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ABRAHAM BELL AND GIDEON PARCHOMOVSKY

Of Property and Federalism

ABSTRACT. This Essay proposes a mechanism for expanding competition in state property law, while sketching out the limitations necessary to protect third parties. The fact that property law is produced by the states creates a unique opportunity for experimentation with such property and property-related topics as same-sex marriages, community property, adverse possession, and easements. The Essay begins by demonstrating the salutary effects of federalism on the evolution of property law. Specifically, it shows that competition among states has created a dynamic property system in which new property institutions replace obsolete ones. The Essay then contemplates the possibility of increasing innovation and individual choice in property law by inducing state competition over property regimes. Drawing on the scholarly literature examining state competition for corporate law and competition over the provision of local public goods, the Essay constructs an open property system that creates an adequate incentive for the states to offer new property regimes and allows individuals to adopt them without relocating to the offering state. This Essay also has important implications for the burgeoning literature on the *numerus clausus* principle, under which the list of legally permissible property regimes is closed. The Essay argues that in a federal system, it is socially desirable to expand the list of property forms to include certain out-of-state forms.

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INTRODUCTION

Property law in the United States is largely the domain of the states, not the federal government.[1] This seemingly unremarkable fact has profound implications for the structure and substance of property law and policy. The existence of multiple jurisdictions creates a potential for competition over property forms. Competition over property forms, in turn, leads to innovation in property doctrine. Examples are legion. In the area of marital property, for example, New York recognizes professional degrees as marital property,[2] California and eight other states subject assets accumulated during marriage to a community-property regime,[3] and Massachusetts has recently announced that same-sex marriages must be recognized under its state constitution, effectively granting married same-sex couples the same property rights as all other married couples.[4] Examples can be found outside of the realm of marital property as well. Artists in California enjoy *droit de suite*—a continuing property right over fine art whose title they have surrendered to others.[5] And many states have recognized the validity of conservation easements for

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1. *See, e.g.*, Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 22 (1990) (O'Connor, J., concurring) (recognizing "state law as the traditional source of . . . real property interests"). Federal property law is traditionally limited to the regulation of properties owned by the United States and intellectual property law—subjects specifically placed under congressional jurisdiction by the U.S. Constitution. The Property Clause of the Constitution grants the national government authority to regulate properties it owns. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). The Constitution also empowers the national government to exercise authority over federal enclaves within states. *Id.* art. I, § 8, cl. 17 (granting Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over . . . the Seat of the Government . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"). Additionally, the Patents and Copyrights Clause gives Congress the power to establish and regulate intellectual property rights. *Id.* art. I, § 8, cl. 8 (granting Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). While both the Takings Clause and the Federal Due Process Clause limit national powers to regulate property, they have the effect of making many kinds of property issues an amalgam of state and federal law. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 942-99 (2000); *see also* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004).

2. O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985).

3. *See* WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES, at xxvii (6th ed. 2004); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 124 n.229 (2004).

4. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

5. CAL. CIV. CODE ANN. § 986 (West 1982 & Supp. 2005).

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environmental protection, in spite of the common law rule that no nontraditional types of easements may be recognized.[6] American property law may, therefore, be viewed as a giant laboratory in which states vie to develop the most efficient property regime.[7] Although the effects of state competition have been closely scrutinized by scholars in other legal fields – most notably corporate law[8] – the impact on property law has been largely neglected.[9]

The importance of federalism in property law is highlighted by the recent scholarly movement to embrace the *numerus clausus* principle as a defining feature of the field.[10] The *numerus clausus* principle, as familiarly enunciated by Bernard Rudden, holds that the law of property "lays down a restricted list of entitlements which it will permit to count as property interests, or 'real rights'. Anything else sounds only, if at all, in contract."[11] Thus, for example, Anglo-American law recognizes only four types of present possessory estates in land: fee simple, fee tail, life estate, and leasehold.[12] Any attempt to create a new type of estate will be rejected by the courts.[13] Yet, as we will argue, the *numerus*

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6. *See* Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 26, 27-31 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (explaining the variety of conservation statutes among the states, some based directly on the Uniform Conservation Easement Act, others bearing little resemblance to that Act).

7. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

8. *See infra* Section II.A.

9. Stewart Sterk has done a great deal of work addressing the role of state competition and federalism in the development of several discrete areas of property law. *See, e.g.*, Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000) [hereinafter Sterk, *Asset Protection Trusts*]; Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992); Sterk, *supra* note 1; Stewart E. Sterk, *Jurisdictional Competition To Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003).

10. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002); Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1730-39 (2003).

11. Bernard Rudden, *Economic Theory v. Property Law: The* Numerus Clausus *Problem*, *in* OXFORD ESSAYS IN JURISPRUDENCE 239, 239 (John Eekelaar & John Bell eds., 3d ser. 1987).

12. These estates may be found in their absolute forms, or as defeasible estates, such as life estate determinable or fee simple subject to condition subsequent. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 12-13 (2000).

13. *See infra* notes 39-40 and accompanying text.

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clausus description of property law as limited to this short menu is only partly accurate, because menus differ from state to state.

Interstate competition in property law may be characterized by two poles. In most cases, the menu of available property forms is determined by the situs of the property. Consequently, if an individual wants to benefit from a property form not offered on the local menu of forms, she must incur the cost of relocating to another state. If the relevant asset is realty, changing situs may be impossible altogether. At this extreme, then, the *numerus clausus* description of property law is quite accurate.

At the other extreme, however, property owners can reach beyond the limits of the local menu and take advantage of the national menu. Under the Full Faith and Credit Clause of the U.S. Constitution, an act establishing property status must generally be respected in all states. Thus, when one state adopts a lax form of divorce or recognizes same-sex marriage, states must generally recognize this status as one giving rise to the ordinary property forms attending marriage or its dissolution.[14] As Nevada's divorce law has demonstrated,[15] it is relatively cheap for parties to take advantage of out-of-state status opportunities and thereby import out-of-state law to expand the list of available property forms beyond those offered on the local menu. At this extreme, then, the *numerus clausus* description of property law is incomplete.[16]

Federalism allows owners to reach beyond a short menu of forms, making the number of property forms variable over time and between states. The importance of federalism in fostering dynamism and choice can be seen throughout the law of property. Consider again laws related to spousal and joint property rights. Some states provide for the creation of "community

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14. *See, e.g.*, Williams v. North Carolina, 317 U.S. 287, 303 (1942) (requiring North Carolina to recognize a divorce issued by a Nevada court). *But see* Defense of Marriage Act § 2, 28 U.S.C. § 1738C (2000) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."). As we discuss below, there are important limitations on the requirement that states grant full faith and credit to one another's acts. *See infra* notes 180-189 and accompanying text.

15. *See infra* note 76 (discussing some consequences of Nevada's liberal divorce law).

16. States may take action to prevent nonresidents from enjoying the benefits of local law or residents from taking advantage of foreign law. Massachusetts, for example, bars out-of-state couples from getting married if the marriage would be illegal in their state of residence. This law would prevent nonresident same-sex couples from marrying in Massachusetts. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 1998). Likewise, Massachusetts law invalidates marriages contracted by Massachusetts residents in out-of-state jurisdictions if the marriage would have been illegal under Massachusetts law. *Id.* § 10.

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property" between spouses;[17] others restrict spousal rights to individually owned property or the traditional cotenancies (joint tenancy, tenancy in common, and tenancy by the entirety).[18] Some states have abolished tenancies by the entirety (a form of joint tenancy available only to married couples);[19] others have simply altered the rules governing such tenancies.[20] Some states allow unilateral conversion of a joint tenancy into a tenancy in common;[21] others do not.[22] Some states allow spousal rights to be claimed by same-sex couples;[23] others do not.[24] These conflicting state rules do not stay meekly in place. According to statistics compiled by the U.S. Census Bureau, 43.4 million Americans changed their place of residence between March 1999 and March 2000, 19.4 million of whom moved to new states.[25] As couples move across

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17. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 382 (5th ed. 2002) (noting that community-property systems exist in Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin); *see also* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY §§ 5.14-.16, at 232-44 (2d ed. 1993) (describing the history and nature of community property systems).

18. *See* DUKEMINIER & KRIER, *supra* note 17, at 383-419 (discussing the common law marital property system).

19. *See* 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 52.01[3], at 52-4 to -12 (Michael Allan Wolf ed., 2001) (discussing each state's approach to tenancy by the entirety); Colleen M. Feeney, Note, *Lien on Me: After* Craft, *a Federal Tax Lien Can Attach to Tenancy-by-the-Entirety Property*, 34 LOY. U. CHI. L.J. 245, 255 n.78 (2002) (listing and discussing states in which, as of 2002, tenancy by the entirety has either been abolished or never existed: California, Connecticut, Louisiana, Maine, Minnesota, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, South Carolina, South Dakota, Washington, West Virginia, and Wisconsin).

20. *See* 7 POWELL, *supra* note 19.

21. *See* CUNNINGHAM ET AL., *supra* note 17, § 5.4, at 199-200 (noting the general rule that a joint tenant can unilaterally sever a joint tenancy by transferring his interest to a third party, thereby converting the joint tenancy to a tenancy in common).

22. *See, e.g.*, Spitz v. Rapport, 604 N.E.2d 801 (Ohio Ct. App. 1992) (holding that a joint tenant may not unilaterally terminate the survivorship rights of another joint tenant).

23. For example, Vermont recognizes the rights of same-sex couples to enter into a "civil union." VT. STAT. ANN. tit. 15, § 1204(a) (2002) (providing that parties to a civil union "shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage"); *cf.* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Constitution requires legal recognition of same-sex marriages).

24. *See* Jes Kraus, Note, *Monkey See, Monkey Do: On* Baker, Goodridge, *and the Need for Consistency in Same-Sex Alternatives to Marriage*, 26 VT. L. REV. 959, 977 (2002) ("[M]ost states and countries still do not offer any benefits to same-sex couples . . . .").

25. *See* JASON SCHACHTER, U.S. CENSUS BUREAU, P20-538, CURRENT POPULATION REPORTS: GEOGRAPHICAL MOBILITY 1 (2001), *available at* http://www.census.gov/prod/2001pubs/p20-538.pdf.

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state lines, states must adopt rules for dealing with the newly introduced property forms.[26] Some states look to the situs of the property,[27] others look to the place of the property right's creation,[28] and yet others create hybrid rules to compromise between the conflicting property regimes, essentially creating new forms of property.[29]

However, competition under the existing federal system is limited. When creating new property rights, owners may not choose willy-nilly from the competing property regimes now in force throughout the United States. Because real property is both immobile and subject to situs rules, it is excluded from at least some of the salutary effects of federalism. Even when personalty is at issue and, therefore, the owner can avoid situs rules, choice-of-law rules will often require that the asset be physically present to some degree in the relevant jurisdiction for the asset to be governed by the jurisdiction's rule.

This artificial geographic limitation on an owner's choice creates an unnecessary obstacle to interstate competition in property forms and the innovation that can result. To see why, consider the effects of federalism on contract law. Individuals may adopt any arrangement they want simply by inserting a choice-of-law clause in the contract. No similar option is available in property law. One may not, for example, create a chattel in California, but specify that it will be governed by the property law of Wyoming. To enjoy the full benefits of federalism, the owner must make sure that the chattel satisfies the relevant situs rules by relocating the chattel to Wyoming at creation.

This Essay proposes a way to change the existing state of affairs. It outlines a new legal mechanism that would increase states' incentives to create new property forms while allowing owners to take advantage of those forms without relocating. We posit that under certain plausible conditions our mechanism will lead to a "race to the top" in property law. Our starting assumption is that the interstate competition made possible by the federal structure is highly desirable. First and foremost, competition expands the menu of available property regimes, providing citizens with greater choice. A

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26. For instance, when a married couple owns a car as community property, and then moves to a state that does not recognize that property form, the target state must have a rule for coping with the unrecognized form. *See infra* Subsection I.A.3.

27. *See, e.g.*, Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585, 585 (1987) ("Courts continue to reach choice-of-law decisions for real property disputes by mechanically applying the situs rule, giving little consideration to concepts of fairness and justice.").

28. See DUKEMINIER & KRIER, *supra* note 17, at 425 (explaining that in the case of migrating couples, "[o]nce the property has been initially characterized, the ownership does not change when the parties change their domicile unless both parties consent to the change in ownership" (emphasis omitted)).

29. *See infra* note 167.

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richer menu of property rules gives individuals a greater chance of finding the most suitable property regime for them. Second, competition creates a fertile ground for experimentation with new property forms and proliferation of these forms as states adopt laws that have proven useful in other states. Third, more localized control of property forms, particularly those regarding realty, produces property law at a level of government to which property owners are more likely to pay close attention, resulting in better matches between the rules adopted and the affected citizens' welfare preferences.[30]

However, in enlarging the menu of property forms to enhance the beneficial effects of federalism, we must take account of the complications arising from three interlocking elements. First, in order for state legislatures to capture the full value of innovative property forms, they should be able to collect payment from out-of-state property owners who wish to adopt them. Because innovative forms have some characteristics of public goods, other states may be able to free-ride on these innovations. If state legislatures are unable to collect such payments, they may have an insufficient incentive to come up with new property forms, and competition will be diminished. Second, a completely open federal market for property forms would suffer from a peculiar imbalance: It would entitle one to establish property forms in the entire United States by winning the political debate in a single jurisdiction. By contrast, to block a property form, one would have to win the debate in all jurisdictions. Third, and finally, legislation results not simply from the well-intentioned decisions of local policymakers or from local budgetary concerns. The political landscape is also influenced by campaign contributions and other factors related to the personal interests of the policymakers. Our proposal takes account of all three complications.[31]

Our Essay relies on two important reference points. The first is the Tiebout hypothesis, which predicts that competition among localities will result in a variety of communities with different amenities, and citizens will select the community that fits their preference best by voting with their feet.[32] The second is the burgeoning literature on whether state competition in corporate law leads to a race to the bottom or a race to the top.[33] However, in the

30. As William Fischel has noted, the regulation of property taxes at the local level renders homeowners particularly attuned to local politics. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4-5 (2001).

31. *See infra* Part III.

32. In addition, we note Albert Hirschman's terminology distinguishing between control through exit and voice. In the context of this Essay, we treat Hirschman's work as an important extension of Tiebout's theory. *See infra* Section II.D.

33. *See infra* Section II.A.

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property context, there is no one dominant state à la Delaware[34] and the potential for interstate competition is much greater. Each of these literatures provides a rich background for analyzing the importance of interjurisdictional competition in producing efficient law.

By casting a fresh eye on federalism's effect on property, our Essay produces two central insights. The first is theoretical: We show that the current restrictive interpretation of property law is choice-constraining and, thus, welfare-diminishing. The second is normative: We make a case for greater autonomy for owners in selecting the property regime that will apply to their assets. Specifically, we propose adopting a flexible version of the *numerus clausus* principle, one that allows owners to go beyond the menu of property forms offered in their jurisdiction and to import forms from other states that better fit their needs. To avoid a race to the bottom, we suggest that owners must register their use of an out-of-state property form.

The Essay proceeds in three parts. In Part I, we discuss the movement to characterize property as embodying a principle of "optimal standardization," and demonstrate why this movement is inherently in tension with the federal structure of American property law. In Part II, we connect this observation with the ever-burgeoning literature on the importance of state competition in the development of efficient legal constructs. In particular, we translate some of the findings in the scholarship on corporate law and the Tiebout hypothesis into the property context. In Part III, we make the normative case for enhancing interstate competition and owner autonomy in property law and introduce an innovative proposal capable of achieving these goals.

I. STANDARDIZATION AND CHANGE IN THE LAW OF PROPERTY

An accepted part of the property canon in common and civil law systems, the *numerus clausus* principle received scant attention in the United States for most of the nation's history. In fact, until recently no one even bothered to give the principle an English name.[35] The fortunes of *numerus clausus* were reversed only in 2000, when Thomas Merrill and Henry Smith argued that *numerus clausus* was a central organizing principle of the law of property.[36] Expounding

34. The official website of the State of Delaware states that "[m]ore than half a million business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 58% of the Fortune 500." State of Delaware, Division of Corporations, http://www.state.de.us/corp (last visited Sept. 20, 2005).

35. *See* Merrill & Smith, *supra* note 12, at 4 ("In the common law, the principle that property rights must conform to certain standardized forms has no name. In the civil law, which recognizes the doctrine explicitly, it is called the *numerus clausus* – the number is closed.").

36. *Id.*

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on Rudden's description of *numerus clausus* as forcing a "restricted list of entitlements which . . . count as property interests,"[37] Merrill and Smith developed a theory that positioned the principle at the center of property theory. As its name—closed enumeration—suggests, the *numerus clausus* principle closes the list of property forms such that any attempt by private parties to create a new form of property succeeds only in creating contractual rights enforceable between those parties. The *numerus clausus* principle therefore establishes a sharp line between contract and property law. Parties to a contract can create any contractual rights they want, so long as basic ingredients such as promise, acceptance, and consideration are present. By contrast, parties cannot create a new type of property right, but rather must fit a property conveyance into a type already recognized by law.[38] Accordingly, a lease "for the duration of the war" does not create a leasehold of such duration; the leasehold will instead be interpreted as being either a term of years[39] or a tenancy at will.[40]

Merrill and Smith argued that the principle of *numerus clausus* is central to American property law. Noting that property rights are in rem and avail against the rest of the world rather than merely those who are parties to an agreement, Merrill and Smith tied the *numerus clausus* principle to a broader information-based analysis of property law. They argued that because each additional property form increases the burden on third parties of obtaining information about the nature of property rights, limiting the list of property forms keeps the information costs of property law in check. Thus, where Rudden saw no connection between the *numerus clausus* principle and any economic theory, Merrill and Smith seemingly reconciled the two within the information-oriented framework. In the aftermath of the Merrill and Smith article, there has been an outpouring of articles celebrating the *numerus clausus* principle, on both efficiency and non-efficiency grounds.[41]

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37. Rudden, *supra* note 11.

38. Merrill and Smith acknowledged that in some cases parties could utilize existing property forms in creative ways in order to achieve functionally new forms. For example, the intended lease "for the duration of the war" could be restructured as a conveyance of a determinable estate. Merrill and Smith assert that the costliness of this legal creativity can be viewed as a "pollution tax" that deters the creation of functionally new forms. *See* Merrill & Smith, *supra* note 12, at 35.

39. *See, e.g.*, Smith's Transfer & Storage Co. v. Hawkins, 50 A.2d 267, 268 (D.C. 1946) (holding that a lease running until the end of World War II was to be treated as a term-of-years tenancy).

40. *See, e.g.*, Nat'l Bellas Hess, Inc. v. Kalis, 191 F.2d 739, 740-41 (8th Cir. 1951) (holding that a lease until sixty days after the end of World War II was to be treated as a tenancy at will); Stanmeyer v. Davis, 53 N.E.2d 22, 24-25 (Ill. App. Ct. 1944) (ruling that a lease "for the duration of the war" was a tenancy at will).

41. *See supra* note 10.

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As we show in this Part, the emerging conventional wisdom about the desirability of the *numerus clausus* principle suffers from at least one important flaw: It fails to capture American property law's federal structure.[42] Indeed, the fact that property forms differ across jurisdictions ensures that the "closed" list of property forms in any given jurisdiction is in a constant state of flux and development.[43]

To highlight the importance of federalism, we will examine some of the many property doctrines that have been fundamentally altered by it. Specifically, we examine several menus of property forms—cotenancies, easements, and continuing intellectual property rights (for example, *droit de suite*)—whose diversity is enhanced by the variety of options offered by different states.

At the outset, we stress that this survey is far from complete. Besides the doctrines specifically mentioned here, many other property rules have been caught up in the maelstrom of federal competition. For instance, as Robert Sitkoff and Max Schanzenbach demonstrate, competition for trust funds, driven by changes in the tax code, has led states to revamp their approach to the Rule Against Perpetuities.[44]

A. Cotenancies

Common law recognized three main types of concurrent ownership interests: joint tenancies, tenancies in common, and tenancies by the entirety.[45] A joint tenancy is characterized by joint ownership in the asset as a whole with

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42. Other aspects of property are also difficult to reconcile with the information-based thesis propounded by Merrill and Smith. Their theory is predicated on an incomplete analysis of the nature of property rights and their costs and benefits. While information costs certainly play a role in shaping property law, they hardly exhaust the cost-benefit calculus involved in determining the efficacy of property rules. We address this issue at greater length in Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005).

43. To be sure, Merrill and Smith considered "idiosyncratic property rights" to be the bane of their approach, and nothing in the federal structure allows such personalized rights. *See* Merrill & Smith, *supra* note 12, at 26-34. Nonetheless, the availability of a wide variety of available property forms across jurisdictions belies the strict *numerus clausus* approach.

44. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. (forthcoming 2005).

45. DUKEMINIER & KRIER, *supra* note 17, at 339. Dukeminier and Krier noted that coparceny, also recognized at common law, was "early eliminated" from the American colonies. *Id.* at 339 n.2. Similar to a tenancy in common and contemporaneous with primogeniture, coparceny described the cotenancy held by the daughters of a decedent lacking a male heir. Dukeminier and Krier also noted that a handful of other types of concurrent tenancies were known at common law. *Id.* at 339.

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a right of survivorship.[46] Traditionally, a joint tenancy required the presence of four unities: unity of title, unity of time, unity of possession, and unity of interest.[47] Tenancies in common, by contrast, never required the four unities. They differ in effect from joint tenancies primarily in that they do not create a right of survivorship.[48] Tenancies by the entirety, the third option, are very similar to joint tenancies. Like joint tenancies, they require the presence of the four unities, and are accompanied by a right of survivorship. However, tenancies by the entirety differ in two important respects. First, they may only be adopted by married couples, meaning that they require a fifth unity—the unity of marriage. Second, tenants by the entirety wishing to transfer their property interest must generally secure their cotenant's permission to do so.[49]

While these three property forms may appear to exhaust the menu of available cotenancies, in fact, potential cotenants have a plethora of options, thanks to differences among the states.

1. *Tenancy by the Entirety*

Tenancy by the entirety has fallen into disfavor in recent decades, leading to a remarkable diversity of approaches to such tenancies in the United States. Many states have abolished tenancies by the entirety altogether.[50] In states that have retained this regime, a wide variety of rules has emerged regarding the

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46. *Id.* at 340.

47. Blackstone formulated the doctrine thus:

> The *properties* of a joint estate are derived from it's unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*: or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

WILLIAM BLACKSTONE, 2 COMMENTARIES *180.

48. DUKEMINIER & KRIER, *supra* note 17, at 340.

49. *See* Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1530 (2003) (noting that most jurisdictions "require[] a joint act by both spouses so that only the marital unit, as opposed to any individual spouse, has the right of control" over property held by the entirety).

50. 7 POWELL, *supra* note 19, § 52.03[3], at 52-22 to -24 (noting that tenancy by the entirety has been abolished in California, Connecticut, Maine, Minnesota, New Hampshire, New Mexico, North Dakota, South Dakota, Washington, West Virginia, and Wisconsin); *see also* DUKEMINIER & KRIER, *supra* note 17, at 384 (discussing the Married Women's Property Acts, which "removed the disabilities of coverture and gave a married woman, like a single woman, control over all her property as separate and immune from her husband's debts"); Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423 (2001) (discussing the historical bases and evolution of cotenancies).

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effect of purported unilateral transfers.[51] One group of states allows unilateral transfers, so long as the property interest remains subject to a right of survivorship,[52] another prohibits all unilateral transfers,[53] and a third group bars creditors from levying on the debtor-spouse's right of possession but permits them to levy on the debtor-spouse's right of survivorship.[54] States are also divided as to the types of assets that may be held in tenancy by the entirety, with most, but not all, permitting only interests in land to be so held.[55]

2. *Joint Tenancies*

As we noted above, common law recognized a joint tenancy only when the four unities were present. However, many states have recently recognized joint tenancies even when one of the unities is missing. Thus, the law of various jurisdictions reveals a considerable disagreement as to whether a joint tenancy survives a joint tenant's fictional "conveyance" to herself. California, for example, permits a joint tenant to terminate a joint tenancy—and extinguish

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51. *See* Sawada v. Endo, 561 P.2d 1291 (Haw. 1977) (discussing the effect of unilateral transfers on tenancy by the entirety in various jurisdictions); *see also* Dagan, *supra* note 49, at 1529-30 ("Contemporary law is divided on the question of whether one spouse can transfer his or her interest in the entireties property during marriage, as well as on the corresponding power of that spouse's creditors to subject the debtor-spouse's interest in the entireties estate to creditors' claims.").

52. *See, e.g.*, Coraccio v. Lowell Five Cents Sav. Bank, 612 N.E.2d 650 (Mass. 1993) (interpreting a statute equalizing rights of spouses in entireties and holding that one spouse may mortgage his or her interest in such property without the other spouse's consent, subject to the other spouse's survivorship right).

53. *See, e.g.*, Estate of Lampert v. Estate of Lampert, 896 P.2d 214 (Alaska 1995) (applying Hawaii law); *Sawada*, 561 P.2d at 1295; Arbesman v. Winer, 468 A.2d 633, 638 (Md. 1983) (holding that neither spouse can make an effective lease without joinder of the other); Elko v. Elko, 49 A.2d 441 (Md. 1946).

54. *See, e.g.*, King v. Greene, 153 A.2d 49 (N.J. 1959) (holding that a creditor's interest attaches to the debtor-spouse's interest after the death of the other spouse); Stauffer v. Stauffer, 351 A.2d 236, 245 (Pa. 1976) (holding that only the survivorship right can be unilaterally transferred, or seized by creditors). Additionally, a de facto federal law of tenancies by the entirety permits forfeiture of rights of survivorship, but not of current possession. United States v. 1500 Lincoln Avenue, 949 F.2d 73, 77-78 (3d Cir. 1991).

55. John V. Orth notes that an "exception to the rule of no holding of personalty in tenancy by the entirety is recognized in cases in which realty held in that estate is converted into its money value without the consent of both owners. The usual case of 'involuntary conversion' occurs when real property is taken by condemnation." John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 47 n.60 (citing Ronan v. Ronan, 159 N.E.2d 653 (Mass. 1959)).

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the other joint tenant's right of survivorship—by self-conveyance.[56] By contrast, until 2004 Nebraska held to the traditional common law rule that requires a real conveyance—i.e., a transfer to a third party—in order to break the unities of time and title, and thereby terminate a joint tenancy.[57] New York, taking a middle position, allows a self-conveyance to sever a joint tenancy, but only if the conveyance is properly recorded so as to impart notice to the other cotenant.[58] A similar split of authority can be found on the effects of divorce,[59] and executions of mortgages[60] or leaseholds,[61] on the continued existence of a joint tenancy.[62]

As we discuss later in this Part, joint tenancy underwent an even more thorough reform in the twentieth century, as many states sought to abolish the right of survivorship by statute. Ultimately, however, these states revived the right of survivorship in joint tenancies.[63]

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56. CAL. CIV. CODE ANN. § 683.2 (West Supp. 2005); Riddle v. Harmon, 162 Cal. Rptr. 530, 534 (Ct. App. 1980); *see also* Minonk State Bank v. Grassman, 432 N.E.2d 386, 387 (Ill. App. Ct. 1982); Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n, 161 N.W.2d 688, 691-92 (Minn. 1968); *In re* Estate of Knickerbocker, 912 P.2d 969 (Utah 1996).

57. Krause v. Crossley, 277 N.W.2d 242, 246 (Neb. 1979) ("Here the cotenant . . . attempted to sever the joint tenancy by a deed from himself as grantor to himself as grantee. We now hold that this act does not constitute a severance of the joint tenancy and that the right of survivorship at the time of the death of [the cotenant] was in the plaintiff . . . ."); *see also* R. H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 12-13 (1998) (discussing the history of Nebraska's adherence to traditional rules of joint tenancy). The Nebraska General Assembly overruled *Krause* in 2004. *See* NEB. REV. STAT § 76-118 (2004).

58. *See* N.Y. REAL PROP. LAW § 240-c (McKinney Supp. 2005) (stating that no unilateral transfer by a joint tenant "shall terminate the right of survivorship of any non-severing joint tenant or tenants as to the severing tenant's interest unless the deed or written instrument effecting the severance is recorded, prior to the death of the severing tenant, in the county where the real property is located").

59. "Some courts have held that a joint tenancy is not automatically extinguished as a result of the dissolution of the marriage of the joint tenants." 7 POWELL, *supra* note 19, § 51.04[3], at 51-23 to -24.

60. *See, e.g.*, Downing v. Downing, 606 A.2d 208 (Md. 1992) (holding that neither a mortgage on the property executed by all joint tenants nor an agreement between joint tenants conferring upon one the exclusive right to receive income from the property will sever the joint tenancy); Eder v. Rothamel, 95 A.2d 860, 863 (Md. 1953) (holding that conveyance of a mortgage destroys the unity of title (citing Musa v. Segelke & Kohlhaus Co., 272 N.W. 637 (Wis. 1937))).

61. *See, e.g.*, Tehnet v. Bosell, 554 P.2d 330, 335 (Cal. 1976) (holding that a lease does not break the unities); Alexander v. Boyer, 253 A.2d 359, 364 (Md. 1969) (holding that a lease breaks the unities).

62. *See generally* Helmholz, *supra* note 57.

63. *See infra* notes 82-89 and accompanying text.

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3. *Community Property*

The emergence of community-property regimes in a handful of states has further expanded the menu of options for concurrent ownership. In community-property states, spouses interested in co-ownership of property may reject the traditional common law cotenancies and instead hold assets as community property. Community property is considered to be owned by the spouses as a single unit and is therefore subject to joint management. However, community property does not carry with it a right of survivorship.[64] Dissolution of the marriage by divorce terminates the community-property regime; depending on the state, the community property is then divided according to the principle of either equal or joint distribution.[65]

Community-property states also divide on the question of what incoming property becomes community property or separate property. For instance, some states, including Idaho[66] and Texas,[67] assign community-property status to income from separate property, while others view such income as separate property.[68]

The issue of marital property is further complicated by two factors. First, states are divided on whether marital property regimes are mandatory or optional. Common law property regimes are generally optional, meaning that couples may decide in what form to own their property.[69] Couples may decide upon separate ownership of assets, or upon one or another form of joint tenancy. Community-property regimes, however, are generally mandatory. Thus, property acquired by one spouse's earnings automatically becomes community property.[70] Alaska, however, is an elective community-property state in which couples have the option of holding property as a community or separately.[71] Most states also allow the voluntary transmutation of property

64. DUKEMINIER & KRIER, *supra* note 17, at 421.

65. 7 POWELL, *supra* note 19, § 53.07[1], at 53-100 to -101.

66. IDAHO CODE §§ 32-906, 32-906A (1996 & Supp. 2005).

67. TEX. FAM. CODE ANN. §§ 3.001-.002 (Vernon 1998).

68. *See, e.g.*, WASH. REV. CODE ANN. §§ 26.16.010-.020 (West 2005).

69. Wisconsin, for example, provides such an optional community-property scheme. 7 POWELL, *supra* note 19, § 53.02[1], at 53-4 to -26.

70. Community-property states may, however, preserve separate ownership for "property acquired before marriage and property acquired during marriage by gift, devise, or descent." DUKEMINIER & KRIER, *supra* note 17, at 420.

71. *See* ALASKA STAT. § 34.77.030 (2004). Indeed, Alaska invites nonresidents to opt into Alaska community-property law by creating an Alaska community-property trust. *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 456 (7th ed. 2005).

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forms by agreement, permitting spouses to transform community property to separate property or vice versa.[72]

Second, and more confusingly, marital property issues are becoming increasingly complicated as a result of growing gaps between states concerning the legal recognition of marital status. Massachusetts has recognized the rights of same-sex couples to marry,[73] while Vermont[74] (and perhaps California[75]) has granted such couples the right to form civil unions carrying the same legal status. This would seem to grant same-sex partners the ability to obtain marital or quasi-marital status in one of these states, and, by extension, the right to enjoy the property rights attendant to marital status in any state in the Union.[76] However, in 1996, Congress enacted the Defense of Marriage Act (DOMA), which granted states the right not to recognize the validity of acts respecting a same-sex relationship "that is treated as a marriage" or to give effect to rights and claims "arising from such [a] relationship."[77] While many scholars have argued that DOMA exceeds congressional power under the Full Faith and Credit Clause,[78] others have argued for the validity of the Act.[79]

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72. *See* 7 POWELL, *supra* note 19, § 53.03[1][b1], at 53-32.

73. Goodridge v. Dep't Pub. Health, 798 N.E.2d 941 (Mass. 2003).

74. VT. STAT. ANN. tit. 15, §§ 1202, 1204 (2002).

75. While the California Supreme Court halted same-sex marriages in 2004 in *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004), the court did not rule on the constitutionality of such marriages.

76. Such, for example, was the case with Nevada divorce when that state's liberal rules for marriage dissolution altered property rights for divorcing couples throughout the Union. Once couples obtained a Nevada divorce, their home states were required to give "full faith and credit" to the divorce, leading, for example, to the dissolution of tenancies by the entirety and other property forms affected by marital status. *See* NELSON M. BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 181-88 (1962). According to Blake:

> By the 1920's the Nevada courts were granting about 1,000 divorces a year; after the residence requirement was reduced to three months, production more than doubled with over 2,500 divorces in 1928. The effect of the 1931 law reducing residence to six weeks was equally dramatic. The rate again doubled, and in 1931 there were 5,260 Nevada divorces. Annual production fell off somewhat during the later years of the Great Depression, but soared wildly under the impact of World War II, reaching 11,000 in 1943 and 20,500 in 1946. Thereafter, it subsided to a more or less stable level of between 9,000 and 10,000 a year during the later 1950's.

Id. at 158-59.

77. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)).

78. *See, e.g.*, Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 649 (1997); Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 812 (1999); Andrew Koppelman, *Same-Sex*

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Additionally, some have argued that cases recognizing a "public policy" exception to the Full Faith and Credit Clause would allow states to refuse recognition to foreign same-sex marriages even in the absence of DOMA.[80] As of April 2003, thirty-seven states had enacted laws denying local effect to same-sex marriages and civil unions recognized in other states.[81] Today, one must check the chain of marital status as well as the chain of property rights in order to determine the legal status of property ownership. Thus, for example, a purchaser of an automobile from one member of a same-sex couple from a community-property state would have to see if the automobile was purchased as community property and whether the same-sex couple was entitled at the time of purchase to the marital rights to create such a property status.

4. *The Rise and Fall of Cotenancies*

The dynamism in property forms can be seen by examining not only differences between state policies, but also the development of property forms over time. The question of whether there is vibrant competition for property law regimes is an empirical one beyond the scope of this Essay. Nonetheless,

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Marriage, Choice of Law, and Public Policy, 76 TEX. L. REV. 921, 974 (1998); Letter from Laurence H. Tribe, Professor, Harvard Law Sch., to Senator Edward M. Kennedy (May 24, 1996), *reprinted in* 142 CONG. REC. S13,359-61 (daily ed. June 6, 1996).

79. Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 456 (1998) (arguing for the validity of DOMA under the "Effect Clause"); Lynn D. Wardle, Williams v. North Carolina, *Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 223 (1998) (same); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 391-92 (1998) (same).

80. *See, e.g.*, Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 888-89 (2004) ("[S]ome advocates and scholars on both sides of the DOMA debate acknowledged that due to the 'public policy exception,' other states with connection to the parties likely would not have to recognize same-sex marriages from another state. Opponents of the legislation therefore argued it was unnecessary because the Constitution itself would not require states to give the same-sex marriages recognition."). The public policy exception permits states to refuse to recognize the validity of foreign states' acts when such recognition would "involve an improper interference with important interests of the sister State." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971). Others, however, argue that the public policy exception is unconstitutional. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

81. *See* Leigh Jones, *Gay Partner May Pursue Wrongful Death as Spouse*, N.Y. L.J., Apr. 15, 2003, at 1 ("[W]hile 37 other states have used the federal law to pass their own laws establishing that they do not recognize same-sex unions in other jurisdictions, some 13 states, New York among them, have not codified the apparent power that the Defense of Marriage Act provides to states.").

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several episodes in the history of cotenancy law in the United States suggest that property doctrines at the state level do not stand in place, but rather change in response to the give and take of politics.

Several states tried to do away with the right of survivorship as a feature of joint tenancies.[82] Among these states were North Carolina in 1784[83] and Pennsylvania in 1812.[84] Generally, the explanation for the abolition was straightforward: Given the ability of parties to pass property to one another through testamentary instruments, there was no need for a special form of property that would allow a person to take up ownership automatically upon death of a cotenant.[85] Yet, political forces—concerned with the ability to pass property without probate—inexorably pushed toward the recreation of the survivorship right.

Thus, for instance, Ohio courts eliminated joint tenancies with survivorship in the 1826 decision *Sergeant v. Steinberger*,[86] but later recognized the ability of parties to create an effective "joint and survivorship deed."[87] North Carolina reversed its abolition act in 1991, thereby allowing the creation of a joint tenancy with survivorship, while preserving an interpretive presumption against survivorship.[88] Pennsylvania reached a similar result by judicial interpretation of the relevant statute in 1934.[89] Tenancies by the entirety underwent a different reform. At common law, the husband was entitled to possess, manage, and control the assets during the marriage.[90] This

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82. *See supra* text accompanying note 63.

83. Act of 1784, ch. 22, § VI (repealed 1991), *reprinted in* 24 THE STATE RECORDS OF NORTH CAROLINA 574 (Walter Clark ed., 1904).

84. Act of Mar. 31, 1812, ch. 194, 1812 Pa. Laws 259 (codified at 68 PA. CONS. STAT. ANN. § 110 (West 2004)).

85. *See* John V. Orth, *Joint Tenancy Law*, 5 GREEN BAG 2d 173 (2002).

86. 2 Ohio 305 (1826).

87. Curlis v. Pursley, 10 Ohio Misc. 266, 270-71 (Ct. Com. Pl. 1967).

88. Act of July 12, 1990, ch. 891, § 1, 1990 N.C. Sess. Laws 224 (codified at N.C. GEN. STAT. § 41-2 (2004)); *see* John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina*, 69 N.C. L. REV. 491 (1991).

89. *In re* Lowry's Estate, 171 A. 878 (Pa. 1934) (holding that while the statute abolished the right of survivorship as an incident of joint tenancy, it did not prevent the creation of such a right either by devise or grant in deed). We present no broader theory about the importance of particular branches of government in the shaping of property. For one interesting perspective on the struggle between legislature and judiciary, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

90. *See* Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. REV. 455, 457 (2003) ("[A]t common law husbands were generally the titleholders or managers of all the marital property since married women were unable to own or manage property given the disabilities of married women."); Orth, *supra* note 55, at

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inequitable feature of the estate, however, was abolished over the course of the twentieth century.[91] Today, tenancy by the entirety, where it exists, provides for equality between spouses.

B. Easements

While subject to less dramatic changes than the law of cotenancies, easements have also been subject to a variety of approaches throughout the United States. Easements are property interests in realty (or personalty)[92] that grant owners use rights but not possessory rights. Traditionally, only a handful of use rights and restrictions were cognizable at common law as easements. Outside this list, any agreement between parties regarding the use of assets would create no property rights. Nevertheless, a number of new easements have been recognized in various U.S. jurisdictions, as have new means for creating them.[93]

Easements may be classified as either affirmative or negative. Affirmative easements grant the easement-holder the right to use the servient property in a certain manner—such as the right to cross neighboring property by foot—while negative easements bar the servient property owner from certain uses—such as blocking water flow.[94] English common law recognized only four types of negative easements: "[T]he right to stop your neighbor from (1) blocking your windows, (2) interfering with air flowing to your land in a defined channel, (3) removing the support of your building (usually by excavating or removing a supporting wall), and (4) interfering with the flow of water in an artificial stream."[95] Additionally, negative easements could only be appurtenant (for the benefit of a property) and not in gross (for the benefit of a person).[96]

42-43 (noting that "[w]ell past the middle of the twentieth century, [tenancy by the entirety] was still male-dominated in a number of states").

91. Orth, *supra* note 55, at 43 ("[I]n a process not completed until late in the twentieth century, state after state legislated to equalize the rights of the spouses over property held in the tenancy by the entirety.").

92. *See* Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004).

93. In addition to the approaches to privately held easements we mention here, there are a variety of state rules regarding public easements. For instance, in some states, courts are generous in creating prescriptive public easements, or the equivalent, in order to promote access to coastal beaches. *See, e.g.*, Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604, 610 (N.H. 1994); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

94. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 2.03, at 2-14 to -17 (rev. ed. 1998).

95. DUKEMINIER & KRIER, *supra* note 17, at 855 (footnote omitted).

96. *See* 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.01 (Michael Allan Wolf ed., 2000).

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American law also traditionally limited the types of negative easements that could be recognized.[97] However, many states have expanded the list beyond the traditional four. Perhaps the most famous new easement is the conservation easement, which is essentially a negative easement in gross that prevents development of land that is harmful to the environment.[98] The purposes of conservation easements include: "retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, [and] preserving the historical, architectural, archaeological, or cultural aspects of real property."[99] Under the common law, the conservation easement would be impossible. It prevents a use beyond the four traditional prohibitions recognized under English law, and it runs in gross rather than being appurtenant.[100] Yet, in the past fifty years, many states have provided for conservation easements,[101] including the eighteen states and the District of Columbia that have adopted the Uniform Conservation Easement Act.[102] In fact, only Wyoming, Pennsylvania, North Dakota, and Oklahoma continue to prohibit the form.[103] Permissible conservation easements have varied widely among those states that permit them. For instance, some states' conservation easements "cover only land conservation, while others cover both land conservation and historic preservation."[104]

C. Droit de Suite

Copyright law extends the domain of property law to intangible expressive works. Under the United States Copyright Act, the initial copyright vests in the author of the work.[105] Authors may subsequently assign their rights to others

97. DUKEMINIER & KRIER, *supra* note 17, at 857 ("In the main, American courts accepted the English restrictions on creating new types of [negative] easements.").

98. *See* Sarah C. Smith, Note, *A Public Trust Argument for Public Access to Private Conservation Land*, 52 DUKE L.J. 629, 633 (2002).

99. UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1996).

100. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 381 (2001) (noting that "conservation easements are an anomaly without precedent in the common law of easements").

101. *Id.* at 384-85 (discussing the legislation of conservation easements by states).

102. *Id.* at 385.

103. *Id.*

104. *Id.* at 384.

105. 17 U.S.C. § 201(a) (2000).

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and, if they do, they are no longer entitled to a share in the profits from the resale of the work.

However, a minority property doctrine, in force in the state of California, creates and preserves a continuing property right for the artist who created the work. This right, known as the *droit de suite*, is recognized under the California Resale Royalties Act (CRRA).[106] It provides that when a work of fine art—defined as "an original painting, sculpture, or drawing, or an original work of art in glass"[107]—is resold, payment must also be made to the artist (or successors for twenty years after the artist's death).[108] The artist's right to a share in the proceeds of a resale exists notwithstanding the artist's previous transfer of all ownership of the artwork that is the subject of the sale. Indeed, without such a transfer, the CRRA preserves no rights for the artist.[109]

In order for the CRRA to apply, the seller must be a California resident at the time of the resale, or the resale must take place within California.[110] Artists may not transfer or waive their right to royalties except by a written contract "providing for an amount in excess of 5 percent of the amount of such [re]sale."[111]

II. THE VALUE OF STATE COMPETITION

In this Part, we discuss the utility of interstate competition for property regimes. Our analysis incorporates two rich literatures: the elaborate body of work on state competition in corporate law and the scholarship spawned by Charles Tiebout on competition over the provision of local public goods. In addition, we examine the mechanisms through which federalism produces political change, and we tie the scholarship concerning competition to Albert Hirschman's analysis of voice and exit as instruments of policy shaping. We conclude this Part by discussing how our analysis ties into the existing scholarship on the production of various property forms and rights.

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106. CAL. CIV. CODE ANN. § 986 (West 1982 & Supp. 2005); *cf.* Morsenburg v. Baylon, 621 F.2d 972 (9th Cir. 1980) (holding that § 301 of the 1976 Copyright Act does not preempt the California legislation because the latter merely provides a supplemental right to the copyright holders).

107. CAL. CIV. CODE ANN. § 986(c)(2) (West 1982 & Supp. 2005).

108. *Id.* § 986(a)(7).

109. *Id.* § 986(a), (b)(5). The artist's share on resale is a royalty equal to five percent of the gross resale price (unless the resale price is under $1,000 or less than the price previously paid by seller); the duty to pay falls upon the seller or the seller's agent. *Id.* § 986(a)(1), (b)(4), (b)(5).

110. *Id.* § 986(a).

111. *Id.*

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A. State Competition in Corporate Law

The rich literature on the effects of interstate competition for corporate law provides a natural starting point for our analysis. This body of scholarship developed in two stages. The first salvo in the debate was fired by William Cary, who famously stated that competition among states to attract corporations generates a "race for the bottom."[112] According to Cary, corporate managers seek out the regulatory regime most favorable to their schemes at the expense of the shareholders. Cary's bleak prediction was inextricably related to the agency problem that is the underlying concern of much corporate law. The agency problem arises out of the divergence of interests between the principal and agent, and posits that one cannot always presume that the agent will serve the interests of the principal rather than her own. In the corporate context, the shareholders are the principals and formal owners of the corporation, but they must entrust the daily operations to an agent, the professional management, which enjoys effective immunity from shareholder oversight.

Cary's pessimism was soon countered by a much more optimistic view. In a famous article, Judge Ralph Winter argued that state competition would actually lead to a race to the top.[113] In Winter's view, shareholders would invest only in companies subject to regulatory regimes that curbed managerial excess. The result, wrote Winter, would be that the need for capital to fund corporate activities would force managers to incorporate in those states whose legal regimes reliably overcame the agency problem and protected shareholders.[114]

Soon, however, the Winter-Cary debate was eclipsed by a more fundamental question—is there, in fact, any race at all? Michael Klausner pointed out that Delaware leads the nation in incorporations by a substantial margin. The dominance of Delaware's corporate law leads to "network externalities" that make Delaware a superior choice for a prospective corporation, irrespective of the attractiveness of its corporate law.[115] Subsequently, Ehud Kamar, alone and together with Marcel Kahan, took

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112. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974).

113. Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

114. *Cf.* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 732-37 (1987) (reviewing empirical studies of state competition and arguing that "to the extent they can be used to buttress any position, it is the value-maximizing view associated with Ralph Winter").

115. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 844 (1995) (pointing out that "network externalities may have increased the value of the Delaware charter and created a self-reinforcing dynamic that extended Delaware's lead" (footnote omitted)).

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Klausner's insight a step further by positing that Delaware enjoys a monopoly position in the market for incorporations, calling into question the ability of other states to compete with Delaware.[116] And, indeed, recent contributions to the debate support the view that there is no robust competition among states in this context. For example, Lucian Bebchuk and Assaf Hamdani have suggested that the alleged "race" for incorporations never transpired, and that the process would be more aptly described as a "leisurely walk."[117]

There are three important differences between the corporate context and the property context. First, much of the controversy about the competition for efficient corporate law concerns the agency problem. As noted previously, Cary feared a race to the bottom in which corporate managers would choose jurisdictions that benefited their interests at the expense of shareholders.[118] However, property law typically does not involve such a clash of interests – the owner seeks to take advantage of favorable laws to enhance the value of her own assets.

Second, in the property context, no state enjoys Delaware's dominant status.[119] While New York and California are highly influential, one cannot summarize the law of property by focusing exclusively on these two states. On many doctrinal questions, New York and California law are in diametric opposition. At a risk of mild overstatement, it may be said that New York property law is somewhat conservative and static, while California's is marked by sometimes controversial innovations.[120] Moreover, important cases in the

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116. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 748 (2002) (concluding that states do not compete over incorporations and that Delaware enjoys a monopoly status); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1910 (1998) (arguing that "Delaware has market power that allows it to engage in anticompetitive behavior").

117. Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 553 (2002). However, Melvin Eisenberg, and later Mark Roe, have pointed out that although Delaware is virtually immune to competition from other states, it faces potential competition from the federal government, which may at any time increase its regulatory oversight. Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1512 (1989) (noting that potential intervention by the federal government provides a check on Delaware's ability to abuse its dominance); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (discussing the possible effects of federal regulations on Delaware law).

118. *See* Cary, *supra* note 112.

119. According to Sitkoff and Schanzenbach, Delaware, South Dakota, and Alaska are the dominant states in jurisdictional competition over trust law. *See* Sitkoff & Schanzenbach, *supra* note 44.

120. Most notably, New York generally follows the traditional common law rule against perpetuities, *see* DUKEMINIER & KRIER, *supra* note 17, at 334, and refuses to impose a duty to mitigate damages on landlords, *see* Holy Prop. Ltd. v. Kenneth Cole Prod., 661 N.E.2d 694, 696 (N.Y. 1995).

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property canon come from various jurisdictions in the United States, ranging from Massachusetts[121] and New Jersey[122] to Minnesota[123] and Oregon.[124]

Third, there are more significant barriers to creating property rights in different states than there are to forming corporations. Particularly when realty is concerned, the choice among property regimes may entail choosing between highly imperfect substitutes. Real estate in one location is never the precise equivalent of real estate in another, and the law governing property rights in such real estate is invariably that of the realty's situs. Even when chattels are concerned, creating property rights in another state may involve significant costs, such as relocating one's residence. The result is that the gains to be enjoyed from another state's property regime must be rather large before it is cost-effective to take steps to fall under the competitor's property law.

Although Delaware currently dominates the market for incorporation, it did not always enjoy this position. Until the end of the nineteenth century, New Jersey dominated the market. Between 1888 and 1899, forty-two percent of the companies whose value exceeded one million dollars were chartered in that state; in 1899, the percentage climbed to fifty-five percent.[125] In that same year, in a conscious attempt to challenge New Jersey's dominance, Delaware enacted its General Corporation Laws.[126] To a large extent, Delaware's

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121. Massachusetts is credited as the first state to recognize conservation easements. *See* Jean Hocker, *Foreword* to PROTECTING THE LAND, *supra* note 6, at xvii.

122. Arnold v. Mundy, 6 N.J.L. 1, 12 (1821) (holding that "the navigable rivers, where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products" are held in public trust for the benefit of the residents of New Jersey).

123. Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n, 161 N.W.2d 688, 691-92 (Minn. 1968) (holding that a joint tenancy may be terminated and transformed into a tenancy in common by a unilateral conveyance to oneself); *see also* Helmholz, *supra* note 57, at 10 (stating that *Hendrickson* was the first case to recognize this option).

124. State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969) (declaring an easement for the public over Oregon's privately owned dried sand beaches based on the doctrine of custom); Steven W. Bender, *Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches*, 77 OR. L. REV. 913, 913-14 (1998) ("Nationally, Oregon is credited with, and sometimes criticized for, resuscitating the custom doctrine as applied to beach rights."). Credit for being the first state to invoke the custom doctrine to declare rights in the public should arguably go to Hawaii. *See In re* Ashford, 440 P.2d 76 (Haw. 1968) (locating seaward boundaries at the upper reaches of the wash of waves on grounds of Hawaiian custom).

125. *See* RUSSELL CARPENTER LARCOM, THE DELAWARE CORPORATION 12-13 (1937).

126. *See* Kahan & Kamar, *supra* note 116, at 727 n.171 (describing how Delaware challenged New Jersey).

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legislation was a copy of New Jersey's corporate law,[127] but the former was subsequently complemented by a marketing campaign designed to promote Delaware's reputation as an appealing locale for incorporation.[128] Furthermore, over time, the Delaware legislature updated its General Corporate Laws to remain attractive to corporations. The story of Delaware illustrates that competition among states is in fact possible and that the target audience, in this case corporations, responds to innovative approaches by states.

B. The Tiebout Hypothesis

A second reference point for our analysis is the Tiebout hypothesis.[129] In a pathbreaking article, Charles Tiebout set out to challenge the view that public goods may not be provided efficiently due to the absence of an effective mechanism for the public to reveal its preferences.[130] Tiebout commenced his analysis by pointing to an important difference between central and local government with respect to the provision of public goods.[131] He observed that at the central (or federal) level, the preferences of the citizens are a given, and the government must adjust to them.[132] At the local level, however, localities can compete to attract residents by varying their revenue and expenditure patterns, and residents can then choose among these localities by moving to the one that best fits their preferences ("voting with their feet").[133] As Tiebout noted, the greater the number of communities and the larger the variance between them, the closer individuals will come to satisfying their preferences.[134] This analysis led Tiebout to conclude that under certain conditions, it is possible to achieve efficient provision of local public goods.[135]

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127. *See* Chicago Corp. v. Munds, 172 A. 452, 454 (Del. Ch. 1934) ("[I]t is common knowledge that the general act of this state adopted in 1899 was modeled after the then existing New Jersey act.").

128. *See* Kahan & Kamar, *supra* note 116, at 727 n.171 (noting that "[t]he adoption of [Delaware's] new code was followed by vigorous marketing efforts").

129. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

130. This view was associated with the economists Richard Musgrave and Paul Samuelson. *See* Richard Abel Musgrave, *The Voluntary Exchange Theory of Public Economy*, 53 Q.J. ECON. 213 (1939); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. STAT. 387, 388-89 (1954).

131. Tiebout, *supra* note 129, at 418.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 420. Tiebout's specific assumptions were that: (1) Each consumer-voter is fully mobile and selects the community that best satisfies his preferences for public goods; (2) consumer-voters have full knowledge of differences; (3) there are a large number of communities; (4)

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Tiebout's analysis has become a classic in legal scholarship. His basic insight was subsequently applied to myriad legal fields, ranging from environmental law[136] to banking[137] to antitrust.[138] At least to some extent, the Tiebout hypothesis has found support in empirical studies.[139] These studies suggest that migration patterns between city and suburbs are significantly affected by tax levels and investment in education.[140]

What are the implications of the Tiebout hypothesis for competition over property forms? In the United States, property law is a local public good that fits Tiebout's framework of analysis.[141] In addressing this question, then, it is necessary to take account of two unique characteristics of property law as a

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there are no restrictions due to employment opportunities; (5) public services exhibit no economies or diseconomies between communities; (6) each community has an optimal community size (number of residents for which a bundle of services can be produced at the lowest cost); and (7) communities seek to maintain optimal community size. *Id.* at 419.

136. *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing that competition among states over environmental regulation will not lead to a race to the bottom). Revesz's article was a response to two articles by Richard Stewart, both positing that competition among states over environmental regulation will lead to a race to the bottom. Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977).

137. *See* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 12-13 (1977) (suggesting that federal and state regulators compete over bank charters). *But see* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 693-707 (1988) (employing public choice theory to argue that the competition between federal and state regulators identified by Scott does not exist, and recommending devolution to the state level in order to create competition).

138. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 23-25 (1983).

139. *E.g.*, Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 524 (1991) ("Many studies have shown that middle-class migration between the city and the suburbs is significantly affected by the disparity . . . between city and suburban spending for education."); Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 615 (1997) ("Empirical data, in fact, bear out the Tiebout hypothesis.").

140. *See* William A. Fischel, *Did John Serrano Vote for Proposition 13? A Reply to Stark and Zasloff's* Tiebout and Tax Revolts: Did *Serrano* Really Cause Proposition 13?, 51 UCLA L. REV. 887 (2004); Poindexter, *supra* note 139, at 615. However, a recent empirical study by Paul Rhode and Koleman Strumpf suggests that long-run trends in geographic sorting are inconsistent with the Tiebout hypothesis. Paul W. Rhode & Koleman S. Strumpf, *Assessing the Importance of Tiebout Sorting: Local Heterogeneity from 1850 to 1990*, 93 AM. ECON. REV. 1648 (2003).

141. *See, e.g.*, Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087, 1092-97 (1999) (characterizing law as a public good).

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subject of state competition. First, the fact that property forms are produced on the state level, not the local level, dramatically increases the relocation costs individuals must incur to change property regimes. By contrast to competition over education, which requires relatively modest moves from the city to the suburbs or from one suburb to another, competition over property forms entails significant changes in lifestyle. Second, by contrast to natural amenities, the law may be transported to other places. That is, it is not necessary for individuals to live in a particular place in order to enjoy a legal regime that exists there; laws may, in principle, be imported by people in other locales. Together, these factors suggest that while Tiebout competition is probably less robust today for property law than for local amenities, increasing the portability of state property law should make it quite amenable to Tiebout competition.

C. Politics and the Production of Property Law

As should be evident by now, while there is competition in the market for the production of property law, this market is quite different from the ordinary one for consumer goods. Property laws are, for the most part, produced by a political process. Consumers cannot simply contract with suppliers for the production and delivery of their desired goods or make purchases from retailers on an open, competitive market. The purchase price of property law is indirect, and is incurred when one casts votes, contributes to political campaigns, or enters into a jurisdiction and exposes oneself to local taxes. The supply side of the property law market is even more complicated. A variety of political institutions, most importantly elected legislative bodies, produce property laws.[142] These bodies, in turn, are staffed by decisionmakers who ideally have no direct pecuniary interest in the legislative outcome, but who often seek to maximize ideological preferences, personal reputation, reelection opportunities, and other political rents, sometimes at the expense of state profits or the public welfare. The agency problem that plagues corporate law thus expresses itself even more sharply in the political context. Finally, the good being consumed itself bears a peculiar quality—property laws are jurisdictional, rather than personal. Generally, one cannot purchase a property law of individual application.

142. Property law may also be produced by the courts. *See supra* notes 82-91 and accompanying text (describing the role of courts and legislatures in legal developments in the law of cotenancies).

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In a recent article, Saul Levmore observed that property institutions develop along two paths.[143] The first path is presumed to be efficient, and is governed by the forces of supply and demand, mediated by transaction-cost economics.[144] Along this path, new property rights evolve when the expected value from their creation exceeds the expected cost.[145] The second path is not presumed to be efficient, and is dominated by interest groups engaged in constant rent-seeking. These actors do not seek to create efficient economic institutions, but rather to take advantage of their political influence to obtain favorable property regimes.[146] The evolution of property law is thus shaped by two inconsistent forces and, in particular, the interplay between them.

How does federalism affect the analysis? We contend that federalism augments the efficient forces and weakens the inefficient ones. As we already explained, the federal structure of the United States enables interstate competition over property forms along the lines of the Tiebout model. This competition places constant pressure on local legislatures to design or adopt new property regimes that are consistent with the preferences of local residents. To be sure, local legislatures are not immune from external interest-group pressure. Nonlocal interest groups can influence local decisionmaking through campaign contributions and other forms of lobbying. However, as Madison noted, to the extent that these interest groups desire to establish uniform national rules, federalism stands as an obstacle.[147] When lawmaking is done on the state level, as is the case with property, attempts by interest groups to achieve nationwide uniformity are by and large doomed.[148] Imagine, for

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143. Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181 (2003) [hereinafter Levmore, *Property's Uneasy Path*]; *see also* Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. 421 (2002).

144. Levmore, *Property's Uneasy Path*, *supra* note 143, at 182 ("[T]he conventional and optimistic story is that the emergence of property rights in personal and real property has been a story of evolutionary success.").

145. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

146. Levmore, *Property's Uneasy Path*, *supra* note 143, at 182 ("There is room, however, for an alternative and more skeptical depiction of the evolution of these property rights. This story is one of interest groups, tribute, and grave market imperfections.").

147. THE FEDERALIST NO. 10, at 59, 62 (James Madison) (Carl Van Doren ed., 1979) (arguing that the federal system renders factions "unable to concert and carry into effect schemes of oppression" because the "influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States").

148. This may create a problem if property regimes are characterized by network effects. A network externality exists when the utility that a given user derives from a good depends upon the number of other users who are in the same network. *See, e.g.*, Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

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example, that an interest group seeks to reintroduce the fee tail into all U.S. jurisdictions. If property law were produced by a central legislature, a massive lobbying campaign could yield the desired result. When the production of property law is controlled by the states, however, the lobbyists must target each state legislature, and more critically, every state has veto power over the proposed changes. Thus, federalism dilutes the influence of out-of-state interest groups and diminishes their ability to pass inefficient legislation for the whole country.

Naturally, interest groups will often agree to settle for less than sweeping national changes. Changing the law in certain states may satisfy their goals. Yet, even in these cases, enhancing federalism provides a check on the ability of interest groups to pass inefficient legislation. The existence of more efficient property regimes in other states, and the ability of consumers to readily take advantage of such regimes, would create a constant pressure on states with less efficient ones to modify their laws. In the face of these competitive pressures, interest groups would have to expend more resources to maintain the inefficient regimes they helped pass. The higher cost of maintaining inefficient regimes may, in turn, deter interest group lobbyists from promoting the inefficient legislation in the first place.

In the property context, as in others, interest groups opposing some kinds of revolutionary change will find themselves strengthened, rather than weakened, by federalism. For example, if property forms can be freely taken advantage of in every jurisdiction, interest groups will be able to defeat complete abolition of a property form by winning in a single jurisdiction.[149] As we will discuss later, this necessitates limiting our proposal in order to prevent federalism from leading to a race to the bottom in property law.[150]

D. Exit, Voice, and Federalism

A related way of examining the issue of local provision of law and its interplay with politics is through the prism of Albert Hirschman's distinction between the control mechanisms of "exit" and "voice."[151] Hirschman suggested that the market could exercise quality control over some types of goods, not only through consumers' exercise of the option to exit and purchase a competing good, but also by utilizing consumers' voice to appeal for superior products. Hirschman's perspective may be translated into terms we have

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149. *Cf.* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993) (arguing against viewing protection of the status quo as "neutral" among participants in the political arena).

150. *See infra* Section III.B.

151. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

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discussed thus far. Control by exit parallels Tiebout's competitive mechanism in which consumers obtain the preferred package of public goods by "voting with their feet." Control by voice, in turn, corresponds to political control of public goods through effective democratic mechanisms. Naturally, proponents of an interest group theory of politics tend to be skeptical about the effectiveness of control through voice.

Federal systems are designed to enhance both exit and voice options. The greater diversity of local property schemes allows owners to exit jurisdictions with undesirable property schemes in favor of states with more favorable ones. The effective limitation of interest groups to those jurisdictions in which they are strongest also decreases their ability to compete with rank-and-file property owners in other jurisdictions. In the context of contractual choice-of-law clauses, Larry Ribstein has argued that the ability to exit the jurisdiction of local law through choice-of-law clauses drives lawmakers to produce efficient laws.[152]

William Fischel has also argued that local political control enhances property owners' voice at the expense of other interest groups. According to Fischel's "homevoter hypothesis," homeowners dominate local politics because, as a group, homeowners' most valuable asset is generally their homes, and that asset's value is dramatically affected by local political decisions. Fischel notes that the local decisions that homeowners seek to affect are much broader than traditional property law, and include such related issues as property taxes, zoning, and educational funding. Nevertheless, the concentration of political power in the hands of homeowners seeking to maximize the value of their primary assets leads to an enhanced political voice for rank-and-file property owners at lower levels of government.[153]

III. ENHANCING CHOICE IN PROPERTY

In this Part, we move from the descriptive to the normative. Having explained how federalism shapes the American property system, and the attendant virtues of federalism, we now argue for a further expansion of state competition and individual choice in property law. Specifically, we propose a system that would allow owners to opt into certain out-of-state property regimes in exchange for the payment of a modest fee. Today, in order to enjoy an out-of-state property form, property owners typically must change their residence. Our proposal obviates the need to relocate, under certain

152. *See* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363 (2003).

153. FISCHEL, *supra* note 30, at 6.

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circumstances, by allowing property owners to avail themselves of the national menu of property forms.

In our proposed world, a couple married in Massachusetts could agree to hold property under California's community-property regime. As under current law, property forms could not thereafter be altered at will, but the creators of any given property estate would be able to choose among legal options from outside state lines in setting up the new estate. Thus, an individual creating a new property right in any part of the United States would be able to choose from the full list of forms available in all states.

In the next Section, we lay out our proposal in greater detail. In the Section following, we address potential objections and explore some of the informational and prudential boundaries of our proposed scheme.

A. A Proposal for Choice in Property

Policymakers have failed so far to take full advantage of the expanded menu of property forms generated by the American federal system. At present, residents of a certain state who wish to adopt a property form of another state must relocate, as predicted by the Tiebout hypothesis, to the state in which their desired form is offered. There is no inherent reason, however, why this should be so. In sum, relocation costs are a distortion of the market for property forms that may lead property owners to choose suboptimally where such costs overwhelm the potential benefits of choosing a foreign state's form.

A helpful way to analyze the problem is by viewing property forms as an item on the market. In this view, when one chooses which property form to attach to a given asset, one chooses from the available options on the market just as one might select a television from an electronics store. To make this choice, the consumer evaluates the expected utility of the purchased asset and compares it to the market price. The state's list of property forms, under the current property regime, is analogous to the list of domestically produced televisions, and out-of-state property forms are like imported televisions. The current requirement that one relocate in order to "purchase" out-of-state property forms acts like a tariff or an import tax. It discourages consumers from purchasing potentially superior out-of-state forms, thereby favoring suboptimal local forms.[154]

154. Granted, the importation analogy is not precise in all respects. Today, one cannot order up an out-of-state property form at will and import it. Sometimes, as with community property, the property owner must migrate temporarily to the other state in order to impress a new property regime upon her ownership of an asset. Other times, the migration must be permanent in order to benefit from domiciliary situs rules governing property forms. Still, viewing relocation as a tax on out-of-state forms remains a useful way of examining the issue.

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The higher cost of attaching out-of-state property forms to assets forces many owners to forego certain out-of-state forms they would have chosen in a perfectly competitive property-forms market, making them settle for an inferior in-state form. Thus, extending our analogy, our proposal acts as a free trade regime under which tariffs are eradicated and consumers can choose from among foreign and domestic products. Specifically, we seek to eliminate the need for relocation—whether temporary or permanent—in order to adopt out-of-state property forms. Or, put differently, we call for the establishment of a national menu of property forms available to all citizens.

Under our proposed regime, whenever a new property right is created or acquired, the parties may define the property right by choosing from the full menu of options available throughout the country. Thus, for example, when a landowner in Massachusetts transfers realty to her children in anticipation of her death, she may select not only from the available real property estate forms in Massachusetts, but also from those of New York, California, and all the other states of the Union. Naturally, in order to provide notice to interested third parties, the landowner would have to make an explicit indication in the in-state registry of the type of estate chosen.

Additionally, the estate would have to be registered in the state from which the property form was taken. States must have some sort of incentive to offer innovative products and services, and property law is no exception. States that create and offer desirable property forms must stand to gain from their innovations. Indeed, only if states can collect the full value derived from innovative property forms—a measure that reflects the value for both in-state and out-of-state residents—will they have an optimal incentive to develop new property forms.

Generally, states' rewards come in the form of tax revenue. When residents vote with their feet and move to an area with superior public services and goods, they expose themselves to the full panoply of local taxes. Tiebout's model predicts that local governments will adjust their taxes and services in order to reach the lowest average cost of providing the desired package of public goods. The problem is that relocation costs often prevent individuals from voting with their feet. Many property owners who wish to adopt an out-of-state property form ultimately refrain from doing so due to the high relocation costs, thereby diminishing the states' incentive to come up with innovative property forms. Put differently, the high relocation costs inhibit competition both on the demand side and the supply side. Worse yet, relocation costs are a social deadweight loss; they impose a cost on the relocating owner without creating offsetting benefits for anyone else.[155]

155. Tiebout also noted the adverse effects of relocation costs on the market for local public services. *See* Tiebout, *supra* note 129, at 421-22.

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To overcome the problem of high relocation costs we turn once again to the field of corporate law. There, the problem was avoided by allowing firms to incorporate in a state of their choice in exchange for the payment of an incorporation fee and the firm's continued exposure to the incorporating state's taxes and legal system. This option already provides some choice to owners of personal property who wish to take advantage of foreign property law. As we note later, the property law of chattel is determined by the owner's domicile. An owner of chattel therefore may impose a foreign property regime on her personalty by creating a foreign corporation or trust and transferring the property to that entity.[156]

However, our proposal goes beyond the option of fictional domiciliary change by directly permitting property registration in other jurisdictions, as with corporations. In effect, incorporation is a form of registration that permits the state to enjoy enhanced revenues as a result of superior legal forms. The broader lesson to be drawn is that registration can serve as the opening for states to enhance local revenues, and thereby profit from the superiority of the legal forms they provide. Registration, in other words, can substitute for relocation. Thus, we propose that rather than relocating, a property owner should be able to register asset *X* in any state of her choice, and by so doing attach the menu of property forms available under the law of that state to asset *X*. In exchange, the property owner will have to pay a one-time registration fee and, possibly, perennial property taxes. To be sure, because the asset will still be physically located in its original jurisdiction, this jurisdiction should also be able to impose property taxes – after all, the local jurisdiction will still have to provide services connected with the property.[157]

Our proposed registration system evokes yet another analogy: choice-of-law and forum provisions in contracts. As we noted earlier, parties often use choice-of-law clauses in contracts to take advantage of out-of-state legal provisions. There are several important differences to note, however. First, contract law is not subject to the dynamic of Tiebout competition. States do not benefit from the fact that out-of-state parties select their law in choice-of-law clauses. Consequently, states have no incentive to craft contract laws that

156. *Cf.* Sterk, *Asset Protection Trusts*, *supra* note 9, at 1065-74 (discussing the use of such fictional property relocation in the context of trust law competition, and noting that jurisdictional competition can undermine states' policies).

157. We do not confine ourselves to any particular mechanism of implementing the registration system. One possibility is national legislation, allowing the states to adopt a uniform reciprocal system. Another might be state entrepreneurship, in which one state offers a registry, and leaves it to property owners to litigate or battle for recognition in other states. Irrespective of how a registry system arose, the efficiency of property registration would doubtless become one of the goods involved in property-form competition.

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meet the needs of out-of-state parties.[158] Out-of-state parties simply free-ride on the state's contract law. Our proposal, by contrast, is likely to improve the quality of the legislating state's substantive law—a phenomenon that is unlikely to occur with respect to contract law. Second, contracts are binding only on the contracting parties; they do not affect third parties. Property and corporate law, by contrast, affect many third parties. As Merrill and Smith correctly observed, property rights are in rem rights availing against the rest of the world, and they therefore impose informational and other costs on the public. As a result it is more important to govern the potential negative externalities imposed by property forms by extracting a price from the beneficiary of a property form.[159]

B. The Limits of Choice in Property

Having sketched out the basics of our proposal for expanding the choice of forms available to property owners, we now turn to potential objections to our scheme. We deal in turn with four potential challenges: the greater informational burdens imposed by relaxation of the *numerus clausus* principle; the use of out-of-state property forms to limit others' rights, such as by reducing the exposure of property to adverse possession; the linkage between legal status, such as marital status, and the right to exploit property forms; and the potential tension between moral sensibilities and property forms. Each of these challenges demands that we more precisely tailor our federal property regime.

1. Information Costs

As we have noted, Merrill and Smith found the importance of the principle of *numerus clausus* in the imperative to convey information about property rights. According to Merrill and Smith, because property law creates rights in rem that are good against an indefinitely large group of people who will never bargain over the content of the rights, it is particularly important for the law to limit the opportunities for confusion about the rights' content. Limiting the list

158. Indeed, the related forum-selection clauses impose an uncompensated cost on the forum state. As Alex Stein recently noted, contracts create an externality in that they may give rise to future litigation, and the court system is subsidized by the public. *See* Alex Stein, *An Essay on Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases*, 48 U. TORONTO L.J. 299, 341-44 (1998).

159. This last point also explains, once again, why choice-of-law clauses in contract law are an imperfect substitute for free choice of property forms. The contract-only clauses bind the parties to the contract, but no others. Thus, even though contract law already recognizes the validity of choice-of-law clauses, there should still be a market for selecting property forms.

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of property forms, wrote Merrill and Smith, accomplishes this goal by making third parties responsible only for determining which of the permitted property forms applies to a given object, rather than guessing which of an infinite number of bargains was struck, as is the case in the law of contract.[160]

We believe that the informative importance of the *numerus clausus* rule can be overstated. First, even under the current system third parties cannot assume, without checking, that out-of-state forms do not apply to an asset. Property owners can and do move about the United States. Additionally, property transactions may be carried out by parties across state lines. As a consequence, states already must take account of foreign property rules in choice-of-law doctrines. For instance, one who purchases chattel from a person who recently moved into the area must take into account the possibility that the chattel is held in a property form unfamiliar in the jurisdiction where the sale is taking place.

It is a longstanding choice-of-law rule that conflicts involving real estate are governed by the law of the situs in which the realty is located.[161] Originating in England,[162] this rule has been adopted by U.S. courts, and has been consistently applied in real estate cases. The courts' continued adherence to the *lex situs* rule has attracted the ire of academic commentators.[163] Critics of the rule argued that *lex situs* leads to the same inequitable results that prompted the abolition of other territorial rules from modern conflicts law and their replacement with a due process "minimum contacts" standard.[164] Yet, the *lex situs* rule has withstood the attacks and continues to control disputes over real estate.

By contrast, disputes involving personal property are controlled by the law of the owner's domicile.[165] This rule implies that owners can move personalty from one state to another and retain the property regime of their domicile. Therefore, insofar as personalty is concerned, third parties cannot assume that

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160. *See* Merrill & Smith, *supra* note 12, at 8 ("When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders.").

161. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 19.1, at 743 (2d ed. 1992).

162. Moffatt Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 STAN. L. REV. 1299, 1302-05 (1966) (describing the evolution of the *lex situs* rule in England).

163. *See, e.g.*, MOFFATT HANCOCK, STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND TITLES 300-09 (1984) (criticizing the mechanical application of *lex situs*); Alden, *supra* note 27, at 586-87 (referring to decisions under the *lex situs* rule as "unjust" and calling for the abolition of the rule).

164. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

165. *See* HANCOCK, *supra* note 163, at 232.

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the law of the situs applies. Rather, they must determine the owner's domicile and ascertain the law of that jurisdiction.

A further complication arises in cases involving marital property. As a general rule, when a married couple changes its domicile from a community-property state to a common law state, the community property, and the property acquired with community funds, will remain as such.[166] For example, if a couple from Washington (a community-property state) migrates to Pennsylvania (a common law state), the assets of the couple may be subject to a community-property regime even in Pennsylvania. Indeed, the relocation of couples from community-property to non-community-property states may result in new forms of hybrid property where a single item is partially ruled by a community-property regime, and partially not.[167] Hence, in cases involving marital property, third parties must not only inquire about the domicile of the couple, but also about their domicile at the time an asset was acquired.[168]

The legal intricacy of interstate marital property claims and transactions is likely to multiply in coming years as a result of the controversy over recognition of same-sex marriages. As noted earlier, Vermont and Massachusetts each recognize some form of same-sex union, but a substantial majority of states purport to deny full faith and credit to such unions.[169] Given the political potency of the issue, and the intricacy of the attendant constitutional questions, the status of same-sex unions seems unlikely to be resolved in the near future. One imagines that it will not be long before complicated property cases—perhaps adopting old anti-miscegenation rules—

166. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (1971). Comment (a) to § 259 notes: "Considerations of fairness and convenience require that the spouses' marital property interests . . . are not affected by a change of domicil to another state by one or both of the spouses." Comment (b) adds: "When a chattel or document is taken into a second state and is there exchanged for some other movable or immovable, the spouses acquire the same interests therein as they had in the original chattel or document."

167. *See, e.g.*, Newman v. Newman, 558 So. 2d 821 (Miss. 1990) (holding that California pension rights are apportioned and governed by the California community-property regime for the time period of the couple's domicile in California); *see also* REPPY & SAMUEL, *supra* note 3, at 599-601.

168. Further complications may be introduced by the local law on distribution of property upon dissolution of the marriage. As we have noted elsewhere, issues of distribution of "marital property" are not necessarily questions of property law. Bell & Parchomovsky, *supra* note 42, at 611-12. However, anticipated rules of distribution certainly confound the community-property equation. *See generally* Merrie Chappell, Comment, *A Uniform Resolution to the Problem a Migrating Spouse Encounters at Divorce and Death*, 28 IDAHO L. REV. 993 (1992).

169. *See supra* notes 23-24 and accompanying text.

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arise in which courts will have to fashion new conflict-of-laws rules to deal with incompatible laws of marital status.[170]

Second, many forms of property rights may be registered—indeed, many property rights are protected only if the owner registers the rights.[171] Once a right is registered, there is no need for guesswork at all about the nature of property protection that attaches to a given object, and the *numerus clausus* rule is thus of limited utility.[172]

Third, the closed menu conveys very little information. For instance, a buyer of realty cannot know, on the basis of the *numerus clausus* rule, whether a seller of a given house is in possession of a life estate, a defeasible fee, or a fee simple absolute. Indeed, the buyer cannot even know whether the seller possesses any legal rights at all. The *numerus clausus* rule merely ensures that if the seller has legal rights, they will be in one of the recognized forms of estate. The *numerus clausus* rule thus transfers very little operative information.

Nevertheless, we must acknowledge that there is an informational cost to permitting greater use of out-of-state property forms. We therefore suggest that states require registration of out-of-state property forms as a prerequisite for taking advantage of such forms. While there will be some costs involved in learning foreign law, the registry should offer greater clarity, significantly reducing the information costs of permitting increased choice. Additionally, as scholars have noted in the context of conflict of laws, parties that have to bear litigation costs will choose their law in a manner that reduces the costs of understanding and implementing foreign law.[173]

2. *Defensive and Offensive Uses of Property Choice*

To ensure that competition among states over property forms does indeed lead to a race to the top, it is necessary to distinguish between defensive and offensive uses. Specifically, we posit that the freedom of property owners to

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170. *See* Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married when We Return Home?*, 1994 WIS. L. REV. 1033; Alan Reed, *Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 387, 414-44 (2000); *see also infra* note 191.

171. Patents are an obvious example. Inventors must file their patent application for review by the Patent and Trademark Office and, if the patent is approved, it gets registered. As for copyrights, although registration is no longer a prerequisite for protection, it is a precondition for bringing an infringement suit. *See* 17 U.S.C. § 411(a) (2000).

172. *But see* Hansmann & Kraakman, *supra* note 10 (arguing that the restriction on the creation of new property rights by private actors serves not to standardize rights, but rather to facilitate verification of the ownership of rights offered for conveyance).

173. *See, e.g.*, Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000).

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import out-of-state forms should be restricted to defensive uses, and that the importation of offensive forms should not be permitted.

The line between defensive and offensive uses is not easily drawn. Offensive uses are those that involve nonconsensual erosion of the property rights of other owners. Offensive uses thus include doctrines such as nuisance and adverse possession. Assume that *A*, a property owner from New York who plans to acquire title to *B*'s property by adversely possessing it, wishes to take advantage of the shorter adverse possession period that exists in California. Could she import the California rules of adverse possession and attach them to *B*'s property? The answer is no. Adverse possession is an offensive use, or form, and thus out-of-state owners may not import it. Similarly, property owners should not be able to take advantage of other states' lax nuisance rules in order to diminish the value of neighboring properties.

Defensive uses are different, in that they do not involve a nonconsensual erosion of other property owners' rights. Consider, for example, the case of conservation easements. Assume that *E*, an avid environmentalist, wishes to create a conservation easement in a state that does not recognize this property form. Can *E* import the form? The answer, under our proposed regime, is yes. By creating a conservation easement, *E* does not adversely affect the rights of third parties. Of course, the creation of the easement has implications for *E*. Her decision to restrict future development may lower the price she will receive if she sells the property. The conservation easement may also improve the value of neighbors' properties, or grant third parties new rights to enforce the easement. But the new easement cannot in any way diminish the rights of other property owners.

What about more standard two-party easements? They too should fall under the category of defensive uses. If *C* and *D* voluntarily enter into an affirmative easement appurtenant that is not recognized by their own state but exists in other states, nothing should bar them from doing so.[174] In this case, because the easement was created consensually, there is no fear that it will imperil the rights of the servient estate owner. By contrast to the nuisance example, the voluntary nature of the easement ensures against usurpation of third parties' property rights. Of course, once the easement has been consummated, it will affect subsequent buyers and sellers of the lots. However, so long as these buyers and sellers are in full possession of the relevant information about the easement, the efficacy of the bargain will guide their actions. Because easements require registration to be binding on third parties, such parties should be able to learn of the easements at a very low cost.

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174. As we noted above in Section I.B, states differ on the kinds of duties and benefits that may be solemnized in an easement.

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By the same token, even under our system, the rules of acquiring property that do not involve mutual consent should be those of the local state. Thus, one cannot use another state's law to exercise finder's rights or to prevent others from using the local law of adverse possession. In other words, nonconsensual acquisition of property should be strictly governed by local state law. To allow claimants under foreign acquisition rules—as distinct from locally recognized owners—to select such out-of-state rules unilaterally would increase conflicts over property and foment litigation. Indeed, attempts to import foreign acquisition rules should be viewed as offensive tactics of the sort our framework rejects. Only after property has been acquired can its owner decide which form to attach to it. The initial recognition of property rights in nonconsensual transactions should be left to local law.

We illustrate some examples of defensive and offensive uses of property rules in the table below:

Table 1.
OFFENSIVE AND DEFENSIVE PROPERTY RULES

SAMPLE OFFENSIVE USES	SAMPLE DEFENSIVE USES
Adverse possession	Tenancies (with consent of cotenants)
Nuisance	Trusts (with consent of beneficiaries and trustee)
Easements (without consent of burdened party)	Easements (with consent of benefited and burdened party)
Finder's Rights (without consent of original owner)	Leaseholds (with consent of lessor and lessee)

3. *Status*

Closely related to the issue of federalism in property forms is the subject of status. Status issues related to property may arise in two ways. First, state law may determine the status of interpersonal relationships in a way that determines whether persons (real or artificial) or partnerships may hold property. For instance, some forms of property—such as tenancies by the entirety and community property—are available only to married couples. Yet state law is not uniform on the question of which couples are entitled to be married. Massachusetts, for instance, recently recognized the rights of same-

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sex couples to marry.[175] Most states, however, do not recognize the married status of such couples. By the same token, all states recognize the rights of corporations, as artificial persons, to own property, but states differ on the qualifications for incorporation.[176]

Second, state law governs the question of whether many objects such as fetal tissue[177] or human organs[178] may be the subject of claims under property law.[179]

For the most part, the U.S. Constitution already dictates that the principle of choice should govern. Under the Full Faith and Credit Clause, states must give full faith and credit to all public acts, records, and judicial proceedings of other states.[180] As a consequence, states generally are unable to question a status granted in another state, and they may not refuse to respect property rights stemming from that status.[181] This result is in accord with the needs of the federal system backed by our proposal. It should be noted, however, that the Clause also empowers Congress to determine the effect of public acts and records in other states. The extent of this power is not certain but, at least in

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175. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) ("Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."). Massachusetts was not the first state to recognize same-sex marriage. That distinction is reserved for Hawaii. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), a plurality of the Hawaii Supreme Court ruled that the denial of marriage licenses to same-sex couples violated the Hawaii Constitution's equal protection clause and thus should be subject to strict scrutiny. The court remanded the case to allow the state to show that the prohibition was narrowly tailored and promoted a compelling state interest. On remand, the circuit court held that the state had failed to meet its burden, effectively legalizing same-sex marriage. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Hawaii subsequently amended its constitution to ban same-sex marriage. HAW. CONST. art. 1, § 5 (amended 1996).

176. *See, e.g.*, Cyril Moscow, *Michigan or Delaware Incorporation*, 42 WAYNE L. REV. 1897 (1996).

177. *See* Nancy E. Field, Note, *Evolving Conceptualizations of Property: A Proposal To De-Commercialize the Value of Fetal Tissue*, 99 YALE L.J. 169 (1989).

178. *See, e.g.*, Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494 (Ct. App. 1988) (denying a property right under California law in spleen cells removed from a patient's body). *See generally* Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195 (1996).

179. Federal law governs the susceptibility of some items to property rights. The prominent example is the property status of inventions, expressions, and marks. *See supra* note 1.

180. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

181. *But see* Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397, 398-99 (1995) (noting limits on comity with regard to marriages in violation of a state's public policy).

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the above-mentioned case of DOMA,[182] Congress has claimed the right to abolish altogether the requirement that states recognize the validity of acts respecting a same-sex relationship "that is treated as a marriage" or rights and claims "arising from such [a] relationship."[183] As previously noted, scholars dispute the Act's validity,[184] and this conflict is almost certain to be resolved ultimately by the Supreme Court.

Quite aside from DOMA and related acts, a handful of states have retained some version of the Uniform Marriage Evasion Act, which forbids nonresidents from utilizing temporary entry into a state to take advantage of different state rules regarding marriage.[185] The Uniform Marriage and Divorce Act abolished the Uniform Marriage Evasion Act,[186] and most states followed suit. Among the states retaining a version of the Evasion Act are Illinois,[187] Massachusetts,[188] and Mississippi.[189]

The Evasion Laws are a statutory embodiment of the "public policy" exception to the requirement of full faith and credit. The exception—a principle that emerged from conflict-of-laws doctrine—permits states to refuse to recognize the validity of foreign states' acts where such recognition would "involve an improper interference with important interests of the sister State."[190] The public policy exception thus allows states to reject foreign acts that are considered incompatible with domestic law for reasons of public

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182. *See supra* notes 73-81 and accompanying text.

183. 28 U.S.C. § 1738C (2000).

184. *See supra* notes 78-79 and accompanying text.

185. Enacted in 1912, the Uniform Marriage Evasion Act sought to "codify the rule nullifying out-of-state marriages by domiciliaries whose marriage would be prohibited within the domicile." *See* Koppelman, *supra* note 78, at 944. While the statute failed to achieve broad adoption, and was withdrawn in 1943, about fourteen states still have some form of the statute. *Id.* at 944 & n.73.

186. UNIF. MARRIAGE & DIVORCE ACT § 201 cmt., 9A U.L.A. 175 (1998).

187. 750 ILL. COMP. STAT. 5/216 (1993 & Supp. 2005).

188. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 1998); *see also supra* note 16.

189. MISS. CODE ANN. § 93-1-3 (2004).

190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1971); *see also supra* note 80.

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policy.[191] While it is well-grounded in case law, important questions have been raised about the public policy exception's constitutionality.[192]

The logic of our position dictates that an out-of-state status that affects property rights should be available on the same terms as out-of-state property rights themselves. In other words, access to out-of-state statuses should not be limited, subject to the exceptions outlined in this Section.[193]

4. Morality and Property

Property has an obvious moral dimension. The infamous example of human slavery in the United States amply demonstrates that there may be moral reasons for abolishing some previously recognized forms of property.

In theory, our proposal could make it possible for one state to impose immoral property forms on other states. This concern finds support in the infamous case of *Dred Scott*.[194] There, the Supreme Court ruled that congressional acts making certain federal territories slave-free were unconstitutional because they deprived slave masters of their "property" in contravention of the Fifth Amendment's Due Process Clause.[195] In formulating a proposal that would allow the property regime of a single state to extend beyond its borders, the lessons of the past should not be forgotten.

A simple and ready way to assuage this fear is to let the federal government retain its residual power to intervene in "the market for property forms" through regulation. When the federal government elects to intervene for moral reasons it can either do so by excluding certain assets from appropriation or by prohibiting certain property forms in specific assets. Intervention of the former type may be employed if a state attempts to create property rights in other human beings. Regulation to outlaw such attempts is consistent with the

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191. For discussions of the public policy exception in the context of same-sex marriage, see F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561; Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 43-44 (1998); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996); Koppelman, *supra* note 78; and Sack, *supra* note 80.

192. *See* Kramer, *supra* note 80.

193. A similar conclusion was reached by Larry Ribstein. *See* Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309 (2005).

194. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1856).

195. *Id.* at 450-51.

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Thirteenth Amendment and is fully justified in our opinion.[196] Intervention of the latter type may be appropriate to regulate property regimes in human organs or tissues. For example, the federal government may decide for moral reasons that a person may donate her organs but not sell them.[197] Alternatively, one might rely upon the public policy doctrine from the field of conflict of laws to reject perceived immoral forms at the state level. Under this doctrine, states would reject a property form (or status) that was so contrary to the moral standards of the state as to be an intolerable interference with the state's sovereignty.[198]

Fortunately, it is highly unlikely that any state in the Union would try to reintroduce slavery. However, there may still be instances where moral arguments should trump property rights, such that it would be wrong to force interstate recognition of immoral property forms. Indeed, claims have been made regarding the moral propriety of recognizing property rights in animals,[199] fetal tissue or organs,[200] and rights stemming from marital status.[201]

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196. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

197. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that markets have inherent limitations and that certain entitlements must, for moral reasons, remain outside the ken of market transactions).

198. *See supra* Subsection III.B.3.

199. *See, e.g.*, STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000) (contending that certain species of primates should be considered persons and given basic human rights).

200. *See, e.g.*, Gregory Gelfand & Toby R. Levin, *Fetal Tissue Research: Legal Regulation of Human Fetal Tissue Transplantation*, 50 WASH. & LEE L. REV. 647 (1993) (arguing in favor of the moral propriety of using fetal tissue).

201. *See, e.g.*, Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165, 172 (1998) ("Laws establishing slavery and denying property rights to married women could not be justified by traditional moral norms under this standard, because these laws facilitated the ability of whites and men to dominate slaves and women in personal relationships and to exploit their labor and sexuality."); *see also* Michael Paulson, *Vatican Warns on Same-Sex Marriage*, BOSTON GLOBE, Aug. 1, 2003, at A1 (reporting on a Vatican declaration that same-sex marriages "go against natural moral law"). Congressman Henry Hyde, while arguing in favor of DOMA, stated that whether society should recognize same-sex marriage "is a moral issue" and that "[p]eople don't think that the traditional marriage ought to be demeaned or trivialized by same-sex unions." SAME-SEX MARRIAGE: PRO AND CON 225 (Andrew Sullivan ed., 1997).

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CONCLUSION

The federal character of American property law renders it a fertile ground for experimentation with new and exciting property regimes. The positive project of this Essay is to show how state production of property law enhances diversity in property forms and thereby enables more individuals to satisfy their property preferences. The normative project of this Essay is to suggest a mechanism that would further expand the menu of available property forms. Recognizing that relocation costs can hobble the beneficial effects of state competition over property forms, the Essay proposes that property owners be permitted to adopt out-of-state property forms in exchange for the payment of a registration fee. Our proposal creates not only more choices for property owners, but also a meaningful incentive for states to invest in more innovative property regimes. In the absence of a dominant state, like Delaware in the corporate context, competition in the field of property along the lines of our proposal has the potential to revitalize this venerable, yet antiquated, field.

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