Law and Entrepreneurial Opportunities

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INTRODUCTION

In his book Siberia Bound, Minnesota-native Alexander Blakely details his five years living and working in postcommunist Siberia in the mid-1990s.1 Blakely was motivated to bring capitalism to a place where it had not existed.2 During Blakely’s time in Siberia, he and his Siberian business partner “Sasha” engaged in numerous en-

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2 Id. at xi.
entrepreneurial ventures that included selling cocoa beans, chocolate, latex gloves, and potatoes. Most strikingly for purposes of this Article, entrepreneurship in Siberia was largely pursued in the absence of the rule of law.

Blakely describes routine bribery in his business dealings and never mentions the law or lawyers except to note their absence. In one anecdote, Blakely recounts borrowing $20,000 from a local lender. Sasha presented the lender with a contract, which the lender slid back across the table to Sasha. Blakely describes what happened next:

Sasha, still grinning, ripped the paper lengthwise in two, then ripped the two halves into quarters, then into eighths . . . . I felt drunk with emotion. In two days, we had sold six tons of chocolate and borrowed twenty thousand dollars without a single lawyer charging two hundred dollars an hour to put words on paper to protect us from any and every eventuality. Even better, there would be no lawyers to siphon thousands of dollars from us when an unforeseen eventuality did occur and a dispute arose, a dispute that only lawyers profited from.

Blakely's anecdote resonates with many entrepreneurs who view lawyers and the law as impediments to business. In this Article, however, we claim that law is not only essential to entrepreneurship in the obvious ways—honest courts enforce contracts and property rights, for example—but also on a different, more fundamental level. We contend that law plays an integral part in encouraging entrepreneurs to create the very opportunities from which they profit. Although Blakely did not realize it, his opportunities in law-barren Siberia were limited, and it is telling that he left Siberia after only five years. By contrast, the United States is rich with entrepreneurial opportunities,

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3 See id. at 1–9, 103, 144.
4 Id. at 7.
7 In the end, although he and Sasha were making money, Blakely admitted that their business model boiled down to an unappealing proposition: bribing the directors of chocolate factories. BLAKELY, supra note 1, at 301. In a study of ten Baltic and Central European countries after the disintegration of the Soviet Union in 1991, Tomi Ovaska and Russell Sobel found that different amounts of "entrepreneurial activity" (measured by the number of new enterprises and by the number of new patent and trademark applications) correlated with "credit availability, contract enforcement, low government corruption, sound monetary policy, high foreign direct investment, and policies (such as low regulations and taxes) that are consistent with giving citizens a high degree of economic freedom." Tomi Ovaska & Russell S. Sobel, Entrepreneurship in Post-Socialist Economies, 21 J.
in part because of the role of our legal system in encouraging entrepreneurs to create them.8

"Opportunity" is a central concept in entrepreneurship research,9 and this Article explores the relationship between law and entrepreneurial opportunities. We adopt the widely held view that entrepreneurial opportunities are ideas created by entrepreneurs, rather than resources waiting to be discovered.10 Of course, as with all products of the imagination,11 entrepreneurial opportunities draw on existing resources for inspiration,12 and we contend that some legal systems are better than others at encouraging entrepreneurs to think about existing resources in new ways. We also contend that when entrepreneurs exploit opportunities, the inventory of resources expands and lays the foundation for the creation of even more entrepreneurial opportunities.13 This "opportunity cycle," represented in the figure below, leads to plentiful and continuous opportunity creation.14

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8 See infra Part III.
10 See, e.g., Alexander Ardichvili et al., A Theory of Entrepreneurial Opportunity Identification and Development, 18 J. BUS. VENTURING 105, 106 (2003) ("While elements of opportunities may be 'recognized,' opportunities are made, not found.").
11 See Peter G. Klein, Opportunity Discovery, Entrepreneurial Action, and Economic Organization, 2 STRATEGIC ENTREPRENEURSHIP J. 175, 182 (2008) (preferring to discuss entrepreneurs imagining opportunities rather than creating them, but conceding that "[a]t one level, the distinction between opportunity creation and opportunity imagination seems semantic").
13 This is not a revolutionary claim. Half a century ago, Kenneth Arrow wrote a now-famous article about learning by doing in which he hypothesized, "it is the very activity of production which gives rise to problems for which favorable responses are selected over time." Kenneth J. Arrow, The Economic Implications of Learning by Doing, 29 REV. ECON. STUD. 155, 156 (1962). The Harvard Business Review recently referred to the "experience curve"—the notion that companies "develop competitive advantage [by learning over time] . . . to lower costs, gain efficiencies, and improve products by redesigning and utilizing better technology"—as one of five "charts that changed the world." Andrea Ovans, Vision Statement: The Charts That Changed the World, 89 HARV. BUS. REV. 34, 34 (2011).
14 After creating the opportunity cycle, we discovered Michael Gollin's "innovation cycle," which also has three stages and resembles the opportunity cycle. See MICHAEL A. GOLLIN, DRIVING INNOVATION: INTELLECTUAL PROPERTY STRATEGIES FOR A DYNAMIC WORLD 17-19 (2008). Gollin's cycle begins with "creative work by individuals" using existing knowledge. Id. at 17. The second stage is "adoption by society," which Gollin also refers to as "diffusion." Id. at 18. Gollin uses the term "innovation" in a narrow sense, including only those creative works that are shared. Id. at 17-18. "Personal creative acts" do not count as innovations. Id. The third stage is "accessibility of knowledge" without which no cycling of innovation can occur. Id. at 18. A "successful innovation" is one that "joins the reservoir of accessible knowledge," providing a foundation on which creative people build in the "next revolution of the innovation cycle." Id. at 19. As is evident from
Legal rules play an important role in the opportunity cycle, and two sets of stories regarding law are foundational to innovation research:

—The first is that property rights (i.e., the right to exclude) are essential in the development of innovative resources because property rights assure market participants that they can retain many of the benefits of their success.\(^{15}\)

—The second is that various sets of legal rules—including laws limiting barriers to entry, bankruptcy laws, and corporate laws relating to limited liability and asset partitioning—reduce the costs of entrepreneurial action and failure, thus emboldening entrepreneurs to exploit opportunities.\(^{16}\)

Our thesis is that these stories are part of a grander tale about the opportunity cycle and that the central theme of this tale is that promoting entrepreneurial action is a fundamental value of the U.S. legal system.

Over a half century ago, Willard Hurst offered a similar thesis with regard to nineteenth-century legal policy in the United States, observing that "the release of individual creative energy was the domi-

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16 See, e.g., Entrepreneurship, Growth, and Innovation: The Dynamics of Firms and Industries 246 (Enrico Santarelli ed., 2006) (stating that "limited liability encourages entry by providing a kind of wealth insurance for potential risk averse entrepreneurs").
nant value" of the American legal system.Echoing Max Weber and anticipating Douglass North, Hernando de Soto, the "Rule of Law" scholars, the "Legal Origins" theorists, and others, Hurst argued that law provided a stabilizing influence that allowed private actors to plan for the future. Within a "framework of reasonably predictable consequences," Hurst surmised that private actors were "likely to cultivate boldness and energy in action." In this Article, we suggest that these values have stayed intact to the present day.

Although we claim as a descriptive matter that promoting entrepreneurial action is a fundamental value of the U.S. legal system, we also recognize circumstances in which this value has largely been absent from policy debates. For example, federal immigration law, which has traditionally been motivated by concern for national security,

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17 JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 7 (1956); cf John P. Roche, Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction, and Casualty in the Age of Enterprise, 30 U. CHI. L. REV. 680, 680 (1963) (arguing that the "key dogma" of the industrial revolution was entrepreneurial liberty, which amounted to "the notion that what was good for business was good for the nation").

18 See MAX WEBER, ECONOMY AND SOCIETY 642-43 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978).


24 HURST, supra note 17, at 10-11 ("[T]he law of private property—the law of the autonomy of private decision makers—includes also positive provision of legal procedures and tools and legal compulsions to create a framework of reasonable expectations within which rational decisions could be taken for the future.").

25 Id. at 22.

26 Indeed, some commentators argue that "laws in the United States do more to hinder entrepreneurship than assist it." Christine Hurt, The High Cost of Entrepreneurship, CONGLOMERATE BLOG: BUSINESS, LAW, ECONOMICS & SOCIETY (Jan. 31, 2013), http://www.theconglomerate.org/2013/01/the-high-cost-of-entrepreneurship.html; see also ERIC J. GOUVIN, OF SMALL BUSINESSES AND ENTREPRENEURS: TOWARD A PUBLIC POLICY THAT SUPPORTS NEW VENTURE FORMATION, IN ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES: THE ROLE OF LAW 27, 29 (Megan M. Carpenter ed., 2012) (arguing that "law frequently ... erects obstacles to new business formation").

27 Immigration law "refers to the body of law governing the admission and expulsion of aliens." HIROSHI MOTOMURA, IMMIGRATION LAW AFTER A CENTURY OF PLENARY POWER: PHANTOM CONSTITUTIONAL NORMS AND STATUTORY INTERPRETATION, 100 YALE L.J. 545, 547 (1990).
ity, labor supply, family reunification, refugees, and other considerations is only now considering the promotion of entrepreneurial action as a motivating value. For the past decade, the focal point of these policy debates has been the H-1B visa, which is of particular importance to technology firms because it allows temporary or nonimmigrant workers in occupations requiring "a body of highly specialized knowledge" to work for a sponsoring employer in the United States for up to three years. More recently, however, the discussion of links between immigration and entrepreneurship has ex-

28 Congress regulates immigration law under the "plenary power" doctrine, which has its origins in the so-called Chinese Exclusion Case. Chae Chan Ping v. United States, 150 U.S. 581 (1899). The plenary power doctrine was justified in that case by reference to national security considerations. See id. at 604 ("While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."). Despite criticism, see, e.g., Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 S.C. Rev. 255, 255 (1984) ("[T]he Court should abandon the special deference it has accorded Congress in the field of immigration."). the Supreme Court of the United States continues to invoke the plenary power doctrine. See Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). National security remains one of the driving forces of immigration law. Matthew J. Lindsay, Immigration, Sovereignty, and the Constitution of Foreignness, 45 CONN. L. REV. 743, 749 (2013) (arguing that "the association between immigration regulation and national security remains essential to justifying a power unmoored from the Constitution and shielded from judicial scrutiny").


30 See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 §§ 201(b)(2)(A)(i), 203(a), (d) (1952) (codified in 8 U.S.C. §§ 1151(b)(2)(A)(i), 1158(a), (d) (2012)). For a recent discussion of the policy of family reunification, see Jessica Feinberg, The Plus One Policy: An Autonomous Model of Family Reunification, 11 NEV. L.J. 629, 650 (2011) (proposing "adding a new category to immigration law's current family reunification scheme, with the aim of providing U.S. citizens and those with whom they share important relationships significant relief from the harsh results that often arise under the current system").

31 See, e.g., 8 U.S.C. § 1158(b) (2012) (permitting the Secretary of Homeland Security or the Attorney General to grant asylum to an alien who is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42)(A)).

32 See Stephen H. Legomsky, Immigration Policy from Scratch: The Universal and the Unique, 21 WM. & MARY BILL RTS. J. 399, 355 (2012) (referring to family reunification, labor immigration, and refugees as the "three main pillars" of immigration policy, but also acknowledging other considerations).

panded, including the promotion of the “StartUp Visa Act” and the launch of “Entrepreneur Pathways” in November 2012 by the U.S. Citizenship and Immigration Services (USCIS), a resource developed “to enhance communications with the entrepreneurial community and provide foreign entrepreneurs with the tools and information to determine which nonimmigrant visa category is most appropriate for their particular circumstance.” While we acknowledge that other values are important in creating, interpreting, and enforcing laws, we believe as a normative matter that the promotion of entrepreneurial action is an important value to add to these and other debates.

This Article proceeds as follows. In Part I, we begin by reviewing the existing literature on entrepreneurial opportunities. We recognize that entrepreneurial opportunities have an objective component, which leads some commentators to assert that entrepreneurial opportunities are discovered. Nevertheless, we join the vast majority of entrepreneurship scholars in concluding that it is the subjective acts of the entrepreneur that mostly create entrepreneurial opportunities.

In Part II, we examine how entrepreneurs create opportunities and recognize the sources of novelty or innovation in entrepreneurial opportunities. We review briefly the vast psychology literature on creativity and innovation, which holds that new opportunities have their genesis in existing resources. Relying on the theory of creative cognition, we maintain that entrepreneurs draw on existing resources, their life experiences, and other available ideas in using the processes of analogy, conceptual combination, and abstraction to create entrepreneurial opportunities.

In Part III, we argue that a legal system can facilitate the creation of entrepreneurial opportunities by emboldening entrepreneurs to act. A legal system encourages entrepreneurial action by assuring entrepreneurs that they can retain the benefits of their success while reducing the costs of their failure. Here we draw on Willard Hurst, who discussed how nineteenth-century legal policy in the United States fa-

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34 See, e.g., The White House, Building a 21st Century Immigration System 9 (May 2011) (noting that the United States Citizenship and Immigration Service “has already begun initial steps to reduce barriers for high-skilled immigrants by identifying and reducing undue immigration barriers faced by foreign-born entrepreneurs”).
cilitated the "release of individual creative energy" through transacting. Encouraging entrepreneurs to act and release their creative energy results in the pursuit of many ideas, and it is this combination of acting and having existing ideas to act upon that leads to the development of an opportunity cycle that sustains an entrepreneurial society.

I

ENTREPRENEURIAL OPPORTUNITIES

Entrepreneurship scholars strive to understand the nature and causes of entrepreneurial action, and the most influential definitions of entrepreneurship revolve around the concept of opportunities. For instance, Jonathan Eckhardt and Michael Ciuchta define entrepreneurship as "the discovery, evaluation, and exploitation of entrepreneurial opportunities." Scott Shane offers a similar definition: "Entrepreneurship is an activity that involves the discovery, evaluation and exploitation of opportunities to introduce new goods and services, ways of organizing, markets, processes, and raw materials through organizing efforts that previously had not existed." As evidenced by these definitions, the concept of opportunities plays a central role in the study of entrepreneurship.

Entrepreneurial opportunities are the subset of market opportunities that involve some form of novelty or innovation. Joseph Schumpeter offers a typology of five forms of entrepreneurial opportunities: 1) new goods; 2) new methods of production; 3) new geographical markets; 4) new raw materials; and 5) new ways of organizing. Eckhardt and Ciuchta define entrepreneurial opportunu-

37 See Hurst, supra note 17.
38 Peter Klein observes that "occupational" and "structural" theories of entrepreneurship focus on the entrepreneurial mindset and the entrepreneurial firm, respectively, paying little or no attention to entrepreneurial opportunities. Klein, supra note 11, at 176-77. "Functional" theories of entrepreneurship focus on judgment, innovation, adaptation, alertness, and coordination. Id. at 177-78. According to Klein, "[w]hat unifies these varied aspects of the entrepreneurial function is the concept of the opportunity." Id. at 179.
41 Jonathan T. Eckhardt & Scott A. Shane, Opportunities and Entrepreneurship, 29 J. Mgmt. 333, 336 (2003) ("[W]e define entrepreneurship as the discovery, evaluation, and exploitation of future goods and services. This definition suggests that, as a scholarly field, entrepreneurship involves the study of opportunities." (emphasis added)).
42 For a more in-depth discussion of entrepreneurial opportunities versus market opportunities, see Scott A. Shane, Fool's Gold? The Truth Behind Angel Investing in America 39-41 (2009) [hereinafter Shane, Fool's Gold].
nities as "situations in which new goods, services, raw materials, markets, and organizing methods can be introduced for profit." Shane and Venkataraman also focus on the "newness" of entrepreneurial opportunities, writing that "[e]ntrepreneurial opportunities differ from the larger set of all opportunities for profit, particularly opportunities to enhance the efficiency of existing goods, services, raw materials, and organizing methods, because the former require the discovery of new means-ends relationships."

How much newness, novelty, or innovation turns an ordinary market opportunity into an entrepreneurial opportunity? Entrepreneurship often brings to mind novelty in the strong sense, such as a new technology developed in Silicon Valley and funded by venture capital. Although Schumpeter wrote several decades before the emergence of Silicon Valley, he appeared to contemplate novelty in the strong sense. He defined an entrepreneur as someone who carries out "new combinations" or as he famously put it, is an agent of "Creative Destruction." Schumpeter's entrepreneur is an agitator who mixes things up by introducing new information into a complacent

Harvard Univ. Press 1961) (1934); see also Shane, General Theory, supra note 40, at 34 (observing that there has been a lack of research on the forms that entrepreneurial opportunities may take and that only one empirical study has employed Schumpeter's typology of opportunity); Eckhardt & Shane, supra note 41, at 340 (illustrating Schumpeter's typology with examples).

Eckhardt & Ciuchta, supra note 39, at 210.

45 Scott Shane & S. Venkataraman, The Promise of Entrepreneurship as a Field of Research, 25 ACAD. MGMT. REV. 217, 220 (2000) (emphasis omitted). In 2010, Shane and Venkataraman were honored with the AMR Decade Award; they each wrote a reflection on the field of entrepreneurship, giving special attention to entrepreneurial opportunities. See Scott Shane, Reflections on the 2010 AMR Decade Award: Delivering on the Promise of Entrepreneurship as a Field of Research, 37 ACAD. MGMT. REV. 10, 14–17 (2012) [hereinafter Shane, Reflections]; Sankaran Venkataraman et al., Reflections on the 2010 AMR Decade Award: Whither the Promise? Moving Forward with Entrepreneurship as a Science of the Artificial, 37 ACAD. MGMT. REV. 21, 22–23 (2012) [hereinafter Venkataraman et al., Reflections]. These reflections prompted further commentary on the subject of entrepreneurial opportunities. See generally Sharon A. Alvarez & Jay B. Barney, Epistemology, Opportunities, and Entrepreneurship: Comments on Venkataraman et al. (2012) and Shane (2012), 38 ACAD. MGMT. REV. 154 (2013) (raising issues with both Venkataraman's and Shane's articles); Raghu Garud & Antonio Paco Giuliani, A Narrative Perspective on Entrepreneurial Opportunities, 38 ACAD. MGMT. REV. 157 (2013) (proposing a "narrative perspective" to address issues that Shane and Venkataraman do not address). These commentaries, in turn, provoked responses. See generally Jonathan T. Eckhardt & Scott A. Shane, Response to the Commentaries: The Individual-Opportunity (IO) Nexus Integrates Objective and Subjective Aspects of Entrepreneurship, 38 ACAD. MGMT. REV. 160 (2013) (responding to the commentaries on Shane's 2012 article); Sankaran Venkataraman et al., Of Narratives and Artifacts, 38 ACAD. MGMT. REV. 163, 163 (2013) [hereinafter Venkataraman et al., Narratives] (describing "relationships between narratives and artifact that could enhance an agenda for researching entrepreneurship" in response to the Garud and Giuliani article).

46 Schumpeter, supra note 43, at 66.

In today's knowledge economy, opportunities that are novel in the strong or Schumpeterian sense are particularly valuable. Still other entrepreneurial opportunities involve novelty in the weak sense. The typical small business owner is often described as an entrepreneur, and some scholars have argued that opportunities exploited by small business owners count as entrepreneurial opportunities. For example, Scott Shane has stated that "the entrepreneurial process can involve a type of innovation that is much milder [than technological shake-ups], such as placing a restaurant on a different corner of an intersection from existing restaurants, or using different recipes or employees in a new restaurant in the same location as an old one." Israel Kirzner's writings on entrepreneurial opportunities are well known and also invoke innovation in the weak sense; even a situation in which a commodity in one market can be sold for more in another market is considered an entrepreneurial opportunity. If opportunities involving innovation in the weak sense are also counted as entrepreneurial, the importance of entrepreneurial opportunities to our society and economy is multiplied many times over.

In developing the concept of opportunities, scholars have debated whether opportunities are objective phenomena waiting to be discovered by entrepreneurs or whether entrepreneurs subjectively

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48 Eckhardt & Shane, supra note 41, at 341.
50 See Scott A. Shane, The Illusions of Entrepreneurship: The Costly Myths That Entrepreneurs, Investors, and Policy Makers Live By 41 (2008) (hereinafter Shane, Illusions) (describing the typical entrepreneur as "a white man in his forties" who is "just trying to make a living, not trying to build a high-growth business").
51 Shane, General Theory, supra note 40, at 8. But see Robert A. Baron, Opportunity Recognition as Pattern Recognition: How Entrepreneurs "Connect the Dots" to Identify New Business Opportunities, 20 Acad. Mgmt. Rev. 104, 107 (2006) ("[T]he focus here is on what have been described as innovative opportunities—ones that truly break new ground rather than merely expand or repeat existing business models, such as, for instance, opening a new Italian restaurant in a neighborhood that does not currently have one.").
52 A fair amount of the existing opportunities literature is devoted to comparing and contrasting Kirznerian and Schumpeterian opportunities. See, e.g., Israel M. Kirzner, Perception, Opportunity, and Profit: Studies in the Theory of Entrepreneurship 111 (1979) ("In Schumpeter it appears that the entrepreneur acts to disturb an existing equilibrium situation. . . . [I]n our discussion the entrepreneur is seen as the equilibrating force."); Guido Buenstorf, Creation and Pursuit of Entrepreneurial Opportunities: An Evolutionary Economics Perspective, 28 Small Bus. Econ. 323, 325 (2007) (comparing Schumpeterian and Kirznerian entrepreneurs and their different effects on market processes).
53 See Israel M. Kirzner, Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach, 35 J. Econ. Lit. 60, 70 (1997) (describing a situation in which the daring entrepreneur "buys where prices are 'too low' and sells where prices are 'too high'").
“create” or “imagine” opportunities. Under discovery theory, entrepreneurial opportunities may arise from exogenous shocks to the competitive equilibrium—including changes in technology, changes in consumer preferences, and political or regulatory changes—or simply from the limits of the price system. According to Sharon Alvarez and Jay Barney, “this emphasis on exogenous shocks forming opportunities suggests that discovery theory is predominantly about search—systematically scanning the environment to discover opportunities to produce new products or services.” Thus, Israel Kirzner described opportunities as being like twenty-dollar bills lying on a beach, simply waiting to be plucked up by an entrepreneur.

Proponents of discovery theory recognize that this account of entrepreneurial opportunities implies that “entrepreneurs who discover opportunities are significantly different from others in their ability to either see opportunities or, once they are seen, to exploit these opportunities.” Kirzner attempts to capture this difference with the concept of “alertness,” and some entrepreneurship scholars have attempted to operationalize this concept. Peter Klein has argued that this research program “misses the point” of Kirzner’s metaphor of entrepreneurial alertness: “Kirzner is not making an ontological claim about the nature of profit opportunities per se—not claiming, in other words, that opportunities are, in some fundamental sense, objective—but merely using the concept of objective, exogenously given, but not yet discovered opportunities as a device for explaining the tendency of markets to clear.”

While we are sympathetic to Klein’s reading of Kirzner, the academic criticism of the objective theory of opportunities and Kirzner’s response to that criticism are instructive. For example, Don Lavoie criticizes Kirzner’s account of entrepreneurship, observing that “acts of entrepreneurship . . . require efforts of the creative imagination, skillful judgments of future cost and revenue possibilities, and an abil-

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55 See Eckhardt & Shane, supra note 41, at 336–38.
56 Alvarez & Barney, supra note 54, at 13.
57 See Israel M. Kirzner, *Competition and Entrepreneurship* 15–16 (1973) (“The entrepreneurial element in the economic behavior of market participants consists . . . in their alertness to previously unnoticed changes in circumstances which may make it possible to get far more in exchange for whatever they have to offer than was hitherto possible.”).
58 Alvarez & Barney, supra note 54, at 14.
59 Kirzner, supra note 57, at 67.
60 See Klein, supra note 11, at 179–80 (discussing opportunity identification literature which “seeks to build a positive research program by operationalizing the concept of alertness”).
61 Id. at 180 (emphasis omitted).
ity to read the significance of complex social situations." Kirzner conceded that cultural and social detail would be important in the application of economic theory, which is consistent with Klein's view that "entrepreneurs act based on their beliefs about future gains and losses, rather than reacting to objective, exogenously given opportunities for profit."

Thus, the boundary between discovery theory and creation theory is rather blurry as both theories seem to admit that entrepreneurial opportunities are at least partly endogenous to entrepreneurs. While we do not wish to trivialize the objective attributes of entrepreneurial opportunities, scholars largely agree that entrepreneurial opportunities are historically, culturally, and psychologically contingent.

Scott Shane offers an excellent illustration of opportunity creation—even though he labels it "discovery"—as we understand the concept. Shane tracked eight entrepreneurial teams who explored a single MIT technology for a three-dimensional printing process in the hopes of licensing that technology. The eight teams each saw a different application for the patented technology, ranging from architectural...

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63 See Israel M. Kirzner, The Economic Point of View: An Essay in the History of Economic Thought 146–47 (1960); Israel M. Kirzner, The Alert and Creative Entrepreneur: A Clarification, 32 Small Bus. Econ. 145, 150 (arguing that he was not "in any way denying the elements of boldness, creativity, and innovativeness that, in the real world, certainly do characterize entrepreneurial activity").
64 Klein, supra note 11, at 182-83.
65 In creation theory, "opportunities are social constructions that do not exist independent of entrepreneur's perceptions." Alvarez & Barney, supra note 54, at 15. Scott Shane, who refocused the attention of entrepreneurship scholars on opportunities, is perhaps the most adamant scholar on the objective nature of entrepreneurial opportunities. See Shane, Reflections, supra note 45, at 15 ("Entrepreneurial opportunities are situations in which it is possible to recombine resources in a way that generates a profit. Business ideas are entrepreneurs' interpretation of how to recombine resources in a way that allows pursuit of that opportunity."). Shane's view that "objective factors influence opportunities" reflects precisely our own view. Id. Embracing this idea eliminates the need for a new and separate concept of "business ideas." See id.
67 Peter Klein would concede on this point but would also argue that the subjective nature of entrepreneurial opportunities and the fact that "we treat them as a black box" makes them less useful as a unit of analysis. Klein, supra note 11, at 183. He would focus instead on entrepreneurial action, which he describes as "the assembly of resources in the present in anticipation of (uncertain) receipts in the future." Id. The opportunity cycle labels this "opportunity exploitation." See id. at 179.
69 Four of the teams actually started new firms to exploit the technology, while four did not. Id. at 454.
tural models based on CAD drawings, to a new drug delivery system, to ceramic filters for power generation.\textsuperscript{70} These variations show that the technology was not the opportunity but rather a resource—an existing idea.\textsuperscript{71} Each entrepreneurial team then created its own opportunity based on that resource.\textsuperscript{72}

Guido Buenstorf also illustrates opportunity creation using the example of special bikes designed by a group of California “hippies” for their downhill races. An entrepreneur who was not part of this original group later commercialized the bikes as “mountain bikes.”\textsuperscript{73} Buenstorf’s analysis matches our own. He views the hippies’ modified bike as a resource, not an opportunity. The unaffiliated entrepreneur then discovers the resource, evaluates it, and uses it to create the mountain bike.

What we call the act of creation comes after an entrepreneur discovers and evaluates resources but before an opportunity exists. The entrepreneur’s act of creation is what turns existing resources into new entrepreneurial opportunities.\textsuperscript{74} In Part III of this Article, we discuss how legal rules affect the opportunities that entrepreneurs perceive, but first we will examine the entrepreneur’s creative process through existing psychology literature.

II

WHERE DO NEW OPPORTUNITIES COME FROM?

As noted in the preceding Part, the act of opportunity creation is a cognitive process. Although entrepreneurship literature and psychology literature are not always consistent in describing imagination or creativity, certain creative processes are generally recognized in

\textsuperscript{70} Id. at 455 tbl.1.

\textsuperscript{71} Schumpeter did not make the mistake of conflating entrepreneurship with invention. He observed that “[a]lthough entrepreneurs of course may be inventors just as they may be capitalists, they are inventors not by nature of their function but by coincidence and vice versa.” Schumpeter, supra note 43, at 88–89.

\textsuperscript{72} See Shane, supra note 68, at 455–59 (comparing the ability of the eight teams to recognize and take advantage of opportunities).

\textsuperscript{73} Buenstorf, supra note 52, at 329–30. Randall Holcombe gives another example: Xerox developed the use of on-screen windows and the computer mouse, but its lack of “entrepreneurial insight” allowed Apple and Microsoft to exploit these opportunities. Randall G. Holcombe, The Origins of Entrepreneurial Opportunities, 16 REV. AUSTRIAN ECON. 25, 28 (2003).

\textsuperscript{74} Venkataraman describes entrepreneurship in a manner that is strikingly similar to the opportunity cycle: “[M]ost entrepreneurial opportunities in the world have to be made through the actions and interactions of stakeholders in the enterprise, using materials and concepts found in the world. Opportunities are, in fact, artifacts. And their making involves transforming the extant world into new possibilities.” Venkataraman et al., Reflections, supra note 45, at 26.
both psychology and entrepreneurship. Further, although theories about creative cognitive processes vary, they all rely on one basic premise: new ideas come from some combination, restructuring, or extension of existing ideas.

A. The Crucial "Incubation" Stage in the Creative Process

Imagination is a broad field of study covering many different methods of reconstructing past experiences and images. In modern psychology, this field has been divided into four separate subfields: consciousness, daydreaming, night dreaming, and creativity. Creativity—defined as “the production of any idea, action, or object that is new and valued” is the form of imagination that most closely relates to the creation of entrepreneurial opportunities. Creativity is a process that has several stages, the most important of which, for our purposes, is incubation. The incubation stage is crucial to our ac-

75 While we focus on the psychology literature, entrepreneurial scholars have offered explanations for how entrepreneurs either discover existing ideas or create new opportunities. An entrepreneur who discovers an existing resource before someone else has a favorable information asymmetry. Entrepreneurs might have superior information or access to existing resources due to their current jobs, prior experiences, or social networks. They may also gain informational advantages through an active search for information. When no informational asymmetries exist, one entrepreneur may be able to see something in an existing resource that another does not. These “belief” asymmetries mean that entrepreneurs are able to evaluate shared information differently during the creative process. Individual traits such as intelligence, creativity, and alertness can influence an entrepreneur’s ability to imagine new opportunities from known resources. See e.g., Shane, General Theory, supra note 40, at 45 (“[P]eople discover opportunities that others do not identify for two reasons: first, they have better access to information about the existence of the opportunity. Second, they are better able than others to recognize opportunities, given the same amount of information about it, because they have superior cognitive capabilities.”).

76 See e.g., Arthur S. Reber et al., Penguin Dictionary of Psychology 371 (4th ed. 2009) (“Imagination: The process of recombining memories of past experiences and previously formed images into novel constructions”); Denis A. Grégoire et al., Cognitive Processes of Opportunity Recognition: The Role of Structural Alignment, 21 ORC. SCI. 413, 426 (2010) (“In line with past research, we observe that the executives in our study used their prior knowledge of markets to search for and think of opportunities for new technologies.”); Brian J. Loasby, Uncertainty and Imagination, Illusion and Order: Shackleian Connections, 35 Cambridge J. Econ. 771, 772 (2011) (focusing on George Shackle’s idea that “we can acquire new knowledge only by connecting it to our existing knowledge[.] and that the consequences of such connections are in general not predictable”).


78 Id. at 229.

79 Creativity, in 2 Encyclopedia of Psychology, supra note 77, at 387, 338.

80 The other stages are preparation, insight, evaluation, and elaboration. Id. at 339. This general psychological theory of creativity has been directly applied to opportunity creation in some cases, with each stage representing a part of the entrepreneurial process. See Ashford C. Chea, Entrepreneurial Venture Creation: The Application of Pattern Identification Theory to the Entrepreneurial Opportunity-Identification Process, Int’l J. Bus. & MGMT. 37, 43–45 (2008).
count of the connection between law and entrepreneurial opportunities.

Incubation is the unconscious process whereby the brain combines ideas with information stored in memory at random and whereby the individual either accepts or rejects these combinations of ideas with the information stored in memory.\(^1\) Though it is unknown exactly how this happens, there are several theories about the process, including the theory of creative cognition, which will be discussed below. An individual cannot engage in the incubation process without becoming immersed in and curious about an unresolved problem, but after the individual has these two prerequisites, the incubation process can occur without the conscious knowledge of the creative thinker.\(^2\)

Psychologists and cognitive scientists have devised several theories to describe the process through which the brain creates new ideas. One theory that has gained substantial support both in the psychology and entrepreneurship literatures is the theory of creative cognition.\(^3\) Although there are different branches within this theory that have created separate versions of cognitive processes,\(^4\) the core of the theory accepts the notion that there are at least three processes by which an individual creates new ideas: analogy, conceptual combination, and abstraction.\(^5\) Like other psychological theories of imagination, this theory relies on the premise that new ideas come from existing ideas.\(^6\)

To take each part of the theory of creative cognition in turn, analogy is the process of transposing a conceptual structure from a habitual context to an innovative context; this is like using the structure of a planetary system to visualize the orbit of electrons around an atom.\(^7\) Combination is the concept of combining old ideas in new ways, such as combining the different structures of elements to create the double helix for DNA mapping.\(^8\) Abstraction is "the discovery of any structure, regularity, pattern, or organization that is present in a number of

\(^{1}\) See Creativity, supra note 79, at 339.
\(^{2}\) Id.
\(^{4}\) See Ward, supra note 83, at 181.
\(^{5}\) Id. at 176–85; see also Hans Welling, Four Mental Operations in Creative Cognition: The Importance of Abstraction, 19 Creativity Res. J. 163, 168–74 (2007) (discussing analogy, conceptual combination, and abstraction theories in turn).
\(^{6}\) See Ward, supra note 83, at 176.
\(^{7}\) See Welling, supra note 85, at 168–69.
\(^{8}\) Id. at 169 ("Combination is the merging of two or more concepts into one new idea.").
different perceptions that can be either physical or mental in nature.\textsuperscript{89}

Although creative cognition has found some application to entrepreneurship, other theories apply more specifically to explain the process of creating or recognizing entrepreneurial opportunities. One such theory claims that entrepreneurs engage in the process of structural alignment in order to create new ideas for opportunities.\textsuperscript{90}

Structural alignment is a theory that cognitive scientists created to explain analogies and analogical thinking,\textsuperscript{91} and it is a theory that is referenced frequently in the field of creative cognition as well.\textsuperscript{92} Structural alignment involves comparing abstract relationships and capabilities of a certain technology or object with technological fields or domains that are familiar to the entrepreneur.\textsuperscript{93} This allows the entrepreneur to process the new information and create new ideas for exploiting the technology.\textsuperscript{94}

The concepts that underlie the structural alignment theory fit well with both the theory of creative cognition and the general psychological theory of creativity. In essence, structural alignment is an amalgamation of the processes of abstraction and analogy under the creative cognition theory. The entrepreneur discovers structures and patterns associated with an object (engages in the process of abstraction) and then analogizes that new information with more familiar information the entrepreneur has stored about market places and other domains. Under the general psychological theory of creativity, this process would fall under the phase of incubation, as it is an unconscious cognitive process.

B. The Other Stages in the Creative Process

Although less critical to our connection between law and opportunities, the other stages in the creative process are also important and reveal that entrepreneurs draw on existing ideas to create new opportunities. These other stages in the creative process, discussed below, are preparation, insight, evaluation, and elaboration.

Preparation is the process whereby the individual becomes immersed in the "symbolic system, or domain" of a particular branch of technology.\textsuperscript{95} For example, painters often become familiar with the

\begin{itemize}
  \item \textsuperscript{89} Id. at 170.
  \item \textsuperscript{90} See Grégoire et al., supra note 76, at 415–16.
  \item \textsuperscript{91} See generally Dedre Gentner, Structure-Mapping: A Theoretical Framework for Analogy, 7 COGNITIVE SCI. 155 (1983) (discussing structure-mapping as a framework that describes the rules of analogies and analogical thinking).
  \item \textsuperscript{92} See e.g., Finke et al., supra note 83, at 22–23; Ward, supra note 83, at 180.
  \item \textsuperscript{93} See Grégoire et al., supra note 76, at 416.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} Creativity, supra note 79, at 339.
\end{itemize}
works of art of other painters, and writers read the works of other writers.\textsuperscript{96} Also included in the preparation stage is a sense of curiosity about some unresolved problem in the particular branch of technology.\textsuperscript{97} Unresolved problems may either be presented to the creative thinker or discovered by the thinker who is dealing with problematic situations.\textsuperscript{98} In short, the preparation stage is where an entrepreneur discovers an existing idea. Using the examples from earlier in this Article, preparation is where Buenstorf's entrepreneur discovers the downhill bike or Shane's entrepreneurs discover the MIT technology.\textsuperscript{99}

Insight is the moment of illumination that occurs when a combination of ideas is "strong enough to withstand . . . unconscious censorship."\textsuperscript{100} Because this experience is often so strong, it is usually the experience that creative thinkers focus on to the exclusion of the preceding and succeeding processes.\textsuperscript{101} However, psychologists consider the other processes to be more important to the creative process in general.\textsuperscript{102}

Evaluation is the process whereby the creative thinker seeks to reconcile the new combination of ideas with the existing ideas within the domain of the branch of technology.\textsuperscript{103} Many idea combinations fail in this process because although the idea may be novel, it is not completely consistent either with logic or with the field in which the creative thinker is working.\textsuperscript{104} At this stage, the creative thinker can err either on the side of being too concerned with having a perfect theory or not being concerned enough.\textsuperscript{105}

Finally, elaboration is the process whereby the idea is tested and applied.\textsuperscript{106} This is the end of the creative process and produces the final opportunity. For example, after the novelist has come up with the idea for a brilliant book, he or she must now sit down, write the book, and take it through the editing process.\textsuperscript{107} This is another stage in which the opportunity may fail because it is a stage that requires time and hard work.\textsuperscript{108} In sum, new opportunities come from existing

\begin{itemize}
  \item \textsuperscript{96} See id.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} See supra notes 68–73 and accompanying text.
  \item \textsuperscript{100} Creativity, supra note 79, at 339.
  \item \textsuperscript{101} See id.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} Id.
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Id. at 339–40.
  \item \textsuperscript{107} See id.
  \item \textsuperscript{108} Id.
\end{itemize}
ideas, and our brief review of the psychology literature helps explain the process.

III

THE OPPORTUNITY CYCLE

Several years ago, one of the authors was visiting an indoor children's play park with a colleague in Germany. While observing their children at play, the German lawyer offered several suggestions about how the play park might be improved, and he speculated that the business would be much more successful if the owners of the play park adopted his innovative ideas. His companion, impressed by the lawyer's ingenuity, wondered aloud if he might be tempted to leave his legal practice to build a more advanced play park. The German lawyer was puzzled. Why would he leave his prestigious professional position to become an entrepreneur? In his view, entrepreneurship was for people who could not succeed in loftier intellectual pursuits.

As we consider why people might create and exploit entrepreneurial opportunities, we would do well to remember two points illustrated by this anecdote. First, entrepreneurship has a cultural dimension that may be (mostly) independent of legal and market incentives. Second, people think creatively even when they have no intention of profiting from their innovative ideas. Nevertheless, incentives matter.109 In this section, we argue that legal rules encourage the creation of entrepreneurial opportunities by assuring market participants that they can retain many of the benefits of their success while reducing costs associated with transacting, especially when the transactions fail. As discussed in more detail below, scholars in various areas of law have linked law and entrepreneurial action. We seek to generalize these insights arguing simply that when law emboldens action, entrepreneurs create more opportunities.

A. Motivating the Release of Energy

When Willard Hurst published Law and the Conditions of Freedom in 1956, he was striving to debunk the image of the nineteenth-century United States as a laissez-faire society,110 but Hurst's claim that Ameri-
can law promoted the "release of individual creative energy" as an independent value is a tantalizing suggestion.\textsuperscript{111} Under this view, legislatures and courts defined private property to protect the autonomy of an individual vis-à-vis the state, created legal rules to ensure the enforcement of valid contracts, and imposed tort liability to encourage people to rely on others.\textsuperscript{112} Legal forms, including the corporation, "loaned the organized force of the community to private planners."\textsuperscript{113}

Hurst builds his story on two rather mundane observations about the operation of law in nineteenth-century America. First, the institution of private property—comprising not only the rules relating to ownership that are typically associated with property law, but also the rules against injury that are associated with criminal law and tort law—ensured autonomy for private decision makers as against the public officials, as well as against other private parties.\textsuperscript{114} Second, the willingness of courts to enforce promises allowed property owners to plan for the use of their property in the future.\textsuperscript{115} When combined, these observations direct our eyes toward the importance of transactions as the source of energy.\textsuperscript{116} Hurst was not interested in the solitary inventor or the reclusive author. The "release of individual creative energy" was accomplished through collaborative business ventures, and Hurst was interested in the entrepreneur.\textsuperscript{117}

The Hurstian entrepreneur was inspired to action by the prospect of material gain. The state's role was to secure property rights and reduce the risks associated with venturing.\textsuperscript{118} The legal framework, therefore, served as a form of subsidy for business transactions.\textsuperscript{119} The common law rules examined by Hurst were largely agnostic about social power were very important elements of this pattern of policy. But so, too, was a complicated affirmative use of law to furnish instruments and procedures and to impose as well as enforce patterns of dealing. In this aspect, our nineteenth-century policy involved a good deal less of simple laissez faire than has often been claimed for it.\textsuperscript{111} \textsuperscript{112} \textsuperscript{113} \textsuperscript{114} \textsuperscript{115} \textsuperscript{116} \textsuperscript{117} \textsuperscript{118} \textsuperscript{119}
the substance of transactions.\textsuperscript{120} The motivation of legal policy makers was not efficiency or fairness,\textsuperscript{121} but action.\textsuperscript{122}

In the modern regulatory state, legal rules are more complex and intrusive than those studied by Hurst, but the bias for action still inheres in much of our current legal policy. In the following sections, we describe two roles that the legal system performs in facilitating the creation of entrepreneurial opportunities: ensuring that entrepreneurs retain the benefits of their success and reducing the costs of action and even failure. We do not attempt to give a comprehensive account of the U.S. legal system;\textsuperscript{123} instead, we offer various examples of laws that illustrate the central point of our Article, that the promo-

\textsuperscript{120} Id. at 14 ("In more and more instances, from mid-century on, the law itself provided a framework for the parties’ dealing, unless they explicitly contracted out of the transaction which the rules of law shaped for them. This was notably true in respect to the instruments of commerce . . . . ") (characterizing "this development was a particularly important form of the more general, growing confidence of the courts in implying agreements from the parties’ dealings and construing their agreements in the light of trade custom.").

\textsuperscript{121} See generally Louis Kaplow & Steven Shavell, Fairness Versus Welfare 3–4 (2002) (arguing that "legal rules should be selected entirely with respect to their effects on the well-being of individuals in society").

\textsuperscript{122} The foundation for this legal policy may have been laid in the near aftermath of the American Revolution. As observed by Gordon Wood:

[No banks, no government, no institutions could have created the American economic miracle of [the early nineteenth century] . . . . America suddenly emerged a prosperous, scrambling, enterprising society not because the Constitution was created or because a few leaders formed a national bank, but because ordinary people, hundreds of thousands of them, began working harder to make money and 'get ahead.' Americans seemed to be a people totally absorbed in the individual pursuit of money.


\textsuperscript{123} For example, we do not discuss tax policy. For an excellent and brief summary of the arguments relating to the effect of tax subsidies on entrepreneurship, see Victor Fleischer, Taxing Founders’ Stock, 59 UCLA L. Rev. 60, 92–97 (2011) (arguing that the “effect of the tax subsidy is mostly inframarginal, rewarding entrepreneurs for activity they would have conducted anyway”). We could also have discussed capital formation which has been in the news recently with the passage of the Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106, 126 Stat. 306 (2012). For an excellent examination of the role of capital formation in entrepreneurship, see Elizabeth Pollman, Information Issues on Wall Street 2.0, 161 U. Pa. L. Rev. 179, 185–86 (2012). In a contribution to this symposium, Robert Thompson and Donald Langevoort argue that regulation of the public offering process is motivated by “concern for the sales pressures that come from having to dispose of a significant volume of securities in a short time and the risks of deception and opportunism that may result.” Robert B. Thompson & Donald C. Langevoort, Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising, 98 CORNELL L. Rev. 1575, 1627 (2013). As the authors recognize, however, efforts to control fraud through regulation affect the cost of capital formation. Id. at 1618. Thus, as with other legal rules discussed in this Article, the debate over capital formation for entrepreneurial firms is about the optimal level of regulation. For an empirical investigation of the effect of securities regulation on the creation of new entrepreneurial ventures, see Douglas Cumming & April Knill, Disclosure, Venture Capital and Entrepreneurial Spawning, 49 J. Int’l Bus. Stud. 563, 564 (2012) (suggesting that stricter disclosure standards for venture capital investments would encourage "entrepreneurial spawning").
tion of entrepreneurial action is a fundamental value in the U.S. legal system.

B. Retaining the Benefits of Success

As noted by Hurst, one of the basic requirements for entrepreneurship is the right to own private property.\textsuperscript{124} Property theorists are quick to observe that "property" is not a thing\textsuperscript{125} but rather a "bundle of rights" with respect to a thing.\textsuperscript{126} The tricky part of defining "property" is that the bundle of rights is not the same for all things.\textsuperscript{127} As a result, the designation of something as "property" does not say anything about the associated rights.\textsuperscript{128} Thus, the label "property" has come to be seen by some as "almost meaningless."\textsuperscript{129} Fortunately, we are not interested in the legal definition of property but rather in the economic understanding of property rights. For many economists (and lawyers, as it turns out), the essence of "property" is the right to exclude.\textsuperscript{130} We use "property rights" in this sense to motivate our discussion of law and entrepreneurial opportunities.

The right to exclude is pervasive. As Shyamkrishna Balganesh has observed, "[t]he idea of exclusion, in one form or the other, tends to inform almost any understanding of property, whether private, public, or community."\textsuperscript{131} The right to exclude from a resource implies

\textsuperscript{124} See Hurst, supra note 17, at 10–11.
\textsuperscript{125} Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 Yale L.J. 357, 358 (2001) (stating, tongue-in-cheek, that "[s]omeone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication—or worse").
\textsuperscript{127} See Waldron, supra note 126, at 315 (noting that if the bundle of rights "remained constant for all or most of the cases that we want to describe as private property, the bundle as a whole could be defined in terms of its contents" but that "it does not remain constant, and that is where the difficulties begin").
\textsuperscript{128} See Joan Williams, The Rhetoric of Property, 83 Iowa L. Rev. 277, 297 (1998) ("Labeling something as property does not predetermine what rights an owner does or does not have in it.").
\textsuperscript{129} Merrill & Smith, supra note 125, at 357.
\textsuperscript{130} See J.E. Penner, The Idea of Property in Law 68 (1997) (contending that "property rights can be fully explained using the concepts of exclusion and use"); 2 William Blackstone, Commentaries on the Laws of England 2 (Univ. of Chi. Press 1979) (1766) (defining property as "that sole and despotic dominion ... exercise[d] over the external things ... in total exclusion of the right of any other" (emphasis added)); see also Cohen, Sovereignty, supra note 126, at 12 (noting that "the essence of private property is always the right to exclude others"); Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 730 (1998) (stating that "the right to exclude others is more than just 'one of the most essential' constituents of property—it is the \textit{sine qua non}").
the correlative duty not to interfere with the resource.\textsuperscript{132} Thus, the right to exclude becomes the touchstone for describing a broad swath of legal rules that protect one person’s resources from infringement by another.

This expansive understanding of the right to exclude also undergirds our view that a fundamental purpose of law in connection with entrepreneurship is to define rights to exclude.\textsuperscript{133} As observed by Kirsten and Nicolai Foss, rights to exclude are inextricably linked to the creation of entrepreneurial opportunities: “[P]roperty rights steer the entrepreneurial discovery process. . . . [I]f the entrepreneur cannot hold (sufficiently) secure property rights to certain resource attributes, he will not explore these and certain resource attributes may therefore never be discovered and explored.”\textsuperscript{134} Multiple entrepreneurs might be interested in creating similar opportunities from the same underlying resources, but not all of them have the legal right to do so. Faced with competing claims to opportunities, the law allocates resources between competing entrepreneurs. It does so through the granting of property rights, which allows the grantee to create and exploit the opportunity while at the same time excluding others from doing so.\textsuperscript{135} Some of the entrepreneurship literature recognizes that property rights are important to opportunities,\textsuperscript{136} and we explain this connection using a traditional example—patent law—and a less obvious one—corporate fiduciary law—as illustrations.\textsuperscript{137}

\textsuperscript{132} See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 55–56 (1913).

\textsuperscript{133} Steven N. S. Cheung, The Structure of a Contract and the Theory of a Non-Exclusive Resource, 13 J. L. & Econ. 49, 67 (1970) ("The transfer of property rights among individual owners through contracting in the marketplace requires that the rights be exclusive. . . . [W]ithout some enforced or policed exclusivity to a right of action, the right to contract so as to exchange is absent.").

\textsuperscript{134} Kirsten Foss & Nicolai J. Foss, Entrepreneurship, Transaction Costs, and Resource Attributes 5 (Ctr. for Strategic Mgmt. & Globalization, Working Paper No. 7, 2006), available at http://ssrn.com/abstract=982103. We do not intend to suggest that all entitlements are potential opportunities, but rather than all opportunities depend on legal entitlements.

\textsuperscript{135} See supra notes 124–32 and accompanying text.


\textsuperscript{137} Other areas of potential inquiry relating to property rights are the law of agency and the law of employment contracts, particularly as they relate to competition by an agent with a principal or former principal. Ronald Gilson has famously argued that refusing to enforce covenants not to compete—effectively refusing employers the right to exclude—is facilitative of entrepreneurial activity. See Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete, 74 N.Y.U. L. Rev. 575, 608–09 (1999). For an argument in favor of a uniform rule of unenforceability that is partly motivated by a desire for more innovation, see Viva R. Moffat, Making Non-Competes Unenforceable, 54 Ariz. L. Rev. 939, 984 (2012) ("[A] number of recent studies indicate that a legal regime in which non-competes are unenforceable is preferable not
1. Patent Law

The legal rules governing the issuance and exploitation of patents define resources through the granting of property rights. Although Willard Hurst did not examine patent law in *Law and the Conditions of Freedom*, the "democratization" of patents in the nineteenth century seems to have played an important role in the economic development of the United States. Patent law is the most conspicuous example of the promotion of entrepreneurial action as a fundamental value of the U.S. legal system.


See Hurst, supra note 17; Oskar Liivak, *Maturing Patent Theory from Industrial Policy to Intellectual Property*, 86 Tul. L. REV. 1163, 1181 (2012) (asking if the release of "individual creative energy" could "extend to patents as well" as traditional property).

See, e.g., B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920*, at 107 (2005) (“The U.S. patent system was instrumental in directing the efforts of a diverse array of individuals toward extracting returns from their improvements.”); Petra Moser, *How Do Patent Laws Influence Innovation? Evidence from Nineteenth-Century World’s Fairs*, 95 AM. ECON. REV. 1214, 1233 (2005) (noting that "the decision to adopt strong patent laws at the beginning of the nineteenth century may have played an important role in encouraging the American focus on manufacturing machinery that spurred economic growth toward the end of the century").


Michael Burstein is skeptical of the need for intellectual property to facilitate information exchange. See Michael J. Burstein, *Exchanging Information Without Intellectual Property*, 91 Tex. L. Rev. 227, 247 (2012) (arguing that a "nuanced understanding of information supports a range of potential strategies for engaging in exchange, of which intellectual property is only one"). Given the potentially high costs of obtaining patent protection, he
As illustrated earlier in Scott Shane's study of three-dimensional printing, the innovations embodied in patents are not themselves entrepreneurial opportunities but rather resources that can be employed in the creation of entrepreneurial opportunities. Based on our understanding of the process of opportunity creation described above, we assume that expanding the inventory of resources would naturally lead to the creation of more entrepreneurial opportunities. Thus, we view the ultimate purpose of patent law as the promotion of entrepreneurial action.

How should the patent system maximize the inventory of socially valuable inventions? While scholars largely "agree on the goals the patent statute is intended to achieve[,] they have offered radically different ideas for interpreting patent law to achieve those goals." The scope of debate regarding patent law is vast because the legal rules defining patent protection must account for a fundamental trade-off: as protection is strengthened, the incentive to innovate is heightened ex ante, but the costs of monopoly are increased ex post. Thus, the attributes determining patent protection—including novelty, utility, non-obviousness—contends that the case for broadening and strengthening intellectual property rights is weaker than many commentators assume. Id. at 275.

Shane, supra note 68, at 467.

Burk & Lemley, Policy Levers, supra note 141, at 1578.

See William D. Nordhaus, Invention, Growth, and Welfare: A Theoretical Treatment of Technological Change 76 (1969). See also Sean B. Seymore, Rethinking Novelty in Patent Law, 60 Duke L.J. 919, 920–21 (2011) ("The U.S. patent system is a pendulum. It swings back and forth, attempting to balance the need to reward inventors for their work against the need to foster innovation through the dissemination of technical knowledge.").

The novelty requirement is codified in 35 U.S.C. § 101 (2006) ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter . . . may obtain a patent . . . ."). Tun-Jen Chiang offers an interesting explanation for the connection between the novelty requirement and the promotion of entrepreneurial action. Tun-Jen Chiang, Defining Patent Scope by the Novelty of the Idea, 89 Wash. U. L. Rev. 1211, 1267 (2012) ("The core purpose of patent law is to protect against misappropriation of information goods, and this means the idea and not the embodiment."). For an argument that the current method of interpreting novelty can have a negative effect on innovation, see Seymore, supra note 144, at 926.

The utility requirement is based on the Intellectual Property Clause of the Constitution, which gives Congress the power to grant exclusive rights to inventors to "promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8. The requirement is also codified in 35 U.S.C. § 101 ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent . . . ."). The U.S. Supreme Court has articulated the policy connecting the utility requirement and the promotion of entrepreneurial action: "The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility. Unless and until a process is refined and developed to this point—where specific benefit exists in currently available form—there is insufficient justification for permitting an applicant to engross what may prove to be a broad field." Brenner v. Manson, 383 U.S. 519, 534–35 (1966). Interpreting this passage, Sivaramjani Thambisetty has argued that "the
ness, subject matter, and scope—have generated intense scholarly debate. We do not attempt to resolve these debates about patent law here, but we highlight the debates to show that both the current legal rules and the reform proposals recognize the promotion of entrepreneurial action as the dominant value in patent law.


The non-obviousness requirement is codified in 35 U.S.C. § 103(a) (2006 & Supp. V 2011) ("A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."). Michael Abramowicz and John Duffy describe the theoretical connection between the non-obviousness requirement and the promotion of entrepreneurial action. Michael Abramowicz & John F. Duffy, The Inducement Standard of Patentability, 120 YALE L.J. 1590, 1594 (2011) ("[I]f the innovation would be created and disclosed even without patent protection, denying a patent on the innovation costs society nothing (because the innovation would be developed anyway) and saves society from needlessly suffering the well-known negative consequences of patents, including the restriction on output caused by a patentee’s exclusive rights and the administrative and litigation costs associated with running a patent system."). Although Abramowicz and Duffy would rely on the non-obviousness requirement to advance the goals of patent law, most courts and commentators agree with Ed Kitch that the non-obviousness requirement is an "awkward" tool "to sort out those innovations that would not be developed absent a patent system." Edmund W. Kitch, Graham v. John Deere Co.: New Standards for Patents, 1966 SUP. CT. REV. 293, 301.

Patent eligibility is determined initially by reference to 35 U.S.C. § 101 ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."). The United States Supreme Court has created three exceptions to the broad patent-eligibility principles in section 101: "laws of nature, physical phenomena, and abstract ideas." Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980). The subject matter requirement is notoriously uncertain, and this uncertainty can impede innovation. See Michael Risch, Everything Is Patentable, 75 TENN. L. REV. 591, 646 (2008).

The scope of a patent is determined by the claims that "define what the inventor considers to be the scope of her invention, the technological territory she claims is hers to control by suing for infringement." Robert P. Merges & Richard R. Nelson, On the Complex Economics of Patent Scope, 90 COLUM. L. REV. 839, 844 (1990). The connection between the scope of patents and the promotion of entrepreneurial action entails consideration of the fundamental trade-off in patent law discussed above. Merges and Nelson add that scope determinations have an important effect on future substitutes. Id. at 870 ("Since some of the follow-on efforts of inventors could result in something not simply slightly different but significantly better than the patented technology, broad patents could discourage much useful research."). The usual answer to this concern is Kitch’s prospect theory. See Edmund W. Kitch, The Nature and Function of the Patent System, 20 J.L. & ECON. 265, 266 (1977). For an analysis of scope as a "levels of abstraction problem," see Tun-Jen Chiang, The Levels of Abstraction Problem in Patent Law, 105 Nw. U. L. REV. 1097, 1100 (2011).

Even when a patent law scholar argues that intellectual property may be trivial, the focus is on innovation incentives. See Jonathan M. Barnett, Is Intellectual Property Trivial?, 157 U. PA. L. REV. 1691, 1692 (2009).
Similarly, recent debates about the so-called “patent crisis”—including discussions of business method patents, the role of patent institutions (the United States Court of Appeals for the Federal Circuit and the United States Patent and Trademark Office), and patent trolls—revolve almost exclusively around the issue of innovation. A striking manifestation of our thesis in this literature comes from the work of Dan Burk and Mark Lemley, who describe the current patent system as comprising “unitary” patent rules that are sometimes tailored to the needs of different industries by courts.

The impulse to adapt the rules of patent law to different industries emanates from a desire to more efficiently promote innovation. To achieve that goal, Burk and Lemley advocate a “modular patent system,” which would be created through the use of “existing policy levers” such as the utility requirement or the PHOISTA standard (“person having ordinary skill in the art”), and the development of “nascent policy levers” such as the presumption of validity and patent misuse claims. As with the debates about patent law doctrines dis-

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155 Burk & Lemley, Patent Crisis, supra note 154, at 4 (stating that the “entire purpose” of patent law is to “promote innovation”).

156 Id. at 109-30.

157 Id. at 131-41.
cussed above, the analysis shows that both current legal rules and re-
form proposals strive to promote entrepreneurial action.

Perhaps not surprisingly, the two contributions to this symposium
relating to patent law propose complementary reforms that would
promote entrepreneurial action by undermining patent trolls. John Duffy argues that the goals of patent law are expressed errone-
ously in a manner that enables patent trolling. According to Duffy, the "public benefit" sought from patenting "can easily be viewed as
including not merely the disclosure required by the statute to be set
forth in the patent document but also the benefit flowing from the
practical knowledge and experience gained from actually building and commercializing the invention." Duffy proposes a "resurrection
of the paper patent doctrine," which would favor the commercialization of inventions. Similarly, Oskar Liivak and Eduardo Pefialver
would limit the right not to use patents: "[U]nless the holder of the patent is actually practicing the invention, remedies for patent
infringement against independent inventors should be significantly
softer than they would be in other successful patent infringement ac-
tions, possibly even de minimis." While one could argue that plac-
ing additional constraints on patenting is contrary to the "release of energy" described by Hurst, the thrust of both of these papers is to
promote entrepreneurial action.

2. **Fiduciary Law**

Fiduciary law arises within many substantive areas of law. For pur-
poses of this discussion, we focus on one subspecies of fiduciary law,
the opportunities doctrine, which is a subset of corporate law's duty of
loyalty. The opportunities doctrine allows fiduciaries—for example,
officers and directors—of corporations or other business entities—to
exploit those opportunities that courts do not deem to belong to the
entity. In the typical case, a third party might approach the fiduci-
ary with an opportunity for profit. In one leading case, *Guth v. Loft, Inc.* it was the opportunity to buy the Pepsi trademark and secret formula out of bankruptcy in the early 1930s. In another leading case, *Broz v. Cellular Information Systems, Inc.*, it was the opportunity to buy a regional cell phone license for an area in Michigan. The fiduciary is presented with a dilemma: Can he simply purchase and exploit the opportunity through a separate company, perhaps a start-up, and reap all of the profits, or does his status as a fiduciary mean that he must offer the opportunity to his employer?

The corporate opportunities doctrine answers this question, albeit imperfectly. In distinguishing between acceptable entrepreneurial behavior and fiduciary obligation, the corporate opportunities doctrine promotes entrepreneurial action where it is appropriate. Without the opportunities doctrine, the fear of acting as a disloyal fiduciary could chill entrepreneurial action. The corporate opportunities doctrine promotes entrepreneurial action by telling fiduciaries which opportunities they can create and exploit on their own and conversely, which opportunities must yield to fiduciary duty.

How does the opportunities doctrine draw this dividing line? As in the case of patent law, the opportunities doctrine fulfills this function through the granting of rights to exclude. Although the opportunities doctrine does not grant property rights that allow the grantee to exclude the rest of the world from the opportunity, it allocates opportunities between the corporation and fiduciary, leaving third parties free to exploit the opportunity until either the corporation or fiduciary establishes property rights that allow it to exclude more broadly.

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*Organizations: Cases, Problems, and Case Studies* 515 (2004) (stating that the question of "whose opportunity is it?" is the "most difficult aspect of the corporate opportunity doctrine"); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399, 1483 n.359 (2002) ("The most difficult issue in [the opportunities doctrine] area is deciding which opportunities belong to the corporation.").

5 A.2d 503, 505-06 (Del. 1939).

673 A.2d 148, 150 (Del. 1996).


*Cf.* Smith & Williams, supra note 163, at 513 (noting that a plaintiff may prevail on a corporate opportunities claim only if the opportunity taken by the fiduciary was a "corporate opportunity").

*Cf.* Talley, supra note 166, at 279 (stating that the corporate opportunities doctrine is "the law’s attempt to regulate circumstances in which a corporate officer or director may usurp new business prospects for her own account").

As Dean Robert Clark explains, "the opportunity need not be corporate property in the strong sense that the corporation could legally object to its being taken and developed by independent third parties. The point is only that, as between the corporation and its fiduciary, the opportunity belongs to the corporation [or fiduciary]." *Clark*, supra note 163, at 224.
The corporate opportunities doctrine thus serves to tell fiduciaries when they can retain the benefits of their own success.

There are a number of tests that courts may choose in defining corporate versus fiduciary opportunities, each drawing the line in a different place. Consider two leading tests: (1) the test favored in Delaware, the state of incorporation for over half of public companies, is the line-of-business test, which asks whether the opportunity is part of a business in which the business entity currently engages or which is a logical and natural adaptation of that business; and (2) the interest or expectancy test, which allocates to the entity only those opportunities in which it has a recognizable interest or expectancy—for example, those opportunities on which the entity has a contractual option. These leading tests give some guidance and strictures to the dividing line between corporate and fiduciary opportunities and in doing so promote entrepreneurial action where appropriate.

Other tests less often used by courts include the “fairness” test, which asks whether it is fair, all things considered, to allow the fiduciary to exploit the opportunity individually, and the “Miller two-step” test—named after the case that created it—which layers the fairness test on top of the line-of-business test. Under the Miller two-step test, if an opportunity is within the entity’s line of business, the fiduciary might still be permitted to exploit it if fair for him to do so. These tests, both of which defer to the nebulous concept of “fairness” without really telling us what that means, have been less successful for a reason—they do not promote entrepreneurial action because they are foggy in their definition of corporate versus fiduciary opportunities. As Eric Talley observes, "jurisdictions adopting [the fairness] test

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170 See Guth v. Loft, Inc., 5 A.2d 503, 514 (Del. 1939). Delaware is not the only state to use this test; rather, “the line-of-business test (or a close variant) has now become preeminent.” Talley, supra note 166, at 289. In addition to the basic line-of-business test, these cases are also decided by looking at certain factors, including whether the fiduciary learned of the opportunity in his individual or corporate capacity, whether the corporation was financially able to exploit the opportunity, and whether the third party refused to deal with the corporation. See Clark, supra note 163, at 224.

171 The classic case that presents this test is Lagarde v. Anniston Lime & Stone Co., 28 So. 199, 201 (Ala. 1900).

172 See Durfee v. Durfee & Canning, Inc., 80 N.E.2d 522, 529 (Mass. 1948) (stating that “the true basis of the governing doctrine rests fundamentally on the unfairness in the particular circumstances of the fiduciary taking the opportunity). Needless to say, this has not proved to be the easiest test for courts to apply.

173 Miller v. Miller, 222 N.W.2d 71, 81–82 (Minn. 1974).

174 See id. The American Law Institute (ALI) has developed yet another test, one that requires fiduciaries to disclose corporate opportunities in advance but allows fiduciaries to take the opportunity should the entity reject it. See The American Law Institute, 1 Principles of Corporate Governance § 5.05 (1994). Under the ALI test, entity opportunities include opportunities that are “closely related to a business in which the [entity] is engaged or expects to engage,” which appears similar to the line-of-business test. Id. at § 5.05(b)(2).
have had little success in articulating—beyond recapitulations of circular rhetoric—the substantive contours of a fairness approach.”

Finally, the opportunities doctrine’s legal allocation of entrepreneurial opportunities through the granting of rights to exclude has another important effect on entrepreneurial behavior: it motivates entrepreneurs to frame opportunities in a manner that will ensure a favorable legal allocation. In doing so, the opportunities doctrine plays a role in shaping the entrepreneur’s creative process.

C. Reducing the Risks of Venturing

The previous section explored one means by which the U.S. legal system entices entrepreneurs to release their creative energy—by allowing them to retain the benefits of success—but the reality is that many, or even most, entrepreneurs fail. Therefore, if we want entrepreneurs to exploit entrepreneurial opportunities, we must also reduce the costs of their failure. We first observe that enticing entrepreneurs to exploit opportunities is not just about limiting the downside in the case of failure ex post but also about reducing the barriers to entry ex ante so entrepreneurs can set about on a path of action in the first place. Second, we discuss what happens if there is this action but it results in failure. We start with barriers to entry, then move to bankruptcy laws, which allow entrepreneurs to discharge debts and have a “fresh start.” Finally, we explain how limited liability and its corollary, asset partitioning, allow entrepreneurs to limit the costs of failure to the business at hand.

1. Barriers to Entry

In the most recent Doing Business report of The World Bank, the United States ranked fourth in the world in terms of “ease of doing business.” This ranking includes multiple measures of the ease of entry into business, including the procedures, cost, minimum capital, and number of days required to form a business. While the regulation of business entry could function as quality control, regulation might also serve incumbent firms or politicians at the expense of con-

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175 Talley, supra note 166, at 293.
176 Cf. Shane, Fool’s Gold?, supra note 42, at 6 (stating that the frequently heard success stories of angel investors are “the rarest of rare events”).
178 See id. at 56.
consumers and innovation. As one would expect, lowering barriers to entry increases business formation. In the United States, entry barriers of the sort described above are relatively low, and business formation is robust in comparison with other countries.

The Doing Business reports were inspired by a series of articles on law and finance, which developed into Legal Origins Theory. Although Legal Origins Theory has various potential implications, we reference it here for the fundamental proposition that "law matters" to economic development in a fairly specific way, namely in facilitat-

180 See Simeon Djankov et al., The Regulation of Entry, 117 Q.J. ECON. 1, 5 (2002) (finding that "countries with more open access to political power, greater constraints on the executive, and greater political rights have less burdensome regulation of entry—even controlling for per capita income—than do the countries with less representative, less limited, and less free government").

181 See, e.g., Miriam Bruhn, License to Sell: The Effect of Business Registration Reform on Entrepreneurial Activity in Mexico, 93 REV. ECON. & STAT. 382, 382 (2011) (performing a statistical analysis and finding that simplifying entry regulation "increased the number of registered businesses by 5% in eligible industries").

182 Economists sometimes measure this attribute of national economics through an economic freedom index. The most influential index was developed by James Gwartney, Robert Lawson, and Joshua Hall, who update the data annually. See James Gwartney et al., Economic Freedom of the World Data, FRASER INST., http://www.freetheworld.com/datasets_efw.html (last updated Oct. 23, 2012). "Economic freedom" is said to have four key ingredients, one of which is "freedom to enter and compete in markets." James Gwartney et al., Economic Freedom of the World 2012 Annual Report 1 (2012). This feature of economic freedom is captured by the part of the index dealing with regulation of business activities (5C), and the United States ranks 90th of 144 countries. See id. at 7, 14.


183 In terms of the number of businesses created in a given year, the United States is the leader. Compare Office of Advocacy, U.S. SMALL BUS. ADMIN., BUSINESS DYNAMICS STATISTICS: FIRMS AND ESTABLISHMENTS BY FIRM AGE, available at http://www.sba.gov/advocacy/849/12162 (reporting that 394,632 new businesses were established in 2010), with New Businesses Registered, WORLD BANK, http://data.worldbank.org/indicator/IC.BUS.NREC (displaying figures for other countries in 2009, with only the United Kingdom and Brazil eclipsing 800,000). Looking at the number of workers who are starting their own businesses as a percentage of the total population, however, the United States falls behind other, smaller countries. See Shane, Illusions, supra note 50, at 18.


185 See La Porta et al., supra note 22, at 306-09 (describing Legal Origins Theory).
ing transactions by limiting barriers to entry.\textsuperscript{186} Though legal scholars have been skeptical of the importance of legal origins as an explanatory variable,\textsuperscript{187} they have embraced efforts to reduce barriers to entry when this would encourage entrepreneurship.\textsuperscript{188} The challenge when dealing with barriers to entry is to determine when they are impediments to entrepreneurship and when they are facilitative of entrepreneurship or some other value.

Barriers to entry take many forms, including the sorts of property rights described in the prior section, and these barriers to entry often have dual effects. For example, patents create a barrier to entry that may harm new entrants\textsuperscript{189} but may also have the salutary effect of ensuring product differentiation.\textsuperscript{190} Joshua Wright offers another example by describing the tension between antitrust law, which encourages new products on the ground that they increase consumer choice, and the “new behavioral approach” to consumer protection law, which holds that “rules and regulations can be designed to improve consumers’ decision-making abilities by altering the design of some consumer credit products, by restricting consumers’ access to others, and by instituting default rules in favor of standardized products” approved by the Consumer Financial Protection Bureau.\textsuperscript{191}

\textsuperscript{186} The idea that “law is essential to economic development has a long and venerable history.” Curtis J. Milhaupt, Beyond Legal Origin: Rethinking Law’s Relationship to the Economy—Implications for Policy, 57 Am. J. Comp. L. 831, 831 (2009). Nevertheless, the earliest claim made by Legal Origins Theory—that increases in shareholder protection would lead to stock market development—has been questioned by using longitudinal data. See John Armour et al., Law and Financial Development: What We Are Learning from Time-Series Evidence, 2009 BYU L. Rev. 1435, 1484 (noting the “absence of a correlation between corporate law reform and stock market development”).

\textsuperscript{187} For critical appraisals of Legal Origins Theory by law professors, see generally Ruth V. Aguilera & Cynthia A. Williams, “Law and Finance”: Inaccurate, Incomplete, and Important, 2009 BYU L. Rev. 1413, and Michaels, supra note 184.

\textsuperscript{188} See, e.g., Katharina Pistor, Rethinking the “Law and Finance” Paradigm, 2009 BYU L. Rev. 1647, 1657 (noting that “the underlying thrust” of legal origin-based arguments “appears to be that entrepreneurship is best left to its own devices and that the regulation of entry imposes unnecessary and socially harmful costs on business”).

\textsuperscript{189} See, e.g., Kelce Wilson, The Four Phases of Patent Usage, 40 Cap. U. L. Rev. 679, 684 (2012) (“Rather than helping to compensate for barriers to entry, the patent system may actually create a significant barrier. When small, a manufacturer is likely to be tightly constrained by an investment-phase budget and is unable to afford litigation-related expenses. Thus, new entrants are particularly vulnerable to nuisance asserts that leverage litigation risk asymmetry to drain precious operating capital.” (citations omitted)).

\textsuperscript{190} See Mark A. Lemley & Mark P. McKenna, Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP, 100 Geo. L.J. 2055, 2082 (2012) (“IP rights contribute significantly to . . . product differentiation . . . . . . [A]n IP right is a barrier to entry that prevents the sort of quick and easy supply substitution that might undermine market power.”).

Taxes, fees, and regulations of all sorts serve as barriers to entry, and the vast literature on public choice theory demonstrates that politicians cater to established businesses at the expense of new entrants. The popular notion of “crony capitalism” describes a system of laws that entrenches incumbent firms and blocks entrepreneurial action. Any legal system that wishes to promote entrepreneurial action must employ mechanisms that constrain the inevitable pressure to favor incumbent firms. We believe that the value of entrepreneurship, sprinkled throughout the U.S. legal system, serves as a constant reminder to legal policymakers to avoid entrenchment of incumbents.

2. Bankruptcy Laws

Willard Hurst argued that “[b]ankruptcy law began mainly as a protection to creditors against the dishonesty of debtors,” but by the mid-nineteenth century, bankruptcy law in the U.S. “was as much to provide means by which debtors might be saved from irretrievable ruin and salvaged as venturers who might yet again contribute productively to the market.” In modern legal and economic scholarship, bankruptcy is widely regarded as an important legal tool to facilitate entrepreneurship. Bankruptcy clearly limits the cost of failure associated with entrepreneurial action.

Bankruptcy scholars have long associated a “fresh start policy” with a desire to encourage entrepreneurship. Bankruptcy law may also encourage entrepreneurship by allowing start-up businesses to charge less; it encourages them to innovate as well); Philip J. Weiser, Innovation, Entrepreneurship, and the Information Age, 9 J. ON TELECOMM. & HIGH TECH. L. 1, 6 (2011) (contending that one role of antitrust law is to protect “disruptive entry”).

See Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 900 (1987) (interpreting empirical evidence in support of a theory that “would simply postulate (1) that reelection is an important motive of legislators; (2) that constituent and contributor interests thus influence legislators; and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership”).

See, e.g., LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 246 (2011) (“What wins in the market is too often not what ‘a free market’ would choose, but what a market bent by tariffs and subsidies and endless incumbency protective regulation defaults to. Call that ‘crony capitalism.’”).

HURST, supra note 17, at 26.

Mike W. Peng et al., Bankruptcy Laws and Entrepreneur-Friendliness, ENTREPRENEURSHIP THEORY & PRACT. 517, 518 (2010); Seung-Hyun Lee et al., Bankruptcy Law and Entrepreneurship Development: A Real Options Perspective, 32 ACAD. MGMT. REV. 257, 259 (2007).

A strong connection between bankruptcy laws and entrepreneurship has been supported empirically. One might be tempted to assume that strong limited liability protection, discussed in the next section, would substitute for bankruptcy laws, but "creditors frequently demand personal guarantees from owner-managers which constitute a 'contracting out' of the liability shield incorporation otherwise gives to the entrepreneur." Thus, Armour and Cumming identify two effects of bankruptcy law that are in some tension: the "insurance effect" results in more entrepreneurship because debtors are more protected against losses of exempt assets, and the "credit supply effect" results in less entrepreneurship because lenders ration credit when debtors are more protected against losses. However, the main thrust of the bankruptcy literature, both normative and empirical, is that it promotes entrepreneurs to act by limiting their cost of failure.

3. Limited Liability and Asset Partitioning

The concept of limited liability has existed in various forms for hundreds of years, and the justification for it has surprisingly remained the same: investors are more willing to invest in a venture if they can be assured that the creditors of the venture will not have the ability to take the personal assets of the investors. This not only encourages investors but also entrepreneurs themselves to engage in transactions because they no longer have to take an "all or nothing"

197 F.H. Buckley, The Debtor as Victim, 87 CORNELL L. REV. 1078, 1089 (2002) (suggesting that "bankruptcy might be a particularly useful incentive device in attracting employees to work in high-risk jobs, such as start-up ventures").
198 See John Armour & Douglas Cumming, Bankruptcy Law and Entrepreneurship, 10 AM. L. & ECON. REV. 303, 337 (2008) ("Controlling for a range of other legal, economic and social factors that may affect national levels of entrepreneurship, we show that bankruptcy law has a pronounced effect on levels of entrepreneurship."); Wei Fan & Michelle J. White, Personal Bankruptcy and the Level of Entrepreneurial Activity, 46 J. L. & ECON. 543, 543-44 (2003) (finding that bankruptcy exemptions are positively correlated with the decision to start a business).
199 Armour & Cumming, supra note 198, at 307.
200 Id. at 305-08.
201 See Lee et al., supra note 195, at 259 (noting "the key issue is not avoiding failure but managing the cost of failure by limiting exposure to the downside while preserving access to attractive opportunities and maximizing gains" (citation omitted)).
202 See William J. Carney, Limited Liability, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE REGULATION OF CONTRACTS 659 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) ("The principal advantage of limited liability is in encouraging investment by passive investors in risky enterprises, particularly where these investors are poor monitors of managers."); Max Radin, The Endless Problem of Corporate Personality, 32 COLUM. L. REV. 643, 654 (1932) ("It was found in medieval Europe that men would often decline to adventure in business transactions unless they could so limit their liability. And this was especially the case when those who were asked to join the enterprise had no direct control over its management.").
Other variations of this investment-encouragement argument for limited liability have found some traction as well. One author found that when states were originally deciding to create limited liability corporation statutes in the 1800s, a major justification offered by proponents of such legislation was that limited liability is much more "democratic." The legislators meant that limited liability offered an opportunity for small business owners to engage in large-scale ventures than they would have under an unlimited liability regime. This would create greater diversification for investors because now the starting of businesses was not limited to just the wealthy—that is, those who could personally guarantee the debts of the corporation.

While opponents to limited liability generally agree with the basic argument that limited liability offers opportunities for small business owners that would not be otherwise available, they argue that limited liability should be abolished when it comes to tort liability or when a parent corporation seeks to limit its liability in connection with a wholly owned subsidiary corporation. However, these arguments have been countered by the general notion that limited liability encourages investment. Others have offered more attenuated counterarguments, claiming that limited liability also reduces the monitoring costs of doing business, which is necessary in today's business world "where passive investors specialize in risk-bearing[ ] and

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203 Richard A. Booth, *Limited Liability and the Efficient Allocation of Resources*, 89 Nw. U. L. Rev. 140, 158 (1994) ("The notion that a small business owner should be prevented from planning how much capital to put at risk is so absurd that it hardly needs to be argued down.").


206 Id. at 155–56.

207 Id.

208 See, e.g., Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1880 (1991) (arguing that there are "no persuasive reasons to prefer limited liability . . . for corporate torts.").


210 Presser, *supra* note 205, at 172 ("Part of the theory of limited liability for corporate shareholders, it would seem, is that by allowing them to externalize some of their costs, and thus increasing the demand for corporate shares, economic development will take place that may have synergistic effects which generate widespread benefits.").
not monitoring of management." Further, limited liability allows organizations to engage in "optimal investment decisions."

The scholarship took a turn when Henry Hansmann and Reinier Kraakman introduced the idea of "asset partitioning" and claimed that limited liability is only one half, and actually the less important half, of organizational law's facilitative function. Asset partitioning is the idea that an entrepreneur may, by choosing one type of business organization over another, move assets out of his own reach and out of the reach of his personal creditors and into the reach of creditors of a corporation or partnership. Not only is this important to reduce the risk of the entrepreneur and the entrepreneur's personal creditors (which is the concept of limited liability or "defensive asset partitioning"), but it also serves the purpose of reducing the risk of the corporation's creditors. The corporation's creditors will not have to worry about the entrepreneur's personal creditors trying to reach the corporate assets (which is the concept of "affirmative asset partitioning" or "capital lock-in").

Because affirmative asset partitioning is regarded as the converse to limited liability, its justifications are similar: it reduces the risk of investors and encourages entrepreneurial activity and firm stability. For example, one of the justifications for asset partitioning is that it increases stability in the firm by requiring partners and shareholders not to withdraw assets before there has been an agreement to liquidate the firm's assets. This, in turn, protects the "firm's going-concern value," which encourages investment in the firm. In sum, limited liability and asset partitioning encourage entrepreneurial action by reducing the cost of failure.

211 Carney, supra note 202, at 670.
212 Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89, 97 (1985) ("When investors hold diversified portfolios, managers maximize investors' welfare by investing in any project with a positive net present value. They can accept high-variance ventures (such as the development of new products) without exposing the investors to ruin. Each investor can hedge against the failure of one project by holding stock in other firms. In a world of unlimited liability, though, managers would behave differently. They would reject as 'too risky' some projects with positive net present values. Investors would want them to do this because it would be the best way to reduce risks. By definition this would be a social loss, because projects with a positive net present value are beneficial uses of capital.").
215 Id.
216 Id.
217 Id.
218 Id.
219 Id. at 1350.
CONCLUSION

In this Article, we have claimed that a legal system, in a macro sense, is crucial to entrepreneurship. Entrepreneurial opportunities lie at the very heart of entrepreneurship, and a legal system that enhances the benefits of success and mitigates the costs of failure for entrepreneurs encourages entrepreneurs to experiment with existing resources to create new opportunities. When entrepreneurs exploit those opportunities, they produce new resources for the next generation of entrepreneurs to use in creating new entrepreneurial opportunities. This “opportunity cycle” leads to a self-perpetuating entrepreneurial society.

A well-known story involving Jeff Bezos and Amazon.com illustrates our thesis well. While working as a senior vice president for a Wall Street investment firm in the early 1990s, Jeff Bezos learned of a United States Supreme Court decision holding that a mail-order business could not be subject to sales tax in a state where the business had no physical presence.220 Bezos had been researching Internet business opportunities as part of his work for the hedge fund D.E. Shaw & Co.,221 but when Bezos proposed that the firm pursue online bookselling, the chief executive officer refused.222 Bezos left the firm, drove across the country to Seattle, Washington, and founded Amazon.com in the garage of his rental home.223

Amazon.com was not the first Internet retailer224—or even the first Internet bookseller225—but Bezos was willing to compete by lowering margins.226 He hired two experienced computer programmers,227 invested over $50,000 of his own money, and provided

220 See Quill Corp. v. North Dakota, 504 U.S. 298, 311-12 (1992) (endorsing the physical-presence test under the Commerce Clause as established in National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967)).
221 See ROBERT SPECTOR, AMAZON.COM: GET BIG FAST 16-22 (2000).
222 Id. at 30.
223 Bezos had no prior connection to Seattle, but he wanted to base his company in a location with a large pool of technical talent, a relatively small population (because residents of the state would be charged sales tax on their purchases from the new company), and close proximity to a major book wholesaler. Id. at 33. Originally formed as a Washington corporation under the name “Cadabra, Inc.,” the company was reincorporated in Delaware with the name “Amazon.com, Inc.” prior to the launch in 1995. Id. at 36.
224 Peapod, an online grocery delivery service, was founded in 1989 and claims to be “the world’s first e-commerce-only company.” Our Company, PEAPOD, http://www.peapod.com/site/companyPages/our-company-overview.jsp (last visited Apr. 7, 2013).
225 See SPECTOR, supra note 221, at 21–22 (identifying Computer Literacy as the first Internet bookseller and BookStacks Unlimited and Wordsworth as two other early entrants into this particular line of business).
226 See Adam Lashinsky, Amazon’s Jeff Bezos: The Ultimate Disrupter, CNNMoney (Nov. 16, 2012, 5:00 AM), http://management.fortune.cnn.com/2012/11/16/jeff-bezos-amazon/ (reporting that a “favorite Bezos aphorism is ‘[y]our margin is my opportunity’”).
227 SPECTOR, supra note 221, at 39–42.
personal credit guarantees to get the firm off the ground.\textsuperscript{228} Amazon.com eventually took additional investments from angel investors\textsuperscript{229} and venture capitalists\textsuperscript{230} before completing an initial public offering of common stock in 1997.\textsuperscript{231}

Despite occasional bumps in the road, Amazon.com has been a spectacular success story. The entrepreneurial opportunity created by Jeff Bezos and the early employees of Amazon.com assembled many existing resources: the Internet, experienced computer programmers, books (the product), the corporate form, and financial capital, among other things. The exploitation of that opportunity has led to the development of additional resources—an online reviewer community,\textsuperscript{292} the prioritization and clustering of reviews,\textsuperscript{293} the associates program,\textsuperscript{294} the Wish List,\textsuperscript{295} and the controversial one-click patent—\textsuperscript{296} that have allowed Amazon.com to expand beyond books into toys, electronics, tools, and other product categories,\textsuperscript{297} and to serve as a model for many other Internet retailers. The company now describes itself in the most expansive terms: “We seek to be Earth’s most customer-centric company for four primary customer sets: consumers, sellers, enterprises, and content creators.”\textsuperscript{298}

Surely most of the credit for this success and these innovations belongs to the hard work of Bezos and his team, but we believe an assist should be awarded to the U.S. legal system, which facilitated this entrepreneurial action.\textsuperscript{299} In making his decision to leave Wall Street, Bezos focused on the immense upside of the opportunity and the lim-
By assuring Bezos that he could retain many of the benefits of his success while reducing the costs associated with failure, the legal system emboldened his action.

By contrast, the Introduction to this Article recounted entrepreneur Alexander Blakely’s glee with the nonlegal society he found in postcommunist Siberia. As we saw, however, Blakely’s glee was short lived, and he left Siberia after only five years. Blakely admits that his business prospects were largely dependent on bribes, and we believe that his entrepreneurial opportunities were limited by the absence of law. Just as Bezos’ successful creation and exploitation of the Amazon.com opportunity owes an assist to the U.S. legal system, Blakely’s failure in Siberia owes an assist to the absence of a legal system that could promote legitimate entrepreneurial action.

easily perceive the opportunity cycle in the development of the Apple iPod. See WALTER ISAACSON, STEVE JOBS: A BIOGRAPHY 406 (2011).

240 SPECTOR, supra note 221, at 30–31.

241 See supra text accompanying note 4.