
ADJUSTING ALIENABILITY

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In recent years, the right to exclude has dominated property theory, relegating alienability — another of the standard incidents of ownership — to the scholarly shadows. Law and economics has also long neglected inalienability, despite its inclusion in Calabresi and Melamed's Cathedral. In this Article, I explore inalienability rules as tools for achieving efficiency or other ends when applied to resources that society generally views as appropriate objects of market transactions. Specifically, I focus on inalienability's capacity to alter upstream decisions by would-be resellers about whether to acquire an entitlement in the first place. By influencing these acquisition decisions, inalienability rules can buttress or substitute for other adjustments to the property bundle in addressing resource dilemmas. Of particular interest is the possibility that limits on alienability could sidestep the holdout problems that have often spurred resort to liability rules, and could do so without interfering as profoundly with the owner's autonomy interests. While alienability limits carry well-known disadvantages, they might be structured in ways that would minimize those drawbacks. Recognizing the full potential of alienability limits in addressing resource dilemmas requires applying the same level of creativity to devising inalienability rules as has previously been applied to the design of liability rules.

Inalienability stood alongside property rules and liability rules in Guido Calabresi and Douglas Melamed's celebrated *Harvard Law Review* article,¹ but law and economics scholars have never considered it an equal partner in the triad.² Unlike property rules and liability

* Professor of Law, University of Chicago Law School. For helpful comments and conversations on earlier drafts, I thank Scott Anderson, Ian Ayres, Ben Barros, Omri Ben-Shahar, Anupam Chander, Nestor Davidson, Chris Drahozal, Chris Fennell, Brett Fischmann, Bernard Harcourt, Paul Heald, Herb Hovenkamp, Larissa Katz, Dan Kelly, Gregg Kettles, Jim Krier, George Lefcoe, Saul Levmore, Richard McAdams, Jonathan Nash, Randy Picker, Daria Roithmayr, Carol Rose, Susan Rose-Ackerman, Adam Samaha, Lior Strahilevitz, Stephanie Stern, Madhavi Sunder, and Steve Yelder. I am also grateful for feedback from students in Lior Strahilevitz's Autumn 2008 Property Theory Seminar, as well as the comments and questions of participants in a 2008 Law and Society panel, the 2008 Property Works in Progress conference, and workshops at the University of Chicago Law School, the University of Iowa College of Law, the University of Kansas School of Law, and the University of Southern California School of Law. I thank the Bernard G. Sang Faculty Fund at the University of Chicago Law School for financial support. Catherine Kiwala and Eric Singer provided excellent research assistance. All errors are inalienably mine.

¹ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

² See, e.g., Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985) ("Inalienability is the stepchild of law and economics."); Matteo Rizzoli, *The Cathedral: An Economic Survey of Legal Remedies* §§ 2.3.3–2.4 (Feb. 13, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1092144> (noting that inalienability rules play a limited role in the economic analysis of remedies). Some notable treatments of inalienability incorporating economic analysis include Rose-Ackerman, *supra*; Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV.

rules, workhorse concepts that permeate every corner of the economic analysis of law, inalienability enters economic discussions mostly as an anomaly, and usually in the company of an entitlement whose suitability for market transfer is hotly contested. A similar pattern can be seen in property theory, where the right to exclude³ has almost entirely eclipsed any sustained consideration of alienability.⁴ This neglect is odd. Not only is alienability one of the standard incidents of ownership,⁵ but limits on an owner's right to exclude sometimes seem to be directly prompted by anxiety about alienability — the specter of one party strategically acquiring a good only to resell it to a higher-valuing party.⁶ Concern about such strategic acquisition for resale surfaces in a variety of contexts, from blackmail to cybersquatting to ticket scalping to water speculation. Yet the connections between these concerns and alienability as an attribute of property remain largely unexplored.

Of course, alienability has not been edged out of legal scholarship entirely. Scholarly debate continues apace about whether particular things, such as human organs or legal rights, should be bought and sold on the open market.⁷ Here, questions of personhood, autonomy,

45 (1999); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985); and Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1198–1202 (1999).

³ For a recent discussion of, and contribution to, the large body of property scholarship focused on exclusion, see Shyamkrishna Balganesh, *Demystifying the Right To Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008).

⁴ This shortfall in the literature is not met by the assertion that alienability has no independent significance for property theory, but rather only represents one facet of exclusion. See Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 742–43 (1998) (arguing that exclusion encompasses all attributes of property, including alienability). Notwithstanding this expansive claim, property theory's explorations of exclusion have given little attention to alienability.

⁵ Alienability has been associated with both the right to the wealth represented by an asset and the ability to transmit the asset to another. See TONY HONORÉ, *Ownership*, in MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161, 170–71 (1987) (discussing the “right to the capital”); *id.* at 171–73 (discussing “transmissibility”).

⁶ See, e.g., 15 U.S.C. § 1125(d)(1)(B)(i)(VI) (2006) (listing the offer to sell a domain name that has not been used as a factor that may indicate bad faith); eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1842 (2006) (Kennedy, J., concurring) (expressing concern about injunctions “employed as a bargaining tool to charge exorbitant fees” to would-be licensees); *infra* section 1.B (discussing these and other examples).

⁷ Hundreds of articles and books have addressed the sale of human tissue. See, e.g., Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305 (2004). The sale of parental rights has also been the subject of extensive debate, much of it provoked by Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). Recent work on the sale of legal rights and claims includes, for example, Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005); Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913 (2006); Steven G. Gey, *Contracting Away Rights: A Comment on Daniel Farber's “Another View of the Quagmire,”* 33 FLA. ST. U. L. REV. 953 (2006); and Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111 (2000). See also Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006)

paternalism, and the downstream personal and societal consequences of allowing or blocking transfers take center stage.⁸ The prominence of this undeniably interesting set of questions has, I suggest, unduly cabined our thinking about alienability. Legal theorists tend to assume that alienability limits are suited only for special realms involving intensely personal or otherwise highly charged entitlements and are of little or no relevance to the ordinary run of property interests.

In this Article, I explore a less-studied side of inalienability rules: their potential as tools for achieving efficiency (or other ends) when applied to resources that society generally views as appropriate objects of market transactions. Specifically, I focus on inalienability's capacity to alter upstream decisions by would-be resellers about whether to acquire an entitlement in the first place. By influencing these acquisition decisions, inalienability rules can buttress or substitute for other adjustments to the property bundle in addressing resource dilemmas. Earlier work, including a 1985 article by Susan Rose-Ackerman and a response piece by Richard Epstein, has already established inalienability's traction as a "second-best" method for achieving goals that cannot be cost-effectively pursued through limits on acquisition or use alone.⁹ For example, alienability limits can reduce pressure on common pool

(addressing alienability in the context of historical protections against creditors); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1246–48 (2005) (discussing the "anticommodification critique" of expansions in property).

⁸ A key catalyst for work in this area is Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*]. See also MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 100–03 (1983) (cataloguing blocked exchanges); Calabresi & Melamed, *supra* note 1, at 1111–15 (discussing rationales for inalienability).

⁹ Rose-Ackerman, *supra* note 2, at 933 (arguing that "inalienability rules can be second-best responses to various kinds of market failures"); Epstein, *supra* note 2, at 970 (explaining that restraints on alienation can "provide indirect control over external harms when direct means of control are ineffective to the task"); see also Susan Rose-Ackerman, *Inalienability*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 268, 273 (Peter Newman ed., 1998) ("Inalienability is frequently useful, not as an ideal policy, but as a second-best response to the messiness and complexity of the world.").

resources,¹⁰ elicit investments in public goods,¹¹ and simplify enforcement.¹² This Article builds on that analysis in three ways.

First, I examine how inalienability rules might, through ex ante effects on acquisition incentives, reduce the incidence of costly holdout or hold-up problems.¹³ Most discussions of holdout dynamics have focused on the choice between property rules and liability rules; debate typically centers on whether an owner's refusal to transfer an entitlement that is highly valued by another party is sufficiently problematic to justify overriding her veto.¹⁴ Counterintuitively, however, concerns about an owner's veto power can be addressed not only by making transfers easier (as through liability rules) but also by making transfers harder (as through alienability restrictions). The former approach cuts through holdout problems in a familiar (and familiarly problematic) way, while the latter alternative encourages the self-selection of owners who are likely to be relatively high-valuing users over the long run.¹⁵ While inalienability's relevance to holdout problems has been noted previously,¹⁶ the idea that inalienability rules might substitute for liability rules in a variety of contexts remains underappreciated.

¹⁰ See, e.g., Epstein, *supra* note 2, at 978–82; Rose-Ackerman, *supra* note 2, at 943; see also Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 870 (2003) (explaining that inalienability can protect “over-consumed resources,” because “without market value, the pressure for exploiting such resources dissipates”); Carol M. Rose, *From H₂O to CO₂: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91, 95 (2008) (noting the potential for trade, which “opens up a resource to everyone in the world,” to “put[] too much pressure on the resource”).

¹¹ See, e.g., Rose-Ackerman, *supra* note 2, at 957–58 (discussing the purposes of inalienability in the Homesteading Acts).

¹² See, e.g., Epstein, *supra* note 2, at 973–78 (giving examples involving guns, alcohol, drugs, and violence-promoting information).

¹³ The term “holdout” is usually associated with multi-party bargaining situations, such as those common in land assembly contexts, while “hold-up” is more frequently used in the context of two-party instances of bilateral monopoly. Both situations exhibit the same basic strategic dynamic; therefore, I will refer to them both as “holdout” problems here. See *infra* section II.C (discussing holdout problems).

¹⁴ See, e.g., Calabresi & Melamed, *supra* note 1, at 1092, 1107 (defining liability rules and explaining how they can overcome holdout problems); *infra* section II.C.

¹⁵ See Ayres & Madison, *supra* note 2, at 54 (explaining how inalienability could induce plaintiffs to reveal whether they value an injunction for its own sake or merely as leverage). One of my students, Steve Yelder, also raised the possibility that alienability limits on injunctions to enforce patents could induce self-sorting by patent holders into different remedial regimes. The potential for alienability restrictions to induce self-selection in the service of distributive goals is explored in Rose-Ackerman, *supra* note 2, at 940. As Rose-Ackerman explains: “If policymakers wish to benefit a particular sort of person but cannot easily identify those people ex ante, they may be able to impose restrictions on the entitlement that are less onerous for the worthy group than for others who are nominally eligible.” *Id.*

¹⁶ Ayres & Madison, *supra* note 2, examines how inalienable injunctions might respond to strategic remedial choices designed to “hold up” the defendant. Michael Heller has examined how bans on fragmentation (that is, prohibitions on alienating particular configurations) might be explained by a desire to reduce downstream holdout problems. Heller, *supra* note 2, at 1176–82.

The Article's second contribution comprises a broader examination of the substitutability and complementarity of different mechanisms for addressing resource tragedies. The idea that inalienability can fill in for or backstop other controls on property has not gone unrecognized,¹⁷ but the full implications of this point have yet to be traced. Here, I examine alternative means for addressing strategic dilemmas — whether the overharvesting or undercultivation problems associated with commons tragedies, or the coordination and holdout problems that are the hallmarks of anticommons tragedies.¹⁸ Doing so sheds new light on the interdependent relationship among limits on acquisition, use, alienability, and exclusion.

Third, the Article examines the conditions under which alienability limits offer a more promising point of intervention than limits on acquisition, use, or exclusion. In comparing alternatives, it is essential to recognize that alienability is not a binary switch to be turned on or off, but rather a dimension of property ownership that can be adjusted in many different ways. While any restriction on alienability carries the potential to inefficiently block the flow of goods to higher-valuing users, carefully designed inalienability rules might have minimal “blocking costs” in certain settings while offering other advantages. In addition to being more easily administrable in some contexts, inalienability rules can sidestep information asymmetries by inducing the self-selection of those who highly value the entitlement.¹⁹ Perhaps most important, alienability limits do not force sales and hence have different implications for autonomy than do liability rules. Thus, they are of particular interest in settings where bargaining dilemmas have reached such a magnitude that *some* intervention into the ownership bundle is indicated.

Significantly, inalienability rules can be consciously designed to minimize the extent to which they lock up resources in suboptimal uses. For example, put options can be combined with alienability limits to avoid tying up resources in the hands of parties who, over time, become low valuers.²⁰ Requiring the use of devices like second-price

¹⁷ See, e.g., Epstein, *supra* note 2, at 990 (“In essence the restraint on alienation is a substitute for direct remedies for misuse when these are costly and uncertain to administer.”); Dean Lueck, *The Economic Nature of Wildlife Law*, 18 J. LEGAL STUD. 291, 318–19 (1989).

¹⁸ See MICHAEL HELLER, *THE GRIDLOCK ECONOMY* 1–22 (2008) [hereinafter HELLER, *GRIDLOCK*] (describing the tragedy of the anticommons as a problem of “gridlock”); Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 926–30 (2004) (discussing the connection between holdout problems and the anticommons tragedy). For an extended discussion of anticommons tragedies, see generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) [hereinafter Heller, *Anticommons*].

¹⁹ See, e.g., Rose-Ackerman, *supra* note 2, at 939, 945–48; *infra* section III.B.2.

²⁰ See *infra* section III.C.1.

auctions can alter incentives to strategically acquire goods that hold significant value for only one party without blocking alienability altogether.²¹ Alienability limits can also be fine-tuned to achieve other social goals. For example, limits on alienability can remove intermediate alternatives and force parties to make “all or nothing” choices that may be desirable from standpoints of efficiency or distributive justice.²²

The analysis proceeds in three Parts that roughly correspond to the three contributions just described. Part I uses the anxiety surrounding certain kinds of transfers as a springboard for exploring the relationship between strategic dilemmas and alienability. Part II builds on those lessons to present inalienability as a mechanism for managing resource tragedies. Part III works through a menu of adjustments to alienability rights and compares the performance of alienability restrictions with interventions at other possible chokepoints.

Before beginning, a clarification about the scope of the project is in order. My approach to inalienability rules in this Article is purely analytic: I seek to examine their potential as tools by showing how they work, how they differ from other approaches, where they might fall short, and how they might be honed to serve desired ends better. I do not grapple with larger questions surrounding the alienability of any specific entitlement or develop an overarching normative theory about alienability. Nor do I tout inalienability as the only or best answer to any particular problem or set of problems. My goal is more modest: to get inalienability rules out of the “special purpose” box to which they have been relegated and to convince readers to view them as viable instruments for addressing ubiquitous, costly dilemmas. Along the way, I hope to foster a broader rethinking of alienability’s place in property theory.

I. ANXIETY AND ALIENABILITY

Proposed transfers may make people uneasy for any number of reasons. Many of these reasons have been extensively treated elsewhere, and I will not attempt to recount them all here. Instead, I want to isolate a specific, underappreciated source of concern — that the free alienability of a good, otherwise comfortably the subject of commerce, will prompt wasteful *ex ante* decisions about acquisition or use that contribute to costly resource dilemmas. Some initial taxonomic work

²¹ See *infra* section III.C.2.

²² See, e.g., Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 668 (2008) (explaining how the invalidation of a condition on a grant puts the donor to a choice between withholding the grant altogether or making it free of the condition); *infra* section III.A.3.

in section A will mark out this area of interest conceptually, and the examples and analysis in sections B and C, respectively, will flesh it out further.

A. *Extrinsic Concerns, Ex Ante Effects*

Two dichotomies are especially relevant to this Article's project.²³ First, we can distinguish between "intrinsic" and "extrinsic" objections to a good's transfer. Intrinsic objections identify features of a particular good that make it a poor candidate for transfer or for market allocation in general. For example, writers opposing the sale of parental rights, human organs, or legal rights often allege harms intrinsic to the transfer of these items, whether framed as an affront to the personhood of the parties involved, a degrading of the entitlement itself, or a coarsening of the sensibilities of society as a whole.²⁴ Extrinsic concerns about alienability, in contrast, are not based on any inherent problem with the transfer of the entitlement in question or with its allocation by the market; the focus is instead on alienability's contribution, within a given structural and institutional context, to social or economic problems that are not part and parcel of the transfer itself. By this definition, extrinsic objections could always be addressed through means other than alienability restrictions, although perhaps less efficiently.²⁵

Notably, both intrinsic and extrinsic objections might be raised about the transfer of the same good. For example, organ sales might be opposed both out of fear that the transfer would compromise some

²³ Existing treatments have broken down justifications for alienability restrictions in a variety of other ways. See, e.g., Calabresi & Melamed, *supra* note 1, at 1111–15 (discussing how efficiency and distributive goals might be advanced through inalienability rules); Epstein, *supra* note 2, at 970 (distinguishing between inalienability rules targeting "the practical control of externalities" and those aimed at "asserted distributional weakness"); Hsu, *supra* note 10, at 870 (listing three categories of goals served by alienability and inalienability); Rose-Ackerman, *supra* note 2, at 932–33 (identifying "[t]hree broad rationales" for restrictions: those based on "economic efficiency itself," those directed at "certain specialized distributive goals," and those necessary to safeguard "the responsible functioning of a democratic state"); W. Stephen Westermann, A Theory of Autonomy Entitlements: One View of the Cathedral Nave Dedicated to Constitutional Rights and Other Individual Liberties 8–9 & n.19 (Apr. 26, 2007) (unpublished manuscript), available at <http://www.ssrn.com/abstract=977964> (listing eight reasons that limits on alienability might be adopted).

²⁴ See, e.g., Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387–90 (1984) (discussing structural justifications for making rights nonwaivable); Radin, *Market-Inalienability*, *supra* note 8, at 1879–86 (discussing potential negative effects of commodification on personhood and on the "texture of the human world" (quoting HILARY PUTNAM, REASON, TRUTH AND HISTORY 141 (1981))).

²⁵ See Rose-Ackerman, *supra* note 2, at 938 (discussing inalienability as a response to market failure in instances where "straightforward responses" like internalizing externalities are unavailable or unduly costly).

element of personhood²⁶ and out of fear that an open market in organs would lead to violence aimed at the involuntary harvesting of organs.²⁷ The latter justification is extrinsic to the sale of the good itself; it turns on whether restrictions on transfers are more effective at controlling the feared violence than alternative approaches, such as heightened enforcement of criminal laws.²⁸ Two primary strands of Richard Titmuss's famous argument about the effects of markets in blood²⁹ also illustrate how intrinsic and extrinsic arguments may become intertwined. Part of Titmuss's thesis focuses on the potential for commercial blood markets to introduce lower-quality blood into the system, given the "conflict of interests" that blood sellers (but not altruistic blood donors) have with respect to private information that bears on blood quality.³⁰ This is an extrinsic objection to alienability, given that blood quality might be addressed in other ways.³¹ A second and logically independent strand of Titmuss's argument, however, posits that the existence of the paid market in blood will actually drive donors out of the system.³² Here, the objection is an intrinsic one — that merely by making blood marketable, its meaning is altered in ways that keep it from being perceived as a meaningful gift. Because this transformation does not occur for ordinary goods (books and sweaters do not become inappropriate gifts merely because they are also sold), the argument must turn on some special characteristic of the good in question that makes its sale problematic.³³

Alienability concerns can also be divided temporally into *ex ante* ("upstream") and *ex post* ("downstream") objections. Think of a proposed transfer from *A* to *B* situated in the middle of a timeline. One set of reasons for blocking the transfer relates to what will happen following that transfer. Perhaps *A* will regret it or will suffer unantici-

²⁶ See, e.g., Radin, *Market-Inalienability*, *supra* note 8, at 1915–17 & n.239.

²⁷ See, e.g., Dean Lueck & Thomas J. Miceli, *Property Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 183, 248 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (citing DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH THE LAW AND WHY IT MATTERS* 242 (2000)).

²⁸ Restrictions on transfers are one way of making illegal activity less profitable — a well-recognized approach to violations that are hard to detect. See *Bartnicki v. Vopper*, 532 U.S. 514, 549–53 (2001) (Rehnquist, C.J., dissenting) (discussing the "dry-up-the-market" justification for making conduct illegal, where doing so makes difficult-to-police violations less profitable).

²⁹ RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971). Debate surrounding Titmuss's work on blood has been extensive. See, e.g., Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343 (1972); Rose-Ackerman, *supra* note 2, at 945–48; Emanuel D. Thorne, *When Private Parts Are Made Public Goods: The Economics of Market-Inalienability*, 15 YALE J. ON REG. 149 (1998).

³⁰ See TITMUSS, *supra* note 29, at 240–46.

³¹ See, e.g., Rose-Ackerman, *supra* note 2, at 946.

³² TITMUSS, *supra* note 29, at 223.

³³ The same argument might, of course, be made with respect to other goods whose sale is challenged on intrinsic grounds — organs, sexual services, reproductive services, and so on.

pated (or myopically underrated) consequences. Maybe *B* will misuse the entitlement or transfer it to others who will do so. The entitlement itself may suffer for having been the subject of a transfer. Broader consequences may also ensue. Perhaps the socially constructed meaning of the entitlement will erode. Or perhaps a society in which more *B*s and fewer *A*s hold the entitlement will be impoverished culturally or compromised distributively or morally. Thus, ex post effects may involve the person who parts with her endowment, the person who acquires it, the endowment itself, or society at large; they may be couched in terms that are consequentialist or deontological; the effects may occur immediately or take a long time to manifest.³⁴

A different set of reasons for blocking the *A* to *B* transfer would be to alter the upstream course of events by influencing whether and how parties initially acquire and use the entitlement. This, too, will have downstream consequences — indeed, that is the very point. But inalienability's role in producing those consequences operates through an indirect mechanism. The value added by the *A* to *B* blockade comes not from blocking the *A* to *B* transfer itself, but by inducing better pre-blockade decisions.³⁵ Seeing a blockade ahead will influence *A*'s decision to acquire the entitlement. Sometimes, these ex ante effects relate closely to features intrinsic to the good. For example, Titmuss's argument that markets in blood would alter incentives to engage in altruistic donation amounts to an upstream effect on individual "harvesting" choices that seems to turn on something intrinsic to the good in question.³⁶ Often, however, ex ante rationales for inalienability are tied to extrinsic considerations such as efficiency or distributive fairness, which might also be pursued in other ways.³⁷

³⁴ These effects would encompass not just individual interests in the entitlement but also what have been termed "structural" or "instrumental" justifications for the inalienability of particular endowments. See, e.g., Vicki Been, "Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 497, 498 & n.125 (1991) (discussing "structural" arguments for the inalienability of constitutional rights that relate to effects on society, governance, or third parties); Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1335–36 (2000) (discussing "non-instrumentalist" and "instrumentalist" rationales for making votes inalienable and identifying the latter with Cass Sunstein's argument that the alienability of votes would change the meaning of voting (citing Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 849 (1994))).

³⁵ A corollary of this point is that the blockade may appear inefficient when viewed ex post. See *infra* section III.B.

³⁶ See TITMUSS, *supra* note 29, at 223.

³⁷ Supply effects that are straightforwardly produced by market forces might be objectionable because of an entitlement's special characteristics. For example, babies or donor organs might be produced in larger quantities or in different output patterns as a result of market forces — results that might be viewed as fundamentally at odds with the meaning of parental rights or organ donation. See, e.g., Tamar Frankel & Frances H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99, 101–02 (1987). At least in theory, these supply effects could be addressed by means other than inalienability (for example, production quotas), making the con-

Similarly, ex post and intrinsic concerns share an affinity in the literature, even though they are not conceptually coterminous. Concerns about the intrinsic wrongness of transferring certain items feed naturally (although not exclusively) into concerns about the ex post effects the transfer itself will have on the parties, on the entitlement, and on society. Because ex post effects are often context-specific in just the way that intrinsic rationales demand, the two are frequently (although not inevitably³⁸) paired. Together, intrinsic and ex post arguments make up the bulk of scholarship about inalienability. This Article, in contrast, focuses on a different and often overlooked subset of alienability concerns: the area defined by the overlap of extrinsic and ex ante concerns. Thus, I focus on inalienability's impact on ex ante incentives to acquire and use goods that are not deemed intrinsically unsuited for market transfer. To get an intuitive sense of this category, it is helpful to consider a few examples of goods that I will call "anxiously alienable."

B. Anxiously Alienable Goods

The following nonexhaustive list offers some concrete examples of anxiously alienable goods. Although these goods are generally accepted as appropriate articles of commerce,³⁹ their transfer ignites concern under certain conditions due to feared ex ante incentive effects on acquisition or use. That concern, interestingly, does not always translate into restrictions on alienability; thus, the legal treatment of the items on the list varies. Each of these examples has received extensive treatment by other authors, which I do not attempt to summarize here; my brief descriptions are instead designed to point to commonalities (and some differences) among the cases.

1. *Patents.* — Patent holders may license their patents to others rather than develop marketable goods and services themselves. While this power to license is not usually deemed problematic, some patent holders who seek licensing arrangements are tagged as "trolls."⁴⁰ Al-

cern "extrinsic" in my schema. Similarly, the concern that people would engage in violence or oppression to harvest organs or produce babies is also "extrinsic" in that these acts could, in theory, be controlled independent of alienability restraints. See *supra* p. 1411. However, features intrinsic to the entitlements at issue contribute to the horrific nature of these acts.

³⁸ For example, Michael Heller's discussion of legal rules against entitlement fragmentation (an extrinsically based inalienability rule) focuses on the ex post effect of these rules on future marketability. See Heller, *supra* note 2, at 1176–82.

³⁹ I do not mean to suggest that there could never be an intrinsic argument relating to the alienability of the goods on this list. See, e.g., Steven Cherenky, Comment, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CAL. L. REV. 595 (1993) (discussing a personhood argument against preinvention agreements that assign patent rights to the employer).

⁴⁰ The term has been attributed to Peter Detkin, who coined it in 2001 when he was a lawyer at Intel. HELLER, GRIDLOCK, *supra* note 18, at 218 n.34. According to Detkin, patent trolls "try

though definitions vary, concerns focus on entities that strategically acquire a patent for the express purpose of later licensing it (that is, with no plan to practice it), then lie in wait as other business entities develop products or services of which the patented material is an integral part.⁴¹ Once reliance on the patented element has reached a very high level, the troll emerges and threatens a devastating shutdown through injunctive relief unless a licensing agreement is negotiated.⁴² The degree of monopoly power enjoyed by the patent holder is obviously great at this stage.⁴³

Concern over such “trolls” (although not denominated as such) was evident in Justice Kennedy’s concurrence⁴⁴ in *eBay Inc. v. MercExchange, L.L.C.*,⁴⁵ a case holding that a four-factor test rather than an automatic presumption determines whether a patent holder is entitled to injunctive relief. On remand, the district court declined to grant an injunction, finding that “MercExchange has utilized its patents as a sword to extract money rather than as a shield to protect its right to exclude or its market-share, reputation, goodwill, or name recogni-

to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.” Alan Murray, *War on “Patent Trolls” May Be Wrong Battle*, WALL ST. J., Mar. 22, 2006, at A2, *quoted in* HELLER, GRIDLOCK, *supra* note 18, at 218 n.34.

⁴¹ See, e.g., Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2008–10 (2007); Douglas Gary Lichtman, *Patent Holdouts in the Standard-Setting Process*, ACADEMIC ADVISORY COUNCIL BULLETIN (Progress & Freedom Found., Washington, D.C.), May 2006, at 4, <http://www.pff.org/issues-pubs/ip/bulletins/bulletin1.3patent.pdf>. Firms are typically described as trolls only when they do not make any products of their own; firms that make products may also hold patent rights essential to others, but their strategic posturing is constrained by their own need to use components patented by others. See HELLER, GRIDLOCK, *supra* note 18, at 59 (noting that the system of “mutual[ly] assured destruction” that constrains “equally balanced competitors” does not deter patent trolls).

⁴² See, e.g., Lemley & Shapiro, *supra* note 41, at 2008–10. A patent holder’s threatened shutdown of BlackBerry email service is often cited as an example of the “patent troll” pattern. See, e.g., *id.* at 2008–09. The shutdown was averted by a \$612.5 million settlement reached shortly before a judge was expected to issue an injunction. See Ian Austen, *BlackBerry Service To Continue*, N.Y. TIMES, Mar. 4, 2006, at C1.

⁴³ Although all patents grant a limited monopoly, the degree of leverage this confers against another party depends on questions of both remedies and substitutes. As the infringer moves further along the path to production, viable substitutes dwindle; the company, through its investments, becomes increasingly committed to one manner of proceeding. See Lichtman, *supra* note 41, at 2. By analogy, all land is unique and hence each landowner holds a monopoly over a specific location, but this only produces significant monopoly power in fairly limited circumstances — as where the land is uniquely well-suited to some particular purpose, or is part of a larger assembly, as for a railroad or highway. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75–76 (1986).

⁴⁴ *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1842 (2006) (Kennedy, J., concurring); see also Balganes, *supra* note 3, at 655; John M. Golden, Commentary, “Patent Trolls” and Patent Remedies, 85 TEX. L. REV. 2111, 2113 (2007).

⁴⁵ 126 S. Ct. 1837.

tion.”⁴⁶ The ability to use things that one owns “to extract money” is of course the essence of alienability.

2. *Domain Names.* — A practice known as “cybersquatting” developed from the acquisition structure for internet domain names.⁴⁷ Cybersquatters are those who strategically acquire domain names closely associated with well-known companies or individuals and then attempt to resell the names to those companies or individuals for a profit.⁴⁸ Congress responded with the 1999 Anticybersquatting Consumer Protection Act⁴⁹ (ACPA), which provides remedies against domain name owners found to have “a bad faith intent to profit from” a protected mark.⁵⁰ ACPA’s multifactor test for bad faith includes (but is not limited to) nine enumerated factors, subject to a safe harbor.⁵¹ For example, the domain registrant’s own intellectual property rights in the name, the fact that the domain name is the registrant’s own legal name or other commonly used name, and the fact that the domain name had already been used by the registrant for bona fide purposes would all weigh against a finding of bad faith.⁵² Factors suggesting an intent to harm the owner of the protected mark or to extract money

⁴⁶ *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 572 (E.D. Va. 2007).

⁴⁷ The system of domain name registration allows website addresses to be claimed on a relatively unrestricted first-in-time basis. *See, e.g., Porsche Cars N. Am., Inc. v. Porsche.net*, 302 F.3d 248, 252 (4th Cir. 2002) (“A person seeking the right to use a particular domain name may register with one of a number of registrar organizations that assign domain names on a first-come first-served basis.”); Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715 (2003) (discussing and criticizing the “first-come, first-served” system of domain name rights). Federal statutes place some limits on domain name registration and use, however. *See infra* notes 49–50 and accompanying text. A great deal has been written about cybersquatting and related phenomena; some treatments that connect the topic to larger property theory and mechanism design questions include Chander, *supra*; Lewinsohn-Zamir, *supra* note 22, at 693–94; and Gideon Parchomovsky, *On Trademarks, Domain Names, and Internal Auctions*, 2001 U. ILL. L. REV. 211.

⁴⁸ *See Virtual Works, Inc. v. Volkswagen of Am., Inc.*, 238 F.3d 264, 267 (4th Cir. 2001); *Sporty’s Farm L.L.C. v. Sportsman’s Market, Inc.*, 202 F.3d 489, 493 (2d Cir. 2000).

⁴⁹ Pub. L. No. 106-113, 113 Stat. 1501A-545 (codified at 15 U.S.C. § 1125(d) (2006)).

⁵⁰ *Id.* § 3002, 113 Stat. at 1501A-545 (codified at 15 U.S.C. § 1125(d)(1)(A)(i)); *id.* § 3003, 113 Stat. at 1501A-549 (codified at 15 U.S.C. § 1117(d)); *see also Virtual Works*, 238 F.3d at 267–68 (describing the statutory scheme). Rules promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN) as part of its dispute resolution policies also focus on bad faith. *See Parchomovsky, supra* note 47, at 213; ICANN, Rules for Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), <http://www.icann.org/dndr/udrp/uniform-rules.htm>; *see also* ICANN, Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>. Further limits on domain name registration for those displaying materials that are obscene or “harmful to minors” are found in the Truth in Domain Names Act of 2003, Pub. L. 108-21, 117 Stat. 686 (codified at 18 U.S.C. § 2252B (2006)). *See generally* Christopher G. Clark, Note, *The Truth in Domain Names Act of 2003 and a Preventative Measure To Combat Typosquatting*, 89 CORNELL L. REV. 1476 (2004).

⁵¹ 15 U.S.C. § 1125(d)(1)(B)(i)–(ii).

⁵² *Id.* § 1125(d)(1)(B)(i)(I)–(IV); *see also id.* § 1125(d)(1)(B)(i)(IX) (including as a consideration the extent to which the mark incorporated into the domain name fails to qualify as “distinctive and famous”).

from the mark owner would weigh in the opposite direction.⁵³ In some circumstances, an offer to sell the name is deemed indicative of bad faith.⁵⁴

3. *Land Use Entitlements.* — The possibility that injunctions will be used to exert undue leverage, already mentioned in the patent context, emerges again in the realm of land use entitlements.⁵⁵ Consider the case of *Pile v. Pedrick*,⁵⁶ in which one party built a wall with foundation stones that encroached trivially on the other party's property.⁵⁷ Refusing damages, and further refusing to allow the other party to file off the ends of the offending stones (which would have required entry onto the plaintiff's land), the plaintiff insisted on an injunction that would require complete destruction of the wall and the building to which it was attached. Presumably, the motive for taking this extreme position was either spite or the desire to extract larger damages than the law prescribed.⁵⁸

Courts may use liability rules to address such innocent encroachments. Either the encroacher is permitted to remain on the land by paying fair market value for it, or (in the case of larger encroachments) the landowner is entitled to the improvements if she pays fair market value for them.⁵⁹ Both approaches place the land and the improvement in the same hands without the need for mutual consent, and hence avoid strategic posturing. However, courts may at times respond to such situations by granting injunctions that, if enforced, would be inefficient. To deter parties from insisting on injunctions solely to gain bargaining leverage, Ian Ayres and Kristen Madison have proposed an alienability limit — a default rule specifying that the plaintiff may not sell her injunction to the defendant — coupled with

⁵³ See *id.* § 1125(d)(1)(B)(i)(V), (VI), (VIII); see also *id.* § 1125(d)(1)(B)(i)(VII) (regarding false or inaccurate contact information).

⁵⁴ *Id.* § 1125(d)(1)(B)(i)(VI).

⁵⁵ The empirical significance of this concern is unclear. Ward Farnsworth's examination of twenty nuisance cases did not reveal any instances of post-judgment bargaining or any indication that such bargaining would have occurred had the cases been decided differently. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 381–84 (1999).

⁵⁶ 31 A. 646 (Pa. 1895).

⁵⁷ *Id.* at 647.

⁵⁸ See Ayres & Madison, *supra* note 2, at 49–50 (analyzing *Pile* and the strategic potential of the plaintiff's remedial choice).

⁵⁹ See, e.g., THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 54–56, 67–77 (2007) (discussing these remedial approaches, which depart from the common law's harsh injunctive treatment of even the most minimal and innocent encroachments). Although these forms of relief represent the modern trend, their availability varies by jurisdiction and is restricted in various ways. See *id.* at 54–56, 76; see also JESSE DUKEMINIER ET AL., PROPERTY 135 (6th ed. 2006) (noting “[t]he modern tendency . . . to ease the plight of innocent improvers”). For additional discussion, see Matteo Rizzolli, Building Encroachments (Dec. 2, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1310256>.

procedures that would allow the defendant to voluntarily increase the amount of damages that will be awarded.⁶⁰ This procedure would put the plaintiff to a forced, final choice between damages (as augmented by the defendant) and an injunction that cannot be lifted in exchange for compensation.⁶¹

The bargaining dilemma that Ayres and Madison identify is not limited to injunctions. Coase pointed out a converse problem with the strategic exercise of land use rights that lie within an owner's discretion (and that are therefore *not* enjoined):

A threatens to build a house which will spoil the view from, and block the light to, *B*'s house. . . . *A* demands £1,000 as the price of agreeing not to build Is this blackmail? Suppose that *A* would not have built, whether *B* made this payment or not, because the cost of building a house on this site exceeded the price at which it could be sold. In these circumstances, the demand for £1,000 could be regarded as blackmail or something akin to it. It is a payment to *A* for agreeing not to do something which he has no interest in doing.⁶²

Many similar problems of the "pay me not to" or "pay me to stop" variety can be readily imagined, from ugly structures to jarring noises.⁶³

4. *Damaging Information.* — Whether inadvertently or through "digging," a party may acquire information about a person that, if disclosed, would be highly damaging to that person's reputation, career, or relationships. It is perfectly legal to disclose that information oneself or to sell it to third parties, such as tabloids, who will disclose it. It is also perfectly legal to keep the information to oneself. But offering to sell the suppression of the information to the person who would be harmed by its disclosure is blackmail, a serious crime. This is thought to present a puzzle or paradox.⁶⁴ Why is it a crime to offer a

⁶⁰ Ayres & Madison, *supra* note 2, at 71–81. The alienability limit would only bar plaintiff-to-defendant sales; the winning plaintiff could sell her injunction to third parties if she wished. *Id.* at 71–72. The alienability limit would serve only as a default rule; the parties together or the defendant acting alone could opt for full alienability. *Id.* at 98–100.

⁶¹ *Id.* at 100 ("Inalienability and additur in effect give defendants the right to make a take-it-or-leave-it offer.").

⁶² Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 670 (1988); see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84–85 (1974) (presenting a similar example in which a "neighbor has no desire to erect the [ugly] structure on the land; he formulates his plan and informs you of it solely in order to sell you his abstention from it").

⁶³ For a recent examination of such problems, see generally Daniel B. Kelly, *Strategic Spillovers* (Dec. 13, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

⁶⁴ The scholarly literature on blackmail is unusually rich. See, e.g., JOEL FEINBERG, HARMLESS WRONGDOING 238–76 (1988); NOZICK, *supra* note 62, at 85–86; Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998); Coase, *supra* note 62, at 671; Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984); Symposium, *Blackmail*, 141 U. PA. L. REV. 1565 (1993). The text sets out the basic puzzle with which most authors begin their analyses.

person whose fate turns on the release or suppression of the information the chance to influence, through a monetary payment, which of two (entirely legal) options one will pursue? Damaging information, generally alienable, somehow becomes a forbidden item of commerce when offered to the one person we might expect to be most interested in what happens to it.

5. *Water*. — In western states where water is scarce, a rule of prior appropriation allocates rights based on diversion for beneficial use.⁶⁵ Water rights are transferable, subject to limitations, but buying rights for speculative purposes is prohibited.⁶⁶ Typically, this prohibition is enforced through beneficial use requirements that do not permit holding water for future use.⁶⁷ If one fails to make beneficial use of water for a period of time, rights to it can be lost.⁶⁸ One may only transfer rights in water that has been put to beneficial use, and the buyer must continue with beneficial use in order to maintain the rights.⁶⁹ These restrictions are apparently driven by concerns that speculative appropriators could monopolize the water supply, causing prices to spike upward in a way that could threaten livelihoods and even lives.⁷⁰ Other restrictions on transfers, such as requiring that the buyer and seller be located in the same stream basin and make the same use of the water, may be understood as responses to measurement difficulties in allocating use rights.⁷¹

In eastern states, where water has generally been more plentiful, a riparian system bundles the rights in surface water with the ownership of property abutting the water source, precluding the à la carte alienation of water rights.⁷² Reasonable use limitations, coupled with dis-

⁶⁵ See, e.g., DUKEMINIER ET AL., *supra* note 59, at 34–35; see also Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445, 455 (2008) (noting that “in many states, prior appropriation has acquired a regulatory overlay”).

⁶⁶ See, e.g., Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998); Sandra Zellmer, *The Anti-Speculation Doctrine and Its Implications for Collaborative Water Management*, 8 NEV. L.J. 994 (2008).

⁶⁷ See Neuman, *supra* note 66, at 964; Zellmer, *supra* note 66, at 1004–05. Speculation may be expressly ruled out. See, e.g., COLO. REV. STAT. § 37-92-103(3)(a) (2008) (defining “appropriation” to exclude “the speculative sale or transfer of the appropriative rights” to other parties). There are a number of exceptions to this rule. See Zellmer, *supra* note 66, at 1012–22. For example, states and local governments can hold water for future use. See Neuman, *supra* note 66, at 968; Zellmer, *supra* note 66, at 1013–16.

⁶⁸ See, e.g., Lewinsohn-Zamir, *supra* note 22, at 655–56; John C. Peck & Constance Crittenden Owen, *Loss of Kansas Water Rights for Non-Use*, 43 U. KAN. L. REV. 801 (1995); Smith, *supra* note 65, at 468; Zellmer, *supra* note 66, at 1005. For a discussion of the distinction between abandonment and forfeiture, see Peck & Owen, *supra*, at 820.

⁶⁹ Zellmer, *supra* note 66, at 1012.

⁷⁰ See, e.g., *id.* at 1007–08.

⁷¹ See YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 119–21 (2d ed. 1997); Lueck & Miceli, *supra* note 27, at 246–47.

⁷² See, e.g., Epstein, *supra* note 2, at 979–82; Zellmer, *supra* note 66, at 1009.

tinctions like those between “natural” and “artificial” uses, further prevent water from being extracted from the stream for resale.⁷³ Although groundwater is handled through a separate regulatory system, alienability may raise concerns in that context as well.⁷⁴ For example, a businessman’s recent plan to withdraw 250,000 bottles of water each day from an East Montpelier, Vermont spring has attracted opposition from neighbors.⁷⁵ Analogous concerns about excessive draws against a common pool explain both the recently enacted Great Lakes Compact, which largely prohibits diversion of water from the Great Lakes basin,⁷⁶ and the continuing ire against the compact’s “bottled-water loophole.”⁷⁷

6. *Scarce Seats.* — Legal limits and social opprobrium often attach to so-called “ticket scalpers,” who buy tickets to popular events solely for the purpose of reselling them later, at a higher price.⁷⁸ Related concerns surround the resale of access to other scarce goods, such as preferred airline seats⁷⁹ or tables at restaurants.⁸⁰ In such cases, the party offering the good or service has set the price below the market-clearing level,⁸¹ producing queuing and other manifestations of excess demand. As a result, there are arbitrage opportunities for an intermediary. The fact that the underlying good is openly sold suggests that the concerns about resale stem from the intermediation itself rather than from a conviction that the good in question is intrinsically unsuited for sale.⁸²

⁷³ See, e.g., Epstein, *supra* note 2, at 979–82; Smith, *supra* note 65, at 473.

⁷⁴ See *DUKEMINIER ET AL.*, *supra* note 59, at 34 (discussing the historical and modern treatment of groundwater).

⁷⁵ Felicity Barringer, *Bottling Plan Pushes Groundwater to Center Stage in Vermont*, N.Y. TIMES, Aug. 21, 2008, at A14.

⁷⁶ Susan Saulny, *Congress Passes Great Lakes Protection Bill*, N.Y. TIMES, Sept. 24, 2008, at A17.

⁷⁷ See Kari Lydersen, *Bottled Water at Issue in Great Lakes*, WASH. POST, Sept. 29, 2008, at A7 (discussing controversy over the compact’s exception for water in containers with capacities of less than 5.7 gallons).

⁷⁸ See, e.g., FEINBERG, *supra* note 64, at 231–38; see also *infra* pp. 1435–36.

⁷⁹ See Ron Lieber & Susan Warren, *Southwest Makes It Harder To Jump the Line*, WALL ST. J., June 7, 2006, at D1.

⁸⁰ See, e.g., Monica Eng & Christopher Borrelli, *Your Table Is Ready — For a Price*, CHI. TRIB., Aug. 8, 2008, at 1 (discussing the online service tablexchange.com, which sells reservations to overbooked restaurants).

⁸¹ But see Pascal Courty, *Some Economics of Ticket Resale*, J. ECON. PERSP., Spring 2003, at 85, 85 (questioning the hypothesis that underpricing is “the fundamental cause of secondary ticket markets”).

⁸² It is possible to quibble with this point. Consider a case that is a bit harder to classify — the practice of law students attempting to buy their way into oversubscribed classes. See Martha Neil, *NYU Students Seek Coveted Law School Classes, Will Pay Cash*, A.B.A. J., July 28, 2008, http://www.abajournal.com/weekly/nyu_students_seek_coveted_law_school_classes_will_pay_cash. Here, the underlying good (a legal education) is the subject of a market transaction, albeit one in which only a limited number of people are invited to engage. Once one’s tuition is paid

C. Middlepeople and Monopolists

Nearly all of the cases above involve intermediaries or “middlepeople” who decide to acquire an entitlement solely because of its alienability. In the remaining examples (such as those involving land use rights), alienability creates an incentive to use or enforce an existing entitlement that would not otherwise be used or enforced. In many of these cases, the incentive is enhanced by the chance of wielding significant monopoly power. If the entitlements in question were inalienable, certain acquisitions and threatened uses would drop out of the picture. Foreseeing the inability to sell, those motivated solely by resale opportunities would simply select out of the market. Inalienability, then, could serve as a tool to change the mix of acquisition and use decisions associated with a given entitlement.

Of course, the fact that inalienability *could* be used in this way does not establish that it *should* be. The fact that strategic acquisition for resale can produce anxiety does not dictate any particular response, and one might well question whether restricting alienability could ever be the right answer. Driving out transactions is usually a bad idea — although consumers may dislike middlepeople for skimming away surplus, such intermediaries typically add value to the market as a whole by lowering search costs, absorbing risk, thickening markets, and spanning time and space to match up consumers with products and services.⁸³ Notwithstanding the anxiety that “speculators” and other intermediaries have produced throughout history,⁸⁴ as a rule they appear to make markets work better.⁸⁵ Is there anything about anxiously alienable goods (or some subset of them) that might cast doubt on this general principle?

One way to approach the question is to observe that some transactions (or threatened transactions) are so fraught with fairness or effi-

and one becomes a member of a law school community, however, access to different portions of the educational experience may be rationed on nonmonetary bases for reasons intrinsic to the meaning of the community and its collective endeavor. See Levmore, *supra* note 7, at 120–21.

⁸³ See, e.g., DONALD N. McCLOSKEY, *THE APPLIED THEORY OF PRICE* 216–24 (1982).

⁸⁴ See, e.g., *id.* at 216 (citing CHARLES P. KINDLEBERGER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES* 38–39 (3d ed. 1996)); Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 *DUKE L.J.* 701, 712–34 (1999) (discussing legal limits on speculation and some possible rationales for them).

⁸⁵ In financial markets, speculative activity is credited with helping to generate more information and liquidity, among other benefits. For a discussion of these points in the context of the SEC’s recent ban on short-selling, see, for example, Menachem Brenner & Marti G. Subrahmanyam, *End the Ban on Short-Selling*, *FORBES.COM*, Oct. 1, 2008, http://www.forbes.com/2008/09/30/short-selling-ban-oped-cx_mb_1001brenner.html. The ban has since expired. See Kara Scannell & Craig Karmin, *Short-Sale Ban Ends to Poor Reviews*, *WALL ST. J.*, Oct. 9, 2008, at C3. For discussion of the benefits associated with land speculation, see, for example, Epstein, *supra* note 2, at 989; and Lewinsohn-Zamir, *supra* note 22, at 694.

ciency concerns that the question is not whether the law will become involved, but how. If policymakers decide that a particular set of transactions leads to unacceptably high bargaining costs or to other normatively unacceptable outcomes, an intervention of some sort is inevitable — whether it takes the form of reviewing particular transactions and applying punishments if indicia of “bad faith” are found, substituting liability rules for property rules, altering acquisition protocols, or something else. Because all of these possible responses will cost something, it makes sense to compare the costs of inalienability with those of the other alternatives. An examination of the potential fairness and efficiency concerns implicated by anxiously alienable goods indicates why the law might get involved and provides a preliminary sense of whether inalienability might offer a viable avenue for that involvement.

1. *Fairness Concerns.* — Perceptions of unfairness, perhaps augmented by cognitive biases, offer important explanations for the concern that attaches to anxiously alienable goods. In many settings involving inalienable entitlements, distributive concerns focus on protecting would-be sellers from exploitation by would-be buyers (think, for example, of the sales of organs or votes), but concerns about exploitation run in the other direction in the case of anxiously alienable goods. Here, sympathies lie with the would-be buyer, while the would-be seller is regarded with suspicion. Three factors seem especially important in this connection.

First, people may perceive unfairness whenever the owner of a good has sufficient leverage to raise prices above competitive or accustomed levels. For example, one study found that 82% of respondents viewed it as either “unfair” or “very unfair” for a merchant to raise the price of snow shovels after a snowstorm.⁸⁶ The snowstorm may be severe enough to give a merchant a temporary geographic monopoly — if people cannot move their cars without buying a shovel, they can only buy from a store within walking distance — and the leveraging of this market power may be viewed as unfairly exploiting a vulnerability. On the other hand, the potential for such a price boost may have created the incentive for the merchant to stock the shovels in the first place, allowing them to take up floor space and overhead during the many non-snowy days preceding the storm.⁸⁷ Moreover, the higher

⁸⁶ Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness As a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986), cited and discussed in MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 89–90 (1993).

⁸⁷ Discussion of these points recently resurfaced surrounding preparations for Tropical Storm Fay. See, e.g., Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/posts/1219175029.shtml> (Aug. 19, 2008, 15:43) (quoting Posting of Glen Whitman to Agoraphilia, <http://agoraphilia.blogspot.com/2003/09/in-defense-of-gouging.html> (Sept. 23, 2008, 15:58)).

price arguably does a better job than queues or mob scenes at efficiently moving the newly scarce resources to their highest-valuing users.⁸⁸ Yet perceptions of unfairness remain, perhaps because of the tendency to focus on the price at which the shovels were available before the storm.⁸⁹ Similar effects may generate distaste for ticket scalpers or reservation merchants.

Second, and closely related, equity concerns are likely to be heightened when the good in question is necessary to forestall a loss. Losses, of course, are a function of baselines, and hence a matter of framing.⁹⁰ However, some goods, like water, are so essential to life that going without them would be unambiguously viewed as a loss by everyone.⁹¹ Likewise, the inability to control an entitlement that is tightly associated with one's identity (even if someone else is the legal owner) could threaten especially painful losses — a factor that could be relevant for some anxiously alienable goods, such as domain names or damaging information.⁹² Even the lowly snow shovel is necessary to keep people from experiencing a loss relative to ordinary days — being snow-bound.⁹³ Similar losses are easy to see in the building of an ugly structure, the enforcement of an injunction that will disrupt a going concern, and so on.

Third, the resale of entitlements that are not allocated through market processes or that are initially sold below the market-clearing price may contribute to a perception of unfairness. A review of the list above reveals that anxiously alienable goods tend to fit this description. If the initial allocation of the good did not screen for high valuation, it is likely both that the initial holder of the entitlement will not be its highest valuer and that a large amount of surplus will result from moving the entitlement into the hands of that high valuer. To allow an intermediary who initially acquires and then resells the enti-

⁸⁸ See TREBILCOCK, *supra* note 86, at 89 (noting that in this scenario, “the price mechanism is being invoked to ration goods in temporary short-supply among an excess of demanders”).

⁸⁹ Kahneman, Knetsch & Thaler, *supra* note 86, at 729–31 (discussing the role of “reference transactions” in fairness evaluations).

⁹⁰ See *id.* at 731–32.

⁹¹ See, e.g., FEINBERG, *supra* note 64, at 232 (distinguishing ticket scalping from charging a high price for water to a person dying of thirst); TREBILCOCK, *supra* note 86, at 84–101 (distinguishing situations based on whether they pose a threat to life).

⁹² I thank Daria Roithmayr for comments on this point. For an extended examination of the distributive implications of domain name policy, see generally Chander, *supra* note 47.

⁹³ Alternatively, the price increase for the shovel might be the loss in the story. If prices had been at “storm levels” all along (even with very frequent “sales”), the reaction would likely be much different. See Kahneman, Knetsch & Thaler, *supra* note 86, at 732 (finding that 71% of survey respondents viewed as unfair a car dealer's \$200 price increase in response to the shortage of a popular car model, while only 42% thought it unfair for a dealer who had previously offered a \$200 “discount” for the car to revert to the car's list price in these circumstances).

tlement to claim a significant share of this surplus may seem to grant her an unearned windfall.⁹⁴

Sometimes, however, the seller acquired the good through some past effort, as in the case of patents, or on the basis of some value added, such as contributing liquidity or special knowledge. Here, the picture is less clear, even from a purely distributive perspective. We might wish to reward creative work and other useful efforts by granting control over at least some portion of the surplus that results. But what if part of the surplus on the table is generated not by those efforts alone but by an idiosyncratically vulnerable position that another party comes to occupy? An analogous question arises with respect to a landowner's right to a share of the surplus that comes from combining her property with that of others, where that surplus comes not from anything that the landowner has done but rather from a larger project conceived by someone else.⁹⁵

These fairness points may seem too cognitively malleable or normatively indeterminate to offer much help in understanding, much less addressing, anxiety about alienability. But inalienability's capacity to filter out particular transactions (and transactors), if otherwise justified on efficiency grounds, could have the side benefit of reducing unfairness perceptions — and potentially doing so in a manner that is less costly than other possible policy reactions.

2. *Inefficiencies.* — A paradigmatic source of inefficiency is the costly wrangling associated with bilateral monopoly.⁹⁶ Land use disputes between neighbors, blackmail, and some of the other scenarios discussed above introduce exactly this concern — the good, offered by a single seller, has an idiosyncratically high value for a single buyer while remaining worthless, or very nearly so, to everyone else. The risk of bargaining impasse or wasteful negotiation is quite high in such cases, especially when the surplus at issue is very large. Significantly, the efficiency analysis is indifferent to how the available surplus gets distributed between the parties, except insofar as distribution feeds back into ex ante incentives to engage in productive activities or affects the efficiency of the bargaining process itself.⁹⁷ The fear is not that one party will “take advantage” of another or get more surplus than she “deserves,” but rather that worthwhile deals will fail alto-

⁹⁴ But see Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1505–10 (1999) (arguing that what appears to be a “windfall” is often the result of planning and effort). In these cases, the initial amount paid may serve as a “reference transaction” that influences the evaluation of the resale's fairness. See Kahneman, Knetsch & Thaler, *supra* note 86, at 729–31.

⁹⁵ See Merrill, *supra* note 43, at 86.

⁹⁶ See, e.g., Ian Ayres, *Monsanto Lecture: Protecting Property with Puts*, 32 VAL. U. L. REV. 793, 802–04 (1998) (describing bilateral monopoly bargaining problems).

⁹⁷ See, e.g., A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1077–78 (1980).

gether, or will happen only after much value is dissipated through costly strategic interactions.

Such bargaining concerns have received a great deal of attention in the literature comparing property rules and liability rules.⁹⁸ In many instances, society may view the costs of wrangling and the risk of impasse as the price it must pay to maintain a system that gives parties appropriate incentives to create unique things of value, to acquire and use special skills, and so on. But suppose we could be certain that the acquisition or use that created the bilateral monopoly added no social value. In that case, the wrangling associated with the resulting bargaining games would produce only a loss.⁹⁹ A mechanism for filtering out *these* kinds of transactions — worthless intermediations that introduce bargaining dilemmas without any countervailing social benefits — would seem welcome from an efficiency standpoint.

Scholars analyzing phenomena like blackmail and cybersquatting have correctly homed in on the worthlessness of the underlying acquisition activity.¹⁰⁰ But worthlessness is a slippery benchmark; as Russell Hardin notes, all of us do lots of things that fail to generate any social product.¹⁰¹ For the most part, however, people internalize the costs of doing (apparently) pointless things, which provides a strong incentive not to engage in them unless their consumption value or some hidden benefit for others makes them worth their opportunity costs. Thus, the market generally drives out truly worthless intermediation. But if the meddler can leverage her worthless intervention into significant monopoly power, her ability to offload costs onto a hapless victim keeps the essential worthlessness of the intervention from operating as a check. That same monopoly leverage then gives rise to high bargaining costs. In such cases, inducing parties to select out of the marketplace through alienability limits might avoid costly bargaining problems relatively cheaply; although some transactions

⁹⁸ See, e.g., Calabresi & Melamed, *supra* note 1, at 1106–07; Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2093–94 (1997).

⁹⁹ Cf. Coase, *supra* note 62, at 671 (“It is obviously undesirable that resources should be devoted to bargaining which produces a situation no better than it was previously.”).

¹⁰⁰ See, e.g., NOZICK, *supra* note 62, at 84–85 (contrasting a case in which a neighbor has a legitimate desire to build a “monstrosity,” where paying him not to do so “will be a productive exchange,” with the unproductive exchange that would follow if the neighbor came up with the building plan “solely in order to sell you his abstention from it”); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1860 (1993) (“No rational economic planner would tolerate the existence of an industry dedicated to digging up dirt, at real resource cost, and then reburying it.”); Lewinsohn-Zamir, *supra* note 22, at 694 (distinguishing cybersquatting from land speculation on the grounds that the former “is a socially wasteful activity”). But see Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905, 1919–21 (1993) (questioning whether the bargaining in blackmail situations can fairly be classified as unproductive, given the realignment of property rights it potentially produces).

¹⁰¹ Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1806 (1993).

would be blocked, those are transactions that would have added no value.

How well do our problem cases above align with this model? Buying domain names for resale seems to line up reasonably well, assuming (as seems true) that the intermediary's involvement plays no role in sustaining or funding the system for making domain names available. Damaging information fits well up to a point, but then hits a snag. Sometimes the information that is uncovered holds market value, keeping the intermediary's involvement from being completely useless.¹⁰² The model arguably fits even less comfortably with patent acquisition; monopoly power may exist, but as long as "trolls" add some value, there is not the kind of worthless meddling that the pattern specifies.¹⁰³ Of course, it is not necessary that transactions be utterly valueless in order for filtering them out to be the best thing, on balance. The question depends not only on the value of the transactions, but also on the costs of the bargaining situations they create and the costs of alternative ways of addressing those bargaining situations. Bringing inalienability explicitly into the picture permits just such a comparison. It may also be possible, as discussed below, to adjust alienability in ways that selectively flush out relatively worthless intermediations while leaving incentives unchanged for relatively valuable ones.¹⁰⁴

Land use presents a somewhat different picture than the other scenarios, in that parties are faulted for threatening to use or enforce an existing right, rather than for newly acquiring an entitlement for leverage purposes.¹⁰⁵ Although it is often assumed that a landowner's threatened use or enforcement of a right that holds no positive value for her is a social waste, this might not always be true.¹⁰⁶ For example, a landowner's threat to build an ugly structure or a tall fence might convey information to her neighbor about the extent of their re-

¹⁰² See *infra* pp. 1460–61 (discussing "market-price" blackmail). In the case of incriminating information, it might be argued that the intermediation of blackmailers serves an additional purpose — private deterrence — although countervailing factors may make blackmail socially costly on net. See Jennifer Gerarda Brown, *Blackmail As Private Justice*, 141 U. PA. L. REV. 1935 (1993).

¹⁰³ For arguments discussing the value added by trolls, see, for example, James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 EMORY L.J. 189 (2006).

¹⁰⁴ See *infra* section III.C.2.

¹⁰⁵ We might think of an injunction as an entitlement that might be intentionally acquired for leverage purposes. But if strong exclusion rights are part of what the landowner holds, the injunction arguably involves only the enforcement of an existing entitlement rather than the acquisition of a new one.

¹⁰⁶ See Isenbergh, *supra* note 100, at 1919–23; *id.* at 1920 (observing that land use bargains that appear to leave things unchanged may actually result in a useful realignment of property rights "beneath the surface").

spective entitlement bundles. This new knowledge is not completely worthless if it leads the neighbor to consider bargaining to a different rights allocation. Such a bargain could lead to a new servitude on the threatening owner's land that would prevent a future owner, who might genuinely wish to build some unsightly structure, from carrying out that plan.¹⁰⁷ More broadly, the possibility of such threats may lead to useful societal arrangements — such as reciprocal covenants that restrain each landowner from undertaking actions like the building of ugly fences.¹⁰⁸ Still, it is worth asking whether the improvement in rights definition that flows from the builder's threat carries a large enough social benefit to justify the resulting bargaining costs.

The last two examples in the list — water and scarce seats — diverge from the pattern in other ways. Water speculators and ticket scalpers do not (at least typically) introduce the prospect of bilateral monopoly.¹⁰⁹ There are multiple units of the good in question, multiple potential buyers, and likely multiple sellers as well; the prospect of two parties wastefully vying over a large amount of surplus seems remote, and the worthlessness of the intermediation is at least open to question. Nonetheless, if one party were to gain a monopoly position over the resource, we would expect the usual deadweight loss to follow: some customers who would have been willing to pay the competitive price no longer purchase the good.¹¹⁰

A different sort of problem arises when the party who is willing to pay the most for the entitlement presents a threat to a common pool resource or public good. Again, *ex ante* effects might justify an inalienability rule — here, because of its capacity to induce self-selection by those who will be good stewards or contributors. For example, people who are willing to engage in a given acquisition protocol, such as standing in a line for tickets or farming the land for a number of years, might also happen to be good contributors to a public good (such as audience enthusiasm or the successful settlement of the West). If so, prohibiting resale will be necessary to make that self-selection work.¹¹¹

¹⁰⁷ See *id.* at 1920–23.

¹⁰⁸ However, to the extent these new rights allocations are hard to alter, new problems may be presented. See, e.g., Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 846–51.

¹⁰⁹ Scenarios like the one in which a person dying of thirst encounters the only water source within reach would be exceptions. See JOEL FEINBERG, *HARM TO SELF* 250 (1986) (discussing this example, posed in Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 88–89 (1981)).

¹¹⁰ See, e.g., Herbert Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 GEO. L.J. 1157, 1162–64 (1983).

¹¹¹ For discussion of and sources for these examples, see *infra* notes 155–158 and accompanying text (ticket queues) and notes 228–229 and accompanying text (homestead settlement).

Similarly, erasing the prospect of resales would reduce the incentive to “stockpile” entitlements in an effort to command monopoly power. Because the viability of some common pool resources depends on faith that others will not threaten the good’s continued availability through stockpiling, getting stockpilers to self-select out of the commons could have important effects.¹¹² At a more basic level, commoners who are drawing against common pool resources only for their own use, rather than for resale, will make more modest draws.¹¹³ This analysis has obvious relevance to rights in water and other natural resources, and is best taken up in the next Part’s examination of alienability restrictions as potential responses to the strategic dilemmas associated with the commons and the anticommons.

II. INALIENABILITY AS TRAGEDY MANAGEMENT

In this Part, I will examine more broadly the role that alienability limits could play in managing collective action problems surrounding resources. My goal at this stage is not to argue that inalienability rules are superior to other interventions; often, they are not.¹¹⁴ Rather, I hope to show how adjustments to alienability can serve as complements to and substitutes for other adjustments to the property bundle, such as the use of liability rules in place of property rules. The examples discussed in this section thus show how inalienability could play a role in increasing the available surplus within various collective settings, whether private or public. Of course, it is an entirely separate question, not reached here, whether the government should expend resources to facilitate the realization of that surplus, especially in instances where it will redound to the benefit of a small group or private entity rather than to the public at large.¹¹⁵

First, a definitional point: While inalienability can be construed quite broadly to include any restriction that has either the purpose or effect of making transfers more difficult or unlikely,¹¹⁶ it is helpful to distinguish legal constraints on the transfer of property (“alienability limits” or “inalienability rules”)¹¹⁷ from other conditions, restrictions, or features that limit, as a practical matter, the seller’s prospects for

¹¹² See *infra* p. 1431.

¹¹³ See *infra* notes 125–128 and accompanying text.

¹¹⁴ Later, I take up the question of when inalienability rules might be preferred. See *infra* Part III.

¹¹⁵ I thank Susan Rose-Ackerman for comments on this point.

¹¹⁶ See, e.g., Rose-Ackerman, *supra* note 2, at 931 (“Inalienability can be defined as any restriction on the transferability, ownership, or use of an entitlement.”).

¹¹⁷ These constraints might either be imposed by law or formulated by private entities in a manner that is legally enforceable.

alienating the property (limits affecting “marketability”).¹¹⁸ The former category includes not only outright bans on transfers, but also transfer taxes or fees, procedures that must be completed prior to sale, criteria that transferors or transferees must meet (such as age restrictions or minimum holding periods), limits on the permissible price range, requirements that items be sold as a bundle (or separately),¹¹⁹ limits on the times at which transfers may occur, and so on.¹²⁰ In the latter category we might place servitudes attaching to real or personal property that restrict its use, or particular entitlement configurations, such as single square inches of land,¹²¹ that are unattractive to most buyers.

¹¹⁸ See *Heller*, *supra* note 2, at 1200 (distinguishing alienability from marketability in a slightly different manner); see also PAUL GOLDSTEIN, *REAL PROPERTY* 474 (1984) (distinguishing “[f]ree alienability,” which in his lexicon “means that a landowner can in disposing of his lands impose whatever conditions he wishes, for as long as he wishes,” from “[f]ree marketability,” the idea “that interests in land should be readily saleable”). The distinction tracks one that has been made in property law between restraints on the alienation of a fee simple absolute and restraints on land use that hinder the owner’s ability to alienate the property. See, e.g., *Mountain Brow Lodge No. 82*, *Indep. Order of Odd Fellows v. Toscano*, 64 Cal. Rptr. 816, 818–19 (Cal. Ct. App. 1967) (distinguishing restrictions on the alienability of a fee simple, which are generally invalid, from restraints on use, which are often valid).

¹¹⁹ Requiring the sale of certain minimum bundles corresponds to “antifragmentation” rules that are often associated with preserving marketability. See *Heller*, *supra* note 2, at 1176–82. The converse requirement that items be sold only separately, rather than built into larger transactions, has been explored in the context of rights and liberties in Westermann, *supra* note 23, at 18–19 (discussing “anti-bundling inalienability rule[s]” (internal quotation marks omitted)).

¹²⁰ It is possible to combine these conditions in various ways. For example, the tax code contains some provisions that link the tax due on the realization of a gain to the holding period of the asset. See, e.g., Stout, *supra* note 84, at 733–34; Internal Revenue Service, Tax Facts about Capital Gains and Losses, <http://www.irs.gov/newsroom/article/0,,id=106799,00.html> (last visited Feb. 8, 2009). This approach effectively prices alienability within different holding periods. I thank Jonathan Nash for this point. Similarly, some affordable housing programs phase in the amount of equity that a departing owner is entitled to receive based on the holding period, again pricing rather than prohibiting alienability. See, e.g., J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L.J.* 527, 545–47 (2007).

¹²¹ See *Heller*, *Anticommons*, *supra* note 18, at 682–84 (discussing Quaker Oats’s 1955 “Big Inch” promotional giveaway in which millions of deeds to square inches of land in the Yukon were packaged in cereal boxes); see also HELLER, *GRIDLOCK*, *supra* note 18, at 6–8 & fig.1.2.

Legal rules can affect either dimension or both at the same time.¹²² Both are of course relevant to whether a transfer actually occurs.¹²³ Recognizing this, some scholars have emphasized the ability of certain alienability restrictions, like those requiring that property be sold in certain minimum bundles, to preserve downstream marketability.¹²⁴ But alienability limits can also have important upstream impacts on incentives to acquire and use entitlements.

A. Overharvesting

Limits on alienability can respond indirectly to concerns about inefficient draws on a common pool resource.¹²⁵ For example, a ban on the sale of eagle feathers may be instrumental in enforcing a prohibition on killing eagles; its overbreadth in blocking the sale of eagle parts taken before the ban went into effect may be justified by difficulties in distinguishing feathers acquired before the ban from those acquired afterwards.¹²⁶ An alienability restriction can have important effects on

¹²² For example, suppose certain categories of people are legally disabled from receiving or owning a good. See Rose-Ackerman, *supra* note 2, at 935–36. The result is a legally mandated thinning of the market which might be classified both as an alienability restriction and as an impediment to marketability. In general, we would expect limits on alienability to reduce marketability. For example, a minimum holding period makes an entitlement harder to transfer both because of the restriction itself (one must wait for the minimum period to elapse before a transfer can be made) and because of the restriction's effect on the desirability of the bundle (some prospective buyers will be put off by the holding period). Similarly, taxes on transfers reduce the surplus available for the parties to a transaction and thus make fewer such transactions worthwhile. In some cases, however, alienability limits are put in place in an effort to preserve long-run marketability. See *infra* note 124 and accompanying text.

¹²³ The impact that both elements have on transfers has led some authors to refer to them both as facets of alienability. See, e.g., Rose, *supra* note 10, at 105 (in discussing cap-and-trade programs, noting that “efforts to improve the *precision* of property rights limit their *alienability*”). Drawing a distinction between them, however, facilitates viewing them as potential substitutes for each other. See James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 637–38 & fig.4 (2000) (distinguishing between, and noting the substitutability of, ex ante narrowing of the “currency” to be used in environmental trading programs and ex post limits on the trades themselves).

¹²⁴ See, e.g., GOLDSTEIN, *supra* note 118, at 474 (explaining how the exercise of “[f]ree alienability” might restrict marketability); Heller, *supra* note 2, at 1176–82 (discussing a number of legal doctrines that might serve the purpose of limiting fragmentation of interests to preserve future marketability); see also Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1374 (1993) (discussing legal rules that “deter destructive decompositions of property interests”); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 15–16 (J. Roland Pennock & John W. Chapman eds., 1982) (observing that property law “abounds in restrictions on decomposition of titles” that may serve “efficiency goals”).

¹²⁵ See, e.g., Epstein, *supra* note 2, at 978–88; Lueck, *supra* note 17, at 318–19; Rose-Ackerman, *supra* note 2, at 942–43.

¹²⁶ See, e.g., Rose-Ackerman, *supra* note 2, at 944–45 (discussing and critiquing *Andrus v. Allard*, 444 U.S. 51 (1979), in which such a ban on sales was upheld against a takings challenge); see also Heller, *supra* note 2, at 1211–12 (discussing *Andrus*); Hsu, *supra* note 10, at 870 (noting the role of the alienability limits contained in the Endangered Species Act).

harvesting levels even if the ban on acquisition is nonexistent or woefully underenforced. The reason is straightforward: the incentive to harvest is magnified if a thick resale market exists for harvested goods.¹²⁷ Without this heightened incentive in place, harvesters will likely turn their attention to other ways of making a living.¹²⁸ Alienability limits may also help to reinforce selective acquisition rules, at least to the extent that permitted categories of harvesting involve personal acquisition by the end user.¹²⁹ For example, under certain circumstances Native Americans can obtain a permit to take an eagle in order to use its tail feathers in a religious ceremony.¹³⁰ Alienability restrictions can help ensure that the eagles killed pursuant to the permits are in fact used in the specified ways.

Inside a limited-access commons, an alienability restriction can stand in for other kinds of governance rules.¹³¹ The fact that a limited-access commons excludes everyone except for the approved commoners already makes possible a wider range of formal and informal solutions to collective action problems than could be sustained in an open-access arrangement.¹³² Nonetheless, some mechanism is necessary to prevent uncooperative behavior within the commons, and rules restricting alienability represent one possibility. For example, if a lim-

¹²⁷ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 351–52 (1967) (stating that the development of the fur trade increased both the value of furs and the intensity of hunting); Rose-Ackerman, *supra* note 2, at 943 (explaining that bans on the sale of fish and game “facilitate conservation by discouraging the entry of profit seeking hunters or fishermen”).

¹²⁸ Under some circumstances, however, an alienability ban could *increase* the number of people who engage in direct acquisition of the resource. For example, if the costs of becoming an eagle hunter were low enough (taking into account the price of equipment, the cost of relocating to an eagle habitat, and the opportunity cost of learning how to hunt eagles), people who are unable to buy eagles might resort to taking their own. Thus, inalienability would seem to work best as a backstop or substitute for acquisition limits where external factors like location or skill requirements make acquisition prohibitively costly for most people.

¹²⁹ See Rose-Ackerman, *supra* note 2, at 943 (discussing how alienability limits can be of help “when the state wishes to preserve a group’s way of life” and giving examples in which native Alaskans are given broader hunting and fishing rights than the general public, subject to restrictions on sales).

¹³⁰ 16 U.S.C. § 668a (2006); 50 C.F.R. § 22.22 (2007); see *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (discussing these provisions).

¹³¹ Commons scholars typically distinguish open-access resources from limited-access commons that are closed to all but specified commoners. See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS* 48 (1990). For discussions of alienability in the context of limited-access commons, see, for example, Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 261–62 (1992); and Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 566 (2001).

¹³² See OSTROM, *supra* note 131, at 48; see also Elinor Ostrom, *Design Principles of Robust Property-Rights Institutions: What Have We Learned?*, in *PROPERTY RIGHTS AND LAND POLICIES* (Gregory K. Ingram & Yu-Hung Hong eds., forthcoming 2009) (manuscript at 7), available at <http://ssrn.com/abstract=1304708>.

ited group of households is permitted access to a fish pond, making the withdrawn fish inalienable may obviate the need to place any firm limit on the number of fish that each household can withdraw. The demand for fish is effectively capped by the limited capacity of the commoners to make personal use of the fish, and, assuming this personal consumption does not threaten the sustainability of the fish population, the resource will not be overdrawn.¹³³ Richard Epstein has applied similar analysis to the system of riparian rights.¹³⁴

Of course, commoners who doubted the continued availability of the resource might overharvest even in this context if the resource could be successfully stockpiled and stored over time for future use. Indeed, the fear that other commoners might engage in resource-endangering stockpiling could itself generate such doubt. But unless external forces threatened the continued viability of the replenishing resource, the problem would take the form of an Assurance Game, which should not be difficult for a rational community to solve.¹³⁵ An alienability limit, then, could successfully stand in for a harvesting limit as long as personal consumption does not outstrip sustainability and commoners have faith in the continued availability of the resource.

One problem with using an alienability limit in place of a harvesting limit is the former's rough-gauge nature, which will generate optimal harvesting levels only under special circumstances. In the fishing example, some amount of harvesting is efficient, as long as it does not threaten the sustainability of the fish pond. If personal consumption by the commoners is below this threshold, we need not worry about overharvesting if alienability is restricted. However, we might worry about underharvesting; it would be mere happenstance if personal consumption by the commoners reached the optimal harvesting level without going over. Limiting demand through alienability restrictions is not a very fine-grained way to limit harvesting, but the cost of its

¹³³ This assumes either that fish are used only in customary ways, such as for bait or food, or that use restrictions operate in conjunction with alienability limits. Otherwise, the development of new uses for the resource could cause demand to rise unexpectedly beyond the usual self-enforcing caps associated with satiation. Cf. Smith, *supra* note 65, at 473 (explaining that riparianism works as "a rough proxy for quantity" but noting that some systems add use restrictions that prioritize "natural wants" over "artificial wants").

¹³⁴ Epstein, *supra* note 2, at 979–82.

¹³⁵ The Assurance Game features a payoff structure in which each party does best (both individually and jointly) by cooperating, provided the other party does so as well. See Daphna Lewinsohn-Zamir, Essay, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 392 nn.39–40 (1998) and sources cited therein (describing the Assurance Game and noting variations of it); Amartya K. Sen, *Isolation, Assurance and the Social Rate of Discount*, 81 Q.J. ECON. 112, 114–15 (1967) (presenting the "assurance problem").

imperfections may be less than the added cost of enforcing a numeric limit on harvests.¹³⁶

I have focused so far on how the inalienability of *resource units*¹³⁷ eases pressures toward overharvesting by limiting the pool of potential demanders. In other words, it is the number of the commoners and their consumption habits, not their identity, that does the work in curtailing resource withdrawal. There is nothing about this rationale that would call for limiting the alienability of *membership slots* within the limited-access commons, at least if problematic selection effects were not at issue.¹³⁸ Yet this latter sort of inalienability has received attention in the literature on limited-access commons,¹³⁹ and it is worth noting why it might be important, either on its own or in combination with limits on the alienability of resource units. If the sustainability of a resource in a limited-access commons depends to some extent on cooperation among the commoners, as will typically be the case, then longevity within the community may be useful in fostering that cooperation. Not only might the commoners gain experience with each other that would foster trust, but the game among them would be turned by virtue of inalienability into one of indefinite repeat play.¹⁴⁰

Another consideration, explored further in the next section, relates to the mechanism for allocating slots within the limited-access commons in the first instance. If this mechanism is designed to select for (or induce self-selection for) cooperative tendencies, then free alienability would undo that selection work. On this account, alienability restrictions lower the cost of cooperation by avoiding the need to reapply

¹³⁶ Cf. Smith, *supra* note 65, at 473 (discussing the use of “rough prox[ies]” in the context of water rights).

¹³⁷ See Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information As a Common-Pool Resource*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 111, 121 (distinguishing a “resource system” from “resource units”); Dean Lueck, *First Possession As the Basis of Property*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 200, 202 (Terry L. Anderson & Fred S. McChesney eds., 2003) (distinguishing resource “stocks” from “flows”).

¹³⁸ If the original members of the limited-access commons won their slots by some means other than a free market allocation, and if potential members are heterogeneous in their capacity to demand the resource, then making the slots alienable might introduce “super-demanders” who would consume the resource at much higher levels than did the departing members they are replacing. Alienability would not introduce a selection effect if the original allocation already drew in super-demanders or if the resource is of a type for which demand does not vary widely among individuals or households.

¹³⁹ See, e.g., Dagan & Heller, *supra* note 131, at 566; McKean, *supra* note 131, at 261–62.

¹⁴⁰ See, e.g., Dagan & Heller, *supra* note 131, at 574–77. Limiting those to whom membership slots may be alienated might be similarly motivated. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights To Exclude*, 104 MICH. L. REV. 1835, 1894–97 (2006) (discussing *Taormina Theosophical Community v. Silver*, 190 Cal. Rptr. 38 (Ct. App. 1983), which involved covenants restricting ownership within a residential community to Theosophical Society members aged 50 and over).

selection criteria over time. The price, of course, is that higher valuers who would be capable of meeting those criteria are shut out.

Now that we have seen how alienability limits can supplement or substitute for direct acquisition rules in preventing overharvesting, it is worth noting two other possible margins for intervention: use and exclusion. To return to the fishing example, suppose that instead of directly limiting the take or indirectly controlling it through restrictions on alienability, limits were instead placed on how fish could be used.¹⁴¹ For example, a prohibition on freezing (or perhaps even refrigerating) the fish would effectively force it to be used locally for immediate consumption, or not at all. Alternatively, processing the fish to produce fishmeal, fish oil, or fish sticks might be prohibited, but using the fish for fillets or as treats for seals might be permitted. This approach would limit demand for the fish in ways that, depending on conditions in the relevant markets, might have the effect of deterring overharvesting. But it would also have the disadvantage of arbitrarily eliminating categories of uses that might be more highly valued.

Adding exclusion rights — as through parcelization — represents a well-known response to commons tragedies.¹⁴² However, such alternatives are not always feasible; some resources, such as water or roving animal populations, cannot be contained by boundary lines or fences.¹⁴³ More interestingly, *limits* on exclusion can also reduce overharvesting incentives, albeit in a much blunter way. In the fishing case, we might imagine something like Michael Heller's "Poach Pond," where catching fish confers no rights of ownership at all.¹⁴⁴ Because anyone may appropriate fish from anyone else (up until the point of actual consumption), people may not bother fishing, choosing instead "to wait on shore and poach others' catches."¹⁴⁵ Heller goes on to explain that underfishing might not be the inevitable result; indeed, depending on the costs of fishing and the costs of preventing poaching through self-help, overfishing might even result.¹⁴⁶ In any case, removing exclusion rights from the fish would be highly unlikely to yield optimal fishing rates, and would almost certainly entail wasteful fighting over resources.¹⁴⁷

¹⁴¹ See Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. S421, S436 (2002) (observing that "at some point restrictions on use function as substitutes for closed access").

¹⁴² See, e.g., OSTROM, *supra* note 131, at 12–13; Ellickson, *supra* note 124, at 1327–30.

¹⁴³ See, e.g., OSTROM, *supra* note 131, at 13; Smith, *supra* note 65, at 448 & n.10.

¹⁴⁴ Heller, *Anticommons*, *supra* note 18, at 675.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ It is difficult to say much about an example like Poach Pond without more information about the other rights (and their enforcement levels) that form the backdrop against which fish may be taken. For example, if a fisher could quickly put the fish in her (privately owned) basket

A liability rule regime represents a different kind of intrusion into the right to exclude,¹⁴⁸ and one that would avoid the wasteful fights of Poach Pond. Suppose, for example, that anyone could take any fish from any fisher by paying a preset fee. Depending on the size of the fee, the frequency with which this option is exercised, and the structure of the market, fishing levels might well be affected.¹⁴⁹

In sum, restricting alienability is one way to turn back threats to a common resource, but it must be compared with other available chokepoints for managing the potential tragedy. Significantly, inalienability does its work in this story through ex ante incentive effects: without the prospect of selling, those with access to the resource have a dampened incentive to harvest.

B. Underinvestment

People may be insufficiently motivated to produce goods for which they cannot fully internalize the benefits.¹⁵⁰ This point is often made in connection with “public goods,” which are nonrival and nonexcludable.¹⁵¹ Some public goods, such as national defense, are provided by the government, with contributions coercively collected through taxation. But there are many other settings in which people cannot capture all of the benefits of their actions. When I paint my house or mow the yard, for example, my neighbors need not pay me for the

and clutch it to her person, the lack of property rights in the fish itself might be of little moment — some other right of the individual would be violated in wresting the fish away. See, e.g., Matthew H. Kramer, *Rights Without Trimmings*, in *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* 7, 11–13 (Matthew H. Kramer et al. eds., 1998) (explaining how rights may “effectively shield” other, unprotected liberties); Balganes, *supra* note 3, at 604–05 & nn.36–37 (citing Kramer, *supra*, and discussing this “shielding” thesis). If we instead assume a regime in which no private property rights exist at all, other questions emerge — such as how a fisher comes to possess the equipment for catching fish in the first place.

¹⁴⁸ The right to exclude is usually associated with property rule protection, which in turn is typified by injunctive relief. For a discussion of this view and a challenge to it, see generally Balganes, *supra* note 3.

¹⁴⁹ See Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 633–34 (2001) (discussing how the choice between property rules and liability rules bears on ex ante investment choices). The example in the text refers to a very simple liability rule regime in which only a single taking of each fish would be possible; many more complicated variations on liability rules have been explored that could produce different results. See *infra* note 192.

¹⁵⁰ Underprovision will not result if enough of the benefits are internalized to make the efficient level of provision worthwhile. See, e.g., Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 276 (2007) (arguing that full internalization is unnecessary to incentivize innovation). This is the flip side of the observation that negative externalities will not always produce inefficiencies. See, e.g., James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 ECONOMICCA 371, 380–81 (1962).

¹⁵¹ See, e.g., RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 6–7 (1986).

spillover benefits they receive.¹⁵² Often outsiders can be excluded from a nonrival good — whether formally, in the case of club goods that can be accessed only by members, or informally, when the good's effects are geographically bounded and most people are too far away to receive any benefit.¹⁵³ Even so, the good will remain nonexcludable within the club or within the locality, creating the risk that insiders will fail to make sufficient investments.

Use restrictions that directly compel a set of inputs represent one response. For example, households that purchase homes in a common-interest community agree to be bound by a set of covenants, which may include affirmative obligations with regard to upkeep and maintenance. Zoning laws or other local ordinances can operate similarly.¹⁵⁴ But specifying inputs and monitoring to detect and punish violations can be prohibitively costly in some contexts. Consider, for example, the local public good of collective cheering and enthusiasm at a sporting event or concert. Issuing mandates that people cheer at particular intervals upon pain of ejection from the stadium is unlikely to be a viable strategy. Instead, one might devise acquisition requirements that induce especially enthusiastic people to self-select. If willingness to pay were a good proxy for enthusiasm levels, ordinary market allocation with full alienability would do the trick. But given different background wealth levels, this may be far from the case.

Perhaps in part for this reason, it is commonplace for entertainments that depend on crowd enthusiasm for their success to be sold below market-clearing prices.¹⁵⁵ The resulting queue acts as a screen-

¹⁵² See, e.g., Ariel Porat, *Expanding Restitution: Liability for Unrequested Benefits* 2–4 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 388, 2008), available at <http://ssrn.com/abstract=1088796>.

¹⁵³ On club goods, see, for example, James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965). On distance as a de facto exclusionary mechanism, see Thráinn Eggertsson, *Open Access Versus Common Property*, in *PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW*, *supra* note 137, at 73, 76.

¹⁵⁴ For a recent example, see Associated Press, *Mow Your Lawn . . . or Risk Jail Time in Canton, Ohio*, *USATODAY.COM*, June 3, 2008, http://www.usatoday.com/news/topstories/2008-06-03-1773423079_x.htm.

¹⁵⁵ See Allan C. DeSerpa, *To Err Is Rational: A Theory of Excess Demand for Tickets*, 15 *MANAGERIAL & DECISION ECON.* 511, 515–17 (1994) (presenting a model of concert pricing in which “the highest-demand buyers in terms of money price will generally not be the ‘best audience’ in their own estimation”; if “propensities to make noise are *inversely* correlated with pure reservation prices,” scalping could reduce welfare by pricing out the part of the audience that is most essential to the experience); see also Gary S. Becker, *A Note on Restaurant Pricing and Other Examples of Social Influences on Price*, 99 *J. POL. ECON.* 1109 (1991) (noting the social interaction effects associated with consuming events); Michael Rothschild & Lawrence J. White, *The Analytics of the Pricing of Higher Education and Other Services in Which the Customers Are Inputs*, 103 *J. POL. ECON.* 573, 581 n.15 (1995) (suggesting that enthusiasm-related externalities produced by season ticket-holders at sporting events might explain the lower prices and other benefits offered to that group).

ing device that arguably does a better job of weeding out the unenthusiastic than could price alone.¹⁵⁶ This two-part pricing mechanism of money and queuing will fall apart, however, if free alienability of tickets is permitted. Limits on ticket “scalping,” then, can be understood as helping to ensure adequate investments in a local public good (crowd enthusiasm) by getting good cooperators in that endeavor to select themselves into the crowd.¹⁵⁷ Of course, if a ticket-holder cannot attend the game and is unable to alienate her ticket, the resulting empty seat is presumably worse for crowd morale — not to mention concession stand sales — than even the most unenthusiastic attendee.¹⁵⁸ But that result could be avoided with a simple mechanism for reselling tickets to the ticket issuer; full alienability at market-clearing prices would not be necessary.

In other settings, inalienability operates even more straightforwardly to ensure that appropriate investments are made in local public goods.¹⁵⁹ Consider higher education admissions policies, which try to select those who will be good contributors to the academic and social climate of the school, as well as to the public good of the school’s reputation (shared by all past and future graduates). One cannot sell one’s seat in Acme Law School’s entering class, nor can one sell one’s diploma from that institution, because doing so would substitute pure market allocation methods for other allocation mechanisms that are deemed better at inducing meaningful cooperation in the relevant educational and reputational enterprises. The alienability restriction is essential to enforcing acquisition limits.

¹⁵⁶ The queue may also be sought for its own sake by the purveyors of the entertainment, as evidence of popular demand. See Becker, *supra* note 155, at 1110 (positing that certain pricing strategies may be explained by the fact that “the pleasure from a good is greater when many people want to consume it”).

¹⁵⁷ The economic literature on ticket scalping suggests a number of alternative explanations for opposition to scalping. See, e.g., Courty, *supra* note 81, at 94–95 (producers wish to distance themselves from scalpers due to consumer pressure, or want to capture the “late market” themselves); Craig A. Depken, II, *Another Look at Anti-Scalping Laws: Theory and Evidence*, 130 PUB. CHOICE 55 (2007) (reviewing past literature and examining effects on prices); James L. Swofford, *Arbitrage, Speculation, and Public Policy Toward Ticket Scalping*, 27 PUB. FIN. REV. 531, 535–38 (1999) (producers wish to pass surplus to consumers to build goodwill).

¹⁵⁸ See Chris Isidore, *In Defense of \$10,000 Super Bowl Tickets*, CNNMONEY.COM, Jan. 31, 2007, <http://money.cnn.com/2007/01/31/commentary/sportsbiz/index.htm> (discussing financial impact of no-shows).

¹⁵⁹ Susan Rose-Ackerman discusses this point using the example of the Homesteading Acts, under which homesteaders could acquire title only by holding the land for some period of time and improving it in specified ways. Rose-Ackerman, *supra* note 2, at 940, 957–59. There, both use and alienability restrictions were bundled within a protracted acquisition protocol, which arguably induced self-selection by (only) those willing and able to make the prescribed investments on the land. See *id.* at 960–61. For a counterargument that homesteading laws may have actually impeded settlement by placing too many restrictions on the land, see Epstein, *supra* note 2, at 989.

A different and presumably unsustainable way of running a law school would be to allow free alienability of seats, but require students to make particular, specified investments both while in school and after graduating, on pain of ejection from the school or (later) revocation of the diploma. These requirements would amount to use restrictions on the law school seat or diploma. Limits on exclusion might also be employed in conjunction with use restrictions. For example, the institution could retain a call option on the seat and the diploma, which could be exercised if investment levels fell below certain standards. Law school already fits this model to the extent that nondisruptive class attendance and some minimum level of exam performance condition one's entitlement to remain. But inalienability remains central, complementing these other efforts to elicit appropriate investments.

Inalienability's role in facilitating the distribution of in-kind benefits, such as subsidized housing or food stamps, can also be understood as an investment problem.¹⁶⁰ Those providing the in-kind benefits want the holders of the entitlement to invest in a public good — poverty alleviation — using specified means. Some people are not well-positioned to invest in poverty alleviation by those means, either because they are not poor or because they do not wish to use the offered goods. Inalienability not only facilitates the application of means-testing to recipients, but also induces self-selection by those who find the in-kind benefits valuable.¹⁶¹ Indeed, even in the absence of a government program, people seeking to access the resources of others might signal their willingness to engage in poverty reduction by requesting in-kind assistance of a sort that is very difficult to alienate, such as a hot meal.¹⁶²

These examples involving the below-market-price provision of resources relate to a larger point about alienability limits: their role in

¹⁶⁰ See Rose-Ackerman, *supra* note 2, at 961 (discussing the relevance of alienability restrictions to welfare policy).

¹⁶¹ See *id.* at 940, 961 (explaining how alienability restrictions can lead those for whom a benefit is intended to self-identify, and can ration goods to those who will use them themselves); cf. David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 825–32 (2004) (discussing how informal rationing of welfare benefits might be accomplished through differential responses to various requirements and hurdles, as well as the possibility that such mechanisms would fail to select for need).

¹⁶² A signal must be more costly for those who lack the desired underlying characteristic than for those who possess it. See, e.g., DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 123 (1994) (defining signaling). Requesting food always entails some up-front costs (in time, effort, or dignity), but the food itself provides a larger offsetting benefit for those in dire need of a meal than it would for the well-fed. Thus, a soup kitchen featuring food that is difficult to transport or resell operates as a screening device. See *id.* (defining screening). See generally Super, *supra* note 161 (similar analysis regarding design of welfare policy).

facilitating price discrimination.¹⁶³ The efficiency story surrounding price discrimination is complex,¹⁶⁴ but Harold Demsetz's observation that price discrimination can facilitate the private production of public goods seems especially relevant to this Article's focus on collective action problems.¹⁶⁵ Inalienability in service of price discrimination might, therefore, offer an alternative to coercive taxation under some circumstances.

C. *Holding Out*

The tragedy of the commons, which manifests in either overharvesting or underinvestment behaviors, has been paired in the literature with the tragedy of the anticommons.¹⁶⁶ In an anticommons, a desired use of a resource requires assembling permission or fragmentary entitlements from a number of parties. Aside from the obvious costs of communicating and coordinating with large numbers of parties, the anticommons presents a central strategic dilemma — the possibility that a party whose entitlement is crucial to the necessary assembly will attempt to “hold out” for a larger share of the assembly surplus.¹⁶⁷ Each fragment holder has a veto power enabling her to block the whole assembly (assuming all pieces are truly indispensable), creating the possibility that value will be dissipated in negotiations, that negotiations will break down altogether and prevent an efficient assembly from taking place, or that the potential for these results will deter any effort at negotiations.¹⁶⁸ The essential problem is one of a “thin market” in which transactions must occur, if at all, between specific parties.¹⁶⁹

This same problem of monopoly power can arise in two-party interactions as well, and several of the examples above — domain

¹⁶³ See, e.g., R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 625–27 (2003) (explaining this point in the context of the first sale doctrine).

¹⁶⁴ See, e.g., Hovenkamp, *supra* note 110; Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1505–08 (2004).

¹⁶⁵ See Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293, 301–04 (1970).

¹⁶⁶ See, e.g., Heller, *Anticommons*, *supra* note 18, at 673–79; see also James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1 (2000). The anticommons idea originated in Frank Michelman's conception of a regulatory regime that would be the “converse” of a commons. See Michelman, *supra* note 124, at 6, 9; see also Frank Michelman, Remarks at Property Panel, Association of American Law Schools: Is the Tragedy of The Common Inevitable? 6–7 (Jan. 1985) (transcript on file with the Harvard Law School Library) (defining the “anti-common”).

¹⁶⁷ For an extended discussion of this point with cites to relevant literature, see Fennell, *supra* note 18, at 926–29, 946–52.

¹⁶⁸ See, e.g., Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991); Fennell, *supra* note 18, at 926–29, 946–52.

¹⁶⁹ See Merrill, *supra* note 43, at 75–78.

names, land use rights, damaging information, and perhaps patents — can present the famously costly bilateral monopoly. The structure of the problem is the same as in the anticommons, in that the property owner holds a veto power or monopoly over an entitlement essential to the desired resource use of another party.¹⁷⁰ Again, value is dissipated as the high valuer and the entitlement holder vie for larger shares of the often enormous surplus that will be generated by the transfer. If the parties bluff too hard, the deal may not go through at all.¹⁷¹ Both the dissipation of value through wrangling and the thwarted exchange produce inefficiencies.¹⁷²

It is worth emphasizing here that property's grant of veto power is not an unusual or anomalous feature, but rather lies at the heart of the institution itself.¹⁷³ The temporal, spatial, and conceptual bounds of an owner's holdings limit the significance of the resulting monopoly power in most circumstances.¹⁷⁴ For example, nearby pieces of property are often very close substitutes for each other, despite each being locationally unique.¹⁷⁵ Nonetheless, so long as property rule protection remains in force, each owner controls something that no other person can precisely supply. Deciding when to recognize and when to restrict that monopoly power is a central dilemma in property law.

This problem is usually approached by weighing the benefits and risks of reducing exclusion rights through liability rules. But such limits on exclusion represent only one of several possible points of intervention; monopoly power giving rise to holdout problems might instead be addressed through limits on alienability, use, acquisition, or some combination of these. These approaches seek not to wrest the entitlement from the hands of the lower-valuing monopolist but to increase the chance that the higher-valuing user will have the entitlement at the outset. Acquisition limits attempt this directly: some proxy characteristic thought to correlate with being a high-valuing user of the entitlement is made a prerequisite for acquiring the entitlement.

¹⁷⁰ Problems of "extortion," where a party seeks payment for refraining from doing something she has no independent interest in doing, boil down to monopoly power as well. See Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 22–25 (1972).

¹⁷¹ Cf. Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 577 (1993) (explaining that in private necessity cases "the bargaining range is so large that there is some risk that no deal will be struck as each side campaigns for the larger fraction of the contested domain").

¹⁷² See, e.g., RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 706–07 (9th ed. 2008) (noting these risks in the context of injunctive relief).

¹⁷³ The power to veto a transaction is the defining characteristic of "property rules," which, true to their name, commonly protect property interests. See Calabresi & Melamed, *supra* note 1, at 1092.

¹⁷⁴ See Richard A. Epstein, *Justified Monopolies: Regulating Pharmaceuticals and Telecommunications*, 56 CASE W. RES. L. REV. 103, 108–09 (2005).

¹⁷⁵ See *id.*

To make the limitation meaningful, further alienability must be restricted to those possessing the same proxy characteristic. Use limits could similarly act as screens, especially if a use is compelled that strategic resellers would find costly.¹⁷⁶

Alienability restrictions more straightforwardly select against those whose primary value is in reselling. Instead of an administrator choosing a proxy characteristic capable of distinguishing between high and low valuers, resale limits induce self-selection by those who are relatively high valuers.¹⁷⁷ For example, parties might be required to hold the entitlement for some period of time before reselling it. If the holding period were set at a level that would be unprofitably long for those bent on resale but comfortably short for anyone making personal use of the entitlement, it would tend to screen out low-valuing acquirers.¹⁷⁸ Complete bans on alienability would even more strongly discourage acquisition by low valuers hoping to resell. Thus, alienability restrictions can drive low valuers out of the marketplace without the need for any administrative judgments about absolute or relative valuations. The exit of these would-be transactors can, in turn, forestall costly holdout problems that might otherwise emerge.¹⁷⁹

However, this benefit comes with some significant costs attached. Figure 1, which sets out the effects of alienability restrictions schematically, illustrates the resulting tradeoff.

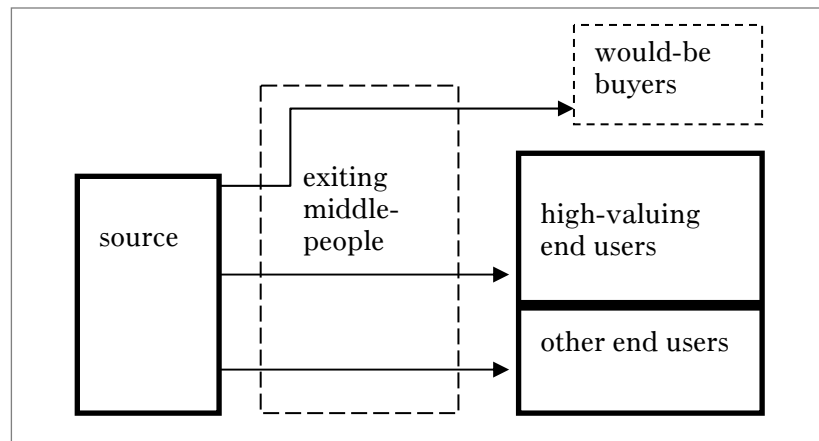
¹⁷⁶ See Rose-Ackerman, *supra* note 2, at 955–56, 960–61 (discussing “coerced use” as a means of targeting benefits).

¹⁷⁷ See *infra* pp. 1453–54 (discussing self-selection induced by alienability limits). Inalienability thus serves as a screening mechanism. See BAIRD ET AL., *supra* note 162, at 122–23 (explaining how screening induces revelation of private, nonverifiable information).

¹⁷⁸ See, e.g., Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543 (2006) (urging a three-year holding period for initial purchasers of certain categories of residential property to discourage real-estate speculation).

¹⁷⁹ This is not to suggest that high valuers or long-term holders are temperamentally disinclined to strategically squeeze surplus out of a deal when they can. The point is simply that fewer transactions (and hence fewer potentially problematic transactions) are necessary to move goods to their highest valuers if those who acquire in the first place are more likely to be high valuers themselves.

FIGURE 1. EFFECTS OF INALIENABILITY



In this schematic, the entitlement in question comes from some “source.” If resale of the entitlement is restricted, a category of potential acquirers (“middlepeople”) will exit from the market, as indicated by the dashed middle box. With the middlepeople out of the picture, high valuers can acquire the good directly from the source and avoid any bargaining or holdout problems associated with buying from an intermediary. But the exit of the middlepeople also generates a number of potential costs, the existence and magnitude of which will depend on empirical facts about the relevant markets and on the specific design of the inalienability rule in use.¹⁸⁰

First, to the extent that the middlepeople were actually reaching a group of would-be buyers who would not otherwise acquire the good (represented by the dashed upper right-hand box), there is an efficiency loss. Here, we confront the question raised in section I.C of whether the intermediaries are offering anything of value by bridging a divide of some kind, whether spatial, temporal, informational, or risk-based. Second, while the inability to resell will weed out many low valuers, not all of those who acquire the good for their own use will necessarily be (or remain over time) the highest valuers of the good. Indeed, with no middlepeople competing to snap up entitlements, hold them, and route them to higher valuers, this result becomes more likely. Thus, restrictions that block resales may lock goods in suboptimal uses, as indicated by the black horizontal bar in the lower right block of Figure 1.

¹⁸⁰ See *infra* Part III.

Finally, any drop in overall demand that results from the exit of the middlepeople could change the supply of the good.¹⁸¹ Whether this will be the case, and whether it will be problematic, depends on the nature of the good. Inventions, for example, are likely to be more sensitive to changes in demand than domain names, which are simply combinations of letters or words drawn from the preexisting language. In some cases, a drop in demand could actually increase supply, as where natural resources are concerned. Reducing the demand for fish, for example, could increase the overall fish population.

III. INALIENABILITY'S DOMAIN

The discussion to this point has established two things. First, the transfer of some goods that seem appropriately market-allocated can nonetheless generate anxiety that may be traceable in part to inefficiencies. Second, inalienability offers one possible, if imperfect, response — a point that becomes especially clear when we see alienability as one margin that might be adjusted to control commons and anticommons tragedies. Taken together, these observations lead us to ask whether, and under what circumstances, inalienability could offer useful traction for resource dilemmas in general and holdout problems in particular. In the balance of the Article, I take up that inquiry.

Although I look at how inalienability rules might serve efficiency goals, the distributive effects of choices about alienability are also relevant — whether as an independent reason for making an adjustment, or as an additional benefit or countervailing consideration. Significantly, inalienability rules can influence the division of surplus that results from a transfer by limiting the range of possible bargains.¹⁸² More generally, alienability underpins property's dual character as a source of wealth-building potential and as a source of consumption value.¹⁸³ Because inalienability breaks apart these two elements, it

¹⁸¹ For a discussion of the relevance of output to questions of alienability, see Levmore, *supra* note 7, at 116–21.

¹⁸² See *infra* section III.A.3.

¹⁸³ This dichotomy appears frequently in the property literature, often building explicitly on KARL MARX, CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION (Frederick Engels ed., Samuel Moore & Edward Aveling trans., George Allen & Unwin 1972) (1887), which defined and distinguished “use-value” and “exchange value,” *id.* at 2–8. See, e.g., JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 1–2 (20th anniversary ed. 2007); Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. (forthcoming May 2009) (manuscript at 16–23), available at <http://ssrn.com/abstract=1138714> (invoking the “use value” and “exchange value” distinction in the context of homes); see also JOHN CHRISTMAN, THE MYTH OF PROPERTY 128 (1994) (distinguishing “control ownership” from “income ownership”); J.W. HARRIS, PROPERTY AND JUSTICE 26–27 (1996) (distinguishing “the use of things” from “the allocation of items of social wealth”); Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 837–38 (1993) (distinguishing “in-kind enjoyment” from “monetary compensation”).

may be sought where use, but not wealth extraction, is viewed as normatively desirable.¹⁸⁴ Other normative considerations, including the preservation of autonomy, also play a role in evaluating alienability choices.

I start by cataloguing the ways in which alienability can be adjusted and showing how these adjustments interact with other features of property entitlements. Inalienability rules — no less than liability rules — can be fine-tuned in numerous ways to achieve particular objectives. With this expanded menu in mind, I examine how inalienability rules stack up against restrictions on exclusion and use. I close with some specific suggestions for better integrating inalienability into the legal toolkit.

A. Alienability Adjustments

Calabresi and Melamed and their successors have generally conceived of inalienability rules as different in kind from property rules and liability rules.¹⁸⁵ There is some basis for this intuition. Property rules and liability rules represent different ways of dividing up control over the fact and the terms of the entitlement transfer between owners and nonowners.¹⁸⁶ In the case of completely inalienable goods, in contrast, control over potential transactions is held socially rather than split between the transacting parties. But absolute bans on alienability are relatively rare, and the entitlements to which they apply most clearly tend to be those for which the appellation of “property” is highly questionable.¹⁸⁷ More commonly, alienability is restricted, not prohibited. Adjustments to alienability thus typically occur against a backdrop in which control over transfers has already been divided up in some manner between owners and nonowners.¹⁸⁸ Revisiting the dif-

¹⁸⁴ See, e.g., Ayres & Madison, *supra* note 2, at 85–86.

¹⁸⁵ See, e.g., Calabresi & Melamed, *supra* note 1, at 1093 (describing “inalienability rules” as “quite different from property and liability rules” in that they “not only ‘protect’ the entitlement” but “may also be viewed as limiting or regulating the grant of the entitlement itself”); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 715 n.1 (1996).

¹⁸⁶ My focus on “control” here echoes in part and diverges in part from Christman’s characterization of “control rights” as distinct from “income rights.” See CHRISTMAN, *supra* note 183, at 127–31.

¹⁸⁷ It is not clear whether inalienability is a cause or a consequence of the item’s uncertain property status in these cases. Compare HONORÉ, *supra* note 5, at 181 (“When the legislature or courts think that an interest should be alienable and transmissible, they reify it and say that it can be owned.”), with J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 129–30 (1997) (saying of choses in action: “It is not because they are alienable that they are things. Rather it is because they are things that they are alienable.” (emphasis omitted)).

¹⁸⁸ Owners are often in the role of “sellers” and nonowners in the role of “buyers,” although a number of other owner/nonowner pairings are possible, such as donor and donee, mortgagor and mortgagee, takee and taker, or defendant and plaintiff.

ferent ways that transaction control can be allocated offers a convenient starting point for examining how inalienability rules can change things.

1. *Two Dimensions of Control over Transfers.* — Control over transfers is divided between owners and nonowners along two dimensions, as shown in Figure 2.¹⁸⁹

FIGURE 2. CONTROL OVER TRANSACTIONS

| Transfer Type Elements of Control | Call Option | Voluntary Transfer | Put Option |
|--------------------------------------|-----------------------------|------------------------|--------------------------------|
| Whether Transfer Occurs | Nonowner Control | Owner-Nonowner Control | Owner Control |
| Transfer Price | Collective or Owner Control | Owner-Nonowner Control | Collective or Nonowner Control |

First, consider the degree of control that the owner has over the *fact* of the transaction.¹⁹⁰ This control can range from zero, when the entitlement is subject to a “call option” held by another party, to absolute, when the entitlement comes with a “put option” that lets the owner force a sale on another party.¹⁹¹ In between these extremes we find the usual case, where the owner is free to initiate and resist trans-

¹⁸⁹ A recent working paper by Matteo Rizzolli includes a figure that similarly sets out three columns for “put-option liability rule,” “property rule,” and “call-option liability rule.” Rizzolli, *supra* note 2, § 3.1, fig.3-1. Rizzolli’s schematic, however, is used to illustrate the Hohfeldian equivalents that each party holds under each type of rule and to make observations about the effects of call options and put options, respectively, on the ownership package. See *id.* § 3.1 (citing Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917)). My depiction differs in that it breaks apart the two elements of transfer control represented by the two rows in Figure 2. This approach yields a refinement in conclusions. Rizzolli indicates that “[t]he bundle of rights is ‘enriched’ under put-option liability rules,” *id.*, but my analysis shows a more complex picture: a put option grants more control over the fact of the transfer but withdraws control from the owner over the price at which the transfer occurs. For further discussion of the operation of put options, see, for example, Ayres, *supra* note 96, at 803-12.

¹⁹⁰ Transfer control could be broken down further. See Morris, *supra* note 183, 833-37, 843 (discussing “initiation choice” and “veto power,” both of which involve control over whether a transfer occurs and which collectively amount to “transfer control” or “a transfer autonomy element”).

¹⁹¹ See, e.g., *id.* at 851-56 (describing the liability rule, or call option, and the “Reverse Liability rule,” or put option).

actions, but may only complete a transaction with the agreement of a willing buyer (or donee). The “Whether Transfer Occurs” row in Figure 2 sets out these possibilities. Voluntary transfers, which require the consent of both parties, take place in the domain of property rules. Calls and puts represent two types of liability rules, with the “call” version corresponding to ordinary or traditional liability rules.¹⁹²

Second, there is the degree of control that the owner has over the price at which any transfer will occur. Once again, this can range from zero, as when the strike price of a call or put option is set by someone else, to absolute, when the owner can specify the price and the buyer is bound to accept it. The typical case lies in between, where the price, and hence the division of surplus from the transfer, is subject to negotiation. The “Transfer Price” row in Figure 2 reflects how price control is split up under calls, voluntary transfers, and puts, respectively. For both calls and puts, the transfer price may be set in more than one way. Two possibilities are expressly noted: that a collective decisionmaker such as a court or agency would set the price, or that the party not holding the option would have previously set the price (“written the option”) for the other party to exercise. Although most discussions of liability rules presuppose that transfer prices will be determined by a collective body, it is also possible to devise systems that place pricing in the hands of the party against whom the option can be exercised.¹⁹³

As Calabresi and Melamed recognized, more than one transfer type may apply to a given entitlement, such as a house.¹⁹⁴ A property rule usually protects one’s home against involuntary transfers, but the government holds a call option when it acts pursuant to its eminent domain powers.¹⁹⁵ The owner may also be said to hold a put option that may be exercised against the government and possibly also against her mortgagee. She can transfer the property to the government by failing to pay her property taxes,¹⁹⁶ and if she lives in a jurisdiction that has

¹⁹² See *id.*; see also Ian Ayres & Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 MICH. L. REV. 1, 5–6 (2001). Scholars have identified numerous ways to structure and combine calls and puts in order to achieve particular objectives. For a recent treatment with discussions of other relevant literature, see IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* (2005). These complex alternatives are not reflected in Figure 2, but could play a role in designing real-world inalienability rules.

¹⁹³ See, e.g., Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1406, 1416–17 (2005).

¹⁹⁴ Calabresi & Melamed, *supra* note 1, at 1093.

¹⁹⁵ See *id.*

¹⁹⁶ Although procedures vary, a protracted failure to pay past-due taxes can result in a transfer of the property to the government. See, e.g., MICH. COMP. LAWS SERV. § 211.78g (LexisNexis 2006). More generally, we might treat any abandonment right as a put option good against the world, at a strike price of zero. Cf. Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47 (2004) (analyzing the plaintiff’s option to abandon

an antideficiency law (or if she is holding a non-recourse loan, or is judgment-proof), she can effectively force the mortgagee to “purchase” the property from her at a price equal to her unpaid balance on the home loan.¹⁹⁷

2. *Alienability Restrictions and Transaction Control.* — Alienability restrictions can alter the control that the parties have over the fact of the transfer or the control that the parties have over the transfer price. Alternatively, a restriction might specify that certain kinds of sales attempts, when coupled with other criteria, will trigger a shift from the voluntary transfer column in Figure 2 to the call or put option columns, or give rise to other consequences, such as criminal penalties. These possibilities will be discussed in turn.

(a) *Limits on Whether a Transfer Occurs.* — The law need not merely divide up control over transfers between owners and nonowners; it may also condition or limit transfers that both parties desire. Such conditions and limitations can take many forms, ranging from taxes,¹⁹⁸ to procedural requirements, to substantive criteria that the parties must meet to engage in a transfer (such as holding periods or age restrictions), to restrictions on when or how a particular good may be sold,¹⁹⁹ to outright bans on transfers. Private parties may also seek

a lawsuit). If proper disposal is required (as for hazardous wastes), the put option may carry a negative price or the transfer may require the consent of the transferee. For a discussion of the limits that the law places on abandonment, including a general prohibition on the abandonment of land, see Lior Jacob Strahilevitz, *The Right to Abandon* (Oct. 23, 2008) (unpublished manuscript, on file with the Harvard Law School Library).

¹⁹⁷ Todd J. Zywicki & Joseph D. Adamson, *The Law & Economics of Subprime Lending*, 80 U. COLO. L. REV. (forthcoming Feb. 2009) (manuscript at 26–35), available at <http://ssrn.com/abstract=1106907> (examining support for an “option model” of foreclosure decisions).

¹⁹⁸ For example, the possibility of taxing the transfer of financial instruments in order to curb speculative activity has recently received renewed attention. See Joseph J. Thorndike, *Speculation and Taxation: Time for a Transaction Tax?*, 119 TAX NOTES 1367 (2008) (surveying implemented and proposed transfer taxes, including one proposed by economist Dean Baker); Stephen Mihm, *The 8th Annual Year in Ideas: The Stock Transfer Tax*, N.Y. TIMES, Dec. 14, 2008, § 6 (Magazine), at 74, 74–76 (discussing Baker’s proposal and its antecedents); see also Robert Pollin, Dean Baker & Mark Schaberg, *Securities Transaction Taxes for U.S. Financial Markets* (Political Econ. Research Inst., Working Paper No. 20, 2002), available at http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_1-50/WP20.pdf.

¹⁹⁹ Such restrictions might set minimum or maximum quantities or require that goods be sold in particular configurations. See *supra* note 119. Legal doctrines that specify what particular sorts of transfers must convey, such as the patent exhaustion doctrine and the first-sale doctrine in copyright, fall into this category. See Richard A. Epstein, *The Disintegration of Intellectual Property* 28–49 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 423, 2008), available at <http://ssrn.com/abstract=1236273> (discussing these and other intellectual property doctrines from the perspective of alienability); David J. Franklyn, *Owning Words in Cyberspace: The Accidental Trademark Regime*, 2001 WIS. L. REV. 1251, 1272–73 (discussing trademark law’s ban on transferring a mark without also transferring goodwill). Not only may the law require that transfers contain certain minimum packages of rights rather than a subset thereof, it may mandate that certain rights be held back from packages that are conveyed. See, e.g., JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 177–80 (2d ed. 2006)

to limit alienability in various ways. Although the law generally prohibits parties from imposing outright bans on alienability, it may permit more limited restrictions on exactly how and when a good may be resold.²⁰⁰

Legal controls on alienability do not always operate to constrict the universe of circumstances in which transfers may occur. Instead, the law might mandate that transfers occur once certain prerequisites have been met. Under civil rights laws, for example, access to public accommodations and entitlements to jobs and housing cannot be withheld based on membership in a protected class. These laws can be understood as prescribing the bundling of alienability; an owner's decision to extend access to some requires extending equivalent access to others.²⁰¹

(b) *Restrictions on the Transfer Price.* — It is also possible to directly constrain the price at which a transfer may occur. At the extreme, goods may be made “market-inalienable”²⁰² so that they must transfer at a price of zero or not at all. Lesser restrictions, such as price floors or ceilings, might be imposed by regulation or through contractual or servitude arrangements. Such restrictions limit how surplus can be divided between the parties, and in so doing, may either facilitate or discourage efficient transfers. For example, price caps could make an efficient transfer unprofitable for the seller, while price floors could make an efficient transfer unprofitable for the buyer. On the other hand, removing some ground from the possible bargaining range could facilitate transactions by cabining stratagems.²⁰³

Notably, the law can limit control over the transfer price not only by specifying permissible prices (or price bands), but also by specifying the protocol that must be used by the parties to arrive at a price. For example, mandatory transfer protocols (such as auctions) might grant

(citing 17 U.S.C. §§ 203, 304(c), 304(d) (2006)) (describing nonwaivable rights to terminate certain copyright grants at specified times under copyright law); Michael Rushton, *The Law and Economics of Artists' Inalienable Rights*, 25 J. CULTURAL ECON. 243, 249–50 (2001) (discussing droit de suite, under which artists retain inalienable rights to a percentage of the proceeds from resale of their work).

²⁰⁰ See, e.g., *DUKEMINIER ET AL.*, *supra* note 59, at 195–96 (noting the law's general disfavor of alienability restrictions on estates in land, as well as some limited exceptions).

²⁰¹ See Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1457–58 (1996). Similar issues of bundled access arise in a variety of other contexts, including debates over “network neutrality.” See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 925–33, 1008–22 (2005).

²⁰² Radin, *Market-Inalienability*, *supra* note 8, at 1850 (“Something that is market-inalienable is not to be sold . . .”).

²⁰³ See Ayres & Madison, *supra* note 2, at 103–05 (citing and discussing RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 57 (1993)).

power over the price to parties other than the seller.²⁰⁴ In addition, the law can decide the degree to which it will permit private parties to place limits on the prices that may be charged by others.²⁰⁵

(c) *Triggers for Control Shifts or Penalties.* — Alienability restrictions need not directly alter the substantive conditions for transfer or the permissible price. Instead, attempted alienation can be made a triggering condition for a shift of control — over transfer price, the fact of the transfer, or both — between owners and nonowners.²⁰⁶ Here, the timing and circumstances of an entitlement's attempted sale might be treated as important factors in deciding whether to chip away at the property bundle in other ways or to subject the owner to some form of liability. For example, property rule protection might be downgraded to liability rule protection following certain kinds of sales offers when other criteria are present. Alternatively, penalties might apply to an attempted sale, as in the blackmail case.

Such alternatives amount to de facto restrictions on the entitlement's alienability, akin to forfeiture restraints on alienability.²⁰⁷ However, one may lose more or less than the entitlement upon attempting to sell. One might merely lose the chance to extract surplus from the transfer. Or, in some cases, one might be subject to sanctions that are more serious than the loss of the entitlement. By providing for case-by-case review of the circumstances surrounding an attempted transfer, such an approach can avoid placing a categorical blockade on sales. But the review introduces costs of its own, including uncertainty for owners and potential owners.

3. *Stronger or Weaker?* — Interestingly, it is not always clear whether alienability restrictions weaken or strengthen property rights. The ambiguity arises because alienability's value derives not only from the freedom to engage in (and resist) transfers, but also from the ability to extract surplus from those transfers. Certain limitations on transactions that make them less likely to occur can also increase the surplus that a buyer or seller will receive if a transaction does occur. Thus, a

²⁰⁴ A sale through a "no reserve" auction would also involve relinquishing control over the fact of the transfer, while setting a reserve would preserve a veto over the transaction if the price falls below a certain level. For a discussion of the potential role of auctions in addressing holdout problems, see *infra* section III.C.2.

²⁰⁵ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (holding that vertical price restraints are not per se violations of the Sherman Act but rather "are to be judged by the rule of reason").

²⁰⁶ Such arrangements are an example of what Abraham Bell and Gideon Parchomovsky have termed "pliability rules." See Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 5 (2002) (discussing "contingent rules that provide an entitlement owner with property rule or liability rule protection as long as some specified condition obtains; however, once the relevant condition changes, a different rule protects the entitlement").

²⁰⁷ See *DUKEMINIER ET AL.*, *supra* note 59, at 195 ("A *forfeiture restraint* provides that if the grantee attempts to transfer his interest, it is forfeited to another person . . .").

rule that limits bargaining *options* may simultaneously enhance bargaining *leverage*.²⁰⁸ For example, requiring that jobs or leaseholds come bundled with particular (non-waivable) protections may simultaneously decrease the chances of landing one of these entitlements while increasing the surplus that will be gleaned in that event.²⁰⁹ Where alienability restrictions apply across the board, they can solve collective action problems that might otherwise lead individuals to cave in one by one to the surplus-draining demands made by a party with more leverage.²¹⁰ These possibilities offer an intuitive explanation of why greater freedom to alienate may actually be less desirable.²¹¹

Whether or not a particular alienability limit will in fact improve results for an actor is an empirical question. These limits can often be conceptualized as legally imposed precommitment devices, similar to one party (*A*) tearing out her own steering wheel during a game of roadway Chicken with another party (*B*).²¹² If *B* indeed faces a

²⁰⁸ Russell Hardin, *The Utilitarian Logic of Liberalism*, 97 *ETHICS* 47, 58–62 (1986); see also THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 22 (paperback ed. 1980) (noting “that, in bargaining, weakness is often strength, freedom may be freedom to capitulate”); Arthur Kuflick, *The Utilitarian Logic of Inalienable Rights*, 97 *ETHICS* 75, 86–87 (1986) (explaining that while making the right to divorce inalienable may keep some prospective couples away from the altar, it also removes a bargaining chip from the table that could introduce imbalances into many marriages that would occur in any case).

²⁰⁹ Cf. Hardin, *supra* note 208, at 61 (observing that a ban on selling oneself into slavery prevents the destitute from making deals they might prefer, but ensures that the next group up the economic ladder will be free workers rather than slaves).

²¹⁰ See *id.* at 58–62 (discussing the nine-hour work day and other examples). This line of reasoning seems to explain the position taken by tenant farmers in *Barlow v. Collins*, 397 U.S. 159 (1970). See Rose-Ackerman, *supra* note 2, at 959 n.79. The farmers sought to maintain a key restriction on agricultural payments they received to avoid being compelled by their landlords to assign their benefits in exchange for the right to work the land. See *id.*; see also Hardin, *supra* note 208, at 62 (“We may not be able to know what were the views of the workers, women, tenant farmers, and children protected by various pieces of supposedly paternalistic legislation over the decades, but it is plausible that, had they been able to express a collective will by voting rather than by individually entering their separate contracts, many of the groups would overwhelmingly have chosen to restrict themselves as the legislation eventually did.”).

²¹¹ See, e.g., Lewinsohn-Zamir, *supra* note 22 (exploring a variety of property law settings in which “more” is not deemed better than “less”); see also EPSTEIN, *supra* note 203, at 183–84 (explaining how a nexus requirement for land use exactions could leave owners better off, based on the empirical prediction that the government would not deny the owner’s requested permit if it were unable to use its denial power to leverage unrelated concessions); W. Stephen Westermann, *Strong Versus Standard Property Entitlements: Toward a New Theory of Legal Entitlements* (Oct. 23, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024081 (arguing that “strong” property entitlements, which come with built-in limitations on what they may be traded for, offer more autonomy to owners because they enhance the owners’ ability to resist trades).

²¹² In roadway “Chicken,” two cars head toward each other on a collision course, each hoping to force the other to swerve. For a description of the Chicken Game and strategies within it, see, for example, BAIRD ET AL., *supra* note 162, at 43–45. The idea of tearing out one’s own steering wheel as a precommitment device in a game of Chicken is often attributed to Thomas Schelling; a discussion of this strategy and related moves appears in HERMAN KAHN, *ON ESCALATION*:

Chicken Game payoff structure, he will see *A*'s precommitment and swerve; *A* will then come away with more surplus.²¹³ But if *B*'s ordering of payoffs leads him to drive straight ahead notwithstanding this precommitment, the removal of *A*'s steering wheel deprives *A* of the chance to prevent the "crash" of a thwarted bargain. In some cases, of course, society has made the judgment that the harm from such thwarted bargains is preferable to other possible outcomes.

Of particular interest for our purposes is the fact that society may place one party in a "precommitment" position in an effort to influence the ex ante incentives of the other party. If it is impossible for a person vulnerable to damaging information to buy silence, for example, it becomes less likely that damaging information will be acquired in the first place.²¹⁴ Similarly, landowners are prevented from engaging in certain kinds of bargains over land use rights, on the theory that governmental bodies will acquire (promulgate and enforce) fewer land use controls if they are unable to use them as leverage to obtain unrelated or disproportionate benefits from landowners.²¹⁵ Whether such suppositions will play out as hoped depends on a number of factors, including the costs of acquisition and the other benefits (if any) that parties derive from the entitlements in question.

For similar reasons, parties might wish to restrict their own power to buy or sell, or to resist buying or selling. Here, law might offer precommitment mechanisms that parties could irrevocably elect.²¹⁶ Ayres and Madison's default alienability limit for injunctions represents just such a mechanism.²¹⁷ Interestingly, their proposal couples a defendant's commitment to not purchase an injunction with a procedure for changing the amount of damages that the plaintiff will receive in the event she elects damages rather than an injunction.²¹⁸ Assuming that the injunction would be inefficient (the equivalent of a crash in Chicken), the Ayres and Madison proposal gives the defendant the

METAPHORS AND SCENARIOS 11 (1965). See also T.C. Schelling, *Uncertainty, Brinkmanship, and the Game of "Chicken,"* in STRATEGIC INTERACTION AND CONFLICT 74, 82-83 (Kathleen Archibald ed., 1966) (explaining how an unresponsive or inaccessible steering mechanism could provide a strategic advantage).

²¹³ See, e.g., Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1049 n.74 (1995) (noting the bargaining advantage conferred by allowing one party to make a take-it-or-leave-it offer).

²¹⁴ Laws that mandate the bundling of alienability can also have ex ante effects — both on the initial choice to acquire an entitlement and on the decision to initiate its transfer. Hence, one effect of civil rights laws may be to induce those bent on discrimination to select out of certain markets. This effect could further the mission of antidiscrimination laws by reducing enforcement burdens.

²¹⁵ See *infra* p. 1455.

²¹⁶ I thank Omri Ben-Shahar for comments on this point.

²¹⁷ See Ayres & Madison, *supra* note 2.

²¹⁸ See *id.* at 79-81.

ability not only to irrevocably remove his steering wheel, but also to set the course of the car in what amounts to a partial swerve, thus making it more likely that the other party will choose to avoid the crash.²¹⁹ Auctions can also be cast as precommitment devices that, by placing binding constraints on a seller's choice set, may yield her a better outcome.²²⁰

B. *Inalienability's Edge*

We have good reason to be suspicious of inalienability: it can lock entitlements into inefficient uses. We should not be surprised, then, to see that the law usually targets other attributes of property when strategic dilemmas loom. Often this turns out to be just the right move. But restricting alienability can at times be a fruitful complement to, or substitute for, other points of intervention into resource tragedies. Moreover, as the previous section makes clear, inalienability is not a single switch to be thrown, but rather a spectrum of approaches for altering control over transfers. With this in mind, we can consider when and how inalienability rules might have an edge over alternative treatments of common interest tragedies — including doing nothing.²²¹

As we have seen, inalienability can affect ex ante incentives to acquire and use entitlements. Foreseeing the inability to resell, a party will self-select into holding an entitlement only if she expects to be a sufficiently high-valuing user of that entitlement over time.²²² Of course, when the situation is examined ex post, the inability to transfer entitlements to higher-valuing users creates inefficiencies. Distributive concerns can also arise: inalienability restricts the choice sets of would-be buyers as well as those of would-be sellers, even though the parties may not be equally responsible for the miscalculations and failed pre-

²¹⁹ See *id.* at 80 (explaining that, counterintuitively, “the defendant is made better off by asking the court to increase the potential damages it must pay” and describing the resulting strategic interaction); Hugh Ward, *The Risks of a Reputation for Toughness: Strategy in Public Goods Provision Problems Modelled by Chicken Supergames*, 17 BRIT. J. POL. SCI. 23, 39 (1987) (discussing a game of Chicken in which “[t]he steering wheel can be set at various angles,” increasing or decreasing the amount that the other party will have to swerve).

²²⁰ See, e.g., R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. ECON. LIT. 699, 703 (1987).

²²¹ If serious problems rarely emerge under status quo arrangements, the costs of any intervention may exceed the benefits. Of course, there is often disagreement about the frequency and severity of particular dilemmas. For example, compare Brief of Various Law & Economics Professors As Amici Curiae in Support of Respondent at 15–16, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130), 2006 WL 639164 (suggesting lack of empirical support for pervasive holdup problems), with Brief Amici Curiae of 52 Intellectual Property Professors in Support of Petitioners at 6, *eBay*, 126 S. Ct. 1837 (No. 05-130), 2006 WL 1785363 (stating that “inappropriate ‘holdups’ occur on a regular basis under the Federal Circuit’s mandatory-injunction standard”).

²²² See *infra* notes 228–235 and accompanying text.

dictions that placed an entitlement in the hands of the latter rather than the former. Under what circumstances, then, would we be willing to tolerate these substantial ex post disadvantages in order to glean the beneficial ex ante effects of alienability restrictions?

My answer comes in two parts. In the balance of this section, I consider some circumstances in which alienability limits might work better than placing pressure on (or only on) property's other margins — acquisition, use, and exclusion. In the next section, III.C, I consider ways that inalienability rules might be structured to reduce the inefficiency generally associated with them.

1. *Administration and Enforcement Advantages.* — Because transfers involve at least two parties and are often subject to regulatory scrutiny for independent reasons, they may be significantly easier to police than other actions involving resources. Our fish pond example above showed how inalienability might work as a quick and dirty de facto harvesting limit, assuming limited appetites and either a limited-access commons or one that is prohibitively difficult for more than a limited number of people to access. While it seems very unlikely that a no-reselling rule will induce optimal harvesting levels, much less get entitlements to their highest valuers, the administrative convenience of the system may outweigh such imperfections. It may be a great deal cheaper to watch for fish leaving the community than it is to monitor the fishing patterns of the commoners.²²³

Even where acquisition or use limits are in place, inalienability might plug gaps in the enforcement of these other limits. While it is easiest to see how such a backstop would work in the context of a categorical ban (say, on taking eagles), alienability limits might also fortify more fine-grained limits on acquisition or use. In these cases, the transfer could provide an occasion for assessing the transferor's and transferee's right to possess or use the thing. Alienability limits can also assist in the application of particular criteria to those accessing resources (such as entitlements to enroll in, attend, and graduate from a given law school). A complete prohibition on transfers would permit a single gatekeeper to administer these criteria. An alternative alienability limit would involve making the criteria "run with the entitlement" servitude-style,²²⁴ so that transfers could be made only to those who met the indicated specifications.²²⁵

²²³ Cf. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 543 (2002) (noting the lower informational burdens of exclusion as compared with governance).

²²⁴ See, e.g., Robinson, *supra* note 164; Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008).

²²⁵ While it is hard to imagine a law school granting a dispensation to sell one's seat to, say, anyone who possesses a particular LSAT score and undergraduate GPA, this approach could

Of course, enforcing inalienability rules is far from costless. Black markets may develop to circumvent alienability limits in many contexts.²²⁶ Efforts to structure alienability in particular ways, as through an auction system, can invite collusive practices that threaten to undermine the goals of the system.²²⁷ But, significantly, other approaches to resource dilemmas (such as trying to control a common pool resource's depletion through limits on acquisition or use alone) also create pressures in the direction of illicit activity. The point, then, is not that inalienability rules are always cheap to administer in absolute terms, nor even that they are always cheaper than other alternatives, but only that a comparative analysis should be undertaken if society has made the determination that some intervention is appropriate.

2. *Overcoming Information Asymmetries.* — Alienability limits may be attractive when directly limiting acquisition or use is unduly expensive. A common culprit in these cases is asymmetrical information.²²⁸ Susan Rose-Ackerman has explored how self-selection prompted by alienability restrictions can overcome information asymmetries in settings like the Homestead Act.²²⁹ Rather than have an administrative agent determine who will be a good homesteader, those who place a high value on homesteading can be prompted to identify themselves if enough restrictions are placed on the use and resale of the property. Likewise, Ayres and Madison have explored how those who highly value an injunction for its own sake (rather than for its exchange value) could be prompted to self-select into that remedy under a regime that bans reselling the injunction to the defendant.²³⁰

The potential to weed out those who are strategically acquiring an entitlement for resale purposes is especially helpful when society is reluctant for distributive or other normative reasons to ration access to a particular entitlement through direct screening or pricing mechanisms. For example, suppose an apartment resident plays her trombone very poorly, so that it causes auditory pain for those in surrounding apart-

work reasonably well in other settings, such as transmitting one's unused leasehold to a person with a certain credit rating and income level.

²²⁶ An extensive literature addresses underground or informal market activity. See, e.g., SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* (2006); Symposium, *The Informal Economy*, 103 YALE L.J. 2119 (1994). Only a subset of underground activity involves goods that cannot legally be sold, and only a subset of that subset involves goods that are the subject of stand-alone alienability limits; many goods that cannot legally be sold (such as illegal drugs) are also illegal to possess or use.

²²⁷ See *infra* notes 264–66.

²²⁸ See Rose-Ackerman, *supra* note 2, at 939, 946–48.

²²⁹ *Id.* at 939–40, 946–48; cf. Strahilevitz, *supra* note 140, at 1869–75 (discussing the self-selection induced by “exclusionary vibes” and “exclusionary amenities” as alternatives to direct exclusion by a gatekeeper, where potential entrants possess private information that is costly for the gatekeeper to obtain).

²³⁰ Ayres & Madison, *supra* note 2.

ments. Because budding musicians confront a learning curve, society may be reluctant to outlaw or fine bad trombone playing, assuming it is confined to reasonable hours. At the same time, it is almost impossible to distinguish musicians in the early stages of their training from opportunists hoping to extract payments from their annoyed neighbors. If the bad-trombone-playing entitlement is inalienable (whether as a function of law or social norms),²³¹ those who continue to play the trombone badly will do so for their own reasons, not to gain strategic leverage. Such trombone playing may still be inefficient in the individual case — perhaps the player lacks talent and will never improve, and the costs she imposes on her neighbors far exceed the utility she derives from her attempts to play. But that inefficiency may be counterbalanced by the benefits of living in a society where people are free (within limits) to nonstrategically play musical instruments at low skill levels.²³²

In other words, we may want to make the entitlement to engage in a behavior depend on one's reason for wishing to engage in it. Spite fences provide another example of this impulse. While it may not be actionable in a given jurisdiction to have a fence that is homely, an unsightly fence constructed with the sole intention of annoying one's neighbor, whether to extract payments or for some other spiteful purpose, may give rise to a cause of action.²³³ The problem is that it can be very difficult to tell why a particular fence has been constructed.²³⁴ Here, we might view an interest in selling the entitlement as evidentiary on the question of intent.²³⁵ Alienability restrictions could screen

²³¹ Social norms, rather than legal prohibitions, seem to be doing the work in examples like this one. Not only may people intuitively appreciate the strategic risks of paying a neighbor to stop doing something, offering cash to one's neighbor to stop playing an instrument couples a direct insult with the interjection of money into a setting where it is likely to seem inappropriate. As this example suggests, de facto limits on alienability may already produce some ex ante selection benefits.

²³² To be sure, we could imagine variations on the entitlement regime, such as a "learner's permit" that allows the poor playing of a musical instrument to continue for only a certain period of time before it becomes enjoined. Such a regime would be administratively costly, however, and would require difficult qualitative judgments.

²³³ See, e.g., *Spite Fences*, in 9 POWELL ON REAL PROPERTY § 62.05, (Michael Allan Wolf ed., 2008) (noting divided authority on the point, but suggesting that "[t]he trend of modern decisions appears to favor the view that a spite fence that serves no useful or beneficial purpose is unlawful"); Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 234–35 (2002) (noting the varying treatment of spite fences); Kelly, *supra* note 63, at 11–14.

²³⁴ See Farnsworth, *supra* note 233, at 235 (noting "the administrative cost of identifying true spite fences and separating them from the look-alikes").

²³⁵ For an extended treatment of this idea in the blackmail context, see Berman, *supra* note 64. The same evidentiary argument would explain the Anticybersquatting Consumer Protection Act's inclusion of an offer to sell a domain name among the factors relevant to the bad faith inquiry. See Ned Snow, *The Constitutional Failing of the Anticybersquatting Act*, 41 WILLAMETTE L. REV. 1, 70 & n.477 (2005) (citing S. REP. NO. 106-140, at 15 (1999)).

out those building for strategic reasons, although they would offer no relief against a truly spiteful fence-builder for whom seeing a neighbor suffer is payment enough. Moreover, by blocking potential bargains, such rules risk leaving in place inefficiently ugly but earnestly constructed fences.

A similar argument might be attempted with respect to the limits on land use exactions contained in *Nollan v. California Coastal Commission*²³⁶ and *Dolan v. City of Tigard*.²³⁷ These decisions reflect the Court's anxiety about strategic acquisition (here, enactment of land use regulations) for later resale to burdened landowners (lifting the regulation in exchange for a concession from the property owner). In this context, substantive checks on acquisition seem superior to indirect attempts to influence acquisition incentives through alienability limits, which could block efficient bargains.²³⁸ But suppose that, for whatever mix of normative reasons, courts do not wish to restrict the ability of local governments to enact sincerely desired land use regulations. Local governmental sincerity may be as difficult to detect as good faith attempts at trombone playing. If so, and if land use regulations resold to landowners for unrelated or disproportionate benefits are, on average, less sincerely desired than those that are not resold in that manner, then the bargaining restrictions might lead local governments to enact a larger proportion of sincerely desired restrictions.²³⁹

Of course, the argument falls apart if the forbidden bargains would not disproportionately attract insincere lawmaking, or if one believes that substantive criteria beyond sincerity should govern land use enactments. There are other reasons to be leery of these bargaining restrictions as well: ex post pressures make such alienability limits difficult to sustain,²⁴⁰ and to the extent the limits are enforced, they unfairly restrict the choice set of the would-be purchaser (the landowner) who had no hand in the government's ex ante decision to acquire the entitlement.²⁴¹

²³⁶ 483 U.S. 825 (1987). *Nollan* requires an "essential nexus" between the purpose of the original restriction and the concession that the landowner provides in exchange for lifting it. *Id.* at 837.

²³⁷ 512 U.S. 374 (1994). *Dolan* requires "rough proportionality" between the landowner's concession and the harms that were addressed by the lifted land use regulation. *Id.* at 391.

²³⁸ See generally, e.g., Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, LAW AND CONTEMP. PROBS., Winter 1987, at 101.

²³⁹ For a discussion and critique of this argument, see, for example, Fischel, *supra* note 238, at 107-08.

²⁴⁰ See, e.g., David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1286-1302 (1997) (discussing circumvention of the *Nollan* and *Dolan* bargaining limits).

²⁴¹ See, e.g., Fennell, *supra* note 238, at 4-5.

3. *Preserving Autonomy.* — Limiting exclusion by downgrading property rule protection to liability rule protection offers one response to resource dilemmas, as we have seen. But liability rules carry some well-known costs, including potential impacts on incentives and on expectations about property. Notably, they introduce valuation concerns — the amount of compensation paid under the liability rule may be deemed inadequate.²⁴² While it may be possible to address these concerns with techniques like self-assessed valuations,²⁴³ these approaches are sometimes disfavored for administrative or distributive reasons.

More fundamentally, liability rules deprive the entitlement holder of a form of autonomy — control over the fact of the transfer.²⁴⁴ That the entitlement can be removed without the entitlement holder's consent might seem independently objectionable in some settings, even if the price paid is quite adequate. Of course, a complete ban on alienability would also deprive the owner of control over the fact of the transfer (albeit in a different way) by forcing her to retain the entitlement forever.²⁴⁵ Yet it is possible to devise alienability limits that leave the usual degree of choice about the fact of the transfer with the entitlement holder,²⁴⁶ while specifying a set of limits that will apply once the choice to transfer has been made. The content of these limits may, in turn, induce self-selection by those who are unlikely to hold out for strategic reasons. Alternatively, the limits may determine the way that surplus will be assigned, which can forestall bargaining breakdowns. To take a simple example, price caps would leave the choice of whether to sell with the owner but would limit returns from

²⁴² See, e.g., Epstein, *supra* note 98, at 2093 (discussing the risk of undercompensation associated with liability rules).

²⁴³ See, e.g., Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982); see also Michael Abramowicz, *The Law-and-Markets Movement*, 49 AM. U. L. REV. 327, 364–73, 389, 392–93 (1999); Fennell, *supra* note 193. It would also be possible to use alienability limits as part of a mechanism designed to elicit truthful valuations. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871 (2007) (combining self-assessed valuation for purposes of eminent domain compensation with restrictions on selling below the self-assessed amount if the government chooses not to go forward with the taking); Parchomovsky, *supra* note 47, at 232–36 (proposing an auction mechanism for allocating contested domain names followed by a two-year period of inalienability).

²⁴⁴ See, e.g., Morris, *supra* note 183, at 842; see also CHRISTMAN, *supra* note 183, at 167 (associating liability rules with a lack of control and explaining that “control rights serve autonomy interests”).

²⁴⁵ See Morris, *supra* note 183, at 842.

²⁴⁶ By “usual degree of choice” I mean the “voluntary transfer” column in Figure 2, in which the owner and the nonowner must both agree to the transfer. Put options, which permit an owner to force a transfer, represent another alternative and will be discussed below. See *infra* section III.C.1.

any sale that does occur, influencing both who will become an owner in the first place and the later course of bargaining.²⁴⁷

Some alienability limits, such as holding periods or criteria that buyers must meet, would operate to thin the market for the entitlement and make a transfer less likely. While this market thinning dilutes the owner's holdings and increases the chance that resources will be locked up in inefficient uses, it arguably interferes with autonomy less than does a forced or prohibited transfer.

C. *Inalienability Without Anxiety*

Refinements to inalienability rules can reduce, often dramatically, the inefficiencies that would otherwise attend them. A couple of concrete ideas will help to flesh out some of the possibilities.

1. *Adding Put Options.* — Often, the costs of inalienability can be greatly reduced by pairing a ban on sales or other transfers with a “put option” that gives the entitlement holder the right to force a transfer of the entitlement to a specified party at a preset price.²⁴⁸ Ordinary alienability requires the willing cooperation of a buyer²⁴⁹ (or other recipient²⁵⁰) and hence does not amount to an enforceable “right” against another party.²⁵¹ Put options amount to just such a right, and hence may be attractive complements to limits on alienability.

²⁴⁷ For a discussion of the impact of price caps and similar restrictions on bargaining, see, for example, EPSTEIN, *supra* note 203, at 57–58; Ayres & Madison, *supra* note 2, at 103–05.

²⁴⁸ See, e.g., Morris, *supra* note 183, at 854–56 (discussing put options). Put options may be explicit, as in financial markets, or they may be embedded in background legal rules or contractual arrangements. See, e.g., George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664 (2006).

²⁴⁹ In relatively narrow circumstances, persons benefited by the actions of others can be required to compensate the actor. Such a legal rule would grant the actor an embedded put option. Cf. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 556–57, 602–03 (2001) (explaining how a landowner's liability to the government for favorable governmental actions would effectively grant the government a put option with a nonzero exercise price).

²⁵⁰ Even gifts require acceptance, although this element may be readily implied. See, e.g., *Gruen v. Gruen*, 496 N.E.2d 869, 874–75 (N.Y. 1986) (“Acceptance by the donee is essential to the validity of an inter vivos gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part.”). Christman, however, uses the example of gifts to argue that “alienation is unilateral” and distinguishes it from “exchange,” which he describes as “a contingent and conditional act.” CHRISTMAN, *supra* note 183, at 129. Presumably, this analysis is based on the fact that the overwhelming majority of donees do accept the gifts they are given, although the law does not require them to do so. See also PENNER, *supra* note 187, at 80–87 (extrapolating from abandonment to find a unilateral right to transfer property).

²⁵¹ I use the term “right” here in the Hohfeldian sense. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–36 (1913). Others have made the same point. See, e.g., Rizzolli, *supra* note 2, at § 3.1 (noting that from a Hohfeldian perspective, “under a property rule, the owner does not have the right to sell as there is no corresponding duty of others to buy the entitlement”); see also HONORÉ, *supra* note 5, at 173 (“In deference to the view that the exercise of a right must depend on the choice of the holder, I have refrained from calling transmissibility a right.” (footnote omitted)).

Of course, the right to abandon property, to the extent it exists,²⁵² can be couched as a standing put option with a strike price of zero. However, abandoned property may create large transaction costs. Other actors must determine that the property is abandoned before making a claim, during which time the property sits unused, or, worse, deteriorates. Clear abandonment protocols can reduce these costs, but only if erstwhile owners are willing to comply with the protocols. That result is more likely if the costs of doing so are low or are reimbursed, or if entitlement holders have their own reasons for complying. As to this last point, consider laws that offer new parents the option of abandoning babies in designated places, such as fire stations, and thus appeal to the parental desire to safeguard the child's well-being.²⁵³ "Use or lose" provisions like those applicable to water rights, or the "monitor or lose" rule associated with adverse possession, are closely related to the ideas of structured abandonment and put options.²⁵⁴ Here, one relinquishes the entitlement and receives a "payment" in the form of relief from monitoring or use in settings where those activities have become costly on net.

To these "embedded put options," we might wish to add put options with positive prices, if alienability will be otherwise restricted.²⁵⁵ In the case of domain names, for example, one concern is that the stock of useful, attractive, and easy-to-remember words and phrases will be depleted by the stockpiling or hoarding of names.²⁵⁶ Although an inalienability regime would remove the incentive to buy and hold names for resale,²⁵⁷ it could also take valuable names out of commission over time. In contrast, allowing holders who no longer need the names to return them to the issuing agency and receive a fee would provide a way of quickly reclaiming those names for use by others.

²⁵² See, e.g., PENNER, *supra* note 187, at 79–80 (discussing the owner's right to cede possession but noting limits on that right, such as those attending the disposal of hazardous wastes); Strahilevitz, *supra* note 196 (examining the right to abandon and limits on it); cf. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005) (examining the common law right to destroy and limits on it).

²⁵³ See, e.g., Abandoned Newborn Infant Protection Act, 325 ILL. COMP. STAT. 2/1–2/70 (2006) (establishing procedures for relinquishing newborn infants, and stating that relinquishment in accordance with the Act creates a rebuttable presumption that the parent consents to termination of parental rights as to that infant).

²⁵⁴ See, e.g., Lewinsohn-Zamir, *supra* note 22, at 650–60, 681–83 (discussing "use it or lose it" provisions and the inertia to which they respond).

²⁵⁵ Explicit put options may also be useful in reducing deadweight losses in settings where serious impediments to marketability exist. For example, consider the practice of offering a household going through foreclosure a lump sum if they leave the home behind in good condition. See Michael M. Phillips, *Buyers' Revenge: Trash the House After Foreclosure*, WALL ST. J., Mar. 28, 2008, at A1 (discussing the "cash for keys" approach, in which homeowners are paid "hundreds or even thousands of dollars to put their anger in escrow and leave quietly").

²⁵⁶ See Franklyn, *supra* note 199, at 1277–78.

²⁵⁷ See *id.* at 1275–77 (discussing the impacts of domain name alienability).

Similarly, if normative considerations point toward making grandfathered fishing rights inalienable, the inefficiency of leaving rights “out” with people who are no longer using them could be eliminated with a buyback program.²⁵⁸

Where a positive strike price is set for a put option, two potential worries follow. First is the concern that wasteful acquisition will occur just to exercise the option.²⁵⁹ This can be controlled by keeping the exercise price equal to or lower than the present-value equivalent of the cost of initial acquisition, or by requiring the entitlement to have been owned for some period before the put option was announced (or anticipated).²⁶⁰ Second, if inalienability is designed to serve intrinsic ends by keeping an individual from parting with a particular entitlement, the put option would operate against that goal, although less strongly than would the prospect of open-market sales. Hence, put options are likely to be most attractive where intrinsic considerations do not dominate and where the costs of initial acquisition can be reliably estimated.

It is important to emphasize how a put option differs from the “call options” that are the stuff of ordinary liability rules. Unlike giving the government or some other centralized body the power to take away the entitlement for a price, the put option leaves control over the fact of the transaction with the entitlement’s owner.²⁶¹ So long as the entitlement is valued for its use by its owner, it can be maintained for that purpose without interference; the choice to force a sale lies with her, not with the government. In some settings, this arrangement may be normatively desirable.

2. *Specifying Transfer Protocols.* — Another way to approach alienability restrictions is by specifying particular transfer protocols that must be followed in the event the owner chooses to alienate the entitlement. The required use of sealed-bid second-price (or “Vickrey”)

²⁵⁸ Cf. L.S. PARSONS, MANAGEMENT OF MARINE FISHERIES IN CANADA 191 (1993) (discussing the use of fishing license buyback programs to address overcapacity problems).

²⁵⁹ See, e.g., Richard A. Epstein, Commentary, *Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres*, 32 VAL. U. L. REV. 833, 844 (1998) (discussing the perverse incentive to pollute that would exist under a put option regime in which parties are paid to stop polluting).

²⁶⁰ For example, some states and localities have begun experimenting with buybacks of environmentally harmful older cars, although careful design is necessary to make sure people do not resurrect dinosaurs from junkyards just to claim the payment. See Alan S. Blinder, *A Modest Proposal: Eco-Friendly Stimulus*, N.Y. TIMES, July 27, 2008, at 5 (explaining that a “Cash for Clunkers” program might specify that “only vehicles that had been registered and driven for, say, the past year would be eligible”).

²⁶¹ See Ayres, *supra* note 96, at 808 (“[U]nder a call option, the fate of the initial entitlement’s holder is decided by the other side, but under a put option, the initial entitlement holder decides her own fate . . .”).

auctions,²⁶² for example, would help to select against strategic acquisition of entitlements that are valuable only to a single identifiable party. In this type of auction, bidders submit their valuations via sealed bids and the highest bidder receives the entitlement — but at the price bid by the second-highest bidder.²⁶³ This setup is thought to induce bids that reflect true valuations: a bidder who idiosyncratically values an entitlement more than everyone else need not fear that she will end up paying any portion of her extra, idiosyncratic increment of value.²⁶⁴ While other types of auctions (including ordinary first-price auctions) will produce the same expected revenue to the seller if certain assumptions hold,²⁶⁵ second-price auctions place the highest valuer's extra increment of value off limits with greater transparency and certainty.²⁶⁶ A Vickrey auction makes strategic acquisition undertaken solely for purposes of reselling to an identifiable high valuer clearly unprofitable, while leaving intact the incentives that the rest of the market provides.

Consider how this approach might play out in the blackmail context. One of the abiding sub-puzzles of blackmail is why so-called “market price” blackmail is illegal.²⁶⁷ In this type of blackmail, the information involved has a market value (say, to a tabloid), and hence its procurement cannot be said to have been a total waste, at least if one

²⁶² See William Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 J. FIN. 8, 20–21 (1961).

²⁶³ See *id.* at 20.

²⁶⁴ See *id.* at 20–21 (observing that, in the absence of collusion, “the optimal strategy for each bidder . . . will obviously be to make his bid equal to the full value of the article or contract to himself” and explaining why higher or lower bids would not be rational). *But see, e.g.*, John H. Kagel, *Auctions: A Survey of Experimental Research*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 501, 508–11, 513 (John H. Kagel & Alvin E. Roth eds., 1995) (discussing experimental results showing bids above the “dominant strategy price” in second-price auctions, but finding that a larger proportion of second-price than first-price sealed bids are within \$.05 of true valuations); Jack L. Knetsch et al., *The Endowment Effect and Repeated Market Trials: Is the Vickrey Auction Demand Revealing?*, 4 EXPERIMENTAL ECON. 257 (2001) (questioning, based on experiments with second- and ninth-price auctions, the demand-revealing properties of Vickrey auctions). For a discussion of second-price auctions and similar mechanisms, see, for example, Parchomovsky, *supra* note 47.

²⁶⁵ See Vickrey, *supra* note 262, at 28; see also McAfee & McMillan, *supra* note 220, at 707–11 (discussing the “Revenue-Equivalence Theorem” and its dependence on certain “benchmark” assumptions).

²⁶⁶ See Vickrey, *supra* note 262, at 28 (suggesting that switching to the “first-rejected-bid” pricing of a second-price auction could achieve gains from “the greater certainty of obtaining a Pareto-optimal result and from the reduction in non-productive expenditure devoted to the sizing-up of the market by the bidders”). Measures would be necessary to control the risk of false “second bids” by those colluding with the seller. See *id.* at 22 (“To prevent the use of a ‘shill’ to jack the price up by putting in a late bid just under the top bid, it would probably be desirable to have all bids delivered to and certified by a trustworthy holder, who would then deliver all bids simultaneously to the seller.”).

²⁶⁷ See, e.g., Berman, *supra* note 64, at 857 (describing “market price blackmail” as “one of the most complex riddles within the blackmail puzzle”); *id.* at 857–60 (discussing and citing literature on this topic).

equates willingness to pay with some social value.²⁶⁸ If we would find nothing wrong with the sale of the information to the tabloid, why should the person who stands to lose reputational capital by its release not be able to bid against the tabloid?²⁶⁹ Such a counterbid to suppress the information might seem little different in principle from the Nature Conservancy bidding against developers to gain control of land in order to protect it from use. One explanation for the prohibition on market price blackmail might be simple administrative ease — it is too difficult to tell when another bidder really exists or to determine that bidder's valuation.²⁷⁰ But there may also be efficiency concerns about allowing the prospect of recovering from the blackmailee to drive decisions about information acquisition. In addition, there may be distributive concerns about allowing the blackmailer to claim a share of the large surplus by which the blackmailee's valuation exceeds that of the nearest market competitor.

These concerns could be addressed by requiring that damaging information about another person be alienated to that person only through a second-price auction. The blackmailer would only be able to get what the top-paying tabloid would be willing to pay, and the blackmailee would have to pay no more than that amount, regardless of how high her valuation might be. Robert Nozick argues for this economic result in discussing the suppression of marketable information:

[A] seller of such silence could legitimately charge only for what he forgoes by silence. . . . So someone writing a book, whose research comes across information about another person which would help sales if included in the book, may charge another who desires that this information be kept secret (including the person who is the subject of the information) for refraining from including the information in the book. He may charge an amount of money equal to his expected difference in royalties between the book containing this information and the book without it; he may not charge the best price he could get from the purchaser of his silence.²⁷¹

A second-price auction offers a way of operationalizing this idea that would sidestep some of the practical concerns scholars have raised about it.²⁷²

²⁶⁸ See Hardin, *supra* note 101, at 1806.

²⁶⁹ For a detailed argument that such blackmail fits within the framework of mutual advantage, see *id.* at 1803–09.

²⁷⁰ See, e.g., Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1675–77 (1993); Hardin, *supra* note 101, at 1806.

²⁷¹ NOZICK, *supra* note 62, at 85–86.

²⁷² See, e.g., DeLong, *supra* note 270, at 1675–76. Some difficulties, such as the problem of defining what the parties are bidding on without giving away the information itself, would remain. See, e.g., *id.*; Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2272–77 (1996). In addition, such an auction would only offer a workable solution in instances in which the information is fully controlled by a single blackmailer; otherwise, it would

The domain name situation could be addressed similarly. A registrant acquiring “vw.net”²⁷³ could offer it for sale, but only through a second-price auction.²⁷⁴ The registrant would be unable to exercise leverage against Volkswagen based on that company’s idiosyncratically high valuation. If Volkswagen were the high bidder, it would receive the domain name, while the registrant would receive only the amount (if any) that a second party was willing to bid. If there were no second bid, the domain name would be transferred for free. Foreseeing this, the registrant would not resort to the auction unless at least one other party were interested in the name. This, in turn, would remove ex ante incentives to acquire a name solely to exert leverage against a single party with an exceptionally high valuation.

Such an approach has its limits. It would work best in situations where a single party values the good much more highly than does everyone else, and where few, if any, legitimate bargains would be thwarted as a result of the rule. Often, these criteria are not met. For example, a patent holder who has added a great deal of social value might nonetheless have only one plausible buyer. Alternatively, a patent holder who has added little or no social value could wield monopoly power against many parties simultaneously. Coercive threats of other sorts may also have broad audiences, as seen in the “Saving Toby” scenario in which the owner of an adorable bunny posted an internet threat to kill and eat the creature unless viewers sent in \$50,000.²⁷⁵ Nonetheless, because some anxiously alienable goods have features amenable to second-price auctions, applications of this protocol are worth considering in greater depth.

More generally, we might consider other kinds of transfer procedures capable of cutting through bargaining dilemmas without unduly

not be within the power of the blackmailer to “convey” the information to the high-bidding blackmailee in a way that would truly take it off the market. I thank Stephanie Stern for this point. Because the blackmailer’s ability to deliver an “exclusive” to a tabloid is likely the source of any significant market potential for the information in the first place, however, the second-price solution could work well in many “market price blackmail” situations.

²⁷³ The domain name “vw.net” was at issue in *Virtual Works, Inc. v. Volkswagen of America, Inc.*, 238 F.3d 264 (4th Cir. 2001).

²⁷⁴ Gideon Parchomovsky has also proposed using an auction mechanism to resolve disputes over domain names. Parchomovsky, *supra* note 47, at 229–40. Significantly, his proposal would allow a trademark holder to force a domain name owner to participate in a process which could involuntarily divest the owner of the entitlement (with compensation at the level bid by the owner). *Id.* at 232–33. His proposal (which also differs from mine in a number of other respects) thus represents a type of contingent liability rule in which control over the fact of the transfer itself depends on who turns out to be the high bidder.

The idea of using auctions to assign domain names in the first instance has also been explored. See Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 HASTINGS COMM. & ENT. L.J. 359, 459–86 (2003).

²⁷⁵ See Stephen E. Sachs, *Saving Toby: Extortion, Blackmail, and the Right To Destroy*, 24 YALE L. & POLY. REV. 251 (2006).

blocking useful transactions. The basic idea is to leave control over the transaction in the entitlement holder's hands while specifying surplus-dividing procedures that must apply in the event the entitlement holder decides to make a transfer and a buyer decides to accept it. Any set of nonnegotiable surplus-dividing rules will sidestep bargaining dilemmas, and distributive goals can be accommodated by adjusting the content of the rules. These points have been well-recognized in the context of liability rules, which always specify a division of surplus. Indeed, the idea that jointly chosen transactions might occur at a pre-stated price can be found embedded in the literature on new forms of liability rules.²⁷⁶ But combining wholly voluntary transactions with mandatory, impasse-averting procedures is a powerful and flexible concept whose true roots lie not in the unilaterally imposed transactions of liability rules but rather in inalienability. Recognizing alienability as an alternative margin for adjusting property entitlements clears a space for new innovations in overcoming strategic dilemmas.

D. Taking Stock

As should be evident by now, inalienability's role in resolving collective action problems is fundamentally interstitial. Whether inalienability rules offer the best chance for increasing surplus or achieving other goals in a given context is a comparative inquiry that turns on the feasibility, efficacy, and normative desirability of other courses of action, including doing nothing. The case for inalienability rules is at its apex when a decision has already been made to intervene in property entitlements in some manner and the other candidate interventions involve significant costs along one or more of the margins identified above — administrability, information asymmetries, or autonomy. Alienability limits deserve a fair hearing in such instances, and giving them one requires recognizing the full range of potential inalienability rules and the many ways in which they might be structured to minimize the disadvantages associated with blocking trades.

²⁷⁶ See Ronen Avraham, *Modular Liability Rules*, 24 INT'L REV. L. & ECON. 269 (2004) (describing "modular liability rules"); Ayres & Goldbart, *supra* note 192, at 9–10, 34–37 (describing "dual-chooser rules"). These authors introduce rules constructed from call and put options that give both parties a say in whether a particular remedy will apply. Although consistently described as "liability rules," the resulting arrangements are the functional equivalent of granting one party an entitlement that may be voluntarily transferred, subject to an alienability limit in the form of a mandatory, nonnegotiable price. For example, the "defendant-presumption" variety of "dual-chooser rule" specifies that the defendant receives the entitlement (say, to continue operating her factory) unless *both* parties agree that it should be transferred to the plaintiff upon payment of an amount specified by the court. See Ayres & Goldbart, *supra* note 192, at 34. A converse rule would presumptively grant the entitlement to the plaintiff (say, to have the factory shut down) but would specify that if both parties agree, the entitlement will be transferred to the defendant at the preset damages price selected by the court. See Avraham, *supra*, at 297 (providing an example of how a court's instructions to the parties might be formulated under such a rule).

If we think that a heightened degree of openness to inalienability rules could improve the flexibility and efficacy with which society addresses strategic dilemmas, how should that openness be operationalized? Here it is important to recognize that restrictions on alienability may be sought by either public or private entities, may restrain either public or private entities, and may serve purposes that fall anywhere along the spectrum from fully private to fully public. The law must decide when to enact and enforce public alienability limits, when to enforce private alienability limits, and when to permit private parties to act collectively to restrict alienability. This Article has not sharply differentiated among these choices, much less argued for any particular enactment, legal doctrine, or institutional arrangement. My focus has instead been on the analytic case for making inalienability rules part of the picture at all. Yet it is worth emphasizing that there are many different ways in which alienability limits might be implemented, all of which offer avenues for future research.²⁷⁷

CONCLUSION

Inalienability has been treated as a curiosity by property scholars, a special topic imbued with exceptional normative content, hived off from the rough and tumble of ordinary resource struggles. This Article has endeavored to reveal another side of inalienability. Like other core property attributes, alienability represents a dimension that can be adjusted to address tragedies of the commons and the anticommons. Because these resource dilemmas are ubiquitous, recognizing inalienability's role in their resolution should bring this underappreciated property attribute out of the shadows. Perhaps most interestingly, alienability adjustments offer a way to address monopoly power while leaving exclusion rights, and the autonomy interests that they are often thought to serve, fully intact.

To recognize this neglected side of inalienability is not, of course, to suggest that such restrictions are always or even frequently superior to limits on acquisition, use, or exclusion. Very often, other margins offer better points of intervention, and even where they do not, nonintervention may be preferable to the inefficiencies that inevitably come from blocking desired exchanges. Nonetheless, it seems likely that properly formulated alienability limits could play an important role in some areas. Just as there are many imaginable variations on property rules

²⁷⁷ Again, the analogy to liability rules is instructive. In addition to examining liability rules as mandatory legal rules, scholars have explored the potential of opt-in regimes featuring such rules. See, e.g., Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

and liability rules, there are many ways that alienability might be altered to address resource tragedies — yet very few of the latter have received explicit consideration by property scholars. Thus, I hope this Article will open the door to more innovation in inalienability.

Equally important for property theory is the payoff of working through the source and meaning of the anxiety surrounding certain kinds of transfers. I have suggested here that this anxiety has its roots not only in distributive concerns but also in worries about the inefficiencies that may follow strategic acquisitions for resale. Although a typical approach to those worries is to dilute the strength of exclusion rights and thereby allow transfers to occur more easily, an intriguing alternative is to make transfers harder to accomplish. By illuminating alienability's place in the constellation of property attributes, I hope to counterbalance in some measure the current trend to view property, and adjustments to it, solely in terms of exclusion. However fruitful debates about the choice between property rules and liability rules have been, it is time to make room in the discussion for inalienability rules.