlife and Parks, 201 P.3d 8, 19 (Mont. 2008) (defining

briefly mention, the right to include.[45] Overall, the focus of most courts and commentators is on other attributes of property, such as the right to exclude, possess, use, or transfer. To date, there is no systematic effort to investigate the right to include.

Recent scholars, while emphasizing exclusion as a unifying feature of property, have hinted there may be another, related concept just beneath the surface. Specifically, a handful of scholars, including Penner, Merrill and Smith, and Merges, emphasize that owners have the ability to *include*. Penner uses the analogy of the gatekeeper to suggest owners can include as well as exclude: "The right to property is like a gate, not a wall."[46] Merrill and Smith also compare owners to gatekeepers in noting "it is important not only to be able to exclude other persons from the thing, but also to be able to include other persons in the use and enjoyment of the thing."[47]

Neither Penner nor Merrill and Smith adopt the realist perspective of property as a bundle of rights.[48] But some realists, including Felix Cohen, also hypothesize that property entails not just the ability to exclude but also the power to "grant permission" to use something.[49] Moreover, several scholars, including Ellickson and Epstein, have argued that one of the virtues of the "bundle of rights" or "bundle of sticks" metaphor is that it highlights "an owner's powers to transfer particular sticks in the bundle."[50]

This idea of inclusion arises in intellectual, as well as real, property. Merges contends analyzing "a typical property right (including especially most IP rights) reveals all sorts of ways that the supposedly exclusive right

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property as "rights to exclude, use, transfer, or dispose of the property" (quoting Members of the Peanut Quota Holders Assn. Inc. v. U.S., 421 F.3d 1323, 1330 (Fed. Cir. 2005))).

[45] *See, e.g.*, JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 4-5 (2d ed. 2007) (stating that "most important sticks in the bundle are: (1) the right to exclude; (2) the right to transfer; and (3) the right to possess and use").

[46] PENNER, *supra* note 3, at 74.

[47] MERRILL & SMITH, *supra* note 3, at 449; *see also* Merrill, *supra* note 22, at 742-44; Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1710 (2012).

[48] *See* Penner, *supra* note 17, at 714-15; Merrill & Smith, *supra* note 17; *see also* Ellickson, *supra* note 26, at 216 (describing Merrill and Smith as "the leading critics of the bundle metaphor").

[49] *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 372 (1954) ("Without the freedom to bar one man from a certain activity and to allow another man to engage in that activity we would have no property."); *see also* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, & MICHAEL H. SCHILL, PROPERTY 88 (7th ed. 2010) (describing Cohen's idea of property as "a relationship among people that entitles so-called owners to *include* (that is, permit) or *exclude* (that is, deny) use or possession of the owned property by other people").

[50] Ellickson, *supra* note 26, at 218 n.4; Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 464 (2010).

of property is actually bound up with various forms of *inclusion*."[51] Merges describes inclusion as not enforcing or waiving IP rights.[52] For example, if a firm owns a patent that is being infringed, the firm may decide not to enforce it. If a company wants to provide life-saving drugs, the company can waive IP rights. Merges advocates a "robust 'right to include,'" which he says is "coextensive with the traditional right to exclude at the heart of IP and property generally."[53] Ultimately, Merges concludes that the "ability to easily *include* is an important flip side to the grant of property rights."[54]

Except for brief treatments by Penner, Merrill, Smith, and Merges, the property theory literature has not focused much on the right to include. Moreover, with a few notable exceptions, the literature on the economic analysis of property rights does not investigate the social advantages and disadvantages of dividing property.[55] And more recent scholars have focus almost exclusively on the costs, rather than the benefits, of fragmentation.[56]

II.
ON THE SOCIAL DESIRABILITY OF INCLUSION

The right to include others is an attribute of ownership that differs from the right to exclude or the right to be included. Yet an owner's decision of whether to include entails a dilemma. Although inclusion can be highly beneficial, it creates a danger of strategic behavior and conflicts over use. How to maximize the benefits of inclusion, while minimizing its

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[51] MERGES, *supra* note 3, at 295.

[52] *See id.* at 286, 295.

[53] *Id.* at 290-91.

[54] *Id.* at 296.

[55] *See* SHAVELL, *supra* note 8, at 27-32; Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995); Jeffrey E. Stake, *Decomposition of Property Rights*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS vol. 2, at 32 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).. In a working paper, I discuss under what circumstances an owner's private incentive to divide property diverges from the socially optimal division. *See* Daniel B. Kelly, *On the Socially Optimal Division of Private Property Rights* (working paper, June 2013).

[56] *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION AND COSTS LIVES (2008); Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998); *see also* Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595 (2002); Francesco Parisi, *Freedom of Contract and the Laws of Entropy*, 10 SUP. CT. ECON. REV. 65 (2003). Excessive fragmentation is a particularly salient issue in the wake of the mortgage crisis. *See, e.g.*, David A. Dana, *The Foreclosure Crisis and the Antifragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 97 (2010); Note, *The Perils of Fragmentation and Reckless Innovation*, 125 HARV. L. REV. 1799 (2012).

potential costs, is the key to unlocking the dilemma. To this end, Part II.A examines the benefits of inclusion, including sharing, exchange, financing, risk-spreading, and specialization. Part II.B analyzes the costs of inclusion: coordination disputes and strategic behavior, conflicts over use, and excessive fragmentation and externalities.

A. Social Benefits of Inclusion

To illustrate why inclusion is socially beneficial, consider a thought experiment. Imagine a world in which: (a) you cannot include others in the use, possession, or enjoyment of your property; and (b) others cannot include you in their property. Such a world—atomistic, isolated, and exclusive—differs dramatically from the interrelated and inclusive world in which we live, work, and play.

Human beings depend upon each other, to survive and to flourish.[57] Most individuals or families, in ancient as well as modern times, own little property. Inclusion can therefore emerge out of necessity, e.g., obtaining permission to hunt on another's land,[58] leasing a field to grow crops,[59] or sharing subsistence harvests.[60] Today, inclusion is also ubiquitous because of the advantages of specialization.[61] A landlord manages an apartment complex on behalf of tenants; a trustee manages funds for beneficiaries; and a CEO manages corporate assets on behalf of shareholders. Owners may include others either gratuitously (sharing) or for consideration (exchange).

1. *Sharing*

Sharing via inclusion is ubiquitous across cultures. Anthropologists and ethnographers have documented the role that "hosting" (i.e., inviting others into one's home) plays all over the world and throughout history.[62]

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[57] *See* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970, at 2 (1997) (characterizing human person as "inevitably dependent on others not only to thrive but even just to survive"); Penner, *supra* note 4, at 185 ("Humans, *qua* humans, depend upon co-operative activity to survive as a matter of their very nature . . . .").

[58] *See* Simon, *supra* note 35, at 552-58.

[59] *See* WILLARD W. COCHRANE, THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS 7-8 (1979).

[60] *See, e.g.*, Hannah B. Loon, *Sharing: You are Never Alone in a Village*, ALASKA FISH & GAME, Nov.-Dec. 1989, at 34, 36 (discussing various kinds of equitable, charitable, and ceremonial sharing of subsistence harvests in Inupiaq Eskimo villages).

[61] *See* YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 51 (2d ed. 1997).

[62] *See, e.g.*, Harumi Befu, *An Ethnography of Dinner Entertainment in Japan*, 11 ARCTIC ANTHROPOLOGY 196 (1974); Russell Zanca, *"Take! Take! Take!" Host-Guest Relations and All That Food: Uzbek Hospitality Past and Present*, 21 ANTHROPOLOGY OF EAST

Moreover, in "Is Civilization the Result of Humans' Need to Share?," Nicholson discusses a study in *Science* that "shows that young human children perform as well as apes on intelligence tests, but that kids beat apes in social skills."[63] She speculates "this human need to voluntarily *share* is why we have language" and may "explain the popularity of sharing on the Web."[64] Sharing may be a result of mere self-interest as well as altruism. For example, even a profit-maximizing firm may share its resources with developing countries by waiving IP rights to life-saving drugs.[65]

Sharing is socially beneficial if the benefits to a donor and donee outweigh the social costs. However, the private incentive to share may diverge from the socially optimal level of sharing because, even if donors are altruistic and benefit from a donee's happiness, they may not take into account that the benefit to donees is itself relevant to social welfare.[66] As a result, unless a donor's motivation is to maximize social welfare, rather than her own self-interest, the private incentive to include others for purposes of sharing may diverge from what is optimal.

2. *Exchange*

Unlike sharing, which entails a gratuitous transfer, exchange entails a transfer in return for consideration. Exchange is fundamental to a market economy because, through voluntary agreements, resources move from low-value to high-value users.[67] The future exchange of goods and services

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EUROPE REV. 8 (2003); *see also* ADAM YUET CHAU, MIRACULOUS RESPONSE: DOING POPULAR RELIGION IN CONTEMPORARY CHINA 126 (2006) ("Hosting is arguably the most important social activity for Shaanbei people.").

[63] Christie Nicholson, *Is Civilization the Result of Humans' Need to Share?*, SCI. AM., May 27, 2008 (discussing Esther Hermann et al., *Humans Have Evolved Specialized Skills of Social Cognition: The Cultural Intelligence Hypothesis*, 317 SCIENCE 1360 (2007)).

[64] *Id.*

[65] *See, e.g.*, Sarah Boseley, *Glaxo Offers Free Access to Potential Malaria Cures*, THE GUARDIAN (U.K.) (Jan. 20, 2010), at 1; Russell Williams, Editorial, *Drug Firms Proud of Their Work Globally*, TORONTO STAR (July 29, 2009), at A18. On philanthropy by corporations, *see* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009).

[66] *See* Louis Kaplow, *A Note on Subsidizing Gifts*, 58 J. PUB. ECON. 469 (1995) (discussing positive externality in giving).

[67] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 115 (8th ed. 2011); *see also* Benjamin E. Hermalin, Avery E. Katz & Richard Craswell, *Contract Law*, *in* HANDBOOK OF LAW AND ECONOMICS vol. 1, at 7 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("The essence of a free-market economy is the ability of private parties to enter into voluntary agreements that govern the economic exchange between them.").

requires contracts. *A* agrees to a contract with *B*, and *B* agrees to a contract with *A*, only if *A* and *B* believe they will benefit from their agreement.[68]

Consider the following exchanges, each of which entails inclusion. In a residential lease, a landlord remains the owner of an apartment but transfers possession of the apartment to tenant. The landlord benefits from receiving the rent; the tenant benefits from having a place to live.[69] The owner of a stadium will permit fans to buy tickets, i.e., revocable licenses, to enter the stadium. The owner benefits from selling the tickets, and fans pay for a chance to watch the concert or game.[70] Finally, in an IP licensing agreement, a firm maintains ownership of its IP rights but allows consumers or other firms to use its intellectual property. The firm obtains a licensing fee; licensees benefit from having access to the IP rights.[71]

In short, the exchange function of inclusion allows parties to enter into various kinds of mutually beneficial agreements regarding property without requiring complete alienation. Moreover, exchange is a general term that includes several particular types of mutually beneficial activities, including financing, risk-sharing, and specialization.

3. *Financing*

Financing is also instrumental in a market economy. One method of financing is a loan from a lender to a borrower. The borrower obtains the loan and, in return, promises to repay the lender (usually, with interest). The borrower may pledge collateral as security against the debt. But one alternative to debt financing is inclusion. Inclusion allows a non-owner to obtain access to property without having to purchase the property.

Historically, leases have served a financing function. In discussing ancient land law, Ellickson and Thorland point out that "[a]nthropological evidence indicates that members of preindustrial societies tend to engage in

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[68] *See* Anthony T. Kronman & Richard A. Posner, *Introduction: Economic Theory and Contract Law*, *in* THE ECONOMICS OF CONTRACT LAW 1, 1-7 (Anthony T. Kronman & Richard A. Posner eds., 1979); *see also* SHAVELL, *supra* note 8, at 296 (discussing "the mutual desirability of a contract").

[69] *See* Ellickson, *supra* note 11, at 1372; *cf.* Louis De Alessi, *Gains From Private Property: The Empirical Evidence*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 90, 102 (Terry L. Anderson & Fred S. McChesney eds., 2003) ("Voluntary renting and leasing are prevalent usufruct arrangements that facilitate the bundling of resource rights and their flow to higher-valued users.").

[70] One academic study estimates that, in 2005, over 277 million tickets were sold in the United States for professional sports events and NCAA football and men's basketball games. *See* Brad R. Humphreys & Jane E. Ruseski, *Estimates of the Dimensions of the Sports Market in the US*, 4 INT'L J. OF SPORT FINANCE 94, 100-01 (2009).

[71] *See* RUDOLF L. ROAS, RACHEL BUNN & WILLIAM E. O'BRIEN, INTELLECTUAL PROPERTY LICENSING AGREEMENTS (2009).

land-leasing at an earlier stage than land-selling."[72] They maintain that "[r]ental arrangements respond to land-occupancy demands of relatively transitory or capital-poor persons."[73] Likewise, one of the original functions of leasing was to circumvent the Church's prohibition of usury.[74] Thus, before the emergence of capital markets, leases served as a financing device for farmers as well as early entrepreneurs.[75]

Similarly, today's consumers, especially if they have few assets or poor credit, may prefer to lease, rather than buy, property for the sake of financing.[76] Several types of leases, including ground leases and sale-leasebacks, are well-established financing devices.[77] Likewise, if a driver needs a new car, the driver can buy the car (with a loan) or lease the car.[78] The lease is also a common device for financing the purchase of aircraft.[79]

Other forms of inclusion also serve as financing devices. Licenses are instrumental in financing IP rights.[80] Mortgage trusts are "a useful mechanism for real estate financing," and, without such trusts, "it would be impossible to explain the expansion of the U.S. housing market after World

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[72] Robert C. Ellickson & Charles Dia. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 369 (1995) (citing FREDERIC L. PRYOR, THE ORIGINS OF THE ECONOMY: A COMPARATIVE STUDY OF DISTRIBUTION IN PRIMITIVE AND PEASANT ECONOMIES 143 (1977)).

[73] *Id.*; *see also* Arthur R. Gaudio, *Wyoming's Residential Rental Property Act—A Critical Review*, 35 LAND & WATER L. REV. 455, 458 (2000) ("One of the initial uses of the leasehold estate was as a financing device for persons in need of funds.").

[74] *See* MERRILL & SMITH, *supra* note 3, at 649; Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 142 (2000).

[75] *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 572-73 (5th ed. 1956); Gaudio, *supra* note 74, at 458.

[76] *See* MERRILL & SMITH, *supra* note 3, at 649; *see also* Spector, *supra* note 74, at 144 n.21 ("parties negotiate leases as a means of obtaining financing").

[77] *See* Gregory M. Stein, *Mortgage Law in China: Comparing Theory and Practice*, 72 MO. L. REV. 1315, 1331 (2007) (describing how ground lease "functions as a financing device"); Marvin Milich, *The Real Estate Sale-Leaseback Transaction: A View Toward the 90s*, 21 REAL EST. L.J. 66 (1993).

[78] *See* MERRILL & SMITH, *supra* note 3, at 688 (leasing is "clearly a financing device, and functions as a substitute for purchasing an auto with a loan secured by a lien").

[79] *See* Michael Downey Rice, *Current Issues in Aircraft Finance*, 56 J. AIR L. & COM. 1027, 1032 (1991) ("Lease financing of aircraft is often viewed as the alternative to 'straight' debt financing.").

[80] *See, e.g.*, Lorin Brennan, *Financing Intellectual Property Under Revised Article 9: National and International Conflicts*, 23 HASTINGS COMM/ENT L.J. 313, 444 (2001) (financing of motion pictures "illustrates prototypical intellectual property financing, with tiers of exclusive and non-exclusive licenses").

War II."[81] Partnerships also facilitate financing and can sometimes serve as an alternative to a secured loan.[82]

4. *Risk-Spreading*

Inclusion also enables both owners and non-owners to spread risk. Spreading risk is beneficial if parties are risk-averse. Parties may attempt to mitigate their exposure to risk in various ways, including diversification and insurance.[83] Yet another mechanism for mitigating risk is inclusion.

The risk-sharing function of inclusion is not a modern phenomenon. Ellickson and Thorland posit that another reason members of preindustrial societies may have engaged in land leases, even prior to land sales, is that leases serve to spread risks.[84] They point out that one of the "two principal theories for the widespread use of sharecropping throughout human history" is that "its risk-splitting feature appeals to cultivators, who are assumed to be more risk-averse than landlords."[85] Indeed, in a seminal contribution to economic analysis of law, *The Theory of Share Tenancy*, Cheung describes sharecropping as a risk-sharing device.[86]

Today, many property forms mitigate risk. Several types of leases serve as risk-spreading devices, including residential leases,[87] oil and gas leases,[88] and leases on state trust lands.[89] Likewise, Hansmann contends

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[81] Dante Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 ARIZ. J. INT'L & COMP. L. 701, 750 (2007) (describing mortgage trusts).

[82] *See* WILLIAM T. ALLEN & REINIER H. KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 40-42 (2003); Robert H. Scarborough, *Partnerships as an Alternative to Secured Loans*, 58 TAX LAW. 509 (2005); *see also* Edward L. Glaeser, *Neither a Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws*, 41 J.L. & ECON. 1, 25 (1998) (discussing "number of subtle mechanisms used . . . to avoid the usury ban" including limited partnerships).

[83] On the role of diversification, *see* HARRY M. MARKOWITZ, PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS (2d ed. 1991); On the role of insurance, *see* GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE (11th ed. 2010).

[84] *See* Ellickson & Thorland, *supra* note 72, at 369 (citing J.V. Henderson & Y.M. Ioannides, *A Model of Housing Tenure Choice*, 73 AM. ECON. REV. 98 (1983)).

[85] *Id.* at 371.

[86] STEVEN N.S. CHEUNG, THE THEORY OF SHARE TENANCY (1969)). *But cf.* DOUGLAS W. ALLEN & DEAN LUECK, THE NATURE OF THE FARM: CONTRACTS, RISK AND ORGANIZATION IN AGRICULTURE (2003) (finding little support for risk-spreading theory).

[87] *See* MERRILL & SMITH, *supra* note 3, at 649 (describing how leasing reduces risk for both tenants and landlords).

[88] *See, e.g.*, Comm'r v. Engle, 84-1 U.S. Tax Cas. (CCH) ¶9134, at 4037 (noting that "lessees can spread their risks over many leased properties").

that condos may have surpassed coops in part because they are a superior device for sharing risk.[90] Dividing property allows risk-averse parties to use, possess, and enjoy property while bearing less risk.

5. *Specialization*

Dividing property rights also may facilitate efficient production via specialization. An owner's including a non-owner may benefit both parties because each party is able to utilize its own strengths and capabilities.

Many property forms, including leases, condominiums, trusts, and corporations, entail specialization. In leasing an apartment or office, tenants "specialize in possession and operation of discrete units within the larger complex," and a landlord is responsible for "constructing, maintaining, insuring, and coordinating assets common to the entire complex."[91] Likewise, condos are popular in part because residents own their units and hire managers to supervise the complex and maintain the common areas.[92] Trusts, by providing managerial intermediation, exemplify the benefits of specialization: the beneficiaries enjoy the benefits of trust income while a trustee is responsible for managing and investing the corpus.[93] Finally, in a corporation, shareholders bear the benefits and burdens of ownership, while directors and managers operate the firm on a daily basis.[94] In discussing the benefits of "divided ownership," Barzel notes that "sole ownership may result in yet a greater loss due to reduced specialization."[95]

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[89] *See, e.g.*, JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 71-77 (1996) (discussing lease as "mechanism for spreading and sharing some of the [financal] risks" of land ownership and management).

[90] *See* Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 24, 60 (1991).

[91] MERRILL & SMITH, *supra* note 3, at 650; *see also* Lueck & Miceli, *supra* note 9, at 217 ("A lease . . . can enhance efficiency by allowing gains from specialization.").

[92] *See* Jonathan D. Ross-Harrington, Note, *Property Forms in Tension: Preference Inefficiency, Rent-Seeking, and the Problem of Notice in the Modern Condominium*, 28 YALE L. & POL'Y REV. 187, 196 (2009) ("condominiums create efficiencies by allowing for specialization in management").

[93] *See* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS AND ESTATES 543 (8th ed. 2009).

[94] *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (rev. ed. 1991); *see also* Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 261-65 (1967) (discussing efficiency of specialization in the corporate form).

[95] BARZEL, *supra* note 61, at 55; *see also* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Contro*l, 36 J.L & ECON. 301, 301-02 (1983) (presenting model in which division of ownership and control is efficient specialization of functions); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L.

Overall, many forms of property that facilitate inclusion promote functional specialization.[96] Such specialization is often advantageous for owners and non-owners alike.

B. Social Costs of Inclusion

While including others can be highly beneficial, it also entails costs, including the risk of strategic behavior and conflicts over use. Moreover, the ability to specify the terms of inclusion is not adequate to deter strategic behavior or potential conflicts. If contracts were complete or property rights perfectly specified and enforced, inclusion would be straightforward. But ex ante specification is difficult for several reasons.[97]

First, it is difficult to foresee all potential contingences.[98] Second, even if foreseeable, it is costly for the parties to specify additional terms.[99] Third, in defining the scope of inclusion, parties may be unable to observe whether they share a common understanding of the terms or conditions.[100] Fourth, even if the parties have the same understanding, either party may act opportunistically, and it is costly to rely on courts or other enforcement mechanisms to verify compliance.[101] In short, although owners may

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REV. 1105, 1173 (2003) ("Divided property rights in assets can be used to facilitate specialization in production or consumption.").

[96] *See* MERRILL & SMITH, *supra* note 3, at 646, 649-50 778-79, 805-06 (explaining that leases, trusts, corporations, and partnerships "permit the management of resources to be separated from their use and enjoyment" and promote the "specialization of functions").

[97] On incomplete contracts, *see* SHAVELL, *supra* note 8, at 299-301; Hermalin, Katz & Craswell, *supra* note 67, at 75-80. On imperfect specification and enforcement of property rights, *see* Sebastian Galiani & Ernesto Schargrodsky, *Land Property Rights and Resource Allocation*, 54 J.L. & ECON. 329, 330 (2011) (noting that "creating, specifying, and enforcing property rights is costly and, hence, these rights will never be perfect" (citing BARZEL, *supra* note 86).

[98] *See* Hermalin, Katz & Craswell, *supra* note 67, at 75 (discussing idea that, because of bounded rationality, individuals "fail to foresee all possible contingencies and, thus, their contracts suffer from unforeseen contingencies").

[99] *See id.* at 76-77; *see also* SHAVELL, *supra* note 8 ("parties will tend not to specify terms of low probability events").

[100] *See* Hermalin, Katz & Craswell, *supra* note 67, at 78-79 (discussing asymmetric information and problem of "observability").

[101] *See* id. at 79 (discussing problem of "verifiability"); *see also* Henry Hansmann & Reinier H. Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEG. STUD. S373, 382 (2002) (noting that "if the parties solve the coordination problem, each needs assurance that the other will not opportunistically assert rights that properly belong to the other"). *See generally* OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE (1995); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 REV. ECON. STUD. 115 (1999).

attempt to condition access, doing so is costly, even if all contingencies could be anticipated; plus, non-owners (or owners) may alter the scope of inclusion in ways that may not be observable or verifiable.

Because contracts and property rights are incomplete and imperfect, inclusion creates several problems, which I divide into three categories: (i) coordination difficulties and strategic behavior, (ii) excessive utilization and inadequate maintenance, and (iii) excessive fragmentation and cost externalization.

1. *Coordination Difficulties and Strategic Behavior*

If a single party, *A*, owns property, in fee simple, there is little or no difficulty in coordinating how to use the property. *A* can use her property in whatever way, and to whatever extent, she believes to be best (assuming no violation of nuisance, covenants, or zoning laws). If *A* wants to go for a swim in her pool, then *A* can do so. As long as she does not schedule two events on her property at the same time, there is no possibility of conflict.

However, suppose that *A* decides to divide her property by including another party, *B*. Now *A* and *B* must coordinate how to use the property. For example, *B* may have a limited right to use the property for a certain purpose (as in a license or easement), with *A* retaining the right to use it for all other purposes. Or *B* may have the right to possess the property for a limited period of time (as in a lease), with *A* reserving the right to retake possession when *B*'s interest ends. A division of rights also could entail *A* and *B* using the property at the same time or in close proximity. In each situation involving more than one party, there is a higher likelihood that disputes will arise because of difficulties of coordination. Put another way, multiple parties may want to use the pool at the same time.[102]

Coordination problems are exacerbated by a possibility of strategic behavior.[103] Including others creates a risk for many types of opportunism. An owner may want to include another for one purpose, but it may be difficult for the owner to limit access for this particular purpose. For example, a party who is being included may seek to expand the scope of the inclusion. Or, other parties may attempt to expand the inclusion by using

[102] *See* SHAVELL, *supra* note 8, at 29 ("If many individuals have the right to use a person's backyard swimming pool at different times, the odds of different people wishing to use the pool simultaneously will increase.").

[103] Williamson defines opportunism as "self-interest seeking with guile." OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 47 (1985). He describes "guile" broadly to include "calculated efforts to mislead, deceive, obfuscate, and otherwise confuse," *id.*, as well as incomplete disclosure of information, *see* Oliver E. Williamson, *Opportunistic Behaviour in Contracts*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 703, 703 (Peter Newman ed., 1998).

the property for the authorized purpose. If the expected costs of inclusion become too high, owners may decide not to include others at the outset.

Consider two examples. A homeowner, *H*, may be willing to grant a neighbor, *N*, an easement over *H*'s land to provide *N* with access to a beach for swimming and boating.[104] But, once included, *N* may increase the intensity of use, number of authorized uses, or the scope of the easement.[105] For example, *N* may use the easement not only for swimming and boating but also for having a picnic.[106] Similarly, a patent owner, *P*, may seek to license a design patent to a firm, *F*, for a new smartphone.[107] Yet, once included, *F* may attempt to increase the scope of the license.[108] Knowing this, owners, such as *H* and *P*, may be less willing to include non-owners, such as *N* and *F*, at the outset. Of course, opportunism is a two-way street: owners, like non-owners, may act strategically, meaning that non-owners also may choose to forgo an otherwise beneficial inclusion.

Opportunism is thus problematic for several reasons. First, fearing strategic behavior, there is less incentive for owners to include others or for non-owners to seek to be included and, thus, a lower likelihood of sharing or exchange. Second, even if dividing property rights is feasible, parties often will incur additional costs in specifying the terms of inclusion. Third, opportunism may result in monitoring costs, especially if a non-owner is acting as an agent (e.g., a trustee or director) on the owner's behalf.[109] The possibility of strategic behavior is thus a significant cost of inclusion, and may impede certain socially valuable transactions that involve inclusion.[110]

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[104] *See, e.g.*, Cool v. Mountainview Landowners Coop. Ass'n, Inc., 86 P.3d 484, 486 (Idaho 2004) (describing easement for "'use of the beach area . . . for swimming and boating only'").

[105] *See* Lee J. Strang, *Damages as the Appropriate Remedy for "Abuse" of an Easement: Moving Toward Consistency, Efficiency, and Fairness in Property Law*, 15 GEO. MASON L. REV. 933, 935-36 (2008).

[106] *See Cool*, 86 P.3d at 488 ("Picnics and gatherings for relaxation and social interaction would not under any stretch be swimming.").

[107] *See, e.g.*, Dan Levine & Edwin Chan, *Apple Expert Shines Light on Samsung Sales in U.S.*, REUTERS, Aug. 13, 2012 (reporting "an Apple executive testified that the company had licensed prized design patents to Microsoft").

[108] *See* Dan Levine & Poornima Gupta, *Apple, Samsung Launch Salvos as Smartphone Trial Heats Up*, REUTERS, July 31, 2012 ("Apple sued Samsung in . . . federal court, accusing the South Korean company of slavishly copying the iPhone and iPad.").

[109] A corporate manager may not have the same interests as shareholders, *see* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), and a trustee may not have the same interests as the settlor, *see* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004).

[110] *Cf.* Hansmann & Kraakman, *supra* note 101, at 382 (potential for opportunism may decrease value of rights as "parties may take costly private actions to protect their rights;

2. *Excessive Utilization and Inadequate Maintenance*

Another difficulty with inclusion is a potential for conflicts over use. Because a non-owner may have a shorter time horizon than an owner with respect to the property, the non-owner may discount the future utility of the property. As a result, the non-owner may engage in actions—e.g., imposing excessive wear-and-tear—that do not maximize the property's value in the long run.[111] For the same reason, a non-owner's incentive to maintain or improve the property may diverge from what is socially optimal. Thus, a non-owner may engage in actions—e.g., failing to maintain the property—that result in a decline in the asset's value.

Consider the landlord-tenant relationship. A tenant will take actions that affect the property's future value.[112] But the tenant does not bear the full costs or benefits of using or maintaining the property. Consequently, a tenant may utilize the property excessively or maintain it inadequately.[113] In an agricultural lease, the owner may worry a tenant farmer will ignore the long-term sustainability of the field.[114] In a residential lease, the landlord may fear that a tenant will ignore a minor problem (e.g., a leaky faucet), leading to a more serious problem in the future (e.g. flooding).[115] Similarly, a rental car company may limit the number of miles but is usually unable to prevent excessive "wear-and-tear" on the brakes or the upholstery.[116] Likewise, the interests of licensees and licensors, trustees and settlors, and directors and shareholders may diverge as well.

Thus, although a non-owner's actions affect the future value of the property, the non-owner may not have an incentive to internalize the costs.

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investments in improving and using assets may be discouraged; privately borne risk may increase; and transactions that would otherwise take place may not occur").

[111] *See* POSNER, *supra* note 67, at 90-94 (discussing divided ownership in estates in land); SHAVELL, *supra* note 8, at 79 (discussing externality in the treatment of rental property).

[112] *See* POSNER, *supra* note 67, at 90-91, 94; SHAVELL, *supra* note 8, at 79.

[113] *See* Lueck & Miceli, *supra* note 9, at 217 ("the division of ownership and use . . . creates potential incentive problems for both landlords and tenants regarding the optimal maintenance and use of the property").

[114] *See* SHAVELL, *supra* note, at 8 ("[w]hen a person rents farmland, he may reduce its usefulness by abusing it, letting it erode"); Lueck & Miceli, *supra* note 9, at 178 (model in which, given a fixed rent, landlord and tenant "under invest in maintenance").

[115] *Cf.* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1078 (D.C. Cir. 1970) (noting a "tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs"); Davidow v. Inwood N. Professional Group—Phase I, 747 S.W.2d 373, 376 (Tex. 1988) (noting that, "because commercial tenants often enter into short-term leases, the tenants have limited economic incentive to make any extensive repairs to their premises").

[116] *See* POSNER, *supra* note 67, at 94; SHAVELL, *supra* note 8, at 79.

Owners can take measures to mitigate the problem.[117] However, such measures are usually imperfect and costly. As a result, owners will have an incentive to include others less often than if the interests of the parties were aligned. And, once again, there is a risk that owners, as well as non-owners, may engage in this type of strategic behavior.[118]

3. *Excessive Fragmentation and Cost Externalization*

In addition to disputes over coordination and conflicts about use, inclusion may result in certain negative effects on third parties. This section discusses three situations in which inclusion may entail external effects, including the costs of excessive fragmentation, spillover effects, and third-party information costs.

An owner's dividing property rights may impose costs on others by creating excessively complex interests. Posner maintains that "people who create excessively complex interests burden the courts as well as themselves and their grantees, so there is some externality that might warrant public intervention."[119] Similarly, Dagan and Heller posit that one reason to limit certain types of division is "protecting against the negative externalities that may arise from excessive fragmentation of property rights."[120]

In deciding whether to divide property, owners will consider the costs of complexity on the value of their property. As I discuss elsewhere, an owner will divide property rights if and only the expected benefits of dividing property exceed the expected costs of doing so, including the costs of fragmentation.[121] Thus, fragmentation that is excessive appears to arise primarily based on limited foresight, mistake, or changed circumstances.[122]

Insofar as there are external effects due to fragmentation, the law attempts to minimize any harm. Posner notes that, in some circumstances, "undivided ownership is . . . facilitated by automatic reuniting of divided land once the reason for the division has ceased."[123] For example, at

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[117] *See* SHAVELL, *supra* note 8, at 17.

[118] *See* DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 49, at 482 (discussing how tenants have incentive to "neglect maintenance" and landlords have incentive to "neglect everyday repairs").

[119] POSNER, *supra* note 67, at 95.

[120] *See* Kelly, *supra* note 55; *see also* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 596 n.185 (2001) (citing Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1173-74 (1999)).

[121] *See* Hansmann & Kraakman, *supra* note 101, at 418; Merrill & Smith, *supra* note 17, at 52.

[122] *See* Hansmann & Kraakman, *supra* note 101, at 418 ("excessive fragmentation often arises out of mistake or changed circumstances"); Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 957-60 (1988) (discussing inadequate foresight).

[123] POSNER, *supra* note 67, at 95.

common law, there was a presumption that "a conveyance of land to a railroad or other right-of-way company is . . . an easement that is terminable when the acquirer's use terminates."[124] More broadly, Hansmann and Kraakman point out that the "law's approach is generally not to prevent such fragmentation, but rather to facilitate its elimination when it gets out of hand . . . through a broad range of familiar doctrines," such as partition, dissolution, and eminent domain.[125]

Another external cost that may arise is that an owner's inclusion of a non-owner may affect neighbors or other market participants. If an owner decides to rent her home to a tenant, the tenant's use of the property may affect not only the homeowner but also the neighbors. For example, renting a house to students for a semester or to alumni for a football weekend may entail external costs.[126] Similarly, with licenses, the owner of a home business may invite customers into her home (for legal advice, haircuts, etc.), but the customers may impose costs, including street congestion and noise, on local residents.[127] For this reason, even if a division is beneficial for both the owner and non-owner, the division may be socially detrimental if the external costs exceed the net benefits to the parties.

Dividing property may impose costs not only on neighbors but also on other market participants. Merrill and Smith argue that, if two parties were able to create idiosyncratic property rights, these rights would impose information or measurement costs on potential trespassers, other buyers and sellers, and creditors.[128] On a broad scale, these other market participants must "ascertain the legal dimensions of property rights in order to avoid violating the rights of others and to assess whether to acquire the rights of others."[129] Merrill and Smith posit that "compulsory standardization of property rights" controls "external costs of measurement to third parties."[130]

III.
COMPETING MODES OF INCLUSION

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[124] *Id.*

[125] Hansmann & Kraakman, *supra* note 101, at 418.

[126] *See, e.g.*, Angela Forest, *A Decade of Change on Campus in Newport News*, DAILY PRESS (Newport News, VA), Dec. 31, 2006, at A1; Margaret Fosmoe, *Condo Plans Draw Fire Legacy Square Near ND Now to be Student Rentals*, SOUTHBENDTRIBUNE.COM, Nov. 16, 2000.

[127] *See* Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1198, 1231 (2001); *see also* Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061, 1090.

[128] *See* Merrill & Smith, *supra* note 17, at 31-32.

[129] *Id.* at 69.

[130] *Id.* at 33.

To maximize the net benefits of inclusion, law authorizes multiple ways of including others, including informal, contractual, and proprietary inclusion. Part III.A discusses informal inclusion through nonenforcement and waiver. Part III.B analyzes inclusion via contract, compares informal and contractual inclusion, and identifies limitations of contract in deterring opportunism. Part III.C considers inclusion through recognized forms of property. After examining the justifications for distinguishing these property forms from contracts, it compares several property forms that facilitate inclusion.

A. Informal Inclusion

Informal inclusion involves situations in which an owner includes another in property, but the inclusion imposes no legal obligations on the parties. Unlike formal inclusion, which relies on contract or property law, informal inclusion relies on an owner's discretion and social norms to govern the scope, terms, and termination of the inclusion. This Article discusses two types of informal inclusion: nonenforcement and waiver.

As noted, Robert Merges discusses how owners include others by not enforcing property rights.[131] Merges highlights the "crucial *postgrant* stage in the life of a typical property right."[132] He argues that attending to this stage "reveals all sorts of ways that the supposedly exclusive right of property is actually bound up with various forms of *inclusion*."[133] The most obvious example, according to Merges, is "nonenforcement" because "rights that are theoretically exclusive can be voluntarily left idle for all sorts of reasons—rendering them not very exclusive at all."[134]

Nonenforcement is distinct from the other types of inclusion. First, nonenforcement is passive. Unlike a gratuitous license or a lease, an owner who includes through nonenforcement does not have to take any affirmative steps. Second, nonenforcement is ex post. Unlike a waiver that is given in advance, the decision not to exclude a non-owner only occurs, or is made evident, after the non-owner begins to use the owner's property. Third, unlike contracts or property forms, nonenforcement does not create new

[131] *See supra* notes __-__ and accompanying text.
[132] MERGES, *supra* note 1, at 295.
[133] *Id.*
[134] *Id.*; *see also* Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 43 ARIZ. L. REV. 145, 161 n.22 (2011) (collecting "empirical evidence on extensive underenforcement of patents in biotechnology" and "extensive nonenforcement of copyrights in the online context").

rights or duties. In other words, nonenforcement functions as an implicit waiver of the right to exclude after the fact.

The problem with nonenforcement is it provides little certainty. The non-owner is able to use the property only under a continual risk of losing access. At any time, the owner may decide to exclude. With a few exceptions like estoppel, laches, and adverse possession, the law does not provide a non-owner with any legal rights or remedies. Social norms and other factors may affect the circumstances in which the owner decides to terminate the inclusion.[135] But, ultimately, the decision not to enforce is within the owner's discretion. Owners may decide to exclude at any time or for any reason, even if opportunistic.[136] Moreover, non-owners may have an incentive to expand the scope of inclusion and use property excessively, especially knowing owners can revoke at any time. Thus, nonenforcement may provide little protection against strategic behavior.

Another type of informal inclusion is waiver. Owners can include non-owners in their property by gratuitously waiving the right to exclude. A waiver of the right to exclude is a "permission slip" from an owner to a non-owner.[137] The waiver may be explicit, e.g., an invitation, or implicit, e.g., a store opening its doors.[138] Yet, unlike nonenforcement, which entails an owner's decision not to enforce after the fact, a waiver entails a decision to include before the fact—essentially, a promise in advance not to exclude.

Including others through waiver is pervasive.[139] A common type of waiver is a gratuitous license.[140] Gratuitous licenses involve a waiver of the right to exclude, converting what would otherwise be a trespass into a lawful entry upon or use of the owner's property.[141] Another example is the

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[135] *See, e.g.*, Rebecca S. Eisenberg, *Noncompliance, Nonenforcement, Nonproblem? Rethinking The Anticommons In Biomedical Research*, 45 HOUS. L. REV. 1059, 1095 (2008) (discussing social norms governing "nonenforcement of patents").

[136] *See, e.g.*, Robert P. Merges, *Individual Creators in the Cultural Commons*, 95 CORNELL L. REV. 793, 804 (2010) ("strategic use of patents here has the potential to do real economic harm").

[137] Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 976 (2000) ("A license is a 'permission slip' from someone with the right to exclude that allows another to gain access to a resource.").

[138] *See, e.g.*, St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So. 2d 670, 676 (Fla. 1950).

[139] *See* MERGES, *supra* note 1, at 286-87 ("The choice to waive property rights is part and parcel of the property system, and owners often exercise this choice so as to reduce the worst potential effects of property rights."); SINGER, *supra* note 192, at 362 ("Possessors of real property constantly grant non-owners permission to enter their property.").

[140] *See* THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 85 (2010) (noting that "licenses are ubiquitous in everyday life")

[141] *See* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 11:1 (2008) (defining license as "the permission to do something on the land of another that, without such authority, would be unlawful").

waiver of IP rights in life-saving drugs.[142] Because waiver is consistent with several advantages of inclusion, the "ability to waive property rights is a crucial benefit."[143]

The problem with waiver, even if inclusion is beneficial, is that it provides little certainty to non-owners. Compared to nonenforcement, waiver lowers the risk to non-owners; without revoking a waiver, the owner cannot claim a non-owner is trespassing or infringing. However, like nonenforcement, a waiver or gratuitous license is freely revocable.[144] If an owner withdraws a waiver or license, the non-owner may have no legal remedy, unless the license is coupled with a grant or constitutes an easement by estoppel.[145] The ambulatory nature of the interest means that, in the absence of social norms or repeat play, a non-owner may have little incentive to rely on a waiver.

Thus, except in limited circumstances, waiver does little to reduce the possibility of opportunism. Non-owners may attempt to increase the scope of their rights, utilize property excessively, or maintain it adequately. These problems may discourage owners from granting a waiver or license. Similarly, non-owners may hesitate to participate in informal inclusion, given that a waiver or license is freely revocable and an owner can revoke, or threaten to revoke, the waiver at any time. To deter opportunism, it may be necessary to rely on more formal mechanisms of inclusion like contracts.

B. Contractual Inclusion

While informal inclusion typically relies on the discretion of owners and social norms, formal inclusion relies on legal rules. For example, two or more parties may enter into a contract in which an owner includes another in the use, possession, or enjoyment of property in exchange for consideration. An owner may include a non-owner by agreeing not to enforce an exclusion right, from distressed loan workouts and foreclosure defenses,[146] to the settlement of patent and copyright disputes.[147] Similarly,

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[142] *See* MERGES, *supra* note 1, at 286 ("Most major pharmaceutical companies have undertaken voluntary free drug distribution programs." (citing *Pharmaceuticals: Quagmire to Goldmine?*, THE ECONOMIST, May 17, 2008, at 102)).

[143] *Id.*

[144] *See* 25 AM. JUR. 2D *Easements and Licenses* § 122 (2012) ("A license ordinarily may be revoked without notice and without cause . . . .").

[145] A gratuitous license may be irrevocable if the licensor combines a license with a grant or if the license constitutes an "easement by estoppel" because the licensee reasonably and substantially relies on a license and revoking the license would be unjust. *See* SINGER, *supra* note 52, at 363.

[146] *See* Richard S. Fries, *Distressed Loan Workouts and Remedies*, 600 PLI/Real 223, 230, 239 (2012) (discussing "Agreement to Waive or Not to Enforce Rights").

there are many types of contracts, including IP licenses, in which an owner includes another by waiving the right to exclude in advance.[148]

Unlike gratuitous licenses, which entail sharing, contractual licenses involve exchange. A ticket that permits a spectator to enter a sports stadium or movie theatre is, by most accounts, a license.[149] In exchange for entry into the stadium or theatre, a licensee pays the admission price, i.e., the cost of the ticket. Similarly, an owner may license a patent in exchange for royalty payments or an equity stake in a firm.[150] Licensing IP rights also serves as a mechanism for financing, risk-spreading, and specialization.

However, unlike gratuitous licenses, which are freely revocable, the meaning of "revocability" in contractual licenses is ambiguous.[151] There is uncertainty about whether such agreements entail a contract, a license, or a contract and a license.[152] The modern view is that non-gratuitous licenses have most, perhaps all, of the attributes of contracts.[153] Yet, arguably, even modern licenses, including IP licenses, are not identical to contracts. In analyzing copyright law, Newman contends the concept of license "belongs fundamentally to property, not contract."[154] Likewise, Merrill and Smith argue that it may be worthwhile to distinguish between a "license" and a "contract for a license" because "it probably leads to confusion to start treating licenses as if they were themselves contracts."[155] Finally, IP licenses may entail certain anti-opportunism devices that contracts do not, including mandatory rules and the doctrine of misuse.[156]

Compared to informal inclusion, contracts provide several benefits. Assuming they are enforceable, contracts allow parties to include others

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[147] *See* Carl Shapiro, *Antitrust Limits to Patent Settlements*, 34 RAND J. ECON. 391, 392 (2003) ("The lion's share of patent disputes are settled rather than litigated to a resolution in court." (citing Jean O. Lanjouw & Mark Schankerman, *Characteristics of Patent Litigation: A Window on Competition*, 32 RAND J. ECON. 129 (2001))).

[148] *See* Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1452 (2004) (noting "ubiquitous use of restrictive licensing agreements" in IP).

[149] *See* BRUCE & ELY, JR., *supra* note 141, at § 11:1 (collecting cases).

[150] *See, e.g.*, Herbert Hovenkamp, *Response: Markets in IP and Antitrust*, 100 GEO. L.J. 2133, 2154 (2012); Ash Nagdev et al., *IP as Venture Capital: A Case Study of Microsoft IP Ventures*, 8 WAKE FOREST INTELL. PROP. L.J. 197, 208-09 (2008).

[151] While a "contractual" license is "revocable" in one sense, revocation may constitute a breach of contract, resulting in damages. *See* BRUCE & ELY, JR., *supra* note 178, at § 11:6.

[152] *See* MERRILL & SMITH, *supra* note 140, at 86.

[153] *See, e.g.*, McCoy v. Mitsuboshi Cutlery, Inc., 67 F.3d 917, 920 (Fed. Cir. 1995) ("Whether express or implied, a license is a contract governed by ordinary principles of state contract law." (quoting Power Lift, Inc. v. Weatherford Nipple-Up Sys., Inc. 871 F.2d 1082, 1085 (Fed Cir. 1989))).

[154] Christopher M. Newman, *A License is not a "Contract Not to Sue": Disentangling Property and Contract in the Law of Copyright Licenses*, __IOWA L. REV. __ (2013).

[155] MERRILL & SMITH, *supra* note 3, at 157 (TM).

[156] *See* Christina Bohannan, *IP Misuse as Foreclosure*, 96 IOWA L. REV. 475 (2011).

with more certainty. Because both parties know they can rely on legal remedies to vindicate their rights, they have less concern about opportunism and conflicts over use. Moreover, unlike informal inclusion, which is freely revocable, contractual inclusion provides more certainty to non-owners. Consequently, an owner's promise not to enforce the right to exclude may encourage reliance.[157] In addition, because an owner will have less incentive to exclude, contracts may deter strategic behavior, one of the primary objectives of contract law.[158]

However, contracts are not without limitations. Contracts are costly to negotiate, draft, and enforce.[159] Given such costs, informal inclusion can be superior to contractual inclusion in a number of circumstances. First, if the benefits of inclusion are relatively small, a contract may not be worth the costs. For example, if a child needs to enter a neighbor's yard to retrieve a ball, the costs of a contract would exceed the benefits. Likewise, an invitation, rather than a formal contract, usually suffices for a dinner party. In both situations, there is little or no risk of opportunism.

Second, even if there is a risk of opportunism, relying on nonlegal sanctions such as social norms may be superior to drafting and enforcing a contract if the only risk is "low-value" opportunism. In analyzing the choice between law and norms in property disputes, Ellickson notes that "the size of the stakes matters."[160] If the stakes are high, channeling parties into contracts and formal remedies may be preferable because "the exercise of informal remedies [may] trigger a violent feud."[161] By contrast, if the stakes are low, "a grievant is less likely to regard the relatively high administrative costs of the legal system to be worthwhile."[162] Similarly, in analyzing how parties cooperate, Eric Posner notes that "nonlegal sanctions deter low-value opportunism" and "contract law serves to deter certain kinds of high-value opportunism.[163]

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[157] *See* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L. J. 1261, 1276-83 (1980); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEG. STUD. 401, 419 (1991); *cf.* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEG. STUD. 411, 416 & n.11 (1977).

[158] *See* POSNER, *supra* note 67, at 117.

[159] *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 246-48 (1991) (discussing contracts as social controls and indicating that one "major drawback" is "the transaction costs of arranging and enforcing them").

[160] *Id.* at 257.

[161] *Id.*

[162] *Id.*

[163] Posner, *supra* note 12, at 762; *cf.* Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 210, 212-13 (2009) (arguing litigation in complex contracts is limited to extreme cases of opportunism).

Third, even if there is a possibility of "high-value" opportunism, informal division can be superior to contractual division if social norms are robust or reputation is sufficiently important.[164] For example, the diamond trade in New York City involves valuable merchandise and a high risk of misappropriation. Nevertheless, as Lisa Bernstein explains, the "industry is able to use reputation/social bonds at a cost low enough to create a system of private law enabling most transactions to be consummated and most contracts enforced completely outside the legal system."[165]

Overall, owners will have a private incentive to include others by contract, rather than through nonenforcement or waiver, if the net benefits of contractual inclusion are positive and exceed the net benefits of informal inclusion. If the benefits of inclusion are relatively small, then drafting a contract is often not worth the costs. Even if the benefits of inclusion are more significant, parties may not enter a contract if transaction costs are substantial (the attorneys' fees may quickly exceed the gains from trade). Parties are likely to divide property by contract if there is a danger of high-value opportunism, if transaction costs are not prohibitive, and if social norms or reputation are inadequate.

However, it may still be the case that the private incentive to include diverges from the socially optimal level of inclusion. There may be too little inclusion, even with this ability to include informally or contractually, because contracts deter opportunism and prevent conflicts only imperfectly. For example, because contracts rely primarily on compensatory damages (while disfavoring specific performance and disallowing punitive damages), contracts may be inadequate to deter certain types of strategic behavior.[166] Thus, the usual remedy for breach may be insufficient to deter opportunism, resulting in too little cooperation.[167]

C. Proprietary Inclusion

In addition to informal and contractual inclusion, the law authorizes parties to include others through forms of property. Proprietary inclusion,

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[164] *See, e.g.*, Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992).

[165] *Id.* at 138.

[166] *See, e.g.*, Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. REV. 735, 746 (2006); Richard Squire, *Shareholder Opportunism in a World of Risky Debt*, 123 HARV. L. REV. 1151, 1205 (2010) (discussing shareholder opportunism and arguing fraudulent transfer law "provides a powerful equitable remedy in a setting where contractual remedies often are inadequate to deter opportunism").

[167] *Cf.* Posner, *supra* note 166, at 762 (arguing "traditional model of contract law is inadequate" because rational individuals would act differently "if they could rely on the courts to deter opportunism in contractual relationships").

like contractual inclusion, is typically more costly than informal inclusion. Although more expensive than informal inclusion, contractual inclusion and proprietary inclusion provide more certainty and greater protection against the possibility of opportunism.

If owners could accomplish optimal inclusion using contracts alone, the forms of property would seem to be superfluous. This section argues the forms continue to perform a useful function—they are instrumental in deterring opportunism and promoting cooperation—because parties cannot achieve the socially optimal level of inclusion by contract alone. Essentially, property forms complement contracts by providing owners with a set of standardized forms from which to choose in deciding how to include others. Moreover, the forms not only serve as viable alternatives to contract; they also can provide more certainty and a greater degree of protection against opportunism.

Accordingly, the Article analyzes four features of property that help to distinguish proprietary and contractual inclusion: (i) third party effects; (ii) mandatory rules; (iii) fiduciary duties; and (iv) supracompensatory remedies. There is a substantial literature on each of these attributes. The Article extends this analysis by focusing on how each attribute functions as an anti-opportunism device and how such attributes can serve as substitutes as well as complements.

1. *Justifications*

a. Third Party Effects

One difference between contracts and property is that contracts are *in personam*—binding the parties to the contract—whereas property rights are *in rem*—binding "the rest of the world."[168] Merrill and Smith argue that the reason we have these two modalities of rights is third-party information costs.[169] Thus, allowing inclusion by contract or property forms might be advantageous because, in different circumstances, each type of inclusion may reduce information costs with respect to third parties. The argument for distinguishing contract and property based on third-party information costs ultimately rests on assuming that adequate notice does not solve the problem, an assumption that has been the subject of debate.[170]

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[168] *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780-89 (2001) (discussing nature of *in rem* rights).

[169] *See id.* at 790-99.

[170] *Compare* SHAVELL, *supra* note 8, at 32 n.7 (arguing information-cost problem can be resolved through adequate notice and registries), *and* Hansmann & Kraakman, *supra* note 101, at 374 (limitations on property not a matter of standardization but of notice), *with*

Like Merrill and Smith, Hansmann and Kraakman believe there is a functional difference between contracts and property. However, they assert the difference is that "a property right in an asset, unlike a contract right, can be enforced against subsequent transferees of other rights in the asset."[171] In other words, a "property right 'runs with the asset.'"[172] Under this view, in which limitations on the types of property "facilitate verification of ownership of the rights offered for conveyance," property law reduces verification costs "by presuming that all property rights in a given asset are held by a single owner."[173] This presumption of undivided ownership is subject to an "exception that a partitioning of property rights across more than one owner is enforceable if there has been adequate notice of that partitioning to persons whom it might affect."[174]

To illustrate, compare easements and leases, two types of property rights, with Creative Commons licenses, which are contracts.[175] Easements and leases both "run with the land" and bind future transferees.[176] By contrast, in a Creative Commons license, license terms are not necessarily binding on downstream users because these users are not in privity of contract.[177] As a result, a contract between licensor and licensee does not capture the interests of all users. Merges advocates a statutory, rather than contractual, solution: Congress should legislate a "right to include" by incorporating a robust waiver mechanism into IP law.[178] In doing so, Merges illustrates one limitation of dividing property rights by contract.[179]

Merrill & Smith, *supra* note 22, at 43-45 (rejecting idea that "notice cures all" because of "third-party information costs" on other market participants).

[171] Hansmann & Kraakman, *supra* note 137, at 374.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *See* Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 198 (2004) ("From a legal perspective, the Creative Commons is a copyright license. Thus the entire scheme operates by virtue of contract.").

[176] *See* MERRILL & SMITH, *supra* note 3, at 983. In most easements, "the benefit of the easement is attached to a particular parcel of land, and runs with the ownership of the benefitted land." MERRILL & SMITH, *supra* note 140, at 200-01. Similarly, if a landlord transfers an apartment, the general rule is that the new landlord is "subject to the ongoing leasehold interest" and is bound by those provisions of the original lease that "'run with the land.'" MERRILL & SMITH, *supra* note 3, at 712.

[177] *See* Robert P. Merges, *Locke Remixed*, 40 U.C. DAVIS L. REV. 1259, 1272-73 (2007).

[178] *Id.* at 1272; *see also* MERGES, *supra* note 1, at 290 (advocating "a simple and binding mechanism for *waiver*—allowing a rightholder to make a binding dedication of his works to the public, and thus implementing a *right to include* that is coextensive with the traditional right to exclude at the heart of IP and property generally").

[179] *See* MERGES, *supra* note 1, at 229 ("The problem is that these [Creative Commons] licenses are only contracts. A better mechanism would be to build the waiver mechanism directly into copyright (and patent) law . . .").

b. Mandatory Rules

While contracts rely primarily on default rules which parties may modify freely, property forms more often entail nonwaivable rules that restrict customizability, from disclosure requirements to the implied warranty of habitability. One function of these mandatory rules is to deter strategic bargaining, especially in situations in which parties may have asymmetric information.

Many scholars have noted the role of mandatory rules in deterring opportunism. In discussing joint custody, Levmore notes that "mandatory rules reduce strategic behavior and attendant costs."[180] In analyzing the implied warranty of habitability, Merrill and Smith suggest the rule may be immutable because it "can plausibly be viewed as a form of protection strategy adopted in a context where tenants remain rationally ignorant and are vulnerable to strategic behavior by landlords."[181] In examining the corporation, Eisenberg asserts that the "law should also provide mandatory rules that empower the courts to override bargains concerning structural and distributional terms when necessary to prevent opportunism."[182]

Of course, mandatory rules may prevent two parties from achieving a mutually beneficial exchange. Plus, there is a possibility that mandatory rules sometimes may increase opportunism.[183] Thus, in any context, there is room to debate whether or not a nonwaivable rule is beneficial. But, theoretically, a rule that is mandatory may deter opportunism by preventing certain types of strategic bargaining.

c. Fiduciary Duties

As is well-recognized, fiduciary duties are useful in reducing agency costs.[184] Fiduciary law applies in many situations that entail a principal-agent relationship, including a settlor and trustees (or beneficiaries and trustees) and shareholders and managers.[185] If an agent's incentives diverge

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[180] Saul Levmore, *Joint Custody and Strategic Behavior*, 73 IND. L.J. 429, 433 (1998).

[181] Merrill & Smith, *supra* note 168, at 833.

[182] Melvin Avon Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1466 (1989).

[183] *See, e.g.*, Jonathan R. Macey, *Corporate Law and Corporate Governance: A Contractual Perspective*, 18 J. CORP. L. 185, 197 (1993); *cf.* Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 554-55 (2001) ("using mandatory rules to increase trust, in any form, may have precisely the opposite effect").

[184] *See supra* note __.

[185] *See* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991).

from the principal's objectives, the relationship creates agency costs. Agency costs include the costs of shirking as well as any costs a principal may incur in attempting to monitor the agent to prevent shirking.[186]

The purpose of the fiduciary duties, including the duties of loyalty and care, is to reduce agency costs by providing an ex post check on opportunism.[187] An agent's fiduciary duty to the principal means the agent may be liable if the agent violates one of the duties. Knowing this, the agent may have less incentive to act opportunistically. In discussing the role of fiduciary duties in corporate law, Easterbrook and Fischel point out that the fiduciary principle "replaces prior supervision with deterrence" and "the contours of the fiduciary principle reflect *the difficulty that contracting parties have in anticipating when and how their interests diverge*."[188] Similarly, in exploring agency costs in trust law, Sitkoff explains that "the fiduciary obligation has eclipsed limited powers as the chief device for controlling managerial agency costs."[189]

Economists have long stressed the role of different organizational forms in controlling agency costs.[190] The substance of fiduciary duties does vary by context: fiduciary duties in trust law are different than the fiduciary duties in corporate law.[191] Therefore, in various contexts, fiduciary duties can play an important function in reducing agency costs.

d. Supracompensatory Remedies

Property forms also differ from contracts in their remedies. Unlike contracts, which typically rely on compensatory damages, many property forms entail supracompensatory remedies, including specific performance

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[186] *See* Jensen & Meckling, *supra* note 109; JEAN-JACQUES LAFFONT & DAVID MARTIMORT, THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL (2002).

[187] *See* Sitkoff, *supra* note 109, at 1049 ("Agency theory, and in particular its emphasis on the problem of opportunism in circumstances of asymmetric information, explains these basic contours of fiduciary doctrine.").

[188] Frank H. Easterbook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982) (emphasis added); *see also* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1404 (2002) ("fiduciary law can be justified on the grounds that it deters opportunistic behavior").

[189] Sitkoff, *supra* note 109, at 683.

[190] *See, e.g.*, Fama & Jensen, *supra* note 95, at 333.

[191] *See* A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183, 186-87 (2010); *see also* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1045 (2011) ("precise contours of the fiduciary obligation vary across the fiduciary fields").

and injunctions, punitive damages, and restitution. Often, such remedies can play a role in deterring opportunism.[192]

First, consider specific performance and other forms of injunctive relief. For several reasons, including a concern about deterring efficient breach,[193] the law generally disfavors specific performance as a contractual remedy.[194] By contrast, many property forms rely on specific performance more often. There is some evidence that requiring performance ex post may deter opportunism ex ante.[195] More generally, one function of equity and equitable remedies, including injunctions, is to deter strategic behavior.[196]

Second, consider punitive damages. In the American legal system, punitive damages are not recoverable for a breach of contract.[197] However, there is a possibility of punitive damages or treble damages for many forms of property, including easements,[198] leases,[199] and trusts.[200] In many cases, the economic rationale for these types of supracompensatory damages is a concern about opportunism or bad faith.[201]

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[192] *Cf.* Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1970 n.27 (1996) ("hard-to-detect opportunism must be subject to quite severe sanctions if it is to be effectively deterred").

[193] *See* Steven Shavell, *The Design of Contracts and Remedies for Breach*, 99 Q.J. ECON. 121 (1984); *see also* Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980) (emphasizing desirability of moderate damages and role of damages as substitute for complete contracts).

[194] *See* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 2 THEORETICAL INQUIRIES L. 1 , 20 (2001).

[195] *See* Yair Listokin, *The Empirical Case for Specific Performance: Evidence from the Tyson-IBP Litigation*, 2 J. EMPIRICAL LEG. STUD. 469, 470 (2005); *see also* Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61, 84 (1987) ("In contracts involving non-fungible goods or services, the only way to deter promisor opportunism is to strictly enforce the specific performance remedy.").

[196] *See* Henry E. Smith, *An Economic Analysis of Law Versus Equity* (Oct. 22, 2010), *at* http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf.

[197] *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

[198] *See, e.g.*, Apel v. Katz, 697 N.E.2d 600 (Ohio 1998).

[199] *See, e.g.*, Polk v. Sexton, 613 So. 2d 841, 845 (Miss. 1993) (upholding punitive damages award for breach of a commercial lease"); MASS. GEN. LAWS ch. 186, § 15F (2000) (providing for treble damages if "tenant is removed from the premises or excluded therefrom by the landlord or his agent except pursuant to a valid court order").

[200] *See, e.g.*, Miner v. International Typographical Union Negotiated Pension Plan, 601 F. Supp. 1390, 1393 (D.C. Colo. 1985) ("Exemplary damages are available in the common law of trusts not to secure performance but to deter conduct harmful to the trusts." (citing Rivero v. Thomas, 194 P.2d 533 (Cal. Dist. Ct. App. 1948))).

[201] *See* David D. Haddock, Fred S. McChesney, & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 1 (1990).

Third, consider the remedy of restitution. [202] In contract cases, a court usually calculates damages based on a party's expectation interests, with reliance and restitution being described as "alternative" measures.[203] Yet, as Kull points out, restitution could protect against certain types of opportunistic behavior in contractual enforcement.[204] Recently, the *Restatement (Third) of Restitution & Unjust Enrichment*, for which Kull served as the Reporter, extended the remedy of disgorgement of profits to opportunistic breaches.[205] By contrast, unlike this relatively limited role in contract law (at least historically), restitution continues to play a significant role in several property forms, including trust and fiduciary law.[206]

2. *Applications*

Proprietary inclusion entails a number of forms. Each form relies on a unique combination of anti-opportunism devices, including mandatory rules, fiduciary duties, and supracompensatory remedies. This Article examines (1) easements, (2) leases, (3) condos and coops, (4) trusts, and (5) partnerships and corporations; compares these forms to each other and other types of inclusion; and explores how each form deters opportunism.

a. Easements

An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the

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[202] On restitution, *see generally* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004); Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927 (2001); Andrew Kull, *Rational Restitution*, 83 CAL. L. REV. 1191 (1995); Sale Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985).

[203] *See, e.g.*, E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1148-49 (1970); *see also* Samuel Williston, *Repudiation of Contracts*, 14 HARV. L. REV. 317, 318 (1901) (discussing "right to restitution as an alternative remedy instead of compensation in damages").

[204] *See* Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465, 1518 (1994) (noting that rescission affords "protection against those forms of opportunism that exploit undercompensatory enforcement").

[205] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39 (2011); *see also* Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1046 (2011) (describing "disgorgement remedy for opportunistic breach of contract").

[206] *See* Sitkoff, *supra* note 191, at 1049 (pointing out the "availability of a disgorgement remedy . . . reflects the additional deterrent and disclosure purposes of fiduciary law"); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1496 (2002) (noting that the "deterrent effect of restitution mitigates the temptation for a fiduciary to act opportunistically").

uses authorized by the easement."[207] In the United States, "[v]ast numbers of easements encumber land title records."[208] Because owners may grant easements "gratuitously or as part of a more general exchange of property rights," easements can facilitate sharing or exchange.[209]

Easements differ from other types of inclusion that enable sharing. Compared to nonenforcement or waiver, easements offer greater certainty and permanence. An owner that includes others via nonenforcement or waiver can still decide to exclude at any time. By contrast, the owner of a servient estate cannot exclude the owner of the dominant estate.[210]

Distinguishing easements and licenses is difficult.[211] The difficulty is both forms divide property according to a particular *use*, not *possession*. The "fundamental difference" between easements and *gratuitous* licenses is that owners may "revoke consent at any time and thereby terminate the licenses," while "easements are irrevocable interests in land of potentially perpetual duration."[212] Thus, compared to revocable licenses, easements provide more certainty.

But the challenge is in distinguishing easements from *irrevocable* licenses.[213] Courts usually characterize easements as "real property" as opposed to "mere licenses."[214] But the authority for the *in rem* nature of easements is "relatively thin."[215] Moreover, contractual licenses are arguably more like property than many courts have assumed.[216]

Easements also differ from types of inclusion that enable exchange. Unlike leases, easements are "nonpossessory" because they authorize only "limited uses" on the burdened property.[217] Because they involve limited uses, the financing and risk-sharing functions that are pertinent for leases

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[207] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (2000).

[208] Long Beach Unified Sch. Dist. v. Godwin, 32 F.3d 1364, 1369 (9th Cir. 1994)

[209] MERRILL & SMITH, *supra* note 140, at 202.

[210] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (2000) ("easement . . . obligates the possessor not to interfere with the uses authorized by the easement").

[211] *See, e.g.*, Clossson Lumber Co., Inc. v. Wiseman, 507 N.E.2d 974, 976 (Ind. 1987); *see also* Wesley Newcomb Hohfeld, *Faulty Analysis in Easement and License Cases*, 27 YALE L.J. 66, 66 (1917) ("unusual chaos of conceptions and inadequacy of reasoning").

[212] BRUCE & ELY, JR., *supra note* 141, at § 11:9

[213] *See* MILTON R. FRIEDMAN & PATRICK A. RANDOLPH, JR., FRIEDMAN ON LEASES § 37:1.2 (5th ed. 2006) ("distinction between a license, particularly an irrevocable license, and an easement" is "endlessly elusive").

[214] *See, e.g.*, Borek Cranberry March, Inc. v. Jackson Co., 785 N.W.2d 615 (Wisc. 2010); Simmons v. Abbondandolo, 184 A.D.2d 878, 879 (N.Y. App. Div. 1992).

[215] MERRILL & SMITH, *supra* note 140, at 202.

[216] *See* Newman, *supra* note 154.

[217] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 cmt. d (2000); *cf.* Wagner v. Doehring, 553 A.2d 684, 687 (Md. 1989) ("nonpossessory character of an easement distinguishes the interest from possessory interests").

are not relevant for easements. Instead, easements serve a role similar to an agreement between parties (often, neighbors) regarding the use of property. The modern trend is to view most easements as contracts,[218] but easements retain several non-contractarian features. Unlike contracts, easements allow the original parties to bind future owners; that is, both the benefit and burden of an easement "run with the land."[219]

Easement law has developed doctrines to combat opportunism, from disfavoring variation to issuing injunctions for abuse. Courts are reluctant to vary a party's obligations under an easement.[220] Dnes and Lueck suggest the rationale for this reluctance is that "variation could be claimed opportunistically as a means of altering the easement, possibly resulting in costly adjudication."[221] In addition, an easement holder may "abuse" the easement by exceeding its scope.[222] While Strang advocates damages, rather than injunctions, as the remedy for abuse,[223] the traditional remedy of injunctive relief may help to reduce the likelihood of strategic behavior.

b. Leases

Leasing is one of the most common ways by which owners include others in their property.[224] In 2010, out of the 112 million occupied housing units, over 37 million units were rentals.[225] Many businesses, including most law firms, lease commercial real estate.[226] And half of the nearly 3 million owners of farms rent their land to others.[227] Leasing is also a

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[218] *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982); *see also* Abington Ltd. Partnership v. Heublein, 717 A.2d 1232, 1240 (Conn. 1998) ("[T]he recently approved provisions of the Restatement (Third) of the Law of Property (Servitudes) . . . adopt a contracts oriented view of the law of easements and servitudes.").

[219] *See* Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1403-04 (1982).

[220] *See* Antony Dnes & Dean Lueck, *Asymmetric Information and the Law of Servitudes Governing Land*, 38 J. LEG. STUD. 89, 111 (2009).

[221] *Id.* at 106 tbl. 1.

[222] *See* BRUCE & ELY, JR., *supra* note 141, at § 8:17.

[223] *See* Strang, *supra* note 105.

[224] *See* Ellickson, *supra* note 11, at 1372 ("scores of millions of leaseholds in the United States demonstrate the ubiquity of these opportunities for mutual gain"); Thomas J. Miceli et al., *The Property-Contract Boundary: An Economic Analysis of Leases*, 3 AM. L. & ECON. REV. 165, 165 (2001) ("leasing . . . is a common economic arrangement").

[225] U.S. Census Bureau, Statistical Abstract of the United States: 2012, Construction and Housing, tbl. 982, *at* http://www.census.gov/compendia/statab/2012/tables/12s0982.pdf

[226] *See* Ed Poll, *Farewell, Firm Overhead*, 31 NO. 3 LEGAL MGMT. 58, 60 (2012).

[227] *See* Bureau of the Census: Statistical Brief, *Who Owns America's Farmland?* (May 1993), *available at* https://www.census.gov/apsd/www/statbrief/sb93_10.pdf.

common way of acquiring personal property like airplanes and automobiles,[228] as well as commercial and industrial equipment.[229]

Leases facilitate exchange without requiring the outright transfer of property.[230] A lessor transfers possession of the apartment, office space, farm, or car to a lessee. In return, the lessee makes a (rental) payment to the lessor. Leases also have served as a financing device from preindustrial times to the present.[231] They help to spread risk by providing tenants with more flexibility than ownership.[232] And leases entail specialization as well: a landlord and tenant both benefit by performing different functions in managing and using a complex asset.

Leases differ from other forms of inclusion, including licenses and easements. Whereas a license concerns *use*, a lease concerns *possession*.[233] In addition, compared to licenses, lease law entails more mandatory rules, including the implied warranty of habitability in residential leases.

Distinguishing leases and easements is straightforward, in theory. The distinction turns on whether an interest is for "exclusive possession," in which case it is a lease, or a "nonpossessory right to use," in which case it is an easement. [234] However, if the terms of a lease narrow a possessory interest and the terms of an easement involve broad use rights, the distinction begins to evaporate.[235]

Finally, since the landlord-tenant revolution,[236] many courts assume leases are contracts.[237] However, although residential leases are similar to contracts, including in their remedies for breach, leases differ in several ways. First, once in possession, a tenant, unlike a party to a contract, has an *in rem* right against the world. Second, at least for residential leases, lease law relies on mandatory rules, such as the implied warranty of habitability, more often than contract law. Third, like the benefit and burden of an easement, the terms of a lease often "run with the land."[238] This can

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[228] MERRILL & SMITH, *supra* note 3, at 650.

[229] *See* U.S. Census Bureau, Service Annual Survey: 2009, tbl. 1227 (2011), *available at* http://www.census.gov/compendia/statab/2012/tables/12s1225.pdf.

[230] *See* Miceli et al., *supra* note 224, at 183 ("In many economic settings, leasing an asset is preferred to owning it.").

[231] *See supra* notes __-__ and accompanying text.

[232] *See supra* notes __-__ and accompanying text.

[233] *See* FRIEDMAN & RANDOLPH, JR., *supra* note 213, at § 37:1.1.

[234] *See* BRUCE & ELY, JR., *supra* note 141, at § 1:3 ("In theory, easements are easily distinguished from leases.").

[235] *See* FRIEDMAN & RANDOLPH, JR., *supra* note 213, at § 37:1.2.

[236] *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

[237] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970).

[238] MERRILL & SMITH, *supra* note 3, at 845.

produce outcomes, like the inability of a new landlord to evict an existing tenant, that differ from the result if leases were simply contracts.[239]

Many rules governing leases target opportunism. Historically, agricultural leases provided a way to minimize the risk of a landlord's expropriating the land and inputs.[240] Unlike agricultural leases, modern residential leases involve active management, maintenance, and governance problems in which landlords can exploit asymmetric information.[241] As a result, the law attempts to deter landlord opportunism by providing each tenant with an implied warranty of habitability.[242] There is a considerable literature on whether this warranty should be a mandatory or default rule.[243] However, if the purpose of the rule is to deter landlord opportunism, there is a case for the rule being nonwaivable. A mandatory rule may protect tenants who lack the financial resources to hire an attorney to review the lease or a professional to inspect the property.[244] Such tenants may be particularly vulnerable to strategic behavior.[245]

Understanding the lease as an anti-opportunism device helps explain divergences among different types of leases. Unlike residential leases, most commercial leases are not subject to a warranty of fitness for intended purpose.[246] Moreover, while most states impose a duty to mitigate damages on a landlord if a tenant vacates a dwelling,[247] there is no analogous duty in most states to mitigate if a tenant vacates a commercial property.[248] These differences may be justifiable if the risk of opportunism is lower in the context of commercial leasing. In general, commercial tenants may have more sophistication, greater legal representation, and higher financial stakes

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[239] *See id.* at 827-28.

[240] *See* Miceli et al., *supra* note 224, at 168 (noting "the conveyance gives the tenant a greater incentive to invest by protecting him from the risk of appropriation")

[241] *Id.* at 651, 823.

[242] *See* Lueck & Miceli, *supra* note 9, at 218-19 (describing how the law provides tenants with "an enforcement mechanism by transforming the lease into a contract with an implied warranty of habitability").

[243] *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389 (2011) (collecting citations).

[244] *See* Merrill & Smith, *supra* note 168, at 827.

[245] *See id.* at 833.

[246] *See* MERRILL & SMITH, *supra* note 3, at 695 ("To date, only a small minority of states have adopted an implied warranty of fitness in commercial cases." (citing Barton Enters. v. Tsern, 928 P.2d 368 (Utah 1996))). For a survey, *see* Anthony J. Vlatas, Note, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases*, 94 COLUM. L. REV. 658, 659 n.5 (1994).

[247] *See, e.g.*, Sommer v. Kridel, 378 A.2d 767 (N.J. 1977); *see also* Austin Hill Country Realty, Inc., v. Palisades Plaza, Inc., 948 S.W.2d 293 (Tex. 1997) (adopting duty to mitigate and noting 42 states and D.C. have adopted this duty in residential leases).

[248] *See* Lueck & Miceli, *supra* note 9, at 221 n.95 (noting that "the duty to mitigate has not been universally applied to commercial leases").

than residential tenants.[249] Courts recognize an implied covenant of good faith and fair dealing in commercial leases, and this covenant may serve as a check on opportunism.[250] But, overall, the risk of strategic behavior based on informational asymmetries is arguably lower in the commercial context.

Conversely, tenants may impose costs on landlords by excessively utilizing or inadequately maintaining rental property.[251] The common law addressed this concern through the doctrine of waste,[252] which still applies, although now landlords usually specify what tenants may and may not do to the property in the terms of the lease. Overall, as Lueck and Miceli suggest, the implied warranty of habitability and the doctrine of waste "may in fact work in combination to create efficient bilateral incentives for maintenance in the presence of the rental externality."[253]

c. Condos and Coops

The use of common-interest communities (CICs), including condos and coops, has grown exponentially.[254] With condos and coops, residents purchase individual units and pay an association fee to maintain common areas and amenities. In return, residents obtain some of the benefits of home ownership, e.g., residents may prefer CICs to leases if they value having control over decisions like remodeling the kitchen.[255] CICs also achieve economies of scale regarding maintenance and certain amenities that residents may not otherwise have been able to afford.[256]

Compared to leases, CICs mitigate the costs of division. Because residents own their units, condos avoid excessive utilization or inadequate maintenance (except in common areas). But, unlike leases, CICs introduce

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[249] *See* Daniel B. Bogart, *Good Faith and Fair Dealing in Commercial Leasing: The Right Doctrine in the Wrong Transaction*, 41 JOHN MARSHALL L. REV. 275, 277-78, 300-01 (2008) (discussing ways in which commercial leases differ from residential leases).

[250] *See id*. at 280.

[251] *See* John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209, 1211 (2007); Vlatas, *supra* note 246, at 690-91.

[252] *See* Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 677 (2006); Stake, supra note 5, at 1300.

[253] Lueck & Miceli, *supra* note 9, at 219.

[254] *See* Michael H. Schill, Ioan Voicu, & Jonathan Miller, *The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. Legal Stud. 275, 277-82 (2007); *see also* Hansmann, *supra* note 117, at 25 (discussing how condos and coops "have spread rapidly through the real estate market").

[255] MERRILL & SMITH, *supra* note 3, at 750.

[256] *See* Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 841-42; Mark D. West & Emily M. Morris, *The Tragedy of the Condominiums: Legal Responses to Collective Action Problems After the Kobe Earthquake*, 51 AM. J. COMP. L. 903, 927 (2003).

the risk of opportunism by an association or governing board.[257] Moreover, as Strahilevitz notes, some amenities can function as exclusionary devices, suggesting CICs may involve a danger of discrimination.[258]

The main differences between condos and coops involve financing and approving residents. Condos may have a financing advantage because the collective mortgage in a coop means that each owner "bears a portion of the risk that one of his or her fellow share owners will default."[259] On the other hand, the collective mortgage in a coop does make it easier for coops to utilize tax-deductible debt for improvements, impose liens on defaulting owners, and evict owners for transgressing rules.[260] In approving residents, coops may reduce demand by requiring the disclosure of financial records, imposing limitations on shareholder debt, and prohibiting subletting.[261] On the other hand, these strict financing and approval requirements may reduce the risk for other shareholders. Plus, some owners may desire this type of exclusivity, although attempts by coops "to maintain a community with certain desired characteristics" can increase the risk of discrimination.[262]

The laws governing CICs entail rules that mitigate opportunism. A key feature distinguishing condos from co-ownership is that the owners of condos generally do not possess the right of partition.[263] This eliminates the risk of strategic exit. Jurisdictions differ on whether condo developers are subject to fiduciary duties,[264] but condo directors are normally subject to such duties.[265] In addition, in many jurisdictions, covenants in the master deed, as well as subsequent actions by the association or board, are subject to a "reasonableness" requirement.[266] Finally, other anti-opportunism tools,

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[257] *See* Yoram Barzel & Tim R. Sass, *The Allocation of Resources by Voting*, 105 Q. J. ECON. 745, 770 (1990); *see also* West & Morris, *supra* note 256, at 927 (discussing how strategic behavior is a "source of collective-action costs" for condo owners).

[258] *See* Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 449 (2006) (exploring whether "residential golf communities have functioned as exclusionary club goods").

[259] Schill et al., *supra* note 254, at 283; *see also* Allen C. Goodman & John L. Goodman, Jr., *The Co-op Discount*, 14 J. REAL ESTATE FIN. & ECON 223 (1997).

[260] *See* Schill et al., *supra* note 254, at 283.

[261] *See id.* at 283-84.

[262] *Id.* at 284; *cf.* Strahilivetz, *supra* note 258, at 452 (discussing how residents in Manhattan cooperatives may want to exclude certain applicants).

[263] *See* Dagan & Heller, *supra* note 120, at 616 n.258.

[264] *See* 31 C.J.S. *Estates* § 261 (2012).

[265] *See, e.g.*, VINCENT DI LORENZO, NEW YORK CONDOMINIUM AND COOPERATIVE LAW § 12:2, at 217-19 (2d ed. 1995, supp. 2007-2008))).

[266] *See, e.g.*, Nahrstedt v. Lakeside Village Condominium Ass'n., 878 P.2d 1275 (Cal. 1994) (citing Civil Code § 1354).

including the implied warranty of habitability, apply to coops (technically, coop shareholders are "lessees"), but generally do not apply to condos.[267]

Should an anti-opportunism device like the implied warranty of habitability extend to CICs? Existing law appears to turn on a formalistic distinction: coop shareholders, as lessees, enjoy an implied warranty; condo owners, who are not lessees, do not.[268] But, functionally, the owners of coops and condos are similarly situated. Unlike residential tenants, the owners of coops and condos tend to have a significant financial stake. Plus, a purchaser of a coop or condo may be more likely than a residential tenant to obtain an inspection, especially if a lender requires it. Thus, there may be less need for a mandatory implied warranty of habitability to prevent opportunism, and no reason for treating coops and condos differently.

d. Trusts

There are three types of trusts: donative, charitable, and business. Donative and charitable trusts facilitate sharing, as owners gratuitously transfer property to trustees for the benefit of ascertainable beneficiaries or a charitable purpose. Both trusts also facilitate specialization. The trust form captures the benefits of managerial intermediation: the beneficiaries receive distributions of income and principal from the trust, while a trustee specializes in managing, investing, and distributing trust property.[269]

Business trusts facilitate exchange, rather than sharing, in pensions, investments (mutual funds, real estate investment, and asset securitization), and corporate and municipal bond transactions.[270] In addition, business trusts serve the functions of financing, risk-spreading, and specialization. For example, the utilization of trusts as "special purpose vehicles" in asset securitization plays a key role in structured finance.[271] Financial institutions use business trusts "to diversify lending risk,"[272] and mutual funds rely on trusts to allow small investors to diversify their portfolios.[273] Corporate and

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[267] *See* Christopher S. Brennan, Note, *The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominiums*, 67 FORDHAM L. REV. 3041 (1999).

[268] *See, e.g.*, 1324 W. Pratt Condominium Ass'n v. Platt Const. Group, Inc., 404 Ill. App. 3d 611 N.E.2d 1093 (1st Dist. 2010).

[269] *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 93, at 543.

[270] *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 167-78 (1997); Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 562 (2003).

[271] Schwarcz, *supra* note 270, at 564-65.

[272] *Id.* at 565.

[273] *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 9, at 556.

municipal bond transactions that utilize the trust form also benefit by having a trustee act as a sophisticated financial intermediary.[274]

Trusts differ from other forms of icnlusion. Inclusion by waiver, rather than in a donative or charitable trust, would eliminate the benefits of managerial intermediation. While charitable trusts are a "close cousin" to nonprofit organizations,[275] a trust is more focused in purpose and has more stringent fiduciary duties.[276] Partnerships and corporations compete with business trusts but, as discussed below, differ in several respects including their fiduciary duties. Finally, Langbein and others have noted the close connection between trusts and contracts.[277] Insofar as these forms differ, the differences seem explainable by alternative approaches to opportunism, including a greater reliance on asset partitioning and mandatory rules in trust law.[278]

Because a trustee is an agent of both the settlor and the beneficiaries, a trust entails a high risk of opportunism. Sitkoff emphasizes that the "problems of shirking and monitoring, the driving concerns of agency cost analysis, abound in trust administration."[279] The primary legal constraints on this type of "agency misbehavior," which Macey describes as "trustee opportunism,"[280] are the fiduciary duties.[281] The duties of loyalty and care can deter trustees from misappropriating or mismanaging trust property. A key feature of fiduciary duties is that they vary by context, e.g., the duties are more stringent in trust law than corporate law.[282] This tailoring provides parties with multiple forms from which to choose in including others.

The risk of opportunism is especially significant in charitable trusts. Unlike donative trusts, whose beneficiaries are often in a position to enforce

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[274] *See* Langbein, *supra* note 270, at 174.

[275] Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 437 (1998). On non-profits, *see generally* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

[276] *See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974).

[277] *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 650-59, 671 (1995); *see also* Sitkoff, *supra* note 109, at 629-31 (discussing contractarian challenge).

[278] *See* Hansmann & Mattei, *supra* note 275, at 472 (discussing how trusts can play an "asset partitioning" function that is generally impracticable to replicate via contract); *see also* M.W. LAU, THE ECONOMIC STRUCTURE OF TRUSTS 21-35 (2011) (arguing trust law is "not merely a specialized branch of contract law" because of the role of mandatory rules).

[279] Sitkoff, *supra* note 109, at 623.

[280] Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 316 (1988).

[281] *See* Sitkoff, *supra* note 191, at 1049 (pointing out "problem of opportunism in circumstances of asymmetric information" explains "basic contours of fiduciary doctrine").

[282] *See id.* at 1045 (discussing how agency problem in family trusts differs from agency problem in publicly-traded corporations).

a trustee's fiduciary duties, charitable trusts rely on state attorneys general, who usually have limited resources, and little political will, to expend on enforcement.[283] As a result, some law reform efforts have attempted to incorporate new mechanisms, including an expansion of settlor standing, for enforcing the duties of a charitable trustee.[284]

Business trusts also rely on fiduciary duties to prevent opportunism. Historically, fiduciary duties were a key element in adopting the trust form in ERISA and pension law.[285] Opportunism by an employer or employees is still possible.[286] However, in comparing business trusts and corporations, Warburton finds "trust law is effective in curtailing opportunistic behavior, as trust managers charge significantly lower fees than their observationally equivalent corporate counterparts."[287] His study suggests that "trusts are more effective than corporations in curtailing opportunistic behavior by managers" and that the fiduciary duties in trusts are "a superior mechanism for mitigating managerial opportunism and agency conflict within business organizations."[288] As discussed below, fiduciary duties in corporate law may have certain offsetting advantages.

e. Partnerships and Corporations

Rather than relying on business trusts, today's business enterprises rely primarily on partnerships and corporations. Including others via a partnership (general, limited, limited liability, or limited liability limited) or corporation (publicly traded, closely held, or privately held) serves several functions, including financing, risk-spreading, and specialization.

Partnerships are an alternative to debt financing,[289] and corporations serve as financing devices.[290] In addition, partnerships and corporations both help to spread risk. Indeed, one explanation for the partnership form is

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[283] *See* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Haw. L. Rev. 593, 622-624 (1999); Joshua C. Tate, *Should Charitable Trust Enforcement Rights Be Assignable?*, 85 CHI.-KENT L. REV. 1045 (2010).

[284] UNIF. TRUST CODE § 405(c); *see also* Tate, *supra* note 328, at 1051-56.

[285] *See* Langbein, *supra* note 270, at 182.

[286] *See, e.g.*, Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1158 (1988) ("Once the initial agreement is concluded, either party may have an incentive to behave opportunistically.").

[287] Warburton, *supra* note 191, at 183.

[288] *Id.* at 187.

[289] *See* William Klein & John C. Coffee, *The Need to Assemble At-Risk Capital*, *in* BUSINESS ORGANIZATION AND FINANCE 53-54 (3d ed. 1988).

[290] *See* FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 10-11 (1991) ("The corporation is a financing device and is not otherwise distinctive.").

the "insurance theory" of partnership.[291] Likewise, in corporations, both limited liability and different classes of stock can reduce risk for shareholders.[292] Finally, both forms entail specialization. In their seminal work on the corporation, Berle and Means discuss the advantages of separating ownership (by shareholders) from control (by managers).[293] This type of separation allows the officers to serve as "specialized managers of a complex of assets," while the shareholders, or partners, receive the "benefits of this asset management" through dividends or earnings.[294]

Overall, partnerships and corporations provide more certainty than informal inclusion, greater protection than contracts, and more flexibility than business trusts. Specifically, informal inclusion is insufficient to provide the permanence necessary for a business of potentially infinite duration. Contracts may not be capable of replicating the functions of a corporation, including asset-partitioning and preventing opportunistic holdup.[295] Partnerships and corporations serve as substitutes for business trusts.[296] But these forms differ from trusts, in terms of their insolvency regimes and residual claimants.[297] Plus, the flexibility of the corporate form may explain why most owners incorporate rather than create a trust.[298]

Partnerships and corporations both entail anti-opportunism devices. The risk of opportunism is pervasive in partnerships, close corporations, and public corporations.[299] In partnerships and close corporations, "reputation and interpersonal trust can play a larger role in protecting against opportunism."[300] Partners also may apportion income to reduce

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[291] *See* Kevin Lang & Peter-John Gordon, *Partnerships as Insurance Devices: Theory and Evidence*, 26 RAND. J. ECON. 614 (1995).

[292] *See* POSNER, *supra* note 67 536-37; Schwarcz, *supra* note 270, at 574.

[293] BERLE & MEANS, *supra* note 94.

[294] MERRILL & SMITH, *supra* note 3, at 805.

[295] On asset-partitioning, *see* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law* 110 YALE L.J. 387 (2000). On deterring hold-up, *see* WILLIAMSON, *supra* note 130; Grossman & Hart, *supra* note 101; Hart & Moore, *supra* note 101.

[296] *See* Henry Hansmann, Reinier Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5, 14.

[297] *See* Langbein, *supra* note 270, at 189 (discussing insolvency regimes); Schwarcz, *supra* note 270, at 559, 585 (discussing residual claimants).

[298] *See* Warburton, *supra* note 191 at 184 (finding "business flexibility that corporations grant leads to greater agency conflict and risk taking, but also to potentially superior risk-adjusted performance").

[299] *See, e.g.*, Paul G. Mahoney, *Trust and Opportunism in Close Corporations*, *in* CONCENTRATED CORPORATE OWNERSHIP 177 (Randall K. Morck ed., 2000); Charles R. O'Kelley, Jr., *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 NW. U. L. REV. 216, 238 (1992); Richard Squire, *Strategic Liability in the Corporate Group*, 78 U. CHI. L. REV. 605 (2011).

[300] Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 796 n.18 (2007).

strategic behavior.[301] In publicly-traded firms, the potential for investors to "exit" by selling their shares may deter opportunism by managers as well as shareholders.[302] In addition, if shareholders threaten to exit, law "provides a robust solution to the problem caused by threats of opportunistic exit."[303] Corporate law also entails mandatory rules, such as disclosure requirements and insider trading prohibitions,[304] to deter strategic behavior.[305]

The ultimate safeguards against strategic behavior in partnership and corporate law, as in trust law, are fiduciary duties.[306] Although trust law, with its more stringent fiduciary duties, may be superior to corporate law in deterring opportunism, Warburton finds there is a trade-off: corporations retain greater flexibility and achieve a higher rate of return for investors. In any event, the risk of opportunism, as well as range of anti-opportunism devices, is an important factor in selecting among the forms.[307]

3. *Extensions*

a. Franchises

The franchise is a popular form of inclusion.[308] The owner of a franchise (the franchisor) may franchise an outlet by including another (the

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[301] *See* Bradley T. Borden, *Partnership Tax Allocations and the Internalization of Tax-Item Transactions*, 59 S.C. L. REV. 297, 303-17 (2008) .

[302] *See* Darian M. Ibrahim, *The New Exit in Venture Capital*, 65 VAND. L. REV. 1, 26 (2012).

[303] Edward B. Rock & Michael L. Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations*, 24 J. CORP. L. 913, 929 (1999).

[304] *See* Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983). *But cf.* Henry G. Manne, *Insider Trading: Hayek, Virtual Markets, and the Dog that Did Not Bark*, 31 J. CORP. L. 167 (2005).

[305] On the use of mandatory rules in corporate law, *see* Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989); Bernard Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990); Symposium, *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989).

[306] Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55 (John W. Pratt & Richard J. Zeckhauser eds., 1991).

[307] *See* O'Kelley, *supra* note 299, at 218-19 (explicating "theory of form choice" in which parties "choose a governance structure for their firm that provides the optimal mix of adaptability and protection from opportunism"); *cf.* Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 215 (2001) ("firms select from among the menu of possible organizational forms for the very purpose of surmounting the difficulties otherwise imposed by contracting costs").

[308] *See* G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Contracts*, 28 J.L. & ECON. 503, 503 n.1 (1985) ("Franchising accounts for approximately one-third of total retail sales in the United States and Canada.").

franchisee), rather than expanding the firm, if doing so reduces agency costs.[309] Specifically, a firm will franchise if the agency costs of franchising (inefficient risk-bearing, free riding, and appropriating quasi-rents) are lower than the agency costs of owning and operating a new outlet (managerial shirking).[310]

While franchises are an alternative form of inclusion for owners attempting to reduce agency costs, there is a significant risk of opportunism by franchisors and franchisees.[311] Franchisees may fail to maintain a brand.[312] They may manipulate information or shirk their obligations to provide customer service and maintain the cleanliness of their units.[313] Such actions increase monitoring costs and reduce the agency-cost advantage of franchises.[314] Conversely, franchisors may act strategically by threatening to terminate an agreement to extract quasi-rents,[315] although ex post rents may discourage ex ante opportunism.[316] Franchisors also may encroach upon existing franchisees by authorizing new franchisees or establishing new outlets in the same area.[317]

Franchises are an important organizational form because they are distinct from other types of inclusion like contracts and leases. Although similar to contracts, franchises differ as they entail certain mandatory rules

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[309] *See id.*; Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 226 (1978); *see also* James A. Brickley & Frederick H. Dark, *The Choice of Organizational Form: The Case of Franchising*, 18 J. FIN. ECON. 401, 402 (1987) (showing "the trade-off between agency problems associated with each form of organization is an important variable in explaining how firms choose between the two organizational forms").

[310] *See* Brickley & Dark, *supra* note 309, at __.

[311] *See* Benjamin Klein, *Transactions Cost Determinants of "Unfair" Contractual Arrangements*, 70 AM. ECON. REV. 356, 358-60 (1980) (discussing opportunism by franchisors and franchisees).

[312] *See id.* at 358 ("Given the difficulty of explicitly specifying and enforcing contractually every element of quality to be supplied by a franchisee, there is an incentive for an individual opportunistic franchisee to cheat the franchisor by supplying a lower quality of product than contracted for.").

[313] Uri Benoliel, *The Behavioral Law and Economics of Franchise Tying Contracts*, 41 RUTGERS L.J. 527, 529 (2010).

[314] *See id. at* 530 ("opportunistic actions are likely to significantly increase the franchisor's monitoring costs and thereby off-set the reduction of the franchisor's product-quality monitoring costs arguably generated by a franchise tying contract").

[315] *See* Klein, *supra* note 311, at 359 ("franchisor may engage in opportunistic behavior by terminating a franchisee without cause, claiming the franchise fee and purchasing the initial franchisee investment at a distress price").

[316] *See* Patrick J. Kaufmann & Francine Lafontaine, *Costs of Control: The Source of Economic Rents for McDonald's Franchisees*, 37 J.L. & ECON. 417, 419 (1994).

[317] *See* Uri Benoliel, *Criticizing the Economic Analysis of Franchise Encroachment Law*, 75 ALB. L. REV. 205 (2012); Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 193 (2010).

(e.g., limitations on termination) and attempt to deter renegotiation in ways contracts generally do not.[318] Franchises are also similar to leases because a franchisor is leasing the use of its trademark to a franchisee for a period of time. But, unlike leases, franchises do not entail any implied warranties; instead, franchisees bear almost all the risk of a new franchise.[319]

Franchises differ from corporations for they entail different residual claimants and control agency costs in different ways.[320] In a franchise, the franchisees are the residual claimants and thus have an incentive to monitor their employees in ways that shareholders do not.[321] Moreover, unlike corporations as well as trusts, franchises generally do not impose a fiduciary obligation on the franchisor.[322]

Finally, the Federal Trade Commission requires a franchisor to provide a disclosure document to a franchisee 14 days before finalizing their agreement.[323] This mandatory disclosure is an attempt to reduce asymmetric information.[324] In addition to regulating entry, the law attempts to regulate exit via franchise termination laws that prevent strategic termination.[325] Franchisors structure agreements to minimize franchisee opportunism, and choose this form if it will reduce agency costs, so the law seeks to reduce franchisor opportunism.[326]

b. Security Interests [*in progress*]

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[318] R. Preston McAfee & Marius Schwartz, *Opportunism in Multilateral Contracting: Nondiscrimination, Exclusivity and Uniformity*, 84 AM. ECON. REV. 210, 210 (1994).

[319] Franchise agreements usually do not include guarantees or warranties for franchisees.

[320] *See* Steven C. Michael, *To Franchise or Not To Franchise: An Analysis of Decision Rights and Organizational Form Shares*, 11 J. BUS. VENTURING 57, 58 (1996) (conducting empirical study to explore "the share of franchise systems relative to other organizational options such as the corporation or the partnership").

[321] *See* Rubin, *supra* note 309, at 226.

[322] *See, e.g.*, Crim Truck & Tractor Co. v. Navistar Transp. Corp. 823 S.W.2d 591, 594-96 (Tex. 1992) (rejecting imposition of general fiduciary duties on the franchise relationship); Amoco Oil Co. v. Cardinal Oil Co., 535 F. Supp. 661, 666 (E.D. Wisc. 1982) (holding that obligation of good faith under Wisconsin contract law does not make franchisor-franchisee relationship a fiduciary one); *see also* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905, 922-26 (1994).

[323] 16 C.F.R. § 436.2(a) (2007).

[324] FTC, Disclosure Requirements and Prohibitions Concerning Franchising, Statement of Basis and Purpose, 72 Fed. Reg. 15,445, at 15,534 (Mar. 30, 2007).

[325] *See* Jonathan Klick, Bruce Kobayashi, & Larry Ribstein, *Federalism, Variation, and State Regulation of Franchise Termination*, 3 ENTREPRENEURIAL BUS. L.J. 355 (2009) (noting trade-off in franchise termination laws between "reducing 'cream skimming'" by franchisors and "preventing franchisors from disciplining shirking franchisees").

[326] *See* Antony W. Dnes, *Franchise Contracts, Opportunism and the Quality of Law*, 3 ENTREPRENEURIAL BUS. L.J. 257, 270-73 (2009).

c. Co-Ownership

Co-ownership entails inclusion if an existing owner includes a non-owner in her property.[327] Including another as a co-owner may facilitate sharing (if gratuitous) or exchange (if for consideration).[328] Co-ownership also can provide a financing function if one (or more) of the co-owners provides capital or assists in paying the mortgage.[329] Co-ownership also plays a risk-spreading function, especially in the absence of insurance or support systems.[330] Finally, co-ownership can facilitate specialization, whether in organizing a household[331] or operating a taxicab.[332]

But co-ownership involves a risk of opportunism. In real property, co-owners may fail to pay their share of expenses or share rental income.[333] In IP law, co-ownership can entail strategic behavior. Rai et al. point out "[p]atent law encourages strategic behavior on the part of co-owners by allowing each one to 'make, use, offer to sell, or sell the patented invention . . . without the consent of and without accounting to the other owners.'"[334]

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[327] If an owner includes a non-owner as a co-owner, the new co-owner has a separate but undivided interest in the property. *See* MERRILL & SMITH, *supra* note 3, at 596 (noting that each interest is "*undivided*, in the sense that each tenant in common has the right to possess the whole of the property").

[328] *See* MERRILL & SMITH, *supra* note 3, at 594 ("There are many reasons for multiple people to wish to be co-owners, involving various types of multiple use and relationships based on sharing.").

[329] *See* ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 85 (2008) (citing Sandra Fleishman, *The Buddy System; A New Theory of Buying Power: With Double the Income, Even Singles Can Afford Double the House*, WASH. POST, Mar. 17, 2001; Jim Rendon, *Splitting the Cost of Buying a House*, N.Y. TIMES, July 11, 2004)). Legal barriers may prevent certain types of lending *among* co-owners. *See* Bradley T. Borden, *Open Tenancies-in-Common*, 39 SETON HALL L. REV. 387, 428 (2009) ("The IRS's prohibition against inter-co-owner lending finds little support in economic theory."). Also, co-ownership may impose additional monitoring costs on lenders. *See* Alex R. Pederson, *The Rejuvenation of the Tenancy-in-Common Form for Like-Kind Exchanges and its Impact on Lenders*, 24 ANN. REV. BANKING & FIN. L. 467, 480 (2005).

[330] *See* Ellickson, *supra* note 11, at 1341.

[331] *See* GARY S. BECKER, A TREATISE ON THE FAMILY 30-79 (1991) (discussing the division of labor in households and families); *cf.* ELLICKSON, *supra* note 442, at 77 ("An increase in numbers may make it easier for housemates . . . to specialize in their work both within and beyond the home.")

[332] *See* BARZEL, *supra* note 61, at 57-58.

[333] *See* Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WISC. L. REV. 331, 349.

[334] Arti K. Rai, Jerome H. Reichman, Paul F. Uhlir, and Colin Crossman, *Pathways Across the Valley of Death: Novel Intellectual Property Strategies*, 8 YALE J. HEALTH POL'Y, L. & ETHICS 1, 23 (2008).

Merges and Locke note that "the common ownership problem highlights the fact that co-owners have incentives to behave 'opportunistically' with respect to one another—i.e., to cheat on each other."[335]

Co-ownership may entail excessive utilization or inadequate maintenance because the "effects of the use by each co-owner are only partially internalized to that owner."[336] Barzel provides a particularly vivid example, a taxicab that is owned and operated by two people. Given shared ownership of the cab, there is a danger that either owner may engage in excessive use. While the co-owners may delineate time slots or "shifts" for using the cab and pay for their own fuel, certain items like tires, upholstery, and the engine are more likely to become common property.[337]

Co-ownership law has developed mechanisms to mitigate strategic behavior and conflicts over use. For example, the right of partition "gives each cotenant an automatic right to terminate the cotenancy at any time."[338] By giving a co-owner the ability to exit ex post, partition may reduce the incentive to act opportunistically ex ante.[339] However, because any co-owner may utilize partition to force a sale of the property, a co-owner also may employ partition strategically.[340]

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[335] Robert P. Merges & Lawrence A. Locke, *Co-Ownership of Patents: A Comparative and Economics View*, 72 J. PAT. & TRADEMARK OFF. SOC'Y 586, 587, 592 (1990).

[336] MERRILL & SMITH, *supra* note 3, at 594-95; *see also* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (Pap. & Proc. 1967); Ellickson, *supra* note 11.

[337] *See* BARZEL, *supra* note 61, at 57-58.

[338] MERRILL & SMITH, *supra* note 3, at 598.

[339] *See id.* at 604 ("Partition affords each co-owner an avenue for *exit*, and the threat of exit can help a co-owner protect her interests.").

[340] *See* John G. Casagrande Jr., *Acquiring Property Through Forced Sales: Abuses and Remedies*, 27 B.C. L. REV. 755 (1986); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 508 (2001).

FORMS OF INCLUSION & ANTI-OPPORTUNISM DEVICES

Form of Inclusion	Mandatory Rules	Fiduciary Duties	Remedies	Other
1. Contracts	good faith and fair dealing; duty not to defraud; UCC = quantity term	No	compensatory damages; at times, specific performance (SP); no punitive damages	duress; unconscionability; limitations on stipulated $
2. Licenses	implicated more often in certain licenses (e.g., software) than contracts	No	compensatory damages; at times, SP; injunctive relief under Copyright Act	irrevocable only if grant or easement by estoppel; misuse doctrine
3. Easements	"run with the land"	No	If abuse, injunction = majority rule; damages = minority rule	irrevocable (but can be abandoned); presumption against variation
4. Residential Leases	implied warranty of habitability (IWH); constructive eviction (if T abandons)	No	T = damages, reformation, or rescission L = terminate plus $ or maintain plus back rent	L = duty to mitigate; T = can assign; warranty of quite enjoyment; waste
5. Commercial Leases	no IWH/suitability; good faith/fair deal; constructive eviction (if T abandons)	No	damages; strongly disfavor SP; L = T liable as rent due, re-let for T's benefit, or accept as surrender	L = no duty to mitigate; T = assign; warranty of quite enjoyment; waste
6. Agricultural Leases	no IWH implied covenant of good husbandry	No	L breaches → T must perform & sue for damages; T breaches → L must perform & sue for damages	L = no duty to mitigate; waste
7. Cooperatives	IWH (residents = lessees)	board = loyalty (business judgment)	liens; ejectment (some states); breach of IWH → damages = maintenance – rental value	financial disclosure/restrictions; board approval; no subletting
8. Condominiums	no IWH; restrictions = "reasonable"	board = loyalty + care developers (split)	owner = $/injunction (vs. board, other owners, or developer); some claims board itself must bring	no right of partition restrictions on leasing/sub-leasing
9. Donative Trusts	UTC § 105(b): good faith, benefit Bs, trustee $, modify, inform Bs	loyalty (sole benefit) care (no bus. j. rule)	against trustee (§ 1001) = damages; removal (§706)	asset partitioning; spendthrift; ascertainable beneficiary
10. Charitable Trusts	"charitable purpose"; UTC § 105(b)	loyalty (sole benefit) care (no bus. j. rule)	injunctions; damages; cy pres; removal (§706)	asset partitioning
11. Nonprofits	no distribution of net earnings	loyalty + care (like corporation)	injunctions; damages; cy pres; loss of exemption; liability for Ds; damages (= taxes owed)	"any lawful purpose" certain financial disclosures to IRS
12. Business Trusts	fiduciary duties (ERISA); info disclosure (mutual funds); no exculpation clause	loyalty + care (no bus. j. rule)	against trustee = damages; removal of trustee (less rigorous)	asset partitioning; conduit taxation; voting rights
13. Partnerships	RUPA §103: duty of loyalty/care (unless reasonable/approved), good faith, disassociate, expel, wind up	§404: loyalty, care (gross negligence); good faith/fair dealing	damages, all partners jointly and severally liable (unless limited liability); dissociation (§602)	limited liability (LLPs, LLLPs)
14. Corporations	asset partitioning; duty of loyalty; S/D meet; disclosure; no insider trading	loyalty (best interest) care (business j. rule)	damages, injunctions; cf. derivative actions	limited liability; voting rights; exculpation clause on duty of care
15. Franchises	good faith; termination laws	No	damages, injunctions, future royalties (newer)	FTC → disclosure document

IV.
THE IMPLICATIONS OF INCLUSION

A. The Property-Contract Interface

Understanding how owners include others has implications not only for law reform but also for property theory. Recently, there has been significant interest in the distinction between property and contract.[341] Because inclusion is customizable, many property forms appear to converge with contract. As a result, there is a tendency among some courts, law reformers, and legal scholars to adopt a contractarian approach for the forms, including licenses, leases, easements, trusts, and corporations.[342]

Yet, while many property forms involve contractual elements, most forms differ from contracts in several ways. Because property rights are *in rem* and run with the land, these forms often provide more certainty over time, especially for future owners and users. Moreover, many of the forms provide additional protection against certain types of opportunism based on a greater reliance on mandatory rules (to prevent strategic bargaining), fiduciary duties (to reduce agency costs), and supracompensatory remedies (to deter opportunistic breach). Thus, rather than merging with contracts, these property forms continue to perform distinct functions.

The reason the law authorizes "multiple doctrines with differing rules by which rights are subdivided" is to facilitate cooperation.[343] Owners are more likely to divide property and include others if they are able to select from among multiple forms, each of which entails a unique combination of anti-opportunism devices. Likewise, in certain situations, non-owners may prefer proprietary inclusion over informal or contractual inclusion because of the certainty and protection against opportunism that particular property forms may provide. By reducing opportunism and other costs of inclusion, a proliferation of property forms helps to ensure that the private incentive to include converges with the optimal level of inclusion.

Therefore, attempting to eliminate the forms, or to rely exclusively on contracts to include others, may be misguided. Instead, by authorizing multiple forms of inclusion, including informal, contractual, and proprietary inclusion, the law promotes the social use of property.

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[341] *See, e.g.*, Hansmann & Kraakman, *supra* note 101, at 378; Merrill & Smith, *supra* note 168, at 774.

[342] *See, e.g.*, McCoy v. Mitsuboshi Cutlery, Inc., 67 F.3d 917 (Fed. Cir. 1995) (licenses); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (leases); French, *supra* note 218 (easements); Langbein, *supra* note 277 (trusts); EASTERBROOK & FISCHEL, *supra* note 290 (corporations).

[343] Stake, *supra* note 55, at 42.

B. The *Numerus Clausus* Problem

There is a related debate about why property law provides pre-packaged or "off-the-rack" forms. That is, why does contract allow free customizability, whereas property entails a *numerus clausus* principle, in which the number of forms is closed?[344] One theory is that off-the-rack forms reduce *bargaining costs*.[345] A second theory, developed by Merrill and Smith, is that some degree of standardization based on a menu of forms reduces *information costs*.[346] A third theory, formulated by Hansmann and Kraakman, is that the law regulates the types and degree of notice for creating different kinds of property to minimize *verification costs*.[347]

This Article does not contradict any of these theories. It also emphasizes transaction costs (broadly understood). Like Hansmann and Kraakman, who focus on the risk of opportunism, this Article emphasizes opportunism.[348] However, unlike Hansmann and Kraakman, who focus mainly on third-party opportunism, the primary focus of this Article is on the risk of opportunism between the owner and non-owner. The law authorizes, and attempts to maintain, the contours of a (limited) number of forms to provide mechanisms for reducing opportunism and facilitating inclusion. Essentially, law provides these various forms as "focal points" around which parties can organize their activities by including others through different combinations of anti-opportunism devices.[349] Hence, property forms not only can facilitate communication among market participants by reducing information costs and verification of ownership of rights offered for conveyance by reducing verification costs but they also may enable greater cooperation between the original parties.

This theory also does not contradict Merrill and Smith's observation that the costs of complex property interests are incorporated into the price

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[344] For a seminal analysis, *see* Bernard Rudden, *Economic Theory v. Property Law: The* Numerus Clausus *Problem*, *in* OXFORD ESSAYS IN JURISPRUDENCE: THIRD SERIES 239 (John Eekelaar & John Bell eds., 1987).

[345] *See, e.g.*, Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, *in* THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 213 (Nicholas Mercuro & Warren J. Samuels eds., 1999) ("off-the-rack property devices can reduce transactions costs").

[346] *See* Merrill & Smith, *supra* note 22.

[347] *See* Hansmann & Kraakman, *supra* note 101.

[348] *See id.* at 382-84.

[349] *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 57-59, 71-74 (rev. ed. 1980) (discussing value of focal points in tacit coordination, tacit bargaining, and explicit bargaining); *cf.* John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 493-94 (1975) (discussing "channeling" function of legal formalities).

of an asset.[350] Most of the costs, including disputes about coordination, the costs of opportunism, and conflicts over use like excessive utilization and inadequate maintenance, are not third-party externalities. Instead, such costs affect only the owner seeking to include or the non-owner seeking to benefit from an inclusion. However, if the incentive to include is too low and diverges from the optimal level of inclusion, there is a social loss because certain types of inclusion that otherwise would occur may not occur. A legal system that supports inclusion through the optimal set of forms essentially expands the production-possibility frontier by increasing the number of opportunities for socially beneficial cooperation.[351]

A related, but relatively unexplored, question is how many forms is socially optimal.[352] The question is especially salient in the context of the property forms that enable inclusion. Some courts question the significance of such forms, suggesting they are antiquated or unnecessary.[353] If so, then it may be socially beneficial to reduce the number of forms, or eliminate them altogether. Conversely, sometimes a single form (e.g., a lease) applies in multiple contexts (residential, commercial, and agricultural) in which owners may have diverse interests.[354] If so, then it could be useful to divide the forms further so they correspond more closely with their functions.

This Article suggests that restricting the menu of forms too much would be undesirable. There are advantages to having multiple forms by which parties may include others. Each form serves a unique function. At the same time, if the forms were freely customizable, the forms might be less effective as focal points in facilitating coordination and cooperation. Because too much customizability would result in category confusion, maintaining clear distinctions among the forms allows parties to select the

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[350] *See* Merrill & Smith, *supra* note 22, at 28-29.

[351] *See* JAMES D. GWARTNEY ET AL., ECONOMICS: PRIVATE AND PUBLIC CHOICE 42 (12th ed. 2009) ("Changes in legal institutions that promote social cooperation . . . will also push the production possibilities curve outward.").

[352] *See* Merrill & Smith, *supra* note 22, at 40 ("We do not argue that any particular number of property forms is in fact optimal.").

[353] *See, e.g.*, Golden West Baseball Co. v. City of Anaheim, 31 Cal. Rptr. 2d 378, 395 (Cal. Ct. App. 2d 1994) ("Little practical purpose is served by attempting to build on this system of classification" for "it is increasingly difficult and correspondingly irrelevant to attempt to pigeonhole these relationships as 'leases,' 'easements,' 'licenses,' 'profits,' or some other obscure interest in land devised by the common law in far simpler times.").

[354] *See, e.g.*, Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1006 (2005) (book review) ("The modern residential lease is worlds away from the agricultural lease of the sixteenth century or from the modern commercial lease in a shopping center, but property makes room for all of them."); MERRILL & SMITH, *supra* note 3, at 650 ("One problem that has long vexed lease law in the real property context is that it does not differentiate leases in terms of the underlying functional reasons the parties have for entering into a lease.").

form that minimizes the risk of opportunism. Of course, as the benefits and costs of inclusion change over time, the law can add or subtract new forms and rely on new devices and doctrines to deter opportunism.

C. The Right to Exclude

In analyzing the "social" dimensions of property, the prior literature focuses on how using property may generate social costs and how owning it entails social obligations. By contrast, in analyzing the right to include, this Article highlights why property can facilitate cooperation and promote the social use of resources.[355]

The conventional view is that property rights are individualistic. Penalver notes the "individualistic school of property thought is certainly the dominant one within Anglo-American property law."[356] Likewise, Penner observes: "Our paradigm or standard 'picture' of property comprises the single owner, along with their goods, occupying their land, to the exclusion of others."[357] To a certain extent, this conventional view is true: individual rights in private property are a central feature of free market economies. But many commentators assume that, because of the right to exclude, ownership is necessarily inconsistent, incompatible, or in tension with the "social function" of property.[358]

Recognizing that owners have a right to include, as well as exclude, helps to clarify the social nature of property. Some owners may misuse their property by imposing social costs on others, isolating themselves from others, or discriminating against others. But, many owners decide to use their property not only as a "wall" to exclude others but also as a "gate" to include neighbors, friends and family, colleagues and customers, and even strangers and those in need.[359] In his way, the right to include may assist in understanding the right to exclude and reconciling competing perspectives about the function of property.[360]

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[355] *See* PENNER, *supra* note 3, at 74-75; Penner, *supra* note 4, at 167.

[356] Eduardo Moises Penalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 107, 195 (2000).

[357] Penner, *supra* note 18, at 166 ("(footnote omitted)).

[358] Sheila Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Law Perspective*, 80 FORDHAM L. REV. 1003 (2011); *cf.* Penner, *supra* note 4, at 188 (noting "individualistic taint which has attached itself to ownership, at least amongst legal and political philosophers").

[359] *Cf.* Penner, *supra* note 17, at 745 (arguing that "the ability to share one's things, or let others use them, is fundamental in the idea of property").

[360] *Cf.* Dagan & Heller, *supra* note 120, at 622 ("Sympathizers of privatization and communitarian approaches have seen conflict where there can be—and from a global perspective, often is—harmony.").

CONCLUSION

This Article has investigated how owners may include, as well as exclude, others from their property. Until now, this "right to include" has received little attention. But inclusion plays a valuable role in coordinating economic activities and social relationships. By promoting sharing and exchange, facilitating financing and risk-spreading, and enabling functional specialization, inclusion can be highly beneficial. But inclusion also entails costs, such as coordination difficulties, strategic behavior, and conflicts over use. Accordingly, the Article investigates the circumstances in which the private incentive to include may diverge from the socially optimal level of inclusion, resulting in either too little or too much inclusion.

There is a real danger that a potential for opportunism could result in owners including others too little. If law did not provide a range of options to reduce this risk of strategic behavior, owners may decide not to include others in their property. But law provides multiple forms of inclusion: informal, contractual, and proprietary inclusion. Informal inclusion entails the nonenforcement or waiver of an owner's right to exclude. Contractual inclusion involves a formal waiver of exclusion. But, in addition to informal or contractual inclusion, owners may include others through various forms of property, including easements, leases, condos and coops, trusts, partnerships, and corporations. Each form entails a unique mixture of mandatory rules, fiduciary duties, and supracompensatory remedies. By providing more certainty and protection against opportunism, these property forms help to ensure that an owner's incentive to include converges with what is socially optimal.

Analyzing the forms of inclusion suggests that law should continue to provide a range of options by which owners may include others. Because the forms each play a unique role in deterring opportunism, these forms are distinct from one another as well as contracts. Authorizing a menu of forms not only reduces information and verification costs but also facilitates cooperation by providing parties with focal points to coordinate activities. Ultimately, analyzing the many ways by which owners include others suggests that ownership is not necessarily exclusive or individualistic. Rather, ownership can be inclusive and promote the social use of property.